



A critical analysis of violent strikes in South Africa

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Declaration

I, Shakti Jainarain do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

Signed at Durban on this the Day of in the year

Signature:

Dedication

This dissertation would not be possible without the love, support and encouragement of my beautiful wife Yusthie Jainarain. In honour of my late grandparents, Mr and Mrs Ramsarup Lachman who formed the bedrock of my academic aspirations. I also wish to acknowledge my mother Renuka Jainarain and brother Sarish Jainarain.

I am indebted to the astute supervision of Ms Rowena Bernard and Mrs Angela Crocker who consistently guided me in the right direction and did not lose hope in my endeavours. This dissertation would not be possible without their guidance and supervision.

Abbreviations

Constitution	Constitution of the Republic of South Africa Act 108 of 1996.
CCMA	Commission for Conciliation Mediation and Arbitration.
COSATU	Congress of South African Trade Unions.
EFF	Economic Freedom Fighters.
ICA	Industrial Conciliation Act 11 of 1924.
LRA	Labour Relations Act 66 of 1995.
LRA 1956	Labour Relations Act 28 of 1956.
LRAA	Labour Relations Amendment Act 8 of 2018.
NACTU	National Council of Trade Unions.
NUM	National Union of Mineworkers.
NUMSA	National Union of Metalworkers South Africa.
RGA	Regulation of Gatherings Act 205 of 1993.
SACCOLA	South African Employers Consultative Committee On Labour Affairs.
SACTWU	South African Clothing and Textiles Workers Union.
TES	Temporary Employment Service.

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ABSTRACT:

Violence during strikes is a major problem in South Africa. As time progresses, details of violent strikes are becoming more prevalent and alarming. Violent strikes impact the economy and investment. In addition, violent strikes wreak havoc in the workplace, disrupting business, posing a threat to human life, employment security, and property. This dissertation analyses the laws that regulate strikes. It will be argued that the Constitution and the Labour Relations Act are premised on peaceful strike action. Therefore, this dissertation will consider the social, political and economic factors that cause strikes to become violent as well as factors such as casualization and non-standard employment and its link to strike violence. This dissertation will also consider solutions available to deal with violent strikes which are comprised of legal mechanisms and how employers and employees can adapt their negotiation skills to avoid violence.

CHAPTER ONE:

INTRODUCTION

1.1 Background:

Violence in the workplace during strikes has come to represent the hallmark of strikes in South Africa. According to Calitz “violence has also become endemic during strikes in South Africa, the most notorious example being the strike at Lonmin mine in 2012 during which 44 people were killed.”¹

The extent of violence during strikes is alarming and grim. In *Food and Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* the workers conspired to assassinate a manager.² In the same case, the workers engaged in egregious acts of violence such as the burning of motor vehicles and homes and the killing of witnesses.³ Data from the South African Institute of Race Relations reflects that “181 fatalities occurred in strike violence between January 1999 and October 2012. A further 313 people were injured and over 3058 arrests made during that time period.”⁴ Recent statistics from the Department of Labour indicate that between 2005 and 2015 there were approximately 85 strikes per year.⁵ In addition, during the same period at least 5.2 million work days were lost, and in 2015 alone, 55 percent of strikes did not comply with the law.⁶

Violent strikes have a negative effect on the economy and investment. It was reported in the Mail and Guardian that, “Wildcat strikes across the mining sector have cost South Africa more than an estimated R10-billion in lost production. From an ever-widening

¹ K Calitz “Violent, frequent and lengthy strikes in South Africa: Is the use of replacement labour part of the problem?” 2016 *South African Mercantile Law Journal* 436,437.

² *Food and Allied Workers Union on behalf of Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC).

³ Ibid.

⁴ Nearly 200 killed in strike action in 13 years published on the 21 January 2013 available at [http://irr.org.za/reports-and-publications/media-releases/Strike Violence.pdf/view](http://irr.org.za/reports-and-publications/media-releases/Strike%20Violence.pdf/view), accessed on 14 March 2014.

⁵ Annual Industrial Action Report 2015 available at <http://www.labour.gov.za/DOL/documents/annual-reports/industrial-action-report/2015/industrial-action-report-2015>, accessed on 07 June 2016.

⁶ Ibid 35.

trade deficit to lower expectations of tax revenue, a volatile rand, and risks for employment, there are few aspects of the economy that have been left unscathed.”⁷

The right to strike is a constitutionally guaranteed right.⁸ To enable the right to strike, the Labour Relations Act⁹ creates a legislative framework for protected strikes. It will be shown that despite legislation, strikes in South Africa are excessively violent causing harm to property, injury to people and in some cases, even death.

This dissertation will analyse the causes of violent strikes, arguing that the social, economic and political circumstances of South Africa are significant contributing factor as well as systemic factors like casualization and non-standard employment. This dissertation will also highlight how the use of replacement employees during a strike leads to increased strike violence.

From a historical standpoint, violent strikes in South Africa are not new and can be attributed to the social, economic and political circumstances that prevailed at the time. This dissertation considers the solutions available to address the issue of violent strikes which include applying for an interdict; having a strike declared unprotected; conducting a secret ballot before commencing with a strike and the role of the CCMA in rendering an advisory arbitration award in the public interest.

Due to the dynamic nature of strike violence, it will be argued that the solution is not only a legal one but rather a hybrid between the law and involvement from the relevant stakeholders to avoid violent strikes. It will be argued that whether a strike results in violence is largely dependent on the manner and form in which the employer and employees negotiate.

1.2 Research questions:

This paper will endeavour to examine:

- 1.2.1 What legislation regulates strikes, and is such legislation adequate in achieving its purpose?
- 1.2.2 Can strike violence be attributed to shortcomings in the law or are there further contributing factors?

⁷ “Midterm budget: strikes cost the economy dearly” *The Mail & Guardian* 25 October 2012, available at <https://mg.co.za/article/2012-10-25-strikes-cost-economy-dearly>, accessed on 13 May 2013.

⁸ The Constitution Act 108 of 1996, Section 23 (2).

⁹ Act 66 of 1995.

- 1.2.3 Is it possible for strike violence to be prevented, and if so, what means can be used to curtail strike violence?
- 1.2.4 How can labour dispute resolution mechanisms and the parties involved affect the way in which a strike plays out?

1.3 Objectives:

This paper aims to:

- 1.3.1 Determine whether strike violence in South Africa is a new phenomenon.
- 1.3.2 Identify the law that regulates the right to strike in South Africa and whether this legal framework is adequate in its purpose.
- 1.3.3 Determine whether the violence that occurs during a strike can be attributed to the social, political and economic circumstances of South African.
- 1.3.4 Identify the legal remedies available to employers affected by strike violence.

1.4 Research Methodology:

The desktop-based method of research will be used in this paper. This entails the use of and reference to textbooks, journal articles, statutes, and law reports. This paper endeavours to cite sources accurately and will also refer to newspaper articles and reliable internet resources.

1.5 Significance of the study:

Violent strikes have become alarmingly prevalent in recent years. Violence in the workplace poses a risk to human life, property, job security, and to the economy, such as loss of production, loss of permanent employment and investment in the country.¹⁰ It is, therefore, significant to analyse why strikes escalate to violence and the impact it has on the economy. It is also significant for employers, employees and their representatives to understand the laws that regulate strikes to ensure peaceful industrial action.

The impact of this dissertation is to shift thinking about the causes of strike violence, arguing that factors such as bargaining power, inequality, casualization and non-standard forms of employment have an influence in determining the way in which a strike takes place.

¹⁰G Murwirapachena and K Sibanda “Exploring the incidents of strikes in post-apartheid South Africa.” (2014) 13 *International Business and Economics Journal* 553 at 556.

1.6 Structure of the dissertation:

Chapter one introduces the topic and provides a background of violent strikes in South Africa.

Chapter two provides a historical overview of violent strikes, as well as laws implemented to regulate strikes.

Chapter three sets out the legal framework regulating strikes in the workplace. The LRA, the Constitution and the Code of Good Practice that regulate strikes are discussed.

Chapter four looks at the causes of violent strikes. The political, social and economic factors as well as the link between casualization, non-standard employment and the use of replacement employees that prevails in South Africa and how these relate to strike violence are discussed.

Chapter five considers the mechanisms in place to deal with strike violence as well as addressing alternative means of resolving disputes that may lead to violent strikes.

Chapter six will conclude the dissertation and provide recommendations where necessary.

1.7 Conclusion:

Strike violence has reached endemic proportions in South Africa, this has a ripple effect on the economy, employment security and investment. It is therefore necessary to analyse the causes of why strikes become violent and what can be done to prevent such violence. This dissertation will analyse the legislative framework that regulates the right to strike and whether such legislation is adequate in achieving its purpose. It will be demonstrated through desktop research methodology that legislation is adequate in regulating strikes however the legislation is not always adhered to which results in violent strikes. Further that political, social and economic factors result in strikes becoming violent. The recent amendments pertaining to the

secret ballot requirement and advisory arbitration in the public interest will also be discussed. This dissertation will argue that an integrative approach is required between the law on one hand and the relevant stakeholders to ensure orderly industrial action.

CHAPTER TWO:

THE HISTORY OF VIOLENT STRIKES IN SOUTH AFRICA

2.1 Introduction and background

The earliest recorded strike took place in ancient Rome in 311BC where flute players refused to work because they were not allowed to consume meals in the Temple of Jupiter.¹¹ The Roman flute players stopped working until their demands were satisfied.

The United Kingdom during the 19th century was home to industrial growth which is known today as the “industrial revolution”.¹² “As the 19th century progressed, the strike became more central to working-class activism.”¹³ During this period, strikes were known to achieve political aims.¹⁴ Strikes were defined as “being a form of social activism, strikes became the dominant form of social conflict in developed industrial society.”¹⁵ Strikes in the United Kingdom, arose as a result of high prices, industrial depression, unemployment and social ills such as tuberculosis.¹⁶ These strikes unfortunately were not well documented, proper record keeping only started after 1888.¹⁷ It is therefore difficult to say with accuracy what the causes of strikes were, rather, “strikes apparently change and fulfil diverse functions and respond to different problems and stimuli over different stages of industrial development.”¹⁸

This chapter focuses on major violent strikes that occurred in South African history arguing that strikes arose due to the social, political and economic circumstances of the time. Legislation that was promulgated to deal with violent strikes is also discussed demonstrating that despite the legislative framework, strikes continue to be violent. Through the changing course of history in South Africa, the political landscape transformed resulting in a constitutional democracy with a comprehensive labour law framework that aims to regulate strikes. Despite the panoply of legislative measures violent strikes continue relentlessly.

¹¹ R Reid “Strikes” (1910) 30 *Canadian Law Times* 749.

¹² E Cronin “The Peculiar Pattern of British Strikes since 1888” (1979) 18(2) *Journal of British Studies* 118 at page 122.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid* 123.

¹⁶ *Ibid* 126.

¹⁷ *Ibid* 123.

¹⁸ *Ibid* 130.

2.2 Overview of violent strikes in South Africa:

Due to the discovery of precious minerals in the interior of South Africa in the late 1800's, industrialisation grew.¹⁹ It became necessary to supply the growing industry with cheap labour. This led to black men migrating to the interior of South Africa in search of work. In the mines, there was a need for skilled workers which resulted in white workers immigrating to South Africa from the United Kingdom and Australia.²⁰ With the arrival of white workers, the workplace changed. The division between the skilled white worker and the unskilled black worker led to friction. Like the experiences of the United Kingdom during the 19th century, the issue of race in South Africa was a social and political issue that caused strikes.

In the late 1800's industry in South Africa grew, especially in the mines. The discovery of diamonds in 1867 as well as the discovery of gold in 1886,²¹ created a demand for skilled labour. Since many white workers had the necessary skills, they enjoyed a sense of superiority in the workplace and sought to preserve their status.²² In the early stages of industrialisation, this factor served as an impetus for conflict between black and white workers. "Therefore, the first two decades of the 20th century South African labour history were characterised by endemic labour unrest and industrial strike action."²³ Which, in this particular context was attributed to "race forming the underlying base of this militant strike period."²⁴ Bendix argues that the socio-political system is a reflection of the industrial relations system.²⁵

South Africa has a long history of strike violence.²⁶ Workers realised that striking was a means to exercise their rights and to obtain better conditions of employment. Below is a discussion of some of the various strikes that are recorded in South African history.

In 1907, the economic circumstances in the Transvaal²⁷ led to an economic recession. This, accompanied by an abundance of Chinese labourers, triggered violent strikes. Employers hired cheaper paid black workers which aggravated the unemployed white populace and resulted in violent strikes. The striking employees' encountered resistance from the

¹⁹ S Van Velden & W Visser "Strikes in the Netherlands and South Africa 1900 – 1998 a comparison" (2006) 30(1) *South African Journal of Labour Relations* 51 at 52.

²⁰ Ibid 52.

²¹ Ibid 52.

²² Ibid 52.

²³ Ibid, 52.

²⁴ Ibid 52.

²⁵ S Bendix *Industrial Relations in the new South Africa* 3 ed (1996) 75.

²⁶ Ibid.

²⁷ Now known as Gauteng.

government and employers which resulted in nine people dying and hundreds more being injured.²⁸

Due to the poor treatment of mineworkers, a strike erupted in 1913. This strike spread to sympathisers in the mining and railway sectors. The strike was excessively violent resulting in numerous arrests, prosecutions and the deportation of strike organisers to the United Kingdom and Australia. The reason cited for the dissatisfaction amongst employees was job fragmentation where employees job descriptions changed to accommodate the employment of cheaper paid black employees.²⁹ In practical terms, an employee's job description was altered to reduce his expense to the employer which made it possible to employ cheaper paid black employees.

In 1920, the price of gold decreased. The "status quo agreement" of 1918 stipulated that for every seventeenth black worker there would be at least two white workers employed. In addition, during this period white workers earned more than their black counterparts.³⁰ Mine owners sought to economise and considered the retrenchment of white workers, the scrapping of the "status quo agreement" and a reduction of pay for white workers.³¹ Aggrieved by these changes, in January 1922, approximately 25000 white workers on the Rand embarked on a violent strike. In response, the government used force to end the strike. This became known as the "Rand Rebellion" where "153 workers were killed, 500 wounded, 5000 arrested and four strike leaders were hanged for treason."³²

"In the latter part of 1918 and early 1919 black mineworkers embarked on a strike for higher pay and the abolition of the colour bar."³³

According to Joseph, South Africa at "the beginning of the 1900s experienced an endemic of impetuous strike action as a result of dissatisfaction in working conditions."³⁴ Employees used strikes as a means to challenge managerial prerogative and control, and as a tool to advance their interests against the power of employers. Due to the increase in violent strikes the need to regulate such action became necessary as such conduct impacted on the

²⁸ Bendix (note 25;77).

²⁹ Ibid.

³⁰ S Van Velden & W Visser (note 19;55).

³¹ Ibid.

³² Bendix (note 25;79).

³³ Mpfari Budeli "Worker's Right to Freedom of Association and Trade Unionism in South Africa: An Historical Perspective" 2009 *Fundamina* 15-2.

³⁴ Judell-Lesha Joseph "The Effectiveness of South African Labour Legislation in dealing with Mass Industrial Action before and after the Promulgation of the Constitution Act 108 of 1996" (unpublished LLM dissertation, University of KwaZulu-Natal 2016 at page 12).

business of employers as well as the stability of government. Violent strikes persisted in the decades following the 1922 “Rand Rebellion” most notably “in 1946, labour protest spread to the gold mines with a week-long strike by more than 70 000 African miners, which was ruthlessly suppressed by the police.”³⁵

During the 1950’s “Apartheid policies were opposed by township residents through massive stay-aways from work and boycotts of municipal services.”³⁶ The Apartheid system was devised by the National Party after their election victory in 1948. “Apartheid called for the separate development of different racial groups in South Africa.”³⁷ From 1955 “Black labour played a more prominent role in the mounting protest, and there was a wave of strikes by commercial, industrial and service workers on the Rand and in other urban centres.”³⁸

The 1970’s saw an “outburst of strikes by Black industrial workers during 1973-1974, and a huge increase in the level and extent of Black labour unrest during the 1980’s.”³⁹ Violence continued into the new democracy after 1994. The development of strike violence post-democracy will be detailed under 2.4 below. One of the most notable strikes in South African post-democracy was the strike at the Lonmin platinum mine in 2012. Buitendag and Coetzer are of the view that the strike at Marikana “is perhaps only the newest instalment in a century long cycle of industrial action”⁴⁰ in South Africa’s history. It must be accepted therefore that violence in the labour relations context has occurred throughout South Africa’s labour history.

2.3 Early legislation that regulated strikes:

According to Myeza⁴¹ the 1922 rebellion:

...demonstrated the power of unregulated strikes and resulted in the government passing the Industrial Conciliation Act which imposed limitations on the right to strike by making a strike

³⁵ M Beittel “Labour unrest in South Africa, 1870-1990” *Review (Fernand Braudel Center)* (1995) 18 (1) 87-104, 89.

³⁶ Ibid.

³⁷ “A history of Apartheid in South Africa.” Available at <https://www.sahistory.org.za/article/history-of-apartheid-south-africa> accessed on the 31 May 2020.

³⁸ M Beittel (note 34;90).

³⁹ Ibid.

⁴⁰ N Buitendag & N Coetzer “History as a system of wrongs – examining South Africa’s Marikana tragedy in a temporal legal context.” *Strategic Review of Southern Africa* (2015) 37 (2) 94-117, 94.

⁴¹ S.P Myeza ‘*The Extent of the Right to Strike in South African Labour Law.*’ Nelson Mandela Metropolitan University available at: <http://dspace.nmmu.ac.za> accessed on 18 March 2020.

illegal unless the statutory requirements of attempting to settle the dispute in either the industrial council or conciliation board were adhered to.

The Industrial Conciliation Act⁴² (hereafter ICA) was promulgated with the aim of regulating collective bargaining and providing recourse to statutorily enforceable mediation and arbitration. According to Lewis⁴³ “the Industrial Conciliation Act was specifically designed to restrict the militant defensive strategies adopted by South African trade unions in the years before 1922.” The ICA can be regarded as the first legislation that implemented provisions that prevented strikes. The ICA prevented strikes by firstly not including a provision relating to a strike ballot⁴⁴ this meant that unions could not undertake a ballot and therefore it would be unlawful to go on strike as a ballot was a requirement to go on a lawful strike. “The government made sure that no strikes could take place.”⁴⁵ Secondly, municipal workers were also prohibited from striking⁴⁶ and thirdly conciliation boards were established to mediate between employers and employees thus further minimising the possibility of strikes.⁴⁷ However, in as much as the ICA is regarded as an attempt to consolidate industrial relations principles, it excluded black employees from its ambit. It may be argued that the divisions based on race presented themselves in the labour relations context well before the advent of Apartheid in 1948. Bendix points out that this resulted in a “dual set of labour relations which favoured white workers.”⁴⁸ The implementation of the ICA was based on the principle of voluntariness which meant that parties who did not wish to belong to the dispute resolution mechanisms of the ICA did not have to.

During the time of the Rand Rebellion, the government promulgated the Wage Act,⁴⁹ the main purpose of which was to normalise pay for employees regardless of race. It is argued that this was a progressive step towards alleviating the inequalities that plagued the industrial sector. However, the Wage Act of 1925 was a failure because certain jobs were reserved for white employees only. It appeared good in theory, that employees would earn

⁴² Act 11 of 1924.

