



UNIVERSITY OF TM
KWAZULU-NATAL
—
INYUVESI
YAKWAZULU-NATALI

COLLEGE OF LAW AND MANAGEMENT STUDIES
SCHOOL OF LAW

TITLE:
VIOLENCE DURING INDUSTRIAL ACTION: A CRITICAL ANALYSIS OF
RECENT CASE LAW

STUDENT NAME: OLYVIA THEMBELIHLE GCUME

STUDENT NUMBER: 207501505

THIS RESEARCH PROJECT IS SUBMITTED IN PARTIAL FULFILMENT
OF THE REGULATIONS FOR THE DEGREE OF MASTERS OF BUSINESS
LAW IN THE COLLEGE OF LAW AND MANAGEMENT STUDIES AT
THE UNIVERSITY OF KWAZULU-NATAL, 2018.

SUPERVISOR:

NICCI WHITEAR-NEL

DECLARATION

I hereby declare that this thesis is my own unaided work, and that all my sources of information have been acknowledged. To my knowledge, neither the substance of this dissertation, nor any part thereof, is being submitted for a degree in any other University.

Olyvia Thembelihle Gcume

Date: 25 July 2018

ACKNOWLEDGMENTS

“Praise the LORD! Oh give thanks to the LORD; for He is good; For His loving kindness is everlasting.”

Psalm 106:1

Thank you to God Almighty for the strength to complete this dissertation. To my mother for the love and support throughout this long journey, I am grateful to my whole family thank you for bearing with me through the most difficult days. Lastly to my supervisor I appreciate all the assistance kindness and valuable comments.

TABLE OF CASES AND STATUTES

Constitutions

The Constitution of the Republic of South Africa Act 108 of 1996.

The Indian Constitution, 1950.

Statutes

The Constitution of the Republic of South Africa Act 108 of 1996.

The Industrial Dispute Act, 1947.

Internal Security Act 47 of 1982.

The Labour Relations Act 66 of 1995.

The Labour Relations Amendment Act 6 of 2014.

The Regulation of Gatherings Act 205 of 1993.

The Riotous Assemblies Act 17 of 1956.

The Trade Union Act, 1926.

Cases

Afrox Ltd v SA Chemical Workers Union & others (1997) 18 ILJ 406 (LC).

All Indian Bank Employees Association v National Industrial Tribunal 1962 AIR 171.

Gravas & others v SATAWU & others (2011) 32 ILJ 2426 (SCA).

FAWU obo Kapesi & others v Premier Foods Limited t/a Blue Ribbon Salt River (2010) 31 ILJ 1654 (LC).

Food & Allied Workers Union v In2Food (Pty) Ltd (2014) 35 ILJ 2767 (LAC).

Food & Allied Workers Union & others v Rainbow Chicken Farms (2000) 21 ILJ 615 (LC).

Food & Allied Workers Union on behalf of Kapesi & Others v Premier Foods Ltd t/a Blue Ribbon Salt River (C722/2012) [2012] ZALCCT 36.

In2Food (Pty) Ltd v Food & Allied Workers Union & others (2013) 34 ILJ 2589 (LC).

Modise and Others v Steve's Spar Blackheath (2000) 21 ILJ 519 (LAC).

National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd and Minister of Labour 2003 (2) BCLR 182 (CC).

National Union of Food Beverage Wine Spirits & Allied Workers & Others v Universal Product Network (Pty) Ltd (2016) 37 ILJ 476 (LC).

South African Transport & Allied Workers Union v Garvas & others 2011 (12) BCLR 1249 (SCA).

South African Transport & Allied Workers Union v Garvas & others (007/11) [2011] ZASCA 152.

SATAWU v Garvas (2012) 10 BLLR 959 (CC).

Shoprite Checkers (Pty) Ltd v CCMA (2006) 27 ILJ 2681 (LC).

Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Worker's Union and Others (2012) 33 ILJ 998 (LC).

Verulam Sawmills (Pty) Ltd v AMCU (2016) 37 ILJ 246 (LC).

Crompton Greaves Ltd. v. IITS Workmen (AIR 1978 SC 1489) 4.

Syndicate Bank v. K. Umesh Nayak (1995 AIR 319) 27

Mineral Miners Union v Kudremukh 1988 ILR KAR 2878.

VNR Steel (Pty) Ltd v NUMSA 1995 ILJ 1483 (LAC) 49.

TABLE OF BOOKS AND ARTICLES

Books

Grogan, J *Workplace Law* 11 Ed Cape Town Juta (2014).

Patel, E *Workers' Rights: From Apartheid to Democracy* Kenwyn Juta – What Role for Organized Labour? Kenwyn Juta (1997).

Journals

Banjo, A and Balkaran S 'A descriptive analysis of the 2007 public sector strike' (2009) 33 *South African Journal of Labour Relations* 120.

Benjamin P 'Beyond dispute resolution: the evolving role of the CCMA (2014) 35 *ILJ* 10.

Brassey, M 'Fixing the laws that govern the labour market' (2012) 33 *ILJ* 1.

Buitendag, N 'History as a system of wrongs – examining South Africa's Marikana tragedy in a temporal legal context' *Strategic Review for Southern Africa* (2015) 37(2) 94.

Botha, M 'Responsible unionism during collective bargaining and industrial action: are we there yet?' (2015) 48(2) *De Jure* 341.

Calitz, K "Violent, frequent and lengthy strikes in South Africa: is the use of replacement labour the problem?" 2016 28:3 *SAMLJ* 437.

Heyns, C 'The African Regional Human Rights System: in need of reform?' (2001) 2

AHRJL 159.MA Chickay 'Defining the Right to Strike: a Comparative Analysis of International Labour Organisation Standards and South African Law' (2012) *Obiter* 260, 263.

Gericke, S 'Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law' 2012 (75) *THRHR* 585.

Govindee, A 'Lessons from social assistance law reform: India Part 1 the ties that bind the Indian Constitution and reasons for comparing SA with India' (2005) 26(3) *Obiter* 575.

Grogan, J 'Riotous strikes Unions liable to victims' (2012) 28(5) *EL* 11.

Khumalo, K 'Developing the crime of public violence as a remedy the violation of the rights of non-protesters during violent protests and strikes – a critical analysis of South African jurisprudence' (2015) 36 *Obiter* 578.

Manamela, E & Budeli M 'Employees' right to strike and violence in South Africa' (2013) 46 *Comparative and International Law Journal of Sothern Africa* 308.

Mischke, C 'Strike violence and dismissal when misconduct cannot be proven-is a dismissal for operational requirements a viable alternative?' (2012) 22(2) *CLL* 12.

Myburgh, A 'Failure to obey interdicts prohibiting strikes and violence the implications for labour law and the rule of law' (2015) 23(1) *CLL* 1.

Ngcukaitobi, T 'Strike law and structural violence and the inequality of in the platinum hills of Marikana' (2013) 34 *ILJ* 836. Masilbane, D 'Guaranteeing the safety of non-striking employees during strikes: The fallacy of policing' *Acta Criminologica* 2010 23(2) 31.

Odeku, K 'An overview of the right to strike phenomena in South Africa' (2014) 5(3) *Mediterranean Journal of Social Sciences* 695. Rycroft, A 'What can be done about strike-related violence?' (2014) 30:2 *International Journal of Comparative Labour Law and Industrial Relations* 199.

Rycroft, A 'Can a Protected Strike Lose Its Status?' (2012) 33 *ILJ* 821.

Rycroft, A 'The regulation of strike misconduct: the Kapesi decisions' (2013) 34 *ILJ* 859.

Rycroft, 'Strikes and the amendments to the LRA' (2015) 36 *ILJ* 1.

Samuel, O 'Protracted strikes and statutory intervention of the SA Labour relations landscape' (2016) 13(1) *Journal of Contemporary Management* 1027.

Tenza, M 'An investigation into the causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions' (2015) *Law Democracy and Development* 211.

Williams, G 'Social dynamics transformation: critical perspectives on Southern Africa' (1988) 14(1) *Journal of African Studies* 57.

INTERNET SOURCES

‘ILO Origin and history’ available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>, accessed on 07 September 2017.

‘How the ILO works available at <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm>, accessed on 07 September 2017.

‘Ratifications for South Africa’ available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888, accessed on 07 September 2017.

‘Convention 87’ available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232, accessed on 07 September 2017.

‘Committee on Freedom of Association’ available at https://www.ilo.org/global/standards/WCMS_626849/lang--en/index.htm, accessed on 02 January 2019.

‘Committee on Freedom of Association’ available at https://www.ilo.org/global/standards/WCMS_626849/lang--en/index.htm, accessed on 02 January 2019.

Convention 98’ available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/dialogue/documents/publication/wcms_168332.pdf, accessed on 07 September 2017.

‘The African Human and People’s Rights Charter’ available at <http://www.achpr.org/instruments/achpr/>, accessed on 07 September 2017.

B Gernigon ‘ILO Principles concerning the right to strike’ available at <http://www.ilo.org/standards/lang--en>, accessed 09 September 2017.

‘SADC Fundamental Social Rights in SADC Charter’ <http://www.sadc.int/documents-publications/show/837>, accessed on 07 September 2017.

J Maree ‘Why has the public-sector strike in South Africa experienced such devastating strikes and what can be done about it’ available at <http://www.psc.gov.za/conferences/2013/Maree%20Public%20Services%20Strike3%203rd%20Biennial%202013.pdf>, accessed on 07 September 2017.

‘2014 South African platinum strike: longest wage strike in South Africa available at <http://www.sahistory.org.za/article/2014-south-african-platinum-strike-longest-wage-strike-south-africa>, accessed on 04 September 2017.

C Mischke ‘Interdicts – Requirements & Pitfalls’ available at <http://www.ecmba.org.za/PDF/IR/2014/08.14%20Interdicts.pdf>, accessed on 01 October 2017.

S Dherver ‘Can misconduct be used to dismiss employees in terms of section 189?’ available at <http://www.mondaq.com/southafrica/x/187158/employee+rights+labour+relations/Can+Misconduct+Be+Used+To+Dismiss+Employees+In+Terms+of+Section+189> accessed on 01 October 2017.

India: Trade Unions and Collective Bargaining’ available at <http://www.nishithdesai.com/fileadmin/pdfs>, accessed on 07 January 2019.

L Bhasin “Labour and Employment Laws of India” available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan029043.pdf>, accessed on 02 November

Nowak, J ‘Workers unrest in Automobile plants in India: Strikes and Occupation at Muruti Suzuki and Bajaj Auto in 2011/12’ available at ‘Workers unrest in Automobile plants in India: Strikes and Occupation at Muruti Suzuki and Bajaj Auto in 2011/12’ available at <http://column.global-labour-university.org/2014/04/workers-unrest-in-automobile-plants-in.html>, accessed on 05 November 2017.

‘All you need to know about unlawful assembly section 144’ available at [http:// blog-iplleaders-in.cdn.ampproject.org](http://blog-iplleaders-in.cdn.ampproject.org) accessed on 04 February 2019.

TABLE OF CONTENTS

	Declaration	1
	Acknowledgements	2
	Table of cases	3
	Table of books and articles	5
	Chapter 1	10
1	Background	10
1.1	The importance of the right to strike: Internationally and Regionally	10
1.2	The importance of the right to strike: South Africa	14
1.3	Research questions	18
1.4	Research Methodology	18
1.5	Rational for Study	18
1.6	Statement of Purpose	18
2	Literature review	19
3	Chapter 3: The laws governing strikes	26
3.1	Introduction	26
3.2	The right to strike in terms of the Labour Relations Act 66 of 1995	26
3.3	The Regulation of Gatherings Act 205 of 1993	27
3.4	Interdicts	30
3.5	Withdrawal of Protection	34
3.6	Misconduct	35
3.7	Conclusion	38
4	Chapter 4: The right to strike in India	39
4.1	Introduction	39
3.2	The law that regulates strikes in India	39
3.3	The violent strike on the Maruti Suzuki plant	42
3.4	Conclusion	47
5	Chapter 5: Possible solutions to strike violence	47
5.1	Introduction	47
5.2	Interdicts	47
5.2	Violent strikes and collective bargaining	50
5.3	Compulsory arbitration	53
5.4	Powers of the Labour Courts	52
5.5	The offence of public violence and the policing of strikes	54
6	Chapter 6	57
	Conclusion	

INTRODUCTION

1.1 Background

Strikes allow workers through their representative unions to enforce their demands for higher wages and better working conditions.¹ Strikes are a key component of collective bargaining since the “relationship between the employer and employee” is an unequal one². If workers are not allowed to strike they cannot exercise their right to freedom of association, the right to strike and to bargain collectively.³ Sachs writes that:

“The key, absolutely fundamental rights of workers are those rights that enable the working people to fight for and defend their rights. These rights comprise the first group of rights. This group of rights consist of three rights namely, the right to establish and join trade unions; the right to collective bargaining and the right to strike. These are the three pillars of the working people, of their capacity to defend all their other rights.”⁴

The right to strike is important as it is recognised and protected by the Freedom of Association and Protection of the Right to Organise Convention, 1948 No. 87 (ILO Convention No. 87); the Right to Organise and Collective Bargaining Convention, No 98 (ILO Convention No 98; the African Charter on Peoples’ Rights; the Constitution of the Republic of South Africa Act 108 of 1996 and the Labour Relations Act 66 of 1995. Despite having progressive labour law, violent and lengthy strikes have increased in South Africa since 2006. The impact of these strikes is detrimental to the prospects of foreign investment; the economy and to third parties whose property is damaged during these riotous strikes. Lives are lost, and people injured due to these violent strikes. This dissertation will examine the importance of the right to strike internationally; regionally and in South Africa then set out various incidents of strike violence in South Africa.

1.2 The importance of the right to strike: Internationally and Regionally

The International Labour Organisation (ILO) was formed in 1919⁵. Its purpose is to help improve social conditions throughout the world by creating internationally recognised human

¹ E Manamela & M Budeli ‘Employees’ right to strike and violence in South Africa’ (2013) 46 *Comparative and International Law Journal of Sothern Africa* 308.

² Ibid.

³ Ibid.

⁴ E Patel ‘Workers’ Rights: From Apartheid to Democracy – What Role for Organized Labour’ (1997) 47.

⁵ “ILO Origin and history” available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>, accessed on 07 September 2017.

and labour rights.⁶ The ILO Declaration on fundamental principles proclaims that signatories have a responsibility which emanates from their membership in the ILO, to uphold, to promote and to give effect to the principles concerning the fundamental rights.⁷ Freedom of association allows employers' and workers' organisations rights to pursue and protect the rights of their members.⁸

In 1996 South Africa ratified the ILO Convention No. 87 and the ILO Convention No 98.⁹ The right to strike is not openly set out in the ILO Conventions however, Convention 87 creates the right of workers' and employers' organisations to "organise their administration and activities and to formulate their programmes".¹⁰ The Committee on Freedom of Association was established by the International Labour Organisation in 1951 to ensure compliance with the Freedom of Association and Protection of the Right to Organise Convention, 1948 No. 87.¹¹ The primary function of the Committee of Freedom of Association was to investigate any violations of the ILO Convention No. 87.¹² The ILO convention No. 87 provides that strike action is connected to the exercise of the right to strike.¹³ The ILO Committee on Freedom of Association developed principles which limit the right to strike.¹⁴ The right to strike prohibits any abuses and certain requirements regarding lawfulness must be complied with.¹⁵ The right to strike is of paramount importance however it must be exercised within the confines of the law and the right to strike should not impinge on the rights of others. Sanctions imposed in the event of a misuse of the right to strike should be consistent to the seriousness of the violations.¹⁶ The Freedom of Association and Protection of the Right to Organise Convention, 1948 No. 87 and the Right to Organise and Collective Bargaining Convention, 1949 No 98 works together

⁶ Ibid.

