JUDELL-LESHA JOSEPH

209501569

The effectiveness of South African labour legislation in dealing with mass industrial action before and after the promulgation of The Constitution Act 108 of 1996

(Submitted in completion for the LLM Degree in Labour Law at the University of Kwa-Zulu Natal in the year 2016)

Supervisor: Adv. Darren Cavell Subramanien

FORMAL DECLARATION

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

Acknowledgements

There are many people who God brings into our lives who make a lasting impression on who we become and what we will achieve. I have been blessed to have such people who through their inspiration and encouragement have made this dissertation possible. The people are as follows:

My family, especially my late mother, whose ideals are evident in who I have become.

My supervisor, Adv. Darren CavellSubramanien, for his guidance, advice and constant motivation throughout this dissertation.

My editor, DrRose Kuhn, for her willingness to assist me in the editing of my thesis and the location of sources that have been necessary for the completion of this work.

The library staff at both the Law School Library and the Main Library at the University of Kwa-Zulu Natal (Pietermaritzburg Campus) for assisting me in the location of resources.

However, above all I would like to thank The Lord Jesus Christ, whose strength and faithfulness has been sufficient in all seasons of my life.

Contents

CHAPTER ONE

INTRODUCTION

1.1. BACKGROUND TO THE STUDY

> "The key, absolutely fundamental rights of workers are those rights that enable the working people to fight for and defend their rights. This group of rights consist of three rights namely, the right to establish and join trade unions, the right to collective bargaining and the right to strike".[1]

The freedom to exercise these rights has to be acknowledged as an undeniable characteristic of a liberated society.[2] A society which lacks the right to strike cannot be regarded as a democratic one.[3] The effort to obtain rights for workers in South Africa has always been and continues to be placed within an extensive framework of ideological and basic human rights battle for the people of the country.[4] Over the centuries industrial action has been fundamental in contributing to the "cathartic progression" which has carved the edifice of employment law[5] as we know it today. South Africa's transition to democratic labour relations has been interwoven with socio-economic developments.[6]

The Wiehahn Commission's (the Commision) Report of 1979 emerged as an oasis to a parched and weary nation and a turning point in South African labour relations. It is only upon the publication of the Commission's Report could the majority of South Africa's labour force benefit from labour rights, particularly the legalisation of strike action.[7] The development of the right to strike, therefore, cannot be regarded in isolation but rather it is an essential mechanism utilised to

---

[1] E Manamela & M Budheli, 'Employees' right to strike and violence in South Africa' (2013) 46(3) *CILSA* 309.
[2] J Bowers & M Duggan *The Modern Law of Strikes* (1987) 1.
[3] L MacFarlane *The Right to Strike* (1981) 12.
[4] R Bernikow 'Ten years of the CCMA- An assessment for labour' *DITSELA (Western Cape) Labour Law Seminar* (2007) 13.
[5] W P Visser '"To fight the battle of the workers": The emergence of pro-strike publications in the early twentieth century South Africa' (2004) 49(3) *International Review of Social History* 3.
[6] D du Toit 'Industrial democracy in South Africa's transition' (1997) 1 *LDD* 39.
[7] P Benjamin, R Jacobus & C Alberton Strikes, Lockouts and Arbitration in the South African Labour Law.*Proceedings of the Labour Law Conference 1988* (1989) 27.

counteract the dictates of management[8] as well as promote and defend the interests of trade union members.[9]

In *South African National Defence Union v Minister of Defence and another,*[10] it was held that the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution) entrenches the right for trade unions to collectively bargain, as well as their members' right to strike in order to advance collective bargaining.[11] Thus, there exists an inextricable relationship between these components because, "[i]f workers [can]not, in the last resort, collectively refuse to work, they [can]not bargain collectively."[12] The constitutionalisation of employment rights has thus beneficially influenced labour law[13] by enshrining the fundamental right to strike action within South African legislation.[14]

South Africa's development of strike action echoes a historically segregated workforce.[15] Government's past enactment of discriminatory legislation created a divide between blacks and whites[16] thus inciting labour unrest, which has had both domestic and international ramifications.[17] Due to these racial policies, in 1964 the country was compelled to resign from the International Labour Organization (ILO).[18] After being threatened with international exclusion and sanctions alongside a tremulous economy, Government was compelled to reform its policies.[19]

---

[8] T Cohen & L Mattee 'Public Servant's right to strike in Lesotho, Botswana and South Africa - A comparative study' (2014) 17(4) *PER* 1631.
[9] L J Matee *Limitation on Freedom of Association The Case of Public Officers in Lesotho* (unpublished LLM thesis, University of Kwazulu- Natal, 2013) 9.
[10] *South African National Defence Union v Minister of Defence and another* 1999 (4) SA 469 (CC).
[11] *South African National Defence Union supra* note 10 at 20.
[12] J Brand Strike avoidance - How to develop an effective strike avoidance strategy? *23rd Annual Labour Law Conference* (2010) 1.
[13] G M Ferreira 'The development of South African labour law for the past ten years (1994-2004)' (2005) 24(2) *Politeia* 17.
[14] S Vettori 'The Labour Relations Act 66 of 1995 and the protection of trade unions' (2005) 17 *SA Merc LJ* 297.
[15] W P Visser '*A racially divided class: Strikes in South Africa, 1973- 2004*' available at *http://www.sun.academia.edu/WesselVisser,* accessed on 5 July 2015.
[16] V Mhungu *Positive Discrimination in South African Employment Law: Has Affirmative Action Overstayed its Welcome?* (unpublished LLM thesis, University of Kwazulu- Natal, 2013) 1.
[17] T Cohen 'Limiting organizational rights of minority unions: *POPCRU v LEDWABA* [2013] 11 BLLR 1137 (LC)' (2014) 17(5) *PER* 2209.
[18] B P S Van Eck 'Regulated flexibility and the Labour Relations Bill of 2012' 2013 *De Jure* 605.
[19] W P Visser 'From MWU to solidarity – A trade union reinventing itself' (2006) 30(2) *SAJLR* 4.

A defining event in the country's history of labour was the mass strike action in Durban during 1973,[20] which served as a precursor to the renaissance of labour reformation that emerged through the Commission's Reforms in 1979.[21] This led to numerous amendments to labour legislation which for the first time endowed all employees with equal rights irrespective of race.[22] Copious legislation have since then been enforced to ameliorate labour law.[23]

1.2. STATEMENT OF THE PROBLEM

South Africa's Labour Relations Act 66 of 1996 (hereafter referred to the LRA) has been declared as one of "the world's most progressive labour legislation[s]".[24] However, in the light of the volatile strike action that has threatened to cripple the country over recent years,[25] industrial action which is the uniting of workers as a fortified front has been replaced by generating fear and causing destruction.[26] This necessitates a closer examination of South Africa's labour legislation in order to critique how effective it is in regulating industrial action. If indeed South Africa's labour legislation can be described as one of the most advanced, surely strike action which is constitutionally enforced for all South African workers[27] should not be described as a "massacre"?[28]

The progression of South Africa's labour legislation has become a superstructure built upon legislature's response to industrial action.[29] This is evident in the gruesome 1922 Rand Rebellion which sowed the seed for the promulgation of the Industrial Conciliation Act 11 of 1924 (hereafter referred to as the Industrial Conciliation Act).[30] Due to the Industrial Conciliation

---

[20] ibid 4.
[21] J F Myburgh '100 years of strike law' (2004) 25 *ILJ* 964.
[22] M Wiseman 'Recent South African labour legislation: Assessing the new rights of black workers' (1986) 179 *Boston College International & Comparative Law Review* 163.
[23] M Budeli 'Workers' right to freedom of association and trade unionism in South Africa' (2009) 15(2) *Fundamina: A Journal of Legal History* 14.
[24] R Welch 'Rights to strike in UK and SA law: A comparison' (2000) 26 *International Union Rights* 26.
[25] D T Masiloane 'Guaranteeing the safety of non-striking employees during strikes: The fallacy of policing' (2010) 23(2) *Acta Criminologica* 35.
[26] P Zulu 'Reflections on mass action, ethics and rationality' 2009 *African Journal of Rhetoric: Moments of Engagement- Power, Rhetoric and Protests* 207.
[27] R Venter *Labour Relations in South Africa* (2006) 44.
[28] C Chinguno 'Marikana: fragmentation, precariousness, strike violence and solidarity' (2013) 40(138) *Review of African Political Economy* 639.
[29] Muburgh (note 21 above; 962).
[30] Act 11 of 1924.

Act's exclusion of blacks from its definition of an employee,[31] blacks remained excluded from trade union membership and the use of industrial action for 55 years. Even though white trade unions were permitted registration,[32] their right to engage in strike action was severely constrained by the dispute resolution system of the industrial councils.[33]

The transition from oppression to democracy ultimately led to the enactment of numerous legislation intended to protect employees by extending various rights and implementing frameworks to address the consequences of century long inequalities.[34] The Constitution entrenches labour rights and most significantly the right to strike,[35] while the LRA provides an extensive framework to govern dispute resolution and affords organisational rights as well as the right to strike. The LRA's implementation of bargaining councils have been effective, however, it has encountered a number of challenges, mainly due to the deficiency of additional programmes to enforce successful bargaining.[36] Since these enactments, labour relations have undergone fundamental changes to employment.[37]

It is therefore necessary to emphasise that trade unionism and its active involvement in strike action have been fundamental in shaping labour relations. Even years into democracy, strike action still demands the attention of the employer.[38] It has to be conceded that strike action is predictable, as it is the ultimate weapon workers can utilise to protect their interests.'[39] This in turn has resulted in a dramatic increase in strike action over the years, which has had drastic consequences for the country at large. This dissertation will not question the function or purpose of industrial action, but rather it will seek to analyse the reasons why violent strike action has escalated over the years in the light of legislation.

---

[31] s 1.
[32] M Uys '*Factors Influencing the Future Existence of Trade Unions in South Africa'* (unpublished LLM thesis, University of the North-West, 2011) 4.
[33] D S Harrison *Collective Bargaining Within the Labour Relationshipin a South African Context* (unpublished LLM thesis, University of the North-West, 2004) 24.
[34] P Benjamin 'Labour market regulation: International and South African Perspectives' *HSRC Employment and Economic Research Program* (2005) 41.
[35] The Constitution; s 27.
[36] S Godfrey, J Theron & M Visser 'The state of centralized bargaining in South Africa: An empirical and conceptual study of collective bargaining' *DPRU Working Paper 07/ 130* (2007) [4].
[37] Cohen (note 17 above; 2210).
[38] G Murwirapaechena 'Exploring the incidents of strikes in post-apartheid South Africa' (2014) 13(3) *International Business & Economics Research Journal* 553.
[39] M A Chicktay 'Placing the right to strike within an international framework' 2006 27(2) *Obiter* 346.

The violence which accompanies strikes is increasingly disturbing. When procedures implemented for dispute resolution are ignored, court interdicts disregarded and strikers engage in intimidation and violence to assert their claims, it is quite blatant that South Africa needs to evaluate the effectiveness of the policies and procedures it has enforced to regulate dispute resolution.[40] Even more alarming is that strike action used today to assert demands, are compared to those which occurred prior to the promulgation of the Constitution. This begs the question of whether South Africa's progress is merely inscribed in policy rather than practice.

1.3. OBJECTIVES OF THE STUDY

This research is intended to be an evaluation of the effectiveness of the LRA in managing and supervising the implementation of the right to strike. The dissertation acknowledges that there are many contributing factors that cause violence and unwarranted illegal conduct of strikers such as inequality between races which have been inherited from apartheid, poverty and social deficiencies, union rivalry and unemployment to name a few.[41] However, this dissertation will not engage in any discussion pertaining to the above mentioned contributing factors. The main objectives of the study are as follows:

- The dissertation will analyze the effectiveness of the provisions of the LRA and how successful it has been in managing and preventing illegal and violent strike action.
- The dissertation will also consider the possible pitfalls of the provisions of the LRA as well as the interpretation of such provisions by the Judiciary which could be probable contributors to the increase in violent strike action.
- The dissertation will also provide recommendations on how the LRA could help decrease strike violence.

[40] C Bosch … et al *The Tokiso Report on the State of Labour Dispute Resolution in South Africa* (2013) 17.
[41] G Murwirapechena & K Sibanda 'Exploring the incidents of strikes in post-apartheid South Africa' (2014) 13(3) *International Business & Economics Research Journal* 554.

1.4. RELEVANCE OF THE STUDY

Firstly, cognisance must be given to the fact that the Constitution provides all workers with the right to strike among other labour rights.[42] The constitutionalisation of the right to strike is the recompense for the militant stance organisations adopted, which has culminated in the right to engage in strike action as well as to promote democracy.[43] Additionally, the Constitution also enforces basic human rights enshrined in chapter 10. However, recent strikes have seen essential services come to a devastating halt with chronic patients not attended to and urgent surgeries completely disregarded in hospitals.[44] Furthermore, due to the fact that intimidation and violence are so frequent during strike action it has "been established as a tradition".[45]

For instance, the strike in 2010 caused essential services to come to an abrupt standstill and court interdicts to be defied. This was an unequivocal violation of s 71(10) of the LRA. In 2011, the engineering strike resulted in workers using intimidation and violence to canvass through factories to prevent non-striking workers from carrying on employment.[46] During the Marikana strike, 34 striking platinum miners were mercilessly shot to death leaving homes without incomes and robbing families of their fathers and husbands. This repulsed the country and sent shock waves through the international world while taking on the title of a massacre, likened to the Soweto uprisings.[47] This is indeed a calamitous problem. It is unacceptable that legislation, which endorses basic human rights, should also contain a right which infringes upon such human rights. This is evidently not the intention of legislature and should not be deemed acceptable, as the right to strike is essential to the implementation of freedom and democracy[48] and should not contravene the very purpose it seeks to uphold.

Secondly, the LRA provides a regulatory framework which outlines the procedures for collective bargaining and effective dispute resolution. Additionally, it provides a list of workers who may

---

[42] The Constitution; s 27.
[43] B Hepple'The right to strike in an international context' available at *http://www.law.utoronto.ca/documents/.../-StrikeSymposium09-Hepple.pdf*, accessed on 2 June 2015.
[44] TR Mle 'A critical analysis of the 2010 Public Service strike in South Africa: A service delivery approach', available at *http://www.sabinet.co.za/webx/access/electronic/.../jpad-v47-ni-si1-a7.pdf*, accessed on 13 April 2015.
[45] P Benjamin 'Assessing South Africa's commission for conciliation, mediation and arbitration (CCMA)' *Working Paper No. 47* (2013) 35.
[46] Bosch (note 40 above; 17).
[47] P Alexander 'Marikana, turning point in South African history' (2013) 40(138) *Review of African Political Economy* 611.
[48] Matee (note 9 above; 1).

not engage in strike action, and if such workers do engage in strikes then such action will be unprotected. However, the mere fact that numerous strikes have been characterised by brutality and are unprotected, illustrates that there is a discrepancy between what policy strives to achieve and the veracity of industrial action.

This is indeed concerning, as our legislation cannot be deemed to be advanced on the one hand while on the other hand reality negates the core moral values legislation intends to implement. It is therefore essential that this dissertation not only evaluate current legislation in its regulation of strike action, but also posit amendments where defects exist, as well as suggestions on how policies and procedures should be implemented to ensure compliance.

1.5. RESEARCH QUESTIONS

- How has industrial action contributed to the development of South African labour legislation before and after the promulgation of the 1996 Constitution?
- What are the policies which regulate the employment relationship between employer and employee?
- More pertinently, are they adequate in preventing conflict from escalating into strike action?
- Is the recent epidemic of strike action indicative of the flaws in legislation's competence in regulating strike action?
- If indeed there are such flaws in our legislation, what can be done to amend these laws in order to prevent a recurrence of past events?

1.6. METHODOLOGY

This is a desktop study and the compilation of this dissertation will include visits to various libraries to consult information resources as well as the extensive uses of the interlibrary loan facility are envisaged. Numerous sources will be utilised in writing this dissertation, which include both South African and international sources such as books, journal articles, conference papers, cases and articles.

1.7. TIME FRAME FOR THE COMPLETION OF THE DISSERTATION

The work on this dissertation began in 2015 and it is envisaged that it will be completed in 1 year.

1.8. OUTLINE OF THE CHAPTERS

In chapter 2 the dissertation will begin with a discussion on the development of labour legislation which led to the endorsement of the right to strike. In chapter 3 the dissertation will then go on to elaborate on the international laws and international instruments that protect and regulate the right to strike. Chapter 4 will then go on to discuss the entrenchment of fundamental labour rights that are enshrined within the LRA. Chapter 5 will focus on the regulation of strike action and the various methods that the LRA endorses to eliminate and deter illegal strike action. Chapter 6 will illustrate the recent strike action that has plagued our country as well as suggest possible solutions which would decrease violent and unprotected strike action. In conclusion, the dissertation will summarize the significant aspects of the discussion and will provide concluding remarks on a way forward for the country.

CHAPTER TWO

THE HISTORICAL DEVELOPMENT OF LABOUR LEGISLATION

2.1. INTRODUCTION

> "The freedom of employees to combine and to withdraw their labour is their fundamental safeguard against the inherent imbalance of power between the employer and the individual employee. This freedom has been accepted as a hallmark of a free society".[1]

In order to fully appreciate the right to strike within our free society, one has to take cognisance of its progression over the centuries. It is trite that the right to strike has been postulated as necessary to enforce fairness within the collective bargaining system.[2] However, the role of industrial action far exceeds its mere purpose within labour relations.[3]

Firstly, it is imperative to state that historically South African labour relations were established upon a system of gross inequality.[4] Therefore, it is within this system that the pertinence of industrial action is highlighted, as the effort to obtain rights for workers has always been and continues to be placed within an extensive framework of ideological and basic human rights battle.[5] It has become quite common for workers to make certain demands within their employment circumstances that they now see manifest within the political sphere.[6] Significant amendments to South Africa's policies have fueled Government's attempts to address the socio-political deficiencies of the country.[7]

---

[1] J Bowers & M Duggan *The Modern Law of Strikes* (1987) 1.
[2] A Bogg *The Democratic Aspects of Trade Union Recognition* (2009) 256.
[3] M A Chicktay 'Placing the right to strike within a human rights framework' (2006) 27(2) *Obiter* 348.
[4] V Mbungu *'Positive discrimination in South African employment law: Has affirmative action overstayed its welcome'* (unpublished LLM thesis, University of KwaZulu- Natal, 2013) 1.
[5] R Bernikow 'Ten years of the CCMA- An assessment for labour' *DITSELA (Western Cape) Labour Law Seminar* (2007) 13.
[6] T Novitz *International and European Protection of the Right to Strike* (2003) 57.
[7] G M Ferreira 'The development of South African labour law for the past ten years (1994-2004)' (2005) 24(2) *Politeia* 17.

The trade union movement has been fundamental in structuring the political and socio-economic policies of South Africa.[8] It is therefore fundamental to emphasise the role of South African trade unions[9] and their alignment with political organisations that have largely contributed to the egalitarian society we live and work within.[10] It is even more crucial to accentuate the role of labour legislation and its progression despite the oppressive laws enacted to repress race groups in the past. However, legislation has not been enforced simply upon the request of workers, but rather it is the significance of strike action and its crippling effect on the economy, which has largely contributed to attracting Government's rapid response to changing legislation over time. It is for this reason that the evolution of strike action cannot be mentioned without referring to the epoch of apartheid.

This chapter deals exclusively with the evolution of labour law within the repressive regime of apartheid. It firstly explicates the inception of South Africa as a Union and the beginning of industrial labour in South Africa. It further discusses the birth of the first trade union as well as the earliest noted strike actions, which saw Government enforcing legislation to contain disputes. Secondly, the chapter goes on to discuss the establishment of the country as a Union and the initiation of oppressive legislation. This era sees the rise of white supremacy and the violent clashes by black workers against apartheid labour laws.

Thirdly, the chapter elaborates on the rights of workers within the apartheid regime. It becomes apparent that the role of legislation was merely to facilitate the agendas of Government in maintaining white dominance. Finally the chapter discusses the radical changes which initiated a reformation within labour law as well as the country as a whole.

In order to comprehend where our country is going, one firstly has to acknowledge where we have come from.

---

[8] G Murwirapachena 'Exploring the incidents of strikes in post apartheid South Africa' (2014) 13(3) *International Business & Economics Research Journal* 553.

[9] C Twala & B Kompi 'The Congress of South African Trade Unions (COSATU) and the tripartite alliance: A marriage of (In) Convenience? *HASA Conference (University of the North- West) Reflecting on the 25 years of COSATU (1985-2010)* (2010) 174.

[10] B Hepple 'The Right to Strike in an international context', available at *http//:www.law.utoronto.ca/documents-/conferences2/strikeSymposium09-Hepple.pdf*, accessed 5 July 2015.

2.2 THE INCEPTION OF THE UNION OF SOUTH AFRICA

2.2.1. The period between the years 1652 and 1910

In 1652 the Dutch East Indian Company[11] was established by the European settlers when they descended upon the shores of South Africa along with a small number of unskilled slaves.[12] In 1658 there was a great need for labourers, which necessitated shipments of slaves from areas such as Angola, Guinea Coast and in subsequent years as the need arose, from southern India, Ceylon, Indonesia and Madagascar.[13] Slavery was the backbone of the labour industry of South Africa.

In 1809 the slave trade was legally abolished.[14] However, the concept of slavery still existed,[15] and only in 1934 did South Africa formally abolish slavery. As a result thereof, Government passed non-racial legislation to regulate the rights and functions between master and servant.[16] Legislation was however merely to prescribe the duties of the employer and worker as no struggle for power existed between the parties. The trade union movement was insignificant during this time; as such a need did not present itself.[17] This was to change through the industrial revolution.

The nineteenth century marked the inception of the country's industrial development as a result of the gold and diamond discoveries,[18] which consequently led to the establishment of the mining industry[19] as well as other industries necessary to sustain the mining industry. The

---

[11] G W Mukundi *South Africa: Constitutional, Legislative and Administrative Provisions Concerning Indigenous Peoples* (2009) 10.
[12] D Nupen 'Constitutionalism and Political Stability in South Africa' (2004) 4(2) *African Journal on Conflict Resolution* 120.
[13] G H Le May *Black and White in South Africa: The politics of Survival* (1971) 5, F Wilson *Labour in the South African Gold Mines 1911-1969* (1972) 1.
[14] N J Rhoodie *Apartheid and Racial Partnership in Southern Africa* (1969) 13.
[15] H Corder, N Hayson & P Malherb *Focus on the History of Labour Legislation* (1979) 29.
[16] M Budheli 'Workers' right to freedom of association and trade unionism in South Africa' (2009) 15(2) *Fundamina: A Journal of Legal History* 2.
[17] M Kittner, M Korner- Dammann & A Schunk *Labour Uunder the Apartheid Regime- Practical Problems and the Legal Framework of Labour Relations in South Africa* (1989) 3
[18] J S Saul & S Gelb *The Crisis in South Africa: Class Defense, Class Revolution* (1981) 10, W H Thomas *The Socio-Political Structure of the South African Economy-its Dynamic Perspective in South Africa: Industrial Relations and Industrial Sociology* (1979) 6.
[19] F A van Jaarsveld *From van Riebeeck to Vorster 1652-1974* (1975) 159.

development of gold mining necessitated the procurement of labour.[20] South Africa possessed a majority of Asian and Black unskilled labourers.[21] This was insufficient for the demand required by these emergent industries[22] therefore skilled European, American as well as Australian labourers were brought in to fill the gap.[23] Trade unionism is essentially a British concept,[24] and it is with these immigrants that the first trade unions of South Africa were initiated.[25] It is significant to draw attention to the fact that Asians and blacks constituted the vast majority of unskilled labourers, who were unrepresented by trade unions.[26]

As a result of the displacement of black labourers during the Anglo-Boer War, which took place between 1899 and 1902,[27] many black labourers did not return to the mines after the war. Therefore an urgent need for labourers arose. This precipitated the immigration of Chinese workers. However, due to a number of conflicting issues that presented itself, the repatriation of these immigrants was compelled by Government.[28] The beginning of the 1900's experienced an endemic of impetuous strike action as a result of dissatisfaction in working conditions.[29] These strikes are pertinent to the development of labour legislation as they resulted in Government's hasty efforts to contain the aggressive stance that these workers had taken by implementing various laws.[30] Although legislation was futile in curtailing the torrent of strikes that threatened to wreak havoc during the early 1900's,[31] these enactments ultimately restrained workers from trade unionism and strike activity for over a decade. These early strikes included the 1907 and

---

[20] S Dubow *Racial Segregation and the Origins of Apartheid in South Africa, 1919-36* (1989) 55.
[21] R Garrans *The Government of South Africa* (1908).
[22] R A Jones & H R Griffiths *Labour Legislation in South Africa* (1980) 1.
[23] W P Visser 'White labour aristocracy and black proletariat: The origins and development of South Africa's racially divided working class', available at *http://sun025.sun.ac.za/portal/page/portal/Arts /Departmente1 /geskiedenis/docs/white-labour-aristocracy.pdf* , accessed 5 July 2015.
[24] 'Reform vs Oppression: The impact of Wiehahn Commission on Labour Relations in South Africa,' available at *http://fbcdn-profile-a.akamaihd.net/hprofile-ak-xfh/v/f1.0-1*, accessed 2 June 2015.
[25] M Budeli 'Trade unionism and politics in Africa: The South African experience' 2012 *CILSA* 460.
[26] E Hellmann *Handbook on Rrace Relations in South Africa* (1949) 109.
[27] A Venter *South African Government and Politics* (1989) 37.
[28] F A Johnstone *Class, Race and Gold: A Study of Class Relations and Racial Discrimination in South Africa* (1976) 29-30.
[29] E Manamela & M Budeli 'Employees right to strike & violence in South Africa' (2013) 46(3) *CILSA* 10.
[30] J Riekert & J Grogan *Riekert's Basic Employment Law* (1987) 3.
[31] J F MyBurgh '100 years of strike law' (2004) 25 *ILJ* 962.

1913 miners' strikes, the railway and printer's strike in 1911, as well as a general strike which took place in 1914.[32]

The general strike of 1914 was an extension of the 1913 strike, which led to the enactment of further legislation that sought to stifle strike action. On 14 January 1914, Government declared martial law and ordered the arrest of many labour leaders, as well as the deportation of nine strike leaders. These actions were supported by Parliament, and made possible by the promulgation of the Indemnity and Undesirables Special Importation Act.[33] Government presented the Peace Preservation Bill to Parliament in 1914, which effectively abolished workers rights to engage in strikes, picketing and abdicated all forms of freedom of speech and assembly. This was strongly opposed and resulted in the enactment of the Riotous Assemblies and Criminal law Act[34] which banned the forced enrollment to unions, violent forms of strike action and picketing, along with an absolute ban on strikes within public service functionaries, as well as increasing the level of control of law enforcement.[35]

Government made further efforts to address the turmoil within industrial labour law by enacting the Workman's Compensation Act[36] along side the Riotous Assemblies and Criminal Law Amendment Act,[37] which sought to increase the states' control on the disorder initiated by public persons and trade unions.[38] These enactments were a direct result of the early strike action during the 1900's which sought to prevent future anarchy caused by industrial action. A significant progression in legislation was the Industrial Disputes Prevention Act[39] which pioneered South Africa's first system of conciliation. It applied only to mining, engineering and metal sectors, essential municipal services and the building industry. The Industrial Disputes Prevention Act excluded black and Asian workers and employers who employed less than ten white workers.[40]

---

[32] W P Visser "To fight the battle of the workers" : The emergence of pro-strike publications in early twentieth-century South Africa' (2004) 49(3) *International Review of Social History* 402.
[33] Act 1 of 1914.
[34] Act 27 of 1914.
[35] W P Visser 'The South African labour movement's responses to declarations of martial law, 1913-1922' *War and Society of Africa Conference, South African Military Academy* (2001) 13.
[36] Act 27 of 1914.
[37] Act 25 of 1914.
[38] Visser (note 35 above; 13).
[39] Act 20 of 1909; s 5(2)
[40] J Simons & R Simons *Class and Colour in South Africa 1850-1950* (1983) 95.

The Industrial Disputes Prevention Act stipulated that if employers intended to make any amendments to the terms and conditions of the employment relationship, a month's notice of such changes was required.[41] Where an employee disagreed with such changes, and only if the proposed changes affected ten or more of the employees of the enterprise, a conciliation and investigation board would be assigned in terms of the Industrial Disputes Prevention Act.[42] It is imperative to note that the dispute resolution framework created under the Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA) is very similar to that created under the Industrial Disputes Prevention Act, as both of these enactments provide for parties to engage in conciliation regarding disputes of interest, such as terms and conditions of employment.

Where disputes arose regarding terms and conditions of employment, the board would be charged with the responsibility of investigating the conflict and providing a report on their findings. These findings were not regarded as obligatory, but rather consultative.[43] Under the Industrial Disputes Prevention Act, strike action was permissible. However, this right of recourse was only available once the investigative board had given its report on the conflict and when independent action to resolve the dispute by the parties had come to an end.[44] The Industrial Disputes Prevention Act was pivotal to the progression of labour rights as it afforded workers the lawful means of countering the dictates of employers. Instead of merely accepting conditions of employment, the Industrial Disputes Prevention Act provided for a legal means of negotiating disagreements through the establishment of the conciliation and investigation board. In addition, strike action as early as 1909 was recognised by legislature as a social power that could be used to induce employers into submission when conciliation was unsuccessful.

It is essential to note that as early as 1909 conciliatory bodies similar to those created under the LRA were formed to settle disputes. Even though these councils differed in that their findings were not obligatory in contrast to the binding nature of collective agreements reached through the bargaining councils,[45] they are comparable in terms of the purpose their existence seeks to fulfill which is to resolve disputes and issues relating to terms and conditions of employment.[46] It

[41] Act 20 of 1909; s 5(1)
[42] Act 20 of 1909; s 25.
[43] Act 20 of 1909; s 25.
[44] Act 20 of 1909; s 6(1).
[45] Act 66; s 31.
[46] J Grogan *Collective Labour Law* (2007) 83.

is also worth mentioning that strike action from the early 1900's was used as a mechanism to assert demands on employers. When one seeks to understand the essence of strike action, one becomes aware that regardless of the era in which strike action originated, the purpose for which it exists pervades through generations.

2.3. THE RIGHTS OF WORKERS UNDER THE APARTHEID REGIME AND THE PROGRESSION INTO DEMOCRATISED SOCIETY (1910-1948)

2.3.1. The period between the years of 1910-1948

In 1910, due to the convergence of the various railway systems,[47] the previous Boer Republics in the Transvaal and the Orange Free State as well as the Cape and Natal British colonies emerged[48] to form the Union of South Africa.[49] A constitution was adopted by the country which placed all inhabitants under British rule. Those who did not comply with the normative standards of European rule were deemed to be subjects of administration.[50] The constitutionalisation of white supremacy was an indication to blacks that white aristocracy was not willing to enforce equality.[51]

The concept of white dominance and black oppression was well established by 1910, and until the latter part of the twentieth century altered very little in its intents and purposes.[52] The Union was able to implement the edifice of the 'colour bar' through the enactment of various racial laws structured for the specific oppression and exploitation and subjugation of the black race.[53] The ideology of racial segregation and political control established the foundation of the superstructure of the labour framework.[54]

---

[47] H M Robertson *South Africa: Economic and Political Aspects* (1957) 83.
[48] South African Information Service '*Progress through separate development: South Africa in peaceful transition'* 2nd ed (1968) 35.
[49] L Van der Walt 'The first globalisation and transnational labour activism in Southern Africa: White labourism, the IWW, and the ICU, 1904-1934' (2007) 66(2-3) *African Studies* 225.
[50] D J van Vuuren … et al *Change in South Africa* (1983) 2.
[51] South African Human Rights Commission Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996) (1998) 2.
[52] R M Price *The Apartheid State in Crisis: Political Transformation in South Africa, 1975-1990* (1991) 3.
[53] W P van Schoor 'The origin and development of segregation in South Africa' *A. J Abrahamse Memorial Lecture* (1951) 18.
[54] S Terreblanche *A History of Inequality in South Africa 1652-2002* (2002) 247.

White labour leaders were some of the first political leaders to welcome segregation policies. These labour leaders were compelled to respond to the white labourer's concerns that black workers would replace the unskilled white. Therefore, out of fear the white labourer demanded segregation[55] and Government willingly complied with their demand through the promulgation of discriminatory legislation. In 1911, the Mines and Wage Act[56] was passed which formed the cornerstone on which further discriminatory policies would be implemented.[57] The Mines and Wage Act effectively sought to enforce the reservation of job categories specifically for white workers.[58] It applied broadly to not only the mining industry but also to the tramways, infrastructure and construction sectors.[59] The Mines and Wage Act effectively provided that workers possess competency certificates in order to occupy skilled positions within the mines.[60] In addition, such competency certificates were not to be issued to non-Europeans in the Transvaal and Free State provinces.[61]

However, if such competency certificates were issued in any other province, these would consequently be denied acknowledgement in the Transvaal and Free State provinces.[62] This legislation was implemented to stifle the progression of the black worker by ensuring that blacks only undertook menial labour. It is submitted that the effect of this legislation restrained black workers as unskilled labourers. It is imperative to reiterate that the South African economy was at its peak during the early 1900's as a result of the gold and diamond discoveries. Consequently, employers required an abundance of labour at a cheap rate. This led to the enactment of further legislation in favour of the white employer.

The Native Labour Regulations Act[63] was promulgated to fortify the grip on black labour by ensuring that these workers were more economical to obtain and keep hold of, as black workers formed the perennial of cheap and unskilled workforce.[64] The Native Labour

---

[55] Dubow (note 20 above; 57).
[56] Act 12 of 1911.
[57] Jones & Griffiths (note 22 above; 3).
[58] B Dollery 'Labour Apartheid in South Africa: A rent seeking approach to discriminatory legislation' (1990) 29(54) *Australian Economic Papers* 118.
[59] ibid 118.
[60] J A Cruise 'The gender and racial transformation of mining engineering in South Africa' (2011) 111 *The Journal of The South African Institute of Mining and Metallurgy* 218.
[61] Regulation 99 of Mines and Works Act.
[62] Regulation 285 of Mines and Works Act.
[63] Act 15 of 1911.
[64] R I Rotberg & J Barratt '*Conflict and Compromise in South Africa'* (1980) 90.

Regulations Act stipulated that a written contract had to be concluded as well as attestation to take place before a judicial officer such as a magistrate.[65] Employers were explicitly prohibited from coercing employees for reasons such as higher salaries or benefits "to desert or to break any binding contract".[66] In addition, employees themselves were held criminally liable if they failed to carry out the terms of the employment contract without a lawful reason.[67]

This is quite evident in the case of *R v Smit,*[68] where the court dealt with the common law approach to strike action and held that a strike is essentially the refusal to continue work, which constitutes a breach on the part of the employee in his contract. The employer in such circumstances is entitled to cancel the employment contract and dismiss the employee without prior notice. Therefore, following from the Native Labour Regulations Act as well as case law, if black employees embarked upon strike action it would have been regarded as a breach in his employment contract and he would be dismissed without a right of recourse. Black workers thus lacked a crucial element in dispute resolution as they could not use strike action as a threat to employers.

Even though black labourers approached racial policies with much resistance, this resistance was not successfully expressed through labour movements.[69] A significant trade union that arose in the early 1900's was the South African Native National Congress (SANNC) which was the forerunner of the African National Congress (ANC). The constitution that was adopted in 1910 initiated the same militant stance the (SANNC)[70] had taken against the reservation of thirty-two job specifications for white labour. Thus, the SANNC gained the support of black workers.[71] Even though the SANNC remonstrated against the exclusion of rights pertaining to voting, as well as many others laws, this, however, proved futile as segregation policies continued all the more.[72] Consequently, there was a desperate cry among black workers for a voice that would

---

[65] G Orde-Browne *The African Labourer* (1967) 179.
[66] Act 15 of 1911; s 13(c).
[67] Act 15 of 1911; s 14 (1) (C).
[68] *R v Smit* 1995 (1) SA 239 (C) 98.
[69] C Fenwick, E Kalula & I Landau 'Labour Law: A Southern African Perspective' *Discussion Paper Series No. 180* (2007) [4].
[70] C Landsberg '100 Years of ANC foreign policy' (2012) 35 *The Thinker* 25.
[71] Van der Walt (note 56 above; 56).
[72] M Finnemore *Introduction to Labour Relations in South Africa* 8thed (2002) 19.

speak on their behalf against these injustices. This cry was thought to be heeded to in the formation of the Industrial and Commercial Workers' Union (ICU).

The year 1918 was when the first black workers' union took root under the leadership of General Secretary Clemens Kadalie.[73] The ICU was the most prominent union to be established on the African continent[74] and by the latter part of the 1920's over 100 000 members constituted the ICU.[75] However, regardless of its large membership by 1931 the union had become a vapor in the wind and could not survive as a result of ineffective leadership, poor administration and external stress placed upon it.[76] In contrast to black unions during the 1920's, white unions flourished. In 1920, the British Amalgamated Society of Engineers combined with smaller craft unions to become the Amalgamated Engineering Union. The exclusion of black workers branded them as 'pseudo-craft' unions.

The term 'pseudo' essentially denotes something that is pretentious and false.[77] It must be noted that the progression of initial craft unions was based on the skills of its members. Therefore, it has been argued that these unions represented themselves as skilled workers within labour sectors to intentionally exclude black workers who by tradition and as a result of the Mines and Wage Act were regarded as unskilled labourers.[78] This effectually allowed white workers to advance over their black counterparts. Thus, white craft unions were an illusory pretense of skilled workers unions as they implemented a strategy to racially segregate black workers.[79] Although early trade unions had devised the strategy to exclude blacks on the basis of skills, unions formed after 1945 progressed with the assistance of employers and Government to secure their elite position by the promulgation of legislation.[80]

The 1930's experienced a surge in black unionism across various industries. This was strongly opposed by the Chamber of Mines who feared that the organisation of black unions within prominent industries would be extended to the mines. This stance continued well after the

---

[73] C Kadalie *My Life and the ICU* (1970) 11.
[74] E Webber *Essays in Southern African Labour History* (1978) 114.
[75] J A Grey Coetzee *Industrial Relations in South Africa: An Event Structure of Labour* (1976) 6.
[76] T Lodge *Black Politics in South Africa Since 1945* (1983) 8.
[77] P Alexander *Workers, War & the Origins of Apartheid: Labour & Politics in South Africa 1939-48* (2000).
[78] L Switzer *South Africa's Alternative Press: Voices of Protest and Resistance, 1880s-1960s* (1997) 271.
[79] J Lewis *Industrialisation and Trade Union Organisation in South Africa, 1924-55: The Rise and Fall of the South African Trades & Labour Council* (1984) 109.
[80] ibid 88.

Second World War and eventually led to the establishment of the African Mine Workers' Union in 1941. However, the union was constantly restrained by the Chamber and the arrest of organisers.[81] White workers within the mines were protected by the dependence capital had on their skills. This secured and justified their significantly high salaries. Therefore, when capital realised that black workers could undertake the same work for a relatively lower wage, white workers had lost their bargaining foothold.[82]

The disposition around the mining industry during the 1920's was highly volatile as mine owners began to submit white workers to harsh conditions of employment and a threat of a reduction in salaries.[83] Suffice it to say that the sole reason white labourers enjoyed the benefits of high salaries was at the exploitation of their lowly remunerated black counterparts.[84] However, beneath the security of white labour lay a deep under-current of a 'big financial view', which saw the Labour Party (LP) favouring the mass of economical black labour in comparison to the well paid white workforce.[85] The LP's financial strategy basically entailed that the expense of wages in mines would be substantially reduced if lowly paid black workers replaced highly paid white workers. This sought to benefit the country's financial position as this would ensure that costs would be significantly cut back, because black workers would undertake the same job as white workers but only for a fraction of the cost of wages for a white worker. This was the white workers' most dreaded fear that would soon become reality.

The walls of white labour began to crack and both skilled and unskilled white labourers were rendered vulnerable. Skilled white labourers feared their replacement by the black labourer, whereas semi-skilled white labourers were threatened by restrictions on job specifications.[86] This in turn would culminate in defensive measures to protect their interests, such as the use of industrial action.[87] In 1920, hostilities intensified when recommendations were made by the Low

[81] L Flynn *Studded with Diamonds and Paved with Gold: Miners, Mining Companies and Human Rights in Southern Africa* (1992) 206-207.
[82] P C W Gutkind, R Cohen & J Copans *African Labour History* (1978) 37.
[83] C R D Halisi *Black Political Thought in the Making of South African Democracy* (1999) 40.
[84] G W Shepherd, Jr. *Anti-Apartheid: Transnational Conflict and Western Policy in the Liberation of South Africa* (1977) 5.
[85] H Brotz *The Politics of South Africa: Democracy and Racial Diversity* (1977) 7.
[86] S Godfrey…et al *Collective bargaining in South Africa: Past, Present and Future?* (2010) 18.
[87] B P S van Eck & S R van Jaarsveld *Principles of Labour Law* (1998) 10.

Grade Mine Commission to eliminate job reservations for white workers.[88] This decision would effectively open positions within the mines, thereby allowing black works the opportunity of placement of certain jobs specifically reserved for white workers only. The protection white workers received were a result on the dependency on their race. Therefore, the elimination of job reservations for white workers essentially eliminated the white worker's protection.

In 1922, there was a decision to retrench white miners who were semi-skilled in an attempt to save on wages.[89] This ignited a bloodbath of violent insurrection in the Witwatersrand. This became branded as the Rand Rebellion and lasted approximately three months.[90] The Rand Rebellion was known as South Africa's largest strike, which involved over 22 000 participants and was the most gruesome to ever occur in labour history.[91] The strike caused grievous harm, which included the death and injury of many workers.[92]

However, it was the Rand Rebellion that drew cognisance to the lack of adequate attention being given to labour legislation. This was quite evident in the enactment of the Mines and Works Amendment Act,[93] which sought to ensure greater regulation of the mines in an attempt to prevent strikes such as the Rand Rebellion.[94] The country's poor white problem, which was caused by the retrenchment of unskilled whites, required the exclusion of black workers and the inclusion of white unskilled workers at a wage given to semi-skilled workers. Thus the colour bar was entrenched through the Mines and Works Amendment Act.[95] The Rand Rebellion was thus essential for future developments which would follow in its wake.

The strike initiated a transformation in industrial labour relations and was instrumental in establishing the trajectory of South African labour law for two crucial reasons.[96] Firstly, white labourers were able to bring about political change in the country that saw the fall of the Smuts

---

[88] S van der Berg & H Bhorat 'The Present as a Legacy of the Past: The labour market, inequality and poverty in South Africa' *DPRU Working Paper* (1999) 4.
[89] MyBurgh (note 31 above; 962).
[90] M Visser.'From MWU to solidarity –A trade union reinventing itself.'(2006) 30(2) *SAJLR 2.*
[91] Manamela & Budeli (note 29 above; 8).
[92] A Tolcher 'How does the 1922 Rand Rebellion reveal the relative importance of race and class in South Africa? (2011) 1 *University of Sussex Undergraduate History Journal* 6.
[93] Act 25 of 1926.
[94] Cruise (note 60 above; 217).
[95] J Seekings '"Not a single white person should be allowed to go under:" Swartgevaar and the origins of South Africa's welfare state, 1924-1929' *CSSR Working Paper No. 154* (2006) 13-14.
[96] J Grogan *Workplace Law* 7thed (2003) 318.

Government in the 1924 elections which was to their benefit.[97] Secondly, it gave rise to a 'conciliation system' established through the enactment of the Industrial Conciliation Act 11 of 1924.[98] When the National Labour Party came into power in 1924,[99] the Industrial Conciliation Act was promulgated. This was the country's first all-inclusive piece of legislation to govern labour relations.[100]

As a mechanism of preventing a recurrence of the Rand Rebellion, the Industrial Conciliation Act was aimed at placating the white worker and enforcing dispute resolution between employers and employees.[101] The Industrial Conciliation Act sought to provide a solution to the increasingly poverty stricken white class by instilling a system of preferential treatment towards white workers.[102] The Industrial Conciliation Act also recognised strike action within collective bargaining and necessitated a period of 'cooling off' until attempts were made to resolve an issues through negotiation.[103] The Industrial Conciliation Act also made reforms regarding unions and organisations.

The Industrial Conciliation Act necessitated trade unions and employer's organisations to be registered.[104] South African trade unions were thus attributed equivalent recognition to unions in Britain and became legal entities.[105] The agreements reached through negotiations created binding obligations on all constituents within that given industry. In addition, industrial action could only be utilised once an extensive conciliatory process had been undertaken.[106] The most far-reaching implication of the Industrial Conciliation Act was that for 55 years black workers were excluded from trade union membership. Even though white trade unions were permitted

---

[97] Finnemore (note 72 above; 20).
[98] H G Ringrose *The Law and Practice of Employment* (1983) 7.
[99] Seekings (note 95 above; 3).
[100] M Finnemore & R van Rensburg *Contemporary Labour Relations* 2nd ed (2002) 9.
[101] H Bhorat, C van der Westhuizen & S Goga 'Analysing Wage Formation in the South African Labour Market: The role of Bargaining Council's *DPRU* (2007) 3.
[102] D du Toit *Capital and Labour in South Africa* (2010) 94.
[103] P Randall *Power, Privilege and Poverty* (1972) 34.
[104] Act 11 of 1924; s 12.
[105] Ringrose (note 98 above; 7).
[106] D S Harris '*Collective Bargaining within the labour relationship: In a South African context.*' (unpublished LLM thesis, North-West University, 2004) 24.

registration their right to engage in strike action was severely constrained to the dispute resolution system of the industrial councils.[107]

Regrettably, however progressive the Industrial Conciliation Act may have been, black workers were exclusively excluded from it[108] as they did not constitute an 'employee' under the definition provided for in the Industrial Conciliation Act.[109] The wiliness of legislation ensured that only registered trade unions participated in collective bargaining and considering black workers were not permitted to formulate or join registered union,[110] Government effectively enforced a dual strategy to alleviate the "poor white problem" to suppress the black worker.[111] Consequently, there was a need for legislation to regulate workers who did not fall under the Industrial Conciliation Act.

In 1925 the Wage Act[112] was passed as a means of instituting further management and conciliation mechanisms in labour relations.[113] Where industries fell outside the scope of the industrial council system and where there was an absence of consensus under the Industrial Conciliation Act, the Wage Act provided for a unilateral decision regarding conditions of employment and salaries.[114] The Wage Act in contrast to the Industrial Conciliation Act was applicable to black workers.[115]

The Wage Act had no particular specifications of wage determinations based on race. However, the Wage Act did insist that the Wage Board take into consideration the daily expense of labourers as well as the given industry's ability to afford the pay structure. Even though this was in place, the Board was able to maneuver through the provisions to benefit white workers.[116]

---

[107] M Uys '*Factors influencing the future existence of trade unions in South Africa'* (unpublished LLM thesis, University of the North-West, 2011) 4.
[108] N J Rhoodie *South African Dialogue: Contrasts in South African Thinking on Basic Race Issues* (1972) 298.
[109] Act 11 of 1924; s 24.
[110] J Maree 'Trends in the South African collective bargaining system in comparative perspective' (2011) 35(1) *SAJLR* 13.
[111] A Gwaindepi '*The developmental state, social policy and social compacts: A comparative policy analysis of the South African case'* (unpublished LLM thesis, Rhodes University) 63.
[112] Act 27 of 1925.
[113] J V du Plessis … et al *A Practical Guide to Labour Law* (1994) 51.
[114] Jones & Griffiths (note 22 above; 27).
[115] Act 27 of 1925, s 1.
[116] Corder, Hayson & Malherb (note 15 above; 49).

This was indeed contrary to the intention of legislature which "was to secure an employee a proper minimum wage, commensurate with his qualification and services".[117]

In 1930, the Industrial Conciliation Act was amended. The provisions of the Industrial Conciliation Act 24 of 1930 (hereafter referred to as the Industrial Conciliation Act 1930) enabled the Minister of Labour to pass resolutions regarding black workers who were excluded from the Industrial Conciliation Act 1930. These amendments encompassed decisions regarding workers who were excluded from the definition of an employee enshrined in the Industrial Conciliation Act 1930.[118]

In 1934, a commission of enquiry was instituted to examine the Industrial Conciliation Act 1930 and the Wage Act. Based on their findings, the Industrial Conciliation Act 1930 and the Wage Act underwent further amendments, which resulted in the Industrial Conciliation Act 36 of 1937 (hereafter referred to as the Industrial Conciliation Act 1937).[119] The Industrial Conciliation Act 1937 was promulgated to provide a more effective framework for dispute resolution and thus reduce strike action by workers. However, this in fact had an adverse effect which resulted in a surge of strike activity. In 1935 Natal experienced an upsurge of trade union movement. Sporadic strikes took place which involved the Natal Iron and Steel Workers' Union as well as other strike action involving factory and coal workers lasting on average between 2 and 16 days.[120]

However, despite this sporadic strike activity, the most significant strike of this era was the Rand Rebellion. As a result of the belief that Government was the cause of the volatile censorship of the strike, by the time of the 1948 elections the country had lost its faith in the Smuts Government.[121] Consequently, this elevated the National Party (NP) into power.[122]

---

[117] *Ex Parte Minister of Justice: In re R v Gerstnera* 1930 AD 420 at 431.
[118] Budheli (note 16 above; 7).
[119] Ringrose (note 98 above; 8).
[120] H G Ringrose *Trade Unions in Natal* (1951) 24.
[121] H Wolpe *Race, Class & the Apartheid State* (1988) 62.
[122] L Boulle … et al *Malan to De Klerk* (1994) 9.

2.3.2. The period between the years 1948-1990

In 1948, the Nationalists (National Party) were elected into power on a platform used to enforce apartheid[123] primarily due to the growing concern white conservatives had[124] over the substantial progress of black workers and their continued propaganda for communist ideologies.[125] The National Party sought to contrive an elaborate framework of legislation to implement the concept of apartheid. The separation of races was inculcated in all spheres of life.[126]

In October 1948, the Industrial Relations Commission of Enquiry (the Commission) was instituted which was led by P. W. Botha. Thus the Commission became known as the 'Botha Commission'.[127] The Commission was of the view that black workers did not possess the necessary skills required for the participation in the elaborate labour relations structure. However, the Commission did suggest that black workers obtain some form of assignment within the labour system.[128]

Upon the recommendations of the Commission, the Suppression of Communism Act[129] was passed which sought to suppress trade union movement and further prohibited all forms of communist propaganda.[130] This enactment was a response to the 1946 mine workers strike which was aimed at weakening black trade unionism. This subsequently led to the banning and arrest of numerous leaders of black trade unions. This resulted in effective leadership being ousted from their positions.[131] Black unions therefore lacked any form of organisation and strength, thus reducing their bargaining power substantially.[132]

Consequently, the obligation of employers to negotiate with such unions was also weakened.[133] The Commission also suggested that black trade unions should be permitted to negotiate with conciliation boards on a pre-condition that the board be chaired by an official of the state and

---

[123] R Schrire *South Africa: Public Policy Perspectives* (1982) 72.
[124] T Karis *From Protest to Challenge: A Documentary History of African Politics in South Africa 1882-1962* (1973) 79.
[125] M T W Arnheim *South Africa after Vorster* (1979) 15.
[126] A D Lowenberg & W H Kaempfer *The Origins and Demise of South African Apartheid* (1998) 33.
[127] Budheli (note 16 above; 9).
[128] Budheli (note 25 above; 469).
[129] Act 44 of 1950.
[130] B Hepple 'Is South African labour law fit for the global economy?' *Labour Law Colloquium Mt Fleur* (2011) 10.
[131] D J van Vuuren & D J Kriek *Political Alternatives for Southern Africa: Principles and Perspectives* (1983) 74.
[132] D Ncube *The Influence of Apartheid and Capitalism on the Development of Black Trade Unions in South Africa* (1985) 82.
[133] Lewis (note 80 above; 136).

only if the state consented to the initiation of the board.[134] This era was characterised by its heightened political militancy,[135] strikes and stay aways and Government's response through the enacting of various security legislation designed to quell any form of resistance towards apartheid.[136] This may have solved the problem of black resistance, but negotiations between employers and black workers were seriously hampered.

In 1953, the Native Labour (Settlement of Disputes) Act[137] (hereafter referred to as the Native Labour Settlement Act) was passed to regulate employment conditions and for resolving disputes between black workers and employers.[138] Where an enterprise consisted of twenty or more black workers the Native Labour Settlement Act provided for internal committees. However, the powers of these committees were limited, as they were consultative in nature, merely to discuss a conflicting matter that presented itself in the workplace.[139] This is evident in *P.E. Bosman Transport Works Committee &others v Piet Bosman Transport (Pty) Ltd,*[140] where it was held that the worker committee created under the Black Labour Relations Act had no *locus standi,* because it was merely a statutory body possessing limited functions. It could not take up issues beyond the employer or assume the role of a litigant. Nor could this body acquire any further powers merely because its constitution authorises such additional powers.[141]

Additionally, the Black Labour Relations Act[142] was promulgated to assist black employees. The Black Labour Relations Act introduced a dual legal system that sought to work alongside the Industrial Conciliation Act by protecting the interests of black workers where the Industrial Conciliation Act 1930 excluded black workers.[143] However, even though the Black Labour Relations Act provided black employees with more labour rights to improve the relationship

---

[134] Budheli (note 16 above; 10).
[135] S Welschen *The Country We are Supposed to be* (2012) 74.
[136] G M Carter *Which Way is South Africa Going?*(1980) 14,T M Shaw & K A Heard *Cooperation and Conflict in Southern Africa: Papers on a Regional Subsystem* (1977) 202, T Hanf … et al *South Africa: The Prospects of Peaceful Change: An Empirical Enquiry into the Possibility of Democratic Conflict Regulation* (1981) 257.
[137] Act 48 of 1953.
[138] A Sampson *Black and Gold: Tycoons, Revolutionaries and Apartheid* (1987) 105.
[139] Act 48 of 1953; s 7.
[140] *P.E. Bosman Transport Works Committee & Others* 1980 (4) SA 801 (T) 67.
[141] *P.E. Bosman supra* at 66F-H.
[142] Act 48 of 1953.
[143] S T van der Horst & J Reid *Race Discrimination in South Africa: A Review* (1981) 57.

between employer and employee, it prevented the registration of black trade unions and prohibited black workers from the use of industrial council systems.[144]

In 1956, the Industrial Conciliation Act[145] (hereafter referred to as the Industrial Conciliation Act 1956) was endorsed. The Industrial Conciliation Act 1956 further entrenched the separation of workers based on race, as well as proscribing new unions consisting of both white and coloureds from being registered.[146] It also provided that specific types of work were reserved for people of particular races.[147] The Industrial Conciliation Act 1956 allowed for the formulation of an industrial tribunal which was tasked with providing recommendations concerning the enforcement of job reservations for workers.[148] However, this legislation also had a major shortcoming similar to its predecessors.

The Industrial Conciliation Act 1956 specifically excluded black workers from its definition of an employee.[149] Therefore, the Industrial Conciliation Act 1956 provided another mechanism for enhancing apartheid policies by enforcing stringent control on black trade union movements.[150] This was achieved by the banning of multi-racial unions from being registered and required existing multi-racial unions to divide into unions according to their race.[151] It is imperative to reiterate that black labour formed between 70 to 80 % of South Africa's workforce. Strike action by black workers would have had insurmountable consequences on economic activity. Thus, legislature prohibited industrial action by black workers and even though the formation of black trade unions was permissible, their registration was denied as a form of control on black labour.[152] The Industrial Conciliation Act 1956 therefore, excluded black workers from the system of collective bargaining and in doing so effectively established white trade unionism. The

[144] W P Visser *A Racially Divided Class: Strikes in South Africa, 1973-2004* (2007) 12.
[145] Act 28 of 1956.
[146] M Swilling *Views on the South African State* (1990) 46.
[147] Act 28 of 1956; s 77.
[148] Coetzee (note 75 above; 46).
[149] Act 28 of 1956; s 1 defined an employees as, "any person (other than a bantu) employed by or working for, any employer, and receiving or being entitled to receive, any remuneration and any other person whatsoever (other than a bantu) who in any manner assists in the carrying on, or conducting of the business of the employer".
[150] L Douwes Dekker *Industrial Relations for a Changing South Africa* (1990) 20.
[151] Act 28 of 1956; s 77.
[152] J de St. Jorre *A Home Divided: South Africa's Uncertain Future* (1977) 36.

employers' right to dismiss workers who engaged in strike action was enforceable irrespective of whether the strike was regarded as legal or illegal.[153]

Even though this legislation was endorsed to advance the concept of apartheid, it was South Africa's first statute which comprehensively embodied issues such as workers' freedom of association and entrenched trade union rights. It prohibited an employer from preventing an employee to join a trade union according to their race or any other association of the employee.[154] The Industrial Conciliation Acts sowed the seeds of settling disputes via negotiation.[155] This was to be endorsed through the elaborate system of dispute resolution enshrined in further legislation.

2.3.3. The initiation of a new labour relations framework between the years 1956 and 1973

In 1956 Government also passed the LRA.[156] The LRA provided for the establishment of industrial councils. These councils performed 'quasi-judicial' functions by attempting to prevent conflicts between parties to the labour relationship through negotiation processes aimed at concluding agreements.[157] The LRA created a special court structure to address issues of unfair labour practices. These were the Industrial Court, the Labour Appeal Court as well as the Appellate Division.[158]

The LRA prescribed a process for collective bargaining. However, it did not provide for a right to strike but rather for the 'freedom' to engage in strike action, on the precondition the dispute related to an issue of employment. The LRA did not explicitly mention that striking employees could not be dismissed. This in turn led to a number of unfair dismissal cases.[159] Nor did it prescribe a set amount an aggrieved party could claim for unfair dismissal, which allowed the Industrial Court to have complete discretion regarding the matter.[160]

---

[153] MyBurgh (note 31 above; 964).
[154] Act 28 of 1956; s 78(1).
[155] *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A).
[156] Act 28 of 1956.
[157] J P A Swanepoel *Introduction to Labour Law* 2nd ed (1986) 25.
[158] Act 28 of 1956; 17(c).
[159] J Grogan *Workplace Law* 6th ed (2001) 9.
[160] S Vettori 'The role of human dignity in the assessment of fair compensation for unfair dismissals' (2012) 15(4) *PER* 105.

The Industrial Court was also entitled to reach a binding agreement enforceable on potential strikers. Once such an agreement was reached, any strike action taken after this step would have been unlawful as well. Where no industrial council had jurisdiction over the matter, then an application had to be brought for a conciliation board to be established. This conciliation board could either refuse or provide the Minister with a report.[161]

The case of *National Union of Mineworkers (NUM) v East Rand Gold & Uranium*[162] adequately elucidates the application of this mandatory requirement. In this case the court was presented with a situation where the parties were engaged in bargaining over wage increase as the previous recognition agreement had expired. At the end of the initial negotiations, the parties had not reached consensus. The union then applied for the establishment of a conciliation board. The board was appointed and the parties met to discuss the issue, but could not reach a resolution.[163] After a strike ballot had been taken and the majority of the members voted for a strike, the strike began. The court held that,

> "strike action was a legitimate corollary of collective bargaining,…discrimination against union members on the basis of their participation in strike action amounted to the imposition of a penalty for striking, an approach which was open to abuse and which had the potential to lead to industrial strife. Such discrimination was not consistent with basic principles of collective bargaining".[164]

The LRA also provided for a mediator where industrial council or conciliation boards have reached a deadlock regarding the dispute. The mediator's role was to act as a chairman over the matter and has to use his own persuasive techniques to bring the parties to an agreement.[165] The LRA also provided for voluntary and compulsory arbitration. This process took place when an industrial council or conciliation board could not reach an agreement and parties did not intend engaging in strike action or lock-out. The decision of an arbitrator was binding and final on the parties.[166] According to the LRA, strike action initiated while parties were waiting an award by the voluntary arbitration hearing was deemed unlawful. Registered trade unions, their officials

---

[161] D Davis & H Corder 'Poverty and co-option: The role of the courts' *Carnegie Conference Paper No. 90* (13-19 April 1984) 6.
[162] *National Union of Mineworkers (NUM) v East Rand Gold & Uranium* (1989) 10 *ILJ* 103 (IC) 105, see also *Mutual & Federal Insurance Co Ltd v Banking Insurance Finance & Assurance Workers Union* (1996) 17 *ILJ* 241 (A), *Black Allied Workers Union (SA) v Pek Manufacturing Co (Pty) Ltd* (1990) 11 ILJ 1095 (IC).
[163] *NUM v East Rand Gold & Uranium supra* note 162 at 1222D-F.
[164] *NUM v East Rand Gold & Uranium supra* note 162 at 1223A-D.
[165] Act 28 of 1956; s 44.
[166] Act 28 of 1956; s 45 & 46.

and employers' organisations as well as their members could not initiate strike action if they were part of the industrial council, which adopted a constitution stating that matters which were not decided by the council had to be submitted for arbitration.[167]

Even where there was no such clause in the council's constitution, strike action was still not permissible unless there was a majority vote taken by secret ballot, which favoured the strike action.[168] In terms of the LRA, the Industrial Court was established. The court's jurisdiction was laid out in s 17(11) of the LRA. The court was enabled to grant *status quo* orders regarding unfair labour practices until a final determination had been made. The Industrial Court played a significant role within the dispute resolution system as its enforcement of *status quo* orders was intended to promote parties to engage in negotiations through conciliation in an attempt to resolve labour disputes through the process stipulated by the LRA first rather than engaging in court proceedings or industrial action.[169] It was able to hear appeals taken from the industrial registrar, an employer or his association or even a trade union. The Industrial Court was therefore classified as a quasi-judicial body that undertook an advisory role.[170]

The LRA had both a civil and criminal effect with regard to strikes and lock-outs. Firstly, in terms of civil law a strike's legality was irrelevant. Therefore, if a worker participated in a strike he or she could be dismissed for breach of contract on the basis of prolonged absenteeism during the strike. Workers were not protected against dismissal. Consequently, the dismissal of a black worker gave way to potential criminal liability. According to the Black (Urban Areas) Consolidation Act,[171] (hereinafter referred to as the Black Urban Areas Act) a black worker would lose his right to live in an urban area once dismissed by his employer and if he did not find alternate employment within a specific time he would return to his 'homeland'. If he did not return to his homeland, he would be criminally liable. Such a worker would have then resorted to finding employment in his rural homeland where job opportunities were scarce.[172] These

[167] Swanepoel (note 157 above; 97).
[168] ibid 97.
[169] *Van Lingen v Est Van Lingen*1946 (2) PH F54, *Keen & 24 Others v Durban City Council* 1950 (1) PH K26, *United African Motor & Allied Workers Union v Fodens (SA) (Pty) Ltd* (1983) 4 *ILJ* 212 (IC), *Shezi (1) Nxumalo (2) Zuke (3) v Consolidated Frame Cotton Corporation Ltd* (1984) 5 *ILJ* 10.
[170] D J de Villiers SC 'The Industrial Court' (1991) 4(1) *Consultus* 54.
[171] Act 25 of 1945; s 10.
[172] Swanepoel (note 157 above; 980).

devastating consequences were hoped to have been reversed when South Africa became a republic, however, this was not the case.

In 1961, South Africa became a republic which saw the adoption of The Republic of South Africa Constitution[173] (hereafter referred to as the Constitution). The Constitution, together with the Electoral Laws Consolidation Act[174] endorsed segregation more ruthlessly by promoting political and social rights for whites only. During this time Government sought to place a more stringent hold on blacks which resulted in the enactment of the Black Authorities Act 58 of 1951, the Black Labour Act 67 of 1964 and the Promotion of Black Self- Government Act 46 of 1959. These discriminatory acts were strongly opposed by the international community who attempted to admonish South Africa by passing resolutions against apartheid.

The United Nations General Assembly passed Resolution 1761 of 1962 which criticised South Africa's practices of apartheid. Therefore, member states of the United Nations were compelled to end all military and economic relations with the country. Consequently, South Africa was obliged to withdraw as a member from the International Labour Organisation in 1966. This resulted in South Africa becoming isolated from international affairs which had drastic effects on the country's economy.[175] This isolation, however, did not deter South Africa who further sought to stifle any form of progression by black workers through the promulgation of yet more legislation.

In 1973, the Bantu Labour Regulation Act[176] was established. The Bantu Labour Regulation Act sought to standardise working conditions for black employees. It implemented the process of negotiation of settling conflicts and disputes between employees and their employers as well as creating structures to initiate labour committees. However, the Bantu Labour Regulation Act challenged the formation of black trade union movement by limiting black workers to committees that were primarily employer-initiated and lacked any substantial power to bargain effectively. Even though blacks were permitted to establish black trade unions, such unions were not permitted to engage in negotiations regarding wages and employment conditions.[177] It is

[173] Act 32 of 1961.
[174] Act 46 of 1946.
[175] J S Saul *Recolonisation and Resistance: Southern Africa in the 1990's* (1982) 16.
[176] Act 70 of 1973, this amended the Black Labour Settlement of Disputes Act 48 of 1953.
[177] S Johnson *South Africa: No Turning Back* (1988) 8.

submitted that by prohibiting black workers in the decision-making process of wages and conditions of employment, legislature effectively restrained black workers to the dictates of their employers.

The surge in the manufacturing sector culminated in the migration of black workers to urban areas resulting in the urban African population doubling in size. Black labour was severely controlled by the state. The capacity of black workers to formulate unions was very limited. Even though there were some unions in place, their success was inconsistent and undependable. The Trade Council of South Africa was based in Durban, which sought to operate primarily within the textile sector, but was highly ineffective. Black workers continued to be unrepresented at the beginning of the 1970's, while Indian workers obtained partial representation.[178]

Even though the atmosphere was dominated by racial oppression, this era was characterised by numerous strikes, which rose from 6 000 strikers in the 1960's to 94 000 in the early 1970's.This effectively led to the birth of the black consciousness movement among university students, and the South Africa Students' Organisation (SASO), as well as the National Union of South African Students' (NUSA). The working class as well as unions that had been immobilised in the 1950's and 1960's contributed largely to the formation of new trade unions. These progressions laid the foundation for the 1973 strike action.[179]

The beginning of the 1970's saw the National Party government make radical changes to the private sector of employment relations, as there was an urgent need for stability. There existed a grave need for skilled workers, coupled with the torrent of sporadic strike action and internal pressure, Government was forced to reform its policies.[180] Government initially held that black workers should only upon the approval of white unions, receive promotions, but due to the critical state of the economy, cabinet had to alter its view.[181] The labour constraints on black workers began to steadily loosen. Due to a scarcity of skilled workers, Government was compelled to improve training facilities for blacks. Job prospects for blacks thus became a

---

[178] J Brown 'The Durban strikes of 1973: Political identities and the management of protest' 2010 *Popular Politics* 34.

[179] 'Ufil' Umuntu, Ufil' Usadikiza!- Trade Unions and Struggles for Democracy and Freedom in South Africa', available at *http://redblackwritings.files.wordpress.com/2014/07/Khanya-trade-unions-and-struggles-for-democracy-1973-2003.pdf* , accessed on 3 July 2015.

[180] J D Brewer *Can South Africa Survive?* (1989) 112.

