

**The prevalent and violent industrial action in the mining industry: The
need to curb the prevalent and violent strike action in South Africa.**

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Declaration

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

Statement of originality

This dissertation is an original piece of work which is made available for photocopying and for inter-library loan.

Signed at Pietermaritzburg on this the day of

Signature: -----

Dedication

I would like to dedicate this thesis to my parents, my lovely wife and my three children. This is for all your support and love.

Acknowledgements

With the completion of this study, I wish to express my thanks and sincere appreciation to my father, Rev Johnson Mhlonipheni Bavu, who has always pushed me in the right direction and has never stopped expressing the importance of education in one's life. To my mother for the same role and her support and belief in me. To my wife for her tolerance, encouragement and understanding often under very difficult circumstances throughout the course of this study.

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To God be the glory.

Abstract

The right to strike is a fundamental human right recognized in international law and the South African Constitution. In South Africa, employees have a constitutional right to strike. Section 23 of the Constitution of the Republic of South Africa, 1996, provides all workers with labour rights including the right to strike. The right to strike is given effect to in chapter IV of the Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA). The LRA provides for the requirements and limitations which employees, in exercising their right to strike, ought to comply with in order to ensure that their strike is protected. In terms of the LRA a strike is protected if it complies with the provisions of the LRA.

The purpose of this study is to explore the manner in which the right to strike has been exercised recently in South Africa, with specific focus on the mining sector. It will be shown that recent strikes in the mining sector have been unprotected and characterised by an element of violence. This will be done to establish whether the limitations thereof, intended to combat unprotected strikes, serve the purpose of curbing the unprotected strikes. As a means of assessing how the regulation of strike action could be improved, this study will, inter alia, compare the law which regulated the right to strike in terms of the previous Labour Relations Act No. 28 of 1956 and in terms of the current Labour Relations Act No. 66 of 1995 which replaced the former.

The study will then suggest a more effective legal means by which to curb unprotected strikes like those seen recently in the mining industry. This would involve adjustments, additions, and the tightening of strike laws. Some of these changes would involve reintroducing elements of the repealed Labour Relations Act of 1956.

Contents

Chapter 1: Introduction	13-16
1.1 Background and statement of purpose.....	16-19
1.2 Rationale for the study.....	19-20
1.3 Research problems and objectives.....	20-21
1.4 Literature review.....	21-28
1.5 Research methodology.....	28-29
1.6 Research outline.....	29-31
Chapter 2: Collective Bargaining	31
2.1 Introduction.....	31-33
2.2 Purpose of industrial action as part of collective bargaining.....	33-35
2.3 Industrial action as part of collective bargaining under the Labour Relations Act No. 28 of 1956.....	35-40
2.3.1 The Legal Strike under Act No. 28 of 1956.....	40-42
2.3.2 The Illegal Strike under Act No. 28 of 1956.....	42-43
2.4 Industrial action as part of collective bargaining under the Labour Relations Act No. 66 of 1995.....	43-44

2.4.1 Reforms and Innovations.....	44-46
2.4.2. Protected Strikes under the 1995 Act.....	46-47
2.4.3 Unprotected Strikes under the 1995 Act.....	47-49
2.5 Conclusion.....	49
Chapter 3: The Procedural and Substantive Restrictions	51
3.1 Introduction.....	51-52
3.2 The substantive limitations of the right to strike	52-55
3.3 Overview on general procedural restrictions.....	55-56
3.4 Historical developments of the notice requirement.....	56-57
3.4.1 The introduction of the notice requirement.....	57-58
3.4.2 The emphasis of the notice requirement by the Industrial Court.....	58-61
3.5 The provisions of ELRA and PSLRA.....	61-63
3.6 Notice of industrial action in terms of the LRA.....	63-70
3.7 Conclusion.....	70
Chapter 4: Unprotected industrial action in the mining sector	71
4.1 Introduction.....	71-72
4.2 The extent and practice of strike actions in South Africa.....	72-75
4.3 Elements of unprotected strikes.....	75-77

4.3.1 The Marikana strike.....	77-79
4.3.2 The possible causes of the Marikana Strike.....	79-80
4.3.3 The Anglo-Ashanti Gold Strike.....	80-81
4.3.4 Anglo Platinum (Amplats) Strike.....	81
4.3.5 Coal Mining Strike.....	81
4.3.6 The Farm Workers Strike.....	81-84
4.4. The role of employers and the mining industry.....	84
4.5. The government's ineffectiveness in implementing the Mining Charter.....	84-85
4.6. Labour movements.....	85-86
4.7. Government's reaction to unprotected strikes.....	86-87
4.8. The legal consequences of an unprotected strike.....	87-88
4.8.1 Court interdicts.....	88-90
4.8.2 Compensation.....	90-91
4.8.3 Dismissal.....	91
4.9. Conclusion.....	92

Chapter 5: The Labour Courts and Trade Unions on the practice of violent strike

action.....	94
5.1 Introduction.....	94

5.2 Jurisdiction and powers of Labour Courts.....	94-96
5.3 The approach of the Courts.....	96-106
5.4 The role and liability of Trade Unions.....	106-112
5.5 Conclusion.....	112
Chapter 6: The right to strike per International Law Organisation principles and foreign jurisdictions.....	115
6.1 Introduction.....	115-116
6.2 The meaning of the right to strike.....	116-117
6.3 The ILO's principles on the right to strike.....	117-119
6.4 The right to strike under international labour law.....	119-120
6.4.1 ILO Convention 87 of 1948.....	120-121
6.4.2 ILO Convention 98 of 1949.....	121-122
6.5 ILO Restrictions on exercising the right to strike.....	122-124
6.5.1 Prior notice.....	124
6.5.2 Conciliation Mediation and Arbitration.....	124-125
6.5.3 Quorum and majority.....	125-127
6.6 Illegal exercise of the right to strike.....	127-128
6.7 Limitation on right to strike under foreign jurisdictions.....	128-129

6.7.1	Australia.....	129-131
6.7.2	United States of America	131-133
6.7.3	United Kingdom.....	133-134
6.7.4	Canada:	134-136
6.7.5	New Zealand:	136-139
6.7.6	Botswana:	139-141
6.8	Conclusion.....	141

Chapter 7: Curbing the Prevalent Violent Strike Action in South Africa: Conclusion and Recommendations.....143

7.1	Introduction.....	143-144
7.2	The need to prevent unprotected strike action.....	144-147
7.3	Ineffective statutory restrictions.....	147-149
7.4	Proposed solutions by government.....	149-150
7.4.1	Proposed Code of Good Practice.....	150-152
7.5	Suggestions and Recommendations.....	152-157
7.6	Conclusion.....	157

8. Bibliography	159
8.1 Books.....	159-161
8.2 Journal Articles.....	161-165
8.3 Chapter in Books.....	165
8.4 Statutes and Bills.....	165-167
8.5 International Instruments.....	167-168
8.6 Newspaper Articles.....	168
8.7 Internet Sources.....	168-169
8.8 Reports.....	169
8.9 Website Articles and Reports.....	169-171
8.10 Cases.....	171-172

CHAPTER 1: INTRODUCTION

1.1 Background and Statement of Purpose

Industrial action is accepted as an integral part of collective bargaining and essential to the rights of workers. Industrial action can take many different forms, including a strike¹, a lock-out², a picket³, a product boycott⁴ and protest action⁵. Strike action itself can take different

¹ A strike is defined in s 213 of South Africa's Labour Relations Act 66 of 1995 ("the Act") as meaning: "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.

² A lock-out is defined in section 213 of the Act as meaning: "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 any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion.

³ Picketing is not defined in the Act. However, Barker & Holtzhausen *Labour Glossary* 113 describe picketing as "action by employees or other persons to publicize the existence of a labour dispute by patrolling or standing outside or near the location where the dispute is taking place, usually with placards indicating the nature of the dispute. The aim of the picketing might simply be to communicate the grievance to the public or it might be to persuade other employees in that workplace not to work and to take their side in the dispute, to deter scab labour, to persuade or pressurise customers not to enter the workplace, to disrupt deliveries or to drum up public support".

⁴ The term "product boycott" generally refers to the boycott of a certain product of an employer by customers or the public in support of workers who are in dispute with their employer. They do not buy the product or have anything to do with it until the dispute has been resolved.

⁵ The term "protest action" is defined in section 213 of the Act as meaning: "the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike".

forms such as an overtime ban⁶, a work-to-rule⁷, a rotating strike⁸, a go-slow⁹, an intermittent strike¹⁰, a secondary strike and a sympathy strike. Labour relations in South Africa are regulated, inter alia, by the provisions of the Labour Relations Act 66 of 1995, which replaces the Labour Relations Act. 28 of 1956. The Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA) is itself subject to the Constitution of the Republic of South Africa,¹¹ (hereinafter referred to as the Constitution), which is the supreme law of the land, and it was enacted to give effect to s 23 of the Constitution. In terms of s 23 of the Constitution everyone has the right to fair labour practices.¹² The section further provides that ‘every worker has the right to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike’.¹³ The right to strike is one of the fundamental rights enshrined in the Constitution.¹⁴ The right to strike is necessary to give effect to the right to engage in collective bargaining as it corrects the inherent inequality of power in the employment relationship.¹⁵ Further s 64 of the LRA provides that every employee has the right to strike and every employer has recourse to lock-out in certain circumstances and if certain requirements are met.

⁶ Barker & Holtzhausen *Labour Glossary* 113: An overtime ban refers to a case where employees collectively refuse to work overtime in order to put pressure on the employer to agree to their demands or to address their grievances.

⁷ The term “work-to-rule” refers to a case where workers collectively decide to do only what they are legally obliged to do in regard to their work and nothing more. Cameron et al *The New Labour Relations Act* describe the term “work-to-rule” in the following terms: “A work-to-rule occurs when employees act concertedly in following the terms of their contracts to the letter. If the concerted action is carried out in furtherance of an industrial demand, which is usually the case, and it in fact entail an “obstruction of work”, then perhaps it should be regarded as a strike.”

⁸ Barker & Holtzhausen *Labour Glossary* 142 defines a rotation strike as a “strike that occurs in one or certain sections of an organisation at any given time, whether it moves to another or other sections

⁹ Barker & Holtzhausen *Labour Glossary* 114: The term “go-slow” refers to a case where workers collectively work slowly in order to put pressure on their employer to agree to their demands.

¹⁰ Barker & Holtzhausen *Labour Glossary* 142 define an intermittent as meaning “a repeat strike, each lasting for a short time, e.g. a few hours each day or during each shift. Also known as an irritation strike”.

¹¹ Constitution of the Republic of South Africa Act 108 of 1996. (1996 Constitution).

¹² Section 23 (1) of the 1996 Constitution.

¹³ Section 23 (2) (a) (b) and (c) of the 1996 Constitution.

¹⁴ Ibid.

¹⁵ P Davies & M Freedland *Kahn-Freund’s Labour and the Law* 3 ed (1983) 292: “[I]f workers could not, in the last resort, collectively refuse to work, they could not bargain collectively. There can be no equilibrium in industrial relations without a freedom to strike.”

In many countries the right to strike is provided for in statutory law.¹⁶ In some it is even entrenched in their constitutions,¹⁷ as is the case in South Africa.¹⁸ However, like all rights, the right to strike may be reasonably limited in the interest of other values and goals. Section 36 of the Constitution provides the requirements to be met in order for a limitation to be justified. In South Africa, there are both substantive and procedural limitations on the right to strike, which are set out in the LRA.¹⁹ The South African mining industry, which is the main focus of this thesis, has been overwhelmed by several instances of industrial action, some of which have been unprocedural. The propensity for workers in South Africa to undertake unprocedural industrial action has assumed a worrisome level in recent years and most especially in the mining industry. According to data collected and analysed in 2013 by the Department of Labour, there was an overall rise in the number of strikes as compared to 2012.²⁰ The Department recorded 114 industrial action incidents in 2013, an increase from 99 recorded strikes in 2012. This in my view necessitates the assessment of current labour legislation in so far as its limitations of strike are concerned, so as to establish and incorporate constitutional systems within the LRA to combat the illegal and unprotected strikes that have transpired, including those in the mining industry.

It is the purpose of this research therefore, to show that the propensity for workers in South Africa to undertake unprocedural industrial action has assumed an unacceptable point in and that it has become a trend for workers to disregard the requirements of the labour legislation, and to breach provisions of the existing collective agreements which restrict their right to strike. This research also intends to examine the current strike actions by workers, in the mining industry, in relation to the collective bargaining process recognised by labour legislation and to establish whether the limitations intended to combat violent and unprocedural strike action are effective., Furthermore, this study seeks to investigate whether the bargaining process serves its purpose. It is well established that although the right to

¹⁶ Some of those countries are South Africa, Namibia, Botswana, Swaziland, Ghana, Zimbabwe, Zambia, Denmark, Sweden, Spain, Finland and the Netherlands.

¹⁷ 1996 Constitution.

¹⁸ Section 23 (1) (c) of the 1996 Constitution of the Republic of South Africa.

¹⁹ Section 64 and 65 of the Labour Relations Act 66 of 1995 (hereinafter referred to as the “LRA”).

²⁰ Annual Industrial Action Report, Department of Labour, Strikes Statistics (2013), page 4.

strike is protected in international and domestic law, it is not absolute. In discussing this issue, reference will be made to the International Labour Organisation principles and the statutory provisions of some countries dealing with limitations on the right to strike. The purpose in referring to such statutory provisions is to show what provisions such statutes contain, and how can these be of assistance when considering how to regulate the right to strike in South Africa more effectively. The research further points out that because of the prevalent unprocedural strikes that we have seen, mainly in the mining industry, there is a need to better regulate the right to strike. The study will suggest how this can be done without impairing the employees constitutional right to strike.

1.2 Rationale for the Study

The propensity for employees in South Africa to undertake unprocedural industrial action suggests that the right to engage in strike action needs to be reassessed and better regulated. This issue is very important because many of these unprocedural strikes have been seen to be successful. This creates the perception that unprocedural, violent strike action is effective. We have witnessed this in the mining industry and subsequent strikes by farm workers in the Western Cape. An illegal strike for instance at Lonmin Mine, which caught global attention, was successful despite its element of unlawfulness. The employees achieved their demand for a wage increase. Subsequent to this strike the neighbouring mines, such as the Anglo Gold Mine, also embarked on an illegal strike in support of a demand for a wage increase. Through this strike they also achieved a commitment from management to increase their wages.

These instances of unprocedural industrial action by workers portend grave danger for a peaceful and harmonious industrial relations practice in the country. They have the potential to set a precedent that could fundamentally redefine the *modus operandi* of strike actions in South Africa, in the near future. If these instances of unprocedural industrial actions are not addressed, employees from other employment sectors could adopt the same method of industrial action to address their grievances.

As a means of assessing how the regulation of strike action could be improved, this study will, inter alia, examine the law which regulated the right to strike in terms of the previous Labour Relations Act 28 of 1956 and in terms of the current Labour Relations Act 66 of 1995, which replaced the former. It is also the intention of this study to examine the current

strike actions by employees, particularly in the mining industry, to assess if they are conducted as required by the collective bargaining process recognised by the current LRA. It will also be suggested that the consequences of embarking on unprotected strike action, including having interdicts issued against the illegal strikers, do not seem to have curbed the trend of increasing numbers of unprotected strikes. In the end it will be suggested that the right to strike needs to be better regulated so as to curb the prevalence of unprocedural strikes, with specific reference to the mining industry.

1.3 Research Problems and Objectives

This research will investigate emerging evidence that suggests a radical departure by employees from the procedure and limitations regulating strike action in terms of the LRA. In dealing with this problem the research will focus on the mining industry, which best illustrates the prevalence of the problem of unprotected strike action.

Great care will be taken in this research to ensure that the foundation of the research lies in the current legal framework and how it lacks effectiveness when dealing with the growing trend towards unprocedural labour related strikes in South Africa, particularly in the mining sector. I will also examine what actions can be taken to remedy the situation.

Trade unions have an obligation in terms of the collective bargaining processes²¹ to take responsibility for their members when they exercise the right to strike. This includes both a duty towards advancing their collective interests and a responsibility to do so within the ambit of the law. However, trade union leaders have failed in this second duty to encourage their members to undertake peaceful legal activity. In dealing with this problem, I will make suggestions as to what appear to be the prevalent factors contributing to this problem and I will suggest how the right to strike can be better regulated.

Research Questions

²¹ LRA.

1.3.1 What are the parameters of protected strike action?

1.3.2 What are the consequences of embarking on unprotected and/or violent strike action?

1.3.3 Why is there a trend towards violent, unprotected strike action?

1.3.4 How can this trend be curbed?

1.4 Literature Review

A great deal of literature has been written on the subject regarding the need to better regulate the right to strike in the mining industry. Most labour law texts however, give only a cursory overview on the subject. They do not provide a detailed examination of the topic, which this research intends to provide.

The right to strike enjoys a high degree of protection in South African law. In *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and another*²², the Constitutional court declared it to be ‘of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees’ and found that ‘it is through industrial action that workers are able to assert bargaining power in industrial relations’.²³ According to Prof Darcy Du Toit and trade union leader Roger Ronnie²⁴ the LRA sets out to promote the right to strike as an essential element of collective bargaining.²⁵ Du Toit and Ronnie suggest that in a number of aspects, however, ranging from violence erupting in the course of strike action to the practical exclusion of large sections of the workforce from exercising the right to strike, it has become apparent that the current model is in need of adjustment²⁶. Du Toit and Ronnie further suggest that the violence which has characterised a number of strikes in recent years,

²² *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and another* 2003 (24) ILJ 305 (CC) 13.

²³ Ibid 74.

²⁴ D Du Toit & R Ronnie, “The Necessary Evolution of Strike Law”, (2012) *Acta Juridica*, 195.

²⁵ Ibid 195.

²⁶ Ibid 195.

mostly in the mining sector, has cast doubt on the effectiveness of the LRA in this vital area²⁷. Du Toit and Ronnie²⁸ argue that violence on the picket-line is a wake-up call not simply to introduce stricter controls, but to re-examine our system of dispute resolution, including strike law, more generally with a view of ‘eliminating dysfunctional barriers’ to the right to strike rather than introducing new ones²⁹. Du Toit and Ronnie³⁰ provide that the recent strikes in the public sector have become unruly which is the problem that this thesis has also identified in the mining sector. They further indicate that the current restrictions on the right to strike within the LRA are not effective in dealing with the illegal industrial actions which have enjoyed prevalence lately. They suggest that this necessitates a re-examination of the right to strike in South Africa as well as the framework giving effect to the right. However, Du Toit and Ronnie, in their assessment, do not really indicate how the re-examination can best be done in dealing with the issue of unruly strikes. This thesis will confirm their general findings, but it will go a step further by suggesting how to improve the manner in which the right to strike is regulated, as well as suggesting new provisions to amend the LRA by drawing from the experience of certain foreign countries, which could reduce the prevalence of unprotected strikes. Tembeka Ngcukaitobi, in his assessment of the situation in the Platinum Hills of Marikana,³¹ opines that “the role of the state is to create a legal framework within which parties can address their labour concerns”³². However, he reminds us that ‘any type of legal regulation implies an acceptance of the underlying social order’³³. He further provides that ‘our present LRA framework remains ineffective in the face of inadequate public service delivery, ambiguous business social responsibility, changing union dynamics and the collapse of collective bargaining institutions. Unprotected strikes occur at an increasing rate. The prevalence of violence in industrial action caused by this instability means that there remains a limited role that the law can play. The solution then becomes one of a political nature’.³⁴ It seems that the authors mentioned above agree concerning the problem of unprotected strikes, however, I do not

²⁷ Ibid 195.

²⁸ Ibid 196.

²⁹ Ibid 196.

³⁰ Ibid 196.

³¹ T Ngcukaitobi “*Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana*” (2013) 34 ILJ 836, 836.

³² Ibid 836.

³³ Ibid 836.

³⁴ Ibid 836.

share the same suggestions towards solving the problem. Tembeka Ngcukaitobi suggests that the LRA is ineffective in dealing with the issue and believes that the solution is that of political nature.³⁵ I seek to differ with this because in my opinion, contravention of law cannot be corrected by a political solution. Ineffectiveness of the legislation demands an assessment of that particular legislation and identification of what measures or provisions can be introduced or removed to bar and/or to curb the ineffectiveness, which is what this thesis will be driving towards. According to Maserumule, the LRA, rather than positively implementing the constitutional right to strike, serves to limit it. He asserts that the courts, similarly, have failed to protect the right and have instead been preoccupied with giving effect to the limitation of that right³⁶. Ben-Israel³⁷, argues that “while a general prohibition of strikes constitutes a considerable restriction on the opportunities open to trade unions for the furthering and defending of the interests of their members, the situation is different when the law imposes procedural restrictions or a temporary ban on strikes. Pertaining to the procedural restrictions, one can mention, for example, the obligation to observe a certain quorum ...for example the decision of whether to vote would be determined by the number of votes casted either for or against the strike action. Such restrictions on the right to strike are acceptable as long as they do not place substantial limitations on the means of action open to trade unions organisations”. Having identified the problem of a radical departure by employees from the procedure and limitations governing strike action, this thesis will suggest., amongst other things, that there is a need to be introduce a secret ballot requirement before embarking on an industrial action.

Ben-Israel³⁸ suggests the introduction of secret ballot in dealing with the situation of violent and unprotected strikes. However, in my opinion, the introduction of secret ballot alone cannot solve the problem of unprotected strikes: it is but is one solution among others that needs to be introduced. Gavin Hartford³⁹, refers to the strike at Lonmin’s Marikana platinum

³⁵ Ibid.

³⁶ P Maserumule “*A perspective on developments in strike law*” (2001) 22 *ILJ* 45,46.

³⁷ B-Israel *International Labour Standards: The Case of Freedom of Strike*, (1988) 118.

³⁸ Ibid 118.

³⁹ G Hartford, *Analysis: Mining’s Unholy Trinity and Current Impasse*, 7.

<http://www.dailymaverick.co.za/article/2012-10-11-analysis-minings-unholytrinity-and-current-impasse/#.VqsM5NL2bmQ>.

mine in 2012, which culminated in the death of 44 people, as South Africa's "mirror and lodestar" of how negotiations over wages and labour relation issues had degenerated over time. He argued that socio-economic inequality was the root of the many unprotected strikes in South Africa, with employees facing rural poverty, amongst many other challenges⁴⁰. The unprotected strike in Marikana, according to Thenjiwe Meyiwa and her co-authors, is 'perceived as a protest against the unequal distribution of mining benefits, characterised by the poor social conditions of mining communities, and the perceived collusion between state, labour and capital that has long undermined workers' rights and promoted corruption'.⁴¹ I am of the view that Hartford is correct by holding that socio-economic inequality has been the root of many unprotected strikes in South Africa over the last few years because socio economic inequality is also one of the factors in the mining industry that causes employees to lose patience with the employer. Amongst other solutions, the issue of socio-economic inequality could be solved by enforcing the Mining Charter, which has never been implemented. However, it is my opinion that despite socio-economic issues, there is still a need to better regulate the right to strike in terms of the law.

Hartford further notes that mineworkers' reliance on unions to negotiate wage increases had also turned into a bitter-sweet situation for them, as unions had shifted their focus from promoting workers' interests to establishing a majority within the sector and becoming the ruling union. "Union democracy has been lost over the years, as union leaders' accountability to employers has substituted their accountability to union members. Union leaders have become more prone to focusing on the benefits of being shop stewards than on finding ways to deal with issues affecting workers socially and economically," he explained.⁴² Hartford advised that South Africans need to go back to the basics of negotiation to alleviate wage-related strikes, and to do this he suggests that it is important for employers to re-establish

⁴⁰ Z Mavuso, Mining Industry issues calls for Policy Amendment. www.miningweekly.com/article/labour-conference-highlights-mining-industry-issue-calls-for-policy-amendment-2014-08-09.

⁴¹ T Meyiwa, M Nkondo and others, *State of the Nation 2014: South Africa 1994-2014: A twenty-year review*, 2014,473.

⁴² G Hartford, Addressing the Twenty-Seventh Annual Labour Law Conference, held at the Sandton. Convention Centre from August 5 to 7.; Z Mavuso www.miningweekly.com/article/labour-conference-highlights-mining-industry-issue-calls-for-policy-amendment-2014-08-09.

social and individual relationships with their workers, so that they become aware of the issues that workers face on a daily basis. Further, establishing workplace dialogue and forums would assist employers in becoming aware of worker's concerns, thereby preventing strikes, as problems can be dealt with beforehand.⁴³ Hartford suggests that collective bargaining negotiations have departed from the LRA framework and other collective agreements giving effect to the LRA. He points out that they have turned into violent strikes and further refers to the Marikana tragedy.⁴⁴ Hartford suggests that another cause of violent strikes is 'union democracy' where union leaders, as a result of the power they have gained within that particular industry, abandon the worker's interests which should be at the top of their agenda in order to achieve the wellbeing of their workers. As a result of this, workers start losing hope in their leaders and opt for violent strikes in solving their grievances.⁴⁵ Hartford's suggestions aimed at alleviating violent strikes are more of a social orientated solution rather than a legal solution because he is mainly suggesting that the employers must establish social and individual relationships with workers so they can be aware of the issues affecting workers on the ground.

John Brand,⁴⁶ stated that South Africa has one of the highest incidences of industrial action in the world, with the strikes also being among the most violent. In 2012, the country lost 17-million work hours, with 16 million of these in the mining sector, 99 strikes took place, 45 of which were unprotected or violent. He said there was need to re-evaluate the legal status of the right to strike in South Africa⁴⁷. The Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as the CCMA)⁴⁸ has suggested interest arbitration as an alternative to collective bargaining, which the commission's director, Nerine Kahn, said was

⁴³ G Hartford, Analysis: Mining's Unholy Trinity and Current Impasse, 7.
<http://www.dailymaverick.co.za/article/2012-10-11-analysis-minings-unholytrinity-and-current-impasse/#.VqsM5NL2bmQ>.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Z Mavuso, Review of strike-prone South Africa's dispute resolution approach urged,
<http://www.miningweekly.com/article/labour-conference-highlights-mining-industry-issues-calls-for-policy-amendment-2014-08-29>. Specific reference made to J Brand, "How The Law Can Better Regulate the Right to Strike" Addressing the Twenty-Seventh Annual Labour Law Conference, held at the Sandton Convention Centre from 5 -7 August 2014.

⁴⁷ Ibid.

⁴⁸ Section 112 of the LRA.

not proving beneficial in any industry or sector in South Africa.⁴⁹ Kahn explained that “Interest arbitration is a mediated process between parties in which an arbitrator or arbitration panel makes a binding ruling in a dispute on the grounds that a settlement would be in the wider public interest”⁵⁰. Organised labour’s reaction to the suggestion of “interest arbitration” has not been favourable. In this regard it was reported that the Congress of South African Trade Unions (hereinafter referred to as Cosatu) had started to brief its lawyers on finding ways to block attempts by government to prescribe interest arbitration over industrial action in certain circumstances. Cosatu argued that interest arbitration was a direct threat to the constitutional right of workers to strike. This research will argue that as much as there is a need to re-evaluate the right to strike in our country, the necessary introduction of new provisions or deletion of ineffective measures to regulate industrial action must be implemented without impairing the worker’s constitutional right to strike.

John Brand provides that “there is a need to balance the right to strike with other fundamental rights, such as those pertaining to trade, property, movement, healthcare, food, water and social security,”⁵¹ which are also enshrined in the Bill of Rights.⁵² He suggests that the Constitutional Court must consider international and foreign law in re-evaluating the right to strike in South Africa.⁵³ This is also legislated both in the Constitution and in the LRA. Brand highlighted that legislation on the right to strike in the US, New Zealand, Australia and Canada included limitations pertaining to the obligation to engage in good-faith bargaining

⁴⁹ Z Mavuso, Review of strike-prone South Africa’s dispute resolution approach urged, <http://www.miningweekly.com/article/labour-conference-highlights-mining-industry-issues-calls-for-policy-amendment-2014-08-29>. Specific reference made to Nerine Kahn, Addressing the Twenty-Seventh Annual Labour Law Conference, held at the Sandton Convention Centre from 5-7 August 2014.

⁵⁰ Ibid

⁵¹ Z Mavuso, Review of strike-prone South Africa’s dispute resolution approach urged, <http://www.miningweekly.com/article/labour-conference-highlights-mining-industry-issues-calls-for-policy-amendment-2014-08-29>. Specific reference made to John Brand, “How the Law Can Better Regulate the Right to Strike”, Addressing the Twenty-Seventh Annual Labour Law Conference, held at the Sandton Convention Centre, 6th August 2014.

⁵² Chapter 2 of the 1996 Constitution.

⁵³ Z Mavuso, Review of strike-prone South Africa’s dispute resolution approach urged, <http://www.miningweekly.com/article/labour-conference-highlights-mining-industry-issues-calls-for-policy-amendment-2014-08-29>. Specific reference made to John Brand, “How the Law Can Better Regulate the Right to Strike”, Addressing the Twenty-Seventh Annual Labour Law Conference, held at the Sandton Convention Centre, 6th August 2014.

prior to embarking on industrial action and a right to recourse to the courts in the event of unprotected strike actions, while Canadian and Australian legislation also included secret ballot requirements.⁵⁴ Brand argues that the legislation had worked well for these countries and could be considered in South Africa. He further mentioned that establishing an independent institution to educate social partners about their rights and obligations in terms of the Bill of Rights, training them in mutual gain, good-faith negotiation and risk analysis, and providing them with reliable and relevant financial and economic information about collective bargaining could be beneficial to South African workers' right to strike. He noted that "While the rationale behind collective bargaining is to maintain industrial peace, the protection given to the fundamental right to strike is based on the functional importance of strikes to collective bargaining in a free market economy".⁵⁵ Brand suggested that a Specialised Industrial Action Protection Unit could be established in the South African Police Service to protect people from criminal conduct during industrial action and that employers must not be allowed to hire replacement workers during protected industrial action.⁵⁶ Further, trade unions, trade union officials and office bearers must be required to respect the right of non-strikers to work.⁵⁷ Brand also suggests that the Labour Court be given a mandate to grant appropriate and proportional relief to any party whose rights had been violated during industrial action, for any breach of law, and that this might include, in extreme cases, suspending the protection of industrial action for limited periods. He further argues that the Labour Court must also be given the power to suspend the right to engage in protected strike action in the event of an acute national emergency.⁵⁸ This research will concur with John Brand's suggestions pertaining to the alleviation of violent strikes.

The right to strike is regulated by the LRA.⁵⁹ Darcy Du Toit,⁶⁰ referring to the case of *NUMSA v Bader Bop (Pty) Ltd*⁶¹ argues that the focus of attention must not be on the constitutional

⁵⁴ Ibid

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Section 64-68 of the LRA. The same rules apply, with the necessary changes, to lock-outs by employers.

⁶⁰ Ibid.

mandate to engage in industrial action but on the statutory framework regulating that right, in order to determine whether it gives proper effect to that mandate. Some have argued that the statutory framework does not give proper effect to the constitutional mandate. Koboro J Selela⁶² argues that the current constitutional and statutory framework on collective labour dispute resolution in South Africa calls for urgent attention. The question which he attempts to answer is whether there is a future for meaningful collective bargaining in South Africa in light of the recurrent industrial unrest.⁶³ He provides that the limitation of the right to strike contained in s 65(1) of the LRA⁶⁴ is inadequate if regard is had to the significant impact of industrial action on the socio-economic interests of the parties involved.⁶⁵ He suggests that if South Africa is to prevent a repeat of the likes of the Marikana strike, urgent attention should be paid to the specific provisions of the LRA which deal with the right to strike.⁶⁶ He further suggests that a specific provision should be introduced into the LRA to extend the powers of the Labour Court to include the jurisdiction to adjudicate on fairness of industrial demands.⁶⁷ Selela's suggestion is, in my view, a direct contravention of the employees right to bargain freely and without the interference of a third party or any sphere of government. The question of whether the industrial demands are fair lies with the parties involved. The solution of extending the Labour Court's jurisdiction, in so far as dealing with the determination of fairness of industrial demands, will not assist in alleviating the recurrent industrial unrest, and instead it will cause confusion between the courts powers and the right to engage in collective bargaining.

1.5 Research Methodology

⁶¹ Note 22 above, 13.

⁶² KJ Selela, "The Right to Strike and the Future of Collective Bargaining in South Africa: An Exploratory Analysis" (2014) 3 *IJSS*, 5.

⁶³ *Ibid.*

⁶⁴ Section 65(1) of the LRA provides: (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if – (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration; (c) the issue in dispute is one that a party has the right to refer to arbitration or to Labour Court in terms of this Act; (d) that person is engaged in – (i) essential service; or (ii) maintenance service.

⁶⁵ Note 62 above, 5.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

This research will rely on desktop research and the sources of information to be consulted will include the labour legislation, the Constitution, relevant legal texts, cases, journal articles, and international instruments such as the International Labour Organisation conventions. A comparative analysis of the interpretation of the right to strike in other jurisdictions such as Botswana, New Zealand, USA, Australia and Canada will be conducted. No empirical research will be conducted on the subject.