⁴³ J Lewis “Industrialisation and Trade Union Organisation in South Africa, 1924-55: The Rise and Fall of the South African Trades and Labour Council.” 1984. African Studies Series. Cambridge University Press. ISBN 0 521 26312 3 (hardcovers). ISBN 0 521 3175 8 paperback (South Africa) only.

⁴⁴ C Jordaan & W Upkere “The South African Industrial Conciliation Act of 1924 and current Affirmative Action: an analysis of Labour economic history” *African Journal of Business Management* (2011) 5 (4) 1093-1101 at page 1094.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Bendix (note 25;81).

⁴⁹ Act 27 of 1925.

equally regardless of race, but in practice job reservation excluded black employees completely. It can also be argued that this may have been a measure to create a false sense of equality so that racial domination could be perpetuated.⁵⁰ By 1926 the Mines and Work Regulation Amendment Act⁵¹ was implemented to entrench racial divisions in the workplace through job reservation.

The ICA of 1924 remained largely unchanged until it was amended and became known as the Labour Relations Act 28 of 1956 (hereafter referred to as the LRA of 1956). A notable amendment to the LRA of 1956 was that it made provision for a compulsory secret ballot before workers could engage in a strike.⁵² A secret ballot means that “all members of the union who are eligible to vote must vote either in favour of or against a proposed strike”⁵³. In addition, “black employees were completely excluded from collective bargaining under the LRA of 1956 and therefore could not strike.”⁵⁴ The LRA of 1956, like its predecessor regarded strikes as a “breach of contract which allowed employers to repudiate the employment contract leaving striking employees without protection against unfair dismissal.”⁵⁵ Since the strike ballot was legislated under the LRA of 1956, if there was a failure to hold a ballot the consequence would be that the employees would not be able to go on strike and if they did the employer could dismiss them for breach of contract.

2.4 The development of strike violence in South Africa:

The labour and political uprisings in the 1970's urged the National Party government to rethink its policy on labour law. The LRA of 1956 completely excluded black employees from its ambit.⁵⁶ The Wiehahn Commission was established to evaluate labour policies and to make recommendations to the government. The Wiehahn Commission recognised that there were certain prerequisites to ensure a peaceful industrial relations system. This entailed that employees could join trade unions with regulation by the relevant authorities. The Commission recommended that employees be permitted to participate in collective bargaining with the

⁵⁰ Bendix (note 25;81).

⁵¹ Act 25 of 1926.

⁵² Section 65 (2) (b).

⁵³ 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* Volume 211 at 214.

⁵⁴ J Myburgh “100 Years of Strike Law” (2004) 25 *Industrial Law Journal* 962, 964.

⁵⁵ Ibid.

⁵⁶ Ibid.

employer. Importantly, the Commission recognised that workers could legitimately go on strike.⁵⁷

The Wiehahn Commission made numerous recommendations for the change of the labour relations system in South Africa.⁵⁸ The commission recommended that the recognition of non-white employees' rights that could be made justiciable by a dedicated Industrial Court. This served as the impetus to intensify change in the socio-political context. Employees recognised the benefits attained using protest in the labour relations context and they utilised the same approach in challenging the inadequacies of social inequality.

Although the Wiehahn commission of enquiry was revolutionary, it did not mark the end of industrial unrest in South Africa. After the Wiehahn commission of enquiry and during the 1980's, trade unions in South Africa grew. The reason for the growth of trade unions can be attributed to the political system that prevailed at the time. According to Myburgh, "the creation of black trade unions in South Africa in the 1980's coincided with a decade of political turmoil."⁵⁹

During the 1980's trade unions took on the role of fighting for social justice and political aspirations such as the end of Apartheid. "The growth in size and proportion of the trade union movement in South Africa over a relatively short period of time has been spectacular. It has resulted in changes to employment practices and the belief that unionism and wider political trends are indivisible."⁶⁰

In 1985 the Congress of South African Trade Unions (COSATU) was formed. COSATU, a labour federation, used the mass mobilisation of workers to protest against Apartheid.⁶¹ The National Union of Mineworkers (NUM), South African Clothing and Textile Workers Union (SACTWU) and National Union of Metalworkers South Africa (NUMSA) were amongst the biggest unions in South Africa that supported COSATU in mass action against the government and employers.⁶²

COSATU and its affiliates organised the largest strike in South African history in 1987 and 1988. In 1988 a three-day national strike was organised which involved three

⁵⁷ N Wiehahn *The Complete Wiehahn Report* Johannesburg, Lex Patria, 1982 xi.

⁵⁸ Myburgh (note 53;964).

⁵⁹ Myburgh (note 53;965).

⁶⁰ J Barret & Finbarr-Mullins "A South African trade unions: a historical account, 1970-1990" (1990) 113 *Monthly Labor Review* 25.

⁶¹ Ibid 26.

⁶² Ibid 30.

million employees and was the largest ever of its kind.⁶³ These strikes became violent and in response, employers and the government made a concerted effort to contain union activity.⁶⁴

The government made changes to the Labour Relations Act of the time⁶⁵ which made it difficult for trade unions to embark on strike action. The government played a repressive role which caused more protest and labour militancy.⁶⁶ In South Africa, trade unions were a powerful force to abolish Apartheid.⁶⁷

In the years that followed, due to the increase of strikes, the Labour Relations Act was again amended⁶⁸ to restore the Labour Relations Act to its pre-1988 version. The Amended Act⁶⁹ was a product of negotiations between the state, South African Employers Consultative Committee on Labour Affairs (SACCOLA), COSATU and National Council of Trade Unions (NACTU). “This set a pattern of labour laws being the outcome of negotiations between the main parties.”⁷⁰ Trade unions provided the impetus for the change of legislation through strikes. In the years that followed, there were no new changes to the labour laws. Between 1990 and 1994 there was significant political change in South Africa with the unbanning of political organisations “culminating in the elections for a new democratic government established in April 1994.”⁷¹

Seven months after the new government took control of South Africa, “a Ministerial Legal Task Team was appointed on 9 August 1994 to draft a new Labour Relations Act,”⁷² which was promulgated on the 12th December 1994.⁷³ The new Labour Relations Act,⁷⁴ with regard to the law on strikes, will be discussed in detail in chapter 3.

Rycroft, commenting on the LRA posited that the “main thrust of the Act is to deal with what is now seen as an unacceptably high incidence of unprocedural and unnecessary strikes.”⁷⁵ However, since its inception it did little to curtail the level of violence during strikes. Recent history depicts that strikes are more common and violent than ever before.

⁶³ Ibid 28.

⁶⁴ Ibid 27.

⁶⁵ Act 83 of 1988.

⁶⁶ Barret & Finbarr Mullins (note 59;27).

⁶⁷ Ibid 30.

⁶⁸ Act 9 of 1991.

⁶⁹ Ibid.

⁷⁰ A Rycroft “Labour” (1996) 7 *South African Human Rights Yearbook* 138; 140.

⁷¹ M Finemore & R van Rensburg *Contemporary Labour Relations* (1999) 42.

⁷² Ibid 141.

⁷³ Ibid.

⁷⁴ Act 66 of 1995.

⁷⁵ Rycroft (note 69;145).

In 2006 a strike in the security industry became violent. Fifty people were killed, and property damages cost approximately R1.5 million.⁷⁶ In 2012, at the Lonmin platinum mines in Marikana, thirty-six people were killed and the strike damage to property was excessive.⁷⁷

The main reasons for the strike at Marikana were union rivalry and the demand for higher wages. The extent of the strike at Marikana led to a commission of enquiry being established to probe the reasons for the violence at Marikana and to make recommendations to prevent future violence.⁷⁸ The recommendations made by the Marikana Commission of enquiry are detailed in Chapter 5.

In 2012 truck drivers went on strike for higher wages.⁷⁹ This strike attracted a lot of media coverage, highlighting damage to property and harm to workers. During 2012, in De Doorns, Western Cape, farm workers embarked on a violent strike. The reason for the strike related to higher wages. Property worth millions was destroyed by the strikers.⁸⁰

2.4.1 Incidences of strike violence reported in the South African law reports.

The incidence of strike violence has not declined in recent years. The law reports are laden with cases of violent strikes. In *Verulam Sawmills (Pty) Ltd v AMCU*⁸¹ employees were reported to be carrying weapons, stopping vehicles, removing passengers from public transport as well as blocking entrances to and from the employer's premises. The employees in this case also damaged vehicles and caused the workplace to close during the strike.⁸²

The court was required to determine whether a punitive cost order should be awarded against the trade union for not complying with the picketing rules that were agreed upon with the employer before the strike could take place (please see Chapter 3 below for a discussion on picketing rules). The evidence presented to the court indicated that the trade union organiser of the strike did not take all reasonable steps envisaged in the Labour Court order⁸³ to ensure that the employees did not commit acts of violence, damage to property and the blocking of roads.

⁷⁶ E Manamela & M Budeli "Employees right to strike and violence in South Africa" (2013) 46 *Comparative and International Law Journal of South Africa* 322.

⁷⁷ *Ibid* 323.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*.

⁸⁰ *Ibid*.

⁸¹ (2016) 37 ILJ 246 (LC).

⁸² *Ibid* paragraphs [6] and [7].

⁸³ *Ibid* paragraph [21].

The court adopted the principle of the *Tsogo Sun Casinos (Pty) Ltd t/a Monte Casino v Future of South African Workers Union*⁸⁴ case which determined that unions can be held liable for the violent conduct of their members during a strike by stating:

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.⁸⁵

In *Verulam Sawmills* punitive costs were awarded against the trade union for being “vexatious and unreasonable.”⁸⁶ The judge commented that violent strikes constitute “economic duress”⁸⁷ which gives employees an unfair advantage during collective bargaining. It is also apparent from this judgment that unions and their members will be held liable for not taking reasonable steps to ensure that violence does not occur, and picketing agreements are complied with.

In *Gri-Wind Steel SA v AMCU*⁸⁸ the court noted the “alarming levels of violence.”⁸⁹ Workers blocked intersections, burnt tyres on the road and committed assault. In this case the employer brought an application to hold the trade union and its members in contempt of court for not adhering to a Labour Court order that prevented violence. The court set out the legal principles for holding parties in contempt of court which entails that “proof of contempt of a court order requires, in particular, proof of the order, of due service on the relevant party, and of deliberate wilful disobedience. Moreover, there must be proof beyond a reasonable doubt.”⁹⁰

In the *Gri-Wind Steel* case the court was not persuaded that the union or its members wilfully disobeyed the court order which resulted in the application being dismissed. This was because the Labour Court order did not specify precisely what steps the union ought to take to prevent employees from undertaking unlawful activity. Steenkamp J noted that the notice of motion drafted by the employer’s representatives was not adequate in specifying what the union should do to prevent violence, the Labour Court order did not impose obligations on the union.⁹¹ The court however made clear its disdain for strike violence.

⁸⁴ (2012) 33 ILJ 998 (LC).

⁸⁵ Ibid paragraph [14].

⁸⁶ Ibid paragraph [22].

⁸⁷ Ibid paragraph [15].

⁸⁸ (2018) 39 ILJ 1045 (LC).

⁸⁹ Ibid paragraph [18].

⁹⁰ *Fakie NO v CCH Systems (Pty) Ltd* (2006) SA 326 (SCA), paragraph [42].

⁹¹ *Gri-Wind Steel Supra* paragraph [21]

An analysis of case law indicates that the courts have a low level of tolerance to strike violence. In *KPMM Road and Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union*⁹² the employees went on a strike that became violent resulting in threats of harm, injury to property and the blocking of roads. During the violent strike, the employer applied to the Labour Court for an interdict to restrain the striking employees from acts of violence and for the trade union to prevent its members from committing any further violence or damage to property.

The Labour Court granted an order restraining striking workers from committing acts of violence and damage to property as well as requiring the trade union to take reasonable steps to persuade striking employees from committing acts of violence. This court order did not stop the striking employees from committing acts of violence and damage to property.

When the strike came to an end the employer applied to the Labour Court to hold the trade union and employees in contempt of court for not adhering to the interdict. The court used the doctrine of common purpose to conclude that the employees, by virtue of being on strike were complicit in the acts of violence.⁹³ In addition, the court also found that the trade union did not take all reasonable steps to persuade its members from engaging in acts of violence.⁹⁴

The court condemned violence stating that “this kind of behaviour deserves no constitutional protection and should be completely rooted out of the employment environment.”⁹⁵ The court expressed its dissatisfaction at the commonality of violent strikes by stating: “This court is inundated with applications by employers seeking to interdict and stop unlawful conduct, violence and intimidation in the course of protected strike action.”⁹⁶

In conclusion the court found that the trade union and employees were guilty of contempt of court. The trade union received a fine of R1000 000.00 suspended for three years provided that the union was not found guilty of being in contempt of court. The employees were fined R1000.00 each which was deductible from their salaries.

⁹² (2018) 39 ILJ 609 (LC).

⁹³ Ibid paragraph [40].

⁹⁴ Ibid paragraph [51].

⁹⁵ Ibid paragraph [1].

⁹⁶ Ibid paragraph [5].

Dissatisfied by the outcome of the Labour Court, the union appealed to the Labour Appeal Court in *Association of Mineworkers & Construction Union v KPMM Road & Earthworks (Pty) Ltd*⁹⁷. The Labour Appeal Court first addressed the issue of whether the employees and the trade union were in contempt of court.

Counsel for the employer conceded that there was no legal or factual basis for the employees to be guilty of contempt of court.⁹⁸ The only issue before the court was whether the trade union was guilty of contempt for breaching the Labour Court order. The court evaluated this question by following the principle in the *Fakie NO v CCII Systems* judgment,⁹⁹ specifically whether the trade union was wilfully or in bad faith, defiant of the Labour Court order.

Upon analysing the Labour Court order Davis JA established that the Labour Court order was too vague. According to the Labour Appeal Court the words in the Labour Court order was open to different interpretations.¹⁰⁰ The court could not conclude that the trade union wilfully and in bad faith defied the court order.

Although the union was absolved of liability in respect of being in contempt of court, Davis JA emphasised the importance of drafting correct notice of motion documents to be lodged with the court when applying for an interdict to restrain striking employees from engaging in unlawful acts.¹⁰¹

Violence exhibited by striking workers has reached a point where workers blatantly disregard the rule of law. This was evident in *Pik-it-up Johannesburg (Pty) Ltd v South African Municipal Workers Union*¹⁰² where workers trashed the streets by overturning bins and placing trees and debris on the road. The workers went so far as to try and intimidate the presiding judge which resulted in the court having to clear the gallery of striking workers.¹⁰³

Employers continue to suffer economic losses due to violent strikes. In *National Union of Mineworkers obo Shayi v Sishen Iron Ore Company (Pty) Ltd*,¹⁰⁴ the employees brought an unfair dismissal application to the Labour Court. The employees later conceded during the Labour Court trial that the strike was unprotected. Evidence led by the employer's

⁹⁷ (2019) 40 ILJ 297 (LAC).

⁹⁸ Ibid paragraph [10].

⁹⁹ Supra.

¹⁰⁰ Ibid paragraph [18]

¹⁰¹ Ibid [19].

¹⁰² (2016) 37 ILJ 1710 (LC).

¹⁰³ Ibid paragraph [23].

¹⁰⁴ (JS318/13) [2017] ZALCJHB 217 (30 June 2017).

witnesses relating to the violence and economic losses sustained during the unprotected strike was not challenged. The fact that the employees ignored the Labour Court interdicts was also unchallenged. The violence during the strike comprised of workers using heavy earth moving machinery to knock down fences.¹⁰⁵ It was unchallenged evidence before the court that the employer lost approximately US \$ 14 000 000 per day due to strike violence.¹⁰⁶ The law reports indicate that workers armed with weapons such as knobkerries, sjamboks and sticks is the norm. Assault, intimidation and vandalism are also commonly practiced during violent strikes.¹⁰⁷

The frequency of violent strikes has led the courts to become more dynamic in their approach to dealing with strike violence. To deal with the regularity of violent strikes the judiciary is moving towards declaring protected strikes unprotected because of the level of violence during the strike. Declaring protected strikes unprotected will be discussed in detail in chapter 5.

The issue of union liability for strike violence was decided in the matter of *South African Transport & Allied Workers Union & Another v Garvas*¹⁰⁸ (hereafter referred to as the *SATAWU constitutional court decision*). In this case members of the union SATAWU embarked on a protected strike which complied with the procedures of the LRA (see chapter 3 below for a discussion of the procedural requirements to embark on a strike). It is important to note that this matter was decided in the context of the Regulation of Gatherings Act 205 of 1993 (hereafter referred to as the RGA). During the strike the members of SATAWU became violent and as a result widespread damage occurred to businesses in the vicinity of the gathering including the looting of street vendors, damage to property, motor vehicles and the death of fifty people. Before organising the gathering SATAWU complied with the procedural requirements of the RGA, however, violence ensued. Members of the public who suffered damages as a result of the violent gathering united and instituted a claim of damages against SATAWU, firstly under the RGA and alternatively under the common law.

The RGA was specifically promulgated to regulate public gatherings and is premised on the notion of the right to gather, assemble and demonstrate. According to the RGA “every person has the right to assemble with other persons and to express his views on

¹⁰⁵ Ibid paragraph [41].

¹⁰⁶ Ibid paragraph [48].

¹⁰⁷ For a more recent example see *Richfield Graduate Institute of Technology v Private Schools & Allied Workers Union* (J1049/17) [2017] ZALCJHB 236 (13 June 2017) at paragraph [10].

¹⁰⁸ (2012) 33 ILJ 1593 (CC).

any matter freely in public and to enjoy protection of the State while doing so.”¹⁰⁹ The RGA states unequivocally that the right to gather, assemble and demonstrate shall be done “peacefully and with due regard to the rights of others.”¹¹⁰

If a gathering result in “riot damage” any person or organization may be found liable. The RGA defines riot damage as: “any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, immediately before, during or after, the holding of a gathering.”¹¹¹ follow.

The Constitutional Court was tasked with determining firstly: “what section 11 (2) means. In other words, does it create a real defence that meets the constitutional requirement of rationality?”¹¹² secondly, whether the defence provided for in section 11 (2) limits the right to freedom of assembly which is guaranteed in section 17¹¹³ of the Constitution and if so whether this was a justifiable limitation.¹¹⁴ The union on the other hand persistently maintained that section 11 (2) of the RGA should be declared inconsistent with section 17 of the Constitution and that the defence created in terms of the RGA was an insurmountable defence and would have a “chilling effect”¹¹⁵ on section 17.

The Constitutional Court found that section 11 (2) (a), (b) and (c) are interrelated¹¹⁶ and must be read together which creates a composite defence against “riot damage” that is capable of being proven and not “illusory”¹¹⁷ as the trade union proposed. Furthermore, that section 11 (2) (b) does not interfere with section 17 of the Constitution. The crux of the Constitutional Court decision was that the trade union ought to have reasonably foreseen the possibility of damage and did nothing to prevent it which resulted in SATAWU being held liable for riot damages. The *SATAWU* Constitutional Court decision makes it possible for trade unions to be held liable for damages caused during a strike under the auspices of the RGA. This includes claims brought by third parties.

¹⁰⁹ Preamble to the RGA.

¹¹⁰ Ibid.

¹¹¹ Section 1 of the RGA.

¹¹² *Satawu v Garvas* supra paragraph [4].

¹¹³ Section 17 of the Constitution of the Republic of South Africa Act 108 of 1996 provides that “everyone has the right, peacefully and unarmed, to demonstrate, to picket and to present petitions.”

¹¹⁴ *Satawu Constitutional court* Paragraph 26.