⁷ Ibid.

⁸ 'How the ILO works available at <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang-en/index.htm>, accessed on 07 September 2017.

⁹ 'Ratifications for South Africa' available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888, accessed on 07 September 2017.

¹⁰ 'Convention 87' available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232, accessed on 07 September 2017.

¹¹ Ibid.

¹² 'Committee on Freedom of Association' available at https://www.ilo.org/global/standards/WCMS_626849/lang-en/index.htm, accessed on 02 January 2019

¹³ 'Committee on Freedom of Association' available at https://www.ilo.org/global/standards/WCMS_626849/lang-en/index.htm, accessed on 02 January 2019.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

with¹⁷ the Right to Organise and Collective Bargaining Convention, 1949 No 98 is concerned with the “right to organise and to bargain collectively.”¹⁸ The Right to Organise and Collective Bargaining Convention, 1949 No 98 aims to protect trade union members and trade unions from acts of discrimination from the employer on the basis of their involvement in trade union activity.¹⁹ The protection of the right ensures that workers can exercise their right to freedom of association.²⁰ Article 8 provides that workers must exercise their right to strike within the confines of the law. The ILO recognises that the right to strike is a key component of the right to freedom of association further that the right to strike may be limited where the public safety is concerned.²¹ The right to strike is not absolute; it must be exercised without encroaching on the rights of third parties.²² In order to ensure the rights of third parties are not impinged during a strike the ILO permits the imposition of pre-requisite requirements for a strike. All pre-requisite requirements must be reasonable.²³ The ILO Committee on Freedom of Association states that where a strike becomes violent, the right to strike may be restricted.²⁴

The Organisation of African Unity (OAU) now the African Union adopted the African Human and People’s Rights Charter 21 ILM 58 (1082) (the African Charter) in 1981.²⁵ The initial OAU charter did not incorporate human rights.²⁶ The African charter is aimed at safeguarding and promoting human rights on the continent.²⁷ South Africa ratified and adopted this charter in 1996.²⁸ Article 10 of the African Human and People’s Rights Charter provides:

- “1) every individual shall have the right to free association provided that he abides by the law
- 2) Subject to the obligations of solidarity provided for in Article 29 no one may be compelled to join an association.”²⁹

¹⁷ ‘Convention 98’ available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/dialogue/documents/publication/wcms_168332.pdf, accessed on 07 September 2017.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Manamela (note 1; 310).

²¹ Manamela (note 1; 316).

²²

²³ Ibid.

²⁴ Ibid.

²⁵ Manamela (note 1;320)

²⁶ Ibid 25.

²⁷ ‘The African Human and People’s Rights Charter’ available at <http://www.achpr.org/instruments/achpr/>, accessed on 07 September 2017.

²⁸ Ibid 27.

²⁹ Ibid.

The African charter does not explicitly recognise the right to strike.³⁰ The African Charter recognises the right to freedom of association but does not go as far as to protect the right to strike.³¹ Africa has been severely criticised for its poor record on human rights.³²

In the South African Development Community (SADC) the Fundamental Social Rights in SADC Charter, 2003 was drafted with the objective to create an environment that is inductive to positive labour relations within the region.³³ The Fundamental Social Rights Charter is in harmony with the abovementioned ILO conventions Article 4 of the Charter of Fundamental Social Rights makes protects workers right to strike and to bargain collectively.³⁴

The right to strike is important it is protected by international and regional instruments. The right to strike may be derived from ILO Conventions 87 and 98. ILO Conventions 87 and 98 do not create an explicit right to strike many countries have included the right to strike in their constitutions. The right to strike is not absolute and may be limited further, the right to strike must be exercised within the confines the law. The ILO recognises the importance of the right to strike and the need to respect the right to freedom of association. The ILO Declaration on fundamental principles at work adopted by the International Labour Conference in 1998 provides that all members even those who have not ratified the ILO Conventions have an obligation to respect and promote the right to freedom of association.³⁵ Where the right to freedom of association is not recognised workers cannot defend their rights. The right to freedom of association does not exist without limitation, the most common limitations in member states is the imposition of compulsory arbitration through the decision of the relevant authorities or by agreement of the parties; the imposition of penal sanctions for organising or participating in strikes and the imposition of a ballot requirement which ensures that only a strike that enjoys the majority support of the workforce proceeds.³⁶ Workers enjoy the right to freedom of association which is protected at international level provided that demonstrations are peaceful.³⁷ The right to freedom of association does not permit abuses in the exercise

³⁰ C Heyns 'The African Regional Human Rights System: in need of reform?' (2001) 2 AHRJL 159.

³¹ Manamela (note 1; 310).

³² B Gernigon 'ILO Principles concerning the right to strike' available at [http://www.ilo.org/standards/lang—en](http://www.ilo.org/standards/lang-en), accessed 09 September 2017.

³³ 'SADC Fundamental Social Rights in SADC Charter' <http://www.sadc.int/documents-publications/show/837>, accessed on 07 September 2017.

³⁴ Ibid.

³⁵ Gernigon note 32.

³⁶ Gernigon note 32.

³⁷ Gernigon note 32.

involving failure to comply with reasonable requirements requiring lawfulness or acts involving criminal acts.³⁸

1.2 The importance of the right to strike in South Africa

The right to strike is entrenched in s23 of the Constitution which provides that “every worker has the right to strike and everyone is guaranteed the right, peacefully and unarmed, to picket”.³⁹ This constitutional protection is in line with ILO standards. Section 39 of the constitution requires courts and tribunals to consider international law including the ILO standards when interpreting the right to strike. This further illustrates the importance of international instruments in protecting the right to strike as well as the limitations that may be placed on this right. The preamble of the LRA provides that the LRA was enacted “to give effect to the public international law obligations of the Republic relating to labour relations” this affirms that the ILO standards are binding on South Africa but also that the LRA must be read together with international law strike is defined in s 213 of the Labour Relation Act 66 of 1995 (LRA) as:

“the partial or complete concerted refusal to work, or the retardation or obstruction of work by persons who are or who have been employed by the same employer or by different employers, for remedying a grievance or resolving a dispute in respect of any matter of mutual interest between the employer and the employee.”⁴⁰

Section 213 of the LRA provides that a strike must be a “concerted effort” the striking workers, must be acting in concert to achieve a certain goal. In *FAWU v Rainbow Chickens*⁴¹ the court held that a mere stoppage of work did not amount to a strike, a strike must be accompanied by a demand that the employ can comply with.⁴² The court further held that even though the applicants acted in concert, they were not doing so to resolve a dispute they had with the employer. The court also held that the employer was not placed in a position where if he acceded to the applicants demands the applicant would return to work.⁴³ A “mutual interest” may include matters relating to discipline, health and safety and terms of employment the only caveat is that the demand must be lawful.⁴⁴ The refusal to work must be for the sole purpose of resolving a dispute of mutual interest between the parties.

³⁸ Gernigon note 32.

³⁹ The Constitution of the Republic of South Africa Act 108 of 1996 s17.

⁴⁰ The Labour Relations Act 66 of 1995 s 213.

⁴¹ (2000) 21 ILJ 622 (LC).

⁴² *Rainbow Chickens* supra note 41 at 24.

⁴³ *Ibid* note 37.

⁴⁴ MA Chickay ‘Defining the Right to Strike: a Comparative Analysis of International Labour Organisation Standards and South African Law’ (2012) *Obiter* 260, 263.

Section 64(1) of the LRA provides that “every employee has the right to strike and every employer has the right to lock-out”.⁴⁵ The right to strike must be applied in accordance to the requirements specified in the LRA. A strike will be unlawful if it does not comply with the requirements set out in section 64 of the LRA. If a worker engages in a protected strike he does not breach his employment contract by participating in the strike and may not be dismissed for participation in the strike. Section 64 provides for a mandatory referral of “the issue in dispute” with the Commission. If the dispute is resolved strike action is averted. Where the conciliation fails the CCMA must issue a certificate stating that the issue remains unresolved; thirty days must have lapsed since the referral to the CCMA, and any person who after the issuing of the certificate and lapse of thirty days must furnish the employer with 48 hours’ written notice of the intended strike. The right to strike is used by workers to safe guard and promote their employment interests.⁴⁶

The significance of the right to strike was emphasised in the judgment of *National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd and Minister of Labour*⁴⁷ where the court held that the:

“right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers can assert bargaining power in industrial relations. The right to strike is a critical component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood. It is also important to comprehend the dynamic nature of the wage-work bargain and the context within which it takes place. Care must be taken to avoid setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change.”⁴⁸

The right to strike is a vital element to collective bargaining and allows workers to assert their bargaining power.⁴⁹ South Africans have been oppressed from the times of imperial colonial rule to apartheid. Throughout these times violence was sanctioned by the state to control and further oppress the majority. Violence and various forms of sabotage were also used by the

⁴⁵ The Labour Relations Act 66 of 1995 s 64.

⁴⁶ Chicktay (note 44, 263).

⁴⁷ *National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd and Minister of Labour* 2003 (2) BCLR 182.

⁴⁸ *Bader Bop (Pty) Ltd* (supra note 47 at 13).

⁴⁹ Manamela (note 1 above: 309).

oppressed majority to retaliate. This culture of violence still lingers on in the way striking workers protest. Violence is still used by striking workers as a tool to achieve their economic demand. During the apartheid regime:

“Strikes were frequently accompanied by violence and strikers were regularly beaten, arrested and shot by the police. Strike breakers were intimidated, beaten and sometimes murdered by striking workers. Labour analysts ascribed the high levels of workers’ violence to the conditions under which trade unions organised and engaged in collective bargaining during the apartheid era - in particular, the failure to fully institutionalise industrial conflict, and, more broadly, the absence of political rights which imbued industrial action with a strong political dimension. The implication was that with the political incorporation of workers into a post-apartheid democracy, and with the full institutionalisation of industrial conflict in new post-apartheid labour legislation, strike violence and the elevated levels of mass militancy which sustained it, would decline. This has not happened. Strikes have increasingly been accompanied by heavy-handed police action - beatings, shooting with rubber bullets, arrests - while intimidation, assaults and murders of strike breakers have been a persistent feature of many large-scale strikes”.⁵⁰

In recent years South Africa has been riddled with lengthened and violent strikes. Striking workers have used various methods to add impetus to their strikes. These methods include vandalising and damaging property, looting, assaulting and killing non-striking workers and intimidation.⁵¹ In 2006 the security guard strike lasted for three months. “The South African Transport and Allied Workers Union” (SATAWU) arranged a demonstration, which involved security guards.⁵² The demonstration was the result of a prolonged strike where fifty people lost their lives.⁵³ The riot damage caused by the protest was estimated to be R1.5 million. A number of people were injured, shops looted and vandalised.⁵⁴

In 2007, 700,000 public servants embarked on industrial action which lasted 28 days. The strike almost crippled the South African economy.⁵⁵ Most schools and hospitals were closed and the strike was also supported by public transportation bringing the country to a standstill.⁵⁶ At the

⁵⁰ G Williams ‘Social dynamics transformation: critical perspectives on Southern Africa’ 1988 14(1) *Journal of African Studies* 57.

⁵¹ M Tenza ‘An investigation into the causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions’ (2015) 19 *Law Democracy and Development* 211.

⁵² *SATAWU v Garvas* (2012) 10 *BLLR* 959 (CC) at para 10.

⁵³ *Ibid.*

⁵⁴ *Garvas supra* note 52 at 12.

⁵⁵ *Garvas supra* note 52 at 10.

⁵⁶ *Garvas supra* note 52 at 10

time it was described as one of the lengthiest and most intense strikes in South African history.⁵⁷ The strike was characterised by various forms of intimidation from the state.⁵⁸ The police “using tear gas; rubber bullets; stun grenades and batons” harassed the striking workers.⁵⁹ The South African Defence Force (SANDF) was used as “strike-breakers” in hospitals throughout the republic.⁶⁰ Members of the SANDF carrying weapons were placed within close proximity to the protesters at schools and hospitals.⁶¹ On 9 June 2007 it was reported that striking health workers vandalised and damaged sterile operating theatres, and “stopped all surgical procedures at Tygerberg Hospital.”⁶² Eventually the parties agreed on a 7.5% wage increase.⁶³

In 2012, a dispute about wages between Lonmin Plc. and their employees ended in tragedy claiming the lives of almost 40 people.⁶⁴ Striking workers were shot at close range with assault guns, the violence with which the killings were executed makes the Marikana massacre one of the most bloodiest and brutal strikes in democratic era. The longest strike in the Republic followed in 2014, where it took almost five months to put an end to the violent strike in the platinum sector.⁶⁵ In January 2014, platinum mine workers embarked on a strike. The issue in dispute was an increase in wages. Impala Platinum Holdings; Anglo American Platinum Limited and Lonmin Plc. sustained damage of R24.1 billion in revenue. Miners lost 45% of their annual income.⁶⁶

1.3 The research questions

- i. What remedies are available where damage is caused by striking workers?
- ii. Does the judicial system offer meaningful ways to curb strike violence?
- iii. Is strike violence prevalent in other foreign jurisdictions? What measures are in place in foreign jurisdictions to curb strike violence?

⁵⁷ A Banjo and S Balkaran ‘A descriptive analysis of the 2007 public sector strike’ (2009) 33 *South African Journal of Labour Relations* 126.

⁵⁸ Banjo (note 57 above; 126).

⁵⁹ J Maree ‘Why has the public-sector strike in South Africa experienced such devastating strikes and what can be done about it’ available at <http://www.psc.gov.za/conferences/2013/Maree%20Public%20Services%20Strike3%203rd%20Biennial%202013.pdf>, accessed on 07 September 2017.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ ‘2014 South African platinum strike: longest wage strike in South Africa available at <http://www.sahistory.org.za/article/2014-south-african-platinum-strike-longest-wage-strike-south-africa>, accessed on 04 September 2017.

⁶⁶ Ibid.

1.4 Research Methodology

This study will take the form of a qualitative approach with specific reference to the Constitution and labour law legislation in evaluating the available mechanisms to deter and curb strike violence. The study will include an outline of the laws governing protected and unprotected strikes, followed by the main discussion, namely whether the law in its current form prevents strike violence. The research in this study will encompass an evaluation of the texts on this topic, statutes on strike violence, and court judgments.

1.5 Rationale for the Study

The amount of violence during industrial action is escalating. Misconduct involving murders of non-striking workers, destruction of property, looting of shops, intimidation and other criminal activities⁶⁷ is becoming more prevalent. It is important to examine the legislation that pertains to strikes and to ascertain how effective it has been in deterring violence during strikes. If the current legislation fails to curb violence during strikes better mechanisms have to prevent violence during strikes and to limit the damage to property and loss of life.

1.6 Statement of Purpose

The purpose of this study is to examine the body of applicable law on how it has developed in relation to strike violence and how effective it has been in curtailing violent strikes in order to determine if it should be developed further to include mechanisms that prevent violence during strikes. The study will determine if there are any areas of the law that can be developed to limit the occurrence of violent strikes.

⁶⁷ A Rycroft 'What can be done about strike-related violence?' (2014) 30:2 *International Journal of Comparative Labour Law and Industrial Relations* 199.

