STRIKE AVOIDANCE – HOW TO DEVELOP AN EFFECTIVE STRIKE AVOIDANCE STRATEGY – presented by John Brand at the 23rd Annual Labour Law Conference – August 2010

Introduction

The right to strike for the purposes of collective bargaining is one of the fundamental rights enshrined in Section 27 of The South African Constitution. It is an extremely important right and is essential for collective bargaining to work effectively. ‘If workers could not, in the last resort, collectively refuse to work, they could not bargain collectively. The power of management to shut down the plant (which is inherent in the right of property) would not be matched by corresponding power on the side of labour. These are the ultimate sanctions without which the bargaining power of the two sides would lack “credibility”. There can be no equilibrium in industrial relations without a freedom to strike.’ – P Davies and M Friedland, in Khan – Freund’s Labour and The Law 3rd Edition (1983) 292.

The rationale behind collective bargaining is to maintain industrial peace and as Halton Cheadle says “it is one of the ironies of collective bargaining that its very object, industrial peace, should depend on the threat of conflict.” – The New Labour Law, M Brassey, E Cameron, H Cheadle and M Olivier. The protection that The Constitution and the Labour Relations Act give to this fundamental right to strike is thus based on the functional importance of strikes to collective bargaining. As it is sometimes simply put “collective bargaining without the right to strike amounts to collective begging”.

Strike action can take two forms. The first is conventional, non violent strike action which is preceded by good faith negotiation. The second is violent strike action which is preceded by bad faith negotiation. It is conceivable for violent strike action to follow good faith negotiation and peaceful strike action to follow bad faith negotiation but these permutations are less common.

If parties want to avoid strikes they need to be able to deal with both forms of strike action and both forms of negotiation. They need to be able to prepare for effective mutual gain negotiation as well as for adversarial bad faith negotiation and they need to be able to prepare for peaceful as well as violent strike action.

Obviously preference should be given to good faith, mutual gain negotiation but, if it is forced to, a party must be prepared to counter adversarial and bad faith negotiation.
Similarly preference should be given to preparation for peaceful strike action but again, if it is forced to, an employer needs to be prepared to deal with violent strike action.

This paper will focus first on how both unions and employers can avoid strikes by negotiating in good faith and for mutual gain. Then, because of the prevalence of strike related violence and adversarial negotiation by unions in recent times, it will examine what employers can do to deal with that situation.

**Mutual Gain Negotiation**

In this country and elsewhere, some unions and employers have found that the most effective way to advance their interests and at the same time to avoid unnecessary strike action is to participate in sophisticated mutual gain negotiation. To do this they both need to accept the pluralist idea of partnership between legitimate entities with divergent interests in a constitutional democracy. Unions who recognise this in South Africa also realise that the use of strike action to win benefits is often futile in an economy in which the imbalance of power between capital and labour is so pronounced. They appreciate that there are better ways to get what workers need than by simply flexing their muscles.

Parties who negotiate for mutual gain acknowledge each other as legitimate stakeholders in a pluralist society rather than as enemies that have to be defeated in an ongoing class war. They recognise their dependence and their independence and accept that they have overlapping and different interests.

Their recognition agreements are characterised by mutual commitments to freedom of association, good faith bargaining, exhaustion of dispute procedures, democracy, picket rules and non violence. These commitments do not exist on paper alone but are complied with on a daily basis.

Employers take great trouble to eradicate conflict aggravators from their operations and to introduce conflict moderating processes and procedures such as consultation, training and development. They seek to nip conflict in the bud and to prevent it from escalating into heated disputes.

In compliance with their commitment to good faith bargaining unions and employers do the following. The combined union and employer negotiating team undergo joint training in
modern negotiation theory and practice. In certain instances employers have undergone this training without their union counterparts doing likewise and they have found it very difficult to achieve optimum outcomes if their union counterparts do not have similar knowledge and skill. If both parties are exposed to the fact that in reality it is possible to achieve outcomes which are of greater value to both parties than the win/lose outcomes or compromises which typically result from traditional adversarial negotiation, then it is far easier to achieve optimum outcomes.