[181] Visser (note 90 above; 4).

primary concern. Consequently, employment for whites was severely threatened and caused great anxiety within white trade unions.[182]

2.4. THE WIEHAHN REFORMS

A defining event in the country's history of labour activity was the mass strike action in Durban during 1973 which served as a precursor to the renaissance of labour reformation.[183] This strike action was a culmination of decades of forced acceptance of labour policies. These strikes were initiated as a result of factories following suit of the factories in neighbouring cities[184] The wave of strike action which engulfed the industrial sector, saw approximately 60 000 to 100 000 black employees down tools over grievances regarding insufficient pay, and increasing unemployment and poverty rates.[185] It is quite evident that "tragedy tends to catalyze change."[186] The institutionalisation of racial segregation accompanied by the torrent of strike action fertilised the ground for an unprecedented harvest of trade union movement which black South Africans had long anticipated.[187]

The Durban strikes of 1973 concluded in a new system of labour relations, which was a result of the black trade union movement. The employment relationship between mine bosses and black workers was previously regulated by a contract that supported apartheid policies. However, that relationship saw significant transformation as negotiations between employers and unions took place within an extensive framework based on anti-apartheid ideologies. Therefore, previous labour contracts began to resemble standard forms of employment contracts.[188] By the year 1976, Government took cognisance of the profound force black workers had become.[189] Government was placed in a suffocating corner by having to deal with international pressure such as the threat

---

[182] ibid 4.
[183] Visser (note 144 above; 2).
[184] E J Wood *Forging Democracy from Below* (2000) 132.
[185] Visser (note 90 above; 4).
[186] 'Marikana as a tipping point? The political economy of labour tentions in South African Mining Industry and how to best resolve them' *Governance of Africa's Resources Programme- Occasional Paper No. 164* (2013) 5.
[187] S McDonald *South Africa: In transition to What?* (1988) 52.
[188] 'The Policy Gap- Review of the corporate social responsibility programs of the platinum mining industry in the platinum producing region of the North West Province', available at *http://www.bench-marks.org. downloads/ 070625-platinum-research-full.pdf* , accessed on 6 July 2015.
[189] Harris (note 106 above; 33).

of sanctions being placed on the country by the United Nations, as well as the threat of disinvestment by multinationals.[190] As a result, Government was compelled to respond.

In 1977, the Wiehahn Commission was established being named after the president of the Commission, Professor N.E Wiehahn,[191] a labour law specialist and the Minister of Manpower's legal advisor.[192] The Commission comprised of thirteen members consisting of white representatives of employers and unions. The Commission's only member, who was black, was a businessman. The Commission adopted Dutch and German works councils as models for South African labour relations.[193] The Commission was charged with the responsibility of examining various prospective reforms regarding collective labour law. Its report which was released between the years 1979 and 1981 contained six parts.[194]

In 1979, the Commission's first report was submitted. The Commission's essential recommendations for labour reform were that all workers be entitled to the right to freedom of association irrespective of their race or sex.[195] Membership of trade unions should be decided upon by the unions themselves. This would lift the ban on those unions which consisted of mixed races and institute a free and voluntary association to trade unions.[196] It was also suggested that unions be able to freely decide on their own terms and conditions. Employers may not prohibit an employee from union activities or membership, as this would constitute unfair labour practice.[197]

The Commission also proposed the eradication of job reservation according to race as well as including making apprenticeships accessible to all workers.[198] All racial constraints were repealed as well as the Bantu Labour Regulations Act of 1973.[199] The Commission was also of the view that there existed a deficiency of sufficiently qualified workers. Therefore, it

---

[190] M Wiseman 'Recent South African Labour Legislation: Assessing the New Rights of Black Workers'' (1989) 9(1) *Boston College International and Comparative Labour Review* 173.
[191] R E Bissol & C A Crocker *South Africa into the 1980's* (1979) 63.
[192] A Lichtenstein 'From Durban to Wiehahn: Black workers, employers and the state in South Africa during the 1970's' *Wits Institute for Social and Economic Research (WISER)* (2013) 1.
[193] Kittner, Korner-Dammann & Schunk (note 17 above; 37).
[194] Ringrose (note 98 above; 10).
[195] M Budeli 'Employment Equity and Affirmative Action in South Africa: A Review of the Jurisprudence of the Courts since 1994' *Conference on 'Twenty years of South African Constitutionalism' New York Law School* 1998 4.
[196] Finnemore (note 72 above; 25).
[197] V V Razis *Swords or Plough Shares? South Africa and Political Change: An Introduction* (2001) 68.
[198] W G James *The State of Apartheid* (1987) 11.
[199] Budeli (note 25 above; 472).

recommended training of workers to be implemented through the enactment of legislation such as the Manpower Training Act of 1981.[200] It recommended that a National Manpower Commission be instituted. This Commission would be endowed with the responsibility of making proposals on labour reformation and would be affiliated to the Ministry of Manpower, and lastly, there should be an independent Industrial Court to secure the consistent outcome of cases.[201] The institution of the Industrial Court would effectively replace the industrial tribunal and be responsible for dispute resolution.[202]

At first, white union leaders were in favour of the elimination of the colour bar, as most white workers were given promotions or pay hikes. However, this changed dramatically with the 1976 recession and worsened after 1981. This led to the loss of jobs due to the reorganisation of the labour market. Consequently, white workers began to fiercely oppose the National Party.[203] Government accepted over 90% of the recommendations made by the Commission. This catalysed an entirely new dispensation from that which had been embedded in the country for over a century. This was met with various reactions.

Even though white conservatives of white trade unions were not in favour of the recommendations, internationally it was enthusiastically welcomed.[204] As a result of these recommendations, amendments were made to the Industrial Conciliation Act of 1956 in the years 1979 and 1980. This Act also underwent various amendments in subsequent years, which created the Labour Relations Amendment Act 51 of 1981, and thereafter the 1983, 1984, 1988 and 1991 amendment acts.[205]

In 1980, parts 2, 3, 4 and 6 of the Wiehahn Report was published. These reports were not fundamental in the development of trade union rights or the right of freedom of association. Nor did they include any regulations regarding industrial action.[206] In 1981, part 5 of the Wiehahn Report was presented. These recommendations however, did consist of various proposals regarding trade union practice and the right to freedom of association. It further proposed that

---

[200] A Kraak 'Shifting understandings of skills in South Africa', available at http://www.hsrcpress.ac.za, accessed on 3 July 2015.
[201] Finnemore (note 72 above; 25).
[202] R Venter *Labour Relations in South Africa* (2006) 14.
[203] S Marks & S Trapido in S Johnson *South Africa: No Turning Back* (1988) 20.
[204] Van Vuuren (note 40 above; 189).
[205] Budheli (note 16 above; 14).
[206] Jones & Griffiths (note 22 above; 199).

South Africa's labour policies and practices should correlate to the standards set by international instruments. The report also suggested that the prerequisites governing trade union registration should be revisited and amended where necessary.[207]

The enforcement of the recommendation created significant progress for black workers. The year 1977 saw the formation of 22 black unions, which represented 88 000 members. Subsequently, various bodies were created to render legal advice and provide training regarding collective bargaining and organisational skills. To curb this progression by some, parallel unions were initiated, which effectively meant that white unions would run alongside black unions in order to dominate an industry.[208] The role of trade unions was taken very seriously and they were especially held accountable when they engaged in unlawful strike action. This was evident through the outcome of a number of important cases.

In *Murray & Roberts Buildings (Cape Town) Pty Ltd v SA Allied Workers' Union,*[209] the respondent initiated a strike involving the applicant's employees. The strike took place and the applicant gave the strikers notice that they were dismissed.[210] The union denied that it encouraged the illegal strikes and if the union organiser had initiated it, then the organiser had done so without the union's consent or knowledge.[211] The court held that it is probable that the respondent did nothing to prevent the strike or discourage the effect the strike had on the employees or the employer's business. The actions of the representatives of the respondent constituted unfair labour practice.[212] The court was not willing to tolerate deviations from legislation from either employees or employers.

The Industrial Court was also unyielding towards employers who did not engage in all possible procedures for dispute resolution or attempt negotiation with unions. In *MAWU v Natal Die Castings Co. (Pty) LTD,*[213] the employees embarked on a strike over a wage dispute which resulted in the dismissal of strikers on the second day of the strike. The employer was only willing to reinstate some employees who it viewed were not guilty of misconduct. The union

[207] C H Schoeman, I Botha & P F Blaauw 'Labour conflict and the persistence of Macro underemployment in South Africa' (2010) 13(3) *SAJEMS* 276.
[208] W Ananaba *The Trade Union Movement in Africa: Promise and Performance* (1979) 72.
[209] *Murray & Roberts Buildings (Cape Town) Pty Ltd v SA Allied Workers Union* (1987) 8 *ILJ* 325 at 335.
[210] *Murray & Roberts Buildings supra* note 209 at 327A-B.
[211] *Murray & Roberts Buildings supra* note 209 at 331C-E.
[212] *Murray & Roberts Buildings supra* note 209 at 335A-D.
[213] *MAWU v Natal Die Castings Co (Pty) LTD* (1986) 7 *ILJ* 520 (IC) at 336G-I.

insisted upon the reinstatement of all the strikers as well an inquiry into the allegations of misconduct of the strikers. The court held that the dismissal of the strikers was unfair and condemned the employer for not making an effort to reach an agreement with the union or to engage in arbitration.[214]

Part 6 of the report was particularly important for employees within the mining industry. The reforms removed the racial specifications of the Mines and Works Act of 1965, by substituting the term 'scheduled person' with that of 'competent person.' Thus, black workers were permitted to receive blasting tickets, which would equate them with white miners.[215] Another pivotal implication of the reforms was the formation of the Industrial Court. The term 'court' is rather misleading as it was not a court *per se*, but was in reality a 'quasi-judicial tribunal,' which was in other words a board that undertook seemingly judicial functions relating to labour law.[216] Therefore, the Industrial Court was essentially similar to the role and functions of its predecessor, the industrial tribunal, but with the additional power of extended jurisdiction.

Cognisance must be given to the fact that according to the LRA, legal strikes did not fall within the ambit of unfair labour practices. The concept of unfair labour practice became pertinent when dealing with dismissals, which were a result of employees striking.[217] 'Unfair labour practice' is a term which is wide enough to allow the court's interpretation. If a matter could not be resolved by the industrial council or conciliation board within its sector, such a case would be referred to the Industrial Court to be decided upon.[218] Even though the Industrial Court was not authorised to make judgments regarding questions of law, the court could make decisions regarding an unfairness of a labour practice, because an unfair labour practice does not require the element of lawfulness. This element will be discussed in detail further on in the chapter.[219]

Even though the Wiehahn Commission sought to provide relief to the political, socio-economic, national and international crisis which was a result of the black labour movement, these

---

[214] Act 28 of 1956; s 7(11).
[215] Visser (note 23 above;16).
[216] Act 28 of 1956; s 7(11).
[217] MyBurgh (note 31 above; 965).
[218] *NUMSA v Vetsak Co-Operative Ltd & Others* (1996) 17 *ILJ* 455 (A) at para 460D-E, *Council of Mining v Chamber of Mines of South Africa* (1984) 6 *ILJ* 293 at para 56E-G.
[219] Swanepoel (note 157 above; 66).

recommendations could have been seen as a means of restraining black labour.[220] The Commission was adamant that black unions even though unregistered, enjoyed a far greater level of freedom in comparison to white unions that entitled them to engage in political propaganda at their will.[221] Therefore, the recommendations presented by the Commission were a mechanism of control and suppression rather than emancipation of black trade unions. Registered unions would require adherence to a framework of "rule by proclamation." This would be an intensified extension of Government's power over trade unions.[222]

The year 1983 saw the promulgation of The Republic of South African Constitution (hereinafter referred to as the Constitution 1983).[223] This Constitution was very much the same as its predecessor in that it was responsible for functioning racial segregation amongst blacks and whites. Blacks were once again refused political rights. In 1984, a tri-cameral parliament was initiated, which included coloureds and Indians but omitted blacks. Trade union movements during this period were highly influential in combating the apartheid policies.[224] The 1980's were characterised by civil unrest directed against apartheid policies. Even though central Government was a fortified force, these rebellions resulted in the demise of local Government systems.[225]

In the year 1988, the Labour Relations Act[226] (hereafter referred to as the Labour Relations Act of 1988) underwent further amendments. In terms of the Labour Relations Act of 1988, black employees were given extended protection by the specification that any direct or indirect intervention regarding an employee's right to associate or not to associate would constitute unfair labour practice.[227] This effectively ensured that all employees were protected from discrimination as a result of their trade union membership. However, its ambit was limited in that it excluded employees within the public sector, employees in the farming sector and domestic servants.

---

[220] Price (note 52 above; 122).
[221] A Callinicos *South Africa Between Reform and Revolution* (1988) 40.
[222] A van Heerden *Wiehahn Commission* (1988) 56.
[223] Act 110 of 1983.
[224] W G James *The State of Apartheid* (1987) 38.
[225] C Crabb *Action through aesthetics art initiatives in South Africa during the Apartheid* (unpublished LLM thesis, Georgia State University, 2013) 12.
[226] Act 83 of 1988.
[227] C Thompson 'Beyond recognition: A new social contact' (1988) 5(4) *Indicator SA* 70.

In the year 1971, the Bantu Affairs Administration Act[228] had been promulgated in light of the Riekert Commission's report which dealt with the control of the entry of black workers into urban areas. It was implemented to ensure proficient administration over the metropolitan areas and to promote an increase in the mobility of black labour. The administration boards set up under the Bantu Affairs Administration Act were tasked to increase 'necessary' labour coming into the area and control 'unnecessary' labour that should be removed from the area.[229] Effectively, this meant that legislature was willing to allow black workers into urban areas as this would increase productivity substantially. Consequently, those workers who were deemed to be unbeneficial to production and the economy were taken out of the urban areas.

Employees within the public sector were governed by the Public Services Act.[230] In terms of the Public Services Act, employees were entitled to join associations. These associations however, were restricted in their rights to deliberate on conditions of employment with the state. A further amendment entitled the Industrial Court to issue urgent interdicts proscribing practices of unfair labour. The Public Services Act endorsed the element of liability on union members, their officials and even their office bearers for any injuries or damages to property as a result of unprotected strike action. The amendments also created the Labour Appeal Court.[231]

After the height of apartheid in the 1980's, the 1990's ushered in a new democratic order. The first democratic elections led to the repeal of apartheid policies and finally brought an end to the institution of apartheid. An interim constitution was put in place, which enshrined equality of race and sex entitling every citizen the right to fundamental freedoms.[232] During the 1990's there were many reformations within the labour system. At this time the country experienced numerous political and social challenges, which had dire consequences for the economy. Consumer boycotts as well as an increase in industrial action largely contributed to South

[228] ibid 70.
[229] Thompson (note 227 above; 19).
[230] Act 111 of 1984.
[231] MyBurgh (note 31 above; 965).
[232] R Kruger *'Racism and law: Implementing the right to equality in selected South African Equality Courts'* (unpublished LLM thesis, Rhodes University, 2008) 53.

Africa's instability.[233] In the year 1993 negotiations between parliamentary bodies and the ANC, which was led by Nelson Mandela, were held to legislate the concept of equality.[234]

2.5 DISCUSSION OF THE ROLE OF THE INDUSTRIAL COURT IN DEVELOPING PERTINENT CASE LAW THAT HAVE ADEQUATELY ILLUSTRATED THE INCONSISTENCIES BETWEEN LEGISLATION AND THE LABOUR COURTS

As was previously discussed, the Industrial Court was given a wide range of discretionary powers in terms of interpretation and application of principles.[235] This was primarily due to the fact that the LRA and its amendments did not provide express definitions to terms. The successors of the Labour Relations Act of 1988, expressly included strike action from its definition of unfair labour practice. This inclusion of strike action under unfair labour practice by the Labour Relations Act of 1988 had devastating consequences for employees. Even if employees followed the process as stipulated by the Labour Relations Act of 1988, their actions could still be deemed unlawful according to the Industrial Court's perception of fairness.[236]

Consequently, the Industrial Court was left to its own discretion in determining concepts of fairness which were highly contradictory.[237] Furthermore, it is submitted that the legislature did not provide a distinction between disputes of rights and disputes of interest. It is submitted that this lack of clarity resulted in inconsistency in the development of principles in labour law and ultimately preserved the black employee's title of underdog. Firstly, it resulted in an overwhelming case load for the Industrial Court as it was now tasked with a dual responsibility to act as arbitrator and judicial officer. This point is clearly portrayed in *BTR Dunlop Ltd v National Union of Metalworkers of South Africa (2)*.[238] The case essentially dealt with the dismissal of a shop steward following a disciplinary enquiry. Employees of the respondent initiated a strike for the reinstatement of the shop steward. This strike was deemed to be illegal, as it did not comply with legislation. The employees were thus interdicted from proceeding with

---

[233] National Labour and Economic Institute '*The Extent and Effects of Casualisation in Southern Africa: Analysis of Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe'* (2006) 53.
[234] D Tilton & R Calland 'In Pursuit of an Open Democracy: A South African Case Study', available at http://www.opendemocracy.org.za , accessed on 5 July 2015.
[235] J Grogan *Collective Labour Law* (2007) 87.
[236] C Tanner 'Making amends: The new look LRA' (1991) 8(2) *Indicator SA* 89.
[237] M Finnemore *Introduction to Labour Relations in South Africa* 6th ed (1998) 35.
[238] *BTR Dunlop Ltd v National Union of Metalworkers of South Africa* (1989) 10 *ILJ* 701 (IC).

the strike. As a result of the interdict, the employees then made a submission for the establishment of a conciliation board, alternatively that the matter be referred for adjudication.[239] A conciliation board was set up which reached a deadlock regarding the matter. The matter was then referred to the court for determination. However, before the matter could be decided on, employees engaged in a second strike after taking a strike ballot. Consequently, an application was made to the court to interdict the proposed strike pending the determination of the court. This application was granted.[240]

The decision of the court was primarily based on two elements, namely: the lawfulness of the strike and whether the strike was fair. This case illustrates how the Industrial Court could determine that a strike was lawful on the one hand and also decide that it was unfair. The court in this regard provides criteria for determining whether a strike is lawful. According to the Industrial Court, lawfulness depends on the provisions detailed by the Labour Relations Act of 1988.[241] *In casu,* the court held that the second strike was lawful as it followed the steps as determined by s 65 of the Labour Relations Act of 1988. The first strike, however, was deemed to be illegal as it did not follow the process as laid down by the Labour Relations Act of 1988.[242] It follows from this decision that in determining lawfulness of strike action, the court is primarily concerned with the procedure followed by employees. Hence, if the Labour Relations Act of 1988 did not include strikes under the banner of unfair labour practice, the only enquiry for strike action would be whether such a strike was lawful in terms of its adherence to legislation's dispute resolution framework.

In determining the fairness of a strike, the court provided yet another criteria stating that "[a]ny strike to enforce a demand which is illegal or contrary to public policy is manifestly illegitimate and unfair".[243] It follows from this benchmark that the court is concerned with the effect of the strike on society and whether such action would be initiated to enforce something which is illegal. It is submitted that this criteria developed by the Industrial Court is correct and consistent with the principles of fairness which is that all people should be treated the same and that no person should be prejudiced by the illegal acts of others. Fairness denotes concepts of justice,

---

[239] *BTR Dunlop Ltd supra* note 238 at 702H-G.
[240] *BTR Dunlop Ltd supra* note 238 at 702H-G.
[241] *BTR Dunlop Ltd supra* note 238 at 704H.
[242] *BTR Dunlop Ltd supra* note 238 at 703G.
[243] *BTR Dunlop Ltd supra* note 238 at 706B-C.

peace and equity. However, the Industrial Court provides a further standard by which to determine fairness in which it states that the court must look at whether a strike is functional to collective bargaining.[244] It is submitted that this standard is incorrect.

The reason for this submission is that the court in this regard based such a standard in light of *National Union of Mineworkers v East Rand Gold & Uranium*.[245] The case dealt with a lawful strike that ensued after employees reached a deadlock regarding wage negotiations. The employer issued an ultimatum that employees who engaged in strike activity would not be liable to be paid a back-dated wage. However, employees who did not participate in the strike would be entitled to the back-pay. The employees argued that this amounted to an unfair labour practice.[246] The court in *East Rand Gold & Uranium supra* agreed with this argument as it was held that "[s]trike action was a legitimate corollary of collective bargaining".[247] Furthermore, "discrimination against union members on the basis of their participation in strike action amounted to the imposition of a penalty for striking".[248] The court in *East Rand Gold & Uranium supra* arrived at its decision on the basis that the employer sought to unfairly discriminate against his employees because they had participated in a strike. The unfair discrimination was in the form of refusal to pay back pay to the striking workers. Therefore, the employer's actions amounted to an unfair labour practice.

It is imperative that the case of *East Rand Gold & Uranium supra* be distinguished from that of *BTR Dunlop supra*. In the former case the situation centered on collective bargaining of wage negotiations that ultimately led to a lawful strike. It is submitted that in this case there was a dispute of interest as a dispute of interest arises when parties have failed to reach an agreement at the bargaining table.[249] Therefore, *East Rand Gold & Uranium supra* differs significantly from that of *BTR Dunlop supra* as in the latter case the dispute was one of rights. The court itself stated that the dispute in question of *BTR Dunlop supra* is a dispute of rights and further

[244] *BTR Dunlop Ltd supra* note 238 at 706B-C.
[245] *National Union of Mineworkers v East Rand Gold & Uranium* (1989) 10 *ILJ* 103 (IC).
[246] *National Union of Mineworkers v East Rand Gold & Uranium supra* note 245 at 104A-C.
[247] *National Union of Mineworkers v East Rand Gold & Uranium supra* note 245 at 104H-I.
[248] *National Union of Mineworkers v East Rand Gold & Uranium supra* note 245 at 104H-I.
[249] C Tustin & D Geldenhuys *Labour Relations: The Psychology of Conflict and Negotiation* 2nd ed (2000) 129.

expounds that such a right is where the "legal entitlements are assessed by reference to a known body of law (for instance a case concerning the lawfulness or fairness of a dismissal)".[250]

It is therefore submitted that the standard of functionality that is used in *East Rand Gold & Uranium supra* is correct as in the context of this case, strike action was deemed to advance collective bargaining. Hence, the strike was acknowledged to be functional to collective bargaining.[251] It is further submitted that the court in *BTR Dunlop supra* is incorrect in applying the same standard of functionality, because *BTR Dunlop supra* does not deal with an interest dispute but rather a rights dispute as stated by the court. A rights dispute does not operate the same as an interest dispute. It is evident that in terms of interest disputes, parties engage in collective bargaining. However, disputes of rights have to be referred to the Industrial Court for determination where a conciliation board has been unsuccessful in settling the dispute.[252]

Therefore, it follows that the same standard of functionality cannot be applied to *BTR Dunlop supra* as this matter did not even concern collective bargaining. Even though the court did hold that the strike was not in relation to the dismissal of the shop steward but rather that the strike was a result of a failure to refer the matter for adjudication, the standard for functionality yet again does not become relevant to the decided case. The concept of adjudication differs substantially to collective bargaining as bargaining is concerned with negotiating on the interests of employees regarding terms and conditions of their employment and other matters that are deemed to be of mutual interest to the parties.[253] Hence, it is respectfully submitted that the court's findings are unsound. Thus the case of *BTR Dunlop supra* blatantly conveys the pitfalls of the inclusion of industrial action under the banner of unfair labour practice. It also illustrates that legislature's lack of clarity on the separation of rights and interest disputes allowed the court to develop a benchmark which as discussed did not adequately entrench concepts of reason and justice.

Additionally, by allowing disputes of right and disputes of interest to be decided on by a court of law, legislation and the court structures negated the concept of collective bargaining principles and adjudication. It has been asserted that the court was viewed as a mechanism to reduce strike

---

[250] *BTR Dunlop Ltd supra* note 238 at 711G-H.
[251] *BTR Dunlop Ltd supra* note 238 at 705F.
[252] *Food & Allied Workers Union v Clover Dairies* (1986) 7 *ILJ* 697 (IC).
[253] *BTR Dunlop Ltd supra* note 238 at 706B-D.

action by employees as any disputes which arose would be adjudicated through judicial inquiry.[254] It is respectfully submitted that this was not correct; rather, it created even more problems for the worker who had to submit to the dictates of the judiciary which often gave one party an advantageous position over the other.

The Industrial Court achieved this by removing disputes of interest, which should have been resolved through negotiation and compromise at industrial level between parties, and left them at the discretion of a judiciary whose aim was to make a final judgment that would create a win-lose situation for the parties.[255] Furthermore, the system took matters which should have been decided through arbitration that is a process of investigation and consultation with both parties, and placed it in the hands of an overloaded court system that did not have required skilled and expertly trained staff. Moreover, the court's procedures were too technical, thus making it difficult for lay people to access.[256]

In *BTR Dunlop supra*, the court dealt with another issue of unfairness. The court asserts that parties possess a right of paramount significance in that they can have their matter adjudicated by the Special Labour Appeal Court, which is the highest court where a matter may be decided. Therefore, the court reasoned that the strike was a "coercion to compel a party to abandon his right to have the matter adjudicated by a court of law". Consequently, it was unfair on that basis. It is submitted that the rationale of the court itself is unfair. If the strike was deemed unfair as it coerced the employer to arbitration, then the opposite should also hold true in that it would be unfair for an employee to be forced to have the matter decided by a court of law when the law provides that a party may waive his right to have the matter heard in court and may decide on an alternate forum such as adjudication.[257] It is submitted that this reasoning is unjust and does not take the employees' rights into consideration. Consequently, the employee retained his position as the underdog. This case provides an ideal illustration of how the Industrial Court applied contradictory and unreasonable principles of fairness. However, much fault in this area rests on legislature and its inability to properly define terms and to provide simple and clear mechanisms

---

[254] Prof. N E Wiehahn *The Complete Wiehahn Report* (1982) 462.
[255] 'The Industrial Court in the cross volley' (1984) 2(3) *Indicator SA* 1.
[256] A Steenkamp & C Bosch 'Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential' (2012) *Acta Juridica: Reinventing Labour Law: reflecting on the first 15 years of the Labour Relations Act and future challenges* 121.
[257] *BTR Dunlop Ltd supra* note 238 at 708B-709A.

for dispute resolution depending on the classification of the dispute. By not distinguishing between disputes of rights and interest, parties could unilaterally decide what type of right that particular dispute fell under.

Consequently, the door to abuse was opened. In such instances, parties would intentionally pursue a matter under the term 'dispute of right' to ensure that strike action would not be a recourse available to employees.[258] The Industrial Court's reaction in these circumstances was against the employer. In regard to disputes of interest there was persuasion to the argument, reinforced through the court's judgment, that in terms of such disputes employers were compelled to engage in bargaining in order to resolve the dispute to ensure that it would not escalate to strike action.[259]

After a succession of cases, this was affirmed by the Supreme Court in *Natal Die Casting v President, Industrial Court & others*.[260] In *Natal Die Casting supra* the employer and employees engaged in negotiations regarding wages, the most significant aspect being that of a bonus. Consequently, there was a letter written to the employer informing it that a dispute will be declared following failed negotiations of which the third respondent alleged that it was due to the employer's failure to negotiate in good faith, thus rendering it an unfair labour practice.[261] The dispute was then referred to the Industrial Council within the particular sector to resolve the dispute.

The employees sought resolution and the suspension of any dispute proceedings on the basis that the employer negotiated in good faith. However, after further unsuccessful negotiations the employer made an offer which was refused by the employees. Consequently, the dispute was invoked yet again.[262] A strike ballot was then taken which favoured a strike and as a result the employees refused working. This led to the dismissal of the employees. It was argued that the

---

[258] *Metal & Electrical Workers Union of SA v National Panasonic Co* (1999) 12 *ILJ* 533 (C).
[259] *Black Allied Workers Union & Others v Umgeni Iron Works* (1990) 11 *ILJ* 589 (IC) at 591A-C, see also *Bleazard & Others v Argus Printing & Publishing Co Ltd & Others* (1983) 4 *ILJ* 60 (IC), *United African Motor and Allied Workers Union v Fodens SA (Pty) Ltd* (1983) 4 ILJ 212 (IC), *Black Allied Workers Union (SA) v PEK Manufacturing (Pty) Ltd* (1990) 11 *ILJ* 1095 (IC), *Sentraal-Wes (Kooperatief) Bpk v Food & Allied Workers Union & Others* (1990) 11 *ILJ* 977 (LAC), *East Rand Gold & Uranium Co Ltd v National Union of Mineworkers* (1989) 10 *ILJ* 683 (LAC).
[260] *Natal Die Casting v President, Industrial Court & Others* (1987) 8 *ILJ* 245 (D).
[261] *Natal Die Casting v President, Industrial Court & Others supra* note 260 at 247B-E.
[262] *Natal Die Casting v President, supra* note 260 at 247E-I.

Industrial Court did not have jurisdiction to hear the matter. The court held that it did in fact have jurisdiction over the matter. The court itself highlighted the lack of clarity within the Labour Relations Act in that it was silent as to the exact powers of the Industrial Court regarding the kind of 'determination' it could make.[263]

Therefore, the court agreed with the case of *Trident Steel (Pty) Ltd v John NO & Others*,[264] where the court stated that the Industrial Court may not only make a declaratory order, but it may also make any order that would settle the dispute between the parties.[265] It is submitted that this lack of clarity by legislature ultimately provided the Industrial Court with unlimited jurisdiction. It could thus make any order according to its discretion that would bring the dispute to an end. The court, once satisfied of its jurisdiction, turned to the merits of the case. The fact that a strike in *Natal Die Casting supra* was deemed unlawful because it did not follow the conciliatory procedure before engaging in strike action, does not mean that the issue which brought about the strike cannot be deemed an unfair labour practice. In reaching its decision, the court gave consideration to s 1 of the Labour Relations Act of 1988 and its definition of unfair labour practice. The court decided that the failure of the employer to engage in negotiations in good faith on the issues which gave rise to the strike as well as the dismissal of the employees based on the strike over these issues, amounted to an unfair labour practice. The reinstatements of the dismissed employees were thus ordered. It is submitted that there are two very significant issues which are raised in this case.

The first issue which the court highlights is that of legislature's poor drafting of the Labour Relations Act of 1988 in light of its silence on the powers of the Industrial Court. This is pertinent in that such silence consequently led the court to assume unlimited jurisdiction in terms of any order it deemed fit to end a dispute. This was a key aspect of one of the pitfalls in the Labour Relations Act as the Industrial Court through its interpretation of section 46(9)(*a*), could construe a 'determination' to mean anything it saw fit. This effectively meant that the Industrial Court not only interpreted section 49, but also developed that respective section to enable it to perform unlimited functions.

---

[263] *Natal Die Casting v President, supra* note 260 at 253F-G.
[264] *Trident Steel (Pty) Ltd v John NO & Others* (1987) 8 *ILJ* 27 (W), See also *Marievale Consolidated Mines Ltd v President of the Industrial Court & Others* (1986) 7 *ILJ* 152 (T), *Towels, Edgar Jacobs Ltd v The President of the Industrial Court & Others* 1986 (4) SA 660 (C).
[265] *Natal Die Casting v President, Industrial Court & Others supra* note 260 at 254B-E.

The second issue which arises is that the term unfair labour practice can extend to an employer's refusal to settle a dispute, which would lead to industrial action. Therefore, in terms of this decision, an employer would be compelled to accept the demands of employees so as to prevent them from engaging in industrial action. Nowhere in the decided case does the court make reference to the employees' wage and bonus demands being reasonable so as to convey that the employer was unreasonable in not consenting to their demands. This begs the question as to which circumstances would give rise to where an employer would not be compelled to accept the demands of the employees.

Furthermore, in circumstances where employees demand salaries or bonuses which exceed the economic capability of the employer, would such an employer be deemed to have negotiated in bad faith if he cannot consent to the employees' demands? It may well be that in this given case the employer had sufficient means of increasing wages and paying bonuses, however, it is submitted that the court does not provide clarity as to when the demands of employees are unreasonable and whether employers in such cases would also have to submit to the demands of their employees. It is submitted that the court's assumed extended jurisdiction and its interpretation of unfair labour practices was a recipe for inconsistency. The extended jurisdiction of the court also allowed it to interpret and develop legal concepts.

The term 'unfair labour practice' was broadly defined which extended the net over a wide variety of acts within the labour relations framework.[266] It was held in *Consolidated Frame Cotton Corporation v President, Industrial Court,*[267] that "[t]he concept of an "unfair labour practice" covers a wider field than the matters referred to in paragraph (*a*) and (*b*) of s 43 (l)…". As a result of legislature's lack of clarity on the term 'unfair labour practice', the Industrial Court had to extend its powers and develop the law rather than simply interpret it. This effectively meant that the Industrial Court had to define the term 'unfair labour practice'.[268] Therefore, the overlapping of the criteria for unfair labour practice led the Industrial Court to become burdened

---

[266] *Bleazard & Others v Argus Printing & Publishing Co Ltd* (1983) 4 *ILJ* 60 (IC), *SA Diamond Workers' Union v The Master Diamond Cutters' Association* (1982) 3 *ILJ* 87 (IC), *Grafton Furniture Mfg (Pty) Ltd v Industrial Council for the Furniture Mfg Industry* (1982) 3 *ILJ* 294.

[267] *Consolidated Frame Cotton Corporation v President, Industrial Court* 1985 (3) SA 150 (N).

[268] *Mynwerkersunie v O'Okiep Copper Co Ltd supra* at 257, *Raad van Mynvakbonde v Minister van Mannekragen n ander* 1983 (4) SA 29 (T), *United African Motor & Allied Workers Union v Fodens (SA) (Pty) Ltd supra* at 254, *Msomi v The Claims Officer & Another* (1980) 1 *ILJ* 292 (N), *Moses Nkadimeng & Others v Raleigh Cycles (SA) Ltd* (1981) 2 *ILJ* 34 (IC), *NUTW v Stag Packings (Pty) Ltd* (1982) 3 *ILJ* 285 (IC).

by the volume of cases continuously being presented to it.[269] One such case was that of *NUMSA v Vetsak Co-Operative Ltd & Others*.[270] The Appellate Division was called upon to decide on the dismissal of employees who engaged in a lawful and legitimate strike. The strike was regarded as a legitimate purpose, as it sought to obtain a wage agreement through the process of collective bargaining. The strike was also regarded as being lawful, because it complied with the statutory requirements of the LRA.[271]

However, upon receiving an ultimatum to return to work, the employees refused to do so thus resulting in the dismissal of the striking workers. The court was therefore presented with the issue as to whether the employer's dismissal of the employees amounted to unfair labour practice. In its dissenting judgment, the court made significant points regarding the freedom to strike. The court stated that workers may not be dismissed merely for engaging in strike action. If this were to be the case, then the purpose of strike action would be nullified and the whole process of collective bargaining would be undermined. However, regardless of whether a strike is within its statutory requirements or not, an employer may be validated for dismissing employees on the basis of breach of contract due to prolonged absenteeism.[272]

In deciding whether the employer's actions amounted to unfair labour practice, the court made reference to s 1 of the Labour Relations Act of 1988. It reasoned that the court has to have due regard to both the employer and employee when making a decision on fairness.[273] Cognisance must be given to the fact that merely because a strike is lawful in terms of the Labour Relations Act of 1988, it does not automatically render the dismissal of striking workers to be unfair. Similarly, if a strike is regarded as unlawful, then that warrants the dismissal of striking employees.[274]

The court reasoned that unfair labour practice cases could not be decided according to a rubber stamp basis, but rather, each case had to be assessed on its own merits taking in into account whether a strike was lawful, whether the conduct of both employer and employee was lawful,

---

[269] *Stewart Wrightson v Thorpe* 1977 (2) SA 943 (A), *Mynwerkersunie v O'Okiep Copper Co Ltd* (1983) 4 *ILJ* 140 (IC).
[270] *NUMSA v Vetsak Co-Operative Ltd & Others* (1996) 17 *ILJ* 455 (A).
[271] *NUMSA v Vetsak Co-Operative Ltd supra* note 270 at 460A-B.
[272] *NUMSA v Vetsak Co-Operative Ltd supra* note 270 at 460D.
[273] *NUMSA v Vetsak Co-Operative Ltd supra* note 270 at 461A-B.
[274] *NUMSA v Vetsak Co-Operative Ltd supra* note 270 at 460B-C.

whether such parties acted in good faith and the nature of the strike in regard to its aims and purpose.[275] The court acknowledged that the test adopted to determine unfair labour practice was too widely construed for any party to foresee the outcome of the case.[276] It is submitted that the decisions of the courts presented much inconsistency that ultimately left parties with a lack of direction regarding industrial disputes. This in turn meant that parties were constantly unsure of the consequences of their conduct and whether or not their actions would have had devastating consequences. Indeed it is submitted that each case has to be decided on its own facts, however, the Industrial Court did not provide a sufficient guideline or criteria that allowed different facts to be assessed according to the same standards. It is for this reason that there were many contradictions in its decisions.

The contradictory application of the law was applied in another case that was brought before the Supreme Court of Appeal (SCA), namely *National Union of Mineworkers (NUM) v Black Mountain Mineral Development Company (Pty) Ltd*.[277] A strike ensued as a result of an impasse in negotiations regarding wages, which consequently led to the dismissal of such workers. The respondent gave the striking workers a choice to return to work on their own terms. Those who accepted this were re-instated to their positions. However, those who did not were dismissed. This resulted in the dismissed employees having to return to their homelands. Subsequently, the union instituted proceedings on behalf of the dismissed employees on the basis that it constituted unfair labour practice and claimed the re-instatement of such employees.[278]

The matter was initially dismissed by the Industrial Court. The SCA in making its decision stated that:

> "striking as such does not amount to misconduct. There is accordingly an important distinction between dismissal for misconduct and dismissal in consequence of strike action, and it follows that considerations relevant to the former are not necessarily relevant to the latter".[279]

This rationale that the court adopted is an excellent portrayal of the inconsistency of labour relations under the Labour Relations Act of 1988. In light of the above extract from the court's

---

[275] *NUMSA v Vetsak Co-Operative Ltd supra* note 270 at 460F-461A.
[276] *NUMSA v Vetsak Co-Operative Ltd supra* note 270 at 460D-E.
[277] *NUM v Black Mountain Mineral Development Company (Pty) Ltd* (1994) 15 *ILJ* 1005 (LAC).
[278] *NUM v Black Mountain Mineral Development Company (Pty) Ltd supra* note 277 at 61E-F.
[279] *NUM v Black Mountain supra* note 277 at 61E-F.

judgment, it would follow that only misconduct arising out of the strike action would be relevant to the merits of a case. Misconduct that did not form part of or was a result of strike action, would therefore not have a bearing on the strike action. Even though the court stipulates that this is a standard can be used to determine an employee's conduct, the standard is not applied to all cases. The inconsistency of the court is evident in its lack of application of the same standard to all cases.

In the *National Union of Metal Workers of South Africa (NUMSA) v G M Vincent Metal Sections (Pty) Ltd,*[280] dealt with by the SCA, the matter was first heard by the Industrial Court, then taken on appeal to the Labour Appeal Court (LAC) and finally reached the SCA. Employees of the respondent and members of NUMSA engaged in a number of unlawful activities in the first half of 1992, which resulted in written warnings being given to all NUMSA members and the final step being that of dismissal. On the 3rd of August 1992, employees engaged in a strike. The respondent then effected the dismissal of the striking employees from the 24 of August 1992. NUMSA then decided to call off the strike based on a judgment handed down by the SCA in another case that was not in their favour. Of the striking workers who returned to work, 2000 were not accepted back into employment.[281]

In reaching its decision, the court took into account a number of factors. The first factor was that of the financial position of the respondent's business. The court made reference to the substantial losses that the business suffered due to a downward spiral of the steel sector. The court also raised the fact that the respondent tried to communicate with NUMSA on various occasions, but without success. The respondent even mentioned to the union that the strike was having severe ramifications on the business and asked for an exemption from the strike. However, the union only responded on one occasion concerning the retrenchment of the workers. The third factor that the court raised was that of the violence, which took place on the 21st of August. The court also made reference that the requirements of the Labour Relations Act of 1988 stipulated that a strike ballot had to be taken and had thus rendered the strike unlawful[282]

---

[280] *NUMSA v G M Vincent Metal Sections (Pty) Ltd* (1999) 20 *ILJ* 2003 (SCA), *BAWU & Others v Edward Hotel* (1989) 10 *ILJ* 357 (IC).
[281] *NUMSA v G M Vincent Metal Sections (Pty) Ltd supra* note 280 at 4-6.
[282] *NUMSA v G M Vincent Metal Sections (Pty) Ltd supra* note 280 at 7-10.

The court ultimately had to decide whether the striking employees' failure to heed to the ultimatum given by the employer amounted to an unfair labour practice. The court reasoned that the concept of fairness had to be applied according to the precedent that had developed through various cases presented before the court.[283] However, pertinently to this discussion is that the court held that the employer was justified in taking into account the disciplinary record of the employees and that in refusing to re-employ or re-instate the employees it had dismissed, it had not committed unfair labour practice. This disciplinary record included employees' behavior that was not in the course of the strike.[284] It is respectfully submitted that the standard for determining unfair labour practice differed greatly. By not applying the same standard to all cases, the court was actually being unfair and contradictory to the purpose and intent it sought to uphold.

If individuals could not have known how the court was going to interpret cases, they could not have known whether their actions were permissible or not. This was prejudicial considering that employees were rooted in a past of insecurity. It is submitted that the Industrial Court created much doubt and uncertainty on significant issues of the law. This is turn resulted in a very shaky justice structure, which left those dependent upon it with very little hope. Much of this could have been avoided if legislature had provided adequate tools for the courts to build with.

2.6 CONCLUSION

Chapter two presented and discussed the chronological evolution of industrial relations and in particular the right to strike action from a legislative perspective in South Africa between the years 1640 and 1990. The chapter presented this discussion in five sections namely the time periods 1640 - 1910; 1910 to 1946 and 1946 to 1990, as well as special mention of the important role of the Wiehahn Commission of Inquiry and finally the evolution of relevant case law. It is only in fairly recent times that the right to freedom of association and right to strike of all workers in South Africa have been endorsed and finally embedded in the interim constitution and final Constitution of 1996. Labour union development and existence was along racial lines and recognition of unionisation of white labour was a specific political goal to entrench policies of apartheid and continue the subjugation of black workers to their white counterparts. South Africa

[283] *NUMSA v G M Vincent Metal Sections (Pty) Ltd supra* note 280 at 18.
[284] *NUMSA v G M Vincent Metal Sections (Pty) Ltd supra* note 280 at 35.

has indeed evolved from an oppressive state to a country that now enjoys constitutionalised labour rights. However, the journey has been long and bitter. There has been much bloodshed over centuries during violent strike action that has paid for the changes we see today. However, it is worth noting that these strikes have had a cathartic effect on the country, as the apartheid Government in every instance was adamant about preventing such a horrific repetition through the enactment of legislation.

It is for this reason that one can acknowledge that there is an inextricable link between strike action and the progress of legislation. This emphasises the pertinence of strike action and the necessity of preserving and protecting its role and function within society today.

The next chapter, Chapter three will cover the international laws regulating strike action.

CHAPTER THREE

INTERNATIONAL LAWS REGULATING STRIKE ACTION

3.1. INTRODUCTION

The protection of workers' rights has recently been the focus of many scholars and state officials. This is largely due to the fact that workers' rights have been positioned under the banner of human rights and thus necessitates greater protection.[1] The right to strike has been acknowledged as an essential right not only in South African law, but also within international law.[2] This is primarily due to the paramount role industrial action has within society at large. Where any labour market exists, strikes are to be regarded as an unavoidable and indispensable corollary[3] to the employment relationship, particularly to the rights pertaining to trade unions.[4] International laws form the mould which shapes legislation within individual countries.[5] The Constitution compels South African courts, tribunals and forums to give effect to international laws.[6] In addition, the international treaties signed and endorsed by various countries impresses an obligation on such states to submit to the policies enshrined by the binding treaty.[7] Various countries such as Italy, Spain, Portugal, France and South Africa have constitutionalised the right to strike.[8] The constitutionalisation of strike action as well as the promulgation of supporting legislature, which gives effect to this right, emphasises the mandate that these international frameworks seek to achieve.[9]

---

[1] O V C Okene 'Human rights at work: Measuring the democratic rights of Nigerian workers by international standards' (2015) 35 *Journal of Law, Policy and Globalization* 125.
[2] M A Chicktay 'Defining the right to strike: A comparative analysis of international labour organizational standards and South African law' (2012) 33(2) *Obiter* 260.
[3] O V C Okene 'Derogations and restrictions on the right to strike under international law: the case of Nigeria' (2009) 13(4) *The International Journal of Human Rights* 553.
[4] S Leader *Freedom of Association: A Study in Labor Law and Political Theory* (1992) 182.
[5] E Manamela & M Budeli'Employees' right to strike and violence in South Africa' (2013) 46(3) *CILSA* 3.
[6] The Constitution of the Republic of South Africa, 1996; s 39.
[7] R Kruger *Implementing the Right to Equality in Selected South African Equality Courts* (unpublished Phd, Rhodes University, 2008) 55.
[8] Italy endorsed the right to strike in 1948, Spain in the year 1978, Portugal in the year 1976, France in the year 1946 and South Africa in the year 1994.
[9] R Bernikow 'Ten years of the CCMA – An assessment for labour' (2007) 11 *LDD* 15.

This chapter seeks to highlight the significance of the right to strike within an international framework. It is imperative to do so, firstly, because strike action is synonymous with the right to freedom of association. Even though strike action has not been unequivocally enunciated as a right in a number of States' legal frameworks as well as international policy, the right to freedom of association is universally protected and therefore confers protection on industrial action.

Secondly, industrial action has been protected by a number of universal bodies. This alone is indicative of the significance of this right, as the conventions and resolutions which have been ratified by these international instruments have subsequently been adopted by states internationally. Thus, States are compelled to protect the right to strike.

This chapter will firstly illustrate the necessity and limitations that are required to enforce the right to strike and ensure that it is not subject to the abuse of employees. The discussion will then go on to highlight the international bodies which protect strike action. The discussion will focus on three instruments namely, the International Labour Organization (ILO), the European Charter on Human Rights (ECHR) and the African Charter on the Human Rights of the Peoples (African Charter) as a discussion of all international instruments is beyond the scope of this work.

3.2 THE NECESSITY FOR THE PROTECTION OF THE RIGHT TO STRIKE

Strike action has conventionally been construed as an integral element to collective bargaining[10] necessary for the enhancement of employment conditions, wages and the hours of work.[11] Strikes are regarded as a collective 'movement'[12] which derives itself from the disputes between workers and employers relating to the employment, requiring the temporary suspension of work by the employee in order to compel a change in employment.[13]

---

[10] P J Cavalluzzo 'Freedom of Association and the right to strike in Canada after Fraser' *Call Conference Quebec City* (2012) 13.

[11] A R Mason 'The Right to Strike' (1928) 77(1) *University of Pennsylvania Law Review and American Law Register* 59.

[12] *Shammagar Jute Factory v Their Workmen* (1950) *Law Institute Journal* 235 (IT).

[13] M I Shadur 'Majority Rule and the Right to Strike' 1 January 1949, available at *http://www.jstor.org/stable/1597953?_seq=1&cid=pdf=_refe-_rence#reference-tab-contents*, accessed on 5 July 2015.

However, this right has far exceeded its ambit, as it accomplishes much more than its contribution towards the work interests of employees.[14] The purpose of industrial action may lead to improved dialogue between workers and management and thus contribute to revolutionary policies which could mobilise workers against socio-economic difficulties.[15] It is for this reason that industrial action has been classified as a socio-economic right within international law.[16]

Socio-economic rights are attributed a lesser degree of protection, due to the criticism that they are regarded as dictatorial and cause severe economic losses to countries. This is primarily due to the purpose of a strike being to cause economic losses to the employer in an attempt to coerce the employer to yield to the negotiated demands of the employees.[17] The economic losses incurred by employers as a result of loss of production and profit[18] ultimately impact negatively on society[19] and the economy as a result of a low annual growth rate which retards the country's GDP growth.[20] Therefore, socio-economic rights are regarded as second generation rights. Civil and political rights on the contrary, are afforded a significantly greater level of protection within international law,[21] mainly because of the fundamental freedoms civil and political rights have always sought to advance such as the right to free association,[22] the right to free speech and the right not to be subjected to forced labour among other rights.[23]

Thus, the right to strike necessitates greater protection within international human rights because if individuals are not able to engage in strike action then their basic human rights could be

---

[14] B Nkabinde 'The Right to Strike, an Essential Component of Workplace Democracy: Its Scope and Global Economy' (2009) 24(1) *Maryland Journal of International Law*. 276; Case No. 772 (Spain) 139th Report of the CFEA; Case No. 1068 (Greece) 214th Report of the CFEA; Case No. 1018 (Morocco) 214th Report of the CFEA; Case No. 1131 (Upper Volta) 22nd Report of the CFEA.

[15] M Servais 'The ILO Law and the freedom to Strike' available at *https://www.**law**.utoronto.ca/.../**Strike** **S**ymposium09_ Servais.pdf*, accessed on 15 September 2015; Case No. 1381 (Ecuador) 248th Report of the CFEA; Case No. 1081 (Peru) 214th Report of the CFEA.

[16] T Novitz *International and European Protection of the Right to Strike* (2003) 102.

[17] *NUMSA v Boart MSA* [1996] 1 BLLR 13 (LAC).

[18] Z Qinghong 'Regulate the right to economic strike so as to create harmonious labour relations' 7 March 2011, available at *http://www.jttp.cn/a/report/opinion/2011/0307/942.html*, accessed on 15 September 2015.

[19] International Labour Office *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Report iii, Part 4 A) (1992) 226.

[20] L Krugel 'Strike season and its impact on the economy' 6 November 2013, available at *http://www.sablog.kp mg-.co.za/2013/11/strike-season-impact-economy/*, accessed on 15 September 2015.

[21] ibid 102.

[22] *Collymore v Attorney-General*, [1970] AC 538.

[23] M A Chicktay 'Placing the right to strike within a human rights framework' (2006) 27(2) *Obiter* 348.

violated.[24] The right to strike allows employees to improve working conditions and wages[25] that ultimately lead to the improvement of an employee's livelihood as well as their dignity within society.[26] There is an undeniable correlation between industrial action and the right to life because if employees are able to obtain a living wage that allows them to afford food, clothes, housing, medical treatment etc. then there is a greater possibility that such employees would have a healthier life.[27] If employees are prevented from engaging in strike action, they would also be prevented from withholding their labour at their own will. Consequently, workers would be forced to carry on their work against their will and be compelled to accept any condition of employment dictated to by the employer thus, their right to be free from slavery.[28] Furthermore, strikes are a form of voicing employees' dissatisfaction with the conditions of employment enforced by management, thus, if employees were prevented from striking then their right to freedom of speech would also be violated.[29]

Parties to the ILO have for over 60 years, acknowledged that strike action is indeed a right and that there is an inextricable relationship between industrial action and the right to freedom of association.[30] Furthermore, human rights cannot subsist without the implementation of social justice.[31] Freedom of association is viewed as a conduit to realise subsequent rights. The United Nations Commission on Human Rights which is tasked with the promotion and protection of the right or freedom to strike, has enunciated that freedom of association cannot solely safeguard the best interests of employees because industrial action is the best effective means of worker protection.[32] It is significant to emphasise that in approximately 3000 international cases, the ILO[33] has, unopposed, validated and applied the right to freely associate and the right to strike.[34]

---

[24] Nkabinde (note 14 above; 339).
[25] *Tramp Shipping Corporation v Greenwich Marine Incorp* [1975] 2 ALL ER 989 (C.A).
[26] *Reference Re Public Service Employee Relations Act* [1987] 1 SCR 313.
[27] *Francis Corallie Mullin v Administrator of Delhi* AIR 1981 SC 746.
[28] J R Bellace 'The ILO Law and the freedom to strike' (2014) 153(1) *International Labour Review* 30.
[29] *NAACP v Clairborne Hardware C* 458 US 886 (1982), *State v Traffic Telephone Workers Federation of New Jersey* 66 A.2D 616, 1 N.J 335, 9 A.L.R. 2D 854 (1949).
[30] 'The right to strike: A comparative perspective. A study of national law in six EU states' available at http://www.ier.org.uk, accessed on 5 July 2015.
[31] M Budheli 'Workers' right to freedom of association and trade unionism in South Africa: An historical perspective' (2009) 15(2) *Fundamina: A Journal of Legal History* 1.
[32] T Cohen & L Matee 'Public servant's right to strike in Lesotho, Botswana and South Africa- A comparative study' (2014) 17(4) *PER* 1632-1633.
[33] G P Politakis 'Protecting Labour Rights as Human Rights: Present and future of International Supervision' *Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations, Geneva* (2006) 2.

Therefore, if protection is given to the freedom of association, which is a first generation right and not to the right to strike, this would be an illusory notion of democracy.[35] The right to strike has been acknowledged as the cornerstone of the right to freedom of association, therefore they are both regarded as integral rights to the implementation of democratic values.[36] The majority decision of McLachlin CJ, LeBel, Binnie, Fish, Bastarache, and Abella JJ in *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia*[37] held that an employee's right to collective bargaining and freedom of association endorses democratic values such as the right to dignity, the right to freedom of choice and the right to equality.[38]

Secondly, the right to strike necessitates protection as it is fundamental to the practice of collective bargaining and in obtaining effectual relations between capital and labour.[39] The success of collective bargaining is thus dependent upon industrial action,[40] as without strike action employees lack negotiating power.[41] The ILO does not contain a clear endorsement of strike action within the Freedom of Association and Protection of the Right to Organize Convention[42] (hereinafter referred to as the Freedom of Association Convention) and the Right to Organize and Collective Bargaining Convention[43] (hereinafter referred to as the Right to Organize Convention).[44] However, the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations have affirmed that industrial action is an essential prerequisite to the Freedom of Association Convention and as such necessitates a responsibility to protect the right to strike.[45] The reason for the affirmation by the CFA is that the right to strike has been acknowledged as an integral part of the furtherance

---

[34] Chicktay (note 23 above; 346).
[35] M Budheli 'Freedom of association for public sector employees' (2003) 44(2) *Codicillus* 49.
[36] L J Matee '*Limitation on Freedom of Association: The Case of Public Officers in Lesotho'* (unpublished LLM thesis, University of Kwazulu-Natal, 2013) 1.
[37] *Health Services and Support-Facilities Subsector Bargaining Ass'n v British Columbia*, [2007] SCC 27, [2007] 2 SCR 391.
[38] *Health Services and Support-Facilities supra* note 58 at 393.
[39] *HandWoven Harris Tweed Co. Ltd v Veitch* (1942) AC 435.
[40] Manamela & Budheli (note 5 above; 309).
[41] *Davis v Henry* 555 So. 2d 457- (La.1990).
[42] The Freedom of Association and Protection of the Right to Organize Convention No. 87 of 1948.
[43] The Right to Organize and Collective Bargaining Convention No. 98 of 1949.
[44] R Dalton & R Groom 'The right to strike in Australia: International treaty obligations and the external affairs power' (2000) 1 *Melbourne Journal of International Law* 162.
[45] I Vonk-Asscher 'Equality and Prohibition of Discrimination in Employment' in R Blanpain (ed) *Bulletin of Comparative Labour Relations* (1985) 19

of the right to freedom of association and the freedom of organization.[46] Esson JA in *Dolphin Delivery Ltd v Retail Wholesale & Department Store Union, Local*[47] held that freedom of association includes the right to join and take part in union activities. Every union member has the right to jointly pursue the shared interests of its members.[48] The majority decision in which Bayda CJS and Cameron JA concurred in *Re Retail, Wholesale & Department Store Union, Locals*,[49] held that there is a vital connection between freedom of association, collective bargaining and industrial action.[50] Cameron JA held in his judgment that as freedom of association protects the right to enter into unions for the function of bargaining then it follows that this right should also include the right to participate in the bargaining process as well as the right to strike.[51] In *Black v Law Society of Alberta*,[52] Kerans JA held that the freedom of association includes the activities that are related to the enforcement of this freedom and necessitate constitutional protection if they are associated to a fundamental right that is enshrined to enforce human rights.[53] In *Baena-Ricardo et al v Panama*[54] the Inter-American Court of Human Rights based its findings on the Committee of Experts and the CFA in deciding that the dismissal of 270 strikers by Panama violated Article 16 of the American Convention on Human Rights which entrenched the right to freedom of association.[55] The decision of the Committee of Experts and the CFA was endorsed in *Lavigne v Ontario Public Service Employees Union*[56] where the court stated that the principle of freedom of association which is the protection of the interests of individuals can only be actualised through the pursuit of other supporting rights.[57]

In the landmark decision of *Demir and Baykara v Turkey,*[58] the European Court on Human Rights (ECHR) enforced the protection of the right to strike within Article 11 of the ILO, which

---

[46] R Ben-Israel *International Labour Standards: The Case of the Freedom to Strike* (1987) 93.
[47] *Dolphin Delivery Ltd v Retail Wholesale & Department Store Union, Local* 580 (1984), 10 D.L.R (4th) 198 (B.C.C.A).
[48] *Dolphin Delivery Ltd v Retail Wholesale & Department Store supra* note 47 at 207-208.
[49] *Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985) 19 DLR (4th) 609.
[50] *Re Retail, Wholesale & Department Store Union supra* note 49 at 624-626.
[51] *Re Retail, Wholesale & Department Store Union supra* note 49 at 643-644.
[52] *Black v Law Society of Alberta*, [1986] 3 WWR 590 (Alta. C.A.).
[53] *Black v Law Society of Alberta supra* note 52 at 612.
[54] *Baena-Ricardo et al v Panama*, Inter-American Court of Human Rights, Merits, Reparations and Costs, Judgment of Feb. 2, 2001, Series C No. 72.
[55] *Baena-Ricardo et al v Panama supra* note 54 at 162-163.
[56] *Lavigne v Ontario Public Service Employees Union* (1991) 81 DLR (4th) 545.
[57] *Lavigne v Ontario Public Service Employees Union supra* note 56 at 66.
[58] *Demir and Baykara v Turkey* [2009] IRLR 766; 48 EHRR 54.

enforces the right to Freedom of Association. In *Demir and Baykara* the ECHR dealt with an application against Turkey which was brought by the president of the trade union, Tum Bel Sen. The applicants claimed that their right to form unions as well as undertaking collective bargaining and entering into collective bargaining agreements had been violated by the domestic courts and essentially were in breach of Article 11 of the Convention, or with Article 14.

The union had engaged in a collective agreement with the Gaziantep Municipal Council for a period of two years. According to the agreement, the municipal council was obliged to fulfill a number of tasks and responsibilities. This, however, it did not do. Civil proceedings were then brought to the district court, which ruled in favour of the union. However, when taken on appeal the decision was overturned. The fourth civil division found that although the law allowed civil servants to establish and join trade unions, they did not possess the capacity to enter into binding collective agreements.[59] In making its decision, the court made note of the fact that public servants hold different positions in society as compared to private employees and as there was an absence of legislation governing collective agreements concluded by public employees and unions, the court must look at international instruments such as the ILO which would give guidance to the court's findings.[60]

When the matter was brought before the Grand Chamber, the court viewed the government's objection of the European Social Charter as not even being a preliminary objection because an application cannot merely become inadmissible on the basis of the instruments, but rather until the court has assessed its merits.[61] In deciding on the case the Grand Chamber made continuous reference to the ILO's conventions.[62] The court held that the right of public employees to participate in collective bargaining was entrenched in international law, which included international and regional instruments. The judiciary is required to interpret legislation in the light of international laws.[63] Collective bargaining is based on the notion that employers have always possessed superior power in labour relations due to the fact that the employee is dependent on the wage paid to him for work rendered. Employees are thus required to work

[59] *Demir and Baykara supra* note 58 at 16-19.
[60] *Demir and Baykara supra* note 58 at 20-21.
[61] *Demir and Baykara supra* note 58 at 53.
[62] *Demir and Baykara supra* note 58 at 64.
[63] Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*) Judgment of 30 Nov. 2010, p. 664, para 66.

collectively to acquire adequate influence that would enable them to negotiate and bargain successfully with their employer. Employees exercise this collective power through strike action.[64] The right to join a trade union was a right that inferred more than mere membership to an organisation. It also included the right of a trade union to be heard through representing its members' interests which includes striking in order to be heard.[65] Furthermore, European practice illustrates that this right has been adopted by numerous member states. In addition, the Grand Chamber stated that the ILO Convention No. 98 had been ratified by Turkey. There is no evidence in this Convention that would exclude the applicant's rights based on Article 6 of the Convention.[66] Based on these findings the Chamber held that it could not accept an argument based on the omission of law and a delay in legislation. Neither was this sufficient to nullify an agreement that had been in place for two years and restrict the union members' rights to freedom of association.[67]

If employees were denied the right to strike then this would vitiate the common goal that the implementation of these rights seeks to achieve as these freedoms together with the right to strike share a reciprocal relationship.[68] The right to strike has been acknowledged to be so closely entwined with the right to organise and the freedom of association that the right to strike should be afforded some level of constitutional protection.[69] The Supreme Court of Canada (SCC) recently affirmed the correlation between the right to strike and the right to freedom of association in the landmark decision of *Saskatchewan Federation of Labour v Saskatchewan (SFL).*[70] The Saskatchewan Federation of Labour along with other unions contested the provisions of the Public Service Essential Services Act[71] (hereinafter referred to as the PSEA) and The Trade Union Amendment Act (hereafter referred to as the Trade Union Amendment Act)[72] on the grounds that they contradicted the constitutional provisions of s 2(d) of the

---

[64] *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA* 1996 (4) SA 744 (CC).
[65] *Newspapers Ltd v Wilson, Palmer and others* [1995] 2 AC 454.
[66] *Demir and Baykara supra* note 58 at 165-166.
[67] *Demir and Baykara supra* note 58 at 167.
[68] S Leader *Freedom of Association: A Study in Labour Law and Political Theory* (1992) 182.
[69] *United Federation of Postal Clerks v Blount* 325 F. Supp. 879 (D.D.C), AFF'D, 404 U.S. 802 (1971); *Werhof v Freeway Traffic Services GmbH & Co KG* (2006) ECR I-2397.
[70] *Saskatchewan Federation of Labour v Saskatchewan* (2015) SCC 4.
[71] Act, S.S. 2008, c. P-42.2.
[72] Act, S.S. 2008, c. 26.

