THE MANTLE OF THE SHOP STEWARD IS NOT AN EASY ONE TO WEAR

NUMSA obo Motloba v Johnson Control Automotive SA (Pty) Ltd (2017) 38 *ILJ* 1626 (LAC) Revisited

1 Introduction

NUMSA obo Motloba v Johnson Controls Automotive SA (Pty) Ltd (2017) 38 *ILJ* 1626 (LAC) (*Motloba*) raises four discrete, yet interrelated issues that require close examination. The first relates to the constitutional and statutory protection accorded to trade union membership and activities. The second engages the exercise of organisational rights in the workplace. With the demise of the duty to bargain (see e.g., *Ministerial Task Team* "Explanatory Memorandum to the Draft Labour Relations Bill" 1995 *ILJ* 293; Thompson "A Bargaining Hydra Emerges from the Unfair Labour Practice Swamp" 1989 10 *ILJ* 908), created to breathe life into collective bargaining and provide the lifeblood to recognised trade unions in the workplace. The third brings to the surface the recurrent headache for management concerning the dual and contradictory role of the shop stewards on the shop floor. The point of immediate relevance is that, while conducting union activities, a shop steward in theory, at least, operates on equal footing with management. It merits emphasising that the theory becomes murky when the union official is also an employee. (*Re Workers' Compensation Board and Workers' Compensation Board Employees Union* (1990) 15 LAC (4th) 332, 335). Put simply, "the ordinary rules applicable to the normal employer-employee relationship are then somewhat relaxed" (*FAWU v Haverstime Corporation (Pty) Ltd* [2007] BLLR 638 (LC) par 42 (*Haverstime*)). Be that as it may, a shop steward is still an employee of a company with the usual obligation to conform to all workplace rules.

Fourth, and possibly most important, shop stewards' propensity for an "anything goes approach" in their dealing with management. The contentious issue encountered here concerns the tendency of shop stewards to exceed the bounds of acceptable conduct in fulfilling their representational responsibilities. As a result, trade union representatives have been disciplined and in extreme cases dismissed for misconduct. Accordingly, the marginal line separating insubordination and insolence (*CCAWUSA v Wooltru Ltd t/a Woolworths (Randburg*) (1989) 10 *ILJ* 311 (IC) 314H–J (*Wooltru*); *Ngubo v Hermes Laundry Works CC* (1990) 11 *ILJ* 591 (IC); *Sylvania Metals (Pty) Ltd v Mello NO* [2016] ZALAC 52 par 16–17 (*Sylvania Metals*); *Sibanda v Pretorius NO* [2019] ZALCJHB 84 par 30 (*Sibanda*)), the interconnected acts of intimidation and assault (*Walsh v Superintend General: Eastern Cape Department of Health* (2021) 42 *ILJ* 1461 (LAC); *NEHAWU obo Skhosana v Department of Health: Gauteng* [2018] ZALCJHB

201 (*Skhosana*)), disruptive conduct in the course of collective bargaining process (*Adcock Ingram Critical Care v CCMA* (2001) 22 *ILJ* 1799 (LAC) (*Adcock Ingram*); *Mondi Paper Co Ltd v PPWAWU* (1994) 15 *ILJ* 778 (LAC) *(Mondi Paper)*), misconduct at disciplinary or arbitration proceedings (*TAWU obo Meek v Portnet* [1998] 9 BALR 1239 (IMSSA)) as well as the breakdown of the trust relationship and intolerability occasioned by dishonesty (*BIFAWU v Mutual and Federal Insurance Co Ltd* (2006) 27 *ILJ* 600 (LAC) (*BIFAWU*) deserve critical scrutiny.

These four core issues underscore the dual relationship of a shop steward with an employer within the generally adversarial labour-management climate. Having carefully examined the relevant facts and the litigation history, the commentary then deconstructs the critical aspect of *Motloba*. The aim is to get to grips with the dilemma that confronts management decision-makers: how to strike a balance between the right of the shop stewards to exercise their functions as trade union representatives and the right of the employers to discipline shop stewards for acts of misconduct committed in course of his or her union representation duties? Expressed in a slightly different tone, striking a balance between the right of trade representatives to be accorded a wide latitude in the manner they go about carrying out their representation functions, and the concomitant responsibility as shop stewards to scrupulously refrain from abusing their union position.

2 The factual background

In essence, the circumstances leading to the dismissal of the shop steward in *Motloba* demonstrate that the mantle of the shop steward is not an easy one to wear. Motloba had been in the service of the company for almost a decade. In that period, he was a shop steward on an intermittent basis for a period of four years. In the aftermath of a heated exchange with the payroll manager in front of agitated employees concerning the interpretation of the Metal Industry Bargaining Council's collective agreement relating to the calculation of public holiday pay, Motloba was suspended, later charged, and dismissed on account of three disciplinary offences. The first charge focused on the physical and verbal assault of the manager. The second charge concerned serious disrespect, impudence, and/or insolence. The last charge related to threatening and/or intimidating behaviour towards the manager.