LITERATURE REVIEW

South Africa has always experienced violent strikes due to the failure to institutionalise industrial conflict; it was believed that entering into the democratic dispensation would reduce strike action and its violent nature however, that has not been the case.⁶⁸ Benjamin writes that:

“Industrial action in recent years has been characterized by violent and destructive behaviour, as well as 'an observable contempt for- the LRA and court orders'. The use of collective violence aimed at the employer, non-striking workers or the public - to strengthen a bargaining position relative to the employer has been normalized to such an extent that one commentator regards it as having 'been established as a tradition’.”⁶⁹

Benjamin is of the view that when violence erupts during industrial action the CCMA may assist in these circumstances by mediation according to s150 of the LRA.⁷⁰ When the parties meet it serves as an opportunity to resurrect talks on the issues in dispute that gave rise to the strike.⁷¹ The author asserts that there is a need to get involved before the dispute between the parties escalates into violence, that a more proactive approach is required to curb strike violence.⁷² The CCMA may be a possible solution by facilitating collective bargaining to prevent industrial action from spiralling out of control into violence.⁷³

Tenza states that failure to regulate protracted strikes contributes to the occurrence of violence during industrial action as there is no statutory requirement for a ballot to be run in order to ascertain whether the proposed strike enjoys majority support from the workforce; the use of replacement labour and the lack of a regulatory mechanism to control lengthy strikes.⁷⁴ Tenza investigates the causes of strike violence but limits the enquiry to violence as a direct consequence of the inadequate bargaining system.⁷⁵ He argues the an inadequate bargaining system is the cause of violent strike action and the failure to apply a ballot requirement prior to industrial action fails to “democratise” industrial action.⁷⁶ “Section 65 (2) (b) the Labour Relations Act 28 of 1956” contained a ballot requirement. The ballot requirement was omitted

⁶⁸ P Benjamin ‘Beyond dispute resolution: the evolving role of the CCMA’ (2014) 35 *ILJ* 10.

⁶⁹ Benjamin (note 68 above; 10).

⁷⁰ Benjamin (note 68 above; 12).

⁷¹ Benjamin (note 68 above; 12).

⁷² Benjamin (note 68 above; 23).

⁷³ Benjamin (note 68 above; 23).

⁷⁴ Tenza (note 51 above; 212).

⁷⁵ Tenza (note 51 above; 214).

⁷⁶ Tenza (note 51 above; 214).

from the 1995 LRA because it had failed to prevent violence during strikes during the apartheid era. The author argues that the political climate has changed and that the reintroduction of a ballot requirement may be more a more effective mechanism of preventing violent strikes since.⁷⁷ A ballot system requires all eligible union members to vote in favour or against a proposed strike.⁷⁸ Once the ballot has been conducted the CCMA will provide proof that the union has complied the ballot requirement.⁷⁹ The ballot requirement will democratise industrial relations and curb strike violence by minimising confrontations between striking workers and replacement labour and clashes between non-striking workers and striking workers. Reintroduction of the ballot requirement would prevent strikes with little support, if the majority of workers want to engage on a strike and few workers remain at work the employer will suffer greater economic harm and this adds pressure on the employer to resolve the dispute.⁸⁰ He argues that a legislated ballot requirement will allow workers to determine whether they want to engage in the proposed strike.⁸¹ The existence of a ballot requirement will ensure that a strike does not take place if it does not enjoy majority support. He argues further that a ballot requirement will assist in reducing acts of violence against non-striking workers.⁸² The author argues that the use of replacement labour creates a catalyst for violence during a strike. During a strike an employer is expected to suffer economic loss however, employers mitigate this potential loss by engaging replacement labour. Employers are statutorily allowed to maintain production during strikes.⁸³ Section 76(1) (b) of the LRA creates a provision for “no work, no pay” which means that employees suffer loss during industrial action. The use of replacement labour provokes the striking employees into fighting with the replacement employees.⁸⁴ The author states the courts must be empowered to stop strike violence the LRA must be amended to allow the courts to take pro-active steps to prevent stop and suspend a violent strike.⁸⁵

⁷⁷ Tenza (note 51 above; 215).

⁷⁸ Tenza (note 51 above; 214).

⁷⁹ Tenza (note 51 above; 214).

⁸⁰ Tenza (note 51 above; 214).

⁸¹ Tenza (note 51 above; 215).

⁸² Tenza (note 51 above; 215).

⁸³ Tenza (note 51 above; 215).

⁸⁴ Tenza (note 51 above; 220).

⁸⁵ Tenza (note 51 above; 220).

The writer argues that “the right to strike” is significant however, the rights of others are as equally crucial as the rights of striking workers.⁸⁶ The writer asserts “that the right to strike” must be exerted within the boundaries of the law.⁸⁷ The right to strike must be limited as little as possible to allow the workers a better bargaining position against their employers.⁸⁸ The right to strike is an essential tool the workers have against the employer.⁸⁹ The writer suggests that collective bargaining should be used as the key labour dispute resolution mechanism.⁹⁰ The writer asserts that collective bargaining allows each party to make compromises on crucial issues and find a solution in order to bring about a conclusion.⁹¹

The writer asserts that the recognition of the right to strike has had limited triumph eliminating the elevated levels of violence during strikes.⁹² It was believed that the recognition and protection of the “right to strike” would reduce the amount of strikes but that has not been the case. The continued use of violence during strikes is a reinstatement of the inadequacies of the LRA as a deterrent to violence.⁹³ A strike can lose its protected status and become an unprotected strike.⁹⁴ Strike violence may lead to a strike losing its protected status. The LRA envisages a peaceful demonstration.

The workers’ right to strike is a key tool in the exercise “of their right to freedom of association” and one of the only methods at the disposal of trade unions when collective bargaining fails⁹⁵. Industrial action is used as a mechanism to offset the power of the employer.⁹⁶ The authors express that a violent strike is not “functional to collective bargaining” and not beneficial to bargaining in good faith.⁹⁷ The right to strike does not give striking workers free reign to partake in riotous and disorderly conduct.⁹⁸ Employees who engage in acts of misconduct

⁸⁶ K Odeku ‘An overview of the right to strike phenomena in South Africa’ (2014) 5:3 *Mediterranean Journal of Social Sciences* 695.

⁸⁷ Odeku (note 86 above; 696).

⁸⁸ Odeku (note 86 above; 692).

⁸⁹ Odeku (note 86 above; 699).

⁹⁰ Odeku (note 86 above; 699).

⁹¹ Odeku (note 86 above; 700).

⁹² N Buitendag ‘History as a system of wrongs – examining South Africa’s Marikana tragedy in a temporal legal context’ (2015) 37:2 *Strategic Review for Southern Africa* 96.

⁹³ Buitendag (note 92 above; 96).

⁹⁴ Rycroft (note 67 above; 4).

⁹⁵ Manamela (note 1 above; 308).

⁹⁶ Manamela (note 1 above; 308).

⁹⁷ Manamela (note 1 above; 323).

⁹⁸ Manamela (note 1 above; 324).

during a strike should be held to account.⁹⁹ Violence during strike action is unacceptable; the rule of law should be maintained during the duration of the strike.¹⁰⁰

Strike violence impairs the rights of non-striking workers.¹⁰¹ Khumalo offers an alternative approach to addressing strike violence; his approach looks for a solution outside labour legislation.¹⁰² Khumalo asserts the offence of public violence may be used as measure to curb strike violence.¹⁰³ This is evidenced by the blatant disregard for “the right to life; dignity; equality as well as freedom and security of the person.”¹⁰⁴

Violent strikes are counter-productive to workers’ interests Botha asserts that a remedy to this problem of protracted violent strikes lies with the reintroduction of the ballot requirement or compulsory arbitration where the strike has become violent.¹⁰⁵ The writer suggests that other sanctions may be imposed like the award of damages on the grounds of violence.¹⁰⁶ Trade unions must be held responsible for the conduct of their members during the collective bargaining process.¹⁰⁷ The author argues that more pro-active measures are needed.¹⁰⁸

Rycroft writes that there are circumstances where the Labour Court should on application declare that the protected status of a strike lost.¹⁰⁹ The author argues that if industrial action is not connected to “collective bargaining” and is merely injurious and “without demand the legal protection of that strike is lost”.¹¹⁰ The picketing rules in the LRA ensure that strikes are orderly.¹¹¹ Recent judgments have found that the right to assemble does not include demonstrations that are violent.¹¹² In *Garvas & others v SA Transport & Allied Workers Union & others*¹¹³ the court held that ‘in the past the majority of the population was subjected to the

⁹⁹ Manamela (note 1 above; 324).

¹⁰⁰ Manamela (note 1 above; 324).

¹⁰¹ K Khumalo ‘Developing the crime of public violence as a remedy the violation of the rights of non-protesters during violent protests and strikes – a critical analysis of South African jurisprudence’ (2015) 36 *Obiter* 579.

¹⁰² Khumalo (note 101; 579).

¹⁰³ Khumalo (note 101; 579).

¹⁰⁴ Khumalo (note 101; 584).

¹⁰⁵ M Botha ‘Responsible unionism during collective bargaining and industrial action: are we there yet? (2015) 48(2) *De Jure* 341.

¹⁰⁶ Botha (note 105 above; 341).

¹⁰⁷ Botha (note 105 above; 343).

¹⁰⁸ Botha (note 105 above; 343).

¹⁰⁹ A Rycroft ‘Can a Protected Strike Lose Its Status?’ (2012) 33 *ILJ* 821.

¹¹⁰ Rycroft (note 109 above; 822).

¹¹¹ Rycroft (note 109 above; 822).

¹¹² Rycroft (note 109 above; 822).

¹¹³ *Garvis & others v SA Transport & Allied Workers Union & others* (2011) 32 *ILJ* 2426 (SCA) at para 50.

tyranny of the state. We cannot now be subjected to the tyranny of the mob.” In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*¹¹⁴ the court held that “‘if the picket exceeds the bounds of peaceful persuasion or incitement to support the strike, to become coercive and disruptive of the business of third parties, the picket ceases to be reasonable and lawful’. Rycroft opines that there may be difficulty in determining “‘how much violence would have” to have taken place before the court would intervene.¹¹⁵ He proposes that the court must inquire whether there: “‘has misconduct taken place to an extent that the strike no longer promotes functional collective bargaining and is therefore, no longer deserving of its protected status?”¹¹⁶ The court would have to consider the intensity of violence and the measures taken by the union to prevent it.¹¹⁷

Violence and intimidation of non-striking employees has become a hallmark of industrial action in South Africa.¹¹⁸ Masilbane asserts that strikes are characterised by intimidation and violence, the success of a strike is dependent on its ability to bring an industry to an abrupt halt.¹¹⁹ Violence is often directed against non-striking employees to discourage them from continuing to provide their services to the employer during the strike, while violence against employees by non-striking employees could be reactionary or defensive. The critical tool that employees have if bargaining fails to deliver the intended results is to withhold their labour power.¹²⁰ Non-striking workers are vulnerable to violence, threats of violence and physical harm.¹²¹

The author asserts that in both the *Food & Allied Workers Union on behalf of Kapesi & Others v Premier Foods Ltd t/a Blue Ribbon Salt River*¹²² and *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & Other*¹²³ cases interdicts were ignored and intervention by the police was ineffective.¹²⁴ There are many other cases where interdicts have

¹¹⁴ (2006) 27 ILJ 2681 (LC).

¹¹⁵ Rycroft (note 109 above; 826).

¹¹⁶ Rycroft (note 109 above; 826).

¹¹⁷ Rycroft (note 109 above; 826).

¹¹⁸ D Masilbane ‘Guaranteeing the safety of non-striking employees during strikes: The fallacy of policing’ 2010 23:2 *Acta Criminologica* 34.

¹¹⁹ Masilbane (note 118 above; 34).

¹²⁰ Masilbane (note 118 above; 34).

¹²¹ Masilbane (note 118 above; 34).

¹²² (2012) 33 *ILJ* 1779 (LAC).

¹²³ (2012) 33 *ILJ* 998 (LC).

¹²⁴ A Myburgh, A ‘Failure to obey interdicts prohibiting strikes and violence the implications for labour law and the rule of law’ (2015) 23(1) *CLL* 1.

been disregarded by striking workers. The writer argues that this occurrence of ignoring interdicts is becoming more prevalent.¹²⁵ Myburgh believes the position of the Labour Court is undermined by the failure to obey interdicts. The writer postulates that where the levels of violence escalate to unacceptable levels, it is the aggression that compels an employer to accede to high wage demands to.¹²⁶ Myburgh asserts that the failure to abide by court orders proclaiming strikes unprotected dispossesses the employer of this “strike-breaking” instrument.¹²⁷

Samuel suggests that the Labour Court must be empowered by a better mechanism to end strike violence would be to reintroduce the provision of the 1956 LRA which sanctioned the court to suspend a violent strike.¹²⁸ The writer suggests that the s68(1) should be amended to compel greater responsibility on unions whose members are identified as perpetrators of violence and the vandalism and damage of property.¹²⁹ The writer argues that liability must be imputed on the strikers and their unions.¹³⁰

The arrangement of the “labour law market has been identified as the leading factor driving inequality”¹³¹ Ngcukaitobi asserts that violence is an effective means of social change.¹³² He argues that the reintroduction of the ballot requirement as a pre-requisite for a protected strike or lock-out fails to resolve the matter of “historically ingrained violence”.¹³³ The author states that in order to enforce their right to equality, workers depend on the protection of labour law but also on the proper functioning of the bargaining structure and delivery of social services.¹³⁴ The writer is of the opinion that the proposed reinstatement of the ballot requirement appends an “administrative” burden to the realisation of protected strike action.¹³⁵ He states that striking employees are not frightened by the consequences of an unprotected strike under the LRA further; changing the LRA will do little in reducing the occurrence of unprotected violent

¹²⁵ Myburgh (note 124 above; 3).

¹²⁶ Myburgh (note 124 above; 5).

¹²⁷ Myburgh (note 124 above; 5).

¹²⁸ O Samuel ‘Protracted strikes and statutory intervention of the SA Labour relations landscape’ (2016) 13(1) *Journal of Contemporary Management* 1027.

¹²⁹ Samuel (note 128 above; 1028).

¹³⁰ Samuel (note 128 above; 1028).

¹³¹ T Ngcukaitobi ‘Strike law and structural violence and the inequality of in the platinum hills of Marikana’ (2013) 34 *ILJ* 843.

¹³² Ngcukaitobi (note 131 above; 848).

¹³³ Ngcukaitobi (note 131 above; 849).

¹³⁴ Ngcukaitobi (note 131 above; 849).

¹³⁵ Ngcukaitobi (note 131 above; 850).

strikes.¹³⁶ He asserts that the reinstatement of the ballot requirement will be interpreted as a restraint on the powers of trade unions and limits on the workers right to strike.¹³⁷ The ballot requirement formed part of the 1956 LRA; it was omitted from the 1995 LRA because of the onerous compliance requirements.¹³⁸ Ngcukaitobi states that the ballot requirement was deliberately left out of the 1995 LRA in order to curtail the misuse of this requirement by the employer. The reintroduction of the ballot requirement would create an additional administrative burden for union

Conclusion

South Africa is experiencing elevated levels of violence during industrial action. The continuous incidents of violence includes intimidation, killing of non-striking workers, the damages to property all indicate that there is a problem with our collective bargaining system. Trade unions and their members blatantly ignore interdicts and court orders this indicates that the judicial mechanisms in place are ineffective. The right to strike is constitutionally protected. The main purpose of the right to strike is to attempt to restore the inequalities created by socio-economic factors and to force the employer to meet the workers' demands. The right to strike can only be exercised if certain requirements are met, strike violence amounts to an abuse to the right to strike, and there has been an increase in the number of strikes in South Africa. The duration of strikes is also increasing the longer the strike the more violent it becomes. The increasing levels of violence during strikes cast doubt on the effectiveness of the LRA in curbing strike violence.

¹³⁶ Ngcukaitobi (note 131 above; 851).

¹³⁷ Ngcukaitobi (note 131 above; 851).

¹³⁸ Ngcukaitobi (note 131 above; 851).