1.6 Research Outline

The research spans seven chapters including this one. Chapter 2 will explore the purpose of collective bargaining with specific reference to industrial action in detail. An assessment of collective bargaining and its effectiveness will be conducted both under the old labour legislation as well as under the current labour legislation. Consideration will be given on the advantages and disadvantages of the introduction of the new labour legislation in relation to as collective bargaining, with specific reference to industrial action.

Chapter 3 will focus on the justification and effectiveness of the procedural restrictions in respect of industrial action, such as the requirement of a notice prior to embarking in industrial action. An assessment will be conducted to determine whether this requirement assists in curbing the propensity of strikes in the labour industry. Historical developments leading to the inclusion of the requirement of prior notice of industrial action in the LRA, will be discussed.

Chapter 4 will explore the characteristics of recent unprocedural strike actions in South Africa. Reference will be made to various incidents wherein unprocedural strike actions played out in, amongst others, the Marikana Massacre, the Amplats, Gold Mine strike and Farm Workers strike. Furthermore, it will be shown that it is mainly because of strike actions such as these that a re-evaluation of our collective bargaining laws is necessary.

Chapter 5 will discuss the role of the Labour Court in relation to strike actions as contemplated by the LRA. An assessment of how the courts have interpreted the right to strike will be considered. This will be achieved through an analysis of judicial decisions dealing with violent strikes. A further assessment will also be conducted on the co-operation

between the trade union leadership and the courts, if any, where orders by the courts requiring compliance from the unions have been made. This will talk to the trend of interdicts granted by the courts and how these orders have been perceived by the striking workers.

In Chapter 6 the International Law Organisation Principles on the right to strike will be discussed. Selected foreign countries will form the basis of a comparison of the limitations on the right to strike. Reference will be made to the statutory provisions of these countries dealing with limitations on their right to strike. The idea in referring to such statutory provisions is not to state what the legal position is in such countries, but to show what provisions such statutes contain, and which of those can be of assistance when incorporated in our Labour legislation so as to better regulate the right to strike in our country. The foreign states that I will use in my comparative assessment are Botswana, Namibia, New Zealand, USA, Australia and Canada and the UK, to mention a few.

In Chapter 7, concluding remarks and recommendations for the re-evaluation of the right to strike will be made. Furthermore, it will be recommended that a secret ballot would be of assistance in our country. It will also be shown that the introduction of a secret ballot alone will, however, not address the unprotected and violent strike problem. I will show that incorporating the statutory provisions of the foreign states that contain limitation provisions, as identified in Chapter 6, South Africa can adopt similar provisions that could curb the unprotected strikes in South Africa.

CHAPTER 2: COLLECTIVE BARGAINING

2.1: Introduction

Collective Bargaining is the process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation.⁶⁸ The process of collective bargaining involves the making of demands, and compromises in order to reach agreement on the issue in dispute.⁶⁹ Collective bargaining is a process of constructive engagement between employees (usually led by a trade union) and the employer for the purpose of settling disputes between them. In *Metal & Allied Union v Hart Ltd*,⁷⁰ a distinction was made between ‘consultation’ and ‘bargaining’ with the intention to distinguish between the two terms. It was held that:

“to consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take.”⁷¹

It was also held that ‘the term ‘negotiate’ is akin to bargaining and means to confer with a view to compromise and agreement’.⁷² Prior to 1979, the applicable legislation was the Labour Relations Act of 1956. It was facilitative rather than prescriptive⁷³. This means that it contained no rigid or narrow provisions. Rigid or narrow provisions are provisions that are inflexible or constricted. It contained alternatives to situations that were not favourable in certain circumstances or for purposes of race relations in the workplace, rather than providing largely restrictive provisions with no exceptions. For example, before 1979 trade unions that recruited and accepted black workers as members of their unions were excluded from

⁶⁸ J Grogan, *Workplace Law* 9ed (2010))353.

⁶⁹ Ibid.

⁷⁰ *Metal & Allied Workers Union v Hart Ltd* 1985 (6) ILJ 478 (IC)

⁷¹ Ibid493H.

⁷² Ibid 493 I.

⁷³ E Cameron, H Cheadle & C Thompson *The New Labour Relations Act* 1989, 7.

statutory forums such as the bargaining forums for employers and their associations. However, these unions negotiated directly with employers and concluded what became known as ‘recognition agreements’. In terms of such agreements a trade union and an employer regulated their mutual interests much in the same way as an industrial council does through its constitution. ‘A recognition agreement established and formalised the relationship between the employer and a union like a collective agreement would do. These agreements typically contained provisions in which the employer would recognise a union’s bargaining entitlement for a particular bargaining unit, and which would regulate how collective bargaining should take place.’⁷⁴ The 1956 Act was premised on the view that the workplace belongs to and is governed by the employer (subject to a requirement that workers should be treated fairly),⁷⁵ whereas the current LRA introduces a wholly different paradigm⁷⁶. It regards the worker as an ‘industrial citizen’ who is entitled to enjoy rights and freedoms in the workplace⁷⁷. The changes to the law regulating collective bargaining confirmed the power of the court to pronounce upon bargaining rights⁷⁸. As an example, the Industrial Court, amongst other things, was not empowered to restrain the commission of unfair labour practices as it had no jurisdiction over unfair labour practices.⁷⁹ The Labour Courts, now under the LRA, have exclusive jurisdiction to grant an interdict or order to restrain⁸⁰ where the employer or employees exercise their bargaining rights in a manner that is not recognised by applicable labour legislation. These bargaining rights may be rights exercised by either party as available to them in terms of collective bargaining, for example the right to embark on industrial action by the employees or the right to lock-out by the employer. The LRA currently provides for collective bargaining in three statutory forums: Bargaining Councils,⁸¹ Public Service in Coordinating Bargaining Council⁸² and Statutory Councils.⁸³ The LRA

⁷⁴ Grogan J (note 68 above)370.

⁷⁵ B Jordan, *Collective Bargaining under the New Labour Relations Act: The Resurrection of Freedom to Contract*, 2009,1.

⁷⁶ Ibid 1.

⁷⁷ Ibid 1.

⁷⁸ Cameron, H Cheadle & C Thompson (note 73 above) 7.

⁷⁹ E Cameron, H Cheadle & C Thompson 48.

⁸⁰ Section 157 (1) and section 158 (1) of the LRA.

⁸¹ Section 27 of LRA.

⁸² Section 36 of the LRA

⁸³ Section 39 of the LRA.

recognises collective bargaining in terms of non-statutory arrangements by way of collective agreements. These collective agreements must, however, comply with the statutory obligations of the LRA. Within collective bargaining and as an integral part thereof, there is what is known as industrial action. Industrial action is an integral part of collective bargaining because it is fundamental to the bargaining process as it puts the employer and the employee in a state of equilibrium.⁸⁴ This means that the employer and employee have equal bargaining rights in the workplace as provided for by the LRA. The strike action enables the employees to put economic pressure on the employer by withholding their labour. Equally on the other hand economic pressure is placed on the employees by the principle of “no work no pay” which applies during strike action whether it is protected or not.⁸⁵

2.2 Purpose of Industrial Action as part of Collective Bargaining

Collective bargaining has been defined as ‘a voluntary process for reconciling the conflicting interests and aspirations of management and labour through the joint regulation of terms and conditions of employment.’⁸⁶ There are two main purposes of collective bargaining:

Firstly, collective bargaining aims to regulate terms and conditions of employment; and secondly has the purpose of being an avenue for the resolution of disputes.⁸⁷ The LRA legislates and enforces these two purposes of collective bargaining through providing a framework for collective bargaining and promoting collective bargaining.⁸⁸ The LRA grants trade unions a fixed list of rights such as the access to employer’s premises and the right of employees to join and participate in trade union activities.⁸⁹ But beyond these the legislature has left it to the parties to decide how their bargaining relationships are to be structured. In other words, the LRA seeks to secure only the means of collective bargaining, without prescribing, or empowering the courts to prescribe, how these means should be exercised.

⁸⁴ P Davies & M Freedland *Kahn-Freund’s Labour and the Law*, 3ed, (1983) 292.

⁸⁵ Ibid 292.

⁸⁶ A Rycroft & B Jordaan, *A Guide to South African Labour Law*, 2ed, (1992) 116.

⁸⁷ A Basson, SR Van Jaarsveld and others, *Essential Labour Law Vol 2* (2003) 35, 55.

⁸⁸ S Van Jaarsveld & B Van Eck, *Principles of Labour Law*, 1998, 146.

⁸⁹ Section 4 (1) (a) and (b) of the LRA.

These goals were reiterated in the case of *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another*⁹⁰ where it was held by the Constitutional Court that the LRA sought to provide a framework whereby both employers and employees and their organisations could partake in collective bargaining and the formulation of industrial policy and that it sought to promote orderly collective bargaining.⁹¹ The processes of collective bargaining endorsed by both the 1956 Act and the LRA will be considered below to show that both these pieces of legislation shared the same purpose of collective bargaining, despite the new reforms and innovations initiated by the LRA, which will also be briefly discussed in this chapter.

When the process of collective bargaining does not yield the desired outcome (for instance where the employer says ‘no’ to the employees’ demands), the trade unions often opt for industrial action and in most cases this will take the form of strike. To constitute industrial action in the form of a strike, the refusal to work must be ‘for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee’.⁹² Either a grievance or a dispute must therefore exist before workers can be deemed to be on strike, and strikers must intend their action to remedy or resolve that grievance or dispute. In opting for industrial action in the form of a strike, employees would normally engage other employees in the workplace and demonstrate their demands or grievances by getting together in one point and downing the tools. In most cases employees would even disrupt the running of the business and this would normally be associated with violence in certain circumstances.

⁹⁰ *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (2) BLLR 103 (CC).

⁹¹ Ibid 13.

⁹² J Grogan *Workplace Law*, 9ed, (2007) 380.

2.3: Industrial Action as part of Collective Bargaining under the Labour Relations Act of 1956

Industrial action as part of collective bargaining under the 1956 Act will be discussed in this section. It will establish how the previous Act regulated industrial action with the aim of comparing it with the current regulation under the LRA.

There is no doubt that for collective bargaining to be successful the parties involved need to be cooperative and reach a common ground favourable to both parties. As Grogan states:

A collective bargaining system can work only where the participating parties are looking towards a particular incentive which they intend to agree upon. Collective bargaining in other words is successful where the participating parties have a mutual interest which will inform the intended agreement. The capacity of the parties to underpin their negotiating stances with potential resort to industrial action constitutes the mutual incentive.⁹³

The research in this chapter will, in light of the above, establish the purpose of collective bargaining and its effectiveness. The purpose and effectiveness thereof is discussed both under the 1956 Act and the LRA. Strike action is the most important weapon within the collective bargaining framework because it compels the employer to consider even the powerless employees' grievances and/or demands. When the employees embark on a strike action, the employer is placed under economic pressure by virtue of employees withholding their labour. Therefore, the employer is forced to consider their grievances. This is a weapon that even unrepresented employees in the workplace could use in order to attract the attention of the employer to consider their grievances.

The Labour Relations Act No. 28 of 1956 (hereinafter referred to as "the 1956 Act") was introduced to regulate collective bargaining in the workplace. The provisions dealing with industrial action as part of collective bargaining will be discussed herein and the intention is to establish how the provisions regulated industrial action under the 1956 Act.

⁹³ Ibid.

The 1956 Act provided striking workers with immunity from prosecution⁹⁴ and immunity from delictual or contractual liability when embarking on industrial action.⁹⁵ However, strike action was not forbidden by s 65. This research will argue and partly concur with Barney Jordan's conclusion and recommendations, that even though the right to strike in the mining sector has mostly turned violent, the intervention of the state and its organs cannot really solve the problem as the problem is statutory in nature and calls for revision of the current LRA provisions on industrial action.⁹⁶ The 1956 Act provided for substantive limitations, such as s 65 proscribing the freedom to strike which did not apply to all employees and which criminalised those responsible for striking before using the statutory dispute resolution procedures. Giving effect to the aforementioned, the substantive limitations of s 65 of the 1956 Act provided that:

no employee or other person shall instigate a strike or incite any employee to take part in or to continue a strike or take part in a strike or in the continuation of a strike, and no employer or other person shall instigate a lock-out or incite any employer or other person to take part in or to continue a lock-out or take part in a lock-out or in the continuation of a lock-out- during the period of the currency of any agreement, award or determination which in terms of this Act is binding on the employees or employers who are or would be concerned in the strike or lock-out and any provision of which deals with the matter giving occasion for the strike or lock-out⁹⁷ ... or during the period of one year reckoned from the date of publication of a notice under section 14 (2) of the Wages Act, 1957 (Act No 5 of 1957), in respect of a determination made under that Act, which is binding upon the employees or employers who are or would be concerned in the strike or lock-out, and any provision of which deals with the matter giving occasion for the strike or lock-out.⁹⁸

In quoting this section, the intention is to show that in terms of s 65 of the 1956 Act, as stated above, no one was entitled to embark on a strike whilst an agreement or award which was binding on the employees or the employer was in subsistence. An agreement or award

⁹⁴ Section 65 of the Labour Relations Act No. 28 of 1956.

⁹⁵ Section 79 of the Labour Relations Act No. 28 of 1956.

⁹⁶ Ibid.

⁹⁷ Section 65 (1) (a) of the Labour Relations Act No. 28 of 1956.

⁹⁸ Section 65 (1) (b) of the Labour Relations Act No. 28 of 1956.

binding the parties was a limitation and any employee or employer who was involved in a strike or furtherance or continuation thereof, would not be covered by immunity from prosecution or delictual action provided by the section.

Further s 65 (2) (b) of the 1956 Act stipulated that:

no trade union or employers' organisation and no office bearer, official or member of such union or organisation shall call or take part in any strike or lock-out by members of the union or organization, unless the majority of the members of the union or organization in good standing in the area and in the particular undertaking, industry, trade or occupation in which the strike or lock-out is called or the taking part in the strike or lock-out takes place, have voted by ballot in favour of such action after a report has been made to the Director General.⁹⁹

In terms of this section no strike would take place without having been preceded by voting through a secret ballot. All members in good-standing would partake and the decision of whether the strike should take place would be determined by the result of votes cast.

Section 65 (2) (b) of the 1956 Act was seen as further limitation and the deciding factor in respect of whether the industrial action in the workplace would qualify as protected. Employees could not embark on a strike if no voting was conducted by way of a secret ballot, before the strike action was commenced. The possibility of a strike would be determined solely by this process and if only the minority of the employees voted in favour of the strike, the intended strike would be prohibited.

It is clear in terms of this provision that a ballot was a prerequisite for a strike. This was emphasised in *SACWU v Sentrachem*¹⁰¹ where it was stated that in the ordinary course it would make no sense to provide for the taking of a ballot in respect of the area in which the strike has actually occurred as a matter of fact. If this would be permissible it would be an indication of the fact that a strike which is illegal by virtue of being premature, may be legalised by a subsequent ballot of those participating in it. This case applied to s 65 in that a

⁹⁹ Section 65 (2) (b) of the Labour Relations Act 28 of 1956.

strike in the workplace should be preceded by the ballot which is the determining factor as mentioned above. A strike therefore, cannot be permissible if it was not preceded by a ballot as that strike would not have been determined through the prerequisite of ballot as provided by s 65. A ballot that would take place after the occurrence of the strike would be illegal as it occurred without being permitted through the outcome of the ballot. The subsequent ballot would be legitimising the illegal strike which lacked the ballot prerequisite.

In *Rainbow Chicken Farms (Pty) Ltd v FAWU*¹⁰⁰ the court ruled that the strike was prohibited, since the issue in dispute was regulated by a collective agreement that provided for arbitration as a private dispute settlement process, and this route was still open as it had not yet been pursued prior to embarking on industrial action. The union overlooked the agreement in place, upon which they were bound. Besides this transgression the strike ballot was not properly conducted prior to embarking on an industrial action. It was judicially confirmed that a pre-strike ballot had to be proper, and it was also one of the points of procedural compliance necessary in order to make the strike legal.¹⁰¹ The employer had locus standi to enforce compliance and was provided with an order interdicting the strikes on the basis that the ballot procedures were defective. The employees in this case had not complied with the agreement upon which they were bound. They failed to conduct a proper pre-strike ballot process. It is as a result of this case among others that caused the ballot provision to be left out in the LRA. The strike in terms of the 1956 Act was defined widely to cover virtually all forms of collective, concerted worker pressure on the employer with the purpose of enforcing a demand connected with the employment relationship.¹⁰² The function of a strike was essentially explained as an attempt to break a deadlock situation in negotiations over such matters as collective agreements.¹⁰³ However, disproportional harmful strikes would normally attract the court's intervention. Disproportional strikes are strikes which are characterised by violence and which end up being harmful to the participants and other innocent parties. These were strikes which did not comply with the 1956 Act and did not take into account the

¹⁰⁰ *Rainbow Chicken Farms (Pty) Ltd v FAWU* (1997) 8 BLLR 1081 (LC).

¹⁰¹ Ibid.

¹⁰² M Fouche, JV du Plessis & others *A Practical Guide to Labour Law*, 8ed, (1994) 299.

¹⁰³ H Cheadle and others *Current Labour Law* (1997) 23.

substantive limitations provided by s 65 as discussed above. These strikes resulted in violence and were harmful to the employer. They would therefore, be illegal, as they would contain violence resulting in harming the employers running of business.¹⁰⁴ Employees would be dismissed for having participated in such strike actions. The elements which characterised the existence of a strike, are derived from a breakdown of the definition ‘strike’, which consisted of (i) a cessation of work, (ii) through collective action of employees with a common purpose, (iii) accompanied by a demand to induce or compel the employer or a secondary employer to agree with or accept the proposals of striking employees.¹⁰⁵ The courts began to consider inter alia the fairness of the dismissal of striking employees. The principle that employees who had been dismissed for participation in a protected strike could be re-instated, was accepted in an early matter, *MAWU v Stobar Reinforcing (Pty) Ltd*¹⁰⁶ in which dismissals relating to go-slow were considered.¹⁰⁷ It is significant that the court was able to intervene to remedy infringements of the rules of collective bargaining. It is significant that both strikes and lockouts were brought into the scope of the definition, until the 1991 amendments excluded strikes and lock-outs. The court’s jurisdiction over unfair labour practices evidently filled the vacuum that existed in strike law, where it was, for instance, silent on matters such as unlawful but otherwise legitimate and fair strike action.¹⁰⁸ The court could be able to develop the fairness concept, to the extent that conduct which would otherwise be entirely lawful, could still be unfair.¹⁰⁹ The introduction of the unfair labour practice jurisdiction gave rise to a situation where the lawfulness or legality of a party’s actions was not conclusive of the matter since the disputing party was able to secure relief on the basis that such conduct was unfair.¹¹⁰ It has also been held that participation in an unlawful strike did not preclude the dispute giving rise to that strike being categorized as resulting from an alleged unfair labour

¹⁰⁴ E Cameron, H Cheadle & C Thompson *The New Labour Relations Act* (1989) 16.

¹⁰⁵ A Rycroft & B Jordaan (note 86 above) 280.

¹⁰⁶ *MAWU v Stobar Reinforcing (Pty) Ltd* (1983) 4 ILJ 84 (IC).

¹⁰⁷ Reinstatement was also considered in *Die Raad Van Mynvakbonde v Die Kamer Van Mynwese van Suid Afrika* (1984) 5 ILJ 344 (IC); *MWASA v Argus Printing and Publishing Company Ltd* (1984) 5 ILJ 16 (IC).

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

practice on the part of the employer, enabling the court to retain its jurisdiction to hear the application.¹¹¹

2.3.1: The legal strike under the 1956 Act

The substantive requirements for protected strike action under the 1956 Act required that where industrial action occurred in conformity with the provisions of the Act, three sets of legal consequences would follow:

Firstly, such action would not attract any criminal liability;¹¹² secondly, both the action itself as well as associated conduct would not be actionable at common law because of the immunity introduced by s 79 (1); and thirdly, the legality of an act would be relevant in assessing its legitimacy for the purposes of the unfair labour practice jurisdiction.¹¹³

The legal dispute procedure or process following a deadlock at the workplace over a rights or interest dispute¹¹⁴ was to proceed to conciliation at a Department of Labour Conciliation Board, applicable bargaining council, or another forum in terms of a binding collective agreement.¹¹⁵ If the dispute remained unresolved, or upon the cessation of s 45 arbitration proceedings,¹¹⁶ the employees could embark on strike action. It remained an option for a party to invoke a separate procedure) for urgent interim relief on 48 hours' notice to the opposing party, in terms of s 17 (11) (Aa). This provision gave the court power to urgently grant an interdict or any other order in the case of any action prohibited in terms of s 65, or other interim relief, in terms of s 17 (11) read with s 43 or 46 of the 1956 Act. If a dispute remained unresolved employees could embark on a strike provided all the substantive and procedural requirements had been complied with. If the requirements were not met, the other party had a

¹¹¹ *Natal Die Casting Co (Pty) Ltd v President, Industrial Court* (1987) 8 ILJ 245 251 B.

¹¹² Section 65 (3) of the LRA.

¹¹³ E Cameron, H Cheadle & Clive Thompson (note 104 above) 86.

¹¹⁴ Such as union recognition, wages, interpretation of collective agreement.

¹¹⁵ E Cameron, H Cheadle & Clive Thompson (note 101 above) 86.

¹¹⁶ In terms hereof, the Industrial Council or Conciliation Board would decide that any dispute which has been considered by that Industrial Council or Conciliation Board be referred for arbitration.

remedy which it could invoke in terms of s 17 (11) of the 1956 Act. In terms of this remedy any strike action which was not in compliance with the legal requirements could be urgently interdicted.

Other applicable provisions pertaining to lawful strikes were the “golden formula” or triad of protections.¹¹⁷ These provisions were contained in s 65; s 79 which conferred a general immunity; the court’s protection of strikers from dismissal by virtue of its unfair labour practice jurisdiction;¹¹⁸ and participation in strikes substantially in compliance with section 65.¹¹⁹ Section 65 required that the union give notice of strike in terms of s 65 (1) (d) (i) and (ii). A strike ballot would then be conducted in terms of s 65 (2) (b), which held that members of the trade union who were of good standing would vote. A strike would then commence, which would only be lawful, if there had been a majority vote by secret ballot of union members in good standing. The reason for the strike had to be the same as the reason for the dispute arising in the first place.¹²⁰ It was an offence to call or take part in a strike if the parties belonged to an industrial council whose constitution provided for arbitration of an unresolved dispute.¹²¹ In respect of illegal strikes, a further procedure developed in judge-made law, requiring an employer to issue an ultimatum,¹²² and then to conduct pre-dismissal hearings before taking the final decision to dismiss.¹²³ The 1956 Act did not contain any express provisions governing the dismissal of legal strikers¹²⁴ and such cases were dealt with under the unfair labour practice jurisdiction of the Industrial Court.

¹¹⁷ M Brassey, E Cameron, H Cheadle & M Olivier, *The New Labour Law: Unfair Labour Practice in South African Law* (1987) 79.

¹¹⁸ Section 43 (4) & s 46 (9) of the LRA.

¹¹⁹ M Brassey, E Cameron, H Cheadle & M Olivier (note 117 above) 79.

¹²⁰ M Fouche *A Practical Guide to Labour Law* 8ed (1994) 302.

¹²¹ S65 (2) of the 1956 Act.

¹²² Discussed below at 3.3 ‘Illegal Strikes’.

¹²³ *NTE Ltd v South African Chemical Workers Union and others* (1990) 11 *ILJ* 43 (N).

¹²⁴ H Cheadle & others *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 22.

2.3.2 *The illegal strike under the 1956 Act*

A strike not in compliance with s 65 of the 1956 Act was illegal in status, meaning that it was a strike not recognised in terms of the Act as it contravened the prerequisites of industrial action as provided for by s 65.

The court distinguished between legal and illegal strikes in *SA Chemical Workers Union v Sentrachem Ltd*¹²⁵. Some of the illegal strikes were termed ‘wildcat strikes’.¹²⁶ A ‘wildcat strike’ would be any strike which the trade union has lost control of and which has become associated with violence and intimidation which ends up taking the form of criminal behaviour.¹²⁷ An illegal wildcat strike occurred when workers broke ranks with the union in *NUMSA, Wewe and 36 Others v Fry’s Metals (Pty) Ltd*¹²⁸ and they were subsequently dismissed. A wild cat strike conducted independently of the union constituted a form of illegal and interdictable strike under the 1956 Act. This meant that any strike that was conducted outside the parameters of a registered union within the workplace was not recognised and therefore, illegal. On the other hand, it goes without saying that a legal strike would be one which takes place in the name of the registered union and within its ranks. Furthermore, that strike would have to comply with the prerequisites of industrial action as stipulated by section 65. Grogan¹²⁹ stated that the legality of industrial action should not be determined by reference to contractual obligations and possible prejudice to individuals, only, but also to public policy considerations and the intention of the legislature. This statement holds true of the new dispensation introduced to strike law in 1995. The legality of industrial action under the new constitutional dispensation cannot be solely dependent on the on collective agreements or any other contractual agreements in place which bind the parties. The Constitution and other legislation such as the Regulation of Gatherings Act No. 205 of 1993 (hereinafter referred to as the RGA) which gives effect to the right to strike, cannot be overlooked in determining the legality of a strike. This legislation, without necessarily stating

125 SA Chemical Workers Union v Sentrachem Ltd (1988) 9 ILJ 410 (IC).

126 E Cameron, H Cheadle & C Thompson *The New Labour Relations Act* (1989), 86.

127 Ibid 86.

128 NUMSA, Wewe and 36 Others v Fry’s Metals (Pty) Ltd (1991) (12) SA 31 (IC).

129 J Grogan “The Legal Status of Overtime Bans” (1988) 105 SALJ 655,662.

the prerequisites, gives guidelines on how a legal strike should be conducted. Of particular importance is that the preamble of the RGA requires that when people gather with the intention to march or demonstrate they must do so peacefully and in a manner that will not infringe other people's rights. The law therefore should serve as secondary force regulating the conduct of parties, while collective bargaining should be the primary and desired means of resolving workplace disputes. It therefore follows that strikes which are functional to collective bargaining deserve protection since it encourages trade unions to comply with the procedures or principles promoted by the Act.¹³⁰

2.4 Industrial Action as part of Collective Bargaining under the Labour Relations Act 66 of 1995

The state of collective bargaining in our country has reached a very robust level and this can be witnessed by the prevalent strikes that have taken place in the mining sector recently with specific reference to the Marikana and Gold Fields strikes. The unions have in some cases resorted to industrial action in almost all sectors of employment in South Africa.

The preamble and s1 of the LRA states that its purpose inter alia, is to give effect to s 23 of the Constitution¹³¹ Section 23 of the Constitution includes reference to the right to fair labour practices and at s 23 (2) (c), the right to strike. Section 3 of the LRA states that 'any person applying this Act must interpret its provisions to give effect to its primary objectives, in compliance with the Constitution, and in compliance with the public international law obligations of the Republic'. Section 23 of the Constitution states that 'every employee has a right to fair labour practice'. Further it affords the employees with the right to strike. The LRA through s 3 as indicated above, is required to give effect to s 23 of the Constitution. It is therefore, clear that industrial action as part of collective bargaining, is derived from and has its rationale in the Constitution.

130 M Brassey, E Cameron, H Cheadle & M Olivier, *The New Labour Law: Unfair Labour Practice in South African Law* (1987) 261.

131 1996 Constitution.

Chapter IV of the LRA regulates industrial action and builds upon the pre-existing strike law, which is transformed so as to bring it in line with the Constitution, and relevant ILO standards.¹³² To mention a few, the ILO Standards regarding the right to strike, as provided by the Committee of Experts and by the Committee on Freedom of Association, are that “the right to strike is a fundamental right, provided that the right is exercised in a peaceful manner’ and that ‘a general prohibition of strikes can only be justified in the event of an acute economic, national emergency and for a limited time.”¹³³ The ILO Standards will however, be discussed in chapter 6 below.

2.4.1 Reforms and innovations

The LRA recognises the right of employees to engage in industrial action. The right to strike is an essential part of industrial action and is a fundamental right which is entrenched in the Constitution.

It is important to make mention that out of all the key legislative changes brought by the LRA in relation to the regulation of industrial action; the definition of strike has not been altered from the definition contained in the 1956 Act. The legislative changes will be indicated below. They will be discussed in detail in the following chapter.

Key legislative changes that distinguish the LRA from the 1956 Act in respect of strike law include the following:

Firstly, the introduction of advisory arbitration award as a pre-strike requirement in respect of a dispute concerning a refusal to bargain has been inserted.¹³⁴ In terms of the advisory arbitration insertion, the party intending to embark on industrial action as a pre-strike requirement, is required to refer the issue in dispute for conciliation to a bargaining council

¹³² Chapter IV of the LRA.

¹³³ The core labour standards consist of five standards, laid out in ILO Conventions and these are: Freedom of association and the effective recognition of the right to collective bargaining (Convention No. 87 & No. 98); The elimination of all forms of forced and compulsory labour (Convention No. 29 & No. 105); The effective abolition of child labour (Convention No. 138 & No. 182); The elimination of discrimination in respect of employment and occupation (Convention No. 100 & No. 111).

¹³⁴ Section 143 of the LRA.

having jurisdiction or, if there is no such bargaining council, to the CCMA.¹³⁵ The employees may not strike until the council or the commissioner has issued an arbitration award which the parties ought to comply with, or until the council or commissioner has certified that the parties have been unable to resolve the dispute,¹³⁶ or if 30 days have passed since the date of referral,¹³⁷ whichever occurs first. This is meant to assist the parties to try and find a way of achieving resolution of their disputes. It can also be seen as means to prevent a dispute from resulting in a strike whereas the issue that the aggrieved party is striking for could have been resolved by finding common ground between the parties. Secondly, strikers now enjoy indemnity from criminal prosecution in respect of protected strike action.¹³⁸ When the union embarks on a protected strike the members are automatically indemnified from criminal prosecution. The indemnity will, however, be removed when the strike turns violent.¹³⁹ The research in Chapter 4 will discuss in detail violent strike action which lacks indemnity from criminal prosecution. Participation in or conduct in furtherance of a strike or lock-out under certain circumstances, will deprive strikers of protection. This will be in situations where the participation or conduct in furtherance of a strike is not in compliance with the limitations that ought to be complied with prior to embarking on a strike action. Thirdly, innovations include the removal of the ballot as a factor affecting the legality of a strike or lock-out;¹⁴⁰ the recognition and regulation of picketing, strikes and protest action; and the introduction of “minimum” services.¹⁴¹ The unfair labour practice jurisdiction of the court in respect of strikes and lock-outs was abolished. Under the 1956 Act the Labour Court had a jurisdiction on unfair labour practice matters to determine what was meant by unfair labour practice and whether a particular strike or lock-out fell within the ambit of unfair labour practice. This is no longer the position under the LRA. The LRA now provides a clear definition of unfair labour practice and categorizes what falls under unfair labour practice. Section 64 to 77 in

¹³⁵ Section 64 (1) (a) of the LRA.

¹³⁶ Section 64 (1) (a) (i) of the LRA.

¹³⁷ Section 64 (1) (a) (ii) of the LRA.

¹³⁸ J Grogan, *Workplace Law*, 9ed (2010) 396.

¹³⁹ *Ibid* 396.

¹⁴⁰ Strike ballots are now an internal requirement in terms of the Trade Union Rights in the LRA which may include ballots conducted for workplace forum activities or to vote for the dissolution thereof. Guidelines on balloting regarding closed shop agreements were promulgated by notice 903 in GG 18926 of 1998-06-05.

¹⁴¹ D Du Toit *Labour Relations Law*, 5ed (2006) 223.

Chapter IV of the LRA contains provisions regulating the right to strike and recourse to lock-out, and prescribes the procedures¹⁴² to be complied with prior to exercising the right to strike or recourse to lock-out.¹⁴³ Section 68 and 76 respectively, govern compliant strikes or lock-outs, and the legal consequences of strike or lock-out not in compliance with the LRA.

2.4.2. Protected strikes in terms of the LRA

Protected strikes are those which comply with the provisions of s 64, 65 and 67 in Chapter IV of the LRA. These sections impose procedural requirements and substantive limitations on strike action. For a strike to be proper and in compliance with the definition of 'strike' in terms of the LRA, the following elements must be present:¹⁴⁴ There must be a work stoppage;¹⁴⁵ by a number of employees;¹⁴⁶ for the purpose of remedying a grievance or resolving a dispute;¹⁴⁷ and the issue in dispute must be a matter of mutual interest between employer and employee.¹⁴⁸ The procedural requirements must be complied with before the strike will be protected. The procedural requirements include that the dispute must be referred for conciliation, that proper notice of the commencement of a strike or lock-out be given,¹⁴⁹ and when the disputes relates to a refusal to bargain, that an advisory arbitration order be issued prior to the commencement of the strike action.¹⁵⁰ In terms of s 64 (1) (a), the issue in dispute is referred either to a bargaining council or to the CCMA for conciliation. Failing settlement, a certificate of outcome is issued, or a period of 30 days from the date of referral of the dispute must elapse. It is only then that the employees can embark on a strike action provided they have issued the 48-hour written notice to the employer. At least 48 hours written notice of commencement of strike action must be given to the other party in terms of s

¹⁴² 48 hour's notice of the commencement of strike or lock-outs.