The union challenged Motloba's dismissal at the bargaining council. The arbitrator approached the dispute and premised his findings on *Haverstime*. Broadly speaking, the well-established *Haverstime* proposition resonates with what the Donovan Commission understood as the dual role of a shop steward at the workplace to be "more of a lubricant than an irritant" (Donovan Commission para 96). Or, more accurately stated, "an employee, when he approaches or negotiates with a senior official or management, in his capacity as shop steward, does so on virtually an equal level with such senior official or management and the ordinary rules applicable to the normal employer-employee relationship are then somewhat relaxed" (*Haverstime supra* par 65). During his verbal onslaught, Motloba prodded Bezuidenhout in the chest with his finger. While accepting that the manager was

traumatised by the incident, the arbitrator concluded that the probabilities were equipoised. In other words, "the evidence tendered by both parties was credible and reliable and their versions equally probable" (*Motloba supra* par 20). The arbitrator similarly stated:

> "(I)t seems as though the distinguishing factor was Mrs. Bezuidenhout's perception of the situation she had to face. Her perception of what was busy happening appears to have been removed from the actual event as a result of her psychological realm …" (*Motloba supra* par 20)

In sum, the arbitrator was not persuaded that Motloba was guilty of the charge of assault because the employer had failed to prove that the misconducting shop steward acted intentionally and unlawfully. Accordingly, if the employee touched the manager, the mere touching did not amount to an assault.

With regard to the charge of serious disrespect, impudence, and/or insolence, alleged to have been committed by the shop steward against the manager, the arbitrator was of the view that the evidence was unclear. Moreover, the *Haverstime* principle provided a short and direct answer to the preferred charge of serious disrespect, impudence, and/or insolence. While launching into a disruptive verbal outburst directed at the manager, Motloba was acting in a representational capacity. Under those circumstances, Motloba was entitled to wide latitude to criticise management and to do so free from the threat of discipline. It has been said that intemperate language directed against members of management may not amount to insubordination if spoken by a shop steward in the course of performing his/her representational responsibilities (see e.g., *In Re Millenium Construction Contractors, and Construction and General Workers' Union Local 92* (2001) AGAA No 46; 97 LAC (4th) 1 (ACL Sims), 25 May 2001, par 44; *Yellowhead Road & Bridge (Ft George) Ltd and BC Government and Service Employees' Union* [2015] CanLII 28434 (BC LA) 23).

Concerning the charge pertaining to threatening and/or intimidating behaviour, the arbitrator determined that there was no direct evidence to sustain the guilty verdict. There can be no doubt that the manager subjectively felt intimidated by agitated employees and the forward approach of Motloba, however, objectively it could not be said that the latter acted in an intimidating and threatening manner toward Bezuidenhout. In any event, "he was merely performing his duties as a shop steward" (*Motloba supra* par 25), Motloba was entitled to immunity from discipline.

For the above reasons, the arbitrator concluded that the employer had failed to prove, on a balance of probabilities, the charges it levelled against the employee. Therefore, the dismissal of Motloba was procedurally fair but substantively unfair. Considering the critical issue of relief, it was the arbitrator's view that the preferred remedy for unfair dismissal in terms of section 193(1) of the Labour Relations Act 66 of 1995 (LRA) was foreclosed by "the non-reinstatable conditions" in sections 193(2)(*a*)–(*d*) (*Mediterranean Textile Mills (Pty) Ltd v SACTWU* [2012] 2 BLLR 142 (LAC) par 28). According to the arbitrator, reinstatement was impractical given that "there will still be a fair amount of interaction between Mrs Bezuidenhout and Mr Motloba" (*Motloba supra* par 26). The arbitrator then awarded the employee compensation equivalent to 12 months' remuneration.

3 The review proceedings before the LC

Dissatisfied with the arbitrator's decision not to order reinstatement, despite finding that his dismissal was substantively unfair, Motloba filed an application to review and set aside the arbitration award. In turn, the employer launched a cross-review against the arbitrator's conclusion that the dismissal of Motloba was substantively unfair.

The LC decided against Motloba on all points in reversing the arbitrator's award. It held that the arbitrator had committed reviewable irregularity by failing to assess the credibility and reliability of witnesses including the probabilities. On the first charge of physical and verbal assault, the LC concluded that the arbitrator failed to properly apply his mind to the evidence in finding that the probabilities were evenly balanced (*Motloba supra* par 29). The LC held after finding that Bezuidenhout was a credible and reliable witness and her evidence probable, it was not open for the arbitrator to conclude that her "perception of what was busy happening appeared to have been removed from the actual event" (*Motloba supra* par 29).

Two points are apparent from the arbitrator's failure to have regard to the evidence. First, it was obvious that the manager feared for her safety because of Motloba's conduct. The LC also castigated the arbitrator for concluding that the employer failed to establish that there was an intention to assault. In this regard, the arbitrator disregarded the unchallenged evidence of the company's witness to the effect that she had heard Bezuidenhout exclaiming "Excuse me" shortly after witnessing Motloba pointing his finger in Bezuidenhout's direction (*Motloba supra* par 29). It was also clear from Bezuidenhout's evidence that when the irate shop steward had pointed his finger at her, she countered angrily: "Excuse me", as a direct result of the latter's finger having touched her (*Motloba supra* par 29). Second, in finding that there was no evidence of intent to assault, the LC found that the arbitrator gave Motloba the benefit of a defence to which he tendered no evidence (*Motloba supra* par 31). Had the arbitrator undertaken careful and conscientious scrutiny of the evidence in accordance with the mandated review threshold (*Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC) par 110; *Head of Department of Education v Mofokeng* (2015) 36 *ILJ* 2802 (LAC) par 30–33. See generally, Myburgh "Determining and Reviewing Sanctions After *Sidumo*" 2010 31 *ILJ* 1 and Myburgh "The LAC's Latest Trilogy of Review Judgments: Is the *Sidumo* Test in Decline?" 2013 34 *ILJ* 1; Murphy "An Appeal for an Appeal" 2013 34 *ILJ* 27; Fergus "The Distinction Between Appeals and Reviews – Defining the Limits of the Labour Court's Powers of Review" 2010 31 *ILJ* 1556; Murphy "The Reasonable Employer's Resolve" 2013 34 *ILJ* 2486; and Murphy "Reviewing an Appeal: A Response to Judge Murphy and the SCA" 2014 35 *ILJ* 47), he would have regard to the evidence showing that immediately after the incident, Bezuidenhout told both her colleagues about the physical contact by Motloba. The arbitrator also ignored the corroborating evidence by both these fellow employees that the shop steward was aggressive and angry as a consequence of the accusation by members of the union that he had acceded to the employer's method of calculating the public holiday payment.