THE LAW GOVERNING STRIKES IN SOUTH AFRICA

2.1 Introduction

This chapter examines various court decisions and is divided into sections on the remedies and relief available when violence erupts during a strike or when the strike escalates into violence. The emphasis is on how the courts have dealt with strike violence and how the court's attitude towards strike violence has developed.

2.2 The right to strike in terms of the Labour Relations Act

The right to strike is essential to collective bargaining.¹³⁹ It is an effective tool for employers to assert their rights against the employer.¹⁴⁰ The right to strike is well-established in our constitution however it does not exist without limitation.¹⁴¹ The right to strike can only be exercised if certain procedural and substantial requirements are met. The substantive requirements prohibit strikes in certain circumstances, only strikes that are defined in the LRA enjoy the immunities and protection as afforded by section 213 of the LRA. The procedural requirements are set out in section 64 of the LRA.

The following are the requirements for a protected strike the employees or their representative union must refer the matter in dispute for conciliation to a bargaining council or to the CCMA.¹⁴² The employees may only embark on the strike once the commissioner issues a certificate citing that the parties have failed to settle their dispute or until 30 days have lapsed since the referral.¹⁴³ The right to strike emanates after the lapse of the 30 days whether or not the CCMA has handed out a certificate, unless the parties have agreed to extend the period.¹⁴⁴ Where there is a refusal to bargain a non-binding advisory arbitration award must first be issued, this award is not binding however, and one must first be issued before an employer's starts a lockout or before employees embark on a strike.¹⁴⁵ Upon the expiry of the 30 days, the employer, employers' organisation or bargaining council must be given 48 hours' notice of the commencement of the strike.¹⁴⁶ The notice must be issued by an authorised member of the

¹³⁹ Manamela (note 1 above; 309).

¹⁴⁰ Manamela (note 1 above; 308).

¹⁴¹ Manamela (note 1 above; 309).

¹⁴² The Labour Relations Act 66 of 1995 s64 (1) (a).

¹⁴³ The Labour Relations Act 66 of 1995 s64 (1) (a) (i).

¹⁴⁴ The Labour Relations Act 66 of 1995 s64 (1) (a) (ii).

¹⁴⁵ The Labour Relations Act 66 of 1995 s64 (1)(a)(i) .

¹⁴⁶ The Labour Relations Act 66 of 1995 s 64 (1) (b).

union.¹⁴⁷ The notice to the employer must set out the exact time of start of the strike¹⁴⁸. The right to strike is not waived if the employees fail to embark on the strike on the specified date; the employees may start the strike within a reasonable time after specified date¹⁴⁹. Where the striking employees fail to adhere to the provisions of a collective agreement but comply with the pre-strike procedure contained in the LRA, the strike will be protected.¹⁵⁰

Section 65 of the LRA lays out the circumstances where employees may not strike¹⁵¹. Employers and registered unions may choose to exclude the right to strike in their contracts. This can be achieved by including a “peace clause” in a collective agreement. A peace clause refers to a clause in a collective agreement which states that employees cannot strike where the matter in contention is already covered by an existing collective agreement.¹⁵² Employees must abide by the conditions of a collective agreement for the duration that it is in operation, employees may strike over the conditions of a future collective agreement even though the current collective agreement is in force.

Section 74 of the LRA provides that workers engaged in essential services may not strike.¹⁵³ Employees engaged in essential services must refer their disputes for compulsory arbitration.¹⁵⁴

2.3 The right to strike in terms of the Regulation of Gatherings Act 205 of 1993 (RGA)

The long title of the Act stipulates that the purpose of the Act is to “regulate the holding of public gatherings and demonstrations at certain places and to provide for matters connected therewith.” In terms of the RGA a “gathering” is defined as:¹⁵⁵

“Any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air

- (a) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted, or propagated; or

¹⁴⁷ J Grogan *Workplace Law* (2014) 438.

¹⁴⁸ Grogan (note 147 above; 438).

¹⁴⁹ Grogan (note 147 above; 438).

¹⁵⁰ Grogan (note 147 above; 439).

¹⁵¹ Grogan (note 147 above; 442).

¹⁵² Grogan (note 147 above; 438).

¹⁵³ Grogan (note 147 above; 447).

¹⁵⁴ Grogan (note 147 above; 447).

¹⁵⁵ The Regulation of Gatherings Act 205 of 1993 s9.

(b) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution.”¹⁵⁶

Section 11(1) (a) of the RGA makes provision for “joint and separate liability for any riot damage”¹⁵⁷ that is a consequence of a gathering for a convener of a gathering. In the labour context the convener of a gathering will most probably be the employees’ union. The RGA regulates claims against the conveners if the gatherings and demonstrations they organised deteriorate into riots and cause damage.¹⁵⁸ Section 1 of the RGA defines “riot damage” as “any loss suffered as a result of any injury to or death of any person, or any damage to or destruction of, any property, caused directly or indirectly by and immediately before, during or after, the holding of a gathering”.¹⁵⁹ Broad language is used to describe the various possible forms of loss which may occur.

In *SATAWU and another v Garvas and others*¹⁶⁰ the Western Cape High Court held that section 11(2) of the RGA was constitutionally valid.¹⁶¹ The union appealed to the Supreme Court of Appeal.¹⁶² The SCA dismissed the appeal.¹⁶³ The SCA rejected the assertion that section 11(2) (b) of the RGA has a “chilling effect on the exercise of the right to freedom of assembly”.¹⁶⁴ The Constitutional Court found that rational meaning could be attached to section 11 of the RGA and dismissed the appeal.

SATAWU arranged a demonstration through the street of Cape Town to register the demands of its members in the security sector.¹⁶⁵ During the course of the strike 50 people died as a result of the violence, property owned by innocent third parties and property of the city was damaged.¹⁶⁶ SATAWU adhered to the stipulations of the RGA; it delivered a notice to the local

¹⁵⁶ The Regulation of Gatherings Act 205 of 1993 s9.

¹⁵⁷ The Regulation of Gatherings Act 205 of 1993 s 11(2)..

¹⁵⁸ J Grogan ‘Riotous strikes Unions liable to victims’ (2012) 28:5 *EL* 11.

¹⁵⁹ *Ibid.*

¹⁶⁰ *South African Transport & Allied Workers Union v Garvas & others* (007/11) [2011] ZASCA 152.

¹⁶¹ *Garvas* supra note 156 at 1.

¹⁶² *South African Transport & Allied Workers Union v Garvas & others* 2011 (12) BCLR 1249 (SCA).

¹⁶³ *SATAWU* supra note 162 at 32.

¹⁶⁴ *SATAWU* supra note 162 at 50.

¹⁶⁵ *Garvas* supra note 52 at 10.

¹⁶⁶ *Garvas* supra note 52 at 10.

authority and arranged marshals to supervise the crowd.¹⁶⁷ Notwithstanding all the precautionary steps taken by SATAWU the march descended into violence and riot damage estimated at R1, 5 million was caused.¹⁶⁸ A number of people were injured and 39 were arrested¹⁶⁹. The respondents sued SATAWU in terms of s 11(1) of the RGA and alternatively in terms of the common law for damages suffered.¹⁷⁰

SATAWU renounced responsibility and argued that the words “and was not reasonably foreseeable” used in section 11(2) (b) of the RGA “make the statutory defence against imposition of civil liability for riot damage created in section 11(1) irrational and therefore unconstitutional.”¹⁷¹ SATAWU argued that the irrationality emanates from the wording of subsection (b) and (c) of section 11(2) “which requires the organiser of a gathering to show that the act or omission which led to the riot damage was not foreseeable and that the organisers took reasonable steps to prevent the act or omission that was reasonably foreseeable.”¹⁷²

The Honourable Chief Justice Mogoeng writing for the Constitutional Court stated that the purpose of the legislature passing section 11 of the RGA was to place liability on organisers holding gatherings.¹⁷³ The Constitutional Court held that section 11(2) must be construed in a way that produces a reasonable meaning and reserve its legitimacy so that the purpose it was legislated to serve is realised.¹⁷⁴

With regards to the right to freedom of assembly the Constitutional Court held that:¹⁷⁵

“The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right

¹⁶⁷ *Garvas* supra note 52 at 11.

¹⁶⁸ *Garvas* supra note 52 at 12.

¹⁶⁹ *Garvas* supra note 52 at 12.

¹⁷⁰ *Garvas* supra note 52 at 12.

¹⁷¹ *Garvas* supra note 52 at 13.

¹⁷² *Khumalo* (note above 101; 582).

¹⁷³ *Garvas* supra note 52 at 38.

¹⁷⁴ *Garvas* supra note 52 at 37.

¹⁷⁵ *Garvas* supra note 52 at 61.

and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights.”

Section 17 of the Constitution gives effect to South Africa’s international obligations. The right to strike is an important tool for workers to express their grievances or concerns however; it must be balanced against other rights: the right to dignity¹⁷⁶ the right to freedom and security of the person¹⁷⁷ and the right to property.¹⁷⁸ If a gathering becomes violent it follows that the gathering is no longer peaceful; and such a gathering falls outside of the protection of section 17 of the Constitution places an obligation on unions to ensure that their gatherings are peaceful. The court held that the importance of the limitation was fundamental as it served to safeguard innocent third parties especially those who do not have the means to identify and pursue those who commit riot damage.¹⁷⁹ Both the Supreme Court of Appeal and the Constitutional Court in the SATAWU cases held that section 11(2) of the RGA was not irrational. When organisers take reasonable steps to avoid damage that is reasonably foreseeable, the damage, the damage becomes no longer reasonably foreseeable and if it does occur the organisers of the gathering are not negligent because they have taken steps to avoid what was reasonably foreseeable. The Constitutional Court held that the purpose of providing for liability of organisers was to avoid common law difficulties associated with proving the legal duty on organisers to avoid harm.

Section 158 of the LRA empowers the Labour Court to make decisions relating to labour disputes. The Labour Court may grant interim relief; an interdict; a declaratory order; an award for damages and an order directing specific performance.¹⁸⁰ The following section will focus on the remedies available to the employer and to third parties where violence and riotous damage ensues during a strike.

2.4 Interdicts

An interdict is a court order that an applicant may seek to enforce a right.¹⁸¹ It may take the form of a prohibitory or mandatory interdict.¹⁸² A mandatory interdict is an order which

¹⁷⁶ The Constitution of the Republic of South Africa Act 108 of 1996 s10.

¹⁷⁷ The Constitution of the Republic of South Africa Act 108 of 1996 s12.

¹⁷⁸ The Constitution of the Republic of South Africa Act 108 of 1996 s25.

¹⁷⁹ *Garvas* supra note 52 at 67.

¹⁸⁰ The Labour Relations Act 66 of 1995 s158 (1)(I) (vii).

¹⁸¹ C Mischke ‘Interdicts – Requirements & Pitfalls’ available at <http://www.ecmba.org.za/PDF/IR/2014/08.14%20Interdicts.pdf>, accessed on 01 October 2017.

¹⁸² *Ibid.*

instructs a party to do something or perform specific acts.¹⁸³ A prohibitory interdict prevents a party from performing specific acts.¹⁸⁴ The focus of an interdict is in the future. An interim interdict preserves the status quo until the dispute between the parties is ultimately resolved.¹⁸⁵ A final interdict settles the dispute between the parties.¹⁸⁶

In the case of *Tsogo Sun Casinos (Pty) Ltd*,¹⁸⁷ an urgent interdict was granted against the respondents.¹⁸⁸ The respondents were interdicted from, among other things blocking entry and exit from the applicant's premises.¹⁸⁹ The respondents were engaged in a lengthy strike due to a wage dispute.¹⁹⁰ There was a picketing agreement in place which outlined the way the respondents would conduct themselves during the picket.¹⁹¹

“Regrettably, the picketing that occurred was anything but peaceful. In the founding papers, the applicant averred that the individual respondents were acting in breach of the picketing agreement by engaging in a variety of criminal acts, including assault, theft, malicious damage to property, and blocking access to and egress from the applicant's premises. The conduct described in the founding and supplementary affidavits includes the emptying of rubbish bins onto the road outside Montecasino, burning tyres on the road, blocking the road with 20 liter water bottles, throwing packets of broken glass onto the road, throwing bricks at members of the SAPS, damaging vehicles, dragging passengers from vehicles and assaulting them, rolling concrete dustbins into Montecasino Boulevard, damaging patron's vehicles, and assaulting persons in the vicinity of Montecasino. The applicant's attempts to resolve the issue of strike-related violence by agreement with the first respondent failed – an undertaking given by the first respondent at the applicant's request proved to be worthless. Ultimately, intervention by the SAPS was necessary, but even this did not deter the individual respondents.”¹⁹²

Judge van Niekerk said that:

“This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino* supra note 123 at 2.

¹⁸⁸ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino* supra note 123 at 2.

¹⁸⁹ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino* supra note 123 at 2.

¹⁹⁰ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino* supra note 123 at 4.

¹⁹¹ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino* supra note 123 at 4.

¹⁹² *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino* supra note 123at 4.

But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.”¹⁹³

The court granted costs against the first respondent. The court further held:¹⁹⁴

“This court must necessarily express its displeasure in the strongest possible terms against the misconduct that the individual respondents do not deny having committed, and against unions that refuse or fail to take all reasonable steps to prevent its occurrence. Had the applicant not specifically confined the relief sought to an order for costs on the ordinary scale, I would have had no hesitation in granting an order for costs as between attorney and own client.”¹⁹⁵

The court implied that where a strike spirals out of control and escalates into violence it may lose its protected status. Most importantly the court expressed that it will not hesitate to grant a punitive costs order on a cost on “an attorney-and-client” scale against the union that fails to take all reasonable steps to guarantee that its members abide with the terms of the picketing agreement.¹⁹⁶

In the judgment of *Verulam Sawmills (Pty) Ltd v AMCU*¹⁹⁷ the role that needs to be played by unions in ensuring that their member comply with the picketing agreement in force came into the spotlight.¹⁹⁸ The Association of Mineworkers and Construction Union (AMCU) was engaged in a protracted strike, with the applicant. During the strike the workers conducted themselves in a manner in conflict to the terms of the picketing agreement in place (the striking employees carried weapons, obstructed traffic and stopped non-striking employees from entering the applicant’s premises) as a result the employer closed down operations and wrote to the strike convener setting out the various violations of the picketing agreement.¹⁹⁹ In

¹⁹³ Tsogo Sun Casinos (Pty) Ltd t/a Montecasino supra note 123 at 13.

¹⁹⁴ Tsogo Sun Casinos (Pty) Ltd t/a Montecasino supra note 123 at 14.

¹⁹⁵ Tsogo Sun Casinos (Pty) Ltd t/a Montecasino supra note 123 at 14.

¹⁹⁶ Tsogo Sun Casinos (Pty) Ltd t/a Montecasino supra note 123 at 14.

¹⁹⁷ *Verulam Sawmills (Pty) Ltd v AMCU* J1580/15) [2015] ZALCJHB 359.

¹⁹⁸ *Verulam Sawmills (Pty) Ltd* supra note 197 at 4.

¹⁹⁹ *Verulam Sawmills (Pty) Ltd* supra note 197 at 6 – 8.

response to the letters AMCU said that the striking workers had been addressed with regards to complying with the picketing rules.

