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**Strikes and essential services: A South African perspective considered in
light of the proposed amendments to the LRA**

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1. INTRODUCTION, RESEARCH QUESTIONS AND STRUCTURE:

1.1 INTRODUCTION:

The recent violence associated with strikes in a democratic South Africa, an example of which being Marikana¹, is extremely troubling. It troubles the economy, the related potential for international investment in the country, the image of the ruling party and highlights the inability of trade unions to exercise control over their members. It seems that violence² has become synonymous with the all-important right to strike but that those exercising such right clearly lack the associated responsibility. The prevalence of violent strikes in South Africa has been evident in recent years, most recently in the 2010 public servants strike and is considered further below in paragraph 5.8. This may be since the right to strike is entrenched in the Constitution³ (“the Constitution”) and such right is only limited in certain circumstances, such as the instance of essential services⁴. The question is whether this limitation does in fact prevent essential services employees from striking. This is since employees which fall within this definition are still seen striking⁵ along with non-essential services employees. The topic of essential services was brought to the fore again earlier in 2013 when Jacob Zuma⁶, the president of South Africa, publicised the resolve of the African National Congress’ (“ANC”), National Executive Committee, previously mentioned by Gwede Mantashe, to designate teachers as essential services. The comment was met with sharp criticism⁷, however it does raise the question as to whether it is possible, or at all that simple, to designate a sector as one rendering an essential service as a response to disruption associated with strikes. It is also important to consider the other issues and problems which have arisen associated with the interpretation and application of the law in essential services,

¹“The Marikana Commission of Inquiry” available online at <http://www.marikanacomm.org.za/> accessed on 21 September 2013; Terms of Reference of the Commission of Inquiry into the tragic incidents at or near the area commonly known as the marikana mine in rustenburg, NorthWest Province, South Africa published in Government Gazette GN 50 of GG 35680, 12/09/2012

² M Brassey ‘*Labour Law After Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?*’ (2013) 34 ILJ 823 at 823 and 829 available online at <http://jutastat.ukzn.ac.za.ezproxy.ukzn.ac.za:2048/NXT/gateway.dll?f=templates&fn=default.htm> accessed on 21 September 2013

³ The Constitution of the Republic of South Africa Act No. 108 of 1996, Section 23 (2)(a)

⁴ Section 65(d) of the Labour Relations Act No. 66 of 1995 (hereinafter the act is referred to as “the LRA”)

⁵ T Harbour ‘Who are the essential service workers?’ *Mail & Guardian* 9 September 2010 available online at <http://mg.co.za/article/2010-09-09-who-are-essential-service-workers> accessed on 18 August 2013

⁶ S Hlongwane, ‘Education as an essential service? Unlikely’ 2010 *The Daily Maverick*, available online at: <http://www.dailymaverick.co.za/article/2013-02-11-education-as-an-essential-service-unlikely/> accessed on 18 August 2013

⁷ *Loc cit*

including the failure to conclude minimum service agreements and the role and powers of the Essential Services Committee. The aforementioned problems have not gone unnoticed and amendments to the Labour Relations Act No. 66 of 1995 (“LRA”) are currently moving through the legislative process. The amendments are currently in the form of the Labour Relations Amendment Bill (“LRAB”) which was adopted by the National Assembly in Parliament on 20 August 2013⁸ and has made its way to the National Council of Provinces (“NCOP”). The proposed amendments will be considered further herein. The LRAB will not be finalised since the meeting scheduled by the NCOP was cancelled and parliament will be in recess until 28 January 2014. The LRAB may still be subject to further amendments and recommendations which may or may not be accepted.

1.2 BACKGROUND:

In order to analyse, *inter alia*, the above issues arising in essential services and strikes it is necessary to understand the context in which such issues arise. In doing so one must have regard to the position of South Africa on a micro level, in terms of what laws apply in South Africa with respect to strikes generally and the effect of essential services with respect to the role of the Essential Services Committee (“ESC”) and on a macro global level in terms of what norms and standards are acceptable to the International Labour Organisation (“ILO”) with respect to such issues. The issues raised and research objectives are important due to the prevalence of strikes in general and specifically with regard to the essential services and minimum service agreements. This is since the effect on employer, employee, government, potential international investors and ultimately the economy is immense. The issues which arise must be considered against the historical background of inequity, injustice and prejudice experienced in labour law in South Africa. This is crucial to understanding how the issues which face South Africa, as a developing country, can be adequately dealt with by legislature and other instruments to achieve a sustainable, productive and fair labour environment.

⁸ Labour Relations Amendment Bill, B 16B—2012, amended by the Portfolio Committee on Labour (National Assembly) available at <http://www.info.gov.za/view/DownloadFileAction?id=196649> accessed on 14 September 2013

1.3 AIMS AND OBJECTIVES:

The aim of the research is to trace, highlight and identify the historical, current and potential future legal, political and economic effects of strikes in essential services, concluding minimum service agreements (“MSA’s”), as well as the potential further effects created by the proposed amendments contained in the Labour Relations Amendment Bill. The further aim of the research is also to show, understand, analyse and respond to the challenges presented by labour issues in strikes in essential services as well as identifying future possible legislative or other means of achieving the objectives of the LRA and in terms of the LRAB, where these are not addressed or it is believed that this will not be achieved. The aim of the research is also to critically discuss and evaluate the measures being employed through the legislature and the common law established through judicial decisions which determine disputes in the context of such measures.

1.4 RESEARCH QUESTIONS / ISSUES:

The research question is whether the current labour law framework in South Africa is appropriate and adequate with regards to the industrial action in essential services. This dissertation will also consider the potential impact of the proposed amendments to the LRA with respect to essential services.

1.5 RESEARCH METHODOLOGY:

The research methodology employed in this dissertation is one centred on desktop research. In conducting the desktop research the approach has been to review and analyse primary sources, such as legislation and case law, and secondary literary sources, such as journals and articles centred on and around the research questions and issues. This approach was conducted in order to distil the research questions and issues to properly meet the objectives of such research through critical analysis and additional external thought.

1.6 STRUCTURE OF THE DISSERTATION:

Chapter 1, of which this section forms a part, sets out the backdrop against which the research questions and issues are to be dealt, as well as the aims and objectives sought to be achieved and the research methodology employed. Chapter 2 sets out a brief history of the strike and

collective bargaining landscape in South Africa generally in order to examine the inextricable links between past labour law, political issues and following triumph and establishment of South Africa's Constitutional democracy. Chapter 3 considers the ILO's international perspective on strikes and collective bargaining in terms of the ILO Conventions. Chapter 4 deals with the South African perspective on strikes and essential services, including the relationship with the right to bargain collectively, through legislation such as the Constitution and LRA, as well as the consequences and issues arising therefrom including protected and unprotected strikes and the appropriate dispute resolution mechanisms. Chapter 4 analyses the legislative framework surrounding essential services, minimum service agreements, the role and powers of the Essential Services Committee as well as how the Courts have interpreted such legislation. Chapter 5 considers the current issues which have arisen in the context of essential services, maintenance services and the Essential Services Committee. Chapter 6 will consider the possible and intended effects of the anticipated LRAB with respect to essential services and also with regard to the right to strike. Chapter 7 considers the further issues which may arise and do currently exist in the essential services and minimum service agreements, strikes and collective bargaining and the suggested measures to deal with such issues. Chapter 8 is the conclusion which draws together the above in logical coherence to answer the research questions posed and objectives reached in considering such issues.

2. BRIEF HISTORY OF STRIKES AND COLLECTIVE BARGAINING IN SOUTH AFRICA:

2.1 INTRODUCTION:

In South Africa the right to strike and bargain collectively is significantly different today in terms of the LRA, to that which existed historically. It is also apparent historically that the relationship between labour law and politics is intertwined. In order to consider the current position it is necessary to consider the history of labour laws which governed strikes and collective bargaining. The period pre-1996 and the Constitution of South Africa will be considered here, with the period post 1996 being dealt with in Chapter 3. This chapter is not intended to provide a complete history of strikes in South Africa or the strife facing workers under apartheid rule. It is however important to highlight relevant historical occurrences in strikes which, it could be argued, were a part of the demise of apartheid and unfortunately may contribute to the prevalence of violence which is seen today associated with industrial action.

2.2 LABOUR LAW PRE-1996:

The colonial labour history evident in South Africa illustrated by Acts such as the Masters and Servants Act, which was only repealed as recently as 1974⁹, shows the abominable and slave-like manner employees were viewed and treated. In 1922 violent and bloody strikes in the mining sector led to the first dispute resolution legislation.¹⁰ This was discussed in the analysis conducted by the Development Policy Research Unit, University of Cape Town, where it was noted that the:

*“first legislation in South Africa to comprehensively establish mechanisms for dispute resolution was the Industrial Conciliation Act of 1924. This Act excluded African employees, and was established primarily to resolve disputes of interest”.*¹¹

At the time referred to, when the Industrial Conciliation Act was established, disputes of rights were to be determined by the Courts¹² as opposed to the way disputes of interest are

⁹ SR Van Jaarsveld, JD Fourie and MP Olivier ‘Historical Development of Collective Labour Law’ in W A Joubert (founding ed) *The Law of South Africa* vol 13(1) Second Edition Volume (2009) para 279

¹⁰ *Loc cit* at para 280

¹¹ H Bhorat, Kalie Pauw, Liberty Mncube ‘Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data’ (2007) available online at: <http://www.labour.gov.za/DOL/downloads/documents/research-documents/CCMA%20September%2007%20v7%20-%20FINAL.pdf> accessed on 21 September 2013

now dealt with in terms of the LRA.¹³ There have been, naturally, a number of developments in labour legislation and the approach to the labour relationship since 1922. The period from 1922 to 1937 saw the greater acceptance of trade unions and recommendations of a commission of inquiry into wages and conciliation saw the amendment of the Industrial Conciliation Act.¹⁴

Through the period 1937 to the 1970's a number of issues as well as progression, in the labour arena was seen, without limitation or particular order, including: further strikes, discriminatory laws, the Workmen's Compensation Act No. 30 of 1941, Industrial Conciliation Act No. 28 of 1956 (later renamed the Labour Relations Act (LRA) as amended), industrial growth, the Botha Commission of Inquiry whose recommendations were not accepted by government to recognise black trade unions, the Wage Act No. 44 of 1937 and the Black Labour Relations Regulation Act No. 48 of 1953.¹⁵

As noted by *Hemson*¹⁶ a strike by 1000 dockworkers in Durban in the 1969, which saw most of the workers being dismissed, was one of the biggest of the decade and served to motivate the Wages Commission ("WC"). The WC was a project of the University of Natal conducted by a group of student activists, motivating the idea of worker power and helping 'organise' workers.¹⁷ This culminated in the strikes in Durban in 1973 which involved at times up to approximately 50 000 workers and which had been orchestrated by the WC and SACTU.¹⁸ The Durban strikes were widely regarded as being politically revolutionary, since the wage demands which were being made could only be achieved by the transformation of apartheid and were used as means to express political dissatisfaction, which could not otherwise be expressed.¹⁹ The strikes also displayed the unity amongst the African working class.²⁰ It arguably provided the foundation for the link between politics and labour which is still evident today in the tripartite alliance between the ANC, South African Communist Party

¹² *Loc cit*

¹³ Schedule 4 to the LRA, Flow diagram 8

¹⁴ See note 10 at para 280

¹⁵ See note 10 at paras 280-282

¹⁶ Hemson, D, Legassick M, and Ulrich, N, *White Activists and the Revival of the Workers Movement*, in *The Road to Democracy in South Africa: 1970-1980, Volume 2, 1970-1980*, pp. 251-261 available online at:

<http://books.google.co.za/books?id=JGE->

[XB5QlD8C&pg=PA252&lpg=PA252&dq=The+Wages+Commission+Natal&source=bl&ots=c87nFTSF0c&sig=m4PIMb5z6kgcrM7QUOlccMlf89Q&hl=en&sa=X&ei=tmgFT8TkFMSxhAer4uzKAQ&sqi=2&redir_esc=y#v=onepage&q=The%20Wages%20Commission%20Natal&f=false](http://books.google.co.za/books?id=JGE-XB5QlD8C&pg=PA252&lpg=PA252&dq=The+Wages+Commission+Natal&source=bl&ots=c87nFTSF0c&sig=m4PIMb5z6kgcrM7QUOlccMlf89Q&hl=en&sa=X&ei=tmgFT8TkFMSxhAer4uzKAQ&sqi=2&redir_esc=y#v=onepage&q=The%20Wages%20Commission%20Natal&f=false) accessed on 14 September 2013

¹⁷ See note 16 at page 252

¹⁸ See note 16 at page 254

¹⁹ See note 16 at page 256

²⁰ *Loc cit*

(“SACP”) and Congress of South African Trade Unions (“COSATU”). Employers reacted to these strikes by forming liaison committees.²¹ The liaison committees did not allow workers to negotiate collectively, but the mind-set of workers to strike had been shifted by the realisation of their collective power as a labour force.²² Over a number of years that followed further unions and alliances were formed, with the help of the activists and universities.²³ International pressure through sanctions which were imposed, one notably in the United States of America on South African coal, resulted in the abolishment of the Masters and Servants Act referred to above in 1974.²⁴ The links between politics and labour were further strengthened during this period. The Soweto uprising and Heinemann strike further contributed to this.²⁵ The 7 month strike, ‘won’ by workers, at Fatti’s and Moni’s factory, followed by various boycotts, has also been identified as:

“the herald of a rolling wave of strikes that swept the country in the following years”²⁶

It was clear from 1976 onwards into the 1980’s that the political and organised labour tide was barrelling forward into something big and unstoppable. The ultimate breaking of the wave occurred in the release of Mr Nelson Mandela which developments culminated in the birth of a Constitutional democracy in South Africa. It is mentioned with sadness, but also as a celebration of an incomparable life, that Mr Mandela passed away during the writing of this paper and in view of his inimitable struggle, to which many in labour can thank for the rights they now enjoy, this paper is dedicated to him. Mr Mandela was instrumental in securing the ‘negotiated’ Constitution of the Republic of South Africa and a new set of labour laws in the amended Labour Relations Act of 1995.

2.3 CONCLUSION:

It is clear that the link between labour and politics is intertwined and it is important to consider when examining the possible solutions to attempt to better regulate strikes. It also illuminates the thinking behind how essential services could or should function when requiring consensus from trade unions who were established amidst the struggle of politics

²¹ See note 16 at page 257

²² *Loc cit*

²³ See note 16 at page 252

²⁴ See note 16 at page 291

²⁵ See note 16 at page 279

²⁶ See note 16 at page 305

and labour. It is also important to bear this in mind when considering the proposed amendments in the form of LRAB, to address the prevalence of strikes in essential services as well as the issues arising in concluding minimum service agreements and the role and powers, or lack thereof, of the Essential Services Committee.

3. THE INTERNATIONAL PERSPECTIVE ON THE RIGHT TO STRIKE AND BARGAIN COLLECTIVELY:

3.1 INTRODUCTION:

This chapter will consider the right to strike and bargain collectively from an international perspective. This is shown by examining the ILO Conventions and its recommendations. This is in order to provide an understanding of what the international standard is in order to further consider, as below, the current labour law in South Africa and the proposed amendments in essential services.

3.2 THE INTERNATIONAL PERSPECTIVE OF THE ILO:

The International Labour Organisation (“ILO”) is an agency of the United Nations (“UN”), which is based in Switzerland, Geneva, and is the worldwide body which, *inter alia*, is instrumental in promoting decent work in certain countries which are members.²⁷ South Africa is a member and the offices for the region governing South Africa, Namibia, Botswana, Lesotho and Swaziland are in Pretoria. The ILO also provides an international standard of labour law and which member states are obliged to comply with. In addition section 39 of the Constitution provides that when a court, tribunal or forum is interpreting the Bill of Rights it must consider international law and may consider foreign law.²⁸ This is important to bear in mind when considering the ILO’s role in strikes, collective bargaining and essential services. Therefore the ILO and its policies contained in its Conventions and other publications are relevant to understanding how rights in labour law should be interpreted and applied from an international global perspective on labour law.