4 In the LAC

Giving the judgment of the LAC, Phatshoane AJA reiterated the principle formulated in the considerable body of authority that a shop steward should fearlessly pursue the interest of his or her constituency and ought to be protected against any form of victimisation for doing so (*Motloba supra* par 48. See also *NUM* v *Black Mountain Mining* [2010] 3 BLLR 281 (LC(par 42; *Adcock Ingram Critical Care supra* par 15; *SACTWU v Ninian & Lester (Pty) Ltd* (1995) 16 *ILJ* 1041 (LAC); *Mondi Paper supra*; *BIFAWU supra* par 19–21). Nevertheless, this was no licence to resort to defiance and needless confrontation. Assaults and threats thereof were not conducive to harmony or productive negotiation. It was improper to hold that when one acts in a representative capacity "anything goes".

Two strands of reasoning can be discerned from Phatshoane AJA's opinion. First, the arbitrator miscomprehended the nature of the enquiry he was enjoined to undertake in holding that the incident was in relation to an issue of relevance to industrial relations (*Motloba supra* par 41). The incident complained of did not arise during the course of the negotiations or within the context of the collective bargaining process (*Motloba supra* par 49). Second, Phatshoane AJA concluded that reliance by the arbitrator on *Harvestime* was plainly wrong and had correctly been found by the LC as amounting to a gross irregularity (*Havestime* supra par 42). In effect, the gross irregularities committed had a distorting effect on the outcome of the arbitration and vitiated the award (*Motloba supra* par 54). In short, the appeal had to fail.

5 Constitutional and statutory safeguards accorded to shop stewards

Section 23(2) of the Constitution of the Republic of South Africa 1996 constitutes the cornerstone of several rights and protections afforded to shop stewards. The elevation of the right to fair labour practices to the status of a fundamental right in the South African Constitution has afforded significantly stronger protection to job security and trade union rights (*NEHAWU v UCT* (2003) 24 *ILJ* 95 (CC) par 40–41). The major objectives of the LRA leave no doubt that the drafters had a discerning grasp of the reality that the protection of trade unionists and their activities extends to action short of dismissal, otherwise, the employer could make life miserable for the trade union member or representative without going as far as dismissing him or her (see e.g., *Kabeni v Cementile Products (Ciskei) (Pty) Ltd* (1987) 8 *ILJ* 442 (IC) and *Simelane v Audell Metal Products (Pty) Ltd* (1987) 8 *ILJ* 438 (IC)). The relevant provisions of the LRA thus prohibit action against employees because they are trade union members by preventing or deterring them from being or seeking to become members or penalising them for doing so (s 5(2)(*a*)). In the same breath, for participating in trade union activities, whether by means "velvet glove of bribery" (a case in point offering of reward to non-strikers: *NUMA obo Members v Elements Six Productions (Pty) Ltd* [2017] ZALCJHB 35); *NUM v Namakwa Sands (A Division of Anglo American Corporation Ltd)* (2008) 29 *ILJ* 698 (LC); *FAWU v Pet Products* [2007] 7 BLLR 781 (LC) [2007] 7 BLLR 781 (LC)) "… or the

mailed fist of coercion" (Bercusson *Current Law Statutes Annotated* vol 2 (1978) cited in Bowers and Honeyball (eds) *Textbook on Labour Law* 4ed (1996) 346).

Leaving aside for the moment against action short of dismissal provided by section 5, there is a robust and explicit statutory employment protection in section 185 of the LRA (Van Niekerk "'In Search of Justification' The Origins of the Statutory Protection of Security of Employment in South Africa" 2004 25 *ILJ* 853). Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practices. In its operational context, the right not to be unfairly dismissed serves as a safeguard against employment vulnerability and precariousness (*Sidumo v Rustenburg Mines Ltd* (2007) 28 *ILJ* 2405 (CC) par 74 (*Sidumo*)). At the same time, it infuses the ethos of fairness (*Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* 571 (LAC) 599H–I; *BMW (SA) (Pty) Ltd v Van der Walt* (2000) 21 *ILJ* 113 (LAC) 117I and 124H; *Sidumo supra* par 63; *NEHAWU supra* par 38–40; *CWIU v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC) par 69; *BMD Knitting Mills Pty) Ltd v SACTWU* (2001) 22 *ILJ* 2264 (LAC) 2269I–2270B)) into the inherently unequal employer-employee relationship (see e.g., *In R*e *Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) par 66; *R (on the application of UNISON) v Lord Chancellor* 2017 UKSC 51 par 6. See further Davies and Freedland, *Kahn-Freund's Labour and the Law* 3ed (1983) 18; Wedderburn *The Worker and the Law* (1986) 5).