Canadian Charter of Rights and Freedoms[73] (hereinafter referred to as the Charter). The PSEA was the first statute in Canada that prevented essential service employees from striking. The essential service employees were compelled to continue working according to the previous terms of their bargaining agreement. Furthermore, the PSEA did not provide any significant framework for resolving disputes for essential service employees such as compulsory arbitration or additional processes for conciliating the dispute.[74] The Trade Union Amendment Act increased the necessary written support while reducing the time limit which employees had to furnish written support. It also amended the provisions pertaining to communication between management and employees.[75]

The SCC stated that in determining whether there was an infringement of s 2(d) of the Charter there had to be an investigation into whether the intrusion on the right to strike amounted to a considerable interference in the procedure of collective bargaining.[76] The intrusion on the right to strike should not be impaired more than is absolutely necessary. The mere fact that a service is performed by a public employee does not automatically categorise the service as 'essential'.[77] The SCC considered that the provision under the PSESA which allows an employer of a public employee to unilaterally make a decision that the service the employee is providing is an essential service. The employer is also entitled to unilaterally decide how the essential service should be carried out, as well as the classification of employees, their names and the number of employees who are allowed to engage in the strike.[78] The SCC held that these provisions of the PSESA are an intrusion on the right to strike which exceeds what is absolutely necessary to maintain continued essential services during the subsistence of a strike and thus causes prejudice to the essential service employees.[79] Even though the right to strike requires more stringent regulation due to the severe impact strikes have on the disruption of vital services that the public are dependent on, these regulations should not be so extensive that employees are prevented from striking regardless of whether or not their services are indeed indispensable.[80] International

[73] Part I of the Constitution Act, 1982.
[74] *Saskatchewan Federation of Labour v Saskatchewan supra* note 70 at 247.
[75] ibid 247.
[76] *Saskatchewan Federation of Labour v Saskatchewan supra* note 70 at 250.
[77] ibid 247.
[78] ibid 247.
[79] *Saskatchewan Federation of Labour v Saskatchewan supra* note 70 at 250; *Hunter v Southam Inc*. [1984] 2 SCR 145.
[80] *International Union, U.A.W.A. v Wisconsin Employment Relations Board* 336 US 245 (1949).

law requires that individual countries' domestic laws effectively regulate the right to strike, however, it does not provide for a complete elimination of the right to strike without an alternate dispute resolution procedure for essential service employees.[81] Furthermore, industrial action is an integral element of collective bargaining, thus, if industrial action is limited in such an intrusive way that it hampers collective bargaining then strike action has to be substituted with another dispute resolution mechanism that would be as effective as strike action.[82] However, the PSESA does not provide any substitute dispute resolution mechanism. Thus, the unilateral entitlements of the public employer together with the lack of any dispute resolution mechanism led the SCC to determine that the provisions of the PSESA were unconstitutional.[83]

The SCC was then called upon to determine the constitutionality of the Trade Union Amendment Act. The court stated that in terms of this provision there was no interference with the right to freedom of association as the provision merely introduced amendments to the bargaining process which affected how a union could acquire or lose the position of a negotiating agent.[84] Furthermore, the rules which govern the relationship between employer and employee did not largely impede with the right to freedom of association to an extent that it weakened the right to freedom of association more than was realistically essential.[85]

The case of *SFL supra* highlighted three essential characteristics of the right to freedom of association. The first was that employees have a right to organise and to choose a union to bargain on their behalf, as is evident in the decision of the SCC that the provision within the Trade Union Amendment Act which increased the requirements on how a representative could obtain or lose his representativity was not unconstitutional.[86] Secondly, the decisions in *SFL supra* highlight that employees possess the right to bargain and that legislature's restrictions on bargaining should not excessively impair the right to freedom of association. Thirdly, the SCC emphasised that the right to strike is an imperative component of collective bargaining.[87] The right to take joint action which includes the right to strike necessitates that the right to strike be

---

[81] *Re Alberta Union of Provincial Employees and the Crown in Right of Alberta* (1980) 120 DLR (3d) 590 (Alta. Q.B).
[82] *Brotherhood of R.R. Trainmen v Jacksonville Terminal Co*. 394 US 369 (1969).
[83] *Saskatchewan Federation of Labour v Saskatchewan supra* note 70 at 251.
[84] ibid 251.
[85] ibid 251.
[86] ibid 251.
[87] ibid 251.

recognised as an essential right that should be enforced through domestic laws.[88] Thus, it is undeniable that the right to freedom of association provides a channel for the implementation of the right to engage in collective bargaining and industrial action.[89]

The ILO acknowledges that the rights pertaining to collective bargaining and trade unionism which could result in strike action is one of the core foundational principles enshrined within international labour policies.[90] Collective bargaining presents a platform that enables unions to engage in deliberations regarding conditions of employment,[91] as collective bargaining seeks to even out the battle field by instilling necessary checks and balances to prevent an abuse of power from either party in the employment relationship.[92] The right to strike is thus a crucial weapon in the bargaining arena without which workers would be left entirely defenseless in economic combat with employers.[93]

An essential component of collective bargaining is power. The employer is mindful that the employee is dependent on him as he pays him a wage. This is the 'power' that the employer possesses over the employee. However, the employee is at the same time aware that without his labour the employer's production would cease.[94] The employee's power is thus in his ability to withhold his labour through the implementation of strikes. In this way the power between the employer and the employee in the employment field is balanced which gives both the employer and the employee equal footing during collective bargaining.[95] Therefore, strike action provides the employee with power which is essential during collective bargaining or else collective bargaining would amount to collective begging.[96] This essentially means that employees are

---

[88] *Laval un Partneri v Svenska Byggnadsarbetareforbundet*, Judgment of 18 Dec. 2007 [2007] ECR I-11767.
[89] *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing 4 Home* (1983) ONSC 4 DLR (4th) 231; *Retail, Wholesale and Department Store Union, Local 544 v Saskatchewan* (1985) 9 DLR (4th) 609.
[90] P van der Heijden 'International Right to Strike under Stress' available at *http://www.thehagueinstitu teforglobaljustice.org /.../ interna tional-Right-to-strike-under-stress-1372942440.pdf.*, accessed on 5 July 2015*; Schechter Poultry Corp. v United States* 295 US 495 (1935); *National Labour Relations Bd. v Jones & Loughlin Steel Corp*. 301 US 1 (1938).
[91] C Tshoose 'Determining the threshold for organizational rights: The legal quagmire facing minority unions resolved- *South African Post Office v Commissioner Nowosenetz No* [2013] 2 BLLR 216 (LC)' (2013) 34(3) *Obiter* 1.
[92] B Rust 'So, you think being a trade union is plain sailing?' (2001) 25(1) *SALR* 59-60.
[93] Okene (note 3 above; 553).
[94] D S Harrison '*Collective Bargaining within the abour relationship: In a South African context'* (unpublished LLM thesis, University of the North-West, 2004) 6-7.
[95] *Crofter Harris Tweed Co. v Veitc*, [1942] 1 All ER 142 (HL).
[96] Ben- Israel (note 46 above; 93), German Federal Labour Court (Bundesarbeitsgericht) Judgment 10 June 1980 (Case 1 AZR 822/79).

provided with bargaining power through strike action so that they do not have to beg the employer to accede to their demands, but rather that they can pressurise the employer to reach consensus during negotiations.[97] The pressure that the employer experiences is through the loss of production, the inability to conduct business efficiently and the loss profits that are a direct consequence of the withholding of labour by employees.[98] The withholding of labour through strike action can thus be viewed as the economic power that brings an employer to agree on the contradicting viewpoints between it and the employees.[99] Thus, industrial action threatens the employer to enter into bargaining negotiations, because the employee is supported by his or her trade union that represents the employee's employment interests and so can implement his power by way of strike action if negotiations are unsuccessful.[100] The right to strike is thus intrinsic to collective bargaining. Freedom of association is necessary to facilitate collective bargaining, which needs to be supplemented by the right to strike.[101] Collectively, these rights become indistinguishable in the pursuit of parity in the employment relationship.[102]

Thirdly, the right to strike necessitates protection as it improves the socio-economic position of society. It is worth reiterating that the impetus for collective bargaining and trade unionism is to create a symmetrical balance of power between employers and workers.[103] This in turn inculcates an ethos of social justice such as equality, acceptance and respect for fundamental human rights and labour rights of workers as well as economic development that transcends the parameters of employment to manifest itself within society.[104] Conventionally, the right to strike was construed as being essential to the pursuance of improved remuneration and employment conditions.[105] However, it must be acknowledged that an increase in wages stimulates the economy by placing more disposable income in the hands of the working.[106] Furthermore, an improvement of working conditions has a synonymous effect, as this leads to a happier workforce results in

---

[97] *B.R. Singh v Union of India* [1999] Lab IC 389 (396) (S.C.), *Gujarat Steel Tubes v Its Mazdoor Sabha* AIR (1980) SC 1896.
[98] *Kairbitta Estate v Rajmanickam* [1960] II LLJ 275 (SC).
[99] *Syndicate Bank v K. Umesh Nayak* [1994] II LLJ 836 (SC).
[100] T Kalusopa, K Otoo & H Shindondola-Mote 'Trade Union Services & Benefits in Africa' available at http://www.ituc-africa.org /IMG/pdf/BENEFITS _REPORT _FINAL_DRAFT. pdf., accessed on 15 September 2015.
[101] *Mounted Police Association of Ontario v Canada* (2005) SCC 1.
[102] Cohen & Matee (note 32 above; 1631), *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia* [2007] 2 SCR 391, [2007] SCC 27.
[103] A Bogg *The Democratic Aspects of Trade Union Recognition* (2009) 255.
[104] Chicktay (note 2 above; 262).
[105] Nkabinda (note 14 above; 276).
[106] ibid 276.

greater productivity. Therefore, this could be a probable way in which the socio-economic welfare of society could be ameliorated.[107] The Committee of Experts has reaffirmed that the right to strike far surpasses its primary role in improving working conditions, but it can also assist in "solutions to economic and social policy questions and to labour problems of any kind, which are of a direct concern to workers".[108] The CFA confirmed the sentiments of the Committee of Experts by stating that strike action is an integral component of trade union activities and is a fundamental mechanism accessible to employees to promote and protect their social and economic concerns.[109]

3.3 THE NECESSITY FOR LIMITATIONS ON THE RIGHT TO STRIKE

As was previously discussed, the right to strike is indeed a paramount right which requires protection within international and regional law.[110] The protection that this right necessitates personifies its vital responsibility and significance within society.[111] It is therefore crucial that effective restrictions and limitations are enforced to prevent an abuse of this right and ensure that the implementation of strikes is effected in an orderly manner.[112] Even though the right to strike has been described as an essential right, it cannot be regarded as an absolute right and is therefore subject to limitations which are enshrined in legislation and are vital to freedom and democracy, including the protection of fundamental rights and morals, health and security and the general concern over public interest.[113]

The right to strike is regarded as a 'fundamental right'. Hence, no law can explicitly exclude specific categories of workers from embarking in strike action. However, workers engaged in essential services may be restricted from this right on the basis that the furtherance of their work is guaranteed through legislation and is validated by concern over the interests of society.[114] The ILO identifies three groups of workers that may not engage in strike action, these being workers

---

[107] Matee (note 36 above; 12).
[108] 'Freedom of Association and Collective Bargaining: General Survey by the COE on the Application of Conventions and Recommendations, Report 111(48)' *International Labour Law Conference 69 Session, Geneva* (1983) para 200.
[109] Freedom of Association Digest 1985, para 360.
[110] M Fichter & D Stevis 'International Framework for Assessment of US Labour Standards' available at *http://www.law.upenn.edu/.../ Herrnstadt10U.Pa.J.Bus.&Emp.L.187(2007).pdf.*, accessed on 15 September 2015.
[111] Okene (note 3 above; 194).
[112] *The Rail, Marine, and Transport Workers v U.K* 1045/10-Chamber Judgment [2014] ECHR 366 (8 April 2014).
[113] Servais (note 15 above; 17).
[114] ibid 17.

who form part of essential services such as the police or the nation's armed forces and specific public officers who exercise authority on behalf of the country.[115] Essential services have been categorised as a service whose "… interruption … would endanger the life, personal safety or health of the whole or part of the population".[116] This prohibition on essential service employees is applicable to workers in both private and public services, which are deemed to be essential, or conditionally, that there is an unequivocal or impending danger to the welfare, wellbeing or right to life of society at large or a part thereof.[117] The CFA noted that the purpose for restricting strikes in essential services would be distorted if there was no clear distinction made between undertakings involving the state and those of essential services. Therefore, the CFA sought to list various services which constitute essential services. These are "the police and armed forces, firefighting services, prison services, provision of food to pupils in schools, cleaning of schools and air traffic control services".[118] Even though these institutions engaged in essential services are prohibited from striking, this does not guarantee that such employees will never engage in strikes nor does it ensure the safety of employees during the subsistence of a strike.[119] These bans on strikes by employees in essential services have been upheld in numerous constitutional cases brought before the courts.[120]

In order to determine how the right to strike should be limited with regard to essential service employees, the judiciary is required to apply the test of proportionality.[121] In *Regina v Oakes*,[122] the Supreme Court of Canada (SCC) stated that there is a two stage inquiry to determine the proportionality of limiting a constitutional right. The SCC stated that the first stage necessitates an inquiry into the way in which the particular legislation contravenes the constitutional rights.[123]

---

[115] Matee (note 36 above; 13).
[116] Freedom of Association: 1985 Digest, para 540-564.
[117] Servais (note 15 above; 4).
[118] Matee (note 36 above; 22).
[119] D T Masiloane 'Guaranteeing the safety of non-striking employees during strikes: The fallacy of policing' (2010) 23(2) *Acta Criminologica* 35.
[120] M S Weiss 'The right to strike in essential services under United States labour law' available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2189&context=fac_pubs., accessed on 15 September 2015.
[121] *Sunday Times Case* 30 ECHR (Ser. A) 1 (1979).
[122] *Regina v Oakes* [1986] 1 SCR. 103, *Ts'epe v IEC and Others* (2005) AHRLR 136 (LeCa 2005).
[123] *Regina v Oakes supra* note 122 at 135.

The second stage necessitates an investigation into whether the legislation endorsed is evidently and reasonably justifiably reasonable.[124]

Even though the ILO places limitations and restrictions on the right to strike, it does not condone the enforcement of overly constrictive limitations. The CFA has indicated that the restricting conditions implemented on the right to strike should be reasonable and not restrict the actions of unions without just cause.[125] This essentially infers that a strike should only be limited if it threatens the public interest of society and would be detrimental to the health and safety of individuals.[126] The Californian Supreme Court analysed the term 'essential services' undertaken by public employees in *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn*[127] and for the first time in Canada the Judiciary permitted public employees to engage in strike action. In July 1976 approximately 75% of the employees of *Sanitation District* engaged in an 11 day strike over failed wage negotiations. An injunction was obtained to restrain the strike, however, the injunction was futile as the strike continued. The service which these employees rendered were regarded not only as public services but also essential services. Their services included providing and maintaining sewage and treatment facilities across the country. During the strike the District was able to secure some of its operations through the labour of management and non-striking employees. The employees then accepted a new offer which ended the 11 day strike. The District immediately proceeded with instituting action for civil damages as a result of the strike. The high court first considered the common law position of striking public employees. The high court considered that there was no clear direction from legislation on whether all public employees should be prohibited from striking.[128] The court also analysed other cases that stated that if there was an absence of legislation authorising strike action by public sector employees then such an action undertaken by these public employees would be illegal.[129]

---

[124] *Regina v Oakes supra* note 122 at 136.
[125] B Gernigon, A Odero & H Guido 'ILO principles concerning the right to Strike' (1998) 137(4) *International Labour Review* 42.
[126] *School Committee of the Town of Westerly v Westerly Teachers Ass'n* 299 A 2d 441 (1975).
[127] *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Ass.* 38 Cal 3d 564 (1985).
[128] *El Rancho Unified School Dist. v National Education Assn*. 33 Cal 3d 946 (1983).
[129] *Los Angeles Met. Transit Authority v Brotherhood of Railroad Trainmen* (1960) 54 Cal 2d 684, *In Re Berry* (1968) 68 Cal 2d 137, *City and Country of San Francisco v Cooper* (1975) 13 Cal3d 898.

These cases based their view on the postulation that strikes by public employees were a revolt against the government and would lead to chaos and immense disruption.[130]

In *Sanitation District supra* the Supreme Court rejected the lengthy line of precedent and stated that the prohibition on striking public employees is no longer supported. The court reasoned that the outmoded precedent which prevented public employees from striking was based on the notion that the government was sovereign and could not be questioned because they could never be accused of doing wrong.[131] The Supreme Court also stated that these cases do not acknowledge that that there is an imbalance between the socio-economic interests of employees and large-scale enterprises and government organisations.[132] Furthermore, the line of precedent failed to take into account the modern reality that employers possessed more power than employees and that the law in modern society sought to empower employees to overcome this imbalance of power.[133] Bird CJ held that the only way of effectively combating this imbalance of power and opposing the abuse inflicted by employers is through the constitutional right to strike.[134] The Supreme Court stated that due to the size and power of government as well as the undertaking of a wide variety of services by government this necessitated that public sector employees be treated the same as private sector employees.[135] Thus, the Supreme Court held that the common law position which prohibited all public sector employees from striking could not be supported.[136] The court acknowledged though, that there were public services which were regarded as essential whose disruption would be detrimental to the safety and health of the public.[137] If the employees within these essential services engaged in strikes then their actions would be deemed illegal.[138] The case of *Sanitation District supra* illustrates that there is a distinction between the services undertaken by public sector employees and services undertaken by public employees engaged in essential services.[139]

---

[130] *City of Cleveland v Division* 268, 41 Ohio Op. 236, 90 N.E.2D 711 (1949), *Board of Education v Shanker* 54 Misc. 2d 941, 283 NYS 2d 548 (Sup. Ct. 1967).
[131] *County Sanitation Dist. No. 2 supra* note 139 at 432.
[132] *Anderson Fed'n of Teachers v School City of Anderson*, 252 Ind. 558, 251 NE 2d 15 (1969).
[133] *County Sanitation Dist. No. 2 supra* note 139 at 432.
[134] *County Sanitation Dist. No. 2 supra* note 139 at 444, *Texas & New Orleans R.R. Co v Brotherhood of Ry. And S.S Clerks* 281 U.S. 548, 570 (1930).
[135] *County Sanitation Dist. No. 2 supra* note 139 at 431.
[136] *County Sanitation Dist. No. 2 supra* note 139 at 567.
[137] *County Sanitation Dist. No. 2 supra* note 139 at 580.
[138] *County Sanitation Dist. No. 2 supra* note 139 at 586.
[139] *United States v United Mine Workers* 330 US 258 (1947), *Helvering v Gerhardt*, 304 US 405, 427 (1938).

In another landmark case of the ECHR, the Grand Chamber affirmed that Article 11 of the ILO contained the right to strike which was enforced through the case of *Enerji Yapi-Yol Sen v Turkey.*[140] The case dealt with a Turkish trade union which represented public employees employed in various field such as motorway construction, energy, registration of land and roadworks. The union expressed its intention to strike in 1996.[141] This was countered with the government's immediate ban on striking by all civil employees which was expressed in the form of a circular. The members of the union, notwithstanding the circular, engaged in industrial action and accordingly received disciplinary action. As a result of obtaining no recourse in the domestic courts of Turkey, the union escalated the matter to the ECHR on the basis that the ministerial circular which was handed to the union breached the employees' right to engage in trade union activity.[142]

The Grand Chamber approached the matter based on the decision handed down in *Demir supra.* The court first considered whether the Turkish government had infringed the employees' rights enshrined in Article 11 of the ILO. The ECHR stated that the Grand Chamber compels countries to develop laws that allow trade unions to battle for the rights of their members within the legal limits provided by Article 11.[143] The ECHR affirmed that "the strike which allows the unions to make their voice heard constitutes an important aspect for the members of a union to protect their interests".[144] The court stated that this assertion is supported by the fact that international instruments such as the ILO and the ESC have enunciated that the right to strike, the right to collective bargaining and the right to trade unionism are inseparable rights which are fundamental to the pursuit of employees' rights. The ECHR was thus satisfied that the court should give effect to the right to strike especially in light of the significance that these international instruments mentioned above have placed on the right to strike and its connection to collective bargaining and trade union rights.[145]

The ECHR then considered whether the circular which entrenched the ban on striking by all public employees interfered with the right to trade unionism. The ECHR determined that the

---

[140] *Enerji Yapi- Yol Sen v Turkey*, Application No 68959/01, Decision 21 April 2009.
[141] *Enerji Yapi- Yol Sen v Turkey supra* note 140 at 11.
[142] ibid 11.
[143] *Enerji Yapi- Yol Sen v Turkey supra* note 140 at 24.
[144] ibid 11.
[145] *Enerji Yapi- Yol Sen v Turkey supra* note 140 at 24.

circular was vague and included all public employees who were banned from striking. This was deemed to be excessive in a democratic society.[146] The ECHR held that the right to strike was not regarded as an absolute right but was subject to a number of limitations and conditions. Therefore, the ban on strikes should only be acceptable for employees engaged in essential services. The ECHR emphasised that there are categories of workers who can be prohibited from striking based on the type of service that they provide, however, this ban cannot extend to all public employees.[147] The court stated that a reasonable and lawful restriction on the right to strike would clearly indicate the types and categories of employees who could engage in strikes as well as those employees who could not engage in strikes.[148] The ECHR held that the circular sent out by government did not indicate the categories of workers who could strike and those who could not strike. The circular was elusive and included all the public employees employed by government and did not adequately balance the rights of the employees and the requirements enshrined in Article 11(2).[149] Therefore, the ECHR held that the rights of the Turkish employees to engage in trade union activities were infringed.[150]

The case of *Enerji Yapi-Yol Sen v Turkey* elucidates that member states that have ratified the Conventions of the ILO are compelled to promulgate national laws and interpret legislation which generally or specifically restrict the right to strike in accordance with the ILO's Conventions.[151] Furthermore, the ratification of the European Community Social Charter of the Fundamental Social Rights of Workers, ratified by 11 European Council, states and has stated, that the "right to resort to collective action in the event of a conflict of interests shall include the right to strike subject to the obligations arising under national regulations and collective agreements".[152] The United States of America (US) has promulgated legislation, namely the National Labour Relations Act (29 USC 151 (2006), (hereinafter referred to as the NLRA), which protects the rights to strike. In terms of s 7 of the NLRA, the right to strike, the right to freely engage in collective bargaining as well as the right to freedom of association forms the

[146] *Enerji Yapi- Yol Sen v Turkey supra* note 140 at 32.
[147] ibid 32.
[148] ibid 32.
[149] ibid 32.
[150] ibid 32.
[151] No. 86 1948 and No. 98 of 1949, *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3, *Health Services and Support-Facilities Subsector Bargaining Ass'n v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391.
[152] W McCarthy *Legal Intervention in Industrial Relations: Gains and Losses* (1992) 153.

basis of the NLRA. In terms of s 13, the NLRA unequivocally states that there should be no interpretation of the NLRA that would encumber the right to strike.

However, the Judiciary's interpretation of the NLRB has been inconsistent with the values enshrined in the international instruments mentioned above. This inconsistency is evident in the case of *NLRB v Mackay Radio & Telegraph Co.*[153] The American Radio Typographists Association (ARTA) entered into negotiations regarding an increase in wages, union recognition, hours of work and the enforcement of a contract of employment, failing which the union threatened strike action. As a result of failed negotiations a two day strike commenced. The company hired 11 men during the strike to maintain the functionality of one of their offices. After the strike had been declared unsuccessful, the company announced that the entire workforce could return to work with the exception of the 11 men who were replaced during the strike. The company did indicate that these 11 strikers could be rehired provided that posts opened up. Two days later, the company rehired 7 of the 11 strikers as posts became available. The four men who had not been rehired, were the strongest supporters of the union.[154]

The ARTA directed a complaint to the NLRB. The Board transferred the matter to the national board, which decided that the four men had been discriminated against due to their affiliation to the union. The company declined to enforce the decision of the Board, which was then referred to the Ninth Circuit Court of Appeals. Justice Roberts summed up the judgment in addressing the issue of the constitutionality of the NLRA and the issue of replacing posts of striking employees by referring to s 13 of the NLRA,[155] and stating that:

> "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create a place for them".[156]

This decision effectively weakens the right to strike as the court construes striking as a freedom and not a right. With regard to freedoms, there is no duty to prevent a person from acting. If employees are given the freedom to engage in a strike, an employer would not have a right to stop that employee from engaging in the strike. However, at the same time the employer does not

---

[153] *NLRB v Mackay Radio & Telegraph Co* 304 US 333 (1938).
[154] 'Radio men call strike' *New York Times* 5 October 1935 at 3.
[155]' Radio operators begin walkout' *New York Times* 6 October 1935 at 1.
[156] *NLRB v Mackay Radio & Telegraph Co supra* note 153 at 345-346.

possess a positive duty to not interfere with the strike.[157] The decision in *Mackay supra* has been criticised by the international community as the replacement of striking employees' posts prejudices and unreasonably limits an employee's right to engage in protected strike action. An employee cannot effectively assert the right to strike if there is a fear that if the employee engages in a strike then there is a possibility that his or her post will be replaced. Therefore, the whole process of collective bargaining is rendered futile, as it curtails the equal footing that the bargaining table is supposed to instill because employers would be allowed additional power over the employee by hiring replacement labour.[158] This in turn is a violation of international frameworks such as the ESC,[159] the ILO Conventions Nos.86 and 98, which enshrine the right to effective collective bargaining and trade union rights, as well as the ECHR,[160] which give effect to right such as freedom of association and freedom of assembly that ultimately facilitates productive collective bargaining.

The European Court of Justice in the leading case of *ITWF v Viking Line ABP,*[161] has highlighted core human rights issues regarding the right to freedom of establishment and when it is permissible to limit the right to strike.[162] In *ITWF supra*, Viking Line operated a ship named *The Rosella* between the areas of Finland and Estonia. It decided to carry its operations under the Estonian flag, so that it could reduce its costs by replacing the highly paid Finnish crew with an Estonian crew who earned lower wages. The ITWF had a policy against 'reflagging' of ships for convenience in areas where the labour cost was lower, when in reality their seat was in another country. An affiliate member of the ITWF, the Finnish Seamen's Union, planned strike action. The ITWF advised its members to not enter into negotiations with Viking, as this would obstruct its business. Viking then sought an injunction, claiming that the proposed strike action would

---

[157] E C O'Neil 'The right to strike: How the United States reduces it to the freedom to strike and how international framework agreements can redeem it' (2012) 2(2) *Labor & Employment Forum* 218.
[158] R Welch 'Right to Strike in UK and South African Law: A Comparison' (2000) 7(1) *International Union Rights* 26.
[159] Article 6(4) of the ESC.
[160] Article 11 of the ECHR.
[161] *ITWF v Viking Line ABP* [2008] IRLR 143 (C-438/05), *Laval un Partner: Ltd v Svenska Byggnadsarbetare-forbundet,* 18 December 2007 [2007] ECR 1-11767, *OU Viking Line Esti* [2007] ECR I-10779 (Viking Line), *Rechtsanwalt Dr. Dirk Ruffert v Land Niedersachsen* [2008] ECR I-1989, *Commission of the EC v Luxembourg* [2008] ECR I-4323.
[162] A Davis 'One step forward, two steps back? The Viking and Laval cases in the ECJ' (2008) 37(2) *Industrial Law Journal* 128.

infringe their right to freedom of establishment provided for in TEC, article 43 (now amended to article 49 of TFEU).

The High Court of Justice granted the order, which was subsequently reversed by the Court of Appeal of England and Wales. The matter was then taken before the European Court of Justice. In reaching its decision, the court made reference to international instruments, which protect collective bargaining and the right to strike, such as the European Social Charter and Convention No. 87 of the ILO regarding the freedom of association and organisation. The court also highlighted the instruments enacted at national or community level such as the Charter of Fundamental Rights of the European Union.[163] The case law regarding fundamental rights is highly dependent on the ECHR as well as the constitutions of ILO member states. Unions are confronted with a massive problem when defending their rights, as the right to strike is not explicitly contained in Article 11 of the ECHR.[164] The Charter of Fundamental Rights of the European Union states that the right to strike must be protected in accordance with the laws at community and national level.[165] The court also observed that the right to strike for promoting the protection of workers can be regarded as a legitimate interest, which justifies a restriction of one of the principle rights which the Charter of Fundamental Rights of the European Union provides for, such as the freedom of establishment. Furthermore, the rights of workers are to be regarded as one of the overriding reasons of the public concern acknowledged by courts.[166]

The court stated that even though the right to collective bargaining and the right to strike has been credited as a 'fundamental right', this does not mean that it is exempt from restrictions. "The right to strike may not be relied on, in particular, where the strike is *contra boni mores* or is prohibited under national law or community law".[167] Even though the courts have acknowledged that there is a positive right to strike; this right is subject to the limitations enshrined in national laws. This essentially means that any member state of the ILO may limit the right to strike either generally or specifically through the enforcement of the member state's national law, however,

[163] *ITWF v Viking Line ABP supra* note 161 at 43.
[164] A Davies 'The right to strike versus freedom of establishment in EC law: The battle commences' (2006) 35(1) *Industrial Law Journal* 82.
[165] Article 28 of the Charter of the Fundamental Rights of the European Union.
[166] *ITWF v Viking Line ABP supra* note 161 at 77.
[167] *ITWF v Viking Line ABP supra* note 161 at 44.

the member state has to ensure that such limitations are in compliance with the Convention No. 87 and Convention No. 98.[168]

3.4 THE ENTRENCHMENT OF THE RIGHT TO STRIKE IN INTERNATIONAL INSTRUMENTS

3.4.1 THE INTERNATIONAL LABOUR ORGANISATION (ILO)

The ILO was established in 1919[169] and is regarded as a specialised bureau within the United Nations. The ILO serves as a custodian of international labour standards which are contained in its recommendations and conventions.[170] The ILO postulates that there is a necessity to formulate an economic and social framework that would provide the building blocks for employment and security, synonymously with retaining the ability to adapt to increasing competition globally.[171]

The conventions and recommendations of the ILO have had a significant impact on international labour law. It accomplishes this through two methods. The first is that when countries ratify conventions of the ILO, they fall under the umbrella of the ILO's supervisory framework. The second method is that the ILO provides technical assistance to countries in an attempt to facilitate the implementation of their policies.[172]

It is imperative to highlight that there is no explicit reference to the right to engage in strikes in the ILO conventions. A possible explanation for the exclusion of the right to strike was that both ILO conventions were signed into force during a prevalent communist sphere that subsisted after the Cold War. Therefore, the western community was wary of enforcing socio-economic rights. At the time the ILO was enforced, an Anglo-American position was established, which separated freedom of association to be given protection under first generation rights and the right to engage in strike action as socio-economic in nature.[173] Britain was the key player in the ILO's

---

[168] Manamela & Budheli (note 5 above; 316).
[169] M Hamalengwa, C Flinterman & E V O Dankwa *The International Law of Human Rights in Africa* (1988) 15.
[170] J Kloosterman 'The Right to Strike? The ILO's Freedom of Association Convention' available at *http://www.Georgezgeorgiou .com/wp-content/plugins/.../download.php?id=40*, accessed on 15 September 2015.
[171] P Benjamin 'Labour market regulation: international and South African perspectives' *HSRC Employment & Economic Policy Research Programme* (2005) 7.
[172] C Fenwick, E Kalula & I Landau 'Labour Law: A Southern African Perspective' *International Institute for Labour Studies, Geneva* (2007) 7.
[173] Novitz (note 16 above; 4).

establishment as well as its consolidation and progression during the inter-war period that gave rise to the 1948 and 1949 conventions which form the basis of the right to strike as will be discussed in detail further on in the chapter.[174]

It is imperative to note that the ILO does not contain any express right to engage in strike action.[175] This should not lead to the assumption that the ILO discounts or refrains from creating a framework that seeks to protect and advance the right to strike.[176] However, the right to strike can be construed from the pronouncements of the IOL's supervisory instruments,[177] such as the Committee of Experts on the Application of Conventions and Recommendations (CEACR),[178] as well as the ILO's Governing Body Committee on Freedom of Association (CFA).[179] Firstly, the right to strike can be inferred from the ILO's two foundational conventions, which are, the Freedom of Association and Protection of the right to Organize Convention No. 87 of 1948[180] and the Right to Organize and Collective Bargaining Convention No. 96 of 1949.[181] Both the CEACR and the CFA have enunciated that the right to strike cannot be isolated from the rights entrenched in the ILO Conventions above which are the Freedom of Association and the right to engage in collective bargaining and trade unionism, as these rights together form the impetus for employers and employees to reach consensus on disputes.[182]

Of the 185 parties to the ILO, 153 states have ratified the No. 87 Convention and 163 states have ratified the No. 98 Convention.[183] Even more so both these conventions constitute the ILO Declaration on Fundamental Principles and Rights at Work (1998), which is esteemed as the core

---

[174] B Creighton 'The ILO and protection of freedom of association in the United Kingdom' in K D Ewing, C A Gearty & B A Hepple (ed) *Human Rights and Labour Law: Essays for Paul O'Higgins* (1994) 3.
[175] Dalton & Groom (note 44 above; 1).
[176] Gernigon, Odero & Guido (note 125 above; 7).
[177] ILO *Freedom of Association and Collective Bargaining* 1994 at para 142.
[178] The CEAR was established by way of a resolution adopted at the International Labour Conference in 1926 to supervise and report on member states adherence to the ILO's policies.
[179] The CFA was established through the ILO's Executive Council's Governing Body in the year 1951. The Committee is tasked with the supervision of the Freedom of Association Convention. It inspects complaints regarding member states non-compliance with core principles regulating Freedom of Association.
[180] The Freedom of Association Convention was opened for signature on 17 July 1948 and entered into force generally on 4 July 1950.
[181] The Right to Organize and Collective Bargaining Convention was opened for signature on 1 July 1949 and entered into generally on 18 July 1951.
[182] S Leader 'Can you derive a right to strike from the right to freedom of association?' (2009) 15 *Candian Labour and Employment Law Journal* 3.
[183] The conventions of the ILO (No. 87 and No. 98) have been signed and ratified on 19 February 1996. Upon South Africa's readmission to the ILO, these conventions were ratified, which created compulsory requirements under the banner of international law.

principles of International labour standards. Every constituent to the ILO, which has enforced these conventions are compelled to give effect to the terms enshrined in these conventions.[184]

Articles 3, 8 and 10 contained in the Freedom of Association Convention form an integral basis to the right to strike. Article 3 pertains to the rights of unions to freely and collectively organise themselves and engage in activities as well as enforcing the prohibition on any interference that would in any way constrict organisations from lawfully exercising this right. Article 8 stipulates that the national laws which are enacted to regulate organisations should not in any manner impede or impair the rights of organisations guaranteed within the convention. Article 10 specifies that the word 'organisation' refers to any workers' organisation or organisation of an employer which is purposed for the advancement and protection of the interests of its members.[185]

The Committee has consistently reaffirmed that the right to strike is intrinsic to the essence of workers' rights and that of organisations. The particular use of the word 'worker', rather than 'trade union', elucidates that the Committee emphasises that federations as well as confederations together with trade unions, should not be prevented, either directly or indirectly through state legislation, from exerting the right to strike.[186]

The Committee has further highlighted that the lawful implementation of strike action should not cause sanctions or punishments that would amount to anti- union discrimination that would contradict the intent and purpose of the Right to Organize and Collective Bargaining Convention 1949 (No. 98).[187] The Committee has made various rulings in accordance with these principles, such as in Jamaica where strike action resulted in the state banning union meetings. The Committee decided that the right to strike as well as conducting trade union meetings is imperative to the rights of trade unions.[188]

---

[184] G E Yeyeye 'Trade unions in Tanzania: A wolf in sheep's clothing? (2014) 5(1) *Open University Law Journal* 71.
[185] Okene (note 3 above; 555).
[186] ibid 555.
[187] Okene (note 3 above; 556).
[188] Bellace (note 28 above; 19).

In addition to the two ILO Conventions (No. 87 and No. 98), the ILO has formulated resolutions which have been adopted to give effect to the right to strike.[189] One of these is the resolution concerning the Abolition of Anti- Trade Union Legislation in the States' members of the International Labour Organization that was adopted in 1957. This resolution provides for "the effective and unrestricted exercise of trade union rights, including the right to strike, by workers". The second is the resolution concerning Trade Union Rights and their Relation to Civil Liberties, which was adopted in 1970. This resolution entails, "further action to ensure full and universal respect for trade union rights in the broadest sense", in particular the, "right to strike".[190]

3.4.1.1. REPORTING PROCEDURE

All member states which are party to the ILO are required to produce reports at various points in time detailing the mechanisms they have adopted to carry out the provisions detailed in the conventions. Representatives of workers' unions and employers' associations are entitled to critique these reports.[191] Constituent states are required to submit reports on,

> "the position of the law and practice in their countries in regard to matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given to the provisions of the Recommendations and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them".[192]

The Committee of Experts (CoE) then examines these remarks and makes various comments, which are then presented as a report at the International Labour Conference (ILC). These reports are further examined by the Committee on Application of Standards (CAS), from where a conclusion is then drawn. The end products of both these committees are publicised. Where member states have deviated from compliance, they are requested to then bring into line their policies or practices in keeping with ILO provisions. The ILO also provides technical support to member states to ensure that their suggestions are implemented.[193]

The CoE and the CFA maintain a relationship of concurrence in their decisions in order to sustain consistency within the ILO's supervisory framework. Even though the CoE and CFA

---

[189] Gernigon, Odero & Guido (note 125 above; 783).
[190] ILO 1970 pp 735-736.
[191] L Betten *The Right to Strike in Community Law* (1985) 185.
[192] Article 19, para 6(d) of the Constitution of the ILO.
[193] Van der Heijden (note 27 above; 2-3).

vary in composition and their supervisory functions, the committees undertake the application of universally approved principles, which are not selectively enforced.[194]

3.4.2 THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR)

Regional human rights are imperative frameworks, which are key role players in the development of national laws. There are three human rights systems which regulate European countries, two of which will be discussed under this section, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the European Social Charter (ESC).[195] In 1950 the ECHR was adopted by the Council of Europe, and explicitly entrenches the protection of civil and political rights, while excluding the protection of socio-economic rights. This has led to numerous controversies regarding the right to strike.[196]

The reason socio-economic rights had been explicitly excluded from the ambit of the ECHR was due to a view held that socio-economic rights were not at that time being completely observed, and that only in years to come would European countries be able to fully afford all citizens with equivalent respect. It was postulated firstly to be essential to establish civil and political democracy.[197] Therefore, the ECHR does not contain an express right to strike action. However, numerous members of the ECHR have consistently asserted that the right to strike can be derived from Article 11 of the ECHR, which provides for the right to freedom of association.[198]

However, ten years into the adoption of the ECHR, social and economic rights were included in the European Social Charter (ESC), which came into effect in 1961.[199] The ESC was regarded as the first treaty to bind international states to explicitly protect and recognise the right to strike.[200] The ESC expressly entrenches the right to strike in Article 6(4) which provides for "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered

---

[194] Bellace (note 28 above; 63).
[195] S Hardy *Labour Law and Industrial Relations in Great Britain* (2007) 57.
[196] R O'Gorman 'The ECHR, the EU and the weakness of social rights protection at the European level' (2011) 12(10) *German Law Journal* 1844.
[197] Betten (note 191 above; 19).
[198] Hardy (note 195 above; 231).
[199] Betten (note 191 above; 18).
[200] D Harris & J Darcy *The European Social Charter* 2nded (2001) 2.

into".[201] Even when the Article was revised in 1996, Article 6(4) remained unchanged.[202] This provision provides the foundation for which employees may exercise their right not only for the right to strike but also for an employer's right to collective action in the form of lock outs.[203] Article 6(4) does not make any reference on who may authorise strikes. Thus, the Article opens the door for deciding which groups would be afforded this right. Although, any decision taken must be in accordance to the limiting provisions that are enshrined in Article 31 of the ESC.[204]

The ESC acts as a reporting mechanism on the ILO's policies and constituents of the ILO. The European Committee on Social Rights is assigned to supervise member states' compliance with ESC provisions.[205] The European Committee on Social Rights is comprised of subcommittees such as the Independent Experts Governmental Committee and the Parliamentary Assembly of the Council of Europe. These committees include expert delegates from member states of the Council of Europe.[206] Member states of the Council of Europe are required to submit biannual reports of their compliance with the ESC provisions to the Council of Europe's Secretary-General. The Committee of Independent Experts examines these reports.[207] There are essentially two mechanisms which the European Committee on Social Rights adopts to supervise member states' compliance with the ESC.[208] The first mechanism is through the Collective Complaints Procedure which are complaints submitted by non-governmental organizations and social partners of the Council of Europe.[209] The European Committee of Social Rights investigates the report according to formal requirements to decide on whether the complaint will be allowed. The European Committee of Social Rights then examines the merits of the complaint. Their decision is then submitted in the form of a report to the relevant parties as well as to the Committee of Ministers. This report is publicised within a four month period of its submission to the relevant

---

[201] Article 6(4) of the ESC.
[202] ESC (revised), 1996 (ETS 163).
[203] S Evju 'The right to collective action under the European Social Charter' (2011) 2(3) *European Labour Law Journal* 199.
[204] A T Jacobs *The Law of Strikes and lock outs: Comparative Labour Law and Industrial Relations* (2007) 642.
[205] Article 21-29 of the ESC.
[206] Van der Heijden (note 193 above; 3).
[207] H R Troskie *A comparative survey of the law relating to strikes in South Africa and the Netherlands* (unpublished LLM thesis, UNISA, 1998) 49.
[208] ibid 49.
[209] Council of Europe 'Collective complaints procedure: an overview' available at *http://www.coe.int/en/web/turin-european-social-charter/collective-complaints-procedure1*, accessed on 28 December 2015.

parties.[210] The second mechanism that the European Committee of Social Rights follows is the Reporting System. The Reporting System comprises of reports that have been submitted to the European Committee of Social Rights by member states.[211] The decisions which are agreed upon by the European Committee of Social Rights are termed 'conclusions' and are published on a yearly basis.[212] Although these conclusions are revered by the member states they are not enforceable in member states' national laws. Essentially, this means that even if the European Committee of Social Rights concludes that the report submitted by the member state was not in compliance with the ESC, the decision cannot be enforced through that state's national legislation.[213]

3.4.3. AFRICAN CHARTER

The Organization of African Unity (OAU) adopted the African Charter as a means of protecting the fundamental rights of African people. This decision was a milestone within the African continent as for the first time African leaders acknowledged that violations of human rights cannot be tolerated within Africa and that the rights of individuals should coincide with the standards entrenched by the international community.[214] The African Charter has received universal ratification as the members of the African Charter are also members of the African Union. This means that member states of the African Charter are obliged to ensure that their domestic laws conform to the standards of the international community and the African Charter.[215] The African Charter has become the basic and fundamental regional instrument that has been enshrined to protect and promote human rights within the African continent as well as create unity between all African member states of the African Charter.[216]

The African Charter is the first international convention on human rights to secure every category of human rights within one instrument. The African Charter enshrines civil and political

---

[210] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Treaty No.158.
[211] Article 21-29 of the ESC.
[212] 'The reporting procedure: an overview' available at *http://www.coe.int/en/web/turin-european-social-charter/reporting-system*, accessed on 28 December 2015.
[213] Protocol amending the European Social Charter, Treaty No. 142.
[214] C R M Dlamini 'Towards a regional protection of human rights in Africa: the African Charter on Human and Peoples' rights' (1991) 24(2) *CILSA* 193.
[215] A Jibril 'Derogation from Constitutional rights and its implications under the African Charter on Humans and Peoples Rights' (2013) 17 *LDD* 79.
[216] J C Mubangizi *The Protection of Human Rights in South Africa* (2004) 26-27.

rights which are regarded as first generation rights.[217] However, it is imperative to also note that the African Charter enshrines social and economic rights which are regarded as third generation rights. Therefore, the African Charter provides the basis for the right to strike by enshrining the "right to economic, social and cultural development forms".[218] The African Charter does not make any explicit reference to the right to strike, however, Article 10(1) of the African Charter entrenches the right to freedom of association and Article 11 entrenches the right to freedom of assembly which have been connected to the right to strike as well as Article 5 which prohibits slavery. Furthermore, Article 15 provides that all individuals are entitled to perform "work under equitable and satisfactory conditions".[219] Even though Article 15 is vague in its scope of what constitutes "equitable and satisfactory conditions", this Article together with the socio-economic rights entrenched in Article 22 give effect to the right to strike, as striking has been acknowledged as a mechanism to further employees' socio-economic rights which was discussed previously in the chapter.[220]

The African Commission on Human and Peoples Rights (ACHRP) has been appointed as a supervisory body to ensure compliance with the provisions enshrined in the African Charter. The ACHRP has affirmed that the provisions discussed above must be interpreted from the viewpoint of when workers were enslaved during colonisation. Therefore, ACHRP has also reasoned that the drafters of the African Charter sought to remind African governments of the painful past of black workers in order to develop their socio-economic interests at present.[221] The ACHRP has affirmed that social and economic rights are fundamental components of human rights within the African continent.[222] The ACHRP has thus construed the Articles discussed above as an enforcement of the right to join and form trade unions as well as the right to strike that would

---

[217] Article 2-13 of the African Charter.
[218] Article 22 of the African Charter.
[219] T Novitz *Laws against Strikes: The South African Experience in an International and Comparative Perspective* (2015) 61.
[220] M Ssenyonjo *The African Regional Human Rights System* (2012) 59.
[221] *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) at 56.
[222] *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria supra* note 222 at 68.

further workers' socio economic rights.[223] This has allowed trade unions to receive protection in furthering the interests of their members through strikes and other demonstrations.[224]

The ACHRP has a responsibility to protect and uphold the rights of people.[225] The ACHRP must also undertake any function that is required of it by the government and the Assembly of Heads of State.[226] The ACHRP is entitled to perform any investigation including accepting recommendations provided by the Secretary General and OAU.[227] The African Commission has been appointed to monitor member states compliance with the ACHRP through a reporting procedure. The reporting procedure is established through the Articles of the African Charter.[228] The ACHRP is tasked with gathering data relating to human rights and analyses reports submitted by member states and Non Governmental Organisations (NGOs). The ACHRP is also commissioned to investigate complaints and violations of the ACHRP that have been submitted by member states and non-parties.[229] The ACHRP will only consider a complaint if the member state has exhausted its internal remedies or if the matter was unreasonably delayed by the member state's national courts.[230] Even though the fundamental task of the ACHRP is to promote the values enshrined in the Charter, there are various international human rights standards which direct its functions such as the ESC, Universal Declaration of Human Rights, the Charter of the United Nations and the Charter of the Organization of African Unity.[231]

3.5. CONCLUSION

The specific political and socio-economic battles that have plagued each country's past has necessitated the right to strike. This is illustrated in the paramount role organisations adopt in their militancy against authoritarian control, which has culminated in democracy and the

---

[223] A van Daele *International Labour Rights and the Social Clause: Friends or Foes* (2004) 332.
[224] B Saul, D Kinley & J Mowbray *The International Covenant on Economic, Social and Cultural Rights* (2014) 494.
[225] Article 45 of the African Charter.
[226] Article 45(4) of the African Charter.
[227] Article 46 of the African Charter.
[228] Article 62 of the African Charter.
[229] S Amadi 'The African Charter on Human Rights: discovering its potential' (2002) 3(1) *ESR Review: Economic and Social Rights in South Africa* 5.
[230] P De Vos 'A new beginning: the enforcement of social, economic and cultural rights under the African Charter on Human and People's Rights' (2004) 8(1) *LDD* 11-12.
[231] Article 60 of the African Charter.

enforcement of worker rights.[232] Although strike action inflicts economic and societal pains, it initiates a healing process through the use of international labour organisations, which have been discussed above, that sees the relationship between the workforce and the state being reconciled.[233]

The right to strike has been acknowledged as fundamental to the pursuit of employees' rights.[234] Therefore, it follows that the right to strike should not be understated or devalued as it has been a significant contributing factor to the attainment of workers' rights both nationally and internationally.[235]

The next chapter, Chapter Four, will deal with the entrenchment of fundamental labour rights.

[232] B Hepple 'The right to strike in an International context' available at *https://www.law.utoronto.ca/documents /conferences2/StrikeSymposium09_Hepple.pdf*., accessed on 15 September 2015.
[233] W P Visser *A Racially Divided Class: Strikes in South Africa, 1973-2004* (2007) 1.
[234] J Servais *International Labour Law* (2011) 122.
[235] W P Visser '"To Fight the Battle of the Workers": The emergence of pro-strike publications in the early twentieth century South Africa' (2004) 49(3) *International Review of Social History* 402.

CHAPTER FOUR

THE ENTRENCHMENT OF FUNDAMENTAL LABOUR RIGHTS UNDER THE LABOUR RELATIONS ACT 66 OF 1995

4.1. INTRODUCTION

The most significant implication of South Africa's transition from apartheid to democracy was its transformation within the labour market. Democracy in the country essentially entailed the entrenchment of worker rights in the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), the pursuance of workplace democracy through the restructuring of laws and the enforcement of affirmative action. Labour relations in a democratised society now faced the challenges of redressing the injustices of the past by harmonising the employment relationship to obtain peace in the workplace which would eventually lead to greater productivity.[1]

In1994 the democratic government hastily instructed a drafting committee which comprised of attorneys who were integral to the liberation movement, representatives of prominent employers as well as international experts. The committee was tasked with the drafting of labour legislation which would instill much needed stability and reformation to an area that was characterised by uncertainty and inequality.[2] The culmination of protracted negotiations between government, employers and employees saw the formation of the most significant labour legislative framework, the Labour Relations Act 66 of 1995 (hereinafter referred to as LRA), which is the foundation of current labour relations.[3]

This chapter will firstly discuss the role of the LRA within employment relations. The discussion will include the aim of the LRA which is to transform the relationship between employees and

---

[1] G M Ferrira 'Developments in labour relations in South Africa: Ten years of democracy (1994-2004)' (2005) 24(2) *Politeia* 199.
[2] P Benjamin 'Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)' (2013) 4.
[3] H Bhorat, C van der Westhuizen & S Goga 'Analysing Wage Formation in the South African Labour Market: The Role of Bargaining Councils' (2007) 9.

their employers by moving away from dissention to harmony and co-operation.[4] The LRA does this by enforcing a dispute resolution system aimed at resolving conflict through a framework that seeks to benefit both parties.[5] The chapter will then go on to discuss the entrenchment of trade union rights. The enforcement of rights within the LRA pertaining to trade unions and their representatives is pertinent as these rights lead to consistent interaction between employers and their workers, thereby allowing any concerns or issues to be properly communicated so that amicable consensus can be obtained.[6] The chapter will then discuss the role of collective bargaining within the dispute resolution framework of the LRA and its pivotal role in resolving conflict which is necessary to prevent the dispute from escalating to strike action.[7] Lastly, the chapter will elaborate on the entrenchment of the right to strike and the protection afforded to strikes which fall within the definition of 'strike' enshrined in the LRA.[8]

4.2 THE ROLE OF THE LABOUR RELATIONS ACT (LRA)

The promulgation of the LRA was a significant milestone within labour relations for two paramount reasons. Firstly, the LRA afforded almost all public servants who were once excluded from previous amendments of the current LRA with bargaining power rights. It changed industrial councils to become bargaining councils. Even though the LRA did not impose a duty on employers and employees to engage in bargaining, it did codify and fortify the rights of unions within the labour market.[9]

Secondly, the LRA entrenches the protection of strike action.[10] The right to strike is tantamount to the protection of lock-outs which is an employer's right to recourse. However, for the purposes of this chapter emphasis will only be placed on the right to strike in light of the topic of this thesis. The right to strike is endorsed in Chapter Five of the LRA. According to the LRA,

---

[4] R Raju & C Stilwell 'From adversarialism to cooperation: Key implications of the new South African labour dispensation for the library and information sector' (2007) 25(1) *Mousaison* 6.
[5] H Bendeman 'An analysis of the problems of the labour dispute resolution system in South Africa' (2006) 6(1) *Africa Journal of Conflict Resolution* 81.
[6] P Le Roux & S Hanif 'Majoritarianism in the context of organizational rights: employment law' (2015) 15(10) *Without Prejudice* 32.
[7] J Ibietan 'Collective bargaining and conflict resolution in Nigeria's public sector' (2013) 21(2) *Ife Psychologia: An International Journal 221.*
[8] A van Heerden 'Protected strikes-getting the balance right: labour law' (2011) 11(9) *Without Prejudice* 67.
[9] J Maree 'Trends in the South African collective bargaining system in comparative perspective' (2011) 35(1) *SAJLR* 13.
[10] S Godfrey … et al *Collective Bargaining in South Africa: Past, Present and Future?* (2010) 90.

strikes are afforded full protection if the act constitutes a strike under the definition of the LRA.[11] The protection of striking employees is vital as the old Labour Relations Act of 1956 and its subsequent amendments did not protect employees against dismissal.[12]

This effectively meant that even though employees were given a framework for how strike action should be implemented, it did not enunciate strike action as a right. Therefore, employers could have still held employees liable on breach of their employment contract.[13] This was a grave injustice as not only did employers have the use of lock-outs as their right of recourse, but also employers had control over the exercise of strike action. Hence, the LRA sought to redress this inequality by enshrining strike action as a right.[14]

There are four fundamental objectives which the LRA seeks to achieve, namely; to promote economic growth, instill justice within society, create harmony in the once turbulent labour market and inculcate the concept of democracy within the workplace.[15] There are a number of cases that portray how the courts have dealt with the enforcement of these objectives. For illustrative purposes the following cases will be discussed at this point in the chapter. It is essential to take cognisance of the objectives of the LRA in that they have firstly been enacted in the light of international obligations implemented through the International Labour Organisation (ILO) and its conventions. Secondly, it has been enacted to give effect to the labour rights enshrined in the Constitution.[16] The objectives of the LRA are therefore synonymous with the objectives of the ILO and the Constitution. Therefore, the interpretation of the LRA's objectives must be in conformity with international laws and the Constitution.[17] This precedent was affirmed in the *Ceramic Industries Ltd t/a Betta Sanitay Ware & another v NCBAWU & others*,[18]

---

[11] s 213.
[12] H Suchard 'Labour relations in South Africa: retrospective and prospective' (1982) 12(2) *Africa Insight* 92.
[13] C Tanner 'Making amends: The new look LRA' (1999) 8(2) *Indicator SA* 89.
[14] G Gall 'Trade unions and the ANC in the 'New' South Africa' (1997) 24(72) *Review of African Political Economy* 208.
[15] The LRA; s 1, P Benjamin, H Bhorat & H Cheadle 'The cost of "doing business" and labour regulation: The case of South Africa' (2010) 149(1) *International Labour Review* 74.
[16] P A Grobler, M Kirsten & S Warnich 'Building capacity for their members: What employers' organizations in South Africa need to know' (2005) 36(2) *S.Afri.J.Bus.Manage* 39.
[17] P H Reyneke *Labour practices in South Africa and Korea: A comparative study against international labour organization standards* (unpublished MBA thesis, University of Johannesburg, 2009) 84.
[18] *Ceramic Industries Ltd t/a Betta Sanitary Ware & another v NCBAWU & others* [1997] 6 BLLR 697 (LAC).

where the court stated that the objectives of the LRA must be interpreted in conformity with international law and the Constitution.[19]

It must be understood that the Constitution was enacted to redress the injustices of the past not only within society but also within the field of labour. It is for this reason that the LRA has the dual function of inculcating transformation in the workplace as well as in society at large. In *Foodgro (A division of Leisurenet Ltd) v Keil*,[20] the court explained the objective of 'economic development' by stating that this objective must be advanced:

> "in conjunction with other goals, namely those of social justice, labour peace and the democratization of the workplace. This is to be done by fulfilling the primary objects of the Act: giving effect to fundamental rights and International Labour Organization (ILO) obligations, providing a proper framework for collective bargaining and the formulation of industrial policy; and promoting orderly collective bargaining, employee participation in workplace decision-making and effective resolution of labour disputes".[21]

The Labour Appeal Court (LAC) in this case conveyed a pertinent point in that the promotion of economic development cannot be achieved in isolation, but rather it is inter-linked with the concept of justice and unity within society.[22] The court acknowledges that unjust laws that govern society negatively impact on labour relations. In addition, labour peace essentially entails the elimination of strife which takes the form of strikes and lock-outs.[23] By engaging in collective bargaining, parties would be able to resolve disputes amicably and speedily rather than resorting to strikes and lock-outs.[24] This in turn would result in a decrease of work days lost and greater productivity.[25] Lastly, instilling equality in the workplace ensures that all employees are treated the same, therefore, employees would be able to work in an environment that is free from animosity. Thus, the morale of the workplace would be significantly improved.[26]

One of the objectives that the LRA seeks to promote is successful dispute resolution which is achieved through collective bargaining aimed at enhancing co-operative decision making

---

[19] *Ceramic Industries Ltd t/a Betta Sanitary Ware supra* note 18 at 70.
[20] *Foodgro (A division of Leisurenet Ltd) v Keil* [1999] 9 BLLR 875 (LAC).
[21] *Foodgro (A division of Leisurenet Ltd) v Keil supra* note 20 at 11.
[22] A Desai & A Habib 'Labour relations in transition: The rise of corporatism in South Africa's automobile industry' (1997) 35(3) *The Journal of Modern African Studies* 495.
[23] Bruniquel & Associates 'September to October 2011 Workbook' 2011 *Labour Law Update* 30.
[24] *Pep Stores (Pty) Ltd v Laka No & others* (1998) 19 *ILJ* 1534 (LC).
[25] M Daemane 'Human Resources Management (HRM) and trade unions compatibility: 'Soft-hard' model digestion for human capacity building and sustainable productivity at workplace' (2014) 5(7) *JETEMS* 122.
[26] S Harvey 'Labour brokers and workers' rights: Can they co-exist in South Africa?' (2011) 128(1) *SALJ* 104.

between employers and employees.[27] It does this through the establishment of workplace forums and consultation with the employee. Furthermore, it has established a simple process for dispute resolution that has been enforced through conciliation and arbitration and through the use of independent bodies designed to resolve conflict.[28] The courts have addressed the issue of dispute resolution by emphasising the significance of collective bargaining which is evident in the following cases.

In *North East Cape Forests v SAAPAWU & others (2)*,[29] the court held that where a dispute arises pertaining to the objectives of the LRA and a matter of contractual terms and conditions, the objectives of the LRA should take precedence over the contract. Collective bargaining and the right to strike should not be subordinate to the principles that regulate contract law.[30] The court in this case illustrates that the fulfillment of the objectives of the LRA should be regarded with the greatest importance and that the right to strike action and collective bargaining should be viewed as paramount in giving effect to the objectives of the LRA.[31]

The objectives of the LRA essentially signify that this legislation is deemed to be the foundation of dispute resolution. This was manifest in *NAPTOSA & others v Minister of Education, Western Cape & others*,[32] where the court held that in the event of a grievance an employee is compelled to first seek resolution under the procedure prescribed by the LRA. If, however, no remedy is found through the LRA's dispute resolution process then the LRA could potentially be held liable for not providing sufficient protection to rights enshrined in the constitution.[33] The court sought to highlight through case law that the objectives of the LRA are a pertinent characteristic of the legislation itself. The LRA not only entrenches successful bargaining as a primary objective in an attempt to prevent industrial strife, but it also provides a comprehensive framework for resolving conflict.[34]

---

[27] G Ferreira 'Collective Bargaining and the public sector' (2008) 43(2.1) *Journal of Public Administration* 194.
[28] F Howitz, H Jain & L Mbabane 'Trade union consultation by employers under employment equity legislation' (2005) 29(1) *SAJLR* 5.
[29] *North East Cape Forests v SAAPAWU & others (2)* [1997] 6 BLLR 711 (LAC).
[30] *North East Cape Forests v SAAPAWU & others (2) supra* note 29 at 719, *FAWU v General Food Industries Ltd* [2002] 10 BLLR 950 (LC) at 12.
[31] H Cheadle 'Collective bargaining and the LRA' (2005) 9(2) *LDD* 147.
[32] *NAPTOSA & others v Minister of Education, Western Cape & others* (2001) 22 *ILJ* 889 (C).
[33] *NAPTOSA & others supra* note 32 at 896.
[34] P Molusi 'The constitutional duty to engage in collective bargaining: notes' (2010) 31(1) *Obiter* 161.

The court's enforcement of the LRA's dispute resolution framework is further illustrated in *Mackay v ABSA Group &another*,[35] where the court stated that,

> "all disputes arising from the employer-employee relationship must be effectively resolved. Such disputes are resolved through conciliation, arbitration and adjudication, and those of a collective nature through collective bargaining. It is clear that it could never have been intended that some disputes arising out of the employer-employee relationship are incapable of resolution in terms of the Act".[36]

By handing down this judgment the court highlighted that the LRA's dispute resolution framework is deemed effective in dealing with matters of conflict and that the LRA has a duty to protect the rights of employees.[37] Furthermore, the protection of employees' rights is enforced through the process of collective bargaining within the dispute resolution system. However, even though the courts have taken a stringent view point on the interpretation and enforcement of the LRA's purpose and objectives, it does not involve itself within the actual bargaining process.[38]

In *National Police Services Union & others v National Negotiating Forum & others,*[39] the court pointed out that the LRA does not place any duty on either the employer or the employee to engage in the bargaining process. The courts are not given authority to determine or influence the result of the bargaining process. The outcome of such negotiations is entirely dependent on the parties themselves.[40] This ruling essentially portrays that both parties to the bargaining process must be given equal power which instills democracy within labour relations.[41] Industrial democracy seeks to undo the unilateral power that existed with employers over their employees which has been enforced through legislation for centuries. The LRA therefore seeks to empower the employee.[42]

Ultimately, the promulgation of the LRA was to revolutionise labour law and in doing so give effect to s 23 of the Constitution which enshrines labour rights for all employees.[43] Even more significantly, the LRA seeks to enforce s 23(2) that endorses trade union rights and the right to

---

[35] *Mackay v ABSA Group & another* [1999] 12 BLLR 1317 (LC).
[36] *Mackay v ABSA Group & another supra* note 35 at 15.
[37] C Bosch 'Bent out of shape?: critically assessing the application of the right to fair labour practices in developing South African labour law' (2008) 19(3) *Stell LR* 387.
[38] J M Brown 'Enforcement difficulties in the public and private sectors' (2007) 11 *LDD* 104.
[39] *National Police Services Union & others v National Negotiating Forum & others* (1999) 20 *ILJ* 1081 (LC).
[40] *National Police Services Union supra* note 39 at 52.
[41] D de Villiers 'Interest based bargaining: The role of the trust relationship between employer and employee' (1999) 2(3) *SAJEMS* 443.
[42] D du Toit 'Industrial democracy in South Africa's transition' (1997) 1 *LDD* 42.
[43] M Olivier 'Fundamental rights and labour law: Some recent developments (part 2)' (1996) 345 *De Rebus* 668.

strike. Therefore, the objectives as stated by the LRA and the constitutionalisation of labour rights further emphasises the mandate that should be carried out.[44]

4.3. THE ENDORSEMENT OF TRADE UNION RIGHTS AND COLLECTIVE BARGAINING

4.3.1 THE ENDORSEMENT OF TRADE UNION RIGHTS

The transitional phase of South Africa to democracy redefined the focal point of trade unions in that prior to democratisation, unions purposed themselves in the fight for liberation. However, the post-apartheid era saw unions engaging in policy formation with government.[45] The endorsement of trade union rights[46] within the Constitution[47] as well as the LRA essentially provided for stronger protection of the rights of workers. In order to understand how trade unions protect and promote employees' rights it is firstly necessary to comprehend what constitutes a trade union and how it undertakes to protect employees.[48]

A trade union can be described as the 'in-between' body that bridges the gap between an employer and an employee.[49] Essentially the role of a trade union is to safeguard the existing rights of its members and also improve and enhance these rights,[50] and all employees are entitled to join and participate in trade union activities.[51] The fundamental function of a trade union is to engage in the process of collective bargaining with employers on behalf of their members as well as provide representation for matters concerning disciplinary proceedings or on matters pertaining to grievances.[52]

---

[44] R Bernikow 'Ten years of the CCMA- An assessment for labour' (2007) 11 *LDD* 15.
[45] M Uys '*Factors influencing the future existence of trade unions in South Africa'* (unpublished LLM thesis, University of the North West, 2011) 7.
[46] For the purpose of this chapter the terms 'trade union rights' and 'organizational rights' will be used synonymously.
[47] s 23 (2).
[48] W A Attley 'The role of trade unions' (1987) 76(303) *Studies: An Irish Quarterly Review* 296.
[49] K R Sundar 'Trade unions and civil society: Issues and strategies' (2007) 42(4) *International Journal of Industrial Relations* 713-714.
[50] A A Landman 'The registration of trade unions-the divide narrows' (1997) 18 *ILJ* 1186.
[51] *Independent Municipal and Allied Trade Union and others v Rustenburg Transitional Council* (2000) 21 *ILJ* 377 (LC), *Keshwar v SANCA* (1991) 12 *ILJ* 816, *Wilson v UK* [2002] 35 ECRR 523.
[52] J Grogan *Collective Labour Law* (2010) 35.

The role of a trade union is essentially described in *Amalgamated Engineering v Minister of Labour*[53] where the court stated that a "trade union concerned should act as the spokesman of its members whenever a dispute arises between employers and employees".[54] A trade union is confronted with the challenge to meet the requirements of the majority members' needs, to obtain all "sources of power at its disposal and to achieve its goals by implementing strategies".[55] Therefore, trade unions are essential to the furtherance of concepts of equality and democracy in the workplace as they promote the interests of employees by ensuring that employees are placed in an equal position to their employers.[56]

It is therefore imperative that trade unions are given adequate protection by legislation.[57] It is for this reason that the LRA prescribes the steps which unions may follow to acquire organisational rights.[58] The LRA prescribes the requirements for the registration of trade unions and its regulation. The effect of the registration of a trade union establishes the union as a body corporate. Hence, rights and obligations are conferred upon the trade union.[59] In *Vidar Rubber Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration (CCMA) & others,*[60] the court held that mere compliance with the requirements stipulated in s 97(1) for the registration of unions or employers' organisations does not in itself bring a union within the definition of a trade union. The 'purpose' of that given union is an additional element which would have to be satisfied to determine whether the union does constitute a trade union under the definition of the LRA.[61] It must be noted that the purpose of a trade union is essentially to protect and promote the interests of its members, thus only employees may become members of trade

[53] *Amalgamated Engineering v Minister of Labour* 1949 (4) SA 908 (A).
[54] *Amalgamated Engineering supra* note 53 at 912.
[55] M Finnemore & R van Rensburg *Contemporary Labour Relations* 2nded (2002) 139.
[56] T Chetvernina 'Trade unions in transitional Russia-peculiarities, current status and new challenges' (2009) 12(3) *Journal for Labour and Social Affairs in Eastern Europe* 408.
[57] N Botha & C Mischke 'A new labour dispensation for South Africa' (1997) 41(1) *Journal of African Law* 136.
[58] s 21.
[59] s 97 (1).
[60] *Vidar Rubber Products (Pty) Ltd v CCMA & others* [1998] 6 BLLR 634 (LC).
[61] *Vidar Rubber Products (Pty) Ltd supra* note 60 at 60, *National Employers Forum v Minister of Labour & others* (2003) 24 *ILJ* 954 (LC), *Workers Union of SA v Crouse No & Another* (2005) 26 *ILJ* 1723 (LC).

unions.[62] The protection of its members can only be achieved if a trade union is a separate body corporate.[63]

The LRA further stipulates that a trade union must be an independent body which requires that a union must not be within "the direct or indirect control of an employer or employer's organization" and that a union must be "free of any interference or influence of any kind from any employer or employer's organization".[64]

The independence of a trade union is vital as it ensures that it operates as a body that is free from any bias or undue influence. The best interests of employees can only be appropriately obtained if a union can acquire the trust, cooperation and dependence of its members.[65] This will only come about if members are convinced that their representatives will always act on their behalf without prejudicing their interests. The LRA attempts to assist in acquiring the trust of members by ensuring that a trade union does not undertake its duties for its own benefit.[66]

The purpose of a trade union is enshrined in its constitution; therefore the LRA seeks to regulate the constitutions of trade unions so as to ensure that they engage in ethical and fair practices.[67] The LRA does not require a union to strictly adhere to its constitution unless the unions' constitution includes requirements under s 65(2)(*b*) of the LRA, which stipulate the requirements for a protected strike.[68] The LRA specifies that a trade union may not be purposed to gain a benefit and that it may decide on the criteria for membership to that particular union. Furthermore, a union may determine what payments are to be made by members, how such payments are to be determined as well as other payments required from members.[69] In *NEWU v Mtshali & another*,[70] the court dealt with s 95(5)(*a*), (*b*) & (*f*) of the LRA. The particular union had decided to amend its constitution which entailed that under this proposed amendment members

---

[62] *NEWU v Mtshali & Another* (2000) 21 *ILJ* 1166, *Midland Chamber of Industries Staff Committee v Midland Chamber of Industries* [1995] 5 BLLR 74 (IC).
[63] M E Manamela 'The role of the registrar of labour relations in the registration of trade unions' (2006) 18 *SA Merc LJ* 453.
[64] s 95(2)(*a*) - (*b*).
[65] M Bennett 'The super federation: independence unionism comes of age factions and fractions in the post-Wiehahn era' (1985) 3(2) *Indicator SA* 1.
[66] A Adigun 'The implications of social democracy on industrial relations in Nigeria' (2014) 5(1) *JETEMS* 29.
[67] s 95(5)(*a*) - (*w*).
[68] *KZN Furniture Manufacturer's Association v National Union of Furniture & Allied Workers of South Africa* [1996] 8 BLLR 964 (N).
[69] s 95(5)(*a*), (*b*) & (*f*).
[70] *NEWU v Mtshali & another* [2000] 3 BLLR 337 (LC).

would be compelled to make payments of disbursement costs and fees.[71] The proposed amendment conflicted with s 95(5)(*a*) and (*f*) as the payment of these fees was more than the required payment by members and such proceeds would thus be a beneficial gain to the union. The court upheld the decision taken by the registrar.[72] In *Mtshali supra* a further proposed amendment was made to the union's constitution which allowed job seekers or applicants' membership into that given union. The court upheld the decision of the registrar who denied the registration of that amendment as it conflicted with the LRA'S definition of an employee.[73]

Even though the LRA prescribes mandatory steps for the registration of trade unions,[74] union representatives may still act on behalf of members in court proceeding and on matters taken to the CCMA where such unions have not been registered.[75] The LRA confers rights upon a trade union that take effect immediately when a trade union is registered. This is pertinent as the LRA stipulates that members of a union cannot be held liable for any obligations or liabilities incurred by the trade union nor would any of its members, office-bearers, officials as well as union officials be held personally accountable for losses incurred to any given person in the pursuance of conducting union functions.[76] However, this protection is only afforded if such an act or omission was performed in good faith.[77] The requirement that protection only be given to *bone fide* acts emphasises that unions may not engage in criminal activity in the pursuit of their members' interests as they would be held liable for any damages that ensue as a result of their conduct.[78] Although the registration of a union essentially affords unions rights, this however does not mean that because it is a corporate body that they are a law unto themselves. This would vitiate the function of a union. The acquisition of organisational rights is enshrined to assist in

---

[71] *NEWU v Mtshali & another supra* note 70 at 20.
[72] *NEWU v Mtshali & another supra* note 70 at 20.
[73] *NEWU v Mtshali & another supra* note 70 at 18-19.
[74] s 96(1) – (7).
[75] *Marble Hall Spar v SACWU& others* [1997] 10 BLLR 1311 (LC), *Vidar Rubber Products (Pty) Ltd v CCMA & others* [1998] 6 BLLR 634 (LC), *Secunda Supermarket CC t/a Secunda Spar & another v Dreyer NO & others* [1998] 10 BLLR 1062 (LC).
[76] s 97(2) & (3).
[77] *SA Transport & Allied Workers Union v Garvis* (2012) 33 *ILJ* 1593 (CC*), Food & Allied Workers Union v Ngcobo* (2013) 34 *ILJ* 1383 (SCA)*, Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC), *Manguang Local Municipality v SA Municipality Workers Union* (2003) 24 *ILJ* 405 (LC), *NUM v Libanon Gold Mining Co* (1988) 9 *ILJ* 832 (IC), *SAWU v Cape Lime* (1988) 9 *ILJ* 441 (IC), *Lomati Mill Baberton (A Division of Sapp Timber Industries) v Paper Printing Wood & Allied Workes Union* (1997) 18 *ILJ* 178 (LC).
[78] *Adcock Ingram Critical Care v CCMA & others* [2001] 9 BLLR 979 (LAC) at 15.

the furtherance of a union's functions. Therefore, the LRA prescribes further mechanisms for the acquisition of trade union rights.