¹¹⁵ *Supra* paragraph [11].

¹¹⁶ Ibid paragraph 42.

¹¹⁷ Ibid paragraph 72.

In the matter of *Mahlangu v South African Transport and Allied Workers Union, Passenger Rail Agency of South Africa*¹¹⁸ the plaintiff, Ms Mahlangu instituted action against the South African Transport and Allied Workers Union (hereafter referred to as SATAWU) under the RGA. The plaintiff secured temporary employment as a replacement employee at a company in Springs during a nationwide strike organised by SATAWU in 2006.

The plaintiff was accosted by members of SATAWU outside her workplace in Springs. The members of SATAWU were armed with sticks and sjamboks. The aim was to have the plaintiff travel with them to Johannesburg. When the group of SATAWU members and the plaintiff boarded a train at Springs, the plaintiff was stripped naked, assaulted with weapons and thrown off the moving train. The plaintiff sustained injuries and therefore instituted an action for damages against SATAWU under section 11 of the RGA.

The court narrowed down the issues and established that in order for the plaintiff to succeed in her action she had to prove firstly that there was a “gathering” as defined in the RGA, secondly that she was injured as a result of the conduct of the SATAWU members and thirdly that the damage she suffered was causally linked to the conduct of the SATAWU members.¹¹⁹

In applying the RGA the court noted that the purpose of the RGA was to “regulate the holding of gatherings at certain places.”¹²⁰ The court further noted that “gatherings” are defined as: “any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act (Act 29 of 1989) or any other public place or premises wholly or partly open to the air.”¹²¹ The court was of the view that the riot damage that occurs must be at the location where the gathering is taking place. The court concluded that the damages suffered by the plaintiff did not take place at a “gathering” therefore the plaintiff’s case was dismissed. What can also be observed from this judgment is how replacement employees are often the cause of strike violence. The link between replacement employees and strike violence will be investigated under chapter 4 of this dissertation.

The court further reasoned that SATAWU, the organisers of the gathering could not have reasonably foreseen that its members in Springs would cause riot damage for a

¹¹⁸ (2014) 35 ILJ 1193 (GSJ).

¹¹⁹ Ibid paragraph 39.

¹²⁰ Preamble to the RGA.

¹²¹ Section 1 of the RGA.

gathering taking place in Johannesburg. In this case it is also evident that striking workers were hostile towards replacement labour however the court did not examine the link between the violent assault and the use of replacement labour. This case clearly indicates that although trade unions may be held liable for not being in control of strikes that become violent as was the case in *SATAWU v Garvas*¹²² the requirements for liability are very exacting under the RGA.

It must be emphasised that the RGA provides specific recourse to litigants in the form of damages to those affected by riot damage. The RGA is not an instrument to be used directly in the employment context. This was the issue in *ADT Security (Pty) Ltd v National Security and Unqualified Workers Union (NASUWU)*¹²³. The appellant in this matter was the employer of ADT Security (Pty) Ltd. The appellant approached the Labour Court to obtain an interdict prohibiting its employees from engaging in a march to the appellants head offices under the RGA. The purpose of the march was to address, amongst other issues, organisational rights with the appellant.

The appellant sought to obtain an interdict against the march arguing that it was unlawful because it bypassed the dispute resolution procedures of the LRA. Section 22 of the LRA makes provision for the acquisition and determination of organisational rights disputes. In addition, section 64 of the LRA creates a process for employees to embark on a strike. The appellant argued that these procedures were being bypassed by the respondent union.

In deciding this issue, the court made reference to and endorsed the views of the Constitutional Court in *Sidumo and another v Rustenburg Platinum Mines Ltd*¹²⁴ in which the court regarded the LRA as a “specialised negotiated legislation giving effect to the right to fair labour practices.”¹²⁵ The Court also referred to *Chriwa v Transnet Ltd*¹²⁶ in which the court opined “that the existence of a purpose-built framework in the form of the LRA and associated legislation implies that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment related matters.”¹²⁷ The

¹²² Supra.

¹²³ (2015) 36 ILJ 152 (LAC).

¹²⁴ (2007) 28 ILJ 2405 (CC).

¹²⁵ Ibid paragraph 94.

¹²⁶ (2008) 29 ILJ 73 (CC).

¹²⁷ Ibid paragraph 41.

principle of utilising the correct forum to obtain relief was also discussed in *Gcaba v Minister for Safety and Security*¹²⁸ where the court held:

The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA). Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system.¹²⁹

Hlope AJA concluded that the respondent trade union in the *ADT* case ought to have utilised the processes contained in the LRA to pursue organisational rights. In the employment context it is imperative that parties seek redress first from the applicable labour legislation rather than circumventing the legislation which may lead to an unwanted result.

2.5 Conclusion:

This chapter demonstrates that strike violence in South Africa is not a new phenomenon but has been a feature of the workplace since industrialisation. History illustrates that strike violence was caused by the prevailing social, political and economic order.

The government adopted a reactive approach to industrial unrest by implementing laws that curtailed strikes. In the years that followed, social unrest and the quest for democracy in South Africa gave rise to growing militancy from the oppressed black majority and increasing international pressure that placed a strain on the government.

The Wiehahn Commission of enquiry maintained that all workers be allowed to exercise the right to strike. These factors contributed to the change from the Apartheid regime to a democratic state governed by the Constitution which allowed for the creation of specific legislation that regulated strikes. However, despite the efforts of the legislature to promulgate labour legislation, recent history depicts that strikes are increasingly violent. This had led courts to find trade unions liable under the LRA and the RGA for the unruly and riotous behaviour of its members.

In the next chapter an analysis of the legislation dealing with strike violence is undertaken. The purpose of this chapter is to show that despite having a structured legislative

¹²⁸ (2010) 31 ILJ 296 (CC).

¹²⁹ Ibid paragraph 56.

framework regulating protected strikes, strikes turn violent thereby causing damage and harm to the economy. This will then assist in providing recommendations as to how to restrict strike violence.

CHAPTER THREE:

THE LEGAL FRAMEWORK: RIGHTS AND REMEDIES

3.1 Introduction:

This chapter will start by analysing the “right to strike” as provided in the Constitution.¹³⁰ The Labour Relations Act¹³¹ will also be analysed and highlighted as the key legislation that regulates strikes and provides recourse to those that suffer because of violent strikes. The laws in South Africa will be analysed to determine whether an adequate regulatory framework is provided. It will be argued that the laws create a balance between an employee’s right to strike as well as recourse to the employer if strike laws are not complied with. Furthermore, it will be demonstrated that the Constitution, the LRA, and case law create an environment where the right and freedom to strike is promoted rather than curtailed.

3.2 The Constitution:

3.2.1 Section 23 (2) (c): The right to strike

The legal hierarchy in South Africa is predicated by the Constitution which establishes itself “as the supreme law of the Republic”¹³² and which states that “law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”¹³³ The Constitution makes provision for “fair labour practices” in terms of section 23. In terms of this section, “every worker has the right to strike.”¹³⁴ The right to strike is “generally considered a vital adjunct to the right to bargain collectively.”¹³⁵ The right to strike is fundamental to the protection of the interest of employees.¹³⁶ Under the LRA of 1956 employees were not free to engage in strike action, as such conduct was criminalised.¹³⁷ Employees were also not free to engage in

¹³⁰ Constitution of 1996.

¹³¹ Act 66 of 1995.

¹³² Constitution Act 108 of 1996; section 2.

¹³³ Ibid.

¹³⁴ Constitution Act 108 of 1996; section 23(2)(c).

¹³⁵ I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 495.

¹³⁶ S Woolman & M Bishop *Constitutional Law of South Africa* 2 ed (2014) 44.

¹³⁷ Myburgh (note 53;968).

collective bargaining with the employer. This was changed with the entrenchment of the right to strike in the Constitution. The right to strike is regulated by the LRA of 1995. Whereas in the past employees could be dismissed due to breach of contract employees are now insulated by the right to strike which is given effect to by the LRA.¹³⁸

When dealing with an objection to the exclusion of a right to lockout as opposed to the inclusion of the right to strike, the court remarked that “collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers.”¹³⁹ It was, therefore, justifiable to provide workers with the right to strike and employers with recourse to lockout. It is argued that the law adequately regulates the right to strike if one considers that the drafters of the Constitution had the insight to perceive the imbalance of power between employers and employees and provided employees with a right to strike. In addition to an employer’s recourse to lock-out, employers have many other remedies at their disposal when dealing with striking employees. Employers can dismiss employees for misconduct or retrench based on operational requirements. Employers may approach the Labour Court for an interdict to restrain striking employees or to seek compensation for a strike that does not comply with the LRA. In addition, employers may engage replacement employees to do the work of striking employees. In sharp contrast to the employer’s remedies, employees can only go on strike to remedy demands or grievances.

Creamer regards the protection of the right to strike as opposed to an employer’s recourse to lock-out as a “*decisive shift* - from a symmetrical to an asymmetrical regulation of industrial action - which, it is argued, is required for the creation of increased substantive parity in the collective bargaining relationship.”¹⁴⁰ Creamer’s argument implies that for there to be substantive equality between employers and employees it is necessary to treat employers differently and to this extent, the Constitution adequately regulates the right to strike. According to Creamer:

In terms of the substantive parity approach, constitutional rights are a means for the establishment of conditions for greater equality and equal participation in social and economic

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Kenneth Creamer “The meaning and implications of the inclusion of the right to strike and the exclusion of lock-out right: Towards asymmetrical parity in the regulation of industrial action.” (1998) 19(1) *Industrial Law Journal* 1; 20.

life. This commitment must find expression through laws that have as their objective the amelioration of the conditions of those who find themselves in positions of disadvantage.¹⁴¹

Therefore, Creamers approach to asymmetrical parity is interpreted to mean that in order to express substantive parity it is necessary that the right to strike is protected rather than elevating the employers recourse to lock-out. In short, Creamer posits that: “substantive parity requires that different rules should apply to employers and employees engaged in collective bargaining.”¹⁴²

It may be inferred from this reasoning that section 23 of the Constitution was drafted taking cognisance of the difference in power between employers and employees and therefore promotes the right to strike in favour of employees. Martin Brassey comments as follows:

That the two [the lock-out and the strike] should be treated differently is not purely a matter of historical accident or political expediency. Formally they may seem symmetrical, but in practice, they play very different roles. When employers want to change terms of employment, they do not reach for the lock-out; provided they negotiate to impasse first, they can implement the changes unilaterally. Then, if the workers refuse to accept the changes, the law gives their employer the right to retrench or dismiss them. If they refuse to leave the premises, the law provides a range of sanctions that range from judicial interdicts to the police baton. The strike, in contrast, is the only means, short of resignation, by which workers can change their lot. It is the way they fend off exploitation and give teeth to the demands that they make at the bargaining table. For them, it is a vital necessity, for the employers just an optional extra. By giving collective rights only to workers the law seems to favour them at the expense of their employers.¹⁴³

Therefore, it is argued, that from a Constitutional perspective, the right to strike is adequately regulated in South Africa. The right to strike has also been interpreted as “promoting the dignity of workers in a constitutional democracy so that workers are not treated as coerced employees.”¹⁴⁴ The Constitutional right to strike is not absolute and, like any other right in the Bill of Rights may be limited in terms of section 36 of the Constitution.

¹⁴¹ Ibid;12.

¹⁴² Ibid;13.

¹⁴³ Martin Brassey “Sam’s Missile: Entrenching Industrial Action in a Bill of Rights” 1993 *Employment Law* 10-28.

¹⁴⁴ *National Union of Metalworkers South Africa v Bader Bop (Pty) Ltd* (2003) 3 SA 513 (CC) paragraph [13].

3.2.2 Section 23 (5) Collective bargaining:

To understand how the Constitution adequately regulates the right to strike, it is important to understand the concept of collective bargaining. It will be argued that when there is a breakdown of the collective bargaining relationship, employees' resort to strike action, and thus collective bargaining is a necessary precursor to strikes.

The Constitution provides in this regard that "every trade union, employers' organisation and employer has the right to engage in collective bargaining."¹⁴⁵ Collective bargaining is defined as "the process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation."¹⁴⁶ Collective bargaining is a process of demand and concession with the objective of reaching agreement. Thus, the aim of collective bargaining is to reach an equitable settlement on matters of mutual interest through negotiations. Collective bargaining assumes that there is a willingness of both parties to listen to each other as well as consider the representations made by each side.

Collective bargaining is of importance to the right to strike as "[...] the right to strike is indivisibly bound with the right to bargain collectively."¹⁴⁷ If the process of collective bargaining is one that operates on the premise of addressing matters of mutual interest and the terms and conditions of employment, it must follow therefore that should the collective bargaining process fail, there must be remedies for the employees to exercise in order to have their grievances addressed. Collective bargaining is constitutionally entrenched in section 23 (5) of the Constitution. In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*¹⁴⁸ it was maintained that:

Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers, therefore, need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action.¹⁴⁹

The Constitution adequately regulates strikes by entrenching the right to collective bargaining in section 23 (5). Collective bargaining is the necessary precursor to strikes. The law encourages agreement between the parties through collective bargaining. If an agreement cannot be reached; employees may strike to have their demands addressed. It

¹⁴⁵ Constitution Act 108 of 1996; section 23(5).

¹⁴⁶ J Grogan *Workplace Law* 10 ed (2010) 405.

¹⁴⁷ D Du Toit & R Ronnie "The necessary evolution of strike law" 2012 *Acta Juridica* 195,196.

¹⁴⁸ 1996 (4) SA 744 (CC).

¹⁴⁹ *Ibid*, paragraph 66.

has been outlined that the aim of collective bargaining is to reach an equitable settlement on matters of mutual interest through negotiations which must be conducted peacefully. “The economic pressure meant to be put on the employer as a result of a strike is sufficient and functional to collective bargaining.”¹⁵⁰ It is argued that the mere withholding of labour is sufficient for the purposes of collective bargaining.

According to Botha and Germishuys: “The pressure placed on the employer because of the violence and not as a result of the strike, forces the employer to reach agreement. This means that the employer is placed under economic duress.”¹⁵¹ It is argued, that when striking employees use violence in the context of a strike it has the effect of giving the employees the unfair advantage of “economic duress” to secure their demands therefore the use of violence during a strike can never be functional to collective bargaining. The courts have gone as far as enquiring into whether a strike which is not functional to collective bargaining should be protected under the LRA. For a discussion regarding the functionality of a strike to collective bargaining please see chapter 5.

3.3 The Labour Relations Act:

The LRA is specific legislation that regulates strikes in South Africa. An analysis of the LRA will be undertaken to depict how this legislation regulates the right to strike. The LRA must be interpreted “to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.”¹⁵² In addition, the LRA endeavours to “regulate the right to strike.”¹⁵³ Crucial to the assessment of the right to strike is its correlation to the idea of collective bargaining and thus the LRA endeavours to “promote and facilitate collective bargaining in the workplace and at a sectorial level.”¹⁵⁴ It will be demonstrated that the LRA creates a framework that adequately regulates strikes by providing substantive requirements and procedural preconditions that must be satisfied before a strike complies with the LRA. When these requirements are complied with the strike is regarded as being “protected” in terms of section 67 (1) of the LRA and enjoys the protections afforded to striking employees by the LRA. Should a strike not comply with the requirements of the LRA the strike will be regarded

¹⁵⁰ M M Botha and W Germishuys “The promotion of orderly collective bargaining and effective dispute resolution, the dynamic labour market and powers of the Labour Court (2)” (2017) 80 *Journal of Contemporary Roman-Dutch Law* 531-552 ;531

¹⁵¹ Ibid.

¹⁵² Labour Relations Act 66 of 1995; Section 1(a).

¹⁵³ Preamble to the LRA.

¹⁵⁴ Ibid.

as “unprotected” and consequences may follow. It is noteworthy to mention that the word “unprotected” does not appear in the LRA and is used as a contrast to a “protected strike”. The LRA also provides limitations and recourse to employers if strikes do not satisfy the substantive requirements or the procedural preconditions.

3.3.1 Definition of a strike:

For a strike to be protected it must adhere to the definition of section 213 of the LRA:

the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee and every reference to ‘work’ in this definition includes overtime work whether it is voluntary or compulsory.¹⁵⁵

From this definition, it is deduced that there are distinct elements that comprise a strike. To understand the definition of a strike, certain essential elements to this definition must be highlighted and discussed below.

3.3.2 “The partial or complete concerted refusal to work, or the retardation or obstruction of work (...)”:

The employment relationship is characterised by the principle of labour and reward. Grogan describes it as:

A contract between two persons, the master (employer) and the servant (employee), for the letting and hiring of the latter's services for reward, the master being able to supervise and control the servant's work.¹⁵⁶

An employee is bound by a contract of employment to render services to the employer in exchange for remuneration, when an employee stops working or refuses to work, this constitutes an element of a strike. The stoppage must be for work that the employee is contractually obliged to do and that such work is legal.¹⁵⁷ The definition also includes the “retardation” or “obstruction” of work. The retardation of work occurs where employees slow

¹⁵⁵ Section 213 of the LRA 66 of 1995.

¹⁵⁶ Grogan (note 145;16).

¹⁵⁷ See *SA Breweries Ltd v Food & Allied Workers Union and others* (1989) 10 ILJ 844 (A).

down normal production for example in the case of *National Union of Mineworkers v Chrober Slate (Pty) Ltd*¹⁵⁸. The mine workers excavated slate but refused to allow this slate to be loaded by drivers until the employer provided a front-end loader to assist. The court found that this was a retardation of work.¹⁵⁹ The obstruction of work is for example where off duty employees block access to the company premises or intimidate fellow workers from complying with their duties.¹⁶⁰ Where employees prevent other employees from working or commence a “go-slow” where their duties will be done at a reduced pace so as to hinder the employer’s operational capacity is conduct that constitutes a strike.¹⁶¹

According to Grogan: “when two or more employees down tools, their action constitutes a strike only if they act with a common purpose: they must have agreed to act *in concert*.”¹⁶² However section 23 of the Constitution provides that “Every employee has the right to strike.” This must be understood in the context of the LRA which specifically defines a strike as being a concerted effort by employees. Therefore, a single employee cannot go on strike. Section 23 of the Constitution must be read with the LRA which explicitly requires two or more employees to go on strike as “according to the LRA, strikes are afforded full protection if the act constitutes a strike under the definition of the Labour Relations Act.”¹⁶³

3.3.3 “(...) by persons who are or were employed by the same employer or by different employers (...)”:

This element is interpreted to include employees who are employed by an employer or who have been employed by that employer. The latter applies to employees who have been dismissed and a dispute still exists with the employer.¹⁶⁴ Importantly, the phrase makes it possible for employees employed by different employers to embark on a strike; this is known

¹⁵⁸ (2008) 29 ILJ 388 (LC).

¹⁵⁹ Ibid paragraph [53].

¹⁶⁰ Grogan (note 145;406)

¹⁶¹ A range of possibilities may encompass the definition of ‘strike’ such as overtime bans, work-to-rule, intermittent or ‘grasshopper’ strikes. For a general discussion on the various characteristics a strike manifests itself in, see: S Bendix *Industrial Relations in the new South Africa* 3 ed (1996) 531. See also for a more detailed analysis of the various forms of collective conduct that may amount to a strike M Finnemore *Introduction to Labour Relations in South Africa* 6 ed (1998) 244.