²⁷ International Labour Organisation website available at: <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> accessed on 26 September 2013

²⁸ See note 3 at section 39(1)(b) and (c)

3.3 ILO CONVENTIONS 87 AND 98:

The ILO considers that the right of persons to form and join unions and engage in collective bargaining is one of the fundamental human rights.²⁹ This is derived from the dignity of the human person as contained in the Universal Declaration of Human Rights.³⁰ The two main tools which the ILO uses to promote and protect these rights are Conventions No. 87 and 98.³¹ These were established in 1948 and 1949 respectively and have been categorized as fundamental Conventions.³² Convention No. 87 provides for the right of freedom of association and protection of the right to organise. Convention 98 provides for the right to organise and bargain collectively. Although neither Convention expressly provides for the right to strike, it is considered as a corollary of the right to organise under the Convention 87.³³ Conventions 87 and 98 were ratified by South Africa on 19 February 1996.³⁴ *Brassey* has noted that when a convention is ratified such a convention will then have the force of law and accordingly must be respected and enforced as such, unless and until such time as it may be denounced.³⁵ LAWSA³⁶ states with respect to Convention 98 that:

“measures should be adopted, taking into consideration local circumstances(my emphasis), to encourage and promote the full development and utilisation of voluntary bargaining

²⁹ R Gopalakrishnan, “Freedom of Association and Collective Bargaining in export processing zones: Role of the ILO supervisory mechanisms”, Working Paper 1, International Labour Standards Department, International Labour Office, Geneva 2007 at page 3 available online at http://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_087917/lang--en/index.htm accessed on 14 September 2013;

³⁰ **Universal Declaration of Human Rights**, Articles 1 and 23(4) available at: <http://www.un.org/en/documents/udhr/> accessed on 15 December 2013

³¹ See note 29; International Labour Organisation, ‘*C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)*’ available online at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087 accessed on 15 December 2013; International Labour Organisation, ‘*C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*’ available online at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C098 accessed on 15 December 2013

³² See note 29

³³ See note 27 at page 4

³⁴ International Labour Organisation, ‘*Ratifications for South Africa*’, available online at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888 accessed on 15 December 2013

³⁵ M Brassey “*Fixing the Laws that Govern the Labour Market*” (2012) 33 ILJ 1 at page 5 available online at: <http://jutastat.ukzn.ac.za.ezproxy.ukzn.ac.za:2048/NXT/gateway.dll?f=templates&fn=default.htm> accessed on 9 November 2013

³⁶ SR Van Jaarsveld, JD Fourie and MP Olivier ‘*Right to Collective Bargaining, International Position*’ in W A Joubert (founding ed) *The Law of South Africa* Volume 13(1) - Second Edition Volume Para 470

*machinery between trade unions and employers, so that employment conditions could be determined by means of collective agreements”.*³⁷

3.4 THE RELATIONSHIP BETWEEN INDUSTRIAL ACTION, THE LIMITATION THEREOF, AND COLLECTIVE BARGAINING:

The expensive disruptive nature of strikes for employees, employers and society, as referred to above, has been recognised by the ILO as a:

*“failure in the process of fixing working conditions through collective bargaining..., they are often a symptom of broader and more diffuse issues, with the result that even if a strike is prohibited by national legislation or a judicial order, this will not prevent it from occurring if the economic and social pressures are sufficiently strong”*³⁸ (own emphasis)

The above recognition, it will be submitted, is an important observation since it lends support for the propositions contained herein of the links between labour law as well as economic and social policies of government. It also provides guidance on what measures could be proposed to be adopted legislatively or otherwise to deal with the prevention of strikes or at least their limitation or better regulation in essential services and the possible declaration of additional industries’ services as essential.

It is also proposed that:

*“Strike action is one of the fundamental means available to workers and their organizations to promote their economic and social interests. It is the most visible and controversial form of collective action in the event of a labour dispute and is often seen as the last resort of workers’ organizations in pursuit of their demands.”*³⁹

The above is undoubtedly correct. However in a South African context, as considered further below, collective industrial action seems to be the first port of call rather than a last resort. Trade unions and the employers often *go through the motions of negotiation* knowing that a strike is the ultimate intended result or at the very least contemplated. The importance

³⁷ *Loc cit*

³⁸ ILO “Labour Legislation Guidelines: Chapter V: Substantive Provisions of Labour Legislation: Introduction” (10-12-2001) ILO Introduction <http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch5.htm#1> accessed on 12 September 2013

³⁹ *Loc cit*

and fundamental nature of strike action cannot be overstated. However the corollary of the rights and obligations which flow with strikes is unfortunately not always respected by the parties. This is evidenced by the level of violence and intimidation often reported to be associated and even part of such strikes. In considering the right to strike, comparatively from an international point of view, the aforementioned quotations from such article confirms that the right to strike is expressly recognised in a vast number of countries either as an individual right or as a collective right. In the case of a collective right to strike, the important distinction is drawn that, individual members may only be protected when embarking on a strike where it is sanctioned by a trade union.⁴⁰ It is further interesting to note that not all countries have limitations on the right to strike when it comes to essential services or public services, although many limit such right in emergency situations.⁴¹ The prohibition on the right is further narrowly construed, from an international perspective in the light of the following with respect to public servants, and will be considered further below in Chapter 5:

“This prohibition of the right to strike may include members of the judiciary and officials working in the administration of justice, but may not be extended to cover public servants in general or public employees engaged in state-owned commercial or industrial enterprises (Digest of decisions and principles of the Freedom of Association Committee of the Governing Body, paras. 537,532). In view of the above distinction, any legislative restrictions should define as clearly and narrowly as possible the class of public servants whose right to strike is restricted. The determination of such public servants should be made on the basis of: the nature of the tasks that they perform; and the likely impact of disruption to that service in the event of a strike.”⁴²

3.5 THE LIMITATION OF STRIKES IN ESSENTIAL SERVICES:

The ILO also considers that the right to strike may be limited with respect to essential services provided that the definition and declaration of such is within the ILO supervisory bodies that it is:

⁴⁰ See note 38, contained under the heading “The right to strike in Constitutions and legislation”

⁴¹ See note 38, contained under the heading Possible exclusions from the right to strike: public servants; essential services; minimum service; disputes over rights

⁴² See note 38, under the heading Public Services

“defined as those the interruption of which would endanger the life, personal safety or health of the whole or part of the population”⁴³

The above definition may then, as indicated, be established generally and the interpretation of such to be attended to by a public authority or court, alternatively by providing a procedure to determine essential services, as well as by legislating a specific list of whether certain activities amount to essential services.⁴⁴ Importantly the concession is also made that such a determination is a delicate matter and will depend subjectively on the country and what is required in certain circumstances peculiar to such country.⁴⁵ It is further recommended, where there is a limitation on the right to strike, that sufficient mechanisms must be in place for workers as a guarantee to promote a speedy resolution through conciliation, mediation and, in the case of a deadlock, arbitration of such disputes arising in such circumstances where applicable.⁴⁶ In limiting the impact of a total or partial prevention of the right to strike it is also confirmed, by ILO supervisory bodies, that a minimum service could be established.⁴⁷ In doing so the following guidelines provide that the following two requirements must be met, firstly that *“the service required must genuinely and exclusively be a minimum service, that is one which is limited to the operations that are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear; and secondly that “the workers’ organizations concerned should be able to participate, if they so wish, in defining such a service, along with employers and the public authorities.”*⁴⁸ It is further recommended that such definition should be clear, applied strictly and determined in advance, not during a dispute, in order to promote clarity, objectivity; and further that a suitable independent body capable of making a determination should be established to intervene should such a dispute arise regarding the definition or application of same, it is also important that the body has the power to issue enforceable decisions.⁴⁹ The application of such recommendation is considered below further in the South African context.

⁴³ See note 38, under the heading ‘Essential Services and Emergency Situations’

⁴⁴ *Loc cit*

⁴⁵ *Loc cit*

⁴⁶ *Loc cit*

⁴⁷ See note 38, under the heading ‘Minimum Service’

⁴⁸ *Loc cit*

⁴⁹ *Loc cit*

3.6 DISPUTE RESOLUTION AND STRIKE BALLOTS:

With respect to the right to strike and the procedure for conducting a protected strike it is recommended preferable, in order not to unduly limit the right to strike, that conciliation and mediation be exhausted as well as a strike ballot be conducted and proper notice be given, as contained in legislation in order to curtail such limitation.⁵⁰ As noted further the reasoning for such conciliation or mediation is that it accords with the freedom of association and could encourage further negotiation and strike ballots in order to ensure democratic control. Importantly the following should be noted:

“In countries where the right to strike is a collective right, and therefore subordinate to a trade union decision, there is often a legal obligation for a union to hold a strike ballot before a strike is called and for a specific majority of the workers concerned to approve the strike. Provisions of this type are in accordance with the principles of freedom of association where they are not such as to make the exercise of the right to strike very difficult or even impossible in practice. In particular, legislative provisions on this subject should ensure that:

- *the quorum and the majority required are reasonable and not such as to make the exercise of the right to strike very difficult or even impossible in practice;*
- *account is only taken of the votes actually cast in determining whether there is a majority in favour of a strike.*

(General Survey, para. 170; Digest, paras. 506, 507, 508, 511)”⁵¹

3.7 NOTICE PERIODS FOR STRIKES:

The rationale behind the provision of notice periods, before a strike may be commenced with, is to allow a final opportunity for negotiation, thus encouraging voluntary collective bargaining in accordance with Convention No.98. However the notice period should not unduly restrict the right to strike. Thus, if the strike has been preceded by conciliation or arbitration, as referred to above, the notice requirement may be shorter, since the employer would have been aware of the dispute as a result of the conciliation/mediation process.

⁵⁰ See note 38, under the heading ‘Conditions for the exercise of the Right to Strike’

⁵¹ *Loc cit* and under the heading ‘Strike Ballots’

Conversely if the dispute arises in essential services the notice period should be longer.⁵² In this respect it is stated that:

“The Committee on Freedom of Association has found the following notice periods in such services to be compatible with principles of freedom of association:

- *a 20-day notice period in the case of services of social or public interest (Digest, para. 504); and*
- *a 40-day notice period in the case of an essential service, provided that the time period is designed to provide the parties with further time for reflection (Digest, para. 505).”⁵³*

3.8 PICKETING:

Picketing is a demonstration conducted in support of a strike, it is generally allowed in many countries, provided it is peaceful. Some countries restrict it legislatively, in order to be in line with the principles of freedom of association.⁵⁴ The South African position with respect to picketing is discussed further below.

3.9 CONCLUSION:

The above highlights the manner in which the rights to organise, strike and bargain collectively are viewed by the ILO. The ILO provisions have been interpreted in a number of ways by different countries, as is evident below when considering education as an essential service, with reference to British Columbia and Germany. The position of the ILO Conventions and application in South Africa are considered further below in Chapter 4. It could be argued that so far South Africa has complied with such Conventions.

4. STRIKES AND COLLECTIVE BARGAINING IN SOUTH AFRICA; POST 1996 IN TERMS OF THE CONSTITUTION AND LRA:

4.1 INTRODUCTION:

In this chapter the position of South African labour law post 1996, in terms of the Constitution will be considered. In doing so it is important to bear in mind the historical

⁵² See note 38, ‘Notice periods’

⁵³ *Loc cit*

⁵⁴ See note 38, under the heading ‘Peaceful picketing’

inequity in labour law referred to in chapter 2 above. As stated by *Cheadle*⁵⁵ with respect to maintaining “industrial peace”:

*“it is one of the ironies of collective bargaining that its very object, industrial peace, should depend on the threat of conflict.”*⁵⁶

This statement could not be put more correctly, particularly in a South African context where conflict both politically and in labour law has often been intertwined and prevalent. In order to understand how collective bargaining and the right to strike and the limitation of that right may be procured it is necessary to consider the relevant legislation. The Constitution is the first instrument which must be examined and thereafter the LRA and the relevant substantive and procedural provisions regarding strikes and essential services.

4.2 INTERPRETATION, APPLICATION AND THE EFFECT OF INTERNATIONAL LAW IN THE BILL OF RIGHTS IN THE CONSTITUTION OF SOUTH AFRICA:

The starting point to examine the above recognition is to have regard to the cornerstone of democracy being, the Bill of Rights, contained in the Constitution of the Republic of South Africa (“the Constitution”).⁵⁷ Sections 1 and 2 of the Constitution provide, *inter alia*, that the Constitution is the supreme law of the land and is founded upon such basis including the rule of law, where law or conduct is inconsistent with it then such is invalid, further that the obligations imposed by the Constitution must be fulfilled.⁵⁸

In order to consider the importance, extent and application of the Bill of Rights regard must be had to sections 7 and 8. It is legislated, *inter alia*, in section 7 that the Bill of Rights is a cornerstone of democracy in South Africa, enshrining the rights of all the people of South Africa and it affirms the democratic values of human dignity, equality and freedom.⁵⁹ Further that the state must respect, protect, promote and fulfil the rights in the Bill of Rights⁶⁰ and further that the rights in the Bill of Rights are subject to the limitations clause of section 36.⁶¹ In considering how to apply the Bill of Rights it is stated in section 8 that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of

⁵⁵ M Brassey, E Cameron, H Cheadle & M Oliver ‘*The New Labour Law*’ (1987) Juta & Co Ltd

⁵⁶ *Loc cit*

⁵⁷ See note 3

⁵⁸ See note 3 at sections 1 and 2

⁵⁹ See note 3 at section 7(1)

⁶⁰ See note 3 at section 7(2)

⁶¹ See note 3 at section 36

state.⁶² It is further stated that the Bill of rights binds and applies to natural and juristic persons to the extent applicable to such right⁶³ and such juristic person.⁶⁴ Importantly it is also confirmed that a court, when applying a provision of the Bill of Rights, must apply the common law or develop it where such right does not give effect to it⁶⁵ and may develop the common law to limit such right, provided the limitation accords with section 36.⁶⁶ It is convenient to expand on the reference above⁶⁷ to section 39 of the Bill of Rights here which confirms when interpreting the Bill of Rights a court, tribunal or forum must promote the values that underlie an open and democratic society based on human, dignity, equality and freedom⁶⁸; must consider international law⁶⁹ and may consider foreign law.⁷⁰ In doing so in such interpretation the court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights⁷¹ and consider that the Bill of Rights does not prohibit any other rights or freedoms that are recognised or conferred by the common law, customary law or legislation provided they are consistent with the Bill.⁷² Therefore when considering the ILO conventions, or provisions in the LRA regarding strikes, or competing rights in the Constitution it is important to interpret them in terms of these provisions. It is also important to note that international and foreign law must be considered, therefore the way in which other countries interpret and apply the aforementioned Conventions and recommendations of the ILO should be considered and applied.

4.3 THE RIGHT TO STRIKE AND BARGAIN COLLECTIVELY: THE CONSTITUTION:

In the light of what is to be achieved here it is important to examine the relevant provisions regarding the right to strike. It is provided in section 23(2)(c) of the Constitution that every worker has the right to strike. The Constitution provides the right to fair labour practices for

⁶² See note 3, section 8(1)

⁶³ See note 3, section 8(2)

⁶⁴ See note 3, section 8(4)

⁶⁵ See note 3, section 8(3)(a)

⁶⁶ See note 3, section 8(3)(b)

⁶⁷ See note 28

⁶⁸ See note 3, section 39(1)(a)

⁶⁹ See note 3, section 39(1)(b)

⁷⁰ See note 3, section 39(1)(c)

⁷¹ See note 3, section 39(2)

⁷² See note 3, section 39(3)

everyone⁷³ as well as the right of a worker to form and join a trade union⁷⁴ and participate in the activities and programmes of a trade union.⁷⁵ It is interesting and important to note, as observed by *Cheadle*⁷⁶, that the right to fair labour practices is odd in that it is found in the Constitution, in section 23(1) as noted above, since it is not found in any other constitution in the world, other than in Malawi which borrowed the wording from South Africa. This is considered important by Cheadle when examining policy formulation in addition to this the extension of the concept of ‘worker’, after the LRA as contained in section 23, by the Constitutional Court of the inclusion of those “*engaged in work relationships akin to an employment relationship*”⁷⁷, as having “*profound implications for both the scope of the current law and any labour law reform*”.⁷⁸ This determination is important when considering the nature of the relationship and how collective bargaining functions within such context as well as further below when considering labour law reform in the form of the LRAB. *Cheadle*⁷⁹ goes further to examine whether the rights contained in section 23 mean that compulsory collective bargaining is constitutionally authorised by such section. However, it seems, that he prefers the meaning: “*that the guarantee was a freedom to bargain rather than a right to bargain*”⁸⁰, nonetheless an argument remains that it should be a right as opposed to a voluntary process. Although, parties can be compelled to negotiate through power play. This illustrates how the relationship, between the right to strike and bargain collectively, essentially arises from the age old power struggle between employer and employees/trade unions, ie. bargain collectively or else there will be a strike. It cannot be put any better than contained in the footnote of *Du Toit’s*⁸¹ article, by *Jacobs*⁸² where it is stated “*That is without a right to strike, “collective bargaining would amount to collective begging”*. However *Du*

⁷³ See note 3, section 23(1)

⁷⁴ See note 3, section 23(2)(a)

⁷⁵ See note 3, section 23(2)(b)

⁷⁶ H Cheadle, ‘*Regulated Flexibility: Revisiting the LRA and the Bcea*’ (2006) 27 ILJ 663 at 672 available online at: <http://jutastat.ukzn.ac.za.ezproxy.ukzn.ac.za:2048/NXT/gateway.dll?f=templates&fn=default.htm> accessed on 21 September 2013

⁷⁷ *Loc cit* and *SA National Defence Union v Minister of Defence & another* (1999) 20 ILJ 2265 (CC) at paras 21-30

⁷⁸ See note 76 at para 31

⁷⁹ See note 76 at para 104

⁸⁰ See note 76 at para 104

⁸¹ D Du Toit, R Ronnie ‘*The necessary evolution of strike law*’ (2012) *Acta Juridica* 195 at page 196 available online at:

http://search.sabinet.co.za.ezproxy.ukzn.ac.za:2048/WebZ/images/ejour/ju_jur/ju_jur_2012_a11.pdf; sessionid=0:bad=http://search.sabinet.co.za.ezproxy.ukzn.ac.za:2048/ejour/ejour_badsearch.html:portal=ejournal: accessed on 16 November 2013

⁸² ATJM Jacobs ‘*The law of strikes and lockouts*’ in R Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 10 ed (2010) 659 at 660

Toit argues that the corollary of this is not true and that it is not certain that this traditional model, as it exists in South African labour law, can continue to effectively serve the current global trends in employment law and due to the emergence of ‘Neo-liberalism’ requires greater flexibility, this with reference to the views of Cheadle.⁸³ *Cheadle*⁸⁴ considers that the response in the LRA, to mitigate the effects of the voluntary nature of collective bargaining, is contained in the compulsory dispute resolving mechanisms and the ultimate resolution of interest disputes by striking.⁸⁵ The considerations of flexibility and sectoral responses to issues involving the right to strike and bargain collectively are particularly important and highlight the need for a dynamic response to labour challenges. This as noted by *Cheadle*⁸⁶ as well as *Pillay*⁸⁷ below and it is submitted that they should be a foremost consideration when analysing proposed solutions, legislative or otherwise, to the issues considered herein with respect to strikes, essential services, minimum services and the Essential Services Committee. Importantly every trade union, employers’ organisation and employer has the right to engage in collective bargaining⁸⁸. In so engaging in collective bargaining it is also prescribed⁸⁹ that national legislation may be enacted to regulate collective bargaining, where such legislation limits a right in such Chapter it must comply with section 36(1). In LAWSA⁹⁰ it is confirmed that the collective bargaining has existed for some time in South Africa, however it is stated that:

“The content of this right is controversial and uncertain, especially if this right also imposes a duty on the other party (usually the employer) to bargain collectively. During May 2007 the Constitutional Court acknowledged the right to collective bargaining, however, without clarifying the contents of this right”⁹¹.

