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SOUTH AFRICAN COLLIERIES HR ASSOCIATION

27 OCTOBER 2017

GREENSIDE COLLIERY

DEVELOPMENTS IN LABOUR LAW

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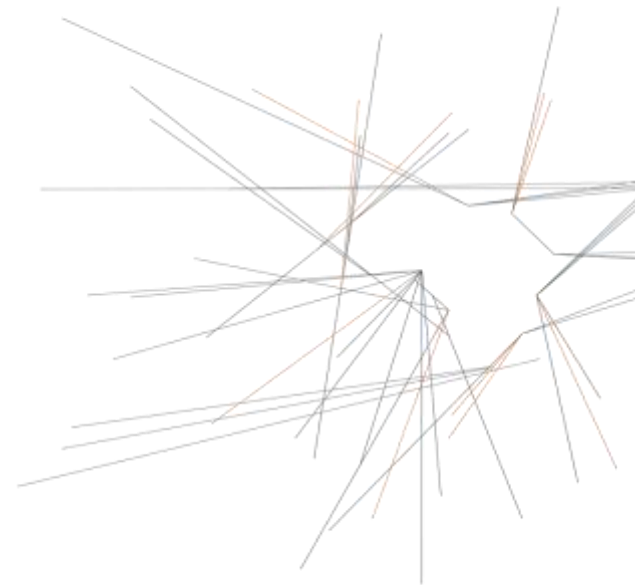
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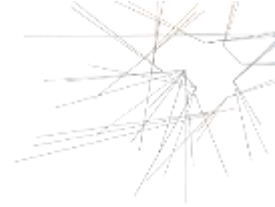
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October 2017

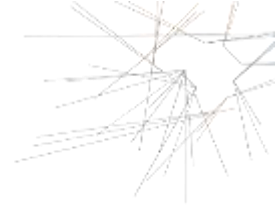


STRIKE LAW: NEW DEVELOPMENTS: AVOIDING STRIKE ACTION:



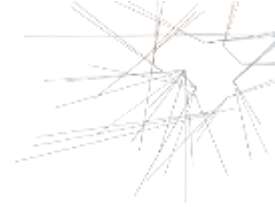
- Effective collective bargaining
- Pre-planning
- Information sharing
- Winning trust – knowing your opponent and their expectations
- Getting the deal

RECOGNITION AGREEMENTS



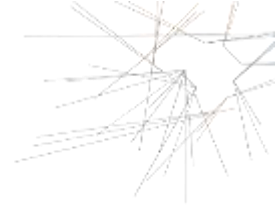
- Procedures for meeting and collective bargaining
- Peace clause
- Picketing agreement
- Duty to go for mediation
- Role of CCMA s150
 - the director of the CCMA may appoint a commissioner to conciliate a dispute which has not been referred to it if the parties consent, to if the director believes that it is in the public interest to do so
- Communication with trade union representatives and head office

HOW TO BE PREPARED



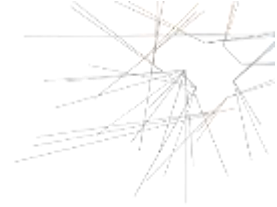
- Attempt to conciliate through the CCMA – role of experienced mediator
- Agree picketing rules
 - record primary purpose – peaceful withholding of labour
 - picketing dos and don'ts – do sing, chant, carry placards / don't interfere with access, intimidate, assault, carry weapons, wear masks
 - place of picket, time of picketing and number of picketers – specific
 - picketing outside of rules is unauthorised
 - appointment of marshals and duties of marshals
 - duties of the union – take all reasonable steps to ensure that members comply with picketing rules
 - employer obligations
 - role of police – to enforce the law

HOW TO BE PREPARED



- Importance of reliable intelligence
 - pick up trends in various industries
 - know about leadership issues in AMCU/NUM/UASA/Solidarity
 - broader community and political environment
 - analyse and strategize
- Contingency plans for possible strike violence
 - trained private security
 - security cameras/lights/audio recording equipment
 - safe transport for non-striking employees
 - communication with local SAPS