¹⁴³ These procedures were confirmed in *Ceramic Industries t/a Beta Sanitaryware v National Construction, Building and Allied Workers Union (2) (1997) 18 ILJ 399 (LC)*.

¹⁴⁴ J Grogan (note 138 above)327.

¹⁴⁵ Ibid 137.

¹⁴⁶ Ibid.137.

¹⁴⁷ Ibid.137.

¹⁴⁸ Ibid.137.

¹⁴⁹ Section 64 (1) (b) and (c) of the LRA.

¹⁵⁰ Ibid384.

64 (1) (b).¹⁵¹ Striking is permissible only after notice is given and as discussed above, and notice of proposed strike should be given to the employer.¹⁵² If the employer is a member of an employer's organisation that is a party to the dispute, the employer is required to give notice to the organisation.¹⁵³ If the issue in dispute relates to a collective agreement to be concluded in a bargaining council, Section 64 (1) (b) (i) stipulates that such notice must be given to that council. Advisory arbitration is required if the issue in dispute concerns a refusal to bargain.¹⁵⁴ Section 64 (2) requires that a commissioner must make an advisory award before notice of the proposed industrial action is given in terms of s 64 (1) (b).¹⁵⁵ In the event of an employer failing to comply with a "status quo" notice in terms of s 64 (3) (e), the employees may dispense with statutory procedures and immediately go out on strike,¹⁵⁶ or they or their trade union can apply for an interdict in the Labour Court to enforce compliance.¹⁵⁷ This also means that the referral must have been sent directly to the employer.

When comparing the substantive limitations created by both the 1956 Act and LRA, it is clear that the substantive limitations in s 65 of the LRA are similar to those of s 65 of the 1956 Act, despite the absence of the ballot requirement. The substantive limitations on strike action will be discussed in Chapter 3 below.¹⁵⁸

2.4.3 Unprotected strikes under the LRA

The LRA provides incentives such as protection for compliant strike action,¹⁵⁹ in an effort to reduce the strikes. It does not prescribe criminal sanctions for unprotected strikes or protest action that does not comply with its provisions, save for instances such as contempt of court

¹⁵¹ Where the state is the employer the required notice period in terms of s 64 (1)(d) is 7 days.

¹⁵² Subject to s64 (b) (ii) of the LRA.

¹⁵³ Section 64 (b) (ii) of the LRA.

¹⁵⁴ Section 64 (2) and s 135 (3) (c) of the LRA.

¹⁵⁵ Section 135 (3) (c) of the LRA.

¹⁵⁶ This notice replaced the industrial court's power to make status quo orders under the 1956 Act, and regulates a dispute concerning a unilateral change to terms and conditions of employment referred to a council or the CCMA.

¹⁵⁷ Section 158 (1)(b) read with s 64 (5) of the LRA.

¹⁵⁸ D Du Toit *Labour Relations Law*, 5ed (2006) 245.

¹⁵⁹ J Grogan J, *Collective Labour Law*, 9ed (2007) 383.

proceedings.¹⁶⁰ The consequences of non-conforming or unprotected strike action include the following:

Firstly, the employer can make an application to the Labour Court to interdict and restrain unlawful conduct.¹⁶¹ This is a practical and important remedy available to the employer to get a court order which requires the employees to stop their strike action. Secondly, the employer may make a claim for compensation in respect of loss attributable to the strike, lock-out or related conduct.¹⁶² This claim can be instituted by an employer where his property has been damaged as a result of unprotected strike action by the union in the workplace; Thirdly, the employer can institute disciplinary action against unprotected strikers, since engaging in an unprotected strike is a form of misconduct. This is where an employee would be subjected to a disciplinary process to determine whether he or she is indeed guilty of misconduct and whether a dismissal would be justifiable in the circumstances.¹⁶³ Fourthly the employer can lock-out striking employees. This is where employees are denied access to the workplace.

In *Rustenburg Platinum v Mouthpiece Workers Union*¹⁶⁴ criteria for awarding and quantifying compensation were applied, and it was held that claims for losses must be based on loss from the strike itself, not for losses incurred by strikers conduct in furtherance of the strike.¹⁶⁵ In *County Fair Foods v FAWU*¹⁶⁶ the employer applied for an interdict to stop a strike by the union on the basis that it was unprotected, since they had failed to follow the procedure in a collective agreement. It was held that the union could elect to follow the collective agreement procedure or the statutory procedure in section 64 (1). It could be argued that this violates the doctrine of *pacta sunt servande*¹⁶⁷. The Labour Court found that the union's strike was illegal on the basis that they ignored the collective agreement to which they were a party and were

¹⁶⁰ Ibid.

¹⁶¹ Section 68 (1) (a) of the LRA.

¹⁶² Section 68 (1) (b) of the LRA.

¹⁶³ J Grogan, *Workplace Law*, 9ed (2007) 94.

¹⁶⁴ *Rustenburg Platinum v Mouthpiece Workers Union* (2002) 1 BLLR 84 (LC).

¹⁶⁵ S 68 of the LRA was subsequently amended in 2002 to include claims relating to conduct in furtherance of a strike or lock-out.

¹⁶⁶ *County Fair Foods v FAWU* (2001) 22 ILJ 1103 (LAC); *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA* (1998) 19 ILJ 279 279 (LC).

¹⁶⁷ This principle means that contracts and clauses are laws with binding force between parties and requires that every contracting party must keep his promise and fulfil his obligation.

therefore obliged to honour. The court further found that the union did not comply with the statutory procedure provided by the LRA in terms of section 64 (1).¹⁶⁸ Striking employees are protected against dismissal in terms of s 67 (4) if they comply with the s 64 requirements and other provisions in Chapter IV.¹⁶⁹ Employees dismissed for participating in a protected strike will succeed in a claim for an automatically unfair dismissal.¹⁷⁰ The unprotected striker may be disciplined on the basis of misconduct, and is also exposed to civil claims by the employers. However, unprotected strikers are also entitled to the right not to be unfairly dismissed in terms of s 185 of the LRA and to be fair the employer must comply with the ordinary requirements of fairness as well as the special considerations applicable to unprotected strike action as a form of misconduct. The principle reaffirmed in *TGWU v Coin Security Group (Pty) Ltd*¹⁷¹ is that participation in an unprotected strike is not sufficient to automatically justify the dismissal of strikers.

2.5 Conclusion

As far as the right to strike is concerned and through the comparison undertaken in this chapter, the most significant aspect of the LRA's protection of strike activity is that it is wider than that provided for under the 1956 Act,¹⁷² in the sense that the definition of a strike covers all forms of concerted activity aimed at remedying or resolving employment-related grievance and disputes, including a refusal to work voluntary overtime.¹⁷³ The purpose of industrial action as part of collective bargaining has also been discussed to show that the purpose is that of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee.¹⁷⁴ It has also been discussed that the right to strike is an important part of collective bargaining and that it is an effective and powerful bargaining tool for employees.¹⁷⁵ The differences between protected and unprotected strikes

¹⁶⁸ Section 64 (1) of the LRA.

¹⁶⁹ M Brassey, *Commentary on the Labour Relations Act* Vol 3 A4, (1999) 4.

¹⁷⁰ S 187 (1)(a) of the LRA.

¹⁷¹ *TGWU v Coin Security Group (Pty) Ltd* (2001) 4 BLLR 458 (LC).

¹⁷² E Cameron, H Cheadle & C Thompson *The New Labour Relations Act* (1989),7.

¹⁷³ Section 213 of the LRA.

¹⁷⁴ P Davies & M Freedland *Kahn-Freund's Labour and the Law*, 3ed, (1983) 292.

¹⁷⁵ *Ibid* 292.

both under the 1956 Act and the LRA as well as the legal consequences in relation thereto have also been canvassed in this chapter. In light of the case law that has been discussed, it transpires that the issue of illegal strikes and some which were termed as wildcat strikes, have always been evident in the workplace. There is also no evidence of any provision in the 1956 Act that could have better regulated the right to strike or to have tried curbing the occurrences of violent strikes in the workplace. The only provision which would be advisable to retain from the 1956 Act, in trying to find a solution to end the propensity of violent strikes in the workplace, is that which provided for a ballot requirement prior to embarking on a strike. This provision, however, cannot successfully curb the problem alone; other provisions from the foreign states' legislation, which will be discussed in chapter 6, would also need to be incorporated into our legislation. Chapter 6 will discuss these foreign provisions in detail.

In the next chapter, justification and effectiveness of the procedural restrictions in respect of industrial action, such as the requirement of a notice prior to embarking in industrial action, will be discussed to see whether the requirement assists in curbing the unprotected strikes in the mining industry.

CHAPTER 3: THE PROCEDURAL AND SUBSTANTIVE RESTRICTIONS

3.1 Introduction

This chapter will explore the procedural and substantive restrictions provided in terms of the LRA, prior to embarking on industrial action. To acquire the protection accorded by the LRA, all employees contemplating strike or protest action must follow the prescribed statutory procedure, unless different procedures are prescribed by any applicable collective agreement.¹⁷⁶ The statutory pre-strike procedure is set out in section 64 of the LRA. Substantive limitations per s 65 of the LRA will also be briefly discussed. One of the crucial procedural restrictions is the requirement that prior notice be given before a strike or lock-out is embarked on.¹⁷⁷ Special reference will be made to the ‘notice requirement’ with the intention of assessing whether this requirement has been effective in curbing the prevalent violent strike actions that have recently unfolded in the labour industry and especially in the mining industry. We have witnessed not only their high level of violence but strikes which have also culminated in a number of deaths of employees throughout the process. Historical developments leading to the inclusion of the requirement of prior notice of industrial action in the LRA, will be discussed. This discussion will be made in order to establish the circumstances in the workplace relating to industrial action, which as a result thereof, led to the introduction of the notice requirement by the Industrial Court. Industrial Court decisions will also be discussed in detail to establish the role and influence of courts in leading to the inclusion of the notice requirement. Historically the inclusion of prior notice was introduced through Industrial Court decisions and this chapter will therefore focus on the restriction provided by the LRA as well as on a discussion and analysis of these decisions.

Despite the influence the decisions of the Industrial Courts have had relating to the introduction of notice, two pieces of legislation were passed in 1993 providing for the inclusion of the notice requirement, requiring that a notice should be issued to the employer before a strike action is embarked on. These were the Education Labour Relations Act of

¹⁷⁶ J Grogan, *Collective Labour Law* 2ed (2007) 383.

¹⁷⁷ B-Israel *International Labour Standards: The Case of Freedom of Strike*, (1988)).

1993¹⁷⁸ (hereinafter referred to as “the ELRA”) and the Public Service Labour Relations Act of 1993¹⁷⁹ (hereinafter referred to as “the PSLRA”).

3.2 *The Substantive Limitations of the Right to Strike*

The LRA provides for circumstances in which employees may not engage in strike actions.¹⁸⁰ This section denies protection to employees who strike in circumstances which are specifically prohibited by the section.. The circumstances will be discussed in detail. Employees who strike despite being bound by a collective agreement prohibiting them from striking over the disputed issue, or which requires that the dispute be arbitrated, will be engaging in an unprotected strike.¹⁸¹ In *University v Botha Vista*¹⁸², the court held that the employees could not strike because they were bound by the collective agreement that prevented the issue in dispute from being the subject of the strike. The court reasoned that these employees were bound to this agreement despite having resigned from the union.¹⁸³ The reason for the court’s decision was that even though they had resigned from the union they were still employees in the work place and therefore the agreement was still applicable. The court relied on s 23 (1) (c) and 23 (2) of the LRA to reach its decision. In *South African National Security Employers’ Association v TGWU & others*,¹⁸⁴ the employer sought albeit unsuccessfully, to obtain an interdict against a strike in support of wage demands to be implemented after the expiry of a current agreement. The court held that in terms of s 65(3) (a) (i) the parties were bound by the terms of a collective agreement for the period that it is operative.¹⁸⁵ This simply meant that workers were free to strike about the terms of the next agreement, even though the current agreement was still in force. In this case employees had embarked on a strike for terms and conditions of an agreement that would operate after the

¹⁷⁸ Education Labour Relations Act 146 of 1993.

¹⁷⁹ Public Service Labour Relations Act 103 of 1993.

¹⁸⁰ Section 65 of the LRA.

¹⁸¹ Sections 65 (1) (a) and (b) of the LRA.

¹⁸² *University v Botha Vista 1997 (18) ILJ 1040 (LC)*.

¹⁸³ *Ibid.*

¹⁸⁴ *South African National Security Employers’ Association v TGWU & others [1998] 4 BLLR 1057 (LC)*.

¹⁸⁵ *Ibid.*

expiry of the agreement during which period they had embarked on a strike. The court refused the application for an interdict on the basis of section 65 (3) (a) (i) of the LRA.

Where employees strike in respect of an issue that can be referred for arbitration or to the Labour Court, that strike cannot be protected in terms of section 65.¹⁸⁶ According to Grogan this is certainly the most extensive limitation on the right to strike created by the LRA.¹⁸⁷ Under the 1956 Act, employees had the right to strike over disputes of rights or interests, however, under the LRA the right to strike over disputes of rights has been mostly prohibited thereby drawing a strict division between disputes that must be resolved by arbitration or adjudicated and those that can be resolved by industrial action, unless the parties have agreed that disputes of interest must be resolved by arbitration. This prohibition is consistent with the interim Constitution,¹⁸⁸ in terms of which the LRA had been drafted, which had confined the right to strike to ‘the purposes of collective bargaining’.¹⁸⁹ In relation to non-bargaining issues, the LRA provided only for ‘protest action’ in limited circumstances and subject to a stricter procedure.¹⁹⁰ The limitation on the right to strike was removed in s 23 (2) (c) of the final Constitution. It is however, pointed out by Cheadle¹⁹¹ that the ‘change in wording between the two constitutional texts is consistent with the approach taken by the ILO. The right to strike extends beyond its role in collective bargaining, to the right to strike over the social and economic policies that have a direct impact on the interests of workers’. The right to strike can be a method by employees to demand their socio-economic rights. This is especially relevant in the mining industry where living conditions of employees are not compliant with what the Mining Charter demands.

Section 65 (1) (c) however, has remained unchanged. This may be seen as a limitation on the right to strike that is not envisaged by the final Constitution.¹⁹² Cheadle argues that the

¹⁸⁶ S 65 (1) (c) of the LRA.

¹⁸⁷ J Grogan, (note 176 above)388.

¹⁸⁸ S 27 (4) of the Constitution of the Republic of South Africa Act 200 of 1993.

¹⁸⁹ D Du Toit & R Ronnie “The necessary evolution of strike law” (2012) *Acta Juridica* 195,208.

¹⁹⁰ See s 77 of the LRA; amongst other limitations, the right is limited to registered trade union or union federations, and 14 days” notice must be given to the National Development and Labour Council (NEDLAC).

¹⁹¹ H Cheadle e& Others (note 124 above)18-32(1).

¹⁹² D Du Toit & R Ronnie (note 189 above)208.

reasons for excluding the right to strike in the case of disputes of rights are well-known and he justifies this limitation with reference to the statutory objective of ‘labour peace’ and further argues that there is no need for industrial action where a legal remedy is provided.¹⁹³ Section 65 also disallows a strike in circumstances where employees are bound, for instance, by an arbitration award, ministerial determination or Basic Conditions of Employment Act¹⁹⁴ (hereinafter referred to as the “BCEA”) determination which regulates the disputed issue.¹⁹⁵ There are two related reasons according to Grogan¹⁹⁶ for denying protection to workers who strike over issues that have been determined by an arbitration award: ‘first, the dispute has been authoritatively finalised; second, the fact that dispute has been determined means that there is no longer a dispute over that issue’¹⁹⁷. This limitation is to a certain extent related to s 65 (1) (c) discussed above. The relation is that industrial action is prohibited in circumstances where the dispute can be referred for arbitration or where the dispute has been determined by an arbitration award or is regulated by the BCEA. Where employees are engaged in essential or maintenance services, they are prohibited from embarking on a strike.¹⁹⁸ Essential services are the Parliamentary Service, the South African Police Service and a service ‘the interruption of which endangers the life, personal safety or health of the whole or any part of the population’.¹⁹⁹ Workers are protected under the LRA only if they down tools for one of the purposes mentioned in the definition of a strike.²⁰⁰ It is the intention of this research to indicate that even after the development of such limitations in the LRA, violent strikes have been prevalent and that limitations of this nature, such as the notice requirement and in as far as what the notice contains, has not assisted in curbing the violent strikes that we have seen recently in the labour industry and more particularly in the mining sector.

¹⁹³ M Brassey, E Cameron, H Cheadle & M Olivier (note 130 above)18-36.

¹⁹⁴ Basic Conditions of Employment Act 75 of 1997.

¹⁹⁵ S 65 (3)(a) of the LRA.

¹⁹⁶ J Grogan, (note 176 above) 392.

¹⁹⁷ Ibid 392.

¹⁹⁸ Section 65 (1) (d) of the LRA.

¹⁹⁹ Section 213 of the LRA.

²⁰⁰ J Grogan, *Workplace Law*, 9ed (2010) 393.

3.3 Overview on General Procedural Restrictions

The LRA has put in place measures which employees contemplating industrial action must comply with in order for that industrial action to be legally recognised and protected. These measures can be interpreted as restrictions on the right to embark on industrial action.

The first procedural step is to refer the issue in dispute for conciliation to a bargaining council having jurisdiction or, if there is none, to the CCMA.²⁰¹ The employees may not strike until the council or the commissioner has certified that the parties have been unable to resolve the dispute,²⁰² or if 30 days have passed since the date of referral²⁰³ whichever occurs first. The council or the CCMA has 30 days to try to resolve the dispute, unless the parties agree to²⁰⁴ extend this period.²⁰⁵ The issue referred for conciliation must be same over which the employees ultimately strike.²⁰⁶ Thus, if the dispute referred for conciliation is over the employer's refusal to comply with demand A, the employees cannot strike over the employer's refusal to comply with demand B.²⁰⁷ After the lapse of the prescribed period, the employer, bargaining council²⁰⁸ or employer's organisation, as the case may be, must be given at least 48 hours' notice before commencement of strike.²⁰⁹ 7-days' notice is required when the employer is the State. Where the employer is bound by a bargaining council agreement, and the issue in dispute relates to a collective agreement to be included in the council,²¹⁰ it is sufficient that notice is given to the bargaining council.²¹¹ However, notice to the bargaining council will not suffice where the employer whose employees are intending to strike is not a member of the council.²¹² The notice to the employer must specify the precise

²⁰¹ Section 64 (1) (a) of the LRA.

²⁰² Section 64 (1) (a) (i) of the LRA.

²⁰³ Section 64 (1) (a) (ii) of the LRA.

²⁰⁴ Section 64 (1) (a) (ii) of the LRA.

²⁰⁵ J Grogan, (note 176 above) 383.

²⁰⁶ J Grogan (note 176 above) 384.

²⁰⁷ *NUMSA obo Mahlangu & another v Edelweiss Glass & Aluminium [2004] 6 BALR 747 (CCMA)* (strikers referring dispute over organisational rights but striking in support of demand for 13th cheque).

²⁰⁸ Where the dispute relates to a collective agreement to be concluded by the council.

²⁰⁹ Section 64 (1) (b) of the LRA.

²¹⁰ *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA & Others (1999) 20 ILJ 677 (LAC).*

²¹¹ Ibid.

²¹² *SA Airways (Pty) Ltd v SATAWU & Others (2006) 27 ILJ 1034 (LC).*

time of the commencement of the strike.²¹³ It is insufficient merely to state that the strike will commence at some later time.²¹⁴

3.4 Historical Development of the Notice Requirement

The inclusion of the requirement in the LRA of prior notice of industrial action²¹⁵ took place in 1995 when the LRA came into operation and the inclusion of the notice was preceded by developments which will also be discussed herein. Initially the inclusion of the notice requirement was devised by the Industrial Court when it held in certain judgements²¹⁶ in 1987 and 1988 that employees who had gone on strike without giving any warning or notice to their employer had acted unfairly towards their employer. These were cases where employees, who had been dismissed for striking brought unfair labour practice claims against their employers under the Labour Relations Act 28 of 1956 (“the 1956 Act”). Taking into consideration that the origin of the notice requirement in the LRA was the Industrial Court, this chapter will discuss decisions where the issue of the notice requirement was developed²¹⁷ There were many decisions where the courts consistently held that the resorting of workers to industrial action without prior notice to their employers to be unfair, holding that it was necessary for employees to notify the employer prior to embarking on industrial action. These cases demonstrate that the Industrial Court played a very important role in the development of the procedural requirement for protected industrial action in South Africa. It is necessary to discuss at least some of these cases in order to show how the idea of prior notice of industrial action originated and developed, which resulted in its ultimate inclusion in the new statutory dispute-resolution dispensation for labour disputes in post-apartheid South Africa.

3.4.1 The introduction of the notice requirement

²¹³ J Grogan, (note 176 above) 384.

²¹⁴ *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union & others (2) (1997) 18 ILJ 671 (LAC); Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union (1998) 20 ILJ 260 (LAC).*

²¹⁵ Section 64 (1) (b) of the LRA.

²¹⁶ *MAWU v BTR Sarmcol (1987) 8 ILJ 815 (IC) at 836G and BAWU & others v Palm Beach Hotel (1988) 9 ILJ 1016 (IC) at 1023G.*

²¹⁷ *MAWU v BTR Sarmcol (1987) 8 ILJ 815 (IC) at 836G and BAWU & others v Palm Beach Hotel (1988) 9 ILJ 1016 (IC) at 1023G.*

The first indication of an obligation on the part of a union to give an employer a strike notice or warning before resorting to a strike, was given in the decision of the Industrial Court in *Metal and Allied Workers Union v BTR Sarmcol*.²¹⁸ In this case the court referred to aspects of the union's conduct before and during the strike, which it was displeased with. This included that the strike was conducted without prior warning and with machines simply left running.²¹⁹ In 1988 the Industrial Court developed this principle further. In *BAWU & others v Palm Beach Hotel*²²⁰ it was held that even if the strike could be said to have been legal, the union and its members had acted unreasonably and unfairly by resorting to a strike without giving the employer "notice of when the strike would begin". Although reference is made here and elsewhere in this discussion to a legal strike, the question whether, under the Labour Relations Act 28 of 1956, there was a right to strike and, therefore, whether one could talk of a legal strike, was a controversial one. This was because on its own, the 1956 Act did not expressly refer to a right to strike, but simply specified conditions which had to be fulfilled in order for a strike not to constitute a criminal offence. However, just before the end of the apartheid era, the old Labour Appeal Court handed down one of its most celebrated judgments in *BAWU & others v Blue Waters Hotel*²²¹ which had as its basis an acknowledgement of the existence in South Africa of the right to strike. In this case the requirements for a legal strike in terms of the 1956 Act were described as being that "there had to be a dispute between employees or a union and an employer."²²² An application had to be made to the Department of Labour in terms of s 35 of the 1956 Act for the appointment of a conciliation board or industrial council to try to resolve the dispute through consensus.²²³ If a period of 30 days from the application for the establishment of a conciliation board, or from the delivery of the referral of the dispute to the industrial council, had lapsed without the dispute having been resolved, a secret ballot had to be conducted to determine whether the majority of workers supported a decision to strike.²²⁴ Although the 1956 Act did not contain a specific provision recognising the right to strike in the work place, it did not prohibit strike

²¹⁸ *Metal and Allied Workers Union v BTR Sarmcol* (1987) 8 ILJ 815 (IC).

²¹⁹ *Ibid* 832A.

²²⁰ *BAWU & others v Palm Beach Hotel* (1988) 9 ILJ 1016 (IC) at 1023G.

²²¹ *BAWU & others v Blue Waters Hotel* (1993) 14 ILJ 963 (LAC).

²²² Section 65 of the 1956 Labour Relations Act.

²²³ *Ibid*.

²²⁴ *Ibid*.

action. It simply provided for requirements which had to be complied with in order for a strike to be legal. These requirements included the holding of a secret ballot. Looking at case law that has been discussed in this chapter thus far and which will also be referred to later, it is clear that the inclusion of the notice requirement developed because it seemed unfair for the employer to see employees embarking on a strike without having been notified.²²⁵ The question of whether the rate of strikes depleted as a result of introduction of notice requirement by the court will be considered. However, this research intends to show that the notice requirement is not effective in curbing the strikes in the work place as instead, it simply prepares the employer for the impending strike rather than combating the likelihood of a violent and unprotected strike.

3.4.2 The emphasis of the notice requirement by the Industrial Court

From the time of the introduction of the notice requirement by the Industrial Court in 1987 and 1988, it was considered relevant to determine the legality and fairness of strikes brought before it. Employers took advantage of the opportunity to have strikes declared illegal on the basis that the proper notice had not been provided. They used this as a basis to interdict strike action

In *MWASA & others v Perskor*²²⁶ reasons which led to the union's failure to give strike notice were provided. One was that a previous strike upon which the workers had embarked prior to the one in issue had served as a warning to the employer. Another reason was that the employer could not have believed that the situation would have remained static. It was also provided that the strike had not been planned and had arisen out of the frustration which the workers had been experiencing. The Industrial Court held that none of these factors or reasons outweighed the importance of the necessity to notify the employer of an intended strike, , where, as in this case, the employer's business will be severely disrupted by a strike without warning.²²⁷ It was deemed only fair to do so. The Union took the matter on appeal. The Labour Appeal Court found that the dismissals were unfair and unlawful on the basis that

²²⁵ Ibid.

²²⁶ *MWASA & others v Perskor* (1989) 10 ILJ 1062 (IC).

²²⁷ Ibid I.

although the employer had been obliged to observe the audi alterem partem rule before they could dismiss their striking employees, they had failed to do so. What is fundamental from the appeal ruling in this case, is that even though notice was not given by the union before embarking on a strike, the Labour Appeal Court still saw it necessary for employees to be given an opportunity to explain the reasons for not giving notice of the strike, prior to dismissal.

In discussing this case, I have intended to establish that the Industrial Court was more concerned about the giving of notice than assessing the fairness of the employees' dismissals, both of which, I hold, had to be equally attended to as they are equally important. It is however, the argument in this research that the introduction of the notice requirement by the Industrial Court was a reasonable measure to deal with the propensity of violent strikes at the time. However, in applying the notice requirement the Industrial Court should not have overlooked the fairness of the dismissals of employees for having embarked on a strike without notice.

It cannot be ruled out that these decisions were driven by the level of disruptions that these strikes ended up causing in the workplace. The notice requirement was introduced as means to curb the disruptive strikes. It will be established later as to whether prior notice was the best possible requirement to deal with disruptive strikes. This establishment will be necessary because the current LRA regulating industrial action now provides for the notice requirement preceding the strike, however, the labour market and especially the mining sector has experienced violent strikes. The Industrial Courts in dealing with the issue of strike notice, have paid less attention to the reasons for failure by the unions to give notice regardless of the possible reasonableness of their failure. They acted as if prior notice was a statutory requirement where they would be forced not to compromise. It is the argument in this chapter that in trying to address the issue of violent strikes, attention should also be paid to the rights of employees so that there is balance between the corrective measures needed to curb the violent strikes and the needs and rights of employees.

In *NTE Ltd v South African Chemical Workers Union and others*²²⁸ the employer had purported to institute a lock-out against his employees in order to put pressure on them to agree to a lower wage increase than the one they were demanding and to other new terms and conditions of employment. At that time the definition of lock-out in s 1 of the 1956 Act included what was termed the 'lock-out dismissal'. Such a dismissal entailed an employer terminating the contracts of employment of his employees for the purpose of compelling them to agree to his demands. A dismissal coupled with such purpose constituted a lock-out in terms of this section. In purporting to lock-out the workers by terminating their contracts of employment in this case, the employer did not give them notice of the termination of their contracts of employment which could have been construed as some kind of a lock-out notice. The Industrial Court held that notice of the impending lock-out was required.

In *Food and Beverage Workers Union & others v Hercules Cold Storage (Pty) Ltd*²²⁹ the then Labour Court took the union's failure to give the employer notice of when the strike would commence as underscoring the union's intention to cripple the company financially and as supporting the employer's contention that the union lacked *bona fides* in negotiating with it. This was an appeal against a decision of the Industrial Court,²³⁰ where it transpired that the union's failure to give the employer prior notice of the strike was not one of the factors that the Industrial Court took into account when it dealt with the case. Even though the issue of prior notice was not codified as a statutory pre-requisite for the determination of legality of a strike, it is the argument of this research that it ended up being an accepted norm in the workplace through the precedents made by the Industrial Court in the majority of cases discussed herein. Some unions and employers had accepted the need to give prior notice before industrial action and were beginning to incorporate the notice requirement in their collective agreements or recognition and procedural agreements. This appears from the arbitration award in *Mercedes-Benz of SA (Pty) Ltd v NUMSA*²³¹ where the collective

²²⁸ *NTE Ltd v South African Chemical Workers Union and others* (1990) 11 ILJ 43 (N).

²²⁹ *Food and Beverage Workers Union & others v Hercules Cold Storage (Pty) Ltd* (1990) 11 ILJ 47 (LAC).

²³⁰ *Equity Aviation Services (Pty) Ltd v South African Transport and Allied Workers Union and Others* (1989) 10 ILJ 457 (IC).

²³¹ *Mercedes-Benz of SA (Pty) Ltd v NUMSA* (1991) 12 ILJ 667 at 672.

agreement that had been concluded between the employer and the union in 1989 included a provision in the pre-strike dispute procedure in terms of which the union had to give the employer at 72 hours' written notice of the commencement of industrial action before industrial action could be embarked upon. Despite the Industrial Court's influence as shown and discussed above, another important factor which also contributed to the introduction of the notice requirement into the LRA was the appointment of the Technical Committee of the National Manpower Commission in 1990,²³² chaired by Professor AA Landman. The Committee was asked to consider various proposals made by stakeholders regarding the 1956 Act, in response to an invitation issued in the Government Gazette of 13 October 1989. One of the proposals that the Technical Committee made was that there should, amongst others, be a statutory requirement that before a strike could be said to be legal, it be shown that "24 hours (or such other period as may have been agreed in writing) written notice of the commencement of the strike has been given".²³³

3.5 The Provisions of ELRA and PSLRA

In 1993 two pieces of legislation were enacted which are very important to the historical developments that led to the inclusion of the requirement of notice of industrial action. These statutes were the Education Labour Relations Act 66 of 1995 (hereinafter referred to as "ELRA") and the Public Service Labour Relations Act (hereinafter referred to as "PSLRA"). Their importance lies in the fact that they marked the first occasion in the history of South Africa that a strike notice and a lock-out notice were included in a statute as a requirement for a legal strike and lock-out.

The ELRA gave educators and/or teachers the right to strike, but the exercise of such right was subject to the provisions of the Act.²³⁴ The ELRA also precluded an employee organisation, office bearer, official or member thereof, from calling or taking part in any strike unless written notice of at least seven days has been given to the employer or

²³² This was a commission established under the 1956 Act.

²³³ See "Proposals for Consolidation" 297.

²³⁴ Section 151 (1) of the Education Labour Relations Act 66 of 1995 (hereinafter referred to as the "ERLA").

employers concerned, stipulating the date of commencement of such strike.²³⁵ The ELRA precluded an employer from instituting a lock-out unless he has given written notice to the employee organization or organizations concerned, of the commencement of such lock-out.²³⁶ These were now statutory requirements that compelled both the employee and the employer to issue a written notice prior to embarking on industrial action. Failure to issue the required notice would render the industrial action illegal. Section 19 (1) of the PSLRA granted employees the right to strike and the employers the right to lock-out, provided that certain conditions were met. The PSLRA prohibited a strike unless certain conditions were met. One of these was that written notice of at least 10 days, of the date of the commencement of such a strike, had to have been given to the particular employer or employers concerned.²³⁷ Section 19 (5) of the PSLRA further required an employer to give written notice of at least 10 days to the employees concerned. The first Minister of Labour²³⁸ in post-apartheid South Africa appointed a Ministerial Task Team to draft the Labour Relations Bill. The main responsibility of this Ministerial Task Team was to overhaul the laws regulating labour relations and to prepare a negotiating document in draft Bill form to initiate a process of public discussion and negotiation amongst the social partners, namely government, organised labour, business as well as other interested parties.²³⁹ It seems here that the post-apartheid government deemed it necessary to determine which parts of the pre-1995 jurisprudence on the law of strikes and lock-outs should be carried over into the new dispensation, bearing in mind the provisions of the supreme law of the land, the Constitution.

In the Explanatory Memorandum prepared by the Ministerial Task Team which accompanied the draft Bill, as well as in the draft Bill itself, provision was made for the giving of prior

²³⁵ S 15 (5) (b) of the ELRA.

²³⁶ Section 15 (1) of the ELRA.

²³⁷ S 19 (4) of the Public Service Labour Relations Act 103 of 1993 (hereinafter referred to as the “PSLRA”).

²³⁸ Former Minister of Labour Tito Mboweni.

