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TITLE:

A CRITICAL ANALYSIS OF THE LAW ON STRIKES IN SOUTH AFRICA

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28 NOVEMBER 2014

Declaration

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Menzi Douglas Mbona
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Durban.

List of Acronyms

AMCU	Association of Mineworkers and Construction Union
BAWU	Black Allied Workers Union
CEPPWAWU	Chemical Energy Paper Printing Wood and Allied Workers Union
FAWU	Food and Allied Workers Union
FOSAWU	Future of South African Workers Union
IMATU	Independent Municipal and Allied Trade Union
LRA	Labour Relations Act
NCBAWU	National Construction Building and Allied Workers Union
NEHAWU	National Education Health and Allied Workers Union
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
POPCRU	Police and Prisons Civil Rights Union
SACOSWU	South African Correctional services Workers Union
SANDU	South African National Defence Union
SAPS	South African Police Service
SATAWU	South African Transport and Allied Workers' Union
SAMWU	South African Municipal Workers Union
TOWU	Transport and Omnibus Workers Union
UDF	United Democratic Front

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Chapter 1: Introduction and context of the research

1.1 Background

Strikes are one of the bargaining tools used by workers to advance their interests,¹ and historically, can be traced as far back as the industrial revolution of the late 18th and early 19th centuries.² They were born out of the need to address the power imbalance between employees and employers.³ Customarily, employers have had financial muscle to advance their interests, whereas the strength of workers lies in their collectivism.⁴

The purpose of a strike is to ensure that the employer's business remains at a standstill until the demands of workers are met.⁵ Workers know that employers rely on them for production and that embarking on a strike means a decrease or stoppage in production, which has an adverse consequence on business.⁶ Thus, the relationship between employer and employee is one of interdependence: employees depend on their employers for a living, and employers depend on their employees for labour.⁷

It is unfortunate that striking has come to be associated with violence.⁸ Striking and violence are not synonymous, despite the increasing number of violent strikes in South Africa that challenge this assertion. The scale of violence is increasing each year and the consequence of strikes on the national level has been devastating.⁹

In a bid to curb the outbreak of violence that has consistently accompanied strikes, the legislature has devised ways to regulate strikes. These measures range from legislation to

¹ A Levy 'Can Anybody Hear Me? The Audi Rule and the Dismissal of Strikers' (2010) 31 *ILJ* 825, 831.

² E Yavuz 'The Industrial Revolution and Consequences' 2 available at <https://www.yeditepe.edu.tr/dotAsset/74101.pdf>, accessed on 4 August 2014.

³ J Brand 'Strikes in Essential Services' paper presented to the South African Society for Labour Law (SASLAW) (2010) 1 available at <http://www.saslaw.org.za/papers/Strikes%20in%20Essential%20Services.doc>, accessed on 29 June 2014.

⁴ E Manamela & M Budeli 'Employees' Right to Strike and Violence in South Africa' (2013) 46 *CILSA* 308, 308.

⁵ A Landman 'Protected Industrial Action and Immunity from the Consequences of Economic Duress' (2001) 22 *ILJ* 1509, 1509.

⁶ Ibid.

⁷ E Williams 'The Employment Relationship' (2010) 1 http://guidesandtrackers.co.za/human_resource_management/module_2.pdf, accessed on 19 June 2014.

⁸ C Mischke 'Strike Violence and Dismissal: when Misconduct cannot be proven is Dismissal for Operational Requirements a Viable Alternative?' (2012) 22 *CLLJ* 12, 12.

⁹ Many strikes have left a trail of destruction and maimed productivity. Many workers have been dismissed, others killed and in the process, the economy has plummeted.

negotiated solutions.¹⁰ The passage of time has seen the effectiveness of each and every measure put to the test, and this study will evaluate those measures in the context of strike laws in South Africa.

1.2 Problem statement

There is nothing wrong with embarking on a strike. In fact, the right to strike is granted by both the Constitution and the LRA. However, what is of great concern is the relationship that exists between strikes and the collective violence that has increasingly accompanied strikes over the years. Some scholars and researchers such as Tembeka Ngcukaitobi, Karl von Holdt and Gavin Hartford have linked the violence with various factors including: (a) low wages that workers are paid, which creates a sense of relative deprivation: workers feel they are getting paid less than they ought to be paid;¹¹ (b) the appalling working and living conditions that workers are subjected to. This is particularly the case with mine workers whose working conditions are rough and dangerous, with between nine and 15 hours of work a day, 12 months a year. In addition, their backs get bruised and scared due to the rocks that fall on top of them when working underground, posing a daily threat to their lives.¹² Miners live in informal settlements (hostels and shacks) provided for by mining companies, which sometimes run out of electricity, clean running water and lack proper sewage systems. This leads to the miners and their children having symptoms of chronic illnesses;¹³ (c) the increasingly close and sometimes inappropriate relationship between employers and trade union representatives, can cause a social distance between workers and their trade union representatives;¹⁴ (d) the political culture of violent behaviour during protests, which can be dated back to apartheid;¹⁵ and (e) the history of the ‘enemy status in the opposing camp’, where striking workers view management as the enemy and vice versa.¹⁶ The violence is

¹⁰ For example, the conclusion of collective agreements between employers and employees and the granting of prohibitory interdicts by the Labour Court.

¹¹ G Hartford ‘The Mining Industry Strike Wave: what are the Causes and what are the Solutions?’ (2012) 3 available at http://uscdn.creamermedia.co.za/assets/articles/attachments/41878_2012_10_03_mining_strike_wave_analysis.pdf, accessed on 10 October 2014.

¹² Ibid.

¹³ T Ngcukaitobi ‘Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana’ (2013) 34 *ILJ* 836, 839-840.

¹⁴ O Jolys ‘Marikana and Beyond’ (2013) 9 available at http://www.rosalux.co.za/wp-content/uploads/2013/01/Marikana-Labour-01_2013.pdf, accessed on 13 July 2014.

¹⁵ K von Holdt ‘Institutionalisation, Strike Violence and Moral Orders’ (2010) 128 available at: <http://transformation.ukzn.ac.za/index.php/transformation/article/download/1115/922>, accessed on 9 May 2013.

¹⁶ Ibid 135.

exacerbated by certain factors in strike action such as ‘scab labourers’ who become readily available as replacements for striking workers. This weakens the indispensability of strikers, and the replacement labourers also assume the status of enemies in the eyes of the replaced strikers.¹⁷

These scholars have attributed strike violence to socio-economic and socio-political factors without having provided a coherent analysis of the law governing strikes, to determine what role played, if any, the law plays in strike violence. Thus, one of the purposes of undertaking a critical analysis of the law on strikes in South Africa (as the title of this dissertation suggests), is to determine whether these laws are responsible for the violence that ensues during strikes, or whether such violence is solely a result of other factors such as those discussed above. It is important to establish this in order to curb the violence that accompanies strikes.

1.3 Objectives of the research

The effect of strikes on the economy is a concern to every South African who is conscious of the need for a functional economy. At the same time the purpose behind the right to strike should not be ignored.¹⁸ The broad objective of this study is to explore the relationship between the strike action and the ensuing violence, and to establish the possible factors of violent strikes. More specifically, the study aims to examine the legal mechanisms which have been put in place by the legislature to regulate the violence associated with strikes and further to determine the sufficiency of these legal mechanisms. The study also considers whether there is need for an improvement in the legal mechanisms, and provides some possible solutions that could assist in curbing violent strikes.

It is significant to have a study that critically evaluates the South African law on strikes. The study not only explores the importance of the right to strike, but also discusses the challenges which have come with that right. Of significance is the way in which strikes have a direct bearing on the economy. Thus, it is imperative that matters affecting the economy be discussed and solutions advanced with the aim of achieving industrial peace and economic stability in a way that balances the interests of all those involved.

¹⁷ von Holdt (Note 15 above) 147.

¹⁸ The purpose of the right to strike is to create some sort of equilibrium in the collective bargaining system.

The specific objectives of the study can be broken down into five research questions, as follows:

- a. What is the law on strikes in South Africa?
- b. What are the different legal mechanisms that employers can use or the different legal steps they can take to try and prevent or minimise and/or regulate strike violence?
- c. How do employers deal with misconduct during strikes?
- d. Under what circumstances are trade unions liable for riot damage by their members during strikes?
- e. To what extent (if any) does the LRA contribute to strike violence, and are there any other possible drivers, or root causes of strike violence in South Africa?

1.4 Conceptual framework

This study is underpinned by the assumption that the employment relationship is inherently hostile. This is because strike violence is driven by the structural violence inherent in the employment relationship, particularly a labour intensive industry such as mining.¹⁹ Such structural violence takes the form of various labour related, socio-economic and socio-political factors.²⁰ Thus, the dissertation does not promise to find solutions to strike violence but possible ways of managing it.

1.5 Research methodology

The dissertation consists of desktop research, as opposed to empirical research. However, there are elements of empirical research, in chapter 3 and mostly chapter 6 of the dissertation. The empirical research was not conducted by the author of the dissertation, but by various persons who interviewed workers who participated in the 1992 and 2007 South African public service strikes. Interviews were also conducted (following the Marikana tragedy) with some Marikana mine workers and community members in the vicinity of the Marikana mine. In order to show the workers' views in different industries of the private and public sectors,

¹⁹ J Martens & P Alexander 'Marikana and Beyond' (2013) 23 available at http://www.rosalux.co.za/wpcontent/uploads/2013/01/Marikana-Labour-01_2013.pdf, accessed on 13 July 2014.

²⁰ Ngcukaitobi (note 13 above) 840.

and in order to paint a clear picture of some of their experiences, the author of the dissertation has included these interviews and provided an analysis of them. Reference is made to the Constitution,²¹ as the primary source of the right to strike. The dissertation refers extensively to the Labour Relations Act (LRA),²² as the statute which makes provision for the right to strike, and other provisions relating to strikes and strike violence. Other statutes relating to strikes and strike violence (such as the Regulation of Gatherings Act)²³ are referred to. Lastly, the dissertation discusses, and sometimes examines case law surrounding strikes and strike violence and reviews scholarly literature.

1.6 Structure of the dissertation

Chapter 2 deals with the laws governing strikes. Great emphasis will be placed on sections 64 and 65 of the LRA. Section 64 grants every employee the right to strike and sets out the procedures that must be followed in order for a strike to be protected. On the other hand, section 65 deals with the limitations on the right to strike. Chapter 3 deals with the different legal mechanisms an employer can use, or the different steps that an employer can take, to try to prevent, minimise and/or regulate strike violence. Chapter 4 deals with misconduct during strikes and dismissal for misconduct. This includes a discussion on derivative misconduct, which is a rule that workers can be disciplined or dismissed if they refuse to divulge who are or were the perpetrators of violence during a strike. Chapter 5 deals with the liability of trade unions where their members embark on an unprotected strike and further the liability of unions for members' misconduct during a strike (whether protected or unprotected). Chapter 6 deals with the socio-economic and socio-political factors driving strike violence. Lastly, Chapter 7 deals with recommendations made by the author to some of the problems identified in the dissertation and the final conclusion.

²¹ The Constitution of the Republic of South Africa, 1996.

²² The Labour Relations Act 66 of 1995.

²³ The Regulation of Gatherings Act 205 of 1993.

Chapter 2: The laws governing strikes

2.1 Introduction

In South Africa, workers have a fundamental right to strike; hence the law governing strikes is comprehensive. A strike is often described as the most effective weapon²⁴ against an employer, having the potential to narrow the gap existing in the (unequal) bargaining power relationship between employer and employee.²⁵ As an effective weapon against employers, strikes also have the potential to cause, and in most cases actually do cause, substantial financial losses to the employer.²⁶ Thus, if employees are going to embark on a strike, in order for the strike to be protected, the procedures provided for in the LRA must be followed. This chapter provides the statutory definition of a strike. It further provides explanations of the different forms of strikes, as provided in the statutory definition of a strike. The right to strike as granted by both the Constitution and the LRA is set out. Lastly, the chapter discusses the different limitations on the right to strike.

2.2 The legal framework

The legal framework consists of: the statutory definition of a strike; the different forms of strike; the two different kinds of strike; the right to strike, granted by both the Constitution and the LRA; and the limitations on the right to strike. Each aspect of the legal framework mentioned here will be dealt with in turn below.

2.2.1 The statutory definition of a strike

The LRA defines a strike as follows:

The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to ‘work’ in this definition includes overtime work, whether it is voluntary or compulsory.²⁷

²⁴ JV du Plessis, MA Fouche & MW van Wyk *A Practical Guide to Labour Law* 2 ed (1996) 305.

²⁵ Brand (note 3 above) 1.

²⁶ A good example is the recent five month long platinum mines strike (over better wages), which was estimated to have cost platinum mine producers approximately R25 billion in revenue.

²⁷ Section 213 of the Labour Relations Act 66 of 1995.

It is clear from the definition that the following elements must be present for the existence of a strike: (a) there must be collective action of workers with a common goal. It follows that an individual employee who decides not to work is not considered to be on strike; (b) there must be an act or omission. The most common act is the refusal or failure of the employees to work or to continue with their work, or a lack of progress in their work; (c) the reason behind the refusal to work must be to remedy a grievance or to resolve a dispute.

In *Leoni Wiring Systems (EL) (Pty) Ltd v National Union of Metalworkers of South Africa (NUMSA)*,²⁸ after consultations on the closure of a plant, the union wrote to the employer expressing its dissatisfaction with the closure of the plant. The employer confirmed that some employees would be retrenched and presented a list of employees who would be retrenched. In response, the union gave the employer notice of its intention to strike over the closure of the plant. In response to the notice, the employer applied to the Labour Court to interdict the strike. The Court found that although the union had expressed its dissatisfaction with the closure of the plant, a dispute did not exist.²⁹ The Court held that if a dispute arises between parties, it is not only the dispute itself that must be stated clearly, but also the outcome or solution to the dispute. The fact that a party is dissatisfied with another's actions does not mean that the parties are, as a matter of fact, in dispute. The Court clarified that a dispute arises only when the parties express their differing views and assume different positions regarding a specific complicated fact.³⁰

In *Afrox Ltd v South African Chemical Workers Union (SACWU) and others*,³¹ the employees embarked on a strike in order to pressurise the employer to abandon a staggered shift system. The employer abandoned the shift system and began retrenching some of the employees.³² The Labour Court held that when the cause of complaint is removed, the existing strike is dysfunctional and no longer has a purpose. The Court held further that the employees could not continue striking in response to the retrenchments. This was because the retrenchments did not give rise to the dispute; instead it was the shift system that did so, which the employer later abandoned.³³

²⁸ *Leoni Wiring Systems (EL) (Pty) Ltd v NUMSA* (2007) 28 ILJ 642 (LC).

²⁹ T Cohen, A Rycroft & B Whitcher *Trade Unions and the Law in South Africa* (2009) 47.

³⁰ *Ibid* 27.

³¹ *Afrox Ltd v SACWU and others* [1997] 4 BLLR 382 (LC).

³² Cohen (note 29 above) 48.

³³ *Afrox Ltd* (note 31 above) 388.

In *Gobile v BP Southern Africa (Pty) Ltd and others*,³⁴ three employees refused to work overtime and on public holidays because they alleged, contrary to their employer's view, that they were contractually not obliged to do so. Their refusal to work was not accompanied by any express demand. The Labour Appeal Court inquired into the purpose of their action in order to decide whether their refusal to work constituted a strike.³⁵ The Court held that the employees' aim was to make their employer accede to their perception of what their contractual obligations should be. Therefore, their actions constituted a strike.³⁶

The fourth element of a strike is that the dispute must be in respect of any "matter of mutual interest"³⁷ between the employer and the employees. In *Mzeku and others v Volkswagen SA (Pty) Ltd and others*,³⁸ the union suspended its shop stewards who had disregarded an agreement between the union and the employer. The employees stopped working and demanded that the shop stewards be reinstated.³⁹ The Labour Appeal Court accepted the Labour Court's reasoning that the work stoppage was not a strike. This was because it was aimed at resolving an internal dispute between the employees and the union and at forcing the union to accede to a demand. However, the Labour Appeal Court regarded the work stoppage as an unprotected strike and held that the employer could not comply with the demand.⁴⁰

2.2.2 The different forms of strike

The following inferences can be drawn from a reading of the statutory definition of a strike: a strike can either be primary or secondary, and there are different employers for employees who engage in a primary strike as opposed to those who engage in a secondary strike. A primary strike is where the employees strike to place pressure on their own employer for their

³⁴ *Gobile v BP Southern Africa (Pty) Ltd and others* (1999) 20 ILJ 2027 (LAC).

³⁵ Cohen (note 29 above) 48.

³⁶ *Gobile* (note 34 above) 9. See also Cohen (note 29 above) 48.

³⁷ A matter of mutual interest is a matter over which none of the parties to the dispute (that is, neither employer nor employee) have a right. This means a party cannot take another to court over such matter and if it did, the court would not make ruling on the matter, but dismiss it instead. This is because there is no case law or precedent on which a court can rely in order to reach a decision regarding a matter of mutual interest. This is further attributable to the fact that courts do not entertain matters of mutual interest because in order to litigate a person must have either an existing right to the issue in dispute or an interest in the matter. A 'matter of mutual interest' does not fall into either one of these two categories, which is why it is not entertained by the courts. Thus, such matters must be negotiated by the parties with the aim of reaching an agreement, failing which the matter will be taken, by either party to the dispute, to the relevant bargaining council, where the arbitrator or mediator will make a decision.

³⁸ *Mzeku and others v Volkswagen SA (Pty) Ltd and others* (2001) 22 ILJ 1575 (LAC).

³⁹ Cohen (note 29 above) 49.

⁴⁰ *Ibid.*

own demands. These employees have a direct interest in the matter over which they strike.⁴¹ In a secondary/sympathy strike, the employees who do not have a direct interest in the matter, strike in order to place pressure on the employer of the primary strikers.⁴² Secondary strikers can thus be seen as employees who merely offer their support or sympathy to the primary strikers, in order to intensify the strike and get the employer of the primary strikers to accede to their demands.⁴³

The three most important types of primary strikes are: a full work stoppage, a repetition/intermittent strike and a partial strike. These will all be discussed in turn. A full work stoppage⁴⁴ is a complete refusal to work. A repetition/intermittent strike⁴⁵ is a recurring strike, which is undertaken by the same employees in respect of the same issue(s) and at the same time.⁴⁶ This type of strike could either be legal or illegal, depending on the circumstances under which it occurs. A partial strike⁴⁷ is a strike which is short of a total stoppage of work. A partial strike is a collective term⁴⁸ for a go-slow strike, a work to rule strike, an overtime ban and a sit-in. These will also be discussed in turn. In the case of a go-slow⁴⁹ strike, employees work at a slower pace than usual and the production rate is consequently slower than usual. The effect of such is that the employer experiences a decrease in income. Another consequence is that the workers who embark on this type of strike do not forfeit their wages. Further, it is not easy for the management of a company to take action against employees who embark on such a strike as it is difficult for an employer to prove that the employees are on a go-slow strike.⁵⁰

With a work-to-rule⁵¹ strike, the employees' aim achieve is the same as in a go-slow, namely a decrease in income, but the method for achieving this is different. The employees try to ensure that the employer loses money, but without breaching the employment contract. With regards to an overtime ban,⁵² if employees are contractually obliged to work overtime and

⁴¹ Cohen (note 29 above) 65.