The reference to the Constitutional Court above refers to the decision of *SANDU v Minister of Defence*⁹² where the Court held, *inter alia*, that:

⁸³ See note 81 at page 197

⁸⁴ See note 76 at para 105-106

⁸⁵ See note 76 at para 106

⁸⁶ *Loc cit*

⁸⁷ See Chapter 5 below; D Pillay “Essential Services: Developing Tools for Minimum Service Agreements” 2012 33 ILJ 801

⁸⁸ See note 3, section 23(5)

⁸⁹ See note 3, section 23(5)

⁹⁰ SR Van Jaarsveld, JD Fourie and MP Olivier ‘Right to Collective Bargaining, Position in South Africa’ in W A Joubert (founding ed) *The Law of South Africa* Volume 13(1) - Second Edition Volume Para 471

⁹¹ *Loc cit*

⁹² *SANDU v Minister of Defence* 2007 ILJ 1909 (CC)

“no matter how broadly the term 'collective bargaining' is construed in s 23(5) of the Constitution, it cannot include the right of a union to bargain with a legislator on the content of law”⁹³

The further issues arise when considering the application of collective agreements to extend to employees not parties to such agreements, constituting a minority non-represented by a union, highlighting the argument for better sectoral determination as discussed in enhancing the process of collective bargaining.⁹⁴

Section 36(1)⁹⁵ is the limitations clause in the Constitution which sets out what is to be considered in determining whether such right can be justifiably limited in such circumstances in order to pass constitutional muster. The effects and issues in collective bargaining and the right to strike set out above are considered further below.

4.4 THE LRA:

The right to strike and facilitation of collective bargaining are so important that they are found in the Bill of Rights. The rights do not however subsist, naturally, in a vacuum and in isolation within the Constitution. This is evidenced by the reference to national legislation in section 23(5) of the Constitution above, and therefore it must be read with the LRA in order to give proper effect to such rights. The LRA has been described as that which:

“regulates individual and collective employment relations. It created the institutions and processes for dispute resolution. These institutions include the Commission for Conciliation, Mediation and Arbitration (the CCMA) and the Labour Courts (the Labour Court and the Labour Appeal Court)”⁹⁶

4.4.1 AIMS, OBJECTIVES AND INTERPRETATION OF THE LRA:

The purpose of the LRA is set out in section 1. It must be borne in mind when understanding how the LRA is to be interpreted and given effect to. Therefore it should be borne in mind herein when considering how to interpret the provisions relating to strikes, collective bargaining, essential services, minimum services the Essential Services Committee and the

⁹³ *Loc cit*

⁹⁴ See note 76 at para 117 - 118

⁹⁵ See note 3, section 36

⁹⁶ See note 11 at page 3

proposed amendments in the form of the LRAB. In order to comply with the responsibility of providing national legislation and mechanisms, to support the constitutional provision of labour rights sets out in section 1 of the LRA, the purpose of the LRA is stated to:

“advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objectives of this Act, which are –

- (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;*
- (b) to give effect to obligations incurred by the Republic as a member of state of the International Labour Organisation;*
- (c) to provide a framework within which employees and their trade unions, employers and employers’ organisations can-*
 - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and*
 - (ii) to formulate industrial policy; and*
- (d) to promote –*
 - (i) orderly collective bargaining;*
 - (ii) collective bargaining at a sectoral level;*
 - (iii) Employee participation in decision-making in the workplace; and*
 - (iv) the effective resolution of labour dispute”*

It is clear that reference to section 27 of the Constitution refers to the interim Constitution and has not since been amended to be in line with section 23 of the final Constitution as referred to above. There is also confirmation of it being a primary objective to give effect to the obligations placed on South Africa as a member of the ILO, as discussed above in Chapter 3. The primary objectives are also to provide a framework to promote, orderly sectoral, collective bargaining on matters of mutual interest between employer and employee and their organisations as well as effective dispute resolution. These objectives and purposes of the LRA are important and apply largely to what is considered herein. Therefore the relevance and import of the research questions and issues considered are given credence here. In section 3 of the LRA it is stated that when any person applies the Act they must interpret its provisions, to give effect to its primary objects; in compliance with the Constitution; and in compliance with public international law obligations of the Republic.⁹⁷ In the case of

⁹⁷ Section 3 of the LRA

*SANSEA v TGWU and Others*⁹⁸ it was confirmed that the LRA must be interpreted to give effect to its purpose. This case involved industrial action which was argued to fall within a collective agreement and was thus unprotected. Since where a strike is prohibited by collective agreement and it commences it will be deemed to be unprotected, this is considered further below. The Court held that a literal interpretation of what “issue in dispute” meant did not support the intention of the legislature and further that where issues fall outside a collective agreement there was nothing stopping a strike, provided the requisite procedure was observed and followed. In the matter of *NEHAWU v UCT and Others*⁹⁹, the Constitutional Court considered the provisions of section 197 of the LRA and held that a purposive approach must be adopted when interpreting the LRA to give effect to the rights contained in the Constitution.¹⁰⁰ The case further confirmed that where a Constitutional issue is raised, access to the Constitutional Court is possible, however litigants should exhaust other available remedies first. If not then the Constitutional Court would be slow to interfere unless the matter raised important issues of principle, failing which the matter should be appealed to the SCA first. In the case of *NUMSA and Others v Fry’s Metals (Pty) Ltd*¹⁰¹ the SCA confirmed that the LRA must be interpreted to give effect to the Constitution and that it had jurisdiction to entertain appeals from the LAC in the appropriate circumstances following the correct petition procedure.¹⁰² It is therefore prudent to consider and apply the above in practice when attempting to interpret a provision of the LRA, considering international law, in order to give effect to the purpose of the LRA and how the Courts should be approached when dealing with constitutional issues in labour law.

4.4.2 DISPUTES OF INTEREST V DISPUTES OF RIGHTS: WHEN TO STRIKE:

In order to analyse the right to strike and the consequences thereof it is important to understand the distinction between a dispute concerning a right as opposed to a dispute concerning an interest.¹⁰³ In a dispute concerning a right it follows that the right must exist, one which a party is legally entitled to¹⁰⁴, for example where parties seek to enforce a right in

⁹⁸ *South African National Security Employers Association v TGWU & others* (1) [1998] 4 BLLR 364 (LAC)

⁹⁹ *NEHAWU v University of Cape Town and Others* 2003 (2) BCLR 154 (CC)

¹⁰⁰ *Loc cit* at para 16 and 41

¹⁰¹ *NUMSA & others v Fry’s Metals (Pty) Ltd* [2005] 5 BLLR 430 (SCA)

¹⁰² *Loc cit*

¹⁰³ Section 64 and 213 of the LRA: Definition of ‘strike’

¹⁰⁴ J Grogan ‘*Workplace Law*’ Chapter 21 ‘The bargaining process’, ‘Background’ available online at

terms of a contract, such a dispute concerns that right. It is not permissible in terms of the LRA to strike over a right and such disputes should be determined by the procedures prescribed in the LRA¹⁰⁵ and which may ultimately result in an arbitration or further litigation. This was confirmed in the decision of *HOSPERSA v Northern Cape Provincial Administration*.¹⁰⁶ Another example of a rights dispute would be where a party is dismissed for misconduct. A party may only strike over an interest dispute. An example of such would be where a party seeks an increase in wages, the party does not have a right to an increase in wages therefore, provided the correct procedure is observed and complied with, a party may strike in such circumstances, this is considered further below.

4.4.3 THE POST-1996 POSITION: STRIKES AND COLLECTIVE BARGAINING, GOOD FAITH, THE LRA AND THE CONSTITUTION:

As noted by *Brassey*¹⁰⁷ in terms of the previous LRA (Industrial Conciliation Act of 1956) issues concerning a dismissal could be resolved either by strike or by a court, however the protection of a worker striking in the case of a dismissal was not sufficient.¹⁰⁸ This changed with the ‘negotiated’ LRA in its current form, and as stated by *Brassey*:

*“Unions won an unqualified right to strike over disputes of interest (wages and the like) but surrendered the right to strike over disputes of right (effectively dismissals). Now all dismissal disputes must be resolved by the CCMA”.*¹⁰⁹

Essentially this development is described by *Brassey* as good industrial relations practice allowing collective action only to be suppressed where there is an alternative way to resolve such disputes.¹¹⁰ This is an important trade-off between the right to strike and dealing with disputes of rights, however whether the over encompassing rationale and ‘negotiated’ result best serves employees can be debated. In the matter of *NUMSA and Others v Bader Bop (Pty)*

<http://jutastat.ukzn.ac.za.ezproxyukzn.ac.za:2048/NXT/gateway.dll?f=templates&fn=default.htm>
accessed on 23 November 2013

¹⁰⁵ Section 65(1)(c) of the LRA

¹⁰⁶ *HOSPERSA v Northern Cape Provincial Administration* (2000) 33 ILJ 1066 (LAC)

¹⁰⁷ See note 35 at page 13

¹⁰⁸ *Loc cit*

¹⁰⁹ *Loc cit*

¹¹⁰ *Loc cit*

*Ltd*¹¹¹ the Constitutional Court also had to determine the interpretation of the LRA and the Constitution when it came to the right to strike and considering whether an unrepresentative (minority) trade union could acquire organisational rights. The court held that this could be so. In doing so the Court stated the following with respect to the right to strike:

*“That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood.”*¹¹²

The Court held that a purposive approach should be adopted, in accordance with section 39 of the Constitution, and one which does not limit the fundamental rights in the Constitution should be preferred¹¹³ in order to give effect to the ILO Conventions 87 and 98, as discussed above.

As noted by *Grogan*¹¹⁴ at common law strikes amounted to a breach of the employment contract allowing summary dismissal by an employer.¹¹⁵ Therefore the protection afforded to employees by the LRA and the Constitution is crucial. As further noted by *Grogan*¹¹⁶ the relationship between the right to strike and the right to bargain collectively was judicially recognised by the Appellate division, albeit pre-Constitution, in the case of *NUM v East Rand Gold & Uranium Co. Ltd.*¹¹⁷ This case also importantly confirmed that the philosophy behind the LRA (1956) is that collective bargaining is the preferred means of maintain good labour relations and resolving labour disputes and furthermore that strikes are an essential and integral element of collective bargaining.¹¹⁸ It was also importantly confirmed that parties are obliged to, since there is a duty to, negotiate with each other in the process of collective bargaining, albeit. Prior to the Constitution there was a suggestion that there should be a duty

¹¹¹ *NUMSA and Others v Bader Bop (Pty) Ltd and Another* 2003 (2) BCLR 182 (CC)

¹¹² *Loc cit* at paragraph 13

¹¹³ *Loc cit* at para 46

¹¹⁴ J Grogan ‘*Workplace Law*’ Chapter 23, ‘*Strikes and Protest Action*’, ‘*Introduction*’ available online at <http://jutastat.ukzn.ac.za.ezproxyukzn.ac.za:2048/NXT/gateway.dll?f=templates&fn=default.htm> accessed on 21 November 2013

¹¹⁵ *Loc cit*

¹¹⁶ *Loc cit*

¹¹⁷ *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd*(1991) 12 ILJ 1221 (A) at pages 1237-8

¹¹⁸ *Loc cit* and at page 1236

to bargain collectively, as noted in *LAWSA*¹¹⁹, in the matter of *FAWU v Spekenham Supreme*¹²⁰ where the judge stated the following:

*“I do not believe that voluntarism has any further right of existence in a system which is principally intended to combat industrial unrest. In my view, and having regard to the fact that fairness is now the overriding consideration in labour relations in South Africa, it is time for the court to find firmly and unequivocally that in general terms it is unfair for an employer not to negotiate with a representative trade union”*¹²¹

However this was not the approach taken in the LRA and Constitution where there is no duty or right to bargain collectively, however the legislation does seek to encourage parties to negotiate. In the later cases of *Entertainment Commercial Catering & Allied Workers Union v Southern Sun Hotel Interests (Pty) Ltd*¹²² and *SANDU v Minister of Defence and Others*¹²³, referred to above, it is apparent that where parties engage in collective bargaining they must do so in good faith, the requirement of good faith does not however exist in isolation with respect to collective bargaining.. This is supported by the matters of *York Timbers Ltd*¹²⁴ and the Constitutional Court decision of *Everfresh*¹²⁵ which although did not decide the issue on good faith it did give an indication of the Courts attitude to this aspect, although confirming that it cannot be a stand-alone criterion. Although the above cases deal with the notion of good faith in contracts and the conclusion of contracts where parties are ‘required’ to negotiate in good faith it could be argued to apply to labour matters the next time a matter comes before the Constitutional Court on this issue. The above matters confirm a duty or obligation to follow the law when considering collective bargaining, but the issue remains that although you can force parties to negotiate through legislation you cannot force them to conclude an agreement. This is evident when considering the current essential services provisions of the LRA and proposed amendments below. The major issue with collective bargaining is where parties simply go through the motions required but ultimately will end up with a strike. It seems that further legislative reform is required in this area as parties left to their own devices will always, and in some cases are in fact are obligated to look after their

¹¹⁹ SR Van Jaarsveld, JD Fourie and MP Olivier ‘Right to Collective Bargaining, International Position’ in W A Joubert (founding ed) *The Law of South Africa* Volume 13(1) - Second Edition Volume Para 470

¹²⁰ *FAWU v Spekenham Supreme* 1988 ILJ 628 (IC)

¹²¹ *Loc cit*

¹²² *Entertainment Commercial Catering & Allied Workers Union v Southern Sun Hotel Interests (Pty) Ltd* (2000) 21 ILJ 1090 (LC)

¹²³ See note 92

¹²⁴ *South African Forestry Co Ltd v York Forest Timbers Ltd* 2005 (3) SA 323 SCA at paragraphs 29-35

¹²⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC)

own (or members) best interests, therefore there are more issues at play than simply forcing parties to negotiate. When one considers the economic impact of wage increases, where a company cannot afford them but the uneducated illiterate believe the company can, as well as forming a ‘negotiation policy or perception’ with employees or the unions where they know from past experiences how the employer has dealt with issues and may prefer the stick to the carrot to keep up a controlling and dominant image so as not to lose credibility. Essentially all these power struggles cannot be expected to be resolved by the parties as their interests are too diverse, collective bargaining is a good way of dealing with disputes of interest. However the question is, is it the best way of dealing with these issues expecting the parties to be the lions and the ringmaster is perhaps a bit ambitious in my view. This can be considered further below.