¹⁶² Grogan (note 145;407)

¹⁶³ DC Subramanien and JL Joseph “The right to strike under the Labour Relations Act 66 of 1995 (LRA) and possible factors for consideration that would promote the objectives of the LRA.” *Potchefstroom Electronic Law Journal* (2019) 22 1;3 accessed from <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a440> on the 04th June 2020

¹⁶⁴ See *NAAWU v Borg-Warner SA (Pty) Ltd* (1994) (15) ILJ (A) 509 at page 516.

as a secondary strike. A secondary strike occurs where employees of one company (primary employees) embark on a protected strike and in solidarity, employees of a different company (secondary employees) joins a strike to support the primary employees. Secondary strikes are regulated by section 66 of the LRA.

In terms of section 66 (2) (a) of the LRA a secondary strike is only permissible if the strike at the primary employer is one that complies with sections 64 and 65 of the LRA. According to section 66 (2) (b) of the LRA secondary employees must notify the secondary employer in writing that they are going to embark on a secondary strike. In addition, section 66 (2) (c) of the LRA provides that the “nature and extent of the secondary strike must be reasonable in relation to the impact that the secondary strike may have on the business of the primary employer.”

3.3.4 “(...) for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between the employer and employee (...)”:

This element goes to the core of the reason to strike. A strike must be for the “purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between the employer and employee.”¹⁶⁵

The LRA envisages that employees may go on strike for a multiplicity of reasons that pertain to the employment relationship. It is important to emphasise that the purpose of a strike is twofold, it must be to remedy a grievance between an employer and an employee alternatively it must be to resolve a dispute between the employer and employee.

The reasons for embarking on a strike are not easy to distinguish, as a “matter of mutual interest” may be described as a: “sweeping phrase seemingly encompassing issues of employment in general, and is not limited strictly to matters pertaining to wages and conditions of service.”¹⁶⁶ A matter of mutual interest is therefore an issue between the employee and employer. The term matter of mutual interest could cover a wide variety of issues that affect the employment relationship which enables employees to go on strike.

¹⁶⁵ Labour Relations Act 66 of 1995; section 213.

¹⁶⁶ Grogan (145;372).

In the case of *Pikitup (SOC) Ltd v South African Municipal Workers Union on behalf of Members & Others*¹⁶⁷ the employer introduced a breathalyser test to investigate employees who reported for work under the influence of alcohol. If the test indicated a positive reading for alcohol consumption the employee could have a second attempt at the test or to undertake an intravenous blood alcohol test.

Aggrieved by the implementation of the test the employees chose to embark on a strike to persuade the employer not to implement breathalyser testing. The employer approached the Labour Court to interdict employees from striking as the introduction of the breathalyser test was an operational management measure. The Labour Court initially granted an interim interdict on the basis that the demand made to the employer was not a matter of mutual interest but rather an operational management measure.

On the return date, the Labour Court held that the requirement to have employees undergo a breathalyser test and subsequently an intravenous blood alcohol test was a matter of workplace health and safety which was of interest to both employer and employee.. The Labour Court refused to make the interdict final.

Aggrieved the employer applied to the Labour Appeal Court to rule on whether the requirement to undergo a breathalyser test was a legitimate operational management measure or a matter of mutual interest, the latter of which enabled the employees to go on strike. Musi AJA noted that the term matter of mutual interest “defies precise definition.”¹⁶⁸

The court accepted Grogan’s definition¹⁶⁹ of a matter of mutual interest which is “any matter which affects employees in the workplace however indirectly, falls within the scope of the phrase “matters of mutual interest” and may accordingly form the subject matter of strike action.”¹⁷⁰ The Labour Appeal Court stipulated that mutual interest issues must relate to the employment relationship:

The phrase mutual interest seeks to limit the issues that may form the subject matter of a strike. It can therefore not be without boundary. The matter should not be too far removed from the employment relationship so that it can properly be said that it does not concern the employment relationship. Matters that are purely socio-economic or political would generally not be matters

¹⁶⁷ (2014) 35 ILJ 983 (LAC).

¹⁶⁸ Ibid paragraph [54].

¹⁶⁹ Grogan (note 145;372)

¹⁷⁰ Ibid paragraph [56].

of mutual interest [...] The facts of each matter will determine whether such issue is one of mutual interest.¹⁷¹

Applying this principle to the facts of the case, the court concluded that “health and safety issues are primarily the responsibility of the employer but they are matters of mutual interest over which the parties may engage in collective bargaining and if they cannot agree the employees may embark on strike action”¹⁷² Therefore, the appeal was dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.¹⁷³

The reasons that can give rise to a strike are broad. Employees have the latitude to engage in strikes if the reason for the strike pertains to the employment relationship. The common law position in the *Rand Tyres v Industrial Council for the Motor Industry (Transvaal)*¹⁷⁴ decision indicates that the right to strike should not be unnecessarily curtailed. Therefore, it is argued that the LRA adequately regulates the right to strike by providing a wide scope of reasons that employees may strike for.

In as much as the right to strike is defined very broadly in the Constitution and the LRA, the right to strike cannot be exercised in an unfettered manner. The LRA provides for procedures and limitations to strike which will be discussed below.

3.4 Procedure for participating in a strike:

Section 64 of the LRA provides procedures that need to be complied with to ensure that a strike enjoys legal protection. According to the LRA, employees may only strike “if the issue in dispute¹⁷⁵ has been referred to a council or to the Commission.”¹⁷⁶ The purpose of referring a dispute is to compel parties to negotiate with a view of resolving the issue in dispute before a strike is declared.¹⁷⁷ This indicates that the LRA adequately regulates the right to strike by requiring parties to exhaust negotiations before a dispute is referred.

¹⁷¹ Ibid paragraph [57].

¹⁷² Ibid paragraph [67].

¹⁷³ Ibid.

¹⁷⁴ 1941 TPD 108.

¹⁷⁵ The phrase “issue in dispute” is commonly repeated in chapter IV of the LRA. This phrase is defined in section 213 as “in relation to a strike or lock-out, means the demand, the grievance or the dispute that forms the subject matter of the strike or lock-out”.

¹⁷⁶ Labour Relations Act 66 of 1995; section 64(1)(a).

¹⁷⁷ *CWIU v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 ILJ 321 (LAC) para 27-28.

Employees have thirty days¹⁷⁸ since the referral of the dispute to strike,¹⁷⁹ regardless of whether a conciliation meeting takes place. Allowing employees thirty days suggests that a decision to strike must be taken carefully as there may be consequences. It is argued that the LRA adequately regulates the right to strike by stipulating that time must pass before the decision to strike is taken.

In addition, employees who want to strike must provide the employer with “at least 48 hours’ notice of the commencement of the strike in writing.”¹⁸⁰ The purpose of notifying the employer before the start of a strike is to warn employers that a strike is going to commence and to prepare for the impending power play.¹⁸¹ Thus, the LRA not only promotes the right to strike but is cognisant of the employers business operations. Notifying the employer before the strike is a measure to warn the employer that a strike is due to commence.

When interpreting the right to strike according to the procedural preconditions, the courts have adopted an approach that is least restrictive to the right to strike.¹⁸² The procedural preconditions must be interpreted considering the disparities between employees and employers. The LRA was created as a measure of redress.¹⁸³ Therefore, it is clear that the LRA adequately regulates the right to strike by setting out a simple procedure that must be complied with. The courts interpret these procedures considering promoting the right to strike and ensuring equity between employers and employees.

The reason for the procedures is to ensure peaceful and orderly collective bargaining.¹⁸⁴ This forms the basis of the LRA in relation to the regulation of strikes. In this regard, it is argued that the procedural preconditions of the LRA adequately regulates the right to strike.

Compliance with the requirements also ensures that the strike itself is protected thus allowing employees to strike without fear of consequences.

¹⁷⁸ Labour Relations Act 66 of 1995; section 64(1)(a)(ii).

¹⁷⁹ *City of Johannesburg Metropolitan Municipality & Another v SAMWU & Others* [2011] 7 BLLR 663 (LC) 669A, *Gillet Exhaust Technology (Pty) Ltd t/a Tennaco v NUMSA on behalf of members & another* (2010) 31 ILJ 2552 (LC).

¹⁸⁰ Labour Relations Act 66 of 1995; section 64(1)(b).

¹⁸¹ *Ceramic Industries t/a Beta Sanitaryware* (note 130 above) at 677 A-D.

¹⁸² *SA Transport and Allied Workers Union & others v Moloto NO & another* (2012) 33 ILJ 2549 (CC) at paragraph 53.

¹⁸³ *Moloto* Supra paragraph 57.

¹⁸⁴ Labour Relations Act 66 of 1995; section 1.

3.5 Limitations to the right to strike:

The right to strike cannot be exercised without limitation. There are instances where employees are limited from striking, these limitations are important and necessary to ensure that strikes only occur when they are legally permissible and the grievance or demand constitute a matter of mutual interest as discussed in 3.4 above. The LRA provides the following limitations as to when employees cannot strike; these include:

Where a “collective agreement” is in place or still in force in that “prohibits” the right to strike.¹⁸⁵ A collective agreement entered into freely and voluntarily between employers and trade unions on behalf of employees are binding. The parties can agree that the employees will not strike, and the employers will not impose a lock-out. The courts give legitimacy to collective agreements¹⁸⁶ a strike that takes place contrary to a collective agreement will be unprotected.

A limitation also applies where there is an agreement in place that would have the “issue in dispute referred to arbitration.”¹⁸⁷ Disputes that must be arbitrated include an employers’ right to freedom of association¹⁸⁸, the interpretation and application of collective agreements.¹⁸⁹ Disputes about the interpretation and application of agency shop and closed shop agreements must be arbitrated.¹⁹⁰ Organisational rights disputes must be arbitrated with the exception of sections 12- 15 of the LRA which make provision for employees to embark on a strike.

The Labour Relations Amendment Act 8 of 2018 provides, in section 150A for an advisory arbitration panel appointed in the public interest to arbitrate issues of dispute. Prior to these amendments’ issues of matter of mutual interest could only be ventilated by way of a strike. These amendments will be discussed in Chapter 5 below.

The right to strike is further limited where employees are engaged in “essential” or “maintenance services.”¹⁹¹ An essential service is defined as “a service, the interruption of which endangers the life, personal safety or health of the whole or any part of the population and includes the parliamentary service and the South African Police Service.”¹⁹² It is therefore

¹⁸⁵ Labour Relations Act 66 of 1995; section 65(1)(a).

¹⁸⁶ *Glencore Operations SA v National Union of Metalworkers SA* (2018) 39 ILJ 2305 (LC).

¹⁸⁷ Labour Relations Act 66 of 1995; section 65(1)(b).

¹⁸⁸ Section 6 of the LRA.

¹⁸⁹ Section 24 of the LRA.

¹⁹⁰ Section 24 (6) and (7) of the LRA.

¹⁹¹ Labour Relations Act 66 of 1995; sections 65(1)(d)(i) and (ii).

¹⁹² Section 213 (a)-(c) of the LRA.

reasonable when human life, security and safety is at risk that essential service employees are precluded from going on strike.

Where a collective agreement applies, or the matter is determined by an “arbitration award.”¹⁹³ If the issue in dispute has been resolved through arbitration the matter is now final unless the employees review the case in the Labour Court. Employees are rightfully precluded from embarking on a strike once the matter has been arbitrated as there will no longer be an issue in dispute.¹⁹⁴

In addition, if a determination is made by the Minister of Labour in terms of the Wage Act¹⁹⁵ employees are prohibited from striking because the Wage Act is an act of parliament it is not a matter that the employee will be in dispute with the employer over.

The LRA adequately controls the right to strike by streamlining the reasons that employees choose to go on strike. It is argued that the limitations are a measure to curb unnecessary and unprocedural strike action.¹⁹⁶

3.6 Protection to the right to strike:

Provided that a strike complies with the procedures enumerated in section 64 (1) of the LRA and is not limited by section 65 (1) of the LRA protected strikes are regulated by section 67 of the LRA. The right to strike is supported by providing protection to employees who choose to strike by immunising them against dismissal, delict or breach of contract for participating in a protected strike if section 64 of the LRA is complied with.

The employer is not obliged to pay employees who are on strike. This is provided for in section 67 (3) of the LRA and is also firmly rooted in South African common law. According to Grogan: “The legal basis for exempting employers of the obligation to pay striking employees is that employees who are on strike are by definition not discharging their obligation to tender service.”¹⁹⁷ The principle of no work no pay is a trite principle in South African labour law as posited by Basson J in *South African Municipal Workers Union v*

¹⁹³ Labour Relations Act 66 of 1995; section 65(3)(a)(i).

¹⁹⁴ *Bader Bop v National Union of Metalworkers SA* (2002) 23 ILJ 104 (LAC) paragraph [33].

¹⁹⁵ Labour Relations Act 66 of 1995; section 65(3)(a)(i) and (b).

¹⁹⁶ Rycroft (note 69;148).

¹⁹⁷ Grogan (note 145;434).

*Ekhuruleni Metropolitan Municipality*¹⁹⁸: “In respect of the practice of “no work for no pay”, it is trite that this practice arises from the principle that an employee is to tender his/her services to the employer in return for payment of his/her salary.”¹⁹⁹

The no work for no pay principle is without exception as section 67(3)(a) provides that an employer “must not discontinue payments made in kind during the strike” such as “accommodation, the provision of food and other basic amenities of life.”²⁰⁰ Should an employer deem necessary, the LRA makes provision for the recovery of a payment made in kind “after the end of the strike.”²⁰¹

“An employer may not dismiss an employee for participating in a protected strike”²⁰² or for “conduct in contemplation or in furtherance of a protected strike.”²⁰³ Section 67 (4) is reinforced by section 187 (1) (a) of the LRA which makes the dismissal of employees who embark on a protected strike automatically unfair. In *Edelweiss Glass & Aluminium (Pty) Ltd v NUMSA & Others*²⁰⁴ the employees were on a protected strike that complied with section 64 of the LRA. The reason for the strike was initially regarding organisational rights. However, during the strike employees included a further demand of a 13th cheque. The employer viewed this demand as being a new issue because only the issue of organisational rights was conciliated at the CCMA. The employer issued an ultimatum to which the employees ignored and subsequently dismissed the employees for participating in an unprotected strike.

The Labour Appeal Court ruled, that due to the unique facts of the case it was to be expected that the employees would change their demands during the strike and that the employees were entitled to do so, this meant that the strike was protected and the dismissal of the employees for participating in a protected strike was automatically unfair. The Labour Appeal Court upheld the order of the Labour Court which included retrospective reinstatement.

The section makes an important qualification in that “subsection (4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for the reason related to the employee’s conduct during the strike, or for a reason

¹⁹⁸ (2012) 33 ILJ 2961 (LC).

¹⁹⁹ Supra paragraph [18].

²⁰⁰ Labour Relations Act 66 of 1995; section 67(3)(a).

²⁰¹ Labour Relations Act 66 of 1995; section 67(3)(b).

²⁰² Labour Relations Act 66 of 1995; section 67(4).

²⁰³ Labour Relations Act 66 of 1995; section 67(4).

²⁰⁴ (2011) 32 ILJ 2939 (LAC).

based on the employer's operational requirements."²⁰⁵ This provision is important when dealing with the question of strike violence as it provides the employer with recourse when dealing with violent employees. Thus, an employer may not dismiss an employee for the act of participating in a protected strike however an employer may dismiss an employee for his or her conduct during a strike or based on the operational requirements of the employer. "In other words, a protected strike does not protect employees against the consequences of any misconduct."²⁰⁶ Therefore employees may be dismissed for misconduct during a strike and "nor does a protected strike suspend the employers right to retrench employees for genuine operational reasons, even if the operational problems were caused by the strike."²⁰⁷ Common types of misconduct that may constitute grounds for dismissal of employees participating in a protected strike include, but are not limited to assault, intimidation and damage to company property. The employer is within their right to institute disciplinary action against transgressors in terms of Chapter VIII of the LRA and in accordance with the Code of Good Practice: Dismissal.²⁰⁸

Regardless of being protected, misconduct during a strike is punishable. In *Arnolds & Coca Cola (Lakeside)*²⁰⁹ during a protected strike Mr Arnold was aware of a plan to bomb a co-employee's home. Mr Arnold was aware of the plan and did not inform the employer. The employee was dismissed due to this misconduct. The Commissioner concluded that the dismissal was substantively fair.

In *National Democratic Change and Allied Workers Union & Others v Cummins Emission Solutions*²¹⁰ the employees were on a protected strike in the automotive sector. Various acts of intimidation and assault took place that resulted in the dismissal of employees. The employees referred a case to the Motor Industry Bargaining Council claiming that their dismissal was automatically unfair in terms of section 187 (1) (a) of the LRA. The employees were referred to the Labour Court where they could not prove that they were automatically unfairly dismissed on account of them participating in a protected strike. The court confirmed that the employees were fairly dismissed due to misconduct arising from a protected strike.

²⁰⁵ Labour Relations Act 66 of 1995; section 67(5).

²⁰⁶ J Grogan *Dismissal* 3 ed (2017) 140.

²⁰⁷ Ibid.

²⁰⁸ Labour Relations Act 66 of 1995; schedule 8.

²⁰⁹ (2019) 40 ILJ 1353 (CCMA).

²¹⁰ (2014) 35 ILJ 2222 (LC).

An employer may also retrench employees during a protected strike due to the employer's operational requirements. The requirements for retrenching employees are to be found in sections 189 and 189A of the Labour Relations Act. Similar to dismissals due to misconduct during a protected strike, employees cannot be retrenched for participation in a strike.

An example of retrenching employees during a protected strike can be found in the case of *SA Chemical Workers Union v Afrox*²¹¹ the employees who were employed as drivers embarked on a protected strike regarding the regulation of overtime at the workplace. During the course of the strike the employer consulted with the striking employees relating to the engagement of contractors to do the work of drivers if they refuse to work the proposed staggered shift system. The employees refused and were subsequently retrenched. The employees claimed at the Labour Court that they were retrenched for participating in a protected strike.

The court indicated that in order to establish whether employees were retrenched for the act of participating in a legal strike is a factual question that must be answered objectively.²¹² The court looked at the factual circumstances of the case and established that the employees were not retrenched due to their participation in a protected strike. Evidence before the court indicated that the employees were consulted about the possibility of engaging contract drivers well before the strike commenced. It is apparent from this case that the courts will look at the employer's decision to retrench alongside the facts of the case and what the true cause of the retrenchment was.²¹³ Retrenchment due to operational requirements may take place when workers are on a protected strike.

Another example of where employers have undertaken retrenchments during a protected strike is the case of *NUM v Black Mountain Mineral Development Company (Pty) Ltd*. The employer was in the business of mining and was in a poor financial situation. During the annual wage negotiations the employees and employer reached a stalemate on the amount of the wage increase. The employees were aware of the poor financial position of employer but nevertheless embarked on a protected strike.²¹⁴ Whilst the employees were on strike the employer initiated retrenchments.²¹⁵

²¹¹ (1999) 20 ILJ 1718 (LAC).

²¹² Ibid paragraph [32].

²¹³ (1994) 15 ILJ 1005 (LAC).

²¹⁴ Ibid 1007 B-C.

²¹⁵ Ibid.

The key issue before the court was whether the retrenchments were as a result of the employees embarking on a strike or whether the retrenchments were as a result of “irreparable economic hardship”²¹⁶ that necessitated the retrenchments. The court held that an employer “need not wait for his doors to close before making the decision to retrench.”²¹⁷ The court further added that “it would be preferable to hold that the likelihood of substantial economic loss would entitle an employer to protect its business by exercising its right to dismiss striking workers.”²¹⁸ This judgment indicates that although the timing of retrenchments during a protected strike may be questionable, it is imperative to determine whether the probability of substantial economic loss justifies the retrenchment.