⁴² C Cooper 'Sympathy Strikes' (1995) 16 *ILJ* 759, 759.

⁴³ C Kahnovitz 'Secondary Strikes: when are they Permissible?' (2006) 27 *ILJ* 2026, 2027.

⁴⁴ J Grogan *Workplace Law* 7 ed (2003) 327.

⁴⁵ Cohen (note 29 above) 46.

⁴⁶ *Ibid.*

⁴⁷ Grogan (note 44 above) 327.

⁴⁸ SR van Jaarsveld & BPS van Eck *Principles of Labour Law* (1998) 319.

⁴⁹ MA Chicktay 'Defining the Right to Strike: a Comparative Analysis of International Labour Organisation Standards and South African Law' (2012) *Obiter* 260, 268.

⁵⁰ van Jaarsveld (note 48 above) 320.

⁵¹ Cohen (note 29 above) 46.

⁵² *Ibid.*

they refuse to do so, such a refusal constitutes a strike. On the contrary, if no such contractual obligation exists, the employees' refusal to work overtime will not constitute a strike. Lastly, a sit-in⁵³ is when employees occupy their workplace with the aim of obstructing access to the work processes. However, this form of industrial action will only be regarded as a strike if the statutory requirements of a strike are complied with.

2.2.3 The two different kinds of strike

There are two different kinds of strike action in the LRA: protected and unprotected strikes. Protected strikes are contained in section 67 of the LRA. These are strikes that comply with the procedural requirements in section 64 of the LRA (including strike procedures contained in a collective agreement or the constitution of a bargaining council).⁵⁴ The most important consequence of a protected strike is that employees who embark on such a strike may not be dismissed by their employer.⁵⁵ Unprotected strikes are contained in section 68 of the LRA. These are strikes that do not comply with the procedural requirements in section 64 of the LRA. A strike is also unprotected if it is prohibited by section 65 (1) of the LRA. These are strikes over certain issues in dispute and strikes by persons who are employed in essential services, or maintenance services.⁵⁶ The most important consequence of an unprotected strike is that an employer may dismiss the strikers. However, the dismissal must be both substantively and procedurally fair.⁵⁷

2.2.4 The right to strike

As mentioned above, the right to strike is granted by both the Constitution and the LRA, and the way in which the right to strike is expressed in each is shown below.

The right to strike is enshrined in section 23 (2) (c) of the Constitution, which provides that "every worker has the right to strike."⁵⁸ The right is granted without express limitation. However, just like every other right in the Constitution, it is not absolute and remains subject

⁵³ Chicktay (note 49 above) 268.

⁵⁴ Cohen (note 29 above) 45.

⁵⁵ Ibid

⁵⁶ Section 65 (1) of the Labour Relations Act 66 of 1995.

⁵⁷ The Code of Good Practice: Dismissal.

⁵⁸ Section 23 (2) (c) of the Constitution of the Republic of South Africa, 1996.

to the limitations clause contained in section 36.⁵⁹ In this regard, the LRA was enacted to give effect to the right to strike, but also to limit the right to strike, as explained below.

The two main strike provisions in the LRA are sections 64 and 65. Section 64 grants employees the right to strike and employers the corresponding recourse to lock-out.⁶⁰ It further sets out the procedures that must be followed in order for the strike to be protected. On the other hand, section 65 deals with the limitations on the right to strike and recourse to lock-out respectively.

The difference between the right to strike in section 23 (2) (c) of the Constitution and section 64 of the LRA, is that in the former it is granted to every *worker*, whereas in the latter it is granted to every *employee*.⁶¹ Thus, the Constitution provides for a wider scope of inclusion of persons in the right to strike, than the narrower scope of inclusion contained in the LRA. As defined in the LRA, a person need not be an employee in order to enjoy the right to strike; they merely need to be a worker.

Upon the enactment of the LRA, sections 64 and 65 serve amongst other things, as amendments to the common law position that an employee who embarks on a strike commits a fundamental breach of his employment contract, entitling the employer to terminate the employment contract immediately.⁶² The legislature's abolition of this common law position can be seen as an attempt to balance or at least reduce the unequal power relations between employers and employees.

Having dealt with the right to strike, the chapter now deals with the limitations on the right to strike.

⁵⁹ Manamela (note 4 above) 334.

⁶⁰ A lock-out is defined in section 213 of the LRA as the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of a matter of mutual interest between employer and employee, whether or not the employer breached those employees' contracts of employment in the course of or for the purpose of that exclusion.

⁶¹ The term 'worker' is not defined either in the Constitution or the LRA, whereas an 'employee' is defined in section 213 of the LRA as (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting business of an employer.

⁶² J Grogan 'Strike Dismissals in the Public Sector' (1991) 12 *ILJ* 1.

2.2.5 Limitations on the right to strike

Apart from the general limitation contained in section 36 of the Constitution,⁶³ the LRA restricts the right to strike by requiring pre-strike procedures, prohibiting strike action over certain issues in dispute and prohibiting certain employees from striking. These are all discussed in turn.

In order for a strike or lock-out to be protected, certain requirements must be satisfied. The purpose of the statutory pre-strike procedures is to provide the parties with an opportunity for conciliation and possible settlement of the dispute. It is also to allow the employer to prepare for any possible industrial action that may take place.⁶⁴ The procedural requirements are as follows:

Referral of the dispute for conciliation:

The issue in dispute must have been referred for conciliation to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the relevant bargaining council.⁶⁵ It is imperative that all the issues that are in dispute are listed in the referral, since workers are only permitted to strike over those issues which have been referred for conciliation. In the event that there is a dispute about whether the dispute is strikeable, the court, in its attempt to identify the real nature of the dispute, is not limited to the way in which the dispute was described in the referral or the certificate of outcome. The union is the only party that needs to be cited in the referral.⁶⁶

⁶³ This section is referred to as the 'limitations clause' and it provides the following:

1. The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

2. Except as provided for in subsection (1) or in any other provision of the constitution, no law may limit any right entrenched in the Bill of Rights.

⁶⁴ Cohen (note 29 above) 49.

⁶⁵ Section 64 (1) (a) of the Labour Relations Act 66 of 1995.

⁶⁶ Cohen (note 29 above) 49.

In *Early Bird Farm (Pty) Ltd v Food and Allied Workers Union (FAWU) and others*,⁶⁷ the company had farming-and-processing divisions. When employees from the processing plant embarked on a strike for a wage increase, their fellow employees in the farming division also embarked on a strike for a wage increase. Both demands were the same.⁶⁸ The Labour Appeal Court held that since only the dispute of the processing plant employees had been referred for conciliation, the strike of the farm workers for a wage increase was unprotected. However, to the extent that the individual workers' participation in the strike was in support of demands relating only to the union members based in the processing plant, such participation was lawful and protected.⁶⁹

Obtaining a certificate of outcome:

The CCMA must provide a certificate stating that the issue remains unresolved, in other words, a certificate of outcome.⁷⁰ If 30 days (calculated from the date the CCMA or council received the referral) has elapsed, then a certificate of outcome may be obtained without waiting for a conciliation hearing.⁷¹ However, it is best to wait for conciliation so that any disagreement about the nature of the dispute, or any claim that the dispute is not a strikeable one, may be rectified before the union proceeds with the following step.⁷²

If the dispute concerns a 'refusal to bargain',⁷³ the union must wait for the conciliation hearing to obtain an advisory arbitration award from the CCMA, or council, before it can move on to the next step.⁷⁴ The union is not bound by the advisory arbitration award. However, if it turns out that the strike was unprotected, the advice given in the award may be useful when the court assesses whether any disciplinary action was taken by the union in response to the unprotected strike.⁷⁵

⁶⁷ *Early Bird Farm (Pty) Ltd v FAWU and others* (2004) 25 ILJ 2135 (LAC).

⁶⁸ Cohen (note 29 above) 49.

⁶⁹ *Early Bird Farm (Pty) Ltd* (note 67 above) 48. See also Cohen (note 29 above) 50.

⁷⁰ Section 64 (1) (a) (i) of the Labour Relations Act 66 of 1995.

⁷¹ Section 64 (1) (a) (ii) of the Labour Relations Act 66 of 1995.

⁷² Cohen (note 29 above) 50.

⁷³ A refusal to bargain includes:

(a) A refusal: (i) to recognise a trade union as a collective bargaining agent; or (ii) to agree to establish a bargaining council.

(b) A withdrawal of recognition of a collective bargaining agent.

(c) A resignation of a party from a bargaining council.

(d) A dispute about: (i) appropriate bargaining units; (ii) appropriate bargaining levels; or (iii) bargaining subjects.

⁷⁴ Section 64 (2) of the Labour Relations Act 66 of 1995.

⁷⁵ Cohen (note 29 above) 50.

Sending written notice to the employer of the commencement date of the strike

The union must notify the employer in writing as to when the strike will begin. In the case of a proposed strike, the union must give the employer at least 48 hours' notice of the commencement of the strike.⁷⁶ If the employer is the State, then the notice must be given to the State at least seven days before the strike begins.⁷⁷ In the event that there is a secondary strike, such strikers must give their employers seven days' notice of the secondary strike. This will enable the employer of the secondary strikers to prepare for the strikers' absence from work.⁷⁸ If the dispute concerns a collective agreement, written notice must be given to the relevant bargaining council.⁷⁹ On the other hand, if the employer is a member of an employers' organisation, written notice must be given to the employers' organisation.⁸⁰

In *South African Transport and Allied Workers' Union (SATAWU) and others v Moloto NO and another*,⁸¹ the company employed persons who were members of SATAWU and others who were not. SATAWU had issued a single strike notice and some non-members participated in the strike. The non-members were dismissed for unauthorised absence from work. The Constitutional Court found that the provisions of section 64 envisage only one strike in respect of one dispute or issue in dispute. It further found that section 64 does not appear to suggest that more than one notice in relation to the single strike is necessary.⁸² The Constitutional Court held that the dismissed strikers met the provisions of section 64 (1) (b) of the Act by engaging in a strike when only SATAWU (and not also its non-members) issued a strike notice.

In *Ceramic Industries Ltd t/a Betta Sanitaryware and another v National Construction Building and Allied Workers Union (NCBAWU) and others*,⁸³ the union had referred a dispute to the CCMA concerning the payment of wages during an early work stoppage. Thereafter, it notified the company that a strike would begin at any time after 48 hours from the date of the notice. The Labour Appeal Court held that the provisions of section 64 (1) (b) of the LRA needed to be interpreted and applied in a way that gave best effect to the primary objects of

⁷⁶ Section 64 (1) (b) of the Labour Relations Act 66 of 1995.

⁷⁷ Section 64 (1) (d) of the Labour Relations Act 66 of 1995.

⁷⁸ Cohen (note 29 above) 50.

⁷⁹ Section 64 (1) (b) (i) of the Labour Relations Act 66 of 1995.

⁸⁰ Section 64 (1) (b) (ii) of the Labour Relations Act 66 of 1995.

⁸¹ *SATAWU and others v Moloto NO and another* (2012) 33 ILJ 2549 (CC).

⁸² *Ibid* 64.

⁸³ *Ceramic Industries Ltd t/a Betta Sanitaryware and another v NCBAWU and others* [1997] 6 BLLR 697 (LAC).

the LRA and its own specific purpose, which needed to be done within the constraints of the language used in section 64 (1) (b). The Court stated that one of the primary objects of the LRA is to promote orderly collective bargaining. Section 64 (1) (b) gives expression to this object by requiring written notice of the commencement of the proposed strike. The section's specific purpose is to give the employer advance warning of the proposed strike so that the employer may prepare for the power play that will follow. The specific purpose is defeated if the written notice does not inform the employer of the exact time in which the proposed strike will begin. The Court found the union's notice defective for failing to stipulate the exact time that the proposed strike would begin, and held that the provisions of section 64 (1) (b) were not complied with.⁸⁴

There are certain instances in which union will be exempt from complying with the pre-strike procedures contained in section 64 (1). These instances are dealt with below.

A union does not have to comply with the above statutory pre-strike procedures in the following instances: (a) where the parties to the dispute are members of a bargaining council and the dispute has been dealt with by that bargaining council in accordance with its constitution⁸⁵; (b) where the strike or lock-out is in line with the procedures in a collective agreement⁸⁶; (c) where the employees strike in response to a lock-out (by their employer) that does not comply with the provisions of Chapter 4 of the LRA⁸⁷; (d) where the employer locks-out its employees in response to their taking part in a strike that does not comply with the provisions of Chapter 4⁸⁸; or (e) where the employer fails to comply with the requirements of subsections 4⁸⁹ and 5^{90, 91}.

⁸⁴ Ibid 702. See also Cohen (note 29 above) 51.

⁸⁵ Section 64 (3) (a) of the Labour Relations Act 66 of 1995.

⁸⁶ Section 64 (3) (b) of the Labour Relations Act 66 of 1995.

⁸⁷ Section 64 (3) (c) of the Labour Relations Act 66 of 1995.

⁸⁸ Section 64 (3) (d) of the Labour Relations Act 66 of 1995.

⁸⁹ Subsection 4 provides that any employee or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a bargaining council or the CCMA in terms of subsection 1 (a) of section 64 may, in the referral, and for the period referred to in subsection 1 (a): (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

⁹⁰ Subsection 5 provides that the employer must comply with a requirement in terms of subsection 4 within 48 hours of service of the referral on the employer.

⁹¹ Section 64 (3) (e) of the Labour Relations Act 66 of 1995.

Having dealt with the procedural limitations on the right to strike, or the pre-strike procedures that have to be complied with, the chapter now deals with the substantive limitations on the right to strike.

Section 65 firstly prohibits strikes over certain disputes or issues in dispute, and secondly it prohibits certain employees from embarking on strike action. These limitations are each discussed in turn.

The Prohibition of strikes over certain issues in dispute:

Employees may not strike if they are bound by a collective agreement that: (a) has a peace clause that prohibits strike action over the issue in dispute;⁹² (b) regulates the issue in dispute; or (c) requires the issue in dispute to be arbitrated.⁹³

In *Black Allied Workers Union (BAWU) and others v Asoka Hotel*,⁹⁴ the parties fell under the jurisdiction of an Industrial Council and were bound by the terms of a gazetted Industrial Council agreement which set minimum wages. The union demanded that the employer negotiate with it over wage increases. The employer refused to do so and the union members engaged in a strike in furtherance of their demand. The employees were dismissed and sought their reinstatement in terms of the LRA. The Industrial Court held that the demand for negotiations over higher wages was not covered by any provision of the Industrial Council agreement (which set minimum wages only) and that consequently the strike contravened section 65 (1) (a) of the LRA.⁹⁵ The Court held further that it would protect employees who engaged in legal strikes in circumstances where the employer neither negotiated in good faith nor had proven to be reasonable. In the circumstances of the case, the Court found that the employer had dismissed the strikers prematurely and in a way that was procedurally unfair.⁹⁶

In *Leoni Wiring Systems (East London) Pty Ltd v NUMSA and others*,⁹⁷ the employees who were NUMSA members wanted to embark on a strike for better severance pay, following the employer's implementation of a retrenchment exercise in terms of the LRA. The Labour Court held that the collective agreement did not establish a minimum entitlement, but an

⁹² Section 65 (1) (a) of the Labour Relations Act 66 of 1995.

⁹³ Section 65 (1) (b) of the Labour Relations Act 66 of 1995.

⁹⁴ *BAWU and others v Asoka Hotel* (1989) 10 ILJ 167 (IC).

⁹⁵ *Ibid* 173.

⁹⁶ *Asoka Hotel* (note 94 above) 180.

⁹⁷ (2007) 28 ILJ 642 (LC).

actual one in respect of severance pay. Therefore, the collective agreement regulated the issue of severance pay and the employees could not strike for better severance pay.⁹⁸

In *Early Bird Farm (Pty) Ltd v FAWU and others*,⁹⁹ the company had farming-and-processing divisions. When employees from the processing plant embarked on a strike for a wage increase, their fellow workers in the farming division also went on strike for a wage increase for themselves. The Labour Appeal Court held that because they were bound by a collective agreement with the union, the farm workers were not entitled to strike over wage demands on their own behalf.¹⁰⁰

In *Airport Handling Services (Pty) Ltd v Transport and Omnibus Workers Union (TOWU) and others*,¹⁰¹ the company applied for an interdict to prevent its employees from continuing to embark on a protected strike, prior to entering into an agreement with the company. The Labour Court held that since the agreement was entered into between the company and the union, it was a collective agreement. Thus, the employees were obliged to discontinue their strike. This was despite a vote by the majority of them in favour of the strike, pending negotiations between the company and the union.¹⁰²

If employees embark on a strike where there is an agreement that states that the particular type of issue in dispute must be referred to arbitration, such a strike will be unprotected.¹⁰³ Further, once a dispute has been taken to arbitration, the decision of the arbitrator is final and no party is allowed to strike in order to obtain a different result.¹⁰⁴ Section 65 (1) (c) of the LRA prohibits parties from embarking on a strike to resolve a dispute that such party has a right to refer to arbitration or the Labour Court.¹⁰⁵ The reason for this is that the dispute is one that can be taken to court and an appropriate remedy can be granted. Thus, the disputes over which employees may not strike are: allegations of unfair dismissal; automatically unfair dismissals; unfair labour practices; victimization; the interpretation and application of a collective agreement; picketing; agency and closed shop agreements; and admission or

⁹⁸ Ibid 40. See also Cohen (note 29 above) 54.

⁹⁹ (2004) 25 ILJ 2135 (LAC).

¹⁰⁰ Cohen (note 29 above) 54.

¹⁰¹ *Airport Handling Services (Pty) Ltd v TOWU and others* [2004] 3 BLLR 228 (LC).

¹⁰² Ibid 8.

¹⁰³ Cohen (note 29 above) 55.

¹⁰⁴ Ibid.