4.4.4 THE PROVISIONS OF THE LRA DEALING WITH STRIKES, PROTECTED AND UNPROTECTED, AND LOCKOUTS:

The provisions which give substantive and procedural effect to the right to strike, contained in the Constitution, are set out in the LRA. The provisions set out when a party can strike or not, and if it can, what is required to be done to ensure such a strike is protected. Since failure to observe and comply with such provisions may render a strike unprotected, this is discussed further below. The starting point is to consider section 213 of the LRA where the word strike is defined as follows:

*“‘strike’ means the partial or complete concerted refusal to work, or the retardation or obstruction of work, persons who are or have been employed by the same employer or by different employers, for the purposes 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”.*¹²⁶

It is important to observe, *inter alia*, from the above that a strike is conducted by persons therefore a single employee cannot strike.¹²⁷ Section 64 of the LRA spells out the right to strike by employees and the recourse available to an employer to lock employees out. The importance of the right to strike is evident and is described in LAWSA¹²⁸ as a “*fundamental*

¹²⁶ Section 213 of the LRA

¹²⁷ *Schoeman and Another v Samsung Electronics SA (Pty) Ltd* (1997) 10 BLLR 1364 (LC) at 1367

*international labour right*¹²⁹, “*fully recognised*”¹³⁰ in South Africa, however this is provided that the “*prescribed requirements are complied with*”.¹³¹ Section 64(1)¹³² sets out the procedure to be followed to ensure that a strike is protected or is ‘legal’. In interpreting such section the matter of *SATAWU and Another v Moloto NO and Another*¹³³ offers some guidance on who the persons are who may strike and what or whether notice is required by non-union represented employees. Section 64 also sets out the circumstances under which an employee or employer does not need to comply with such procedures in section 64(3) an example of which would be where employees proceed with strike action in breach of the provisions of the LRA¹³⁴ or where an employer locks out employees in response to their involvement in a strike in consequence of such breach.¹³⁵ In order for a strike to be protected, where a collective agreement exists, the parties must comply with a collective agreement in order for the strike to enjoy protection under the LRA. In the case of *County Fair Foods (Pty) Ltd v Food & Allied Workers Union and Others*¹³⁶ the argument was made that so long as the Act had been complied with compliance with the collective agreement could be disregarded and the strike would be protected. This contention was rejected. Therefore where the procedure is not followed, then the strike may be referred to as illegal and is unprotected.¹³⁷ The reference to ‘protection’ is therefore with respect to the consequences which may occur in the case of a protected and unprotected strike. Essentially where employees embark on an unprotected strike it means that they are not guarded from the effects of their actions and accordingly would not be protected from being dismissed¹³⁸ or civil action.¹³⁹ In section 67 of the LRA a ‘protected strike’ and ‘protected lockout’ are defined as a strike or lockout that,

¹²⁸ SR Van Jaarsveld, JD Fourie and MP Olivier ‘*Collective Labour disputes, Strikes*’ in W A Joubert (founding ed) *The Law of South Africa* Volume 13(1) - Second Edition Volume Para 825

¹²⁹ *Loc cit*

¹³⁰ *Loc cit*

¹³¹ *Loc cit*

¹³² Section 64(1) of the LRA

¹³³ *South African Transport and Allied Workers Union and Another v Moloto NO and Another* (2012) 33 ILJ 2549 (CC)

¹³⁴ Section 64(3)(c)

¹³⁵ Section 64(3)(d)

¹³⁶ *County Fair Foods (Pty) Ltd v Food & Allied Workers Union & others*(2001) 22 ILJ 1103 (LAC) at paragraphs 15 -

¹³⁷ J Grogan ‘*Workplace Law*’ Chapter 23, ‘*Strikes and Protest Action*’, Section 4 ‘*Protected (legal) and unprotected (illegal) strikes and protest action*’ available online at <http://jutastat.ukzn.ac.za.ezproxyukzn.ac.za:2048/NXT/gateway.dll?f=templates&fn=default.htm> accessed on 22 November 2013

¹³⁸ Section 68(5) of the LRA

¹³⁹ *Loc cit*

respectively, complies with the LRA.¹⁴⁰ It is also confirmed that a person does not commit a breach of contract or delict when taking place in such a protected strike or lockout.¹⁴¹ An employer also does not have to pay remuneration to a striking employee (no work, no pay principle), subject to certain circumstances.¹⁴² Further, importantly, an employer cannot dismiss an employee for taking part in a protected strike¹⁴³, with the exception of the conduct of such employee during a strike or for operational reasons.¹⁴⁴ Therefore the employer's weapons are limited in the event of a protected strike to non-payment of striking employees, using replacement labour (with the exception of maintenance services) of non-striking workers or the possibility of obtaining a declaration of a service as essential by the ESC (below) or an *ad hoc* declaration as such. Immunity is provided to striking employees and employers locking out since civil proceedings may not be instituted against an employee striking or employer locking out, with the exception of an act constituting an offence,¹⁴⁵ in compliance with the LRA.¹⁴⁶ It is important to note, with respect to strike or lockout balloting, that where a ballot is not complied with, where required by a trade union or employer's organisation, it does not affect the legality of a strike or lockout since it does not constitute a ground for litigation.¹⁴⁷ This could be a possible area of further consideration of limiting the right to strike by requiring mandatory ballots for protected strike status to be enjoyed.

In terms of section 68(5) of the LRA: "*Participation of a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal*".¹⁴⁸ Section 68 of the LRA also sets out the exclusive jurisdiction of the Labour Court in such instances and the powers afforded to it to interdict such strike action or lockout.¹⁴⁹ It further prescribes the Labour Court's jurisdiction with respect to ordering payment for "*just and equitable compensation*".¹⁵⁰ This is done by considering the circumstances set out in section 68(1)(b).¹⁵¹ This is an important section however it is not

¹⁴⁰ Section 67(1) of the LRA

¹⁴¹ Section 67(2) of the LRA

¹⁴² Section 67(3) of the LRA

¹⁴³ Section 67(4) of the LRA

¹⁴⁴ Section 67(5) of the LRA

¹⁴⁵ Section 67(8) of the LRA

¹⁴⁶ Section 67(6) of the LRA

¹⁴⁷ Section 67(7) of the LRA

¹⁴⁸ Section 68(5) of the LRA

¹⁴⁹ Section 68(1)(a) of the LRA

¹⁵⁰ Section 68(1)(b) of the LRA

¹⁵¹ Of the LRA

certain how effectively this is applied in practice for fear of wanting to prolong dispute in the workplace, or as described by Brand as not wanting to “*rock the boat*” after a strike due to costs and delays associated with litigation.¹⁵² *Brand* however also notes the decision in the matter of *SATAWU v Garvas*¹⁵³, which is discussed further below, with respect to union liability for conduct occurring during a strike. Importantly section 68(4) provides that the notice provisions of section 68(2) and (3) do not apply to an employer or employee engaged in an essential or maintenance service.¹⁵⁴

When following section 64(1) of the LRA it is clear that a strike or proposed strike, or lockout, can only occur where the CCMA has furnished a certificate or after certain time periods have elapsed and the appropriate prescribed notices have been given.¹⁵⁵ This is however not always the case since a collective agreement may also provide for a procedure to be observed before a strike can commence, such contractual procedure must then be given effect to.¹⁵⁶ This is also confirmed by section 65(1)(a)-(d) of the LRA which provides that a person may not take part in a strike or lockout where the issue in dispute is prohibited or a prescribed procedure is to be followed, in particular with respect to disputes of rights and interests as referred to above in section 65(1)(c), by such sections of the Act where contained in a collective agreement¹⁵⁷ or where engaged in an essential or maintenance service.¹⁵⁸ This limitation is further qualified by section 65(2) and (3) dealing with an issue of organisational rights prescribed in sections 12 to 15 of the LRA¹⁵⁹ or where bound by an arbitration award or collective agreement.¹⁶⁰ In the case of *Vodacom (Pty) Ltd v Communication Workers Union*¹⁶¹ it was confirmed that the obligations contained in a collective agreement cannot be overridden by the right to strike in section 64 by obtaining a certificate of compliance and accordingly compliance with the collective agreement took precedence. This case essentially revolved around a matter of interpretation of the interrelationship between sections of the LRA but does highlight the Court’s approach to upholding and promoting collective

¹⁵² J Brand ‘Strikes in Essential Services’ 22-09-2010 *The Institute of Accountability in Southern Africa* available online at: http://www.ifaisa.org/Strikes_in_Essential_Services.html accessed on 18 August 2013 see footnote 16 in such article

¹⁵³ *SA Transport & Allied Workers Union & another v Garvas & others*(2012) 33 ILJ 1593 (CC)

¹⁵⁴ See section 68(4) of the LRA

¹⁵⁵ Section 64(1) of the LRA

¹⁵⁶ Section 64(1)(b) and Section 64(3)

¹⁵⁷ Section 65(1)(a)-(c)

¹⁵⁸ Section 65(1)(d)

¹⁵⁹ Section 65(2)(a)

¹⁶⁰ Section 65(3)(a)(i)

¹⁶¹ *Vodacom (Pty) Ltd v Communication Workers Union* (2010) 31 ILJ 2060 (LAC)

bargaining. The failure to follow the procedure in the LRA and clearly identify an issue in dispute by the employees can result in an interdict being issued prohibiting a strike, this occurred in the case of *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union*.¹⁶²

4.4.5 SECONDARY STRIKES:

A secondary strike is defined in section 66 of the LRA as:

*“a strike or contemplation of conduct in the furtherance of a strike, that is in support of strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand”.*¹⁶³

A secondary strike must comply with sections 64 and 65 of the LRA as above.¹⁶⁴ This means that appropriate notice be given¹⁶⁵, and importantly no person make take part in such strike “*unless the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer*”.¹⁶⁶ Should a party, subject to sections 68(2) and (3), contravene section 66(2) a party can apply to a Court for an interdict to prohibit or limit such secondary strike.¹⁶⁷ With respect to section 66(2) *Grogan*¹⁶⁸ states that there have been many cases dealing with the meaning of section 66(2)(c) and prefers the meaning where “*the reasonableness of a secondary strike must be assessed solely on the basis of the effect of the secondary strike on the business of the primary employer*”¹⁶⁹. *Grogan*¹⁷⁰ also notes, interestingly, that in *SALGA v SAMWU*¹⁷¹ “*the Labour*

¹⁶² *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union* (2008) 29 ILJ 650 (LC).

¹⁶³ Section 66(1) of the LRA

¹⁶⁴ Section 66(2)(a) of the LRA

¹⁶⁵ Section 66(2)(b) of the LRA

¹⁶⁶ Section 66(2)(c) of the LRA

¹⁶⁷ Section 66(3)

¹⁶⁸ J Grogan ‘Workplace Law’ Chapter 23, ‘Strikes and Protest Action’, ‘The requirements for protection’, ‘Secondary Strikes’ available online at <http://jutastat.ukzn.ac.za.ezproxyukzn.ac.za:2048/NXT/gateway.dll?f=templates&fn=default.htm> accessed on 23 November 2013

¹⁶⁹ *Loc cit*; Section 66(2)(c) of the LRA and Section 66(2)(c); *Billiton Aluminium SA v National Union of Metalworkers of SA*(2001) 22 ILJ 2434 (LC); *Hextex & others SA Clothing & Textile Workers Union & others*(2002) 23 ILJ 2267 (LC)

¹⁷⁰ *Loc cit*

*Appeal Court held that, because municipalities provide a number of functions for the provincial and national tiers of government, a strike by municipal workers in support of a nationwide strike by public servants would have satisfied the requirements of the LRA*¹⁷².

4.4.6 PICKETING:

Picketing is contained in the Bill of Rights of South Africa in section 17 of the Constitution where it is legislated that:

“Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions”.¹⁷³

This right to picket, peacefully and unarmed, can also be limited, as discussed above with reference to section 36 of the Constitution. It seems that unfortunately this right is abused and results in violence, intimidation and damage to property, usually accompanying similar action and common purpose within a strike. Picketing is defined in section 69 of the LRA and is essentially is where a registered trade union conducts a picket, peacefully, to demonstrate usually in the support of a protected strike or opposition of a lockout.¹⁷⁴ As stated by *Grogan*:¹⁷⁵

“Pickets are demonstrations designed to convey to the general public the reason for strikes and to mobilise support for the strikers' cause. They typically take the form of gatherings at points on or near the employer's premises, and may be accompanied by verbal, written or symbolic messages (speeches, songs, posters, dancing) to express the strikers' message”.¹⁷⁶

A picket can be held near the employer's premises¹⁷⁷, or by the consent of the employer which may not be unreasonable withheld¹⁷⁸, on the employer's premises. Section 69 further

¹⁷¹SALGA v SAMWU [2011] 7 BLLR 649 (LAC)

¹⁷² *Loc cit*

¹⁷³ See note 3, Section 17

¹⁷⁴ Section 69(1) of the LRA

¹⁷⁵ J Grogan 'Workplace Law' Chapter 23, 'Strikes and Protest Action', 'The extent of protection', 'the right to Picket' available online at <http://jutastat.ukzn.ac.za.ezproxyukzn.ac.za:2048/NXT/gateway.dll?f=templates&fn=default.htm> accessed on 23 November 2013

¹⁷⁶ *Loc cit*

¹⁷⁷ Section 69(2) of the LRA

prescribes that the CCMA may attempt to secure an agreement¹⁷⁹, when referred to it should there be a dispute on rules applying to such picket, as well as other disputes for example where section 69 is being breached or there is an allegation that the right to picket is being undermined¹⁸⁰. The CCMA must attempt to resolve the dispute, provided the prescribed notice has been given¹⁸¹, through conciliation¹⁸² failing resolution by referral to the Labour Court¹⁸³. Pickets are considered further below with respect to the proposed amendments to the LRA contained in the LRAB.

5. THE DEFINITION OF, IMPLICATIONS AND ISSUES ARISING IN ESSENTIAL SERVICES IN SOUTH AFRICA:

5.1 THE RIGHT TO STRIKE AND THE LIMITATION OF SUCH RIGHT BY ESSENTIAL SERVICES IN THE LRA:

The ILO definition of an essential services worker was incorporated into the Labour Relations Act¹⁸⁴ (“LRA”) when promulgated in 1995.¹⁸⁵ It also introduced the establishment of an Essential Services Committee (“ESC”) to determine and resolve disputes of essential services. As noted by *Benjamin and Cooper*, prior to this the LRA listed certain sectors in which strikes were absolutely prohibited.¹⁸⁶ Therefore the definition in the LRA not only created a new distinction but revolutionised strikes in South Africa. It was also the first time workers were guaranteed the right to form, join and hold office in trade unions.¹⁸⁷ As mentioned the right to strike is contained in the Constitution.¹⁸⁸ It is further contained in section 64 of the LRA, as above, subject to certain procedural qualifications. An example of which is giving of the requisite notice of a strike¹⁸⁹ or no notice provided it complies with the

¹⁷⁸ Section 69(3) and section 69(6) of the LRA

¹⁷⁹ Section 69(4) of the LRA

¹⁸⁰ Section 69(8)

¹⁸¹ Section 69(9)

¹⁸² Section 69(10)

¹⁸³ Section 69(11)

¹⁸⁴ Section 213 of the Labour Relations Act No. 66 of 1995

¹⁸⁵ P Benjamin and C Cooper “*Innovation and Continuity: Responding to the Labour Relations Bill*” (1995) 16 ILJ 258 (A) available online at [http://jutastat.ukzn.ac.za.ezproxy.ukzn.ac.za:2048/nxt/gateway.dll/University%20of%20KwaZulu-Natal/LABL/538/15274/16147/16152?f=templates\\$fn=document-frameset.htm\\$Q=\[field%20folio-destination-name:'y1995v16ILJpg258'\]\\$x=Advanced#0-0-0-239541](http://jutastat.ukzn.ac.za.ezproxy.ukzn.ac.za:2048/nxt/gateway.dll/University%20of%20KwaZulu-Natal/LABL/538/15274/16147/16152?f=templates$fn=document-frameset.htm$Q=[field%20folio-destination-name:'y1995v16ILJpg258']$x=Advanced#0-0-0-239541) accessed on 14 September 2013

¹⁸⁶ See note 9

¹⁸⁷ See note 9 at page 259

¹⁸⁸ See note 3

¹⁸⁹ LRA section 64(1)

procedures identified in a collective agreement¹⁹⁰ and can also occur where it is regarding a dispute, commonly, regarded as a unilateral change to terms and conditions of employment.¹⁹¹ In terms of section 65(1)(d) of the LRA a person may not take part in a strike or lock-out or take part in any conduct in the contemplation of furtherance of a strike or lock-out if the person is engaged in, *inter alia*, an essential service or a maintenance service. The regulation of essential and maintenance services is contained in sections 70 to 75 of the LRA. These sections will, *inter alia*, be amended if the LRAB is promulgated in due course, this is considered further below in Chapter 6.