A more recent example of an employer undertaking retrenchments during a protected strike is the case of *NUMSA v Dorbyl Ltd*²¹⁹ where the employer was in the bus manufacturing industry and experienced “serious financial challenges.”²²⁰ Despite the financial challenges the employer and employees reached a deadlock during the annual wage increase. The employees embarked on a protected strike despite management cautioning them that the financial situation of the business was very poor.²²¹ Whilst the employees were on strike the employer initiated retrenchments. The employees perceived that the retrenchments were caused because the employees embarked on a strike and pursued the matter in the Labour Courts.

According to the court, “the crisp issue on appeal was what was the dominant reason for the dismissal? Was it more probable that the dominant or main reason for the dismissal was a variety of proper operational requirements and not the strike itself?”²²² In arriving at its decision the court was satisfied that the need to retrench pre-dated the strike.²²³ The court reasoned that “although the individual appellants participation in the strike contributed to, or accelerated, the decision to dismiss, it was not the dominant reason for the dismissal.”²²⁴ The cases discussed pertaining to the retrenchment of striking employees makes it clear that an employer is empowered to retrench during a protected strike, however if

²¹⁶ Ibid 1012 A-C.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ (2007) 28 ILJ 1585 (LAC).

²²⁰ Ibid paragraph [7].

²²¹ Ibid paragraph [10].

²²² Ibid paragraph [22].

²²³ Ibid paragraph [26].

²²⁴ Ibid.

challenged that retrenchments were in response to a strike the courts will look at the dominant reason that resulted in the retrenchments.

The LRA provision on protected strikes prevents employers from instituting civil legal proceedings against employees “who participate in a protected strike or in any conduct in contemplation or in furtherance of a protected strike.”²²⁵ Employees are protected against claims for damages if they participate in a strike that complies with the LRA. As will be discussed further, this right is not without limitations and goes to the core of the way strikes take place. The LRA unequivocally states that subsections 67(2) and 67(6) “do not apply to any act in contemplation or in furtherance of a strike or lock-out, if that act is an offence.”²²⁶

Critics to the strike provisions of the LRA, such as Puke Maserumule argue that the LRA does not create a positive right to strike but rather enforces compliance with the LRA.²²⁷ This view is myopic and fails to take cognisance of the positive rights put in place by the LRA as outlined above. It is argued that the LRA adequately regulates the right to strike.

3.7 Unprotected strikes:

As discussed above, the LRA provides procedures that need to be complied with for a strike to be protected. Protection entails immunity from criminal and civil liability if employees do not commit misconduct or commit an offence. Not complying with the procedures stipulated in section 64 and 65 of the LRA results in a strike being unprotected. Section 68 of the LRA provides remedies to employers in the event that the procedures for a protected strike are not complied with. The LRA provides remedies to employers if a strike does not comply with the provisions of the LRA.

In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*²²⁸ the trade union had a list of demands and requested all its members to not tender their services until their demands were satisfied. A meeting was called with the trade union who conceded that the strike was unprotected. The employer approached the Labour Court for compensation in terms of section 68 (1) (b) of the LRA.

²²⁵ Labour Relations Act 66 of 1995; section 67(6).

²²⁶ Labour Relations Act 66 of 1995; section 67(8).

²²⁷ P Maserumule “A perspective on developments of strike law.” (2001) 22 *ILJ* 46.

²²⁸ (2001) 22 *ILJ* 2035 (LC).

Farber J outlined three requirements that needed to be satisfied before liability is established:

It is manifest that in relation to a strike, three requirements must be satisfied before the question of whether compensation as contemplated in terms of subsection (1)(b) is to be awarded, and, if so in what amount, arises for determination. In the first instance it must be established that the strike does not comply with the provisions of chapter IV of the Act. Secondly, the party invoking the remedy must establish that it sustained loss in consequence of the strike. Thirdly it must be demonstrated that the party sought to be fixed with liability participated in the strike or committed acts in contemplation or furtherance thereof.²²⁹

If these requirements are satisfied a trade union and its members will be held liable for compensation. In this case the union was found to have not complied with the requirements of section 64 and section 65 of the LRA. The court awarded compensation in the amount of R100 000.00 which was to be paid in instalments of R5000.00 per month. The employer initially claimed losses of R15 000 000.00 but later reduced its claim to R100 000.00.

3.8 Remedies:

The following section deals with remedies, in particular interdicts, compensation and dismissals.

3.8.1 Interdict:

An interdict is a remedy available to prevent strike violence. Section 68 (1) (a) of the LRA enables the employer to apply for an interdict to restrain striking employees who do not comply with chapter IV of the LRA. The Labour Court “has exclusive jurisdiction - (a) to grant an interdict in order to restrain – (i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike.”²³⁰ Interdicts are defined as “a common law remedy aimed at protecting applicants from suffering irreparable damage caused by the wrongful activities of defendants.”²³¹ Applied to the employment context the employer may apply for an interdict when its rights to property and safety are violated by striking employees.

²²⁹ Ibid 2041 C-E.

²³⁰ Section 68 (1) (a) of the LRA.

²³¹ O'Reagan, C “Interdicts restraining strike action- implications of the Labour Relations Amendment Act 89 of 1988” (1988) 9 *Industrial Law Journal* 959.

For an employer to obtain an interdict, the following must be established:

- A reasonable apprehension of irreparable harm that will be suffered should the interdict not be granted.
- That the applicant has no other satisfactory remedy and,
- That the balance of convenience favours the applicant.²³²

In *South African Post Office v TAS Appointment and management services CC and Others*²³³ the workers were employees of a temporary employment service who provided services to the South African post office.

They embarked on an unlawful strike with the demand of obtaining permanent employment with the South African Post Office. The undisputed evidence before the court was that the strike was characterised by unlawful conduct. The court granted the interdict to restrain the striking workers from participating in the unprotected strike.

The South African Post Office was not the employer but could demonstrate that it suffered harm at the hands of the unprotected strikers. This serves to show that it is not only an employer who may seek remedy under section 68 (1) (a) of the LRA.

If a strike becomes violent in breach of the LRA, “the Labour Court has exclusive jurisdiction to grant an interdict or order to restrain.”²³⁴ An interdict prohibits employees from committing violence. If an interdict is breached, employees can be charged for contempt of court which is a criminal offence. A fine or imprisonment may be imposed for breach of an interdict.²³⁵ In the case of *In2Food (Pty) Ltd v Food and Allied Workers Union*,²³⁶ the court found that the union was in contempt for not complying with an interdict and imposed a fine of R500 000, 00. The court remarked that,

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 [...] These actions undermine the very essence of disciplined collective bargaining and the very substructure of our labour relations regime.²³⁷

²³² *Ceramic Industries Ltd t/a Betta Sanitary Ware v NBCAWU* (1997) 18 ILJ 550 (LC) 556; 557.

²³³ (2012) 33 ILJ 1958 (LC).

²³⁴ Labour Relations Act 66 of 1995; section 68(1)(a).

²³⁵ *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & Other Workers & Others* (1998) (1) SA 685 (C).

²³⁶ (2013) 34 ILJ 2589 (LC).

²³⁷ *In 2 Food Supra* 2591.

This indicates the courts' proclivity to impose penalties on those who do not comply with its orders during violent strikes. This matter was successfully appealed²³⁸ on the basis that the employer could not establish a breach of the interdict, however, the Labour Appeal Court did not interfere with the above statement and regarded it as an "important policy statement."²³⁹ It is clear that an interdict is an option to curtail violent strikes.

The Labour Court's approach to enforcing an interdict in the context of breach of picketing rules was decided in the case of *Verulam Sawmills (Pty) Ltd v AMCU*.²⁴⁰ The employees initiated a protected strike. During the strike, workers became aggressive, damaging property, blocking entrances to and from the employer's premises as well as intimidating non-striking workers. The strike was regulated by picketing rules that were devised by the employer and the trade union. The employer cautioned workers that it would enforce the picketing agreement by applying for an interdict and seek costs against the trade union. At the Labour Court, the trade union did not challenge the application for an interdict.

The court likened strike violence to a "pandemic,"²⁴¹ finding that a trade union has a duty to take "all reasonable steps"²⁴² to ensure compliance with the picketing agreement. The court reasoned that the aim of picketing rules is to ensure safety. If the non-striking workers who were being intimidated were to also withhold their labour it would be an unfair economic advantage over the employer. In this case, the trade union was ordered to pay the employer's costs on an attorney-client scale for not taking reasonable steps to prevent the violence. The interdict was also upheld prohibiting workers from engaging in acts of violence. This case demonstrates that interdicts can be used as effective relief from strike.

However, while interdicts are legislated remedy to strike violence, thus far trade unions have mostly shown disrespect for interdicts. This implies that interdicts may not be effective in curbing strike violence. The key disadvantage of interdicts is that employees and their unions simply do not adhere to court orders which is of concern for preventing strike violence.

The fact that interdicts are plainly ignored was evident in *Pikitup Johannesburg (Pty) Ltd v SA Municipal Workers Union & Another*²⁴³ violence exhibited by striking workers

²³⁸ *Food and Allied Workers Union v In2Food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC).

²³⁹ *Food and Allied Workers Union* supra paragraph [6].

²⁴⁰ (2016) 37 ILJ 246 (LC).

²⁴¹ Ibid 12.

²⁴² Ibid 14.

²⁴³ (2016) 37 ILJ 1710 (LC).

had reached a point where workers blatantly disregarded the rule of law. The workers trashed the streets by overturning bins and placing trees and debris on the road. The workers went so far as to try and intimidate the presiding judge which resulted in the court having to clear the gallery of striking workers.²⁴⁴ Initially the matter came before the Labour Court on an urgent basis to restrain striking employees from engaging in acts of violence and intimidation. An interim order was made by the Labour Court. The very next day the employees engaged in unlawful acts of violence, damage to property and intimidation.

Before dealing with the issue of whether the trade union was in contempt the Labour Court order, Lagrange J highlighted the importance of obeying court orders, it is necessary for the functioning of the rule of law in a democratic society. From the cases discussed above, too often trade unions do not obey court orders. Not obeying court orders is a sign of contempt for the authority of the courts and will lead to a state of lawlessness.

On the issue of contempt of court, Lagrange J established that the trade union did not comply with the legal obligations imposed upon it by the Labour Court order. The court ordered that “SAMWU is ordered to pay a fine of R80 000-00, which is suspended from the date of this order on condition the union is not found guilty of contempt of any order of this Court during that time.”²⁴⁵

From the cases surveyed, interdicts are not obeyed, it is suggested that the courts take a more robust approach when penalising unions and employees for not adhering to its orders. In this regard, Tenza argues that “as a court order, an interdict must be honoured. It should be respected not only because it is a court order but as one of the founding values of our Constitution.”²⁴⁶ It is argued that indeed interdicts, as an instrument of the rule of law must be honoured, however in practice striking employees have shown a blatant disregard for the rule of law this begs the question of what more can be done to remedy violent strikes.

Myburgh comments that “interdicts are not usually worth the paper they are written on (in the eyes of the perpetrators)”²⁴⁷ and “have proven woefully inadequate.”²⁴⁸ In the light of excessive strike violence, Myburgh proposes that “where interdicts to stop strikes are not heeded-the only way to restore the collective bargaining position of the employer and

²⁴⁴ Ibid paragraph [23].

²⁴⁵ Ibid paragraph [40].

²⁴⁶ M Tenza “The liability of trade unions for conduct of their members during industrial action.” Unpublished Doctoral thesis available at <http://hdl.handle.net/10500/23172> accessed on the 13 January 2019.

²⁴⁷ A Myburgh “Interdicting protected strikes on account of violence.” (2018) 39 *ILJ* 703;704.

²⁴⁸ Ibid.

to prevent a continuation of economic duress [...] is to suspend the strike.”²⁴⁹ According to Myburgh under the terminology “cooling off”²⁵⁰ is where the Labour Court may order the suspension of a violent strike “pending the union establishing that a resumption of the strike would be on a peaceful basis.”²⁵¹ It is submitted suspending a strike on account of violence will be a viable option to remedy violent strikes. The aim of an interdict is to restrain employees from committing acts of violence which has thus far been an ineffective remedy. A court order that suspends a strike until the violence stops could be an effective way to stop violence as the strike would no longer be recognised as a strike until the violence ends.

As an alternative to interdicts to remedy violent strikes, Fergus is of the view that: “Given the LRA’s purpose of advancing labour peace and orderly collective bargaining, as well as the right to strike is not unlimited, it is readily arguable that the statutory formulation of that right should be read as one which may only be exercised peacefully.”²⁵² Fergus is of the view that the word “peaceful” must be read into the definition of a strike in terms of section 213 of the LRA. This viewpoint is also shared by Le Roux.²⁵³ This would imply that a strike could only be peaceful. If violence is committed, then the conduct does not constitute a strike and would not enjoy the protection of the LRA. It is argued that this would bring a swift end to strike violence if a strike is not classified as a strike in terms of section 213 of the LRA.

3.8.2 Compensation

An employer may approach the Labour Court,²⁵⁴ to claim compensation due to losses that occur from an unprotected strike, due to the conduct of striking workers. The Labour Court may award compensation that is “just and equitable.”²⁵⁵ The requirements to hold a union and its members liable for compensation have been outlined in 3.7 above.

²⁴⁹ Ibid 720.

²⁵⁰ Ibid 723.

²⁵¹ Ibid.

²⁵² E Fergus “Reflections on the (Dys)functionality of strikes to collective bargaining: recent developments.” (2016) 37 *ILJ* 1537;1548.

²⁵³ P A K Le Roux “Stike interdicts: dealing with violence and unlawful demands.” (2015) 25 (5) *CLL* 52;57

²⁵⁴ Section 68 (1).

²⁵⁵ Section 68 (1) (b).

In *Mangaung Local Municipality v SAMWU & Others*²⁵⁶ employees from the electricity department went on an unprotected strike. This strike lasted 6 working days and consisted of blockading entrances to and from the workplace. Employees were prevented from doing their duties, and those who continued working were paid overtime which financially affected the Mangaung municipality. The employer made an application for compensation in terms of the LRA for losses sustained during the unprotected strike. The union sought to distance itself from the unprotected strike. Evidence indicated that the trade union did nothing to intervene in the strike when requested to do so by the employer.

Thus, in the context of an unlawful strike, unions cannot simply distance themselves from the strike action. According to the court :

Where a trade union has a collective bargaining relationship with an employer, and its members embark on unprotected strike action and the union becomes aware of such unprotected strike action and is requested to intervene but fails to do so without just cause such a trade union is liable in terms of s 68 (1) (b) of the Act to compensate an employer who suffers losses due to an unprotected strike.²⁵⁷

The notion of fairness in the context of awarding compensation in terms of section 68 (1) (b) of the LRA appears to have no clear parameters. In the decision of *Algoa Bus Company (Pty) Ltd v SATAWU*²⁵⁸ the employer, a public transport company was faced with an unprotected strike. As a result of the strike, commuters were without transport, which resulted in lost revenue for the employer. The uncontested evidence reflected that the strike was premeditated, there were no attempts to comply with the LRA, the strike was not in the interest of orderly collective bargaining and neither was it in response to unjustified conduct of the employer.²⁵⁹ The employer claimed compensation for R465 001.34 that it quantified as losses caused by the unprotected strike.

In arriving at its decision, the court had no hesitation in finding that the union and employees were liable for compensation in terms of the LRA. The question of appropriate compensation was the issue in this case. The judge alluded that his understanding of “just and equitable” compensation meant that it must be fair.²⁶⁰ In the circumstances, the judge ordered compensation for R100 000.00 to be paid in monthly instalments of R50.00 per month.

²⁵⁶ (2003) 24 ILJ 405 (LC).

²⁵⁷ Ibid paragraph [47].

²⁵⁸ (2010) 2 BLLR 149 (LC).

²⁵⁹ Ibid, paragraph 40.

²⁶⁰ Ibid, paragraph 44.

The courts are less tolerant of unprotected strikes, where employees and their trade unions are in wilful disregard to the requirements of chapter IV of the LRA. In the case of *Algoa Bus Company (Pty) Ltd v Transport Action Retail and General Workers Union*²⁶¹ employees embarked on an unprotected strike that lasted 7 and a half working days. The employer obtained an interdict against the workers on the 5th day of the strike, but this did little to dissuade workers.

Ultimately, because the interdict was defied, the strike was premeditated and not in response to unjustified conduct of the employer, the court award compensation of R1 406 285, 30 to be paid jointly and severally by the trade union and its members. The *Algoa* judgment reflects a paradigm shift in terms of compensation awarded for losses incurred during unlawful strikes. Compensation to this extent is unprecedented and sends a clear message to trade union organisers that employers do have recourse against non-compliance with chapter IV of the LRA. Compensation is not an effective remedy against strike violence. Despite the courts awarding compensation which is arguably mild compared to the level of losses experienced by employers and there is no evidence to suggest that compensation awarded in terms of section 68 (1) (b) has the effect of deterring striking employees from committing acts of violence and damage. The LRA further does not define what “just and equitable” compensation means.²⁶²

Since it is argued that compensation in terms of section 68 (1) (b) of the LRA may be inadequate, this brings into question whether there are other means of pursuing a claim against the trade union and striking employees for losses incurred during a violent strike such as the common law delictual claim for damages.

According to Le Roux the main distinction between compensation awarded in terms of section 68 (1) (b) and the common law action for damages are as follows:

The common law delictual claim requires that the plaintiff must establish that he/she or it suffered loss caused by the unlawful and intentional or negligent act or omission of another party. If these requirements are met the plaintiff is entitled to recover the full loss suffered. A claim for compensation will succeed if the requirements of s 68 (1) (b) are met and the Court has a wide discretion to determine what the amount of compensation would be.²⁶³

²⁶¹ (2015) 36 ILJ 2292 (LC).

²⁶² Tenza (note 245;114)

²⁶³ P A K Le Roux “Claims for compensation arising from strikes and lockouts Common law and the LRA.” (2013) 23 *CLL* 11;13

The main difference between a common law delictual claim and compensation in terms of section 68 (1) (b) of the LRA is that with the former once a claim has been proven the plaintiff will be awarded the damages that were incurred whereas with the latter, the discretion to award compensation lies with the court. From the cases discussed above it is clear that this discretion could vary between minimal and substantial compensation and this has the tendency to lead to disproportionate outcomes. It is argued that the remedy of compensation awarded by the Labour Court in terms of the LRA is the correct remedy. Tenza notes that the “the Labour Court has a wide discretion to determine the amount of compensation to be awarded.”²⁶⁴ Furthermore “the Labour court should be willing to award more substantial amounts of compensation for these type of wrongdoings to discourage unions and their members from continuing with unlawful conduct in the future.”²⁶⁵

3.8.3 Dismissal:

In addition to obtaining an interdict and claiming compensation to remedy strike violence employers are permitted to dismiss striking employees. Dismissal means that “an employer has terminated employment with or without notice.”²⁶⁶ An employer is permitted to dismiss striking employees who commit misconduct during a protected strike and for operational requirements.²⁶⁷ The act of participating in an unprotected strike can also warrant a dismissal.²⁶⁸

Prior to the dismissal of striking employees, employers must consider the Code of Good Practice: Dismissal²⁶⁹ which provides that “a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure.”²⁷⁰ Item 6 of the Code of Good Practice: Dismissal provides that participation in an unprotected strike “does not always deserve dismissal.”²⁷¹ A decision to dismiss employees for participation in an unprotected strike must take into account “(a) the seriousness of the contravention, (b) attempts made to comply with this Act; and (c) whether or not the strike was in response to unjustified conduct by the employer.”²⁷²

²⁶⁴ Tenza (note 245;117)

²⁶⁵ Ibid 118.