The keystone of shop stewards' protection against arbitrary or unfair treatment by their employers, and disparate disciplinary treatment lies in the Code of Good Practice, Schedule 8 to the LRA. Item 4(2) fair procedure addresses the tricky question of disciplinary action against shop stewards. It stipulates that

> "Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union."

The effect of Item 4(2) is the imposition of legal restraints on the employer's disciplinary power over trade union representatives. The Donovan Commission summed up the role of a shop steward in elegant terms:

> "the steward plays a vital role in a complex and un-coordinated bargaining situation. It is often wide of the mark to describe [them] as 'trouble-makers'. Trouble is [often] thrust on them. In circumstances of this kind they may be striving to bring some order into a chaotic situation, and management may rely heavily on their efforts to do so .... For the most part the steward is viewed by others, and views himself as an accepted, reasonable and even moderating influence; more of a lubricant than an irritant". (*Royal Commission on Trade Unions and Employers' Association, Report*, London, Her Majesty's Stationery Office, Juin 1968, 346 par 96–110. See also Banks "The Reform of British Industrial Relations: The Donovan Report and the Labour Government's Policy Proposals" (1969) 24 *Industrial Relations* 333).

Sight must therefore never be lost that the special protection accorded to trade union activities should not operate as a cloak or a pretext for conduct that may ordinarily warrant discipline and dismissal. Moreover, a shop steward is an employee in the first instance like any other (*NUMSA v*

Assmang Machadodorp Chrome Works (Pty) Ltd [2018] ZALJHB 93 par 9) and does not enjoy any other special privileges outside the scope of the provisions of section 141 of the LRA, or section 15, which regulates time off for union activities.

6 Organisational rights

In any discussion about trade union representatives, the first port of call is organisational rights. The concept of organisational rights encompasses several rights afforded to a trade union under sections 12 to 16 of the LRA. The LRA grants trade unions organisational rights to equip them to function more effectively and to build support at the workplace. Organisational rights are subject to conditions and threshold requirements in order to ensure the orderly exercise of the rights and that work is not unduly interrupted. The trade union must be registered, it must be sufficiently represented in the workplace, and it must form part of a bargaining council that has jurisdiction over the business of the employer (see generally, *MATUSA v Central Karoo District Municipality* [2019] 2 BLLR 159 (LC)). The LRA in section 213 defines the workplace as a place, or places, where employees of the employer work. It was held in *Chamber of Mines of SA obo Harmony Gold Mining Co v AMCU* ([2014] 3 BLLR 258 (LC) that an employer must first take into consideration the membership across the workplace as well as whether members seeking organisational rights represent a sufficient number of employees in that workplace (see also *NUMSA v Lufil Packaging* (*Isithebe*) 2020 (6) BCLR 725 (CC)).

The LRA makes provision for the right of access to the premises of the employer, the right of trade union membership to be deducted by way of a stop order, and of particular importance the right to elect a shop steward (ss 12, 13, and 14 of the LRA). The representative union's constitution governs the election, nomination, and removal of shop stewards (s 14(3) of the 1995 LRA. See also *Mhlekude v SAA* (2016) 38 *ILJ* 577 (LAC)). More importantly, trade union representatives are accorded space to assist in grievance and disciplinary proceedings, monitoring the employer's compliance with work-related provisions of the LRA and any other relevant legislation (ss 14(4)(*a*) and 14(4)(*b*) of the LRA). It should be noted that the LRA does not place any express limitation on the functions performed by shop stewards (for extended analysis, see Apfel *Trade Union Representatives and the Boundaries of Lawful Trade Union Activities* (LLM Thesis, UJ) 2014 22. Therein lies the minefield on the shop floor.

Section 15 makes provision for the right to leave for an employee who is an office-bearer of a representative trade union or a federation to which the representative trade union is affiliated. A shop steward is permitted to take "reasonable time" off work during working hours to perform functions as a representative and to be trained with regard to any subject relevant to his functions. Section 16 of the LRA makes provision for the disclosure of information, it states that an employer has the duty to disclose all information that is relevant to the trade union representative to allow the trade union to effectively carry out its functions. The organisational rights contained in sections 14, 15, and 16 only apply if a representative trade union enjoys majority representation at the workplace.