¹⁰⁵ Section 65 (1) (c) of the Labour Relations Act 66 of 1995.

expulsion from bargaining councils.¹⁰⁶ These are all the issues in dispute over which the LRA prohibits striking.

Having dealt with the first prohibition under section 65, namely strikes over certain disputes or issues in dispute, the chapter now deals with the second prohibition, namely employees who are prohibited from embarking on strike action.

There are only two kinds of employees who are prohibited by the LRA from embarking on strike action; namely employees of essential services or maintenance services. In *South African Police Service (SAPS) v Police and Prisons Civil Rights Union (POPCRU)*,¹⁰⁷ the Constitutional Court confirmed the rulings of the Labour Court and Labour Appeal Court that only members of the SAPS employed under the SAPS Act are engaged in an essential service under the LRA, not all members of a trade union who are not also members of the SAPS.

In addition to the two limitations identified in section 65 that have been discussed above, there are three further limitations on the right to strike that have been read into the LRA by case law, as discussed below:

When the demand requires the employer to act unlawfully:

In *TSI Holdings (Pty) Ltd and others v NUMSA and others*,¹⁰⁸ the employees embarked on a strike after the company had refused to dismiss the company supervisor upon the request of the employees. The employees alleged that the supervisor made a racist comment to some of the employees. The Labour Appeal Court held that the strike was unprotected because the demand of the employees required the employer to violate the supervisor's right to not be dismissed without a hearing.¹⁰⁹

When the demand requires the employer to act unreasonably:

In *Greater Johannesburg Transitional Metropolitan Council v Independent Municipal and Allied Trade Union (IMATU) and another*,¹¹⁰ the union demanded the employer to secure the jobs of its employees who were transferred in terms of section 197 of the LRA. The Council claimed that the demand was impossible to satisfy and that the strike embarked on by the

¹⁰⁶ Cohen (note 29 above) 55.

¹⁰⁷ *SAPS v POPCRU* (2011) 32 ILJ 1603 (CC).

¹⁰⁸ *TSI Holdings (Pty) Ltd and others v NUMSA and others* (2006) 27 ILJ 1483 (LAC).

¹⁰⁹ Cohen (note 29 above) 57.

¹¹⁰ *Greater Johannesburg Transitional Metropolitan Council v IMATU and another* [2001] 9 BLLR 1063 (LC).

union and its members was unprotected.¹¹¹ The Labour Court held that the union's failure to specifically identify essential service employees in the strike notice did not render the strike unprotected.¹¹² Further, the dispute could not be referred to the Labour Court for adjudication, as the union had not alleged that the transfers contravened the LRA. Instead, the dispute could be resolved through collective bargaining.¹¹³

Demands with which an employer cannot deal:

In *Mzeku and others v Volkswagen SA (PTY) Ltd and others*,¹¹⁴ some of the employees embarked on a strike in the form of withholding their labour. Later, some of the employees returned to work whilst others did not, and the company dismissed those who failed to return to work. The Labour Appeal Court held that under the LRA, the relief of reinstatement is not competent in the case of a dismissal that is unfair solely because the employer did not follow a fair procedure. Therefore, the strike was unprotected because it concerned a demand that the employer was not empowered by law to satisfy.¹¹⁵

Since the right to strike is a fundamental right of workers granted in the Constitution without express limitation,¹¹⁶ it is important that any limitations on the right to strike be justified. If this were not so, employees would have no effective weapon against employers who would remain considerably financially and socially more powerful than their employees. Thus, as a way of clarifying that the limitations on the right to strike do not taint this right, or render it less valuable, the Constitutional Court in *South African National Defence Union (SANDU) v Minister of Defence and others*¹¹⁷ found that the limitations on the right to strike passed constitutional muster and were thus justified.

¹¹¹ Cohen (note 29 above) 57.

¹¹² *Greater Johannesburg Transitional Metropolitan Council* (note 110 above) 43.

¹¹³ *Greater Johannesburg Transitional Metropolitan Council* (note 110 above) 33, 47.

¹¹⁴ (2001) 22 ILJ 1575 (LAC).

¹¹⁵ *Ibid* 79. See also Cohen (note 29 above) 58.

¹¹⁶ Section 23 of the Constitution of the Republic of South Africa, 1996.

¹¹⁷ *SANDU v Minister of Defence and others* (2007) 28 ILJ 1909 (CC).

2.3 Conclusion

In summary, a strike is a refusal to work by a collection of workers or employees. The refusal to work is aimed at remedying a grievance or resolving a dispute. The dispute must be in respect of any matter of mutual interest between employer and employee. Further, a strike can be either primary or secondary. The right to strike is provided for in both section 23 of the Constitution and in section 64 of the LRA. The scope for persons who are eligible to strike is wider in the Constitution than it is in the LRA, as the Constitution refers to every *worker* whereas the LRA refers to every *employee*. Section 64 contains the procedural requirements that must be followed in order for a strike to be protected, whereas section 65 explains the substantive limitations on the right to strike. These include both the issues in dispute over which employees are prohibited from strike and those employees who are prohibited from striking. If there is to be any development to strike laws in South Africa, it is imperative that the right to strike and its limitations be respected by both employers and employees. Chapter 3, which follows, deals with the legal mechanisms an employer can use, or the steps an employer can take to minimise and/or regulate violence by employees during strike action.

Chapter 3: The different legal mechanisms an employer can use, or the legal steps an employer can take to try to prevent, minimise and/or regulate violence during strikes

3.1 Introduction

It can be assumed that employers aim to create healthy, tolerable relationships with their employees and vice versa, as this benefits both parties to the employment relationship. However, despite this mutual understanding, it is commonly known that the employment relationship is never always smooth. Disputes about wages or dismissals can often lead to industrial action, accompanied by violence.¹¹⁸ Thus, it is important for employers to have ways preventing violence during strikes, or if violence does occur, to try and minimise the violence or any adverse effects it could have. As soon as a protected strike becomes violent, it loses its legitimacy.¹¹⁹ Therefore, in order to prevent this, it is crucial that a strike is embarked upon peacefully and in accordance with the procedures set out in section 64 of the LRA.¹²⁰ This chapter discusses the different mechanisms an employer can use to minimise and/or prevent violence during strikes. These are as follows: concluding collective agreements; agreeing to and complying with the rules of picketing; obtaining a prohibitory interdict; instituting a delictual claim for damages; and laying a charge of misconduct. Each one is dealt with in turn.

3.2 The formation of proper relationships with employees through collective agreements

The first way that employers can try to minimise violence during strikes is by concluding collective agreements that will regulate the relationship between them and their employees. This is usually considered as the first option by employers because it is a diplomatic way of trying to prevent the occurrence of strikes, and if strikes are prevented then violence is prevented too. The reason collective agreements can prevent strikes is because they stipulate

¹¹⁸ Manamela (note 4 above) 322.

¹¹⁹ A Rycroft 'Can a Protected Strike Lose its Status? *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 ILJ 998 (LC)' (2013) 34 ILJ 821, 827.

¹²⁰ Manamela (note 4 above) 323.

the forum(s)¹²¹ that could be used to resolve a dispute between the employer and employees, and the issues in dispute over which employees cannot strike. The two different kinds of collective agreements that are provided for by the LRA are addressed below.

a. Agency shop agreements

An agency shop agreement is provided for in section 25 (1) of the LRA and is concluded between a majority union and an employer. In terms of this agreement, the employer deducts an agreed fee from the wages of non-union members, who are eligible for membership.¹²² This is to ensure that non-unionised employees also contribute financially towards the enjoyment of any benefits received by the entire workforce. Such benefits are a result of negotiations entered into by the majority union, on behalf of its members, with the employer.¹²³ A conscientious objector (that is, a person who refuses to join a trade union because of his conscience) is not obliged to become a member of a trade union and may request that his fees be paid to a fund administered by the Department of Labour.¹²⁴

In terms of section 25 (3), an agency shop agreement is binding only if it provides the following:¹²⁵ (a) employees who are not members of the representative trade union are not compelled to become members of that trade union; (b) the agreed agency fee must be equivalent to or less than: (i) the amount of the subscription payable by the members of the representative trade union; (ii) if the subscription of the representative trade union is calculated as a percentage of an employee's salary, that percentage; (iii) if there are two or more trade unions who are party to the agreement, the highest amount of the subscription that would apply to an employee; (c) the amount deducted must be paid into a separate account administered by the representative trade union; (d) no agency fee deducted may be: (i) paid to a political party as an affiliation fee; (ii) contributed in cash or kind to a political party or a person standing for election to any political office; or (iii) used for any expenditure that does not advance or protect the socio-economic interest of employees.

¹²¹ Collective agreements usually state that disputes will be resolved through internal (workplace) dispute resolution processes. The employer's exclusion of dispute resolution processes outside those provided for in the workplace is a way of avoiding the magnification of the issue or dispute, which could lead to (violent) industrial action.

¹²² Section 25 (1) of the Labour Relations Act 66 of 1995.

¹²³ Cohen (note 29 above) 6.

¹²⁴ Section 25 (4) (b) of the Labour Relations Act 66 of 1995.

¹²⁵ Section 25 (3) of the Labour Relations Act 66 of 1995.

b. Closed shop agreements

A closed shop agreement is provided for in section 26 (1) of the LRA and is concluded between an employer and a trade union. In terms of this agreement, if two thirds of the employer's total workforce votes in favour of being a member of a union of their choice, then the entire workforce (including those employees who voted against union membership) have to become union members.¹²⁶ If there are any employees who do not become union members, they are dismissed and such dismissal is not regarded as unfair.¹²⁷

A closed shop agreement is binding only in the following circumstances:¹²⁸ (a) a ballot concerning the employees to be covered by the agreement, has been held; (b) two thirds of the employees who voted have voted in favour of the agreement; (c) there is no provision in the agreement requiring membership of the representative trade union before employment commences; and (d) it provides that no membership subscription or levy deducted may be: (i) paid to a political party as an affiliation fee; (ii) contributed in cash or kind to a political party or a person standing for election to any political office; or (iii) used for any expenditure that does not advance or protect the socio-economic interest of employees.

The subject of closed shop agreements is one that is highly controversial in South African labour law and amongst its scholars. Many do not agree with the way closed shop agreements operate and the effect of non-compliance with them, on employees. Hayek believes that closed shop agreements should be regarded as restraints of trade and that they should not enjoy the benefit of protection by the law.¹²⁹ Vettori argues that closed shop agreements violate an employee's right to freedom of association¹³⁰ (which is guaranteed by the International Labour Organisation and section 18 of the Constitution). This is in the sense that an employee does not have the freedom not to associate with any trade union, where two thirds of the employer's workforce has voted in favour of joining a trade union of their choice.

¹²⁶ Section 26 (1) of the Labour Relations Act 66 of 1995.

¹²⁷ Section 26 (6) (a) of the Labour Relations Act 66 of 1995.

¹²⁸ Section 26 (3) of the Labour Relations Act 66 of 1995.

¹²⁹ M Budeli *Freedom of Association and Trade Unionism in South Africa: from Apartheid to the Democratic Constitutional Order* (PhD thesis, University of Cape Town, 2007) 61 available at http://uctscholar.uct.ac.za/PDF/158331_Budeli_M.pdf, accessed on 11 July 2014.

¹³⁰ S Vettori 'The Labour Relations Act 66 of 1995 and the Protection of Trade Unions' (2005) 17 *SA Merc LJ* 297.

Budeli argues that although there is no legislation that specifically provides for ‘freedom not to associate’, the right to freedom of association in the Constitution should be interpreted to mean that a person also has the right to choose whether or not they wish to associate with a trade union or an employer’s organisation.¹³¹ Van der Merwe shares the same view as Budeli that closed shop agreements may be unconstitutional and that although section 18 expressly grants a positive right of freedom of association, it should be understood to also include the negative right of freedom not to associate.¹³² He argues that such an interpretation or understanding of the right is consistent with section 39 (2) of the Constitution, which states that “a right in the Bill of rights should be interpreted in a way that promotes the values that underlie an open and democratic society based on human dignity, equality and freedom.”¹³³ He argues further, as does Budeli, that regard must be given to international law and foreign law, as per section 39 (2) of the Constitution and that the inclusion of the “negative right” is consistent with international law (such as the ILO) and foreign law (jurisdictions such as the United Kingdom, where the courts have been progressive in their approach to the right to freedom of association).¹³⁴

However, Budeli notes that the ILO Conventions 87 and 98 are silent on the specific issue of whether the right to freedom of association includes the negative right not to associate.¹³⁵ Despite this, the ILO Committee on Freedom of Association held that “when interpreting Convention No 87, although [it] does not explicitly refer to the right to dissociate, the general right to dissociate is included in the right to associate.”¹³⁶

The author of this dissertation agrees with the abovementioned authors that closed shop agreements violate the right to freedom of association. Whether it is not in the best interests of the employer and/or a majority trade union if employees do not join a union of their choice is not the concern of the employees and should thus not affect them. Employees who do not wish to join trade unions should be left to face the normal consequences of non-union membership, such as not being part of a collective bargaining process with the employer, and

¹³¹ M Budeli ‘Understanding the Right to Freedom of Association at the Workplace: Components and Scope’ (2010) *Obiter* 16, 20.

¹³² J van der Merwe *Conscientious Objectors, Closed Shop Agreements and Freedom of Association* (LLM thesis, University of the North West, 2005) 22 available at <http://dspace.nwu.ac.za/handle/10394/1131>, accessed on 2 August 2014.

¹³³ Section 39 (2) of the Constitution of the Republic of South Africa, 1996.

¹³⁴ Budeli (note 131 above) 23.

¹³⁵ Budeli (note 131 above) 30.

¹³⁶ Budeli (note 131 above) 30-31.

will have no union to represent them should any dispute arise between them and their employer.¹³⁷ It is unfortunate that there is not a lot of jurisprudence on closed shop agreements, considering their controversial nature.

One obvious reason for this is that trade unions are reluctant to challenge the constitutionality of section 26 (1) of the LRA. This is understandable from their perspective, as a successful challenge of the section means that they could lose members and in the case of minority unions, probably even cease to exist. This is because employees would no longer be compelled to join trade unions of their choice and thus pay monthly subscription fees. Another obvious reason is that employers are not challenging the constitutionality of the section. Perhaps this is because employers also prefer that unions exist rather than not exist. This could be because they prefer to deal with union officials and shop stewards rather than with their employees directly. Some employers may believe that they can persuade union officials and shop stewards to reach settlements that do not have adverse effects on the business of the employer, in exchange for an office in the workplace and/or a secret wage increase.¹³⁸ On the other hand, dissatisfied employees are less likely to be persuaded to consider the employer's interests and are thus more likely to be hostile towards the employer.¹³⁹

This view is substantiated by Gavin Capps in an interview with *Amandla* newspaper in September 2012. The issue for that month dealt with the Marikana tragedy (as it had recently occurred) and the way the police handled it. When asked: "what has happened with the National Union of Metalworkers (NUM)? It seems workers have rejected NUM to strike independently and join the rival union, the Association of Mineworkers and Construction Union (AMCU)"¹⁴⁰, Capps replied:

When I did field research in the industry in [the years] 2000-1, in the Bafokeng area, I was struck by the degree of alienation of ordinary workers. In a relatively short time they had started feeling that NUM no longer represented them effectively. This could be attributed to the fact that, [amongst other things], after NUM's recognition struggles, the [mine] bosses employed various strategies to develop closer relations with the local union leadership. They

¹³⁷ SB Gericke 'Revisiting the Liability of Trade Unions and/or their Members during Strikes: Lessons to be Learnt from Case Law' (2012) 75 *THRHR* 566, 568-569.

¹³⁸ Jolys (note 14 above) 9.

¹³⁹ *Ibid.*

¹⁴⁰ Jolys (note 14 above) 9.

realised that union incorporation was better than a force like NUM rather than facing autonomous worker action with which one cannot negotiate and reach compromises.¹⁴¹

Capps cited a practical example by noting that at the Impala Platinum Holdings Limited mines, the union office is right next to the mine manager's office. He further stated that "managers fostered strategies of socialising with NUM leaders (both organisers and senior shop stewards) and this generated a feeling amongst workers that grievances were not being taken up [to the mine management]."¹⁴²

This is proof of the increasingly close (and perhaps inappropriate) relationship between mine management and union officials and shop stewards. Such relationships are to the detriment of the mine workers, particularly lower graded mine workers (such as rock drill operators). This is because their best interests cannot possibly be served by the unions, who are 'in bed' with mine management with more lucrative offers than any mine worker could ever meet.

Having said all this, one must neither forget nor understate the crucial role played by trade unions in society. Gericke notes the importance of trade unions as follows:

Trade unions are invaluable institutions in modern democratic society. Their administrative and legal skills are priceless in the collective bargaining process; and so is the degree of accuracy and commitment to their responsibilities and obligations to serve the interests of their members, to preserve their dignity and to better their conditions of employment and standard of living. They provide an essential counterbalance to the power of management during negotiations. They are the vigilant custodians, not only of their members' interests but of the economy, the labour market and society at large. They guard over the rights of their members in the workplace and play a significant role in maintaining the dignity and interests of minority groups and previously disadvantaged members of a society. Fair and justified dismissals due to unlawful behaviour and/or unprotected strikes are not serving the interests of employees in a country that is still deeply deprived of employment opportunities and divided by poverty.¹⁴³

The subject of trade unions (particularly their liability) will be dealt with in more detail in chapter 5 of the dissertation.

¹⁴¹ Ibid.

¹⁴² Jolys (note 14 above) 9.

¹⁴³ Gericke (note 137 above) 584.

The legal effect of a collective agreement

A collective agreement binds the following persons:¹⁴⁴ (a) the parties to the collective agreement; (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them; (c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates: (i) the terms and conditions of employment; or (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers; (d) employees who are not members of the registered trade union(s) party to the agreement if: (i) the employees are identified in the agreement; (ii) the agreement expressly binds the employees; (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1) (c) who was a member at the time it became binding. This is so whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement.¹⁴⁵ Further, a collective agreement, where applicable, changes any contract of employment between an employer and employee who are both bound by the collective agreement.¹⁴⁶ Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period of time may terminate the agreement by giving reasonable notice in writing to the other parties.¹⁴⁷

Recognition agreements

Recognition agreements are not provided for in the LRA. They are concluded between the employer and a trade union where the employer agrees to recognise a trade union in the workplace if the trade union has a sufficient percentage of members in the employer's

¹⁴⁴ Section 23 of the Labour Relations Act 66 of 1995.

¹⁴⁵ Section 23 (2) of the Labour Relations Act 66 of 1995.

¹⁴⁶ Section 23 (3) of the Labour Relations Act 66 of 1995.

