WITH COMPLIMENTS

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Employee Looting and Strike Violence: When Is Dismissal Fair?

Employee looting and/or violence can take place during strike action or it can occur during non-workplace incidents such as the recent looting and public disorder sprees. In both cases employers

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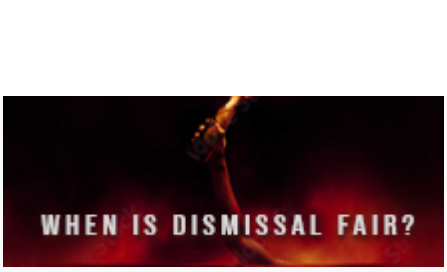
need to take action, but with care.



Addressing firstly the "strike" scenario, employees have strongly entrenched rights when it comes to taking industrial action. But strikers who indulge in, or associate themselves with, any form of violence or intimidation can expect little sympathy from our courts.

Two Labour Appeal Court decisions illustrate -

Dismissed for associating with a crowd assault

> ***"Within a labour law context the requisite intention exists where it is proved that an employee intended that misconduct would result or must have foreseen the possibility that it would occur and yet, despite this, actively associated himself or herself reckless as to whether such misconduct would ensue" (extract from the judgment below)***

First up is the case of 148 workers dismissed for misconduct during a strike.

- When the employer's Human Resources Manager left his office to engage with the strikers they surrounded and seriously assaulted him. He was pushed out of a glass window, had rocks thrown at him and was punched and kicked while he lay on the ground. He feared for his life and was left with injuries to his face, arm, and body. Video footage showed striking employees celebrating and chanting after the assault was over.

- At a disciplinary hearing 12 employees were found to have participated directly in the assault, and the others were found to have participated by association and thus to have acted with "common purpose". All were summarily dismissed.

- The Labour Court confirmed all 148 dismissals. 41 of the employees appealed to the Labour Appeal Court on the grounds that common purpose in the assault had not been proved because there was no evidence that they had been on the scene of the assault, nor that they had been aware of the assault, had intended to make common cause with it, or that they had performed an act of association with it.

- Quoting from the Constitutional Court that "it was unnecessary to place each employee on the scene to prove common purpose which can be established by inferential reasoning having regard to the conduct of the workers before, during and after the incident of violence" and commenting that "…the inference drawn that all employees were involved in or associated themselves with the assault became the most probable and plausible", the Court held that the 41 had been present at the scene and had associated themselves with the actions of the group before, during or after the misconduct. The Court accordingly confirmed the dismissals.

Dismissed for carrying sticks, piping, and a sjambok in a picket line

> ***"The constitutionally protected right to strike does not encompass a right to carry dangerous weapons on a picket line which, by their nature, not only expose others to the very real risk of injury, but also serve to threaten and intimidate" (extract from the judgment below)***

The second case saw a group of employees dismissed after taking part in a national strike which turned violent.

- Three of the employees each carried a stick while picketing with a group of other strikers, another carried a length of PVC pipe and the fifth carried both a stick and a sjambok. Others in the crowd carried a golf club and an axe respectively. At least two people sustained severe injuries during the course of the strike.

- The employees were charged with "brandishing or wielding of dangerous weapons during [the] strike" and following disciplinary hearings they were dismissed.

- When the matter eventually came before the Labour Appeal Court, it upheld the dismissals, finding that the strikers were aware of a workplace picketing rule barring weapons of any kind being "carried or wielded" by picketers and that they "knew or could reasonably have been expected to have known that

disciplinary action could result if the picketing rules were breached."

- The end result is yet another warning to employees that whilst their right to strike is strongly protected by constitutional principles, strikes and picketing become unlawful if they are not peaceful, non-violent, and free of dangerous weapons.

What about off-duty employees who took part in the recent public looting?

Published images and videos of the recent orgy of public looting and destruction show criminal behaviour so blatant and shameless that many of the perpetrators will no doubt be readily identifiable by their employers.

You may feel justified in proceeding immediately against any of your employees so implicated, even though they happened to be off-duty and nowhere near your workplace at the time. After all, who wants a looter or arsonist working for them?