Organisational rights can also be acquired through the conclusion of a collective agreement which would encompass the organisational rights permitted to a union as well as the limitations and exercise of such rights.[79] The acquisition of organisational rights is imperative as it allows an employer to recognise and acknowledge the union as a bargaining agent during wage negotiations.[80] Minority unions who do not have sufficient representivity of the workforce are not recognised by the employer as bargaining agents during negotiations,[81] as was illustrated in *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another*.[82] In *Bader Bop supra* the General Industrial Workers Union of SA represented the majority of employees employed by Bader Bop.[83] Thus, the union was entitled to all the rights accrued to a majority union in terms of part A, chapter III of the LRA. The National Union of Metalworkers of South Africa (NUMSA) who only represented 26% of Bader Bop's workforce approached Bader Bop in an attempt to persuade it to entitle the union with organisational rights.[84] The employer was only willing to afford NUMSA access to the business premises in terms of s 12 of the LRA and stop order facilities in terms of s 13 of the LRA. However, Bader Bop was unwilling to recognise NUMSA as a bargaining agent and therefore the representatives of NUMSA could not bargain with the employer on behalf of its members.[85] The dispute pertaining to organisational rights was referred to the CCMA for conciliation; however, the issue was not resolved. NUMSA then

---

[79] D Bosch, E Molahlehi & W Everett *The Conciliation and Arbitration Handbook: A Comprehensive Guide to Labour Dispute Resolution Procedure* (2004) 126, *Transnet Soc Ltd v National Transport Movement* [2014] 1 BLLR 98 (LC), *Bravo Group Sleep Products (Pty) Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union* (2009) 30 *ILJ* 1090 (LC), *Fakude v Kwikot (Pty) Ltd* (2013) 34 *ILJ* 2024 (LC), *Mzeku v Volkswagen SA (Pty) Ltd* [2001] 8 BLLR 857, *Aunde South Africa (Pty) Ltd v NUMSA* [201]1 10 BLLR 945 (LAC).

[80] *Independent Municipal and Allied Trade Union and others v Rustenburg Transitional Council* (2000) vol *ILJ* 377 (LC), *Wilson v UK* [2002] 35 EHRR 523, *Keshwar v SANCA* (1991) 12 *ILJ* 816, *National Police Services Union & others v National Negotiating Forum & others* (1999) 20 *ILJ* 1081 (LC)

[81] *South African Post Office Ltd v Commissioner Nowosenetz* [2013] 2 BLLR 216 (LC), *Chamber of Mines of SA v Association of Mineworkers & Construction Union* (2014) 35 *ILJ* 1243 (LC), *Kem-Lin Fashions CC v Brunton* (2001) 22 *ILJ* 109 (LAC), *Glass, Cement and Soil Industries Workers' Union* Case No. 2303 (Turley) (2003), *United Association of SA v BHP Billiton Energy Coal SA Ltd* (2013) 34 *ILJ* 2118 (LC), *POPCRU v LEDWABA* [2013] 11 BLLR 1137 (LC), *Mutual & Federal Insurance Co Ltd v Banking Insurance Finance & Assurance Workers Union* (1996) 17 *ILJ* 241 (AD).

[82] *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* 2003 (3) SA 513 (CC), (2003) 24 *ILJ* 305 (CC).

[83] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 306D-E.

[84] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82at 306G.

[85] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 306H.

informed the employer that it intended embarking on a strike in accordance to chapter IV of the LRA. The employer contended that the union was not able to strike over organisational rights and thus approached the LC where the court ruled that the employees were entitled to strike over organisational rights.[86] On appeal at the LAC, the court overruled the decision of the LC and interdicted the strike. The union then approached the Constitutional Court (CC) on the basis that the provisions of the LRA infringed on their constitutional right to engage in strike action.[87]

O'Regan J who represented the majority decision of which Chaskalson CJ, Langa DCJ, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Sachs J and Yacoob J concurred in the judgment of O'Regan J. The CC analysed the applicant's argument in light of the purpose of the LRA as enshrined in s 1 of the LRA.[88] Firstly, the LRA is required to give effect to the rights enshrined in the Constitution. Secondly, it has to give effect to the international conventions endorsed by the International Labour Organization. Thirdly, the LRA is required to enforce a framework for the resolution of disputes through the mechanism of collective bargaining. Fourthly, the LRA seeks to instill the concept of orderly collective bargaining which includes the participation of employees in working together with the employer to resolve disputes.[89] O'Regan J stated that in interpreting the Bill of Rights the court is required to consider international law and foreign law as well as promote values that are based on human dignity.[90]

The CC firstly considered that the international conventions adopted by the ILO[91] were pertinent to the issue before the court. O'Regan J averred that Article 2 of the Convention 87 of 1948 provides that both workers and employers are entitled to establish and join organisations without any authorisation or distinction on any terms.[92] The Committee of Experts on the Application of Conventions and Recommendations and the Freedom of Association Committee of the Governing Body of the ILO have affirmed that Article 2 promotes the significance of the fundamental right of freedom of association afforded to all workers and their employers to join

---

[86] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 306H-I.
[87] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 306J.
[88] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 307A.
[89] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 307G-H.
[90] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 307I.
[91] Freedom of Association and Protection of the Right to Organize Convention 87 of 1948 (hereinafter referred to as the Convention 87 of 1948) and the Right to Organize and Collective Bargaining Convention 98 of 1949 (hereinafter referred to as the Convention 98 of 1949).
[92] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 308A.

and participate in any organisation of their choice.[93] The CC considered that if there is a broader interpretation of the LRA that would not limit fundamental rights then that interpretation should be followed. The LRA in terms of part A of chapter III evidently entrenches organisational rights on unions who are either sufficiently representative[94] or majority unions.[95] These rights are enforceable through mechanisms provided for through conciliation which is then followed by arbitration. There are two options available to employees and employers if conciliation is unsuccessful, either arbitration or industrial action.[96] O'Regan J stated that the LRA does not include any provision which seeks to exclude unions who do not meet the threshold requirements to receive organisational rights from utilising mechanisms such as collective bargaining and strike action to pressurise the employer to afford the union organisational rights.[97] Organisational rights which pertain to the recognition of shop stewards, stop-order facilities and access to the workplace are 'matters of mutual interest' to both employees and the employers and as such are capable of forming the issue in dispute for purposes of collective bargaining and industrial action.[98]

Furthermore, O'Regan J elucidated that s 20 of the LRA provided that there was nothing in Part A which prevents parties from concluding collective agreements that would regulate organisational rights. The CC went on to further affirm that the intention of international bodies was that minority unions should be provided the equivalent rights of majority unions.[99] The conclusion of collective agreements has been further endorsed in subsequent cases.[100] The CC thus upheld the appeal by affording minority unions the right to strike to obtain organisational rights.[101]

Another mechanism for acquiring organisational rights is where the given employer and the union is party to a bargaining or statutory council. The acquisition of organisational rights through this mechanism takes precedence over a collective agreement which may be concluded

---

[93] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 308B.
[94] The LRA; ss 12, 13 & 15.
[95] The LRA; ss 14 & 16.
[96] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 308G.
[97] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 308H.
[98] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 308I.
[99] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 309A.
[100] *UASA- The Union v BHP Billiton Energy Coal: South Africa* (JS 1082/09) [2012] ZALCJHB 97, [2013] 1 BLLR 82 (LC), *United Association of South Africa- The Union v Impala Platinum Ltd* (Case no: JS 1082/09), unreported.
[101] *National Union of Metalworkers of SA & others v Bader Bop supra* note 82 at 309G.

between the employer and union that would give the union complete exclusivity. These rights basically provide an automatic access to workplaces as well as the right to stop orders within the registered sphere of the given council, regardless of whether such a union is representative within the workplace.[102] A union's representivity within the workplace is pertinent as the endorsement of union rights is enshrined according to a union's representivity in the given workplace.[103]

The term 'workplace' is significant in that union officials are entitled to enter the workplace when it is reasonable to do so in order to recruit members and fulfill their obligations.[104] The attainment of organisational rights for all trade unions is fundamental to the concept of collective bargaining as it is through the process of collective bargaining that unions engage in negotiations regarding issues pertaining to the employment relationship.[105]

4.3.2. THE RIGHT TO COLLECTIVE BARGAINING

In order to acknowledge the purpose and aims of collective bargaining, it is firstly imperative to understand the nature of collective bargaining. Collective bargaining can be described as "the joint determination by employees and employers of the problem of the employment relationship".[106] There are also other definitions which broaden our understanding of the term.[107]

There are three significant characteristics that can be extracted from these definitions. Firstly, collective bargaining involves the collaboration of trade unions and an employer or his association. The term 'collective' in itself signifies that bargaining cannot be achieved

---

[102] H Landis & L Grosset *Employment and the Law: A Practical Guide for the Workplace* (2003) 291.
[103] ch 3.
[104] s 12.The term workplace is defined according to the LRA in s 12 as: "the place or places where employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organization, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation".
[105] C Tshoose 'Determining the threshold for organizational rights: The legal quagmire facing minority unions resolved- *South African Post Office v Commissioner Nowosenetz No* [2013] 2 BLLR 216 (LC)' (2013) 34(3) *Obiter* 600.
[106] T J Benjamin & W Fred *Labour Relations Law* 2nd ed (1975) 3.
[107] The Wiehahn Commission Report Part v par 2.6.2. has described collective bargaining as "a process of decision-making between employers and trade unions with the purpose of aiming at an agreed set of rules governing the substantive and procedural terms of the relationship between them and all aspects of issues arising out of the employment situation." Collective bargaining has also been described as "all negotiations which takes place between an employer, a group of employers or one and more employers organization, on the one hand, and one or more workers' organizations, on the other, for: a) determining working conditions and terms of employment: and /or b) regulating relations between employers and workers…" Article 2 of the ILO Collective Bargaining Convention No 154.

unilaterally but that parties must voluntarily come together.[108] Secondly, collective bargaining refers to a process of negotiations.[109] This is an essential point as the essence of collective bargaining is defined by its attempt to resolve issues through discussion, dialogue and compromise[110] rather than resorting to a more militant approach through strikes and lock-outs. Thirdly, an agreement must be reached pertaining to the terms and conditions of the employment relationship. At the end of successful collective bargaining, parties must conclude a collective agreement that will become binding on the parties within the employment relationship. Collective bargaining is dependent on the cooperation, trust, mutual aspirations and the willingness to compromise within the employer-employee relationship.[111] This point is further illustrated in *Macsteel (Pty) Ltd v NUMSA,*[112] where the court stated that:

> "the LRA creates machinery which makes collective bargaining not only possible but compulsory. Its aim is to avoid if possible industrial strife and to maintain peace. Its operation is such that, if parties negotiate genuinely and in good faith, and their demands and offers are reasonable, settlement will be reached before disruption takes place…".[113]

Therefore, it is submitted that the function of collective bargaining is to ensure that parties come to an understanding about the issue and that the dispute will not necessitate industrial action or lock-outs to reach a resolution. This would benefit both the employer and the employee in that the employer would save on production time lost and the employee would not forfeit the right to be paid. Collective bargaining has many objectives; however, the main objective is the conclusion of collective agreements pertaining to conditions of employment as well as matters relating to the mutual interest of both an employer and an employee.[114]

A collective agreement can be defined as a written agreement that is concluded by a trade union and the employer or his/her representative which would stipulate the conceded conditions of

---

[108] *UAMAWU v Fodens (SA) (Pty) Ltd* (1983) vol *ILJ* 212 (IC); *East Rand Gold and Uranium Co Ltd v NUM* (1989) vol *ILJ* 683 (LAC), *SA Municipal Workers Union v SA Local Government Association* (2010) 31 *ILJ* 2178 (LC), *SA National Defence Union v Minister of Defence* (2006) 27 *ILJ* 2276 (SCA), *National Union of Mineworkers v Eskom Holdings Soc Ltd* (2012) 33 *ILJ* 669 (LC), *NUM v East Rand Gold and Uranium Co Ltd* (1991) vol *ILJ* 221 (A).

[109] *ECCAWUSA & others v Southern Sun Hotels (Pty) Ltd* (2000) 21 *ILJ* 1090 (LC).

[110] *Metal & Allied Workers Union v Hart Ltd* (1985) 6 *ILJ* 478 (IC).

[111] D Bolton, J J Bagram, L Witten, Y Mohamed, Z Zvobgo & M Khan 'Explaining union participation: The effects of union commitment and demographic factors' (2007) 31(1) *SA Journal of Industrial Psychology* 74.

[112] *Macsteel (Pty) Ltd v NUMSA* (1990) 11 *ILJ* 995 (LAC).

[113] *Macsteel (Pty) Ltd v NUMSA supra* note 112 at 1006B·E.

[114] M Seweryński, 'Representation of employees in collective bargaining within the firm'(2007) 11(3) *Electronic Journal of Comparative Law* available at http://www.ejcl.org/113/article113-2.pdf, accessed on 15 September 2015.

employment or other matters pertaining to the mutual interest of employees and employers.[115] The LRA provides that collective agreements are regarded as a contract between the parties and that the general nature of a contract should apply by binding the parties to the collective agreement.[116] The LRA stipulates that a collective agreement may vary any employment contract concluded by an employer and his employee. The effect would be binding on both parties.[117] Furthermore, the LRA allows the terms of a collective agreement to override its general provisions. Collective agreements may even limit rights enshrined in the constitution, such as the right to strike.[118] However, such a collective agreement must not be contrary to the interests of society.

This point was reiterated in *Mthimkhulu v CCMA & another*[119] where the court stated that it will uphold "the products of collective bargaining save for the instance where the collective bargaining agreement itself is *contra boni mores* and therefore void on that basis".[120] This case elucidates that the contents of collective agreements are given a wide range of power to regulate the employment relationship with merely one exception. Even though the Labour Court (LC) would be willing to uphold a collective agreement, it does not intervene if there is a dispute regarding its contents. This was evident in *NPSU & others v The National Negotiating Forum & others*,[121] where the court refused to make a decision regarding whether a particular trade union had recognition as the matter pertained to the interpretation of the provisions of the collective agreement and had to be decided through conciliation and arbitration proceedings.[122]

These have been pertinent improvements to the conventional process of collective bargaining as employees have made significant progress by extending their power over the substance of policies which relate to them.[123] The LRA provides for three aspects of the right to collective bargaining. Firstly, it promotes the freedom to engage in collective bargaining by establishing

---

[115] s 213.
[116] s 23.
[117] s 23(3).
[118] s 64(1)(*a*) provides that where a collective agreement that parties may not engage in strike action over a specific dispute, then strike action in such an instance will be unlawful.
[119] *Mthimkhulu v Commission for Conciliation, Mediation & Arbitration & another* (1999) 20 *ILJ* 620 (LC).
[120] *Mthimkhulu v Commission for Conciliation, Mediation & Arbitration supra* note 119 at 27.
[121] *NPSU & others v The National Negotiating Forum & others* [1999] 4 BLLR 361 (LC).
[122] *NPSU & others supra* note 121 at 55, see also *ECCAWUSA & others v Southern Sun Hotels (Pty) Ltd supra.*
[123] G Adler 'Engaging the state and capital: Labour and the deepening of democracy in South Africa' (1998) 2 *LDD* 2.

institutions for voluntary collective bargaining within sector level and the conclusion of collective agreements. Secondly, the LRA ensures that parties have the right to utilise "collective economic power" such as strikes and lock-outs. Thirdly, there is a positive right within the public sector placed on parties to engage in collective bargaining. However, it does not impose a positive duty within the private sector.[124] These elements will be discussed in more detail within dispute resolution.

4.4. THE FRAMEWORK FOR THE RESOLUTION OF INTEREST DISPUTES

The dispute resolution framework is essential to the right to strike as it is this framework which seeks to remedy conflict before employees engage in strike action. The LRA has established avenues for dispute resolution that are speedy and easily available in keeping with its primary objective which is to resolve conflict.[125] However, more significantly is that employees are compelled to engage in a conciliatory phase which is a precondition for a protected strike as enshrined in s 64(1) of the LRA.[126] In light of the topic of this dissertation, the mechanisms for dispute resolution will only be analysed in terms of interest disputes.

As discussed in Chapter Two, the old LRA did not expressly provide clarity on disputes of right and disputes of interest which resulted in many inconsistencies on whether the matter had to be referred for negotiation or whether the matter had to be decided by a court. The LRA which regulates the present dispute resolution has resolved this issue by expressly stating those disputes which should be referred to the CCMA for arbitration and to the LC for resolution.[127] This is highly pertinent as employees may only lawfully strike over disputes of interest.[128] This was further endorsed in *MITUSA v Transnet (Pty) Ltd*,[129] where the court stated that the dispute resolution system distinguishes between rights which are resolved through arbitration and those which must be resolved through a display of power.[130]

---

[124] H Cheadle 'Collective bargaining and the LRA' (2005) 9(2) *LDD* 148.
[125] S Vettori 'Enforcment of labour arbitration awards in South Africa' (2013) 25 *SA Merc LJ* 245.
[126] A Van Heerden 'Protected strikes-getting the balance right: labour law' (2011) 11(9) *Without Prejudice* 66.
[127] s 65 (1).
[128] J V Spielmans 'Labour disputes on rights and on interests' (1939) 29(2) *The American Economic Review* 301.
[129] *MITUSA v Transnet (Pty) Ltd* (2009) 23 *ILJ* 2213 (LAC).
[130] *MITUSA v Transnet (Pty) Ltd supra* note 129 at 106.

The distinction of disputes is pertinent as there are different mechanisms for resolving rights and interest disputes.[131] The LRA prescribes two categories of disputes which may be referred to the CCMA for arbitration, namely: disputes which relate to the terms of the LRA such as those pertaining to the actual provisions of the LRA which are referred to as rights disputes[132] and disputes which relate to matters of mutual interest which are referred to as interest disputes.[133] If employees merely want to approach the CCMA for a demand on an increase in wages, they will be instructed that the correct procedure would be to engage in collective bargaining and industrial action.[134] Similarly, if a dispute pertains to a rights dispute, such a dispute has to be referred to the CCMA for arbitration to be resolved.[135] It is therefore imperative that there is a distinction made between rights and interest disputes as it determines which resolution technique to adopt.[136]

Disputes of interest essentially pertain to the enactment or alteration of a new set of rules,[137] whereas, disputes of rights pertain to the way in which existing rules and norms are interpreted and applied.[138] In all disputes, regardless of their nature, parties are required to engage in conciliation before the matter can be referred for arbitration or the process of adjudication.[139] It must be noted that legislation does not impose a mandatory duty to bargain.[140] Therefore, in such cases, conciliation would be the first point of dispute resolution for interest disputes.[141]

Such a referral is made to the bargaining council within that given sector or if one does not exist, the dispute is referred to the CCMA.[142] If a matter is categorised as a dispute of interest and is not resolved within the 30 day time frame stipulated by the LRA, then parties are entitled to

---

[131] O V C Okene & C T Emejuru 'The disputes of rights versus disputes of interests' dichotomy in labour law: The case of Nigerian labour law' (2015) 35 *Journal of Law, Policy and Globalization* 136.
[132] s 133(1)(*b*), *Sithole v Nogwaza NO* (1999) 20 *ILJ* 2710 (LC), *Gauteng Provinisale Administrasie v Scheepers* (2000) 21 *ILJ* 1304 (LAC), *SA Democratic Teachers Union v Minister of Education* (2001) 22 *ILJ* 2325 (LC).
[133] s 133(1)(*a*).
[134] J Grogan *Dismissal, Discrimination and Unfair Labour Practices* 2nded (2007) 12.
[135] *BHT Water Treatment (a division of Afchem) (Pty) Ltd incorporating PWTSA v CCMA & others* [2002] 2 BLLR 173 (LC), *University of the Witswatersrand Johannesburg v Commissioner Hutchinson* (2001) 22 *ILJ* 2496 (LC).
[136] *Sapeko Tea Estates (Pty) Ltd v Maake & others* [2002] 10 BLLR 1004 (LC).
[137] *HOSPERSA v Northern Cape Provincial Administration* (2000) 21 *ILJ* 1066 (LAC).
[138] T Hanami & R Blanpain *Industrial Conflict Resolution in Market Economics: A Study of Australia, The Federal Republic of Germany, Italy, Japan and the USA* 2nded (1989) 8.
[139] H Bhorat, K Pauw & L Mncube 'Understanding the efficiency and effectiveness of dispute resolution' 2007 *DPRU* 4.
[140] M S Anstey, J Grogan & T Nycukaitobi *Collective Bargaining in the Workplace* (2011) 51.
[141] J T Gibson *South African Mercantile & Company Law* (2003) 664.
[142] C G Van Der Merwe & J E Du Plessis *Introduction to the Law of South Africa* (2004) 427.

engage in industrial action or lock-out.[143] There are specific interest disputes which have to be referred to for arbitration if conciliation fails as industrial action cannot be an option because it would be detrimental to the health and safety of the country.[144] Additionally, there are disputes such as rights disputes which must be referred to the CCMA for arbitration such as dismissals and then there are other disputes which cannot be solved through arbitration but must be referred to the LC for adjudication.[145]

4.5. THE ENTRENCHMENT AND REGULATION OF THE RIGHT TO STRIKE

Industrial action is protected by both the Constitution[146] and the LRA. However, this protection is not absolute, but rather the LRA places a number of conditions on its protection.[147] The entrenchment and regulation of industrial action which is specified by the LRA is enforced to give effect to the spirit of the Constitution.[148] The significance of the entrenchment of the right to strike within the Constitution was emphasised in *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA*.[149] The CC was called upon to consider whether the proposed amendments to the new constitution complied with the constitutional principles enshrined in the interim constitution.[150] There were essentially two objections. The first objection was that the inclusion of the right to strike within the new constitution and the exclusion of an employer's right to lock-out was in violation of the constitutional principles II and XXVIII. The second objection raised was that the proposed provision failed to identify and protect an employer's right to participate in collective bargaining in terms of the constitutional principle XXVIII.[151] However, for purposes of illustrating only the

---

[143] A Steenkamp & C Bosch 'Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential' (2012) *Acta Juridica: Reinventing labour law: reflecting on the first 15 years of the Labour Relations Act and future challenges* 122.
[144] International Labour Office *Grievance arbitration: A practical guide* (1977) 5.
[145] J V Du Plessis, M A Fouche & M W van Wyk *A Practical Guide to Labour Law* (2001) 323.
[146] The Constitution; s 23.
[147] DLA Cliffe Dekker Hofmeyer *From recognition to strike: An overview of collective labour law* 8.
[148] 'The right to strike: government perspective' (2010) 35(11) *IMIESA* 9.
[149] *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA*, 1996 (4) SA 744 (CC), (1996) 17 ILJ 821 (CC), *R v Smit* 1995 1 SA 239 (K), *Raad van Mynvakbondde v Die Kamer van Mynwese* (1984) 5 ILJ 344 (IC).
[150] *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA supra* note 149 at 822A.
[151] *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA supra* note 149 at 839H-840A.

superiority of the entrenchment of the right to strike, the discussion will only focus on the first objection.

In terms of the first objection, it was argued that effective collective bargaining necessitates that parties utilise economic power to counter each other. This economic power usually takes the form of lock outs and strikes. Therefore, the right to lock out should be recognised in exactly the same way that the right to strike is recognised and protected.[152] This argument is based on the standard of equality that the right to strike is the equivalent to the right to lock. Thus, both the right to strike and the right to lock out should be included in the new constitution.[153] In response to the first objection, Chaskalson J held that this objection cannot be accepted. The CC arrived at this decision by considering that collective bargaining is founded upon the acknowledgment that employers have always possessed superior social and economic power over their workers.[154] Collective bargaining is enforced to counteract the unequal power that has existed between employer and employee.[155] The unequal power apportioned to employers and employees was highlighted in *Bader Bop supra* where O'Regan J emphasised that the right to strike is a critical mechanism that allows employees to declare their bargaining power within employment relationship.[156] Furthermore, the right to strike is essential in furthering the dignity of employees as it allows workers to assert their demands and not to be intimidated into unilateral conditions of employment that are implemented by the employer.[157] Workers are compelled to work together in order to exert their power in the form of strikes which is an employee's only weapon against the employer. However, employers implement their power through an array of weapons such as dismissal, the replacement of current labour with substituted labour, and the unilateral introduction of new working conditions and terms as well as the right to lock out.[158] The significance of the right to strike as a fundamental right for employees has therefore resulted in the right being more commonly enshrined within constitutions of various countries than the right

---

[152] *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA supra* note 149 at 840C-D.
[153] *Chairperson of the Constitutional Assembly, ex parte supra* note 149 at 840G-841A.
[154] *Chairperson of the Constitutional Assembly, ex parte supra* note 149 at 841A.
[155] *FAWU v Spekenham Supreme* (1988) 9 *ILJ* 628 (IC), *R v Smit* 1995 (1) SA 239 (K), *Raad van Mynvakbonde v Die Kamer van Mynwase* (1984) 5 *ILJ* 344 (IC), 'Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations' Report 111 (4B), *International Labour Conference 69 Session, Geneva* (1983) para 200.
[156] *National Union of Metalworkers of SA & others v Bader Bop supra* note 78 at 307B.
[157] *National Union of Metalworkers of SA & others v Bader Bop supra* note 78 at 307C.
[158] *Chairperson of the Constitutional Assembly, ex parte supra* note 149 at 841A-C.

to lock out. Thus, Chaskalson J concluded that the right to strike and the right to lock out are not always equivalent in importance.[159]

The second objection was that the explicit inclusion of the right to strike without the explicit inclusion to the right to lock out diminishes an employer's right to collective bargaining and affords less significance to the rights of employers than that which is afforded to employees.[160] In light of the second argument, Chaskalson P enquired into the requirements of constitutional principle XXVIII. The CC stated that in terms of this principle there was no request that the proposed text include an express reference to the economic power available to either workers or employers.[161] The court further elaborated that when the right to collective bargaining is recognised there is an implied inference to the right to utilise economic power against the parties involved in collective bargaining.[162] Furthermore, the inclusion of the right to engage in strikes does not weaken an employer's right to participate in collective bargaining and neither does it diminish an employer's right to effect lock out against employees.[163]

The third objection was that by including the right to strike within the Constitution infers that legislation such as the LRA which protect lock outs would be unconstitutional and would consequently be in violation of constitutional principle XXVIII.[164] Chaskalson J held that this objection was unfounded as the effect of the entrenchment of the right to lock out within the LRA is merely to ensure that the right to lock out is regulated in accordance with constitutional principles.[165] Furthermore, the CC stated that the progression of the LRA will arise through the expertise of the labour courts and labour legislation. The LRA and its provisions will always be under constitutional inspection so that the rights of both employers and employees are always upheld.[166] Furthermore, in light of the third objection, it was argued that the failure to expressly endorse the right to lock out in the new constitution is not in accordance with constitutional principle II which requires that the new constitution entrenches and protects "all universally

[159] *Chairperson of the Constitutional Assembly, ex parte supra* note 149 at 841C.
[160] *Chairperson of the Constitutional Assembly, ex parte supra* note 149 at 840C-D.
[161] *Chairperson of the Constitutional Assembly, ex parte supra* note 149 at 840C-D.
[162] *Chairperson of the Constitutional Assembly, ex parte supra* note 149 at 840D-E.
[163] *Chairperson of the Constitutional Assembly, ex parte supra* note 149 at 840F.
[164] *Chairperson of the Constitutional Assembly, ex parte supra* note 149 at 841E.
[165] *Chairperson of the Constitutional Assembly, ex parte supra* note 149 at 841E-F.
[166] *Chairperson of the Constitutional Assembly, ex parte supra* note 149 at 841G.

accepted fundamental rights, freedoms and civil liberties".[167] Chaskalson J responded to this objection by stating that the right to lock out has not been accepted as a universally fundamental right as none of the main international conventions entrenches the right to lock out. Only a few countries have acknowledged the right to lock out within their constitutions. Thus, the CC concluded that the exclusion of the right to lock out is not in violation of constitutional principle II.[168]

The purpose of a strike in its most simple description is to coerce the employer to do or not to do something.[169] However, the implementation of strike action is not as simple, as this action sometimes has devastating consequences that affect the economy and society, thus the regulation of strikes is paramount to guard against abuse.[170] However, it is the devastating consequences that often compel the employer to accede to the demands made by workers.[171] Therefore, it is firstly imperative to understand what a strike is in order to identify those actions of employees that are protected by the LRA.[172]

There are certain characteristics that can be extracted from the definition of a strike and if such characteristics are not present then such a strike would not be afforded protection. Consequently, the definition of a strike seeks to emphasise that there is a difference between lawful and unlawful strikes.[173] There are three essential elements which constitute a strike as stated in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd.*[174] In *Plascon supra*, the court stated that the first requirement is that there must be a refusal to perform work, secondly, the refusal must be undertaken by employees[175] and lastly, such refusal of work must

---

[167] *Chairperson of the Constitutional Assembly, ex parte supra* note 149 at 841H.
[168] *Chairperson of the Constitutional Assembly, ex parte SA supra* note 149 at 841H-842A.
[169] *Food & General Workers' Union & others v Minister of Safety & Security & others* (1999) 20 *ILJ* 1258 (LC) at 15.
[170] G P Thomas *Government and the Economy Today* (1992) 248, T K Rabb & R I Rotberg *Industrialization and Urbanization: Studies in Interdisciplinary History* (1981) 138, F Paukert & D Robinson *Incomes Policies in the Wider Context: Wage, Price and Fiscal Initiatives in Developing Countries* (1992) 159.
[171] *Stuttafords v SACTWU* [2001] 1 BLLR 47 (LAC).
[172] s 213 defines a strike as "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 purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory".
[173] *SA Chemical Workers Union and others v Sentrachem Ltd* (1998) 9 *ILJ* 410 (IC).
[174] *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 *ILJ* 321 (LAC).
[175] *Khosa and Others v Minister of Social Development and Others* 1999 (6) BCLR 615 (CC), *FGWU v The Minister of Safety & Security* [1999] 4 BLLR 332 LC.

be purposed to resolve a matter of mutual interest as stated by the LRA.[176] In regard to the first element, the refusal to perform work can be carried out partially or completely.[177]

In *Steel Mining & Commercial Workers Union & others v Brano Industries (Pty) Ltd*,[178] the court held that the employees' refusal to work amounted to a strike. This decision was held even though the employees alleged that they had not engaged in a strike but rather a meeting over the dismissal of the shop steward where at such meeting employees demanded that disciplinary proceedings be suspended.[179] The court illustrated that the partial refusal to work even though not for a lengthy period can amount to a strike. Furthermore, the LRA provides that an act can constitute a strike even if there is a retardation[180] or obstruction of work.

In *SA Breweries Ltd v Food & Allied Workers Union & others,*[181] the court held that the term 'work' has to be given a narrow interpretation to define only those actions which the employee is obliged to perform in terms of the employment contract.[182] The court mentioned three significant constituents of a protected strike. Firstly, there must be a failure, retardation or the obstruction of work. Secondly, the action must be undertaken as a collective[183] and thirdly, the action must be initiated to compel the employer to submit to the demands of the employees.[184]

The third requirement is that the strike must be initiated to resolve a dispute concerning a matter of mutual interest.[185] The first aspect of this requirement pertains to the dispute over which the strike is initiated. The LC and the LAC have on numerous occasions verified that there has to be an actual dispute over which the employees are engaged in strike action.[186] The judiciary is required to investigate the true nature of the dispute and not merely the way in which the dispute is presented.[187] In *SA Scooter & Transport Allied Workers Union & others v Karras t/a*

---

[176] *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd supra* note 174 at 22.
[177] *Floraline v SASTAWU* [1997] 9 BLLR 1223 (LC).
[178] *Steel Mining & Commercial Workers Union & others v Brano Industries (Pty) Ltd* (2000) 21 *ILJ* 666 (LC).
[179] *Steel Mining & Commercial Workers Union & others v Brano Industries (Pty) Ltd supra* note 178 at 668B-D.
[180] *Simba (Pty) Ltd v Food & Allied Workers Union & others* (1998) 19 *ILJ* 1593 (LC).
[181] *SA Breweries Ltd v Food* (1989) 10 *ILJ* 844 (A).
[182] *SA Breweries Ltd v Food supra* note 181 at 844J.
[183] *Schoeman v Samsung Electronics (Pty) Ltd* [1997]10 BLLR 1364 (LC), *NUM v CCMA* (2011) 32 *ILJ* 2104 (LAC).
[184] *SA Breweries Ltd v Food & Allied Workers Union & others supra* note 181 at 846B-G.
[185] *National Union of Metalworkers of SA v Hendor Mining Supplies* (2007) 28 *ILJ* 1278 (LC).
[186] *FAWU v Rainbow Chicken Farms* [2000] 1BLLR 70 (LC), *SATAWU v Coin Reaction* (2005) 26 *ILJ* 150 (LC).
[187] *Coin Security Group (Pty) Ltd v Adams* [2000] 4 BLLR 371 (LAC).

Floraline,[188] the court held that the employees had engaged in an illegal strike as there was no actual dispute over which the employees had left the employers' business premises and continued to stay away from work based on an alleged threat by the employer.[189] Thus, the mere stoppage of work without a 'purpose' does not render the employees' actions as a strike.[190] In addition to the employees' collective refusal to continue work, they are also required to assert a demand and it must be made known that the refusal to continue work will persist until that demand is met by the employer.[191] The cessation of work must be to induce the employer to accede to the demands of the employees.[192] In regard to the term 'dispute' there has been further clarity pertaining to strikes. In *TSI Holdings (Pty) Ltd v National Union of Metalworkers of SA & others*,[193] the court mentioned that there are three categories of strikes namely strikes over which employees have a demand, strikes that have a grievance with an absence of a demand and strikes which revolve around a dispute.[194]

The mere collective refusal to work without asserting an actual demand cannot constitute a strike. In *Simba (Pty) Ltd v Food & Allied Workers Union & others*[195] the issue centered on a change in staggered tea-breaks. The applicants alleged that this would not have been implemented without properly consulting the employees. The employees then engaged in a strike.[196] In arriving at its decision, the court considered the definition of a strike under the LRA.

---

[188] *SA Scooter & Transport Allied Workers Union & others v Karras t/a Floraline* (1999) 20 *ILJ* 2437 (LC), see also *Samancor Ltd v National Union of Metalworkers of SA & others* (2000) 21 *ILJ* 2305 (LC), *Pick n Pay (Pty) Ltd v SA Commercial Catering & Allied Workers Union & others* (1998) 19 *ILJ* 1546 (LC).

[189] *SA Scooter & Transport Allied Workers Union supra* note 188 at 2448E-F, *Rand Tyres & Accessories v Industrial Council for the Motor Industry* 1941 TPD 108, *East London (Pty) Ltd v National Union of Metalworkers of SA and others* (2007) 28 *ILJ* 642 (LC).

[190] *De Beer v Walker* 1948 (1) SA 340 (T).

[191] *Media Workers Association of SA & others v The Argus Printing & Publishing Co Ltd* (1984) 5 *ILJ* 16 (IC), *Paper Wood & Allied Workers Union v Uniply (Pty) Ltd* (1985) 6 *ILJ* 255 (IC). *Media Workers Association of SA, The & others v Facts Investors Guide (Pty) Ltd & another* (1986) 7 *ILJ* 313 (IC), *R v Mtiyana* 1952 (4) SA 103 (N), *NUM v CCMA* (2011) 32 *ILJ* 2104 (LAC).

[192] *Ngewu, Masondo v Union Cooperative Bark and Sugar Co Ltd* 1982 (4) SA 390 (N), *R v Canqan & others* 1956 (3) SA 366 (E).

[193] *TSI Holdings (Pty) Ltd v National Union of Metalworkers of SA & others* (2006) 27 *ILJ* 1483 (LAC).

[194] *TSI Holdings (Pty) Ltd v National Union of Metalworkers of SA & others supra* note 193 at 27, *National Union of Metalworkers on behalf of Employees v Commission for Conciliation, Mediation & Arbitration* (2011) 32 *ILJ* 2104 (LAC).

[195] *Simba (Pty) Ltd v Food & Allied Workers Union & others* (1998) 19 *ILJ* 1593 (LC).

[196] *Simba (Pty) Ltd supra* note 195 at 1595A-G.

It was noted that even though the actual definition in s 213 does not mention 'issue in dispute', this term can be read into the definition by referring to s 64(1) of the LRA.[197]

The court highlighted that this was necessary to prevent any confusion and problems which were encountered under the old Labour Relations Act of 1956 where employees as a collective would engage in a refusal to work without actually asserting the demand that initiated such refusal.[198] It is for this reason that 'issue in dispute' should refer to a demand, grievance or a dispute that would establish the basis for a protected strike.[199] The court held that the employees *in casu* failed to use their refusal to work as a method of compellation. The employees were merely exercising their collective right not to work. The situation would have been different if the employees refused to work the staggered breaks until there was a grievance resolved.[200]

There was no actual demand, grievance or dispute which the employees were striking over. The employees' refusal to work was held to be a consequence of the implementation of the staggered breaks, however, it was not regarded as the initiator of the refusal to work.[201] It can be concluded from this case that the court was interested in very specifically, whether there was an articulated demand, grievance or dispute that initiates the strike. It is quite evident from the facts of a case whether this is indeed present, as if this was so then the employees *in casu* would have resumed work once the dispute over staggered breaks was resolved.

The requirement of the existence of a demand, dispute or grievance as contemplated by s 1 of the LRA was reiterated in *Food & Allied Workers Union & others v Rainbow Chicken Farms*.[202] The employees were employed as butchers at Rainbow Chicken Farms on the basis of their Muslim faith that permitted them to slaughter chickens in terms of Halaal principles. The other employees of Rainbow Chicken Farms were dependent on the work undertaken by the slaughterers and could not perform their tasks without the Muslim employees.[203] All the Muslim butchers refused to work on their Muslim religious holiday, Eid ul Fitr. The collective agreement which regulated the employees' days off stated that they were only entitled to gazetted public

---

[197] *Simba (Pty) Ltd supra* note 195 at 1596D.
[198] *Simba (Pty) Ltd supra* note 195 at 1596F-I.
[199] *Simba (Pty) Ltd supra* note 195 at 1596G-H.
[200] *Simba (Pty) Ltd supra* note 195 at 1597F-G.
[201] *Simba (Pty) Ltd supra* note 195 at 1597H-J.
[202] *Food & Allied Workers Union & others v Rainbow Chicken Farms* (2000) 21 *ILJ* 615 (LC).
[203] *Food & Allied Workers Union & others v Rainbow Chicken Farms supra* note 202 at 615C.

holidays and Eid ul Fitr was not a gazetted public holiday.[204] The employees refused to work on Eid and were thus held liable in breach of the collective agreement by collectively refusing to work. They were given two choices. Firstly, they could be dismissed with leave to appeal the decision. Secondly, they could be given a final warning without leave to appeal the warning. The employees chose to be dismissed. The employees argued that their dismissals were automatically unfair in terms of s 188 and s 187(1)(*f*) of the LRA.[205] Reveals J held that the employees had not been unfairly discriminated against in terms of s 187. However, for purposes of illustrating the requirement of a collective refusal to perform work in pursuit of a demand, the discussion will only focus on the employer's contention that the employees refusal to work amounted to a strike.[206]

The employer argued that the actions of the employees constituted a strike. If this was the case then the strike would have been unprotected and this would have been viewed in a more severe position than mere unauthorised absenteeism.[207] Reveals J considered this argument in light of s 1 of the LRA which endorsed the definition of a strike. The LC placed emphasis on the purpose of a strike which is to remedy a grievance or resolve a dispute.[208] The LC stated that even though the actions of the employees were collective, they did not refuse to continue work to resolve a dispute or grievance. There had been no demand asserted by the employees. The employer was not pressurised to comply with any request declared by the employees.[209] If indeed the actions of the employees amounted to a strike then the employer would have been placed in a situation that if it had agreed to the employees' demands then the employees would have returned to work. The grievance or demand would have disappeared and there would have been no cause for continuation of the strike. However, this was the reality of the situation in *Rainbow Chicken Farms supra.*[210] Reveals J held that the employees merely refused to work on Eid because of their religion. Their actions were the same as the actions of any other employee who would absent themselves from work for any random reason. The fact that the employees had provided

---

[204] *Food & Allied Workers Union & others v Rainbow Chicken Farms supra* note 202 at 615D.
[205] *Food & Allied Workers Union & others v Rainbow Chicken Farms supra* note 202 at 615D-E.
[206] *Food & Allied Workers Union & others v Rainbow Chicken Farms supra* note 202 at 620E.
[207] *Food & Allied Workers Union & others v Rainbow Chicken Farms supra* note 202 at 621A-B.
[208] *Food & Allied Workers Union & others v Rainbow Chicken Farms supra* note 202 at 621C, *SA Security Employers Association v TGWU & others* (2) [1998] 4 BLLR 436 (LC), *Flora Line v SASTAWU* [1997] 9 BLLR 1223 (LC).
[209] *Food & Allied Workers Union & others v Rainbow Chicken Farms supra* note 202 at 621D.
[210] *Food & Allied Workers Union & others v Rainbow Chicken Farms supra* note 202 at 621E.

notice of their absenteeism made no difference to the situation as a notice of absenteeism could be submitted for other reasons of absenteeism as well.[211] Therefore, Reveals J held that the actions of the employees could not amount to a strike as there the necessary element of a grievance or dispute absent from the employees' refusal to work.[212]

Furthermore, it is required that this demand, dispute or grievance is clearly communicated to the other party as was illustrated in *City of Johannesburg Metropolitan Municipality v SA Municipality Workers Union & others.*[213] The applicants in *City of Johannesburg supra* sought an interdict declaring the strike to be unlawful while awaiting the enquiry of the certificate declaring that the dispute in issue was unresolved after conciliation. The applicants questioned the jurisdiction of the conciliator as well as that the six disputes which were referred for conciliation were not issues which had reached a deadlock as they were merely issues under discussion and was therefore at that stage not capable of being referred for conciliation.[214]

In terms of the facts of this case, the court identified that were three issues which could not be regarded as issues in dispute. The first issue concerned transport of the employees. The court in this instance highlighted that this issue was not even raised in the meeting held with the employer and on that basis could not even be regarded as an issue in dispute. The second issue pertained to parity. The court gave due cognisance to the minutes of the meeting held with the employer which stated that the agreement which was reached in terms of parity was that SAMWU would consult with SALGA regarding its proposals and SAMWU would then report back to the employer.

This would effectively allow the employer to either accept or refuse the demands made by the unions. SAMWU had not complied with this agreement. Hence, parity was held not to be an issue in dispute. The last issue raised was that of casualisation. The court did not consider whether the matter was one that was to be determined by the LC, but rather it studied the minutes of the meeting held with the employer and determined that this was not an issue that arose as a dispute. Therefore, it could not be regarded as a dispute which could have been referred to for

---

[211] *Food & Allied Workers Union & others v Rainbow Chicken Farms supra* note 203 at 621F.
[212] *Food & Allied Workers Union & others v Rainbow Chicken Farms supra* note 203 at 621F.
[213] *City of Johannesburg Metropolitan Municipality v SA Municipality Workers Union & others* (2008) 29 *ILJ* 650 (LC).
[214] *City of Johannesburg Metropolitan Municipality supra* note 213 at 650J-651B.

conciliation as the parties had not reached a stalemate.[215] There is a distinct similarity in the method the court adopted for arriving at its decision. This similarity pertains to the fact that all three issues were not regarded as a demand in the meeting held with the employer. The court elucidates why this is imperative in dispute resolution and in determining whether a strike would be afforded protection under the LRA.

The court *in casu* highlighted that a protected strike can only commence if there is an 'issue in dispute'.[216] It was further stated that it is during negotiations between the employer and the other party that an agreement can be concluded on the dispute in issue. Therefore, a strike cannot take place if the dispute in issue is absent.[217] When parties engage in discussions regarding a dispute, this dispute must be objectively unambiguous so that the other party undoubtedly acknowledges that this is the dispute in contention. In addition to clearly stating what the issue is, the other party is required to provide a solution to the dispute in issue.[218] The mere fact that the other party conveys discontent regarding an issue does not automatically give rise to a dispute.[219]

The court in this regard clearly stipulated that a dispute can only arise if both parties have contradicting opinions and positions regarding a specific factual situation.[220] Essentially, a dispute emerges if one party says yes and the other party says no. There must be an existing contention regarding the viewpoint of a particular issue.[221] The reason that the court viewed that the parties should be clearly made aware of the dispute is that the employer should be given the opportunity to express his viewpoint and deliberate with the other party that would either conclude in an agreement or result in a deadlock.[222]

It is submitted that the decision of the court correctly reflects the intention and objectives of the LRA. The requirement that a dispute be clearly raised during negotiations has two purposes. Firstly, it allows that both parties obtain complete understanding as to what needs to be decided

---

[215] *City of Johannesburg Metropolitan Municipality v SA Municipality Workers Union & others supra* note 213 at 661E-I.
[216] *City of Johannesburg Metropolitan Municipality supra* note 213 at 658C.
[217] *City of Johannesburg Metropolitan Municipality supra* note 213 at 658E.
[218] *City of Johannesburg Metropolitan Municipality supra* note 213 at 658F-G.
[219] *City of Johannesburg Metropolitan Municipality supra* note 213 at 658H.
[220] *City of Johannesburg Metropolitan Municipality supra* note 213 at 658H.
[221] *City of Johannesburg Metropolitan Municipality supra* note 213 at 658A, *SACCAWU v Edgars Stores Ltd & another* (1997) 18 *ILJ* 1064 (LC), *Durban City Council v Minister of Labour & another* 1953 (3) SA 708 (D).
[222] *City of Johannesburg Metropolitan Municipality supra* note 213 at 659E-I.

on. This is important because only if one knows what a dispute is about can a resolution be found. Secondly and more pertinently, it furthers the objectives of the LRA by ensuring that there is an opportunity to engage in amicable deliberations regarding the dispute that would allow both parties equal participation in a way forward. It is submitted that this forms the essence of the LRA which seeks to obtain peaceful dispute resolution.

In *Pikitup (SOC) Ltd v SA Municipal Workers' Union on behalf of Members & others*,[223] the court considered the requirement that a demand has to be a matter of mutual interest. The case centered on the proposed implementation of a breathalyser testing procedure for all its drivers. This implementation was a result of approximately 250 drivers reporting drunk to work. The union opposed this implementation.[224] The matter remained unresolved after conciliation and consequently employees engaged in a strike. The company applied to interdict the strike and declare same unlawful. The court held that this was not a matter of mutual interest, but rather that it pertained to the operational management of the company and was excluded from being an issue which could be collectively bargained. The strike was thus interdicted.[225] Upon the return date of the case, the court found that the strike was a matter of mutual interest and as such was lawful. The matter was then taken on appeal to determine firstly whether the breathalyser test was unlawful and secondly, whether health and safety issues were matters of mutual interest.[226] However, for purposes of drawing attention to the term 'matter of mutual interest', this discussion will only focus on the second issue brought on appeal.

Musi AJA first analysed the significance of construing the term 'matter of mutual interest' widely, as to hold otherwise would have severe ramifications for the right to engage in collective bargaining. The court considered that the term 'matter of mutual interest' was extremely wide and could encompass a number of issues. It was agreed that this term should include any issue that directly or indirectly affects the employees within the employment relationship.[227] It is submitted that this is the precise intention of legislature, because if it wanted to restrict this term to specific issues it would have done so. By interpreting this term broadly, legislature tacitly acknowledged that there is an unquantified list of issues which would have a bearing on a

[223] *Pikitup (SOC) Ltd v SA Municpal Workers' Union on behalf of Members & others* (2014) 35 *ILJ* 983 (LAC).
[224] *Pikitup (SOC) Ltd supra* note 223 at 984D-E.
[225] *Pikitup (SOC) Ltd supra* note 223 at 984F.
[226] *Pikitup (SOC) Ltd supra* note 223 at 984G-H.
[227] *Pikitup (SOC) Ltd supra* note 223 at 1000F-G.

particular trade that would affect an employee and his employer.[228] This was also the position of legislature prior to the promulgation of the LRA.[229] Therefore, the term must be construed in a literal sense to include any issue within the employment relationship.[230] However, Musi AJA stated that even though the LAC should broadly interpret the term 'matter of mutual interest', the LC and the LAC must be careful not to afford an overly extensive interpretation of the term that would include any issue as a subject matter of a strike. The court stated that where the issue pertains to a socio-economic or political nature, then such a dispute cannot be regarded as a subject matter for a strike as the employer would be confronted with uncertainty and would be completely out of his control.[231] This is a correct reflection of the intention of legislature as the LRA has provided an extensive regulation of the right to strike to ensure that the right can be adequately controlled and its potential destruction minimalised.[232]

The LAC turned to the Occupational Health and Safety Act of 85 of 1993 (hereinafter referred to as the OHSA) to determine that a wide interpretation of the term 'matter of mutual interest' was essential to give effect to the right to engage in collective bargaining. Musi AJA highlighted that the OHSA requires both the employer and the employee to work together to provide a safe and healthy workplace. The LAC held that the purpose of the OHSA is in line with the intention of collective bargaining which is to ensure that employers and employees engage in cohesive interaction to resolve disputes.[233] It was further held that the decision handed down by Snyman J in the LC was too narrow as it limited collective bargaining to only issues which pertained to terms and conditions of employment. Furthermore, Musi AJA stated that the LC's decision did not take into account that there is an implied condition within an employment contract which entails that employees are entitled to work in a healthy and safe environment.[234]

It was thus argued that due to the power that management possesses, it is capable of implementing health and safety procedures that ostensibly appear to be in the employees' best interest. However, the employees may hold that such procedures are contrary to their interests. If health and safety issues were exempt from collective bargaining then employees would be

[228] *Minister for Labour & Minister for Justice* 1941 TPD 108 at 115.
[229] *Rand Tyres & Accessories v Industrial Council for the Motor Industry (Transvaal)* 1941 TPD 108.
[230] *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 5 BLLR 578 (LC) at 581C.
[231] *Pikitup (SOC) Ltd supra* note 223 at 1000H-I.
[232] *Durban City Council v Minister of Labour* 1948 (1) SA 220 (N).
[233] *Pikitup (SOC) Ltd supra* note 223 at 1003A-D.
[234] *Pikitup (SOC) Ltd supra* note 223 at 1003A-C.

prevented from deliberating on issues that could potentially be obtrusive to their rights.[235] It is submitted that this ruling is in accordance with the primary purpose of the LRA which is to ensure that employees engage in collective bargaining so that their rights are not in any way infringed by the dictates of the employer. It was on this basis that the court concluded that health and safety issues are matters of mutual interest.[236]

This point was further elucidated in *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & General Workers Union & Others*,[237] where the court held that a demand over equity shareholding of 20% amounted to a dispute of mutual interest and is therefore a matter over which employees may engage in industrial action.[238] The court arrived at its decision based on the fact that the right to strike can be used as an instrument to obtain fair conditions of employment as well as acquire new rights. The employment environment is one that has to constantly adapt and reform according to new developments in society. Therefore, issues which revolve in and around bargaining have to be flexible to accommodate these changes.[239] It follows from this case that the court is not willing to apply a stringent test in determining whether a dispute is one that amounts to a matter of mutual interest. The most pertinent issue which can be derived from precedent is that the dispute must affect both the employer and employee. The mere fact that an act constitutes a strike does not in itself render the strike lawful.

4.5.1. SECONDARY STRIKES

The LRA not only provides for the protection of primary strikes but also for secondary strike action.[240] Essentially, a secondary strike is initiated to further and support the primary strike.

---

[235] *Pikitup (SOC) Ltd supra* note 223 at 1001A-C.
[236] *Pikitup (SOC) Ltd supra* note 223 at 1001A-C.
[237] *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & General Workers Union & others* (2009) 30 *ILJ* 1099 (LC).
[238] *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines supra* note 237 at 1121E-H.
[239] *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines supra* note 237 at 112OF-I.
[240] s 66(1) defines a secondary strike as: "a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer, but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in the demand", L Booysen, H M Erasmus & M D Van Zyl *The Auxiliary Nurse* (2004) 11.

Therefore, it is not necessary for secondary strikers to have a dispute with their employer.[241] A secondary strike must comply with the general requirements of a strike as defined in the LRA.[242]

The first requirement for the protection of the secondary strikes is that the primary strike must be protected in order for the secondary strike to also receive protection.[243] This was clearly explained in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd supra* where the LAC emphasised that a secondary strike will be afforded protection if the primary strike has followed the procedure for a protected strike as enshrined in s 64 of the LRA.[244] The case centred on a deadlock between the Industrial Chemical Group (ICG) and the union. The union followed the stipulated process and for all intents and purposes, the strike was deemed to be protected.[245] However, the focal point which the court addressed was how far the protection extended and whether protection was only for those employees of the employer who were directly affected by the strike demand or whether employees who were not directly affected by a dispute were prohibited from engaging in a strike to support their co-workers.[246]

Cameron JA considered the employer's contention that the terms and conditions of employment of employees outside of the bargaining unit differed from the terms and conditions of those employees who were part of the bargaining council. The interests of non-bargaining unit employees were different from those who were members of the bargaining unit.[247] The dispute which the employer had referred to the CCMA related to the ICG's failure to reach consensus on demands pertaining to the bargaining unit. The strike was in furtherance of these demands. However, the non-bargaining unit members were not party to the strike dispute and had no interest in the outcome of the strike. Therefore, their participation in the strike was unprotected.[248]

---

[241] *SA Clothing & Textile Workers Union v Free State & Northern Cape Clothing Manufacturers' Association* (2001) 22 *ILJ* 2636 (LAC).
[242] s 213.
[243] s 66 (1).
[244] *Chemical Workers Industrial Union v Plascon supra* note 174 at 323A.
[245] *Chemical Workers Industrial Union v Plascon supra* note 174 at 323A-C.
[246] *Chemical Workers Industrial Union v Plascon supra* note 174 at 323A-C.
[247] *Chemical Workers Industrial Union v Plascon supra* note 174 at 323H-J.
[248] *Chemical Workers Industrial Union v Plascon supra* note 174 at 323H-J.

Cameron JA considered that where a constitutional right is entrenched without express limitations, such limitations should not be "cut down to read implicit limitations into them".[249] Cameron JA highlighted that the LRA imports express limitations on the right to strike. These express limitations include formal procedures for a protected strike and material limitations on who is permitted to strike.[250] The court noted that there was no express limitation in the LRA which limited strikes by only those who are directly affected by a dispute and consequently went on to consider whether such limitation could then be imported into s 66(1) of the LRA. This, however, had to be interpreted in light of the LRA.[251]

The LC went on to analyse the definition of the term 'strike'. Cameron JA stated that the definition consisted of three basic elements. Firstly, there has to be non-performance of labour, secondly, this must be undertaken by employees and thirdly, it must be for a purpose.[252] The court decided that the most significant aspect of the definition stated that there has to be a common purpose of resolving the dispute of mutual interest between the employer and the employee. The court further noted that this is as far as any mutuality extends. There is no evidence to support the assertion that employees have the same employer or have the same interest in the dispute. It was further highlighted that the definition of 'strike', more specifically does not indicate who the parties of the dispute have to be.[253] Cameron JA held that the definition of term 'strike' was broad enough to include both primary and secondary strikes. The definition can also include strikes which involve the same employer who are not directly affected by the strike dispute.[254]

The LC stated that this broad definition was in line with the LRA's definition of 'issue in dispute' which does not specify the identity of the parties to the dispute and thus poses no limitation on who they may be.[255] Furthermore, the word 'other' within the definition of secondary strikes enshrined in s 66(1) of the LRA denotes that legislature intended that other employees who are not employed by the same employer may embark on strike action in support

[249] *Attorney-General v Moagi* 1982 (2) Botswana LR 124, *S v Zuma & others* 1995 (2) SA 642 (CC).
[250] *Chemical Workers Industrial Union v Plascon supra* note 174 at 327E-F.
[251] *Chemical Workers Industrial Union v Plascon supra* note 174 at 327G-H.
[252] *Chemical Workers Industrial Union v Plascon supra* note 174 at 327G-I.
[253] *Chemical Workers Industrial Union v Plascon supra* note 174 at 328A-B.
[254] *Chemical Workers Industrial Union v Plascon supra* note 174 at 328A-B.
[255] *Chemical Workers Industrial Union v Plascon supra* note 174 at 328C-D.

of co-employees on condition that their actions are protected under s 66(1) of the LRA.[256]

The LC agreed that the purpose of s 64(1) was intended to ensure that employees followed the procedure stipulated by the LRA. Once such requirements are met, there are no other procedures specified by the LRA. There are no express or implicit limitations which prove that the LRA envisaged that employees be limited to only demands which directly had an interest in.[257] Therefore, it was held that once the statutory procedures have been fulfilled, a strike will be deemed protected and a union is permitted to call all its members in support of the strike.[258] It is submitted that this decision is correct. A significant aspect that the court deals with is the purpose of the LRA. It is imperative to note that the LRA has been promulgated to enforce the constitutional right to strike. The reason the LRA imposes statutory procedures is to ensure that the dispute resolution process is first followed and that strikes are only a last resort.[259] Once statutory procedure is followed, a strike would be afforded protection. Once such protection is afforded and the main aim of the LRA is fulfilled, there is no logical reason why an additional limitation should be imported. The LRA provides express limitations on the right. It serves to reason that if the LRA envisaged that this right be limited to employees who are directly affected by a dispute, then it would have expressly entrenched the limitation along with the other limitations.[260] The LRA does not merely require that a nexus exists between the primary employer and the secondary employer. There is an additional requirement that the secondary strike be reasonable in a way that the pressure exerted on the secondary employer is the same as that placed on the primary employer.[261]

The second requirement for a lawful secondary strike is that the employer must receive seven days' notice of the intended strike. The third requirement is that there has to be a link between the primary employers' business and the secondary employers business so that the nature and

[256] *Chemical Workers Industrial Union v Plascon supra* note 174 at 328C-D.
[257] *Chemical Workers Industrial Union v Plascon supra* note 174 at 328A-B.
[258] *Chemical Workers Industrial Union v Plascon supra* note 174 at 329I-J.
[259] *Chemical Workers Industrial Union v Plascon supra* note 174 at 329A-D.
[260] *Chemical Workers Industrial Union v Plascon supra* note 174 at 329A-D.
[261] R Pillay 'Secondary Strikes-Protected or not?' 2012 *Labour Update-The way forward* 2.

extent of the secondary strike affects the business of the primary employer.[262] The effect on the primary employer must be economic in nature.[263]

The test for reasonableness was established in *Billiton Aluminium SA Ltd supra,*[264] where the court determined that the secondary strike has to be "reasonable in relation to the business of the primary employer".[265] The employees of Samancor embarked on a protected strike which was followed by a sympathy strike by workers employed by Billiton Aluminium SA Ltd (BASAL) in support of the members of NUMSA employed by Samancor.[266] The employer sought an interdict to restrain the strike at BASAL on the basis that it was unprotected.[267]

Pillay J first considered that s 66(2)(*c*)[268] of the LRA requires that a secondary strike have an effect on the business of the primary employer. This is based on the acceptance that there has to be a nexus linking the secondary employer or the employees to the primary employer or the employees. If no nexus exists there can be no effect on the business of the employer. Thus, there would be no further enquiry.[269] Additionally, the secondary strike is also expected to be reasonable to the primary employer's business. This reasonableness is what qualifies the necessary effect between the secondary and primary employer.[270] Reasonableness pertains to the extent and the nature of the secondary strike. The scope of the strike concerns the actual strikers and workplaces which participated in the strike as well as the length of the strike.[271] However, there only needs to be a possible direct or indirect effect in terms of the nature and the extent of the secondary strike.[272] There are no clear limitations embedded within s 66(2)(*c*), thus the

---

[262] s 66 (1), *Samancor Ltd & another v NUMSA* [1999] 11 BLLR 1202, W C Vaughn *A Lawyers' Guide to Doing Business in South Africa* (1996) 126.
[263] *Hextex & other v SA Clothing & Textile Workers Union & others* (2002) 23 *ILJ* 2267 (LC).
[264] *Billiton Aluminium SA Ltd v National Union of Metalworkers of SA* (2001) 22 *ILJ* 2434 (LC).
[265] *Billiton Aluminium SA Ltd v National Union of Metalworkers of SA supra* note 264 at 2436[2].
[266] *Billiton Aluminium SA Ltd v National Union of Metalworkers of SA supra* note 264 at 2434G-H.
[267] *Billiton Aluminium SA Ltd supra* note 264 at 2434H-I.
[268] s 66(2)(*c*) states: "No person may take part in a secondary strike unless…the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer".
[269] *Billiton Aluminium SA Ltd supra* note 264 at 2436B-C.
[270] *Billiton Aluminium SA Ltd supra* note 264 at 2436D.
[271] *Billiton Aluminium SA Ltd supra* note 264 at 2436E.
[272] *Billiton Aluminium SA Ltd supra* note 264 at 2436F.

judiciary has a very wide discretion in determining whether a secondary strike is reasonable or not.[273]

In application of s 66(2)(*c*), Pillay J highlighted that there was a nexus which existed between the secondary and primary employer for three reasons. Firstly, BASAL was completely owned by BPH Billiton. BPH Billiton owned 60% of shares in Samancor the business of the primary employer.[274] Secondly, the LC noted that Samancor, BPH Billiton and BASAL were administered by independent boards although they were public bodies and thirdly, all three entities were vulnerable to a negative market reaction if industrial action had to take place.[275] Pillay J reasoned that the secondary strike could indirectly affect the primary employer as a result of the inter-connected construction of these three bodies, the level of ownership by BHP Billiton in the secondary and primary employer's business and the market reaction on shares caused by the secondary strike.[276]

Once the court was satisfied that a nexus existed between the primary and secondary employer's business, Pillay J was also called upon to investigate the second enquiry which was whether the nexus had a possible effect on the business of the primary employer. In doing so, Pillay J considered two pertinent cases. The first case that was analysed was *Samancor Ltd & another v National Union of Metalworkers of SA*.[277] The employees of Samancor and Manganese Metal were interdicted from engaging in a secondary strike on behalf of NUMSA members employed by Columbus Steel Joint Venture.[278] The basis for the applicants' contention was that the secondary strike was not reasonable or proportional to the primary employer's business as required under s 66(2)(*c*).

In making a determination, Landman J stated that an enquiry into the corporate relationship of the Columbus Steel Joint Venture, Manganese Metal and Samancor had to be undertaken to determine the possible direct or indirect effect of the secondary strike on the primary employer.[279] In light of the facts of the case, Landman J held that Manganese Metal and

---

[273] *Billiton Aluminium SA Ltd supra* note 264 at 2437B.
[274] *Billiton Aluminium SA Ltd supra* note 264 at 2435B.
[275] *Billiton Aluminium SA Ltd supra* note 264 at 2435B.
[276] *Billiton Aluminium SA Ltd supra* note 264 at 2435C.
[277] *Samancor Ltd & another v National Union of Metalworkers of SA* (1999) 20 *ILJ* 2941 (LC).
[278] *Samancor Ltd & another v National Union of Metalworkers supra* note 277 at 2942C-D.
[279] *Samancor Ltd & another v National Union of Metalworkers supra* note 277 at 2942H-I.

Samancor apparently conducted business together as some of Manganese Metal's plants were carried out together or was within the ambit of Samancor's management. However, Manganese Metal was not an instrumental supplier of chrome to Columbus Steel.[280] It is imperative to note that chrome was a pivotal metal which underpinned the processes of Columbus Steel. Therefore, the strike which took place at Manganese Steel could not have had a possible effect either directly or indirectly on the business of Columbus Steel.[281] Even though Manganese Metal was completely owned by Samancor, this only created a nexus between Manganese Metal and Columbus Steel. A simple nexus between the primary employer and the secondary employer without the secondary strike having an effect on the business of the primary employer was insufficient.[282]

In regard to Samancor, Landman J held that 80% of Columbus Steel was supplied by Samancor. Furthermore, Samancor and Columbus Steel had embarked on a joint undertaking. Therefore, the strike at Samancor would have influenced the operations of Columbus Steel.[283] The LC specifically highlighted that it was insignificant that Samancor did not have authority over the everyday running of Columbus Steel as this strike was not about the everyday running of the business, but rather it was about capital and an increase in wages to NUMSA members.[284] Therefore, Samancor had an evident and justifiable economic interest which could have been an incentive to influence negotiations between the union's members and Columbus Steel.[285] The LC accordingly held that on these grounds that a nexus existed between the primary employer's business and the secondary strike.[286]

Landman J then engaged in the second enquiry which pertained to whether the secondary strikes at Samancor and Manganese Metal were reasonable in light of the nature and extent of these strikes in regard to Columbus Joint Venture.[287] The LC considered this in light of s 66(2)(*c*) which in terms of the nature and extent of the strike compel an investigation into the reservation of performing work, the timing of the strike as well as other considerations such as the possible

[280] *Samancor Ltd & another v National Union of Metalworkers supra* note 277 at 2942H-I.
[281] *Samancor Ltd & another v National Union of Metalworkers supra* note 277 at 2942H-I.
[282] *Samancor Ltd & another v National Union of Metalworkers supra* note 277 at 2942H-I.
[283] *Samancor Ltd supra* note 277 at 2943A.
[284] *Samancor Ltd supra* note 277 at 2943A.
[285] *Samancor Ltd supra* note 277 at 2943B.
[286] *Samancor Ltd supra* note 277 at 2943B.
[287] *Samancor Ltd supra* note 277 at 2943B.

effects on the business of Columbus Steel.[288] The court held that it would have been reasonable if NUMSA only engaged in strikes against chrome ore mines, chrome or ferro alloy plants under Samancor's ownership as these plants have an effect on the production of chrome which is necessary for production at Columbus Steel.[289] However, Landman J held that in regard to Manganese Metal the secondary strikes which took place at its plants and mines would not have had an effect on the primary employer as the business was not a major supplier of chrome to Columbus Joint Venture.[290] Therefore, the court held that an interdict against Manganese Metal was justified, however, an interdict against Samancor had to be limited only to the chrome, alloy and ferro plants as this would have had a reasonable effect on the business of the primary employer.[291]

The court in *Billiton supra* also highlighted the case of *Sealy of SA (Pty) Ltd & others v Paper Printing Wood & Allied Workers Union*[292] in its judgment. In *Sealy supra* the LC was called upon to adjudicate an urgent interdict against a proposed strike by the secondary employers. In analysing s 66(2)(*c*) of the LRA, Basson J quoted legal authors who stated that s 66(2)(*c*) establishes a concept of proportionality. The legality of the secondary strike is founded upon the impact such a strike might have on the primary employer's business.[293] Basson J determined that the secondary employers and the primary employer operate in two entirely different trades. The secondary employers are engaged in manufacturing of mattresses, wall units, furniture as well as supplying bedding to other businesses. The primary employer is engaged in the production of paper and pulp industry.[294] The LC stated that on this basis there can be no nexus between the secondary employer and the primary employer.