²³⁹ See “Explanatory Memorandum” 278-279 accompanying the Draft Bill (Labour Relations Bill *Gazette* 16259 General Notice 97 of 10 February 1995).

notice of strikes, lock-outs and protest action.²⁴⁰ In the terms of reference of the Ministerial Task Team it had to have regard to international law, and it is notable that the requirement of notice before industrial action is quite common internationally.²⁴¹ It would have not escaped the attention of the Task Team, that case law suggested that failure to give a strike notice to the employer was regarded as unfair. It would also not have escaped the attention of the Task Team that the ELRA and the PSLRA prescribed the giving of prior notice of a strike and lock-out, nor would it have escaped their attention that the committee chaired by Professor AA Landman had recommended this requirement. It is this not surprising that the Ministerial Task Team included the requirement of notice in the Bill for industrial action to qualify as protected.

3.6 Notice of Industrial Action by the LRA

The LRA was passed in 1995 and it contained the requirement that notice be given before industrial action takes place in the workplace.

The relevant provisions in the LRA are s 64 (1) (b), (c), (d), s 66 (2) (b) and s 77 (1) (b). This marked the first time in the history of South African labour law that a statute of general application laid down such a requirement.²⁴² The provisions of s 64 (1) (b), (c) and (d) of the LRA read as follows:

(1) Every employee has the right to strike and every employer has recourse to lock-out if-

(a)

(b) In the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-

(i) The issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

²⁴⁰ Ministry of Labour Draft Negotiating Document in the Form of a Labour Relations Bill *Gazette* 16259 General Notice 97 of 10 February 1995.

²⁴¹ ILO, 1996, para 502-504.

²⁴² RMM Zondo, "The requirement of notice of industrial action" (2009) Master's Thesis, UNISA, 24.

- (ii) The employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or
- (c) In the case of a proposed lock-out, at least 48 hours' notice of the commencement of the strike, in writing, has been given to any trade union that is a party to the dispute or if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council;
- (d) In the case of proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).

Section 64, as quoted above, puts measures in place which striking employees and employers intending to lock-out employees should comply with in order for that strike or lock-out to be legal and in compliance with the LRA. The requirements for giving of proper notice in terms of this section has not been clear and the courts have assisted in interpreting the meaning of the section in this regard. The section is not specific as to who must give the notice, nor of precisely when it must be given.

It is therefore imperative to analyse and discuss relevant case law so as to ascertain the meaning of this provision and how the courts have dealt with its interpretation. In *SATAWU and others v Moloto NO and another*²⁴³ the court also elaborated on the purpose of the requirement of giving notice and how the relevant provision of the LRA should be interpreted.²⁴⁴ The issue in this case was whether employees who were not identified in the strike notice were entitled to go out on strike in terms of that same notice, or whether they were required to issue a separate notice to the employer before going on a protected strike.

SATAWU was the majority union at the workplace. The union had decided to embark on a strike after it had deadlocked with the employer and after the dispute remained unresolved

²⁴³ *SATAWU and others v Moloto NO and another* 2012 (6) SA 249 (CC).

²⁴⁴ *Ibid* para 81.

thereafter. The employer on the other side had been assured by the minority trade unions in the workplace that they were not party to the dispute and that their members would not be joining the strike. SATAWU members then embarked on a strike and it transpired that a certain few non-SATAWU members joined along and participated in the strike action.

The employer having noted the participation of non-SATAWU members was satisfied that those members were not covered by the striking notice that had been issued by SATAWU. These members were subsequently dismissed as a result of the strike which was classified as unprotected in respect of those employees who had not been members of SATAWU at the time of the issue of the strike notice. SATAWU then referred the matter to the Labour Court, which ended up being heard by the Constitutional Court, arguing that the dismissals were unfair. The employer on the other side argued that it was an implied requirement of s 64 (1) (b) that the strike notice would only be valid in respect of those employees who had referred the dispute and on whose behalf the notice had been given.²⁴⁵ The Labour Court ruled that a trade union was entitled to increase its membership during the course of a strike action and therefore, the members in question were members of SATAWU.²⁴⁶ Thus the notice covered them even though they had not been members of SATAWU at the time of the issue of the notice. In terms of this ruling the employer was found to have unfairly dismissed the employees as they were participating in a protected strike. The court also stated that it had to adopt a purposive interpretation of the provisions of s 64 (1) (b) and accepted that the purpose of this section was set out by the Labour Appeal Court in the case of *Ceramic Industries Ltd t/a Betta Sanitary ware v National Construction, Building and Allied Workers Union*.²⁴⁷ It held such purpose as being to give the employer advance warning of the proposed strike so that an employer may prepare for the power play that will follow. The court also ruled that the section did not place any limitation on who should give notice, nor on whose behalf it could be given. The court ruled that it did not require that the notice give an indication of how many employees would go on strike nor of which unions they belonged to. The court also ruled that to limit the right to strike to those whose union had issued a strike notice would be

²⁴⁵ *SATAWU and Another v Equity Aviation Services (Pty) Ltd* 2006 (11) BLLR 1115 (LC) para 21.

²⁴⁶ Ibid para 25.

²⁴⁷ *Ceramic Industries Ltd t/a Betta Sanitary ware v National Construction, Building and Allied Workers Union* (1) (1997) 18 ILJ 716 (LC).

a limitation over and above the limitations on the right to strike as provided by the LRA and as such the effect would be to deny the employees their fundamental right to strike.

The employer referred the matter to the Labour Appeal Court.

On appeal,²⁴⁸ the disputed issue was whether the Labour Court had correctly classified the dismissal as automatically unfair as the form of a dismissal for participation in a protected strike. The Labour Appeal Court unanimously found that SATAWU had failed to discharge the onus of proving that the dismissed employees were their members at the time of the strike.²⁴⁹ However, the court was divided on the question of whether the notice of intention to strike issued by the union also entitled the non-union members to strike. The majority held that the non-union members were permitted to join the strike in respect of the same notice issued by SATAWU. The court held that this approach would not undermine orderly collective bargaining. The court also emphasised that the plain meaning of statutes should be given effect to. That is why it reasoned that there was no requirement in section 64 (1) (b) that the strike notice should identify precisely who was to go on strike. It further stated this requirement that the notice should identify who was to go on strike should not be introduced by the court.

However, the minority judgment in this case by Zondo JP found that the use of the word “we” in the strike notice implied that it would only be SATAWU members who would participate in the strike action. He found that just as it was permissible for trade unions to limit the right to strike of non-union members by way of a collective agreement with the employer, so they should be held to any limitations on the strike action implied by their strike notice.²⁵⁰

The matter was further referred to the Supreme Court of Appeal.²⁵¹ The Supreme Court of Appeal rejected the approach taken by the majority of the Labour Court of Appeal and preferred the minority view of Zondo JP. The SCA accepted and agreed that constitutional

²⁴⁸ *SATAWU and others v Moloto NO and another* 2012 (6) SA 249; para 24.

²⁴⁹ *Equity Aviation Services (Pty) Ltd v South African Transport and Allied Workers Union and Others* 2009 (10) BLLR 933 (LAC) para 49

²⁵⁰ 2009 10 BLLR 933 (LAC) at para 49.

²⁵¹ *Equity Aviation Services (Pty) Ltd v South African Transport and Allied Workers Union and Others*, (2012) (2) SA 177 (SCA).

rights should not be unnecessarily limited. It held that the primary objects of the LRA include ‘providing a framework for and promoting orderly collective bargaining and promoting the effective resolution of labour disputes’ and that s 64 (1) (b) was clearly designed just for that reason.

The SCA held that the question for it to decide was “whether employees who have not given notice of a proposed strike defeat orderly collective bargaining when they participate in a strike where other participants have given notice”.²⁵² The SCA found that it was not necessary to ‘read in’ to s 64 (1) (b) the requirement that those going to strike should be identified. The SCA also found that every employee who intends to go on strike must notify his employer of that intention personally or through a representative for the strike action to be protected. It found that to hold otherwise would lead to disorderly collective bargaining and usher in an era of chaotic collective bargaining in our labour dispute resolution system.²⁵³ The SCA finally found that the strike was unprotected and the employees’ dismissals were not automatically unfair. It therefore, overturned the ruling of the Labour Court of Appeal. The matter was then referred to the Constitutional Court where the fundamental question to be decided was “whether the dismissed employees met the provisions of s 64 (1) (b) by engaging in a strike when only SATAWU issued a strike notice on behalf of its members”. The minority judgement followed the decision of the SCA. It held that “the purpose of the strike notice is more than a mere trigger for the 48-hour window period that precedes the commencement of a strike, but rather a mechanism meant to enable an employer to prepare properly for the impending power play”.²⁵⁴ The minority judgement reasoned, the strike notice should necessarily identify who was to participate in the strike. The majority decision on the other hand overturned the decision of the SCA. The court found that it should follow the purposive approach to interpretation. It was further stated that where the language was clear, the court could not speculate about issues which the legislature saw fit not to detail in the section. The court also stated that “the procedural pre-conditions and substantive limitations of the right to strike in the LRA contain no express requirement that every

²⁵² *SATAWU and others v Moloto NO and another* 2012 (6) SA 249, para 43.

²⁵³ *Equity Aviation Services (Pty) Ltd v South African Transport and Allied Workers Union and Others*, (2012) (2) SA 177 (SCA) para 28.

²⁵⁴ *SATAWU & others v Moloto NO and another* 2012 (6) SA 249; (CC) para 24.

employee who intends to participate in a protected strike must personally or through a representative give notice of the commencement of the intended strike, nor who will take part in the strike”.²⁵⁵

The court found that the employees had been dismissed for engaging in protected strike action, and that their dismissals were automatically unfair.

The implications of this judgement are that the employees have now been vindicated in that they are at liberty to embark on a strike action spontaneously and that strike action may result in participation of more employees than those who had initially notified the employer. The underlying requirement in terms of this ruling is that the strike must be protected. In a way, this therefore weakens the effect of the notice requirement in terms of s 64 (1) (b) of the LRA. On the other hand, it may be argued that this interpretation of the section by the Constitutional Court should be blamed as it fails to be specific. Had it been specific it would be clear who is entitled to participate in a strike preceded by the ‘notice requirement’. That is why the research in this chapter finds that the notice requirement is not effective and therefore, cannot be the best option available to curb the prevalent violent strikes in the workplace.

Section 66 of the LRA will not be discussed in detail as it entails almost the same requirement as section 64. However, it would be necessary to briefly quote what the section entails as it also speaks about the issue of the notice requirement. Section 66 (2) (b) provides:

(2) No person may take part in a secondary strike unless:

(a) ...

(b) The employer of the employees taking part in the secondary strike or, where appropriate, the employers’ organisation of which that employer is a member, has received a written notice of the proposed secondary strike at least seven days prior to its commencement.

²⁵⁵ *SATAWU & others v Moloto NO and another 2012 (6) SA 249; (CC).*

This provision shares the same finding as section 64 (1) (b) which the courts have found in respect of section 64 (1) (b). It is also not clear who bears the obligation to give notice of a secondary strike, as nothing is expressly stated in the section. However, it is doubtful that the secondary employees have that obligation. There is also no doubt therefore, that this section bears a possibility of sharing the same legal implications as section 64 (1) (b) of the LRA.

Section 77 (1) (b) and (d) of the LRA also entail the notice requirement. It provides that:

- (1) Every employee who is not engaged in an essential service or a maintenance service has the right to take part in a protest action if-
 - (a) ...
 - (b) The registered trade union or federation of trade unions has served a notice on NEDLAC stating-
 - (i) the reasons for the protest action; and
 - (ii) the nature of the protest action;
 - (c) ...
 - (d) At least 14 days before the commencement of the protest action, the registered trade union or federation of trade unions has served a notice on NEDLAC of its intention to proceed with the protest action.

The fundamental difference in this section, in respect to the aforementioned section, is the required number of days after which a protest action could take place. What is in common is the necessity for prior notice of the protected industrial action. Again, this section is no different from what has been found in section 64 of the LRA in as far as the interpretation and possible legal implications are concerned.

3.7 Conclusion

This chapter has discussed the procedural restrictions provided by the LRA preceding an industrial action in order for it to be protected in terms of the LRA. Special reference was made to the notice requirement which employees ought to comply with before embarking on a strike. It was necessary that before much could be said about the notice requirement, a

historical development of the notice requirement into the LRA be dealt with so as to understand factors that influenced the legislature to introduce this requirement.

This chapter highlighted through the historical development of the notice requirement discussed above, that there is no doubt that this requirement was introduced as a measure that was meant to curb the prevalence and destruction caused by such strikes to the workplace. It was also shown that the relevant provisions in respect of the notice requirement, introduced since 1995 into the LRA by the new democratic dispensation, have not been effective in curbing the violent strikes in the workplace. This has been shown by raising ambiguity of the provisions of the LRA such as the 'notice requirement'. To support the ambiguity relevant case law was discussed which has shown in my view the negative legal implications of these provisions.

In the next chapter, this research will explore characteristics of recent unprocedural strike actions in South Africa. Reference will be made to various incidents wherein unprocedural strike actions played out, such as in the case of, the Marikana Massacre, the Gold Mine strike and NUMSA strike. It will further be shown that it is mainly because of strike actions such as these that a re-evaluation of our collective bargaining laws is necessary.

CHAPTER 4: UNPROTECTED INDUSTRIAL ACTION IN THE MINING SECTOR

4.1 Introduction

This chapter will explore the unprotected strike actions that have taken place in the mining industry and in other sectors. Reference will be made to various incidents wherein unprotected strike actions played out for instance in the Marikana Massacre,²⁵⁶ Amplats,²⁵⁷ Gold Mine strike²⁵⁸ and Farm Workers strike.²⁵⁹ It will be argued that it is as a result of the type of strike action characterising the Marikana Massacre, Amplats, Gold Mine strike and Farm Workers strike, that our strike law must be urgently re-evaluated. In South Africa, the right to strike is a constitutional right and it is regulated by the Constitution and the LRA.²⁶⁰ Section 23 of the Constitution of the Republic of South Africa confers on every worker the right to strike.²⁶¹ It further provides that “every trade union, employers’ organization and employer has the right to engage in collective bargaining”²⁶² and goes on to provide that national legislation may be enacted to regulate these rights.²⁶³ In South Africa all sectors of employment are experiencing strike actions.²⁶⁴ While some of the strikes are legal and protected within the ambit of the law, others have been found to be illegal and unprotected.²⁶⁵ These types of illegal and unprotected strikes have been prominent in the mining industry. The mining industry accounts for substantial foreign exchange earnings of the country and

²⁵⁶ This was a strike action embarked upon by mine workers of Lonmin Platinum Mine which later resulted into a Massacre. The strike was over a salary increase.

²⁵⁷ This strike action occurred in October 2012. The mine workers from Anglo Platinum had organised this strike throughout the four Anglo Platinum Mines. The strike was also over salary increase.

²⁵⁸ This was a strike action which commenced on the 12th of September 2012 at the Anglo Ashanti Gold Mine. The mine workers were among other issues demanding a monthly salary of R16 000.00.

²⁵⁹ This was a farm workers strike. The strike occurred in Boland near De Doorns. The farm workers were striking for a wage increase from R70.00 to R150.00 a day.

²⁶⁰ 1996 Constitution and the LRA.

²⁶¹ *SATAWU and others v Moloto NO and another 2009 10 BLLR 933 (LAC)*. Section 23 (2) (c) of the 1996 Constitution.

²⁶² Section 23 (5) of the 1996 Constitution.

²⁶³ Section 23 (6) of the 1996 Constitution.

²⁶⁴ G Seidman, *Manufacturing Militance - Workers' movements in Brazil and South Africa, 1970-1985*, 1ed (1994).

²⁶⁵ M Olivier, “The South African Constitution and Freedom of Religion- Some labour law

also hires a huge number of workers.²⁶⁶ Violent strikes have produced a lot of ugly incidences during the apartheid regime and it seems not to be declining during the post-apartheid democratic dispensation.²⁶⁷ The issue of illegal and violent strikes has been a trend in the mining sector over the last 3 to 4 years. If strike action is not compliant with the LRA it will be an unprotected strike and may result in negative consequences for the participants, including the possibility of dismissal.

4.2 The Extent and Practice of Strike Actions in South Africa

The right to strike has been widely recognised as a fundamental element of stable collective bargaining. Industrial action is one of the essential means available to employees to promote and protect their economic and social interests, and to resolve industrial disputes. Employers may also use industrial action (for example through lock-outs).²⁶⁸ There can be no effective collective bargaining without the exercise of the right to strike. This right compels the unwilling employer to consider the grievance(s) of the employees in the workplace and is the only instrument at the disposal of employees to ensure successful collective bargaining. The right to strike and the extent to which people can strike are fundamental freedoms which distinguish a participative democratic government from a more authoritative one.²⁶⁹ In a democratic and participative government where the right to strike is recognised, as in South Africa, the employee will not be regarded as having contravened his contract of employment by striking and those on strike may not be penalised for striking. However, this does not allow the employees to disregard the substantive and procedural requirements for protected strike action as provided by the LRA. Employees who participate in a protected strike are protected against any form of victimisation by the employer.²⁷⁰ However employers may dismiss workers for misconduct committed during the strike, or for reasons based on the

imperatives and implications” *Dutch -Reformed Theological Journal*, 43(3&4) 530-542.

²⁶⁶ M Altman, “Low Wage Work in South Africa” (2006) *HSRC* 12.

²⁶⁷ K Odeku, “An overview of the right to strike phenomenon in South Africa” (2014) Vol 5 *MJSS* 695.

²⁶⁸ J Romeyn, “Striking a balance: the need for further reform of the law relating to industrial action” Parliamentary Research Paper, Parliament of Australia 33 (2008) 7.

²⁶⁹ M Davidmann, “Slavery, compulsion and freedom: the right to withdraw one’s labour” (1996). <http://www.solhaam.org/articles/right.html>. (Last accessed on 4 June 2013).

²⁷⁰ J Grogan J, *Collective Labour Law* (2007) 383.

employer's operational requirements.²⁷¹ These employees are also protected against dismissal and civil legal proceedings by the employer.²⁷² The Labour Court has exclusive jurisdiction to interdict or restrain strikes which are violent and unprotected.²⁷³ An example of an unprotected and violent strike would be strikes such as those we have witnessed in Marikana at Lonmin Mine in 2012, where a huge number of workers lost their lives. Participation in unprotected strike may constitute a fair reason for the dismissal of an employee.²⁷⁴ While it may be generally accepted that the right to strike is the most precious tool the strikers have against the employer,²⁷⁵ this right is not absolute as it is limited in terms of the LRA.²⁷⁶ There have been instances of unreasonable and incessant strikes in South Africa that have negatively impacted on other sectors because they were not prevented. In South Africa a strike may well drag for quite some time without any intervention from the government and all other areas of service would be disrupted. This we have also witnessed through the Marikana strike as indicated above. It is understandable that the government is supposed to be seen to be neutral regarding labour disputes, however, when the dispute is as a result of a sector which sustains the economy of the country, such as mining, the government could intervene by ensuring that the dispute is either prevented or resolved amicably after it has started. The government therefore, should ensure that the Mining Charter is not only left as theory but is implemented and that there is accountability. The recent mining strikes including the Marikana, Amplats and Gold Fields strikes have suggested a radical departure from the established collective bargaining and labour dispute resolution procedures, as provided by the LRA.²⁷⁷ The employees have used these unprotected strikes to achieve their demands. Violence and intimidation was also one tactic which was used, whereas in terms of the available labour dispute resolution procedures such actions are prohibited. The trend that we have seen from these strikes, is the disregard of the procedural requirements of the LRA and a breach of provisions of the existing collective agreements which have been duly executed by elected labour union officials. Such breaches have taken the form of wildcat

²⁷¹ Section 67 (5) of the LRA.

²⁷² Section 67 (5) and (6) of the LRA.

²⁷³ Section 158 (1) of the LRA.

²⁷⁴ Section 67 (4) of the LRA.

²⁷⁵ K Odeku (note 268 above) 700.

²⁷⁶ Ibid 700.

²⁷⁷ Section 11 and 64 of the LRA.

strike actions, which employ violence, arson, intimidation and threats in order to force employers to accede to their demands. Although the right to strike is protected, and employees are free to engage in a strike once the prescribed requirements have been met, employees should not make themselves guilty of misconduct during their strike action. Violence during both protected and unprotected strikes has become a serious concern in South Africa. In 2006, during the strike by the security industry, employees who were members of SATAWU, damaged property to an estimated value of R1, 5 million.²⁷⁸ Again in October 2012, truck drivers also embarked on a strike which also turned violent; trucks were set on fire and drivers who did not take part in the strike were assaulted.²⁷⁹ The drivers embarked on a strike on the basis that the employer offered the drivers an 8, 5 percent increase whereas they were demanding 10%. In the same year, farm workers went on strike in the Western Cape demanding more than double their current pay, and property worth of millions of Rands was destroyed during the strike.²⁸⁰ The LRA offers protection for strikers taking part in a protected strike. However, it does not promote violent conduct during a strike. This trend of strikes has taken place despite the procedural requirements in the LRA which are intended to limit the possibility of unprotected strikes. The balance of power in industrial relations favours employers over employees.²⁸¹ This is so because in the workplace the power is vested in the management. It is the management that takes decisions on behalf of the employees. Industrial action and strike action in particular, therefore, is used as a tool by employees to bring some balance and close the gap between them and the employer. In *BAWU v Prestige Hotels CC t/a Blue Waters Hotel*,²⁸² the following was stated with regard to the functionality of a strike:

A lawful strike is by definition functional to collective bargaining. The collective negotiations between the parties are taken seriously by each other because of the awful risk they face if a

²⁷⁸ *SATAWU v Garvis and others CCT 112/11 (2012) ZACC 13,5-6.*

²⁷⁹ W da Costa, B Hans & Sapa “Truck drivers” strike turns ugly” <http://www.iol.co.za/news/crime-courts/truck-drivers-strike-turns-ugly-1390180> last accessed 25 April 2013).

²⁸⁰ “Western Cape 2012 Farm Workers” Strike” http://en.wikipedia.org/wiki/Western_Cape_2012_Farm_Workers_Strike (last accessed 25 April 2013).

²⁸¹ E Manamela & M Budeli, “Employees’ right to strike and violence in South Africa”, (1993) *ILJ* 963 (LAC) 971J-972A.

²⁸² *BAWU v Prestige Hotels CC t/a Blue Waters Hotel (1993) 14 ILJ 963 (LAC).*

settlement is not reached. Either of them may exercise its right to inflict economic harm upon the other. In that sense the threat of a strike or lock-out is conducive and functional to collective bargaining.

From what the Labour Appeal Court stated, a lawful strike is useful to facilitate collective bargaining.²⁸³ Manamela and Budeli,²⁸⁴ submit that

“a violent strike is not functional to collective bargaining and that it is not conducive to bargaining in good faith. The right to strike does not offer striking employees a licence to engage in unruly or criminal conduct”.²⁸⁵

Furthermore, they state:

When employees embark on a strike they do not obtain any permission to conduct themselves in a manner that poses a criminal behaviour. Violence during strike is actually an abuse of the right to strike. In addition to the right to strike, the LRA permits employees on strike to picket peacefully in support of a protected strike. Employees who therefore, commit act of misconduct during a strike should be held accountable for their actions.²⁸⁶

4.3 Elements of Unprotected Strikes.

An unprotected strike is not a criminal offence punishable by law as was the case under the 1956 Act. During the application of this Act if workers were found to have taken part in an unprotected strike they risked the chance of being criminally charged, as the Act provided for such participation to be criminally punishable if it was found to be an unprotected strike. However, although it is not criminalised, participation in an unprotected strike is an act of misconduct which may result in disciplinary action, including dismissal.²⁸⁷ If the strike does not comply with the procedural requirements, or there are limitations in terms of s 65, the

²⁸³ Ibid.

²⁸⁴ E Manamela & M Budeli (note 282 above)323.

²⁸⁵ *Transport & General Worker Union of South Africa v Ullman Brothers (Pty) Ltd* (1989) 10 ILJ 1154 (IC).

²⁸⁶ Ibid.

²⁸⁷ Section 68 (5) of the LRA.

strike will not enjoy protection. The LRA stipulates that ‘no person may embark on a strike if that person is bound by a collective agreement which prohibits a strike in respect of the issue in dispute’.²⁸⁸ If employees embark on a strike in respect of an issue which they know is governed by a collective agreement which they have signed, that strike will be unprotected and can result in dismissal on the grounds of misconduct.²⁸⁹ This section further provides that ‘no person may embark on a strike if he is bound by an agreement which requires that the issue in dispute should be referred for arbitration’.²⁹⁰ If employees embark on a strike in respect of that issue without having referred it for arbitration first, then that strike will not be protected. The immunity that applies in the case of protected strikes does not apply to unprotected strikes. The nature of the unprotected strikes which have been prevalent recently, in our country, and more particularly in the mining sector, will be discussed in detail. These strikes will depict typical characteristics of unprotected strikes. Unprotected strike action can also take form of what is generally referred to as a wildcat strike.²⁹¹ A wildcat strike is an unofficial strike which is characterised by violence and which at the end may result into damage of property. In some instances, wildcat strikes are directed against some policies or agreements accepted by union leaders on behalf of the workers. This is what reportedly transpired at Lonmin Marikana Mine near Rustenburg in 2012 whereby employees disagreed with a collective agreement between the union NUM and the management on remuneration.²⁹² It is clear that strikes which take place without the endorsement of the union and which are not in compliance with the statutory requirements of the LRA are unprotected. The data collected and analysed in 2013 by the Department of Labour indicates a continuous rise in the number of strikes as from 2002. The Labour Department recorded 114 industrial incidents in 2013, up from 99 recorded in 2012. The Department had reported that out of the 99 strike actions embarked upon by workers in 2012, about 45 were unprotected. All of these strikes were characterised by violence, with a total of 241 391 workers participating in the strikes. The mining industry in 2013 continued to experience more working days lost than

²⁸⁸ Section 65 of the LRA.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ MB Mawasha, “An analysis of legal implications for participating in unprotected strike” Unisa Dissertation (2013) 8.

²⁹² MB Mawasha, <http://dailymaverick.co.za/opinionista/2012-10-12-marikana-prequel-num-and-the-mu> (Last accessed on 18 October 2012).

any other sector, totalling 515 971 during that year,²⁹³ In other reports, however, it is indicated that 52 percent of the strikes in 2013 were unprotected as compared to 48 percent protected strikes.²⁹⁴ These statistics show that the unprotected strikes in South Africa are in fact rising instead of going down and the figures point towards a trend where the procedural requirements which employees are required to comply with prior to embarking on a strike action, are being deliberately ignored by employees and/or alternatively, are not effective in curbing the rise of unprotected strikes.

4.3.1 The Marikana strike

The August 2012 , the Lonmin Platinum mineworkers strike, commonly referred to as the “Marikana massacre”, set the pace for a plethora of similar strike actions within and beyond the mining industry.²⁹⁵ This strike has set a precedent for a large number of similar strikes that could change the way in which strike action is conducted in South Africa in the future. Most of mineworkers involved in the Marikana strike were registered members of the recognised trade unions operating within the mining company. These unions were the National Union of Mineworkers (NUM), the Association of Mineworkers and Construction Union (AMCU), and Trade Union Solidarity (TUS), with NUM having the majority membership as the time. NUM as the majority union negotiated and signed a two-year collective agreement with the Lonmin Platinum Mine in October 2011 and the agreement remained binding on all parties until its expiration in 2013. According to an official of the NUM, “Unions signed a two-year salary agreement with Lonmin and we cannot negotiate now because of that.”²⁹⁶ With this in mind, and in terms of the LRA, no wage negotiation could be contemplated until 2013 unless the parties to the subsisting collective agreement, i.e. the employer and unions, expressly

²⁹³ Annual Industrial Action Report, Department of Labour, Strikes Statistics (2013)45. Stats SA (Statistics South Africa), Statistical Release Mining: Production and Sales, Technical Report, Pretoria: Stats SA, 2013.

²⁹⁴ Ibid.

²⁹⁵ MO Samuel, “The mineworkers’ unprocedural strike: Setting the path for redefining collective bargaining practice in South Africa”, *J of Contemporary Management* (Vol 10) *J of Contemporary Management* (2013) 249.

²⁹⁶ G Nicolaides, “Marikana: Reopening wage negotiations would have been illegal” <http://ewn.co.za/2014/09/15/Farlam-Commission-of-Inquiry-Lonmin-refused-to-reopen-negotiations> (Last accessed 15 October 2014).

agreed to re-open negotiation for that purpose.²⁹⁷ Notwithstanding the valid collective agreement, about 3000 mineworkers sought to engage in direct wage negotiation with the management of the mining company. The miners demanded an increase in their salary. The workers appointed a “workers representative” to negotiate with the employer on their behalf, rather than a trade union representative. Members of the worker representatives, according to Mogkata,²⁹⁸ emphasised that the strike action and protests embarked upon by the miners were not trade union organised but were rather coordinated under ‘the hat’ of the workers of Marikana. Not surprisingly the management of Lonmin Platinum mine refused to recognise or negotiate with the representatives appointed by the striking workers. This provoked the workers who perceived management to be uninterested in their economic well-being. The striking workers did not comply with various notices issued by management, which ordered them to return to work or face dismissal. The illegal strike and protest action escalated and became increasingly violent. The workers continued their action and violence continued to escalate, ultimately leading to the death of at least 10 people, including two policemen and two security guards engaged by management.²⁹⁹ This development persuaded the police authorities and trade union officials to approach the striking miners to negotiate, after the employers had obtained an interdict from the Labour Court declaring the strike action by the miners as illegal. The attempt to negotiate was unsuccessful and the striking miners gathered on a hill that overlooks the Lonmin Mine. The striking miners were deliberately and defiantly in breach of the interdict. On the 16th of August 2012, a leader of the AMCU, in an effort to persuade the striking miners to call off the illegal strike and return to work, announced that Lonmin management had given the unions an undertaking that it would not dismiss strikers, provided they reported for duty.³⁰⁰ Chauke and Strydom also reported that the AMCU official told the striking miners that we are pleading with you to consider the request to return to work and that the mining company is willing to listen to your demand”.

²⁹⁷ G Nicolades, “Marikana: Re-opening wage negotiations would have been illegal” <http://ewn.co.za/2014/09/15/Farlam-Commission-of-Inquiry-Lonmin-refused-to-reopen-negotiations>

²⁹⁸ Z Mogkata, “Massacre at Marikana; hardship and confusion” (2012) <http://www.finacialmail.co.za/fm/2012/08/23/massacre-at-marikana>.

²⁹⁹ A Chauke & TJ Strydom “Mine War: South Africa bleeds” (2012) <http://www.timeslive.co.za/thetimes/2012/08/16mine-war-sa-bleeds>.

³⁰⁰ A Chauke & TJ Strydom “Mine War: South Africa bleeds” (2012). <http://www.timeslive.co.za/thetimes/2012/08/16mine-war-sa-bleeds>.

The striking workers did not heed the call, and instead confronted the South African Police Service who had been called in to disarm and disperse the striking miners. The confrontation that ensued eventually led to the death of 34 protesting miners, while another 71 were injured.³⁰¹The striking mine workers disrupted operations at the company and intimidated those workers who chose not to join in on the strike.³⁰²As a result of the tragedy, the Ministry of Labour led by Mr Ngoako Ramatlodi, together with the Commission for Conciliation, Mediation and Arbitration, the management of Lonmin Platinum mine and labour unions at the company, reopened negotiations with the representatives of the striking workers. The striking workers appointed neutral persons, including clergymen, to lead negotiation with the parties mentioned above. Samuel³⁰³ points out that this procedure was a clear departure from the collective bargaining process stipulated by the LRA. The employer was forced, because of the violent unprotected strike action, to re-open negotiations despite the collective agreement that was still applicable at the time and despite the striking workers having breached the procedural requirements put in place by the LRA. The Marikana strike was ‘generally characterised by illegality, violence, intimidation, lawlessness and climaxed with casualties’.³⁰⁴ Regardless of the violence and unprotected strike action embarked upon the workers, they succeeded in their demand for a wage increase, thereby redefining the collective bargaining and dispute resolution mechanisms in the LRA.³⁰⁵ Collective Bargaining and dispute resolution procedures are provided in terms of the LRA in order to resolve disputes and find a common ground between the parties. This process was never utilised in Marikana, instead miners insisted on their needs through violence and intimidation until they received a response that was favourable to them. There is however, no evidence on the part of the employer showing measures taken to resolve this issue.

4.3.2 The possible causes of the Marikana strike

³⁰¹ Z Mogkata “Massacre at Marikana; hardship and confusion”<http://www.financialmail.co.za/fm/2012/08/23/massacre-at-marikana>.

³⁰² Ibid.

³⁰³ MO Samuel (note 296 above) 251.

³⁰⁴ Ibid 251.

³⁰⁵ Ibid 251J

Of all the mining strike actions discussed, the Marikana Strike was the most violent and had the most far reaching consequences. The Marikana strike has been dubbed the “Marikana Massacre” because of the loss of life involved. This strike set a precedent and a number of strikes in the mining sector followed immediately after the Marikana strike. It is therefore, crucial to assess what the possible causes were, that led to the strike.