The court granted interim relief and AMCU was compelled to comply with the picketing rules. The court endorsed the principle set out in the judgment of *Tsogo Sun Casinos t/a Montecasino Pty (Ltd)* that unions are at jeopardy of a punitive costs order being granted against them where their members conduct themselves in an unlawful manner during a protected strike.²⁰⁰ In short, the court found that unions will be held responsible for the unlawful actions of their members²⁰¹. The court held that when the parties have concluded a picketing agreement, the union's legal responsibility for a breach of the picketing agreement emanates from the agreement itself.²⁰² The court also held that a union is bound "to take all reasonable steps" to guarantee that its members obey the terms of the picketing agreement.²⁰³

In the judgment of *In2Food (Pty) Ltd v Food & Allied Workers Union & others*²⁰⁴ Steenkamp J held:

"The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members."²⁰⁵

In *Food & Allied Workers Union v In2Food (Pty) Ltd*²⁰⁶ the Labour Appeal Court had to hear an appeal against an order of the Labour Court. The Labour Court held that the appellant was in contempt of a court order and levied a fine of R500 000.²⁰⁷ The appeal was brought on the basis that there was no proof of the violation of the court order by the appellant.²⁰⁸ The parties were engaged in an unprotected strike, the strike escalated into violence.²⁰⁹ An interdict was granted against the appellant and striking workers were interdicted from persisting with the

²⁰⁰ Verulam Sawmills (Pty) Ltd supra note 197 at 10.

²⁰¹ Verulam Sawmills (Pty) Ltd supra note 197 at 12.

²⁰² Verulam Sawmills (Pty) Ltd supra note 197 at 14.

²⁰³ Verulam Sawmills (Pty) Ltd supra note 197 at 14.

²⁰⁴ *In2Food (Pty) Ltd v Food & Allied Workers Union & others* (2013) 34 ILJ 2589 (LC).

²⁰⁵ *In2Food (Pty) Ltd* supra note 205 at 6.

²⁰⁶ *Food & Allied Workers Union v In2Food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC).

²⁰⁷ *Food & Allied Workers Union* supra note 206 at 1.

²⁰⁸ *Food & Allied Workers Union* supra note 206 at 1.

²⁰⁹ *Food & Allied Workers Union* supra note 206 at 2.

unprotected.²¹⁰ The violence continued even after the interdict was granted.²¹¹ A rule nisi was issued, calling upon the interdicted parties to demonstrate why they should not be held in contempt.²¹² The court upheld the appeal.

Sutherland AJA held:

“The respondent’s thesis that a trade union, as a matter of principle, has a duty to curb unlawful behavior by its members indeed enjoys merit. Indeed, the principle of union accountability for its actions or omissions is beginning to gain recognition.”²¹³

The organiser of a gather must take all reasonable steps to avoid foreseeable damage. A strike must be peaceful and unarmed. Unions will be held liable for damage when a gathering they organized causes riot damage.

2.5 The withdrawal of protection

Sections 64 and 65 of the LRA prescribe the procedure that must be followed with in order for a strike to be protected.²¹⁴ In order for a strike to remain protected it, must be functional to collective bargaining this emanates from section 27 of the Constitution which provides that the right to strike must be “for the purpose of collective bargaining.”²¹⁵ If there is no demand, the strike is not functional to collective bargaining.²¹⁶ The demand must also be attainable.²¹⁷ If there is no demand then the requirement contained in section 213 which provides that a strike must be for the purpose of “remedying a grievance is not met.”²¹⁸

In the judgment of In *Food & Allied Workers Union & others v Rainbow Chicken Farms*²¹⁹ the court stated even though the individual applicants acted collectively however they did not act collectively in order to resolve a dispute or remedy a grievance.²²⁰ The court held that the applicants did not make a demand.²²¹ The applicants refused to work on Eid citing their

²¹⁰ Food & Allied Workers Union supra note 206 at 2.

²¹¹ Food & Allied Workers Union supra note 206 at 3.

²¹² Food & Allied Workers Union supra note 206 at 3.

²¹³ Food & Allied Workers Union supra note 206 at 18-19.

²¹⁴ Rycroft (note 109 above; 822).

²¹⁵ Rycroft (note 109 above; 822).

²¹⁶ Rycroft (note 109 above; 822).

²¹⁷ Rycroft (note 109 above; 822).

²¹⁸ Rycroft (note 109 above; 822).

²¹⁹ Rainbow Chickens supra note 41 at 24.

²²⁰ Food & Allied Workers Union & others supra note 206 at 24.

²²¹ Food & Allied Workers Union & others supra note 206 at 24.

religious beliefs as the reason.²²² The fact that the employees gave the employer notice of the proposed absenteeism had no effect.²²³ If there was no demand over which the employer could bargain, the requirement of a strike is “for the purposes of collective bargaining” had not been complied with.²²⁴

A strike must be orderly.²²⁵ Section 69 provides for picketing rules (which set out the way striking employees must conduct themselves during a picket). In *Garvas*²²⁶ the court held that “in the past the majority of the population was subjected to the tyranny of the state. We cannot now be subjected to the tyranny of the mob.”²²⁷ The courts have adopted the approach that the right to assemble and demonstrate does not encompass violence. In the case of *In Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*²²⁸ the court held that “if the picket exceeds the bounds of peaceful persuasion or incitement to support the strike, to become coercive and disruptive of the business of third parties, the picket ceases to be reasonable and lawful.”²²⁹

2.6 Misconduct

The biggest obstruction to charging striking employees with misconduct during a strike is the difficulty to obtain evidence against the striking employees.²³⁰ Employees are not willing to speak out against their colleagues in a disciplinary enquiry.²³¹ An employer may only charge those employees whom it has evidence against. Any acts of misconduct during a strike are dealt with in terms of the ordinary disciplinary code. According to Item 6 of the Code of Good Practices “dismissal provides that participation in a strike that does not comply with the provisions of chapter IV is misconduct”. Section 67(5) of the LRA permits the dismissal of strikers for a reason related to the striker’s conduct during the strike.

²²² Food & Allied Workers Union & others supra note 206 at 24.

²²³ Food & Allied Workers Union & others supra note 206 at 24.

²²⁴ Food & Allied Workers Union & others supra note 206 at 24.

²²⁵ Rycroft (note 67; 203).

²²⁶ SATAWU supra note 162.

²²⁷ SATAWU supra note 162 at 50.

²²⁸ Shoprite Checkers (Pty) Ltd supra note 114 at 30.

²²⁹ Shoprite Checkers (Pty) Ltd supra note 114 at 30.

²³⁰ C Mischke ‘Strike violence and dismissal when misconduct cannot be proven-is a dismissal for operational requirements a viable alternative?’ (2012) 22(2) CLL 12.

²³¹ Mischke (note 230 above; 12).

The employees in *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River*²³² were aggrieved because they wanted centralised bargaining and they wanted the wages of workers in rural areas to be raised to the level of the workers in urban areas.²³³ A strike broke out as a result of this dispute; some of the employees belonging to FAWU did not participate in the strike but chose to continue working at the Premier Blue Ribbon Bakery in Salt River.²³⁴ Some non-unionised employees and temporary staff supplied by labour brokers continued working for the duration of the strike.²³⁵ During the strike there were various incidents of violence with non-striking employees being attacked and threatened.²³⁶ Non-striking workers were threatened in their homes and told that they would be physically harmed and even killed.²³⁷ Family members of non-striking employees had people coming to their homes and notify them that harm that would befall their family members who continued working at the bakery²³⁸. One female employee was dragged in the middle of the night and attacked with panjas and sjamboks.²³⁹ A car belonging to a non-striking employee was torched and destroyed and houses were petrol bombed. An interdict was sought and granted however, the state of lawlessness prevailed.²⁴⁰ Criminal charges were laid but the police provided no help and the crimes went unpunished²⁴¹. Eventually after two months the strike ended and upon returning to work some employees were suspended on the grounds of operational requirements because they were linked to the strike violence. The CCMA was requested to facilitate consultations.²⁴² The criteria used for the s189 dismissals was the refusal by the applicants to undergo polygraph testing to determine if they had participated in the criminal activities which occurred during the strike.²⁴³ FAWU launched an application in the Labour Court on behalf of the retrenched employees who were its members citing that the dismissals were not procedurally and substantively fair.²⁴⁴ FAWU sought the retrospective reinstatement of their members. The employer averred that they could not institute disciplinary proceedings against the applicants since the key witness was nowhere to be found and other employees were reluctant to testify.²⁴⁵

²³² FAWU obo Kapesi & others supra note 118.

²³³ A Rycroft 'The regulation of strike misconduct: the Kapesi decisions' (2013) 34 *ILJ* 859.

²³⁴ Rycroft (note 233 above; 859).

²³⁵ Rycroft (note 233 above; 859).

²³⁶ Rycroft (note 233 above; 859).

²³⁷ Rycroft (note 233 above; 860).

²³⁸ Rycroft (note 233 above; 860).

²³⁹ Rycroft (note 233 above; 860).

²⁴⁰ Rycroft (note 233 above; 860).

²⁴¹ Rycroft (note 233 above; 860).

²⁴² Rycroft (note 233 above; 860).

²⁴⁴ Rycroft (note 233 above; 860).

²⁴⁵ Rycroft (note 233 above; 860).

The Labour Court asserted that it was possible to proceed relying on written statements in the event where witnesses were reluctant to testify.²⁴⁶ The court further held that hearsay evidence was permitted in disciplinary proceedings.²⁴⁷ Section 189 of the LRA may not be used by the employer to dismiss employees on the basis that it cannot prove charges against such employees.²⁴⁸ Section 189 of the LRA is only available where the misconduct triggered the operational requirements.²⁴⁹ The court held that the employer could not avoid the disciplinary proceedings procedure. The court declined to reinstate the applicants.²⁵⁰

The Labour Appeal Court held that it was fair to say that the complainants who had made affidavits or statements, testified in the Labour Court and if the Labour Court accepted their evidence regarding the identity of the assailants and rejected the evidence to the contrary, then it could be said that the selection criteria was proven satisfactorily.²⁵¹ The court held that the employer did not present all the evidence in its disposal as a result the employer had not proved the employees who were selected for retrenchment on criteria chosen by it had committed acts of violence and therefore the criteria was not objectively applied.²⁵² The court held that there was no connection shown between the applicants and the incidents of violence and as such therefore there was no proof that the employment relationship could not be sustained.²⁵³

Employers may dismiss employees based on their operational requirements where misconduct is involved; employees may not simply resort to dismissals for operational requirements in circumstances where those who commit the serious forms of misconduct cannot be identified or in cases where the employer thinks that they do not have a compelling case against the employees.²⁵⁴

²⁴⁶ Rycroft (note 233 above; 861).

²⁴⁷ Rycroft (note 233 above; 861).

²⁴⁸ Rycroft (note 233 above; 861).

²⁴⁹ Rycroft (note 233 above; 861).

²⁵⁰ Rycroft (note 233 above; 861).

²⁵¹ Rycroft (note 233 above; 861).

²⁵² Rycroft (note 233 above; 861).

²⁵³ Rycroft (note 233 above; 861).

²⁵⁴ S Dherver 'Can misconduct be used to dismiss employees in terms of section 189?' available at <http://www.mondaq.com/southafrica/x/187158/employee+rights+labour+relations/Can+Misconduct+Be+Used+To+Dismiss+Employees+In+Terms+of+Section+189> accessed on 01 October 2017.

The main difficulty with proving misconduct is that the employer often has no or little evidence at their disposal that links the individual employee to the incident of misconduct. This lack of direct proof is illustrated in the *Kapesi* decisions. The employer often does not have sufficient evidence to disciplinary sustain a charge.

3.7 Conclusion

The court will intervene to protect both the right to strike and the right to peaceful picketing. The right to strike may be limited where a strike becomes violent. The court in *Verulam Sawmills* indicated that unions are at risk of a punitive court order where their members conduct themselves unlawfully during a strike.²⁵⁵ The courts are not tolerating violent behavior during strikes and are holding unions accountable for the conduct of their members. The requirements of a protected strike are set out in section 64 of the LRA. The purpose of these requirements is to ensure that a strike takes place within the confines of the law. The RGA regulates how public gatherings are to be held. In the *Garvas* case the courts made it clear that the section 17 of the Constitution only applies to peaceful gatherings, where the gathering is not peaceful and riot damage course the organisers of that gathering cannot rely on the protection of section 17 of the Constitution. The rights of section 17 are conditional on the gathering being peaceful. The purpose of section 11 of the RGA is to deter mob violence and promote order and the rule of law. Unions have to exercise control over their protest marches to prevent violence and damage to property.

²⁵⁵ *Verulam Sawmills (Pty) Ltd* supra note 190 at 10.

STRIKES IN INDIA

4.1 Introduction

In this chapter examines the strike law in India, specifically the violent strike that occurred at the Maruti's Manesar plant. India like South Africa also experiences riotous strikes. There were two violent strikes at Maruti Suzuki, one of the leading car manufacturers in 2012. Both India and South Africa have connections to British tradition and law. In both countries there is a similar experience of poverty and under development.²⁵⁶

4.2 The right to strike in India

The Industrial Disputes Act 1947 (IDA) defines a strike as “a cessation of work by a body of persons employed in any industry acting in combination or a concerned refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment.”²⁵⁷ The right to strike is not expressly protected by legislation. Article 19(1)(c) of the Constitution of India, 1950 provides for the right to freedom of speech and expression also guarantees the country's citizens the right “to form associations or unions” including trade unions.²⁵⁸ This right also includes the right to join an association.²⁵⁹ The Trade Union Act, 1926 allows for the formation and regulation of trade unions, it also outlines the laws governing trade union, a trade union is formed for the purpose of regulating relations between the employer and the employee. The Indian Constitution, 1950 creates a limited right to strike which is subject to certain restrictions. Section 22 of the IDA provides that persons employed in a public utility without giving notice.²⁶⁰ Workers cannot engage in a strike while the conciliation proceedings are underway.²⁶¹

²⁵⁶ A Govindee A 'Lessons from social assistance law reform: India Part 1 the ties that bind the Indian Constitution and reasons for comparing SA with India' (2005) 26(3) *Obiter* 575.

²⁵⁷ The Industrial Dispute Act, 1947 s2 (q).

²⁵⁸ The Indian Constitution, 1950 Article 19 (1)(c).

²⁵⁹ *Ibid.*

²⁶⁰ The Industrial Dispute Act, 1947 s22 provides that: “No person employed in a public utility service shall go on strike in breach of contract— (a) without giving to the employer notice of strike, as hereinafter provided, within six weeks before striking; or (b) within fourteen days of giving such notice; or (c) before the expiry of the date of strike specified in any such notice as aforesaid; or (d) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings. (2) No employer carrying on any public utility service shall lock-out any of his workmen— (a) without giving them notice of lock-out as hereinafter provided, within six weeks before locking out; or (b) within fourteen days of giving such notice; or (c) before the expiry the date of lock-out specified in any such notice as aforesaid; or (d) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.”

²⁶¹ The Industrial Dispute Act, 1947s23 of provides that: “No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer of any such workman shall declare a lock-out— (a) during the pendency of conciliation proceedings before a Board and seven days after the conclusion of such proceedings; (b) during the pendency of proceedings before 1[a Labour Court, Tribunal or National Tribunal] and two months after the conclusion of such proceedings; 2*** 3[(bb) during the pendency of arbitration proceedings before an arbitrator and two months after the conclusion of such proceedings, where a

Legislation does restrict the right to strike by deeming certain strikes illegal. The IDA limits strikes and lockouts equally. The IDA sets out certain activities that may be deemed as “unfair labour practices of workers or workers’ trade unions pertaining to strikes such as advising or actively supporting or instigating any illegal strike or staging demonstrations at the residence of the employers or managerial staff members.”²⁶² The right to strike is not expressed in the Indian Constitution it flows from Article 19(1) (c) and is subject to certain restrictions.