For joint training to be successful all the major players on both negotiation teams need to be present throughout the training. If any major player is absent at the initial stages of the engagement, it is very likely that that player will prove to be very disruptive due to a lack of understanding and buy in to the new process.

Experience also indicates that it is essential to conduct regular refresher training so that new members of the negotiating team are familiarised with mutual gain negotiation and existing members are reminded of its fundamentals. In South Africa negotiation teams have a wide range of levels of literacy, numeracy, education and experience. There are also major language, cultural and class differences and training in this environment throws up a whole range of challenges which are a study in themselves but are not insurmountable.

Parties who go this route usually use the services of an independent and trusted facilitator from the outset. The historical lack of trust which exists between parties cannot be overcome quickly and, without the bridging assistance of a facilitator, lack of trust and poor communication remain a hurdle to effective negotiations. Furthermore because there are many elements of the mutual gain approach to negotiation which are radically different from the traditional adversarial approach, it is essential for a facilitator to be present throughout to assist the parties to do many things which are counter intuitive for them.

One of the greatest challenges in making the move away from adversarial bargaining is, ideally, to ensure that the parties start by putting a problem on the table and by analysing it before moving on to seek and then evaluate and choose solutions. The tradition of starting with demands is so entrenched that, even with training, it is difficult to get the parties to do things differently. This is not only a matter of changing bad habits but also because, even when the representatives of the parties have been trained, they remain answerable to constituencies who expect things to be done in the traditional militant way. It therefore requires some subtlety on the part of the facilitator and the parties to recognise this and allow demands to be put on the table but to convert them into proposals which are held over
until a proper problem analysis has been completed when they can be treated as just one possible solution during the solution search stage of the process.

The facilitator and the parties also need to be sensitive to a negotiation paradox. On the one hand a mutual gain approach to negotiations is likely to deliver a strong outcome, but the process of achieving this may be perceived to be weak by the party’s principals. On the other hand a tough and militant adversarial stance may appear to be strong to the principals but it usually delivers a weak outcome. The facilitator and the parties need to manage this in a way which does result in a strong outcome but without the representatives appearing to be weak. As appreciation of the benefits of mutual gain negotiation is cascaded down into organisations the problem is easier to manage.

It is also necessary for the facilitator to endeavour to change the traditional mandating process in order to put problem analysis before solution search. Instead of both parties starting the negotiations by seeking positional mandates from their principals it is ideal to delay the mandating process until after the problem analysis stage. In reality it has been necessary for the facilitator to accommodate pressure from the representatives’ principals and to allow them to receive mandates at an early stage. However the representatives need to be encouraged to obtain mandates which are as flexible as possible and which accommodate the possibility of considering other solutions if they meet the underlying interests which motivate the chosen position. It is also important to encourage the representatives to start lowering expectations at a very early stage.

What has proved very useful in changing the traditional mandating process is for the facilitator to commence the negotiations with problem analysis, issue identification, interest exploration and solution search at a pre-negotiation meeting before the parties go back to their principals for mandates on possible solutions. These meetings can also be used to negotiate on how to negotiate and to reach agreement on the aim of the negotiations, negotiation guidelines and timetables.

It is a significant challenge for the facilitator to ensure that the parties are thorough at the problem analysis stage. They are often very impatient to get to the solution stage. However, unless time is taken to look at underlying causes of problems and to seriously explore the parties’ underlying interests, fears, needs and concerns one is unlikely to find a mutual gain solution. This is particularly so in relation to complex integrative issues. It is also very important for the facilitator to ensure a proper and credible exchange of information at this problem analysis stage. Both the exchange of credible information and the
generation of creative solution options can be facilitated by the joint appointment, by the parties, of credible consultants and experts.

Once the process does move into the solution search phase it is very important for the facilitator to find ways to encourage creative lateral thinking in the generation of possible options. Even with training, parties remain relatively uncreative in generating solutions which, in combination with one another, will achieve a mutual gain outcome. The use of small task teams can help to make brainstorming effective. It may also sometimes be necessary to do the brainstorming in separate party groups because creativity is often stifled by mistrust and fear of exploitation in mixed groups.