HOW TO BE PREPARED



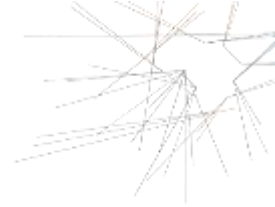
- Consolidate information for possible interdict
 - details of the company / operation
 - names of union officials / shop stewards / branch / regional office
 - detailed sequence of events
 - nature of unlawful activities and details of participants
 - description of loss including loss of revenue / damage to property

STRIKE ACTION AND VIOLENCE



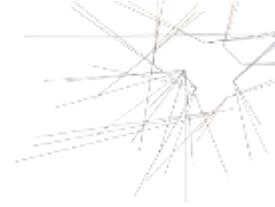
- What is the Labour Courts' views on violent strikes?
- What can be done in the case of a violent strike?
- Does a violent strike lose its protected status?
- *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others* (LC) (2012) Van Niekerk J
 - *"... the exercise of the 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."*

STRIKE ACTION AND VIOLENCE



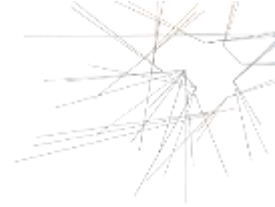
- *Verulam Sawmills (Pty) Ltd v Association of Mineworkers and Construction Union and Others (LC) (2016) Steenkamp J*
 - *"... violence ensues resulting in non-strikers also withholding their labour, the strikers gain an illegitimate advantage in the power play of industrial action, placing illegitimate pressure on employers to settle. Typically, one of two things then happens — either the employer gives in to the pressure and settles at a rate above that reflecting the forces of demand and supply (which equates to a form of economic duress) or the employer digs in its heels and refuses to negotiate or settle while the violence is ongoing (which inevitably causes strikes to last longer than they should). Either way, the orderly system of collective bargaining that the LRA aspires to is undermined — and ultimately, economic activity and job security are threatened."*

STRIKE ACTION AND VIOLENCE



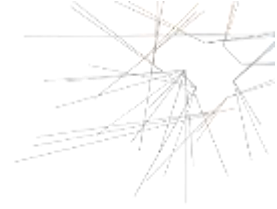
- *KPMM Road and Earthworks (Pty) Ltd v AMCU and others (LC) (2017) Snyman AJ*
 - *"... it would certainly go a long way... if, in the instances where trade unions are involved, these trade union pro-actively implement measures and conduct themselves to ensure lawful conduct by their striking members. Similarly, employers should act responsibly by not aggravating what is obviously a tense situation by way of provocative behaviour. In simple terms – it is time for everyone to grow up and usher employment relations into the modern Constitutional era where parties responsibly and lawfully exercise their respective rights."*

STRIKE ACTION AND VIOLENCE



- Does a violent strike lose its protected status? It seems so.
- Once violence replaces the refusal to work as the focal point of the strike, then it no longer qualifies as a "*strike*" as defined.
- A case has also been made out that the word "*peaceful*" should be read into the definition of "*strike*" to be consistent with:
 - the purpose of the LRA – labour peace
 - orderly collective bargaining
 - constitutional values
 - the rule of law
 - the ILO principles that violent strikes are an abuse of the right to strike

CONTEMPT OF COURT



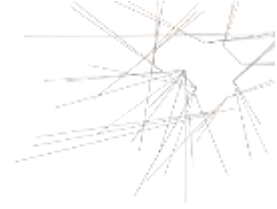
- What can be done in the case of a violent strike?
 - Interdict
 - Contempt of court
- *Ram Transport SA (Pty) Ltd v SA Transport and Allied Workers Union and Others (LC) (2011) Van Niekerk J*
 - *"Regrettably, the detailed incidents of violence and damage to property perpetrated by unidentified persons 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."*