¹⁴⁷ Section 23 (4) of the Labour Relations Act 66 of 1995.

workforce, in terms of the collective agreement concluded between the employer and the majority union.¹⁴⁸

Collective agreements and Majoritarianism

Majoritarianism is a principle of labour law that refers to the situation whereby members of a trade union constitute the majority of an employer's workforce.¹⁴⁹ It is referred to in section 11 of the LRA, as 'trade union representativeness', which means a registered trade union or two or more registered trade unions acting jointly, and that are sufficiently representative of the employees employed by an employer in the workplace.

As per section 18 (1) of the LRA, such a majority union, together with the employer, have the right to conclude a collective agreement which sets a threshold for member representivity of the employer's workforce, which must be met by a trade union. This is in order to be recognised as a trade union with the benefit of the organisational rights that accompany such recognition, in terms of sections 12¹⁵⁰, 13¹⁵¹ and 15¹⁵² of the LRA.¹⁵³

¹⁴⁸ J Kruger & C Tshoose 'The Impact of the Labour Relations Act on Minority Trade Unions: a South African Perspective' (2013) *PELJ* 285, 292.

¹⁴⁹ C Tshoose 'Determining the Threshold for Organisational Rights: the Legal Quagmire Facing Minority Unions Resolved – *South African Post Office v Commissioner Nowosenetz No* (2013) 2 BLLR 216 (LC)' (2013) 34 *Obiter* 600, 610.

¹⁵⁰ This section deals with a 'trade union's access to the workplace' and provides the following: (1) any office-bearer or official of a representative trade union is entitled to enter the employer's premises in order to recruit members or communicate with members, or otherwise serve members' interests; (2) a representative trade union is entitled to hold meetings with employees outside their working hours at the employer's premises; (3) the members of a representative trade union are entitled to vote at the employer's premises in any election or ballot contemplated in that trade union's constitution; and (4) the rights conferred by this section are subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work.

¹⁵¹ This section deals with the 'deduction of trade union subscriptions or levies' and provides the following: (1) any employee who is a member of a representative trade union may authorise the employer in writing to deduct subscriptions or levies payable to that trade union from the employee's wages; (2) an employer who receives an authorisation in terms of subsection (1) must begin making the authorised deduction as soon as possible and must remit the amount deducted to the representative trade union by not later than the 15th day of the month first following the date each deduction was made; (3) an employee may revoke an authorisation given in terms of subsection (1) by giving the employer and the representative trade union one month's written notice or, if the employee works in the public service, three months' written notice; (4) an employer who receives a notice in terms of subsection (3) must continue to make the authorised deduction until the notice period has expired and then must stop making the deduction; (5) with each monthly remittance, the employer must give the representative trade union- (a) a list of the names of every member from whose wages the employer has made the deductions that are included in the remittance; (b) details of the amounts deducted and remitted and the period to which the deductions relate; and (c) a copy of every notice of revocation in terms of subsection (3).

¹⁵² This section deals with 'leave for trade union activities' and provides the following: (1) An employee who is an office-bearer of a representative trade union, or of a federation of trade unions to which the representative trade union is affiliated, is entitled to take reasonable leave during working hours for the purpose of performing the functions of that office; (2) The representative trade union and the employer may agree to the number of days of leave, the number of days of paid leave and the conditions attached to any leave; (3) An arbitration

The impact of section 18 of the LRA on minority unions

Section 18 creates many obstacles for minority unions. If a union does not meet the threshold set by the employer and the majority union, they are not recognised as a trade union and do not have the benefit of the organisational rights sections 12, 13 and 15 of the LRA. Even if a trade union meets the threshold, the employer and the majority union may, in a new collective agreement, upon the expiry of the old one, increase the threshold for sufficient representivity.¹⁵⁴ The effect of this is that the minority unions are sometimes unable to meet the new threshold because they have not gained further members from the employer's workforce, and consequently lose the organisational rights in sections 12, 13 and 15 of the LRA.¹⁵⁵ The members of the minority unions who have lost those organisational rights see not point in continuing their membership with a union that lacks organisational rights. As a result, they join the majority union.¹⁵⁶

Further, the employer and a majority union may conclude a collective agreement which deprives minority trade unions of the right to organise on the shop floor.¹⁵⁷ Probably one of the greatest problems as far as the content of collective agreements is concerned, is that the LRA generally allows collective agreements to trump its provisions.¹⁵⁸ For example, section 64 (1) (a) prohibits a strike where a collective agreement determines that the issue in dispute is not strikeable.

Another obstacle is that minority trade unions and their employees together with employees who do not belong to any trade union are bound by the terms of the collective agreement. In *POPCRU v Ledwaba NO and others*,¹⁵⁹ a dispute arose between POPCRU (the majority trade union in the department of correctional services) and the South African Correctional services Workers Union (SACOSWU), (a minority union in the department of correctional services) about whether SACOSWU was entitled to the organisational rights contemplated in sections 12 and 13 of the LRA.

award in terms of section 21 (7) regulating any of the matters referred to in subsection (2) remains in force for 12 months from the date of the award.

¹⁵³ Tshoose (note 149 above) 610.

¹⁵⁴ Kruger (note 148 above) 295.

¹⁵⁵ Ibid.

¹⁵⁶ Kruger (note 148 above) 295.

¹⁵⁷ B Jordaan 'Collective Bargaining Under the New Labour Relations Act: the Resurrection of Freedom of Contract' (2009) 6 available at <http://www.saflii.org/za/journals/LDD/1997/2.pdf>, accessed on 27 June 2014.

¹⁵⁸ Ibid.

¹⁵⁹ *POPCRU v Ledwaba NO and others* (2014) 35 ILJ 1037 (LC).

The Labour Court stated that because POPCRU is a recognised majority union and because the department of correctional services had already concluded a collective agreement with POPCRU determining threshold representativeness and organisational rights, which were binding on non-parties, the department of correctional services and SACOSWU were not entitled to conclude a collective agreement on organisational rights.¹⁶⁰ The Labour Court remarked further that to apply the SACOSWU collective agreement would negate and breach the POPCRU collective agreements. Further that this would be in conflict with sections 18 (1) and 23 (1) (d) of the LRA, in terms of which SACOSWU and/or its individual members would be bound by the POPCRU collective agreements.¹⁶¹ Thus, the Labour Court found the SACOSWU agreement to be invalid and unenforceable.

In *Chamber of Mines South Africa v Association of Mineworkers and Construction Union (AMCU)*,¹⁶² the Labour Court had to make a decision on the return date of a *rule nisi* that it granted in favour of the employer prohibiting the union from embarking on a strike. The union filed a counter-application challenging the constitutionality of section 23 (1) (d) of the LRA.¹⁶³ The Court found that the limitation of the right to strike by AMCU's members is applicable regarding only those issues regulated by the wage agreement and only for so long as the agreement remains binding. The Court stated that the limitation is consistent with the overall legislative scheme that applies to collective bargaining and the LRA. It held that section 23 (1) (d) of the LRA read with the other relevant sections of the LRA (section 65 (1) (a)) does not violate the principle of legality and constitutes a reasonable and justifiable limitation of the right to strike and other associated rights (namely the rights to: freedom of association; freedom of trade, occupation and profession; fair labour practices and human dignity).¹⁶⁴ Thus, section 23 (1) (d) of the LRA was held to be consistent with the Constitution. These two judgments are indicative of how even the Labour Court endorses the principle of majoritarianism and the enormous weight it attaches to the validity of collective agreements.

¹⁶⁰ Ibid 66.

¹⁶¹ *Ledwaba NO and others* (note 159 above) 66.

¹⁶² *Chamber of Mines South Africa v AMCU* (2014) 35 ILJ 1243 (LC).

¹⁶³ The section permits parties to a collective agreement (the employer and the majority trade union) to extend their agreement to employees who are not parties to the agreement. This is if the members of the majority union comprise a majority of the workforce in the workplace.

¹⁶⁴ *Chamber of Mines South Africa* (note 162 above) 73.

The collective agreement may stipulate that the parties resolve the dispute in the following ways provided below. If not, the employer may suggest that that the dispute be avoided in the following ways in order to avoid a strike, which could turn violent. Some examples of alternative dispute resolution mechanisms an employer can use or suggest are: informal discussion and problem solving; facilitation; mediation; or negotiation. Each dispute resolution mechanism is dealt with briefly in turn. Informal discussion and problem solving are simple and traditional ways of relationship building and dispute resolution, involving the parties in an exchange of positions, interests and possible solutions, with the aim of reaching an understanding or solution to which both parties can agree.¹⁶⁵ Facilitation is the process in which a facilitator assists parties to reach consensus, by chairing the meeting or guiding problem-solving or making suggestions.¹⁶⁶ Mediation is a decision making process in which the parties are assisted by a third person (the mediator) who attempts to improve the process of decision-making and assist the parties to reach an outcome to which both parties can agree.¹⁶⁷ Negotiation is an interactive communication process that may occur when one party seeks something from another or vice versa.¹⁶⁸ The parties communicate their needs and interests in an attempt to reach a decision or resolve a dispute.¹⁶⁹

3.3 Agreement on and compliance with picketing rules

Another way that employers could attempt to prevent strike violence is by trying to reach agreement with the trade union(s) representing the striking employees, on rules of picketing.¹⁷⁰ Section 17 of the Constitution grants everyone the right to, amongst other things, picket peacefully and unarmed.¹⁷¹ According to the Code of Good Practice on Picketing, a picket is “conduct in contemplation or furtherance of a strike”.¹⁷² It could also be understood as a gathering of strikers outside the employer’s business premises who discourage or dissuade co-workers who are not picketing, from going to work.¹⁷³ Its purpose, as per the Code of Good Practice on Picketing, is to peacefully encourage non-striking employees and members of the public to oppose a lock-out or to support strikers involved in a protected

¹⁶⁵ M Anstey *Managing Change: Negotiating Conflict* 3 ed (2006) 406.

¹⁶⁶ J Brand & F Steadman ‘Facilitation’ in J Brand (ed) *Labour Dispute Resolution* (2008) 1, 131.

¹⁶⁷ L Boulle & A Rycroft *Mediation: Principles, Process and Practice* (1997) 7.

¹⁶⁸ R Fisher, W Ury & B Patton *Getting to Yes: Negotiating an Agreement without Giving In* 2 ed (1992) Introduction page.

¹⁶⁹ M Spoelstra & W Pienaar *Negotiation: Theories, Strategies and Skills* 2 ed (1999) 3.

¹⁷⁰ Section 4 (1) of the Code of Good Practice on Picketing.

¹⁷¹ Section 17 of the Constitution of the Republic of South Africa, 1996.

¹⁷² Section 3 (2) of the Code of Good Practice on Picketing.

¹⁷³ Section 3 (1) of the Code of Good Practice on Picketing.

strike.¹⁷⁴ Picketers are permitted to usually hold placards expressing their demands or grievances, and to chant and dance.¹⁷⁵ However, a picket may take place on the premises of the employer, with the employer's permission, which may not be unreasonably withheld.¹⁷⁶ The consequence of a picket is that it causes financial strain or loss to the employer, as there will be a decrease in production due to the stoppage of work by some employees. Thus, the difference between a picket and a strike is that a picket is a step further than a strike. This is in the sense that it involves the refusal to work, accompanied by a demonstration where strikers hold placards, chant and dance outside the employer's business premises. On the other hand, a strike is the mere refusal to work or withdrawal of labour by workers.¹⁷⁷ This is without having to express such refusal on the streets by being vocal or dancing or holding placards outside the employer's business premises.

In *NUMSA v Dunlop*,¹⁷⁸ the company dismissed 250 employees for strike violence. The company and the arbitrator accepted that if there had been picketing rules with proper marshals keeping people in certain areas and monitoring the conduct of workers, the workers would not have been free to march and blockade the access road to the main company, stone the workers and vans entering the company, and stone and assault the riot unit located in front of the company.¹⁷⁹ This shows the important role that picketing rules can play in preventing strike violence.

Although collective agreements aim to prevent strikes, the fact that collective agreements bind non-parties and stipulate the issues in dispute over which employees cannot strike, could lead to strikes, which could turn violent. Some of the alternative dispute resolution mechanisms such as negotiation and mediation may fail to get the employer and employees to reach agreement or resolve a dispute. Further, picketers sometimes do not strictly comply with the rules of picketing. Thus, it is necessary for there to be a legal mechanism employers can use, or a step they can take when employees have embarked on an unprotected strike. This step is applying for and obtaining a prohibitory interdict, and is dealt with in more detail below.

¹⁷⁴ Ibid.

¹⁷⁵ Section 6 (6) of the Code of Good Practice on Picketing.

¹⁷⁶ Section 5 (1) of the Code of Good Practice on Picketing.

¹⁷⁷ Section 213 of the Labour Relations Act 66 of 1995.

¹⁷⁸ *NUMSA v Dunlop*, unreported case no KNP 2439/12.

¹⁷⁹ Ibid.

3.4 Prohibitory interdict

Section 68 of the LRA empowers the Labour Court with exclusive jurisdiction to interdict any person from participating in a strike or lock-out that does not comply with section 64 (unprotected strike).¹⁸⁰ It further empowers the Labour Court to order the payment of just and equitable compensation for any loss suffered as a result of an unprotected strike or any conduct committed in contemplation or in furtherance of an unprotected strike or lock-out.¹⁸¹ The Labour Court's exclusive jurisdiction over labour matters and power to interdict unprotected strikes and strike violence is also provided for in sections 157 (1) and 158 (1) of the LRA.¹⁸² Thus, an employer can obtain an interdict from the Labour Court prohibiting employees from committing violence during a protected strike. The interdict will be an interim one (*rule nisi*) and the parties must return on the return date, where the respondent union must show cause why the interim order must not be made final.¹⁸³

In *National Council of SPCA v Open Shore*,¹⁸⁴ the Supreme Court of Appeal set out the factors a court must take into account before granting an interim interdict:¹⁸⁵ (a) whether the applicant has a *prima facie* right to claim an interdict. What is required is proof of facts that establish the existence of a right in terms of substantive law; (b) the court would normally require the applicant to show a well-grounded apprehension of irreparable harm for the interim relief to be granted, and the respondents will need to prove that there was none for the court to grant a final order on the return date. A reasonable apprehension of injury has been held to be one that a reasonable man might entertain on being faced with certain facts. The applicant for an interdict does not have to show that on a balance of probabilities flowing from undisputed facts, injury will follow. He is only required to show that it is reasonable to apprehend that injury will result. However, the test for apprehension is an objective one. This means that based on the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant;¹⁸⁶ (c) whether the balance of convenience favours the granting of an interim interdict; and (d) whether the

¹⁸⁰ Cohen (note 29 above) 83.

¹⁸¹ Ibid.

¹⁸² A Myburgh 'The Failure to Obey Interdicts Prohibiting Strikes and Violence: the Implications for Labour Law and the Rule of Law' (2013) 23 *CLLJ* 1.

¹⁸³ S Pete ... et al *Civil Procedure: a Practical Guide* 2ed (2005) 138.

¹⁸⁴ *National Council of SPCA v Open Shore* 2008 (5) SA 339 SCA.

¹⁸⁵ Ibid 20.

¹⁸⁶ *Minister of Law and Others v Nordien and Another* [1987] 2 All SA 164 (A) 165.

applicant has no other satisfactory remedy. If all four questions are answered in the affirmative, a court will grant the applicant an interim interdict.

Although employers sometimes disobey court interdicts, it is most common for strikers to disobey them.¹⁸⁷ Such an act amounts to contempt of court, since section 165 (5) of the Constitution states clearly that orders are binding on the persons to whom they apply.¹⁸⁸ Van Niekerk cites some examples of the different ways in which strikers respond to strike interdicts. He states that some strikers “refuse to accept them, or throw them [on] the ground and trample on them.”¹⁸⁹ He notes that the increasing disregard for court interdicts is a threat to the rule of law.¹⁹⁰ The disregard was further reiterated by the Labour Appeal Court in *Modise and others v Steve’s Spar Blackheath*,¹⁹¹ which remarked: “it is becoming distressingly obvious that court orders are, by employers and employees alike, not invariably treated with the respect they ought to demand.”¹⁹²

Myburgh argues that there is little that the Labour Court can do to ensure that strikers comply with strike interdicts.¹⁹³ This is because the crux of the reason underlying strikes, and violence during strikes, is the lack of change in the social and economic status of workers.¹⁹⁴ This makes the issue of strikes and strike violence more of a political than legal matter.¹⁹⁵ He further concurs with Ngcukaitobi that the legislative and executive branches of government have a greater role to play in the reduction or eradication of violence during strikes. This is by creating a legal framework in which both parties to the employment relationship can adequately address their concerns.¹⁹⁶ Further, the executive branch of government has a duty to implement the laws made by the legislator and ensure that service delivery is effected efficiently to citizens.¹⁹⁷ The Labour Court merely enforces the laws made by the legislator.¹⁹⁸

¹⁸⁷ *Modise and others v Steve’s Spar Blackheath* (2000) 21 ILJ 519 (LAC) 21.

¹⁸⁸ Myburgh (note 182 above) 1.

¹⁸⁹ A van Niekerk ‘Marikana: the Perspective of the Labour Court’ (2012) 7 available at <http://www.saslaw.org.za/papers/2012%20conference/SASLAW%20CONFERENCE%202012.docx>, accessed on 7 August 2014.

¹⁹⁰ Ibid.

¹⁹¹ (2000) 21ILJ 519 (LAC).

¹⁹² Ibid 120.

¹⁹³ van Niekerk (note 189 above) 5.

¹⁹⁴ Ibid.

¹⁹⁵ Ngcukaitobi (note 13 above) 856.

¹⁹⁶ Ngcukaitobi (note 13 above) 858.

¹⁹⁷ Ibid.

¹⁹⁸ Myburgh (note 182 above) 5.

Thus, although a prohibitory interdict is one of the mechanisms an employer can use to minimise and/or prevent violence during strikes, owing to the increasing disregard for strike interdicts, one can concur with Myburgh that “interdicts are now often not worth the paper they are written on.”¹⁹⁹ Thus, it may be necessary for an employer to take a further legal step (such as instituting action and claiming delictual damages) where strike violence results in damage to the employer’s property.