5.2 THE DEFINITION OF ESSENTIAL SERVICE:

The definition of an essential service can be found in section 213 of the LRA as follows:

“essential services means-

- (a) A service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;*
- (b) the Parliamentary service;*
- (c) the South African Police Service;”*

Pillay, herself having been a member of the ESC, notes that “*everything about essential services flows from its definition*” as set out above.¹⁹² It is further stated by *Pillay* that there is a link between the service and the interruption and endangerment, that which must be a reasonable probability of occurring.¹⁹³ Importantly *Pillay* also notes that when determining whether a service is essential it is a question of fact.¹⁹⁴ This is due to the diverse nature of industries to which such definition could be applied, it is therefore not possible to adopt a one-size fits all approach in the making of such a determination. As stated by *Brand*¹⁹⁵, if all the LRA did was to provide the definition then there would be a large amount of uncertainty, more than currently exists, in applying such definition to employees within a service. This is the reason why the ESC was established, in order to determine the application and designations within essential services.¹⁹⁶

¹⁹⁰ LRA section 64(3)(b)

¹⁹¹ LRA section 64(4) and (5)

¹⁹² D Pillay “*Essential Services: Developing Tools for Minimum Service Agreements*” 2012 33 ILJ 801 at 807

¹⁹³ *Loc cit*

¹⁹⁴ *Loc cit* at page 808

¹⁹⁵ See note 154, under the heading ‘Defining Essential Services’

¹⁹⁶ *Loc cit*

5.3 CAUSES OF VIOLENT STRIKES IN ESSENTIAL SERVICES: THE LACK OF DESIGNATION OF ESSENTIAL AND MINIMUM SERVICES:

As stated by *Du Toit*¹⁹⁷ a large percentage of violence associated with strikes has arisen in essential services and in particular the public sector which raises questions about the effectiveness of the legislation regulating same.¹⁹⁸ *Pillay* also confirms the high prevalence and intensity of strikes in essential services and believes that the reason for this is because no minimum service agreements (“MSA’s”) are concluded and certified by the ESC.¹⁹⁹ There have only been two MSA’s one by Rand Water and one by Eskom, which fell apart, as considered below.²⁰⁰ Since the introduction of essential services a number of services have been designated, as indicated by *Calitz*²⁰¹ as such, including: the regulation and control of air traffic, the weather bureau, municipal services related to health, safety, water supply and the generation, transmission and distribution of power, emergency and health care services, nursing, medical and paramedical services as well as services supporting them such as catering and medical records.²⁰² These designations, it could be argued, have not had much effect in certain services, as was the case in the public service strikes discussed below. In order to consider the effect of such a designation and possible declaration of other services as essential the regulation, functioning and approach by the Courts must be considered further as below. *Pillay* notes that it was anticipated when most of the abovementioned services were declared as essential:

“that in due course the bargaining partners responsible for providing each service would fine-tune its designations either in MSAs and, if they could not agree, then by declaring disputes about whether particular services were essential or whether particular workers were engaged essential services”.²⁰³

This has not occurred and highlights the level of inaction and perhaps uncertainty as how to approach the ESC, concluding MSA’s, resolution of disputes in essential services and the general reluctance by the parties concerned to do so.

¹⁹⁷ See note 81

¹⁹⁸ See note 81 at page 209

¹⁹⁹ See note 192 at page 801 and 802

²⁰⁰ *Loc cit*

²⁰¹ K Calitz ‘Will the 2012 Amendments to the Labour Relations Act Solve the Problems with Minimum Service Agreements in Eskom Holdings Ltd v NUM’ (2012) 24 SA Merc LJ 438–448 at 439.

²⁰² *Loc cit*

²⁰³ See note 192 at page 809

5.4 THE REGULATION AND FUNCTIONING OF ESSENTIAL SERVICES IN TERMS OF THE LRA:

The regulation of essential services is set out in Sections 70-77 of the LRA. The establishment of an essential services committee (“ESC”), which should be made up of suitably qualified persons, the function of which is to conduct investigations into what should or should not be an essential service, the ESC must determine disputes about such designation as a service as essential and determine if the whole or part of any service is a maintenance service.²⁰⁴ The ESC must give notice, in the Government Gazette (“GG”), of an investigation into whether a whole or part of a service which may constitute an essential service, inviting interested parties to make written or subsequent oral representations, publicly, regarding the possible designation and the ESC must then determine whether to so designate such service. If such designation is made it must be published in the GG, which can be varied or cancelled, the SAPS and Parliamentary service falling within the designation²⁰⁵, as defined in section 213 of the LRA. Minimum services contained in a collective agreement may be ratified by the ESC which then results in such minimum services being regarded as the essential services *inter se* employer and employees, with the balance of employees not dealt with therein no longer being considered as essential as such, and section 74 of the LRA does not apply which deals with disputes as below.²⁰⁶ Pillay states that section 74 is excluded from applying to minimum services since it is “*important as it ring-fences the jurisdiction of the ESC and preserves its exclusive mandate*”²⁰⁷ where the dispute is about whether services are essential or should be agreed as a minimum and would if not limited “*open this field that parliament reserved for specialists to generalist arbitrators*”.²⁰⁸ In terms of section 73 the ESC can be called upon, in the prescribed manner by notice, to determine as expeditiously as possible a dispute as to whether a service falls into that of essential services and whether an employer or employee is engaged in an essential service.²⁰⁹ This section, states Pillay, should have been invoked, in addition to section 72, instead of the parties resorting to litigation as in the SAPS case (see footnote 223 below), thereby the specialist ESC would have been able to

²⁰⁴ LRA section 70

²⁰⁵ LRA Section 71

²⁰⁶ LRA Section 72

²⁰⁷ See note 192 at page 810

²⁰⁸ *Loc cit*

²⁰⁹ LRA Section 73

determine same.²¹⁰Section 74, which importantly deals with disputes arising within essential services, where the preclusion from participating in a strike or lock-out exists, states that a party may refer such a dispute to either a council, if it falls within the scope of the council to deal with it, or refer it to the Commission where the council has no jurisdiction.²¹¹The referrals must be properly served and attempts made to resolve the dispute by conciliation, failing which arbitration, which becomes binding on the state within 14 days but can be reviewed and sent back to the commission or council by Parliament for arbitration. This is an important section to consider since the word may is used it is not a peremptory provision, which perhaps is one of the reasons that the strikes in essential services occur without sanction. An employer can apply, if there is no collective agreement, to the ESC in terms of section 75 for a whole or part of its business to be declared as a maintenance service, this provided such service qualifies as a maintenance service where an interruption of it would result in “*material physical destruction to any working area, plant or machinery*”.²¹² The ESC must quickly determine whether or not the whole or part of the employer’s business or service falls into that of a maintenance service. Importantly as part of this determination the ESC may direct that any dispute in respect of the maintenance service, which is in terms of section 65(1)(d)(ii) deprived of the right to strike, be referred to arbitration.²¹³ This is where it is then dealt with in terms of section 74 as above.²¹⁴ This referral is however qualified in that such a direction may not be made where the terms and conditions of employment of the employees, who are engaged in the essential service, are determined by collective bargaining²¹⁵ or the number of employees engaged in a maintenance service, who are prohibited from striking, is less than those employees allowed to strike.²¹⁶ Section 76 provides that an employer cannot employ persons, temporary or permanent, to continue or maintain production, where a protected strike is occurring or employees have been locked out unless in response to a strike, where some or all of the employers service has been designated as a maintenance service. This will negate the effect of a strike by non-essential services workers if allowed. In section 77 of the LRA it is provided that every employee not engaged in essential services, provided the necessary formalities are complied with, has the right to

²¹⁰ See note 192 at page 802

²¹¹ LRA Section 74

²¹² Section 75 of LRA

²¹³ Section 75(5) of LRA

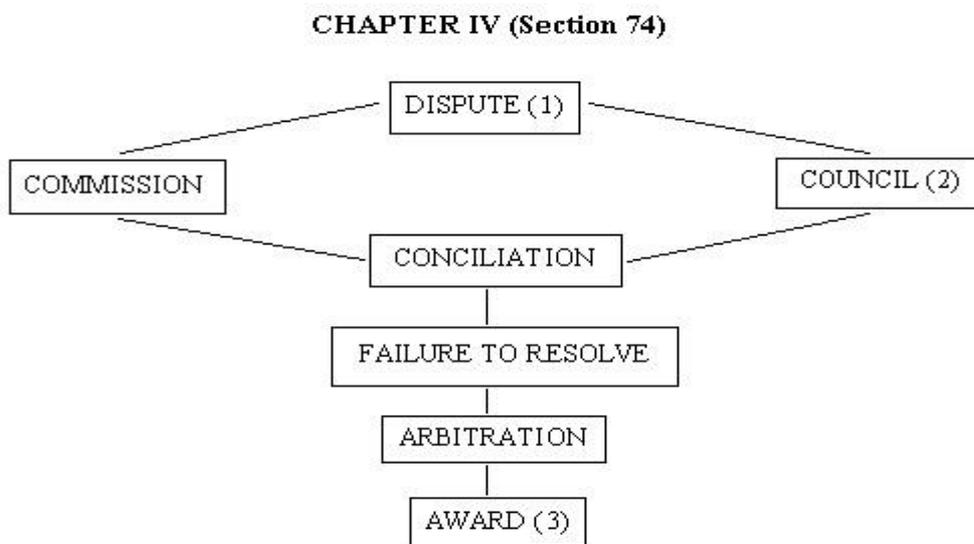
²¹⁴ Section 75(7)

²¹⁵ Section 75(6)(a) of LRA

²¹⁶ Section 75(6)(b) of LRA

take part in protest action. The employee is only provided protection in the LRA insofar as such action or strike is protected in terms of the LRA. Where no protection is found to exist an employee could be dismissed for such strike action which could constitute a fair reason for dismissal.²¹⁷ Section 68, which deals with such “non-compliance”, distinguishes between employees engaged in essential services and those which are not. Where an employee is engaged in an essential service then the notice periods applicable, to those not so engaged, fall away.²¹⁸ Thus providing more direct access to the Labour Court for such urgent matters.

In schedule 4 to the LRA flow diagram 8 sets out what occurs when there is dispute of interest in essential services:



In terms of the LRA where there is a dispute of interest, an example of which being wages, in essential services, the employees cannot strike nor can the employer lockout, this is contained in section 65(1)(d) of the LRA. Therefore a party has the option to refer such dispute to a council or the CCMA. If the parties to the dispute fall within the registered scope of the council then the dispute has to be referred to such council. Where an award is made that has financial implications binding the state there are special procedures prescribed by Parliament which apply.

5.5 ISSUES ARISING IN ESSENTIAL SERVICES:

²¹⁷ Section 68(5)

²¹⁸ Section 68(4)

It is clear from the above that the LRA provides a mechanism to deal with disputes and the determination of essential, minimum and maintenance services. The question is then where do the issues arise? *Calitz* and *Conradie*²¹⁹ are particularly helpful in answering such a question and declaring a particular service as essential or as a minimum service, particularly with respect to the possibility of the declaring the education sector as such. This is considered further in paragraph 5.7 below. It was noted in this journal, with reference to *Pillay*²²⁰ and *Brand*²²¹ that the ESC has been criticised since very few minimum service agreements have been concluded since its inception. However this can also be blamed on the failure to cooperate by the other stakeholders collectively, this is evidenced by the public servant strikes of 2010.²²²

5.5.1 STATUTORY INTERPRETATION OF ESSENTIAL SERVICES:

In the case of *SAPS v POPCRU*²²³, as noted by *Calitz*²²⁴, some crucial questions regarding essential services were considered. The issues arose out of the public service strike of 2007 where employees sought to secure wage demands. The question considered by the LAC was whether the designation in section 71(10) of the LRA of the SA Police Service as an ‘essential service’ prohibited all SA Police Service personnel from participating in a strike or whether it only applied to members deemed to be members of the SAPS as defined in the SAPS Act.²²⁵ Essentially the SAPS had 160 000 staff, 130 000 of which were appointed under the South African Police Services Act (“SAPS Act”) and the balance of 30 000 under the Public Service Act²²⁶ (“PSA”). In this matter, which first came before the Labour Court²²⁷, where an application for a declaratory order was considered to the effect that not all employees within the SAPS constituted essential services employees. The Court agreed with POPCRU’s argument in this regard. It was confirmed by the Constitutional Court in the *POPCRU* case, which confirmed the judgment in the Labour Appeal Court that:

²¹⁹ K Calitz, R Conradie ‘Should teachers have the right to strike? The expedience of declaring the education sector an essential service’ 2013 *Stellenbosch Law Review* Volume 24, Issue 1, Pages 124-145

²²⁰ D Pillay “Essential Services: Developing Tools for Minimum Service Agreements” 2012 33 *ILJ* 801 at 801

²²¹ See note 152

²²² See note 219 at page 130

²²³ *South African Police Service v Police and Prisons Civil Rights Union* 2011 (6) SA 1 (CC)

²²⁴ See note 219 at page 129

²²⁵ South African Police Service Act 68 of 1995

²²⁶ Public Service Act Proc 103 of 1994

²²⁷ *SAPS v POPCRU* 2007 10 *BLLR* 978 (LC) 985

*“It is the service that is essential – not... the industry within which such services fall”*²²⁸

Thus clearly from the above it is evident that in construing the meaning and encompassment of essential services it is intended to be done so narrowly. *Grogan*²²⁹ is critical of the artificial distinction drawn between employees who often work side by side yet are determined differently as essential services or not. According to *Grogan*²³⁰ the following questions had to be considered: Did the prohibition to strike only apply to SAPS members, in terms of the SAPS Act or did it extend such prohibition to PSA employees; Did the prohibition apply to all employees engaged in services so designated or was it just limited to those actually responsible for rendering such services defined as “essential”.

The issues referred to above were decided critically around the word “engaged”. In conclusion *Grogan*²³¹ notes that the current position is accordingly as set out by the LAC²³² judgment, which was confirmed by the Constitutional Court:

“[W]hen a body is declared an essential service, it is the actual service or functions performed by that body that needs (sic) to be insulated from being interrupted by way of a strike from those who are engaged in providing that service or carrying out the functions.”

Therefore PSA employees did not fall within the definition of being *engaged* in essential services since they could not be regarded as being part of the ‘police service’²³³ and it only applied to employees employed under the SAPS Act and designated as members. The Court concluded by finding that:

*“any other interpretation would unjustifiably restrict the employees’ fundamental right to strike”*²³⁴

The above whilst dealing with important issues concerning the determination of certain SAPS employees as being engaged in essential services and the limitation to those specifically so

²²⁸ See note 219 at page 129 ; Loc cit para 26

²²⁹ J Grogan ‘Not Necessarily Essential: Developments in Essential Services Law’ 2011 4 Employment LJ 4 5 available online at:[http://butterworths.ukzn.ac.za.ezproxy.ukzn.ac.za:2048/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://butterworths.ukzn.ac.za.ezproxy.ukzn.ac.za:2048/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) accessed on 25 September 2013

²³⁰ See note 114

²³¹ See note 114

²³² *SAPS v POPCRU* [2010] 12 BLLR 1263 (LAC) and (2010) 31 ILJ 2844 (LAC)

²³³ Loc cit, ILJ at page 2847

²³⁴ Loc cit

engaged, ultimately the case turns on the interpretation of such wording and the limitation imposed by section 36 of the Constitution. It is important, as noted by *Pillay*, that essentially this case was about a statutory interpretation and cautions that “*what it is not is a precedent that PSA employees working for the SAPS do not render essential services*”²³⁵, further this highlights what is stated above that it is a question of fact and one which the Constitutional Court “*could not determine because that power is entrusted exclusively to the ESC. However unlike the SCA, (in the Eskom case discussed below), the CC did not point the litigants to the ESC and the sections relevant to MSAs*”.²³⁶ The case unfortunately does not clearly establish whether a party is engaged in the performance of an essential service or not and is instead an interpretation of a statutory distinction, therefore it would be submitted that *Grogan’s* analysis above is correct. The failure to join the ESC in the SAPS matter is criticised by *Pillay*²³⁷, justifiably so. This is since it could have brought to bear its specialist knowledge and assisted the Constitutional Court in setting a better or more well- rounded precedent and directing the parties to concluding an MSA.²³⁸ Interestingly, and again correctly in my view, *Pillay* believes that the extended litigation in this matter could have been avoided had the parties referred the matter to the ESC to investigate the services rendered or to resolve the dispute, in terms of section 70(2)(a) or (3) read with section 71 and section 70(2)(b) read with section 73 of the LRA respectively.²³⁹ The unintended effect further of such a judgment as noted by *Calitz*²⁴⁰ is that it may prompt workers in essential services, where no MSA exists, to strike in the hope that the Labour Court will be called upon to pronounce, when an interdict of such strike is brought by an employer, that certain of the workers do not perform core services. This issue can be considered below with the LRAB.

5.5.2 ISSUES REGARDING MINIMUM SERVICE AGREEMENTS:

When it comes to minimum services it is not so simple either, as highlighted by the decision in the matter of *Eskom Holdings Ltd v National Union of Mineworkers and Others*.²⁴¹ In this matter, being an appeal to the SCA, the Court had to consider whether:

²³⁵ See note 192 at page 804

²³⁶ See note 192 at page 804

²³⁷ See note 192 at page 806

²³⁸ *Loc cit*

²³⁹ *Loc cit*

²⁴⁰ See note 201 at page 439

²⁴¹ *Eskom Holdings Ltd v National Union of Mineworkers and Others* (2011) 32 ILJ 2904 (SCA)

*“the failure to agree on the terms of a minimum services agreement is a dispute between an employer and a trade union which can be referred to compulsory arbitration by the CCMA under the provisions of section 74 of the LRA”.*²⁴²

The SCA decided the matter, which had been adjudicated firstly by the Labour Court²⁴³ and then Labour Appeal Court.²⁴⁴ The question which arose was whether a dispute regarding the terms of a minimum services agreement could be conciliated or arbitrated in terms of section 74 of the LRA. It was held that they cannot, as only the ESC has the power to determine a dispute in such circumstances. In doing so the court rejected the argument by the unions that the denial of the right to refer the dispute in terms of section 74 left employees without a remedy, instead the court indicated a way out, as set out by section 73 below. Where there is a dispute in terms of section 73 of the LRA only the ESC has the power to determine whether employees' services are an essential service or whether they are engaged in such a service designated as an essential service. The Court held that in this regard that the ESC's power included determining a dispute regarding the terms of a minimum services agreement and that this accordingly was the least limiting interpretation of section 73 of the LRA with regards to the fundamental right to strike. The above decision provided clarity on the functions and jurisdiction of both the CCMA and the ESC, but also highlighted the shortcomings in the current LRA, concerning dispute resolution in essential services. It also illustrated the Court's confirmation of the importance of the right to strike, evidenced by the interpretation to least limit such right as well as the importance of the ESC in the resolution of such disputes. It is hoped that the proposed amendments below will significantly strengthen the arm of the ESC, since as noted by Pillay *“the ESC has no power to enforce participation”*²⁴⁵ in the conclusion of MSA's. The decision in this matter is also significant since it evidences the difference in perspective on the issue of contractual determinations when dealing with minimum services, between the SCA and the LAC. In the LAC the Court held that where the parties could not agree on the terms of the minimum service agreement then the CCMA had jurisdiction to determine such a dispute. On appeal to the SCA it was held that the ESC in fact should determine disputes of such nature and that the CCMA lacked such jurisdiction. In considering the argument about the apparent lack of a remedy in terms of

²⁴² *Loc cit*

²⁴³ *Eskom Holdings Ltd v National Union of Mineworkers and Others* (2009) 30 ILJ 894 (LC)

²⁴⁴ *National Union of Mineworkers and Others v Eskom Holdings Ltd* (2010) 31 ILJ 2570 (LAC)

²⁴⁵ See note 192 at page 810

section 74 and the referral to section 73, *Calitz*²⁴⁶ notes that the reason that Eskom probably did not refer the dispute to the ESC in terms of section 73 was because the ESC had never before determined a dispute regarding minimum services where no agreement existed. Not as stated by the SCA that memories had dimmed from when the ESC had before in 1998 facilitated the conclusion of a collective agreement between Eskom and the trade unions in terms of section 73.²⁴⁷ This is probable and highlights the lack of understanding by persons of the functioning of the ESC. *Calitz*, also questions the correctness of the judgment, albeit that it indicates a way out of the apparent deadlock, in that no specific reference exists in such section to the determination of the terms of the agreement.²⁴⁸ This is now dealt with by the LRAB considered in chapter 5 below.