CONTEMPT OF COURT - UNIONS



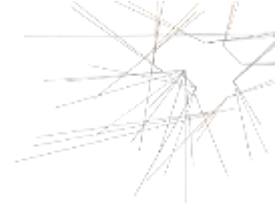
- *In2Food (Pty) Ltd v Food and Allied Workers Union and Others (LC) (2013)*
Steenkamp J
 - *"The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members. This in a context where the Labour Relations Act 66 of 1995, which has now been in existence for some 17 years and of which trade unions, their office-bearers and their members are well aware, makes it extremely easy to go on a protected strike."*

CONTEMPT OF COURT - UNIONS



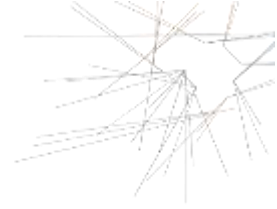
- *Food and Allied Workers Union v In2Food (Pty) Ltd (LAC) (2014)*
 - *"The fact that a trade union can be liable for the acts of its members does not assist in deciding whether the trade union, in its own right, has breached a court order. "*
 - The relief must be framed appropriately. An interdict order against a union should state plainly what action is mandatory from the union (not only the strikers).
 - In this instance the "*strikers*" were forbidden to continue with the violent and unlawful aspects to the strike.
 - In order for the union to be held vicariously liable what would be required is "*proof that the strike and the blockade occurred in pursuance of a decision by the appellant or of an agreement with its members to strike.*" This was not proven.

CONTEMPT OF COURT - UNIONS



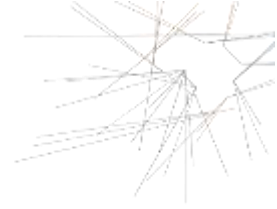
- *KPMM Road and Earthworks (Pty) Ltd v AMCU and others* (LC) (2017) Snyman AJ
 - This case was different to *In2Food* as the obligation on AMCU in terms of the order was that it must take "*all reasonable steps within its power*" to "*persuade*" the members not to engage in unlawful action.
 - "*What was needed was pro-active planning by the first respondent [AMCU] to intervene should these transgressions occur, and then to make arrangements to have responsible personnel on the ground, so to speak, to deal with these transgressions immediately when it should happen, by way of meeting and addressing the errant employees... What the first respondent needed to do was to implement measures to ensure compliance with the order.*"

CONTEMPT OF COURT - UNIONS



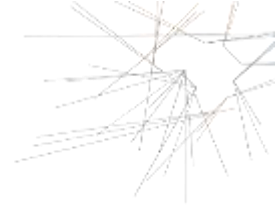
- *"I am satisfied that in reality, all the first respondent did was to convey the order to its members, tell them to comply, and then washed its hands of what may happen thereafter."*
- *"The first respondent, AMCU, has its roots in the mining industry. It has however been growing in popularity and has expanded to beyond the scope of its roots... It enjoys ever increasing popular support, and has, in my view, considerable influence over its members... In simple terms, with this kind of great power must also come great responsibility."*

CONTEMPT OF COURT - UNIONS



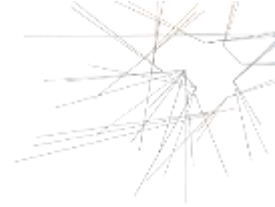
- *"...a fine of R1 000 000.00 (one million Rand) against the first respondent is appropriate... I believe this would send the right message not only to the first respondent, but also to other trade unions, that a failure on the part of trade unions to take the proper and necessary reasonable steps to eradicate unlawful conduct in the course of strike action by their members, could mean that they face severe consequences. This amount also appropriately reflects this Court's displeasure at its orders not being adhered to..."*
- *I intend to suspend this fine of R1 000 000.00 (one million Rand) for a period of 3 (three) years from date of this judgment, on the condition that the first respondent is not found to be in contempt of any order of this Court within this period. This would serve as the appropriate internal deterrent to the first respondent from any further and related transgressions."*