At this juncture, it is convenient to consider the freighted issue of majoritarianism. Incidentally, this taps into the talking point of contemporary labour law discourse. The aftermath of Marikana has triggered intense reflection on the trajectory of collective bargaining, the resurgence of adversarialism, and the prevalence of violent strikers. The soul-searching is evident in the pages of law journals (for a sampling of prominent works: Du Toit *et al Labour Relations Law: A Comprehensive Guide* 6ed (2015) 69; Brassey "Labour Law After Marikana: Is Institutionalised Collective Bargaining in SA Wilting? If so, should we be Glad or Sad?" 2013 34 *ILJ* 823; Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" 2013 34 *ILJ* 836; Rycroft "Strikes and the Amendments to the LRA" 2015 36 *ILJ* 1; and Rycroft "The Legal Regulation of Strike Misconduct: The *Kapesi* Decisions" 2013 34 *ILJ* 859; Theron, Godfrey and Fergus "Organisational and Collective Bargaining Rights Through the Lens of Marikana" 2015 36 *ILJ* 849; Fergus "Reflection of the (Dys)Functionality of Strikes to Collective Bargaining: Recent Developments" 2016 37 *ILJ* 1537; Makama and Kubjana "Collective Bargaining Misjudged: The Marikana Massacre" 2021 *Obiter* 39; Manamela and Budeli "Employees' Right to Strike and Violence in South Africa" 2013 *CILSA* 308; Van Eck and Kujinga "The Role of the Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 ILJ 476 (LC)" 2017 20 *PER/PELJ* 1; Subramanien and Joseph "The Right to Strike Under the Labour Relations Act 66 of 1995 (LRA) and Possible Factors for Consideration that Would Promote the Objectives of the LRA" 2019 22 *PER/ PELJ* 1; Gericke "Revisiting the Liability of Trade Unions and/or Their Members During Strikes: Lessons To Be Learnt From Case Law" 2012 75 *THRHR* 566; Tenza "An Investigation Into the Causes Violent Strikes in South Africa: Some Lessons From Foreign Law and Possible Solutions" 2015 19 *LDD* 211).

Majoritarianism is both a premise of, and a recurrent theme throughout, the LRA (*Kem-Lin Fashions CC v Brunton* (2001) 22 *ILJ* 109 (LAC) par 19; *AMCU v Chamber of Mines* (2016) 37 *ILJ* 1333 (LAC) par 105 (*AMCU I*)). Despite the overall effect of limiting minority unions' access to organisational rights, the apex court has reinforced the majoritarian principle (*AMCU v Chamber of Mines* (2017) 38 *ILJ* 831 (CC) par 76 (*AMCU II*). See also retrenchment). It has been held that section 23(1)(*d*) of the LRA furthers the legitimate governmental purpose of promoting collective bargaining by way of a scheme premised on majoritarianism. The LRA makes being "sufficiently representative" the sentinel for collective bargaining between unions and employers (*National Tertiary Education Union v Tshwane University of Technology* [2017] ZALCJHB 91 par 25). Relevantly, section 18(1) provides that an employer and a registered trade union whose members form most of the employees, may establish a threshold of representativeness in respect of one or more of the organisational rights (see e.g., *IMATU v CCMA* [2017] 6 BLLR 613 (LC); *United Association of SA v BHP Billiton Energy Coal SA Ltd* (2013) 34 *ILJ* 2118 (LC); *POPCRU v Ledwaba* (2014) 35 *ILJ* 1037 (LC); *UASA v Impala Platinum Ltd* (2010) 31 *ILJ* 1702 (LC) (2010); *BHP Billiton Energy Coal SA Ltd v CCMA* [2009] 7

BLLR 643 (LC); *OCGAWU v Volkswagen SA (Pty) Ltd* (2002) 23 *ILJ* 220 (CCMA)).

Sight must never be lost that the LRA cannot be read to condone the effective manipulation of the collective bargaining units to muzzle minority trade unions from participating in collective bargaining on behalf of their members employed by a specific employer (Esitang and Van Eck "Minority Trade Unions and the Amendments to the LRA: Reflections on Thresholds, Democracy and ILO Conventions" 2016 37 *ILJ* 771; Cohen "Limiting Organisational Rights of Minority Unions: *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC)" 2014 17(5) *PER/PELJ* 2209; Kruger and Tshoose "The Impact of the Labour Relations Act on Minority Trade Unions: A South African Perspective" 2013 16(4) *PER/PELJ* 285; Mischke "Getting a Foot in the Door: Organisational Rights and Collective Bargaining in terms of the LRA" 2004 13(6) *CLL* 51). The point is that the emergence of militant trade unions marked by violent strikes and inter-union rivalry disputes can be traced back to the grievous struggle for acquiring organisational rights (see e.g., *Chamber of Mines of SA acting in its own name & obo Harmony Gold Mining Co Ltd v AMCU* (2014) 35 *ILJ* 3111 (LC) par 46; *AMCU I supra; AMCU II supra*).

7 The dual and contradictory role of a shop steward

A partial explanation for why the mantle of the shop steward is not an easy one to wear is because trouble is inevitably thrust upon the incumbent. The basic issue is: the behavioural patterns in the workplace of such a person are, of necessity, somewhat unique and usually of a high profile. The standard of conduct that an employer is entitled to expect from trade union representatives engaged in the conduct of legitimate union business is different from that expected of employees generally. The paradoxical role of a shop steward is succinctly summarised in the Canadian arbitral jurisprudence:

> "The union official, an employee elected by his or her fellow workers to protect and project their interests, is immediately forced into a dual function in the workplace. The elected union official, a cog in the legal mechanism of labour-management relations, is suddenly, and very often with very little preparation, voted into a position of key responsibility. This person, an employee of a company on the one hand, with the need to conform to all the requirements of the supervised workplace, must, on the other hand, conform to a large extent with the wishes and desires of the employees who have elected him/her and also with the policies, procedures and responsibilities of the union he or she represents." (*Canada Post Corporation v CUPW (Fowler and Robinet Grievances)* [1983] CLAD No 44 par 63–64. See also *Canada Post Corporation v Canadian Postal Workers Union* [2010] CanLII 86721 (CA LA) 18–19)