Neil Coleman³⁰⁶ wrote in the *Mail and Guardian* that the following questions need some answers:

- Will the Marikana events turn out to be the democratic era’s equivalent of the 1973 strikes? Have workers rejected their unions as being ineffective and unaccountable, just as the old toothless Trade Union Council of South Africa (TUCSA) was rejected? Is the most powerful and largest union federation in Africa on the brink of collapse?
- Does Marikana represent the nascent emergence of a new, powerful, independent union movement and, more broadly, a political movement that will realign politics in the country?³⁰⁷

Twala³⁰⁸ argues that these questions and the possible answers provided could help in shedding some light on the actual causes of the Marikana Massacre. One would agree with Twala because, besides the well-known cause which was wage related, the miners embarked on this wild cat strike because they had, amongst other things, lost confidence in their trade unions including NUM, which they had relied on for the past years. Twala sets out his assessment of the miner’s grievances³⁰⁹ which were the causes of the Marikana strike and these will be discussed below.

4.3.3 *The Anglo-Ashanti Gold strike*

³⁰⁶ N Coleman, “More Questions than Answers”, *Mail and Guardian*, 26 October -1 November.

³⁰⁷ Ibid.

³⁰⁸ C Twala “The Marikana Massacre: A Historical Overview of the Labour Unrest in the Mining Sector in South Africa” 1 (2012) 62.

³⁰⁹ C Twala (note 308 above) 62.

On the 2nd of November 2012, the Anglo-Ashanti Gold Mine announced it was suspending operations at two of its mines. Striking mine workers barricaded roads linking Rustenburg to Marikana, with rocks and burning tyres. The workers had started embarking on a wildcat strike in September 2012, without following the procedural requirements provided by the LRA. The striking miners were demanding a monthly salary of R16 000.00 including allowances. Subsequent to this unprotected and violent strike, Hedley³¹⁰ reported that more than 8, 000 of the striking miners were dismissed as a result of the unprotected strike action. It is important to make mention that AngloGold Ashanti's management had, prior to the dismissals, issued an ultimatum on the 22nd of October, for striking workers to return to work by no later than 12h00 on the 24th of October, or face dismissal proceedings. However, about 12,000 workers remained on the unprotected strike and this was despite the concerted attempts made to resolve the issue through the gold industry's collective bargaining framework which includes the Chamber of Mines and organized labour. This strike was more or less similar to that of Marikana save to say that it did not result to any loss of life. The distinguishing factor here is that the management, after establishing that the strike was unprotected and in contravention of the provisions of the LRA, subjected the workers involved to disciplinary proceedings which eventually led to their dismissals. This was however, not the case in the Lonmin strike as striking miners retained their jobs even after having engaged themselves in an unprotected strike which lasted for more than five months.

4.3.4 Anglo Platinum (Amplats) strike

Following the precedent already set by mineworkers at Lonmin mine, coupled with the wage increase achieved by the striking miners, more than 12,000 mine workers from four Anglo Platinum (Amplats) mines marched on NUM offices to withdraw their membership.³¹¹ On the 30th of October 2012, it was reported that instead of returning to work, the miners at Amplats barricaded the roads with rocks, logs and burning tyres, blocking fire engines and confronting a police helicopter, water cannons and several armoured vehicles.³¹² The striking miners went

³¹⁰ N Hedley. "End the violence, court tells striking truck drivers". (2012) <http://www.bdlive.co.za/national/labour/2012/10/05/end-the-violence-court-tells-striking-truck-drivers>.

³¹¹ Ibid.

³¹² Ibid.

on to set a power sub-station at the Khuselekani shaft in Rustenburg on fire and the NUM office was also targeted. This strike was also characterised by violence and intimidation which caused the strike to be unprotected. The strike took place after the Lonmin strike and considering what the striking miners achieved at Lonmin, Amplats' strike took the same route as the Lonmin strike.

4.3.5 Coal mining strike

In October 2012 the workers at Forbes and Manhattan Coal and South African Coal Mining Holdings, also went on an illegal strike to demand wage increases.³¹³ Kirilenko further reports that the situation was aggravated by a deadly outbreak of violence resulting in the shooting of two striking workers by security guards at one of the mines owned by Forbes and Manhattan Coal. During the unprotected strike, the striking workers would infiltrate the production areas, assaulting on-duty employees. As a result, one of the on-duty employees was fatally wounded.

4.3.6 The farm workers strike

The practice of unprotected strikes by workers had now escalated to other sectors such as farming in the Western Cape. These sectors had witnessed a number of violent strikes such as those discussed above, unfolding to the benefit of the workers. The farm workers in Boland near De Doorns, also decided to go on an illegal strike to demand a wage increase from R70.00 to R150.00 a day.³¹⁴ This strike, like those in the mining sector, was organised by workers outside of trade union structures. The strike was characterised by violence, intimidation, arson and killing. Farm properties were set on fire and a farm worker was killed.³¹⁵ One of the striking farm workers was reported to have said, as was the case at Marikana and other mines, that the workers had started to form their own representative groups and had distanced themselves from the control of the existing unions under the ambit

³¹³ K Kirilenko "Labour unrest threatens South African mineral supplies". *The Independent Authority*, 5 November 2012.

³¹⁴ J Lunet & I Qalam "South Africa Farmworkers strikes inspired by events at Marikana" 2012. <http://www.wsws.org/en/articles/2012/11/farm-n16.html>.

³¹⁵ Ibid.

of the Congress of South African Trade Unions (COSATU). It was however, reported that although the strikes were not organised by the trade unions, trade union officials nevertheless provided support and direction to the striking farm workers. This strike, even though it was a strike taking place in a different sector of employment, had characteristics which were the same as the mining strikes discussed above and especially characteristic of the Marikana strike. This strike also involved violence, intimidation, malicious damage to property and loss of life. The only inference to be drawn is that the Marikana strike set a precedent for these workers and as such they adopted the same method and approach that the Marikana mine workers used when embarking on their strike.

The Marikana strike has had a significant impact on the labour relations landscape in South Africa.³¹⁶ The strikes, most specifically those in the mining sector which followed after the Marikana strike, were influenced by the latter because most of these strikes took more or less the similar route in the name of demanding a wage increment. On the other hand, it can also be seen simply as the inevitable result of the continuation of the trend of unprotected strike action associated with violence and criminal behaviour. One of the biggest ramifications of Marikana, aside from the tragic deaths of so many, is the perception that the anarchy that was associated with the strike benefited the strikers.

The dangerous trends of unprotected strikes that we have witnessed pose a wide range of implications for South Africa's labour relations practice.³¹⁷ This research agrees with this notion and it is as a result of this idea that this research is suggesting a need to revisit the LRA, to establish how the right to strike can be better regulated in order to curb the propensity for unprotected strikes characterised by violence and intimidation. It therefore goes without saying that with the growing popularity of unconventional and unprocedural strike actions amongst workers, a peaceful and sustainable labour environment can no longer be guaranteed in the workplace. This is because the mining sector has set the tone and furthermore, we have witnessed employees from other sectors of employment such as

³¹⁶ C Twala (note 309 above)66.

³¹⁷ M Samuel "The mineworkers' unprocedural strike: Setting the path for redefining collective bargaining practice in South Africa" (Vol 10) *J of Contemporary Management* (Vol 10),2013, 255.

farming in the Western Cape stating that they were also embarking on unprotected strike using the Marikana *modus operandi* because it has worked for the workers. This situation therefore, cannot be left unattended. It is necessary that the right to strike is better regulated so that a peaceful and sustainable labour environment is guaranteed in the workplace.

4.4. *The Role of Employers and the Mining Industry*

“In the recent years since the democratic dispensation massive platinum boom in the Rustenburg area has generated extensive wealth for companies and executives but ironically the platinum community has not enjoyed the wealth of its mines and instead tensions and poverty for workers and communities has worsened.”³¹⁸

The industry “deliberately fragments its workforce of 180, 000, and out of that about 82, 000 of which are employed through labour brokers and exploited.”³¹⁹

“With workers consciously divided on ethnic, racial and religion lines, huge frustrations have resulted among workers, from whose perspective the industry and employers continue to become rich, while they sweat underground, face death on a daily basis and sink deeper into poverty.”³²⁰

Close to a half of the 180 000 miners are employed through labour brokers which is perceived as cheap labour by the employer wherein employees are used as commodities by the employer to generate profit. These employees are not directly employed by the mine and therefore, their benefits and allowances would not be the same as those employees who are directly employed by the mine. By so doing, the mine is cutting down personnel costs so it can generate more profit. Furthermore, the issue of dividing employees through their ethnic origins and race is what keeps the gaps between them and ultimately causes lack of social cohesion in the workplace.

³¹⁸ N Coleman (note 307 above).

³¹⁹ Ibid.

³²⁰ Ibid.

4.5 The Government's Ineffectiveness in Implementing the Mining Charter

In 2010, South Africa launched a new mining charter to facilitate the sustainable transformation and development of its mining industry, with emphasis on a target of 26 per cent black ownership of the country's mining assets by 2014.³²¹ This launch followed the Mining Charter of 2002. This new charter was aimed at addressing various shortcomings in the implementation of the Mining Charter of 2002.³²² The Mining Charter of 2002 was accused of having failed to consider the rights of communities in terms of community consultation, community input into planning for mining developments; and direct community control of shares in mining companies.³²³ The workers, in a nutshell, claimed that there was no serious attempt to enforce the industry's legal obligations including the provision of housing for miners.

4.6 Labour Movements

A trade union³²⁴ is defined as 'an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisation'. South Africa's collective bargaining legislation, with clear guidelines regarding the responsibilities of employers, labour movements and workers, was regarded as among the best in the world prior to the Marikana incident.³²⁵ Sthembiso Msomi³²⁶ wrote in the *Sunday Times* that 'all the labour related gains achieved over the years in South Africa and particularly in the post 1994 period were undone overnight by the labour movements who failed to represent the workers effectively in the bargaining chambers'.³²⁷ According to Msomi 'many workers belonging to the labour movements claimed that they were expelled

³²¹ C Twala (note 309 above)62.

³²² Launched on the 11th of October 2002 by the Department of Minerals and Energy together with mining industry stakeholders, including the Chamber of Mines, South African Mining Development Association and the National Union of Mine Workers signed the Mining Charter.

³²³ C Twala (note 309 above) 63.

³²⁴ Section 213 of the LRA.

³²⁵ C Twala (note 309 above) 63.

³²⁶ S Msomi "COSATU Elite Losing Touch with Rank and File", *Sunday Times*, 19 August 2012.

³²⁷ Ibid.

from being members if they voiced discontent against the leadership’.³²⁸ This labour movement was NUM. Msomi attributed this to the poor communication between the trade union leaders and members.³²⁹ ‘According to the workers there was no proper feedback given to the members on the labour issues raised in their meetings and in most cases, after collective bargaining, leaders would simply tell them about the wage increases without explaining much on their working conditions and other related perks’.³³⁰ It was also interesting to note the disagreements and evolution of hatred that existed between the members of NUM and Association of Mineworkers and Construction Union (AMCU) over the dominance of the mining sector. AMCU leaders accused the NUM of collaborating with the ‘enemy’ namely, the employer.³³¹ NUM leaders blamed the labour unrests on the rival AMCU and indicated that its members were forced to join the unprotected strike. The situation was further complicated by the tripartite alliance – specifically COSATU’s strong ties with the ruling ANC. The events in Marikana which led to the massacre had some unwarranted consequences for the mining industry in South Africa and amongst other causes this could be blamed on the labour movements who failed to effectively manage and represent the workers when it mattered most. However, having stated these causes, they do not justify in law, the departure by the mining workers from the collective bargaining process provided by the LRA. Furthermore, this research argues that besides the stated causes, the LRA provisions pertaining to the industrial action and/or right to strike in the workplace still need to be revisited in order to curb the propensity of violent strikes in the mining sector and all other employment sectors.

4.7 Government’s Reaction to Unprotected Strikes

The government, having witnessed the wild cat strikes in the mining industry, made some efforts to curb the wave of unprotected strikes. Amongst these efforts, the Minister of Labour tabled the Labour Relations Amendment Bill before parliament in March 2012 for

³²⁸ Ibid.

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ K Mabuza. “Striking Miners Dare Police to ‘Finish Us Off’”, *Sowetan*, 17 August 2012.

approval.³³² The unions would, in terms of the amendments introduced in the Bill, conduct ballots to ensure that the majority of members agreed to the need to strike before a strike would be embarked on.³³³ The perception was that several unlawful acts such as violence and damage to property mostly occur where only a minority supported the cause of their strike.³³⁴

This research will suggest, as stated in Chapter 1 above, that there is a need for the introduction of ballots as a prior requirement before a strike is embarked upon, but it further argues that the ballots alone would not be effective in successfully curbing the wave of unprotected strikes in South Africa.

The proposed introduction of ballots was strongly rejected by COSATU at the National Assembly. COSATU argued that unions had a right on how to consult workers before calling a strike. COSATU successfully blocked the proposed amendment and the requirement for strike balloting was excluded from bill.³³⁵ The Bill was then adopted by the National Assembly without the ballot requirement. This attempt by government clearly shows that the government considers that the existing provisions in the LRA pertaining to the right to strike have had limited effect in dealing with the wave of unprotected strikes that have recently unfolded, especially in the mining sector.

4.8 The Legal Consequences of an Unprotected Strike

The consequences of an unprotected strike can be far reaching in many ways. Even though the right to strike is recognised under the LRA, s 68 of the LRA explicitly provides for the consequences of a strike action embarked upon against the law.

During the operation of the 1956 LRA, non-compliance was visited with criminal liability as well as possible dismissal. The current LRA merely discourages strikes that do not comply

³³² K Hoshino, *The Guardian*, 17 August 2012, 4.

³³³ M Saville “New Labour Bill to curb Illegal Strikes” <http://mg.co.za/2012-04-new-labour-bill--to-curb-illegal-strikes>; <http://www.fin24.com/Economy/Labour-bills-to-curb-illegal-strikes-20120404>.

³³⁴ K Selela, “The right to strike and the future collective bargaining in South Africa: An exploratory analysis”, (Vol 3/No. 5) *International J of Social Sciences* (2014) 7.

³³⁵ M Saville, “Labour Relations Amendment Bill Passed” <http://www.polity.org.za/article/labour-relations-amendment-bill-passed-2013-08>.

with the statutory requirements by “strengthening the hand of the employer.”³³⁶ The remedies through which the employer deals with employees who were involved in unprotected strikes will be discussed below. These are the legal consequences that may result in the event of unprotected strikes:

The Labour Court has exclusive jurisdiction to interdict strikes not in compliance with the Act.³³⁷ Employers are able to sue for compensation for losses occasioned by an unprotected strike;³³⁸ and employers are provided with a fair reason to dismiss employees who participate in a strike that does not comply with the provisions of the LRA.³³⁹ As part of the remedies, an employer who is faced with an unprotected strike has a certain amount of leverage in that the employer may have recourse to lock-out.³⁴⁰ A lock-out is seen as an employer’s economic weapon that gets used during the collective bargaining process to compel employees to accept an offer or proposal on the table which the employees are under no legal obligation to accept.³⁴¹ The employer is exempted from complying with statutory requirements for a protected lock-out if the lock-out is in response to an unprotected strike. The lock-out may be seen as an economic weapon according to Grogan³⁴². It is also a remedy that assists the employer in preventing striking employees from entering the workplace to cause damage.

4.8.1 Court interdicts

The Labour Court has an exclusive jurisdiction to grant an interdict restraining any person from participating in a strike that does not comply with the provisions of the LRA, or any conduct in contemplation or in furtherance of such a strike.³⁴³ In terms of s 68 an employer is entitled to apply to the Labour Court for an interdict prohibiting the unprotected strike action in terms of the LRA. Section 68, however, does not apply where the employer experiences

³³⁶ J Grogan, *Workplace Law*, 9ed (2007) 403.

³³⁷ Section 68 (1) (a) of the LRA.

³³⁸ Section 86 (1)(b) of the LRA.

³³⁹ Section 86 (5) of the LRA.

³⁴⁰ J Grogan *Collective Labour Law* 2ed (2007) 428.

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ Section 68 (1) of the LRA.

criminal conduct or material destruction to property or any unlawful conduct by striking employees emanating from a protected strike. This means when employees comply with the necessary procedural requirements prior to embarking on a strike as required by the LRA, and in the course of the same strike the employees happen to adopt criminal behaviour resulting in damage to property and causing the employer to suffer, this section will not apply. It only applies to unprotected strikes. In simple terms therefore, the employer is entitled by the LRA, when he is satisfied that the strike embarked upon by the employees is unprotected, to apply to the Labour Court for an interdict to prevent the striking employees from continuing with the strike action.

An order in terms of this section can relate, however, only to a strike over a particular issue. It cannot be so framed as to deprive employees of their right to strike over other issues, as this would constitute an unreasonable limitation of the employees' constitutional right to strike.³⁴⁴ An employer, has to adhere to special procedural requirements when seeking a strike interdict. These are provided by section 68 (2) of the LRA as follows:

(2) The Labour Court may not grant any order in terms of subsection (1) (a) unless 48 hours' notice of the application has been given to the respondent: However, the Court may permit a shorter period of notice if-

- (a) The applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;
- (b) The respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and
- (c) The applicant has shown good cause why a period shorter than 48 hours should be permitted.

The Labour Court, in granting the interdict that the employer is seeking, has to satisfy itself that at least a 48-hour notice of the application has been given to the employees or the union organising the strike. Where the employer is seeking the order on far more urgent basis, the notice period may be reduced by leave from the court, provided that there is proof by the

³⁴⁴ J Grogan (note 341 above)403.

employer that he has given written notice to striking employees or union of his intention to seek for the order and that the employees have been given an opportunity to be heard, before a decision is given by the court. Furthermore, the court has to be sure when the employer seeks an order on shorter notice than the stipulated 48-hours, that the basis of urgency is compelling enough for the notice to be dispensed with.

The employer would normally seek an urgent interdict in circumstances where employees are engaged in a wild cat strike which is characterised by violence, intimidation and malicious damage to property. These interdicts are meant to prevent and put a stop to unprotected strikes. The effect of court interdicts in circumstances of wild cat strikes will be discussed in the following chapter where it will be established whether the unions and employees have strictly obeyed these orders as expected by the courts.

4.8.2 Compensation

An employer is entitled to approach the Labour Court and claim compensation for any loss experienced as a result of an unprotected strike.³⁴⁵ The Labour Court may, upon considering the application for compensation by the applicant, order the payment of 'just and equitable compensation' for any loss resulting from an unprotected strike.³⁴⁶ This provision is intended to punish the employees who cause damage to the employer's property during the course of a violent strike which is unprotected. The employer would determine the value of the damage and subsequently sue for compensation thereof. In deciding the issue of compensation, Landis³⁴⁷ provides that the court also takes into account the degree at which it should award just and equitable compensation which he summarises as follows:

1-The extent to which attempts were made to comply with the law;

2- Whether the strike action was premeditated or just spontaneous;

³⁴⁵ Section 68 (1) (b) of the LRA.

³⁴⁶ Section 68 (1)(b) of the LRA.

³⁴⁷ H Landis & L Grossett *Employment and the Law: The Practical Guide for the Workplace*, 2ed (2003) 344.

3- Whether the strike was in response to unjustified conduct by either party to a dispute;

4- Whether there was any compliance with the restraining order;

5- Whether the action is in the interest of collective bargaining; and the duration of the action itself and the financial position of the employer, trade union or employees respectively.³⁴⁸

These are factors which the court would consider in order to arrive at a ‘just and equitable’ order of compensation in favour of the employer. In *Manguang Local Municipality v SAMWU*³⁴⁹ the Labour Court held that where the trade union has a collective bargaining relationship with the employer, and its members embark on an unprotected strike of which the union is aware but in which it has, without just cause, failed to intervene, the union will in terms of s 68 (1) (b), be held liable to compensate the employer for any loss incurred as a result of the strike.

In this case the union had entered into a collective agreement with the municipality and the issue in relation to their decision to embark on an unprotected strike, was an issue governed by the collective agreement that the union was aware of. Despite knowledge of the collective agreement, the union embarked on a strike which was unprotected. The union leadership was proved to have failed in intervening in the process of the unprotected strike, which eventually resulted in the employer experiencing damage in the workplace. It is on that basis that the court ordered the union to compensate the municipality.

4.8.3 Dismissal

An employer in the workplace has the power to dismiss an employee who has been found to have committed an act of misconduct, provided that the misconduct amounts to a dismissible offence. Section 68 (5) of the LRA provides that participation in an unprotected strike or certain forms of conduct in contemplation or furtherance of an unprotected strike, may be a fair reason for dismissal. Manamela³⁵⁰ provides that, as the case may be in any other act of

³⁴⁸ Ibid 344.

³⁴⁹ *Manguang Local Municipality v SAMWU (2003) 3 BLLR 268 (LC)*.

³⁵⁰ E Manamela & M Budeli “Employees right to strike and violence in South Africa” (2013) XLVI *CILSA*, 330.

misconduct, participation in an unprotected strike does not necessarily justify dismissal. A dismissal will only be fair if it is both substantively and procedurally fair.³⁵¹

Mawasha³⁵² emphasises that this means that employers do not have a free hand to dismiss at will – the dismissals must be substantively and procedurally fair. In respect of procedural fairness, the courts have emphasised that employees must be afforded an opportunity to be heard irrespective of whether an ultimatum has been issued or not.

An ultimatum is a requirement which the Code of Good Practice demands the employers to issue, before unprotected strikers can be fairly dismissed. The purpose of an ultimatum is to provide strikers with the opportunity to reconsider their positions before termination of their contracts and it further provides the employer with the necessary opportunity to not act irrationally when deciding on the employees' dismissal.

4.9 Conclusion

This chapter has discussed the unprotected industrial action that has recently taken place in South Africa, particularly in the mining sector. The events that occurred and the mining companies where these unprotected industrial actions took place have been discussed with the aim of exploring the characteristics of an unprotected strike.

These unprotected strikes have been found to have been mainly coupled with violence, intimidation, killings and damage to property. Further it was the Marikana strike that transpired as a typical example of an unprotected strike. The subsequent strikes in the mining sector have also proved to have taken the same route as the Marikana strike by virtue of the same modus operandi. It has been established that despite the possible grievances that may have existed in the mining sector, the striking workers have deliberately departed from the collective bargaining process as provided by the LRA.

³⁵¹ Item 6 of Code of Good Practice of the LRA.

³⁵² B Mawasha “An analysis of legal implications for participating in an unprotected strike” Unisa Dissertation (2013) 25.

The LRA provides for legal consequences in the event that employees are found to have embarked on an unprotected strike. These have also been discussed so as to assess their effect in dealing with the deliberate departure from collective bargaining process by the employees. The problem found is that these are not really effective in curbing the propensity of unprotected strikes and despite that, they have their own limitations which in some circumstances result in the employees escaping punishment even though they are found to have participated in unprotected strikes.

In the next chapter, this research will discuss the role of the Labour Courts in relation to strike action as contemplated by the LRA. An assessment of how the courts have construed the right to strike will be considered. This will be achieved through an analysis of judicial decisions dealing with violent strikes. A further assessment will also be conducted on the cooperation between trade union leadership and the courts, where court orders that require compliance from the unions, have been made. This will talk to the trend of court interdicts and how these have been perceived by the striking workers.

CHAPTER 5: THE LABOUR COURTS AND TRADE UNIONS ON THE PRACTICE OF VIOLENT STRIKE ACTION.

5.1 Introduction

It is the intention of this chapter to discuss the role played by the Labour Courts (hereinafter referred to as “the courts”) in dealing with strike actions brought before them, which are deemed to be unprotected and which end up violent in nature. The chapter will explore the interpretation of strikes given by the courts when dealing with same. As much as this research focuses on the mining strike actions, the analysis of case law in this chapter will also include cases which emanate from other sectors of employment, as strike action by employees would be treated in the same manner by the courts regardless of the employment sector where the strike action emanated. The role of trade union leadership in ensuring that their members embark on legal strikes which do not result in violence will also be discussed in order to establish whether they play their role as expected. An assessment will also be conducted in relation to their compliance with court interdicts interdicting strike actions which have been found by the courts to be unprotected.

5.2 Jurisdiction and Powers of Labour Courts

In South Africa, the Labour Court is tasked with upholding the provisions of the LRA and it has the jurisdiction and power to interdict unprotected strikes and strike violence.³⁵³ Section 157 (1) of the LRA provides that: “the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.”

It is by virtue of this provision that the Labour Court is mandated to deal with matters over which it has exclusive jurisdiction, subject to s 173 of the Constitution. The jurisdiction of Labour Court in terms of this section means that when an Act requires the Labour Court to adjudicate a matter, no other court has jurisdiction.³⁵⁴

³⁵³ Section 157 (1) and 158 (1) of the LRA.

³⁵⁴ J Grogan *Collective Labour Law*, 2ed (2007) 449.

The Labour Court however, shares the same jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution,³⁵⁵ which arises from ‘employment and from labour relations.’³⁵⁶ This simply means that the High Court would in certain circumstances, depending on the cause of action, share the same jurisdiction as the Labour Court. It is understood that there is a thin line between the jurisdiction of the Labour Court and that of the High Court. This should however, not be misinterpreted because the Labour Court, in terms of the LRA has an exclusive jurisdiction in matters that strictly arise from the LRA. The Labour Court shares the same jurisdiction with the High Court in respect of disputes arising from contracts of employment, even if they involve basic conditions as laid down by the Basic Conditions of Employment Act in s 77 (3).³⁵⁷

In terms of s 158 (1) of the LRA the Labour Court may-

- (a) Make any appropriate order, including:
 - (i) The grant of urgent interim relief;
 - (ii) An interdict;
 - (iii) An order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;
 - (iv) A declaratory order;
 - (v) An award of compensation in any circumstances contemplated in this Act;
 - (vi) An award of damages in any circumstances contemplated in this Act; and (vii) An order for costs.

In terms of this section the Labour Court is entitled to make any appropriate order including the granting of interim relief, an interdicting order or declaratory order. The Labour Court

³⁵⁵ 1996 Constitution.

³⁵⁶ J Grogan (note 355 above) 449.

³⁵⁷ Basic Conditions on Employment Act 75 of 1997.

therefore has the same powers as the High Court. This chapter will however focus mostly on case law that has been heard by the Labour Courts.

5.3 The Approach of the Courts

Approaches that have been utilised by the courts in adjudicating matters regarding unprotected strikes will be discussed. The courts, in dealing with unprotected strikes have adopted certain principles, which amongst others, involve the issue in dispute, the notice of strike, the functionality thereof, the employer's economic circumstances and the strike ultimatum.³⁵⁸ These are the principles which the court considers when faced with applications interdicting or declaring a strike as unprotected and unlawful. The earliest approach by the courts under the 1956 Act was the contract-based approach, namely: that an economic strike was a manifestation of a breach of contract.³⁵⁹ Under this Act, a strike related to a grievance concerning employees' economic needs, for an example salary increment, would be treated by the courts as a breach of contract. This was informed by the contract of employment existing between employer and employee which entailed this principle. This however, is no longer the position under the LRA. Under the LRA the courts tend to focus more on the functional approach. The main purpose of the functional approach is to acknowledge that protection against dismissal is justified insofar as the strike remains conducive to collective bargaining. Le Roux provides that in assessing the different principles adopted by the courts, the 'employer's economic circumstances' and 'functionality' are two determining factors that the court considers when handing down its ruling.³⁶⁰ In dealing with unprotected strikes the courts have handed down interdicts, interdicting strikes which are found to be unprotected. Despite such interdicts employees sometimes tend to ignore those court orders and continue with their unprotected strikes. This too will be discussed to establish how the courts react to such disobedience by employees. Myburgh SC³⁶¹ suggests that the court in dealing with unprotected strikes should not compromise in upholding the dismissal of unprotected strikers.

³⁵⁸ Le Roux & Van Niekerk, *South African Law of Unfair Dismissal*, (1994) 296.

³⁵⁹ Ibid.

³⁶⁰ Le Roux & Van Niekerk, *South African Law of Unfair Dismissal*, (1994) 304.

³⁶¹ A Myburgh "The failure to obey interdicts prohibiting strikes and violence: The implications for labour law and the rule of law" (2013) (Vol 23 No. 1) *Contemporary Labour Law* 8.

Myburgh SC³⁶² provides that “when it comes to dealing with employees who have been dismissed for unprotected strike action after having disobeyed a court order; it seems likely that the Labour Court will view this as a severely aggravating factor”. This may indeed be an aggravating factor because the LRA also emphasises that employees engaged in protected protest action forfeit protection from dismissal if their conduct is in breach of or in contempt of Labour Court order.³⁶³ Myburgh SC³⁶⁴ also refers to Conradie JA in his minority judgment at para 120 in *Modise & Others v Steve’s Spar Blackheath*³⁶⁵, where he states that

It is becoming distressingly obvious that court orders are not invariably treated with the respect they ought to command. It is a worrying tendency, one which can only be effectively combated by the courts displaying a marked reluctance to condone non-compliance. Obedience to a court order is foundational to a state based on the rule of law. The courts should by a strict approach ensure that it remains that way. I do not perceive any good reason why the appellants should not be penalised for their non-compliance. They cannot plead ignorance. Their union was closely involved. There is little, then, that can be said in favour of exercising discretion in favour of the appellants and I do not consider that they are, taking the above factors together, entitled to this court’s assistance.³⁶⁶

Here, Conradie JA was stressing his concern over the trend by employees to continuously and deliberately ignore court orders preventing them from proceeding with strikes which have been interdicted and declared unprotected by the courts.³⁶⁷ The majority decision in the Labour Appeal Court was however, that the dismissal of strikers was unfair on account of

³⁶² Ibid.

³⁶³ Section 77 (4) of the LRA.

³⁶⁴ Ibid.

³⁶⁵ *Modise & Others v Steve’s Spar Blackheath* (2000) 21 ILJ 519 (LAC).

³⁶⁶ Ibid 120.

³⁶⁷ Ibid 120.

them not having been afforded a pre-dismissal hearing, which resulted in them being reinstated with six months back-pay.³⁶⁸

The Labour Appeal Court in this case handed down a reasonable judgment because for an employee to have been fairly dismissed, he or she must have been subjected to a disciplinary process where his/her side of the story relating to the alleged misconduct would be considered and evaluated. Therefore, any dismissal without having been subjected to a disciplinary hearing would have been made in a vacuum and would be unfair.

The facts of the *Modise* case were briefly as follows

The appellants were in the employ of the respondent. The respondent had other employees in addition to the appellants. The respondent's employees embarked upon a strike. That strike continued for about two weeks until the respondent issued the strikers with letters of dismissal. Although it appears from the record that it was in dispute whether the appellants had taken part in the strike, during argument it was clarified that the appellants were not denying that during the strike they were part of the group of workers who were on strike.

The appellants point was that they were not willing participants in the strike. The strike had been organised by the South African Commercial, Catering and Allied Workers Union known as SACCAWU of which some of the respondent's employees were members. The appellants case was that they were not members of that union. The respondent maintained that they were. The respondent also maintained that the strike was unprotected. There is also a dispute between the appellants and the respondent on what the demand was which was sought to be enforced through the strike. The respondent contended that the demand was that it and other Spar stores in the region in which the respondent operated, should bargain regionally with SACCAWU.

In *SA Post Office Ltd v TAS Appointment and Management Services CC & Others*³⁶⁹, an interim interdict was granted on 23rd January 2012, on an urgent basis, declaring the strike

³⁶⁸ Ibid 120.

action of the fourth to further respondents to be unprotected strike action in terms of the LRA. The strikers were interdicted from continuing with the strike , prohibited from interfering in a variety of ways with the business of the applicant and they were restrained from coming within 500 metres of the applicant’s premises.³⁷⁰ The strikers were however, not employees of the applicant, the Post Office, but employees of various subcontractors providing labour to the Post Office to perform mail-sorting duties at approximately 23 depots in Gauteng province. The first to third respondents were the subcontractors whose employees were on strike.³⁷¹

The strikers main demand was that they be made permanent employees of the applicant instead of remaining subcontracted workers. Prior to the strike commencing they did not refer any dispute to the CCMA nor did they give any notice of the strike before it commenced. There was also no new evidence contradicting the assertions made by the applicant, on the return day. Accordingly, there is no reason to doubt that the strike was an unprotected one in terms of s 64 (1) (a) and (b) of the LRA.³⁷²

On the return day, the application was opposed by the individual respondents. The opposition was based on a single legal question, namely whether or not this court was entitled to grant an interdict of this nature in a case where the applicant was not the strikers’ employer. The respondent’s representative characterised the point as a jurisdictional one, whereas the applicant’s representative argued that it really concerned the question of whether the applicant had *locus standi* to bring the application.³⁷³

The court found that there was undisputed evidence in that the conduct of strikers included acts of assault and intimidation of permanent and replacement workers, the invasion of the applicant’s various premises and malicious damage to property. These various actions all amounted either to an unlawful interference in the applicant’s employment contracts with other employees, or breaches of the employer’s property rights, or criminal offences, or

³⁶⁹ *SA Post Office Ltd v TAS Appointment and Management Services CC & Others Unreported Case No J112/12, 13- 2-2012 (LC).*

³⁷⁰ Ibid para 1.

³⁷¹ Ibid para 2.

³⁷² Ibid para 3.

³⁷³ Ibid para 1.

alternatively a combination of one or more of these types of infringement. The court further found that the combination of the striker's withdrawal of their own labour, together with preventing the applicant from being able to make use of replacement labour, clearly interfered with the fulfilment of the labour brokers' contractual obligations to the applicant to the obvious detriment of the applicant.