CONTEMPT OF COURT - EMPLOYEES



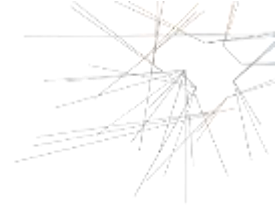
- *KPMM Road and Earthworks (Pty) Ltd v AMCU and others (LC) (2017)*
Snyman AJ
 - *"Where all the employees act in concert, and with common purpose, as they did, they can all be held accountable for violations of the order, even if perpetrated by unidentified individuals. Individual employees who face possible contempt of Court sanction on this basis then have the opportunity to come forward and provide an acceptable explanation to exonerate himself or herself, before being finally held in contempt. If employees however remain silent, it can be accepted that they associate themselves with the group, and must live with the consequences of being held in contempt as a result."*

CONTEMPT OF COURT - EMPLOYEES



- *"a fine of R1 000.00 (one thousand Rand) each is appropriate... and these fines must be paid upon date of this judgment. I shall give the applicant leave, in terms of the Basic Conditions of Employment Act, to deduct these fines from the remuneration of those second to further respondents still employed by the applicant."*

THE NEDLAC ACCORD AND CODE OF GOOD PRACTICE



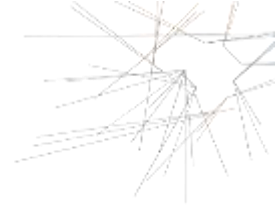
- The constitutional right to strike must be peaceful, free from intimidation and violence
- Parties include members of NEDLAC, CCMA and BCs – notable absentees are AMCU, NUMSA and SAFTU
- Draft Code of Good Practice: Collective Bargaining, Industrial Action and Picketing
 - appointment of trained negotiators
 - no carrying of weapons
 - appointment of CCMA facilitator
 - the role of SAPS
 - the role of private security
 - workplace dialogue

THE NEDLAC ACCORD AND CODE OF GOOD PRACTICE



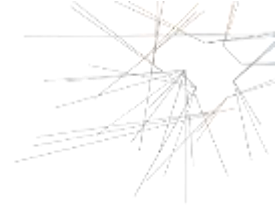
- disputes of right v mutual interest v socio-economic interests
- strikes in respects of employees residing on employer's premises
- default picketing rules – no rules agreed – no picket allowed
- conduct in the picket
- What are the consequences of failing to comply with the Code? Seemingly none – appears to all rely on good faith.

COMMUNITY DEVELOPMENT ISSUES



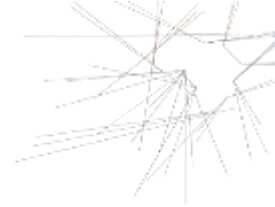
- Social and Labour Plan a prerequisite for granting of Mining rights: Section 100 of MPRDA and Regulation 46(c)
- must implement comprehensive HR Development Programmes, Mine Community Development Plan, Housing and Living Conditions Plan and Employment Equity Plan
- our experience that HR function tasked to deal with all these issues
- however not always properly co-ordinated between HR, Procurement Department, Corporate Social Responsibility Department, Housing, Supply Chain etc.

COMMUNITY DEVELOPMENT PLAN



- wont' get full credit for efforts unless properly co-ordinated
- starting point is SLP, Regulation 46(c) and Mining Charter
- Also have regard to local authorities' Integrated Development Plan

