

Explanatory Note

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“No right, including the right to strike, is absolute.”

(AMCU and Others vs Anglo Gold Ashanti and Others)

The right to strike is understood and accepted to be a principal weapon employees use in the struggle to improve their livelihood and to overcome centuries of discrimination. This right is entrenched in the Constitution of the Republic of South Africa (the Constitution) and therefore cannot be interfered with lightly. However, the right to strike is not absolute and like all other rights, is subject to a limitation.

It is trite that the right to strike is limited by both the Constitution and the LRA. According to section 213 of the LRA, a strike is defined as “partial or complete concerted refusal to work, or the retardation or obstruction of work”. The Constitutional Court has expressed a view that the definition implies that all strikes must be peaceful.

Section 17 of the Constitution reinforces the limitation as it guarantees that “everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions”.

Having considered the limitations imposed by both the Constitution and the LRA, the Constitutional Court, albeit in passing, determined that “once strikes cease to be peaceful, they lose the protection of the law”. Because the Constitutional Court is an apex court its obiter dictum carries weight and has a binding effect on the courts below it. Although the obiter dictum was in the context of the secondary strike, we see no reason why a primary strike cannot be interdicted on the same basis.

In light of the obiter dictum, in this case, we are of the view that employers are not limited to interdicting the violence during a strike but can also interdict the strike itself on the basis that it has turned violent.

It remains to be seen whether the historical and/or potential violence will be a factor that a court will consider in interdicting a primary strike.



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