5.6 DESIGNATION OF A SERVICE AS ESSENTIAL BY THE ESC:

Where a party has applied for a dispute to be determined by the ESC, with respect to whether a service constitutes an essential service, the question arises as to what the status *quo* is pending such a decision by the ESC. This pertinent question was answered in the matter of *Sonqobo Security Services (Pty) Ltd v Motor Transport Workers Union*²⁴⁹. In this matter the court had to determine an application by the employer to the Labour Court for urgent relief interdicting a strike. The employer had previously applied to the ESC to determine a dispute as to whether the service it provided could be designated as essential. The Applicant essentially rendered security services to Empilweni Payout Services (Pty) Ltd who in turn had an agreement with the SA Social Security Agency to facilitate pension payouts on its behalf. The payment of social pensions one month after they fall due had been declared as an essential service by the ESC, gazetted in the *Government Gazette* on 12 September 1997.²⁵⁰ The court held that the right to strike was not able to be limited in such circumstances and the mere application for a service as essential did not allow a party to limit such right to strike in anticipation of the declaration by the ESC. One of the first hurdles which tripped up the employer, as contained in paragraph 7 of the judgment, was that they had failed to give the statutory notice required by the LRA and then had not asked for condonation for such non-

²⁴⁶ See note 201 at page 442

²⁴⁷ *Loc cit*

²⁴⁸ *Loc cit*

²⁴⁹ *Sonqobo Security Services (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC)

²⁵⁰ *Loc cit* at paragraph 2

compliance and therefore the application could be dismissed on such basis alone. It is not known whether a different court would come to a different conclusion if not faced with such a procedural notice irregularity. The Court did however go further in order to consider the merits of the matter. The court held, in paragraph 10, that as it currently stood there had been no declaration by the ESC in terms of section 71 that the Applicant rendered essential services. The Applicant had also failed to establish a *prima facie* right in the face of the Respondent's constitutional right to strike, the Respondent having complied with the procedure in the LRA in order to strike in a protected manner. The Court also noted, in paragraph 11, that the Applicant had been rendering such services since 2003 and accordingly should have moved quicker to determine the ESC dispute. In the circumstances the Court was not prepared to interfere and pre-empt the decision by the ESC. This matter shows that the court respected and preferred the exclusive jurisdiction of the ESC to deal with such matters. It would be interesting to see what would happen in another instance should the prescribed notice having been complied with in another instance. However on the facts the decision appears to be correct as it stands.

5.7 THE POSSIBILITY OF DESIGNATING EDUCATION AS AN ESSENTIAL SERVICE:

It must be stated at the outset that the question, as to whether the determination of education as an essential service is possible, is a complex one, not easily answered nor proposed to be definitively answered herein. It is therefore proposed instead, since a complete elucidation is beyond the purpose of this paper, to provide a *prima facie* view, consideration and suggested approach. The proposal that education in South Africa should be designated as an essential service may not be such an outlandish proposal at first glance. It is clear that the education system in South Africa has deteriorated and a response to such deterioration is required. In the Global Competiveness Report for 2013-2014²⁵¹ South Africa was ranked 146 out of 148 countries for the quality of its educational system.²⁵² This is an indictment on the education sector and one which should raise alarm bells. The question is whether strikes, by teachers, is the sole or a large cause for this. It is submitted that a number of factors most probably

²⁵¹ World Economic Forum, 'The Global Competitiveness Report 2013 – 2014' available online at: http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf, accessed on 14 December 2013

²⁵² *Loc cit* section 2.1, 'South Africa', 5th Pillar, 'Higher Education and Training'

contribute to such scoring but strikes is one of them, this is concluded by *Calitz and Conradie*²⁵³, where it was also noted in the Tokiso Review that SADTU had contributed to 42% of working days lost, by teachers, from 1995-2009. Further, in terms of the 2010 household survey by Stats SA, strikes by teachers in South Africa were identified as the biggest problem experienced in schools by more than a quarter of students.²⁵⁴ Therefore it is clear that a strike by teachers is indeed a problem for pupils. Whether declaring the education sector or a part of it as an essential service will limit strikes and enhance the rights of children to a basic education, bettering the education system, must be considered further. The starting point for consideration of whether a service, in whole or part, can be designated as essential, as noted by *Pillay*, is the definition of essential services and it is then a question of fact in making such a determination.²⁵⁵ The definition is considered and set out above in paragraph 5.2 where in section 213 of the LRA it is contained that: “*essential services means – (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population*”. *Pillay* notes that it must be a reasonable probability, not possibility, of the interruption resulting in such endangerment.²⁵⁶ Therefore in order for education to fall within such definition the nature of the service must be considered. *Pillay*²⁵⁷ lists the following factors to be considered:

*“the nature of the service, the technology available, the needs of the population, the availability of the service and service providers, the costs of the service, the timing or duration of the provision of the service, and the location in which the service is rendered, all of which, and more, go to determining the impact of the interruption of the service.”*²⁵⁸

In South Africa the right to strike²⁵⁹ and right to receive a basic education²⁶⁰ are contained in the Constitution. They could be described as competing rights when considering whether one can be limited by the other. In the article by *Calitz and Conradie*²⁶¹, which authoritatively considers the possibility of declaring the education sector an essential service, a number of propositions are considered. In comparing the aforementioned rights, the authors note, that

²⁵³ See note 219 at page 124-125

²⁵⁴ See note 219 at page 124

²⁵⁵ See note 192 at page 807 - 808

²⁵⁶ *Loc cit*

²⁵⁷ See note 192 at page 810

²⁵⁸ *Loc cit*

²⁵⁹ See note 3

²⁶⁰ See note 3, section 29

²⁶¹ See note 219

they both have historical significance in their express suppression by apartheid, therefore are difficult to balance to ensure the constitutionality of any limitation.²⁶² The ultimate views of the authors are that it would not be possible to declare education, as a whole, as an essential service in terms of the current definition of essential services in section 213 of the LRA.²⁶³ If such a designation were made the authors believe it would most probably fall foul of section 36 of the Constitution²⁶⁴, considered in paragraph 4.2 above, for being overbroad²⁶⁵, considerations of international law notwithstanding.²⁶⁶ The international position is considered by comparing South Africa to Canada, specifically British Columbia, and Germany, which are also open and democratic societies, where educators right to strike has been greatly limited by legislation.²⁶⁷ In such countries, which are members of the ILO²⁶⁸, it is revealed that even though such prohibition exists there are still strikes by educators.²⁶⁹ It is proposed by the authors that, in view of the fact that these countries are members of the ILO eventually they will need to amend their laws to give effect to the Conventions of the ILO to which they subscribe, since they are seen not to be compliant with the ILO currently.²⁷⁰ In South Africa the path to the possibility of legislative reform of the definition of essential services, it is contended, would most likely not be open in view of the buy-in required by trade unions at the National Economic Development and Labour Council (“NEDLAC”).²⁷¹ Therefore the authors propose that the preferred and most likely option in limiting the right to strike of educators is by agreeing that part of the education sector is an essential service, by the conclusion of minimum service agreement.²⁷² It would be submitted that those parts of the education system which could be most detrimental if not functioning, for example grade 11 and 12 educators and the administration staff at all times or during the final two terms of the year, should be declared minimum services. Another proposed solution is to conclude a collective agreement which also limits the right to strike by educators.²⁷³ The buy-in required from unions to conclude such a collective agreement is proposed to be achieved by holding

²⁶² See note 219 at page 141

²⁶³ See note 219 at page 129

²⁶⁴ See note 219 at pages 138 - 139

²⁶⁵ See note 219 at page 140

²⁶⁶ *Loc cit*

²⁶⁷ See note 219 at page 131

²⁶⁸ See note 219 at page 132 and 134 respectively

²⁶⁹ See note 219 at page 135

²⁷⁰ See note 219 at page 133 and 135 respectively

²⁷¹ See note 219 at page 125

²⁷² See note 219 at page 130

²⁷³ See note 219 at page 143

public hearings²⁷⁴ to encourage debate and consensus, as well as by Portfolio Committees calling on the relevant stakeholders as well as through NEDLAC.²⁷⁵ In terms of the proposed amendments to the LRA the ESC and its panels could play an active role in the facilitation of the necessary agreements. In considering the proposition closely, regard must be had as stated by *Pillay*²⁷⁶, to the determination of essential services by the ESC as a question of fact. Therefore it is not entirely impossible that if a buy-in is achieved to conclude a minimum services agreement. Whether this will take place in light of the, proposed, strengthened ESC and the guidelines which can be established by regulation remains to be seen. What is clear is that even where teachers' right to strike has been limited by a designation as essential services in other countries it has not put an end to strikes. In my view in South Africa where strikes are also seen in essential services it is perhaps even more likely that this would not put an end to such strikes, the key appears to be consultation, the ESC and good faith between parties to securing clear rights.

5.8 PUBLIC SECTOR STRIKES AND FURTHER ISSUES CONSIDERED:

In analysing other issues arising from strike action and those which may be categorised as essential services, the article by *Mle*²⁷⁷ is helpful when considering the effects of strikes. In doing so the effects of violence, intimidation and picketing are considered contrary to the sphere within which the Constitutional rights, including the right to strike, must be exercised. The effect on the indigent people in South Africa, particularly who rely upon public education and healthcare is amplified including the societal role of trade unions.²⁷⁸ The article also highlights the disparity of interests between the parties, employee and government, as well as between the individual employees where some engage in industrial action and others choose not to. The conclusions drawn in the article are important however in considering the requirements proposed to ensure proactive and conciliatory process in industrial action, where it is stated that:

²⁷⁴ See note 219 a t page 142

²⁷⁵ *Loc cit*

²⁷⁶ See note 192

²⁷⁷ TR Mle "A Critical Analysis of the 2010 Public Service Strike in South Africa: A Service Delivery Approach" (2012), Journal of Public Administration: Special Issue 1, Vol. 47 March 2012, pages 291 – 298, available online at:

http://search.sabinet.co.za.ezproxy.ukzn.ac.za:2048/WebZ/images/ejour/jpad/jpad_v47_n1_si1_a7.pdf; sessionid=0;bad=http://search.sabinet.co.za.ezproxy.ukzn.ac.za:2048/ejour/ejour_badsearch.html;portal=ejournal: accessed on 9 November 2013

²⁷⁸ *Ibid* at page 295

“Trade unions, however, need to assume the role of agents of change and to assist the state through their members, to achieve the goals of a better life for all”²⁷⁹

This can be applied to the need for consultation and a more mature approach to essential services by trade unions, ultimately as being instrumental in the resolution of disputes in essential services and also when bargaining with respect to minimum service agreements. The article by *Mle* also proposes the following interesting approach by stating:

“ is it time to limit the freedom to strike or even call for limits on unionisation; It is time for trade unions to take stock of their membership in terms of their understanding of the Constitution and Labour Relations Act”, “rigorous education needs to be introduced to empower members; Union members need to be made aware of the economic impact of a prolonged strike (it is estimated that the 2010 strikes cost the country R1 billion a day) and its negative impact on the image of the country and investor confidence”²⁸⁰

The above are important propositions calling for education, accountability and more responsibility from trade unions in exercising their entrenched constitutional rights against the bigger picture, including the individual members approach to the unions proposed action. It is however a noble proposition to assume uneducated, illiterate and poverty-line workers will approach matters on this basis, nonetheless the trade unions have the power to attempt or at least undertake to do so. If however given effect to they may go a long way in the regulation of disputes and a more responsible approach to preventing a damaging effect on the economy. The unfortunate truth however exists that it is the very negative economic results which occur from such strikes that allow the trade unions to wield such power and shift the balance in their favour when negotiating with employers. *Mle* also importantly points out that the state as the employer²⁸¹, or in this context the role players in the essential services industries and ESC, should adopt a more proactive approach to attempting to prevent strikes in the public service, which may inherently involve essential services (even though such strikes are legislatively prohibited). In an article by *Brassey* titled *“Fixing the Laws that Govern the Labour Market”²⁸²* proposals are made to reform the labour environment in South Africa in order to, *inter alia*, limit strikes and in particular strike violence by introducing mandatory balloting. The article, although not its major focus, confirms that South Africa has

²⁷⁹ *Ibid* at page 297

²⁸⁰ *Loc cit*

²⁸¹ *Ibid* at page 297

²⁸² See note 35

the highest strike rate in the world and in particular underlines the current issues of violent strikes and asks the question whether the strikes which are called are even in fact supported by the majority of members within a union.²⁸³ In order to limit such strikes *Brassey* calls for the polling of worker views before striking, as previously applied before the LRA, proposing modern technology as a means to do so.²⁸⁴ In conducting such polls confirmation of a genuine majority vote for such strikes is achieved, which in his view, can reduce the levels of not only strikes but the violence associated therewith.²⁸⁵ Two further propositions are put forward the one being to allow the Labour Court to deprive a strike of the protected status it may enjoy, thus giving an employer such power, however in conclusion it is conceded that this is not preferred.²⁸⁶ This may be seen, in certain circumstances, should the LRAB be passed in its current form as discussed below. The other proposition is to guide the dispute into mandatory arbitration and place a ban on the strike, however it is noted that weak unions may use this opportunistically.²⁸⁷ Another proposition, which subsequent to such article has in fact found its way to Constitutional Court is to hold unions liable for the damage caused by its members unless it takes reasonable steps to prevent such consequences.²⁸⁸ This issue has come before the Court on a few occasions and recently the Constitutional Court in the matter of *Garvas*²⁸⁹ where the Court had the opportunity to confirm that a union can be held liable for the actions of its members, the limitation of such liability for a union or party having been purposefully meant to be interpreted narrowly. Therefore this means that the impugned section of the Public Gatherings Act is a legitimate and justifiable limitation of the right to picket in terms of section 17 of the Constitution.

6: THE EFFECT OF THE ANTICIPATED AMENDMENTS TO THE ESSENTIAL SERVICE PROVISIONS OF THE LRA CONTAINED IN THE LRAB:

6.1 INTRODUCTION:

The LRAB arrives at the NCOP at an interesting time for South Africa. This is in view of the observation that the ruling party and its tripartite partners are notably experiencing relations which are possibly at their weakest seen in recent democratic years. The tenter-hooks upon

²⁸³ *ibid* at page 10

²⁸⁴ *ibid* at page 17

²⁸⁵ *Loc cit*

²⁸⁶ *Loc cit*

²⁸⁷ *Loc cit*

²⁸⁸ *Loc cit*

²⁸⁹ See note 153

which the relationship is balanced and timing wise with the 2014 election approaching cannot be ignored. The amendments have been revised in their path to promulgation and may, since they are in a dynamic process, be subject to still to further amendments by the NCOP, National Assembly or the president before being assented to and promulgated.²⁹⁰ It is not surprising that a large number of the issues and suggestions highlighted by Pillay²⁹¹ are incorporated and given effect to in the LRAB. *Du Toit* notes that there exists “*virtual absence of any amendment to the framework of strike law since the enactment of the Labour Relations Act in 1995*”.²⁹² This absence of amendment to the LRA for some time is worrying particularly in light of the issues considered herein. As stated by *Du Toit* and *Ronnie*²⁹³ in considering the LRA:

*“the Labour Relations Act sets out to promote ‘orderly collective bargaining’ and regulates the right to strike as an essential element of collective bargaining. In a number of aspects, however ranging from violence erupting in the course of strike action to the practical exclusion of large sections of the workforce from exercising the right to strike (or any other form of economic) pressure in support of bargaining demands) it has become apparent that the current model is in need of adjustment”*²⁹⁴

The above call has been heeded and the proposed amendments are considered further below.