A major challenge for both the facilitator and the parties is to regularly stand back from the total negotiation and to think about possible trades across issues. Whilst it is useful to work on issues in separate task teams, it is important to avoid being trapped in issue silos. Often if one party is prepared to address the other party’s concerns on one issue, the other party may be prepared to do likewise on another issue. Particularly when distributive issues are being dealt with, one needs to seek to “expand the pie” by addressing employer interests on the one hand and to facilitate meeting employee distributive needs on the other. It is therefore necessary, at appropriate times, to break out of issue silos and to look for trades between issues.

It is also important for the facilitator to get the parties to look for combinations of solutions to an issue which address different needs and concerns and in doing so to realise mutual gain.

In order to record and reflect progress in the negotiations it is very important for the facilitator to have a working document which grows from the commencement of the negotiation into the final agreement at its conclusion. Early in the negotiation the document will be more like a minute and record issues, needs, interests, fears, concerns and proposals and counter-proposals. As the negotiation proceeds it will progress into more of a single text document reflecting areas of actual agreement, disagreement and possible agreement. In the final stages of the negotiation it will contain a series of draft agreements which are refined to ensure that there is eventually an accurate record of what has been agreed to between the parties and one which is unlikely to give rise to future interpretation disputes.

Experience both here and abroad proves that parties who follow this mutual gain approach to negotiation tend to get good to great outcomes without strike action whereas those who choose an adversarial approach tend to get mediocre to very poor outcomes after strike
Adversarial Negotiations and Strike Violence

Regrettably, in recent times many strikes in South Africa have been marked by negotiation tactics and by acts of violence which are antithetical to functional collective bargaining. In a recent judgment of the Labour Court in the unreported case of FAWU v Premier Foods Limited and Others, Judge Basson said, after referring to evidence of murder, vicious assault, shootings, intimidation, firebombing, ransacking of homes and an assassination fund related to a strike that:

“In summary, this strike was marred with the most atrocious acts of violence on non-striking employees. The individuals who perpetrated these acts clearly had no respect for human life, the property of others or the rule of law. What makes matters worse is the fact that it appears from the evidence that the police and the criminal justice system have dismally failed these defenceless non-strikers. Although criminal charges were laid against certain individuals, nothing happened to these charges. The non-strikers were completely at the mercy of vigilante elements who did as they pleased and who had no regard for the life and property of defenceless individuals. It must be pointed out that although a certain measure of rowdiness and boisterousness behaviour are expected or typical to most strike actions, the acts that marred this particular strike were particularly violent and senseless and stretched far beyond the kind of conduct that normally occurs during a strike.”

The Judge concluded that:

“Strikes that are marred by this type of violent and unruly conduct are extremely detrimental to the legal foundations upon which labour relations in this country rest. The aim of a strike is to persuade the employer through the peaceful withholding of work to agree to their demands. As already indicated, although a certain degree of disruptiveness is expected, it is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands. This type of vigilante conduct not only seriously undermines the fundamental values of our Constitution, but only serve to seriously and irreparably undermine future relations between strikers and their employer.”

Unfortunately this kind of strike related violence is not uncommon and as we have recently seen, it has escalated into sabotage of railway lines resulting in train derailment, the burning of trains, scattering rubbish in cities and organised and systematic violence such as throwing replacement workers from moving trains and the hiring of hit squads. These violent strikes are usually also preceded by negotiation tactics which are not in accordance with universal standards of good faith bargaining.
The threat of conflict which Halton Cheadle refers to above is not conflict of a violent kind but rather the threat of a peaceful withholding of labour to force an employer to meet a demand and, if good faith negotiation fails, then the use of peaceful strike action to assist in resolving a dispute. Whatever the political merits might be of a violent class war by workers against employers that kind of conflict is not what The Constitution and the Labour Relations Act intends to protect.

In conventional employment law the right to strike is conditional upon the strike being preceded by good faith bargaining and on the strike being non violent in nature. In South Africa, not everything that is done in contemplation of, or in furtherance of a protected strike is sanctioned by our law. The Labour Relations Act expressly excludes from protection acts that constitute an offence and it only protects pickets that are for the purposes of peaceful demonstration in support of a strike. Unfortunately, unlike in other countries, the Act does not go further and impose a duty to negotiate in good faith and to act democratically nor, as in those countries does it expressly provide for a strike to be declared unprotected if it is accompanied by high levels of violence.