The court then considered the argument by the union that there was a nexus between the primary employer and the secondary employer on the basis that Anglo American is a shareholder in the primary employer's company.[295] Basson J addressed this argument with the fact that Anglo American's shareholding only amounts to 1% of Afcol, the primary employer and on this basis

[288] *Samancor Ltd supra* note 277 at 2943B.
[289] *Samancor Ltd supra* note 277 at 2943C.
[290] *Samancor Ltd supra* note 277 at 2943C.
[291] *Samancor Ltd & another v National Union of Metalworkers of SA supra* note 277 at 2943D.
[292] *Sealy of SA (Pty) Ltd & others v Paper Printing Wood & Allied Workers Union* (1997) 18 *ILJ* 392 (LC).
[293] *Sealy of SA (Pty) Ltd supra* note 292 at 395C.
[294] *Sealy of SA (Pty) Ltd supra* note 292 at 395E-F.
[295] *Sealy of SA (Pty) Ltd supra* note 292 at 395J.

such a contention is weak. The court stated that there was an insufficient nexus between the secondary employer and the primary employer in respect of the scope and nature of the secondary strike would have on the direct or indirect impact on the business of the primary employer.[296]

The court in *Billiton supra* stated that these cases emphasised two points namely that there has to be a nexus between the primary employer and the secondary employer, however slight that nexus might be.[297] Secondly, the effect of the secondary strike must be reasonable in terms of the nature and the extent of the secondary strike on the primary employer's business.[298] In light of *Sealy supra*, it can be acknowledged that the nexus must not weak in nature. There are three reasons that Pillay J proffers which validates the strong indirect nexus between the secondary employer and BHP Billiton. Firstly, the common factor is that all three bodies are administered by autonomous boards. Secondly, they are all public bodies and thirdly, they would all suffer some loss in share prices as a result of the secondary strike.[299]

The second enquiry that the LC made was in light of *Samancor supra* which necessitates that the extent and nature of the secondary strike has to be reasonable to the primary employer's business.[300] The court in *Billiton supra* held that the complete stoppage by all employees of the secondary employers would have a possible effect on the business of the primary employer. Even if the primary employer continues its business through the use of replacement labour, the secondary strike would still have an effect on the primary employer's business.[301] The court further elaborated that this effect would be colossal as the applicant had a business in which unhindered production was essential. The cost to re-commission smelters would be too great and furthermore, the length of time that it would take to do this would be vast. This meets the requirement of the possible reasonableness of the extent and the nature of the secondary strike on the primary employer.[302]

---

[296] *Sealy of SA (Pty) Ltd Union supra* note 292 at 396E-F.
[297] *Sealy of SA (Pty) Ltd supra* note 292 at 395B.
[298] *Samancor Ltd supra* note 238 at 2943C.
[299] *Billiton Aluminium supra* note 264 at 2438E-F.
[300] *Samancor Ltd supra* note 277 at 2943C.
[301] *Billiton Aluminium supra* note 264 at 2438G-H.
[302] *Billiton Aluminium supra* note 264 at 2438I-J.

In *Hextex & others v SACTWU & others*,[303] the court considered the term 'possible' in terms of s 66(2)(*c*). An urgent application was brought by Hextex, Romatex and Berg River, which were all subsidiaries of the Seardel Group Trading (Pty) Ltd, to declare the secondary strikes that were to take place to be unprotected.[304] The court noted that the union bore the onus of proving that it had complied with the jurisdictional prerequisites that entitled it to invoke the provisions of s 66(2)(*c*) of the LRA.[305] Furthermore, the LC acknowledged that s 66 (2)(*c*) stated that the effect on the primary employer merely be a possibility of being direct or indirect. Pillay J emphasised that the term 'possible' possessed two meanings. The first meaning in terms of the common interpretation of the provision was that the word alluded to something that was likely to happen, probable of occurring or existing. This interpretation reduced adherence with the provision considerably low.[306]

Pillay J stated that in terms of the second interpretation the word 'possible' could be substituted with the word 'potential'. This would infer a greater level of adherence to the provision.[307] This interpretation would require a valid assessment and would place an onerous task on determining the powerfulness that the effect of the secondary strike could have on the primary employer.[308] A further implication of the second interpretation is that if the secondary strike is deemed to have a powerful effect then it should be allowed; however, if the strike has a slight effect or has no effect on the primary employer then such a secondary strike would not be permissible.[309] On the other hand, the second interpretation would also imply that even if there is no powerful effect by the secondary strike, such a strike would be permissible because it has an insignificant impact on the country's economy. However, in terms of *Billiton supra* the effect that the strike has on the secondary employer is of no concern. Thus, the second interpretation would cause much uncertainty.[310] Furthermore, this interpretation would be intrusive on the right to collective bargaining which is based on the concept of self-regulation of industrial affairs. Lastly, Pillay J noted that the second interpretation overlooks that fact that secondary strikes do not occur

[303] *Hextex & others v SACTWU & others* (2002) 23 *ILJ* 2267 (LC).
[304] *Hextex supra* note 303 at 2267F-G.
[305] *Hextex supra* note 303 at 2267H-I.
[306] *Hextex supra* note 303 at 2267I.
[307] *Hextex supra* note 303 at 2271H-I.
[308] *Hextex supra* note 303 at 2271I.
[309] *Hextex supra* note 303 at 2271J.
[310] *Hextex supra* note 303 at 2272A.

suddenly but rather that they grow gradually.[311] This interpretation presupposes that there are different stages of a strike. Consequently, the question arises during which stage the secondary strike's powerfulness or potential should be evaluated?[312]

Pillay J stated that because the right to strike is a constitutionally protected right then the least restraining interpretation should be afforded to this right.[313] Furthermore, the court highlighted that due to the lack of evidence presented the LC was unable to assess the powerfulness that the secondary strike would have on the primary employer. This would be a continuous problem as urgent applications do not allow sufficient time to submit an investigator's report nor does the urgent application allow for an analysis of the primary employer's participation in the strike. In terms of the second interpretation the court would be required to anticipate the effect that the secondary strike would have on the primary employer on a balance of probabilities.[314] The court thus decided to follow the first interpretation of the word 'possible'. Pillay J stated that the effect of s 66(2)(*c*) is to ensure that the secondary strike's extent and nature is capable of creating an effect on the business of the primary employer.[315] A secondary strike would be reasonable if the workers of the secondary employer exert pressure on their employer who in turn exerts pressure on the primary employer to negotiate with its employees to reach a resolution to their dispute. If the possible result of the secondary strike is to facilitate bargaining between the employer and the employees then the secondary strike will be deemed to have a probable effect on the primary employer and should thus be afforded protection.[316] The court stated that the effect that the secondary strike should have must be of an economic or commercial nature. The mere inconvenience incurred by the primary employer would be insufficient to meet this requirement.[317]

Pillay J analysed the above principles in light of the facts of the case. Pillay J held that the link with the other divisions of the applicant is indirect; however, these divisions are capable of

---

[311] *Hextex supra* note 303 at 2272B.
[312] *Hextex supra* note 303 at 2272C.
[313] *Peter v Peter & others* 1959 (2) SA 347 (A), *Arenstein v Secretary for Justice* 1970 (4) SA 273 (T), *Government of the Islamic Republic of Iran v Berends* 1998 (4) SA 107 (Nm), *Principal Immigration Officer v Bhula* 1931 AD 323, *S v Gelderblom* 1962 (1) SA 497 (C), *Nyamakazi v President of Bophuthaswana* 1992 (4) SA 540 (BG), *Majavu* 1994 (4) SA 268 (CK), *Kauesa Minister of Home Affairs* 1996 (4) SA 965 (Nm).
[314] *Hextex supra* note 303 at 2272E-F.
[315] *Hextex supra* note 303 at 2272I-J.
[316] *Hextex supra* note 303 at 2272I-J.
[317] *Hextex supra* note 303 at 2273A.

exerting force on the applicant who will be compelled to order its divisions which have a direct link with Team Puma to stop trading with Team Puma.[318] This would have an effect on Team Puma regardless of whether this effect was great or not. The LC was thus unwilling to conclude there would be no effect on the primary employer as a result of the secondary strike.[319] Pillay J held that this nexus between the primary employer and the secondary employer was sufficient to pressurise the primary employer to engage in bargaining with its employees.[320] The pressure inflicted by the secondary strike on the primary employer would be in the form of a complete cessation of work. This would be extremely harmful to the secondary employer which would be an incentive for the secondary employer to pressure the primary employer. Pillay J thus concluded that in light of the above reasons the applicant had failed to prove that there was an evident right to interdict the employees from engaging in the secondary strike.[321]

4.5.2. PROTEST ACTION

The LRA also provides for the right to engage in protest action.[322] This is indeed a great advancement, as this right has not received protection in our country previously.[323] Protest action can include actions such as picketing, go-slows, stay-aways, work-to-rule and sit-ins.[324] The right to protest action extends further than the employment relationship, as it differs from strikes in that it seeks to advance the "socio-economic interests of workers". In *Government of the Western Cape Province v Congress of SA Trade Unions & another* (COSATU) [325] the court considered the term 'socio-economic interest'. The applicant applied for the interdict against the protest action on the ground that the demands referred to educational issues and not to socio-economic issues. The court in this regard noted that it is difficult to put an exact definition to the term 'socio-economic interest', as its interpretation would depend on the circumstances of each

[318] *Hextex supra* note 303 at 2275D-E.
[319] *Hextex supra* note 303 at 2275D-E.
[320] *Hextex supra* note 303 at 2275E.
[321] *Hextex supra* note 303 at 2275F.
[322] s 77.
[323] *Mbiyane v Cembad t/a TA Art Centre* (1989) 10 *ILJ* 468 (IC), *Dlali v Railit* (1989) 19 *ILJ* 353 (IC), *SA Laundry, Dry Cleaning, Dyeing & Allied Workers Union v Advance Laundries t/a Stork Napkins* (1985) 61 544 (IC).
[324] S Van der Veldon … et al *Strikes Around the World, 1968-2005: Case-Studies of 15 Countries* (2007) 67.
[325] *Government of the Western Cape Province v Congress of SA Trade Unions & another* (1999) 20 *ILJ* 151 (LC).

case.[326] It was held that this term refers to any demand in pursuance of "social status and economic position of the workers in general".[327]

The court considered that this term has to be broadly defined given our country's past. It was held that the demands regarding education fell within the ambit of socio-economic interests as COSATU through these demands attempted to undo the inequalities of our past especially with regard to education.[328] Therefore, due to the interests protest action seeks to uphold, the court requires that very persuasive reasons be given to limit this right.[329] In *Business SA v COSATU & another*,[330] the court held that the right to protest action has to be construed in a wider context than merely the workplace. It extends to society and has an impact on the economy.[331]

Another aspect of protest action which the LRA endorses is the right to picketing.[332] Picketers are obliged to comply with the Code of Good Practice on Picketing,[333] which regulates the enforcement of this right. The court in *Picardi Hotels Ltd v FGWU & others*,[334] sets out the activities which are deemed acceptable. If employees engage in violence or any other criminal act, their conduct will be regarded as unlawful[335] and will not be protected against dismissal.[336]

4.6. CONCLUSION

It is essential to note the LRA has been a defining piece of legislation in South Africa. It has effectively included every employee under its banner in an attempt to implement transformation in labour relations.[337] The main purpose of the LRA, which has been discussed extensively throughout this chapter, is to provide an economic and accessible dispute resolution framework.

---

[326] *Government of the Western Cape Province v COSATU supra* note 325 at 158[17].
[327] *Government of the Western Cape Province v COSATU supra* note 325 at 158[17].
[328] *Government of the Western Cape Province v COSATU supra* note 325 at 159[19].
[329] *Government of the Western Cape Province v COSATU & another* [1998] 12 BLLR 1286 (LC).
[330] *Business SA v COSATU & another* [1997] 5 BLLR 511 (LAC).
[331] *Business SA v COSATU & another supra* note 330 at 517-518.
[332] s 69 which states that "[a] registered trade union may authorise a picket by its members and supporters for the purpose of peaceful demonstration".
[333] GN 765 of 1998.
[334] *Picardi Hotels Ltd v FGWU & others* [1999] 6 BLLR 601 (LC).
[335] *Picardi Hotels Ltd v FGWU & others supra* note 334 at 25. See also *Lomati Mill Barberton (A division of Sappi Timber Industries) v PPWAWU & others* [1997] 4 BLLR 415 (LC), *FGWU & others v The Minister of Safety and Security & others* [1999] 4 BLLR 332 (LC).
[336] *National Education Health & Allied Workers Union obo Cornelius & others and High Rustenburg Hydro* (2004) 25 *ILJ* 1339 (CCMA), *Food & General Workers Union & others v Minister of Safety & Security & others* (1999) 20 *ILJ* 1258 (LC).
[337] I Cheminais … et al *The Fundamentals of Public Personnel Management* (1998) 106.

The essence of these procedures is to ensure that employers and their employees equally contribute to growth, harmony and productivity of the workplace.[338]

The increased productivity and stability in the workplace in turn seeks to advance the purpose of the LRA which is to ensure the improvement of the socio-economic interests of society at large. It is clearly evident from the exploration of the LRA in this chapter that an extensive framework has been developed to resolve disputes rather than having employees resort to strike action. The entrenchment of the right to strike is therefore indicative of legislature's attempt to balance the interests of both employees and employers. The enforcement of this right illustrates positive developments in our law. The right to strike, however, is not an absolute right and consequently various limitations are included in the LRA to ensure that the right is not abused. These limitations will be discussed in the next chapter.

[338] M R Smith & G T Wood 'The end of Apartheid and the organization of work in manufacturing plants in South Africa's Eastern Cape province' (1998) 12(3) *Work, Employment & Society* 482.

CHAPTER FIVE

THE REGULATION OF INDUSTRIAL ACTION

5.1. INTRODUCTION

The entrenchment of the right to strike necessitates proper guidelines on how it should be enforced to guard against the abuse of the right to strike.[1] Therefore the LRA includes explicit prohibitions which indicate when strikes are regarded as illegal.[2] These prohibitions are relevant as they form a guideline that determines whether a strike is protected. Even though s 23 of the Constitution enshrines the right to strike, this right must be exercised according to the limitations provided by the LRA.[3] Furthermore, these limitations are necessary to ensure that public peace and order are maintained.

If strikers engage in criminal behavior during a strike that threatens the health and safety of society, then there are a number of measures which the LRA implements to quell the illegal strikes.[4] Such consequences are essential to deter strikers from criminal activity during a strike in order to protect the basic human rights of employees and society at large. These repercussions for illegal behavior are vital to ensure that strikers who do not comply with the LRA are held accountable for their actions.[5] However, the mere fact that the LRA enshrines various limitations does not mean that they are adhered to.

5.2. PROCEDURE FOR PROTECTED STRIKES

The LRA has entrenched a clear procedure which must be followed for a strike to be protected,[6] however, if these specific procedures are not followed, then employees forfeit the protection

---

[1] L Brookshaw & A Nayanah 'Strikes' (2012) 12(6) *Without Prejudice* 57.
[2] V B Gosai 'Strike action' (2012) 12(10) *Without Prejudice* 27.
[3] H J Deacon 'The balancing act between the constitutional right to strike and the constitutional right to education' (2014) 34(2) *South African Journal of Education* 4.
[4] K O Odeku 'An overview of the right to strike phenomenon in South Africa' (2014) 5(3) *Mediterranean Journal of Social Science* 696.
[5] D L Kgosimore 'Workplace violence: A criminological analysis of a violent labour strike in South Africa' (2007) 20(2) *Acta Criminologica* 62.
[6] The LRA; s 64.

attributed to the right to strike.[7] The LRA provides for two procedural requirements to be followed to ensure the protection of a strike.[8] The first procedure is that employees and employers are compelled to engage in conciliation. If conciliation is unsuccessful or if the matter has been referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for 30 days without resolution then a certificate will be issued indicating that the dispute remains unresolved.[9] The second requirement is that the union must furnish the employer with 48 hours notice of its intention to strike.[10] Thus, for the purposes of this section pertaining to procedure, the discussion will only focus on the second requirement pertaining to 48 hours' notice.

5.2.1 The requirement of 48 hours notice

The primary element that makes way for a lawful strike is that the parties must provide 48 hours notice to the employer of the intended strike.[11] The Supreme Court of Appeal (SCA) was called upon to adjudicate on the requirement of 48 hours notice in the landmark case of *Equity Aviation v SATAWU*.[12] In *Equity Aviation,* SATAWU represented 725 of the 1157 Equity Aviation's employees. As a result of failed negotiations, SATAWU supplied the employer with the required 48 hours notice of its intention to strike. The strike persisted for four weeks involving both represented employees and unrepresented employees. The strike was deemed lawful for the represented employees who had complied with the LRA; however, the unrepresented employees' participation was not regarded as lawful as they had failed to give a separate notice of their intention to strike.[13] Consequently, the unrepresented employees were dismissed for prolonged unauthorised absenteeism. The dismissed employees referred the matter as an automatically unfair dismissal. The Labour Court found that the employees formed part of the union's membership at the time of the strike; however, regardless of this ruling the employees' membership was not a prerequisite for their lawful participation in the strike.[14] On appeal this decision was set aside by the LAC. The majority decision, in which Khampepe ADJP and Davis JA concurred, reasoned that to necessitate a separate strike notice by non-represented employees

[7] *SA Chemical Workers Union and others v Sentrachem Ltd* (1998) 9 *ILJ* 410 (IC).
[8] M Muller, M Bezuidenhout & K Jooste *Healthcare Service Management* 2nd ed (2011) 398.
[9] D Keith *Understanding the CCMA Rrules and Procedures* (2011) 22.
[10] P Le Roux 'Giving notice of strike action' (2012) 22(5) *Contemporary Labour Law* 41.
[11] H Landis & L Grosset *Employment and the Law: A Practical Guide for the Workplace* 3rded (2014) 294.
[12] *Equity Aviation v SATAWU* (478/09) [2011] ZASCA 232 (30 November 2011).
[13] *Equity Aviation v SATAWU* (478/09) *supra* note 12 at 4-6.
[14] *Equity Aviation v SATAWU* (478/09) *supra* note 12 at 6-7.

would also necessitate a separate referral of the dispute for conciliation. The majority court considered this premise in light of the purpose of s 64(1)(*a*), which is to ensure orderly collective bargaining. The purpose of s 64(1) was merely to ensure that there was a referral in order to ensure a lawful strike, it did not intend to require the indication of the identity of the parties. Once the union had referred the matter for conciliation then another referral of the same dispute by non-represented employees would be futile.[15] The reason for this decision was that the issue in dispute affected both the represented employees and non-represented employees. When the matter was referred for conciliation, the union represented the interests of both represented and non-represented employees. Therefore, once the majority union had referred the dispute and was unsuccessful, then non-represented employees were entitled to strike along with the represented employees.[16] The majority court held that there was no rationale to draw a distinction between categories of workers as if legislature intended this to be the case then it would have done so. The employer is entitled to notice of intention to strike but not to the identity of the individuals.[17]

The crucial question in *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & Others*[18] which the SCA had to decide on was whether the unrepresented employees were required to submit a separate notice of their intention to strike or whether the notice submitted by the union was sufficient to include the unrepresented employees that would ultimately render their participation in the strike as being lawful.[19] In the SCA, Lewis JA considered the two chief arguments made by the respondents in the LAC. The first argument which was presented by the respondents was that s 64(1)(*b*) did not require more than one notice. In the majority decision, Khampepe ADJP agreed with this argument and held that to confer any further requirements into s 64(1)(*b*) that legislature has not expressly included would contradict labour law jurisprudence. Furthermore, it would be overly formal which would negate the simplistic framework of dispute resolution. This would be contrary to the objectives of the LRA.[20]

---

[15] *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & others supra* note 12 at 2898E.
[16] *Equity Aviation Services supra* note 12 at 2898F,
Chemical Energy Paper Printing Wood & Allied Workers Union & others v CTP Ltd & another (2013) 34 *ILJ* 1966 (LC).
[17] *Equity Aviation Services supra* note 12 at 2898I.
[18] *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & others* (2011) 32 *ILJ* 2894 (SCA).
[19] *Equity Aviation Services supra* note 18 at 2895C.
[20] *Equity Aviation Services supra* note 18 at 2898G-I.

Davis JA proffered another line of reasoning when he concurred with Khampepe ADJP in his judgment by stating that if "a significant group of workers" provide notice of their intention to strike, then it would ensure satisfactory compliance with the implementation of organised industrial relations.[21] Zondo JP in the dissenting judgment held that this decision was entirely incorrect and would lead to immense uncertainty within the law. Zondo JP reasoned that this could not suffice as a sound justification because the term 'significant group' would mean that if an insignificant group of the employees provided the notice first then a further notice would be required by a significant group of employees.[22] Consequently, if a significant group of employees provided notice then it would not necessitate those who are form part of an insignificant group of employees to provide separate notices.[23] The SCA agreed with the decision of Zondo JP in this regard as Lewis JP held that this was an illogical rationalisation of what s 64(1)(*b*) requires.[24] Furthermore, it is submitted that the conclusion reached by Davis JA is invalidated by the first argument of Khampepe ADJP which states that labour law jurisprudence would be undermined if you include further requirements which legislature had not expressly included.[25] The LRA in s 64(1)(*b*) does not make mention of any term regarding a "significant group of people," therefore, to infer such a term would be contrary to labour law jurisprudence.[26]

The second argument raised by the respondents in the LAC was that requiring non-represented employees to furnish separate notices would be a limitation of the right to strike without justification.[27] The decision held by Khampepe ADJP in regard to the respondents' argument pertained to a strict interpretation of the right to strike in accordance to leading cases which compelled the interpretation of the right to strike to be construed without importing implicit limitations that were not expressly conferred by legislature.[28] The SCA disagreed with this

[21] *Equity Aviation Services supra* note 18 at 2900D-I.
[22] *Equity Aviation Services supra* note 18 at 2900D-I.
[23] *Equity Aviation Services supra* note 18 at 2900D-I.
[24] *Equity Aviation Services supra* note 18 at 2900D-I.
[25] *Equity Aviation Services supra* note 18 at 2898G-I.
[26] *Equity Aviation Services supra* note 18 at 2898E.
[27] *Equity Aviation Services supra* note 18 at 2902C.
[28] *S v Zuma & others* 1995 (2) SA 642 (CC), *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 *ILJ* 321 (LAC).

decision and held that this requirement does not affect the enforcement of the right, but rather how the right is exercised. It was merely a procedural requirement that is required to render the strike lawful.[29]

The SCA considered the argument raised by the employer in the LAC. Equity Aviation averred that the majority decision did not appreciate the difference between s 64(1)(*a*) which necessitated negotiations between the parties to allow for a period of cooling off and s 64(1)(*b*) which allows for the employer to prepare for the strike.[30] If this requirement were undermined then the employer would not be able to determine the magnitude, intensity and the actual focus of the strike. This would defeat the entire purpose of a strike as the employer would not be able to make an informed decision to accede to the employees' demands.[31] Furthermore, an employer would not have knowledge of whether it should take adequate steps to protect the business or to make pre-strike regulatory decisions as well as necessary health and safety precautions that may arise during the strike.[32] The union argued that due to the context that collective bargaining takes place in, Equity Aviation would have been aware of the magnitude of the strike and would have been able to prepare for it.[33] However, this was not the case as Equity Aviation had made inquiries regarding the participants of the strike and it was informed that the strike would only involve union members. Thus, it had made preparations based on this knowledge.[34] The court has to determine whether the purpose of s 64 was frustrated as was illustrated in *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others (1)*.[35] The court on appeal dealt with non-compliance with s 64(1)(*b*). However, the court pointed out that there was no argument that the non-compliance in any way frustrated the purposes of the LRA. Therefore, reliance on the non-compliance failed on appeal.[36]

---

[29] *Equity Aviation Services supra* note 18 at 2898G-I
[30] *Equity Aviation Services supra* note 18 at 2900F-G.
[31] *Equity Aviation Services supra* note 18 at 2900H.
[32] *Equity Aviation Services supra* note 18 at 2901A.
[33] *Equity Aviation Services supra* note 18 at 2901E-G.
[34] *Equity Aviation Services supra* note 18 at 2901E-G.
[35] *Fidelity Gaurds Holdings (Pty) Ltd v Professional Transport Workers Union & others (1)* (1998) 20 *ILJ* 260 (LAC).
[36] *Fidelity Gaurds Holdings supra* note 34 at 269D-F.

Zondo JP took the factors which were presented by Equity Aviation into account when he handed down the dissenting judgment that separate notices were required from non-represented employees. The SCA agreed with the dissenting judgment,[37] and added a fifth purpose that providing a separate notice would protect the non-represented employees. Lewis JA was of the opinion that if all employees complied with the procedural requirements of the LRA then their conduct would be protected under the LRA. Therefore, it is in the best interests of all employees that an employer receive a notice of intention to strike by all its employees who intend to strike.[38] The SCA further approved Zondo JP's interpretation of s 64(1)(*b*) who relied on labour law authors who claim that as soon as the procedural requirements for a valid strike have been fulfilled, namely that the matter has been referred for conciliation and the union has provided the employer with the notice of its intention to strike then the union is at liberty to call out all its members to engage in strike action, non-represented employees may also join in the strike provided that they furnish separate notice of their intention to strike.[39] The SCA and Zondo JA were of the opinion that not to do so would result in disorderly collective bargaining. The SCA accordingly set the decision of the LAC aside.[40]

The SCA's judgment and the dissenting decision of Zondo JP in the LAC fall in line with the conclusion reached by Froneman DJP in *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction and Allied Workers Union*.[41] The LAC held that s 64(1)(*b*) has to be interpreted to advance the objectives of the LRA, one of which is to ensure orderly collective bargaining. The specific purpose of s 64(1)(*b*) gives effect to the objective of the LRA as this section is designed to ensure that the employer is aware of the strike so that he can prepare for it. The objective of the LRA and the purpose of s 64(1)(*b*) would be weakened and made ineffective if employers were not informed as to the exact terms of the strike.[42] There are two ways in which orderly collective bargaining would be damaged by not informing the employer of the exact extent that the strike would take.[43] Firstly, the employer requires this information so that he can

[37] *Equity Aviation Services supra* note 18 at 2901A.
[38] *Equity Aviation Services supra* note 18 at 2899E-F.
[39] *Equity Aviation Services supra* note 18 at 2902E-F.
[40] *Equity Aviation Services supra* note 18 at 2902G-H.
[41] *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction and Allied Workers Union* [1997] 6 BLLR 687 (LAC).
[42] *Ceramic Industries Ltd t/a Betta Sanitary Ware supra* note 41 at 702.
[43] *Ceramic Industries Ltd t/a Betta Sanitary Ware supra* note 41 at 701-702.

decide whether it is more reasonable to accede to the employees demand rather than allowing the strike to commence. The underlying purpose of a strike is to utilise the threat of economic harm to the employer's business to allow the employer the opportunity to consent to the employees demands.[44]

Secondly, separate notices from non-represented employees would enable an employer to protect the interests of the business when the actual strike commences as prior knowledge regarding how many employees will be participating in the strike will indicate the extent of the strike and thus allow the employer to plan ahead based on that knowledge.[45] These are pertinent issues which are imperative in providing the employer with sufficient information to make informed decisions especially within the South African context given the spike in violent strikes that affect the safety of non-strikers and the general public.[46] One can only implement measures to prevent harmful and dangerous occurrences if they can foresee that such harm or danger will occur.[47] An employer cannot be expected to safeguard against severe financial loss or potential danger if it is unaware of the severity that the strike would inflict.[48] This is a grave concern as if there are insufficient measures taken against potential harm then the damage to the business and society at large would be colossal.[49]

However, the in *SA Transport & Allied Workers Union & others v Moloto No & another*,[50] the Constitutional Court (CC) ruled against the decision in *Equity Aviation supra*, thus establishing a new line of precedent. As a result of failed negotiations pertaining to wages the union obtained a certificate that the dispute remained unresolved.[51] The union which represented the majority of Equity's workforce issued a notice to the employer indicating their intention to embark on a strike. Similarly to *Equity Aviation supra*, non-members of the trade union also engaged in the

[44] *Stuttafords v SACTWU* [2001] 1 BLLR 47 (LAC).
[45] N Smit & E Fourie '*Equity Aviation v SATAWU* (478/09) [2011] ZASCA 232 (30 November 2011): The issue of separate strike notices where employees are not members of the trade union' 2012 *De Jure* 432.
[46] *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO & others* (2007) 28 *ILJ* 1827 (LC).
[47] *SATAWU & another v Garvas & others* 2013 (1) SA 83 (LC).
[48] *Algoa Bus Company v SATAWU & others* [2010] 2 BLLR 149 (LC).
[49] A Sedat *The effects of strikes in the South African gold mining industry on shareholder value* (unpublished LLM thesis, University of the Witwatersrand, 2013) 3.
[50] *SA Transport & Allied Workers Union & others v Moloto No & another* (2012) 33 *ILJ* 2549 (CC).
[51] *SA Transport & Allied Workers Union supra* note 50 at 2250[2]-[4].

strike. These employees were then dismissed because of their participation in an unprotected strike.[52]

The CC was called upon to adjudicate on two arguments. The argument presented by the applicants pertained to the language expressed by the legislature which provided for a strict interpretation of the provision of s 64(1)(*b*) in light of the Constitution and the purpose of the LRA.[53] The applicants claimed that to allow any further reading into the provision would entail that the employer is given an unfair advantage over the employees who are already placed in an inferior position within the employment field.[54] The argument presented by the respondents pertained to a purposive interpretation of s 64(1)(*b*) which claimed that in order for the provision to contain any purpose at all, notices of the intended strike had to be given by all employees who intended to strike.[55]

The majority in which Yacoob ADCJ, Froneman J, Nkabinde J, Cameron J and Van der Westhuizen J concurred held in favour of the applicants. The majority considered two primary aspects that followed from the factual context of the case as well as the principle of constitutional jurisprudence of statutes. The majority took cognisance of the recognition agreement that was concluded by the union and Equity Aviation which recognised the union as a bargaining agent which represented all the employees employed by Equity Aviation. Furthermore, there was also an agency agreement in place which permitted the union to engage in negotiations regarding wages on behalf of both non-union employees and members of the union.[56] The CC stated that it is in this context that the notice to strike should be interpreted, as from the beginning of negotiations both members of the union as well as non-union members were represented by the union regarding this wage dispute.[57] Equity Aviation could not reasonably have believed that the strike notice did not include non-union employees from the facts of the case.[58]

The majority further considered was that the right to strike was a Constitutional right which afforded it significant value. Consequently, there should not be any implicit requirement read

[52] *SA Transport & Allied Workers Union supra* note 50 at 2250[2]-[4].
[53] *SA Transport & Allied Workers Union supra* note 50 at 2558D.
[54] *SA Transport & Allied Workers Union supra* note 50 at 2558E-F.
[55] *SA Transport & Allied Workers Union supra* note 50 at 2558G-H.
[56] *SA Transport & Allied Workers Union & others v Moloto supra* note 50 at 2550H-I.
[57] *SA Transport & Allied Workers Union & others v Moloto supra* note 50 at 2550J.
[58] *SA Transport & Allied Workers Union & others v Moloto supra* note 50 at 2551A.

into the right without proper justification.[59] The majority held that there was no proper justification to read an implicit requirement into the right, as the LRA only envisaged one strike in respect of one dispute, thus, there was no rationale or language from statute to assume that there should be two notices given for one strike.[60] In *Moloto supra* the court held that the LRA in s 64 has explicitly stated the procedural requirements that have to be met for the protection of a strike and that once these requirements have been satisfied there does not have to be any further procedures conferred upon it.[61] Yacoob ADCJ, Froneman J, Nkabinde J, Cameron J and Van der Westhuizen J further held that the LRA sought to regulate the right to strike thus there does not have to be any further justification or additional limitations to these explicit limitations which are necessary for the effective regulation of the right.[62] Therefore, it can be deduced that the court in *Moloto supra* has effectively illustrated that the court is unwilling to read limitations into fundamental rights enshrined by the Constitution without adequate justification.[63]

The majority court further reasoned that in terms of the principle of constitutional jurisprudence if there was more than one interpretation of the statutory provision, such interpretation must conform to the spirit, purport and objective of the Bill of Rights.[64] The CC considered that there were two consequences which would give effect to the spirit, purport and objectives of the Bill of Rights from interpreting s 64(1)(*b*) to mean only what was expressly enshrined by legislature.[65]

Firstly, a less intrusive interpretation would ensure greater certainty in enforcing the right to strike, as reading an implicit requirement would require more information in the notice and would lead to further implicit requirements being read into the provision.[66] If this occurred there would be great uncertainty in enforcing strikes as employees would not be able to follow a clear guideline on protected strikes. This would negate the purpose of the LRA which endorses orderly collective bargaining.[67] It is imperative to note that the majority's reasoning regarding this first point on promoting orderly collective bargaining vastly contrasts to the reasoning proffered by

[59] *SA Transport & Allied Workers Union & others v Moloto supra* note 50 at 2550F-G.
[60] *SA Transport & Allied Workers Union & others v Moloto supra* note 50 at 2551C.
[61] *CWIU v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 *ILJ* 321 (LAC).
[62] *New National Party of SA v Government of the Republic of SA & others* [1999] 5 BCLR 489 (CC).
[63] *Islamic Unity Convention v Independent Broadcasting Authority* [2002] 5 BLLR 433 (CC).
[64] *SA Transport & Allied Workers Union & others v Moloto No & another supra* note 50 at 2551C-D.
[65] *SA Transport & Allied Workers Union & others v Moloto No & another supra* note 50 at 2551C-D.
[66] *SA Transport & Allied Workers Union & others v Moloto No supra* note 50 at 2551E.
[67] *SA Transport & Allied Workers Union & others v Moloto No supra* note 50 at 2551F.

the SCA in *Equity Aviation supra.*[68] The court in *Equity Aviation supra* concluded that orderly collective bargaining would be achieved if there was an implicit reading into the notice to strike. The reasoning of the SCA was more in line with how the employer would perceive the strike notice in order to prepare for the power play that was to commence.[69] In *Equity Aviation supra,* the SCA rationalised that the enforcement of orderly dispute resolution would ensure that employers are not caught off guard and that a strike does not proceed to an extent that is uncontrollable, as this would be contrary to the intention of the LRA.[70] In *Moloto supra* the majority's reasoning was in line with the effect that the reading into of implicit requirements would have on the employees. In this regard the majority were of the view that reading into further requirements would make the enforcement of strike indeterminate as the employer would claim that further requirements be read into the provision.[71] This would also erode the very essence of orderly collective bargaining which is to balance the unequal power that exists between the employer and employee.[72]

Secondly, a less intrusive interpretation of the right to strike would enforce the underlying rationale for industrial action which is to balance the social and economic power within the workplace.[73] If more information was required other than that which legislature expressed, the position of the employer would be further strengthened and contradict the purpose of the Constitution which is to level the playing field that has already been tilted in favour of the employer.[74] The employer has possessed economic autonomy over workers for centuries.[75] Workers suffer from an inherent imbalance of power in the workplace as a result of the employer's superior position of enforcing wages and employment conditions and workers have no option but to accept these conditions if he or she is in need of a job.[76] Therefore, by not interpreting further implicit limitations employees would be able to level this imbalance of power that employers have possessed through strike action which would bring pressure upon the

---

[68] Smit & Fourie (note 45 above; 430).
[69] *SA Transport & Allied Workers Union & others v Moloto supra* note 50 at 2558H-I.
[70] D du Toit & R Ronnie 'The necessary evolution of strike law' 2012 *Acta Juridica* 195.
[71] *Poswa v Member of the Executive Council Responsible for Economic Affairs, Environment & Tourism, Eastern Cape* 2001 (3) SA 582 (SCA).
[72] A P Molusi 'The Constitutional duty to engage in collective bargaining: notes' (2010) 31(1) *Obiter* 156.
[73] *SA Transport & Allied Workers Union & others v Moloto No & another supra* note 50 at 2551E-F.
[74] *SA Transport & Allied Workers Union & others v Moloto supra* note 50 at 2551G.
[75] S Gelb 'Inequality in South Africa, causes and responses conference *Somerset West 13-15 October 2004,* 18.
[76] B E Kaufman 'Labor's inequality of bargaining power: Changes over time and implications for public policy' (1989) 10(3) *Journal of Labor Research* 286.

dominant elite and compel employers to accede to the demands of employees.[77] Furthermore, non-unionised employees would feel the impact of an additional strike notice much more severely that employees who are represented by a union, as this would be an additional requirement only non-unionised employees had to comply with.[78]

In terms of the notice, if the employees want to serve notice on their employer who is part of the bargaining council and the dispute pertains to the collective agreement that has not yet been concluded by the particular bargaining council, then notice merely has to be served on the secretary of the bargaining council.[79] The prescribed period that notice should be given varies depending on who the employer is. If the employer is a private body then the required notice period is 48 hours'.[80] However, where the employer is the state, then there must be at least seven days' notice given to the employer of the intended strike.[81] In *City of Matlosana v SA Local Government Bargaining Council,*[82] the court elaborated on the necessity of seven days' notice required when the employer is the state. The court highlighted that the State is responsible for supplying essential and basic needs to the general public. These services are critical in dispensing services to provide for the needs of the public. It is for this reason that the employer being the State requires additional time to decrease any interruption that may occur as a result of the intended strike.[83] The notice period is not the only requirement that the notice needs to meet.

The notice does not have to indicate the exact time which the strike will commence.[84] Additionally, the strike does not have to commence at the time specified in the notice.[85] The purpose of this section is to ensure that the employer is aware of when the strike will take place

---

[77] P N Singh & N Kumar *Employee Relations Management* (2011) 89.
[78] M A Chicktay 'Employment, the economy & growth: The implications for labour law Conference' *Sandton Convention Centre, Johannesburg 30 July-1 August 2013* 17.
[79] The LRA; s 64(1)(*b*)(i), *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v National Union of Metalworkers of SA & others* (1999) 20 *ILJ* 677 (LC) at 678F-J.
[80] The LRA; s 64(1)(*b*).
[81] M O Samuel 'The mineworkers' unprocedural strike: setting the path for redefining collective bargaining practice in South Africa' (2013) 11 *Journal of Contemporary Management* 246.
[82] *City of Matlosana v SA Local Government Bargaining Council* (2009) 30 *ILJ* 1293, see also *Mcosini v Mancotywa & another* (1998) 19 *ILJ* 1413 (TK), *SA Agricultural Plantation & Allied Workers Union & others v Premier of the Eastern Cape & others* (1997) 18 *ILJ* 1317 (LC).
[83] *City of Matlosana v SA Local Government Bargaining Council supra* note 82 at 297F-G.
[84] *Country Fair Foods (A Division of Astral Operations Ltd) v Hotel Liquor Catering Commercial & Allied Workers Union & others* (2006) 27 *ILJ* 348 (LC), *Western Platinum Ltd v National Union of Mineworkers and Others* (2000) 21 *ILJ* 2502 (LC).
[85] *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v National Union of Metalworkers of SA & others* (1999) 20 *ILJ* 677 (LC), *Public Servants Association of SA v Minister of Justice & Constitutional Development & others* (2001) 22 *ILJ* 2303 (LC).

to ensure that he can minimise any disruption caused by the strike or to give the employer the opportunity to accede to the employees' demand.[86] Even though much emphasis is placed on informing the employer when the strike is to commence, the employer does not need to be informed as to the complete details regarding the time and duration.[87] It follows from the discussion of these two paramount cases that the LRA places clear and precise procedures which must be followed for the protection of a strike. However, there are circumstances which the LRA identifies as necessary to exclude the requirements prescribed by statute.[88]

5.3. WHEN STATUTORY PROCEDURE DOES NOT HAVE TO BE FOLLOWED

The LRA acknowledges that there are instances where employees may dispense with the requirements for statutory procedure and may still be afforded the protection of the strike. The first instance that the LRA envisages is if the collective agreement which binds the parties specifies that the dispute in interest is one that employees may not strike over, then such a strike will not be afforded protection in terms of the LRA.[89] In *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA*,[90] the Labour Court held that there are essentially two available means to guarantee the protection of a strike. Firstly, employees are at liberty to follow the statutory procedure indicated by s 64 of the LRA and secondly, employees may adhere to the requirements stipulated by the collective agreement. It is a choice of what the intended strikers would like to follow.[91] Therefore, it follows that a collective agreement may override provisions of the LRA as was previously discussed.[92] If strikers want the protection of the law, they merely need to follow the collective agreement or the provision stipulated in s 64.

The second instance which the LRA allows for dispensing with statutory procedure is when parties are members of a particular bargaining council and that council's constitution prescribes a

---

[86] *Transnet Ltd v SATAWU* [2011] 11 BLLR 1123 (LC) at 12.
[87] *Equity Aviation Services (Pty) Ltd v SATAWU & others* (2009) 30 *ILJ* 1997 (LAC), *Country Fair Foods (A Division of Astral Operations Ltd v Hotel Liquor Catering Commercial & Allied Workers Union & others* (2006) 27 *ILJ* 348 (LC), *Transnet Ltd v SATAWU* [2011] 11 BLLR 1123 (LC).
[88] M M Mamabolo *The dismissal of unprotected strikers and the audi alteram partem rule* (unpublished LLM thesis, University of the North West, 2006) 4.
[89] The LRA; s 65(1)(*b*), *Country Fair Foods (Pty) Ltd v FAWU & others* [2001] 5 BLLR 494 (LAC), *Vista University v Botha & others* [1997] 5 BLLR 614 (LC), *South African National Security Employers Association v TGWU & others (1)* [1998] 4 BLLR 364 (LAC).
[90] *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA* [1997] 10 BLLR 1292 (LC).
[91] *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA supra* note 90 at 1294, *North East Cape Forests v SAADAWU & others* [1997] 5 BLLR 578 (LC).
[92] *Vista University v Botha & others* [1997] 5 BLLR 614 (LC).

process for the resolution of the dispute that has arisen between the parties.[93] The employees in such an instance are obliged to follow that process.[94] The third instance that the LRA envisages is when an employer makes a unilateral amendment or threatens to make such an amendment to the conditions of employment and consequently refuses to withdraw from implementing the amendments.[95] A further instance that the LRA permits for the non-compliance of statutory requirements is when the strike is in response to a lock-out that is unlawfully imposed by the employer.[96] The LRA allows the implementation of strike activity in these instances to promote the right to strike and further the interests of justice to ensure that employees do not have to adhere to strict rules when their employers are not willing to follow due process. However, the interests of justice also ensure that there are certain situations which would result in detrimental consequences if strikes did occur. It is for this reason that there are certain prohibitions on the right to strike.[97]

5.4. THE PROHIBITIONS ON THE RIGHT TO STRIKE

There are essentially four instances when strike action will be prohibited.[98] The first instance is when parties conclude a collective agreement that specifically contain provisions which prohibit the use of industrial action as a means of resolution over certain disputes.[99] These provisions are referred to as peace clauses whose enforcement would prohibit striking over certain disputes or be an absolute ban on all strike activity.[100] In *Enforce Guarding (Pty) Ltd v National Security & Unqualified Workers Union & others*,[101] the company proposed to make changes to the hours of overtime in conformity with ministerial requirements. However, these changes were not in

---

[93] The LRA; s 64(3)(*a*).
[94] *Security Services Employers Organization & others v SA Transport & Allied Workers Union & others* (2006) 27 *ILJ* 1217 (LC), *SANSEA v NUSOG* [1997] 4 BLLR 486 (CCMA).
[95] The LRA; s 64(3)(*e*).
[96] The LRA; s 64(3)(*c*).
[97] Samuel (note 81 above; 246).
[98] The LRA; s 65.
[99] The LRA; s 65(1)(*a*), *Ford Motor Company of SA (Pty) Ltd v NUMSA & others* (P32/07), 08/11/2007, unreported, *Vista University v Botha & others* (1997) 18 *ILJ* 1040 (LC), *National Union of Metalworkers of SA & others v Highveld Steel & Vanadium* (2002) 23 *ILJ* 895 (LAC), *National Union of Metalworkers of SA & others v Hendor Mining Supplies (a division of MarschalkBeleggings (Pty) Ltd* (2003) 24 *ILJ* 2171 (LC), *Hlope v Transkei Development Corporation Ltd* (1994) 15 *ILJ* 207 (ICTK).
[100] A Jacobs *Labour Law in the Netherlands* (2004) 157, C Barrow *Industrial Relations Law* 2nded (2002) 160, *SA Federation of Civil Engineering Contractors on behalf of its members v National Union of Mineworkers & another* (2010) 31 *ILJ* 426 (LC).
[101] *Enforce Guarding (Pty) Ltd v National Security & Unqualified Workers Union & others* (*2001*) 22 *ILJ* 2457 (LC).

excess of the maximum hours as stipulated by the Basic Conditions of Employment Act 75 of 1997 (hereinafter referred to as the BCEA). The dispute pertained to whether the collective agreement prohibited strike action as the agreement stipulated that only overtime that is less than the maximum hours of overtime will be dealt with according to the BCEA.[102] The LC as per Pillay J held that the collective agreement did not prohibit the strike for two reasons. Firstly, the company's proposed amendment did not exceed the 10 hours' overtime stipulated by the BCEA. Therefore the dispute fell within the ambit of the collective agreement and was a matter that was subject to negotiation.[103] Secondly, in terms of the contention that the matter had to be addressed at central level and not plant level, the court further held that there was no bargaining council in place as yet and no mechanisms to resolve the dispute had been set. Thus, the union was entitled to pursue the interests of its members through industrial action. Hence, the collective agreement did not prohibit the strike on this basis as well.[104]

However, it is not only a collective agreement that may prohibit strike action, but rather there are further instances where the constitution of a bargaining council may prohibit strike action.[105] The leading case which has developed this area of the law is that of *SA Clothing & Textile Workers Union v Yarntex (Pty) Ltd t/a Bertrand Group*.[106] The employees of Yarntex engaged in unprotected strikes during the period of July and December of 2007. Consequently, such employees were issued with warnings that explicitly informed them that if they engaged in similar conduct during the next 12 months they would be dismissed.[107] During this period the union reached a deadlock regarding wages and a dispute was declared. The provisions of the National Textile Bargaining Council (NTBC) specifically stated that all negotiations at plant level were prohibited. Therefore, all lock outs and strikes at this level were also prohibited. The company repeatedly reminded the union that this prohibition would render strikes unlawful,

---

[102] *Enforce Guarding (Pty) Ltd v National Security & Unqualified Workers supra* note 100 at 2457E.
[103] *Enforce Guarding (Pty) Ltd v National Security & Unqualified Workers supra* note 100 at 2457H.
[104] *Enforce Guarding (Pty) Ltd v National Security & Unqualified Workers Union & others supra* note 100 at 2457H.
[105] A Young, K van Niekerk & S Mogtlane *Juta's Manual of Nursing* (2003) 73.
[106] *SA Clothing & Textile Workers Union v Yarntex (Pty) Ltd t/a Bertrand Group* (2010) 31 *ILJ* 2986 (LC), *Food and Allied Workers Union (FAWU) V TSB Sugar RSA Ltd & others* [2013] 10 BLLR 973 (LAC), *Transport & Allied Workers Union of SA (TAWUSA) & others v Unitrans Fuel & Chemical (Pty) Ltd* (2013) 34 *ILJ* 1785 (LC).
[107] *SA Clothing & Textile Workers Union v Yarntex supra* note 105 at 2986G-H.

however, this warning was ignored and in September 2008 the majority of the workers engaged in the strike.[108]

There are various factors that the court took into account in deciding this case; however, emphasis will only be placed on the issue pertaining to the NTBC's constitution.[109] As a result of non-compliance by the employees, their dismissal was effected without a hearing. The union referred the matter to the LC stating that the employees' dismissals were both substantively and procedurally unfair. The court reasoned that the strikers were made aware on numerous occasions that the constitution of the NTBC prohibited strike action at plant level. In this regard the union had a responsibility to comply with the rules of the bargaining council.[110] The court stated that this was not a violation of the right to strike as this right is not an absolute right and is therefore subject to s 36 of the Constitution. The strikers had engaged in repeated misconduct and had failed to make representations against their dismissal. Therefore, the strikers had forfeited their right to hold such a hearing. The court accordingly held that the dismissal of the strikers were not substantively or procedurally unfair.[111]

This matter was taken on appeal where the LAC upheld the decision of the LC.[112] On appeal the court reasoned that the constitution of the NTBC served as a collective agreement as this constitution specified how disagreements should be resolved and further explained the everyday procedure of the NTBC. The parties specifically agreed that negotiations regarding wages and conditions of employment were to be taken at subsector levels, thus, if disputes arose at this level then the employees would be entitled to embark on strike action as a means of resolution.[113] The LRA entitles parties to agree on the bargaining level, as well as the subjects who are involved at such levels.[114] Hence, the fact that the constitution explicitly stated that negotiations could only take place at a specific level automatically ousts negotiations at any other level including the remedy of industrial action that would follow failed negotiations.[115] The court concluded that the effect of the constitution of NTBC was tantamount to the content and purpose of a collective

[108] *SA Clothing & Textile Workers Union v Yarntex supra* note 105 at 2986I-J.
[109] *SA Clothing & Textile Workers Union v Yarntex supra* note 106 at 2987A.
[110] *SA Clothing & Textile Workers Union v Yarntex supra* note 106 at 2987D-F.
[111] *SA Clothing & Textile Workers Union v Yarntex supra* note 106 at 2987G-H.
[112] *SA Clothing & Textile Workers Union v Yarntex (Pty) Ltd t/a Bertrand Group* (2013) 34 *ILJ* 2199 (LAC).
[113] *SA Clothing & Textile Workers Union v Yarntex (Pty) Ltd t/a Bertrand Group supra* note 112 at 2210 [64]-[66].
[114] M Sewerynski 'Representation of employees in collective bargaining within the firm' (2007) 11(3) *Electronic Journal of Comparative Law* 4.
[115] *SA Clothing & Textile Workers Union v Yarntex supra* note 112 at 2210 [65].

agreement. Therefore, if strikes could be excluded in a collective agreement then it would follow that strikes could also be excluded in a bargaining council's constitution.[116]

It is submitted that the case of *Yarntex supra* effectively conveys an essential point, which is that the right to strike is regarded as a fundamental right enshrined by the constitution, thus greater significance is conferred upon this right.[117] Consequently, any limitations must be narrowly interpreted and resorted to only when the circumstances necessitate that in doing so it would prevent lesser harm.[118] The limitation of the right ultimately seeks to prevent conflict between other rights.[119] In *Yarntex supra*, the lesser harm that the NTBC sought to prevent was that if industrial action took place at plant level then SATAWU would have been entitled to initiate industrial action against only one employer to the omission of the other employers. This would have collapsed the bargaining process and negated plant-level bargaining.[120] This in turn would have conflicted with the purpose and objectives of the LRA which seeks to ensure orderly collective bargaining.[121]

A second limitation that prohibits industrial action is if the issue in dispute is classified as a rights dispute, because the correct procedure for resolution of rights disputes is through arbitration and adjudication.[122] There is a clear distinction made by the LRA between disputes of interest and disputes of rights, as only interest disputes may entail the use of industrial action.[123] The LRA in s 65(1)(*c*) clearly narrows those issues which are compelled to be referred to for arbitration or adjudication.[124] In *Coin Security Group (Pty) Ltd v Adams & others*,[125] the court held that when determining whether an issue is one over which employees may engage in strike action, the form in which the dispute is presented does not distinguish a dispute. It is the nature

---

[116] *SA Clothing & Textile Workers Union v Yarntex supra* note 112 at 2210 [68].
[117] K J Selala 'The right to strike and the future of collective bargaining in South Africa: An exploratory analysis' (2014) 3(5) *International Journal of Social Sciences* 116.
[118] *S v Zuma & others* 1995 (2) SA 642 (CC).
[119] M G Masitsa 'Teacher's right to strike vis-à-vis learner's right to education- Justice for one is an injustice for the other' (2013) 13(4) *Interim: Interdisciplinary Journal* 20.
[120] *SA Clothing & Textile Workers Union v Yarntex supra* note 112 at 2210 [67].
[121] S Vettori 'The Labour Relations Act 66 of 1995 and the protection of trade unions' (2005) 17 *SA Merc LJ* 304.
[122] L Gordon-Davis & P Cumberledge *The Hospitality Industry Handbook on Legal Requirements for Hospitality Business* 3rded (2013) 292.
[123] Selala (note 117 above;) 119.
[124] *Mawethu Civils (Pty) Ltd v National Union of Mineworkers* (2013) 34 *ILJ* 2624 (LC).
[125] *Coin Security Group (Pty) Ltd v Adams & others* [2000] 4 BLLR 371 (LAC).

of the dispute that distinguishes the type of dispute.[126] Consequently, employers may not simply label a dispute as one that cannot be strikeable just to avoid a strike action. Neither can employees label a dispute as an interest dispute simply to engage in strike action. In *Ceramic Industries Limited t/a Betta Sanitary Ware v NCBAWU & others*,[127] the court affirmed the necessity of the procedural and substantive requirements which have to be adhered to in order for a strike to be protected under the LRA. In terms of procedure, employees are obliged to follow the process as stipulated in s 64 of the LRA. In terms of the substantive limitation that is placed on the right to strike, one such limitation is that issues which are subject to arbitration in terms of the LRA cannot be resolved through industrial action.[128]

This is a vastly different position compared to that which governed substantive limitations under the old LRA where a strike could follow due procedure and still be deemed unfair in terms of its unfair labour practice provision.[129] However, under the current LRA the substantive limitations revolve around the nature of the dispute and whether it is subject to resolution by industrial action.[130] Furthermore, these limitations are only enforceable in terms of the LRA. This means that strikes will still retain their protection even if referred for arbitration under another legislation. In such circumstances, the nature of the dispute would not be relevant as it would be authorised by another Act.[131]

The LRA in terms of s 64 limits the protection of strike action further by stipulating that a strike would lose its protection once the dispute over which the strike was called has been resolved.[132] In *Afrox Ltd v SA Chemical Workers Union & others (2)*[133] the court dealt with the issue of when a strike loses its protection. The dispute arose over the employees' refusal to work staggered shifts in its Pretoria site. The employees then engaged in industrial action over a demand in relation to the dispute. The strike ended in the dismissal of the employees as well as the

---

[126] *Coin Security Group (Pty) Ltd v Adams & others supra* note 125 at 15*, NUMSA & others v Highveld Steel & Vanadium Corporation Ltd* [2002] 1 BLLR 13 (LAC), *Samancor Ltd v NUMSA & others* (2000) 8 BLLR 956 (LC), *MITUSA & others v Transnet Ltd & others* [2002] 11 BLLR 1023 (LAC), *Baderbop (Pty) Ltd v NUMSA & others* [2002] 2 BLLR 139 (LAC).
[127] *Ceramic Industries Limited t/a Betta Sanitary Ware v NCBAWU & others* [1997] 6 BLLR 698 (LAC).
[128] *Ceramic Industries Limited t/a Betta Sanitary Ware supra* note 127 at 700F.
[129] *Ray's Forge & Fabrication (Pty) Ltd v NUMSA & others* (1989) 10 *ILJ* 762 (IC).
[130] *Ceramic Industries Limited t/a Betta Sanitary Ware supra* note 127 at 703J.
[131] *TSI Holdings (Pty) Ltd & others v NUMSA & others* [2004] 6 BLLR 600 (IC).
[132] *SACWU & others v Afrox Ltd* [1997] 4 BLLR 382 (LC).
[133] *Afrox Ltd v SA Chemical Workers Union & others (2)* (1997) 18 *ILJ* 406 (LC).

abandonment of the employer's unsuccessful attempts to transport the gas to its customers. As a result of the employer's inability to deliver its goods to its customers, Afrox enlisted the help of contract workers. The contract workers themselves were not required to work staggered shifts and thus the issue over staggered shifts was no longer in dispute.[134]

In terms of the court's stance on the termination of a strike, the court stated that a strike can end in two ways. The first way is if the strikers end their strike and unqualifiedly return to work. Secondly, a strike can end when the grievance or dispute disappears. This could occur if the employer consents to the strikers' demands or if the dispute is resolved or if the grievance is removed.[135] It must be noted that the purpose of a strike within the framework of collective bargaining is to resolve a dispute.[136] Once there is an absence of a dispute, a strike loses its purpose, thus the strike terminates. Once a strike ends, the protection it has been endowed also terminates.[137] It is submitted that the court's reasoning in this regard is correct and adequately reflects the intention of the LRA regarding strikes. The purpose of a strike as envisaged by the LRA in s 213 is to pursue the resolution of a dispute or grievance. A strike in such an instance is afforded protection provided it complies with the requirements of a lawful strike, which request employees to engage in collective bargaining and provide 48 hours' notice of their intention to strike.[138] If the dispute is resolved, as in this case when the employer enlisted the help of contractors, then the strike no longer has a purpose. If a strike continues after the dispute has been resolved then such a strike would be unlawful. It is submitted that the dismissal of the employees was lawful as the employees engaged in an illegal strike and thus lost the protection against dismissal during the strike. The moment the dispute was resolved, the strike terminated as well as its protection.[139]

The third prohibition on strikes which is when there is an arbitration award, a determination made by the minister or if the BCEA regulates the dispute in contention.[140] The case of *Afrox*

---

[134] *Afrox Ltd v SA Chemical Workers Union & others supra* note 133 at 408D-409D.
[135] *Afrox Ltd v SA Chemical Workers Union & others supra* note 133 at 411A.
[136] *National Union of Mineworkers & others v Free State Consolidated Gold Mines (Operations) Ltd-President Steyn Mine; President Brand Mine; Freddies Mine* 1996 (1) SA 422 (A), *Masilela & others v Reinhart Transport (Pty) Ltd & others* (2010) 31 *ILJ* 2942 (LC), *Food & Allied Workers Union & others v Rainbow Chicken Farms* (2000) 21 *ILJ* 615 (LC).
[137] *Afrox Ltd v SA Chemical Workers Union & others supra* note 133 at 410A-B.
[138] The LRA; s 65. T Healy 'Employees should follow all strike procedures' *STAR* 20 January 2010 at 4.
[139] *Afrox Ltd v SA Chemical Workers Union & others supra* note 133 at 411A.
[140] The LRA; s 65(3)(*a*).

supra elucidates this pertinent prohibition in terms of the resolution for disputes concerning dismissals. The employees in *Afrox supra*, after conceding that the dispute pertaining to the staggered shifts had been resolved, continued to strike over the issue that their employment was replaced by that of contract workers. In this regard, the court stated that strikers are not at liberty to change the dispute over which they are striking. Furthermore, the dispute over their dismissals was not subject to strike action according to the LRA. Disputes regarding dismissals are categorised as rights disputes and as such have to be arbitrated or adjudicated and thereafter referred to the LC.[141]

One of the most significant introductions of the LRA is that of the differentiation of rights disputes and interests' disputes.[142] The intention of the LRA is quite clear in its reason for such separation of disputes. Disputes of existing rights require resolution by a prescribed set of rules which are implemented through arbitration or adjudication and the LC.[143] This distinction is well reasoned and has provided a number of cautionary regulations regarding strike action. In terms of s 65(1)(*c*), employees may not strike over the reinstatement of dismissed employees. In such a case, employees are compelled to resolve the grievance by way of arbitration. However, even after this process has been exhausted employees may not engage in strike action as they would be bound by an award, which prohibits strikes in pursuance of such a dispute.[144] Furthermore, if a dispute proceeds to the LC and has received an outcome, the outcome or determination is regarded as a resolution to the dispute. Therefore, employees are not permitted to strike over the issue as it is deemed to have been resolved.[145]

The court in this instance has affirmed that there is a difference between protected strikes and unprotected strikes which are prohibited.[146] Furthermore, the LC has identified that there are those strikes that fall into neither of these categories. In *Early Bird Farm (Pty) v Food & Allied Workers Union & others*,[147] the court dealt with an issue of the middle ground which could provide another category of industrial action. In *Early Bird Farm supra* the respondents were dismissed from work for engaging in a strike. The matter was then referred to the LC. It was

[141] *Afrox Ltd v SA Chemical Workers Union & others supra* note 133 at 407A-D.
[142] M Vranken *Death of Labour Law?: Comparative Perspectives* (2009) 109.
[143] R Blanpain *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (2007) 690.
[144] The LRA; s 65(3)(*a*)(i).
[145] T Ansay & E C Schneider *Introduction to Turkish Business Law* (2001) 137.
[146] *SAAPAW Free State & others v Fourie & Another* [2007] 1 BLLR 67 (LC).
[147] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others* (2004) 25 *ILJ* 2135 (LAC).

contended by the respondents that the dismissal was automatically unfair on the basis that they had engaged in a lawful strike. Furthermore, the respondents contended that the dismissal even if not found to be automatically unfair should be found to be unfair for having no reason to dismiss the employees as well as being procedurally defective. The respondents not only sought their reinstatement but also compensation.[148] On appeal, the court dealt with three essential issues. The first being of whether the court a quo was correct in deciding that the dismissal of the respondents did not amount to an automatic unfair dismissal. Secondly, whether the court *a quo* was correct in its decision that the dismissal was unfair and thirdly, that the dismissal was procedurally unfair. The court on appeal looked at the first issue in determining the subsequent answers to the second and third questions.[149] In dealing with the first issue, the appeal court decided that the respondents had engaged in a protected strike. The court's reasoning was that FAWU had included the respondents from the farm sector in its negotiations on wages when deliberating on behalf of the employees from the processing plant.[150]

At all times FAWU had included the individual respondents in its negotiations as the wage increase included the respondents. It was irrelevant to hold that the respondents were pursuing their own demands because their demands were one and the same of the employees from the processing plant.[151] Furthermore, the respondents had also participated in the strike ballot and at all times believed that they were party to the dispute. The dispute within the strike ballot was whether the respondents were willing to strike for an increase; it did not at any time specify that such an increase was only to be given to those employees within the processing plant.[152] This is a very critical point as there was no distinction made between the employees within the processing plant and the farm sector. The employees acted as a collective before and during the strike.[153]

The appeal court highlighted that the demand which the respondents pursued was the same as that of the employees in the processing plant regarding the increase of wages. Therefore, when the dispute was referred to the CCMA, it was deemed to include the dispute of the respondents as it was one and the same to that of the other employees. On this basis, the appeal court decided

---

[148] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2138A-B.
[149] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2146D-G.
[150] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2146G.
[151] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2149A-D.
[152] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2146D-G.
[153] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2146H-I.

that the strike adhered to the requirements within s 64 and was thus a lawful strike.[154] In arriving at its decision, the court turned to the question of what the respondent's position would have been had they engaged in the strike on behalf of the employees at the processing plant.[155] On this particular point the applicant argued that the respondents were bound by a collective agreement that required any dispute surrounding wages to be referred to conciliation, arbitration or adjudication. Furthermore, they contended that there had been no dispute to begin with because the respondents had accepted the wage increase.[156] In determining whether the respondents were bound by the collective agreement the court looked at the requirement under s 23(1)(*d*) of the LRA, which requires that individuals be mentioned in the agreement. This, however, was not done. Therefore, the court reasoned that the respondents were not bound by the collective agreement on this basis.[157]

The LC further considered the issue of whether employees belonging to a different bargaining unit or different part of the company may engage in strike action in support of fellow employees belonging to another bargaining unit without having referred the matter again for conciliation. The court based its decision in *Afrox supra* and *Plascon supra,* where the principle derived was that employees who are part of the same bargaining council and the same employer are not obliged to refer the same dispute which fellow employees are striking over if that dispute has already been referred for conciliation. Such employees are at liberty to join the strike as the strike has already been afforded protection.[158]

The appeal court in *Afrox supra* arrived at the decision that even if the respondents were striking in support of the employees from the processing plant, such strike action would have still been deemed lawful as the dispute had already been referred to for conciliation.[159] It is submitted that this decision is correct. The court effectively illustrates that the purpose of s 65 of the LRA is to ensure that the framework for dispute resolution is exhausted before employees engage in strike action. By highlighting this point the court emphasises that as long as the requirements of this

[154] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2150A-B.
[155] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2150J.
[156] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2151A-B.
[157] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2152A.
[158] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2154D-F.
[159] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2154G-I.

section are met, then the same dispute need not be referred for conciliation a second time.[160] The section is meant to ensure that strike action is a last resort and is not meant to prevent employees from utilising it as a form of resolution when conciliation is unsuccessful.[161] The case of *Early Bird Farm supra* clearly elucidates that the court must be satisfied that the dispute in issue has been referred for conciliation and still remains unresolved as a dispute, as resolved disputes cannot be an issue over which employees strike.[162]

The fourth prohibition on the right to strike is when employees are employed within essential and maintenance services. An essential service is one whose "interruption … endangers the life, personal safety or health of the whole or any part of the population".[163] This definition includes the SA Police Service and the Parliamentary Service.[164] The LRA has further provided for an Essential Services Committee to investigate whether a service can be classified as an essential service.[165] This prohibition on the right to strike does not require justification and has been numerously enforced by the judiciary.[166] In *SA Police Service (SAPS) v Police & Prisons Civil Rights Union & another (POPCRU),*[167] the CC was called upon for the first time to adjudicate on the term 'essential service'. The members of POPCRU were called to join the 2007 public sector strike, but were challenged by an urgent interdict brought by the SAPS. After a succession of appearances in the LC and the LAC, the matter was brought directly to the CC to decide on.[168]

The primary argument of the SAPS was that it is regarded as being a single body as defined in s 213 of the LRA; therefore all employees employed by the SAPS are an essential service. It went on to assert that there was no difference between employees between the South African Police Services Act[169] (hereinafter referred to as the SAPS Act) and the Public Services Act (hereinafter referred to as the PSA),[170] as the employees employed under the SAPS Act required the

---

[160] *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others supra* note 147 at 2154G-I.
[161] E Gerick 'Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law' (2012) 75(2) *Journal of Contemporary Roman-Dutch Law* 567.
[162] T W Kheel 'Strikes and public employment' (1969) 67(5) *Michigan Law Review* 941.
[163] The LRA; s 213.
[164] The LRA; s 71(10).
[165] The LRA; s 70.
[166] *New National Party of SA v Government of the Republic of SA & other* 1999 (5) BCLR 489 (CC).
[167] *SA Police Service v Police & Prisons Civil Rights Union & another* (2011) 32 *ILJ* 1603 (CC).
[168] *SA Police Service v Police & Prisons Civil Rights Union & another supra* note 167 at 1604G-J.
[169] Act 68 of 1995.
[170] Proc 103 of 1994.

functions of the employees employed under the PSA.[171] The union contended that this argument was far too inclusive, which would effectively restrict the right to strike of all public sector employees.[172] This was indeed a significant constitutional right which would require an accurate analysis of the LRA.[173]

The CC proceeded to interpret the term 'essential services' in light of the purpose of the LRA and the SAPS Act and its specific context. The court stated that it has to construe the term restrictively so that the right to strike would not be unjustifiably limited.[174] It was held that the provisions of the SAPS Act imply a differentiation between members and other employees. Thus, the SAPS cannot be deemed to be a single entity.[175] The Honourable Nkabinde J considered the LC's reasoning that because the Minister is entitled to appoint persons who are employed under the PSA as members under the SAPS Act, there is a deliberate difference between these two groups of employees. Hence, the Nkabinde J held that not all employees employed by the SAPS were deemed as being part of an essential service.[176]

It is evident from this case that the court is more inclined to construe a statute that will give effect to the right to strike rather than limit it.[177] This interpretation is essential to ensure that fundamental rights are attributed adequate significance.[178] Therefore, it has to be acknowledged that merely because an employee is employed within an essential services sector does not mean that they perform an essential task and they would be permitted to engage in industrial action, hence a minimum service agreement is necessary.[179] However, this is not the reality as there is a

---

[171] *SA Police Service v Police & Prisons Civil Rights Union & another supra* note 167 at 1608E-G.
[172] *SA Police Service v Police & Prisons Civil Rights Union & another supra note* 167 at 1608G-H.
[173] *NEHAWU v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC), *Khumalo & others v Holomisa* (2003) 24 *ILJ* 305 (CC).
[174] *SA Police Service v Police & Prisons Civil Rights Union & another supra* note 167 at 1615A.
[175] The SAPS Act; s 38(1).
[176] *SA Police Service v Police & Prisons Civil Rights Union & another supra* note 167 at 1616D.
[177] C Cooper 'Strikes in essential services'(1994) 15 *ILJ* 903 at 906.
[178] *Minister of Safety & Security v Sekhoto* 2011 (5) SA 367 (SCA), *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundhai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC).
[179] *Eskom Holdings Ltd v National Union of Mineworkers & others (Essential Services Committee Intervening)* (2011) 32 *ILJ* 2904 (SCA).

reluctance to discipline essential service workers who engage in illegal strikers, thus, the compulsion to conclude minimum service agreements have been greatly undermined.[180]

It must be noted that in addition to interpreting statutes to give effect to the right to strike, as was portrayed in *SAPS supra*, the CC may affirm the invalidity of any statute or action that is inconsistent to the rights enshrined in the Constitution and still uphold the purpose of excluding essential service employees from striking.[181] This was illustrated in *SA Defense Union (SANDU) v Minister of Defense & another*.[182] In *SANDU supra* the CC was called upon to decide on whether the provision endorsed by the Defense Act 44 of 1957 (hereinafter referred to as the Defense Act), which prohibited soldiers from joining a trade union was unconstitutional.[183]

The argument presented by the applicants was that 126B(2) read with s 126B(4) violated rights of members of the Defense force to freedom of association, as these provisions prohibited members of the defense force from engaging in public protests, strikes and from joining trade unions. In this regard the CC firstly analysed the constitutional implications of s 126B(2) read with s 126B(4).[184] However, the applicants only contended the constitutionality of the right to engage in public protests and joining trade unions. It was asserted that by joining trade unions, the interests of the soldiers would be better advanced without having them engaging in strikes.[185] The respondents contended that this inclusion would eventually lead to the decline in discipline and order of the defense force.[186] Mokgoro J reasoned that the right to engage in public protest fell squarely within the right to freedom of expression. The right to freedom of expression forms the foundation of a democracy which is integrated within further rights that are reciprocally supportive of each other.[187] The Constitution provides for the right to freedom of religion, beliefs

---

[180] D Pillay 'Essential services: Developing tools for minimum service agreements' (2012) 33 *ILJ* 801 at 802.
[181] *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC), *Mazubuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC), *Ferreira v Levin NO & others* 2011 (2) SA 473 (CC), *Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC), *Mvumvu and others v Minister for Transport and another* 2011 (2) SA 473 (CC), *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), *Harksen v Lane NO and others* 1998 (1) SA 300 (CC), *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 1999 (1) SA 6 (CC), *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), *S v Gwadiso* 1996 (1) SA 388 (CC), *S v Mamabolo (E TV and others Intervening)* 2001 (3) SA 409 (CC), *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).
[182] *SA Defense Union v Minister of Defense & Another* (1999) 20 *ILJ* 2265 (CC).
[183] The Defense Act; s 126B (2).
[184] *SA Defense Union v Minister of Defense & another supra* note 182 at 2266F-H.
[185] *SA Defense Union v Minister of Defense & another supra* note 182 at 2280E-F.
[186] *SA Defense Union v Minister of Defense & another supra* note 182 at 2280G.
[187] *Curtis v Minister of Safety & Security & others* 1996 (3) SA 617 B (CC), [1996] 5 BCLR 609.

and opinion,[188] the right to freedom of association[189] and the right to assembly.[190] These rights collectively form the basis on which individuals are entitled to not only formulate opinions and express them through various manners, but also to form and join associations of people who share the same values and beliefs of such individuals who can promote and propagate the opinions of such individuals as collectives.[191] It must be noted that these rights are enshrined within international instruments such as the ILO Conventions, which have enunciated the right to engage in freedom of association[192] and right to join a trade union and engage in collective bargaining.[193] Furthermore, our courts are compelled to give effect to these rights when interpreting legislation.[194]

O Regan J stated that the ramifications of the prohibition contained ins 126B(2) read with s 126B(4), had grave consequences for the fundamental rights of soldiers. The prohibition restricted all soldiers from either supporting or contending any objective or purpose of any issue that is of social concern that would necessitate the complete detachment and isolation from the activities and concerns of citizens.[195] O Regan J rationalised that this perception of the defense force could not be accurate. This prohibition had too far reaching implications, as members of the defense force under s 199(7) of the Constitution merely requires soldiers to perform their roles impassively. This, however, did not mean that they had to be deprived of the rights and entitlements which are afforded to every citizen in other areas of their life.[196]

Furthermore, O Regan J noted that in various countries, member states of the ILO, allow trade union formation. Even though they are not permitted to negotiate on their members' behalf, such unions may engage in consultation and representation of their members' rights.[197] This elucidates that there can be different roles that a trade union can play without having its members resort to strike action. Consequently, O Regan J was not satisfied that there was sufficient evidence submitted by the respondents to prove that the discipline and efficiency of the defense forces

[188] The Constitution; s 15.
[189] The Constitution; s 18.
[190] The Constitution; s 17.
[191] *SA Defense Union v Minister of Defense & another supra* note 182 at 2272C-D.
[192] Convention 87 of 1948.
[193] Convention 98 of 1949.
[194] *S v Makwanyane* 1995 (3) SA 391 (CC).
[195] *SA Defense Union v Minister of Defense & another supra* note 182 at 2266F-H.
[196] *SA Defense Union v Minister of Defense & another supra* note 182 at 2266F-H.
[197] *SA Defense Union v Minister of Defense & another supra* note 182 at 2281A.

would be undermined if members joined trade unions on the basis of consultation and representation.[198] On the contrary, it may prove that the discipline and efficiency of the defense force would be enhanced if members are allowed to engage in trade union participation as there would be adequate channels to address grievances, disputes and complaints.[199] The CC held decided that in order to give effect to members' rights to engage in acts of public protest and the participation in trade union activity, it was essential that the prohibition against protest action and trade union be severed from the provision. Consequently, members would be entitled to engage in acts relating to public protest, and trade union formation but not industrial action.[200]

The case of *SANDU supra* effectively illustrates that it is possible to allow workers within essential services to advance their rights through trade union formation and protest action without eroding the fundamental purpose of the defense force.[201] The CC in this regard had to ensure the purpose of the defense force which is to maintain the strictest form of discipline that would ensure the safety and security of all who reside within the country.[202] In the dissenting judgment of L Heureux-Dube J it was stated that the country's national defense as well as the international objectives to maintain peace would be unreachable if the defense force did not adhere to the strictest levels of discipline.[203] The judiciary however is compelled to balance the interests of society with the fundamental rights of all citizens[204] in order to prevent differential treatment.[205] However, the judiciary has to also be mindful that disruption caused within essential services is more detrimental than disruptions which occur in any other sector due to vital services tendered by these employees.[206] Therefore, O Regan J has highlighted that even though members of the defense force may engage in trade union participation and protest action, it is essential to ensure that adequate frameworks are implemented to regulate these rights in

---

[198] *SA Defense Union v Minister of Defense & another supra* note 182 at 2281B.
[199] *SA Defense Union v Minister of Defense & another supra* note 182 at 2281C.
[200] *SA Defense Union v Minister of Defense & another supra* note 182 at 2267A.
[201] *SA Defense Union v Minister of Defense & another supra* note 182 at 2281C
[202] *Crocodile Valley Citrus Co v SA Agricultural Plantation & Allied Workers* (case no ESC102, unreported).
[203] *R v Genereux* 88 DLR (4th) 110 (SCC) at 156-7 E.
[204] *S v Pennington and Another* 1997 (4) SA 1076 (CC), *De Freitas and Another v Society of Advocates of Natal (Natal Law Society Intervening)* 1998 (11) BCLR 1345 (CC), *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and others* 1998 (4) SA 1157 (CC).
[205] *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC).
[206] E Cordova 'Strikes in the Public Service: Some determinants and trends' (1985) 124 *International Labour Review* 163.

order to prevent any disruption to strict discipline, as it would be harmful to the country as a whole if this was not done.[207]

5.5. THE METHODS OF CONTROLLING AND DETERRING UNPROTECTED STRIKE ACTION IN SOUTH AFRICA

South Africa has been overwhelmed by a torrent of strike activity in various sectors. These strikes have been noted for their violence and destruction.[208] This is extremely disturbing as the LRA has enshrined specific provisions to regulate strike activity so as to prevent such criminal activity.[209] As was previously discussed, there are a number of protections given to lawful strikes. However, there are also a number of measures which are implemented when employees engage in unlawful strikes. Such consequences are enforced to deter illegal strike activity.[210] It is thus imperative to discuss the provisions of the LRA which entrench consequences for unprotected conduct during strikes and their implementation through the LC and the LAC.