6.2 THE OBJECTS OF THE LRAB:

The object of the LRAB is stated to “*to amend the operation, functions and composition of the essential services committee and to provide for minimum service determinations*”.²⁹⁵ In the memorandum of the objects of the LRAB (“the Memorandum”) the objects of the bill are stated as follows:

“Under the current dispensation numerous problems have been identified with the system for regulating dispute resolution in essential services. These include the scope of the essential service determinations made to date, the small number of minimum service agreements

²⁹⁰ Sections 72-82 of the Constitution of the Republic of South Africa Act No. 108 of 1996

²⁹¹ See note 192

²⁹² See note 81 at page 195

²⁹³ See note 81 at page 195

²⁹⁴ *Loc cit*

²⁹⁵ Preamble to the LRAB

*ratified by the Essential Services Committee (ESC) and the high level of strike action within essential services. Many stakeholders have negative perceptions about the operation and administration of the ESC. To address these problems, clauses 10-15 of the Bill seek to propose amendments to sections 70 to 74 of the Act”.*²⁹⁶

This statement is clearly in line with the view of the majority of the journals considered herein and accordingly could be held to be undoubtedly correct. The question is then whether the LRAB will meet such objects.

6.3 DISPUTE RESOLUTION BY BARGAINING COUNCILS:

Section 51 of the LRA, which deals with the resolutions of dispute by bargaining councils, provides that if a dispute is referred to the council in terms of the LRA, and the party to the dispute is not a party to that council, the council must attempt to resolve the dispute.²⁹⁷ It must firstly do so through conciliation failing which arbitration, if required in terms of the LRA or if not, then where consented to between the parties.²⁹⁸ As already noted above, in terms of section 74 of, the LRA a party to a dispute may refer a matter to a council or the commission where the council has no jurisdiction. The proposed amendment to section 51(9) of the LRA to, it appears, provide more guidance on what should be dealt with should a collective agreement be concluded to resolve a dispute in such section. This is now with reference to the costs involved in the resolution of such a dispute by introducing a levy or fee to be charged by the commission.²⁹⁹

6.4 WIDENING OF THE SCOPE FOR THE RESOLUTION OF DISPUTES:

The proposed amendment to section 65, which deals with the limitation on the right to strike, expands the limitation to include a dispute which a party may refer to the Labour Court out of not only the LRA but any employment law. This therefore widens the scope of application and, as stated by the Memorandum, gets rid of the anomaly in the distinction between

²⁹⁶ LRAB, Memorandum of the Objects on Labour Relations Amendment Bill, 2012, page 26, clauses 10 - 15

²⁹⁷ Section 51(3) of the LRA

²⁹⁸ Section 51(3)(a) and (b)(i)-(ii)

²⁹⁹ LRAB amendment 5, page 5, line 5 - 10

disputes where there is no equal restriction in other employment laws and where industrial action is currently restricted from adjudication under the LRA.³⁰⁰

6.5 REGULATION OF PICKETS, STRIKES AND LOCKOUTS:

Section 69(1) is to be amended by the deletion of the words “*and supporters*”.³⁰¹ This is to limit the authorisation of a picket to only by a registered trade union, since it would seem that the reference to supporters is too wide and not easily determinable. Section 69(6) is to be amended, with respect to a place where a picket can be held in terms of section 69(2)(a), to include and allow a party that is not the employer which owns or controls such premises to make representations before such picketing rules are established by the Commission³⁰² as well as allowing such a party to refer a dispute³⁰³, about a picket as provided in section 69(8) to the Commission. Thus providing fairer and better regulation of pickets, strikes and disputes where the employer does not own or control such premises. Importantly, Section 69 is also to be amended by the addition of sub paragraph 12 to allow the Labour Court to, where a dispute is referred in terms of section 69(8) or (11) upon the prescribed notice having been given³⁰⁴, grant urgent just and equitable relief³⁰⁵. Notably relief can be granted which includes, with respect to a trade union, the suspension of a picket or a strike³⁰⁶ and with respect to an employer the suspension of engagement of replacement labour, even where precluded by section 76 or suspending the lockout.³⁰⁷ This shows that the right to strike or picket can be limited when a dispute in terms of section 69(8) or (11) exists or is unresolved, which it is submitted will be welcomed by an employer in such circumstances. The engagement of replacement labour and the suspension of a lockout can also be limited by application to the Labour Court in the circumstances referred to thus balancing both employees’ and employers’ respective rights.

6.6 THE REVISION AND STRENGTHENING OF THE ESC:

6.6.1 SECTION 70:

³⁰⁰ See note 296 at page 25, clause 7

³⁰¹ LRAB amendment 9(a), page 5, line 30 - 35

³⁰² LRAB amendment 9(b), page 5, line 35-40

³⁰³ LRAB amendment 9(c), page 5, line 45

³⁰⁴ LRAB amendment 9(d), pages 5-6, line 50 and line 5-15 respectively

³⁰⁵ *Loc cit*

³⁰⁶ LRAB amendment (9)(d), page 6, line 0-5

³⁰⁷ *Loc cit*

Section 70 is to be amended to no longer require consultation with the Minister to establish an essential services committee as well as specifically in accordance with the LRA.³⁰⁸ The Memorandum provides that the structure and functioning of the ESC is to be revised to give it greater legitimacy and efficacy.³⁰⁹

6.6.2 SECTIONS 70A-F

The proposed addition of sections 70A, 70B, 70C, 70D, 70E and 70F³¹⁰ will certainly be welcomed. These sections, it is submitted, will provide much needed clout and clarity to the ESC. This will be achieved through streamlining and expanding on the way the ESC is composed, its powers and functions, appointment of panels and their powers and functions within the ESC, its jurisdiction and administration and further by providing for the creation of regulations.

Section 70A provides far greater capacity, guidance on who and clarity to the Minister on how the ESC should be composed, including the involvement of NEDLAC in nomination of members to the Committee and importantly. As noted by *Calitz*, in terms of section 70(a) of the LRA, it currently only requires that persons to be appointed must have knowledge and experience of labour law and relations.³¹¹ This has been revamped to require more experienced persons who have the requisite knowledge not only of labour law, but administration of justice and industry or sector specific experience, as well as an increase in the number of members of the ESC to eight instead of three.³¹² There is also the introduction of experts as assessors.³¹³ The Memorandum reasons, with respect to the appointment of a NEDLAC independent and senior commissioner chairperson and deputy chairperson, that this will ensure that the ESC always has available custodians to give the necessary time to ensure the ESC functions properly.³¹⁴ This is certainly a positive and an acknowledgment of the lack of the necessary skills, capacity and clarity of the composition of the ESC.

Section 70B concerns the powers and functions of the ESC which, it could be argued, have certainly been lacking. The proposed amendments clearly set out the ESC's powers with

³⁰⁸ LRAB amendment 10, page 6, line 20-25

³⁰⁹ See note 296 page 26, clause 10

³¹⁰ LRAB amendment 11, pages 6 - 9

³¹¹ See note 201 at page 444

³¹² *Loc cit*; LRAB amendment 11, page 6, lines 30 -55

³¹³ *Loc cit*

³¹⁴ See note 296, page 26, clause 11

respect to essential services determinations, minimum service agreements, maintenance service agreements and determinations.³¹⁵ As well as promoting effective dispute resolution in essential services to also, importantly, develop guidelines for the conclusion of minimum services agreements.³¹⁶ The *locus standi* is now extended to require by section 70B(d), at the request of an interested party, whether to institute investigations as to whether a whole or part of any service is an essential service.³¹⁷ A further innovation is in the appointment of panels³¹⁸ to perform the functions in section 70D as well as the appointment of an appropriate person or the CCMA to investigate and assist the ESC³¹⁹, allowing delegation and streamlining of the ESC.

Section 70C sets out the appointment of panels of three to five persons as well as assessors. In doing so the inclusion of suitably qualified, relevant persons is evident as well as, importantly, the knowledge and expertise of an assessor in a particular sector.³²⁰ This accordingly addresses concerns and reduces the likelihood of persons who are not familiar with the intricacies of a particular industry or sector from being involved in and assisting the ESC.

Section 70D³²¹ provides for the powers and functions of the panels³²² referred to in section 70C, delegating, limiting and prescribing the scope of such powers and functions. Notably the clear distinction is drawn between such powers and functions of the panel including, conducting investigations as to whether services, in whole or part, should be declared as essential³²³; determination of the designation of a service as essential or not³²⁴ as well as a maintenance service or not³²⁵; determination of disputes regarding such designations as essential³²⁶; ratifying collective agreements which provide for maintenance or minimum services within essential services³²⁷ and determining minimum services required to be

³¹⁵ LRAB amendment 11, page 7, lines 5-20

³¹⁶ *Loc cit*

³¹⁷ *Loc cit*

³¹⁸ *Loc cit*

³¹⁹ LRAB amendment 11, section 70B(3), page 7, line 20

³²⁰ LRAB amendment 11, section 70C, page 7, lines 25 - 55

³²¹ LRAB amendment 11, page 8, 70D

³²² LRAB amendment 11, page 8, 70D(1)

³²³ LRAB amendment 11, page 8, 70D(1)(a)

³²⁴ LRAB amendment 11, page 8, 70D(1)(b)

³²⁵ LRAB amendment 11, page 8, 70D(1)(d)

³²⁶ LRAB amendment 11, page 8, 70D(1)(c)

³²⁷ LRAB amendment 11, page 8, 70D(1)(e)

maintained in a designated minimum service.³²⁸ It is submitted that the aforementioned clear distinctions will encourage and assist affected parties, including the ESC and the panels to more easily establish essential, minimum and maintenance services with greater clarity and by collective bargaining or referral. It is also clear that by legislating that the presiding member of the panel must determine a question of law or procedure³²⁹, allowing the chairperson to extend periods prescribed by the rules of the ESC³³⁰ and condoning late performance³³¹ their powers are greater, more specific and easier to understand. It also elevates the power of a panel, subject to the proviso in subsections 2 and 3, to make decisions essentially as the ESC³³² and to make any appropriate order relating to the functions of the panel, thereby giving the delegation to such a panel more authority.

Section 70E is also extremely positive. It sets out the seat, jurisdiction and administration of the ESC in South Africa³³³ and directs that the CCMA must administer the ESC.³³⁴ Importantly funding, allocated by the director of the CCMA³³⁵, both for the ESC³³⁶ and its staff, appointed by the director of the CCMA³³⁷, is now clearly stated to be provided. Allowances for members of the ESC, assessors and other appointed persons are determined by the Minister of Finance.³³⁸ Such funding is to be found in the monies appropriated by Parliament to the CCMA³³⁹, in terms of section 122 of the LRA, as well as by grants donations and bequests made to the ESC³⁴⁰. This will no doubt enhance the functioning and effectiveness of the ESC and related bodies.

Section 70F now prescribes that the Minister, after consultation with the ESC, is empowered to make regulations³⁴¹ with respect to the functioning of the ESC³⁴² and the panels appointed by it³⁴³. Until such regulations are established the current rules in terms of section

³²⁸ LRAB amendment 11, page 8, 70D(1)(f)

³²⁹ LRAB amendment 11, page 8, 70D(2)

³³⁰ LRAB amendment 11, page 8, 70D(3)(a)

³³¹ LRAB amendment 11, page 8, 70D(3)(b)

³³² LRAB amendment 11, page 8, 70D(4)

³³³ LRAB amendment 11, page 8, 70E(1),(2) and (3)

³³⁴ LRAB amendment 11, page 8, 70E(4)

³³⁵ LRAB amendment 11, page 8, 70E(5)

³³⁶ LRAB amendment 11, page 8, 70E(5)(6)

³³⁷ LRAB amendment 11, page 8, 70E(6)

³³⁸ LRAB amendment 11, page 8, 70E(7)

³³⁹ LRAB amendment 11, page 8, 70E(8)(a)

³⁴⁰ LRAB amendment 11, page 8, 70E(8)(b)

³⁴¹ LRAB amendment 11, page 9, 70F(1)

³⁴² LRAB amendment 11, page 9, 70F(1)(a)

³⁴³ LRAB amendment 11, page 9, 70F(1)(b)

115(2)(cA)(ii) of the LRA, regulating the practice and procedure of the ESC, remain in force.³⁴⁴ It is certainly hoped that such regulations provide, much needed, further clarity to address the issues raised by *Pillay* and considered herein which are not dealt with in the LRAB.

6.6.3 PROCEDURAL REQUIREMENTS TO DESIGNATE A SERVICE AS ESSENTIAL AND THE POWERS TO VARY OR CANCEL SUCH DESIGNATION, DETERMINATION OF MINIMUM SERVICES AND RATIFICATION OF AN MSA BY THE PANEL:

Sections 71(8) and (9) of the LRA, which are proposed to be amended by the LRAB, would provide, where panels have been appointed by the ESC, that a designation by such a panel of a service as essential must be gazetted by the ESC.³⁴⁵ This would essentially ratify such a designation. It is further proposed, importantly, by the LRAB that the panel of the ESC has the power to vary or cancel a designation of a whole or part of a service as essential or the determination of a minimum service or ratification of an MSA, by complying with sections 71(1) – (8) of the LRAB.³⁴⁶ It is thus clear that the panels are intended to have a larger more delegated function within the ESC, this it is hoped will provide greater access to quicker and better determinations and designations within essential, minimum and maintenance services.

6.6.4 AMENDMENT OF SECTION 72 OF THE LRA: MINIMUM SERVICES THE ROLE OF THE PANELS OF THE ESC:

Section 72 is proposed to receive a significant overhaul. Currently section 72 provides that the maintenance of minimum services, in a designated essential service, contained in a collective agreement ratified by the ESC, is to be regarded as an essential service and section 74 does not apply. The amendments in the LRAB now provide, *inter alia*, for the panel of the ESC, when making a determination in terms of section 71, to issue an order.³⁴⁷ Such order may be to direct the parties to negotiate a MSA, within a specified period.³⁴⁸ In the event that such negotiation does not take place then either party can refer the matter for conciliation to

³⁴⁴ LRAB amendment 11, page 9, 70F(2)

³⁴⁵ LRAB amendment 12, page 9, 71(8)

³⁴⁶ LRAB amendment 12, page 9, 71(9)

³⁴⁷ LRAB amendment 13, page 9, 72(1)

³⁴⁸ LRAB amendment 13, page 9, 72(1)(a)

the CCMA or a bargaining council with jurisdiction.³⁴⁹ It is hoped that this will encourage parties not to just negotiate but conclude MSA's. The amendment also provides for the ESC, where a collective agreement is not concluded or ratified³⁵⁰ or has failed to be concluded between the parties, to provide for the maintenance of minimum services.³⁵¹ This is done by a panel of the ESC who can determine what minimum services are required to be maintained in an essential service.³⁵² This certainly strengthens the power of the ESC and its panel as a catch-all where parties do not conclude an MSA. The remnants of section 72 are seen in the proposed amendment to such section, the only difference is that instead of the ESC ratifying a collective agreement, providing for the maintenance of minimum services, it is now the panel which does so.³⁵³ As noted by *Calitz*³⁵⁴ this amendment will benefit employees and trade unions, where their bargaining power with the employer is reduced once a determination of the service as essential is made (as was the case with *Eskom*), since the employer can be compelled to negotiate, failing which the ESC will make the decision for them. Such a determination of minimum services is valid until varied or revoked by the ESC. However this may not take place until after a period of 12 months from such determination.³⁵⁵ This is however limited by section 72(7) which provides that a panel can vary a determination, by ratifying a collective agreement concluded between trade unions representing the majority of employees, covered by such determination, as well as employers who employ the majority of such ' employees.³⁵⁶ Interestingly the proposed amendment in section 72(5) introduces a ballot. It provides that, notwithstanding sections 72(3) and (4), section 74 of the LRA applies where a service has been designated as essential in respect of which the ESC has made a determination of minimum services, if the majority of employees employed in the essential service votes by ballot in its favour.³⁵⁷ This is also subject to section 72(6) which states that 72(5) does not apply with respect to a dispute where a notice of a strike or lockout was issued before a ballot is conducted.³⁵⁸ This is certainly to be welcomed as it protects the interests of employees and allows them to determine the application of section 74, except where naturally

³⁴⁹ LRAB amendment 13, page 9, 72(1)(b)

³⁵⁰ LRAB amendment 13, page 9, 72(2)

³⁵¹ *Loc cit*

³⁵² *Loc cit*

³⁵³ LRAB amendment 13, page 9, 72(3)

³⁵⁴ See note 201 at page 445

³⁵⁵ LRAB amendment 13, page 9, 72(4)

³⁵⁶ LRAB amendment 13, page 9-10, 72(7)(a) and (b)

³⁵⁷ LRAB amendment 13, page 9, 72(5)

³⁵⁸ LRAB amendment 13, page 9, 72(6)

it should take precedence where a strike or lockout already is in motion. *Pillay*, also states that the reason section 74 must not apply to MSA's as it relates to disputes of mutual interest, whereas section 72 deals with the conclusion or certification of MSA's, within the ESC's exclusive jurisdiction dealing with issues about whether a service is essential or minimum.³⁵⁹ In considering this section further the Memorandum states that the reasoning for this is to try and promote interest arbitration and protect employees from an overly broad minimum service designation, where such employees instead vote to be covered by the broader designation of such essential service.³⁶⁰ This then means, as per the Memorandum, that no strike or lock-out can occur in such service and where disputes are then unresolved they must be dealt with through compulsory arbitration.³⁶¹ However, importantly, as noted by *Calitz*³⁶², this does not solve the issue which could arise where the employees are performing minimum services and the majority does not vote for arbitration.³⁶³ It is proposed by *Calitz* that the decision in the case of *City of Cape Town v SALGBC and another*³⁶⁴ will clarify what is intended by section 72(b).³⁶⁵ In this matter the Court held that where both essential and non-essential workers have a dispute, subject to the proviso that it is indeed the same dispute, it can be dealt with by arbitration by essential services workers and by way of a strike by non-essential workers.³⁶⁶ This shows that the LRA provides for both types of employees to ventilate the same dispute in the manner exclusively prescribed and that the conduct of one does not prejudice the rights of the other. Therefore *Calitz* concludes that in view of this judgment employees in minimum services would seem to have the same right to deal with disputes through arbitration where non-essential workers strike, but that the result of such strike will still bind them to the terms and conditions of employment which are determined.³⁶⁷ Section 72(8) of the LRAB provides important clarity when negotiating a minimum services agreement when a dispute arises, where already designated as essential services and subject to a collective agreement. It is provided that such dispute may be referred to the CCMA, bargaining council with jurisdiction for conciliation, then if no

³⁵⁹ See note 192 at page 810

³⁶⁰ See note 296, page 26, Clause 13

³⁶¹ *Loc cit*

³⁶² See note 201 at page 447

³⁶³ *Loc cit*

³⁶⁴ *City of Cape Town v SALGBC and Another* (2011) 5 BLLR 490 (C)

³⁶⁵ See note 201 at page 448

³⁶⁶ *Loc cit*

³⁶⁷ *Loc cit*

agreement is concluded to the ESC for determination.³⁶⁸ This provides welcome instruction and clarity where a dispute arises during negotiation of an MSA. As noted by *Calitz*³⁶⁹ the provisions of the proposed section 72(8) would have meant that in *Eskom* the dispute would have been referred to conciliation, failing resolution, to the ESC for determination.