But whilst our laws may well entitle you to take action against some or all of such employees, that will generally be so only when their provable criminality is in some way linked to, and relevant to, their employment. The law in this regard is unfortunately too complex, and too full of grey areas, for any advice beyond the general observation that you should certainly consider immediate disciplinary action, with the strong caution that **specific professional advice is essential beforehand**.

Violence and Looting – Can You Sue SAPS?

"When a crime is imminent and foreseen it is expected of the law enforcement agency to take appropriate action. The duty of the police to provide assistance arises from their mandate to carry out law and order" (extract from judgment below)

Can you sue the police if they fail to protect you during unrest and violence? It's an important question not just for employers dealing with strike violence. In the aftermath of the massive damage caused by the recent public unrest and looting, the case we now discuss will no doubt find application far beyond the labour relations field.

Strike violence - damages for a vandalised farm and an assaulted employee

- A large fruit farm was subjected to a month-long strike "characterised by violence through various acts of intimidation, assaults, malicious damage to property, vandalism, theft, road blockades and various acts of looting."

- Ahead of the strike, SAPS (the South African Police Services) had been informed of the looming strike and of suspicions that "there is a great likelihood that the strike is likely to be violent."

- What followed was a litany of violent action by a large crowd of strikers - stonings, petrol-bombings, arson, assaults, intimidation, brandishing of knobkerries, threats of murder, looting, and destruction of property. 251 strikers were dismissed after disciplinary hearings, an event which itself led to more violence.

- The farm and a non-striking worker stabbed by strikers sued SAPS in the High Court for damages. Although many of the facts were disputed in evidence, the Court found that the employer had made numerous pleas to SAPS, based some 15 km away, for assistance. During one police response, said the employer, it was informed that the police had no capacity to assist, whilst on many other occasions the police failed to respond at all.

- A Labour Court interdict and contempt of court order were allegedly not enforced, and whilst various criminal charges were laid during the course of the strike, few arrests took place (four of them only when police themselves were stoned).

- On the basis of the evidence before it and its analysis of the duty of the police to provide assistance when a crime is imminent, the Court ordered the Minister of Police and the National and Provincial Commissioners of Police to pay "proven or agreed damages" arising from the strike "as a result of their wrongful and negligent conduct."

- Critical to the outcome was the Court's findings that "The police had a legal duty to act positively to prevent harm to the Plaintiffs. The legal convictions of the community required of the police to act more swiftly to prevent harm to the Plaintiffs. The legal convictions of the community incorporate constitutional values and norms and in our constitutional democracy it cannot be acceptable of the police to sit idle when they should have reasonably foreseen that the strike will turn violent. When a crime is imminent and foreseen it is expected of the law enforcement agency to take appropriate action. The duty of the police to provide assistance arises from their mandate to carry out law and order."

- Factually, the Court found that "The police had the capacity to patrol the area and conduct continuous monitoring which they failed to do. Their failure to respond to various pleas for assistance was not only negligent but wrongful" and "the conduct of the police viewed against the legal and public policy considerations, constitutional norms and values was unacceptable and accordingly unlawful."

Will these principles apply to unrest and looting claims generally?

Of course the recent public unrest, destruction of property and looting were on a totally different scale and took place in a very different context to the facts before the Court in the case above.

At time of writing, media reports suggest that a general failure by security services to foresee and forestall the violence may have rendered them largely incapable of reacting effectively to whatever pleas for help they may have received. In contrast, in the case above the Court seems to have accepted that the police had the resources to react effectively but failed to do so. So although the general principles laid out above will no doubt assist in any attempt to hold the police liable for looting and other losses, time alone will tell whether victims will actually be able to prove any degree of police liability, either generally or in specific instances.

Noisy Neighbours – Your Rights, and Buyers Beware!

"In common law, everyone is in general permitted to use their property for any purpose they choose, provided that the use of the property should not intrude unreasonably on the use and enjoyment by the neighbours of their properties" (extract from the "gym case" below)

Consider this unhappy scenario – you buy your dream home (or perhaps new business premises), only to find that you are afflicted with the noisiest and most unreasonable neighbours you have ever encountered. A friendly approach to them produces no result. Can you get a court order to stop the noise?

Let's address that question with reference to two recent court cases, but first –

What must you prove?