The extent to which an employer is entitled to use its powers of discipline with respect to shop stewards is deeply embedded in the Canadian arbitral debate (see e.g., *Teck Highland Valley Copper* [2016] CanLII 62416 (BC LA) 34–36 (*Teck Highland Valley Copper*); *Re Alcan Smelters and Chemicals Ltd and Canadian Auto Workers, Local 2301* (1996) 60 LAC (4th) 56, 69 (*The Emergency Health Services* 13). It is said that context is key – when a

shop steward deals with a grievance and raises issues, they are, "always on the border of insult" (*Teck Highland Valley Copper supra* par 26). This proposition is articulated in the following fashion:

> "For the purposes of assessing whether or not conduct is insubordinate the standard of conduct that the company is entitled to expect should be different when applied to the acts of union committee men engaged in the legitimate discharge of their duties. For, as Mr. Nickerson for the union put it, a committeeman is, while attempting to resolve grievances between employees and company personnel, always functioning on the border line of insubordination. His role is to challenge company decisions, to argue out company decisions and, if in the discharge of that role he is to be exposed to the threat of discipline for insubordination, his ability to carry out his role will be substantially compromised. This is not to say that a committeeman has a *carte blanche* to ignore at will management instructions and to instruct others not to carry them out. His immunity, if it may be called that, is limited to acts or omissions committed in the discharge of his functions and to acts or omissions which may reasonably be regarded as a legitimate exercise of that function. To put it succinctly, a committeeman is not entitled to punch a foreman in the nose as one of his means of attempting to bring about a settlement of a grievance" (*Re Firestone Steel Products of Canada and United Automobile Workers, Local 27* (1975) 8 LAC (2d) 164 167–168)

Signposts emerging from the Canadian arbitral case law to be applied in determining whether discipline imposed on a union official is justified may be summarised as follows: was the official acting in the capacity of a union representative at the time of the impugned conduct? Could the conduct be properly characterised as malicious in that statements made were knowingly or recklessly false? Was the impugned conduct intimidating or physically threatening? Did the conduct go too far and exceed what might reasonably be considered a legitimate exercise of a union function? In addition, the two-stage test enunciated in *Sun-Rype Products Ltd v Teamsters, Local 213* ([2010] CarswellBC 2047 (*Sun-Rype*)) requires the Labour Board to first assess whether the employee/trade union representative was performing shop steward duties. If the Board finds this, they move to the second prong of the test and ask whether the shop steward's behaviour in performing this duty was legitimate. In explaining this second prong, the illustration given in *Sun-Rype* is particularly informative: "If in fulfilling one's duties, a union official intimidates, bullies, or harasses other employees in the workplace, that will take those actions outside the bounds of acceptable behaviour of a union official" (*Teck Highland Valley Copper supra* par 22).

The fundamental question in the current case was whether Motloba's behaviour crossed the line of legitimate activity and whether such conduct has negatively affected the interests of the employer to render continued employment relationships intolerable.

8 Perennial issues of misconducting shop stewards

8 1 The marginal line separating insubordination and insolence

The need for a cogent distinction between insubordination and insolence arises from the fact that these two forms of nagging conduct are largely defined with reference to each other, or even in contrast with each other (Grogan *Dismissal* 3ed (2017) 285; Teffo "Insolence and Insubordination: The Courts' Views on Employees Gone Rogue" 2016 26(5) *CLL* 45–50. See also *Waste Management (Pty) Ltd v CCMA* [2016] ZALCPE 23 par 4 (*Enviroserve*); *Sylvania Metals supra* par 7). After all, it has been said that even though an employee can simultaneously be both insolent and insubordinate, he/she can be insolent without necessarily being insubordinate (*Wooltru supra* 315D–E). Insolence is generally equated with conduct, which is offensive, disrespectful, impudent, cheeky, rude, or insulting. Such behaviour might be verbal, in writing, or through demeanour, and customarily has the consequences of demeaning the person it is directed at or his or her authority (*Enviroserve supra* par 14). In addition, it was held in *Sylvania* that insolence can transpose to insubordination where there is an outright challenge of the employer's authority. In order for insolence to warrant dismissal it must be serious and wilful (*Sylvania Metals supra* par 18).

It cannot be emphasised enough that insubordination is a blatant manifestation of conduct incompatible with the expansive duty of mutual trust and confidence. In the words of Lord Nicholls, acting in a manner calculated or likely to destroy mutual trust and confidence upon which the employer-employee relationship is anchored (*Malik v Bank of Credit and Commerce International SA* 1998 AC 20; *Malik and Mahmud v Bank of Credit and Commerce International SA* [1997] UKHL 23. See generally, Brodie "The Heart of the Matter: Mutual Trust and Confidence" 1996 25 *ILJ* (*UK*) 121, "Beyond Exchange: The New Contract of Employment" 1998 27 *ILJ* (*UK*) 79; Brodie "Fair Deal at Work" 1999 *OJLS* 83 and Brodie "Mutual Trust and the Values of the Employment Contract" 2001 30 *ILJ* (*UK*) 84; Brooks "The Good and Considerate Employer: Developments in the Implied Duty of Mutual Trust and Confidence" 2001 *UTLR* 26; Bosch "The Implied Term of Trust and Confidence in South African Labour Law" 2006 27 *ILJ* 28, Cohen "Implying Fairness Into the Employment Contract" 2009 30 *ILJ* 2271 and Bosch "The Relational Contract of Employment" 2012 *Acta Juridica* 94; Louw "'The Common Law … Not What It Used to Be': Revisiting Recognition of a Constitutionally Implied Duty of Fair Dealing in the Common Law of Contract of Employment (Part 1)" 2018 *PER/PELJ* 1–25; Raligilia "A Reflection on the Duty of Mutual Trust and Confidence: Off-Duty Misconduct in the Case of *Biggar v City of Johannesburg* Revisited" 2004 *SAJLR* 71).