There is much in conventional labour law from which South Africa could learn about how to encourage good faith bargaining and discourage violent strike action. As we have seen, the criminal justice system is often unable to curb strike related violence and until the Labour Relations Act is amended and the criminal justice system improved, an employer who wants to maintain industrial peace in the face of an incorrigible adversarial union, will have to develop its own strategies to counter bad faith negotiation and to curb strike related violence.

In order to understand how to do this, it is necessary to diagnose what has typically occurred during violent strikes and in the negotiations which preceded them.

**The Typical Dysfunctional Strike**

In the typical dysfunctional strike the picket line has become a major place of violent conflict. This may be because few of the strikes have been preceded by a proper ballot of union members or of all employees in the bargaining unit whom the union represents. This is despite what most union constitutions require. The strike may therefore not be supported by all or even the majority of workers in the bargaining unit. This makes it necessary for strikers to pressure non striking workers to participate in the strike and often persuasion turns to intimidation. This is aggravated by the fact that there has usually been no shortage of unemployed workers to replace the strikers and they too have to be discouraged by the
strikers. The picket line therefore often descends into a war zone in which strikers and non strikers clash and vehicles and property are damaged.

Employers have responded to this picket line violence by obtaining court interdicts and orders which limit workers’ rights to picket within the immediate vicinity of the employers’ premises. Employers also often employ the services of private security firms to assist them to secure their premises because of the South African Police Services inability to assist effectively.

Once an employer has secured its premises, the conflict has tended to relocate to the homes and transport of non strikers and replacement workers. Attacks have also taken place on employer vehicles and property which was located away from the employers’ premises. This kind of violence has proved very difficult and expensive for employers to curb.

The unions have seldom overtly encouraged violence but they have often appeared to do little to curtail it. They have tended to deny that it has happened or have blamed undisciplined and criminal elements for it. Calls for union organisers and shop stewards to marshal the picket lines and help management to curtail the violence have mostly been ineffective.

The unions have generally found the strikes hard to sustain because it is difficult for workers to lose pay for any protracted period in the South African situation and, as support for a strike has waned, the violence has often tended to escalate as die-hard supporters try to keep it alive.

Unions have sometimes taken informal polls amongst those members who remain on strike and the outcome of those polls has usually supported the continuation of the strike probably because it is the hard core supporters who hold out and continue to vote in favour of the strike. Eventually only when the overwhelming majority of the last remaining strikers have decided to end it, does the strike comes to an end.

During the strike, the media has done little more than publish the propaganda that each side has supplied to it. There has seldom been any endeavour to establish the veracity or integrity of the parties claims or denials. In some of the media the reporters have their own personal axes to grind and they have tended to air the propaganda which best represents their personal bias.
An analysis of the outcomes of these strikes reveals that the workers often come off second best. They have sometimes lost more in lost pay during the strike than they would have gained by accepting the employer's final offer before the strike began and they have seldom gained more at the end of the strike than they lost during it. Sadly the inarticulated response of the workers’ has been “you may have beaten us this time but wait for next time” and so the cycle of adversarialism continues.

Because there is such a large pool of unemployed workers in South Africa who are desperate to earn something, employers have more often than not, been able to maintain production during a strike. However, even when this has been the case, the strikes have cost employers large amounts in damage to property, the cost of hiring private security firms and paying for lawyers to enforce their rights.

The Typical Negotiation

An examination of the negotiations which have preceded these strikes reveals that they are usually characterised by the following features.

The negotiators appear to have little understanding of modern negotiation theory and practice and they display very limited negotiation skills. This is true of both union and employer negotiators.

Before negotiation commences the union delivers a letter to the employer containing a long list of extreme demands on a wide range of issues. The employer responds by rejecting most of the demands out of hand and making extremely low counter proposals on others. Central to both parties thinking is the belief that the higher the demand and the lower the counter offer the more likely it is that the eventual midway compromise will favour them. Employers seldom, if ever, make any counter demands of their own.