The court therefore confirmed the rule which both prohibited the strike and the other unlawful conduct associated with the strike. It is clear that the court herein, had established that the strike entailed violence and intimidation and on top of that the intended strike was never referred to CCMA and neither was the notice issued. The court was therefore, left with no option but to declare the strike as unprotected. Considering that the strike was accompanied with violence and intimidation, the court had to interdict and declare the strike unprotected because the process employed by the strikers was not functional to the bargaining processes.

In *National Union of Mine Workers v Wanli Stone Belfast (Pty) Ltd*³⁷⁴, NUM had submitted wage demands to the respondent. These wage demands were contained in a letter dated 9 March 2007. A meeting was held between representatives of NUM (including Mr Mnisi) and representatives of the respondent (including Ms Modlin). The meeting was held on 29 March 2007. At the meeting, Modlin informed the applicant that the respondent was not prepared to discuss wages and that the reason was that the respondent had already implemented wage increases for the year 2007 with effect from January 2007.³⁷⁵ On 30 March 2007, Mnisi referred a dispute to the CCMA. He described the dispute as "the refusal of the company to negotiate wages with the representative union".³⁷⁶ Mnisi further recorded that the result of the conciliation should be "that the company must negotiate with the representative union."³⁷⁷

In a further letter to the CCMA dated 23 July 2007, Mnisi further advised the CCMA that "we hereby notify you that the company refused to negotiate with the representatives from the Trade Union at plant level, hence an application to the CCMA."

³⁷⁴ *National Union of Mine Workers v Wanli Stone Belfast (Pty) Ltd (JS 36/2008) [2013] ZALCJHB 99.*

³⁷⁵ Ibid para 8.

³⁷⁶ Ibid para 8

³⁷⁷ Ibid para 9.

Modlin’s unchallenged evidence in this regard was that she repeatedly advised Mnisi that the dispute concerned a refusal to bargain. In fact, Mnisi conceded during cross examination that the company refused to negotiate and that was why a dispute was referred to the CCMA so “that the company would now negotiate wages.”³⁷⁸ Despite the fact that no advisory award had been issued by the CCMA, NUM issued a strike notice on 1 August 2007. In fact, the strike notice was issued on the very same day that the parties met for conciliation at the CCMA.

Due to the fact that conciliation only took place on 1 August 2007, it is reasonable to accept that the employees must have already decided prior to the conciliation meeting that they wished to embark on strike action.³⁷⁹ On 3 August 2007, just after 8h00, the respondent delivered a letter to the applicant advising them that the strike was unprotected and that should the strike not be called off, the Labour Court would be approached for an interdict.³⁸⁰ It is common cause that shortly before 16h00 on the same day, the respondent delivered a notice of motion and the founding affidavit in the urgent application to NUM. As already pointed out, the court granted the interdict. Part of the order declared the strike unprotected because the dispute concerned a refusal to bargain and no advisory award has been issued in respect of the dispute. The order was confirmed on the return date.³⁸¹

In stating the reason(s) for its decision the court provided that it is trite that participation in a strike that is not in compliance with LRA constitutes misconduct although participation in an unprotected strike will not necessarily result in a fair reason to dismiss. In deciding whether it was fair to dismiss, the court must take into consideration various facts, including, but not limited to, the seriousness of the contravention of the LRA, attempts to comply with the LRA and whether or not the strike was in response to unjustified conduct by the employer.

³⁷⁸ Ibid para 9.

³⁷⁹ Ibid para 10.

³⁸⁰ Ibid para 11.

³⁸¹ Ibid para 12.

In evaluating these considerations, the court must also consider the primary objects of the LRA which is to advance labour peace and to give effect to and regulate the fundamental rights conferred by s27 of the Constitution (which recognises the right to strike for purposes of collective bargaining); to promote orderly collective bargaining and to promote the effective resolution of labour disputes. Careful attention should also be given to the seriousness of the contravention of the provisions of the LRA and whether the conduct of the strikers had the effect of subverting the primary purpose or object of the LRA. It is also important to consider whether the employees who participated in an unprotected strike participated in the unprotected strike knowing that their conduct constituted a contravention of the LRA and therefore amounted to an unprotected strike.

Therefore, the Court ruled that the dismissal of the applicants was substantively and procedurally fair. It is important make mention that the court, in making its ruling, considered the seriousness of the contravention of the LRA in respect of collective bargaining provisions. By so doing the court assessed whether the strike action by the employees was within the ambits of the LRA and having found that the strike action was unprotected, it further assessed what extent that the LRA has been contravened. It is clear that the functional approach herein was adopted by the court, hence it found amongst other issues that the strike was not in compliance with the provisions of the LRA pertaining to collective bargaining.

In *RAM Transport SA (Pty) Ltd v SATAWU & Others*³⁸², the court was again faced with the duty to decide on whether a strike by workers was unprotected and whether or not to grant an interdict. In this case workers had embarked on a strike which was violent and intimidating in nature. Justice Andre Van Niekerk, before handing down his judgement, registered his concern in respect of the strike action accompanied by violence where he stated that

Regrettably, the detailed incidents of violence and damage to property perpetrated by unidentified persons that are recorded in the papers are representative of a blight that has come to characterise the South African industrial relations landscape. This court is always

³⁸² *RAM Transport SA (Pty) Ltd v SATAWU & Others (2011) 3 ZALC (LC)*.

open to those who seek the protection of the right to strike. But those who commit acts of criminal and other misconduct during the course of strike action in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose.³⁸³

The court in its ruling found that the strike action embarked upon by the third to further respondents, at the instance of the first respondent, was unprotected and unlawful and that the respondents were interdicted from participating in the unprotected strike.

In *FAWU obo of Kapesi v Premier Foods t/a Blue Ribbon Salt River*³⁸⁴, the union (“FAWU”) and its members (the individual Applicants) embarked on a protected national strike on 5 March 2007 in support of the union’s demand for centralised bargaining. The demand for centralised bargaining was aimed at bringing the wages of rural employees up to the levels of employees in the urban areas.³⁸⁵ Certain workers at the Salt River plant chose not to participate in the strike, as they were entitled to do. Several of the non-striking workers as well as members of management were thereafter targeted by violent criminal conduct.

The Court heard evidence from some of the victims who testified that their homes and those of the workers who chose to continue working were firebombed and ransacked.

The court also heard evidence of cars and possessions of employees being set alight. Non-striking employees were visited at night by groups of individuals who threatened them. Even after the strike had ended, the acts of intimidation and threats of violence did not cease. Even as late as 30 November 2007 the house and vehicle of one of the non-striking employees were set alight and shots were fired at the house.

³⁸³ Ibid para 9.

³⁸⁴ Ibid.

³⁸⁵ Ibid para 3.

A neighbour subsequently identified some of the attackers. Shortly thereafter he was shot and killed near his home.³⁸⁶

The court also heard evidence of a conspiracy that was put in place to have the respondent's regional director assassinated, and there was evidence that money had been collected for that same purpose from some of the striking employees.

Although criminal charges were laid against certain individuals, the charges were never prosecuted to finality. The non-strikers were completely defenceless, and the police services failed to protect them. The judge stated that although a certain measure of rowdiness and boisterousness behaviour were to be expected in most strike action, the acts that characterised this particular strike were particularly violent and senseless and stretched far beyond the kind of conduct that normally occurs during a strike.³⁸⁷

The judge further stated that

Strikes that are marred by this type of violent and unruly conduct are extremely detrimental to the legal foundations upon which labour relations in this country rest. The aim of a strike is to persuade the employer through the peaceful withholding of work to agree to their demands. As already indicated, although a certain degree of disruptiveness is expected, it is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands. This type of vigilante conduct not only seriously undermines the fundamental values of our constitution, but only serve to seriously and irreparable undermine future relations between strikers and their employer. Such conduct further completely negates the rights of non-striking workers to continue working, to dignity, safety and security and privacy and peace of mind.³⁸⁸

The judge herein is expressing the fact that the strikes in almost all sectors of employment have recently been characterised with violence. He provides that this tendency by employees is harmful to collective bargaining and to the continued employment relationship between

³⁸⁶ Ibid para 4.

³⁸⁷ Ibid para 5.

³⁸⁸ Ibid para 6.

employer and employee. He further emphasised that the strike action was not being used bona fide by the striking workers for purposes for which it was intended, that being to engage in constructive collective bargaining without infringing on others rights in the process. Instead it was being used to violently force the employer to accede to their demands.

In respect of evidence relating to violence herein, Mr. Oosthuizen for the Respondent also argued that this type of conduct by striking employees will destroy the workplace relationship after the strike is over. In this regard, Mr. Lavery (the Respondent's regional director for the Western and Eastern Cape) testified that it would constitute a threat to harmonious inter-personal relations between staff if the Applicants were allowed to return to work. I am in agreement that it is difficult to envisage how workplace relationships could be re-established after a particular violent strike marked by intimidation especially to the degree in this particular case) comes to an end and how one can expect to resume a workplace relationship with someone who is suspected of violent criminal acts which threatened that employee or even his/her family.³⁸⁹

After the strike was called off, the striking employees were ordered to return to work. Subsequently they were suspended on full pay and advised that they were going to be charged with serious misconduct for having allegedly committed acts of violence and intimidation during the strike. It then transpired that the employer could not proceed with the disciplinary hearing as planned due to witnesses who were too fearful to testify or who had disappeared. The employer then decided to proceed by way of the s 189 procedure, that being the operational requirements termination process.

The main contention of the applicants was that the respondent was not entitled to substitute the misconduct proceedings (which involve charging the employees with misconduct and requiring them to appear before a disciplinary hearing and proving their guilt) with a s 189 (operational requirements) procedure. It was the respondent's case that it was not possible to proceed with disciplinary hearings against the individual applicants because some witnesses

³⁸⁹ Ibid para 6.

had disappeared and others were too afraid to testify. In the circumstances the respondent had therefore abandoned efforts to proceed with disciplinary hearing and elected rather to initiate consultations in terms of s 189 and 189A of the LRA, relating to the proposed termination of certain of the respondent's employees on the grounds of operational requirements. The respondent argued that the incidents of criminal violence posed a threat to the running of the respondent's business and that it therefore had no option but to resort to the retrenchment route in order to dismiss the applicants.³⁹⁰

AC Basson J found that the dismissal of the applicants was substantively and procedurally unfair. Even though there was evidence that the strike action was not conducive to collective bargaining, the court found in favour of the applicant (the strikers) in that their dismissal was unfair on the basis that they were never subjected to any disciplinary hearing.

In terms of the above case law, it has been established that the courts when adjudicating upon applications based on strike action, focus on certain principles in order to determine whether it is justifiable for a particular strike action to be interdicted from proceeding and/or declared unprotected and unlawful. The courts have used mainly the functional approach. This approach assesses whether protection against dismissal is justified and whether the strike was conducive to collective bargaining and the dictates of the LRA. What can be learnt from the case law is that a dismissal has to be justified before it can be confirmed by the court, and that it must be proved that the strike action for which the employee was dismissed was unprotected.

5.4 The Role and Liability of Trade Unions

There is a duty upon trade unions to take all reasonable steps to stop and prevent violence, damage to property and other acts of misconduct during a strike.³⁹¹ A union can be held vicariously liable for the acts of its members if the employer can establish that there was a wrongful act committed by the union members and that it was liable for its member's

³⁹⁰ Ibid para 20.

³⁹¹ E Manamela & M Budeli (note 351 above) 333.

actions.³⁹² Although s 17 of the Constitution grants everyone the right to assemble, demonstrate, picket, and present petitions, all these rights must be exercised peacefully. These rights are further limited by s 11 (1) of the Regulation of Gatherings Act (hereinafter referred to as the “RGA”)³⁹³ which provides that if any riot damage occurs as a result of a gathering or demonstration, the organisation or convener responsible for such gathering or demonstration, shall be jointly and severally liable together with any person who unlawfully caused or contributed to the damage.

In terms of the RGA, the convener, prior to embarking on a gathering or demonstration, must notify the relevant local authority in writing specifying the estimated number of people to participate in the demonstration and the exact time when the demonstration will be taking place.³⁹⁴ If these requirements have not been complied with, the intended gathering or demonstration will be unprotected and unlawful. This Act however applies to members of the community who intend to demonstrate against a local authority in addition to employees who intend to demonstrate against their employer.

In *SATAWU v Garvis and others*³⁹⁵, SATAWU organised a protest march, which constituted a gathering in terms of the RGA, as part of its national strike. This resulted in people being killed and property damaged. The respondents claimed damages in the High Court from the union in terms of s11 of the Act. SATAWU denied liability and challenged the constitutionality of s11 (2) (b) of the Act, on the grounds that it was inconsistent with the constitutional right to assemble, demonstrate and picket. The court found against SATAWU, which then appealed to the Supreme Court of Appeal (hereinafter referred to as the ‘SCA’). The SCA dismissed the appeal and SATAWU appealed to the Constitutional Court which found that s 11 was not irrational, and that the constitutional right to assemble and demonstrate was constitutionally protected and guaranteed as long as it was exercised peacefully. The Constitutional Court further held that seeing as the decision to assemble resides with the organisation, the organisation should be responsible for any reasonably foreseeable damage arising from that gathering because the purpose of s 11 (2) is to protect

³⁹² Section 68 (1)(b) of the LRA.

³⁹³ Regulation of Gatherings Act 205 of 1993 (hereinafter referred to as the ‘RGA’).

³⁹⁴ Section 4 of the RGA.

³⁹⁵ *SATAWU v Garvis and others* (2012) 33 ILJ 1593 (CC).

the safety and property of the public from any foreseeable damage. SATAWU's appeal was dismissed as a result. The essence of this case is that where a strike organised by a trade union ends up causing damage to the employer's property, the union would then be vicariously liable for that damage. The test used by the court was whether the ensuing damage was foreseeable and whether it was caused by the members of the union. It was clear that the union leadership in this case had fallen short in playing its proper role, which was to ensure that its members conducted themselves lawfully in the course of their strike action.

In *XSTRATA South Africa (Pty) Ltd v Association of Mineworkers and Construction Union & Others*³⁹⁶, blame for the damage caused to the employer's property was directed at the trade union as it also failed to play its role in ensuring its members conduct themselves lawfully during the course of the strike. The court had to consider three applications in this case. The first two concerned extended return dates of a *rule nisi*. The first application was brought by the Applicant (Xstrata) to confirm an interim order (in the form of a *rule nisi*) granted by Molahlehi J on 11 June 2013, in terms of which the court interdicted an unprotected strike action and strike related misconduct. This application was the main application and was opposed only by the First Respondent, Association of Mineworkers and Construction Union (hereinafter referred to as 'AMCU'). The second was an application brought by Xstrata to confirm an interim order (in the form of a *rule nisi*) granted by Snyman AJ on 26 July 2013, which placed AMCU, the Second Respondent, National Union of Mineworkers (hereinafter referred to as 'NUM') and the individual respondents in contempt of Court on the grounds that they had contravened the order of Molahlehi J. Lastly, an application was brought by AMCU to strike out a portion of Xstrata's founding affidavit in the "contempt application". This will be referred to as the "Strike out application". This application was opposed by Xstrata.

In discussing this case the background to these applications will be briefly discussed so as to understand the initial cause of the applicant turning to the court for relief. The applicant

³⁹⁶ *XSTRATA South Africa (Pty) Ltd v Association of Mineworkers and Construction Union & Others Unreported Case (J 1239/13) (2014) ZALCJHB 58.*

operated mines at Thorncliffe, Helena and Magareng (hereinafter referred to as ‘the company’s mines’). These mines employed about 1 256 hourly paid employees, who were members of both AMCU and NUM. On 28 May 2013, the individual respondents embarked on an unprotected strike at the mines, as had been their pattern in the past..³⁹⁷

On 30 May 2013, the individual respondents were dismissed. The dismissals were confirmed on 5 June 2013. Incidents of violence followed the dismissals on 6, 7 and 10 June 2013. The applicant then launched an urgent application to interdict the unlawful behaviour on 10 June 2013. On 11 June 2013, Molahlehi J granted an interim order (in the form of a *rule nisi*) to the effect that the strike which commenced during the morning of the 28th of May 2013 was not in compliance with Chapter IV of the LRA and was therefore unprotected. The order further stated that the respondents were interdicted and restrained from gathering at any of the applicant’s entrances to the workplace and that they were restricted from encouraging or inciting any of the applicant’s employees to participate in the unprotected strike.³⁹⁸

On 22 July 2013, the order was formally served on AMCU at its head office and also on NUM by telefax. Following further incidents of intimidation and violence during the period 11 to 25 July 2013, the applicant then launched the contempt application. On the 26th of July 2013, Snyman AJ issued a *rule nisi* ruling to the effect that:

The First and Second Respondents are in contempt of the Court order dated 11 June 2013; The Fifth to Further Respondents are in contempt of the Court Order. The First and Second Respondents, are ordered to appear in court on 12 September 2013 to show cause why the First and Second respondents should not be ordered to each pay a fine to be determined by the court for their contempt of the court order. Further it was ordered that the 20 individuals which had been specified on the order are ordered to appear in court on the 12th of September

³⁹⁷ Ibid para 2.

³⁹⁸ Ibid para 3.

to show cause why they should not be imprisoned for a period to be determined by the court for their contempt of the court order.³⁹⁹

The applicant sought a final order that AMCU “ensures” that its members comply with the court order granted by Molahlehi J. AMCU conceded that it was in a position to take reasonable steps to ensure that its members comply with the court order. It however opposed the granting of the order arguing that it would be inappropriate for the Court to order that AMCU “ensures” compliance by its members with the court order.

Furthermore, AMCU held the view that to order it to “ensure” compliance would be to place an obligation on a trade union, for which there was no legal basis. AMCU had further submitted that as an independent trade union, its relationship with its members was governed by its constitution. AMCU provided that there was no duty that arose either in contract, delict, or statute as between union and its members that would compel a union to police its members and to ensure that its members acted in a lawful manner. AMCU acknowledged that it was obliged to act within the scope of the LRA in its collective bargaining relationship with an employer, but stated however, that there was no duty owed by a union to an employer to ensure that its members do not engage in unlawful activities, especially in an unprotected strike that was not authorised, instigated, ratified, promoted or encouraged by the union, and where the union did not support such activities. Lastly, it was argued that any obligation placed on a union to physically “police” its members, in circumstances where its members are engaged in unlawful activities could result in “disastrous consequences”.⁴⁰⁰

The applicant’s arguments in seeking confirmation of the order was that all that was required of AMCU was to do what was “reasonably necessary” to ensure compliance. Secondly, that there existed a legal and factual basis for the ensure compliance order due to the fact that AMCU had a collective bargaining relationship with the company. Thirdly, that the unprotected strike was called for and engaged in by a large group of members of AMCU and

³⁹⁹ Ibid para 4-5.

⁴⁰⁰ Ibid para 29.

was called primarily in opposition to the company's decision to take disciplinary action against Mr. Malibu, an AMCU full time shop steward and mine branch secretary, and also against Mr. Mohlala, an AMCU member. Malibu was the chief protagonist in the strike and had called upon his fellow AMCU members to join the "fight against the company". The company had held various meetings with AMCU during the course of the strike and had communicated with AMCU members through it during the course of the strike. The company had met with AMCU, including its president, Mr. Mathunjwa after the dismissals in an attempt to resolve the matter. At no stage did AMCU distance itself from the conduct of its members and AMCU continued to represent the individual respondents.⁴⁰¹

The judge made mention of the fact that the relationship between trade unions and employers was usually governed by recognition agreements (or collective agreements), which set out the rules regulating the relationship between them. However, the collective bargaining agreement cannot of course deal with every possibility. The judge explained that rules would evolve as the relationship progresses and that it would also develop to take account of judicial pronouncements on the regulations of the collective bargaining relationship. In the case of strike action, the LRA provides for the picketing rules to be agreed upon, in terms of s 69 of the Labour Relations Act. Section 69 is the only provision in the LRA that places an obligation on the union and its members to act "peacefully".⁴⁰²

The judge pointed out that the LRA does not regulate the relationship between the trade union and its members, other than to the limited extent provided for by s 98, 99 and 100 of the LRA. Even then, the monitoring and enforcement in that regard is left to the Registrar of Labour Relations under the Department of Labour.⁴⁰³

The judge held that

"It has become noticeable that unions are readily and easily prepared to lead employees out on any form of industrial action, whether lawful or not. The perception that a union has no

⁴⁰¹ Ibid para 30.

⁴⁰² Ibid para 31.

⁴⁰³ Ibid para 32.

obligation whatsoever to control its members during such activities, which are invariably violent in nature, cannot be sustained”.

The judge then went on to explain that there are various grounds upon which there is an obligation on unions to “police” their members.

The first is a constitutional obligation. In terms of s3 of the LRA the act must be interpreted, inter alia, in compliance with the constitution.

The court held that:

[t]hus when a union calls upon its members to take part in strike action or some form of protest action, this will lead to further activities associated with the strike including marches, demonstrations and handing over of petitions. To the extent that the union members would be engaged in these activities during that strike, section 17 of the Constitution places an obligation on them to do so “*peacefully*” and “*unarmed*”. By implication, the same obligation is placed on the union to ensure that its members indeed exercise these rights likewise and within the confines of other laws of the land..⁴⁰⁴

On this basis the court held that trade unions have the responsibility to sensitise their members to their obligation to act peacefully and unarmed. Tlhotlhalemaje, AJ confirmed the rule declaring the strike action by the respondent to be unprotected and unlawful.

5.5 Conclusion

The role of the courts and how they have interpreted the provisions of the LRA in the context of unprotected and violent strikes have been discussed in this chapter. In discussing their role, it has been established the Labour Court is vested with powers to adjudicate on any labour related matters brought before them including applications seeking to interdict violent strikes

⁴⁰⁴ Ibid para 35-36.

by employees in the workplace. It has also been established that the courts in dealing with strikes characterised by violence, have adopted mostly the “functional approach” which they apply in order to determine whether a strike was functional and conducive to collective bargaining processes as provided by the LRA.

The courts have applied this approach successfully and when a strike is found to have been unprotected such strikes have been interdicted by the courts. A worrying trend has been noted, however, in that in some circumstances, the employees belonging to certain registered and recognised trade unions within the workplace have adopted a tendency of disobeying court interdicts thus, the interdicts do not seem to discourage them from pursuing with the violent strike action. Some of these strikes have resulted in chaos and malicious damage to property, including property of the employer. This chapter has also discussed the liability of trade union leadership whose members have been found to be responsible for the damage caused during the strike. It has been established that in such circumstances the union may be ordered to compensate the employer based on the fact that the trade union leadership has a responsibility to ensure that its members conduct themselves diligently during a strike.

It is evident that the courts with the powers they have as envisaged in the LRA have successfully played their role in interpreting and applying the law. It is however, unfortunate that the courts can only set an example for the would-be violent strikers which example(s) have not necessarily proved to be effective in curbing the prevalent strikes characterised by violence in the mining and other sectors of employment. Reason being that the courts deal with the “after effect” part of the strike, which means they come to the party after a strike has taken place, whereas new effective provisions, as suggested by this research, could be introduced in the LRA to curb and/or prevent violent strikes from emerging at the onset as these would be provisions that the strikers would have to comply with before embarking on a strike. This research, therefore, suggests that the current provisions of the LRA⁴⁰⁵ dealing with strike actions need to be developed as the degree and propensity of these violent strikes clearly call for measures that seek to prevent the emergence of these strikes in the first place, rather than to cure the consequences that come with the violence they entail. In the next

⁴⁰⁵ Section 64 and 65 of the LRA.

chapter, International Law Organisation principles on the right to strike will be discussed. A comparison of limitations on the right to strike in respect of selected foreign countries will be made. Reference will be made to the statutory provisions of these countries dealing with limitations on their right to strike. This will be done in order to establish which of those provisions can be of assistance when incorporated into our labour legislation in order to better regulate the right to strike in our country.

CHAPTER 6: THE RIGHT TO STRIKE WITHIN INTERNATIONAL LAW ORGANISATION PRINCIPLES AND FOREIGN JURISDICTIONS

6.1 Introduction

In this chapter, the right to strike under international labour law will be discussed.

International Law Organisation (hereinafter referred to as the 'ILO') principles on the right to strike will be discussed. Furthermore, the research will discuss an assessment on the limitations within which this right may be exercised. This will be conducted through a comparative analysis of limitations on the right to strike among the selected foreign countries. This will be conducted in order to establish which provision(s) can be incorporated into our labour legislation so as to better regulate the right to strike ⁴⁰⁶ in the workplace, and in order to reduce the prevalent and violent strike action we have witnessed in the mining industry (and also in other employment sectors in our country). The right to strike is protected in international and domestic law. There are various ILO conventions and recommendations which are relevant to strike action, although they do not explicitly provide for the right to strike.⁴⁰⁷ Although they do not explicitly mention the right to strike, they establish the right of workers and employers organizations to 'organise their administration and activities and to formulate their programmes,'⁴⁰⁸ and they identify the aims of such organizations as 'furthering and defending the interests of workers or of employers.'⁴⁰⁹ The ILO conventions relevant to strike action are ILO No. 87 of 1948 and ILO No. 98 of 1949. These will be discussed below. By establishing the right of workers' and employers' organizations to 'organise their administration and activities and to formulate their programmes' they recognise that employees and employers may exercise their right of collective bargaining and through this process the right to strike is not excluded. The right to collective bargaining is derived from the Constitution.⁴¹⁰ The right to strike, through exercising the right to collective

⁴⁰⁶ Section 64 (1) of the LRA.

⁴⁰⁷ International Labour Organisation Convention No. 87 of 1948; International Labour Organisation Convention No. 98 of 1949.

⁴⁰⁸ Article 3 of International Labour Organisation Convention No. 87 of 1948.

⁴⁰⁹ Article 10 of International Labour Organisation Convention No. 87 of 1948.

⁴¹⁰ Section 23 (5) of the 1996 Constitution.

bargaining, is necessary because when there is deadlock at negotiation stage or the employer is unwilling to bargain at all, the available recourse for employees is for them to resort to strike action. Generally the ILO is devoted to promoting social justice and internationally recognized human and labour rights.⁴¹¹ Its main aim is to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.⁴¹² Within the ILO there are two bodies set up to supervise the ILO standards.⁴¹³ They are the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations. The Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations⁴¹⁴ have frequently stated that the right to strike is a fundamental right of workers and of their organizations, and they have defined the limits within which it may be exercised, laying down a body of principles regulating the right to strike.⁴¹⁵ These principles and limitations will be discussed below in order to establish what they entail.

6.2 The Meaning of the Right to Strike

The principles of the ILO's supervisory bodies contain no definition of strike action.⁴¹⁶ Despite the absence of a prescribed definition, certain types of strike action have been accepted by the Committee on Freedom of Association, provided they are conducted in a peaceful manner.⁴¹⁷ These types of strike action include strike action such as "go-slows" or "work-to-rule strikes" and include acts of occupying the workplace. This has been classified as a strike action by the Committee on Freedom of Association on the basis that it is also a form of industrial action directed towards the employer and it shares same objective as

⁴¹¹ B Gernigon, A Odero & H Guido, "ILO principles concerning the right to strike" (Vol 137 No 4) *International Labour Review*, (1998), .444.

⁴¹² Ibid.

⁴¹³ Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations.

⁴¹⁴ ILO, Principles Concerning Right to Strike (1995) 121-170.

⁴¹⁵ These principles are contained in particular in ILO: Freedom of Association and collective bargaining, General Survey of Conventions No. 87 and No. 98, conducted in 1994 by the Committee of Experts the Application of Conventions and Recommendations; and in ILO: Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO.

⁴¹⁶ B Gernigon, A Odero & H Guido (note 412 above) 444.

⁴¹⁷ Ibid.

industrial action by employees in the form of a strike. The underlying factor here is that even though the principles of the ILO's supervisory bodies contain no definition of strike, it is a requirement that the strike action must be peaceful in nature.⁴¹⁸ When the right to strike is guaranteed by national legislation, a question that frequently arises is whether the action undertaken by workers constitutes a strike under law.⁴¹⁹ In determining whether the action undertaken constitutes a strike under law, the action is considered to ascertain whether it complies with the legal requirements regulating it.. The Committee on Freedom of Association considers that restrictions on strike action and workplace occupations should be limited to cases where the action ceases to be peaceful.⁴²⁰ This means that for as long as the strike action is not characterised by intimidation and violence and is performed within the parameters of the law, then that strike action is not limited by the Committee on Freedom of Association.

In summary, although there is no definition of strike in terms of the ILO, the ILO recognises and accepts strike action which is peaceful and in compliance with its principles.

6.3 The ILO's Principles on the Right to Strike

In 1952 the Committee on Freedom of Association declared strike action to be a right and laid down the basic principles underlying this right, which recognises the right to strike to be one of the principal means by which employees and their trade unions may legitimately promote and defend their economic and social interests.⁴²¹ This right was declared by the Committee on Freedom of Association as the most important right which employees could use as a tool in order to defend their socio-economic rights at the workplace.⁴²² It is in no doubt that the right to strike is paramount in the workplace but the main concern is how this right is exercised and whether the legislation which regulates it minimises the violence and intimidation which may accompany it's exercise.. The Committee of Freedom of

⁴¹⁸ Article 8 of International Covenant on Economic, Social and Cultural Rights, 1996.

⁴¹⁹ B Gernigon, A Otero & H Guido (note 412 above) 444.

⁴²⁰ ILO Committee on Freedom of Association, (1994) 173 - 174.

⁴²¹ Ibid (note 421) para 473-475.

⁴²² Ibid (note 421) para 473-475.

Association⁴²³ has expressed views in respect of the right to strike, views which coincide in substance with those of the Committee of Experts. The views of the Committee of Freedom of Association⁴²⁴ are as follows:

The Committee has made it clear that the right to strike is a right which workers and their organisations are entitled to enjoy;⁴²⁴ The Committee reduced the number of categories of workers who may be deprived of this right, and further reduced the legal restrictions on the exercise of the same right.⁴²⁵ One of the categories was declared as that of essential services. The sectors under essential were declared to be the hospital sector, electricity services, water supply services and the air traffic control.⁴²⁶ Essential services are defined as those ‘the interruption of which would endanger the life, personal safety or health of the whole or part of the population.’⁴²⁷ The Committee linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers (which criterion excludes strikes of a purely political nature from the scope of international protection provided by the ILO);⁴²⁸ Stated that the legitimate exercise of the right to strike should not entail prejudicial penalties of any sort, which would entail acts of anti-union discrimination.⁴²⁹

What is of importance and as outlined above by the views of the Committee on Freedom of Association is that the right to strike is a fundamental right which must be exercised within its limitations. These limitations should however not be unreasonably restrictive. Based on the views by the Committee on Freedom of Association, member states of the United Nations must ensure that the right to strike is properly restricted by law in order to avoid abuse of the right and especially so where the exercise of the right may be dominated by violence and intimidation, as is the situation in South Africa.

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ Ibid.

⁴²⁶ ILO Committee on Freedom of Association, 1996d, para 544.

⁴²⁷ ILO Committee of Experts, 1983b, para 214.

⁴²⁸ B Gernigon, A Odera & H Guido (note 412 above) 444.

⁴²⁹ Ibid 444.

6.4 The Right to Strike Under International Labour Law

A provision on the right to strike can be found in the 1966 International Covenant on Economic, Social and Cultural Rights⁴³⁰ (hereinafter referred to as the “ICESCR”), though it makes its exercise subject to conformity with national laws.⁴³¹ Article 8 contains an internal limitation which provides that the right to strike should be exercised in conformity with national laws. National laws prohibit violence during strike action.⁴³² Such national laws would, in the case of South Africa, be laws such as the LRA. Thus, exercising the right to strike outside the ambit of national laws is a violation of the provisions of article 8 of ICESCR. This covenant is relevant to the ones that are provided for above in that it also requires that the right to strike should be exercised within the ambit of national legislation, and further that strike action should not be characterised by violence. The absence of a specific reference to the right to strike in the ILO Conventions does not mean that there is no such right in ILO jurisprudence. Both the ILO’s Committee of Experts on the Application of Conventions and Recommendations and its Committee on Freedom of Association have derived a right to strike from the provisions of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

The Committee of Freedom of Association has made it clear that “freedom of association implies not only the right of workers and employers to form freely organisations of their own choosing but also the right, for the organisations themselves, to pursue legal activities for the defence of their occupational interests”.⁴³³ The Committee has long recognised the right to strike by workers and their organisations as an appropriate means of defending their

⁴³⁰ International Covenant on Economic, Social and Cultural Rights (1967) UNTS 3 6 ILM 360 (1960).

⁴³¹ Article 8 (d) United Nations (1988).

⁴³² Article 8 of International Covenant on Economic, Social and Cultural Rights, 1996.

