

Union liability

assessing the SAMWU case

Warning bells sounded for the union movement with the recent judgement in the case of Sikhwezeli Jada and 582 others v South African Municipal Workers Union (unreported case 447/96, Springs Magistrates Court).

The magistrate's court found in favour of the workers who sued their union on the basis that one of the union organisers had been negligent. If the judgement is upheld on appeal, SAMWU will have to pay its members millions of rands.

Unions have seen a substantial increase in claims being lodged against them by *members or former members*. Most of these relate to unions having failed to lodge their members' dismissal disputes on time. However, more and more union members seem to be exploring the option of suing their union for negligence.

The facts

The union's members, who were employed by the Springs Town Council, went on strike. One of their demands was that the dismissal dispute between the council and four SAMWU shopstewards be referred to voluntary arbitration. The union and the workers did not want to refer the dispute to the old Industrial court because they had lost faith in that institution.

As these events occurred in 1993, the

Anton Roskam and Nadine Fourie discuss the recent magistrate's court's decision that found SAMWU liable for the loss in earnings of its members who were on strike.

old LRA applied. All municipal services were deemed essential and any strike by these workers was automatically illegal.

The members who are suing SAMWU are a group of the strikers. Some of them allege that the SAMWU organiser incited them to strike. The union believes that the workers decided to embark on the strike and that the strike was a 'wildcat strike'.

The strike lasted four days. On the fourth day, a Friday, the council conceded to the demands of the workers. It issued an ultimatum to workers to return to work by 7am on the Monday morning or be dismissed.

The strikers did not trust the council. They wanted the union organiser to check that the employer was not conning them. The union organiser was not able to be at the Springs Town Council before 7am on the Monday morning. He had to be at the Boksburg Council where workers had had

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violent confrontations with the police. According to his testimony, he arrived at the Springs Town Council later that morning and while he was addressing the workers and advising them to return to work, the council's officials handed out dismissal notices.

The workers were re-instated later through negotiations between SAMWU, the Springs Town Council and the newly elected ANC provincial government. The claimants demanded that SAMWU pay them their lost wages from the date of their dismissal to the date of their re-instatement.

Legal implications

The case has both financial implications, for SAMWU as well as implications for its ability to provide future support and services to its members.

The case also has serious consequences for the union movement generally. The key question is: should union members be able to hold their union liable, and if so under what circumstances?

Much of the legal dispute centres on whether the law of contract or the law of delict should apply.

A person is liable in the law of delict when they act unlawfully, either intentionally or negligently, and cause another person harm or loss. A person can be liable for not taking action if, in the eyes of the law, they should have taken action. The court in this case found that the union's constitution compels the union to take action - that is the organiser should advise the members.

The union believes that the law of delict may not apply to these kinds of cases and will challenge the magistrate's decision on appeal. However, even in the way that the magistrates' court applied the law of delict, outstanding questions of law and policy remain.



Petros Mashishi, SAMWU president.

Union liability to members

When would a union be liable to its members?

If the law of delict applies, there may be situations where a union may be liable to its members for negligently or deliberately causing harm or loss to them.

Imagine, for example, where a union official fails to process a member's dismissal dispute and the member's claim is unsuccessful because it was lodged out of time and there is insufficient reason for the delay. If the member's case was a good one, she would have suffered loss of income and could claim against the union.

Take another example of collective industrial action. A union official misrepresents management's settlement offer to the members. The result is that the strike is unreasonably prolonged and members lose their income or jobs.

In these examples, the officials probably have a legal duty to act on behalf of, and in the interests of, their members. The

members could claim damages from the union. But consider the scenario where the union negligently advises members in the course of a strike.

The union's liability to its members in a wildcat strike is very different from a strike sponsored by a union. It seems clear that where workers decide to strike on their own accord, the union's liability regarding the decision to strike is limited or non-existent. However, where a union incites illegal strike action and misleads workers to take actions that result in job or financial losses, the union could carry the liability for these losses.

The distinction between wildcat and union sponsored strikes hides the complexity of the situation. We suggest that other factors must be taken into account in deciding whether the union is liable. Key amongst these are the following:

Worker control

Whether the members or officials decide to embark on a strike, the magistrate or judge should take into account the structures of union decision-making.

The culture of SAMWU and other COSATU-aligned unions centres around the concepts of worker control and worker democracy. This means that members and not officials are the driving power behind decision-making in the union.

Workers have independent powers of decision-making; and officials cannot simply command them to go back to work. Officials can advise and assist workers in making decisions, but workers are free to reject that advice.

The workers themselves have both the right to make decisions and the responsibility to bear the consequences. Members cannot deny responsibility for their decisions and then sue the union on

that basis.

Moreover, it is in the interests of workers, management and collective bargaining that the law promotes this democratic culture of decision-making in the labour movement.

Tensions

Unions are primarily formed to represent workers. Union members expect their union officials to act in accordance with their wishes. They do not want to see the union perform a policing function on behalf of the employer. They often resist the union imposing its own agenda. Sometimes, when workers perceive that union officials are furthering the employer's interests, they react angrily. This is shown by the recent killing of a NUM official as a result of worker fury about a course of action that he suggested. This is often the reality that union officials encounter.

It is often all too easy for a magistrate or judge, with the benefit of hindsight, to find that the organiser should have advised the workers to return to work to resolve the situation.

Union officials and office-bearers must maintain the confidence of their members in order to effectively represent and advise them. If the court imposes a broad legal duty upon organisers or the union, this will decrease their ability to effectively represent and advise workers. It may also affect their credibility with workers. This is not in the interests of orderly collective bargaining.

Orderly collective bargaining

If the law compels the union to advise its members to return to work in a strike, then the union will probably apply the law narrowly, fearing a claim by the workers or the employer. The union organiser will inform the workers that the union is



Will unions be responsible for members' lost wages during a strike?

obliged to advise them that they should return to work. This will not meet industrial realities and will probably not resolve the dispute or the strike. The strike is likely to continue, but without effective union leadership.

The union's ability to resolve the dispute will be lessened as workers may suspect that the organiser's advice is only there to protect the union and employers' interests.

Even an employer would not welcome a broad legal duty being placed on the union official if this means that the advice may remove effective union leadership from the strike.

Union officials must have the freedom to intervene and channel the dispute to a resolution. This means that the organiser has to identify with the workers' complaints and attempt to address them.

Courts should not make unions

responsible for members' bad decision-making. They should rather ensure that union officials are free to make good decisions and maintain members' confidence, in order to resolve workplace conflict. Officials' accountability to members should not be confused with the union's legal responsibility. Accountability of officials to workers is an essential part of the union tradition of worker democracy.

Putting the blame for bad decision-making on the union may give a few workers some financial reparation. But in the long term, it will stunt the union's ability to resolve workplace conflict and to encourage democratic participation of members. ★

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