3.5 Delictual claim for damages

An employer can institute legal action in which he claims for damages in terms of the law of delict. A delict can be described as an actionable civil wrong, where one person causes harm to another resulting in the latter suffering monetary and/or non-monetary loss.²⁰⁰ The employees and the union can be held jointly and severally liable for the damages.²⁰¹ In *SATAWU v Garvas*,²⁰² private property and property of the City of Cape Town was damaged during a strike that was embarked on by members of SATAWU. SATAWU was held liable for damages of R1, 5 million. In *Mangaung Local Municipality v South African Municipal Workers Union (SAMWU)*,²⁰³ the employees in the municipality's electrical department embarked on an unprotected strike. The employer suffered financial loss, due to the employees’ absence from work. The Labour Court held the union liable for the loss suffered.²⁰⁴ Although it is the union’s members who commit delicts during strikes, employers usually institute action against the union (as case law shows) hoping that a court will hold the union liable for its members’ conduct, under the Regulation of Gatherings Act.²⁰⁵ Employers do this, instead of instituting action against individual members, due to the obvious reason that unions have substantially more money than their members.

¹⁹⁹ Ibid.

²⁰⁰ M Loubser ... et al *The Law of Delict in South Africa: Private law* 2ed (2012) 7.

²⁰¹ Section 11 (1) of the Regulation of Gatherings Act 205 of 1993.

²⁰² *SATAWU v Garvas* 2013 (1) SA 83 (CC).

²⁰³ *Mangaung Local Municipality v SA Municipal Workers Union* (2003) 24 ILJ 405 (LC).

²⁰⁴ Although the court held the union liable for the loss, it did not order the union to pay the total estimated amount of loss suffered, that is, R 272 541, 42. Instead, the court ordered the union to pay R 25 000.00, a substantially reduced amount. This was because only some of the members of the union (those in the municipality's electrical department) embarked on strike. Since union monies consist of the monthly subscription fees paid by all members, if the court ordered the union to pay R 272 541, 42, even the funds of those members who did not embark on the strike would be affected.

²⁰⁵ 205 of 1993.

3.6 Charge for misconduct

An employer can lay charges for misconduct during a strike (whether or not the strike was protected or unprotected). Although an employee commits misconduct by virtue of embarking on a strike that does not comply with chapter IV of the LRA, the misconduct referred to here relates to those acts that are considered as criminal acts, for example damage to property, intimidation and assault. Misconduct during a strike will nullify any legitimacy the strike had, and the employer will be in a position to charge the employees with misconduct and even dismiss the employees, depending on the degree of the misconduct and the circumstances of each case.²⁰⁶ A more comprehensive discussion of misconduct will be undertaken in chapter 4 of the dissertation.

3.7 Conclusion

In summary, there are four different mechanisms, short of dismissal, that an employer can use to minimise and/or regulate violence during a strike. The first is to form proper relationships with employees through collective agreements. The different kinds of collective agreements provided for in the LRA are agency shop and closed shop agreements. It has been argued that there is a lot of controversy surrounding closed shop agreements and that many labour law scholars do not favour them and consider them to be either restraints of trade and/or unconstitutional. An employer may also conclude a recognition agreement with a minority trade union. Alternative dispute resolution mechanisms such as mediation and negotiation can be used or suggested by an employer to try to avoid strikes, and any possible violence that could accompany them. The second mechanism an employer can use to try to prevent, minimise and/or regulate strike violence is to agree with recognised trade unions in the workplace on picketing rules. If employees fail to comply with picketing rules, or embark on an unprotected strike, an employer can obtain a prohibitory interdict from the Labour Court, preventing workers from embarking on or continuing to embark on that strike. The author has shown that strike interdicts are disobeyed by employers and mostly employees; therefore, they are often not worth the paper on which they are written. The fourth mechanism an employer can use to try to prevent, minimise and/or regulate strike violence is to institute legal action in which the employer claims delictual damages. Lastly, an employer can lay a

²⁰⁶ Manamela (note 4 above) 326.

charge of misconduct against the employees. Chapter 4, which follows, deals with ‘misconduct during strikes and dismissal for misconduct’.

Chapter 4: Misconduct during strikes and dismissal for misconduct

4.1 Introduction

There are two different kinds of misconduct: firstly, participation in an unprotected strike is misconduct,²⁰⁷ and secondly, misconduct occurs where strikers commit criminal and/or delictual acts during strikes. Even if a strike is protected, no form of misconduct permitted and will inevitably lead to the justified dismissal of employees.²⁰⁸ Misconduct during a strike generally involves a number of employees.²⁰⁹ If the misconduct is made up of different acts committed at different times and places, separate disciplinary hearings should be conducted by the employer,²¹⁰ or where the misconduct is collective, a group disciplinary hearing can be held by the employer.²¹¹ Although there are various kinds of misconduct that employees can commit during strike action, the most common forms are damage to property, intimidation and assault.²¹² This chapter will discuss these kinds of misconduct in the context of strikes. It will further discuss the concepts of derivative misconduct and common purpose, and the way the courts have dealt with these concepts. Lastly, the chapter will address dismissals in the context of strike action.

4.2 Malicious Damage to property

Malicious damage to property is the unlawful and intentional damage to the property of another person.²¹³ The damaging of the employer's property could be the employees' way of expressing their anger towards their employer, and an attempt to set their employer back financially.²¹⁴ This could be more so if the employees believed that the employer is mostly concerned about his own economic interests and less so about the employees' interests.²¹⁵ Damage to the employer's manufacturing or production property could result in a stoppage or

²⁰⁷ Section 6 (1) of the Code of Good Practice: Dismissal.

²⁰⁸ A Rycroft 'What Can Be Done About Strike-Related Violence?' 9 available at http://www.upf.edu/gredtiss/_pdf/2013-LLRNConf_Rycroft.pdf, accessed on 28 June 2014.

²⁰⁹ Manamela (note 4 above) 327.

²¹⁰ Ibid.

²¹¹ Manamela (note 4 above) 327.

²¹² Rycroft (note 208 above) 1.

²¹³ J Burchell *Principles of Criminal Law* 4ed (2013) 736.

²¹⁴ von Holdt (note 15 above) 143.

²¹⁵ von Holdt (note 15 above) 144.

decrease in production, depending on the severity of the damage.²¹⁶ It could also lead to the shutting down of the workplace for a certain period of time, which could have an adverse impact on the employer's business and the employees' job security.²¹⁷ Since damage to property is a criminal offence, an employer can press criminal charges against the employees who commit the offence, in addition to using pre-dismissal disciplinary measures or dismissal itself.²¹⁸ However, case law has shown that employers generally do not press criminal charges. This is because it is generally difficult to single out and identify the perpetrators of criminal acts during strikes involving large numbers of employees,²¹⁹ and the standard of proof is onerous, namely proof beyond reasonable doubt, as opposed to a balance of probabilities required in labour law. Where this occurs employers use the concepts of derivative misconduct and common purpose against all the strikers (which is dealt with in detail below) and/or elect to hold the union liable. For example, in *SATAWU v Garvas*,²²⁰ the complainants opted to sue SATAWU who had organised a gathering of thousands of people to register its members' employment-related concerns within the security industry. The gathering was the result of a lengthy strike action, in the course of which approximately fifty people died and private property and property belonging to the City of Cape Town was damaged. The employer did not dismiss the employees because they had embarked on a protected strike, but instituted action against the union for riot damage. The Constitutional Court held the union liable for damages for the amount claimed of R1, 5 million.

4.3 Intimidation

The intimidation that occurs during strike action seems to usually be directed towards the non-striking employees by the striking employees.²²¹ This could be a way of showing their anger towards the non-striking employees for not joining the strike, and an attempt to get the non-striking employees to join the strike.²²² This view is supported by a 1992 public service striker who remarked: "you know what is frustrating? You are on strike. Others are

²¹⁶ Chicktay (note 49 above) 262.

²¹⁷ J Brand 'Strike Avoidance: How to Develop an Effective Strike Avoidance Strategy' (2010) 1 available at: http://www.lexisnexis.co.za/pdf/Workshop_3_3_Strike_Avoidance_presented_by_John_Brand.pdf, accessed on 09 May 2013.

²¹⁸ In order to justify dismissal, the damage to property must be wilful and serious and the employees' actions must be consciously directed towards the destruction of property.

²¹⁹ D Venter 'Derivative Misconduct: Labour Law' (2008) 8 *Without Prejudice* 44, 46.

²²⁰ 2013 (1) SA 83 (CC).

²²¹ von Holdt (note 15 above) 135.

²²² *Ibid.*

comfortable, they are eating. But they will also benefit even though they are afraid.”²²³ Perhaps the strikers feel that they do all the dirty work, which can have severe consequences for them. Yet, the non-strikers will also benefit from the strikers’ efforts if they succeed in getting the employer to accede to their demands. Striking employees can also intimidate management, as a way of expressing their frustration.²²⁴ The intimidation of non-strikers can also be a way of showing the employer that although management may be in a better bargaining position, the workers have a way of addressing this imbalance, in addition to embarking on a strike.²²⁵ This is despite the fact that intimidation is illegal. Since intimidation is a criminal offence, an employer can press criminal charges against the employees who commit the offence, in addition to using pre-dismissal disciplinary measures or dismissal itself.²²⁶ However, employers generally do not press criminal charges, as it is generally difficult to single out and identify the perpetrators of criminal acts during strikes involving large numbers of employees.²²⁷ Thus, in *SATAWU v Maxi Strategic Alliance (Pty) Ltd*,²²⁸ a group of strikers was intimidated into joining the strike by another group of the employer’s strikers who had voluntarily embarked on the strike. The employer dismissed the voluntary strikers but gave the intimidated strikers a final written warning, as not wanting to embark on the strike made them less culpable. The court upheld the dismissal of the voluntary strikers.

4.4 Assault

Assault is an unlawful and intentional application of force to a person, or inspiring a belief in that person that force will immediately be applied to him.²²⁹ Force does not need to involve the actual application of physical force, but threats of the application of force may be sufficient.²³⁰ This could be an extension of intimidation and could occur where the non-striking employees or management defend themselves by confronting the striking employees for their misconduct. This is probably more extreme than damage to property and intimidation, and could have more severe legal consequences for the perpetrators. Since common assault is a criminal offence, an employer, assaulted employees, or management can press criminal charges against the employees who commit the offence, in addition to using

²²³ von Holdt (note 15 above) 135.

²²⁴ von Holdt (note 15 above) 143.

²²⁵ Brand (note 217 above) 9.

²²⁶ Gericke (note 137 above) 574.

²²⁷ Venter (note 219 above) 46.

²²⁸ *SATAWU v Maxi Strategic Alliance (Pty) Ltd* 2009 ILJ 1358 (LC).

²²⁹ Burchell (note 213 above) 577.

²³⁰ Manamela (note 4 above) 332.

pre-dismissal disciplinary measures or dismissal itself.²³¹ However, employers generally do not press criminal charges, as it is generally difficult to single out and identify the perpetrators of criminal acts during strikes involving large numbers of employees.²³²

4.5 Derivative misconduct

This part of the chapter consists of an explanation of the term ‘derivative misconduct’. It then considers case law on derivative misconduct and the important principles that can be extracted from the case law. This is followed by an analysis of derivative misconduct and the effect it has on employees in the workplace. Lastly, there is a brief explanation of the concept of common purpose, and two cases presented, to show how common purpose applies in practice.

The term derivative misconduct was first introduced by the court in *Chauke v Lee Service Centre CC t/a Leeson Motors*.²³³ It is based on the idea that employees who form part of a group that commits misconduct have an obligation to assist the employer to identify the perpetrators of the misconduct and the failure to do so can justify their dismissal.²³⁴

Grogan gives a more comprehensive explanation of the term, stating that:

Derivative misconduct is the term given to an employee’s refusal to divulge information that might help his or her employer to identify the perpetrator of some other misconduct. It is termed “derivative” because the employee guilty of this form of misconduct is taken to task, not for involvement in the primary misconduct, but for refusing to assist the employer in its quest to apprehend and discipline the perpetrator(s) of the original offence. Trust thus forms the foundation of the relationship between the employer and employee and derivative misconduct is founded on this notion. There is no general obligation on employees to share information about their colleagues with their employers, but at the very least employees must inform their employer if they know that their colleagues are guilty of misconduct which warrants disciplinary action.²³⁵

²³¹ Gericke (note 137 above) 574.

²³² Ibid.

²³³ *Chauke v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC).

²³⁴ T Cohen ‘Collective Dismissal: a Step towards Combating Shrinkage at the Workplace’ (2003) 15 *SA Merc LJ* 16, 22.

²³⁵ MP Coffat *Stopping Thieves at Work: Some Reflections on Entrapment and Derivative Misconduct* (LLM thesis, University of Limpopo, 2011) 37-8 available at http://www.ul.netd.ac.za/jspui/bitstream/10386/963/1/Maake_pc_2011.pdf, accessed on 16 June 2014.

The above explanation shows that employees' loyalty should lie more towards their employers than their fellow employees. This is because the misconduct of an employee in the workplace is an issue in which the employer has a direct interest, as it has adverse effects on the employer's business.

The way in which derivative misconduct applies in practice, can best be illustrated by looking at two popular judgments that have been delivered on the subject:

In *Chauke v Lee Service Centre CC t/a Leeson Motors*,²³⁶ the company dismissed the employees based on derivative misconduct after several company vehicles were damaged on approximately five different occasions, and after all the employees denied responsibility. NUMSA approached the Industrial Court for relief claiming that the dismissal of the employees was substantively and procedurally unfair.

Regarding substantive fairness, the Court found that the probabilities pointed overwhelmingly to the conclusion that, as a result of the bad relationship that existed with the company after dismissal of the NUMSA shop steward for gross negligence, the employees decided to embark on some kind of sabotage and decided to collectively remain silent when questioned on the incident, relying on the belief that as long as they remained silent, the company could not act against them.²³⁷ The Court found that the dismissal was substantively fair. Regarding procedural fairness, the Court found that the company had done everything possible to find out who was responsible for the damages and that the circumstances required no more than the collective hearing and the ultimatum. Thus, the company was entitled to dismiss the employees and the dismissal was, in the circumstances, procedurally fair.²³⁸

The Labour Appeal Court agreed with the Industrial Court's finding that the dismissals were both substantively and procedurally fair. Regarding substantive fairness, the Court stated that the damage to numerous motor vehicles on numerous occasions, which appeared to be some form of sabotage to the company, warranted the employees' dismissal.²³⁹ Regarding procedural fairness, the Court stated that on numerous occasions, the company gave its employees a chance to disclose the identity of those who were responsible for the damages to the motor vehicles, but they repeatedly denied responsibility. The company even held a

²³⁶ (1998) 19 ILJ 1441 (LAC).

²³⁷ Ibid 24.

²³⁸ *Chauke* (note 233 above) 26.

²³⁹ *Chauke* (note 233 above) 40.

meeting with the NUMSA shop steward to identify the culprits, but to no avail. Therefore, it was not necessary to hold individual workplace enquiries before dismissing the workers.²⁴⁰

In *RSA Geological Services (a division of De Beers Consolidated Mines Ltd) v Grogan and Others*,²⁴¹ the employer dismissed its employees for discarding samples of kimberlite, after it had made numerous attempts to discover the identity of the employee who had done so. However, the employees collectively refused to assist the employer as they repeatedly denied knowing anything about the discarded kimberlite samples. The dispute concerning the employees' unfair dismissal was referred to private arbitration. The arbitrator found the dismissal of 10 out of 15 employees to be unfair as the employer failed to prove, on a balance of probabilities, that the employees had information that could have assisted the employer in identifying the culprits.²⁴² The Labour Court held that in order for the dismissal of a group of employees to be justified, in circumstances where the culprits cannot be identified, the employer must prove that the employees knew about the misconduct and for no valid reason chose not to assist the employer in identifying the culprits.²⁴³

The Court held further that:

Once the employer established the scale of the scam, that it was perpetrated over a long time and during normal working hours, the burden of rebuttal fell to the employees to explain why they could not see the sample being discarded, why they could not have known about it, but most of all, why they handed back the note with the telephone number for information and refused to assist the employer. The evidence for the employer called for an answer which the employees were best placed to give. But they refused to testify.²⁴⁴

The Court was satisfied that the employer had, on a balance of probabilities, and with the circumstantial evidence and inferences which the employees failed to rebut, proved that all the employees must have had knowledge of the discarding of the sample, or participated in it.

Venter has identified the following important principles²⁴⁵ that can be extracted from the two cases above: (a) employees have a duty to assist an employer in identifying perpetrators of misconduct in the workplace; (b) a breach of this duty amounts to a breach of the trust

²⁴⁰ *Chauke* (note 233 above) 42.

²⁴¹ *RSA Geological Services (a division of De Beers Consolidated Mines Ltd) v Grogan and others* (2008) 2 BLLR 184 (LC).

²⁴² *Ibid* 13.

²⁴³ *RSA Geological Services* (note 241 above) 49.

²⁴⁴ *Ibid*.

²⁴⁵ Venter (note 219 above) 46.

relationship between employer and employee; (c) an employer may charge and dismiss an employee for the principal misconduct where the employer is not in a position to identify the perpetrators and where the employees refuse to assist the employer in identifying the perpetrators; (d) in order for such dismissal to be justified, the employer must prove on a balance of probabilities that: (i) principal misconduct was committed by employees in the workplace; (ii) the employer has not been able to identify the culprits; (iii) the employees in the workplace either participated in or had knowledge of the misconduct. This is proved with the assistance of either direct evidence or the drawing of inferences and circumstantial evidence; and (iv) despite being granted the opportunity, the employees failed and/or refused to assist the employer in identifying the perpetrators of the misconduct; (e) once the employer has proved this on a balance of probabilities, the onus shifts to the employees to show that either they did not participate in the misconduct or that they had no knowledge of it. If the employees fail to discharge this onus, the inference is drawn that the employees either participated in or at the very least associated themselves with the perpetrators of the principal misconduct.

4.5.1 Does the concept of derivative misconduct place a heavy burden on employees?

It could be argued that the duty of employees to assist their employer in identifying perpetrators of misconduct in the workplace, places a heavy burden on employees to turn against their fellow workers. Although an employee aims to create a tolerable working relationship with their employer, and although their allegiance lies with the employer before anyone else in the workplace, the fact that employees work with each other in the workplace will lead them to want to have a healthy and tolerable relationship, as opposed to a hostile working relationship. Therefore, from an employee's perspective, it might not be in their best interest to alert the employer when another employee commits misconduct in the workplace. This is because dismissal is considered as a last resort,²⁴⁶ and an employee who commits misconduct may be given a warning or a suspension, but continues to work for the employer. Further, that employee risks being labelled as a 'sell-out'²⁴⁷ by other employees. The possibility of tension amongst the workforce after such an incident cannot be overlooked. This could create divisions amongst the workforce and may even have an adverse effect on

²⁴⁶ Cohen (note 234 above) 7.

²⁴⁷ von Holdt (note 15 above) 135.

the rate of production, since workers would not be entirely focussed on the work at hand, but also on the politics of the workplace.