⁴³³ International Labour Organisation: Freedom of Association Committee (1985) 345.

economic and social interests”.⁴³⁴ Thus, it is now established that the right to strike is entrenched as part of freedom of association and the right of workers to organise.⁴³⁵

6.4.1 ILO Convention 87 of 1948

As highlighted above there are two legal sources of the right to strike or freedom to strike.⁴³⁶⁴³⁷ First, the right or freedom to strike is a positive treaty-based international labour standard implicit in Conventions No. 87 and 98, which deal with the freedom of association, the right to organise, and the application of the principles of the right to organise and to bargain collectively. Secondly, the right to strike is implicit in the ILO Constitution in which the concept of the freedom of association is entrenched.⁴³⁸ ILO Convention 87 guarantees all employers and workers, including supervisors, the right to freely establish and join organisations of their own choice subject only to the rules of the organisation.⁴³⁹ Under article 3, workers’ and employers’ organisations are also entitled to “draw up their constitutions and rules; to elect their representatives in full freedom; to organise their administration and activities; and to formulate their programmes without any interference from public authorities.”⁴⁴⁰ This means that the public authorities must refrain from any interference that would restrict such organisations or impede the lawful exercise of their rights. According to this convention, employees are at liberty to constitute their own organisations and participate freely in the collective bargaining processes without any interference or manipulation. In essence this convention guarantees the right to freedom of association. Article 8 of this Convention further provides that in exercising rights provided for in the Convention, workers, employers and their respective organisations, must respect the law of the land. The law of the land, however, should not be such as to impair, and shall not be applied so as to impair, the

⁴³⁴ Ibid. para 362.

⁴³⁵ L Madhuku “The right to strike in Southern Africa” *International Labour Review*, (1997) 3.

⁴³⁶ R Mthombeni “The right or freedom to strike: an analysis from an international and comparative perspective” *XXIII CILSA* (1990), 340.

⁴³⁷ International Labour Organisation Constitution.

⁴³⁸ 1919 ILO Constitution.

⁴³⁹ International Labour Organisation Convention No. 87 of 1948, Article 2.

⁴⁴⁰ Ibid Article 3.

guarantees provided for in the Convention.⁴⁴¹ This means that when employees exercise their right to strike they must do so in a manner that will not undermine the restrictions put in place by the national legislation. However, the national legislation must also be in line with the constitution. For an example, national legislation must not provide for a restriction that would be in contravention of the constitution. Convention 87 of 1948 guarantees the right to freedom of association by the employees and employers in the workplace. Further they are entitled to establish their own terms and conditions within their associations or organisations which will govern how they conduct themselves and their activities. What is of importance and relevance to this research is that this convention demands that the parties in the workplace respect the law of the land and further requires them to exercise the right to strike in a manner that will not contravene the Constitution. This is contrary to the position in South Africa. In amplification this research has found above that workers in the mining sector have departed from exercising the right to strike within the dictates of the LRA. It has also found, in terms of the case law discussed, that workers have even disregarded court orders interdicting them from exercising this right violently and with intimidation.

6.4.2 ILO Convention 98 of 1949

ILO Convention 98 deals in particular with the right to organise and to bargain collectively. It also provides protection for workers, employers, trade unions, or workers' organisations against acts of interference with the exercise of their rights by other parties.

This Convention protects workers against acts of discrimination and victimisation by their employers on the basis of their trade union membership or activity.⁴⁴² These include acts of dismissal, and any other act designed to detrimentally affect workers' union membership, or because of their participation in union activities outside of working hours, or with the consent of the employer, within working hours.⁴⁴³

⁴⁴¹ Ibid Article 8 (1) and (2).

⁴⁴² Convention No. 98 article 1.1.

⁴⁴³ Committee on Freedom of Association, Second Report (1952), Case No 28 (Jamaica), in Sixth Report

6.5 ILO Restrictions on Exercising the Right to Strike

It has been discussed and established above that in terms of the ILO principles and other relevant international instruments the right to strike is protected even though there is no specific reference thereto. However, it is important to acknowledge that the ILO's supervisory bodies do not regard the right to strike as absolute. The ILO has maintained that the right to strike is an essential element of the right to freedom of association, but recognises that strikes may be restricted by law, where appropriate, provided that adequate alternatives to dispute resolution such as mediation, conciliation, and arbitration offer a solution to workers who are affected.⁴⁴⁴ Exercising the right to strike in a way which violates other people's rights is contrary to the principle of freedom of association. According to the Committee of Experts, engaging in an unlawful strike may be considered an unfair labour practice and entail civil liability and disciplinary sanctions for those who engage in it.⁴⁴⁵ The supervisory bodies have accepted that governments may legitimately impose certain preconditions on the right to strike. However, all preconditions must be reasonable, and must not substantially limit recourse to industrial action by employees and trade unions.⁴⁴⁶ The Committee on Freedom of Association also considers that restrictions on the right to strike should be limited to cases where the action ceases to be peaceful.⁴⁴⁷ According to Committee on Freedom of Association, the principle of freedom of association does not protect abuses consisting of criminal acts performed while exercising the right to strike. Thus, violent activities during strikes fall outside the ambit of the protection.⁴⁴⁸ In most cases, the law lays down a series of conditions or requirements that must be met in order to render a strike lawful. The Committee on Freedom of Association has specified that such conditions "should be reasonable and in any event not such as to place a substantial limitation on the means of

⁴⁴⁴ of the International Labour Organisation to the United Nations (Geneva), Appendix 5, 181, para 27.
International Labour Organisation General Survey (1973) para 107.

⁴⁴⁵ Ibid para 176.

⁴⁴⁶ Ibid para 170-172.

⁴⁴⁷ Ibid para 173-174.

⁴⁴⁸ International Labour Organisation, *Digest of Decisions and Principles of the CFA* (5ed) 2006, para 667.

action open to trade union organisations.⁴⁴⁹ The Committee of Freedom of Association has accepted the following prerequisites for protected industrial action:

1. The obligation to give prior notice;⁴⁵⁰ The obligation to have recourse to conciliation, mediation and arbitration procedures in industrial disputes as a prior condition to declaring a strike, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage;⁴⁵¹ The obligation to observe a certain quorum and to obtain the agreement of a specified majority;⁴⁵² The obligation to take strike decisions by secret ballot.⁴⁵³
2. Adoption of measures to comply with safety requirements and for the prevention of accidents;⁴⁵⁴
3. The establishment of a minimum service in particular cases;⁴⁵⁵ and
4. The guarantee of the freedom to work for non-strikers.⁴⁵⁶

A brief discussion will be conducted on these prerequisites so as to understand what they entail and how they ought to be complied with. It is also important to make mention that the LRA does entail most of these prerequisites (which have been discussed above) except the secret ballot prerequisite. The secret ballot prerequisite was however contained in the 1956 Act which preceded the LRA. This research, amongst other assertions, suggests that the secret ballot prerequisite should be re-introduced in the LRA; however, it further argues that the mere reintroduction of this prerequisite cannot address the problem of violent strike actions if not accompanied by other prerequisites as will be suggested in Chapter 7 of this research. An analysis of the limitations on the right to strike by other foreign countries must

⁴⁴⁹ International Labour Organisation, Principles of Freedom of Association, 1996d, para 498.

⁴⁵⁰ Ibid para 502-504.

⁴⁵¹ Ibid para 500-501.

⁴⁵² Ibid para 506-513.

⁴⁵³ ILO, 1996d, para 503 and 510.

⁴⁵⁴ ILO, 1996d, para 554 and 555.

⁴⁵⁵ ILO, 1996d, para 556-558.

⁴⁵⁶ ILO, 1996d, para 586.

be conducted. This will assist in identifying which provisions in the statutes of these foreign countries, when introduced in the LRA, can successfully reduce the propensity for unlawful strike actions. This would ensure better regulation of collective bargaining in the mining industry and other sectors of employment in South Africa.

6.5.1 Prior notice

The Committee on Freedom of Association is of the opinion that in the case of planned collective action, particularly strike action, notice periods help to cool down emotions and assist employees to make a careful, informed decision prior to taking the decision to go on strike.⁴⁵⁷ The committee is also of the opinion that the obligation to notify the employer of the planned collective action in advance cannot be considered a restriction on the right to strike, however, the length of the notice periods may be restrictive in unduly onerous.⁴⁵⁸ The committee is of the opinion that the requirement of notice should be perceived as a legitimate restriction but only to a certain extent. It suggests that the notice can only be acceptable if the required notice period is not too lengthy. This assessment or suggestion is reasonable in that a notice requirement preceding a strike action is a fair and reasonable requirement to enable the employer to be aware and prepared of any possible eventuality that may come with the strike action. However, a notice requirement can be said to be unreasonable if the required notice is so lengthy such that the intended strike action may lose its intended cause or the organisation may be open to manipulation by the management.

6.5.2 Conciliation, mediation and arbitration

The Committee on Freedom of Association accepts that ‘provision may be made for recourse to conciliation, mediation and arbitration procedures in industrial disputes before a strike may be called, provided that they are adequate, impartial and speedy and that the parties involved can take part at every stage.’⁴⁵⁹ The Committee on Freedom of Association has emphasised

⁴⁵⁷ B Gernigon, A Odero & H Guido “ILO principles concerning the right to strike” (1998) (Vol 137, No 4), *International Labour Review*, 454.

⁴⁵⁸ A Swiatkowski “European Social Charter: The right to strike” (Vol 47 No 6), (2005) 290.

⁴⁵⁹ B Gernigon, A Odero and H Guido (note 458 above)454.

that in a large number of countries legislation stipulates that conciliation and mediation procedures must be exhausted before a strike may be called. This is also the situation in South Africa in terms of the LRA.⁴⁶⁰ The spirit of these provisions is compatible with Article 4 of Convention No. 98, which encourages the ‘full development and utilisation of machinery for the voluntary negotiation of collective agreements.’⁴⁶¹ Such machinery in terms of the Committee on Freedom of Association must, however, have the sole purpose of facilitating bargaining.⁴⁶² The Committee on Freedom of Association further suggests that it should not be so complex or slow that ‘a lawful strike becomes impossible in practice or loses its effectiveness.’⁴⁶³ The Committee on Freedom of Association’s suggestion here is correct because for a strike to be effective and for the employer to meet the needs and demands of employees the strike action does not need to be violent.

The conciliation, mediation and arbitration process in terms of the ILO is governed by the Voluntary Conciliation and Arbitration Convention No. 92 of 1951. In line with this prerequisite, the Voluntary Conciliation and Arbitration Convention No. 92 of 1951 advocates that if a dispute has been submitted to conciliation procedure or arbitration for final settlement with the consent of all parties concerned, the latter should be prevented from engaging in strikes and lockouts, while the conciliation procedure or arbitration is in progress and should ultimately accept the arbitration award. This is also the position in South Africa. No party is entitled to proceed with the strike action prior or during a conciliation or arbitration process, or if the issue is one that a party has a right to refer to arbitration.⁴⁶⁴

6.5.3 *Quorum and majority*

The Committee on Freedom of Association in relation to the quorum and requisite majority required for taking strike decisions, has adopted criteria for determining same in response to

⁴⁶⁰ Ibid 455455.

⁴⁶¹ Ibid 455455.

⁴⁶² Ibid.

⁴⁶³ ILO, 1994a, par 171.

⁴⁶⁴ Section 65 of the LRA.

the complaints submitted to it.⁴⁶⁵ A quorum and requisite majority are factors that must be considered before a decision to strike is taken. Among other issues, the complaints were that this prerequisite has made the exercise of strikes through a ballot method difficult and mostly impossible to exercise.⁴⁶⁶ It has indicated and confirmed, for example, that the observance of “a quorum of two-thirds of the members may be difficult to reach, in particular where trade unions have large numbers of members covering a large area”.⁴⁶⁷ With regard to the number of votes required for the calling of a strike, the Committee on Freedom of Association has pointed out that the prerequisites of two-thirds of the total number of members of the union or branch concerned constitutes an infringement of Article 3 of Convention No. 87 of 1948.⁴⁶⁸ In contrast, the Committee on Freedom of Association has considered this to be in conformity with the principles of freedom of association.⁴⁶⁹ A situation where the decision to call a strike in the local branch of a trade union organisation may be taken by the general assembly of the local branch, is when the reason for the strike is of a local nature and where, in the higher-level of trade union organisations, the decision to call a strike may be taken by the executive committee of these organisations by an absolute majority of all the members of the committee.⁴⁷⁰ The Committee on Freedom of Association has also confirmed that in many countries legislation makes the exercise of the right to strike subject to prior approval by a certain percentage of workers. In this regard the Committee on Freedom of Association has emphasised that the ballot method, quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult or even impossible in practice.⁴⁷¹ What is important and relevant here is that the ballot method as a prerequisite for protected strike action should not be a tool to prevent workers from exercising the right to strike. It must be a flexible process that can be used to determine whether there is the democratic will to exercise the strike action in the workplace. It must not be tainted with extra limitations that may make it impossible to exercise. It is important to emphasise that even though this

⁴⁶⁵ ILO, 1994a, para 175.

⁴⁶⁶ ILO, 1994a, para 176.

⁴⁶⁷ ILO, 1996d, para 511.

⁴⁶⁸ ILO, 1996d, para 506.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

⁴⁷¹ ILO, 1996a, para 170.

research suggests amongst other things the re-introduction of secret ballots, it does not suggest that it should be used as a tool to prevent workers from exercising their right to strike.

6.6 Illegal Exercise of the Right to Strike

The right to strike, which is held by the ILO supervisory bodies to be fundamental, is not an absolute right⁴⁷² and its exercise should be compatible with the other fundamental rights of citizens and employers.⁴⁷³ Consequently, the principles of the supervisory bodies cover only legal strikes, that is, strikes which are carried out in compliance with national legislation (where this does not undermine the basic guarantees of the right to strike as have been described above in relation to principles of freedom of association in connection with strikes).⁴⁷⁴ This means that the right to strike should be exercised in a manner that does not undermine the other rights of people which are equally important. The competing rights must be properly balanced against each other. Any act in the exercise of the right to strike which is contrary to how this right should be exercised cannot be recognised under the ILO. Abuses in the exercise of the right may take different forms, ranging from its exercise by groups of workers who may be excluded from this right, or failure to comply with reasonable requirements in declaring a strike, to damaging or destroying premises or property of the employer and/or physical violence against persons.⁴⁷⁵ In examining situations involving abuses in the exercise of the right to strike, the Committee on Freedom of Association (hereinafter referred to as the 'CFA') has decided that the principle of freedom of association does not protect abuses consisting of violence and any other unlawful acts while exercising the right to strike.⁴⁷⁶ The CFA has also decided, in relation to the unlawful exercise of the right to strike, that penal sanctions should only be imposed in respect of strikes where there are violations of strike prohibitions in conformity with the principles of freedom of association.⁴⁷⁷ This means strike actions which are not in compliance with national legislation

⁴⁷² B Gernigon, A Odero and H Guido "ILO principles concerning the right to strike" (Vol 137, No 4) *International Labour Review* (1998), 467.

⁴⁷³ *Ibid.*

⁴⁷⁴ ILO, 1996d, par 498.

⁴⁷⁵ ILO, 1998b, 309th Report, para 305.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

prescribing how strikes should be exercised so as to be deemed legal and recognised, should be punished and/or penalised by enforcement of subsequent disciplinary action. Sanctions in respect of violent strike actions could assist in deterring other would be violent strikers, however, the level of deterrence would be largely dependent on the severity of the sanctions imposed. As much as the provision of sanctions and penalties can be seen as assisting, the problem with sanctions and penalty provisions as possible solutions, is that it is solution which is reactive to the problem. It takes place after the occurrence and its effectiveness depends on the kind of sanction or penalty that would follow. This research argues that the problem of strikes characterised by violence and intimidation in the mining sector warrants a solution which is proactive and which is capable of curbing and/or preventing such strikes from taking place. This therefore, means that provisions capable of curbing unlawful strikes before they even occur are necessary and more important than provisions that would suggest sanctions and penalties after the violent and unlawful strikes have occurred.

6.7 Limitation on Right to Strike by Foreign Jurisdictions

An analysis among foreign states in relation to limitations on the right to strike will be conducted. These foreign states are Australia, USA, UK, Canada, New Zealand and Botswana. A broader analysis was conducted including a various number of other states and these have been identified as states from some of which our country can identify suitable provision(s) that can help to better regulate the right to strike. Selected provisions from these countries will assist in better regulating the right to strike in South Africa by curbing the wave of unlawful strikes in the mining sector as well as other sectors in South Africa.

Provisions will be identified in the following chapter at least from three of the aforementioned states and such provisions will be suggested as suitable for incorporation into the LRA. These will assist to better regulate the right to strike and curb the wave of unlawful strikes in the mining sector. These provisions have been identified because practically, they would be effective in curbing the violent and unlawful strikes in the mining sector and other relevant sectors. These provisions contain strict restrictions which are pro-active but which at the same time do not unjustifiably restrict the employees' right to strike.

6.7.1 Australia:

For much of Australia's history there has been no right to strike and even currently the Australian Constitution⁴⁷⁸ does not recognise or create a specific right to strike.⁴⁷⁹ In 1993, however, the Australian Government passed legislation⁴⁸⁰ protecting the right to strike in terms of s 51 of the Australian Constitution.⁴⁸¹ The legislation was passed in response to various findings by ILO committees, charged with monitoring compliance with ILO conventions.⁴⁸² The committees had found that Australia breached its obligations under certain ILO conventions by failing to protect the right to strike.⁴⁸³ Prior to the Industrial Relations Reform Act of 1993, trade unions and trade union members who took industrial action were exposed to actions for damages in tort and contract.⁴⁸⁴ The Industrial Relations Reform Act 1993 amended Division 4 of the Industrial Relations Act of 1988, inserting a new Part VIB Division 4, which provided for immunity from civil liability for striking employees in limited circumstances.⁴⁸⁵ In 1996 the Workplace Relations Act repealed the Industrial Relations Act of 1993. It also protected the right to strike in the workplace. It has amongst other features, a ballot requirement; a good faith bargaining duty and the right to court intervention. These will be discussed below.

Industrial action by employees or an organisation of employees is not protected under this Act unless certain requirements in section in s 435 (2) are met.⁴⁸⁶ These requirements are that the industrial action must take place during the bargaining period, which is the period allowed for collective bargaining and must be by an organisation of employees that is a negotiating party, or a member of the organisation who is employed by the employer.⁴⁸⁷ Further

⁴⁷⁸ Australian Constitution (xxix) (“external affairs”).

⁴⁷⁹ G Giudice, “The Right to Strike in Australia”, AUSTRALIA\GEGI\233945859.01, 1

⁴⁸⁰ Industrial Relations Reform Act of 1993.

⁴⁸¹ Section 51 of Australian Constitution (xxix) (“external affairs”).

⁴⁸² Commonwealth of Australia, Explanatory Memorandum to the Industrial Relations Reform Bill (1993) 6 (“Explanatory Memorandum”). 26 October 1993.

⁴⁸³ R Dalton & R Groom “The right to strike in Australia: International Treaty obligations and external affairs power” (Vol 1) 2000, 162.

⁴⁸⁴ G McGarry “Sanctions and Industrial Action: The impact of the Industrial Relations Reform Act” 7 (1994) (2) *Australian J of Labour Law* 198.

⁴⁸⁵ Part VIB Division 4 of Industrial Relations Reform Act 1993.

⁴⁸⁶ Workplace Relations Act, 1996. (hereinafter referred to as “the Act”)

⁴⁸⁷ Section 435 (2) of the Act.

employees, prior to their action, are required to issue a notice to the employer.⁴⁸⁸ The said notice must be in writing and must provide at least a three working days written notice prior to the intended day of strike⁴⁸⁹. This means that if employees intend to go on strike they must issue a written notice three days' prior the intended date so the employer can be aware of the intended strike in advance. Engaging in industrial action by members of an organisation of employees that is a negotiating party is not protected action unless, before the industrial action begins, the industrial action is duly authorised by a committee of management of the organisation or by someone authorised by such a committee to authorise the industrial action.⁴⁹⁰ A written notice of authorisation by the committee must also be given to a Registrar.⁴⁹¹ Further industrial action by employees is not protected action unless it has been authorised in advance by a secret ballot⁴⁹². The rule that industrial action by employees is not protected action unless it has been authorised by a protected action ballot does however, not apply to action in response to an employer engaging in industrial action against the employees.⁴⁹³ Secret ballot as a requirement simply requires that before employees or the organisation of employees embarks on a strike, the employees' action must have been decided through a secret ballot. The majority vote then determines whether the employees or their organisation intend to go on strike.

The similarities that South Africa has with Australia are that both countries contain a written notice requirement prior to industrial action. They differ on the required period of notice.

They also differ on the requirement of secret ballot. In Australia, employees are required to conduct a secret ballot to determine whether the intended strike action is the will of the majority of employees. This is also used as a determining factor among the employees.

However, in South Africa this requirement is no longer applicable in the current LRA.

Further and in contrast to South Africa, Australia requires parties to bargain in good faith and

⁴⁸⁸ Section 441 (2) (b) of the Act.

⁴⁸⁹ Section 441 (3) (a) of the Act.

⁴⁹⁰ Section 446 (1) (a) of the Act.

⁴⁹¹ Section 446 (1) (c) of the Act.

⁴⁹² Section 449 (2) of the Act.

⁴⁹³ Section 449 (3) of the Act.

that strike action can only take place during the bargaining period. Beyond this period no strike action is allowed.

What is remarkable here is that when parties bargain they are required to do so in good faith. If parties, during the bargaining process, would uphold this principle there would be fewer reasons for either of the parties to embark on an industrial action because all the expected obligations from parties would be implemented in good faith. It is however, not clear as to what the yard stick is in order to determine when a party has acted in good faith or not.

6.7.2 United States of America

The USA government has repeatedly claimed that international human rights norms, including the right to strike, are adequately protected by U.S. statutory and constitutional law.⁴⁹⁴ It is not clear where in the constitution this right is enshrined, however. In terms of the National Labour Relations Act⁴⁹⁵ employees are guaranteed ‘the right to self-organization, to form, join, or assist labour organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining’.⁴⁹⁶ Section 7 of the Act states in part that ‘Employees shall have the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.’ Section 13 also concerns the right to strike. It reads as follows:

‘Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right’.

It is clear from a reading of these two provisions that the law not only guarantees the right of employees to strike, but also places limitations and qualifications on the exercise of that right.

⁴⁹⁴ LA. Compa, *Unfair Advantage: Workers’ Freedom of Association in the United States under International Human Rights Standards* (2000), 46-47.

⁴⁹⁵ National Labour Relations Act, 1997 (hereinafter referred to as “the Act”)

⁴⁹⁶ Section 7 of the Act.

Strikers who engage in serious misconduct in the course of a strike may be refused reinstatement to their former jobs. This applies to both economic strikers and unfair labour practice strikers. Serious misconduct has been held to include, among other things, violence and threats of violence. Examples of serious misconduct that could cause the employees involved to lose their right to reinstatement are: strikers physically restricting persons from entering or leaving the workplace; strikers threatening violence against non-striking workers; and strikers attacking managerial representatives.

Where employees strike over issues settled by collective bargaining, or during the life of a bargaining agreement, such strike is deemed illegal.⁴⁹⁷ Almost all bargaining agreements contain no-strike clauses prohibiting all work stoppages during the life of such contracts. Violations of such provisions constitute unprotected strike conduct, and may render supporting labour organizations liable for claims for breach of contract.⁴⁹⁸ Even where no express “no-strike” provision is included in the contract, if workers strike over issues subject to final resolution through contractual grievance and arbitration procedures, they would be in violation of the implied “no-strike” obligation in the adoption of those processes.

Parties to an existing collective bargaining agreement cannot resort to a strike or lockout until they have endeavoured, in good faith, to achieve a new agreement without a work stoppage.⁴⁹⁹ This is another requirement. In terms of this requirement the parties are required to bargain in good faith before resorting to a strike action. What is important here is that the parties must bargain honestly and without intentionally misleading the other party.

The party wishing to negotiate a new agreement must provide the other party with notice indicating that they wish to modify the terms of employment. This may be a collective agreement between the parties governing their process of collective bargaining in the workplace. The notice must be issued at least sixty days prior to the termination date of the existing contract.⁵⁰⁰ They must then provide the Federal Mediation and Conciliation Service and the relevant state mediation service with such notice thirty days prior to the termination

⁴⁹⁷ Section 8 (a) and (b) of the Act.

⁴⁹⁸ Ibid.

⁴⁹⁹ Section 8 (d) of the Act.

⁵⁰⁰ Ibid.

date of the current contract to enable such agencies to offer the parties mediation assistance.⁵⁰¹ It is clear that the parties would be expected to comply with the agreement and are prevented from making demands or bargaining on issues that are not covered in the agreement.

Neither side may resort to a strike or lockout for sixty days after such notice has been provided to the opposing party (or the termination date of the contract, whichever comes later), to give the employer and the labour organization the opportunity to resolve their differences through the bargaining process. In most cases, new agreements are reached through this process without resort to strikes or lockouts. Although many labour organizations conduct secret ballot strike votes prior to work stoppages, nothing in federal law requires them to do so.

The similarity between USA and South Africa is the provision for collective agreement between the parties in the workplace which restrict strike action. During the operation of this agreement no party is at liberty to embark on industrial action in respect of an issue which is in the agreement, until the agreement has come to an end. This is also the situation in South Africa as provided in the LRA.⁵⁰² The USA Constitution however, is silent on the right to strike whereas in South Africa the right to strike is enshrined in the Constitution.

6.7.3 *United Kingdom*

There is no right to strike under English Law or their Constitution, and no such right has ever existed.⁵⁰³ As a result of this, any rights associated with strike and industrial action are not protected in any superior document but are rather regulated by statute and common law.⁵⁰⁴ The law in the UK does grant immunity from liability for civil wrongs that are committed during a strike.⁵⁰⁵ These immunities are subject to restrictions and mandatory rules contained in the Trade Unions and Labour Relations (Consolidation) Act 1992 (hereinafter referred to

⁵⁰¹ Ibid.

⁵⁰² Section 65 (1) of the LRA.

⁵⁰³ S Honeyball & J Bowers, *Textbook on Labour Law*, (8ed)2004388.

⁵⁰⁴ Ibid.

⁵⁰⁵ Section 219 of the Trade Union and Labour Relations Consolidation Act 1992 (hereinafter referred to as "TULRCA").

as “TULRCA”).⁵⁰⁶ The UK has experienced disastrous effects from strikes but they did manage to curb strikes under the Thatcher administration.⁵⁰⁷ The UK needed transformation in relation to issues pertaining to industrial action. Margaret Thatcher proved to be the leader that would change the industrial landscape of the country. She served as British Prime Minister from 1979 to 1990 and was the first female leader of the UK.⁵⁰⁸ The right to strike in the UK is defined as the ‘withdrawal of labour by a group of workers who are in dispute with their employer.’⁵⁰⁹ One method of inhibiting or ending a strike in the UK is firing union members who are striking, which can result in elimination of the union. Although this has happened, it is rare due to laws regarding ‘firing’ and ‘right to strike’ having a wide range of differences in the UK depending on whether union members are from the public or private sector. Employees who strike risk dismissal, unless it is an official strike (one called or endorsed by their union) in which case such employees are protected from unlawful dismissal.⁵¹⁰ The underlying point to note here is that generally the right to strike is restricted.

6.7.4 Canada

The Canadian Constitution guarantees everyone the right to associate, organize, to bargain collectively, and the right to strike.⁵¹¹ In terms of the Public Service Labour Relations Act⁵¹² ‘strike’ includes a cessation of work or a refusal to work or to continue to work by persons employed in the public service, in combination, in concert or in accordance with a common understanding, and a slow-down of work or any other concerted activity on the part of such persons that is designed to restrict or limit output.⁵¹³ The Canadian Code⁵¹⁴ which regulates the right to strike in Canada imposes two separate duties on parties to collective bargaining to

⁵⁰⁶ Ibid.

⁵⁰⁷ Administration led by Margaret Thatcher, the British Prime Minister from 1979 to 1990.

⁵⁰⁸ “Essential Margaret Thatcher”, 21 February 2012, available at <http://www.margaretthatcher.org/essential/biography.asp>.

⁵⁰⁹ H Collins, K D Ewing & A McColgan, *Labour Law Text and Materials* (2ed) 2005, 863.

⁵¹⁰ Section 40 of Employment Relations Act, 1999.

⁵¹¹ Section 2 (d) of Canadian Charter of Rights and Freedoms.

⁵¹² Public Service Labour Relations Act, 2003.

⁵¹³ Section 1 of the Public Service Labour Relations Act, 2003.

⁵¹⁴ Collective Bargaining Code under Canada Labour Code-Remedies when parties fail to resolve disputes, Legal and Legislative Affairs Division, 26 January 2009.

conclude a collective agreement. The duties are as follows: A duty to bargain in good faith; and a duty to make every reasonable effort to enter into a collective agreement.⁵¹⁵

A party to collective bargaining may bring a complaint to the Canada Industrial Relations Board on the basis that the other party has failed in either or both of these duties.⁵¹⁶ The Code states where notice to bargain collectively has been given, the

‘bargaining agent and the employer, without delay, but in any case within 20 (twenty) days after the notice was given unless the parties otherwise agree, shall meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and make every reasonable effort to enter into a collective agreement’.⁵¹⁷

Most importantly the Minister has the authority to order that an employer’s latest offer be put to the members of the bargaining unit for a vote if, in the Minister’s opinion, this would be in the public interest. The Minister may also direct the Board or another person or body to be in charge of conducting the vote.⁵¹⁸ Upon the employees’ acceptance of the offer, all strike or lockout activity shall cease. The Minister may do this at his or her own discretion; no referral from a party to the dispute is needed.⁵¹⁹

This means that according to the Canadian Code the Minister has an option to put the employer’s last offer to the members of the bargaining unit to decide on it through a vote. When an offer has been made by the employer after a certain demand was brought by the employees through a recognised bargaining process, the Minister is then entitled to chip in and put that offer to the members of the bargaining unit to decide over it through a secret

⁵¹⁵ Section 50 of Collective Bargaining Code under Canada Labour Code-Remedies when parties fail to resolve disputes, Legal and Legislative Affairs Division, 26 January 2009.

⁵¹⁶ Section 51 of Collective Bargaining Code under Canada Labour Code-Remedies when parties fail to resolve disputes, Legal and Legislative Affairs Division, 26 January 2009.

⁵¹⁷ Section 50 (a) of Collective Bargaining Code under Canada Labour Code-Remedies when parties fail to resolve disputes, Legal and Legislative Affairs Division, 26 January 2009.

⁵¹⁸ Section 108.1 (1) of Collective Bargaining Code under Canada Labour Code-Remedies when parties fail to resolve disputes, Legal and Legislative Affairs Division, 26 January 2009.

⁵¹⁹ Ibid.

ballot. The outcome of the vote will then determine whether the employer's last offer is accepted.

The similarity that South Africa shares with Canada is the notice requirement. However, the reason for which the notice is issued in Canada is different to the South African position. In Canada the notice is issued for parties to commence the bargaining process in the form of negotiations between the employer and employees. It is further required that the parties must meet at least within twenty days after issuing of the notice.⁵²⁰ This however, is not the position in South Africa. In South Africa a written notice of intention to strike is issued prior to embarking on a strike action.

Canada has as a requirement to bargain in good faith which is not a requirement in South Africa. The requirement of bargaining in good faith also exists in Australian law. Another requirement in Canada is that a strike action is required to be preceded by secret ballot. This determines whether the intended strike action is required by the majority of workers or not. The secret ballot requirement in South Africa was only applicable during the 1956 Act. In terms of the LRA this is no longer a requirement in South Africa.

6.7.5 New Zealand

In terms of the New Zealand Constitution everyone is guaranteed the right to freedom of association.⁵²¹

Any act done by a trade union to induce a person to take part, or continue to take part, in industrial action is not protected unless the industrial action has the support of a ballot.⁵²²

Industrial action is also regarded as having the support of the union only if the union has held

⁵²⁰ Section 50 (a) of Collective Bargaining Code under Canada Labour Code-Remedies when parties fail to resolve disputes, Legal and Legislative Affairs Division, 26 January 2009.

⁵²¹ Section 17 of New Zealand Bill of Rights Act, 1990.

⁵²² Section 226 (1) of the Trade Union and Labour Relations Act, 1992 (hereinafter referred to as "the Act").

a ballot in respect of the action in relation to which the requirements of holding of the ballot were satisfied.⁵²³

In terms of the Trade Union and Labour Relations Act, a notice for industrial action is a notice in writing which states whether industrial action is intended to be continuous or discontinuous and specifies where it is to be continuous, the intended date for any of the affected employees to begin to take part in the action.⁵²⁴ The notice is further required to contain the following:

- a list of the categories of employee to which the affected employees belong;⁵²⁵
- list of the workplaces at which the affected employees work;⁵²⁶
- the total number of the affected employees;⁵²⁷
- the number of the affected employees in each of the categories in the list mentioned;⁵²⁸
- the number of the affected employees who work at each workplace in the list mentioned in subsection;⁵²⁹
- the total number of the affected employees;⁵³⁰
- the categories of employee to which the affected employees belong and the number of the affected employees in each of those categories;⁵³¹ and
- the workplaces at which the affected employees work and the number of them who work at each of those workplaces.⁵³²

⁵²³ Section 226 (1) (a) (i) of the Act.

⁵²⁴ Section 234 (1) (b) of the Act.

⁵²⁵ Section 234 (2A-5D) of the Act.