It must be noted that the essential purpose of a strike is to engage in power play that would lead to improved working terms and conditions for the employee.[211] When employees engage in protected strikes they do not commit delicts or breaches of their employment contract.[212] However, if a strike is illegal and unprotected, the LRA has provided various measures to control and deter unlawful conduct by strikers.[213] The LC has extensive jurisdiction to deal with every illegal action committed by strikers whether the illegal action takes the form of a delict or a crime.[214] The effect of the dismissal of strikers who engage in unprotected strikes is that such

---

[207] *SA Defense Union v Minister of Defense & another supra* note 182 at 2283A-E.
[208] M Schutte & S Lukhele 'The real toll of South Africa's labour aggressiveness' 2013 *Africa Conflict Month Monitor* 69.
[209] T Petrus & W Isaacs-Martin 'Reflections on violence and scapegoating in the strike and protest culture in South Africa' (2011) 41(2) *Africa Insight* 50.
[210] H J Deacon 'The balancing act between the constitutional right to strike and the constitutional right to education' (2014) 34(2) *South African Journal of Education* 1.
[211] *CEPPWAWU v Metrofile (Pty) Ltd* (2004) 25 *ILJ* 231 (LAC).
[212] The LRA; s 67(2)(*a*)(*b*).
[213] K Von Holdt 'Institutionalization, strike violence and local moral orders' (2010)72/73 *Transformation: Critical Perspectives on Southern Africa* 137-138.
[214] *Lomati Mill Barberton (A Division of Sappi Timber Industries) v Paper Printing Wood & Allied Workers Union* (1997) 18 *ILJ* 178 (LC).

dismissal results in the termination of the employment relationship which takes effect immediately upon the strikers' dismissal.[215]

The first method of deterring unprotected strike action is through the LC which has been afforded extended jurisdiction to grant interdicts or orders of restraint that would effectively prevent individuals and organisations who engage in illegal strikes.[216] However, such an interdict cannot be granted unless the respondent has given the applicant 48 hours notice.[217] This does not mean that the court is rigidly bound to this rule. The LC may use its discretion in circumstances where the health and safety of citizens necessitate that a shorter notification period of the interdict should be given to the respondent.[218] In some extreme circumstances notice may be verbally supplied.[219] However, the key element for granting an interdict is to prove that urgency is required to prevent harm that may be caused by the unprotected strikers' actions.[220]

There are a number of immunities that are given to individuals who perform tasks within the course of their union functions.[221] The LRA provides that members, officials, union officials and office bearers cannot be held personally responsible for losses which are incurred in pursuance of union activities. However, such immunity from liability is only provided if the act or omission is undertaken in good faith.[222] This is a highly imperative section as there has been an increase in violent strike activity by trade unions.[223] This section emphasises that if such individuals were to engage in violence, intimidation and destruction of property, such individuals would be acting

---

[215] *FGWU & v Minister of Safety and Security & others* [1999] (4) BLLR 332 (LC) at 21.
[216] The LRA, s 68(1)(*a*), *Sappi Fine Papers (Pty) Ltd (Adams Mill) v PPWAWU & others* [1997] 10 BLLR 1373 (SE), *Coin Security Group v SA National Union for Security Forces* 1998 (1) SA 685 (C), *Mondi Paper (a Division of Mondi Ltd) v Paper, Printing Wood and Allied Workers Union & others* (1997) 18 *ILJ* 84 (D), *Fourways Mall (PTY) Ltd & another v SA Catering & Allied Workers Union & another* (1999) 20 *ILJ* 1008 (W), *Administrator of Transvaal & another v Theletsane & others* 1991 (2) SA 192 (A), *Ex Parte Consolidated Fine Spinners & Weavers Ltd* (1987) 8 *ILJ* 97 (D).
[217] The LRA, s 68 (2).
[218] The LRA, s 68(2)(*a*)-(*c*).
[219] *Enforce Guarding (Pty) Ltd v NASUWU & others* [2003] 1 BLLR 9 (LC).
[220] *Edgars Stores Ltd v SA Commercial Catering and Allied Workers Union and others* (1992) 13 *ILJ* 177 (IC), *Blow Molders v NUMSA and others* (case NHN 12/3/316 unreported), *East Rand Plastics (Pty) Ltd v SACWU and others* (case NH 12/3/693 unreported).
[221] F Barchiesi 'Privatization and the historical trajectory of "Social Movement Unionism": A case study of municipal workers in Johannesburg, South Africa' (2007) 71(1) *International Labor and Working-Class History* 51.
[222] The LRA, s 97 (3).
[223] *Ncgobo v FAWU* [2012] 10 BLLR 1035, V Gosai 'When a union fails its members' 2013 *Without Prejudice* 68, 'Dear ANC, you're failing. Love COSATU' *Daily Maverick* 7 September 2012 at [2], available at http://dailymaverick.co.za, accessed on 7 September 2015.

mala fide and would consequently lose the protection afforded by the LRA.[224] In *Langeveldt v Vryburg Transitional Local Council & others,*[225] the court expressed a point in passing that where strikers engage in criminal acts of violence, assault, intimidation and damage to property the employer is entitled to seek recourse from the law to protect the interests of its non-striking employees, its customers, suppliers and property as well as implement discipline on those employees who have engaged in acts of misconduct.[226] The LRA provides that employees who engage in unprotected strikes may be interdicted from engaging in misconduct such as violence, intimidation or damage of property, they may be dismissed, locked-out or they may be liable for compensation in instances where they have been proven to have caused damage.[227]

The first case in which the High Court effusively dealt with criminal acts during a strike relating to intimidation of non-striking employees, harassment and violence was in *Mondi Paper (a division of Mondi Ltd) v Paper, Printing, Wood & Allied Workers Union & others*.[228] The applicant sought and obtained an interim interdict preventing the employees from engaging in criminal behavior such as sabotage and intimidation of non-striking employees during a picket. On the return date, the court was called to determine whether the High Court had jurisdiction as well as whether the rule nisi should be extended.[229] In terms of the issue pertaining to jurisdiction, Nicholson J held that the LC possessed the required jurisdiction to deal with the illegal actions of the employees.[230]

However, in terms of the second issue regarding the rule *nisi*, the LC had concerns relating to application. In the application to the court, the employer could not identify any of the respondents who it alleged was in contempt of the interim order. Therefore, the cited respondents in the application was based on the criteria that excluded those employees who at the start of the strike had absented themselves from work and since then had returned to their posts, but included

---

[224] V P Mahlangu & V J Pitsoe 'Power struggle between government and the teacher unions in South Africa' (2011) 2(5*) Journal of Emerging Trends in Educational Research and Policy Studies* 368.
[225]*Langeveldt v Vryburg Transitional Local Council & others* [2001] 5 BLLR 501 (LAC), *Lomati Mill Barberton (A Division of Sappi Timber Industries) v PPWAWU & others* [1997] 4 BLLR 415 (LC), *Stuttafords v SACTWU* [2001] 1 BLLR 46 (LAC).
[226] *Langeveldt v Vryburg Transitional Local Council & others supra* note 225 at 39.
[227] The LRA; s 68.
[228] *Mondi Paper (A Division of Mondi Ltd) v Paper Printing Wood & Allied Workers Union & others* (1997) 18 *ILJ* 84 (D).
[229] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 84F-G.
[230] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 84H-J.

those workers who absented themselves from work and did not return.[231] The applicant acknowledged that the respondents cited in the application may have included those who did not engage in criminal acts. Thus, the applicant was not seeking final relief against the innocent parties who could be distinguished before the return day of the rule *nisi*.[232]

The LC emphasised that the effect of a court order is tantamount to the enactment of legislation concerning the parties mentioned in an order of court.[233] Nicholson J stated that the present application would place innocent non-strikers in danger of having committed the crime of contempt of court.[234] The court reasoned that there were many employees who merely stayed at home and were not part of the picket. Therefore, to bring a class action, as proposed by the applicant, against all the employees without showing a cause of action would be incorrect. The only common action which all employees engaged in was that of not reporting for work. There is no justification for bringing a contempt of court application against an individual where no proof has been established.[235] If this was allowed then the criminal court would appropriately assume that the order was correctly granted. Therefore, the onus would rest on the innocent non-strikers to prove that the interim order should not have been granted. This is a reversal of the onus of proof and is contrary to the essence of criminal justice which requires that he who alleges must prove.[236] The applicant's argument which was perceived by Nicholson J implied that where there were innocent non-participants of a strike as well as participants who did commit acts of violence, sabotage and intimidation then a different level of proof in orders should be applied.[237] In this regard, the court stated that this was a shocking proposal without any authority for such a suggestion.[238]

The court described that intimidation of non-striking employees and blockading access to the business premises was an "evil" that should not be accepted. However, this evil should be weighed against another evil which is committed against non-participants when the court

[231] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 91G-H.
[232] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 91G-H.
[233] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 92E.
[234] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 92F.
[235] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 93A-B.
[236] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 92G-H.
[237] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 93A.
[238] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 93A.

authorises orders without evidence.[239] The former evil, as held by Nicholson J, does not have such severe ramifications as the latter evil. The latter would cause the entire justice system to lose the trust and reverence of society if it enforces orders against individuals who have been identified as innocent non-participants. On this basis the LC could not discharge the rule *nisi* and hold the respondents in contempt of court.[240]

The LC's judgment indicates that in order for a contempt of court application to succeed there must be proper identification of the perpetrators that connects them to the acts of violence, intimidation and sabotage.[241] The court is unwilling to construe an allegation of contempt lightly and discharges the onus on the applicant to show proof that the cited respondents in the application are in contempt of court.[242] It is insufficient to merely prove that a crime or some form of misconduct has taken place. An applicant has to also prove the identity of the perpetrator of the crime.[243]

The most significant point which can be extracted from *Mondi Paper supra* is that there must be an inextricable link between the identity of the strikers and the misconduct that they are alleged to have committed, as was further affirmed in *Mondi Ltd (MondiKraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union & others*.[244] The evidence presented by Mondi in its application referred to a number of people who ran through the employer's mill wearing civilian clothing, some of which were alleged to have turned off the emergency buttons on numerous machines.[245] Only one individual from that group was identified, however, the only evidence against the individual is that he ran through the mill and did not stop when he heard his name being called. Apart from this evidence there was nothing to prove that he had switched off the emergency buttons. Thus, Francis J held that this was insufficient to ascertain that he or

---

[239] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 93B.
[240] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 93B.
[241] *Mondi Paper (A Division of Mondi Ltd) supra* note 222at 90I-J.
[242] *Mondi Paper (A Division of Mondi Ltd) supra* note 228 at 93C.
[243] A A Landman 'No place to hide- a trade union's liability for riot damage: A note on *Garvis & others v SA Transport & Allied Workers Union (Minister for Safety & Security, Third Party)* (2010) 31 *ILJ* (Wcc) 2521 (2011) 32 *ILJ* 834 at 845.
[244] *Mondi Ltd (MondiKraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union & others* (2005) 26 *ILJ* 1458 (LC).
[245] *Mondi Ltd (MondiKraft Division) others supra* note 244 at 36.

anyone else was responsible. On this basis the final order confirming the rule nisi could not be made as there was a lack of evidence to identify the individual as the perpetrator.[246]

The decision held by Francis J is further elaborated in *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others,*[247] where the applicants applied for an interdict against all the strikers, even though the application alleged misconduct against only specific employees within the group of strikers.[248] Brassey JA held that if there is no evidence to prove that an individual has committed acts of misconduct or is an accomplice to such acts, then an interdict cannot be brought against this individual.[249] This is the correct position of our law even though that individual may be part of a group engaging in malefactors or even if his interests are advanced by the group of workers engaging in misconduct. Our law does not provide for collective guilt as it is unjust to convict one individual based on the actions of the group when no proof has been leveled against him.[250] The LC further elaborated in *Polyoak supra* that if an interdict properly identifies a potential perpetrator and specifically places their actions under restraint then it would emphasise the purpose of an interdict and the authority of the court to exact the full force of the law for their non-compliance.[251] However, an interdict would be discriminatory and a disregard to the principles of due process if it is granted without proper identification of the perpetrators that links the individual to the wrongful acts. This would lead to injustice and the devaluing of the justice system.[252]

The court in *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union & others*,[253] confirmed the decision in *Polyoak supra* by deciding that to grant interdicts against individuals who have not been proven to be linked to the misconduct is simply wrong.[254] The court has conveyed that they are sympathetic towards employers who experience violence during industrial action; however, this does not mean that interdicts will and should be granted on that basis alone. There must be due consideration to limitations that have to be in place which pertain

---

[246] *Mondi Ltd (MondiKraft Division) others supra* note 244 at 36.
[247] *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others* (1999) 20 *ILJ* (LC).
[248] *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others supra* note 247 at 396A.
[249] *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others supra* note 247 at 396A.
[250] *Polyoak (Pty) Ltd v Chemical Workers supra* note 247 at 396A.
[251] *Polyoak (Pty) Ltd v Chemical Workers supra* note 247 at 394A.
[252] *Polyoak (Pty) Ltd v Chemical Workers supra* note 247 at 394B.
[253] *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union &* (2006) 27 *ILJ* 1234 (LC).
[254] *Woolworths (Pty) Ltd v SA Commercial supra* note 253 at 1235B.

to when an interdict should be granted.[255] The court is unwilling to grant 'blanket' interdicts that cover a whole group of people without exact identification of the individuals who are alleged to have committed the misconduct.[256]

In *Sappi Fine Papers (Pty) Ltd (Adams Mill) v Paper Printing Wood & Allied Workers Union & others*,[257] Nepen J affirmed the judgment in *Mondi Paper supra*, regarding the fact that the LC possessed exclusive jurisdiction to provide relief to any strike that falls under s 68 (1) of the LRA.[258] However, Nupen J was silent as to whether the jurisdiction of the LC extended to grant relief in circumstances where non-strikers are intimidated and harassed at their homes.[259] This is highly pertinent as Nicholson J's judgment *Mondi Paper supra* confirms that the onus of proving the respondents' guilt rests with the employer. The judgment further indicates that the employer, especially considering the advancements in technology, ought to take steps to ensure that it can provide valid proof in the event of misconduct during a strike. This statement implies that the employer could have obtained the use of cameras as a means of recording the unlawful conduct.[260] Although, Nicholson J makes no mention as to the relief that intimidated employees may resort to in the event that they encounter intimidation or harassment at their homes.[261] This is regrettable as a majority of cases involving intimidation and attacks on non-strikers or their families occur outside the business premises and thus exceeds the boundaries where employers may take measures to prove the perpetrators wrongdoings.[262] Whereas it may be within the ability of the employer to take measures to provide proof of misconduct in the workplace, the suggestion made by Nicholson J proffers no recourse or process for obtaining relief against the injustice suffered by non-strikers.[263]

The next consequence which follows from an unprotected strike is that the employer may claim compensation against the union who is deemed to have initiated the unprotected strike.[264] In

---

[255] *Woolworths (Pty) Ltd v SA Commercial supra* note 253 at 1235B.
[256] *Woolworths (Pty) Ltd v SA Commercial supra* note 253 at 1236E-F.
[257] *Sappi Fine Papers (Pty) Ltd (Adams Mill) v Paper Printing Wood & Allied Workers Union & others* (1998) 19 *ILJ* 246 (SE).
[258] *Sappi Fine Papers (Pty) Ltd (Adams Mill) supra* note 257 at 246I.
[259] *Sappi Fine Papers (Pty) Ltd (Adams Mill) supra* note 257at 246J.
[260] *Mondi Paper (A Division of Mondi Ltd) supra* note 227 at 93C.
[261] *Mondi Paper (A Division of Mondi Ltd) supra* note 227 at 93C.
[262] Selala (note 117; 121).
[263] *Mondi Paper (A Division of Mondi Ltd) supra* note 227 at 93C.
[264] *Adcock Ingram Critical Care v CCMA & others* [2001] 9 BLLR 979 (LAC).

Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union,[265] the court illustrated how the LRA should be interpreted to provide a 'just and equitable' sum for compensating an employer where a union has initiated and furthered an unprotected strike. On 19 April 2000 the employer received a report indicating that its workforce intended to engage in a strike. There were various attempts made by the employer to communicate with the union regarding the employees' disputes, although these attempts were in vain.[266] The strike commenced on the 20th of April 2000, however, the union only met with the employer during the latter part of 21st April.[267] During the course of the events, mass meetings were held by the union encouraging workers not to return to work until their demands were met.[268] The employer accordingly obtained an interdict on the 21st of April and consequently NUM distanced itself from the strike.[269] During a further meeting held by the employer with the union it was conveyed to the union that the employer believed that the union had instigated the strike. The union did not dispute this allegation.[270] Subsequent to this meeting, the union called off the strike and instructed the workers to return to work.[271] As a result of the strike the damages incurred by the employer due to a loss of production and profits amounted to R 15 370 000, although the employer limited its claim to R100 000.[272]

Farber AJ considered the facts of the case in light of s 68 of the LRA which allows an employer to claim compensation for the damages incurred as a result of an unprotected strike under the authority of a union.[273] The court analysed the first requirement which requires an investigation into whether there were any attempts that were made to comply with the provisions of chapter five of the LRA which outline the process for a protected strike.[274] Farber AJ held that the union had instigated the strike as it had hosted a mass meeting with the employees' encouraging them not to return to work until their demands were met.[275] Furthermore, the union did not deny any

[265] *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002]1 BLLR 84 (LC).
[266] *Rustenburg Platinum Mines Ltd supra* note 265 at 2038B-D.
[267] *Rustenburg Platinum Mines Ltd supra* note 265 at 2038J.
[268] *Rustenburg Platinum Mines Ltd supra* note 265 at 2039A.
[269] *Rustenburg Platinum Mines Ltd supra* note 265 at 2039B.
[270] *Rustenburg Platinum Mines Ltd supra* note 265 at 2039E-I.
[271] *Rustenburg Platinum Mines Ltd supra* note 265 at 2040C.
[272] *Rustenburg Platinum Mines Ltd supra* note 265 at 2036A-B.
[273] The LRA; s 6 (1)(*b*).
[274] The LRA; s 68(1)(*b*)(*aa*).
[275] *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union supra* note 265 at 2042D.

claim by the union that it had instigated the strike. Farber AJ reasoned that the fact that the union failed to make any vocal submission to oppose the allegation essentially deduced one to believe that the allegation was true.[276]

In light of the second requirement which requires an investigation into whether the strike was premeditated,[277] the LC held that it was indeed premeditated. Farber AJ acknowledged that it was highly improbable that there were two strikes which commenced at the same time considering that the mines were situated 26 kilometers apart.[278] The third requirement questions whether there was any unjustified conduct on the part of the employer.[279] In this regard, Farber AJ held that the employer had made every attempt to consider the demands of the union and to conduct meetings with the union. There was no evidence to prove that the employer had not taken the union's demands seriously or that it was unwilling to negotiate to resolve the dispute.[280] In fact it was the union who was unwilling to negotiate with the employer and deemed any communication with such as a waste of time.[281]

The LRA also compels the employer to prove whether there was any compliance to the interdict granted by the court.[282] In terms of this provision there are three aspects that the court has to consider. The first aspect pertains to the interests of collective bargaining.[283] The court in this regard was of the view that the unprotected strike was of a serious nature as it had led to the loss of approximately R15 million.[284] Farber AJ also reasoned that the behavior of the union was completely unacceptable in light of the interests of security within a workplace that necessitate stable and controlled actions in accordance to the law. When parties resort to their own strategies to resolve disputes such as the instigation and participation in illegal strikes it erodes the foundations of collective bargaining, it prejudices the innocent parties involved as well as impacts on the economy as a whole.[285] The second aspect which has to be weighed by the court

---

[276] *Benoni Produce & Coal Co Ltd v Gundelfinger* 1918 TPD 453, *Benefit Cycle Works v Atmore* 1927 TPD 524, *East Asiatic Co (SA) Ltd v Midlands Manufacturing Co (Pty) Ltd* 1954 (2) SA 387 (C).
[277] The LRA; s 68(1)(*b*)(*bb*).
[278] *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union supra* note 265 at 2042H-I.
[279] The LRA; s 68(1)(*b*)(*cc*).
[280] *Rustenburg Platinum Mines supra* note 265 at 2044A-J.
[281] *Rustenburg Platinum Mines supra* note 265 at 2044G.
[282] The LRA; s 68(1)(*b*)(*dd*).
[283] The LRA; s 68(1)(*b*)(*dd*) (ii).
[284] *Rustenburg Platinum Mines supra* note 265 at 2045D-E.
[285] *Rustenburg Platinum Mines supra* note 262 at 2045D-E.

is that of the duration of the strike. In *Rustenburg supra* the union in this regard did instruct the employees to return to work which resulted in the short duration of the strike.[286] The last aspect that the court is compelled to consider is the financial position of the parties. Farber AJ held that the union was in a very strong financial position as compared to the union who was barely solvent. However, this could be resolved by providing a structured payment schedule that would suit the financial position of the union without prejudicing the employer's claim for compensation.[287]

After an assessment regarding the facts of the case in light of the provisions of the LRA, the court awarded the employer R100 000 in compensation to be paid by the union in monthly installments of R5000.[288] The case of *Rustenburg supra* clearly elucidates that the court is limited to the provisions of s 68 of the LRA and may not grant compensation for the entire amount suffered as was permitted under the common law, but is only constrained to compensation that is 'just and equitable' based on the factors that are enshrined by the LRA.[289] The decision of Farber AJ is an exemplary portrayal of how the LC should assess all the factors of the case in its entirety and then based on this assessment, the court should make a decision on which side the scale tilts. The award that is 'just and equitable' must reflect this balance.[290]

However, in *Mangaung Municipality v SA Municipality Workers Union*,[291] the court provided a further criterion in addition to those enshrined in s 68 of the LRA by holding that a union can be held liable not only for initiating an unlawful strike, but also for not taking any steps to end the strike.[292] The court stated that as a result of the relationship that manifests itself during the course of collective bargaining, a union has the responsibility to prevent an illegal strike and where such does occur then the union is liable for any damages suffered by the employer.[293] Furthermore, the union is also liable to compensate the employer if it commissions its representatives to end

[286] *Rustenburg Platinum Mines supra* note 262 at 2045F.
[287] *Rustenburg Platinum Mines supra* note 262 at 2045F-G.
[288] *Rustenburg Platinum Mines supra* note 262 at 2046A.
[289] W Beech S Peart 'Company successfully sues union for compensation for losses attributable to unprotected strikes' 2001 *De Rebus* 55.
[290] ibid 55.
[291] *Manguang Local Municipality v SA Municipality Workers Union* (2003) 24 *ILJ* 405 (LC), *SATAWU and another v Garvas and others* 2013 (1) SA 83 (CC).
[292] *Manguang Local Municipality supra* note 291 at 407C.
[293] *Manguang Local Municipality supra* note 291 at 407C.

illegal strike activity and such representatives fail to do so.[294] The court reasoned that in light of the relationship that exists between the employer and the union as a consequence of collective bargaining, the union undertakes responsibility for the actions of its members and their compliance with the LRA especially when they engage in strike action.[295]

The effect of a protected strike is that it gives way to the temporary suspension of an employee's employment contract.[296] If an employer dismisses an employee for engaging in a protected strike, this would amount to an automatically unfair dismissal.[297] However, where an employee engages in illegal strike action an employer is entitled to effect disciplinary action against the employee which is a lesser sanction than actual dismissal.[298] This may take the form of ultimatums to return to work, provided that such ultimatums are backed by the threat of final warnings.[299] The court will not come to the assistance of dismissed strikers who engaged in illegal conduct during an unprotected strike and ignore ultimatums and warnings to return to work.[300] In regard to final warnings, the case of *National Union of Metalworkers of SA & others v Atlantis Forge (Pty) Ltd,*[301] provided an excellent understanding on how final warnings and consequent dismissals should be discharged. The employees of Atlantis Forge engaged in a strike as a result of a rumour regarding the late pay of annual bonuses. A strike ensued and employees were issued with a final warning on the basis that it was an unprotected strike.[302] However, employees who had previously been given warnings for a strike in February 2002 underwent disciplinary proceedings for their participation in the present strike. Consequently, these employees were dismissed and approached the court for relief on the basis that their dismissals were procedurally and substantively unfair.[303]

---

[294] *Manguang Local Municipality supra* note 291 at 407D-E.
[295] *Manguang Local Municipality supra* note 291 at 407F.
[296] *FGWU v Minister of Safety & Security* (1999) 20 *ILJ* 1258 (LC).
[297] The LRA; s 187 (1) (a) & s 67 (4) & (5).
[298] *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2001) 22 *ILJ* 1603 (LAC).
[299] *Ramotsepane & others v Barmot Truck Hire* 2002 (6) BLLR 525 (LAC).
[300] *NUFAWU of SA v New Era Products (Pty) Ltd* (1999) 20 *ILJ* 869 (IC).
[301] *National Union of Metalworkers of SA & others v Atlantis Forge (Pty) Ltd* (2005) 26 *ILJ* 1984 (LC), *Food and Allied Workers Union obo Rala & others v Coca Cola Bottling & another* (2002) 23 *ILJ* 196 (CCMA), *Mzeku & others v Volkswagen SA (Pty) Ltd & others* (2001) 22 *ILJ* 1575 (LAC).
[302] *National Union of Metalworkers of SA others supra* note 301 at 1985C.
[303] *National Union of Metalworkers of SA others supra* note 302 at 1985D-F.

The court in this instance mentioned that the final warnings given to employees for their strike in February 2002 had lapsed in terms of the disciplinary code. The employer was under a duty to destroy such warnings after a period of 6 months had lapsed. The court accordingly held that their dismissals were unfair.[304] It was noted that the present strike did not in any way include acts of violence or any other criminal behavior; therefore, the employer was enforcing the disciplinary procedure based on their participation in the strike during February 2002. This was entirely incorrect as the employer was initiating disciplinary proceedings on a basis that had expired and could no longer be enforced.[305] Accordingly, the court held that if the employer wanted to enforce disciplinary proceedings then it had to do so within the period specified by the Disciplinary Code that bound the employer and the employees. The dismissals of the employees were held to be unfair.[306]

This case effectively illustrates that when employees engage in misconduct; their previous actions cannot be held against them. Furthermore, there was a prescribed period of time for which the employer could have initiated disciplinary proceeding, but failed to do so. The dismissed employees should not be prejudiced for the employer's failure to adhere to the disciplinary code.[307] It must be noted that dismissals preceding final warnings for unrelated issues to that of an unprotected strike will not be upheld by our courts.[308] Furthermore, an employer must give the employees sufficient time to respond to the ultimatum before effecting the illegal strikers' dismissal.[309] It would be unfair to the employees if the employer issued an ultimatum that the employees could not comply with.[310]

An employer is entitled to dismiss an employee provided that this action follows fair procedure in accordance to the Code of Good Practice (the Code).[311] The employer must take all steps to ensure that the dismissal follows fair procedure and that it engages in dialogue with the union before effecting such dismissals or implementing any unilateral decision.[312] The Code stipulates

---

[304] *National Union of Metalworkers of SA supra* note 302 at 1985G.
[305] *National Union of Metalworkers of SA supra* note 302 at 1985G-J.
[306] *National Union of Metalworkers of SA supra* note 302 at 1986F-G.
[307] *National Union of Metalworkers of SA supra* note 302 at 1986C-E.
[308] *SACTWU & others v Novel Spinners (Pty) Ltd* [1999] 11 BLLR 1157 (LC).
[309] *NUM & others v Billard Contractors CC & Another* [2006] 12 BLLR 1191 (LC).
[310] *WG Davey (Pty) Ltd v National Union of Metalworkers of SA* (1999) 20 *ILJ* 2017 (SCA).
[311] The LRA; s 68(5), *Liberty Box & Bag Manufacturing Co (Pty) Ltd v Paper Wood & Allied Workers Union* (1990) 11 *ILJ* 427 (ARB).
[312] *NUM v Goldfields Security Ltd* (1999) 20 *ILJ* 1553 (LC).

the requirements which have to be met when regarding whether the dismissal was fair.[313] The postulation for the enforcement of dismissal is a result of the employees' failure to comply with the conciliatory framework provided for in the LRA.[314] Essentially, this form of 'punishment' is to dissuade employees from engaging in illegal strikes as such employees had no cause to resort to illegal activity when there are proper channels to follow to resolve a dispute.[315] The courts in this instance have required that strikers provide adequate reasons as to why they engaged in an illegal strike.[316] It must be noted that this illegality of engaging in an unprotected strike must not merely be of a technical nature, but rather there must be a material breach in non-compliance with the conciliatory framework of the LRA.[317] Where strikers engage in an unprotected strike as the union believed that the conciliatory framework would be too slow to resolve the matter, the employees bear the consequences of their unlawful actions.[318]

Therefore, in terms of the requirement that there must be a material breach, the court must be satisfied that the illegal strike was not a mere short cessation of work[319] as a result of misconduct or gross inequality on the part of the employer.[320] In these circumstances the court may be willing to tilt the scale in the favour of the employees.[321] However, there are various factors which the court takes into consideration. The most significant is whether the avenues to resolve the dispute were not appropriate to them and such alternatives were exhausted.[322] The court will

---

[313] *Doornfontein Gold Mining Co Ltd v National Union of Mineworkers & others* (1994) 15 *ILJ* 527 (LAC), *PPWAWU & others v Tongaat Paper Co (Pty) Ltd* (1992) 13 *ILJ* 393 (IC), *Plaschem (Pty) Ltd v CWIU* (1993) 14 *ILJ* 1000 (LAC), *Sentraal Wes (Kooperatief) Bpk v Food & Allied Workers Union & others* (1990) 11 *ILJ* 977 (LAC), *Nomaqumbe & others v Multi Office (Pty) Ltd* (1992) 13 *ILJ* 152 (IC*), Henred Fruehauf Trailers (Pty) Ltd v National Union of Metalworkers of SA & others* (1992) 13 *ILJ* 593 (LAC), *Performing Arts Council (Transvaal) v Paper Printing Wood & Allied Workers Union & others* (1992) 13 *ILJ* 1439 (LAC).

[314] A C Basson 'The dismissal of strikers in South Africa (Part 1)' 1992 *SA Merc LJ* 300.

[315] *NUMSA & others v Nalva (Pty) Ltd* (1992) 13 *ILJ* 1207 (IC), *NUMSA v Elm Street Plastics t/a Adv Plastics* (1989) 10 *ILJ* 328 (IC).

[316] *FAWU v Spekenham Supreme* (1988) 9 *ILJ* 627 (IC).

[317] *MWASA v Perskor* (1989) 10 *ILJ* 441 (IC), *FAWU v National Co-op Dairies (2)* (1989) 10 *ILJ* 490 (IC), *FAWU and SA Breweries* (1990) 11 *ILJ* 413 (ARB), *Seven Abel CC t/a The Crest Hotel v HARWU* (1990) 11 *ILJ* 504 (LAC), *Sasol Industries v SACWU* (1990) 11 *ILJ* 1010 (LAC), *NUMSA v Three Gees Galvanising* (1993) 14 *ILJ* 372 (LAC), *SACWU v Noristan Holdings (Pty) Ltd & others* (1987) 8 *ILJ* 682 (IC), *SACWU v Pharm Natura (Pty) Ltd* (1986) 7 *ILJ* 696 (IC).

[318] *Coin Security Group (Pty) Ltd v Adams* [2000] 4 BLLR 371 (LAC).

[319] *Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Union & others* (1995) 16 *ILJ* 233 (IC).

[320] *AMAWU v Concor Construction West* (1988) 9 *ILJ* 839 (IC).

[321] J Gauntlett & O Rogers 'When all else has failed: Illegal strikes, Ultimatums and Mass Dismissals' (1991) 12 *ILJ* 1171 at 1176.

[322] *Ndamana v Marble Lime & Associated Industries* (1991) 12 *ILJ* 148 (IC), *FAWU v Cape Slaughtering, Flaying & Dressing Co Ltd* (NHK 13/2/2175, unreported).

also consider the financial loss incurred by the employer and his financial position.[323] The court on the other hand will not be willing to assist employees who blatantly ignore the instructions of their unions and engage in violence, assault and intimidation during such unprotected strike activity.[324] There are instances when the court will not at all be willing to assist employees. These instances would be when employees are interdicted from engaging in illegal strike action and nevertheless ignore such interdict. The effect of the dismissal of strikers who engage in unprotected strikes is that such dismissal results in the termination of the employment relationship which takes effect immediately upon the strikers' dismissal.[325]

5.6. CONCLUSION

It is evident from the above discussion that there are clear and precise procedures stipulated by the LRA in s 65 for engaging in lawful strikes. However, there have been instances where the legislature has been silent on specific issues, which has necessitated that the judiciary interprets such provisions in light of orderly collective bargaining.[326] Furthermore, as was abundantly clear from the LRA's prohibitions on how strikes must be conducted and that the court is unyielding towards employees who defy these prohibitions. The Judiciary in this regard as was conveyed is willing to award compensation for an employee's lack of compliance.[327] The reality of the situation however, is that even though these guidelines are endorsed in legislature, there is still great divergence from these provisions that govern an employee's conduct during a strike.[328] These incidents will be discussed in the next chapter, Chapter six.

---

[323] *FBWU v Hercules Cold Storage* (1989) 10 *ILJ* 457 (IC).
[324] *NUM v Libanon Gold Mining Co* (1988) 9 *ILJ* 832 (IC), *SAWU v Cape Lime* (1988) 9 *ILJ* 441 (IC).
[325] *FGWU & others v Minister of Safety and Security & others* [1999] 4 BLLR 332 (LC) at 21.
[326] B Ardell 'Regulating strikes in essential (and other) services after the new trilology' (2011) 17 *Canadian Labour and Employment Law Journal* 404.
[327] *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union supra, Manguang Local Municipality v SA Municipality Workers Union supra, SATAWU and Another v Garvas and others supra.*
[328] B Fleisch 'The politics of the governed: South African Democratic Teacher's union Soweto Strike, June 2009' (2010) 16(2) *South African Review of Education* 118.

CHAPTER SIX

THE EFFECTIVENESS OF LEGISLATION IN GOVERNING STRIKE ACTION AND ITS FUTURE AMENDMENTS

6.1. INTRODUCTION

The transition from apartheid into a new South Africa was believed by many to mark the end of violence and bloodshed through the establishment of mediation and the institution of constitutional values.[1] However, this has not been the reality as South Africa has been termed the 'strike capital of the world', and this is reasonably justified as in recent years the country has been overcome by a surge in service delivery and labour protests that have been accompanied by violence, intimidation, harassment and civil unrest.[2] It has been noted that the majority of these strikes are unprotected and have inculcated an aura of fear, intimidation and catastrophic violence.[3] It has become apparent that even though there is an excessive amount of chaos and disruption during such strikes, these strikes are not only protracted but also conclude with dissatisfactory compromises that often result in further strike action.[4] Even after years of the implementation of the Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA), the Department of Labour has recorded a steady increase in strikes with an account of 51 strikes in 2009, 67 strikes in 2011, 99 in the year 2012 and a shocking 114 strike incidents in the year 2013.[5] In 2014, the Department of Labour recorded a total of 88 strikes. Even though the number of recorded strikes in 2014 decreased from the year 2013, the duration of the strikes in 2014

---

[1] K von Holdt 'South Africa: the transition to violent democracy' (2013) 40(138) *Review of African Political Economy* 589.
[2] L Connolly 'Fragility and the State: Post-apartheid South Africa and the State-Society Contract in the 21st Century' (2013) 13(2) *African Journal on Conflict Resolution* 88.
[3] K Selala 'The right to strike and the future of collective bargaining in South Africa: An exploratory analysis' (2014) 3(5) *International Journal of Social Sciences* 121.
[4] M J Maluleke 'The importance of bargaining and reflections of the public service strike-A perspective from SADTU' 2011 *PSC News* 12.
[5] S K Lusanda *The impact of violence and intimidation on strike actions and their effect on union membership in the Platinum Mining Industry* (unpublished MBA thesis, Gordan Institute of Business Science, University of Pretoria, 2014) 21.

increased. The Department of Labour recorded that in 2013 there were 1.85 million work days lost as a result of strikes. In 2014, this figure soared to 10.3 million work days lost as a result of strikes.[6]

6.2. A REPORT ON RECENT STRIKE ACTION IN SOUTH AFRICA

It is imperative to note that the LRA has extensively promulgated legislature to control the enforcement of the right to strike, as was discussed at length in Chapter 5.[7] However, there has been an overwhelming torrent of recent strike activity in South Africa that has been characterised by grievous criminal activity such as violence, intimidation, harassment, assault, death and contempt of court orders.[8] An analysis of these strikes is thus essential to identify whether the provisions governing strike law are effective in controlling unlawful behavior by strikers.[9] Therefore, this section seeks to highlight the devastating and violent strikes that have brought the country to its knees.[10] This discussion is focused on the time frame between the years 2005 and 2015. The justification for focusing this report on this period is to analyse whether the LRA has been effective 10 years after coming into effect, as this would have provided an adequate phase for the implementation of the LRA within the new South Africa.

The 2006 security guard strike was recorded at that time as being the most violent since the beginning of the new South Africa.[11] The strike concerned the South African Transport and Allied Workers Union (SATAWU) over a wage increase of 11%. Government was only willing to offer 8%. The parties engaged in negotiations to no avail as the union was unwilling to accept

---

[6] 'Strikes costing South Africa billions' available at *http://businesstech.co.za/news/business/98727- /strikes -cost-south-africa-r6-1-billion/*, accessed on 28 December 2015.
[7] A Rycroft 'Can a protected strike lose its status?' (2012) 33 *ILJ* 821.
[8] 'No need for strike violence-Zuma' *The Citizen* 10 July 2014, available at *http://www.citizen. co.za/208466 /need-strike-violence-zuma/,accessed* on 6 September 2015.
[9] T Ngcukaitobi 'Strike law, structural violence and inequality in the platinum hills of Marikana' (2013) 34 *ILJ* 836.
[10] N Ngidi *Market reaction to industrial action in South Africa* (unpublished LLB thesis, University of Witswatersrand, 2011) 24.
[11] T Makgetla 'The most violent post-apartheid strike' *Weekly Mail and Guardian* 4 May 2006 at 10.

the offer of 8%.[12] The violence escalated during mid-May when coaches of Metrorail were set alight and ticket offices petrol bombed. The damages to these coaches were nothing less than R4 million. As a result of these appalling acts of violence, Metrorail was obliged to suspend their service to prevent threats to the lives of innocent commuters and further destruction of property.[13] There had been reports of non-striking security guards being assaulted, intimidated and even murdered.[14] The police were called upon on countless occasions to intervene when strikers began their attacks against fellow workers. It is imperative to note that these horrific acts of violence took place while an interim interdict was in force.[15]

The largest strike after the beginning of the democratic era started on the 1st of June 2007 and lasted for 28 days.[16] This strike involved over a million public sector employees after failed negotiations between Government and employees regarding wages, housing and medical benefits.[17] The mass solidarity action resulted in a complete standstill of services as every sector of the country was paralysed by the disruptions that infiltrated taxi services, municipal services, electrical and cleaning services as well as administrators within the airports, border lines, vehicle licensing departments, labour offices and the deeds offices.[18] The payment of social grants and pensions was also disrupted. Immigration officials engaged in the strike added pandemonium at international airports when flights had to be delayed or diverted.[19] The strike was depicted as the most violent and inhumane strike since the end of apartheid.[20]

---

[12] P Maganda 'Guard strike to intensify' *Daily Dispatch* 23 May 2006 at 10.
[13] C Bailey 'Trains suspended after coaches torched' *Cape Argus* 18 May 2006 at 4.
[14] J Mawade 'Guard killed for not taking part in strike' *The Herald (EP Herald)* 19 May 2006 at 2.
[15] V Nzapheza 'Security thugs go on rampage' *Citizen* 6 April 2006 at 1.
[16] G Wills 'The Effect of Teacher Strike Activity on Student Learning in South African Primary Schools' (2014) *ERSA Working Paper 402* 5.
[17] 'South Africa: over a million public sector workers on strike' *South African Protest News* 21 August 2010 at 1.
[18] 'South Africa: COSATU calls off public service strike' available at *https://www.wsws.org/en/articles/2007/07/s-a- f-r-j14.html*, accessed on 10 August 2015.
[19] A Bajo & S Balkaran 'A descriptive analysis of the 2007 Public Sector Strike in South Africa' (2009) 33(2) *SAJLR* 125.
[20] 'South Africa: Strike action affects health services' available at *http://www.irinnews.org/report/72719/south-a- frica-strike-action-affects-health-services*, accessed on 11 August 2015.

It was reported that nurses stormed wards and physically ripped patients' drips from their arms. They intimidated and forced doctors and nurses to abandon their posts. These strikers were accordingly arrested.[21] Although there are no exact reports concerning the extent of the disruption caused, it is evident that many patients were unable to collect their medication due to the closure of medical institutes.[22] The striking workers would arm themselves with sjamboks, knobkerries and prevent fellow employees' access to the workplace. In one hospital these armed strikers moved beyond the picket line and forced the entire hospital to hastily evacuate their workplace. The patients who were too sick had to be assisted out of the hospital and onto the street.[23] It was former President Thabo Mbeki who echoed the sentiments of the country when he stated that the South Africa should question itself on the type of country and morals it seeks to establish when intimidation, violence and destruction to property become inherent to strike action.[24]

In terms of the LRA,[25] healthcare workers are not permitted to engage in protected strikes unless a minimum services agreement is concluded which would provide that only minimum services be regarded as essential.[26] However, this strike did not merely deprive patients of healthcare services, but it also seeped into the education sector robbing children of their right to education.[27] Teachers were dominant participants of the strike. Schools were compelled to close their doors after teachers violently disrupted classrooms forcing fellow workers to join in the strike.[28] This is extremely concerning as education is regarded as non-negotiable within advanced societies, but yet in South Africa the conduct of these strikers have diminished the value and time within

---

[21] P Zulu *A Nation in Crisis: An Appeal for Morality* (2013) 210.
[22] N Veenstra … et al 'Unplanned antiretroviral treatment interruptions in Southern Africa: how should we be managing these?' (2010) 6(4) *Globalisation and Health* 2.
[23] A Gray 'The Public Sector Strike- confronting reality' 2007 *SA Pharmaceutical Journal* 20.
[24] 'South Arica Public sector strike' *The Washington Post* 13 June 2007, available at http://www.waashington.com /wp-dyn/content/article/2007/06/13/AR2007061300373.html, accessed on 6 September 2015.
[25] The LRA; s 72.
[26] D Pillay 'The South African Essential Services Committee Part ii: Functions of the committee' (2001) 5(2) *Southern African Business Review* 65.
[27] The Constitution; s 29.
[28] Global Centre for Public Service Excellence *Motivation of Public Service Officials: Insight for Practitioners* (2014) 4.

which learning takes place.[29] These striking public sector employees were promised full pay and further benefits while engaged in the four week long strike, however, this promise was never materialised.[30] The most far reaching consequence of the 2007 public sector strike was that it resulted in a loss of approximately R5.6 billion as a result of the 12 million work days lost.[31]

In 2009 taxi drivers went on strike over the proposed implementation of the Bus Rapid Transit System. The strikers showed no mercy as innocent passengers were injured and killed when taxis and buses were petrol bombed.[32] This was followed by more violence in 2010 as the taxi association engaged in further violent strikes. This strike was characterised by immense destruction to buses, shootings and the burning of tyres in and around the city.[33]

Ironically, the longest devastating public sector strikes took place after South Africa's hosting of the 2010 World Cup. In August 2010, public sector employees engaged in a 'chaotic' three week long strike over an increase in wages and housing allowance[34] that was only suspended on the 6th of September 2010.[35] Emphasis needs to be drawn to the fact that workers began strike action when they rejected Government's offer of 7% increase in salary. It is indeed ironic that after a devastating three week strike Government only increased its offer by 0.5% of which was accepted after much negotiation, violence, intimidation and chaos.[36]

---

[29] H J Deacon 'The balancing act between the constitutional right to strike and the constitutional right to education' (2014) 34(2) *South African Journal of Education* 1-2.
[30] 'South Africa: Capitalist government shaken by public workers strike' *Workers Vangaurd* 10 September 2010 at 1.
[31] Bajo & Balkaran (note 19 above; 127).
[32] E Lewis 'Woman, baby die after bus petrol bombed in taxi strike' *Cape Argus* 24 February 2006 at 1.
[33] A Dlamini & L Chilwane 'Violent taxi strike fails to halt Rea Vaya' *Business Day* 16 March 2010 at 4.
[34] 'Public-sector unions to meet over govt wage offer' *Mail & Guardian* 13 October 2010 [1].
[35] S Khumalo 'Judge for yourself' (2010) 19(5) *The Shop steward* 6.
[36] ibid 6.

These striking workers included nurses, police officers, teachers, soldiers as well as other hospital employees.[37] During the sixth day of the strike, the army had to be deployed to hospitals as striking workers began blocking the entrances to hospitals and physically assaulting fellow co-workers who tried to enter. Strikers even went as far as to disrupt surgical theatres.[38] It is quite evident that there is a grave problem, as court interdicts were granted preventing employees from essential services from engaging in strikes, yet strikers still continued. Moreover, employees were threatened with the weapon of dismissal. This as well did not have any affect in deterring the striking workers.[39] It was reported that in the King Edward Hospital in Kwazulu-Natal, strikers prevented workers and patients from entering the hospital. The strikers only permitted patients who required antiretroviral medication to enter the hospital. This occurred even though there was an interdict in place prohibiting strikers from engaging in such conduct.[40] Teachers not only disrupted classrooms, but matriculation students were behind in their preparation for trial examinations. Consequently, these examinations had to be postponed for a later date.[41]

Union leaders "called for a complete shutdown of the public service". Strikers used their chains and locks to lock out fellow workers who attempted to enter hospitals and other institutions. It was noted that not even during apartheid did the violent strikes prevent nurses, doctors and pharmacists from helping the sick.[42] It is no doubt that the 2010 public sector strike caused insurmountable disruption and endangered the lives of many. However, more significantly to our third world country is that this strike is estimated to have cost the country R1 billion a day.[43]

The most concerning issue regarding these strikes is not that they occur, but rather that they are characterised by violence and are a protracted battle. It was clearly highlighted that,

---

[37] 'Maturing contradictions: the 2010 public sector strike in South Africa' available at *http://www.Column .global-labour-university.org/2010/ ... /maturing-contradictions-2010-public.html,* accessed on 8 August 2015.
[38] 'South African Public Sector Strike 'endangering lives' *The Guardian* 23 August 2010 [1].
[39] ibid 1.
[40] 'Strikers defy court order at Durban hospital' *Mail & Guardian* 23 August 2010.
[41] T R Mle 'A critical analysis of the 2010 public service strike in South Africa: a service delivery approach' (2012) 47(1) *Journal of Public Administration* 293.
[42] 'The 2010 Public Sector Strike-bringing out the best and the worst in ordinary people-A report by SAAHIP EXCO 2010 *SA Pharmaceutical Journal* 59.
[43] 'Public Sector unions and government set on a collision course' *Daily Maverick* 5 June 2012 [1].

> "[c]ivil servants have a right to strike in support of their wage demands. But striking teachers do not have the right to throttle school children, sjambok principles to disrupt schools, and health workers do not have the right to use threats of violence to keep hospitals closed".[44]

Another report on the public sector strike highlighted Government's support and understanding for the plight of the striking employees, however, society and Government greatly condemned the violence and intimidation in which the strikers asserted their demands.[45] The violence of the strikers was met with contempt by Government in the form of rubber bullets and water cannons on strikers by the second day of the strike.[46] The 2010 public sector strike was yet again another illustration of non-compliance with the LRA that threatened to cripple our country. Violence and intimidation have become inherent to strikes. This strike, however, was merely a glimpse into South Africa's worst strike in history.[47]

In mid-February 2011, truck drivers embarked on a nationwide strike that sent shockwaves around the country as major retailers such as Pick n Pay and Checkers as well as many others were affected by not receiving their deliveries.[48] The strike was marred by violent destruction to trucks and other property as well as grievous acts of murder and assault on innocent people. This violence was regarded by the spokesperson of the Road Freight Employers' Association as being a tactic employed by strikers to force employers to agree to their demands.[49]

The strike that has gone down in South African history as the most gruesome and bloodiest in South African history is that which has been branded the 'Marikana Massacre'.[50] The unrest began on the 9th of August 2012 as a wildcat strike at the Lonmin mines when miners downed

---

[44] J Maree "Why has the public service in South Africa experienced such devastating strikes and what can be done about it?" *3rd Biennial Labour Relations Conference* 22-24 October 2013.
[45] 'A week into the public sector strike' available at *http://section27.org.za/2010/08/ a-week-into-the- public-sector - strike/* , accessed on 10 August 2015.
[46] S Pera & S von Tonder *Ethics in Healthcare* 3rded (2011) 134.
[47] A Dhai … et al 'The public's attitude towards strike action by healthcare workers and health services in South Africa' (2011) 4(2) *SAJBL* 59.
[48] S Evans 'City feels truck strike impact' *Diamond Fields Advertiser* 18 February 2011 at 10.
[49] G Makhafola, K Moeng & N Moreosele 'Destruction and death now the norm' *Sowetan* 21 February 2011 at 4.
[50] S Lukhele 'The Marikana massacre: where the new South Africa lost its innocence: South Africa-issue in focus' 2015 *Africa Conflict Monitor* 69.

tools.[51] The strike was initiated over a wage demand of R12 500 and a complaint over the hazardous working conditions. The strike was unprotected, which could have given way to the dismissal of these striking miners. Furthermore, the strike was not led by a union, but by a strike committee which was acting independently.[52] There were numerous reports of violence and intimidation that had resulted in the loss of life. The violence continued for a week claiming the lives of at least nine people.[53] This violence led to the bloodiest confrontation the country had experienced post-apartheid.[54]

On 16 August 2012, police placed razor wire around the peaceful group of strikers and forced them out through an opening in the wire using stun grenades and tear gas as a weapon of force.[55] A special task team opened fire which resulted in the killing of 34 striking miners and fatal wounding 78 other miners.[56] It is imperative to note that the shootings were initiated after strikers were ordered to disperse. Once shots were fired strikers began running away from policemen and started scattering. It is reported that many strikers were shot in their backs while trying to flee.[57] The police brutality which robbed bereft families of their fathers, husbands and brothers left the international world aghast and South Africans mortified. It was abundantly clear that the use of force contradicted international and national standards.[58]

---

[51] 'Marikana Massacre 16 August 2012' available at *http://www.Sahistory.org.za/article/marikana-massacre .16 - august-2012*, accessed on 11 August 2015.

[52] P Alexander 'Marikana, turning point in South African history' (2013) 40(138) *Review of African Political Economy* 607.

[53] 'Lonmin massacre: a timeline' *Independent Online SA* 17 August 2012, available at *http://www.iol.co.za*, accessed on 11 August 2015.

[54] Alexander (note 52 above; 608).

[55] A Nash 'Marikana's path' (2015) 41(2) *Social Dynamics* 387.

[56] Alexander (note 52 above; 608).

[57] 'Shot Marikana miners were running away-lawyer' *News24* 12 March 2014, available at *http://www.news24.com/ SouthAfrica /News/Shot-Marikana-miners-were-running-away-lawyer-20140312*, accessed on 11 August 2015, 'The murder fields of Marikana. The cold murder fields of Marikana' *Daily Maverick* 8 September 2012, available at *http://www.dailymaverick.co.za/article/2012-08-30-the-murder- fields-of-marikana-the-cold-murder-fields -of-marikana*, accessed on 11 August 2015.

[58] 'Marikana violence is a sign of things to come' *Business Day Live* 23 August 2012, available at *http://wwwbdlive.co.za/opinion/2012/08/23/marikana-violence-is-a-sign-of-things-to-come*, accessed on 11 August 2015.

A highly significant point in terms of this dissertation is the consequent events which followed in Marikana's wake. On the evening of 16 August, Lonmin miners on their own accord decided to continue the unprotected strike.[59] This act of bravery or defiance, however one views it, was recorded as a momentous achievement for the unskilled workers of South Africa as it ultimately led Government to accede to the miners' demands.[60] The killings of Marikana provided the impetus which led to a series of unprotected wildcat strikes that lasted for six weeks and threatened to cripple the country's economy.[61] This resulted in the entire mining industry being engulfed by illegal strikes, all of which were characterised by violence and intimidation. The illegal strikes disrupted production at major mines such as Amplats, Goldfields KDC West mine, Anglo American and Gold One. A common factor amongst all strikers is that they demanded an exact salary hike and not simply an increased percentage.[62]

These strikes not only caused major disruptions, but also a loss of production resulting in a serious knock on the economy. These illegal strikes raised an enormous question mark on the effectiveness of our dispute resolution system.[63] The aftermath of Marikana, however, was not limited to only the mining industry. There were catastrophic strikes recorded in various other sectors of the country. There were reports of illegal sporadic work stoppages within the motor industry, the farming sector and even violent strikes by truckers.[64]

---

[59] C Chinguno 'Marikana massacre and strike violence post-apartheid' (2013) 4(2) *Global Labour Journal* 160.
[60] Alexander (note 52 above, 609).
[61] 'South Africa: One year after the Marikana massacre' available at *http://socialistparty.ie/2013/08/ south-africa - one-year-after-after-the-marikana-massacre*, accessed on 11 August 2015.
[62] 'Gold Fields evicts workers as mining strike spreads' *Mail & Guardian* 3 October 2012, available at *http://mg.co.za/article/2012-10-03-gold-fields-evicts-workers-as-mining-strike-spreads*, accessed on 11 August 2015, 'South African mines hit by wildcat strikes after Marikana police shootings' *The Guardian* 12 September 2012, available at *http://www.theguardian.com/world/2012/sep/12/south-africa-mines-wildcat-strikes*, accessed on 11 August 2015.
[63] 'Socio-economic drivers behind South Africa's 2012 mining strikes' available at *https://www.goldfields.co.za/reports/annual_report_2012.ana-case7.php*., accessed on 11 August 2015.
[64] Alexander (note 52 above, 609-610), 'Western Cape farm strikes: one year on, still a political football' *Daily Maverick* 13 October 2015, available at *http://www.dailymaverick.co.za/article/2013 -10-28-western -cape-farm - strikes-one- year-on-still-a-political-footbal-l*, accessed on 11 August 2015.

In November 2013, farm workers embarked on an unprotected strike demanding a minimum wage increase of R69 to R105 as well as that a programme regarding land reformation be implemented.[65] Consequently, an interdict was granted by the Labour Court (LC) preventing the union, its officials and its members from causing damage to property, entering farms and intimidating non-strikers. Lastly, it ordered that strikers return to work.[66] The strike was suspended pending negotiations between employers and workers, however, due to its lack of success the strikers vowed that they would continue until their demands were met.[67] The strikers continued unwaveringly in acts of violence such as setting tyres alight outside a police station and petrol bombing approximately 3000 wooden fruit bins, the farms and property of the farmers were destroyed.[68] The towns worst affected by the strike were the biggest farming areas of Graubouw and De Doorns, whose business owners were compelled to close their doors after their shops were looted. The leaders of these towns admitted that they had lost complete control of the strike.[69] The most horrific event of the farm workers strike was on the 9th of January when the N1 freeway outside De Doorns was blockaded by around 7000 strikers. The strikers began veld fires and destroyed buildings along that region and when they tried to move towards the town, the police tried to push back the strikers through the use of armored vehicles and rubber bullets. The strikers retaliated by throwing stones at the police.[70] It is reported that this strike claimed the lives of four people, injured 68 police officials and 28 strikers. The expenses incurred as a result of damages to only police vehicles have been approximately R75 000. The strike also led to the arrest of 337 people from November 2013.[71]

On 23 January 2014, platinum mine workers embarked on the largest platinum strike in the country which threatened to cripple mining giants Anglo American, Lonmin and Impala amongst other mining companies.[72] The unions demanded a 15% wage increase, a one year contract,

[65] X Koyana 'Farmworkers strike ruled unprotected, but defiant Pieterse vows it will resume' *Cape Times* 13 November 2013 at 1.
[66] ibid 1.
[67] B Capazorio 'Farmworker strike to be renewed this week' *Sunday Independent* 6 January 2013 at 4.
[68] M Williams & SAPA 'W Cape farmworker strike violence gains momentum' *STAR* 15 January 2013 at 5.
[69] B Jordan 'Spontaneous rebellion has Western Cape in flames' *Sunday Times* 13 January 2013 at 2.
[70] D Knoetze 'De Doorns' darkest day' *Cape Argus* 10 January 3013 at 4.
[71] J Felix & SAPA 'Violent protest every second day in Cape' *Cape Times* 1 February 2013 at 6.
[72] S Tau 'Mines blamed for prolonging strike' *Citizen* 23 April 2014 at 6.

R1000 housing benefit and the eradication of labour brokers.[73] The strike that began in January 2014 only ended in July that same year costing mine owners an estimated R 24 million loss and employees a R 10.6 million loss in wages.[74] There were reports of strikers intimidating non-strikers and barring them from reporting to work as well as the barricading of roads with rocks. The police were called in to intervene on numerous occasions and tried to disperse strikers with water cannons and rubber bullets.[75]

In September 2015 violent protests by students wreaked havoc at the University of KwaZulu-Natal (UKZN) campuses across the province over the allocation of financial aid, the intention to close the Registration Appeals Committee (RAC) and poor student accommodation.[76] The strike was believed to have begun at the Westville campus but soon spread across all UKZN campuses. The South African Student Congress (SASCO) took full responsibility for initiating the strike and attempted to gather as many students as possible in support of the strike.[77] After a week of violence, on the 8th of September 2015, an interdict preventing further protest action was granted by Judge Chetty in the Durban High Court. In terms of the order, students were prevented from intimidating, harassing, assaulting or causing harm to any person. They were also interdicted from removing and damaging UKZN property as well as preventing access to the university and instigating and organizing mass meetings on campus.[78] However, this interdict did not deter strikers as there were reports of damage to buildings and the torching of UKZN vehicles at Westville campus. The roads around the campus were barricaded with stones preventing any access to the premises.[79] There were also reports of damage to the buildings at residences on the Edgewood and Pietermaritzburg campus. A bus at the Pietermaritzburg campus was set alight along with campus vehicles leading to the arrest of two representatives of SASCO.[80] The students at the Pietermaritzburg campus were asked to vacate residence as students went on a violent rampage throwing stones at cars in the vicinity of the campus and setting rubbish bins,

[73] P Dlamini 'NUMSA digs in its heels' *The Times* 2 July 2014 at 1.
[74] S Tau 'More strikes to come' *Citizen* 25 June 2014 at 1.
[75] A van Vuuren 'NUMSA joins AMCU in platinum sector strikes' *Sunday Independent* 2 February 2014 at 1.
[76] L Jansen 'Violent days at KZN University' *Cape Times* 15 September 2015 at 4.
[77] S Nsele 'Howard, PMB Campuses join UKZN students protests' *The Witness* 16 September 2015 at 5.
[78] S Peters 'Legal bid to end UKZN protests' *Daily News* 23 September 2015 at 5.
[79] K Pillay & C Ndaliso 'Students on rampage' *Daily News* 14 September 2015 at 1.
[80] N Barbeau 'UKZN pair bail bid delayed' *Daily News* 17 September 2015 at 3.

metal sheets and cars in the surrounding area of Allan Paton Avenue on fire. The roads in the vicinity of the campus were barricaded with concrete blocks. The police and ER24 had to be called in to contain the frenzy and attend to injuries as three security guards were taken hostage by students and assaulted.[81] There were numerous arrests made in connection with these violent episodes.[82] After a protracted battle, students and management reached consensus regarding some of their issues. However, the light at the end of the tunnel was soon dimmed when students embarked on a nationwide protest over a 10.5 % increase in fees for 2016 which has become famous as the 'fees must fall' campaign.[83] This demand created a spate of riots throughout many universities in the country such as the Nelson Mandela Metropolitan University, Wits University, University of Cape Town, Rhodes and Stellenbosch University, Fort Hare University and Pretoria University.[84] There were reports of physical clashes between students and strikers which led to libraries being overtaken and their closure demanded by angry strikers. At the University of Pretoria campus, when the university's vice chancellor did not arrive to address the students, strikers took to the street causing serious mayhem resulting in a standstill at Hatfield Road.[85] The students demanded a national shutdown of all universities as they marched to the Union buildings and tried to enter the premises. The scenes reflected those of the apartheid era as police clashed with protesting students using pellet guns, grenades and tear gas to disperse the crowds.[86]

After engaging in dialogue with vice chancellors of South African universities and student representative councils, President Jacob Zuma announced that fees will not increase for the academic year 2016.[87] This, however, was a short lived victory as only one of the issues of protestors was resolved. The students then embarked on advancing their other demands such as free higher education and the end to outsourcing of workers at universities.[88] There has been much analysis regarding this nationwide protest that has highlighted key defects within

[81] A Umraw, K Pillay, C Pieterse & S Nsele 'Students told to leave' *The Witness* 18 September 2015 at 2.
[82] M Nxumalo 'UKZN students spend holiday in jail' *Daily News* 24 September 2015 at 3.
[83] C Peterson 'UCT next target for ire raised by fees' *Cape Times* 19 October 2015 at 1.
[84] Y Jadoo & S Tau 'Fee protest boils over' *Citizen* 22 October 2015 at 3.
[85] V Abreu 'Hatfield campus chaos' *Citizen* 22 October 2015 at 2.
[86] R Munusamy 'Wake-up call' *Weekend Witness* 24 October 2015 at 10.
[87] C Dodds 'Fees fall… but it will cost you' *Sunday Tribune* 25 October 2015 at 1.
[88] C Peterson 'UCT defends outsourcing worker amid protests' *Cape Times* 7 October 2015 at 3.