A worker who is engaged in an illegal strike may be punished with imprisonment of up to a month and/or fine.²⁶³ No one may offer any sort of financial aid to any illegal strike.²⁶⁴ Any person who knowingly provides financial assistance in support of any illegal strike is punishable with imprisonment up to six months and/or fine. The denial of wages is another consequence of an illegal strike is the denial of wages.²⁶⁵ The Indian SC has held that workers are only entitled to wages during a strike that is not only legal, but also “justified”.²⁶⁶ A strike shall be deemed unjustified where “the reasons for it are entirely perverse and unreasonable... [which is] a question of fact, which has to be judged in the light of the fact and circumstances of each case... the use of force, coercion, violence or acts of sabotage resorted to by the workmen during the strike period which was legal and justified would [also] disentitle them to wages during the strike period.”²⁶⁷ The SC has also held that whether or not a strike is “unjustified depends on such factors as “the service conditions of the workmen, the nature of demands of the workmen, the cause which led to the strike, the urgency of the cause or the demands of the workmen, the reason for not resorting to the dispute resolving machinery provided by the IDA or the contract of employment or the service rules and regulations etc.”²⁶⁸

The Industrial Dispute Act, 1947 provides a system for managing the rights of employers and employees and for the examination and resolution of industrial disputes in an amicable manner.²⁶⁹ When employees want to engage in strike action they must comply with the

notification has been issued under sub-section (3A) of section 10A; or] (c) during any period in which a settlement or award is in operation, in respect of any of the matters covered by the settlement or award.”

²⁶² The Industrial Dispute Act, 1947 Fifth Schedule.

²⁶³ The Industrial Dispute Act, 1947 s25.

²⁶⁴ India: Trade Unions and Collective Bargaining’ available at <http://www.nishithdesai.com/fileadmin/pdfs>, accessed on 07 January 2019.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ *Crompton Greaves Ltd. v. IITS Workmen* (AIR 1978 SC 1489) 4.

²⁶⁸ *Syndicate Bank v. K. Umesh Nayak* (1995 AIR 319) 27

²⁶⁹ L Bhasin “Labour and Employment Laws of India” available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan029043.pdf>, accessed on 02 November 2017.

requirements set out in the IDA failure to comply with such requirements render the strike illegal.²⁷⁰ Section 22(1) of the IDA places restrictions on the right to strike. Workers who are employed in the public utility service are not permitted to go on strike without following the prescribed procedure.

These requirements do not disallow workers from engaging in strike action but obliges them to fulfil these requirements before embarking on strike action. These provisions apply only to a public utility service. In terms of section 23 of the IDA there is a prohibition of strikes in certain circumstance.

The purpose of this section is to enable an amicable conciliation, adjudication and arbitration proceedings.²⁷¹ In terms of section 24 of the IDA a strike that is in violation of section 22 and 23 is deemed to be illegal:

1. “ a strike or a lockout shall be illegal if,
 - i. it is commenced or declared in contravention of section 22 or section 23; or
 - ii. it is continued on contravention of an order made under sub section (3) of section 10 or sub section (4-A) of section 10-A;.
2. where a strike or lockout in pursuance of an industrial dispute has already commenced and is in existence all the time of the reference of the dispute to a board, an arbitrator, a Labour court, Tribunal or National Tribunal, the continuance of such strike or lockout shall not be deemed to be illegal; provided that such strike or lockout was not at its commencement in contravention of the provision of this Act or the continuance thereof was not prohibited under sub section (3) of section 10 or sub section (4-A) of 10-A;
3. a strike declared in the consequence of an illegal lockout shall not be deemed to be illegal.”²⁷²

In circumstances where there is already a lock out in place the requirement of six weeks’ notice before commencement of a strike falls away. In *Mineral Miners Union v Kudremukh*²⁷³ the court had to determine whether s 22(1) of the Industrial Disputes Act required workmen employed in a public utility to issue a further notice if an earlier notice they had issued expired. The court held that where the specified date in the initial notice expires a new notice must be issued before workers engage on a strike.

4.3 The violent strike on the Maruti Suzuki plant

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² The Industrial Dispute Act 1947 s 24.

²⁷³ 1988 ILR KAR 2878.

During 2011-2012 the new plant of India's passenger car manufacturer Maruti Suzuki experienced two illegal strikes. The issues in dispute included: recognition of an independent trade union; the disparity between wages between contract and permanent workers and harsh working conditions.²⁷⁴

Maruti Suzuki was originally formed as a state-controlled company but was later acquired by a Japanese company, Suzuki in 2000.²⁷⁵ Maruti's principal plant is in Gurgaon. In 2011 the majority of the labour forces in the plant were contract workers. The contract workers were paid half the wage of permanent workers.²⁷⁶

In June 2011 workers were being compelled to affiliate with the existing trade union Maruti Udyog Kamgar Union (MUKU).²⁷⁷ The independent union Maruti Suzuki Worker's Union (MSWU) was refused registration by the state.²⁷⁸ Following the refusal of registration 2000 workers planned a "sit-in" strike which lasted for two weeks. Later an agreement confirming that the MSWU would be permitted to register and the "sit-in" strike ended²⁷⁹ In August the registration process was negated by the administration.²⁸⁰ The lock-out endured for a month and the workers wanted to resume their duties however, only the permanent employees were permitted entry to the plant.²⁸¹ The contract workers plead with the permanent workers to assist them in their plight and demonstrate solidarity, as a result three nearby plants joined in on the strike.²⁸²

On 14 October the police expelled the canteen managed by the workers.²⁸³ The Suzuki plants in Manesar continued with the strike and a week later management allowed the contract workers to return to work.²⁸⁴ The conflict appeared to be resolved, the leaders of MSWU were

²⁷⁴ J Nowak "Workers unrest in Automobile plants in India: Strikes and Occupation at Maruti Suzuki and Bajaj Auto in 2011/12" available at <http://column.global-labour-university.org/2014/04/workers-unrest-in-automobile-plants-in.html>, accessed on 05 November 2017.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

compelled to accept severance payments, intimidated with threat of prison charges and forced to leave the plant.²⁸⁵

MSWU was registered in 2012 however, the negotiations regarding pertaining increases and the incorporation of contract workers as permanent staff was forbidden by management.²⁸⁶ A tension heightened amid the workers on 18 July a worker was verbally abused and assaulted by a supervisor and consequently his employment was terminated.²⁸⁷ The dialogues between the union and the employer came to a halt. It is reported that the violence was incited by management.²⁸⁸ A fire broke out as a result of the violence and a manger was burnt to death.²⁸⁹ After the incident of 18 July the plant was closed for a whole one month, following which 546 permanent workers and 1800 contract workers were arbitrarily dismissed, 150 workers were arrested despite the fact that many of them were not present at the plant on the 18 July.²⁹⁰

Management and police acted in concert, worker's families were harassed to track down union leaders; arrests were made in an arbitrary fashion and were not based on any investigation.²⁹¹ The union leaders were severely tortured, they were stripped naked and beaten; given electric shocks and submerged in dirty water.²⁹²

The workers main demand was to get union recognition; integration of contract workers into permanent workers and wage increase. The employer rejected all demands pertaining to wage increases and they failed to negotiate in good faith. There is a need for reform in Indian labour law. There was obvious collusion between the management of Maruti Suzuki and the police was unlawful.

During the Maruti Suzuki riots permanent and temporary workers stood in solidarity and engaged in the strike, this is rare as there are always tensions between permanent and contract workers. The use of brutal force used by the police is alarming and unacceptable and instead of decreasing the incidences of brutal force used by the police to clamp down of violent strikes is increasing.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

The state failed to intervene in industrial conflict as much as it should, especially in this case where the state owns a share of Maruti Suzuki. The role of the state should be to protect vulnerable groups in society however in this case the state acted in concert with the management of Maruti Suzuki.

It is to be noted that India has not ratified ILO Conventions 87 and 98 which relate to freedom of association and collective bargaining. When dismissing the striking workers after the riots the employer Maruti did not follow the correct procedure which is highly irregular. The police acted inappropriately there was no investigations that would have showed who was at fault before arrests were affected.

There must be a balance between the operational efficiencies and the workers' rights; there is room for reform to incorporate the importance of meaningful communication between the management and workers by way of improving collective bargaining.

The workers desire to form an independent union of their choice gave rise to this dispute that had disastrous consequences. The use of contract workers is part of the problem as it allows employers to dismiss contract workers easily. A lack of proper regulation led to the Maruti riots. This and many other similar strikes in the automotive industry in India highlight the need for reform in the labour laws to create a platform for meaningful negotiation between management and workers.

The violent riots that occurred at Maruti can be compared to the Marikana that occurred in South Africa in August 2012. There is a similarity in the brutality of violence used by the police.²⁹³ In South Africa the striking workers were killed with assault rifles and shot guns on the day of the massacre 16 August 2012 34 strikers were killed and 78 were injured.²⁹⁴ During the Maruti riots the death toll may not have been as high as that of the Marikana tragedy however; the brutality of the police and the manner in which the striking workers were treated after the riot was appalling, the police made arbitrary arrests; the arrested workers were tortured

²⁹³ Ngcukaitobi (note 131 above; 837).

²⁹⁴ Ngcukaitobi (note 131 above; 837).

in police custody. Unfortunately, the Maruti riots in India and the Marikana tragedy have led to little or no reform in the labour law in the respective countries.

4.5 Conclusion

There are lessons we can learn from India when developing a system to curb strike violence. It is important to strike a balance between the importance of the right to strike and employer's right to trade. The state must never be biased in favour of the employer. Article 19 of the Indian Constitution protects freedom of speech allowing citizens the right to assemble peacefully without arms; the right to assembly is limited by the Indian Penal Code, 1860 and the Code of Criminal Procedure Code 1898 and the Police Act of 1861.²⁹⁵ The regulations in the abovementioned instruments allows the government to impose "reasonable restrictions" on the right to assemble where there is a possibility of violence and public disorder or if it poses a threat to national sovereignty.²⁹⁶ Section 144 of the Code of Criminal Procedure an appropriate authority can prohibit holding of a public meeting where it is necessary for maintaining public order.²⁹⁷ In *Banulal Parate v State of Maharashtra*²⁹⁸ held that "public order has to be maintained in advance in order to ensure it and, therefore, it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory kinds of acts in an emergency for the purposes of maintaining public order." Section 129 and 130 of the Criminal Procedure Code any unlawful assembly of five or more persons likely to cause a breach of public peace may be dispersed by command of any Executive Magistrate or an officer in charge of a police station not below the rank of a sub-inspector, by use of civil force.²⁹⁹ An unlawful assembly is defined as an assembly of five or more persons having common object to perform an act or omission.³⁰⁰ The purpose of section 144 is to give a Magistrate the power to take immediate action in the case of an emergency "to prevent obstruction, annoyance or injury to any person lawfully employed; a danger to human life, health or safety, or disturbance of public tranquillity or a riot or an affray."³⁰¹ This power given to the magistrate in terms of section 144 is to suspend the exercise of the right on a particular

²⁹⁵ 'Dealing with violent civil protests in India' available at <http://www.worfonline.org> accessed on 01 February 2019.

²⁹⁶ *ibid*

²⁹⁷ 'All you need to know about unlawful assembly section 144' available at <http://blog-ipladers-in.cdn.ampproject.org> accessed on 04 February 2019.

²⁹⁸ AIR 1954 SC 657.

²⁹⁹ *Ibid*.

³⁰⁰ *Ibid*.

³⁰¹ The Code of Criminal Procedure 1860, Clause 1 of section 144.

occasion it will only be in force for no more than two months the state government may order the magistrate to extend it for a period of not more than six months.³⁰²

Amending the LRA to include a provision similar to section 144 of the Code of Criminal Procedure would grant the Labour Court the power to intervene immediately to prevent strike violence. Our law needs a proactive mechanism to prevent strike violence and a provision that allows to suspend or to take any other necessary measure to prevent the loss of life, injury and damage to property may be effective.

³⁰² Ibid.

POSSIBLE SOLUTIONS TO STRIKE VIOLENCE

5.1 Introduction

The right to strike is protected by the constitution as well as international and regional instruments.³⁰³ It is of paramount importance that the right to strike is exercised within the boundaries of the law.³⁰⁴ Section 23 of the constitution guarantees the right to strike and s 64 and 65 of the LRA sets out restrictions on the right to strike and the procedure which must be adhered to in order to render the strike protected. Where a strike is unprotected the Labour Court is empowered to grant an interdict restraining those involved from continuing with the industrial action and is also empowered to order just and equitable compensation³⁰⁵

5.2 Interdicts

An interdict is an urgent order where the applicant approaches the court ex parte to obtain an order aimed at protecting the applicant from suffering irreparable harm caused by the wrongful acts of the defendant.³⁰⁶ The court usually grants an interim order restraining the defendant from continuing with their wrongful activities.³⁰⁷

The requirements of an interdict were held in *NCSPCA v Openshow*³⁰⁸ as follows:

“A prima facie or clear right: what is required here is proof of facts that establish the existence of a right in terms of substantive law; A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; Balance of convenience favours the granting of an interim interdict; and the applicant has no other satisfactory remedy.”³⁰⁹

Section 68(1) (a) of the LRA makes provision for an interdict where striking workers act contrary to the provision of the LRA.³¹⁰ An interested party of the employer may apply for an interdict.³¹¹ The court issues an interim order directing the party against whom the order is sought to show why a final order should not be made against them. The following cases interdicts’ were ignored and violence persisted. In *Kapesi & others v Premier Foods Ltd t/a*

³⁰³ Odeku (note 86 above; 695).

³⁰⁴ Odeku (note 86 above; 696).

³⁰⁵ The Labour Relations Act 66 of 1995 s64.

³⁰⁶ Misccke (note 171 above).

³⁰⁷ Ibid.

³⁰⁸ (2008) 5 SA 339 (SCA).

³⁰⁹ NCSPCA supra note 298 at 347B.

³¹⁰ The Labour Relations Act 66 of 1995 s68(1)(a).

³¹¹ Mischke (note 171 above)

*Blue Ribbon Salt River*³¹² and *Tsogo Sun* the violent and wrongful acts persisted even after interdicts had been granted. If a person fails to comply with a court order the affected party may institute contempt of court proceedings. “Contempt of court is committed not by a mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority”³¹³ In *Pikitup Johannesburg (Pty) Ltd (Pikitup) v South African Municipal Workers Union (SAMWU) & others*³¹⁴ the respondents were called upon to show cause as to why they should not be found guilty of contempt of court for failing to abide by an interim court order issued to prohibit the participation of unlawful acts disturbing the applicants business.³¹⁵ The order was aimed at stopping the union and its officials from promoting and participating in the strike.³¹⁶ The day after the order was granted the union marched through Johannesburg central business district armed with sticks trashing waste disposal bins and emptying them on the street.³¹⁷ Three union officials made public statement endorsing the continuance of the strike.³¹⁸ The court emphasised that complying with court orders is necessary for the functioning of legal order.³¹⁹ The Labour Court fined the union R80 000 suspended for a period of 24 months on the condition that the union was not found guilty of contempt of and Labour Court order.³²⁰ The second respondent, the union’s Spokesperson was also fined R10 000 suspended for a period of 24 months on the condition that the union was not found guilty of contempt of and Labour Court order.³²¹

In terms of s 68(1) (b) of the LRA, the Labour Court is empowered to make an order for payment of just and equitable compensation for any loss suffered due to the unprotected strike.³²² When deciding whether or not to grant compensation, the court considers whether:

“(a) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(b) the strike or lock-out or conduct was premeditated;

³¹² (2012) 33 ILJ 1779 (LAC).

³¹³ *Fakie NO v CCII Systems (Pty) Ltd* (2006) 4 SA 326 (SCA) at 333E.

³¹⁴ (2016) 37 ILJ 1710 (LC).

³¹⁵ SAMWU supra note 304 at 2.

³¹⁶ SAMWU supra note 304 at 1.

³¹⁷ SAMWU supra note 304 at 12.

³¹⁸ SAMWU supra note 304 at 37.