In preparing for the negotiations the parties primarily concern themselves with determining what their opening, ideal and fallback positions on each issue will be and how they will apply and absorb pressure.

Once the parties get to the bargaining table they motivate their extreme opening positions and demean the other side’s responses. Unions often walk out or threaten to walk out of the negotiations at the end of the employer’s response and immediately declare a dispute with the employer. The unions say that the employers’ response is an insult and that they do not
intend negotiating further until the employers gets serious.

The unions assume that real negotiations will probably only take place once the employer is faced with imminent or actual strike action. Therefore the unions believe that the sooner the parties get to the Commission for Conciliation Mediation and Arbitration (“CCMA”) the sooner real negotiations will start. Alternatively they hope that the employer will take fright and make concessions to keep the negotiations alive. Employers then often do respond with concessions to keep the unions at the negotiation table. They do this without requiring the unions to make reciprocal concessions and they often get close to their bottom lines before the unions have made any moves at all.

The further negotiations, whether at the CCMA or otherwise, are usually characterised by slow moves from one concession to the other. In making these moves the parties tend to exaggerate the value of their moves while minimising the value of the other’s moves and calling into question the other sides’ good faith. They manipulate information to hide that which is harmful to their position and to emphasise that which undermines their opponents' position. Adversarial, political rhetoric and increasing levels of anger and frustration accompany the process.

As the negotiations progress the parties incrementally remove non wage related issues from the table until only wage and wage related issues are left. Then as it becomes increasingly difficult to bridge the gap between them, the parties tend to resort to the use of power to pressurise each other. This starts with fairly benign go slows, overtime bans and the withholding of benefits, but eventually ends in full blown and violent strike action of the kind described above.

Preparation For War

As stated earlier, employers who want industrial peace and who are faced with opponents who consider themselves to be in a state of perpetual class war need to develop strategies to limit dysfunctional behaviour in contemplation of a strike and violent and destructive behaviour during strike action.

To do this they need to keep in mind the old military motto “si vis pacem, para bellum” - “If you want peace, prepare for war.” It is usually attributed to the Roman military writer Publius Flavius Vegetius Renatus from his work “Epitoma Rei Militaris”. The relevant passage reads “Therefore, he who wishes peace should prepare for war; he who desires victory, should
carefully train his soldiers; he who wants favourable results, should fight relying on skill, not on chance." If a party cannot persuade the other party to engage constructively then, like an army general it needs to invest a significant amount of time and resource into a war strategy to achieve peace.

The typical content of a comprehensive employer strike prevention strategy includes very detailed action plans on at least the following themes – negotiation strategies, continuous production, security, legal, internal communication, external communication, financial information, human resource information and human resource climate. Such a strategy will contemplate and plan to deal with all the features described earlier in relation to adversarial negotiations and violent strikes.

In order to develop detailed action plans under these themes, a meticulous strategy formulation process needs to be followed.

A tried and tested process used to formulate such a strategy has the following stages:
Stage 1 – preparation
Stage 2 – environmental scan
Stage 3 – facilitated workshop
Stage 4 – review and monitoring.

At stage one it is necessary to convene a strategy formulation group which is representative of relevant interests and which has the necessary skills to formulate the strategy. It need not be the same team that will conduct negotiations but it will usually contain important members of that team.

It is useful to appoint a facilitator to facilitate the strategy formulation process. The role of the facilitator is to direct the process and not to act as a consultant or contributor to the substantive contents of the strategy. Other issues which need to be attended to in preparation for the process are dates, venues, invitations to guest presenters and the compilation of relevant pre-reading for the strategy formulation workshop.

In the second environmental scan stage it is essential to conscientise the strategy formulation team about the environment in which the negotiations and any potential strike is likely to take place. The team needs to understand the environmental forces which impact on the employer and the union and to be exposed to as wide a variety of relevant information and options as possible.
A variety of external and internal experts are therefore invited to make a series of presentations to the strategy formulation team on among other issues; the state of the macro economy, the employer's financial position, the parties strategic plans, current wage settlements in the country and in the relevant industry, the macro human resource and political environment and the micro human resource environment.