COMMUNITY INVOLVEMENT

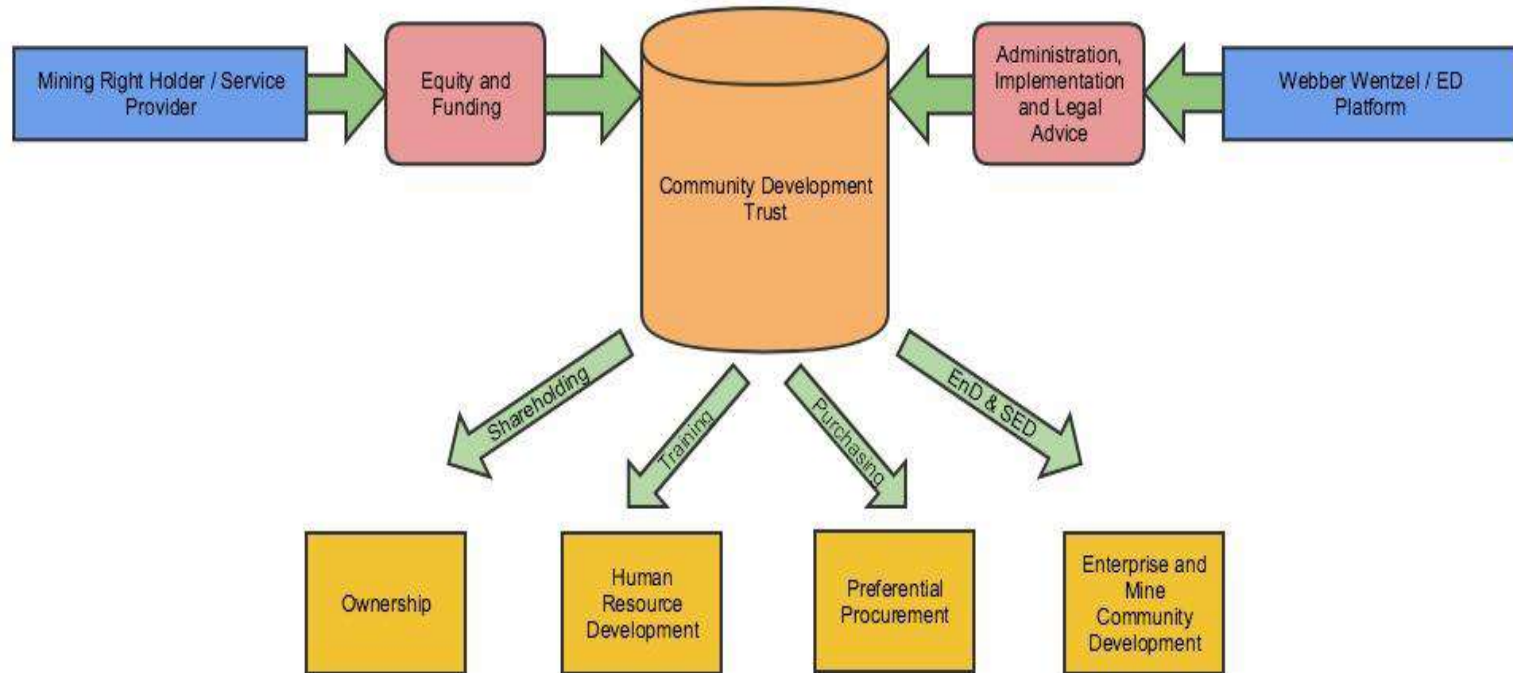


- analyse geographical physical area around mine: aerial mapping
- identify settlements and possible beneficiary areas
- identify leadership in areas: traditional and community leaders
- other interest groups?
- Community forums?

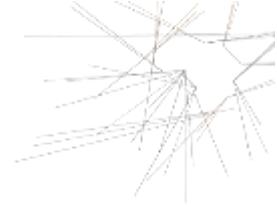
COMMUNITY DEVELOPMENT: SHIFT TO CREATING SHARED VALUE



- Community Development Trust at centre to achieve Mining Charter goals of:
 - infrastructure creation
 - poverty eradication
 - income generation projects
 - measures to address housing and living conditions

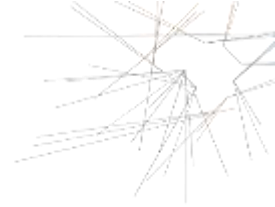


COMMUNITY DEVELOPMENT



- The key tenets of a local economic development planning process includes:
 - extensive participation by recipient communities
 - Creation of a legitimate development vision
 - effective management of community expectations during implementation
 - redirecting harmful voices in positive ways
 - allocating accountability for the delivery of the vision effectively
 - letting local leaders drive the process
 - monitoring, evaluating and adapting the strategy as it progresses
 - being honest about successes and failures

KEYS TO SUCCESS



- constantly monitor development initiatives
- adapt initiatives to suit new conditions if necessary
- create working communication channels with recipient communities



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