



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

Tel: (021) 403-2626
Direct: (021) 403-2809
Fax (021) 403-3888
E-mail: grhoda@parliament.gov.za

LEGAL OPINION

[Confidential]

TO: Chairperson: Committee on Private Members' Legislative Proposals and Special Petitions [Mr S G Thobejane, MP]

COPY Secretary to Parliament

DATE: 29 June 2011

SUBJECT: Legislative proposal by Mr I Ollis, MP - Amendment of the Labour Relations Act

LEGAL ADVISER: Adv G Rhoda, Parliamentary Legal Adviser

REFERENCE: 122/11



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

MEMORANDUM

To: Chairperson: Committee on Private Members' Legislative Proposals and Special Petitions [Mr S G Thobejane, MP]

Copy: Secretary to Parliament

From: Constitutional and Legal Services Office [Adv G Rhoda, Parliamentary Legal Adviser]

Date: 29 June 2011

Subject: Legislative proposal by Mr I Ollis, MP - Amendment of the Labour Relations Act

1. I was requested to advise on the constitutionality of the legislative proposal by Mr I Ollis, MP - Amendment of the Labour Relations Act, 66 of 1995.
2. Mr Ollis proposes that the Act provides for the accountability of unions in the event of destruction of property, violence and intimidation by the union members.
3. I have scrutinised the proposal and have a concern that it conflicts with certain provisions of the Constitution.
4. Section 213 of the Labour Relations Act defines a strike as:

“the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or solving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to ‘work’ in this definition includes overtime work, whether it is voluntary or compulsory.”

5. Section 213 also defines protest action as the following:

“the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike .”

6. In the case of *Business South Africa v Congress of South African Trade Unions & Another (1997) 18 ILJ 474 (LAC)*, the Labour Appeal Court clarified the definition of protest action, by highlighting that the aims of protest action goes beyond collective bargaining, as envisaged by the section 23 of the Constitution. Rather, protest action aims to protect the socio-economic interests of workers. In this regard, protest action draws on section 17 of the Constitution for authority by allowing for peaceful and unarmed picketing, demonstrations and assemblies.
7. However, section 17 of the Constitution contains a ‘built-in’ limitation by requiring that assemblies, demonstrations, pickets and the delivering of petitions be peaceful and unarmed (my emphasis).
8. Section 17 is also limited in terms of section 11 of the Regulation of Gatherings Act, 205 of 1993 by apportioning liability to any organization that arranged such a gathering and that has failed to take the necessary precautions to prevent harm or damage. This liability was confirmed in the case of *Garvis v South African Transport and Allied Workers Union 2580/2007 (reportable)*.
9. It is difficult to analyse the constitutionality of the legislative proposal as it unclear. The proposal aims to limit the right to strike (contained in section 23 of the Constitution) based on the unlawful actions that appears as a result of some sort of gathering, consequential to the strike. Whether this limitation will pass the test set by section 36 of the Constitution, specifically whether there is a relation between the limitation and its purpose, is doubtful.

Adv G Rhoda
PARLIAMENTARY LEGAL ADVISER