Stage three of the process is a facilitated workshop at which the strategy team will carefully consider what the employer's and the union's strengths, weaknesses, opportunities and threats are in the negotiations. This helps isolate the themes that need to be considered and the action plans that need to be developed later in the process.

The strategy team also needs to consider carefully what the key organisational objectives and challenges are that need to be addressed in the upcoming negotiations and to prioritise those objectives. Furthermore the team needs to put itself into the shoes of the other party and consider what its primary needs, interests, fears and concerns are and, as far as possible to estimate what priority the other party may place on those needs.

It is also necessary for the strategy team to carefully consider what the employer's and the union's best alternative to a negotiated agreement would be. This consideration forces the team to think about the pros and cons of comprehensive, grasshopper and secondary strikes for both parties as well as to weigh the advantages and disadvantages of offensive or defensive lockouts, unilateral implementation, boycotts and the like. Sophisticated decision tree and risk analysis techniques need to be used at this stage of the process.

With this background the strategy team must isolate the themes that need to be addressed. Typical themes which emerge are negotiation tactics, internal communication, external communication, security, legal, financial information, human resource information, human resource climate and continuous production.

Thereafter the strategy team needs to develop very detailed, task orientated action plans to address each theme. Those action plans need to define what has to be done by who, by when and who the responsible person for each action plan will be. The overall aim of the action plans is to improve one's own alternatives to a negotiated agreement and weaken the other party's. This greatly enhances the prospect of agreement in the negotiations.
The final stage of the strategy formulation process is the review and monitoring stage during which each action plan is tracked to ensure that what needs to be done is done.

This strategy formulation process usually takes a number of days to develop over a period of weeks. Done properly, it enables a party to manage the human resource climate and the internal and external communication in a way which strengthens its hand at the bargaining table and weakens that of the other party. It also equips the negotiating team with very detailed financial and human resource information which can be used in the negotiation and for internal and external communication purposes.

The security, and continuous production action plans should put an employer in a position to protect its property and employees and to maintain production during a strike. A detailed legal strategy will assist an employer to compel compliance with the Labour Relations Act, the recognition agreement and the civil and criminal law. This will include plans to enforce any duty to negotiate in good faith and to ballot in terms of a recognition agreement. It will also seek to ensure compliance with agreed negotiation and disputes procedures, strike and picketing rules and the civil and criminal law.

The detailed negotiation strategy should enable the employer to foresee the most likely scenarios in the negotiation and to have tactics which are flexible enough to be adjusted to meet the needs of whichever scenario eventuates. In particular tactics can be developed to deal with difficult negotiators in an endeavour to change the negotiations from highly adversarial ones to more interest based and mutual gain ones. The action plans should also ensure that members of the negotiating team understand their roles, responsibilities and the ground rules for the negotiation. The team should also have considered all the information and questions it wishes to pose to the other party and all of its motivations on all the issues that will be negotiated. It should also have carefully worked out all the reasonable settlement permutations. This process will also equip the negotiating team to negotiate a reasonable and realistic mandate with its mandate givers.

Historians say Napoleon Bonaparte perverted the motto “si vis pacem, para bellum” from “If you want peace prepare for war” to “If you want war prepare for peace”. In other words – put your opponent off guard by pretending to want peace while secretly preparing for war.

Something every skilled negotiator needs to be careful of is not to be lulled into a false sense of security by an untrustworthy opponent. If there is any doubt about the good faith of an
opponent then there is a need for caution. If all efforts to ensure a reciprocal mutual gain approach fail then it is better to settle for a mutually mediocre outcome than to risk being seduced into a terrible outcome. A negotiator should not let a devious opponent get a great outcome by exploiting their openness and honesty.

Paradoxically, parties who take the time and trouble to prepare in this way generally find that the preparation for industrial war produces industrial peace and that prevention proves better than cure.

**Conclusion**

Whether one is faced with an incorrigible adversarial opponent or one which embraces freedom of association and good faith mutual gain negotiation, the key to avoiding strike action is meticulous preparation. In the former case that preparation is for war to achieve peace and in the latter it is preparation for peace in order to avoid war.