Government structures.[89] However, Jacob Zuma has warned that these shortfalls are not an excuse for students' use of violence and destruction of property in addressing their demands. It is evident from students' conduct that this is a key element in obtaining resolutions to their demands.[90]

6.3. AN ANALYSIS OF THE ILLEGAL STRIKES AND POSSIBLE RECOMMENDATIONS

It is abundantly evident from the report on strike activity that there are three prevalent features which are manifest in each of the strikes that have been discussed. The first characteristic is that the strikes included participants who are explicitly excluded from engaging in industrial action by the LRA.[91] Secondly, there is an undeniable element of various forms of misconduct such as violence, intimidation, harassment, assault and death that has become synonymous with the enforcement of strikes.[92] Lastly, there needs to be an analysis on how effective interdicts have been in controlling unlawful behaviour.[93] It is also imperative to note that the report on recent strike activity included protests and wildcat strikes that exceeded the boundaries of the employment relationship and were strongly influenced by the strikers' socio-economic challenges.[94] However, this analysis centers only on the possible pitfalls and recommendations regarding the legal element of the LRA which may be a contributor to the increased level of violent strike activity.

---

[89] T Mkhize 'University no place for violence' *Sunday Tribune* 25 October 2015 at 3.
[90] J Maromo 'Zuma urges universities to rein in students who resort to violence' *Cape Times* 7 October 2015.
[91] 'HPCSA against striking doctors' *News24.com* 28 May 2009 at [1], available at *http://www.news24.com/News24/South-Africa/News/0,,2-7-1442_2523713,00.html*, accessed 15 September 2015.
[92] K von Holdt 'Institutionalisation, strike violence and local moral orders' (2010) 72 *Transformation: Critical perspectives on Southern Africa* 137.
[93] C O'Regan 'Interdicts restraining strike action- Implications of the Labour Relations Amendment Act 83 of 1988 (1988) 9 *ILJ* 959 at 959.
[94] Y Dominguez-Whitehead 'Executive university managers' experience of strike and protest activity: A qualitative case study of a South African university' (2011) 25(7) *SAJHE* 1310.

6.3.1. ILLEGAL STRIKING BY EMPLOYEES WHO ARE PROHIBITED BY THE LRA

In terms of the first issue, the LRA seeks to control strike action within essential services by explicitly prohibiting employees within essential and maintenance sectors from engaging in strike activity.[95] Employees within these sectors are required to refer their disputes for arbitration and adjudication rather than having to resort to industrial action.[96] In addition to the LRA prohibiting striking of workers in essential services, it indicates the possible punishment of illegal strikers which can be effected either through dismissal or a final warning.[97] The LRA has also stipulated that such dismissal must follow a guideline on how it should be carried out.[98] It does not, however, indicate that the employer is compelled to execute discipline against such behavior.[99]

The LRA does not specifically stipulate any procedures for enforcing discipline on healthcare workers who engage in strikes as this is regulated by the respective regulations healthcare workers are required to adhere to. The National Council of Nurses compels all nurses to comply with a code of conduct and stipulates the punishment on nurses who do not comply.[100] The code of conduct requires that nurses should at all times maintain an environment that is conducive to the health and welfare of their patients that is "free from neglect and malpractice and free of harassment and intimidation".[101] In light of the recent public sector strikes as discussed above, nurses were in severe breach of this ethical principle, as industrial action by nursing staff was a violation of their patients' right to non-violent and uninterrupted treatment.[102] The violence and

---

[95] The LRA; s 65 (1)(d).
[96] *Nene & others v Durban Transport Management Board* (1992) 13 *ILJ* 684 (IC), *Scholtz v Stadsraad van Mangaung* (NH 11/2/5494, 23 January 1992), *Sibidli & others v Western Province Preserving Co Ltd* (NHE 11/2/106 (EL), 4 March 1992), *Transport & Allied Workers & another v Putco Ltd* (NH 11/2/5494, 23 January 1992).
[97] N P Nala *Strategies for curbing strike action by nurses in public institutions, South Africa* (unpublished Phd thesis, University of South Africa, 2014) 33.
[98] Code of Good Practice: Dismissals; item 6.
[99] M Oliver 'The dismissal of striking workers: Procedural requirements and other aspects' 1993 *De Rebus* 800
[100] M Muller 'Strike action by nurses in South Africa: A value clarification' 2001 *Curations* 42-43.
[101] The South African Nursing Council; (1992) chap iv.
[102] Muller (note 100 above; 38).

intimidation used by nurses during strike activity do not portray the values entrenched by the Nursing Council.[103]

It must be noted that doctors are also obliged to adhere to an ethical guideline enshrined by the Ethical Rules of Conduct for Practitioners registered under the Health Professions Act 56 of 1974 (hereinafter referred to as the Health Professions Act).[104] The Health Professional Council of South Africa (HPCSA), which has been established under the Health Professions Act, acts as a watchdog within the professional field of doctors and is empowered to investigate matters of misconduct even if they have not been referred by the KwaZulu-Natal (KZN) Health Department.[105] However, it is thus surprising that not one of the 16 ethical guidelines entrenched by the HPCSA indicates that strike action is deemed to be unethical.[106] This alone indicates that there is a failure to reflect the prohibitions of the LRA in ethical guidelines that regulate the conduct of healthcare workers.[107] The failure of the HPCSA to indicate that the participation in strike action is regarded as misconduct together with the withdrawal of charges against doctors by the KZN Health Department, conveys a latent attitude towards enforcing disciplinary proceedings against them.[108] This could be a contributing factor as to why healthcare workers lack deterrence from participating in strikes, as if penalties are not enforced against healthcare workers for participating in strikes then there would be no discouragement from engaging in such conduct.[109]

The problem with using dismissal as a weapon of deterrence against illegal strikes is that once a violent strike is over there is so much instability that the employer is afraid of contributing further to the volatile atmosphere that they do not sanction the unlawful conduct of the strikers.[110] Moreover, this questions the practicality of the provision entrenched in the LRA as it

---

[103] P J Kunene *Strikes by nursing personnel: A challenge for nurse managers in KwaZulu-Natal Province* (Unpublished M.Cur Degree, University of Zululand, 1995) 29.
[104] GN R68 of 66 R 717, 4/8/2006; 7.
[105] L London 'HPCSA disciplinary action-'custodian of professional morals?' (2010) 100(11) *SAMJ* 692.
[106] G A Ogunbanje & D van Knapp 'Doctors and strike action: Can this be morally justifiable?' (2009) 51 *Fam Pract* 307.
[107] R Gillon 'Medical ethics during a period of unrest' 1986 *S Afr Med J* 843.
[108] London (note 105; 692).
[109] ibid 692.
[110] M Maeso 'Strikers break law with impunity' *Business Day* 12 September 2011 at 2.

allows for the dismissal of hundreds of doctors, nurses and law enforcement officers who offer services that are vital and without these services our society would suffer irreparable harm.[111]

6.3.2. THE INHERENT ATTRIBUTE OF VIOLENCE IN STRIKE ACTIVITY

The second issue which can be extracted from the report on strike activity is that of the violence and criminal behavior which is inherent in strike action. The most gruesome and horrific acts of violence which have been equated with the Marikana strike have been the long winded case of *Food & Allied Workers Union obo Kapesi & others v Premier Foods Limited t/a Blue Ribbon Salt River*.[112] The discussion of the pertinent issues that this case raises will be dealt with after an explanation of when the matter was heard in the LC under Basson J. Thereafter, the explanation of *Kapesi supra* will continue to when the matter was heard in the Labour Appeal Court (LAC) under Landman AJA and then to the LC under Steenkamp J where the matter was brought to the LC on a second occasion. In the initial proceedings in the LC, FAWU called for a protected strike as a result of failed negotiations. The protected strike, however, was flawed by heinous acts of violence and dreadful criminal conduct.[113] It is alleged that non-strikers received death threats, their homes and cars were fire-bombed, witnesses of the violence were intimidated and one in particular was murdered after an identification of the perpetrators. There was also a conspiracy to have the director of the company assassinated. The employer obtained an interdict preventing such violence and after an agreement was reached, the strikers returned to work. [114] Subsequently, strikers were suspended pending a disciplinary hearing regarding their conduct during the strike. On the day of the disciplinary hearing, the employer's key witness did not arrive. The employer then decided on a basis of lack of evidence that it would proceed with the matter as a s 189 process.[115] It is imperative to distinguish, at this point, that in terms of a disciplinary hearing, the employer is required to prove the guilt of the employees on the basis of

---

[111] R Hebdon 'Behavioural determinants of public sector illegal strikes: Cases from Canada and the U.S' (1998) 53(4) *Industrial Relations* 668.
[112] *Food & Allied Workers Union obo Kapesi & others v Premier Foods Limited t/a Blue Ribbon Salt River* (2010) 31 *ILJ* 1654 (LC).
[113] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1666[6].
[114] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1666[6].
[115] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1656[1].

their misconduct. The process entrenched in s 189 does not require the employer to prove fault on the part of the employees. This was extremely important as without the key witness to testify at the disciplinary hearing the employer would not have been able to prove the fault of the strikers who engaged in misconduct.[116] A notice was sent to the union informing it of the intention to effect the dismissal of the striking employees as contemplated by s 189 proceedings and due to the fact that it could not engage in disciplinary hearings for lack of oral evidence. There were meetings under the auspices of the CCMA which led to the dismissal of the suspended employees. The union then brought an unfair dismissal application against the employer.[117] The union argued that this dismissal was procedurally and substantively unfair. The employer argued that it was compelled to resort to dismissal as the violence committed during the strike threatened the running of the business and necessitated the retrenchment of the employees. The case of the employer, however, did not succeed in the LC, as there was no case made regarding the link between the misconduct and the operational requirements.[118]

The first issue which Basson J considered in the LC was whether hearsay evidence could be used in disciplinary proceedings.[119] This issue is pertinent as it illustrates how the LRA could be interpreted to ensure effective control of strikes. The participation of employees in illegal strikes permits an employer to effect discipline in the form of dismissal. However, in order to do so the employer is required to prove fault on the part of the employee during a disciplinary hearing.[120] This may be problematic as witnesses who have already experienced threats and harassment are too scared to provide oral evidence for fear of further victimization as was evident in the case of *Kapesi supra*.[121] This recommendation conveys how the LC could deal with practical issues of intimidation and harassment, as it is usually difficult during a violent strike to identify perpetrators through oral evidence.

---

[116] A Rycroft 'The legal regulation of strike misconduct: The Kapesi Decisions (2013) 34 *ILJ* 859 861.
[117] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1656.
[118] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1656.
[119] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1672[40].
[120] R I Abrams & D R Nolan 'Toward a theory of 'Just cause' in employee discipline cases' (1985) 3 *Duke Law Journal* 595.
[121] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1666[6].

Basson J referred the court to *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others*,[122] to illustrate an appropriate guideline for conducting a disciplinary hearing. It was stated that the previous LRA prescribed a process for such hearings that was akin to the requirements of a criminal trial.[123] The new LRA does not confer such "onerous procedural requirements" as was indicated in the draft Bill that stated:

> "The draft Bill requires a fair, but brief, pre-dismissal procedure. . . . [It] opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee."[124]

Therefore, the court stated that it was unnecessary to comply with all the requirements which are characteristic of the case of a criminal trial. This would effectively exclude the rules pertaining to the law of evidence.[125] Consequently, a Commissioner is obliged to apply a standard that does not require that evidence be proved on any other standard other than on a balance of probability.[126] This essentially allows one to deduce that pre-dismissal hearings are entitled to be flexible as was emphasised in *Food & Allied Workers Union & others v C G Smit Sugar Ltd, Noodsberg*.[127] The learned Judge De Kock M stated that the reason for this was that fair hearings require that all evidence be presented.[128] There are situations where the interests of the parties concerned and the interests of fair labour relations necessitate that procedure are flexibly complied with, such as when there is real fear of danger or intimidation then an employee should not be required to face his or her perpetrator. In such circumstances, it is permissible for witnesses to testify behind camera.[129] There are numerous precedents which postulate that fear, intimidation, threats of danger and potential harassment are valid reasons for an employee to be exempted from providing oral evidence.[130] The witnesses in *Kapesi supra* had provided written statements indicating the violent conduct of individuals but were unwilling to testify because

---

[122] *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* (2006) 27 *ILJ* 1644 (LC).
[123] *Avril Elizabeth Home supra* note 122 at 1651J-1652A.
[124] *Avril Elizabeth Home supra* note 122 at 1652E-F.
[125] *Avril Elizabeth Home supra* note 122 at 1652G.
[126] *Potgietersrus Platinum Ltd v CCMA & others* (1999) 20 *ILJ* 2679 (LC), *Markhams (A Divion of Foshini Retail Group (Pty) Ltd) v Matji NO & others* [2003] 11 BLLR 1145 (LC).
[127] *Food & Allied Workers Union & others v C G Smith Sugar Ltd, Noodsberg* (1989) 10 *ILJ* 907 (IC).
[128] *Food & Allied Workers Union & others v C G Smith supra* note 127 at 910D-E.
[129] *Food & Allied Workers Union & others v C G Smith supra* note 127 at 910D-E.
[130] *Shishonga v Minister of Justice & Constitutional Development & another* (2007) 28 *ILJ* 195 (LC), *Hlongwane & others v Rector: St Francis College & others* 1989 (3) SA 318 (D), *Ngobo v Durban Transport Management Board* (1991) 12 ILJ 1094 (IC), *Marutha v Sember CC T/A Review Printers, Pitersburg* (1990) 11 *ILJ* 804 (IC).

"they were afraid for their lives, or being assaulted or whatever the case may be".[131] This is highly significant as the foundation of the employer's case in proceeding with the process prescribed by s 189 was due to the belief that the employer possessed insufficient oral evidence, without which he would be incapable of proving the guilt of the strikers.[132]

However, in *Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union & another,*[133] the LAC stated that there were two dire consequences that would follow if the court did not permit the admission of evidence where employees were unable to give oral evidence due to fear, intimidation and the threat to their lives.[134] Firstly, an employer would not be able to prove the employee's guilt even though the circumstances clearly indicate that they are guilty. Secondly, such failure would permit wrongdoers from engaging in an array of criminal activity with the security against liability if they can scare off witnesses from testifying or even prevent testimony by having witnesses murdered.[135] The court further stressed that this was a type of evil, which if permitted within our society would "destroy the very foundations on which our society is built".[136]

The judgments discussed above are in line with the procedure that the LC has approved in *National Union of Metalworkers & others v Deelkraal Gold Mining Co Ltd*,[137] which can be used in situations of fear of intimidation and harassment that compel evidence to be submitted in camera. The court provided a three stage approach that should be followed. The first stage is initiated before an open court or arbitration to determine whether the safety of the lives of such witnesses necessitate the matter to proceed to the next stage.[138] The second stage is when the witnesses provide evidence in camera during which the witnesses will be cross-examined by the judge, adjudicator or union representative. This stage would not include any hearsay evidence

[131] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1666[24].
[132] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1662G.
[133] *Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union & another* (2000) 21 *ILJ* 1315 (LAC).
[134] *Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union supra* note 133 at 1321C.
[135] *Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union supra* note 133 at 1321D.
[136] *Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union supra* note 133 at 1321D.
[137] *National Union of Mineworkers & others v Deelkraal Gold Mining Co Ltd* (1994) 15 *ILJ* 1316 (IC).
[138] *National Union of Mineworkers & others v Deelkraal Gold Mining Co Ltd supra* note 137 at 1318.

and if the witnesses have provided sufficient reason to believe that there is a valid fear of intimidation, then the matter will proceed to the next stage. The third stage is where the witness would provide evidence in camera subject to the cross-examination of the union's representatives.[139] Even though this would help assist the employer's case in bringing criminals to book, it must be noted that there is a dire moral issue which arises from this case, which is that should employees be expected to give evidence at the cost of their own lives, as it is common knowledge that in camera proceedings do not provide complete certainty of anonymity.[140]

In *Kapesi supra,* Basson J relied upon the judgments discussed above in concluding that the employer would have been able to proceed with a disciplinary hearing based on the reasoning that excluding hearsay evidence would give perpetrators impunity over heinous crimes.[141] The primary reason for permitting hearsay evidence was that the interests of justice necessitate that society is not left to the evils of wrongdoers without an aid to the injustice committed against them as was the norm during apartheid.[142] In the past "the majority of the population was subjected to the tyranny of the State, [therefore] we cannot now be subjected to the tyranny of the mob".[143] These sentiments were further echoed by Van Niekerk J in *Ram Transport SA (Pty) Ltd v SA Transport & Allied Workers Union & others.*[144] This case centered on an unprotected strike that was also marred by acts of violence and destruction to the employer's property as well as that of non-striking employees. The court in this regard provided a good illustration as to how the courts should deal with acrimonious conduct by strikers when it stated that if strikers engage in acts of grievous criminal misconduct then their actions cannot go unpunished but must be dealt with by exacting the severest penances that a court of law is permitted to enforce.[145]

---

[139] *National Union of Mineworkers & others v Deelkraal* note 137 at 1318.
[140] Rycroft (note 116; 869).
[141] *Food & Allied Workers Union obo Kapesi supra* note 111 at 1675G-H.
[142] J Stemmet "In case of emergency': South African ststes of emergency, CA. 1985-1988: Synopsis and chronology' (2015) 40(1) *Journal for Contemporary History* 59.
[143] *SA Transport & Allied Workers Union v Garvas & others* (2011) 32 *ILJ* 2426 (SCA) at 50.
[144] *Ram Transport SA (Pty) Ltd v SA Transport & Allied Workers Union & others* (2011) 32 *ILJ* 1722 (LC)
[145] *Ram Transport SA (Pty) Ltd supra* note 144 at 1723C-D.

The second issue that Basson J in *Kapesi supra* had to decide on was whether the employer could successfully proceed with the retrenchment of the employees via s 189. In this regard the court highlighted that this process will only succeed if it can be shown that the dismissal was due to the "continued economic viability" of the business. The conduct of the employees must have proven that it was impossible for the business to continue.[146] A parallel was drawn between the present case and *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO & others*.[147] The company was dealing with severe financial loss and appointed a new manager to address the issue. All proposals to improve production were obstinately opposed by the workforce. This opposition then became violent with death threats to managers as well as attempts to assassinate the new manager and one employee had shots fired at his home. As a result of the inability to individually identify the perpetrators, as was also the situation in *Kapesi supra*, the employer could not effect disciplinary proceedings against the employees.[148] The LC stated that due to the threats on the managers' lives they were unable to perform their tasks in a safe working condition. This effectively would mean that the company would be unable to turn the business around in order for it to be viable.[149] The LC thus concluded that there was an economic reason for dismissal. This would satisfy the requirement of an operational reason. However, this does not mean that any conduct would give rise to the justification of proceeding with s 189 proceedings.[150] The facts of every case would determine whether this was possible. In *Tiger Food Brands supra*, the economic turnaround of the business was necessary as it was already making a loss and the proposals implemented by the managers were indispensable for this very purpose. If the managers could not implement the plans in a safe environment then the business could not be salvaged.[151] The decision in *Tiger Food Brands supra*, indicate that s 189 may be used as a method for dismissing employees who engaged in misconduct during a strike such as threats to management, attempts of assignation and even fire shots at employees homes which is similar to the misconduct in *Kapesi supra*, but the 'economic viability' of a business as being a reason for dismissal as an operational requirement must be proven.[152]

---

[146] *Food & Allied Workers Union obo Kapesi supra* note 111 at 1671F-G.
[147] *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO & others* (2007) 28 *ILJ* 1827 (LC).
[148] *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO & others supra* note 147 at 1828[2]-[9].
[149] *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO & others supra* note 147 at 1835[38].
[150] *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO & others supra* note 147 at 1835[39].
[151] *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO & others supra* note 147 at 1835[39].
[152] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1680A.

The LC has mentioned that even if the misconduct causes the financial loss, this would not vitiate that the retrenchment was to rescue the business from the financial loss.[153] In *SA Commercial Catering & Allied Workers Union & others v Pep Stores*,[154] there was an unexplained shrinkage of stock in two of its branches and the failure to protect the stock by employees under whose care the stock was placed in. This compelled the employer to close the branches pending facilitation on whether there was another way in which the business could be saved and if one could not be found then the employer would have to resort to retrenchment as a means of saving the business.[155] The learned Judge in this regard stated that this was clearly an instance where the employer attempted to consider alternate methods of saving the business rather than resorting to retrenchment. The retrenchment in this instance would fall squarely on the employer's attempt to ensure the economic viability of the business. Thus, the learned Judge concluded that this would satisfy operational requirements.[156] The cases of both *Pep Stores supra* and *Tiger Food Brands supra*, illustrate that the misconduct of the employees must have been the basis for saving the "life of the enterprise".[157]

However, in *Kapesi supra*, the employer had based his entire case on the fact that misconduct had taken place in the workplace and it was impossible for disciplinary proceedings to succeed due to a lack of evidence against perpetrators.[158] The court in its reasoning was not persuaded that the employer had thus proved that the misconduct was a reason for the economic viability of the business, as the applicant did not center its case on this justification. Hence the dismissals were held to be both substantively and procedurally unfair.[159] The court did mention that the continuance of the employment relationship was highly unlikely based on all the violence that had occurred and declined to reinstate the employees, but nevertheless awarded compensation in

[153] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1680F.
[154] *SA Catering & Allied Workers Union & others v Pep Store* (1998) 19 *ILJ* 1226 (LC).
[155] *SA Catering & Allied Workers Union & others v Pep Store supra* note 154 at 1232[26].
[156] *SA Catering & Allied Workers Union & others v Pep Store supra* note 154 at 1236[49].
[157] *Chauke & others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC).
[158] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1678A.
[159] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1686C.

the form of 12 months salary.[160] In *Kapesi supra*, Basson J highlighted two very significant issues that pertain to misconduct during strikes. The first is that disciplinary hearings can be successfully used even in the absence of oral evidence from victims who are too scared to testify. Secondly, that s 189 can be used as a method of dismissal where strikers engaged in violence but only if an economic rationale has been established.[161]

The decision handed down by Basson J, however, was merely the beginning of a protracted legal process. As a result of this decision, the union took the matter on appeal. Landman AJA considered whether the employer had applied the selection criteria of the alleged offenders objectively and without bias.[162] The LAC reasoned that the affidavits and statements did not indicate the link between the individual perpetrators to the acts of misconduct, but rather the identification was connected to operational requirements. There had to have been a personal identification of perpetrators so as to prove that the identification was made objectively.[163] As a result of not being able to identify the perpetrators, Landman AJA could not reason that the employment relationship could not continue if these retrenched employees were not identified as the wrongdoers. The reasoning of Landman AJA was very different to the judgment of Basson J.[164] The LC was compassionate towards the possibility that the employment relationship could be broken by horrific acts of misconduct, even if the identity of the perpetrators who committed the misconduct has not been identified. The LRA also envisages such a possibility which supports the decision of Basson J as s 193(2)(*b*) of the LRA permits the dismissal of employees where the employment relationship has become intolerable.[165] Landman AJA however was not willing to consider s 193(2)(*b*) with regard to the grievous misconduct of the employees, but rather ordered the reinstatement of the employees retrospectively of five years.[166]

---

[160] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1686C.
[161] T Gandidze 'Dismissals for operational requirements' (2007) 11 *LDD* 83.
[162] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1779H-I.
[163] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1780A-B.
[164] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1780C-D.
[165] Rycroft (note 116; 864).
[166] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1780D.

However, upon the reinstatement of the dismissed employees, the employer immediately suspended the employees and instituted disciplinary hearings. This was met with an application by the union interdicting the employer from the disciplinary proceedings. The urgent application was then heard at the LC with the intention to begin proceedings afresh.[167] Steenkamp J stated that it was unfair to pursue proceedings on the basis that no new information had surfaced. Furthermore, it stated that it was unfair that since it had decided on a specific course of action and had failed to then embark on another course using the same evidence. Only if new evidence surfaced could there be a justification for starting the proceedings again.[168] It must be noted that this was an application for an interdict and the element of 'irreparable harm' had to be proven, the LC clearly stated that this requirement had not been satisfied but nevertheless permitted the granting of the interdict.[169] Steenkamp J stated that even though this judgment was in line with the legal principles, it had brought "a sense of disquiet" to the court as those who had engaged in grievous acts of violent misconduct have walked away from their wrongdoings without suffering any adverse consequences of the law.[170] Although the court was of this view, it failed to provide any remedies that the employer could have followed to rectify the procedural and substantive defects in choosing the incorrect procedure.[171] It is highly regrettable that the LC has made this judgment without providing recourse to the actual victim of the violent strike as there is authority that permits making an exceptional case to allow a second disciplinary hearing that would have ensured that the perpetrators of the violent misconduct did not go unpunished.[172] The case of *Kapesi supra* illustrates that there is a deficiency in the interpretation of violent strikes as courts need to create a balance between the tyranny of the strikers and legal principles to provide an opportunity for victims of strike violence to correct procedures under the direction of the court.[173]

---

[167] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1780E-F.
[168] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1780G-H.
[169] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1780I.
[170] *Food & Allied Workers Union obo Kapesi & others v Premier Foods Limited t/a Blue Ribbon Salt River supra* note 112 at 1182E-G.
[171] *Food & Allied Workers Union obo Kapesi supra* note 112 at 1182A-B.
[172] *BMW v Van der Walt* (2000) 21 *ILJ* 113 (LAC) *and Branford v Metrorail Services (Durban) & others* (2003) 24 *ILJ* 2269 (LAC), *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 *ILJ* 89 (LAC), *Semenya & others v CCMA & others* (2006) 27 *ILJ* 1627 (LAC).
[173] Rycroft (note 116; 870).

In order to exact the severest of penalties and provide a deterrence to misconduct during strikes, the court is also entitled to hold the union and their representatives financially responsible for gross misconduct during a strike, as was considered by the LC in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Worker Union & others*.[174] The case involved a protected picket following failed wage negotiations. Even though picketing rules had been formulated, the picket was tarnished by acts of criminal conduct. These included the emptying of dirt bins outside the employer's property, burning tyres on the roads, blocking roads, and throwing bricks at police vehicles. There were also accounts of assault to patrons and non-striking employees, theft, malicious damage to the employer's property and the property of patrons of Montecasino.[175] It is imperative to note that the applicant notified the union and the employees that they were in material breach of the picketing rules although the union made no attempt to restrain its members and maintain order throughout the duration of the strike.[176] An interim order was obtained by the applicant preventing the strikers from engaging in such unlawful conduct and before the return day of the final order, the applicants supplied supplementary affidavits asking that the union and its members be held liable for the costs incurred by their actions as there was no denial that they had engaged in such conduct. The respondents opposed the application on the basis that they were not liable.[177]

The LC analysed the arguments presented by the respondent and stated that a costs order would not have an effect on the continued relationship between the employer and the employees for purposes of collective bargaining. The court went on to emphasise that by awarding such costs it would serve as a lesson to the respondents that collective bargaining is not authorisation to engage in collective brutality. It would also serve as a warning to the union and its officials who failed to intervene and that proactive measures are required to take responsibility of the irresponsible actions of its members.[178] An important remark made by Van Niekerk J was that collective bargaining and dispute resolution extends beyond the workplace and into the public

[174] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) *33 ILJ* 998 (LC).
[175] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino supra* note 174 at 1001[4].
[176] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino supra* note 174 at 1001[5].
[177] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino supra* note 174 at 1001[3].
[178] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino supra* note 174 at 1002[13].

sphere.[179] It is for this reason that the courts need to address misconduct as this conduct also extends to the infringement of the rights of the general public when innocent members of society are assaulted, hurt or have their property damaged.[180] The severity of the misconduct was further highlighted by Van Niekerk J who elucidated that the court will always step in to protect the right to strike and picket, however, the purpose of these rights are blackened when individuals further these rights through means of appalling acts of violence. In such instances, to protect the strike would be tantamount to the protection of violence.[181] The valued judgment handed down by the court stressed that the court's disapproval of such heinous acts of violence necessitates the severest punishment to deter individuals like the respondents who commit such acts and their union and its officials who fail to prevent and control the actions of their members.[182] It is submitted that this judgment affirms the judgment held by the court in *Chemical Energy Paper Printing Wood & Allied Workers Union & others v Metrofile (Pty) Ltd*,[183] where the learned judge described violence during strikes as "abhorrent and completely unacceptable"[184] and stated that the "right to engage in a strike does not give employees the license to engage in misconduct".[185]

The CC made a landmark decision regarding the court's stance against trade unions who initiate gatherings that turn violent in *SA Transport & Allied Workers Union & another v Garvas & others*.[186] In *Garvas supra* SATAWU called for a protest march following the violent and prolonged security strike of 2006. This protest, however, turned violent and riotous. The protest caused extensive destruction to vehicles and property of shop owners to the value of approximately R 1.5 million.[187] The respondents, namely two street traders, one shop owner and five vehicle owners whose cars had been vandalizsd as a result of the riot, instituted a claim for compensation in terms of the Regulation of Gatherings Act 205 of 1993 (herein after referred to

[179] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino supra* note 174 at 1002[13].
[180] *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union & others* (2010) 31 *ILJ* 2539.
[181] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino supra* note 174 at 1004[13].
[182] *Tsogo Sunn Casinos (Pty) Ltd t/a Montecasino supra* note 174 at 1004[14].
[183] *Chemical Energy Paper Printing Wood & Allied Workers Union & others v Metrofile (Pty) Ltd* (2004) 25 *ILJ* 231 (LAC)
[184] *Chemical Energy Paper Printing Wood supra* note 183 at 245[45].
[185] *Chemical Energy Paper Printing Wood supra* note 183 at 246F.
[186] *SA Transport & Allied Workers Union & another v Garvas & others* (2012) 33 *ILJ* 15 93 (CC).
[187] *SA Transport & Allied Workers Union supra* note 186 at 1598[1].

as the RGA) which conferred liability on the organisers of the gathering if any damage occurred.[188]

The union contended that s 11(1) of the RGA which held organiser's liable for damage during a gathering was unconstitutional as it conflicted with the constitutional right to peacefully assemble, demonstrate, picket and make presentations as enshrined in s 17 of the Constitution.[189] It must be noted that the court analysed the term 'reasonably foreseeable' in terms of the RGA. However, for purposes of elucidating the Constitutional Court's (CC) approach on violence, the discussion of this case will focus only on the argument that s 11(1) the RGA was unconstitutional.[190] The CC in this regard held that the right to assemble is not an absolute right, but rather it is conditional on the basis that it takes place in a peaceful and unarmed manner. Where there is a riot it would mean that there was a prevalent feature of violence which excludes the application of s 17 of the Constitution.[191]

The decision in *Garvas supra* was fundamentally based on the unwarranted use of violence during the gathering under the authority of the union. The CC noted that the implications of s 11 would hold organisers liable for damages caused during a demonstration and would make organising gatherings costly. However, the court held that s 11 was justified. However, the CC reasoned that this was justified in terms of s 36 of the Constitution.[192] In arriving at its decision the CC stated that s 11 served a significant purpose, namely that it was designed to safe guard members of our society who have been victims of riotous conduct and lack the means and ability to identify and take action against the perpetrators.[193] Where a gathering causes danger to the health, life and livelihood of the defenseless then organisers of such gatherings must be held responsible for initiating the events that lead to the loss incurred.[194] The CC held that the extent of the limitation on the right to assemble was justified even though it had a dampening effect on

[188] *SA Transport & Allied Workers Union supra* note 186 at 1601[18].
[189] The Constitution; s 17.
[190] *SA Transport & Allied Workers Union supra* note 186 at 1601[18].
[191] *SA Transport & Allied Workers Union supra* note 186 at 1601[18].
[192] *SA Transport & Allied Workers Union supra* note 186 at 98I-99E.
[193] *SA Transport & Allied Workers Union supra* note 186 at 102A-B.
[194] *SA Transport & Allied Workers Union supra* note 186 at 102C.

s 17 of the Constitution.[195] The limitation does not contradict s 17 of the Constitution but merely provided stricter guidelines for its enforcement in order to prevent injury or damage to property. This limitation also acts as deterrence to unions, as it holds unions accountable when damage occurs.[196]

It must be highlighted that the judgment of *Garvas supra* elucidates the tradition of violence which has been inculcated into strikers by decades of confrontations with the apartheid government.[197] Adequate cognisance needs to be given to the fact that South Africa has moved away from repressive laws[198] and has unequivocally welcomed legislation that allows strikers and protestors to freely demonstrate their concerns in the public domain.[199] However, emphasis must be placed on the fact that these entitlements are subject to their peaceful enforcement, as "rights and responsibilities go hand in hand".[200] The reason for this restriction is primarily to protect the health, safety and maintenance of public order.[201] This submission is further enforced by international standards cited by the CC in *Garvas supra*, where the European Court of Human Rights expressed its view in *Ziliberberg v Moldova*[202] by stating that:

> "An individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behavior".[203]

It is abundantly clear that the right to engage in protests and strikes is conditional on the peaceful conduct of strikers as those who engage in criminal behavior will not be protected.[204] However, this does not mean that if the protest or strike causes inconvenience that such conduct will render

---

[195] *SA Transport & Allied Workers Union supra* note 186 at 102F.
[196] *SA Transport & Allied Workers Union supra* note 186 at 102G-H.
[197] K von Holdt & P Alexander 'Collective violence, community protest and xenophobia' (2012) 43(2) *South African Review of Sociology* 106.
[198] Riotous Assemblies Act of 1982; s 74, the Suppression of Communism Act of 1956; s 17.
[199] L Sinwell 'Is 'another world' really possible? Re-examining counter-hegemonic forces in post-apartheid South Africa' (2011) 38(127) *Review of African Political Economy* 62.
[200] M Matisa 'Teachers' right to strike vis-à-vis learners' right to education-justice for one is an injustice for the other' (2013) 12(4) *Interim: Interdisciplinary Journal* 22.
[201] *Cisse v France ECHR* (Application No 51346/99) (9April 2002) at para 44.
[202] *Ziliberberg v Moldova ECHR* (Application NO 61821/00) (4 May 2004).
[203] *Ziliberberg v Moldova ECHR supra* note 202 at para 2.
[204] *Ciraklar v Turkey, 80 DR 46* (1995) (Application No 19601/92).

a union liable.[205] It will only be considered unlawful if it excessively infringes the rights of others.[206] Where individuals are aware of what the law requires, then they are obliged to conform their conduct to adhere to such requirements, therefore there is no cause for engaging in violence.[207]

As discussed in the judgments above, the attitude of the court towards misconduct is one of intolerance which is further enforced by awarding interdicts to prevent employers from suffering irreparable harm caused by the violent actions of employees and their representatives.[208] However, the value of a piece of paper enforced by a court of law must be analysed in light of blatant disregard towards interdicts that purport to prohibit the continuation of criminal behavior.[209]

6.4. ANALYSIS OF THE EFFECTIVENESS OF INTERDICTS WITH RESPECT TO ILLEGAL STRIKES

One of the ways in which employers can seek to maintain order during a strike that is characterised by violence is by applying for an interdict.[210] In respect of interdicts, there have been many incidents where employers have applied for and obtained urgent interdicts prohibiting strikers.[211] However, more often than not, interdicts granted by the LC are completely

---

[205] *G v Federal Republic of Germany*, (1989) 60 DR 256.
[206] *The Gypsy Council v United Kingdom*, Judgment of the Court, 14 May 2002, *Nicol and Selvanayagam v United Kingdom*, Judgement of the court, 11 January 2001.
[207] *RSA v Hugo* [1997] 6 BCLR 708 (CC).
[208] A Rycroft 'Being held in contempt for non-compliance with a court interdict*: In2food (Pty) Ltd v Food & Allied Workers Union & Others (2013) 34 ILJ 2589 (LC)'* (2013) 34 *ILJ* 2499 at 2499.
[209] M Olivier 'Lawful and unlawful strikes' (1993) 303 *De Rebus* 194.
[210] M M Mamabolo *The dismissal of unprotected strikers and the audi alteram partem rule* (unpublished LLM thesis, University of the North-West, 2006) 4.
[211] 'Freight employers to seek interdict against strike violence' *BDLive* 28 September 2012, available at http://www.bdlive.co.za/business/transport/2012/09/28/freight-employers-to-seek-interdict-against-strike-violence, accessed on 5 November 2015.

disregarded. The intervention of security officials from both the police and defense force have proven futile and businesses as well as society bear the brunt as violence continues.[212]

The compliance to orders of court is essential to the maintenance of order and peace within society as was illustrated in *Modise & others v Steve's Spar Blackheath.*[213] The case centered on a failure to adhere to an urgent interdict which was granted by the SCA declaring the strike unprotected. The LAC, in its dissenting judgment handed down by Conradie J, made a significant remark as to the importance of obeying court orders when it stated that court orders are not afforded the respect which they ought to receive. This is evident in their blatant non-compliance to interdicts. The court is called upon to ensure that it penalises those who do not comply with such orders.[214] This view was further endorsed in *North West Star (Pty) Ltd (under judicial management) v Serobatse & another,*[215] where the learned Judge Davis JA held that a society that disregards an order of court would soon be overcome by lawlessness and anarchy.[216] The judiciary has illustrated that where there is a willful failure to comply with an order of court there will be no leniency afforded to such wrongdoers.[217]

The court's lack of leniency towards individuals who are non-compliant with court orders was portrayed in *Security Systems Employers' Organization & others v SA Transport & Allied Workers Union & others*.[218] In *Security Systems supra* an urgent interdict was obtained following a protected strike in the security services sector that involved appalling acts of violence, including murder, countless injuries, vandalism, and damage to the employer's property as well as private property.[219] In terms of the interdict, the members of the union were interdicted from any violence, intimidation, harassment and assault of non-striking and replacement workers and

[212] A Myburgh 'The failure to obey interdicts prohibiting strikes and violence: The implications for labour law and the rule of law' (2013) 23(1) *Contemporary Labour Law* 3.
[213] *Modise & others v Steve's Spar Blackheath* (2000) 21 *ILJ* 519 (LAC).
[214] *Modise & others v Steve's Spar Blackheath supra* note 213 at 558[120].
[215] *North West Star (Pty) Ltd (under Judicial management) v Serobatse & another* (2005) 26 *ILJ* 56 (LAC).
[216] *North West Star (Pty) Ltd (under Judicial management) v Serobatse & another supra* note 215 at 65[17].
[217] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).
[218] *Security Services Employers' Organization & others v SA Transport & Allied Workers Union & others* (2007) 28 *ILJ* 1134 (LC).
[219] *Security Services Employers' Organization & others supra* note 218 at 1144[75].

the union was instructed to affix copies of the interdict on all doors of the employers' premises throughout the country in all languages. This was a clear and precise instruction which gave the union no room to misunderstand what was expected of it.[220] The courts have been unrelenting towards applying a strict approach to what the interdict specifically requires the party to do or not to do.[221]

The honorable Mokgouthlheng AJ considered that in terms of the rule *nisi* pertaining to the union members, it was pointless confirming the rule on the return date as the strike had ended, therefore, the purpose of the interdict which was to bring an end to the violence and other criminal acts had fallen away.[222] However, in terms of the rule *nisi* pertaining to the union and its officials, the court analysed whether there was a *mala fide* and wilful intention not to adhere to the interdict. The argument presented by the respondents was merely to state that they were not in a position to put an end to the violence or to prevent the compliance of the order.[223] The facts of the case revealed that the union had not affixed the order or the terms in numerous cities, nor had it communicated the order or the terms via radio when given the opportunity, furthermore the union did not communicate the order on the website of the company. There had been no steps taken by the respondents to comply with the rule nisi.[224] Mokgouthlheng AJ took into account the evidence discussed above as well as the respondents' argument in reaching the decision that the respondents had not proved that their failure to comply with the order was not wilful and *mala fide*. The court on this basis confirmed that they were in contempt of court.[225] The first respondent was fined R500 000 with a five year suspension on condition that it is not found guilty of contempt on any further order made by the LC.[226]

---

[220] *Security Services Employers' Organization & others supra* note 218 at 1138[22].
[221] *Security Services Employers' Organisation & others v SATAWU & others* (2007) 28 *ILJ* 1134 (LC), *Supreme Spring-A Division of Met Industrial v MEWUSA* (J2067/2010).
[222] *Security Services Employers' Organization & others supra* note 218 at 1143[65].
[223] *Security Services Employers' Organization & others supra* note 218 at 1137[9].
[224] *Security Services Employers' Organization & others supra* note 218 at 1140[34]-[38].
[225] *Security Services Employers' Organization & others supra* note 218 at 1145[83]-[85].
[226] *Security Services Employers' Organization & others supra* note 218 at 1146[87].

The case of *Security Services supra* has highlighted the significant requirements to prove a contempt of court allegation, which is that those who disregard court orders will be severely penalised as a means of exerting the authority of the court.[227] Even though there have been instances where employees and unions have been held accountable for contempt of court orders especially during unprotected strikes,[228] these cases are too few to adequately portray the court's uncompromising attitude towards such offenders.[229] This is partly due to the requirement that the conduct which the applicant seeks to interdict has to be indicated precisely as is required in civil proceedings.[230] In *Security Services supra* it was clearly stated in the interdict that the union was ordered to put up copies of the order to make the employees aware that such an order had been granted. Thus, having failed to comply with this clear order the court found the union to be contempt.[231]

However, the problem arises when there is no clear instruction given to the interdicted party and the LAC is unwilling to broadly interpret terms as was the case in *Food & Allied Workers Union v In2Food.*[232] This case was an appeal from the judgment of the LC.[233] The initial proceeding was based on an interim order that had been granted against an unprotected strike that involved acts of violence, intimidation, assault and harassment. This was completely disregarded by the union and its members who continued to strike. The employer then applied and obtained another interim order to provide reason as to why they should not be held in contempt, thereby effecting the imprisonment of the employees and a claim of R500 000 against the union. On the return day the employer abandoned its proceedings against the employees.[234]

The rule *nisi* was confirmed on the basis that the respondents' answering affidavit merely provided denials to the allegations without any substantiation. The court took into account that

---

[227] *SA Transport & Allied Workers Union & others v Ikhwezi Bus Service (Pty) Ltd* (2009) 30 *ILJ* 205 (LC).
[228] *SA Police Service v Police & Prisons Civil Rights Union & others* (2007) 28 *ILJ* 2611 (LC).
[229] Rycroft (note 207; 6).
[230] *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others* (1999) 20 *ILJ* 392 (LC).
[231] *Security Services Employers' Organization & others supra* note 217 at 1145[83]-[85].
[232] *Food & Allied Workers Union v In2Food* (2014) 35 *ILJ* 2767 (LAC).
[233] *In2Food (Pty) Ltd v Food & Allied Workers Union & others* (2013) 34 *ILJ* 2589 (LC).
[234] *In2Food (Pty) Ltd v Food supra* note 233 at 2590A-B.

the interdict had been properly served on the respondents and declined to go any further into the evidence other than to say that on all the evidence before it there was sufficient evidence that the union was in contempt of the order.[235] The court confirmed the rule and the union was held to be liable for the payment of R500 000. In its judgment the court highlighted a significant reason for its decision for imposing the penalty upon the union when it stated that:

> "[t]he time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members. This in a context where the Labour Relations Act 66 of 1995, which has now been in existence for some 17 years and of which trade unions, their office-bearers and their members are well aware, makes it extremely easy to go on a protected strike..".[236]

The court's decision was based on the fact that there was no excuse for the extent of violence that the employees engaged in during the unprotected strike especially since the LRA has been enacted to provide a simple procedure that would render a strike protected. Furthermore, the court stated that these uncalled acts of violence diminish the effectiveness of orderly collective bargaining.[237] It must be noted that strike action is a component of collective bargaining without which the structures of collective bargaining would have no foundation.[238] When strikes are marred by acts of violence, intimidation, harassment, death threats and assassination attempts against managers, the effectiveness of collective bargaining is also tainted and undermined.[239] In this way it is no longer the negotiation process with the threat of the strike that exerts pressure on the employer to give into the demands of the employees, but rather it is the end to the violence that coerces the employer.[240] The union was aware that the actions of its members were unlawful, however, it did not take any measures to prevent or discourage the furtherance of the strike and attributed all cause for the strike as being solely due to the employer's refusal to bargain and further absolved itself and its employees from all liability. Thus, on this basis the rule had to be confirmed.[241]

---

[235] *In2Food (Pty) Ltd v Food supra* note 233 at 2591B-G.
[236] *In2Food (Pty) Ltd v Food supra* note 233 at 2591H-I.
[237] *In2Food (Pty) Ltd v Food supra* note 233 at 2591H-I.
[238] D Du Toit 'What is the future of collective bargaining' (2007) 28 *ILJ* 1405 at 1405.
[239] M Brassey 'Fixing the laws that govern the labour market' (2012) 33 *ILJ* 1 at 16.
[240] Myburgh (note 169; 5).
[241] *In2Food (Pty) Ltd v Food supra* note 233 at 2592A-B.

However, this was not the end of the matter as FAWU took the matter on appeal. The union contended on a single argument that there was no evidence to prove that they were in contempt of the order. The court considered that the interdict specifically stated that the union must cease to 'continue' the strike.[242] In light of the first argument that was presented by the respondent that the union is liable for the actions of its members, the court stated that in an interdict there is a difference between a juristic person being liable for its members and a juristic person being liable as a separate legal entity. A contempt of court investigation is merely to determine whether the union specifically did what the interdict stated it should not do.[243] The second argument made by the respondents asserted that it was implied that the union had to take steps to prevent the continuation of the strike. In terms of this argument the court stated that there could not be a generous interpretation to the word 'continue' that would infer that the union had to take steps to positively end the strike. The reason for this was that contempt of court proceedings could not be taken lightly due to the quasi-criminal implications. On this basis the court further elaborated that there was no evidence to show that the union had continued with the strike or blocked entrances after the date that the second interdict had been served. All that was required in terms of the interdict was for it, as a juristic person, to discontinue with the strike.[244] The court thus concluded that the interdict was too vague and did not specifically state that the union had to take steps to end the strike by its members and on that basis the appeal was upheld.[245]

This decision is to be criticized s in *Tsogo sun supra* the court clearly stated that the severest of punishment should be given where the union "fails or refuses to take all steps that are responsible to prevent its occurrence".[246] Even though the interdict did not specifically state that the union had to take steps to end the strike, Sutherland AJA should have given more consideration to the respondents' arguments in light of the pivotal case of *Food & Allied Workers Union v Ngcobo NO & another.*[247] In *Ngcobo supra*, FAWU had failed to refer the dispute within the 90 day period. The union, after being approached by the employees regarding the matter, referred the

[242] *In2Food (Pty) Ltd v Food supra* note 233 at 2592C.
[243] *Food & Allied Workers Union v In2Food supra* note 232 at 2771D-F.
[244] *Food & Allied Workers Union v In2Food supra* note 232 at 2771A-B.
[245] *Food & Allied Workers Union v In2Food supra* note 232 at 2771G-J.
[246] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino supra* note 174 at 1004[14].
[247] *Food & Allied Workers Union v Ngcobo NO & another* (2013) 34 *ILJ* 3061 (CC).

matter to another official who assured the employees that he would apply for condonation.[248] This was never pursued by the official, but instead he attempted to take the matter back to the CCMA to start the proceedings afresh. This was justifiably refused. The official then sought legal advice from its attorney who advised that the employees were unfairly dismissed and any award as to costs would be made adversely. On this basis, the union withdrew its representation of the employees and informed them that it would not proceed with their claims in the LC. The CC decided that a union can be held liable for failing to refer a matter on behalf of its members and if the union does commit such a failure then the members are entitled to compensation.[249] Cameron J considered the facts in light of the two arguments made by FAWU. The first being that there was an implied term that the union was entitled to withdraw its representation when it no longer served its interest to represent the members and secondly that the failure to refer the dispute was not in breach of the agreement with its employees.[250] The first argument will be considered as it provides a good illustration on how unions become liable when they represent their members. Cameron J considered the premise of the union that s 23 of the Constitution allowed a union 'to determine its own administration, programs and activities', thus absolving it from liability. However, the court reasoned that this provision is merely to ensure that unions are afforded independence in the furtherance of the interests of its members. However, this provision does not state how the union should engage in such furtherance nor does it state that a union is provided immunity from damages claims.[251]

The union also averred that s 200 of the LRA and s 23(4)(*a*) and the union's constitutional clause 5.11 which states that the aims and objectives allows it to provide legal assistance to officials and members where it is in the interests of the union, allowed the union to withdraw its assistance at any time when it was not in the union's interest to do so.[252] It must be noted that s 200 of the LRA allows a union to act in three capacities, firstly in its own interest, secondly on behalf of its members and thirdly, in the interests of its members.[253] In light of *In2Food supra*, FAWU and its

[248] *Food & Allied Workers Union v Ngcobo supra* note 247 at 3065[4]-[7].
[249] *Food & Allied Workers Union v Ngcobo supra* note 247 at 3065[4]-[7].
[250] *Food & Allied Workers Union v Ngcobo supra* note 247 at 3069[25].
[251] *Food & Allied Workers Union v Ngcobo supra* note 247 at 3069[25].
[252] *Food & Allied Workers Union v Ngcobo supra* note 247 at 3067[18].
[253] The LRA; s 200(1)(*a*)-(*c*).

members had been acting collectively in the unprotected strike, which is evident from the union organiser's statement that it represents and acts on behalf of its members.[254] Furthermore, by stating that the unprotected strike was a result of the employer's actions and by extricating all liability of itself and its members, this conveys that firstly, FAWU was acting on behalf of its members and thirdly that it was aware of the misconduct and unlawfulness of its members' actions and condoned it.[255] This harmful attitude was highlighted in *Garvas supra* where the court stated that "unlawful behavior … threatens the fabric of civilized society and … undermines the rule of law".[256] In regard to the defense of FAWU in *Ngcobo supra*, Cameron J stated that the union had placed unwarranted weight on this provision as it is only promulated to provide unions legal standing to represent its members, it does not however provide immunity. Furthermore, clause 5.11 is merely to indicate the objectives of the union, it does not regulate the functions of the Union.[257]

The learned judge noted that the union's constitution contradicted its own case and conferred liability rather than immunity. In clause 32 it states that shop stewards, officials, committee members and office-bearers are indemnified of costs, incurred as a result of negligence provided their actions do not constitute misconduct.[258] It must be noted that in *In2Food supra*, there was gross misconduct which included the participation of the union. The purpose of this clause is to ensure that those belonging to the union are held accountable when they engage in acts of misconduct.[259] It must be emphasised that the LRA in s 200(1)(*b*) infers that unions represent the attitude and actions of their members. Therefore, the actions of unions and members are one and the same. It is common knowledge that juristic bodies cannot think or act, thus it is only by the actions of their members that they are rendered liable.[260] However, the court in *In2Food supra* clearly stated that an interdict is to be taken seriously and must be clear and must make a

[254] *Food & Allied Workers Union v In2Food supra* note 232 at 2592A-B.
[255] *Food & Allied Workers Union v In2Food supra* note 232 at 2592B.
[256] *SA Transport & Allied Workers Union supra* note 186 at 50.
[257] *Food & Allied Workers Union v In2Food supra* note 233 at 3071[32].
[258] *Food & Allied Workers Union v Ngcobo supra* note 247 at 3072[33].
[259] *Food & Allied Workers Union v Ngcobo supra* note 247 at 3072[33].
[260] L Jordaan 'New perspectives on the criminal liability of corporate bodies: general principles of criminal liability and specific offenses' 2003 *Acta Juridica: Criminal Justice in a New Society: Essays in Honour of Solly Leeman* 50.

distinction between juristic persons acting in their own capacity and juristic persons acting on behalf of their members.[261]

However, even though that may be the case, the role and function of the LC must be analysed in the light of violent strike activity that has plagued our country.[262] It must be noted that the employees who had engaged in the violent misconduct were disciplined and consequently dismissed. It can be noted that justice had been served in this regard.[263] However, the disallowance of a generous interpretation into the word 'continue' ultimately led Sutherland AJA to allow the union to escape any penalties for its involvement in the unprotected strike. The scales of justice in this case have clearly tilted towards the union, as the loss of R16 million has to be solely borne by the employer.[264] The purpose of an interdict is to prevent irreparable harm to the victim; it is therefore ironic that the LAC has enforced harm to the employer through its judgement in *In2Food supra*.[265] It is submitted that in light of the gross forms of misconduct that were permitted to take place under the powers of the union and the fact that the union condoned such atrocious conduct, the court in *In2Foods supra* should have been more compassionate towards the moral implications of not exacting punishment against the union as was illustrated in *S v Mamabolo (E TV & others intervening).*[266] The CC as per the judgment handed down by Kreigler J in *Mamabolo supra,* held that the judiciary is required to depend on moral authority, without which it would be impossible to enforce its power as watchdog over the Bill of Rights.[267] The judiciary can only function properly if it obtains the trust and dependency of society by successfully protecting the ethical and moral values of citizens. Protecting ethical values would be protecting society from horrific acts of violence by unprotected strikers.[268] Thus in response to the strict enforcement of the rule of law by Sutherland AJA in *In2Foods supra*, the CC in

[261] *Food & Allied Workers Union v In2Food supra* note 232 at 2771G-H.
[262] Rycroft (note 165; 2505).
[263] *Food & Allied Workers Union v In2Food supra* note 232 at 2591F-G.
[264] *Food & Allied Workers Union v In2Food supra* note 232 at 2774[20].
[265] A Rycroft 'What can be done about strike-related violence?' *Labour Law Research Inaugural Conference*, Barcelona 13-15 June 2013 7.
[266] *S v Mamabolo (E TV & others intervening)* 2001 (3) SA 409 (CC).
[267] *S v Mamabolo (E TV & others intervening) supra* note 266 at 16.
[268] *S v Mamabolo (E TV & others intervening) supra* note 266 at 18-19.

Mamabolo supra held that "where the Judiciary cannot function properly the rule of law must die".[269]

The judgment handed down in *In2Food supra* clearly indicates that there is a missing link between what the legal principles required for contempt of court and the moral obligations of the court.[270] Furthermore, *In2Food supra* has highlighted an important point which is that the LC and LAC require a distinction between a trade union and the trade union's members' when drafting an interdict because the LAC requires that contempt be proven against the union in its own right. Thus it can be deduced that in terms of an interdict a trade union and its members are regarded to be two separate bodies.[271] This is highly concerning as s 68 of the LRA does not infer that there has to be a separation made between a trade union and its members when drafting an interdict.[272] The case of *In2Food supra* illustrates that a contempt of court penalty can never substitute for a reactive stance from legislature nor will it be a shield against society's growing discontent of violent and criminal behavior during strikes.[273] The effectiveness of the LC and the LAC came under scrutiny during a SASLAW address by Van Niekerk J who reasoned that the viewpoint and role of the court is undermined when strikers advance their interests by exceeding the barriers of the law. One of the ways in which the courts could reaffirm their authority is by providing a narrow interpretation of the provisions of the LRA.[274]

The analysis of cases which illustrate misconduct during strikes and the lack of adherence towards interdicts shows that violence, intimidation, harassment and destruction to property has become inculcated in strike action to the extent that it has "been established as a tradition".[275] A possible contributor to such violence could be the liberal interpretation of the procedural

---

[269] *S v Mamabolo (E TV & others intervening) supra* note 266 at 18-19.
[270] *Food & Allied Workers Union v In2Food supra* note 232 at 2774[19].
[271] M Ling 'Draft the terms you mean' 2014 *Without Prejudice* 38.
[272] The LRA; s 68.
[273] Rycroft (note 166; 6).
[274] Myburgh (note 168; 71).
[275] P Benjamin 'Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)' *Working Paper No. 47* (2013) 35.

requirements of the right to strike.[276] An excessive interpretation of legislation can be detrimental as it often causes the scales of power to tilt either in the favour of employers or employees, which impedes the purpose of orderly dispute resolution.[277] The liberal interpretation of s 65(2) of the LRA by the CC can cause an acrimonious and volatile atmosphere as a result of the principle enunciated in *SA Transport & Allied Workers Union & others v Moloto No & another*.[278] If employers are unaware of the extent of the strike, they cannot prepare for it. Consequently, when there is uncertainty it leads to an unstable arena that forms the breeding ground for violence. A strike that is constructed upon instability is bound to become violent and chaotic.[279] The interpretation of the LRA should not focus solely on the implications of the right to strike on employees, but rather it should extend its scope towards an external effect an interpretation would have on society as a whole,[280] as strikes extend outside of the employment relationship and their consequences are experienced by all citizens especially those who are victims of violent strike action.[281]

It must be considered that when strikers engage in violence and intimidation this ultimately negates individuals' freedom to decide whether they would want to participate in the strike. This violence and harassment adversely affects the lives of non-strikers and endangers their health and safety.[282] It has been proposed by government that the introduction of compulsory ballots prior to a protected strike would largely decrease violence and intimidation against non-striking employees.[283] The lack of mandatory secret ballots can be viewed as a contributor towards the instability of initiating strikes.[284] An additional proposal was made by government for extending the 30 day "cooling off" period enshrined in s 65(1) to 60 days and an extension to 30 days for

---

[276] The LRA; s 65 (2).
[277] J Romeyn 'Striking a balance: the need for further reform of the law relating to industrial action', available at *http://www.aph.gov.au/library*, accessed on 15 June 2015.
[278] *SA Transport & Allied Workers Union & others v Moloto No & another* (2012) 33 *ILJ* 2549 (CC).
[279] M A Chicktay 'Employment, the economy & growth: The implications for labour law' paper presented at *Sandton Convention Centre 30 July-1 August 2013* 17.
[280] C Thompson 'Essential services and the unfair labour practice remedy' (1992) 13 *ILJ* 500 at 500.
[281] S Mottier & P Bond 'Social protest in South Africa', available at *http://ccs.ukzn.ac.za/default.asp?2.27.3.1858*, accessed on 15 June 2015.
[282] D Horsten & C le Grange 'The limitation of the educator's right to strike by the child's right to basic education' (2012) 27(1) *SAPL* 514.
[283] M Malefane 'Proposals 'an attack on unions'' *Sowetan* 8 December 2011 at 4.
[284] P Leon 'A world-class regulatory regime is within our grasp' *Business Day* 31 October 2014 at 11.

establishing picketing rules.[285] Even though these proposals have been vehemently rejected by unions, it draws cognisance to the necessary balance that needs to be struck between the right to strike and the rights of everyday citizens, the protection of private, municipal and state property, street traders, non-striking employees and health, safety and environmental considerations.[286]

There has also been a recommendation to implement compulsory arbitration in the public sector that would effectively ensure that public sector employees were treated the same as employees within essential services.[287] However, this recommendation must be considered in the light of the democratic values of society as well as the fact that compulsory arbitration is currently not as successful as the legislature would have hoped it would be as employees within essential services still embark on strikes. Furthermore, it would add to the growing frustration of the dissatisfied public sector employees.[288] It is submitted that there needs to be more attention given to strikes especially with regard to the misconduct that is anticipated with industrial action.[289] This urgent need had been responded to by the National Economic, Development and Labour Council committee (Nedlac) who agreed on a code of good practice specifically centered on collective bargaining and industrial action. The code is intended to address the entire phase of dispute resolution which would include regulations on pre-negotiation, the negotiation process, post-negotiation proceedings, dispute, and the implementation of industrial action and lockouts as well as the post-strike and lockout phase.[290]

6.5. CONCLUSION

[285] ibid 11.
[286] W Khuzwayo 'Cosatu sees red over proposed changes to LRA' *STAR* 7 November 2011 at 15.
[287] W R Maclaurin 'Recent experience with compulsory arbitration in Australia' (1938) 28(1) *The American Economic Review* 67.
[288] D S Grant & M Wallace 'Why dos trikes turn violent?' (1991) 96(5) *American Journal of Sociology* 1125.
[289] Rycroft (note 1; 827).
[290] Code of good practice on collective bargaining and industrial action' *HR Pulse News Desk* 18 August 2015 at [1], available at *http://www.hrpulse.co.za/news/latest-news/232754-code-of-good-practice-on-collective -bargaining -and- industrial-action*, accessed on 21 November 2015.

The LRA has effectively enshrined provisions that deter and prevent unruly behaviour during strikes such as dismissal, interdicts, the awarding of compensation to victims of strike violence.[291] However, the situation becomes tricky when unions are not involved in calling strikes and employees embark on rampant strikes to secure their demands.[292] It must be noted that in instances of wildcat strikes, union involvement is excluded and includes an undeniable characteristic of violence embedded in asserting demands as was evident in the Marikana strike.[293] It must be further highlighted that incidents such as the Marikana strike are by no means unique as it has become the norm for poverty stricken individuals as they fight for survival.[294] The essence of strikes and protest action exceeds the ordinary boundaries of the employment relationship and focuses on far greater social and political deficiencies of the country.[295] There is a culture of violence that has become integrated in the battle for housing, water, electricity and a decent wage which has now evolved into a class struggle.[296] These events have created an avalanche of terror as protestors and strikers burn tyres and vehicles, loot shops, destroy buildings, block roads and violently confront police.[297] These unprecedented torrents of strike violence reveal an inherent flaw within the social dynamics of society which have been inherited from colonial times.[298] It is far beyond the scope and capabilities of a single piece of legislation, namely, the LRA to address the plight of society's underdogs and their growing frustration about a living wage,[299] nor can it be expected that the LRA should provide a cure for

---

[291] The LRA; s 68,
[292] S J Cole 'Discriminatory discipline of union representatives for breach of their "Higher Duty" in illegal strikes' (1982) 5 *Duke Law Journal* 901.
[293] C Chinguno 'Marikana: fragmentation, precariousness, strike violence and solidarity' (2013) 40(138) *Review of African Political Economy* 639.
[294] M Ndlovu 'Living the Marikana world: The state, capital and society' (2013) 18(1) *International Journal of African Renaissance Studies* 47.
[295] I Bekker & L van der Walt 'The 2010 mass strike in the state sector, South Africa: Positive achievements but serious problems' (2010) 4 *Sozial.Geschichte Online* available at http://www.stiftung-sozialgeschichte.de, accessed on15 July 2015.
[296] P Bond & S Mottiar 'Movements, protests and a massacre in South Africa' (2013) 31(2) *Journal of Contemporary African Studies* 288.
[297] P Alexander 'Rebellion of the poor: South Africa's service delivery protests-a preliminary analysis' (2010) 37(123) *Review of African Political Economy* 26.
[298] M Seedat … et al 'Psychological research and South Africa's violence prevention responses' (2014) 14(2) *South African Journal of Psychology* 136.
[299] L Rafapa 'Rethinking Marikana: Warm and cold lenses in plea for humanity' (2014) 30(2) *Journal of Literary Studies* 126.

the ineffective structures within our socio-economic structures.[300] This requires aggressive intervention from our political leaders who possess greater power to address this inadequacy.[301]

[300] H Wasserman 'The language of listening: the Marikana aftermath' (2013) 33 *Rhodes Journalism Review* 111.
[301] T Ngcukaitobi 'Strike law, structural violence and inequality in the platinum hills of Marikana' (2013) 34 *ILJ* 836 at 858.

CHAPTER SEVEN

CONCLUSION

7.1. CONCLUSION

The right to strike has become recognized as a fundamental right within the national and international community. This right has earned its pertinence for the pivotal role it has played in shaping labour laws and seeking to instill equality within the workplace as well as society as a whole.[1]The significance of strike action is evident in South Africa as the former part of the 20th century experienced a rise in strike action as a response to the inequalities relating to job opportunities and wages between black and white workers.[2]However, it was these inequalities that provided black workers with the impetus to revolt against discriminatory laws within the industrial and political sphere.[3]Strike action thus contributed to the development of labour legislation that sought to bring impartiality within the labour industry through the promulgation of labour legislation.[4]

TheLabour Relations Act of 1995 (hereinafter referred to as the LRA) has been government's reactive response to the deficiencies within the industrial and social field but it has also been the first legislation to endorse the right to strike across all races without any repercussions provided thatthestrike has followed the procedure stipulated by the LRA.[5]The main aim of the LRA has been to rewrite the injustices of the past.[6] In light of the recent violent strikes, the effectiveness

---

[1] LJ Matee 'Limitation on Freedom of Association: The case of Public Officers in Lesotho' (unpublished LLM thesis, University of Kwazulu-Natal, 2013) 9.
[2]S van der Velden& W Visser 'Strikes in the Netherlands and South Africa, 1900-1998: a comparison' (2006) 30(1) *SAJLR* 52.
[3]M Beittal 'Labor Unrest in South Africa 1870-1970' (1995) 18(1) *Review (Fernand Braudel Center)* 90.
[4]H Suchard 'Labour relations in South Africa: retrospective and prospective' (1982) 12(2) *Africa Insight*96.
[5]R Welch 'Rights to strike in UK and SA law: a comparison' (2000) 26 *International Union Rights*, available at*http://www.jstor.org/stable/41935840*, accessed on 13 March 2015.
[6] P Benjamin 'Labour market regulation: International and South African Perspectives' *HSRC Employment and Economic Research Program* (2005) 41.

of controlling the unruly conduct of strikers has come under spotlight.[7] It is quite evident from the chapters discussed within this dissertation that the LRA has promulgated procedures for ensuring the protection of strikes. The LRA has also entrenched a number of methods for controlling and preventing illegal strike action as discussed in chapter six. Furthermore, the Judiciaryhas clamped down on strikers and unions who engage in misconduct during strikes. However, these violent strikes are indicative of the fact that South Africans have inherited a pervasive culture of strife from the apartheid era which is still used today to satisfy their demands.[8] Many of the social and economic frustrations that South Africans have experienced have seeped into the workplace.[9] The similarities of these strikes to those during apartheid range beyond mere violence, but rather include the weakened relationship between government and workers which ultimately leads to such violent conduct.[10]

There are many contributors to the violence and unwarranted illegal conduct of strikers such as inequality, poverty, union rivalry, unemployment to name a few,[11] however, this dissertation has merely considered the legal perspective on possible pitfalls and the likely recommendations that could decrease strike violence. These, however, must be analyzed in light of the democratic values of our country, as no amount of laws will eliminate the violence entrenched in strikes, although it may be probable that government could positively contribute to reducing the unlawful conduct of strikers if it intervened to shape strike activity.[12] A further consideration which must be acknowledged is that even though the Legislature may propose amendments to improve themanagement and supervision of strike activity, it ultimately depends on how these laws are implemented through the court system that would bring about success.[13]

---

[7] 'A critical analysis of the 2010 Public Service strike in South Africa: A service delivery approach', available at *http://www.sabinet.co.za/webx/access/electronic/.../ipad-v47-ni-si1-a7.pdf*, accessed on 13 April 2015.
[8] R S Melkote "Blacks against blacks' violence in South Africa' (1993) 28(23) *Economic and Political Weekly* 1150.
[9] H Adam 'Options for transforming South Africa' (1987) 40(2) *Journal of International Affairs* 298.
[10] R Grawitzky 'Security strike lessons must be learnt' *STAR* 12 October 2006 at 2.
[11] G Murwirapechena & K Sibanda 'Exploring the incidents of strikes in post-apartheid South Africa' (2014) 13(3) *International Business & Economics Research Journal* 554.
[12] C Huxley 'The state, collective bargaining and the shape of strikes in Canada' (1979) 4(3) *The Canadian Journal of Sociology* 230.
[13] K Henrard 'Post-apartheid South Africa's democratic transformation process: Redress of the past, reconciliation and 'unity in diversity'' (2002) 1(3) *The Global Review of Ethnopolitics* 36.