6.6.5 DISPUTES IN THE NEGOTIATION AND CONCLUSION OF MINIMUM SERVICE AGREEMENTS (“MSA’S”):

The proposed amendment to section 73 provides for the inclusion in the heading to deal with disputes about minimum services, in addition to disputes about whether a service is an essential one.³⁷⁰ It is also proposed that a dispute can be referred to the ESC which concerns whether or not an employer and registered trade union(s) which represents employees, in such essential service, should conclude a collective agreement which provides for the maintenance of minimum services in such essential service.³⁷¹ Then most importantly a dispute can be referred to the ESC regarding the terms of such a collective agreement.³⁷² The amendments were perhaps precipitated by the uncertainty which arose in the matter of *Eskom* referred to above. It could be said that the jurisdiction of the ESC and CCMA to consider minimum service agreements may have now been harmonised or more clearly identified to a certain extent. This is borne out by the amendment of section 73 to provide for the ESC to determine a dispute about the terms of a collective agreement.³⁷³ This would now ‘ratify’ the SCA judgment in *Eskom* with reference to section 74 below, however also confirming, as stated by *Calitz*, that the judgment was probably incorrect. This may now deal with the issues referred to by *Pillay*³⁷⁴, confirmed by *Calitz*³⁷⁵ where, for example, an employer refuses to conclude a minimum agreement once a service is declared as essential.³⁷⁶

6.6.6 SECTION 74: DISPUTES IN ESSENTIAL SERVICES

The proposed amendment to section 74, which dovetails section 73(1) (to be amended), by introducing a proviso that it is subject to section 73(1). This accordingly limits the disputes

³⁶⁸ LRAB amendment 13, page 10, 72(8)

³⁶⁹ See note 201 at page 444

³⁷⁰ LRAB amendment 14, page 10, 73

³⁷¹ LRAB amendment 14, page 10, 73(1)(c)

³⁷² LRAB amendment 14, page 10, 73(1)(d)

³⁷³ LRAB amendment 14, page 10, line 25-30

³⁷⁴ See note 192 at page 803

³⁷⁵ See note 201 at page 442

³⁷⁶ *Loc cit*

which may be referred to a bargaining council or the CCMA as those not described in section 73(1), again providing more clarity on what disputes can be dealt with by conciliation, failing which arbitration before the CCMA and those reserved for the exclusive expertise and determination by the ESC. *Calitz* is critical of the fact that disputes in essential services must still be referred to the CCMA for conciliation.³⁷⁷ This since it does not have the requisite specialist expertise in dealing with essential services, therefore recommending that instead panels within the ESC should do so.³⁷⁸ This is supported by the current interpretation of the *Eskom* judgment and the niche functioning of the ESC.³⁷⁹ It is submitted that the probable answer to this lies in the proviso, which still allows the ESC to determine certain disputes referred to therein but preserves the jurisdiction of the CCMA for the purpose of which it was established.

6.7 THE PATH AND POSSIBILITY OF FURTHER REVISION OF THE LRAB:

As noted by *Sax*³⁸⁰ the LRAB will not be considered by the NCOP further in 2013, since the meeting which was to be held has been cancelled and parliament is in recess until 28 January 2014.³⁸¹ However it is further noted, interestingly, that the NCOP committee has recommended that sub-clause 9(a) of the LRAB should be removed.³⁸² This means, as noted, that the LRA will remain unchanged in allowing supporters of a union to join a strike picket.³⁸³ Importantly it was also stated by *Sax*³⁸⁴ that the NCOP has recommended that where a dispute exists that the Labour Court's powers should not extend, when granting relief, to suspend the strike or picket in issue.³⁸⁵ It was recommended that an employer, with reference to section 76 of the LRA, dealing with replacement labour, the Labour Court should also not have the power to suspend the engagement of replacement labour "even in cases in which this is not otherwise precluded".³⁸⁶ It remains to be seen whether the National Assembly will accept such recommendations, should same be made final, as the effects of which are important when considering the powers of the Labour Court and the possible effect

³⁷⁷ See note 201 at page 446

³⁷⁸ *Loc cit*

³⁷⁹ *Loc cit*

³⁸⁰ P *Sax*, *Legalbrief Policy Watch* available online at:

<http://www.legalbrief.co.za/article.php?story=20131119052629421> accessed on 19 November 2013

³⁸¹ *Loc cit*

³⁸² *Loc cit*

³⁸³ *Loc cit*

³⁸⁴ *Loc cit*

³⁸⁵ *Loc cit*

³⁸⁶ *Loc cit*

on employers and employees in such circumstances. It is however clear from the above amendments, in their current form, that a lot of the suggestions proposed by *Pillay* have been included and that the amendments certainly go a long way to creating more certainty for stakeholders and more power and capacity for the ESC.

7. FURTHER ISSUES, CONSIDERATIONS AND SOLUTIONS REGARDING STRIKES, COLLECTIVE BARGAINING AND ESSENTIAL SERVICES:

In light of the above considerations it is apparent that a number of issues have arisen in essential services. This is noted by Grogan³⁸⁷ and evidenced when considering where an employer employs both essential and non-essential service employees and they have the same demand. This is considered above where it was decided in the matter of the *City of Cape Town v SALGBC and Another*³⁸⁸ case that essential services employees do not lose their right to deal with disputes of interest through arbitration and neither do the non-essential service employees lose their right to strike.³⁸⁹ Another matter dealing with strikes in essential services, where the employer was confronted by a protected strike by its non-essential workers, was that of *SAMWU v City of Cape Town (1)*³⁹⁰ (“*SAMWU*”). In *SAMWU* the Court had to consider, essentially, an application for a postponement which is not the main focus here but deals with an important position in essential services. In this matter the Court considered the position where, both essential and non-essential employees were employed, the non-essential workers proceeded with a protected strike and the same dispute had been referred for arbitration by the essential services employees. The Court confirmed that the non-essential services employees can strike, where conciliation fails, in order to attempt to obtain the conclusion of a collective agreement in favour of their demands. However with respect to essential services employees such option is not available and instead the parties must pursue arbitration in terms of section 74. This case again highlights that the rights and process intended for non-essential and essential services workers are distinct and preserved. With respect to essential services workers it also, as noted by *Brand*³⁹¹, should be the preferred approach to use section 74 and not simply embark on an unprotected strike in an attempt to coerce employers to meet essential services employees’ demands. It is also stated

³⁸⁷ See note 114 , paragraph 5.5.4 ‘When Employees are Engaged in Essential or Maintenance Services’

³⁸⁸ See note 364

³⁸⁹ See note 201 at page 448

³⁹⁰ *SAMWU v City of Cape Town (1)* [2008] 11 BLLR 1071 (SALGBC)

³⁹¹ See note 152

by *Brand* that there are seriously structural problems in public sector collective bargaining since there are not appropriately designated bargaining units.³⁹² The reasoning for the lack of designation was since it was believed that the LRA was sufficiently equipped to allow voluntary collective bargaining³⁹³, this has clearly not happened. This is evidenced in essential services, when both essential and non-essential employees are housed in the same bargaining unit, trade unions often pursue strike action in the entire unit.³⁹⁴ This is supported by *Cheadle* who states that the changes, in forms of employment and the labour market in general since 1995, requires the retention and extension of sectoral collective bargaining more than ever.³⁹⁵ This he argues is to enable the policy objectives of the promotion of collective bargaining and protection of the marginalised to be realised and obtained.³⁹⁶

As a solution to the various issues facing South Africa in public and essential services strikes, *Brand* calls for the embracement of modern negotiation practices, by moving away from an outdated adversarial approach to a modern approach of mutual gain and problem solving in negotiations.³⁹⁷ It is advised by *Brand* in order to achieve this it will be required to, *inter alia*, adequately train stakeholders and relevant parties in such modern negotiation theory and preparation for negotiation, using impartial and trusted expert facilitators in essential services, a credible exchange of information and encourage the search for creative and objective solutions to name a few.³⁹⁸ It is however acknowledged by *Brand* that the causes for the prevalence of violent and never before seen strikes in essential services are many and complicated to identify.³⁹⁹ *Brand* further advocates that the process needs to be one of joint problem solving, as opposed to adversarial, encouraged between government, unions and political parties.⁴⁰⁰ It is also stated by *Brand* that he does not believe that there is anything “uniquely pathological” when considering a South African employee or employer where experience can be gained from comparative countries.⁴⁰¹ This may not be correct, although the suggestions with respect to problem solving and negotiation above are correct, it would be submitted that a much more tailored approach is required in South Africa. This is because

³⁹² See note 152, under the heading ‘Structural Problems’

³⁹³ *Loc cit*

³⁹⁴ See note 152, under the heading ‘Minimum Service Agreements’

³⁹⁵ See note 76 at paragraph 97

³⁹⁶ See note 76 at paragraph 98

³⁹⁷ See note 152, under the heading ‘Need for Change’

³⁹⁸ *Loc cit*

³⁹⁹ See note 152, under the heading ‘Conclusion’

⁴⁰⁰ *Loc cit*

⁴⁰¹ *Loc cit*

of the historical and current links evident between politics and labour, where a mind-set of demonstration and violence has often been seen to accomplish much, not least the transformation of apartheid. The approach seems to be a much larger social and equity issue which does in fact require more understanding and willingness between the relevant parties to conclude agreements, where such labour issues arise.

In order to deal with the above issues *Cheadle*⁴⁰² advocates “regulated flexibility” and considers propositions of how to achieve this by examining, critically, the past, current and future labour dispensation, including the policies prior to the LRA coming into force and those now contained therein⁴⁰³.

The prevalence of strikes, in terms of the number per year, as stated by *Du Toit*⁴⁰⁴ appears to be reducing. However it does not take much thought to analyse or find that although the number may have dropped the violence and destruction associated therewith could be on the increase, the strike at Marikana being a recent reminder. There could be a number of reasons politically and socially for this however it remains that governments’ weapon is legislation. Although required to go through NEDLAC it is clear that objections by unions are not always given effect to and government must be applauded for sticking to its guns and attempting to ensure legislative reform where necessary. The question is does the LRAB do enough. Only time will tell in this regard, however one thing is clear in that reform was certainly needed desperately. There are other suggestions of reform, which although did not find their way into the LRAB, should be considered. As noted by *Brassey*⁴⁰⁵ it should be considered:

*“whether balloting should be made compulsory, whether strikes should, if too damaging, be channelled into compulsory arbitration, and what sanctions can be meted out for the strike violence that now seems to be regarded as de rigueur. These sanctions should potentially include claims for damages based on unlawful or violent conduct and derecognition and consequential loss of statutory privileges where unions fail to take reasonable steps to control their members”*⁴⁰⁶

The above statement suggests further alternatives in limiting strike violence, which perhaps since Marikana strike may be considered in possible future amendments. This could perhaps

⁴⁰² See note 76 at para 97

⁴⁰³ *Loc cit* at para 100

⁴⁰⁴ See note 81 at page 200

⁴⁰⁵ See note 2

⁴⁰⁶ See note 2 at page 834

be anticipated by the introduction of balloting in the proposed amendment in section 72(5) of the LRAB, notwithstanding that it is for a different purpose. The proposed channelling into compulsory arbitration is also interesting to consider, although it is not certain whether such process would be respected, this evidenced by current disregard for strike limiting legislation in essential services. In order to attempt to predict the future, which is of course impossible, one can analyse the past and how issues have been dealt with by the Courts and the ESC, to ascertain the likely approach going forward. Whether the amplified powers of the ESC, should the LRAB be passed in its current form, will reduce the frequency of strikes and associated violence, in essential services, since it may be easier to ensure and encourage the conclusion of minimum services agreements, remains to be seen. What is certain is that most of the amendments will certainly be welcomed.

8. CONCLUSION:

The laws regarding strikes, collective bargaining and essential services could be argued to be some of the most important components in existence to ensure the efficient functioning of diverse relationships in labour law. It is however clear when examining the history of strikes in essential services that legislation alone does not prevent strikes in such sectors. What is required is a buy-in from all parties. It is hoped that perhaps through a greater consultative and more inclusive process the unions and government can work together to create better working conditions at the same time as boosting the economy by attracting further international investment. The buy-in however is going to require greater education of the population in such sectors as well as attempts to foster a more responsible form of striking. It is of course easier to say so, than action this, in particular where inequality between the 'haves' and the 'have-nots' is so vast. This perception needs to change and persons need to place more value on employment and doing the best job that they can and appreciate that it is going to take time to right the wrongs of apartheid by working together to maintain a stable and attractive economy whilst at the same time providing decent work for the growing rate of young employed people. It is going to take more courage than ever by the government, trade unions, stake holders, employers and employees to perhaps not always be so quick and selfish in wants and needs and attempt a more meaningful, respectful and consultative approach to the resolution of labour issues. As is often the criticism of legislation it seems excellent in theory and has noble intentions but when put in to practice does not achieve that which it set out to. This is evident when considering the case law and evolution of essential services in South Africa. What is however clear and certainly welcomed is the revamp of essential

services and in particular the powers of the ESC in the LRAB. It is hoped that, if passed into law, the LRAB will significantly empower the ESC by enhancing its composition and structure. The ESC will have more power when it comes to determining minimum services, where agreement between the parties is not reached, and also that regulations could be passed to ensure even better functioning of the ESC and its proposed panels. Most notably it is hoped that the clarity, which it is submitted will be provided by the LRAB, will encourage affected parties to conclude minimum service agreements and refer their disputes concerning essential services through the ESC or CCMA where applicable instead of simply striking. Whether this will reduce the number of strikes and violence in essential services remains to be seen, but it certainly will promote and force communication between parties when negotiating minimum services agreements. This will perhaps facilitate better mechanisms being put in place in collective and minimum services agreements, reducing the need or ability to strike, even where prohibited. In turn it is hoped that this will reveal to stakeholders that it is perhaps better to negotiate, instead of striking or resorting to litigation, and that the ESC is not such a mystery and can assist them in maintaining a stable labour environment whilst at the same time allowing non-essential services employees the right to strike. It is however clear that using the designation, of the whole of a service as essential, as a response to the frequency and violence associated with strikes is not so simple. It is also to be welcomed should the LRAB be passed in its current form, in light of the violence often associated with strikes (through picketing), that the Labour Court would have the power to suspend the picket or strike. It is also clear from the direction of the Courts that the gloves are off when it comes to strike violence and the associated damage caused by strikers who are out of control. It is hoped that this will encourage unions and their members to think twice before resorting to unlawful and criminal conduct to achieve their means. There are no easy answers to solving the issues considered herein, that much is clear. However what is clear is that the labour landscape has changed significantly since 1996 and is extremely dynamic and diverse, consequently further dynamic and diverse solutions will be required going forward. The issues considered confirm that although strikes are not unique to South Africa, the approach to dealing with the issues associated therewith should be, since as it stands it is easy to argue that the current labour law framework may not be appropriate and adequate to address such issues considered herein. The LRAB will bring much needed revision and revitalisation in this regard, the effects will be interesting to follow going forward.

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