²⁶⁶ Section 186 (1) (a) of the LRA.

²⁶⁷ Section 67 (5) of the LRA.

²⁶⁸ Section 68 (5) of the LRA.

²⁶⁹ Schedule 8 of the LRA.

²⁷⁰ Ibid Item 2 (1).

²⁷¹ Ibid Item 6 (1).

²⁷² Ibid.

It is argued that the dismissal of striking employees, whether for participation in an unprotected strike, or for misconduct during a protected strike is an extremely strong remedy because it severs the employment relationship. Dismissal is an effective remedy because the employer will not have to deal with the striking employees after they have been dismissed.

3.9 Picketing:

The LRA recognises the expression of strikes in the form of picketing.²⁷³ Picketing is defined as,

the placement of union members at the entrance to workplaces with various banners and placards, indicating their reason for being there. The functioning of picketing is a means of securing support and maintenance of a strike by publicising the strike, persuading non-strikers who have to pass the picket line to join the strike, and to deter scabs from operating at the plant.²⁷⁴

The employer and trade union can meet to establish picketing rules. Should the parties be unable to agree on picketing rules the commissioner must establish picketing rules.²⁷⁵ Picketing rules set the parameters within which a strike can take place. In addition, picketing rules can also provide for consequences if the rules are contravened by employees.

According to section 69 of the LRA a picket may be held “(a) in any place to which the public has access but outside the premises of the employer; or (b) with the permission of the employer, inside the employers premises.”²⁷⁶ Section 69 (3) further stipulates that “the permission referred to in subsection (2) (b) may not be unreasonably withheld.”²⁷⁷

In a situation where the employer does not own the premises where the workplace is based and where it is owned by a separate party the LRA provides that employees may picket “(a) in a place contemplated in section 69 (2) (a) which is owned or controlled by a person other than an employer if that person has had an opportunity to make representations to the Commission.”²⁷⁸

²⁷³ Labour Relations Act 66 of 1995; section 69.

²⁷⁴ M Finnemore & R van Rensburg *Contemporary Labour Relations* (1999) 463.

²⁷⁵ Section 69 (5) of the LRA.

²⁷⁶ Section 69 (2) (a) and (b) of the LRA.

²⁷⁷ Section 69 (3) of the LRA.

²⁷⁸ Section 69 (6) (a) of the LRA.

In *Shoprite Checkers (Pty) Ltd v The Commission for Conciliation Mediation and Others*²⁷⁹ the employer launched an urgent application to vary the picketing rules established by the CCMA commissioner. The picketing rules established by the CCMA permitted the employees to picket within the employers' premises. Pillay J indicated that the court does have the power to review picketing rules established by the CCMA commissioner.²⁸⁰ In reviewing picketing rules, the Labour Court will establish whether the employer's refusal to allow employees to picket inside the premises is objectively reasonable.²⁸¹ With the facts before Pillay J, it was apparent that the CCMA commissioner established the picketing rules without first hearing the employer.²⁸² The matter was remitted to the CCMA for a fresh meeting on picketing rules. What we draw from the *Shoprite Checkers* decision is that the court will look at all the factors objectively and then decide whether it will grant employees the ability to picket within the employers premises. Ordinarily it is not for the Labour Court to decide. This power is vested in the CCMA commissioner to decide.

The Code of Good Practice on Picketing²⁸³ promotes the "right to assemble, to demonstrate, to picket and to present petitions,"²⁸⁴ but qualifies this by stating that, "this constitutional right can only be exercised peacefully and unarmed."²⁸⁵

"Picketers may not physically prevent members of the public, including customers, other employees and service providers from gaining access to or leaving the employer's premises."²⁸⁶ Importantly, picketers cannot "commit any action which may be unlawful, including but not limited to any action which is, or may be perceived to be violent."²⁸⁷ Therefore, the LRA adequately regulates the right to strike by providing comprehensive rules and guidelines to deal with picketing.

The cases that come before the courts however depict a gross disrespect for picketing agreements. In *Tsogo Sun (Pty) Ltd t/a Montecasino v Future of South Africa*

²⁷⁹ (2006) 27 ILJ 2681 (LC).

²⁸⁰ Ibid paragraph [21].

²⁸¹ Ibid paragraph [29].

²⁸² Ibid paragraph [50].

²⁸³ GN765 in *Government Gazette* 18887 of the 15th May 1998.

²⁸⁴ Item 1(2).

²⁸⁵ Ibid diem.

²⁸⁶ The Code of Good Practice on Picketing; Item 6(7)(a).

²⁸⁷ The Code of Good Practice on Picketing; Item 7(b).

Workers Union ²⁸⁸ the employer and trade union concluded a picketing agreement in the context of a protected strike.²⁸⁹ The employees breached the picketing rules 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 litre 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.²⁹⁰

During the violent protected strike, the employer referred a case to the CCMA concerning the breach of the picketing agreement. The union did not dispute the acts of violence but instead indicated that the employer was “provoking them”.²⁹¹ The court in this case confirmed an interim order made by the Labour Court and awarded costs against the trade union.

3.10 Conclusion:

This chapter analysed the Constitution and LRA in respect to strikes. The Constitution regards the right to strike as an important tool to assist in collective bargaining. The strike provisions of the Constitution were drafted considering the difference in power between employers and employees. Therefore, the right to strike is entrenched as opposed to recourse to lockout.

The right to strike and collective bargaining are complementary. Collective bargaining precedes strikes. This chapter identified the LRA as specific legislation that governs strikes. It is argued that the LRA adequately regulates the right to strike by providing for simple and minimal pre-strike procedures. Employees are then protected against dismissal and breach of contract as well as immunised from civil and delictual liability.

This chapter highlights that the pre-strike procedures are designed to promote a culture of collective bargaining. The courts indicate that the right to strike will not be unduly

²⁸⁸ (2012) 33 ILJ 998 (LC).

²⁸⁹ Ibid paragraph [4].

²⁹⁰ Ibid.

²⁹¹ Ibid paragraph [5].

restricted. In conclusion, it is argued that the legislation is adequate and promotes the right to strike.

CHAPTER FOUR:

CAUSES OF STRIKE VIOLENCE IN SOUTH AFRICA

4.1 Introduction:

Violence during strikes in South Africa is rife. This chapter explores the causes of strike violence. The issues experienced by employees are a significant factor that leads to violence during strikes. This dissertation does not aim to provide a sociological account of the causes of strike violence. The aim is to present and analyse the key social factors that impact on strike violence such as unemployment, poverty, inequality. In addition, the use of replacement labour and whether this increases strike violence will be investigated and lastly the impact of casualization and non-standard forms of employment have on strike violence will be analysed.

4.2 Strike violence and “local moral orders”:

The level of violent strikes in South Africa has risen exponentially in recent years.²⁹² Von Holdt starts from the premise of analysing violent strikes before and after the “institutionalisation” of labour relations in South Africa. The aim of doing so is to examine whether legislation is effective in meeting its objective of promoting labour peace. Von Holdt explains that violence is an intrinsic element of the notion of a strike. In short, employees feel that they do not obtain results if violence is not utilised during strikes.²⁹³

Importance is given to the idea that violent strikes during the apartheid regime were based on a strong sense of community identity or what the author terms as “local moral orders.”²⁹⁴ This is a transient concept that may vary among communities, which means that, depending on the community, there is no single reason for violent strikes.

This implies that the political situation that prevails provides a strong incentive for workers to exhibit a similar form of protest in the working environment. According to Von Holdt, at present employees feel that promises made to them during the struggle for democracy have not materialised and this frustration gives rise to violent strikes.

²⁹² (Note 4;1).

²⁹³ Ibid 142.

²⁹⁴ Ibid 141.

Moreover, it can be said that employees resort to violence because of feeling marginalised, weak and disempowered due to non-standard forms of employment and casualisation.²⁹⁵ Von Holdt concludes that the prevalence of strike violence is not always a legal problem but rather a by-product of the broader social context.²⁹⁶

This conclusion is plausible if applied to the historical incidents of violent strikes as described in chapter two, which occurred in the context of racism and social inequality. Post-democracy, the social dynamics may have changed, however, the South African context is characterised by social inequality which may serve as a catalyst for violent strikes.

4.3 Structural inequality and strike violence in the mining sector:

Structural violence is a theory which looks at the structure of South African society as being the cause of strike violence. Thembeke Ngcukaitobi²⁹⁷ argues that the extreme violence that is common in the South African workplace is a corollary of the structure of society. Hence, as opposed to looking at the problem from the perspective of the actual employees who embark on violent strikes, he argues that one must look to the structures of South African society to elicit the reasons that cause violent strikes.

The author examines strike violence against the backdrop of the mineworkers' strike at Marikana in 2012. Ngcukaitobi posits that the economic and political order of the day has a material impact on the violence that plays out during strikes, "The issues that occupied the workers of Marikana – of grinding poverty – are primarily political and economic, not labour questions. They were transformed into labour questions because of what has been termed by social scientists, structural violence."²⁹⁸

'Structural Violence', at its bare minimum "refers to a form of violence where some social structure or social institution harms people by preventing them from meeting their basic needs."²⁹⁹ A common view expressed during the Marikana strike was that employees

²⁹⁵ Ibid 147.

²⁹⁶ Ibid 128.

²⁹⁷ T Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" (2013) 34 *Industrial Law Journal* 836.

²⁹⁸ Ibid at page 840, paragraph 14.

²⁹⁹ Ibid 840, paragraph 15.

wanted a higher wage to ameliorate their hardships. Workers candidly expressed their predicament resulting from dysfunctional service delivery.³⁰⁰

Ngcukaitobi argues that the social structures in place deprive individuals of obtaining their most basic social needs and this is a form of violence. It is argued that this reasoning is plausible. The violence demonstrated by the striking employees of Lonmin at Marikana must, therefore, be retaliation against the *status quo* as the author maintains that “there is a link between structural violence and direct violence.”³⁰¹ The author concludes that “massive unemployment, soaring poverty levels and income inequality that characterise the South African labour market”³⁰² provide an explanation for strike violence.

To elaborate on his views of inequality, poverty and unemployment, Ngcukaitobi refers to the difference of earnings between employees in South Africa and uses an example of where a mine worker would take 257 years to make what a mining executive makes in one year.³⁰³ Ngcukaitobi also refers to the impact of HIV/AIDS on employees that leads to further social inequality and disadvantage.

Inequality, unemployment and poverty are inextricably linked with the labour market.³⁰⁴ Since democracy in South Africa unemployment has increased.³⁰⁵ Unemployment is the key driver of inequality.³⁰⁶ Even lower paid employees are not exempt from poverty when matched against the wealth of employees that earn more.³⁰⁷ Currently in the first quarter of 2020 Statistics South Africa indicates that the rate of unemployment is calculated at 29,1 per cent.³⁰⁸ It is argued that due to inequality, unemployment and poverty employees resort to strikes in order to alleviate their plight.

According to Govender³⁰⁹ South Africa is one of the most unequal countries in the world.³¹⁰ The gap between the wealthy and the poor are ever widening and this certainly affects the way in which employees deal with inequality. Govender argues that inequality and

³⁰⁰ Ibid 840.

³⁰¹ Ibid 841.

³⁰² Ibid 846.

³⁰³ Ibid 849.

³⁰⁴ M Leibbrandt, I Woolard, H McEwen, C Koep “Employment and inequality outcomes in South Africa” *South Africa Labour and Development Research Unit* 20 accessed from <http://oecd.org/employment/employmentpoliciesanddata/45282868.pdf> on the 07 April 2020.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Ibid 21.

³⁰⁸ http://www.statssa.gov.za/?page_id=1854&PPN=P0277&SCH=7643 accessed on 07 April 2020.

³⁰⁹ J Govender, “Social justice in South Africa.” *Civitas, Rev. Ciênc. Soc.* [online]. 2016, vol.16, n.2, pp.237-258. ISSN 1519-6089. <https://doi.org/10.15448/1984-7289.2016.2.23076>.

³¹⁰ Ibid 237.

poverty lead to violence.³¹¹ As a result of the poverty and inequality that workers experience, violence is considered an appropriate tool to obtain their demands. This view is supported by Murwirapachena and Sibanda who assert that inequality and poverty ‘fuels the fire’³¹² for greater expectations on the part of employees due to the “huge inequity in remuneration structures in South Africa.”³¹³ Employees view their poverty and inequality as an aggravating factor that leads them to the forefront of strike action.

According to Benjamin,³¹⁴ the lack of social transformation in South Africa since democracy in 1994 has resulted in social and economic injustice and inequality³¹⁵ Benjamin argues that: “in this context the resort to violence, which was a dominant mode of struggle against apartheid retains significance both as a tactic to achieve demands and a form of protest action.”³¹⁶ Benjamin’s view can therefore be interpreted to mean that since there has been inadequate social transformation since democracy in 1994 employees readily engage in violent conduct to address the inequality and injustice that they face. According the Benjamin violence has been normalised as a tool against inequality.³¹⁷ Therefore, Benjamin’s views are comparable Von Holdt who argues that social inequality has led to the normalisation of violence being used as a weapon to address social inequality.³¹⁸

Inequality, unemployment and poverty are significant social factors that gives rise to strikes. The extent of inequality, unemployment and poverty persuade employees to pursue their demands violently. Employees do not only see strikes as enhancing their own remuneration but also a means of bettering their social circumstances. In the next section, this dissertation will examine the link between non-standard employment and casualization to strike violence.

³¹¹ Ibid 239.

³¹² Murwirapachena & Sibanda (note 10;555)

³¹³ Ibid.

³¹⁴ P Benjamin “Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)” ILO Working Paper No. 47 (2013) accessed from <http://www.ilo.org/publns> on the 07 April 2020.

³¹⁵ Ibid 36.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid.

4.4 Non-standard employment, casualization and the link to strike violence.

4.4.1 Non-standard employment:

Poverty, unemployment and inequality are not the only reasons for strike violence. A significant contributing factor to strike violence can be attributed to the tensions that arise from ‘non-standard’ employment. Benjamin defines ‘non-standard’ employment as: “outsourcing, the use of fixed term contracts, temporary or part time work and labour broking.”³¹⁹ A ‘non-standard’ employment relationship can be distinguished from a standard employment relationship in which employment continues for an indeterminate or permanent period and which is normally regulated by a contract of employment.³²⁰ Furthermore employees work at a particular workplace which is under the control of an employer.³²¹ The different types of ‘non-standard’ employees will be discussed below.

Outsourcing refers to the process of “replacing services of existing employees by engaging an outside contractor whose duties are perceived to be extraneous to the core business of the employer.”³²² An example of outsourcing would be where an employer retrenches a cleaner and makes use of an external cleaning company instead. The effect of outsourcing is that the workplace becomes diluted with employees who may not work for the same employer thus making it difficult for employees and their unions organise collectively.

Temporary, part time and fixed term contract employees all work for a limited period with an employer.³²³ When compared to the standard employment relationship discussed above, fixed term employees may work for one employer and at one workplace. Furthermore temporary, part time and fixed term employees may also work subject to a contract of employment. The key distinction lies in the fact that temporary, part time and fixed term contract employees work for a limited duration only this has led to the process of Casualization. Casualization is a process that refers to “the make-up of the workforce that has changed or is changing as a consequence of the increased use of temporary or part time employees.”³²⁴

Employees that work for a labour broker or interchangeably known as a temporary employment service (hereafter referred to as TES) are also regarded as “non-

³¹⁹ P Benjamin “Decent work and non-standard employees: options for legislative reform in South Africa: a discussion document” (2010) 34 *ILJ* 845.

³²⁰ J Theron “Employment is not what it used to be.” (2003) 24 *ILJ* 1247.

³²¹ *Ibid.*

³²² *Ibid* 1257.

³²³ *Ibid* 1250.

³²⁴ *Ibid.*

standard” employees. A temporary employment service “means any person who, for reward, procures for or provides to a client other person – (a) who perform work for the client and (b) who are remunerated by the temporary employment service.”³²⁵

4.4.2 Casualization

Du Toit and Ronnie argue that the nature of the workplace has changed significantly due to casualization resulting in difficulties for trade unions to organise employees as they previously did.³²⁶ Prior to casualization trade unions organised employees as a collective which would make the process of embarking on a strike easy to comply with. Changes brought to the workplace have resulted in difficulties organising employees due to casualization and non-standard forms of employment. The result is, according to Du Toit and Ronnie that large parts of the workforce are excluded from enjoying the right to strike.³²⁷

Strike violence is worsened as employees find it difficult to collectively organise strikes due to casualization whereas non-standard employment workers are deprived of fully exercising their right to strike which further angers them and worsens their predicament. Du Toit and Ronnie postulate:

In South Africa, it is suggested, extreme social inequality plays the biggest part in fuelling the tensions that are manifested in disorderly labour disputes. Violence, furthermore, is not the only consequence of inadequate dispute resolution mechanisms; social (and racial) divisions may be deepened by the invisible exploitation of workers who have no effective channel of resolving their frustrations.³²⁸

Casualization and non-standard types of employment have the effect of dislocating the employee from practices associated with collective action.³²⁹ “Many workplaces become home to a cluster of service providers each with its own workforce that did not employ them.”³³⁰ This environment according to Du Toit and Ronnie is “not conducive to collective bargaining.”³³¹

Due to the disjointed nature of the workplace caused by casualization and the use of temporary employment services it is difficult to organise employees to strike. It is

³²⁵ Section 198 (1) of the LRA.

³²⁶ D Du Toit and R Ronnie “The necessary evolution of strike law.” (2012) *Acta Juridica* 195.

³²⁷ Ibid.

³²⁸ Ibid, 196.

³²⁹ Ibid.

³³⁰ Ibid, 198.

³³¹ Ibid, 197.

argued that this has an effect of making non-standard employees feel marginalised and powerless. It is submitted that employees in this context, use violence to gain power and effectively negotiate with the employer.

When employees are not able to exercise their right to strike as a collective this leads to frustration and tension, it is argued that this is a significant contributing factor to strike violence. A significant example of the effects of casualization and non-standard working arrangements were visible during the platinum sector strikes in 2012.

During the strike at the Impala platinum mine in 2012 employees requested a two hundred percent wage increase.³³² The employees were historically affiliated to the National Union of Mineworkers (hereafter referred to as NUM) but chose to by-pass the union and employer collective bargaining structures and voiced their demands through informally established worker forums.³³³ The platinum mining sector has the highest level of third party employment in South Africa.³³⁴ Casualization and the use of outsourced and temporary employment service employees clearly has an impact on how collective bargaining is undertaken. The employees chose to abandon established collective bargaining structures and deal with management directly which resulted in widespread violence.

Chinguno asserts that the “proliferation in the externalisation of work designed to minimise risk and maximise profits”³³⁵ has become the dominant form of employment in the platinum sector. Externalisation can be defined as:

Externalization [...] gives rise to a triangular (or trilateral) form of employment in which a client or core business (what the International Labour Organization (ILO) described as a 'user enterprise' in its failed attempt to introduce a convention on contract labour) implicitly or explicitly determines the conditions under which the employees of the contractor or service provider it engages work.³³⁶

As a result of externalisation, employees have chosen to abandon historic collective bargaining structures and deal directly with employers because it is too difficult to collectively organise. This has resulted in violent consequences during strikes.

³³² C Chinguno “Marikana massacre and strike violence post-apartheid.” (2013) Vol 4 (2) *Global Labour Journal* 160.