To get a "final interdict" (in this instance a court order compelling the offenders to put an end to the noise) you have to prove three things –

1. "A clear right",
2. "An injury actually committed or reasonably apprehended", and
3. "The absence of similar protection by any other ordinary remedy" (in other words, you must show that you have no adequate alternative remedy available to you – an important aspect, as we shall see below).

In the suburbs: The pastor v the puppy daycare home business

> ***"…the courts apply a reasonableness standard, which entails a balancing of the mutual and reciprocal rights and obligations of neighbours" (extract from the judgment below)***

The scene in this first case is a suburban residential area in Cape Town's Northern Suburbs.

- A pastor, needing "a peaceful environment to write, research, study and counsel his congregants", applied to the High Court for an interdict against his neighbours. The problem was their home business in the form of a puppy daycare centre, operating in their garden and offering supervision, structured playtime, potty training, basic training, socialisation and so on for up to 17 dogs at a time.
- The complaint centered on barking on the property, triggering "a cacophony of barking from all the dogs in the neighbourhood" – starting at 6.30 am (Monday to Saturday) until 6 pm. This, said the pastor, was "disturbing and disruptive to the peaceful enjoyment of his property and to his daily activities", plus it had seriously affected the value of his property.
- Before buying the property he had viewed it over a weekend when there was no noise, and, because it was important to him, had specifically asked the previous owner about whether there was a barking problem in the neighbourhood.
- After fruitless discussions with the neighbours, he reported them to the municipal authorities (the City of Cape Town), lodging complaints for almost 4 years, resulting only in the issue of a compliance notice which the City failed to enforce, and a failed attempt at prosecution.
- In the High Court the complainant's attack relied not only on common law "nuisance law" but also on alleged contraventions of the Western Cape Noise Control Regulations (all local authorities have power to make such regulations in terms of National Regulations), the City's Development Management Scheme (with its restrictions on home business activities) and Animal By-Laws.
- The puppy daycare business raised a series of defences to these lines of attack, and disputed many of the complainant's factual allegations, but in the end result the Court ordered the business to stop operating immediately. The business activity, said the Court, was "abnormal use" of a residential property, and "**While such noise may be bearable in a busy City, where there is a lot of activity, such as large volumes of traffic, the constant movement of people and crowds and noise created by businesses, it would definitely disturb the peace and serenity of a quiet neighbourhood where such noises are not expected, and to which the applicant is entitled**." (Emphasis supplied).

In the city: the multi-storey building and the noisy gym

> ***"…What constitutes reasonable usage in any given case is dependent on various factors, including the general character of the area in question – persons living and working in an urban area would, for example, reasonably be expected, in general, to be more forbearing about a higher level of noise intrusion into their lives than neighbours living in a rural***

housing estate" (extract from the case below)

We move now to the second case, also in Cape Town but this time in the City Centre.

- The owners of a property in a multi-storey building in the centre of Cape Town (a married couple living there and an attorney running a law practice in it) approached the High Court for an interdict against the neighbouring gym on the grounds of a substantial noise nuisance. The married couple's bedroom window is just over a metre away from the window and balcony of the gym.

- The gym's premises are zoned for commercial use, and there was no dispute that the area was subject to "substantial traffic noise", but the complaints centered on allegations that the gym produced "loud techno/dance music with a strong beat" and microphone-amplified voice instructions to attendees at gym classes – at times ranging from 6 am to 6.45 pm.

- Many of the facts of the matter were, as is common in such bitterly fought matters, in dispute, and ultimately the Court declined to grant the interdict partially on the grounds of unresolved disputes of fact. Clearly the fact that the area was subject to considerable levels of "inner-city noise" anyway played a part, but the deciding factor seems to have been the Court's finding that the complainants had declined the neighbour's offer to follow the processes of the local Noise Control Regulations, which the Court held to provide an "adequate alternative remedy".

- Moral of this story – don't expect too much peace and quiet in a city centre, and exhaust all alternative remedies before asking for an interdict!

Property buyers – do your "noise risk" homework upfront!

Which leads us to a general note of caution to anyone about to buy a property – prevention being as ever a lot better than cure, investigate and understand the potential for "noisy neighbours" disrupting your peace and quiet before putting in your offer.