Therefore, it may be best for the employer to employ security guards and video surveillance to constantly patrol the workplace to guard against any criminal activity. Nowadays most employers engage widespread video and camera surveillance during strikes and have used this effectively to identify perpetrators of misconduct. In *NUMSA and others v Dunlop*,²⁴⁸ the employer dismissed a large number of workers for misconduct during a protected strike, the employer heavily relied on photographic and video footage to identify many of the perpetrators. This way, the employer's workforce can focus on the work they have been employed to do. Further, they will most probably refrain from committing any criminal activity if they are aware that there is camera surveillance and people present who are specifically employed to guard against any criminal acts within the workplace. Having said all this, there may be instances whereby employees are able to get away with misconduct without being detected by the employer's security measures, but by another employee instead. In such instances, that employee would be obliged to bring this to the attention of the employer.²⁴⁹ Thus, the undeniable fact that employees will always be more aware (than the employer) of what the next one is doing, is perhaps one of the major reasons behind the incorporation of derivative misconduct into our law, and its wide endorsement by our courts.

Another concept which is closely related to derivative misconduct and which is used in the employment relationship is that of 'common purpose', which is dealt with below.

4.5.2 Common purpose

The common purpose rule (or 'doctrine', as it was formerly known) holds that, where two or more people associate together in order to commit a crime, they will each be liable for the criminal conduct of the other(s), which falls within their common design. They will be regarded as co-perpetrators.²⁵⁰ Their unlawful conduct in such a case consists of their act of associating together with a common purpose to commit the crime, which was ultimately executed by one of them.²⁵¹ Where the crime in question is one involving causation (for example, murder), it is not necessary for the State to prove that each participant contributed

²⁴⁸ KNP 2439/12.

²⁴⁹ Venter (note 219 above) 46.

²⁵⁰ Burchell (note 213 above) 467.

²⁵¹ Ibid.

towards causing the prohibited consequence, or even whose actions had actually caused the consequence. As a matter of policy, the conduct of each perpetrator is attributed to all the others.²⁵²

For example, in *S v Mahlangu and others*,²⁵³ Mahlangu carried out a robbery at a garage where two of his accomplices were employed. Mahlangu alleged that the two accomplices were integrally involved in planning and executing the robbery. The Court agreed with this and convicted them of the robbery on the basis of common purpose, but it held (*obiter*) that, even if they had merely been passive bystanders, as employees they were in a position of trust.²⁵⁴ They therefore had a duty to warn their employer of the intended robbery, which they knew about. Because their inaction was a breach of this duty, they could equally have been held liable as accomplices to Mahlangu.²⁵⁵

The fact that employees are expected to alert their employer as to any possible criminal activity or danger towards the employer's business, even if they are merely passive bystanders, illustrates the great weight courts attach to the duty of employees to assist their employer in the prevention of misconduct or criminal activity by anyone at the workplace, whether or not they are employees.

Common purpose can also be used in the context of strike violence, as illustrated in the arbitration case of *Numsa and others v Dunlop*.²⁵⁶ In this case, a number of employees were assaulted and their vehicles were stoned. Using photographic evidence of the crowd that was present at the scene and from which the main perpetrators came, the company contended that the others in the crowd were guilty of misconduct on the basis of common purpose.

4.6 Strike action and dismissals

As mentioned in chapter 2, under the common law, a strike is a fundamental breach of the employment contract, entitling the employer to dismiss the employee with immediate effect.²⁵⁷ However, since the enactment of the LRA, an employee cannot be dismissed solely by reason of having participated in a protected strike.²⁵⁸ Thus, an employee will only have

²⁵² Burchell (note 213 above) 467.

²⁵³ *S v Mahlangu and others* 1995 (2) SACR 425 (T).

²⁵⁴ *Ibid* 427.

²⁵⁵ *Mahlangu* (note 252 above) 427.

²⁵⁶ KNP 2439/12.

²⁵⁷ Grogan (note 62 above) 1.

²⁵⁸ Manamela (note 4 above) 323.

committed misconduct if their participation in a strike does not comply with the provisions of Chapter IV of the LRA,²⁵⁹ in other words, an employee commits misconduct only when s/he embarks on an unprotected strike.²⁶⁰ However, an employee's participation in an unprotected strike does not always warrant their dismissal, which should be considered as a last resort.²⁶¹ If an employer decides to dismiss an employee for reasons of having participated in an unprotected strike, the dismissal must be determined in light of the circumstances of the particular case.²⁶² This includes: (a) the seriousness of the contravention of the LRA, (b) any attempts made by an employee to comply with the provisions of the LRA, and whether or not the strike was in response to unjustified conduct by the employer.²⁶³

Further, before dismissing an employee, an employer should as soon as possible contact a trade union official to discuss the course of action the employer intends to take.²⁶⁴ The employer should send an ultimatum in clear and unambiguous terms, and such ultimatum should state what the employer requires of the employees and the kind of sanction that the employer will impose if the employees fail to comply with the ultimatum.²⁶⁵ The employer must give the employees sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it.²⁶⁶ If the employer cannot be reasonably expected to take these steps above before dismissing the employees, then the employer may dismiss the employees.²⁶⁷ In *Modise and others v Steve's Spar Blackheath*,²⁶⁸ the Labour Appeal Court endorsed the pre-dismissal approaches to the dismissal of strikers, stating that before an employer dismissed employees who embarked on an unprotected strike, the employer should firstly hold a hearing and secondly issue a fair and reasonable ultimatum.²⁶⁹ In *NUM and others v Billard Contractors CC and another*,²⁷⁰ the employer dismissed the striking employees after they had embarked on unprotected strikes on several different occasions, as a response to the suspension of a union shop steward. The Labour Court found that the meeting held by the employer with the strikers' representatives constituted a fair hearing as envisaged

²⁵⁹ Section 6 (1) of the Code of Good Practice: Dismissal

²⁶⁰ Rycroft (note 208) 4.

²⁶¹ Cohen (note 234 above) 7.

²⁶² Note 258 above.

²⁶³ Ibid.

²⁶⁴ Section 6 (2) of the Code of Good Practice: Dismissal.

²⁶⁵ Ibid.

²⁶⁶ Note 263 above.

²⁶⁷ Ibid.

²⁶⁸ (2000) 21 ILJ 519 (LAC).

²⁶⁹ Ibid 96.

²⁷⁰ *NUM and others v Billard Contractors CC and another* [2006] JOL 17286 (LC).

in *Modise and others v Steve's Spar Blackheath*.²⁷¹ The Court found further that the notice of dismissal issued by the employer after the third strike did not constitute an ultimatum. However, the employer was in a position to dismiss the employees only after engaging further with the union, and was satisfied that the employees would still not comply with the notice. The failure to do so resulted in the dismissal of the employees being procedurally unfair.²⁷²

These cases show that there are two conditions that have to be satisfied by an employer when dismissing an employee. Firstly, the dismissal must be substantively fair, in other words, the employer must have a good reason for dismissing an employer. In the context of strikes, it would be that employees embarked on an unprotected strike or a series of unprotected strikes and further failed to comply with the employer's ultimatum. Secondly, although the employer is justified in dismissing an employer for strike related reasons, the dismissal must still be procedurally fair. If it is not, the dismissed employees will have recourse against the employer, on the grounds of a (procedurally) unfair dismissal.

4.7 Conclusion

In summary, misconduct can be divided into two categories: in terms of the LRA an employee commits misconduct by embarking on a strike that does not comply with the provisions of Chapter IV of the LRA. It is also more commonly understood as committing an act that contravenes a workplace rule, or the law. This misconduct is not permitted during strikes. The most common kinds that occur during strikes are malicious damage to property, assault and intimidation. Employees can also be found guilty of committing derivative misconduct or common purpose. The author has argued that derivative misconduct could be seen as placing a heavy burden on employees to turn against each other and cause further tension amongst the workforce, but that it is probably in the best interests of justice. Since the enactment of the LRA, an employee cannot be dismissed solely by reason of having participated in a strike, especially if the strike was a protected strike. This is because dismissal should be considered as the last resort. Before dismissing an employee, the employer has to take certain factors into account which include: the seriousness of the contravention of the LRA; any attempts made by an employee to comply with the provisions of the LRA; and whether or not the strike was in response to unjustified conduct by the

²⁷¹ Ibid.

²⁷² *Billard Contractors CC and another* (note 269 above) 74.

employer. Further, there are various procedural steps the employer must take, such as holding hearings, consulting with the relevant union(s) and issuing an ultimatum. Lastly, if the circumstances of the strike (due to its intensity) do not permit the employer to take some of the above mentioned actions, the employer can dismiss the employees. Chapter 5, which follows, deals with the liability of trade unions for strikes.

Chapter 5: The liability of trade unions

5.1 Introduction

Trade unions play a vital role in ensuring that member concerns, interests and voices are heard at the bargaining or negotiation table.²⁷³ They also play a vital role in a member's ability to access justice through the courts.²⁷⁴ Owing to the fact that they are the official representatives of employees, trade unions can be held liable for any delictual wrongs that employees commit during strikes.²⁷⁵ Thus, it is usually in the interests of employers to institute action against unions for any delicts committed by employees during strikes. This is firstly because it is generally difficult to identify the individual perpetrators of wrongful acts.²⁷⁶ Secondly, unions have more money than their individual members and are thus in a better position to satisfy any claims for damages instituted against them.²⁷⁷ Further, because trade unions can be held liable for the conduct of their members, the union will take active steps to ensure that during a strike they are in control of their members and their actions are within the bounds of the law.²⁷⁸ This chapter discusses the liability of trade unions towards employers, for members' wrongful actions during strikes, and also their liability towards their own members. The liability arises as a consequence of trade unions' rights and duties under the LRA.

5.2 The rights of trade unions and employers' organisations

It is imperative to set out the rights of trade unions, as any liability they may have arises from the right they enjoy. Thus, trade unions have the following rights:²⁷⁹ (a) the right to organise; (b) the right to self-regulation; (c) the right to be recognised; (d) the right of access to the employer's premises; (e) the right to be consulted; (f) the right to be consulted prior to the disciplining of a shop steward; (g) the right to apply for the establishment of a workplace forum; (h) the right to elect trade union representatives; (i) the right to represent; (j) the right

²⁷³ Gericke (note 137 above) 584.

²⁷⁴ Ibid.

²⁷⁵ The liability is created by section 11 (1) of the Regulation of Gatherings Act 1993 of 2005.

²⁷⁶ Venter (note 219 above) 46.

²⁷⁷ The money that trade unions have constitutes of the monthly subscription fees that members pay to their respective trade unions to ensure representation by their trade unions when necessary.

²⁷⁸ M Wallis 'Now You Foresee It, Now You Don't — *SATAWU v Garvas and others*' (2012) 33 *ILJ* 2257, 2262.

²⁷⁹ Cohen (note 29 above) Chapter 3.

to information; (k) the right to enter into agreements on behalf of members; and (l) the right to apply for admission to bargaining councils.

5.3 The duties of trade unions

Since trade unions have rights, they also have duties, which are relevant to their liability. Thus, every trade union has the following technical duties:²⁸⁰ (a) to keep books and records of its income, expenditure, assets and liabilities, prepare financial statements, and to preserve them for at least three years;²⁸¹ (b) to have its books and records audited;²⁸² (c) to make financial statements and the auditor's report available to members for inspection, and to submit them to members' meetings;²⁸³ (d) to keep a list of members, minutes of meetings and ballot papers for at least three years;²⁸⁴ (e) to provide the Registrar of the High Court with a copy of the auditor's report, the names and addresses of office-bearers, notice of change of address and, by 31 March each year, a statement regarding the number of members;²⁸⁵ and (f) to send the Registrar of the High Court a copy of any resolution taken to amend its constitution, and the secretary's certificate that such resolution complies with the constitution.²⁸⁶

In addition to the above technical duties, there are other technical duties that arise due to a trade union being a legal body that is governed by the rules in its constitution.²⁸⁷ As a result of this, a trade union has a duty to comply with its constitution in respect of its members and applicants for membership. The failure to do this risks referral of the dispute to the Labour Court.²⁸⁸

²⁸⁰ Cohen (note 29 above) 21.

²⁸¹ Section 98 of the Labour Relations Act 66 of 1995.

²⁸² Section 98 (2) of the Labour Relations Act 66 of 1995.

²⁸³ Section 98 (3) of the Labour Relations Act 66 of 1995.

²⁸⁴ Section 99 of the Labour Relations Act 66 of 1995.

²⁸⁵ Section 100 of the Labour Relations Act 66 of 1995.

²⁸⁶ Section 101 of the Labour Relations Act 66 of 1995.

²⁸⁷ Cohen (note 29 above) 22.

²⁸⁸ Ibid.

5.4 A union's liability under the Regulation of Gatherings Act²⁸⁹ and the Constitution

5.4.1 The section creating the liability

In terms of section 11 (1) of the Regulation of Gatherings Act,²⁹⁰ if any riot damage occurs as a result of a gathering or a demonstration, then the union or employer's organisation responsible for holding that gathering or demonstration, together with its members, will be jointly and severally liable for that riot damage.

5.4.2 The impact of section 11 (1) on a union's right to freedom of assembly under the Constitution

This has the potential of discouraging unions to exercise their right to freedom of assembly in terms of section 17 of the Constitution. In other words, unions could be more reluctant to demonstrate, fearing that if they do so, they could be held liable for damage that their members cause during the demonstrations.²⁹¹ This is because although unions have some control over their members and their actions, they do not have total control. Members can decide to deviate from the agreed plan with the union, thus causing great legal problems for the union.²⁹²

5.4.3 Exemption from liability under the Regulation of Gatherings Act

A person or union/employer's organisation will escape liability if they are able to prove the following:²⁹³ (a) that he or it did not permit or plan the act or omission which caused the damage; (b) that the act or omission did not fall within the scope of the objectives of the gathering or demonstration and was not reasonably foreseeable; and (c) that he or it took all reasonable steps within his or its power to prevent the act or omission. Proof that a union/employer's organisation condemned the conduct by its members will not by itself be regarded as sufficient proof that it took all reasonable steps to prevent the act.

²⁸⁹ 205 of 1993.

²⁹⁰ Ibid.

²⁹¹ Wallis (note 277 above) 2262.

²⁹² Ibid.

²⁹³ Section 2 of the Regulation of Gatherings Act 205 of 1993.

The leading case for union liability under the Regulation of Gatherings Act²⁹⁴ is *SATAWU v Garvas*.²⁹⁵ In this case, SATAWU organised a gathering of thousands of people to register certain employment-related concerns of its members within the security industry. The gathering was the result of a lengthy strike action in the course of which approximately fifty people died. Private property and property of the City of Cape Town was damaged during the strike action.

The Constitutional Court (CC), per Mogoeng CJ, had to decide on the constitutionality of section 11 (2) of the Regulation of Gatherings Act.²⁹⁶ The first question the Court had to answer was whether section 11 (2) creates a real defence that is rationality.²⁹⁷ The second question the Court had to answer was whether the defence nevertheless limits the rights contained in section 17 of the Constitution and, if so, whether that limitation is justifiable.²⁹⁸

In relation to the first question, the Court stated that in the context of the purpose of section 11 (2), the word “and” between subsections (b) and (c) of section 11 (2) must be given its ordinary meaning and must be read together in order to support the purpose of the provision and its rational outcome. As shown by the purpose of the section, there is no irrational outcome.²⁹⁹ The purpose of section 11 (2) as enacted by parliament was to: (i) provide for the statutory liability of organisations, in order to avoid the common law difficulties associated with proving the existence of a legal duty on the organisation to avoid harm; (ii) afford the organiser a tighter defence, allowing it to rely on the absence of reasonable foreseeability and the taking of reasonable steps as a defence to the imposition of liability; and (iii) place the onus on the defendant to prove this defence, instead of requiring the plaintiff to demonstrate the defendant’s wrongdoing and fault.³⁰⁰

The Court stated further that organisations must be aware of the possibility of damage to property and they must take reasonable steps within their power to prevent any harm that is

²⁹⁴ 205 of 1993.

²⁹⁵ 2013 (1) SA 83 (CC).

²⁹⁶ This section provides a limited defence for an organiser of a gathering who is allegedly liable for riot damage resulting from that gathering. This liability is created by section 11 (1) of the Act.

²⁹⁷ *Garvas* (note 202 above) 4.

²⁹⁸ *ibid* .

²⁹⁹ *Garvas* (note 202 above) 40, 41.

³⁰⁰ *Garvas* (note 202 above) 39.

reasonably foreseeable, from the beginning of the protest action until its end.³⁰¹ The Court concluded that section 11(2) is rational.³⁰²

In relation to the second question, the Court noted that section 17 of the Constitution is worded generously in that it promises people the right to assemble, demonstrate, picket and present petitions.³⁰³ The only condition created by the provision is that such acts must be done peacefully and unarmed.³⁰⁴ The Court stated that the limitation to this right was not necessarily in its regulation, that is, the fact that it must be peaceful and unarmed in order to be constitutionally protected. However, the limitation of the right lies firstly in the cost of organising a peaceful protest action, which is felt more by smaller organisations with fewer resources. Secondly, an organisation's liability for any riot damage that occurs is another limitation. These two limitations have the effect of deterring organisations from exercising this right.³⁰⁵ The Court noted that the purpose of the condition of peaceful protest in the provision was to ensure the safety of members of the public, and the purpose of holding the organisation liable for members' riot damage was to ensure that peoples' rights to physical integrity are respected and protected.³⁰⁶

The Court found that on a proper interpretation of section 11 (2), the section is rational.³⁰⁷ The Court found further that section 11 (2) did limit the right to assemble, but that such limitation on the right to assemble was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.³⁰⁸ SATAWU was held liable for damages in the amount claimed, namely R1, 5 million.

Jafta J provided a well-reasoned dissent to the majority judgment, where he analysed section 11 (2) and stated that the section does not, either expressly or impliedly, prevent anybody from exercising the right in section 17 of the Constitution. Its subject-matter is the defence to liability imposed by section 11 (1) which falls outside the scope of the present challenge. It

³⁰¹ *Garvas* (note 202 above) 44, 45, 47.

³⁰² *Garvas* (note 202 above) 50.

³⁰³ *Garvas* (note 202 above) 51.

³⁰⁴ *Garvas* (note 202 above) 52.

³⁰⁵ *Garvas* (note 202 above) 57.

³⁰⁶ *Garvas* (note 202 above) 67.

³⁰⁷ *Garvas* (note 202 above) 50.