³³³ Ibid.

³³⁴ Ibid, 161.

³³⁵ Ibid.

³³⁶ J Theron “Decent work and the crisis of Labour Law in South Africa” (2014) 35 *Industrial Law Journal* 1829;1831

The mismatch between wage demands and what is offered by the employer can also be argued as a factor that causes strike violence. The wage demand in the Impala Platinum strike discussed above was based on an increase of two hundred percent. Similarly, during the Lonmin strike at Marikana employees demanded a basic wage of R12500.00 which was far from what the employer offered.³³⁷ The frustration that emerges as a result of the disparity of what is demanded as opposed to what is offered is often a factor that escalates into conflict.³³⁸

4.5 The utilisation of replacement employees and strike violence

During the course of a strike, whether protected or not, the employer may impose a lock-out and engage replacement employees to replace the striking employees.³³⁹ The purpose of employing replacement employees is to continue with production whilst the strike continues.³⁴⁰ The use of replacement labour during strikes has been identified as a factor that contributes to strike violence.³⁴¹ Tenza posits that the appointment of replacement labour during a strike “has turned out to be the root cause of violent strikes.”³⁴² The key reasons for the link between the engagement of replacement employees and strike violence is that the striking employees feel that they cannot inflict economic harm against the employer when the business is allowed to continue production or render services whilst the employees are without remuneration.

Section 76 (1) of the LRA provides that an “employer may not take into employment any person- (b) for the purpose of performing work of any employee who is locked out, unless the lock-out is in response to a strike.” Therefore, if an employer effects a lock-out in compliance with section 64 (1) of the LRA to compel employees to oblige to a demand in respect of any matter of mutual interest, that employer cannot appoint replacement employees during the lock-out unless the lock-out is in response to a strike. Thus, if employees embark on a strike, regardless of whether that strike complies with section 64 (1) of the LRA, the

³³⁷ Marikana: How the wage war was won – The Mail and Guardian <https://mg.co.za/article/2012-09-21-00-marikana-how-the-wage-war-was-won/> accessed on the 21 March 2020.

³³⁸ Murwirapachena & Sibanda (note 10;554)

³³⁹ T Kujinga and S van Eck “The right to strike and replacement labour: South African practice viewed from an international law perspective.” (2018) 21 *Potchefstroom Electronic Law Journal* 1;2.

³⁴⁰ Ibid.

³⁴¹ M Tenza “The link between replacement labour and eruption of violence during industrial action.” (2016) 37 (1) *Obiter* 106-120.

³⁴² 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; 219.

employer is permitted to appoint replacement employees to do the work of employees who are on strike.³⁴³

When employees withdraw their labour, they envisage that the employer's production or services that an employer renders will come to a halt, this deprives employers of profit which is the purpose of being in business. In this regard a strike places economic pressure³⁴⁴ on the employer to accept the employees demands or to satisfy a grievance. When the employer is permitted to appoint replacement employees to do the work of those employees who are on strike, this affects the economic pressure that the striking employees wish to inflict on the employer.³⁴⁵

Tenza posits that the use of replacement labour causes friction and "strikers believe that the use of such workers robs them of their weaponry of strike."³⁴⁶ Tenza further notes that the use of replacement labour triggers violence as workers become frustrated that replacement employees are doing work whilst they are on strike.³⁴⁷ The appointment of replacement employees during a strike can be indicative of bad faith bargaining on the part of the employer.³⁴⁸ It is submitted that employees believe that, when they embark on a strike they will not be remunerated, and in exchange the business of the employer will cease to operate thus causing losses in profit. When the employer engages replacement employees under these circumstances striking employees get the impression that the employer does not care about negotiating in good faith but only cares about enrichment this aggravates employees and results in them venting their frustration through violent conduct. It is argued that employees feel betrayed when replacement employees are brought in and it is business as normal.

Historically, replacement employees have always faced the brunt of angry strikers. In *National Union of Metalworkers South Africa v GM Vincent Metal sections (Pty) Ltd*³⁴⁹ the employees embarked on a strike which was a nationwide stay away organised by their trade union NUMSA. During the protracted nationwide strike, the employer made numerous attempts to call the employees back to work, to which calls the striking employees ignored. The employer eventually issued ultimatums for the employees to resume work, but

³⁴³ In this regard the Labour Appeal Court in *Technikon SA v National Union of Technikon employees* (2001) 22 ILJ 427 (LAC) settled the issue of the legality surrounding replacement employees.

³⁴⁴ Tenza (note 340;107).

³⁴⁵ Ibid.

³⁴⁶ Ibid 106.

³⁴⁷ Ibid 106.

³⁴⁸ Tenza (note 340;115).

³⁴⁹ (1999) 2 ALL SA 358 (A).

this was ignored. The employees were dismissed for failing to report for duty, after which, they referred an unfair labour practice dispute to the Industrial Court under the LRA of 1956 as the dismissals took place before the promulgation of the LRA.

Evidence presented to the court indicated that the replacement employees were the target of the striking employees as they were prevented from entering the premises of the employer, they were threatened with violence, they were identified and removed from the premises.

The legal question in this case was whether the employer committed an unfair labour practice (under the LRA 1956) by dismissing the striking employees who refused to comply with ultimatums to return to work. In the end, the court found that the employer did not commit an unfair labour practice by dismissing the employees for not adhering to the ultimatums. However, this judgment is important as it demonstrates that replacement employees are often the target of striking employees.

In *SA Transport and Allied Workers Union v Ram Transport (Pty) Ltd*³⁵⁰ the Labour Court was required to determine if the employees were dismissed fairly. The allegations against the employees involved acts of violence that were committed during an unprotected strike. The allegations consisted of threatening and intimidating replacement employees who were brought in to work whilst the employees were on an unprotected strike.³⁵¹ The main reasons for the dismissals were that they prevented replacement employees from coming to work; and for intimidating and harassing the replacement employees. The evidence accepted by the court showed the employees making “cutthroat” gestures towards replacement employees.³⁵² The employees went as far as to intercept private vehicles that replacement employees were travelling in and threatened them against coming to work or they would be beaten up.³⁵³

The employees were found guilty of intimidation and threatening conduct based on the evidence of witnesses and video footage that was presented to the court.³⁵⁴ The court however could not uphold the employers decision to dismiss the employees because the employer was inconsistent in the application of discipline which made the dismissals

³⁵⁰ [2014] ZALCJHB 471.

³⁵¹ Ibid paragraph [2].

³⁵² Ibid paragraph [44].

³⁵³ Ibid paragraph [60].

³⁵⁴ Ibid paragraph [127].

substantively unfair.³⁵⁵ The employer was found to have acted inconsistently because only one employee was given a final written warning when he was implicated in most of the misconduct and the employer could not put forward a proper explanation to justify this inconsistency.³⁵⁶ The court instead reinstated some employees with limited backpay whilst others were reinstated subject to final warnings.³⁵⁷

*Robertson Winery (Pty) Ltd v Commercial Stevedoring Agricultural & Allied Workers Union and Others*³⁵⁸ concerned employees who were on a protected strike over issues relating to wages. The strike had been protracted which resulted in the employer approaching the Labour Court for an interdict to restrain striking employees from engaging in unlawful conduct which included preventing replacement employees from going to work during the strike.³⁵⁹ The interdict was granted however this did not dissuade striking employees from committing unlawful acts. The employer aggrieved by the striking employees breach of the interdict, approached the Labour Court again to hold the union officials and striking employees in contempt of the interdict.

Upon considering the facts the court was of the view that even though acts of intimidation and threats were made against replacement employees the employer could not identify the individual perpetrators thus absolving the employees of being in contempt of court. The union however was found to be in contempt of court for not ensuring that replacement employees were not threatened or intimidated.³⁶⁰ The union was also held to be in contempt of the court order for threats made against the Human Resources manager of the company. The court imposed a fine of R50 000.00 suspended over a twelve-month period on condition that the trade union was not found guilty of contempt of court.³⁶¹

From the cases surveyed above it is clear that there is a link between the use of replacement employees and strike violence. Striking employees do not want replacement employees to work whilst there is a strike taking place. The motivation behind intimidating and threatening replacement employees, it is suggested, is to make the employer feel the economic harm of a strike. Whilst the employer is allowed to continue production or render

³⁵⁵ Ibid paragraph [136].

³⁵⁶ Ibid.

³⁵⁷ Ibid paragraph [152].

³⁵⁸ (2017) 38 ILJ 1171 (LC).

³⁵⁹ Ibid paragraph [8].

³⁶⁰ Ibid paragraph [43].

³⁶¹ Ibid.

services whilst the striking employees are without remuneration results in anger experienced by striking employees. Striking employees do feel that their efforts to withdraw their labour are undermined when the employer can continue with its operations using replacement employees who become the target of the striking employees.

Tenza is of the view that “the provision that sanctions replacement labour should be removed.”³⁶² Not only will this result in employers not being able to appoint replacement employees during a strike, it will also mean that employers will be prohibited from continuing with production during a strike which will most certainly result in financial ruin and major employment losses. It is argued that allowing an employer to employ replacement employees during a strike is part of the power play that accompanies a strike and is therefore necessary. Anstey points out that “the employer is entitled to use replacement workers and may resort to the lockout option to put pressure on a union to accept its proposals.”³⁶³

Calling for a complete removal of the provision that sanctions the use of replacement labour fails to consider the impact that will be felt by businesses if production is stopped completely. Jordaan is of the view that:

While the use of replacement labour does not deprive workers of the right to strike, a total ban on the use of replacement labour will mean that the employer is denied the right to do business. It is submitted that a substantial case would have to be made out on the basis of public policy as to why this should be the case. The mere fact that replacement labour may reduce the effectiveness of a strike is simply not enough.³⁶⁴

Replacement employees that are appointed during a strike is a contentious issue that contributes to strike violence. The legality of replacement employees in response to a strike is permitted in terms of section 76 (1) of the LRA. The mere fact that replacement labour angers striking workers is not cause for the abolition of section 76 (1) as the viability and sustainability of businesses also need to be considered. Chapter 5 will discuss solutions to deal with strike violence.

³⁶² Tenza (note 340;106).

³⁶³ M Anstey “Marikana and the push for a new South African pact” (2013) *South African Journal of Labour Relations* 133, 137.

³⁶⁴ B Jordaan “Collective bargaining under the new Labour Relations Act: The resurrection of freedom of contract” *Law, Development and Democracy* (1997) 1, 4.

4.6 Conclusion:

The aim of this chapter is to highlight the causes of strike violence. Considering the literature presented, strike violence cannot only be attributed to shortcomings in the law. Social, political and economic factors also have an influence on the violent nature of a strike. In addition, this chapter has identified factors such as casualization, non-standard employment and the mismatch between wage demands and offers can contribute to violent strikes. The use of replacement employees is another factor that contributes to strike violence as employees may perceive the use of replacement employees by the employer as acting in bad faith because employees are deprived of remuneration whilst the employer maintains production.

Von Holdt argues that “local moral orders” in response to the institutionalisation of labour laws will determine whether or not strikes will be violent. The subjects of Von Holdt’s study indicate that violence is a normative response to disempowerment and disillusionment with the powers that be. This, according to Von Holdt provides an explanation for violent strikes.

Ngcukaitobi’s views are plausible, by arguing that the inequality of South African society and the lack of resources contribute to employees’ frustration, which leads to strike violence. Ngcukaitobi promotes a view that in order to rectify structural inequality, the structures and institutions of South Africa need to be addressed to achieve non-violence in the strike context.

CHAPTER FIVE:

PREVENTION OF STRIKE VIOLENCE

5.1 Introduction:

Any solution to strike violence raises two integral considerations. The first being how the law responds to strike violence and the second being, how the employer, employees and their representatives can prevent such violence. The employer has various options available to stop strike violence, these include: approaching the Labour Court for an interdict to restrain striking workers from committing violence which has been discussed extensively in chapter 3; applying to have a strike declared unlawful by the Labour Court; the Labour Relations Amendment Act³⁶⁵ (hereafter referred to as the LRAA) provides for a compulsory secret ballot before a strike takes place; in addition the LRAA makes provision for an “advisory arbitration panel in the public interest” to avoid strike violence. These new amendments will also be discussed to ascertain the effectiveness in curbing strike violence. From the perspective of avoiding strike violence, this chapter will also focus on negotiation practices that can prevent strike violence.

5.2 Declaring a protected strike unprotected:

Recent jurisprudence indicates that a strike may lose its protection due to the violent conduct of employees. Where protection is lost, workers become susceptible to dismissal, breach of contract and delict arising from their conduct.³⁶⁶

In *Tsogo Sun Casinos (Pty) Ltd trading as Montecasino v Future of South African Workers Union & others*,³⁶⁷ the court remarked 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 to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the

³⁶⁵ Labour Relations Amendment Act 8 of 2018.

³⁶⁶A Myburgh “Interdicting protected strikes on account of violence.” (2018) 39 *ILJ* 703

³⁶⁷ (2012) 33 *ILJ* 998 (LC).

end of the resolution of a labour dispute, *one must question whether a strike continues to serve its purpose and whether it continues to enjoy protected status*³⁶⁸ (emphasis supplied).

A strike may become unprotected due to the conduct of striking workers.³⁶⁹ The court in *NUFBWSAW v Universal Product Network (Pty) Ltd*³⁷⁰ (hereafter referred to as the *NUFBWSAW* decision) affirmed in principle, that a lawful strike may lose its protected status due to the level and degree of violent action by workers.

The employees embarked on a protected strike with the assistance of their trade union. It was common cause before the Labour Court that the EFF, a political party, supported the striking workers. During the strike, banners criticising the employer for doing business with Israel were displayed. The employer challenged the validity of the strike notice by arguing that the strike became politically motivated and did not support the initial demand of workers relating to conditions of service. The employer applied for an interdict to declare the strike unprotected due to the alleged levels of violence that took place during the strike. The court adopted the test posited by Rycroft, which asks the question, “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?”³⁷¹ The court did not elaborate on this test but adopted it as a principle to declare a protected strike unprotected.

Although the court adopted this test to determine if a protected strike should lose its protected status, the court emphasised the potential effect of doing so. The court highlighted that even though a strike can be declared unprotected due to the levels and degrees of violence, this conclusion must not be lightly reached.³⁷² The court further explained that,

While, as it has previously indicated, this court will in appropriate circumstances declare an initially protected strike unprotected on account of levels and degrees of violence which seriously undermine the fundamental values of our Constitution, this is not a conclusion that ought lightly to be reached. A conclusion to this effect itself denies the exercise of fundamental labour rights, and as the Constitutional Court pointed out in *SATAWU*, this court ought not to easily adopt too intrusive an interpretation of the substantive limits on the exercise of the right to strike.³⁷³

³⁶⁸ Ibid 13.

³⁶⁹ For examples see *FBWU & Others v Hercules Cold Storage* (1990) 11 ILJ (IC) as well as the more recent *Afrox Ltd v SACWU & Others* (1997) 18 ILJ 406 (LC).

³⁷⁰ (2016) 37 ILJ 476 (LC).

³⁷¹ Ibid 32.

³⁷² Ibid paragraph 38.

³⁷³ Ibid.

From the evidence presented the court was not persuaded that the level and degree of violence were sufficient to declare the strike unprotected. The court did not decide what threshold of violence would be sufficient to declare a protected strike unprotected. Therefore, the facts of a case will determine when a strike will be declared unprotected.

The application before the court in the *NUFBSWAW* decision was to make an interim order interdicting the striking workers, final. The court maintained that such applications are to be determined cautiously. The reason for doing so is to ensure that the courts do not become involved in collective bargaining between employers and their employees.

The ability to apply for a strike to be declared unprotected is a viable option to the employer, especially in the case where violence has replaced peaceful protest. A court, having to decide this question will have to ask, “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?”³⁷⁴

5.3 Compulsory secret ballot before a strike:

The LRAA makes provision for a secret ballot to be undertaken before trade unions can organise its members to embark on a strike.

Section 19 of LRAA, entitled “transitional provisions” provides that trade unions and employers organisations must make provision for a “secret and recorded” ballot requirement in their constitutions before embarking on a strike or lock-out respectively.³⁷⁵ Until such time as trade unions and employers’ organisations effect these changes to their constitutions they must undertake a secret ballot before embarking on a strike or lock-out.³⁷⁶

³⁷⁴ Ibid paragraph 32.

³⁷⁵ Section 19 (1) of the LRAA.

³⁷⁶ Section 19 (2) of the LRAA. Section 19 of the LRAA is to be read with section 95 (5) (p) and (q) of the LRA which provides as follows:

95 (5) The constitution of any trade union or employers’ organisation that intends to register must-

(p) provide that the trade union or employers’ organisation before calling a strike or lock-out must conduct a ballot of those of its members in respect of whom it intends to call the strike or lock-out

(q) provide that members of the trade union or employers’ organisation may not be disciplined or have their membership terminated for failure or refusal to participate in a strike or lock-out if-

- I. no ballot was held about the strike or lock-out or,
- II. a ballot was held but a majority of the members who voted did not vote in favour of the strike or lock-out

If a trade union does not comply with a secret ballot before engaging in a strike the employer may challenge the trade union for not complying with section 19 of the LRA which will prevent employees from going on strike until a secret ballot is complied with.³⁷⁷

The requirement of a secret ballot before engaging in a strike has great potential to curb the possibility of violence. A secret ballot requires that all members of a trade union must, in confidence and privacy indicate whether they agree or refuse to go on a strike. If the majority of union members elect to go on strike, then this reflects the democratic will of the members to go on strike. If the majority of members elect not to go on strike, then the strike does not enjoy the support of the members. Tenza is of the view that if a strike enjoys little support there is less likelihood of violence occurring.³⁷⁸

Violence will also be prevented based on the secrecy of the ballot as this preserves the integrity of the member who votes for, or against strike action. Tenza posits that the confidentiality of a secret ballot will prevent victimisation and ensure transparency in the strike process.³⁷⁹ Therefore the secret ballot requirement is a significant step to reduce the level of violence prevalent in South African strikes. The main aim behind the introduction of the compulsory secret ballot is to guard against “violent behaviour during strikes, intimidation of other workers and damage to property during marches and industrial action.”³⁸⁰ Fergus and Jacobs comment that the aim behind introducing the compulsory secret ballot requirement are “worthy goals”³⁸¹ furthermore, “Strike violence is highly problematic and intimidation of union members (and other employees) who do not wish to strike is often a significant part of that. Supporting well governed and democratic unions is equally important.”³⁸² The compulsory strike ballot requirement will assist in reducing violent strikes. Rycroft also endorses the strike ballot as “a democratic way of testing whether a majority of trade union members are in favour of a strike.”³⁸³ According to Rycroft: “ballots can offer legitimacy, transparency and inclusivity”³⁸⁴ to the decision to go on strike. Since the requirement of the

³⁷⁷ *Mahle Behr SA v National Union of Metalworkers SA* (2019) 40 ILJ 1814 (LC), *Air Chefs (SOC) Ltd v National Union of Metalworkers SA* (2020) 41 ILJ 428 (LC), *Johannesburg Metropolitan Bus Services (SOC) v Democratic Municipal and Allied Workers Union and Another* [2019] 12 BLLR 1335 (LC).

³⁷⁸ Tenza (note 341;215).

³⁷⁹ *Ibid.*

³⁸⁰ Government Notice 1273, Government Gazette 10779, 17 November 2017, Socio Economic Impact Assessment, 191.