For example, the pastor in the puppy case took at face value the seller's reassurances about excessive barking in the neighbourhood – he could perhaps have saved himself 5 years of stress and trouble had he been a bit more cynical and returned to the neighbourhood at various times during the week just to check.

And bear in mind that what may be considered a totally unreasonable noise level in one context could be considered quite acceptable in another. As the Court in the gym case put it: "**…the applicants cannot expect the quiet serenity of the suburbs while living in the inner-city, which comprises a mix of commercial and residential properties, and particularly having purchased a property that is immediately adjacent to a commercially-zoned property."** (Emphasis supplied).

Directors, Creditors - Do Personal Suretyships Survive Business Rescue?

"Creditors have better memories than debtors" (Benjamin Franklin)

In these hard times of pandemic and economically destructive unrest, an unfortunate number of businesses face collapse, and many will opt for the "first aid for companies" option of business rescue.

Creditors coming out of that process with a shortfall (only the luckiest creditors are likely to emerge with full settlement) will naturally look to any personal suretyships they hold to cover that shortfall.

A recent SCA (Supreme Court of Appeal) decision has brought welcome clarity to the question of whether – and in what circumstances – such personal suretyships will survive the business rescue process.

Both directors and creditors need to understand the outcome, and to act accordingly.

Sued for R6m, a CEO's defence crumbles

- A company CEO (Chief Executive Officer) signed a personal suretyship in favour of a creditor supplying the company with petroleum products.
- When the company fell upon hard times it was placed into business rescue. Eventually a business rescue plan was adopted, the rescue process was terminated, and the creditor sued the CEO for the shortfall on its claim of just over R6m.
- The CEO's main defence was that his liability as surety was an "accessory obligation" – in other words, if the creditor's claim against the principal debtor (the company) fell away, he should be released from his liability as surety.
- But, held the Court, although a principal debtor's discharge from liability does indeed ordinarily release the surety, our law allows the creditor and the surety to agree otherwise.
- And the suretyship agreement in this case did just that. It contained "unobjectionable" and "standard" terms which included a specific agreement by the surety that he would remain liable even if the creditor "compounded with" the company by accepting a reduced amount in settlement of its claim. Nor was there any mention in the business rescue plan of its effect on creditor claims against sureties (it could, for example, have provided specifically for sureties to remain on the hook, or to be released). But the deciding factor remained that the wording of the suretyship was such that the creditor did not abandon its claim against the surety by supporting the business rescue plan.
- Bottom line – the CEO goes down over R6m, and the creditor has another shot at emerging unscathed from the mess.

Heed these lessons from the judgment!

The SCA in its judgment undertook a comprehensive interpretation of the terms of the deed of suretyship, of the business rescue plan, and of the relevant legislation. Although the detail will be of more interest to lawyers and academics than it will be to the average director or creditor, it did bring welcome clarity to an issue of great practical importance, and the valuable lessons therein should be heeded -

Directors: As always, think twice before signing any personal suretyship, and if you absolutely have no alternative, at least understand fully what you are letting yourself in for both legally and practically. Equally, ensure that the business rescue plan lets you fully off the hook as regards any possible personal liability; you may be advised to go further and have a separate release agreement with any creditor/s holding your surety. Although not directly relevant to this article, think also of managing any risk of personal liability beyond suretyship, such as allegations of reckless trading and the like.

Creditors: You on the other hand should always try for watertight and upfront suretyships from directors and others with attachable assets (again not directly relevant to this article, but also take whatever security you can over company assets such as debtors, fixed property etc). And when it comes to the business rescue plan, make sure that it leaves your claim against sureties unaffected.

Upfront professional advice and assistance is a real no-brainer here!

Your Websites of the Month: Measure and Maximise Your Business

Creativity

"Creativity is the key to success" (Abdul Kalam)

It's hard to think of a successful entrepreneur who isn't at heart creative. Creativity comes with the territory, and anything you can do to increase it has got to be good for your bottom line.

The good news is that you can train yourself to maximise your creativity. First off take "The Divergent Association Task" **here** – it measures your creativity in under 4 minutes. Then move on to HuffPost's 5 Creativity-building tips in "Yes, You Can Train Yourself to Be More Creative. Here's How" **here**.