³¹⁹ SAMWU supra note 304 at 26.

³²⁰ SAMWU supra note 304 at 40.

³²¹ SAMWU supra note 304 at 40.

³²² F Satter “Legal consequences of an unprotected strike” available at <http://www.kmgattorneys.co.za/Docs/Article%20%20Legal%20Consequences%20of%20an%20Unprotected%20Strike.pdf>, accessed on 01 December 2017.

(c) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and

(d) there was compliance with an order granted in terms of paragraph (a); the interests of orderly collective bargaining; the duration of the strike or lock-out or conduct; and the financial position of the employer, trade union or employees respectively.”³²³

In *Algoa Bus Company v SATAWU and others*³²⁴ the unions engaged in the unprotected strike which affected the applicants transport business.³²⁵ The applicant estimated to have suffered R1,4 million damage, it claimed compensation from the unions.³²⁶ The court found that the strike was unprotected and the unlawful conduct of the striking workers caused loss to the applicant and ordered the respondent to pay “just and equitable” compensation for the loss suffered.³²⁷ Tenza argues that the Labour Court’s practice of ordering small amounts do not discourage unions from continuing with unlawful acts, he further, argues that ordering substantial payments could force unions to discourage unlawful activities during strikes.³²⁸

Section 68(5) of the LRA provides that partaking in an unprotected strike could be a ground for dismissal.³²⁹ In the case of a dismissal due to involvement in an unprotected strike the Code of Good Practices dealing with dismissals has to be considered.³³⁰ In order for such a dismissal to be fair it must be substantively and procedurally fair.³³¹ The substantive fairness of a dismissal must be considered in terms of the facts of the case.³³² The following factors must be considered: “the seriousness of the failure to comply with the provisions of the LRA; the attempts the employees had made to comply with the LRA; and whether or not the strike was in response to unjustified conduct by the employer.”³³³ Procedural fairness lies in interaction with the union; the delivery of an ultimatum and a hearing.³³⁴ A strike must comply with all the procedural requirements of the LRA, where employees engage in an unprotected strike the

³²³ The Labour Relations Act 66 of 1995 s68(1) (b) (a).

³²⁴ (2015) 36 ILJ 2292 (LC).

³²⁵ *Algoa Bus Company* supra note 314 at 2.

³²⁶ *Algoa Bus Company* supra note 314 at 2.

³²⁷ *Algoa Bus Company* supra note 314 at 1.

³²⁸ M Tenza ‘*The liability of trade unions for conduct of their members during industrial action*’ LLD (UNISA 2016) 118.

³²⁹ The Labour Relations Act 66 of 1995 s68(5).

³³⁰ Schedule 8 Code of Good Practice: Dismissal, the Labour Relations Act 66 of 1995.

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Ibid.*

employer is not left without recourse. The LRA provides the abovementioned remedies to the employer.

Section 67(8) of the LRA neutralises the immunity against dismissal and civil claims where the workers engage in violent acts during a protected strike, an employee may be dismissed where their conduct constitutes an offence.³³⁵ Employers do not usually really on section 67(8) of the LRA due to the difficulty of burden of proof in civil proceedings (proof on a balance of probabilities) and criminal matters (proof beyond a reasonable doubt).³³⁶ The conduct of the striking worker must have been in support of a strike or picket or in opposition of a lock-out; this conduct must have turned violent or caused damage to property or harm to members of the public non-striking workers.³³⁷

5.3 Violent strikes and collective bargaining

What is the position when a protected strike becomes violent?. The answer to this can be found in section 68(7) of the LRA which provides that a strike should lose its protected status, any unlawful activities cannot be tolerated as it constitutes an offence.³³⁸ In terms of section 1 (d) of the LRA a strike must be functional to collective bargaining and an unlawful strike does not promote orderly collective bargaining.³³⁹ A strike will lose its protected status if it is not connected “to collective bargaining and is simply destructive and without demand.”³⁴⁰ The requirements outlined in section 64 of the LRA are a foundation for orderliness.³⁴¹ In *Shoprite Checkers (Pty) Ltd v CCMA*³⁴² the court held that “if the picket exceeds the bounds of peaceful persuasion or incitement to support the strike, to become coercive and disruptive of the business of third parties, the picket ceases to be reasonable and lawful.”³⁴³ The right to assemble; demonstrate and picket must be exercised peacefully.³⁴⁴ Section 69 of the LRA makes provision for picketing rules further emphasising that a strike must be orderly. In *Garvas & others v SA Transport & Allied Workers Union & others*³⁴⁵ the court held “in the past the

³³⁵ The Labour Relations Act 66 of 1995 s 68(7).

³³⁶ The Labour Relations Act 66 of 1995 s 68(7).

³³⁷ Tenza (note 328 above; 123).

³³⁸ The Labour Relations Act 66 of 1995 s 68(7).

³³⁹ The Labour Relations Act 66 of 1995 s1 (d).

³⁴⁰ Rycroft (note 67 above; 208).

³⁴¹ Rycroft (note 67 above; 206).

³⁴² Shoprite Checkers (Pty) Ltd supra note 114.

³⁴³ Shoprite Checkers (Pty) Ltd supra note 114 at 30.

³⁴⁴ Rycroft (note 109 above; 215).

³⁴⁵ SATAWU supra note 162 at 50.

majority of the population was subjected to the tyranny of the state. We cannot now be subjected to the tyranny of the mob”³⁴⁶.

In the judgment of *Tsogo Sun Casinos (Pty) Ltd* Judge van Niekerk stated that:

“This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.”³⁴⁷

Violence, chaos and disruptive conduct do not form part of the peaceful picket envisaged in section 17 of the constitution. When a strike becomes violent and disruptive it loses its protection. A strike must be functional to collective bargaining, it is functional to collective bargaining where the strike is concerned with matters concerning the relationship between the employer and employee. In *Afrox v SACAWU*³⁴⁸ the employer applied to the Labour Court to interdict the union from continuing with the strike. The dispute giving rise to the strike was a staggering shift system introduced by the employer; the employer stopped the implementation of the staggered shift system after a number of workers had been retrenched, the union continued the strike despite the employer stopping the implementation. The employer had acceded to the union’s demands and the grievance was resolved. The court held that once the dispute giving rise to a strike is resolved, the strike must end. The court further held where the grievance was resolved the strike is “no longer functional; it has no purpose and it terminates. It is in the interests of labour peace for strike action to be continued in such circumstances even in the case of a protected strike.”³⁴⁹ A strike can lose its protection when it is no longer functional to collective bargaining, in *Tsogo Sun Casino* and *Garvas* provides a basis that a strike characterised by misconduct loses protection. The LRA does not make provision for the loss of protection however, section 158(1)(a)(v) may be used to declare a strike unprotected. Rycroft suggests that the following question be asked: “has misconduct

³⁴⁶ *Garvas & others* supra note 134 at 50.

³⁴⁷ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino* supra note 123 at 13.

³⁴⁸ (1997) 18 ILJ 399 (LC).

³⁴⁹ *Afrox* (note 348 above; 411A).

taken place to an extent that the strike no longer promotes functional collective bargaining, and is therefore no longer deserving of its protected status? In answering this question the court would have to weigh the levels of violence and efforts by the union concerned to curb it.”

A strike must comply with section 64 of the LRA. Section 17 of the Constitution provides that a strike must be peaceful and unarmed. A strike must also be functional to collective bargaining.

5.4 Compulsory arbitration

The ILO Committee on Freedom of Association permits compulsory arbitration in the case of strikes in essential service, in the case of a grave national crisis or in the public service.³⁵⁰ This form of compulsory arbitration is aimed at resolving a labour dispute and a strike is only allowable if both parties agree to compulsory arbitration.³⁵¹ According to the Committee this kind of arbitration is acceptable if the collective agreement makes provision for it as a means of resolving differences or it is agreed to by the parties during negotiations.³⁵² Article 4 of the ILO Convention No. 98 recognizes that where negotiations seem pointless and where it becomes apparent that the impasse in bargaining will not end without some intervention on part of the authorities,³⁵³ the parties should be compelled to engage in compulsory arbitration to resolve the dispute and bring the strike to an end. Section 150(1)(b) of the Labour Relations Amendment Act came into effect on 01 January 2015 it gives the Director of the CCMA the right to get involved in labour dispute if he believes that that it is in the public interest to do so. This section will compel unions to the employer to go back to the negotiating table.

5.5 The powers of the Labour Courts

The Labour Court is tasked with enforcing the provisions of the LRA.³⁵⁴ Further, the Labour Court has jurisdiction and powers to interdict unprotected strikes and violence.³⁵⁵ The jurisdiction and powers of the Labour Court are contained in section 157 and 158 of the LRA. One of the important tools in policing strikes are interdicts however there is an increasing trend of strikers to ignore interdicts and continue with disruptive violent conduct even after such conduct has been interdicted by the Labour court. When interdicts are not complied with, it brings into question the effectiveness of the LRA to regulate strikes. In *Modise and Others v*

³⁵⁰ B Gernigon “ILO Principles concerning the right to strike” available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_087987.pdf , accessed on 05 October 2017.

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Myburgh (note 124 above; 1).

³⁵⁵ Myburgh (note 124 above; 1).

*Steve's Spar Blackheath*³⁵⁶ Conradie JA, in his minority judgment held that: "it is becoming distressingly obvious that the court orders are, by employers and employees alike, not invariably treated with the respect they ought to command."³⁵⁷ In *Tsogo Sun Casinos (Pty) Ltd; Verulam Sawmills (Pty) Ltd* and *In2Food (Pty) Ltd* interdicts were ignored and the striking workers persisted with their violent disruptive conduct.

Interdicts have been ineffective in curbing strike violence; the Labour Court needs to be granted greater powers with regards, to imposing sanctions that end strike violence. In *Food & Allied Workers Union on behalf of Kapesi and others v Premier Foods Ltd t/a Blue Ribbon Salt River*³⁵⁸ the court held that "strikes that are marred by violent and unruly conduct are extremely detrimental to the legal foundations upon which labour relations rest."³⁵⁹ Where a strike erupts into violence the Labour Court should have the power to suspend the strike and in the case of a protected strike to order the loss of protected status of such a strike. Professor Alan Rycroft is of the opinion that a protected strike which is marred by violence should lose its protected status if the violence is of such a nature that it renders "the strike dysfunctional to collective bargaining".³⁶⁰ In *National Union of Food Beverage Wine Spirits & Allied Workers & Others v Universal Product Network (Pty) Ltd*³⁶¹ the court was approached by the employer to make an order declaring that the strike embarked on by the union had lost its protected status as it was no longer functional to collective bargaining owing to the high levels of violence and political involvement.³⁶² The court held that there are circumstances where it would "declare an initially protected strike to be unprotected on account of the levels and degrees of violence which seriously undermine the fundamental values of our constitution."³⁶³ The court stressed that such a conclusion should not be reached without due consideration and that the right to strike should be limited as little as possible.³⁶⁴ In terms of the facts of the abovementioned case the court found that the levels of the violence were not so excessive to render the strike dysfunctional to collective bargaining.

³⁵⁶ *Modise and Others v Steve's Spar Blackheath* (2000) 21 ILJ 519 (LAC).

³⁵⁷ *SATAWU* supra note 162 at 50.

³⁵⁸ *Modise* supra note 356 above at 12.

³⁵⁹ *Food & Allied Workers Union* supra note 96.

³⁶⁰ *Food and Allied Workers Union* supra note 97 above at 6.

³⁶¹ *Rycroft* (note 67 above; 208).

³⁶² *National Union of Food Beverage Wine Spirits & Allied Workers & Others v Universal Product Network (Pty) Ltd* (2016) 37 ILJ 476 (LC).

³⁶³ *Universal Product Network (Pty) Ltd* supra note 361 above at 39.

³⁶⁴ *Universal Product Network (Pty) Ltd* supra note 3615 above at 38.

³⁶⁵ *Universal Product Network (Pty) Ltd* supra note 361 above at 38.

The Labour Relations Amendment Act 6 of 2014 (LRAA) endows the labour courts with additional powers which include the power to suspend a strike or lock-out in certain cases, the labour courts are also empowered to restrain an employer from engaging replacement labour during a strike. Tenza states that this provision may be open to abuse as there are no prescribed period for the suspension.³⁶⁵ An employer may approach the court claiming that the strike endured for an extended period even if there is no foundation for that assertion.³⁶⁶ The amended provision does not provide the necessary relief because it does not allow the court to automatically intervene when a strike has descended into chaos. An affected party must first approach the court to suspend a dangerous strike.

5.6 The offence of public violence and the policing of strikes

Criminal law offers an alternative approach, the offence of public violence may be used as an instrument to protect the community's interests and shield the public from harm and damage to property during a violent protest.³⁶⁷ Developing the crime of public violence may assist in safeguarding the rights of non-striking workers.³⁶⁸ This development should ensure that it is effective in maintain public peace and order during industrial action.³⁶⁹ As discussed above, a demonstration must be carried out peacefully, a person who does not demonstrate peacefully and in an orderly manner and engages in acts of public violence forfeits his right to demonstrate.³⁷⁰ It is important to protect non-striking workers. Victims of violence during industrial action do not have the resources to peruse organisers of gatherings for damages in terms of section 11 of the RGA and would encounter difficulty in identifying those who committed the acts of violence and ultimately pursue damages against them.³⁷¹ Khumalo points out that due to the atrocities of the Apartheid government where statutory instruments like the Riotous Assemblies Act 17 of 1956 and Internal Security Act 47 of 1982 were used to arbitrarily arrest protestors, it may be undesirable to arrest protestors during violent demonstrations.³⁷² He further asserts that incarceration must be effected within the confines of the law and used only in circumstance where excessive violence has erupted during the strike.³⁷³ Criminal law is aimed at protecting the public interest and must be separate from

³⁶⁵ Tenza (note 51 above; 226).

³⁶⁶ Tenza (note 51 above; 226).

³⁶⁷ Khumalo (note 101 above; 579).

³⁶⁸ Khumalo (note 101 above; 587).

³⁶⁹ Khumalo (note 101 above; 588).

³⁷⁰ Khumalo (note 101 above; 598).

³⁷¹ Khumalo (note 101 above; 592).

³⁷² Khumalo (note 101 above; 592).

³⁷³ Khumalo (note 101 above; 594).

delictual claims which protect individual interests.³⁷⁴ Civil actions are compensatory in nature if successful the individual who suffered loss or damage is compensated³⁷⁵. Criminal sanctions are punitive and seek to punish the offender.³⁷⁶ Both criminal and civil sanctions must co-exist, one cannot replace the other.³⁷⁷ The high death toll; assaults; and vandalism and destruction of property damage to property during industrial action requires that something more than section 11 of the RGA is required to curb violence during industrial action. Criminal sanctions in the form of the crime of public violence must be utilised to protect the rights of non-protestors, innocent bystanders and third parties whose property is damaged during industrial action.³⁷⁸ The police have the resources to identify perpetrators of public violence. For the crime of public violence to be more effective in policing violent strikes the legislature must review the sentences meted out for this crime and ensure that the sentences reflect the community's condemnation of violence and the invasion of non-protestors. Violence during protest action is becoming more prevalent and destructive and a harsher punishment is required.³⁷⁹ John Brand asserts that there is a need for a Specialised Industrial Action Protection Unit to protect from criminal conduct during industrial action. The establishment of this specialised unit could assist in the investigating and prosecution of individuals who commit the crime of public violence.³⁸⁰ The right to strike does not give strikers liberty to engage in criminal and rowdy conduct during a strike, this kind of disruptive conduct must be considered as a misuse of the right to strike. Trade union must play a greater part in making sure that their members comply with the provisions of the LRA and that they do not conduct themselves in a violent and unruly manner during industrial action.³⁸¹ Unions must be proactive and take precautionary measures to prevent violence this should also include involving the police to assisting preventing damage to property; intimidations; assaults and killings during the strike.³⁸²

“It is important to emphasise that it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they

³⁷⁴ Khumalo (note 101 above; 595).