³⁸¹ E Fergus and M Jacobs “The contested terrain of secret ballots.” (2020) 41 *Industrial Law Journal* 757;766

³⁸² *Ibid.*

³⁸³ A Rycroft “Strikes and amendments to the LRA.” (2015) 36 *Industrial Law Journal* 1; 6

³⁸⁴ *Ibid.*,10.

compulsory secret ballot is a relatively new implementation time will determine whether it is in fact an adequate measure to reduce violent strikes.

5.4 Advisory arbitration panel in the public interest.

The LRAA makes a concerted effort to reduce violent strikes. This is evidenced by the insertion of sections 150A to 150D. These sections have been inserted to allow the Director of the CCMA to appoint an advisory arbitration panel in the public interest. This dissertation will discuss the advisory arbitration panel in the public interest arguing that it is a welcome solution to the problem of strike violence and may help if the parties seriously consider the advice of the CCMA. This dissertation will only focus on advisory arbitrations in so far as it relates to violent strikes and not recourse to lock-out which is beyond the scope of this dissertation.

Section 150A (2) pertains to the “appointment of an advisory arbitration panel in the public interest” (hereafter referred to as “the panel”) specifically directed towards resolving strikes. The panel must be appointed, if directed by the Minister of Labour³⁸⁵ or on application by a party to the dispute.³⁸⁶ In addition the Labour Court may order the appointment of the panel³⁸⁷ or the parties to the dispute may agree to the appointment of the panel.³⁸⁸

The director may only appoint the panel “if the director has reasonable grounds to believe”:

- (a) The strike or lockout is no longer functional to collective bargaining in that it has continued for a protracted period of time and no resolution of the dispute appears to be imminent.
- (b) There is an imminent threat that constitutional rights may be or are being violated by persons participating in or supporting the strike or lockout through the threat or use of violence or the threat of or damage to property; or
- (c) The strike or lockout causes or has the imminent potential to cause or exacerbate an acute national or local crisis affecting the conditions for normal social and economic functioning of the community or society.³⁸⁹

³⁸⁵ Section 150A (2) (a) (i) of the LRAA.

³⁸⁶ Section 150A (2) (a) (ii) of the LRAA.

³⁸⁷ Section 150A (2) (b) of the LRAA.

³⁸⁸ Section 150A (2) (c) of the LRAA.

³⁸⁹ Section 150A (3) (a) – (c) of the LRAA.

Appointing the panel in the above-mentioned instances is evident of the legislature's aim to resolve disputes in the context of strikes and to avoid violent conduct which typically accompanies protracted strikes.³⁹⁰

Once the panel has been appointed to render an advisory arbitration award, "a person may not apply to any court of law to stay or review the establishment or proceedings of an advisory arbitration panel until the panel has issued its award."³⁹¹ This ensures that the work of the panel is not interrupted by frivolous legal applications which may delay the resolution of a dispute. In addition, "the appointment of the panel does not interrupt or suspend right to strike or recourse to lockout in accordance with Chapter IV."³⁹² Thus neither the employer nor the trade union may not institute legal proceedings to suspend the strike or lockout once the panel has been appointed. Either party who may seek to do so cannot interfere with the power play that is a characteristic of a strike or lock-out.

Furthermore, "the panel must conduct its proceedings and issue an award within seven days of the arbitration hearing."³⁹³ This implies that the CCMA must issue an award swiftly and expeditiously, as any delays may result in violent conduct from striking employees. An arbitration award rendered by the panel must include "a report on factual findings"³⁹⁴, "recommendations for the resolution of the dispute"³⁹⁵ and must provide a "motivation for why the recommendations ought to be accepted by the parties."³⁹⁶ Importantly, the arbitration award must specify "the seven-day period within which the parties to the dispute must either indicate acceptance or rejection of the award."³⁹⁷

"If a party to the dispute fails to indicate either its acceptance or rejection of the award within the period contemplated in subsection (1) (d), the party is deemed to have accepted the award."³⁹⁸ However if a party to the dispute rejects the award then it must provide a motivation to the panel as to why the award was rejected.³⁹⁹ The LRAA also provides that if a party to the dispute rejects the award, the members of their organisation must be consulted

³⁹⁰ P Benjamin and H Cheadle "South African labour law mapping the changes part 1: The history of labour law and institutions." (2019) 40 *Industrial Law Journal* 2189;2214.

³⁹¹ Section 150A (5) of the LRAA.

³⁹² Section 150B (7) of the LRAA.

³⁹³ Section 150B (6) of the LRAA.

³⁹⁴ Section 150C (1) (a) of the LRAA.

³⁹⁵ Section 150C (1) (b) of the LRAA.

³⁹⁶ Section 150C (1) (c) of the LRAA.

³⁹⁷ Section 150C (1) (d) of the LRAA.

³⁹⁸ Section 150C (5) (b) of the LRAA.

³⁹⁹ Section 150C (5) (c) of the LRAA.

before rejecting the award.⁴⁰⁰ It is submitted that requiring a trade union to consult with their members before rejecting an award is crucial. The decision to go on strike is a significant one. Not only are employees without remuneration during the strike, there is the potential that the strike may escalate to violence. Transparency at every stage of the strike process is therefore crucial. The LRAA thus ensures that members of a union are in a learned position before the decision to strike is taken or to cease any violent conduct during the strike.

The most important aspect of legislation is its enforceability. In the case of advisory arbitration in the public interest the award issued by the panel is only binding if the parties to the dispute accepts such advice.⁴⁰¹ If the advice is accepted then the award rendered by the panel is equivalent to a collective agreement concluded in terms of section 23 of the LRA. If the parties fall within the jurisdiction of a bargaining council then the advisory arbitration award will also be equivalent to a collective agreement that can be extended to non-parties in terms of section 32 of the LRA. An advisory arbitration award is advice given by the CCMA to resolve a dispute. If a party chooses not to accept such advice there are no repercussions.

If one has regard to the way interdicts, which are legally binding, are blatantly disregarded it is doubtful that trade unions will heed the advice given by the CCMA. Nevertheless, the new insertions to advisory arbitration in the public interest are welcome as a measure for the CCMA to arbitrate and render its decision concerning a strike. It would be difficult for a trade union to convince its members to undertake a strike that goes against an advisory arbitration award.

5.5 A different approach to negotiations:

The process that precedes a strike is important, the issue in dispute must be negotiated in a manner that will resolve the issues between the employer and employees. It must be emphasised that employees should only strike as a last resort where negotiations fail.

Before discussing the different methods of negotiation, it is important to identify the key characteristics of negotiations. Anstey describes negotiations as

a verbal interactive process, involving two or more parties, who are seeking to reach an agreement, over a problem or conflict of interest between them and in which they seek, as far

⁴⁰⁰ Section 150C (6) of the LRAA.

⁴⁰¹ Section 150D (1) (a) of the LRAA.

as possible to preserve their interests, but adjust their views and positions in a joint effort to achieve an agreement.⁴⁰²

Two types of negotiation namely positional negotiation and integrative negotiation will be discussed.

5.5.1 Positional (distributive) negotiations:

The positional method “involves negotiations in which one side’s gain is the other side’s loss. It is win-lose bargaining.”⁴⁰³ The “distributive form of bargaining with its associated power plays is still the most prevalent form of negotiation in South Africa.”⁴⁰⁴

Power is an important factor in positional negotiations; the employer derives power from the resources that it holds. Employees, on the other hand, derive power from the threat of refusing to tender their services to satisfy their demands. Therefore, during positional negotiations, parties will do their best to assert their power. If the parties occupy themselves with the fight for power, conflict is inevitable.

In positional negotiations, parties become defensive of their stake in the process. Demonstrating power is crucial to winning or losing at negotiations. The fight for power is not the correct way of achieving gains during negotiations, as Bendix suggests,

Although power is necessary within the context of successful negotiation, power (or even the perception of power) could prove extremely dangerous. Negotiations are not a power game in which the intention of one party is to crush the other completely. The objective is to reach a workable solution – workable in the sense that it is acceptable to both or all the parties involved.⁴⁰⁵

It is clear, that the need for power is a characteristic of positional negotiations. In a context such as South Africa where resources are the subject matter of conflict, positional negotiations may be the incorrect approach between employers and employees. Positional negotiation leads to conflict which may, in turn, lead to violence during strikes.

Bendix theorises that environmental factors affect the way in which negotiations are conducted, arguing that the “economy, ideological preferences, socio-political

⁴⁰² M Anstey *Negotiating Conflict* (1991) 92.

⁴⁰³ H Katz *et al.* “The negotiations process and structures” from *Labor relations in a globalizing world*. Ithaca, NY: ILR Press, an imprint of Cornell University Press available at <http://digitalcommons.ilr.cornell.edu/articles/1040> 129, accessed on 28 October 2016.

⁴⁰⁴ M Finnemore & R van Rensburg *Contemporary Labour Relations* (1999) 402.

⁴⁰⁵ S Bendix (note 25; 441).

developments, public policy and demographic changes help to determine the content and progress of negotiations, the power balance between the parties and the attitude adopted by one party towards the other.”⁴⁰⁶ With these environmental factors in mind, it is conceivable that power and conflict may give rise to violent industrial action. This may be the case in a situation where there are contests for resources and benefits.

5.5.2 Integrative negotiations:

The integrative method of negotiation is described as a “win-win” process. The employer and the employee avoid taking up fixed positions during the negotiations. The process has been defined as a “search for solutions which is creative and results in an agreement which meets both parties’ needs.”⁴⁰⁷

This approach has also been described as one where “issues and processes are those in which a solution provides gain for labour and management, leading to joint gain.”⁴⁰⁸ Therefore, if both employer and employee are to gain from this process of negotiation it will enrich their collective bargaining relationship.

According to Bendix, the success of integrative negotiations depends on the mutual legitimacy, respect, openness and honesty between the employer and employee. It is the willingness to share information and work towards a solution.⁴⁰⁹ Thus, it is clear that the success of integrative negotiations depends on the good bond between the employer and employees. Integrative negotiation aims to enrich the collective bargaining relationship by benefitting both the employer and the employee.

Therefore, it is appropriate for parties to engage in negotiations that build trust and mutual respect for each other. An approach that places the employer and employee in a contest for resources is not appropriate and may lead to violence. The way negotiations are undertaken requires further education and training for them to be a success.

⁴⁰⁶ S Bendix (note 25; 430).

⁴⁰⁷ J Brand et al., *Labour Dispute Resolution* 2 ed (2008) 108.

⁴⁰⁸ Katz (note 402;126).

⁴⁰⁹ S Bendix (note 25 above; 466 & 467).

5.6 The role of the South African Police Service in dealing with strike violence and recommendations made by the Marikana Commission of Inquiry:

The role of the SAPS is crucial in dealing with strike violence. In terms of the Constitution, “the objects of the SAPS are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.”⁴¹⁰ There is a clear obligation on the SAPS to take preventative measures to avoid violence and maintain the peace. This obligation on the part of the SAPS also applies to any industrial action that may lead to violence.

The “Code of Good Practice: Picketing” provides guidance of the role of the SAPS during a picket. The police are not permitted to intervene in the reasons behind a strike of a strike. The SAPS must enforce the criminal law and arrest picketers who are armed and commit violence. Importantly the police must protect the members of the public against the unlawful conduct of picketers.⁴¹¹

The Marikana Commission of Inquiry scrutinised the role of the SAPS in dealing with strike violence. The report concluded that the Public Order Policing Unit tasked with policing the gathering at Marikana was inadequate.⁴¹² The commission found that the police never “field tested” the crowd control tactics used at Marikana beforehand.⁴¹³ The commission recommended the appointment of a panel of experts to conduct an analysis of the efficacy of the Public Order Policing Unit to execute their duties with a minimal risk of loss to human life or injury.⁴¹⁴ While the Marikana Commission of Inquiry made recommendations about policing, the commission also noted that employees in South Africa have a propensity to carry dangerous weapons.⁴¹⁵ The Marikana Commission further recommended more training needed to be carried out to handle workers who carry sharp weapons.⁴¹⁶

⁴¹⁰ Constitution Act 108 of 1996; section 205(3).

⁴¹¹ Code of Good Practice: Picketing; Item 7.

⁴¹² I Farlam *Marikana Commission of Inquiry: report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin mine in Marikana, in the North West Province* available at [http://www.thepresidency.gov.za/medialib/downloads/downloads/Full Report of the Marikana Commission of Inquiry.pdf](http://www.thepresidency.gov.za/medialib/downloads/downloads/Full%20Report%20of%20the%20Marikana%20Commission%20of%20Inquiry.pdf), accessed on 25 November 2015.

⁴¹³ Ibid 549.

⁴¹⁴ Ibid 551.

⁴¹⁵ Ibid 547.

⁴¹⁶ Ibid 551.

Considering the prevalence of strike violence, it is apparent that the police serve an important role in preventing violence. It is therefore vital that the SAPS be equipped to deal with violence using less harmful means. The way the SAPS exercise their duties would certainly affect whether a strike is violent or not.

5.7 Conclusion:

Applying for an interdict is a viable option to deal with strike violence. The courts are becoming stricter in holding employees and trade unions accountable for not complying with interdicts. Interdicts are not respected by trade unions and their members regardless of fines and convictions imposed for contempt of court proceedings which diminishes its viability as a remedy to curb strike violence.

An innovation in our law is the ability to declare a protected strike unlawful thereby exposing employees to dismissal, criminal and civil liability for their actions during a strike. Although this may be a useful measure to curtail violent strikes, the test used to determine where a strike will lose its protected status has not been delineated by the courts. The degree of violence that would satisfy a court to declare a protected strike unprotected has not been established in principle. Limiting strikes is an encroachment of a fundamental right. There is also the possibility that employers may use this avenue as an impediment to gain an advantage in the power play occasioned by strikes.

The new amendments to the LRAA, requiring a compulsory secret ballot before employees can engage in strikes is a welcome addition to South African labour legislation that will curb violent strikes. The compulsory secret ballot requirement will be a true yardstick to ascertain if union members want to go on strike. Unions that do not comply with the ballot requirement are susceptible to challenge for not complying with section 19 of the LRAA.

The LRAA also provides for the appointment of an advisory arbitration panel in the public interest. The panel will be required to issue an award making recommendations to a trade union before or during a strike. An advisory arbitration award in the public interest is not binding unless the parties to the dispute accepts it. This it is argued impacts on the efficacy of advisory arbitration awards if unions do not heed the advice of the CCMA. The insertion of sections 150A – 150D of the LRAA are welcome attempts to reduce strike violence.

This chapter also provides insight into the different methods that can be used to negotiate. The positional method of negotiation (or the “win-lose” approach) is most common

in South Africa. This is not a suitable negotiation method as it involves the contest for power and resources which may lead to violence. The distributive method of negotiation is preferred. Employers and employees are not adversaries in this method, rather both parties seek to find solutions to the matter of mutual interest that concerns them. This approach is also known as “win-win” negotiation and is considered to build trust and mutual confidence between employees and employers.

The SAPS have a constitutional and statutory duty to maintain and uphold the law. The Public Order Policing Unit came under scrutiny for their handling of the strike violence at Marikana. The Marikana commission of enquiry recommended that SAPS training needs to improve and that officers need to be better equipped to deal with workers in South Africa who have a propensity for carrying dangerous weapons. There is no doubt, that the police have a crucial role to play in preventing strike violence. Effective policing would avert the potential of workers resorting to violence.

CHAPTER SIX:

CONCLUSION

The Constitution and the LRA have been identified as vital legislation that regulates the right to strike. The Constitution entrenches the right to strike. The Constitution also entrenches the right to collective bargaining which is complementary to the right to strike. It is argued that the right to strike is a weapon available to employees to urge employers to agree to demands or grievances. Employers similarly have the weapon of lock-out to compel employees to accept an employer's demands. Jurisprudence indicates that the right to strike will be broadly interpreted as opposed to an interpretation that restricts the right. Therefore, the law adequately regulates the right to strike.

The LRA provides a vigorous regulatory framework by providing procedural preconditions and substantive requirements that must be complied with for strikes to be protected. Once protected, employees are safeguarded against unfair dismissal, civil and criminal liability and breach of contract for the act of participating in a strike. If, however employees commit a misconduct during a strike they can be disciplined, also if employees engage in criminal activities during a strike the criminal process will follow regardless of whether a strike is protected or not⁴¹⁷. It is argued that the procedural requirements were drafted in a simple manner and will be interpreted to promote rather than restrict the right to strike. Thus, the LRA adequately regulates the right to strike by providing for worker protection and aiming to ensure peaceful strikes.

The LRA also adequately regulates the right to strike by providing recourse to the employer if the stipulated procedures are not complied with. Whether a strike is protected or not, employees lose immunity and may face dismissal for misconduct as well as be held liable for damages that may arise. The employer may also claim compensation as a means of redress when employees participate in an unprotected strike.

This dissertation argues that strike violence is not only because of shortcomings in the law but also because there are significant social, economic and political circumstances of South African society that encourage strike violence. These factors are recapitulated below.

⁴¹⁷ Section 67(8) of the LRA.

Von Holdt is of the view that employees engage in violent strikes as they believe violence to be an intrinsic element of participating in a strike. Von Holdt draws this conclusion after examining incidences of strike violence pre- and post ‘institutionalisation’ in South Africa, arguing that much of the violence is due to the local moral orders of a community.

Ngcukaitobi believes that the structure of South African society is one that commits violence against its citizens. The author feels that because citizens are deprived of their basic needs this results in retaliation against the current order.

Ngcukaitobi exemplifies this by using the demands of workers during the Marikana mineworkers strike to support his theory. Ngcukaitobi’s views are that due to the unequal distribution of benefits and poverty in society, employees become violent to further their demands.

This dissertation has also discussed how casualization and non-standard forms of employment can contribute to strike violence. In addition, this dissertation also discussed what impact poverty, inequality and unemployment have in fuelling the fire of strike violence.

This dissertation argues that strike violence can be prevented. Firstly, the employer can seek remedy from the courts by applying for an interdict to restrain striking workers from causing damage and violence. If an interdict is not complied with, employees may be held in contempt of court. This dissertation has demonstrated that interdicts are not always a viable option as case law is littered with instances where interdicts were blatantly ignored and undermined by trade unions and employees. Further developments have occurred in South African law relating to the introduction of a compulsory secret ballot which has the potential of preventing violent strikes by utilising democratic balloting processes in order to gauge whether employees want to go on strike or not. Advisory arbitration in the public interest is also a new intervention by the legislature to avoid protracted strikes that lead to violence. The CCMA will now play an interventionist role by adjudicating disputes of interest with a view of resolving strikes. The efficacy of an advisory arbitration award in the public interest is however limited to whether the parties choose to abide by the award of the CCMA.

Secondly, employers can apply to the Labour Court to have a protected strike declared unprotected. Once an order of this nature is made, an employer may pursue civil and criminal remedies against the transgressors. Declaring a strike unprotected is a developing area in our law. Presently, the test is whether misconduct has taken place to an extent that the strike no longer promotes functional collective bargaining. Implicit in this test is the extent or level

of violence exhibited to warrant the strike being declared unprotected. It is logical, therefore, that the amount of violence necessary to declare a strike unprotected will depend on the facts of a case.

By highlighting different approaches to negotiation, it is argued that the relevant role players can reduce the risk of violent strikes. This paper highlighted the positional and integrative methods of negotiating, showing how an approach that will build a relationship of mutual trust, respect and understanding is more beneficial than an approach that will place the parties in an adversarial stance which leads to conflict rather than progress. Thus, it is argued that the integrative approach could be more effective in reducing the risk of strike violence.

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