³⁰⁸ *Garvas* (note 202 above) 84.

may be that the defence afforded by section 11 (2) is unattainable, but such deficiency does not translate into a limitation of section 17 of the Constitution.³⁰⁹

Jafta J stated further that the application of section 11 (2) is activated by a claim that a convener of a gathering be held liable in terms of section 11 (1). The defence which section 11 (2) affords may be invoked once there is a claim based on section 11 (1) only.³¹⁰

He further found that since the limitation of the right to assemble freely is not contained in section 11 (2) but in section 11 (1), which falls outside the boundaries of the present challenge, the challenge for constitutional invalidity is ill-conceived.³¹¹ As a result of this, SATAWU failed to show that section 11 (2) limits the rights in section 17 of the Constitution, it was unnecessary to the second leg of the enquiry namely whether the limitation was reasonable and justifiable.³¹²

The author of this dissertation is of the views that section 11 (2) does not limit the right in section 17 of the Constitution. The problem for trade unions arises when their members commit delictual and criminal acts, whilst exercising such a right.

5.5 The circumstances in which a member can claim damages from a union

In *FAWU v Ngcobo NO*,³¹³ two employees were retrenched and sought their union's assistance by instituting an unfair dismissal claim against the employer. The union initially assisted the employees but later failed to pursue their case until it prescribed. The union claimed that their dismissals were fair and that it would not further assist the employees in challenging their dismissals. As a result of this, the employees instituted action against the union. The Constitutional Court held that the union could not rely on the fact that the employees could have applied for condonation themselves. The union had breached its duty by not referring the dispute before the deadline. The union had been negligent in allowing the claim to prescribe, and it cannot be said that the employees had tacitly accepted that the union could refer the dispute at any stage, regardless of the statutory deadline. The court held that the union was liable to compensate the retrenched employees.³¹⁴

³⁰⁹ *Garvas* (note 202 above) 132.

³¹⁰ *Garvas* (note 202 above) 136.

³¹¹ *Ibid.*

³¹² *Garvas* (note 202 above) 141.

³¹³ *FAWU v Ngcobo NO* [2013] 12 BLLR 1171 (CC).

³¹⁴ *Ibid* 39, 42.

In *SAMWU v Jada and others*,³¹⁵ the Spring Town Council's employees, who were also union members, embarked on an illegal strike over the dismissal of four shop stewards. The Council issued several warnings but the employees continued striking. As a result of this, the employer dismissed the striking employees. The dismissed employees instituted a delictual action against the union arguing that they would not have embarked upon the strike and continued with the strike if an official employed by the union, had not started the strike and its continuation. They argued that the union owed them a duty of care to ensure that they did not do anything which would result in their being dismissed, and that duty had been breached.

The Court was satisfied that the decision to go on strike was taken by the employees, even though the union official may have suggested it to them. It stated that the employees knew that the strike they were about to embark upon would be illegal, and that the union official had informed the employees that the union could not participate in their action. The union further informed the employees that they had to elect members to represent them, which recommendation the employees had approved. The Court found that the employees failed to prove that the union owed them a duty of care and that if there was one, the union did not breach its duty of care. The Court held that the union was not the cause of the loss which the employees allegedly suffered, and that even if the employees did suffer loss and the loss was caused by the union, the ratio in *Parity Insurance Co Ltd v Marescia and others*³¹⁶ exonerated the union from liability.³¹⁷

This case is an example where union members did not succeed in claiming damages from a union or loss from their union.

5.6 Strike or lock-out that is not in compliance with the LRA

Section 68 of the LRA empowers the Labour Court with exclusive jurisdiction to interdict any person from participating in a strike or lock-out that does not comply with section 64 (unprotected strike). Section 68 further empowers the Labour Court to order the payment of just and equitable compensation for any loss suffered as a result of an unprotected strike or

³¹⁵ *SAMWU v Jada and others* (2003) 24 ILJ 1344 (W).

³¹⁶ *Parity Insurance Co Ltd v Marescia and others* 1965 (3) SA 430 (A). The ratio in this case is that an offender is in our law not entitled or allowed to derive any benefit from his own criminal conduct.

³¹⁷ *Jada and others* (note 314 above) 1355, 1356 & 1357.

any conduct committed in contemplation or in furtherance of an unprotected strike or lock-out. Section 68 is restricted to the unprotected strikes only.

In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*,³¹⁸ the union's members embarked on unprotected strikes on two separate occasions, for which the employer obtained interdicts. The company suffered loss of approximately R15 million. As to whether compensation should be awarded, the Labour Court noted that the words "just and equitable" in the LRA meant no more than that compensation awarded must be fair. The Court further stated that the section providing for compensation for unprotected industrial action was designed to compensate an aggrieved party for losses actually suffered. However, the amount of compensation does not need to necessarily reflect the exact amount of loss suffered. Regarding the requirements of the Act, the Court noted that, although the strike was of relatively short duration, no attempt whatsoever had been made by the union to comply with the provisions of Chapter IV of the LRA. The strike was premeditated. The Court ordered the union to pay the company the sum of R100 000.00 in monthly instalments of R5 000.00.³¹⁹

In *Mangaung Local Municipality v SAMWU*,³²⁰ the employees in the applicant municipality's electrical department went on an unprotected strike, as a result of which the employer suffered financial loss, due to the employees' absence from work. The Labour Court held the union liable for the loss.

In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union (FOSAWU)*,³²¹ the employees embarked on a protected strike in support of a wage dispute between the company and the union. Various violent and unlawful acts accompanied the strike, including assault, theft, and malicious damage to property and blocking access to and egress from the company's premises. The Labour Court ordered the union to pay the costs of the company's urgent application to interdict the strike.³²²

In *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood and Allied Workers Union (CEPPWAWU) and others*,³²³ the company's employees which were also union members embarked on a protected strike, but switched off the company's machinery at

³¹⁸ *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC).

³¹⁹ *Ibid* 91, 94.

³²⁰ (2003) 24 ILJ 405 (LC).

³²¹ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v FOSAWU* (2012) 33 ILJ 998 (LC).

³²² *Ibid* 14.

³²³ *Mondi Ltd (Mondi Kraft Division) v CEPPWAWU and others* (2005) 26 ILJ 1458 (LC).

its mill. As a result of this, the company allegedly suffered R673 855.00 in damages for the unlawful act. After reviewing the evidence, the Court could not identify the people responsible for shutting down the machinery. Furthermore, there was no evidence whatsoever that any organ of the union supported the conduct in question let alone authorised it. The company had not proved that the union authorised, instigated or ratified the commission of the delict. In addition, there was no evidence that the shop stewards council or the agents of the union at the mill were involved in the conduct. There was not even evidence proving the commission of a crime (that is, the shutdown of the mill). The Labour Court accordingly found that the company had failed to discharge the onus upon it to prove that the union was liable to compensate it for any damages it may have suffered as a result of the shutdown of the mill during the strike.³²⁴

This case shows that in order for unions to be held liable to employers for any loss, employers have to prove a link between the loss and the union or a member of the union. A court will not readily hold a union liable for damage or loss, without sufficient proof.

5.7 Conclusion

In summary, the chapter has shown that trade unions have certain rights and duties in terms of the LRA. A trade union can be held liable for riot damage by its members under the Regulation of Gatherings Act.³²⁵ It has to take certain, active steps to guard against any possibility of damage if it is to escape liability under the Act. Members can also hold unions liable for loss suffered as a result of a union's failure to give proper advice to members. However, in order for a court to hold a union liable to an employer or its members, either party must be able to prove that they suffered loss as a result of the union's actions or lack thereof. Chapter 6, which follows, deals with the social, economic and political factors driving strike violence.

³²⁴ Ibid 41.

³²⁵ 205 of 1993.

Chapter 6: The socio-economic and socio-political factors driving strike violence

6.1 Introduction

Many people believe that violence takes one form: physical or direct violence. However, this is not the case, although it can be argued that the most common form of violence is physical violence. Another form of violence that exists in society is structural violence, which is sometimes used interchangeably with the term ‘structural inequality’.³²⁶ This is because inequality resulting from structures and systems that have been put in place makes the act of perpetuating such inequality, acts of violence. Thus, structural violence can be seen as more passive and subtle than physical violence (which is overt and thus easily identifiable).³²⁷

Sometimes the manifestation of physical violence (for example, the damage to an employer’s property by striking employees, and the assault and intimidation of non-striking employees by striking employees) is a direct result of the structural violence experienced by employees at the workplace.³²⁸ This is certainly the case regarding most of the strikes that occur in labour intensive industries, such as the mining sector, where employees strike for higher wages and better working conditions.³²⁹ This chapter provides a description and definition of structural violence. It further provides an analysis of the 1992 and 2007 South African public service strikes. Lastly, it analyses the Marikana strike and some of the root causes of it, as identified by various scholars.

6.2 The description or definition of structural violence

Ngukaitobi describes structural violence as “a form of violence where some social structure or social institution purportedly harms people by preventing them from meeting their basic needs.”³³⁰ In the context of health, Gilligan defines structural violence as: “the increased rates of death and disability suffered by those who occupy the bottom rungs of society, as

³²⁶ J Galtung ‘Violence, Peace, and Peace Research’ (1969) 6 *JPR* 167, 175.

³²⁷ Ibid 173.

³²⁸ Ngukaitobi (note 13 above) 841.

³²⁹ G Capps ‘Marikana and Beyond’ (2013) 9 available at http://www.rosalux.co.za/wpcontent/uploads/2013/01/Marikana-Labour-01_2013.pdf, accessed on 13 July 2014.

³³⁰ Ngukaitobi (note 13 above) 840.

contrasted with the relatively lower death rates experienced by those who are above them.”³³¹ This definition suggests that structural violence is some sort of ‘classism’ that occurs in a capitalistic society. It depicts working class employees as being socially and economically oppressed by the constant desire of middle class employers to make profit and accumulate more money than they already have. This is done while disregarding and violating some of the basic and fundamental human rights of working class employees.

6.3 The 1992 and 2007 public service strikes in South Africa

The 1992 strike was one in the public health sector, which mainly involved the maintenance or support staff who worked at various public hospitals in the country. The strike began at the Chris Hani Baragwanath Hospital in Johannesburg, Gauteng and spread to thirty two other hospitals in the former province of the Transvaal. From there it spread to other public service workplaces across the country.³³² On the other hand, the 2007 strike was one concerning the public health and public education sectors. It also began at the Chris Hani Baragwanath Hospital and spread to other hospitals in the Gauteng province. Both strikes were for higher wages and were characterised by high levels of violence, including damage to state property and the assault and intimidation of non-strikers.³³³ However, the 1992 strike was viewed by many workers and trade unionists as the more notable and successful strike, because its result was the formal recognition of the National Education Health & Allied Workers Union (NEHAWU) after its launch in 1989.³³⁴

Following interviews with employees, who participated in the 1992 and 2007 strikes, in which von Holdt sought answers about the rationale behind strike violence, von Holdt drew two inferences. The first is that the conduct of employers prior to the strikes undermined what the employees viewed as their collective bargaining rights.³³⁵ This essentially “redu[ced] the strikes to a naked power struggle [between the employees and the employers].”³³⁶ The second reason is that employees are generally dissatisfied with their social position in post-apartheid South Africa. Von Holdt notes that this is particularly the case with mine workers, who feel that they, of all the previously disadvantaged persons who have benefitted by the measures

³³¹ Ngcukaitobi (note 13 above) 841.

³³² von Holdt (note 15 above) 133-4.

³³³ von Holdt (note 15 above) 135.

³³⁴ von Holdt (note 15 above) 133.

³³⁵ von Holdt (note 15 above) 128.

³³⁶ Ibid.

put in place (such as black economic empowerment and affirmative action) to advance previously disadvantaged persons, have benefitted the least, if at all.³³⁷ Thus, the institutionalisation of industrial relations is not attributable solely to labour relations, but social and political factors as well.³³⁸

In an interview during the 1992 strike, an employee was asked where the idea of incorporating violence into strikes came from, and she replied: “I was a member of the United Democratic Front (UDF)...I was part of the school of thought where we had strategies for fighting government. We had all the ideas of how to use force if necessary; we were taught those things: that we could never submit.”³³⁹ This shows that employees have always considered the use of force as a viable option during strikes, to the extent of educating each other and developing strategies as to the exact ways they would use force against the government.

In an interview during the 2007 strike, one of the persons who participated in the strike stated that: “since I was born, I have seen [that] all strikes are violent. There are no...peaceful strikes...”³⁴⁰ He added that “if you don’t use force, problems won’t be resolved speedily. [Force] puts pressure on the [company] management or government to act.”³⁴¹ Another 2007 striker expressed similar views, stating that “violence sends a message to the whole country, those responsible will quickly realise they must resolve things. So the violence assists to wake up the entire country that the innocent will suffer.”³⁴² The first quote shows that violence has become intrinsic³⁴³ in South African strikes and that it has become somewhat psychological for employees to be violent during strikes. The second and third quotes illustrate employees’ awareness of the likelihood of their employers acceding to their demands if a strike is violent. Workers’ demands are more likely to be met when violence is used. The third quote further shows that strikers have identified the potential and/or actual harming of innocent persons as a more effective and speedier solution for getting the employer to accede to their demands. This is especially so where the employer is the State (which has an interest in the well-being of innocent citizens).

³³⁷ K von Holdt ‘The Violence of Order, Orders of Violence: between Fanon and Bourdieu’ (2012) 6 available at: http://www.swopinstitute.org.za/files/Violence_CurrentSocio_Vdense.pdf, accessed on 9 May 2013.

³³⁸ von Holdt (note 15 above) 128.

³³⁹ von Holdt (note 15 above) 135.

³⁴⁰ von Holdt (note 336 above) 6.

³⁴¹ von Holdt (note 15 above) 141.

³⁴² Ibid.

³⁴³ von Holdt (note 15 above) 141.

The fact that violence was a vital tool in the resistance movement's struggle against the apartheid government appears to have had an influence on the prevalence of violent strikes in post-apartheid South Africa. The regime that is in power at the time is irrelevant. A 2007 striker confirmed this by stating that: "you do not say [in] 1992 it was under apartheid, [in] 2007 [it] is under [the] ANC. You won't win a strike like that."³⁴⁴ This shows that for the purpose of winning a strike (by getting the employer to accede the employees' demands) and to the extent that employees' wages are low and/or working conditions poor, employees view the apartheid government and the post-apartheid government as the same. This is why the test for deciding whether or not to embark on a strike (as confirmed by the 2007 striker quoted directly above) is: 'whether employees are dissatisfied with their wages and/or working conditions', rather than 'who is in power'.

Some employees believe that where the majority of the members in a union vote for use of force during a strike (which is prohibited by law), then the law should be disregarded and the members must follow the majority decision. Von Holdt terms this as: 'the law of the majority in the union'.³⁴⁵ It is in such instances that some employees believe that contravening the law is justified. In an attempt to justify strikers' disregard for the law when it clashes with the majority view of a union, a 2007 striker remarked: "how are we going to be successful in winning our demands? We can't always be upright, *umthetho oyaphulwa, oyenzelwe oko phulwa*."³⁴⁶ This shows that employees acknowledge that the law will not always favour them and they have reconciled themselves to contravening it.

Perhaps another reason for violence during strikes is to send a clear message to employers that although employees are illiterate, they are a force to be reckoned with. Some employees believe that their employers mistreat and exploit them because they are illiterate and that their employers view their employees as inferior to them.³⁴⁷ This was confirmed by a 2007 striker who remarked: "when you fight with an illiterate [person], you must be ready to fight. I might start thinking you take advantage [of me], or you do not respect me because I am not educated." He added that: "we use all our force, we pull all the masses. You will never defeat us."³⁴⁸

³⁴⁴ Ibid.

³⁴⁵ von Holdt (note 15 above) 141.

³⁴⁶ The saying is IsiXhosa for 'laws were meant to be broken'; von Holdt (note 336 above) 6.

³⁴⁷ von Holdt (note 15 above) 144.

³⁴⁸ Ibid.

6.4 The Marikana strike

The Marikana massacre of 2012 is viewed by many people as the most horrific incident of police brutality, and the State's disregard for its citizens' right to life since the Bhishe massacre of 1992. Furthermore, it has been compared with the Sharpeville massacre of 1961, and the Soweto massacre/uprising of 1976.³⁴⁹ This is despite the fact that the Sharpeville and Soweto massacres started as political events, whereas the Marikana massacre started as a labour dispute between Lonmin Plc (Lonmin) and its miners for higher wages.³⁵⁰ The end result of the Marikana strike was that 34 Lonmin miners were shot dead by the police and 78 others were injured.³⁵¹

Hartford notes the reality nowadays is that the majority of mine workers have two families to support. Thus, there is a greater sense of urgency for miners to earn more money than they do, considering that they have two families to feed, as opposed to one.³⁵² This fact, coupled with the enormous difference in the earnings of mine workers compared to those of the mine management and union officials is another factor that drives employees to strike violently.³⁵³

Hartford notes further that mine workers are heavily exploited. They work between nine and 15 hours a day,³⁵⁴ 12 months a year and they only have a break from work on Christmas day and Easter. He states that these were the exact same poor working conditions that miners experienced during apartheid and that they have not changed.³⁵⁵ Hartford notes that the rock drill operators are the worst off of all the employees who work in the mines. Their job (which is to extract platinum from the rocks by drilling through the rocks) is the toughest, most dangerous and lowest paid. The reason it is the lowest paid, despite being the toughest and most dangerous, is that rock drillers are illiterate and thus have no prospect of getting promoted to jobs that require literacy. This is notwithstanding their long service of between 25 and 35 years.³⁵⁶

Hartford notes that rock drill operators are a typical example of a miner during the apartheid era and that they have benefitted the least from post-apartheid South Africa. Hartford argues

³⁴⁹ Ngcukaitobi (note 13 above) 837.

³⁵⁰ Ibid.

³⁵¹ Ngcukaitobi (note 13 above) 837.

³⁵² Hartford (note 11 above) 3.

³⁵³ Hartford (note 11 above) 6.

³⁵⁴ Hartford (note 11 above) 16.

³⁵⁵ Hartford (note 11 above) 3.

³⁵⁶ Ibid.

that the dire conditions that rock drill operators are subjected to are a “recipe for social alienation.”³⁵⁷ It can be argued that such social alienation was a key factor leading to the Marikana strike, considering that the strike was planned by an informal strike committee³⁵⁸ established by rock drill operators in order to voice their concerns over low wages and poor working conditions. The strike was neither planned nor endorsed by NUM, which was the majority union at the Marikana mine at the time of the strike.³⁵⁹

It could be argued that miners are justified in striking for higher wages, even if the amounts for which they strike are viewed by their employers as absurd.³⁶⁰ This is because mine bosses also increase their performance salaries/bonuses drastically and disproportionately to the way they have actually performed.³⁶¹ For example, Ngcukaitobi notes that in a recent working paper, the International Labour Office, referred to an increasing gap between salaries of chief executive officers and average or low-skilled employees in South African industries.³⁶² The paper revealed that “executive directors’ fees in the private sector increased by thirty eight per cent between 2003 and 2004, while company performance measured on pre-tax profit only increased by twenty three per cent, showing a discrepancy between executive pay and executive performance.”³⁶³ Thus, it is hypocritical for mine bosses to state that miners make unreasonable demands when they merely seek wage increases to improve their poor standard of living, while mine bosses increase their salaries for far more trivial reasons than those of miners, namely to afford more lavish lifestyles than the ones they already have.