⁵²⁶ Ibid.

⁵²⁷ Ibid.

⁵²⁸ Ibid.

⁵²⁹ Ibid.

⁵³⁰ Ibid.

⁵³¹ Ibid.

⁵³² Ibid.

A union is required to agree with the employer before industrial action ceases to be authorized or endorsed, that it will cease to be authorized or endorsed with effect from a date specified in the agreement ("the suspension date") and that it may again be authorized or endorsed with effect from a date not earlier than a date specified in the agreement.⁵³³ The union is not entitled to conduct strike action where they will continue until their demands are met. A specific date on which their action will cease to be authorised has to be specified on their notice regardless of whether their demand would have been met by such date.

The Trade Union and Labour Relations Act further provides that an employee has no right to complain of unfair dismissal if at the time of dismissal he was taking part in an unofficial strike or other unofficial industrial action.⁵³⁴ The Act also provides when an industrial action can be said to be unofficial. A strike or other industrial action is unofficial in relation to an employee unless he is a member of a trade union and the action is authorized or endorsed by that union, or he is not a member of a trade union but there are among those taking part in the industrial action members of a trade union by which the action has been authorized or endorsed.⁵³⁵

The similarities here are a written notice preceding the action. However, what is different with New Zealand is that the notice has to contain certain specifics as outlined above including an indication of whether or not the intended strike action will be continuous or discontinuous and specifies where it is to be continuous, the intended date for any of the affected employees to begin to take part in the action.⁵³⁶ In New Zealand another requirement is the secret ballot.

What is clear from New Zealand is that the notice requirement has to contain a number of specifics which the striking employees or a union has to ensure that they are contained in the notice before they can embark on a strike. The requirement of these specifics in a notice prevent the strike action from being influenced by employees who were not included in the

⁵³³ Section 234 (7B) (a) of the Act.

⁵³⁴ Section 237 of the Act.

⁵³⁵ Section 237 (2) of the Act.

⁵³⁶ Section 234 (1) (b) of the Act.

notice. This further puts a responsibility on the striking employees or their leaders to ensure that their strike is not influenced or joined by those who were not listed in the notice and who may have an ulterior motive.

What the notice requirement is required to entail in New Zealand is in fact what is lacking in our notice requirement in South Africa. The notice requirement in terms of the LRA for example, does not require the total number of employees which will be affected or partaking in the strike to be specified. This opens the strike action to manipulation by members of the public or others employees who are not affected by the cause of the strike action.

6.7.6 Botswana

Section 13 of the Bill of Rights guarantees freedom of assembly and association with other persons. Section 13(1) proves that:

“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.”

In terms of the Trade Disputes Act⁵³⁷ ‘industrial action’ means a lock out, strike or action short of a strike in furtherance of a trade dispute. Botswana presents a unique situation arising not from its definition of a strike, but from the fact that it deems all strikes lawful unless they are declared unlawful by a court of law. This means that a strike in Botswana would be unlawful when a Minister of Labour or a court of law has made a finding that a particular strike action was unlawful. However, immunity from civil liability under the common law is only granted to trade unions and their members.⁵³⁸

⁵³⁷ Trade Disputes Act No. 15 of 2004.

⁵³⁸ Section 36 of Trade Disputes Act No.15 of 2004.

All countries in Southern Africa, except Botswana, insist on a strike being the last resort after other statutory methods of dispute resolution have been exhausted. Botswana is different in that (other than essential services), resorting to a strike is not expressly subject to any particular preconditions, such as conciliation and prior notice.⁵³⁹ This is solely because there is no law that regulates the conduct of industrial action. It must indeed be noted that the Minister of Labour can declare a strike unlawful where he or she is satisfied that statutory procedures have not been exhausted.⁵⁴⁰ This effectively compels the parties to a dispute to exhaust those procedures.⁵⁴¹

Professor T Cohen in relation to section 13 of the Botswana Bill of Rights argues that while this constitutional provision makes no specific mention of the right or freedom to strike, a purposive interpretation of freedom of association necessitates its inclusion.⁵⁴² The professor is arguing this point because from the point of view of the workplace, there can be no enjoyment of freedom of assembly and association without the necessary enjoyment of the right to freedom to strike. If workers are entitled to assemble and associate to discuss whatever issues or grievances they have in the workplace, it goes without saying that a right to freedom to strike automatically follows provided they have complied with the necessary requirements. This should be the position, because you cannot separate the right to freedom of association from the right to strike.

In Botswana most employees are denied the right to strike by being declared and/or categorised as essential services employees regardless of the duties they perform. Further the absence of a constitutional right to strike makes it impossible for workers in Botswana to legally challenge the exclusion of the whole public service from enjoyment of the right to strike. What is however, confusing in Botswana, is that despite the workers being denied the right to strike, they do enjoy the right to freedom of association. The right to strike cannot be separated from the right to freedom of association. These rights should go together because

⁵³⁹ Section 37 of Trade Disputes Act 15 of 2004.

⁵⁴⁰ Section 34 of the Trade Disputes Act.

⁵⁴¹ Ibid.

⁵⁴² T Cohen & L Matee, "Public Servants' Right to Strike in Lesotho, Botswana and South Africa: A Comparative Study" (2014) 4 *PER / PELJ* (17) ,1463.

when workers associate with each other or in groups to discuss their grievances, subsequently the purpose thereof may be to display to the employer that they have certain grievances.

6.8 Conclusion

It has been established in this chapter that the right to strike is protected by national constitutions, laws, international labour rights instruments, and regional human rights instruments. These may be conventions, treaties, foreign statute or law on the right to strike.

The right to strike, however, is not set out explicitly in ILO Conventions and Recommendations. Though they do not explicitly mention the right to strike, the Freedom of Association and Protection of the Right to Organise Convention No. 87 of 1948, establishes the right of workers and employers' organizations to 'organise their administration and activities and to formulate their programmes, and the aims of such organizations as "furthering and defending the interests of workers or of employers".⁵⁴³

It has also been established that there are the two bodies set up to supervise the application of ILO standards, which is the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations. These bodies have made it clear that the right to strike in the workplace is a fundamental right. The research has also established that the same bodies have set limitation standards which all Members States exercising the right ought to comply with.⁵⁴⁴

The limitations on the right to strike from different foreign states have also been discussed to determine what limitations these foreign states prescribe with the aim of identifying which limitations, when incorporated into our own labour legislation, can curb the violent strike action that we have witnessed in the mining industry and other relevant sectors.

⁵⁴³ E Manamela & M Budeli "Employees right to strike and violence in South Africa" 308 (2013) 3 *Comparative & International Law Journal of South Africa* (2013), 314.

⁵⁴⁴ ILO, 1996d, para 498.

Having regard to the limitations from the above foreign states, it is the submission of the author that the limitations imposed by New Zealand and Canadian law when carefully considered, can assist in curbing and better regulating our right to strike in the workplace. Specific identification and substantiation of these provisions on how and why they can improve the regulation of right to strike in the workplace in our country will be discussed and detailed in the following chapter where this research will be dealing with the conclusion and recommendations. All these countries have different provisions that deal with strikes. Some of these countries' provisions are similar to South Africa's provisions but in each country there are differences. Some of these provisions could be useful when incorporated in the LRA.

CHAPTER 7: CURBING THE PREVALENT VIOLENT STRIKE ACTION IN SOUTH AFRICA: CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

This research has examined the dispensations in respect of the right to strike by workers during the application of the LRA 28 of 1956 and the current LRA. 66 of 1995. This research has also examined the current strike action by workers, particularly in the mining industry, in relation to what is required by the LRA pertaining to industrial action. Having done so, it has been established that under the current LRA, that the right to strike has been redefined by workers successfully. For example, workers in the mining industry have achieved wage increases despite having conducted unlawful strikes. In discussing this issue, reference was made to case law wherein rulings had been made to interdict and deem such strike actions as unlawful, but despite such rulings the workers have continued with their unlawful strikes resulting in the employer being forced to comply.

In assessing the current position in South Africa regarding how industrial action is exercised, particularly in the mining industry, reference was also made to the ILO principles on the right to strike.⁵⁴⁵ A comparison was conducted in respect of certain foreign states⁵⁴⁶ on their recognition of the employees' right to strike and what limitations, if any, they contain in their legislation which protect against the abuse of the right. Throughout this research the aim, therefore, has been to show that workers have largely departed from the prescribed process towards collective bargaining and subsequent industrial action. It was also established that despite this departure some of the limitation provisions that talk to industrial action in the LRA are not effective in curbing the prevalent and violent strike actions that we have witnessed.

In this concluding chapter, therefore, the focus of this research will be to suggest and recommend which specific provisions can be introduced to the LRA in order to effectively

⁵⁴⁵ B Gernigon, A Odero & H Guido "ILO principles concerning the right to strike" (1998) (Vol 137, No 4) *International Labour Review* 444.

⁵⁴⁶ Australia, UK, Canada, New Zealand and Botswana.

curb the occurrence of violent strikes and to help better regulate the right to strike in the workplace. These provisions will be sourced from Canadian and New Zealand legislation, as mentioned in Chapter 6 above. The government has, however, recently made endeavours to try and deal with this problem and a few suggestions were made by NEDLAC.⁵⁴⁷ These suggestions will be highlighted below with aim of assessing them to see if they will be effective in dealing with the identified problem in this research.

7.2 The Need to Prevent Unprotected Strike Action

In South Africa, the right to strike is a constitutional right and it is generally regulated by s 23 of the Constitution and other labour legislation that govern employment relationships.⁵⁴⁸ Section 23 of the Constitution of the Republic of South Africa confers on every worker the right to strike. It further provides that every trade union, employers organization and employer has the right to engage in collective bargaining and goes on to provide that national legislation may be enacted to regulate the process. The national legislation giving effect to this right is the LRA.

This research has established that in South Africa, all sectors of the economy are experiencing strike action that is normally embarked upon by the labour unions.⁵⁴⁹ While some of the strike actions are legal and protected within the ambit of the law, others have been found to be illegal and frivolous.⁵⁵⁰ It has also been established that these types of illegal strikes are prominent in the mining industry.⁵⁵¹

It has been discussed in this research that unprotected striking is not a criminal offence punishable by law as was the case under the 1956 Act. Under the application of this Act, if workers were found to have taken part in an unprotected strike, they risked a chance of being

⁵⁴⁷ Proposed Code of Good Practice on Collective Bargaining.

⁵⁴⁸ Borat and Cheadle, 2009.

⁵⁴⁹ G Seidman, *Manufacturing Militance: workers' movements in Brazil and South Africa, 1970-1985* (1994).

⁵⁵⁰ M Olivier, "The South African Constitution and freedom of religion: some labour law imperatives and implications" (2002) *Dutch Reformed Theological Journal*, 43(3&4):530-542.

⁵⁵¹ M Altman, "Low Wage Work in South Africa" HSRC (2006) 12.

criminally charged and exposed to criminal sanctions. However, under the LRA, an unprotected strike action is classified as an act of misconduct.⁵⁵² If the strike does not comply with the statutory requirements the strike action will not enjoy protection.

This research has undertaken to discuss the nature of unprotected strikes which have unfolded recently in our country, with specific emphasis on the mining sector. This was conducted with the aim of depicting that the strikes do not comply with the statutory restrictions. It has also been established that some of the statutory restrictions are not effective in dealing with the non-compliance of strike law, the result of which is that the strikes are violent in nature. This research acknowledges that the peaceful exercise of the right to strike is important in labour relations and empowers workers to collectively bargain effectively against exploitive mining companies.⁵⁵³

It has been established that this right has not been exercised peacefully by the workers as required in terms of the LRA. Furthermore, it has been indicated above that the data collected and analysed in 2013 by the Department of Labour⁵⁵⁴ indicates a continuous rise in the number of strikes as from 2002. It has been established that the Labour Department recorded 114 industrial incidents in 2013 up from 99 recorded in 2012.⁵⁵⁵ The Department had reported out of that 99 strike actions embarked upon by workers in 2012, about 45 were unprotected and all these strikes were characterised by violence with a total of 241 391 workers participating in that strike.⁵⁵⁶ The mining industry in 2013 continued to experience working days lost, amounting to 515 971 during that year- more than any other sector.⁵⁵⁷ In other reports, however, it is indicated that 52% of the strikes in 2013 were unprotected as compared to 48% protected strikes.⁵⁵⁸

⁵⁵² Section 68 (5) of the LRA.

⁵⁵³ Annual Industrial Action Report (2013): Department of Labour, Strikes Statistics,45.

⁵⁵⁴ Ibid.

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid.

⁵⁵⁸ JP Terblanche, Stats SA (Statistics South Africa), Statistical Release Mining: Production and Sales, Technical Report, Pretoria: Stats SA, (2013).

In the mining sector particularly, strikes characterised by violence and intimidation have been witnessed. These strikes have been identified in this research mainly as, the Marikana strike, the Anglo-Ashanti Gold strike, Anglo Platinum strike and the Coal Mining strike. What all these strikes had in common was violence, intimidation of non-strikers and malicious damage to property. The Marikana strike has had a significant impact on the labour relations landscape in South Africa.⁵⁵⁹ The strikes which followed the Marikana strike, especially those in the mining sector, were influenced by the latter as most of these strikes took more or less a similar route in demanding wage increases.

It has been established that the Marikana strike was generally characterised by “illegality, violence, intimidation, lawlessness and climaxed with casualties.”⁵⁶⁰ Regardless of these irregularities in collective bargaining procedure and practice, the workers succeeded in their demand for a wage increase, through redefining the collective bargaining and dispute resolution mechanisms in the LRA.⁵⁶¹ The Anglo-Ashanti Gold strike took more or less the same route as the Marikana strike. The distinguishing factor herein is that management, after establishing that the strike was unprotected and in contravention of the provisions of the LRA, subsequently involved workers in dismissal proceedings and they were subsequently dismissed. This was however, not the case in the Marikana strike as striking miners retained their jobs even after having engaged themselves in an unprotected strike which lasted for more than five months.

Having established the departure from the prescribed collective bargaining process as provided by the LRA and the subsequent nature of violence undertaken in the name of industrial action, this research suggests that new mechanisms or provisions have to be introduced within the statutory restrictions of the LRA and that amendments need to be made in order to prevent another wave of violent and unprotected strikes.

⁵⁵⁹ C Twala, “The Marikana Massacre: A Historical Overview of the Labour Unrest in the Mining Sector in South Africa” Vol 1(SAPSS) 66.

⁵⁶⁰ Ibid.

⁵⁶¹ J van der Merwe & L. van der Walt “Mineworkers’ unprocedural strike: Setting the path for redefining collective bargaining practice in South Africa” (2013) (Vol 10), *J of Contemporary Management* 251.

7.3 Ineffective Statutory Restrictions

This research has discussed and established that protected strikes are those which comply with the provisions of sections 64, 65 and 67 at Chapter IV of the LRA, which impose procedural requirements and substantive limitations on the use of strikes. The procedural requirements are a prelude to a protected strike, and this includes conciliation, notice of commencement of a strike or lock-out, adherence to time periods, and advisory arbitration where applicable, prior to strike action.

In terms of s 64 (1) (a), the issue in dispute is referred either to a bargaining council or to the CCMA⁵⁶² for conciliation. Failing settlement, a certificate of outcome is issued, or a period of 30 days from the date of referral of the dispute must elapse.

It is required that at least 48 hours written notice of commencement of the strike must be given to the other party in terms of s 64 (1) (b).⁵⁶³ Striking is permissible only after notice is given and notice of proposed strike should be given to the employer.⁵⁶⁴ Discharge of the said conciliation and notice requirements by either party entitles the other party to take industrial action over the dispute. The notice to the employer must specify the precise time of the commencement of the strike.⁵⁶⁵ It is insufficient merely to state that the strike will commence at some later time.⁵⁶⁶

This research has, in addition to establishing the need to incorporate more restrictive provisions in the LRA, also established the ineffectiveness of the statutory restrictions on the right to strike in the LRA with specific reference to the “notice requirement.” The

⁵⁶² Commission for Conciliation, Mediation and Arbitration as established by the LRA.

⁵⁶³ Where the state is the employer the required notice period in terms of s 64 (1)(d) of the LRA is seven days.

⁵⁶⁴ If the employer is a member of an employer’s organisation that is a party to the dispute, s 64 (b)(ii) of the LRA requires that notice be given to that employer’s organisation. If the issue in dispute relates to a collective agreement to be concluded in a bargaining council, s 64 (1)(b)(i) stipulates that such notice must be given to that council.

⁵⁶⁵ J Grogan, *Collective Labour Law* 2ed (2007) 384.

⁵⁶⁶ *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union & others* (2) (1997) 18 ILJ 671 (LAC); *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union* (1998) 20 ILJ 260 (LAC).

ineffectiveness of the notice requirement in curbing unlawful strikes was also proved in the case of *SATAWU*.⁵⁶⁷ This case ended up at the Constitutional Court. It is the view of this research that the ineffectiveness hereof is caused by the vagueness of s 64 (1) (b) of the LRA, which prescribes the notice requirement. In this case the employer had dismissed employees who had participated in a strike by SATAWU, which was preceded by a notice issued by SATAWU on behalf of its members. These employees were not members of SATAWU and they belonged to a minority union that had not issued a notice to strike as it had resolved that it will not go on strike.

The employer argued that it was an implied requirement of s 64 (1) (b) that the strike notice would only be valid in respect of those employees who had referred the dispute and on whose behalf the notice had been given. The Labour Court ruled that the section did not place any limitation as to who should give notice, nor on whose behalf it could be given.⁵⁶⁸

The Labour Appeal Court was divided on the question of whether the notice of intention to strike issued by the union also entitled the non-union members to strike. The majority held that the non-union members were permitted to join the strike in respect of the same notice issued by SATAWU. However, the minority judgement in this case by Zondo JP found that the use of the pronoun 'we' in the strike notice implied that it would only be SATAWU members who would participate in the strike action.⁵⁶⁹

On appeal to the Supreme Court of Appeal, it was found that the strike was unprotected and the dismissal of the employees was not automatically unfair. The matter was then referred to the Constitutional Court where the fundamental question to be decided was whether the dismissed employees met the provisions of s 64 (1) (b) by engaging in a strike when only SATAWU issued a strike notice on behalf of its members. Of importance is that the Constitutional Court further stated that where the language was clear, the court could not speculate about issues which the legislature saw fit not to detail in the section. The Court further stated that the procedural pre-conditions and substantive limitations of the right to

⁵⁶⁷ *SATAWU and others v Moloto NO and another* 2012 (6) SA 249; (2012) 12 BLLR 1193 (CC).

⁵⁶⁸ Ibid para 24.

⁵⁶⁹ Ibid para 26.

strike in the LRA contain no express requirement that every employee who intends to participate in a protected strike must personally or through a representative give notice of the commencement of the intended strike, nor who will not take part in the strike.⁵⁷⁰

It has therefore, been established in this research and through the Constitutional Court judgement that the notice requirement in terms of s 64 (1) (b) of the LRA is not effective. This research further argues that the interpretation by the Constitutional Court should be blamed to the section itself as it fails to express the important specifics that the notice should entail which the Constitutional Court found to have not been specified. Had these been specified it would be clear who is entitled to participate in a strike preceded by the “notice requirement.” The notice requirement, as it stands, cannot be said to be the best means of curbing the prevalent violent strikes in the workplace. To be more specific, what should be considered is that if s 64 (1) (b) is not improved, strike action will always be open to abuse by non-union members and those members of the public who have an ulterior motive.

7.4 Proposed Solutions by Government

It has been established in this research that the government, after having witnessed the wild cat strikes in the mining industry, made some efforts to curb the wave of unprotected strikes.

Amongst these efforts was the tabling of the Labour Relations Amendment Bill before parliament, by the Minister of Labour in March 2012 .⁵⁷¹ The unions would, in terms of the amendments introduced in the Bill, conduct ballots to ensure that the majority of members agreed to the need of the strike before a strike would be embarked on.⁵⁷² This view was however, strongly rejected by COSATU and as a result the Bill was never promulgated.

7.4.1 Proposed Code of Good Practice

The National Economic, Development and Labour Council (hereinafter referred to as “NEDLAC”), comprising of government, business, labour and civil society has put together

⁵⁷⁰ Ibid para 43.

⁵⁷¹ K Hoshino, The Guardian, 17 August 2012, 4.

⁵⁷² M Saville “New Labour Bill to curb Illegal Strikes” <http://mg.co.za/2012-04-new-labour-bill--to-curb-illegal-strikes;http://www.fin24.com/Economy/Labour-bills-to-curb-illegal-strikes-20120404>.

the Code of Good Practice and deliberated extensively thereon, with the hope of finding solutions to promote lasting peace for South Africa's labour relations. This Code will cover all phases of industrial disputes including pre-negotiation, negotiation, post-negotiation, dispute, strike and lockout, post-strike and lockout. This code is intended to curb the violence associated with strike action in the workplace. There are a few critical provisions in the proposed Code of Good Practice. The Code amongst other provisions, provides for picketing rules. This addresses the conduct and the nature of the picket. In detail the provisions summarily provide that:

- (1) The registered trade union and employer should seek to agree to picketing rules before the commencement of the strike or picket.⁵⁷³
- (2) A collective agreement may contain picketing rules. When they negotiate an agreement the following factors should be considered-⁵⁷⁴
 - (a) the nature of the authorisation and its service upon the employer;⁵⁷⁵
 - (b) the notice of the commencement of the picket including the place, time and the extent of the picket;⁵⁷⁶
 - (c) the nature of the conduct in the picket;⁵⁷⁷
 - (d) the number of picketers and their location;⁵⁷⁷
 - (e) the modes of communication between marshals and employers and any other relevant parties;⁵⁷⁹
 - (f) access to the employer's premises for purposes other than picketing e.g. access to toilets, the use of telephones,⁵⁸⁰ etcetera;

⁵⁷³ Section 4 of the Proposed Code of Good Practice on Collective Bargaining.

⁵⁷⁴ Ibid Section 4 (2).

⁵⁷⁵ Ibid Section 4 (2) (a).

⁵⁷⁶ Ibid Section 4 (2) (b).

⁵⁷⁷ Ibid Section 4 (2) (d).

(g) the conduct of the pickets on the employer's premises,⁵⁷⁸ and

(h) this code of good practice.⁵⁷⁹

What is important from this code and relevant for purposes of this research is that the code has slightly dealt with the issue of the notice commencing the strike action. From the code it is clear that the notice will be required to stipulate the number of picketers. This is one issue amongst a few that this research established to be lacking from the notice requirement in the LRA. However, the Code does not seem to deal with other issues within the notice requirement which this research believes are crucial. These issues will be dealt with by way of taking guidance from a foreign statute below.

This code however, cannot be seen as a binding document in that even if either of the parties has been found to be in breach thereof, there are no serious legal consequences. This is so because the code provides that it does not impose any legal obligations and the failure to observe it does not by itself render anyone liable in any proceedings.⁵⁸⁰ In addressing the issue of prevalent violent strike actions, this research argues that the state cannot afford to introduce laws that have no effect of binding the relevant parties, as such an exercise would be fruitless.

These attempts by government clearly show that the government considers that the existing provisions in the LRA pertaining to the right to strike have had limited effect in dealing with the wave of unprotected strikes that have recently unfolded, especially in the mining sector. This research argues that more still needs to be done in order to curb the prevalent wave of unprotected strikes. Even the proposed code does not necessarily address the issues raised by this research.

⁵⁷⁸ Ibid Section 4 (2) (g).

⁵⁷⁹ Ibid Section 4 (2) (h).

⁵⁸⁰ Ibid Section 1 (3).

7.5 Suggestions and Recommendations

It is evident from this research that collective bargaining in South Africa is, for the most part, not exercised as per the LRA. Employees in the workplace have departed from the collective bargaining process stipulated in the LRA. It has also been established that despite the total departure from the prescribed bargaining process, the restrictive provisions on the right to strike in the LRA, such as the notice requirement, has not been effective in curbing the violent strikes that we have noticed in the mining industry. It has further been established that further provisions dealing with this issue need to be introduced into the LRA in order to ensure that the prevalent wave of unprotected strikes is curbed.

This research acknowledges that amongst other driving factors in the mining industry which lead employees to undertake unprotected strike action, socio-economic predicaments are a prevalent cause. However, this research understands that as much as this is a matter of serious consideration, it cannot be used as an excuse or a justification to breach the collective processes in the LRA.

The Government, including COSATU and other relevant stakeholders have not been strict on the mining industry. The mining industry has shown no interest whatsoever, in addressing the socio-economic needs of its employees. This research has established that the Mining Charter which was introduced in 2002 for purposes of addressing the socio-economic issues in the mines, had never been enforced by the employers. It has further been established in this research that a second attempt to implement the Mining Charter in 2010 was undertaken. This new charter aimed at addressing various shortcomings in the implementation of the Mining Charter of 2002. The government therefore, should pay attention to these issues and monitor the implementation of the Mining Charter closely, in order to address the needs of the mineworkers. Failure to facilitate these issues may undermine whatever constructive amendments or new mechanisms that are introduced in the LRA to better regulate the right to strike.

Brassey⁵⁸¹ provides that deeper structural changes are required in the labour law market to address all the problems faced. He suggests fundamental changes in the laws that govern the labour market including repealing labour legislation that unreasonably extends statutory bargaining agreements to non-parties.⁵⁸² According to Brassey, South Africa has the highest strike rate in the world. He provides that in an environment where wage settlements are realistically pitched, workers will have significantly reduced motive to strike due to understanding and reasoning. This view by Brassey confirms what this research has suggested above in that the Mining Charter, which seeks to address socio-economic issues, must be enforced and closely monitored so as to stabilise the situation in the mining industry.

John Brand has also made several suggestions⁵⁸³ most of which when carefully considered can partly assist in curbing the prevalent wave of unprotected strikes in the mining industry.

He suggested as follows during his presentation:

The establishment of an independent institute to:⁵⁸⁷

- Educate the social partners about their rights and obligations in terms of the Bill of Rights and ILO Conventions;
- The notice period for a strike to be increased to 14 days;
- The introduction of a right to a secret strike ballot within the 14 days' notice period
- Such secret ballot shall entitle affected workers and unions to strike protection:⁵⁸⁴
- If the ballot is conducted by the CCMA or a suitably accredited independent body, and
- If the quorum for the ballot is 50% plus one of those workers who wish to participate in the strike, and

⁵⁸¹ M Brassey "Fixing the Laws that Govern the Labour Market" (2012) ILJ 1 17.

⁵⁸² Ibid 1.

⁵⁸³ J Brand "How the Law can Better Regulate the Right to Strike" Sandton Convention Centre, 6th August 2014.

⁵⁸⁴ Ibid.

- If 50% plus one of those workers who vote, vote in favour of the strike, and
- A further ballot may be called after 30 days from the date of a previous ballot, and
- A specialised Industrial Action Protection Unit be established within the South African Police Service to protect people from criminal conduct during industrial action;⁵⁸⁵
- Employers, other than those in essential services, be prohibited from hiring replacement workers during protected industrial action;⁵⁸⁶
- The Labour Court be given the power to grant appropriate and proportional relief for any breach of the law to any party whose rights are violated during industrial action. This may include suspending the protection of industrial action for limited periods of time in extreme cases;⁵⁸⁷
- Public servants exercising authority in the name of the State should be included in the definition of essential services workers.⁵⁸⁸

This research concurs with John Brand's suggestions and particularly one pertaining to the re-introduction of secret ballot. This research has established the need for such reintroduction. John Brand concludes his views by suggesting that there will only be lasting industrial peace when the primary causes of industrial unrest, such as the social wage deficit and the structure and process of collective bargaining are addressed.

This research has also established in Chapter 6, a few restrictive provisions from certain foreign states which can be helpful when incorporated in the LRA as part of statutory restrictions on the right to strike. It has also been established that the notice requirement in terms section 64 of the LRA is vague and that causes the notice to be ineffective. The notice therefore, needs to be amended and be aligned with that of New Zealand. In terms of the

585 Ibid.
 586 Ibid.
 587 Ibid.
 588 Ibid.

Trade Union and Labour Relations Act, 1992 of New Zealand, a relevant notice is a notice in writing which states whether industrial action is intended to be continuous or discontinuous and specifies where it is to be continuous, the intended date for any of the affected employees to begin to take part in the action.⁵⁸⁹

The notice is further required to entail the following:

- a list of the categories of employee to which the affected employees belong;⁵⁹⁰
- list of the workplaces at which the affected employees work;⁵⁹¹
- the total number of the affected employees;⁵⁹²
- the number of the affected employees in each of the categories in the list mentioned;⁵⁹³
- the number of the affected employees who work at each workplace in the list mentioned;⁵⁹⁴
- the total number of the affected employees;⁵⁹⁵
- the categories of employee to which the affected employees belong and the number of the affected employees in each of those categories;⁵⁹⁶ and
- the workplaces at which the affected employees work and the number of them who work at each of those workplaces.⁵⁹⁷

⁵⁸⁹ Section 234 (1) (b) of the Trade Union and Labour Relations Act, 1992.

⁵⁹⁰ Section 234 (2A-5H) of the Trade Union and Labour Relations Act, 1992.

⁵⁹¹ Ibid.

⁵⁹² Ibid.

⁵⁹³ Ibid.

⁵⁹⁴ Ibid.

⁵⁹⁵ Ibid.

⁵⁹⁶ Ibid.

⁵⁹⁷ Ibid.

A union is required to agree with the employer before industrial action ceases to be authorized or endorsed,⁵⁹⁸ that it will cease to be authorized or endorsed with effect from a date specified in the agreement ("the suspension date") and that it may again be authorized or endorsed with effect from a date not earlier than a date specified in the agreement.⁵⁹⁹ The union is not entitled to conduct a strike action that continues until their demands are met. A specific date on which their action will cease to be authorised has to be specified on their notice regardless of whether their demand would have been met by such date.

The required notice in terms thereof is very clear and specific. It assists the employer in knowing which employees will be taking part in the intended strike. Furthermore, this limits the chances of having unknown members partaking in the strike as the employer will be aware of the estimated number of employees that ought to take part in the strike. The moment the number of strikers does not seem to be congruent with the number which the employer was notified of, then such strike would risk the possibility of being unprotected. This will also require the organisers of the strike to ensure that no other members or individuals other than those listed, will partake in the strike. This provision will assist in curbing prevalent strike action because the end date of the strike stipulated in the notice will mean that the strike will cease from that date. There will be no strike action that persists indefinitely as is normally the case in South Africa.

A second restrictive provision that can be introduced is found in Canada. In Canada the right to strike is regulated by a Code of Good Practice.⁶⁰⁰ The Code states that where notice to bargain collectively has been given under this code, the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall meet and commence, or cause authorized representatives on their

⁵⁹⁸ Section 234 (7B) (a) of the Trade Union and Labour Relations Act, 1992.

⁵⁹⁹ Ibid.

⁶⁰⁰ Collective Bargaining Code under Canada Labour Code-Remedies when parties fail to resolve disputes, Legal and Legislative Affairs Division, 26 January 2009.

behalf to meet and commence, to bargain collectively in good faith, and make every reasonable effort to enter into a collective agreement.⁶⁰¹

Most importantly, in terms of this Code, the Minister has the authority to order that an employer's latest offer be put to the members of the bargaining unit for a vote if, in the Minister's opinion, this would be in the public interest.⁶⁰² Upon the employees' acceptance of the offer, all strike or lockout activity shall cease. The Minister may do this at his or her own discretion; no referral from a party to the dispute is needed.⁶⁰³

This means that according to the Canadian Code, the Minister has an option to put the employer's last offer to the members of the bargaining unit to decide on it through a vote. When an offer has been made by the employer after a certain demand was brought by the employees through a recognised bargaining process, the Minister is then entitled to intervene and put that offer to the members of the bargaining unit to decide over it by means of a secret ballot. The outcome of the vote will then determine whether the employer's last offer is accepted. This option can help prevent a number of strike actions from taking place. It suggests the government's involvement in the process. Even if this process can be facilitated by an independent body and not by government, it can still curb the possibility of continuous and violent strikes.

7.6 Conclusion

This research has established that the restrictive provisions on the right to strike in the LRA are not effective, and more particularly the notice requirement which is perceived as the most important and symbolic requirement is also not effective. It has also been established that other than working around the notice requirement to give it more effect, more restrictive

⁶⁰¹ Section 50 (a) of Collective Bargaining Code under Canada Labour Code-Remedies when parties fail to resolve disputes, Legal and Legislative Affairs Division, 26 January 2009.

⁶⁰² Section 108.1 (1) of Collective Bargaining Code under Canada Labour Code-Remedies when parties fail to resolve disputes, Legal and Legislative Affairs Division, 26 January 2009.

⁶⁰³ Ibid.

provisions need to be introduced which can curb the prevalent violent strike actions in the mining sector.

These provisions, taken from the foreign legislation of New Zealand and Canada have been introduced, coupled with the re-introduction of a secret ballot provision. These provisions therefore, hold the potential to curb the prevalent unprotected strike action associated with violence in our country.

This research therefore, recommends that that these provisions be incorporated into the LRA so as to add more restrictive provisions in the LRA preceding the right to strike. These will not amount to the unjustifiable limitation of the right to strike.

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50. *University v Botha Vista* 1997 (18) ILJ 1040 (LC).
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