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Limit the right to bad-faith bargaining and violent strikes

STRIKES, all too often accompanied by violence, are prevalent in SA. This has produced calls to limit the freedom to strike — even calls for limits to unionisation.

The freedom to strike is one of the basic freedoms enshrined in section 27 of the constitution. It is a right found in all free-market democracies. Without the freedom to strike there can be no free market and, paradoxically, without the threat of industrial conflict, there can be no labour peace. Labour peace depends on effective collective bargaining and without a measure of equilibrium between employers and unions at the negotiation table, collective bargaining can have no substance.

It is the threat of industrial action that encourages parties to negotiate seriously.

The threat of peaceful strike action is an essential pillar of the free market. The problem in SA is not the existence of the freedom to strike but the negotiation that precedes strikes and the violence that often accompanies them.

In conventional employment law in free-market democracies, the right to strike is conditional on the strike being preceded by good-faith bargaining; on disputes procedures being exhausted; on democratic decisions being taken to strike; and on the strike action being nonviolent.

At the core of the freedom to strike is the threat of a peaceful withholding of labour to encourage the employer to negotiate seriously and, if good-faith negotiation fails, then to use peaceful strike action to assist in resolving a dispute. A violent class war by workers against employers is not the kind of conflict the constitution intends to protect. Unfortunately, in SA, the Labour Relations Act does not do enough to make the freedom to strike contingent on these conventional conditions. The act does not impose a duty to negotiate in good faith and it expressly prohibits employers from challenging a strike on the basis that it is not supported by the majority of union members or employees affected by it. The act also does not provide that a strike may be declared unprotected if it is accompanied by high levels of violence.

The constitution intends only to protect the peaceful withholding of labour by workers. By entrenching the right to fair labour practice, the constitution contemplated that parties should negotiate in good faith and that unions should strike only with the consent of the majority of affected workers. Unfortunately, these intentions have not been given effect in the act. The act should be amended to give proper effect to the constitution and to bring it in line with labour law in other free-market democracies. Many unnecessary and violent strikes could thus be avoided.

What typically happens in SA is that before negotiation starts, the union delivers a letter to the employer containing a long list of extreme demands. The employer responds by rejecting most of the demands and making low counterproposals on others. Central to both parties' thinking is that the higher the demand and the lower the counteroffer, the more likely it is the eventual midway compromise will favour them. Employers seldom make any counterdemands of their own.

'To avoid these outcomes, enlightened employers and unions are increasingly turning to mutual-gain negotiation

Once the parties get to the bargaining table, they motivate their extreme opening positions and demean the other side's responses. Unions often walk out of the negotiations at the end of the employer's response, and declare a dispute. The unions assume that real negotiations will probably take place only once the employer is faced with imminent or actual strike action; that the sooner the parties get to the Commission for Conciliation Mediation and Arbitration, the sooner real negotiations will start. Alternatively, they hope that the employer will make concessions to keep the negotiations alive.

Employers often respond with concessions to keep the unions at the negotiation table, without requiring reciprocal concessions from the unions. Indeed, they often get close to their bottom lines before the unions have made any moves at all.

The further negotiations are usually characterised by slow moves from one concession to the other. The parties manipulate information to hide what is harmful to their position and to emphasise anything that undermines their opponent's stance.

As the negotiations progress, the parties incrementally remove non-wage-related issues from the table. As it becomes increasingly difficult to bridge the gap between them, the parties resort to the use of power to pressure each other. Most often, the end result is full-blown and violent strike action.

Although strike violence is antithetical to the idea of orderly collective bargaining and the freedom to strike, it is common in SA. The picket line becomes a place of violent conflict, with strikers pressuring nonstriking workers to participate, and persuasion often evolves into intimidation. Frequently, the picket line becomes a war zone. Employers have responded to violence with court interdicts and orders limiting workers' rights to picket in the vicinity of the employer's premises. This moves the violence to the homes of managers and replacement workers.

South African unions have found strikes hard to sustain because it is difficult for workers to lose pay for any protracted period and, as support for a strike has waned, the violence has often escalated as die-hard supporters try to keep it alive. The workers often come off second best — sometimes losing more in pay than they would have gained by accepting the employer's offer before the strike began.

Because of the large pool of unemployed workers, employers have often maintained production during a strike. Even so, strikes cost employers large amounts in damage to property, the cost of hiring private security firms and paying for lawyers to enforce their rights. The outcome is therefore lose-lose or, at best, a mediocre compromise.

To avoid these suboptimal outcomes, enlightened employers and unions are increasingly turning to mutual-gain negotiation. Modern negotiation theory and best practice teaches us that parties are able to reach excellent mutual-gain outcomes in negotiations without strike action. Such parties acknowledge each other as legitimate stakeholders in a pluralist society rather than as enemies to be defeated in a class war. They commit to freedom of association; exhaustion of dispute procedures; industrial democracy; picket rules; nonviolent action; and to mutual-gain negotiation.

On the other hand, employers who want industrial peace but who are faced with incorrigible and adversarial unions need to develop strategies to limit dysfunctional negotiation and violent behaviour. Strategies include themes on planned negotiation tactics; continuous production plans; security plans; legal plans; internal and external communication plans; compilation of financial information; and compilation of human resource (HR) information.

To develop action plans under these themes, employers need to follow a meticulous strategy formulation process. Done properly, this facilitates the management of the HR climate and the internal and external communication in a way that strengthens the party's hand at the bargaining table and weakens that of the other party.

Experience demonstrates that parties that are pro-active and take the time and trouble to prepare generally find that the preparation for industrial war produces industrial peace and that prevention proves better than cure. The key to avoiding unnecessary strike action is meticulous preparation and not passive reliance on the law.

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