³⁵⁷ Hartford (note 11 above) 3.

³⁵⁸ Ngcukaitobi (note 13 above) 837.

³⁵⁹ Capps (note 329 above) 10. NUM has since been overtaken by AMCU, as the majority trade union at three mining companies, namely: Lonmin Plc, Impala Platinum and Angloplatinum.

³⁶⁰ For example, the Marikana mine strikers demanded a wage increase from R4500 to R12 500.

³⁶¹ Ngcukaitobi (note 13 above) 849.

³⁶² Ibid.

³⁶³ The Debbie Budlender Community Agency for Social Enquiry South Africa ‘Industrial Relations and Collective Bargaining: Trends and Developments in South Africa’ (2009) Working paper no 2, 21 http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_158016.pdf, accessed on 4 June 2014.

6.5 Conclusion

The author has provided a description of structural violence, namely that workers are denied, through the entrenchment of a social structure or system, the opportunity to enjoy their basic human rights. Workers feel aggrieved that they have benefitted the least from post-apartheid South Africa. Violence has become intrinsic in South African strikes and has turned into a psychological issue for employees. Employees are aware that employers are most likely to accede to their demands if they incorporate violence into strikes. Further, strikers have identified the potential and/or actual harming of innocent persons as an effective and speedier solution of getting the employer to accede to their demands. The regime that is in power at the time is irrelevant. Workers will embark on strike action if they are dissatisfied with their wages and their working and/or living conditions. Workers know that the law does not always favour them and they have accepted that they will sometimes contravene the law. Miners, particularly rock drill operators, are paid extremely low wages. This is despite the fact that they do the toughest and riskiest work. They have long service records at the mining companies and the majority of them have two families to feed. The Marikana strike, amongst others that have occurred in the mining sector since then (such as the record five month long platinum strike that occurred early this year) is a clear indication that the arguably sub-human treatment of mine workers has taken its toll on them and that they are willing to fight this, despite the cost. Chapter 7, which follows, consists of recommendations or possible solutions to ending strike violence and the final conclusion.

Chapter 7: Recommendations and conclusion

7.1 Introduction

The chapter begins with a discussion of whether there is any realistic and practical alternative to majoritarianism. It then discusses the comparative extent to which the LRA, and socio-economic and socio-political factors, contribute to strike violence in South Africa. This is done by briefly analysing sections 64 and 65 of the LRA, and then analysing the socio-economic and socio-political factors that drive strike violence.

The chapter follows with a summary of all the chapters (one to six) and ends with a concluding remark.

7.2 Any alternative to majoritarianism?

It is easy to say that the principle of majoritarianism should be discarded, as it is highly controversial and has an adverse consequence for minority unions.³⁶⁴ One alternative to majoritarianism could be employers concluding collective agreements with all trade unions that have members in the employer's workforce, regardless of the percentage of the workforce in a union. This would mean, for example, that if twenty different unions had members in an employer's workforce, that employer would have to conclude twenty different collective agreements with each union. Such a situation would be detrimental to the maintenance of uniformity in the workplace, and would make agreements on simple and generally accepted workplace rules and standards difficult. With every trade union having its own view on every issue affecting its members, unreasonable demands could be made on any issue, ranging the starting and ending times of work, to serious issues such as wages, changes to terms and conditions of employment, or the restructuring of a shift system.

Majoritarianism avoids that kind of chaos and lack of order and uniformity by ensuring that there are set rules for generally accepted workplace norms, such as work hours, thereby eliminating the need to debate such issues; instead every employee is bound by them.³⁶⁵ Only those trade unions which meet the threshold of sufficient representivity have a say (in the form of initiating and organising a strike) regarding more serious issues in dispute between an

³⁶⁴ Minority unions are left out of the decision making process in the workplace and there is a sense that decisions are made and imposed by bodies not representative of all the workers, which festers conflict.

³⁶⁵ Section 23 (2) of the Labour Relations Act 66 of 1995.

employer and a minority union, and that are not regulated by a collective agreement.³⁶⁶ Thus, it can be argued that although majoritarianism is controversial, it is good for workplace certainty and stability. Without it, there would be no other practical alternative able to maintain uniformity and compliance with generally accepted workplace rules and norms.

The author of this dissertation recommends that majoritarianism remains in place until a better alternative is found. However, to lessen controversy surrounding majoritarianism, majority trade unions should not be able to unreasonably increase the threshold for sufficient representivity. Further, a collective agreement concluded between an employer and a majority trade union should generally not be unreasonably extended to non-parties.

7.3 Analysis of section 64 of the LRA

The two purposes of the pre-strike procedures contained in section 64 of the LRA are clear. The first purpose is to provide the parties with an opportunity for conciliation and possible settlement of the dispute.³⁶⁷ This is imperative before embarking on a strike, in an attempt to avoid it happening, and the many adverse consequences for all parties involved. The second purpose is to allow the employer time to prepare for any possible strike action.³⁶⁸ The importance of this is to prevent chaos in the workplace by giving the employer an opportunity to implement contingency measures to reduce the damaging effects of a strike on the business.³⁶⁹ This is consistent with one of the objectives of the legislator and the courts (through the interpretation of the LRA), to advance and protect both the rights of the employers and the employees, and to balance the interests of both, rather than favour one over the other. Thus, it can be argued that there is nothing wrong with the pre-strike procedures, as they are designed to maintain industrial peace and order, while allowing workers to exercise their right to strike. Thus, the pre-strike procedures do not appear to be a major cause of strike violence. However, workers may be frustrated at the idea of having to first follow certain lengthy protocols before they embark on a strike, as this effectively limits their right to strike, which could contribute to strike violence, but to a minimal extent.

³⁶⁶ Section 65 (1) (a) of the Labour Relations Act 66 of 1995.

³⁶⁷ Cohen (note 29 above) 49.

³⁶⁸ Ibid.

³⁶⁹ *Moloto NO and another* (note 81 above) 24.

7.4 Analysis of section 65 of the LRA

The prohibition of employees from striking over certain issues in dispute, as per section 65 of the LRA, does not seem to contribute to strike violence. This is because it is not a central issue that workers generally have a problem with, to the extent that they would get violent during a strike. Many labour law cases show that workers usually strike over issues with greater substance that impact heavily on their daily lives, such as wage increases, or the dismissal or retrenchment of workers or shop stewards. Thus, it seems unlikely that this prohibition could be a factor that contributes to strike violence. If it does, the contribution is minimal.

The fact that section 65 of the LRA prohibits strike action by essential service or maintenance service employees is justified,³⁷⁰ as some of the country's most important sectors (such as the health sector and defence force) would come to a standstill if these workers were to strike. Therefore, when persons apply for employment in essential services or maintenance services they ought to know that they are prohibited from striking. However, the law is bound to have flaws. This is because no law can be said to be perfect, especially in a country with an elaborate and sensitive history like South Africa, where the people have different backgrounds and cultures, and many competing interests which the legislator and the courts must consider and balance when making and interpreting laws. Thus, the author submits that strike violence in South Africa can be attributable, to a limited extent, to some of the country's (fallible) laws.

7.5 Analysis of the socio-economic and socio-political factors that drive strike violence

Workers are passionate and sensitive about socio-economic and socio-political issues that affect their daily lives. It is no surprise, therefore, that a person's financial status directly affects, among other things, the kind and quality of food they eat; the kind of house they live in; the kind of schools they send their children to; the class of people they socialise with; and the level of respect they are generally given by people, or the way they are treated by society. Thus, a worker's financial status directly impacts on his human dignity,³⁷¹ and if a worker feels that their employer is compromising their dignity, they are highly likely to retaliate

³⁷⁰ *Minister of Defence and others* (note 117 above).

³⁷¹ T Cohen & L Moodley 'Achieving "Decent Work" in South Africa?' (2012) 15 *PELJ* 320, 320.

without any limits or sense of self-restraint. The classic case of a scorned worker is a mine worker, particularly a rock drill operator (the least earning miner). As has been stated and discussed repeatedly in this study, rock drill operators experience the greatest kind structural violence in the form of extremely low wages and poor working and living conditions.³⁷² In addition to this, mine workers feel that they can no longer rely on their union representatives to speak to mine management about their grievances, as union officials can develop close and sometimes inappropriate relationships with mine management.³⁷³ A loss of confidence in their own leaders is what led rock drill operators at the Marikana mine to form their own committee to represent their interests.³⁷⁴ In light of all the above, the author of this dissertation submits that socio-economic and socio-political factors play a greater role in strike violence than does the law. Thus, in order to curb strike violence, employers need to revisit workers' pay grades and consider the reasonable increase of their wages. Employers, such as mining companies, who make huge profits, should consider the profits with the workers. Further, employers need to improve their worker's working and living conditions, and restructure the operations of the workplace in a way that better accommodates workers.

7.6 Summary of the chapters and final remark

In chapter 1, the study set out the background of strikes in South Africa. The study identified the problem it seeks to address, namely the relationship that exists between strikes and the collective violence that has increasingly accompanied strikes over the years. The study set out its objectives namely: (a) to explore the relationship between the strike action and the ensuring violence, and to establish the possible factors of violent strikes; (b) to examine the legal mechanisms which have been put in place by the legislature to regulate the violence associated with strikes and further to determine the sufficiency of these legal mechanisms; (c) to consider whether there is a need for an improvement in the legal mechanisms, and to provide some possible solutions that could assist in curbing violent strikes; (d) to explore the importance of the right to strike, and discuss the challenges which have come with that right. The study has met these objectives, and the more specific objectives which have been broken down into five research questions, as seen in chapter 1 of the dissertation.

³⁷² Ngcukaitobi (note13 above) 839.

³⁷³ Capps (note 329 above) 10.

³⁷⁴ Ngcukaitobi (note13 above) 837.

In chapter 2, the study set out the legal framework of strikes in South Africa, which includes: (a) the statutory definition of a strike. The study has shown that from this definition, a strike can take different forms – it can either be primary or secondary. Further, there are three important types of primary strikes, namely: a full work stoppage; a repetition/intermittent strike; and a partial strike. It has been noted that there are two different kinds of strike action contained in the LRA, namely protected and unprotected strikes, and that each strike has different consequences. The right to strike is contained in section 23 (2) (c) of the Constitution and section 64 of the LRA. The right to strike in the Constitution is granted to every *worker*, whereas in the LRA it is granted to every *employee*. Thus, the Constitution provides for a wider scope of inclusion of persons in the right to strike, than that in the LRA.

The study has stated that the Constitution does not expressly limit the right to strike, but that despite this, the right to strike is subject to the general limitations clause contained in section 36 of the Constitution. There are procedural and substantive limitations on the right to strike. The procedural limitations are contained in section 64 of the LRA, and they are procedures that a trade union and its employees must follow before embarking on a strike, in order for the strike to be protected. The substantive limitations are contained in section 65 of the LRA and they are divided into two: firstly, section 65 prohibits strike action over certain issues in dispute; and secondly, it prohibits certain employees from striking. It has been stated that there are three further substantive limitations on the right to strike that have been read into the LRA by case law. These are: (a) when the demand requires the employer to act unlawfully; (b) when the demand requires the employer to act unreasonably; and (c) demands with which an employer cannot deal. Lastly, the author stated that the Constitutional Court in *South African National Defence Union (SANDU) v Minister of Defence and others*³⁷⁵ found that the limitations on the right to strike passed constitutional muster and were thus justified.

In chapter 3, the study set out the different legal mechanisms an employer can use, or the legal steps an employer can take to try to prevent, minimise and/or regulate violence during strikes. The first mechanism proposed by the author was the formation of proper relationships with employees through collective agreements. The study stated that there were two different kinds of collective agreements provided for in the LRA, namely agency shop agreements and closed shop agreements. The study argued that there has been a lot of controversy surrounding closed shop agreements. Many labour law scholars neither agree with the way

³⁷⁵ (2007) 28 ILJ 1909 (CC).

closed shop agreements operate, nor with the effect of non-compliance on employees. The study discussed the principle of majoritarianism and explained the controversy surrounding this principle in so far as it creates obstacles for minority unions in a workplace. The second mechanism proposed by the author was that the employer and recognised trade unions in a workplace try to reach agreement on rules of picketing. The third mechanism proposed by the author was that if employees fail to comply with picketing rules or embark on an unprotected strike (which occurs more often than not) an employer can obtain a prohibitory interdict from the Labour Court, preventing workers from embarking on or continuing to embark on that strike. The study has shown that strike interdicts are disobeyed by employers and most employees. Therefore, they are often not worth the paper on which they are written. The fourth mechanism proposed by the author is for an employer to institute legal action in which the employer claims delictual damages when employees damage property during a protected or unprotected strike. Lastly, the author proposed that an employer lays a charge of misconduct against the employees, in the event that they commit any misconduct while embarking on a strike.

In chapter 4, the study has indicated that there are two different kinds of misconduct: firstly, participation in an unprotected strike is misconduct,³⁷⁶ and secondly misconduct occurs when strikers commit criminal and/or delictual acts during strikes. It has been stated that the most common kinds of misconduct committed during strike action are damage to property, intimidation, and assault.³⁷⁷ The study has discussed the concept of derivative misconduct and showed, by providing case law, how it applies in practice. It has been argued that the principle of derivative misconduct places a heavy burden on employees to turn against their co-workers. The doctrine of common purpose (which is similar to derivative misconduct) was also briefly discussed and the author showed, by providing case, how it applies in practice.

The study has discussed dismissal in the context of strikes. It has been made clear that since the enactment of the LRA, an employee cannot be dismissed solely by reason of having participated in a strike, especially if the strike was a protected one.³⁷⁸ This is because dismissal should be considered as the last resort.³⁷⁹ Further, before dismissing an employee, an employer has to take certain factors into account, namely: the seriousness of the

³⁷⁶ Section 6 (1) of the Code of Good Practice: Dismissal.

³⁷⁷ Rycroft (note 208 above) 1.

³⁷⁸ Manamela (note 4 above) 323.

³⁷⁹ Cohen (note 234 above) 7.

contravention of the LRA; any attempts made by an employee to comply with the provisions of the LRA; and whether or not the strike was in response to unjustified conduct by the employer.³⁸⁰ In addition to this, there are various procedural steps an employer must take before dismissing an employee, such as holding hearings, consulting with the relevant union(s) and issuing an ultimatum.³⁸¹ Lastly, the study stated that if the circumstances of the strike (due to its intensity) do not permit the employer to take some of the above mentioned actions, the employer can dismiss the employees.³⁸²

In chapter 5, the study set out the rights of trade unions and employers' organisations. Thereafter, the author set out the duties of trade unions. A union's liability under the Regulation of Gatherings Act,³⁸³ was discussed, including the section creating the liability (section 11 (1)); the impact of section 11 (1) on a union's right to freedom of assembly under the Constitution; and the circumstances under which a union is exempt from liability under the Regulation of Gatherings Act.³⁸⁴ The study provided an analysis of the leading case for union liability under the Regulation of Gatherings Act,³⁸⁵ namely *SA Transport and Allied Workers Union v Garvas*.³⁸⁶ The author showed, through case law, the circumstances in which a member can claim damages from a union, namely where a union breaches its duty of care towards its members or fails to represent its members when necessary. Lastly, the study showed, through case law, how the labour court deals with strikes that are not in compliance with the LRA, including interdicting the strike and ordering a union to pay an employer compensation for loss suffered as result of a strike.³⁸⁷

In chapter 6, the study stated that violence can be either physical or structural. The study indicated that structural violence can be understood as a form of violence where some social structure or social institution allegedly harms people by preventing them from meeting their basic needs.³⁸⁸ The study argued that structural violence can thus be seen as more passive and subtle than physical violence (which is overt and more easily identifiable). The study analysed the responses given by some of the 1992 and 2007 public service strikers during

³⁸⁰ Section 6 (1) of the Code of Good Practice: Dismissal.

³⁸¹ Section 6 (2) of the Code of Good Practice: Dismissal.

³⁸² Ibid.

³⁸³ 205 of 1993.

³⁸⁴ Ibid.

³⁸⁵ 205 of 1993.

³⁸⁶ 2013 (1) SA 83 (CC).

³⁸⁷ Section 68 of the Labour Relations Act 66 of 1995.

³⁸⁸ Ngcukaitobi (note 13 above) 840.

interviews with them by scholars and researchers. Various inferences regarding the reason strikes turn violent can be drawn from the responses given by the interviewed strikers. These inferences include the following: (a) South Africans have over the years developed a culture of violence as a way of dealing with problems;³⁸⁹ (b) strikers have identified the use of force against innocent non-strikers as an effective way of getting the employer/management to accede to their demands;³⁹⁰ (c) a lot of workers are illiterate and believe that their employers will treat them because they are illiterate.³⁹¹ Thus, violence is a way of showing their employers that although illiteracy may be their weakness, force is their strength.

The study discussed some of the structural violence that miners' experience, which many scholars and researchers believe led to the Marikana massacre. Miners, particularly rock drill operators, are paid extremely low wages.³⁹² This is despite the fact that: (a) the majority of them have two families to feed; (b) they work between nine and 15 hours a day, 12 months a year; (c) they do the toughest and riskiest work; and (d) they have long service records with the mining companies.³⁹³ Further, the close relationships that union officials are increasingly having with mine management makes workers believe that their grievances are not being taken up to the mine management, and that they are not well represented by their trade unions.³⁹⁴

Finally, it can be said that there is no simple and singular approach to curbing violent strikes in South Africa. Achieving this requires a complex, multi-pronged approach and a joint effort from all parties who are affected by strike violence (namely employers, employees, trade unions, and government, in its capacity as stakeholder in the well-being of South Africa, and as the representative of South African citizens) to engage in good faith negotiations, debates and dialogue, in an attempt to find agreeable and mutually beneficial solution(s) to curbing strike violence.

³⁸⁹ von Holdt (note 15 above) 141.

³⁹⁰ Ibid.

³⁹¹ von Holdt (note 15 above) 144.

³⁹² Hartford (note 11 above) 3.

³⁹³ Ibid.

³⁹⁴ Capps (note 329 above) 10.

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