Insubordination occurs when an employee acts contrary to his or her duty to be a subordinate in a workplace. It should also be appreciated that there is a difference between insubordination and gross insubordination. Suffice it to state that the run-of-the-mill insubordination is premised on the active

response the employee exhibits against the employer's order. By contrast, gross insubordination involves the wilful and serious refusal by an employee to obey a lawful instruction and a direct challenge to the employer's authority (*SAMWU v Ethekwini Municipality* [2019] 1 BLLR 46 (LAC) par 9; *SAMWU v Ethekwini Municipality* (2017) 38 *ILJ* 158 (LAC) par 9; *Msunduzi Municipality v Hoskins* (2017) 38 *ILJ* 582 (LAC) par 14; *Motor Industry Staff Association v Silverton Spraypainters and Panelbeaters* (2013) 34 *ILJ* 1440 (LAC) par 31). Perhaps a point to be made in this regard is that gross insubordination, unlike the usual insubordination, generally warrants a sanction of dismissal.

In the present case, the shop steward's conduct went too far and exceeded what might reasonably be considered a legitimate exercise of a union function. It will be recalled that Motloba levelled an untruthful accusation against his payroll manager in a physically threatening way in the presence of others. As a result of the shop steward's tirade, the payroll manager was diagnosed as suffering from PTSD (posttraumatic stress disorder) (*Motloba supra* par 35 and 50). Yet, Motloba regarded the whole incident as innocuous – "the proverbial storm in a teacup" (*Motloba supra* par 37.13).

8 2 Intimidation and assault

The place of assault and intimidation in the sphere of employment needs to be seen against the backdrop of criminal law. In order to constitute the offence of assault, it has been held that there are three essential components that must be present in the proven version of events. First, there must be the commission of the prohibited conduct itself. Second, there must be knowledge of wrongfulness (or fault). Finally, the unlawfulness of the conduct. (Snyman *Criminal Law* 6ed (2014) 447). The application of physical force is not an overarching legal requirement for the offence of assault. A slight application of force to the body of the complainant suffices. The principle that assault does not require the actual use of force by the assailant was expounded in the case of *Abrahams v Pick 'n Pay Supermarket (OFS)* (1993) 14 *ILJ* 729 (IC). In that case, a store manager who locked workers in a cold room as a disciplinary measure was held to be guilty of assault, and his dismissal was held to be warranted, even though he had not laid a hand on his victims. In *Adcock Ingram*, a case which concerned unlawful threat of violence, the LAC despite the contrary views from the CCMA commissioner and the LC held that the statement: "You can treat this as a threat – there will be more blood on your hands" amounted to assault or intimidation. The shop steward had made the threat in an atmosphere of total mayhem and his remarks were taken as a grave threat by management who walked out (*Adcock Ingram supra* par 18).

Touching base with *Motloba*, there is no question that the conduct exhibited by the combative shop steward in front of an audience amounted to assault and intimidation. By most accounts, he was aggressive in his tone and disrespectful of both the payroll manager's authority and the company in general. In a threatening tone, Motloba accused Bezuidenhout of using his name to lie to his people (*Motloba supra* par 43). The authors find Tlaletis ADJP's denunciation of the shop steward's behaviour largely accurate. The conduct displayed by the combative shop steward was in truth reminiscent of

the kind of belligerence and militancy that has no place in the contemporary labour relations environment (*Motloba supra* par 43). In this regard, moreover, the impugned conduct occurred outside the course of the collective bargaining process, and the shop steward immunity was otherwise inapplicable (*NUMSA v Hernic Ferrochrome (Pty) Ltd* Case No. NW2126-01). The authorities are adamant that dismissal is the appropriate sanction where employees are guilty of assault and intimidation (*Pailprint (Pty) Ltd v Lyster NO* [2019] 10 BLLR 1139 (LAC); *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* (2019) 40 *ILJ* 1957 (CC)) because "we live in a society wracked by violence. Where an employer seeks to combat that evil, even by harsh measures, this court ought not to be astute to find unfairness" *(Scaw Metals Ltd v Vermeulen* (1993) 14 *ILJ* 672 (LAC) 675. See generally, Smit "How Do You Determine a Fair Sanction? Dismissal As Appropriate Sanction in Cases of Dismissal For (Mis)Conduct" 2011 *De Jure* 49). It has also been explicitly stated that "the problem of intimidation in society, and the need for the law to intervene to prevent this from occurring, is generally acknowledged" (Hoctor, Cowling and Milton *South African Criminal Law and Procedure Volume III: Statutory Offences* 2ed Service Issue 21 (2011) HA 1–5 5, 9).