³⁷⁵ Khumalo (note 101 above; 595).

³⁷⁶ Khumalo (note 101 above; 595).

³⁷⁷ Khumalo (note 101 above; 595).

³⁷⁸ Khumalo (note 101 above; 595).

³⁷⁹ Khumalo (note 101 above; 597).

³⁸⁰ J Brand “How to better regulate the right to strike in South Africa” presented at the 27th Labour Law Conference 06 August 2014, accessed at <http://conflictdynamics.co.za/Files/114/How-the-law-could-better-regulate-the-right-to-strike-in-South-Africa-.pdf>, accessed on 05 May 2017.

³⁸¹ Botha (note 105 above; 344).

³⁸² S Gericke ‘Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law’ 2012 (75) *THRHR* 585.

lose their constitutional protection.”³⁸³ Trade unions must appraise their members to the need to keep demonstrations and that there are grave consequences for engaging in violence during demonstrations. The *Garvas* case illustrates that the court will not hesitate to hold trade unions responsible for the actions of their members.

5.7 Conclusion

Section 64 of the LRA protects employees who engage in a protected strike this protection only applies if the requirements of the LRA are complied with. The immunity contained in the LRA shields the striking employee and representative union from civil liability. This does not give striking workers a licence to commit unlawful acts during a protected strike it means that no action may be taken against them against them for reason of participating in the industrial action. The protected status of a strike shields the striking worker from prosecution. Industrial action must only be exercised in a peaceful manner; the striking workers must also be unarmed. Where a union and its members fail to keep their industrial action peaceful and violence erupts there must be redress for the parties that suffer riot damage. A strike may lose its protected status and the remedy available for unprotected strikes becomes available.

³⁸³ *Garvas* supra note 52 at 33.

CONCLUSION

The right to strike is constitutionally protected in South Africa.³⁸⁴ Strikes in South Africa often involve elevated levels of violence and aggression in the form of damage to property; intimidation; assault and even murder.³⁸⁵ We inherited strike violence from the apartheid era where the state intervened during protests. The police used brutal force to end strikes. Soldiers were deployed as strike breakers.³⁸⁶ In the post democratic era lengthy protracted strikes are prevalent and are becoming more violent.

Chapter two of this study examines the legal mechanisms in place to deal with strike violence. It is evident from the case law that the legal mechanisms are failing to curb strike violence. The courts are willing to adopt a stricter approach with regards to union liability.

“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 serves to seriously and irreparably undermine future relations between strikers and their employer. Such conduct further completely negates the rights of non-strikers to continue working, to dignity, to safety and security and privacy and peace of mind.”³⁸⁷

In *Garvas*³⁸⁸ the court held the exercise of the right to freedom of assembly may not be restricted arbitrarily without good cause.³⁸⁹ The court also held that the organisers of gatherings must exercise their rights in a manner that is considerate of the rights of others.³⁹⁰ The court held that the trade unions must take all reasonable steps to prevent damage to property.³⁹¹ Section 11 of the RGA makes provision for delictual liability for riot damage caused during a strike this provides relief to innocent bystanders who may be victims. The court further held that s17 of constitution only protects peaceful and unarmed demonstrations.³⁹²

³⁸⁴ The Constitution of the Republic of South Africa 23.

³⁸⁵ Tenza (note 51 above; 226).

³⁸⁶ Maree (note 59 above).

³⁸⁷ Food & Allied Workers Union supra note 97 at 6.

³⁸⁸ Garvas supra note 52 above.

³⁸⁹ Garvas supra note 52 at 66.

³⁹⁰ Garvas supra note 52 at 68.

³⁹¹ Garvas supra note 52 at 129.

³⁹² Garvas supra note 52 at 53.

In *Garvas* the court held that:³⁹³

“Nothing said thus far detracts from the requirement that the right in section 17 must be exercised peacefully. And it is important to emphasise that it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection.”

Section 11 of the RGA is designed to curb strike violence and that organisers of gatherings may bear liability for riot damage. Third parties have recourse against the organisers of gatherings when their property has been damaged during strike violence.

The study indicates that there is a general disregard for court orders striking workers continue with misconduct and ignore court orders. Ignoring court orders leads to a state of lawlessness and this cannot be allowed to persist.³⁹⁴ Disobeying interdicts deprives the employers of this useful strike breaking mechanism and renders it ineffective.³⁹⁵ The labour courts are powerless in this regard and the state must intervene to assist the labour courts. Ngcukaitobi writes that:

“The role of the state is to create a legal framework within which parties can address their labour concerns. However, any type of legal regulation implies an acceptance of the underlying social order. Our present LRA framework remains ineffective in the face of inadequate public service delivery, ambiguous business social responsibility, changing union dynamics and the collapse of collective bargaining institutions. Unprotected strikes occur at an increasing rate. The prevalence of violence in industrial action caused by this instability means that there remains a limited role that the law can play. The solution then becomes one of a political nature.”³⁹⁶

The author of this dissertation recommends developing crime of public violence to assist in eliminating the difficulty of obtaining evidence during hearings for strike misconduct. The crime of public violence can be used as a more effective tool to protect the rights of third parties during strikes.³⁹⁷ Developing the crime of public violence would ensure that it executes its

³⁹³ *Garvas* supra note 52 at 53.

³⁹⁴ Myburgh (note 124 above; 5).

³⁹⁵ Myburgh (note 124 above; 5).

³⁹⁶ Ngcukaitobi (note 131 above; 858).

³⁹⁷ Khumalo (note 101 above; 578).

purpose to maintain public peace and also safeguard the rights of non-protestors.³⁹⁸ The argument that developing the crime of public violence would result in limiting the right to freedom of assembly cannot be sustained because s17 of the constitution envisages a “peaceful” and “unarmed” demonstration therefore once there is violence in a demonstration it falls outside the protection of s17 of the constitution.³⁹⁹ Those that continue to demonstrate peacefully maintain the constitutional protection afforded to them by s17, those strikers that commit violent acts forfeit the constitutional protection.⁴⁰⁰ The police are better placed to identify and investigate perpetrators of violence during strikes.⁴⁰¹

The increasing levels of violence during strikes are increasing. Strikers are becoming more aggressive and more militant.⁴⁰² The Marikana massacre illustrates the extreme use of force and aggression on the part of the strikes and the employer aided by the police.⁴⁰³ During the strike on the platinum belt in 2014 6.1 billion in wages was lost due to the five month long strike and what is more alarming is that almost 50% of the strikes in 2014 were unprotected.⁴⁰⁴ There is a breakdown in the collective bargaining system.⁴⁰⁵

Disputes between the employer and employee should be determined using collective bargaining and if the negotiations reach a stalemate, workers are empowered to use collective action to offset the bargaining power of the employer.⁴⁰⁶ “By withholding their labour, employees hope to bring production to a halt, causing him to lose business and to sustain overhead expenses without the prospect of income, in the expectation, that should the losses be sufficiently substantial, the employer will acceded to their demands.”⁴⁰⁷ A trade union is a voluntary association, the relationship between a union and its members is governed by the union’s constitution, each member submits to this constitution when they take up membership.⁴⁰⁸ Trade unions have to educate their members about the right to strike and the

³⁹⁸ Khumalo (note 101 above; 588).

³⁹⁹ Khumalo (note 101 above; 588).

⁴⁰⁰ Khumalo (note 101 above; 589).

⁴⁰¹ Khumalo (note 101 above; 595).

⁴⁰² ‘Why are strikes so violent’ available at <http://www.iol.co.za/news/opinion/why-striker-are-so-violent-171501>, accessed on 04 August 2017.

⁴⁰³ Ibid.

⁴⁰⁴ K Calitz ‘Violent, frequent and lengthy strikes in South Africa: is the use of replacement labour the problem?’ 2016 28:3 *SAMLJ* 437.

⁴⁰⁵ Calitz (note 404 above; 436).

⁴⁰⁶ Gericke (note 382 above; 566).

⁴⁰⁷ *VNR Steel (Pty) Ltd v NUMSA* 1995 ILJ 1483 (LAC) 49.

⁴⁰⁸ Gericke (note 382 above; 581)

fact that protection may be lost if they engage in unruly violent strikes. The Constitutional Court per Mogoeng CJ held that exceptional measures are required to prevent potential unforeseen harm that may arise as a result of the strike.⁴⁰⁹ Trade unions have to take precautionary measures to prevent damage during their demonstration and they have an obligation to exercise the right to strike peacefully or risk the loss of the constitutional protection of this right and further, that they may be held liable for damages in terms of section 11 of the RGA.

Section 39 of the Constitution provides that the courts have a duty to develop the common law, developing the crime of public violence would provide an effective tool for addressing strike violence.⁴¹⁰ Harsher sentences for this offence would also work as a deterrence factor for striking employees. Expanding the crime of public violence needs to be accompanied by the establishment of Specialised Industrial Action Protection Unit to protect from criminal conduct during industrial action.⁴¹¹

It is clear from the cases discussed in Chapter two that court orders are ignored and not adhered to this calls for the legislature to review this remedy and grant the labour courts greater powers in dealing with strike violence. The LRAA does attempt to do this but falls short of giving the labour courts the power to intervene and suspend a violent strike (without being approached by the parties engaged in the dispute to do so). Further, with regards to the use of replacement labour the LRAA does provide some relief in that the court may suspend the use of replacement labour. The legislature should have amended the section to prohibit the use of replacement labour during industrial action.

In India the situation with regards to violence and aggression during industrial action is like that of South Africa. There is need to enhance the labour laws in both countries to ensure that there are fewer incidences of violence in the future.

The history of violence in South Africa and how the prevailing socio-economic and political problems contribute to strike violence that being so there is a need to respect the rule of law.

⁴⁰⁹ Garvas supra note 29 at 38.

⁴¹⁰ Khumalo (note 101; 580).

⁴¹¹ Brand note 380 above.

Violence is a barrier to the peaceful exercise of the right to strike and is a renunciation of the rights of those whom violence is directed. Non-protesting workers; replacement workers and innocent third parties are the victims of strike violence how can they be afforded more protection. During the security strike in 2008 a large number of the 69 people who were killed were replacement workers.⁴¹² The leading causes of violence during industrial action is the confrontation between striking workers (who are demanding most of the time a higher wage and improved working conditions) and unemployed job seekers who are so desperate they are willing to place their lives at risk.⁴¹³ The use of replacement labour albeit limited should be ban it is inconsistent with constitutionally guaranteed right to strike, further it tilts the scales in favour of the employer and places the workers in a weak bargaining position.⁴¹⁴ The author of this dissertation recommends that the legislature should amend the LRA to ban the use of replacement labour in the case of defensive lockouts.⁴¹⁵

Strike violence is a symptom of the failure of the collective bargaining system more needs to be done strengthen effective collective bargaining and as a result reduce the number of protracted violent strikes. The available legal remedies are reactive more needs to be done to encourage good faith negotiations between the employer and the employees.⁴¹⁶ The LRA alone cannot address all the causes and challenges of violent strikes. A holistic approach is needed in combating violence during strike; various measures must be put in place to better police strikes without stifling the right to strike as well as protecting the rights on non-striking workers and innocent bystanders.

The right to strike is accepted internationally through the ILO Conventions 87 and 98. In South Africa the right to strike is a fundamental right that empowers effective collective bargaining. The right to strike enables workers to attempt to restore the inequalities created by socio economic factors. The right to strike can only be exercised if certain procedural and substantive requirements are met. The legacy of apartheid still lingers workers use violence as a tool to achieve goals. Violent and disruptive strikes have become the norm in this country, the duration of strikes is also increasing the longer the strike the more violent it becomes resulting in death injury and damage to property. It is these increasing levels of violence that indicate the ineffectiveness of the LRA in curbing violent strikes. The powers of the Labour court do not

⁴¹² Calitz (note 404 above; 440).

⁴¹³ Calitz (note 404 above; 441).

⁴¹⁴ Calitz (note 404 above; 459).

⁴¹⁵ Calitz (note 404 above; 489).

⁴¹⁶ Rycroft (note 67 above; 199).

provide positive solutions to the problem. Unions cannot stand back when called upon to take responsibility for the conduct of their members. Myburg asserts that the rule of law is undermined by unions. In *Modise v Blackheath Spar*⁴¹⁷ striking workers wilfully disobeyed an interdict prohibiting a strike. The court held that “obedience to a court order is foundational to a state based on the rule of law” the Labour Courts should apply a strict approach when dealing with interdicts. The failure to comply with interdicts undermines the standing of the Labour Court. Further the blatant disregard of court orders distorts collective bargaining and leads to economic duress where the employer is forced to sign a wage agreement of which the wage level does not reflect the forces of supply and demand, in order to bring an end to the violent strike.⁴¹⁸ The courts have made it clear that unions must be held accountable where they deliberately fail to comply with the provisions of the LRA and engage in violent unprotected strikes. An interdict is only effective if the unions and its members comply with the court order. Unions and their members need to respect the rule of law in order for interdicts to be an effective remedy for restricting strike violence.

Section 68(1) (b) of the LRA grants the Labour Court jurisdiction to grant an order for “just and equitable compensation” for any loss suffered as a result of an unprotected strike, Gericke writes that “a lack of accountability in the decisions and actions of trade unions may end in financial loss and unemployment of its members”. In *Tsogo Sun Casinos (Pty) Ltd*⁴¹⁹ the court held that “had the applicant not specifically confined the relief sought to an order for costs on the ordinary scale, I would have had no hesitation in granting an order for costs as between attorney and own client”⁴²⁰ This shows a shift in the courts attitude. In *In2Food (Pty) Ltd v Food & Allied Workers Union & others*⁴²¹ the court went further and found the union in contempt of the court order of the Labour Court and ordered that it pays a fine of R500 000 as well as costs on attorney and client scale. Section 68(1) (b) of the LRA is an effective deterrent and employers must use it to claim compensation from unions where strikes are unprotected and are violent and disruptive. However this remedy is only available once the damage has occurred. Strike violence has a negative impact on the economy the focus should be on preventing violent strikes and encouraging negotiation and arbitration when the employer and workers cannot reach an agreement

⁴¹⁷ (2000) 5 BLLR 496 (LAC).

⁴¹⁸ Myburgh (note 124 above; 2).

⁴¹⁹ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino* supra note 123.

⁴²⁰ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino* supra note 123 at 14.

⁴²¹ (2013) 34 ILJ 2589 (LC).

The right to strike is important and must be protected only where the procedural and substantive requirements have been adhered to by the union. Where a union fails to prevent an unprotected strike or fails to prevent violent strike action the courts decisions in *Algoa Bus Company v SATAWU and others* and *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Worker's Union and Others* must be followed. The Labour Courts approach of awarding small amounts does not discourage unions and their members from continuing unlawful conduct. The Labour Courts must award substantial amounts for unprotected strikes in order to send a strong message to unions and their member.

*SATAWU v Garvas*⁴²² establishes an additional remedy; the claim for damages in terms of section 11(2) of the RGA provides recourse for victims of riot damage. The Constitution places an obligation on unions to ensure that their gatherings are peaceful and free of violence. Despite the court's ruling violent strikes continue to occur. The RGA only regulates protected industrial action; it needs to be amended to extend to unprotected industrial action. There is a need for proactive measures before the riot damage and violence occurs. The LRA must be amended to empower the Labour Court to declare industrial action unprotected; to suspend and or terminate industrial action that threatens lives.⁴²³

⁴²² Garvas supra note 52 at 10.

⁴²³ Tenza (note 51 above; 280).