8 3 Permanent breakdown of the trust relationship and intolerability

On the facts of *Motloba*, the conduct displayed by the errant shop steward led to the breach of the all-encompassing duty of mutual trust and confidence (Bosch "The Implied Term of Trust and Confidence in South African Labour Law" 2006 27 *ILJ* 28; Maloka "Derivative Misconduct and Forms Thereof: *Western Refinery Ltd v Hlebela* (2015) 36 *ILJ* 2280 (LAC)" 2016 19 *PER/PELJ* 13; Tshoose and Letjeku "The Breakdown of Trust Relationship Between Employer and Employee as a Ground For Dismissal: Interpreting the Labour Appeal Court's Decision in *Autozone*" 2020 *SA Merc LJ* 156–174; Raligilia and Bokaba "Breach of the Implied Duty to Preserve Mutual Trust and Confidence: A Case Study of *Moyo v Old Mutual Limited* (22791) [2019]" 2021 42 *Obiter* 714). The LAC accepted that in the circumstances of the case intimidation and assault were serious enough to justify the sanction of dismissal meted out. It is submitted that the conclusion reached by the LAC, to the effect that dismissal was the only appropriate sanction is not only unassailable but is consistent with established authorities (*Skhosana supra* par 57; *Msunduzi supra* par 29; *Malamlela v SALGBC* (2018) 39 *ILJ* 2454 (LAC) par 28). This brings into the equation the pervasive and interrelated issues of the breakdown of the trust relationship and the intolerability of the continued employment relationship (see generally, Okpaluba and Maloka "The Breakdown of the Trust Relationship and Intolerability in the Context of Reinstatement in the Modern Law of Unfair Dismissal 2021 *Spec Juris* 140 and Okpaluba and Maloka "Incompatibility As a Ground For Dismissal in Contemporary South African Law of Unfair Dismissal: A Review of *Zeda Car Leasing* and Other Recent Cases" 2021 *SA Merc LJ* 238; Rycroft "The Intolerable Employment Relationship" 2013 34 *ILJ* 2271–2287; Le Roux "Reinstatement: When Does a Continuing Employment Relationship Become Intolerable" 2008 *Obiter* 69).

In the instant matter, the tell-tale signs of the irredeemable collapse of the trust relationship and intolerability of the continued employment relationship can be seen from the fact Motloba's outburst and aggressive behaviour action resulted in the psychological breakdown of the payroll manager to the extent that she was petrified of people invading her personal space (*Motloba supra* par 51–52). Moreover, the combative trade union representative was unapologetic, there was an irreversible collapse of the trust relationship foreclosing the prospects of continued employment as intolerable. As aptly noted by the LAC,

> "a simple apology may have resolved the issues. Instead, an obstinate trivialization of [the] incident and the denial that the event was inappropriate pervades the record." (*Motloba supra* par 53)

In short, the shop steward's aggressive conduct went beyond the bounds of legitimate union activity as defined in countless cases and based on modern norms of civility and respect in the workplace.

9 Conclusion

The question of whether a shop steward is entitled to immunity from discipline must depend on the facts of each case. The starting point must be that there must be a recognition that once an employee assumes the mantle of shop steward his or her status in the workplace changes substantially. He or she has a dual role. As an employee, he or she must follow the same rules and policies as his or her fellow employees. However, when acting in his or her representational capacity he or she is an integral part of the collective bargaining regime that governs the workplace. The shop steward is then on an equal footing with members of management when carrying out his union duties. He or she must be free to act assertively and without fear of retribution in the members' interests. In doing so, it is unavoidable that he will be required to take a higher profile than his or her fellow workers. Inevitably from time to time he or she will encounter areas of conflict with members of management (see e.g., *Robertson & Caine (Pty) Ltd v CCMA* (2001) 22 *ILJ* 2488 (LC); *FAWU v Mnandi Meat Products & Wholesalers CC* (1995) 16 *ILJ* 151 (IC)).

Regardless of the individual's degree of tact and diplomacy, it comes with the territory that on occasion he or will be bordering the line between vigorously representing his fellow workers and engaging in insubordination towards members of management. Given this difficult role undertaken, the right of a trade union representative to properly carry out his or her duties must be strictly safeguarded except in the most extreme cases. Mere militancy or over-zealousness should not result in the imposition of discipline. A trade union representative must be able to press his or her point of view with as much vigour and emotion as he or she wishes, even though it may turn out in the end that his or her point of view was wrong.

However, the foregoing considerations do not mean that there are no limits to acceptable behaviour on the part of a shop steward. A balance must be struck between the right of a shop steward to be accorded wide latitude in the manner he or she goes about carrying out his or her union duties and his or her concomitant responsibility as a union official to scrupulously refrain

from the abuse of his or her union position to cloak patent insubordination and defiant challenge of management's right to manage the workplace and carry on production without disruption. Given the delicate balancing required between the right of the employer to be able to manage its workplace and to carry on its operation without interruption and the right of the union official to vigorously push the union's point of view in dealings with the employer, it is impossible, and in our view would be risky, to attempt to set out a definitive test in order to determine when a shop steward's conduct ceases to be protected and becomes disciplinable. Each case must be determined on the basis of the total surrounding circumstances.

Granted that aggressive and loud outbursts, even where that include profanity, by itself does not justify the imposition of discipline on a shop steward, it can be seen from *Motloba* that an "anything goes" approach will not be countenanced. In the instant case, the context within which the culminating incident occurred was the deciding factor. The verbal altercation did not emanate during the course of the negotiations or within the context of the collective bargaining process. In summation, a vociferous and fearless shop steward should act in the best interest of his/her constituency and not in a manner that is improper and unbefitting of the office he or she holds.

TC Maloka
University of Limpopo

R Matsheta
University of Limpopo