BIBLIOGRAPHY

SECONDARY SOURCES

1. Adam, H 'Options for transforming South Africa' (1987) 40(2) *Journal of International Affairs* 287-302.

2. Adigun, A 'The implications of social democracy on industrial relations in Nigeria' (2014) 5(1) *JETEMS* 26-31.

3. Adler, G 'Engaging the state and capital: Labour and the deepening of democracy in South Africa' (1998) 2 *LDD* 1-27.

4. Alexander, P 'Marikana, turning point in South African history' (2013) 40(138) *Review of African Political Economy* 605-619.

5. Alexander, P 'Rebellion of the poor: South Africa's service delivery protests- a preliminary analysis' (2010) 37(123) *Review of African Political Economy* 25-40.

6. Alexander, P*Workers, War & the Origins of Apartheid: Labour& Politics in South Africa 1939-48* Cape Town: David Phillip Publishers, (2000).

7. Amadi, S 'The African Charter on Human Rights: Discovering its potential' (2002) 3(1) *ESR Review: Economic and Social Rights in South Africa* 4-5.

8. Ananaba, W *The Trade Union Movement in Africa: Promise and Performance* London: C Hurst, (1979).

9. Ansay, T & Schneider, EC *Introduction to Turkish Business Law* The Hague: Kluwer Law International, (2001).

10. Anstey, MS, Grogan, J & Nycukaitobi, T *Collective Bargaining in the Workplace* Cape Town: Juta and Co. Ltd, (2011).

11. Ardell, B 'Regulating strikes in Essential (and other) services after the new trilology' (2011) 17 *Canadian Labour and Employment Law Journal* 413-447.

12. Arnheim, MTW *South Africa after Vorster* Cape Town: Timmins, (1979).

13. Attley, WA 'The role of trade unions' (1987) 76(303) *Studies: An Irish Quarterly Review* 294-304.

14. Bajo, A & Balkaran, S 'A descriptive analysis of the 2007 public sector strike in South Africa' (2009) 33(2) *SAJLR* 120-131.

15. Barrow, C *Industrial Relations Law*2ed London: Cavendish, (2002).

16. Basson, AC 'The dismissal of strikers in South Africa (Part 1)' 1992 *SA Merc LJ* 20-43.

17. Barchiesi, F 'Privatization and the Historical Trajectory of "Social Movement Unionism": A case study of Municipal Workers in Johannesburg, South Africa' (2007) 71(1) *International Labor and Working-Class History* 1-43.

18. Beittal, M 'Labor Unrest in South Africa, 1870-1970' (1995) 18(1) *Review (Fernand Braudel Center)* 87-104.

19. Bellace, JR 'The ILO Law and the freedom to strike' (2014) 153(1) *International Labour Review* 29-70.

20. Bendeman, H 'An analysis of the problems of the labourdipute resolution system in South Africa' (2006) 6(1) *Africa Journal of Conflict Resolution* 81-112.

21. Benjamin, P 'Labour Market Regulation: International and South African Perspectives'

HSRC Employment and Economic Research Program (2005).

22. Ben-Israel, R *International Labour Standards: the case of the freedom to strike* Deventer: Kluwer Law Publishing, (1987).

23. Benjamin, P 'Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)' *Working Paper No. 47* (*Industrial and Employment Relations Department- Geneva: ILO* (2013).

24. Benjamin, P,Bhorat, H & Cheadle, H 'The cost of "doing business" and labour regulation: The case of South Africa' (2010) 149(1) *International Labour Review* 73-91.

25. Benjamin, TJ& Fred, W*Labour Relations Law* 2 edCape Town: Juta & Co. Ltd, (1975).

26. Bennett, M 'The super federation: independence unionism comes of age factions and fractions in the post-Wiehahn era' (1985) 3(2) *Indicator SA* 1-5.

27. Bernikow, R 'Ten years of the CCMA – An assessment for labour' (2007) 11 *LDD*13-24.

28. Betten, L *The Right to Strike in Community Law* North Holland: Kluwer Law International, (1985).

29. Bhorat, H, van der Westhuizen, C & S Goga 'Analysing Wage Formation in the South African Labour Market: The Role of Bargaining Councils' *DPRU,* (2007).

30. Bhorat, H, Pauw, K & Mncube, L 'Understanding the efficiency and effectiveness of dispute resolution' Cape Town: DPRU*,* 2007.

31. Bissol, RE & Crocker, CA *South Africa into the 1980's* Boulder, Colo.: Westview Press (1979).

32. Blanpain, R *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* Deventer: Kluwer Law Publishing, (2007).

33. Bogg, A *The Democratic Aspects of Trade Union Recognition* Oxford: Portland: Hart Pub, (2009).

34. Bolton, D … et al 'Explaining union participation: The effects of union commitment and demographic factors' (2007) 31(1) *SA Journal of Industrial Psychology* 74-79.

35. Bond, P &Mottiar, S 'Movements, protests and a massacre in South Africa' (2013) 31(2) *Journal of Contemporary African Studies* 283-302.

36. Booysen, L, Erasmus, HM & Van Zyl, MD *The Auxiliary Nurse* Cape Town: Juta and Co. Ltd, (2004).

37. Bosch, C 'Bent out of shape?: critically assessing the application of the right to fair labour practices in developing South African labour law' (2008) 19(3) *Stell LR*374-389.

38. Bosch, D,Molahlehi, E& Everett, W *The Conciliation and Arbitration Handbook: a Comprehensive Guide to Labour Dispute Resolution Procedure* Durban: Butterworths, (2004).

39. Botha, N &Mischke, C 'A new labour dispensation for South Africa' (1997) 41(1) *Journal of African Law* 13-140.

40. Boulle, L & Schrire, R *Malan to De Klerk* London: Hurst, (1994).

41. Bowers, J & Duggan, M *The Modern Law of Strikes* London: Financial Training, (1987).

42. Brassey, M 'Fixing the laws that govern the labour market' (2012) 33 *ILJ* 1-18.

43. Brewer, JD *Can South Africa Survive?* Basingstoke: Macmillan, (1989).

44. Bromberger, N *South Africa: Economic Growth and Political Change* London: Allison & Busby, (1974).

45. Brookshaw, L & Nayanah, A 'Strikes' (2012) 12(6) *Without Prejudice* 56-57.

46. Brotz, H *The Politics of South Africa: Democracy and Racial Diversity* New York: Oxford University Press, (1977).

47. Brown, J 'The Durban strikes of 1973: Political identities and the management of protest' (2010) *Popular Politics and Resistance Movements in South Africa* 31-51.

48. Brown, JM 'Enforcement difficulties in the public and private sectors' (2007) 11 *LDD* 97-108.

49. Bruniquel& Associates 'September to October 2011 Workbook' 2011 *Labour Law Update* 1-100.

50. Budheli, M 'Freedom of association for public sector employees' (2003) 44(2) *Codicillus* 49-60.

51. Budheli, M 'Trade unionism and politics in Africa: The South African experience' (2012) 45(3) *CILSA* 454-481.

52. Budheli, M 'Workers' right to freedom of association and trade unionism in South Africa.' (2009) 15(2) *Fundamina: A Journal of Legal History* 57-74.

53. Callinicos, A *South Africa Between Reform and Revolution* Chicago: Bookmarks, (1988).

54. Carter, GM *Which Way is South Africa Going?* Bloomington: Indiana University Press, (1980).

55. Cheadle, H 'Collective bargaining and the LRA' (2005) 9(2) *LDD* 147-155.

56. Cheminais, I … et al *The Fundamentals of Public Personnel Management* Cape Town: Juta and Co. Ltd, (1998).

57. Chetvernina, T 'Trade unions in transitional Russia-peculiarities, current status and new challenges' (2009) 12(3) *Journal for Labour and Social Affairs in Eastern Europe* 407-431.

58. Chicktay, MA 'Defining the right to strike: A comparative analysis of international labour organizational standards and South African law' (2012) 33(2) *Obiter* 260-277.

59. Chicktay, MA 'Placing the right to strike within a human rights framework' (2006) 27(2) *Obiter* 344-350.

60. Chinguno, C 'Marikana: fragmentation, precariousness, strike violence and solidarity' (2013) 40 (138) *Review of African Political Economy* 639-646.

61. Chinguno, C 'Marikana massacre and strike violence post-apartheid' (2013) 4 (2) *Global Labour Journal* 160-166.

62. Cohen, T 'Limiting organizational rights of minority unions: *POPCRU v LEDWABA* [2013] 11 BLLR 1137 (LC)' (2014) 17(5) *PER* 2208-2227.

63. Cohen, T &Matee, L 'Public servant's right to strike in Lesotho, Botswana and South Africa- A comparative study' (2014) 17(4) *PER* 1630-1658.

64. Cole, SJ 'Discriminatory discipline of union representatives for breach of their "Higher

Duty" in illegal strikes' (1982) 5 *Duke Law Journal* 900-937.

65. Connolly, L 'Fragility and the State: Post-apartheid South Africa and the State-Society Contract in the 21st Century' (2013) 13(2) *African Journal on Conflict Resolution* 87-111.

66. Cooper, C 'Strikes in essential services'(1994) 15*ILJ* 903-930.

67. Cordova, E 'Strikes in the Public Service: Some determinants and trends' (1985) 124 *International Labour Review* 160-170.

68. Corder, H, Hayson, N & Malherb, P *Focus on the History of Labour Legislation* Pretoria: NUSAS, (1979).

69. Creighton, B 'The ILO and protection of freedom of association in the United Kingdom' in Ewing, KD (ed) *Human Rights and Labour Law: Essays for Paul O'Higgins* London: Manstal, (1994).

70. Cruise, JA 'The gender and racial transformation of mining engineering in South Africa' (2011) 111 *The Journal of The South African Institute of Mining and Metallurgy* 217-224.

71. Daemane, M 'Human Resources Management (HRM) and trade unions compatibility: 'Soft-hard' model digestion for human capacity building and sustainable productivity at workplace' (2014) 5(7) *JETEMS* 121-130.

72. Dalton, R & Groom, R 'The right to strike in Australia: International treaty obligations and the external affairs power' (2000) 1 *Melbourne Journal of International Law*162-168.

73. Davis, A 'One step forward, two steps back? The Viking and Laval cases in the ECJ' (2008) 37(2) *Industrial Law Journal* 126-148.

74. Davies, A 'The right to strike versus freedom of establishment in EC law: The battle commences' (2006) 35(1) *Industrial Law Journal* 75-86.

75. Davis, RH *Apartheid Unravels* Gainesville: University of Florida Press,(1991).

76. Deacon, HJ 'The balancing act between the constitutional right to strike and the constitutional right to education' (2014) 34(2) *South African Journal of Education*1-15.

77. Desai, A & Habib, A 'Labour relations in transition: The rise of corporatism in South Africa's automobile industry' (1997) 35(3) *The Journal of Modern African Studies* 495-518.

78. De St. Jorre, J *A Home Divided: South Africa's Uncertain Future* Cape Town: Tafelberg Publishers, (1977).

79. De Villiers, D 'Interest based bargaining: The role of the trust relationship between employer and employee' (1999) 2(3) *SAJEMS* 442-450.

80. De Villiers, D 'The Industrial Court' (1991) 4(1) *Consultus* 54-55.

81. De Vos, P 'A new beginning: the enforcement of social, economic and cultural rights under the African Charter on Human and People's Rights' (2004) 8(1) *LDD* 1-24.

82. Dhai, A … et al 'The public's attitude towards strike action by healthcare workers and health services in South Africa' (2011) 4(2) *SAJBL* 58-62.

83. DLA Cliffe Dekker Hofmeyer *From Recognition to Strike: An Overview of Collective Labour Law* Pretoria: Cliffe Dekker Hofmeyer, (2014).

84. Dlamini, CRM 'Towards a regional protection of human rights in Africa: the African Charter on Human and Peoples' rights' (1991) 24(2) *CILSA* 189-203.

85. Dollery, B 'Labour Apartheid in South Africa: A rent seeking approach to discriminatory legislation' (1990) 29(54) *Australian Economic Papers* 113-127.

86. Dominguez-Whitehead, Y 'Executive university managers' experience of strike and protest activity: A qualitative case study of a South African university' (2011) 25(7) *SAJHE* 1310-1328.

87. Douwes Dekker, L *Industrial Relations for a Changing South Africa* Johannesburg: Lex Patria, (1990).

88. Dubow, S *Racial Segregation and the Origins of Apartheid in South Africa, 1919-36* Hampshire: Macmillan, (1989).

89. Du Plessis, JV, Fouche, MA & van Wyk, MW *A Practical Guide to Labour Law* Durban: Lexisnexis Butterworths, (2001).

90. Du Plessis, JV … et al *A Practical Guide to Labour Law* Durban: LexisNexis Butterworths, (1994).

91. Du Toit, D *Capital and Labour in South Africa* London: Kegan Paul International, (2010).

92. Du Toit, D 'Industrial democracy in South Africa's transition' (1997) 1 *LDD* 39-67.

93. Du Toit, D & Ronnie, R 'The necessary evolution of strike law' 2012 *Acta Juridica* 195-218.

94. Du Toit, D 'What is the future of collective bargaining' (2007) 28 *ILJ* 1405-1435.

95. Evju, S 'The right to collective action under the European Social Charter' (2011) 2(3) *European Labour Law Journal* 196-224.

96. Farrell Inc. Attorneys 'Secondary Strikes-Protected or not?' 2012 *Labour Update-The way Forward* 1-4.

97. Fenwick, C, Kalula, E & Landau, I 'Labour Law: A Southern African Perspective' *Discussion Paper Series No. 180*Geneva: International Institute For Labour Studies, (2007).

98. Ferreira, GM 'Collective bargaining and the public sector' (2008) 43(2.1) *Journal of Public Administration* 191-202.

99. Ferrira, GM 'Developments in labour relations in South Africa: Ten years of democracy (1994-2004)' (2005) 24(2) *Politeia* 197-214.

100. Ferreira, GM 'The development of South African labour law for the past ten years (1994-2004)' (2005) 24(2) *Politeia* 197-214.

101. Finnemore, M *Introduction to Labour Relations in South Africa* 6edDurban: Butterworths (1998).

102. Finnemore, M *Introduction to Labour Relations in South Africa* 8edDurban: Butterworths (2002).

103. Finnemore, M & Van Rensburg, R*Contemporary Labour Relations* 2ed Durban: Lexisnexus Butterworths, (2002).

104. Fleisch, B 'The politics of the governed: South African Democratic Teacher's union Soweto Strike, June 2009' (2010) 16(2) *South African Review of Education* 117-131.

105. Flynn, L *Studded with Diamonds and Paved with Gold: Miners, Mining Companies and Human Rights in Southern Africa* London: Bloomsbury, (1992).

106. Gall, G 'Trade unions and the ANC in the 'New' South Africa' (1997) 24(72) *Review of African Political Economy* 203-218.

107. Gandidze, T 'Dismissals for operational requirements' (2007) 11(1) *LDD* 83-96.

108. Gann, LH & Duignan, P *South Africa: War? Revolution? Peace?* Stanford: Hoover Institution Press, (1979).

109. Garran, R *The Government of South Africa* Cape Town: Central News Agency, (1908).

110. Gauntlett, J & Rogers, O 'When all else has failed: Illegal strikes, ultimatums and mass Dismissals' (1991) 12 *ILJ* 1171-1181.

111. Gerick, E 'Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law' (2012) 75(2) *Journal of Contemporary Roman-Dutch Law* 566-585.

112. Gernigon, B,Odero, A& Guido, H 'ILO Principles Concerning the Right to Strike' (1998) 137(4) *International Labour Review* 1-62.

113. Gibson, JT *South African Mercantile & Company Law* Cape Town: Juta and Co. Ltd,

(2003).

114. Godfrey, S…et al *Collective bargaining in South Africa: Past, Present and Future?* Claremont: Juta, (2010).

115. Godfrey, S, Theron, J & Visser, M 'The state of centralized bargaining in South Africa: An empirical and conceptual study of collective bargaining' *DPRU Working Paper 07/ 130* (2007).

116. Gordon-Davis, L & Cumberledge, P *The Hospitality Industry Handbook on Legal Requirements for Hospitality Business* 3ed Cape Town: Juta and Co. Ltd, (2013).

117. Gosai, V 'Strike action' (2012) 12(10) *Without Prejudice* 27-28.

118. Gosai, V 'When a union fails its members' (2013) 13(5) *Without Prejudice* 68-70.

119. Grant, DS & Wallace, M 'Why do strikes turn violent?' (1991) 96(5) *American Journal of Sociology* 1117-1150.

120. Gray, A 'The public sector strike- confronting reality' (2007) 74(7) *SA Pharmaceutical Journal* 18-20.

121. Grey Coetzee, JA *Industrial Relations in South Africa: An Event Structure of Labour* Cape Town: Juta, (1976).

122. Grobler, PA, Kirsten, M & Warnich, S 'Building capacity for their members: What employers' organizations in South Africa need to know' (2005) 36(2) *S.Afri.J.Bus.Manage* 39-55.

123. Grogan, J *Collective Labour Law* Cape Town: Juta, (2007).

124. Grogan, J *Collective Labour Law* 2ed Cape Town: Juta Law, (2010).

125. Grogan, J *Dismissal, Discrimination and Unfair Labour Practices* 2ed Cape Town: Juta and Co. Ltd, (2007).

126. Grogan, J *Workplace Law* 6ed Cape Town: Juta Law, (2001).

127. Grogan, J *Workplace Law* 7ed Cape Town: Juta Law, (2003).

128. Gutkind, PCW, Cohen, R & Copans, J *African Labour History* Beverly Hills: Sage Publications, (1978).

129. Halisi, CRD *Black Political Thought in the Making of South African Democracy* Bloomington: Indiana University Press, (1999).

130. Hanami, T & Blanpain, R *Industrial Conflict Resolution in Market Economics: A Study of Australia, The Federal Republic of Germany, Italy, Japan and the USA* 2ed Dordtrecht: Kluwer Law and Taxation Publishers, (1989).

131. Hanf, T … et al *South Africa: The Prospects of Peaceful Change: An Empirical Enquiry into the Possibility of Democratic Conflict Regulation*Bloomington: Indiana University Press, (1981).

132. Hamalengwa, M, Flinterman, C &Dankwa, EV *The International Law of Human Rights in Africa* London: MartinusNijhoff Publishers, (1988).

133. Hardy, S*Labour Law and Industrial Relations in Great Britain Dordtrecht*: Kluwer Law International, (2007).

134. Harris, D & Darcy, J *The European Social Charter* 2ed New York: Transnational Publishers, (2001).

135. Harvey, S 'Labour brokers and workers' rights: Can they co-exist in South Africa?' (2011) 128(1) *SALJ* 100-122.

136. Hebdon, R 'Behavioural determinants of public sector illegal strikes: Cases from Canada and the U.S' (1998) 53(4) *Industrial Relations* 667-690.

137. Hellmann, E *Handbook on Race Relations in South Africa* New York: OUP, (1949).

138. Henrard, K 'Post-apartheid South Africa's democratic transformation process: Redress of the past, reconciliation and 'unity in diversity'' (2002) 1(3) *The Global Review of Ethnopolitics* 18-38.

139. Horsten, D & Le Grange, C 'The limitation of the educator's right to strike by the child's right to basic education' (2012) 27 (1) *SAPL* 509-538.

140. Howitz, F, Jain, H & Mbabane, L 'Trade union consultation by employers under employment equity legislation' (2005) 29(1) *SAJLR* 26-52.

141. Huxley, C 'The state, collective bargaining and the shape of strikes in Canada' (1979) 4(3) *The Canadian Journal of Sociology* 223-239.

142. International Labour Office *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Report iii, Part 4 A) (1992).

143. International Labour Office *Grievance Arbitration: A Practical Guide* Geneva: International Labour Organisation, (1977).

144. Jacobs, AT *Labour Law in the Netherlands* The Hague: Kluwer Law International, (2004).

145. Jacobs, AT *The Law of Strikes and Lock Outs Comparative Labour Law and Industrial*

Relations The Hague: Kluwer Law International, (2007).

146. James, WG *The State of Apartheid* Boulder, Colo: L. Rienner, (1987).

147. Jibril, A 'Derogation from Constitutional rights and its implications under the African Charter on Humans and Peoples Rights' (2013) 17 *LDD* 78-110.

148. Johnson, S *South Africa: No Turning Back* Basingstoke: Macmillan, (1988).

149. Johnstone, FA *Class, Race and Gold: A Study of Class Relations and Racial Discrimination in South Africa* London: Routledge & K. Paul, (1976).

150. Jones, RA & Griffiths, HR *Labour Legislation in South Africa* New York : McGraw-Hill Book Co, (1980).

151. Jordaan, L 'New perspectives on the criminal liability of corporate bodies: general principles of criminal liability and specific offenses' 2003 *Acta Juridica: Criminal Justice in a New Society: Essays in Honour of Solly Leeman* 48-71.

152. Kadalie, C *My life and the ICU* London: Cass, (1970).

153. Karis, T *From Protest to Challenge: A Documentary History of African Politics in South Africa 1882-1962* Stanford: Hoover Institute Press, (1973).

154. Kaufman, BE 'Labor's inequality of bargaining power: Changes over time and implications for public policy' (1989) 10(3) *Journal of Labor Research* 285-298.

155. Keith, D *Understanding the CCMA Rules and Procedures* Cape Town: Juta & Co. Ltd, (2011).

156. Kgosimore, DL 'Workplace violence: A criminological analysis of a violent labour strike

in South Africa' (2007) 20(2) *Acta Criminologica* 61-82.

157. Kheel, TW 'Strikes and public employment' (1969) 67(5) *Michigan Law Review* 931-942.

158. Khumalo, S 'Judge for yourself' (2010) 19(5) *The Shop Steward* 6-7.

159. Kittner, M, Korner- Dammann, M & Schunk, A *Labour under the Apartheid Regime- Practical Problems and the Legal Framework of Labour Relations in South Africa* Deventer: Kluwer Law and Taxation Publishers, (1989).

160. Knobel, GJ 'Medical ethics during a period of unrest' (1986) 70(2) *SAfr Med J* 73-74.

161. Landis, H & Grosset, L *Employment and the Law: A Practical Guide for the Workplace* Cape Town: Juta and Co. Ltd, (2003).

162. Landis, H & Grosset, L *Employment and the Law: A Practical Guide for the Workplace* 3

ed Cape Town: Juta and Co. Ltd, (2014).

163. Le May, GH *Black and White in South Africa: The politics of Survival* London: MacDonald, (1971).

164. Lee, R & Schlemmer, L *Transition to Democracy: Policy Perspectives* Cape Town : Oxford University Press, (1991).

165. Le Roux, P 'Giving notice of strike action' (2012) 22(5) *Contemporary Labour Law*41-50.

166. Lewis, J *Industrialisation and Trade Union Organization in South Africa, 1924-55: The*

Rise and Fall of the South African Trades & Labour Council Cambridge: University Press, (1984).

167. Lodge, T *Black Politics in South Africa since 1945*Johannesburg: Ravan Press, (1983).

168. Lowu, PE *The Rise, Fall and Legacy of Apartheid* Westport: Praeger, (2004).

169. Lowenberg, AD & Kaempfer, WH *The Origins and Demise of South African Apartheid* Ann Arbor: University of Michigan Press (1998).

170. Landman, AA 'No place to hide- a trade union's liability for riot damage: A note on *Garvis & others v SA Transport & Allied Workers Union (Minister for Safety & Security, Third Party)* (2010) 31 ILJ (Wcc) 2521' (2011) 32 *ILJ* 834-846.

171. Landman, AA 'The registration of trade unions-the divide narrows' (1997) 18 *ILJ*1183-1197.

172. Landsberg, C '100 Years of ANC foreign policy' (2012) 35 *The Thinker* 24-27.

173. Leader, S 'Can you derive a right to strike from the right to freedom of association?' (2009) 15 *Candian Labour and Employment Law Journal* 271-295.

174. Leader, S *Freedom of Association: A Study in Labor Law and Political Theory* Le Roux, Conn: Yale University Press, (1992).

175. P & Hanif, S 'Majoritarianism in the context of Organisational rights: employment law' (2015) 15(10) *Without Prejudice*32-34.

176. Lichtenstein, A 'From Durban to Wiehahn: Black workers, employers and the state in South Africa during the 1970's' *Wits Institute for Social and Economic Research (WISER)* (2013).

177. Ling, M 'Draft the terms you mean' (2014) 14(8) *Without Prejudice* 48.

178. London, L 'HPCSA disciplinary action-'custodian of professional morals?' (2010) 100(11) *SAMJ*692-693.

179. Lukhele, S 'The Marikana massacre: where the new South Africa lost its innocence: South Africa-issue in focus' 2015 *Africa Conflict Monitor* 69-74.

180. MacFarlane, L *The Right to Strike* Middlesex: Penguin, (1981).

181. Maclaurin, WR 'Recent experience with compulsory arbitration in Australia' (1938) 28(1) *The American Economic Review*65-81.

182. Mahlangu, VP & Pitsoe, VJ 'Power struggle between government and the teacher unions in South Africa' (2011) 2(5)*Journal of Emerging Trends in Educational Research and Policy Studies*365-371.

183. Manamela, ME 'The role of the registrar of labour relations in the registration of trade unions' (2006) 18 *SA Merc LJ*450-455.

184. Manamela, E & Budeli, M 'Employees right to strike & violence in South Africa' (2013) 46(3) *CILSA* 308-336.

185. Maree, J 'Trends in the South African collective bargaining system in comparative perspective' (2011) 35(1) *SAJLR* 7-37.

186. Marks, S & Trapido, S in Johnson, S *South Africa: No Turning Back* Basingstoke: Macmillan, (1988).

187. 'Marikana as a tipping point? The political economy of labour tensions in South African

Mining Industry and how to best resolve them.'*Governance of Africa's Resources Programme- Occasional Paper No. 164* (2013) 55.

188. Masiloane, DT 'Guaranteeing the safety of non-striking employees during strikes: The fallacy of policing' (2010) 23(2) *ActaCriminologica*31-41.

189. Masitsa, MG 'Teacher's right to strike vis-à-vis learner's right to education- Justice for one is an injustice for the other' (2013) 13(4) *Interim: Interdisciplinary Journal*19-31.

190. Mason, AR 'The Right to Strike' (1928) 77(1) *University of Pennsylvania Law Review and American Law Register* 277-282.

191. McCarthy, W *Legal Intervention in Industrial Relations: Gains and Losses* Oxford: Blackwell, (1992).

192. McDonald, S *South Africa: In transition to what?* New York: Preager, (1988).

193. McKinley, DT *The ANC and the liberation Struggle* London: Pluto Press, (1997).

194. Melkote, RS "Blacks against blacks' violence in South Africa' (1993) 28(23) *Economic and Political Weekly*1148-1150.

195. Mle, TR 'A critical analysis of the 2010 public service strike in South Africa: a service delivery approach' (2012) 47(1) *Journal of Public Administration*291-298.

196. Molusi, AP 'The Constitutional duty to engage in collective bargaining: notes' (2010) 31(1) *Obiter* 156-166.

197. Mubangizi, JC *The Protection of Human Rights in South Africa* Cape Town: Juta and Co. Ltd, (2004).

198. Mukundi, GW *South Africa: Constitutional, Legislative and Administrative Provisions Concerning Indigenous Peoples* Geneva: ILO, (2009).

199. Muller, M, Bezuidenhout, M & Jooste, K *Healthcare Service Management* 2ed Cape Town: Juta and Co. Ltd, (2011).

200. Muller, M 'Strike action by nurses in South Africa: A value clarification' (2001) 24(4) *Curations*37-45.

201. Murwirapachena, G 'Exploring the incidents of strikes in post apartheid South Africa' (2014) 13(3) *International Business & Economics Research Journal* 553-560.

202. Myburgh, A 'The failure to obey interdicts prohibiting strikes and violence: The implications for labour law and the rule of law' (2013) 23 (1) *Contemporary Labour Law*1-10.

203. MyBurgh, JF '100 years of strike law' (2004) 25 *ILJ* 962-976.

204. Nash, A 'Marikana's path' (2015) 41(2) *Social Dynamics*387-391.

205. National Labour and Economic Institute 'The Extent and Effects of Casualisation in Southern Africa: Analysis of Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe' *National Labour and Economic Development Institute*, 2006.

206. Ncube, D *The Influence of Aparthied and Capitalism on the Development of Black Trade Unions in South Africa* Johannesburg: Skotaville Publishers, (1985).

207. Ndlovu, M 'Living the Marikana world: The state, capital and society' (2013) 18 (1) *International Journal of African Renaissance Studies*46-58.

208. Ngcukaitobi, T 'Strike law, structural violence and inequality in the platinum hills of Marikana' (2013) 34 *ILJ*836-858.

209. Nkabinde, B 'The right to strike, an essential component of workplace democracy: its scope and global economy' (2009) 24(1)*Maryland Journal of International Law* 270-282.

210. Novitz, T *International and European Protection of the Right to Strike* Oxford: Oxford University Press, (2003).

211. Novitz, T *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* Milano: Franco Angelis, (2015).

212. Nupen, D *Elections, '*Constitutionalism and political stability in South Africa' (2004) 4(2) *African Journal on Conflict Resolution* 119-143.

213. Odeku, KO 'An overview of the right to strike phenomenon in South Africa' (2014) 5(3) *Mediterranean Journal of Social Science* 695-702.

214. O'Gorman, R 'The ECHR, the EU and the weakness of social rights protection at the European Level' (2011) 12(10) *German Law Journal* 1833-1861.

215. Ogunbanje, GA & Van Knapp, D 'Doctors and strike action: Can this be morally justifiable?' 2009 51 *Fam Pract* 306-308.

216. Okene, OVC 'Derogations and restrictions on the right to strike under international law: the case of Nigeria' (2009) 13(4) *The International Journal of Human Rights* 552-580.

217. Okene, OVC 'Human rights at work: Measuring the democratic rights of Nigerian

workers by international standards' (2015) 35 *Journal of Law, Policy and Globalization* 125-134.

218. Okene, OVC 'The right of workers to strike in a democratic society: The case of Nigeria' (2009) 19(1) *Sri Lanka JIL* 193-222.

219. Okene, OVC & Emejuru, CT 'The disputes of rights versus disputes of interests' dichotomy in labour law: The case of Nigerian labour law' (2015) 35 *Journal of Law, Policy and Globalization* 135-140.

220. O'Neil, EC 'The right to strike: How the United States reduces it to the freedom to strike and how international framework agreements can redeem it' (2012) 2(2) *Labor & Employment Forum* 199-230.

221. Olivier, M 'Fundamental rights and labour law: Some recent developments (part 2)' (1996) *De Rebus* 668-670.

222. Olivier, M 'Lawful and unlawful strikes' (1993) 42(303)*De Rebus*192-194.

223. Oliver, M 'The dismissal of striking workers: Procedural requirements and other aspects' (1993) 56(309)*De Rebus*800-80.

224. Orde-Browne, G*The African Labourer*London: Oxford University Press, (1967).

225. O'Regan, C 'Interdicts restraining strike action- Implications of the Labour Relations Amendment Act 83 of 1988' (1988) 9 *ILJ*959-985.

226. Paukert, F & Robinson, D *Incomes Policies in the Wider Context: Wage, Price and Fiscal Initiatives in Developing Countries* Geneva: International Labour Office, (1992).

227. Pera, S & von Tonder, S *Ethics in Healthcare* 3ed Cape Town: Juta and Co Ltd, (2011).

228. Pillay, D 'Essential services: Developing tools for minimum service agreements' (2012) 33 *ILJ* 801-820.

229. Pillay, D 'The South African Essential Services Committee Part ii: Functions of the committee' (2001) 5(2) *Southern African Business Review* 64-71.

230. Pillay, R 'Secondary Strikes-Protected or not?' 2012 *Labour Update-The way forward* 1-4.

231. Petrus, T & Isaacs-Martin, W 'Reflections on violence and scapegoating in the strike and protest culture in South Africa' (2011) 41(2) *Africa Insight* 49-61.

232. Price, RM *The Apartheid State in Crisis: Political Transformation in South Africa, 1975-1990* New York: Oxford University Press, (1991).

233. Prof. N E Wiehahn *The Complete Wiehahn Report* Johannesburg: Lex Patria, (1982).

234. Rabb, TK & Rotberg, RI *Industrialization and Urbanization: Studies in Interdisciplinary History* Princeton: Princeton University Press, (1981).

235. Rafapa, L 'Rethinking Marikana: Warm and cold lenses in plea for humanity' (2014) 30(2) *Journal of Literary Studies*115-134.

236. Raju, R & Stilwell, C 'From adversarialism to cooperation: Key implications of the new South African Labour dispensation for the library and information sector' (2007) 25(1) *Mousaison* 1-20.

237. Randall, P *Power, Privilege and Poverty* Johannesburg: Economics Commission, (1972).

238. Razis, VV *Swords or Ploughshares? South Africa and Political Change: An Introduction* Johannesburg: Ravan Press, (2001).

239. Rhoodie, NJ *South African Dialogue: Contrasts in South African Thinking on Basic Race Issues* New York: McGraw-Hill Book Co., (1972).

240. Rhoodie, NJ *Apartheid and Racial Partnership in Southern Africa* Michigan: Academica, (1969).

241. Riekert, J & Grogan, J *Riekert's Basic Employment Law* Cape Town: Juta, (1987).

242. Ringrose, HG *The Law and Practice of Employment* Cape Town: Juta, (1983).

243. Ringrose, HG *Trade Unions in Natal* New York: Oxford University, (1951).

244. Robertson, HM *South Africa: Economic and Political Aspects* Durham: Duke University Press, (1957).

245. Rotberg, RI & Barratt, J *Conflict and Compromise in South Africa* Lexington: Lexington Books, (1980).

246. Rust, B 'So, you think being a trade union is plain sailing?' (2001) 25(1)*SALR* 58-69.

247. Rycroft, A *'*Being held in contempt for non-compliance with a court interdict*: In2food (Pty) Ltd v Food & Allied Workers Union & Others* (2013) 34 ILJ 2589 (LC)*'* (2013) 34 *ILJ* 2499-2505.

248. Rycroft, A 'Can a protected strike lose its status?' (2012) 33 *ILJ* 821-827.

249. Rycroft, A 'The legal regulation of strike misconduct: The Kapesi Decisions (2013) 34

ILJ 859-870.

250. Sampson, A *Black and Gold: Tycoons, Revolutionaries and Apartheid* London: Hodder & Stoughton, (1987).

251. Samuel, MO 'The mineworkers' unprocedural strike: setting the path for redefining collective bargaining practice in South Africa' (2013) 11 *Journal of Contemporary Management*239-258.

252. Saul, B, Kinley, D & Mowbray, J *The International Covenant on Economic, Social and Cultural Rights* Oxford: Oxford University Press, (2014).

253. Saul, JS & Gelb, S *The Crisis in South Africa: Class Defense, Class Revolution* New York: Monthly Review Press, (1981).

254. Saul, JS *Recolonisation and Resistance: Southern Africa in the 1990's*Trenton: Africa World Press,(1982).

255. Schoeman, CH, Botha, I & Blaauw, PF 'Labour conflict and the persistence of Macro underemployment in South Africa' (2010) 13(3) *SAJEMS*272-292.

256. Schrire, R *South Africa: Public Policy Perspectives* Cape Town: Juta, (1982).

257. Schutte, M & Lukhele, S 'The real toll of South Africa's labour aggressiveness' 2013 *Africa Conflict Month Monitor* 69-73.

258. Seedat, M … et al 'Psychological research and South Africa's violence prevention responses' (2014) 14(2) *South African Journal of Psychology* 136-144.

259. Seekings, J ''Not a single white person should be allowed to go under:" Swartgevaar and

the origins of South Africa's welfare state, 1924-1929' *CSSR Working Paper No. 154* (2006) 13-14.

260. Selala, KJ 'The right to strike and the future of collective bargaining in South Africa: An exploratory analysis' (2014) 3(5) *International Journal of Social Sciences* 115-126.

261. Servais, J *International Labour Law* The Hague: Kluwer Law International, (2011).

262. Sewerynski, M 'Representation of employees in collective bargaining within the firm' (2007) 11(3) *Electronic Journal of Comparative Law* 113-121.

263. Shaw, TM & Heard, KA *Cooperation and Conflict in Southern Africa: Papers on a Regional Subsystem* Washington: University Press of America, (1977).

264. Shepherd, GW Jr. *Anti-Apartheid: Transnational Conflict and Western Policy in the Liberation of South Africa* Westport, Conn.: Greenwood Press, (1977).

265. Simons, J & Simons, R *Class and Colour in South Africa 1850-1950* Harmondsworth: Penguin, (1983).

266. Singh, PN & Kumar, N *Employee Relations Management* New Delhi: Pearson Education, (2011).

267. Sinwell, L 'Is 'another world' really possible? Re-examining counter-hegemonic forces in post-apartheid South Africa' (2011) 38 (127) *Review of African Political Economy*61-76.

268. Smit, N & Fourie, E '*Equity Aviation v SATAWU* (478/09) [2011] ZASCA 232 (30 November 2011): The issue of separate strike notices where employees are not members of the trade union' 2012 *De Jure* 426-436.

269. Smith, MR & Wood, GT 'The end of Apartheid and the Organization of Work in Manufacturing Plants in South Africa's Eastern Cape Province' (1998) 12(3) *Work, Employment & Society* 479-495.

270. South African Association of Hospital and Institutional Pharmacists 'The 2010 Public Sector Strike-bringing out the best and the worst in ordinary people-A report by SAAHIP EXCO'(2010) 77(10) *SA Pharmaceutical Journal* 59-60.

271. South Africa Department of Information '*Progress Through Separate Development: South Africa in Peaceful Transition'* 2ed Pretoria: South Africa Department of Information (1968).

272. South African Information Service *Progress Through Separate Development: South Africa in peaceful transition* 2ed New York: Information Service of South Africa, (1968).

273. South African Human Rights Commission *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)* Parktown: South African Human Rights Commission, (2006).

274. Spielmans, JV 'Labour disputes on rights and on interests' (1939) 29(2) *The American Economic Review* 299-312.

275. Ssenyonjo, M *The African Regional Human Rights System* Martinus Nijhoff Publishers: Leiden, (2012).

276. Stemmet, J "In case of emergency': South African states of emergency, CA. 1985-1988: Synopsis and chronology' (2015) 40(1) *Journal for Contemporary History* 59-76.

277. Steenkamp, A & Bosch, C 'Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential' 2012 *Acta Juridica: Reinventing labour law: reflecting on the first 15 years of the Labour Relations Act and future challenges* 120-147.

278. Suchard, H 'Labour relations in South Africa: retrospective and prospective' (1982) 12(2) *Africa Insight* 89-97.

279. Sundar, KR 'Trade unions and civil society: Issues and strategies' (2007) 42(4) *International Journal of Industrial Relations* 713-734.

280. Swanepoel, JPA *Introduction to labour law* 2ed Johannesburg: Lexicon Publishers, (1986).

281. Swilling, M *Views on the South African State* Pretoria: Human Sciences Research Council, (1990).

282. Switzer, L *South Africa's Alternative Press: Voices of Protest and Resistance, 1880s-1960s* Cambridge: Cambridge University Press, (1997).

283. Tanner, C 'Making amends: The new look LRA' (1999) 8(2) *Indicator SA* 89-90.

284. Terreblanche, S *A History of Inequality in South Africa 1652-2002* Sandton: KMM Review Pub., (2002).

285. 'The Industrial Court in the cross volley' (1984) 2(3) *Indicator SA*1.

286. 'The right to strike: government perspective' (2010) 35(11) *IMIESA* 9.

287. Thomas, GP *Government and the Economy Today* Manchester: Manchester University Press, (1992).

288. Thomas, WH *The Socio-Political Structure of the South African Economy-its Dynamic Perspective in South Africa: Industrial Relations and Industrial Sociology* Durban: Butterworths, (1979).

289. Thompson, C 'Beyond recognition: A new social contract' (1988) 5(4) *Indicator SA* 67-71.

290. Thompson, C 'Essential services and the unfair labour practice remedy' (1992) 13 *ILJ* 500-731.

291. Tolcher, A 'How does the 1922 Rand Rebellion Reveal the relative importance of race. and class in South Africa? (2011) 1 *University of Sussex Undergraduate History Journal* 1-9

292. Tshoose, C 'Determining the threshold for organizational rights: The legal quagmire facing minority unions resolved- *South African Post Office v Commissioner Nowosenetz No* (2013) 2 BLLR 216 (LC)' (2013) 34(3) *Obiter* 600-610.

293. Tustin, C & Geldenhuys, D *Labour Relations: The Psychology of Conflict and Negotiation* 2ed Cape Town: Oxford University Press Southern Africa, (2000).

294. Unterhalter, E *Forced Removal: The Division, Segregation and Control of the People of South Africa* London: International Defence and Aid Fund for Southern Africa, (1987).

295. Van Daele, A *International Labour Rights and the Social Clause: Friends or Foes* London: Cameron May Ltd, (2004).

296. Van Der Berg, S & Bhorat, H 'The Present as a Legacy of the Past: The Labour Market,

Inequality and Poverty in South Africa' *DPRU Working Paper* (1999).

297. Van der Horst, ST & Reid, J *Race Discrimination in South Africa: A Review* Cape Town: David Philip, (1981).

298. Van Der Merwe, CG & Du Plessis, JE *Introduction to the Law of South Africa* The Hague: Kluwer Law International, (2004).

299. Van Der Velden, S & Visser, W 'Strikes in the Netherlands and South Africa, 1900-1998: a comparison' (2006) 30(1) *SAJLR* 51-75.

300. Van der Veldon, S … et al *Strikes Around the World, 1968-2005: Case-Studies of 15 Countries* The Hague: Kluwer Law Interntional, (2007).

301. Van der Walt, L 'The first Globalisation and Transnational Labour Activism in Southern Africa: White Labourism, the IWW, and the ICU, 1904-1934' (2007) 66(2-3) *African Studies* 223-251.

302. Van Eck, BPS 'Regulated flexibility and the Labour Relations Bill of 2012' 2013 *De Jure* 600-612.

303. Van Eck, BPS & Van Jaarsveld, SR *Principles of Labour Law* London: Sweet & Maxwell, (1998).

304. Van Heerden, A 'Protected strikes-getting the balance right: labour law' (2011) 11(9) *Without Prejudice* 66-67.

305. Van Jaarsveld, FA *From van Riebeeck to Vorster 1652-1974* Johannesburg: Perskor, (1975).

306. Van Vuuren, DJ … et al *Change in South Africa* Durban: Butterworths, (1983).

307. Van Vuuren, DJ & Kriek, DJ *Political Alternatives for Southern Africa: Principles and Perspectives* Durban: Butterworths, (1983).

308. Vaughn, WC*A Lawyers' Guide to Doing Business in South Africa* Atlanta: American Bar Association, (1996).

309. Veenstra, N … et al 'Unplanned antiretroviral treatment interruptions in Southern Africa: how should we be managing these?' (2010) 6(4) *Globalisation and Health* 1-5.

310. Venter, A *South African Government and Politics* Johannesburg: Southern Book Publishers, (1989).

311. Venter, R *Labour Relations in South Africa* New York: OUP, (2006).

312. Vettori, S 'Enforcement of Labour Arbitration awards in South Africa' (2013) 25 *SA Merc LJ* 245-254.

313. Vettori, S 'The Labour Relations Act 66 of 1995 and the protection of trade unions' (2005) 17 *SA Merc LJ* 295-304.

314. Vettori, S 'The role of human dignity in the assessment of fair compensation for unfair dismissals' (2012) 15(4) *PER* 101-124.

315. Visser, WP *A Racially Divided Class: Strikes in South Africa, 1973-2004* Amsterdam: Aksant Akademic Publishers, (2007).

316. Visser, WP 'From MWU to solidarity – A trade union reinventing itself' (2006) 30(2) *SAJLR* 19-41.

317. Visser, WP '"To fight the battle of the workers": The emergence of pro-strike publications in the early twentieth century South Africa' (2004) 49(3) *International Review of Social History* 401-434.

318. Von Holdt, K & Alexander, P 'Collective violence, community protest and xenophobia' (2012) 43(2) *South African Review of Sociology* 104-111.

319. Von Holdt, K 'Institutionalization, strike violence and local moral orders' (2010) 72/73 *Transformation: Critical Perspectives on Southern Africa* 127-151.

320. Von Holdt, K 'South Africa: the transition to violent democracy' (2013) 40 (138) *Review of African Political Economy* 589-604.

321. Vonk-Asscher, I 'Equality and prohibition of discrimination in employment' in R Blanpain (ed) *Bulletin of Comparative Labour Relations Bulletin of Comparative Labour Relations* The Hague: Kluwer Law International, (1985).

322. Vranken, M *Death of Labour Law?: Comparative Perspectives* The Hague: Kluwer Law International, (2009).

323. Wasserman, H 'The language of listening: the Marikana aftermath' (2013) 33 *Rhodes Journalism Review*111-113.

324. Webster, E *Essays in Southern African Labour History* Johannesburg: Ravan Press, (1978).

325. Welch, R 'Right to strike in UK and South African Law: A comparison' (2000) 7(1) *International Union Rights*26-27.

326. Welschen, S *The Country We are Supposed to be* Amsterdam: Vrije Universiteit, (2012).

327. Wills, G 'The effect of teacher strike activity on student learning in South African primary schools' (2014) *ERSA Working Paper* 4021-4043.

328. Wilson, F *Labour in the South African Gold Mines 1911-1969* Cambridge: Cambridge University Press, (1972).

329. Wiseman, M 'Recent South African labour legislation: Assessing the new rights of black workers'' (1989) 9(1) *Boston College International & Comparative Law Review* 163-197.

330. Wolpe, H *Race, Class & the Apartheid State* London: Currey, (1988).

331. Wood, EJ *Forging Democracy from Below* Cambridge: Cambridge University Press, (2000).

332. Yeyeye, GE 'Trade Unions in Tanzania: A Wolf in Sheep's Clothing? (2014) 5(1) *Open University Law Journal* 62-79.

333. Young, A, van Niekerk, K & Mogtlane, S *Juta's Manual of Nursing* Cape Town: Juta and Co Ltd, (2003).

334. Zulu, P *A nation in crisis: an appeal for morality* Cape Town: Tafelberg Publishers Ltd, (2013).

335. Zulu, P 'Reflections on mass action, ethics and rationality' 2009 *African Journal of Rhetoric: Moments of Engagement- Power, Rhetoric and Protests* 202-211.

NEWSPAPER ARTICLES

1. Abreu, V ‘Hatfield campus chaos’ *Citizen* 22 October 2015, at 2.

2. Bailey, C ‘Trains suspended after coaches torched’ *Cape Argus* 18 May 2006, at 4.

3. Barbeau, N ‘UKZN pair bail bid delayed’ *Daily News* 17 September 2015, at 3.

4. Capazorio, B ‘Farmworker strike to be renewed this week’ *Sunday Independent* 6 January 2013, at 4.

5. Dlamini, A &Chilwane, L ‘Violent taxi strike fails to halt Rea Vaya’ *Business Day* 16 March 2010, at 4.

6. Dlamini, P ‘NUMSA digs in its heels’ *The Times* 2 July 2014, at 1.

7. Dodds, C ‘Fees fall… but it will cost you’ *Sunday Tribune* 25 October 2015, at 1.

8. Evans, S ‘City feels truck strike impact’ *Diamond Fields Advertiser* 18 February 2011, at 10.

9. Felix, J& SAPA ‘Violent protest every second day in Cape’ *Cape Times* 1 February 2013, at 6.

10. Grawitzky, R ‘Security strike lessons must be learnt’ *STAR* 12 October 2006, at 2.

11. Jadoo, Y &Tau, S ‘Fee protest boils over’ *Citizen* 22 October 2015, at 3.

12. Jansen, L ‘Violent days at KZN University’ *Cape Times* 15 September 2015, at 4.

13. Jordan, B ‘Spontaneous rebellion has Western Cape in flames’ Sunday Times 13 January 2013, at 2.

14. Khuzwayo, W ‘Cosatu sees red over proposed changes to LRA’ *STAR* 7 November 2011, at 15.

15. Knoetze, D ‘De Doorns’ darkest day’ *Cape Argus* 10 January 3013, at 4.

16. Koyana, X ‘Farmworkers strike ruled unprotected, but defiant Pieterse vows it will resume’ *Cape Times* 13 November 2013, at 1.

17. Leon, P ‘A world-class regulatory regime is within our grasp’ *Business Day* 31 October 2014, at 11.

18. Lewis, E ‘Woman, baby die after bus petrol bombed in taxi strike’ *Cape Argus* 24 February 2006, at 1.

19. Maeso, M ‘Strikers break law with impunity’ *Business Day* 12 September 2011, at 2.

20. Maganda, P ‘Guard strike to intensify’ *Daily Dispatch* 23 May 2006, at 10.

21. Makgetla, T ‘The most violent post-apartheid strike’ *Weekly Mail and Guardian* 4 May 2006, at 10.

22. Makhafola,G,Moeng, K &Moreosele, N ‘Destruction and death now the norm ’*Sowetan* 21 February 2011, at 4.

23. Malefane, M ‘Proposals ‘an attack on unions’’ *Sowetan* 8 December 2011, at 4.

24. Maromo, J ‘Zuma urges universities to rein in students who resort to violence’ *Cape Times* 7 October 2015, at [1].

25. Mawade, J ‘Guard killed for not taking part in strike’ *The Herald (EP Herald)* 19 May 2006, at 2.

26. Mkhize, T ‘University no place for violence’ *Sunday Tribune* 25 October 2015, at 3.

27. Munusamy, R ‘Wake-up call’ *Weekend Witness* 24 October 2015, at 10.

28. Nsele, S ‘Howard, PMB Campuses join UKZN students protests’ *The Witness* 16 September 2015, at 5.

29. Nxumalo, M ‘UKZN students spend holiday in jail’ *Daily News* 24 September 2015, at 3.

30. Nzapheza, V ‘Security thugs go on rampage’ *Citizen* 6 April 2006, at 1.

31. Peters, S ‘Legal bid to end UKZN protests’ *Daily News* 23 September 2015, at 5.

32. Peterson, C ‘UCT defends outsourcing worker amid protests’ *Cape Times* 7 October 2015, at 3.

33. Peterson, C ‘UCT next target for ire raised by fees’ *Cape Times* 19 October 2015, at 1.

34. Pillay, K & Ndaliso, C ‘Students on rampage’ *Daily News* 14 September 2015, at 1.

35. ‘Public Sector unions and government set on a collision course’ *Daily Maverick* 5 June 2012, at [1].

36. ‘Public-sector unions to meet over govt wage offer’ *Mail & Guardian* 13 October 2010, at [1].

37. 'Radio men call strike' *New York Times* 5 October 1935, at 3.

38. ‘Radio operators begin walkout' *New York Times* 6 October 1935, at 1.

39. 'South Africa: Capitalist government shaken by public workers strike' *Workers Vangaurd* 10 September 2010, at [1].

40. 'South Africa: over a million public sector workers on strike' *South African Protest News* 21 August 2010, at [1].

41. 'South African Public Sector Strike 'endangering lives' *The Guardian* 23 August 2010, at [1].

42. 'Strikers defy court order at Durban hospital' *Mail & Guardian* 23 August 2010, at 4.

43. Tau, S 'Mines blamed for prolonging strike' *Citizen* 23 April 2014, at 6.

44. Tau, S 'More strikes to come' *Citizen* 25 June 2014, at 1.

45. Umraw, A … et al 'Students told to leave' *The Witness* 18 September 2015, at 2.

46. Van Vuuren, A 'NUMSA joins AMCU in platinum sector strikes' *Sunday Independent* 2 February 2014, at 1.

47. Williams, M& SAPA 'W Cape farm worker strike violence gains momentum' *STAR* 15 January 2013, at 5.

INTERNET ARTICLES

1. Mle, TR 'A critical analysis of the 2010 Public Service strike in South Africa: A service delivery approach', available at *http://www.sabinet.co.za/webx/access/electronic/.../ipad-v47-ni-si1-a7.pdf*, accessed on 13 April 2015.

2. 'A week into the public sector strike' available at*http://section 27.org.za/2010/08/ a-week-into-the- public-sector -strike/* , accessed on 10 August 2015.

3. Bekker, I & Van der Walt, L 'The 2010 mass strike in the state sector, South Africa: Positive achievements but serious problems' (2010) 4 *Sozial, Geschichte Online* available at *http://www.stiftung-sozialgeschichte.de*, accessed 15 July 2015.

4. Code of good practice on collective bargaining and industrial action' *HR Pulse News Desk* 18 August 2015 at [1], available at*http://www.hrpulse.co.za/news/latest-news/232754-code-of-good-practice-on-collective -bargaining -and- industrial-action*, accessed 21 November 2015.

5. Council of Europe 'Collective complaints procedure: an overview' available at *http://www.coe.int/en/web/turin-european-social-charter/collective-complaints-procedure1,*accessed on 28 December 2015.

6. 'Dear ANC, you're failing. Love COSATU' *Daily Maverick* 7 September 2012 at [2], available at *http://dailymaverick.co.za*, accessed on 7 September 2015.

7. 'Freight employers to seek interdict against strike violence' *BDLive* 28 September 2012, available at *http://www.bdlive.co.za/business/transport/2012/09/28/freight-employers-to-seek-interdict-against-strike-violence*, accessed on 5 November 2015.

8. 'Gold Fields evicts workers as mining strike spreads' *Mail & Guardian* 3 October 2012, available at *http://mg.co.za/article/2012-10-03-gold-fields-evicts-workers-as-mining-strike-spreads*, accessed on 11 August 2015.

9. Hepple, B 'The right to strike in an International context' available at*https://www.law*

.utoronto.ca/documents/conferences2/StrikeSymposium09Hepple.pdf.accessed on 15 September 2015.

10. 'HPCSA against striking doctors' *News24.com* 28 May 2009 at [1], available at http://www.news24.com/News24/South-Africa/News/0,,2-7-1442_2523713,00.html, accessed on 15 September 2015.

11. Fichter, M & Stevis, D'International framework for assessment of US labour standards' available at *http://www.law.upenn.edu/.../ Herrnstadt10U.Pa.J.Bus.&Emp.L.187 (2007).pdf.*, accessed on 15 September 2015.

12. Kloosterman, J 'The right to strike? The ILO's Freedom of Association Convention' available at *http://www.Georgezgeorgiou .com/wp-content/plugins/.../download.php?id=40*, accessed on 15 September 2015.

13. Kraak, A 'Shifting understandings of skills in South Africa', available at *http://www-.hsrcpress.ac.za,*accessed on 3 July 2015.

14. Krugel, L 'Strike season and its impact on the economy' 6 November 2013, available at http://www.sablog.kp mg- .co.za/2013/11/strike-season-impact-economy/, accessed on 15 September 2015.

15. 'Lonmin massacre: a timeline' Independent Online SA 17 August 2012, available at *http://www.iol.co.za*, accessed on 11 August 2015.

16. Shadur, MI 'Majority Rule and the Right to Strike,' available at *http://www.jstor.org/stable /1597953?seq=1&cid=pdf= refe- rence#reference-tab-contents,* accessed on 5 July 2015.

17. 'Maturing Contradictions: the 2010 public sector strike in South Africa' available at http://www.*Column*.*global-labour-university.org/2010/ ... /maturing-contradictions-2010-public.html*, accessed on 8 August 2015.

18. 'Marikana Massacre 16 August 2012', available at http*://www.Sahistory.org.za/article/* marikana-massacre*.16 -august-2012*, accessed on 11 August 2015.

19. 'Marikana violence is a sign of things to come' *Business Day Live* 23 August 2012, available at*http://wwwbdlive.co.za/opinion/2012/08/23/marikana-violence-is-a-sign-of-things-to-come*, accessed on 11 August 2015.

20. Mottier, S&Bond, P 'Social protest in South Africa', available at *http://ccs.ukzn.ac.za /default.asp?2.27.3.1858*, accessed on 15 June 2015

21. 'No need for strike violence-Zuma' *The Citizen* 10 July 2014, available at *http://www.citizen . co.za/208466 /need-strike-violence-zuma/,*accessed on 6 September 2015.

22. Qinghong, Z 'Regulate the right to economic strike so as to create harmonious labour relations' 7 March 2011, available at *http://www.jttp.cn/a/report/opinion/2011/0307/ 942.html,*accessed on 15 September 2015.

23. 'Reform vs oppression: The impact of Wiehahn Commission on labour relations in South

Africa,' available at *http://fbcdn-profile-a.akamaihd.net/hprofile-ak-xfh/v/f1.0-1*, accessed on 2 June 2015.

24. Romeyn, J 'Striking a balance: the need for further reform of the law relating to industrial action', available at *http://www.aph.gov.au/library*, accessed on 15 June 2015.

25. Servais, M'The ILO Law and the freedom to Strike' available at *https://www.law.utoronto.ca/.../StrikeSymposium09Servais.pdf*, accessed on 15 September 2015.

26. 'Shot Marikana miners were running away-lawyer' News24 12 March 2014, available at *http://www.news24.com/ SouthAfrica /News/Shot-Marikana-miners-were-running-away-lawyer-20140312*, accessed on 11 August 2015.

27. 'Socio-economic drivers behind South Africa's 2012 mining strikes' available at *https://www.goldfields.co.za/reports/annual_report_2012.ana-case7.php*.,accessed on 11 August 2015.

28. 'South Africa: COSATU calls off public service strike' available at *https://www.wsws.org/en /articles/2007/07/s- a- f-r-j14.html*, accessed on 10 August 2015.

29. 'South African mines hit by wildcat strikes after Marikana police shootings' *the guardian* 12 September 2012, available at*http://www.theguardian.com/world/2012/sep/12/ south-africa-mines-wildcat-strikes*, accessed on 11 August 2015.

30. 'South Africa: One year after the Marikana massacre' available at *http://socialistparty.ie /2013/08/ south-africa -one-year-after-after-the-marikana-massacre*, accessed on 11 August 2015.

31. 'South Arica Public sector strike' *The Washington Post* 13 June 2007, available at *http://www.waashington.com /wp-dyn/content/article/2007/06/13/ AR2007061300373.html*, accessed on 6 September 2015.

32. 'South Africa: Strike action affects health services' available at *http://www.irinnews.org /report/72719/south-africa-strike-action-affects-health-services,* accessed on 11 August 2015.

33. 'The murder fields of Marikana. The cold murder fields of Marikana' *Daily Maverick* 8 September 2012, available at *http://www.dailymaverick.co.za/article/2012-08-30-the-murder- fields-of-marikana-the-cold-murder-fields -of-marikana*, accessed on 11 August 2015.

34. 'The policy gap- review of the corporate social responsibility programs of the platinum mining industry in the platinum producing region of the North West Province', available at *http://www.bench-marks.org.downloads/070625-platinum-research-full.pdf.*, accessed on 6 July 2015.

35. 'The reporting procedure: an overview' available at *http://www.coe.int/en/web/turin -european-social-charter/reporting-system*, accessed on 28 December 2015.

36. 'The right to strike: A comparative perspective. a study of national law in six EU states' available at *http://www.ier.org.uk*, accessed on 5 July 2015.

37. Tilton, D &Calland, R 'In Pursuit of an Open Democracy: A South African Case Study', available at *http://www.opendemocracy.org.za* , accessed on 5 July 2015.

38. Kalusopa, T Otoo, K & Shindondola-Mote, H 'Trade union services & benefits in Africa' available at *http://www.ituc-africa.org/IMG/pdf/BENEFITS_REPORT _FINAL_DRAFT. pdf.*, accessed on 15 September 2015.

39. 'Ufil' Umuntu, Ufil' Usadikiza!- Trade unions and struggles for democracy and freedom in South Africa', available athttp://redblackwritings.files.wordpress.com/2014/07 /Khanya-trade-unions-and-struggles-for -democracy-1973-2003.pdf. , accessed on 3 July 2015.

40. Van der Heijden, P 'International right to strike under stress' available at http://www.thehagueinstituteforglobaljustice.org/.../international-Right-to-strike-under-stress-1372942440.pdf, accessed on 5 July 2015

41. Visser, WP '*A racially divided class: Strikes in South Africa, 1973- 2004*' available at http://www.sun.academia.edu/WesselVisser, accessed on 5 July 2015.

42. Visser, WP 'Right Wing Politics and Resistance: The Mine Workers' Union and Transformation in South Africa, 1964-1997' available at http://sun025.sun.ac.za/portal/page /portal/Arts/Departemente1/geskiedenis /docs/rghtwingpolitics .pdf, accessed on 15 September 2015.

43. W P Visser 'White labour aristocracy and black proletariat: The origins and development of South Africa's racially divided working class', available at http://sun025.sun.ac.za/portal/page/portal/Arts /Departmente1 /geskiedenis/docs/white-labour-aristocracy.pdf, accessed on 5 July 2015.

44. 'Wiehahn Commission' available at *http://www.disa.ukzn.ac.za/webpages/ DC/spe 19791100.0 022.00/spe 1979 1100.026.022.000.pdf., acc*essed on 15 September 2015.

45. Weiss, MS 'The right to strike in essential services under United States Labour Law'

available at *http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2189&context=facpubs.*, accessed on 15 September 2015.

46. 'Western Cape farm strikes: one year on, still a political football' Daily Maverick 13 October 2015, available at *http://www.dailymaverick.co.za/article/2013 -10-28-western - cape-farm -strikes-one- year-on-still-a-political-football*, accessed on 11 August 2015.

THESES

1. Crabb, C '*Action through Aesthetics Art Initiatives in South Africa during the Apartheid*' (unpublished LLM thesis, Georgia State University, 2013).

2. Gwaindepi, A '*The Developmental State, Social Policy and Social Compacts: A Comparative Policy Analysis of the South African case'* (unpublished LLM thesis, Rhodes University).

3. Harrison, DS '*Collective Bargaining within the Labour Relationship: In a South African Context.*' (unpublished LLM thesis, North-West University, 2004).

4. Kruger, R *Implementing the Right to Equality in Selected South African Equality Courts* (unpublishedPhd, Rhodes University, 2008).

5. Lusanda, SK *The Impact of Violence and Intimidation on Strike Actions and their Effect on union membership in the Platinum Mining Industry* (unpublished MBA thesis, Gordan Institute of Business Science, University of Pretoria, 2014).

6. Mamabolo, MM *The Dismissal of Unprotected Strikers and the Audi Alteram Partem Rule* (unpublished LLM thesis, University of the North West, 2006).

7. Matee, LJ '*Limitation on Freedom of Association: The Case of Public Officers in Lesotho'* (unpublished LLM thesis, University of Kwazulu-Natal, 2013).

8. Mbungu, V *'Positive Discrimination in South African Employment Law: Has Affirmative Action Overstayed its Welcome'* (unpublished LLM thesis, University of KwaZulu- Natal, 2013).

9. Nala, NP *Strategies for Curbing Strike Action by Nurses in Public Institutions, South Africa* (unpublished Phd thesis, University of South Africa, 2014).

10. Ngidi, N *Market Reaction to Industrial Action in South Africa* (unpublished LLB thesis, University of Witswatersrand, 2011).

11. Harrison, DS '*Collective Bargaining within the Labour Relationship: In a South African context*' (unpublished LLM thesis, North-West University, 2004).

12. Kunene, PJ *Strikes by Nursing Personnel: A Challenge for Nurse Managers in KwaZulu-Natal Province* (Unpublished M.Cur Degree, University of Zululand, 1995).

13. Reyneke, PH *Labour Practices in South Africa and Korea: A Comparative Study Against International Labour Organization Standards* (unpublished MBA thesis, University of Johannesburg, 2009).

14. Sedat, A *The Effects of Strikes in the South African Gold Mining Industry on Shareholder Value* (unpublished LLM thesis, University of the Witwatersrand, 2013).

15. Troskie, HR *A Comparative Survey of the Law Relating to Strikes in South Africa and the*

Netherlands (unpublished LLM thesis, UNISA, 1998).

16. Uys, M '*Factors Influencing the Future Existence of Trade Unions in South Africa'* (unpublished LLM thesis, University of the North-West, 2011).

CONFERENCE PAPERS

1. Benjamin, P, Jacobus, R & Alberton, C 'Strikes, lockouts and arbitration in the South African labour law'.*Proceedings of the Labour Law Conference 1988* (1989).

2. Bernikow, R 'Ten years of the CCMA- An assessment for labour' *DITSELA (Western Cape) Labour Law Seminar* (2007).

3. Budeli, M 'Employment equity and affirmative action in South Africa: A review of the jurisprudence of the courts since 1994' *Conference on 'Twenty years of South African Constitutionalism' New York LawSchool*(1998).

4. Brand, J 'Strike Avoidance - How to Develop an effective strike avoidance strategy?'*23rd Annual Labour Law Conference* (2010).

5. Cavalluzzo, PJ 'Freedom of Association and the right to strike in Canada after *Fraser' Call Conference Quebec City* (2012).

6. Chicktay, MA 'Employment, the economy & growth: The implications for labour law Conference' *Sandton Convention Centre, Johannesburg 30 July-1 August 2013*.

7. Davis, D &Corder, H 'Poverty and Co-option: The role of the courts' *Carnegie Conference Paper No. 90*13-19 April 1984.

8. 'Freedom of Association and Collective Bargaining: General Survey by the COE on the Application of Conventions and Recommendations, Report 111(48)' *International Labour Law Conference 69 Session, Geneva* (1983).

9. Gelb, S 'Inequality in South Africa, causes and responses conference' *Somerset West. 13-15 October 2004.*

10. Hepple, B 'Is South African Labour Law fit for the global economy?' *Labour Law Colloquium Mt Fleur* (2011).

11. Maree, J 'Why has the public service in South Africa experienced such devastating strikes and what can be done about it?' *3rd Biennial Labour Relations Conference* 22-24 October 2013.

12. Politakis, GP 'Protecting Labour Rights as Human Rights: Present and future of International Supervision' *Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations, Geneva* (2006).

13. Rycroft, A 'What can be done about strike-related violence? '*Labour Law Research Inaugural Conference*, Barcelona (2013).

14. Twala, C & Kompi, B 'The Congress of South African Trade Unions (COSATU) and the tripartite alliance: A marriage of (In)Convenience?' *HASA Conference (University of the North-West) Reflecting on the 25 years of COSATU (1985-2010)* (2010).

15. Van Schoor, WP 'The Origin and development of segregation in South Africa' A. *J Abrahamse Memorial Lecture* (1951).

16. Visser, WP 'The South African Labour Movement's responses to declarations of martial

law, 1913-1922' *War and Society of Africa Conference, South African Military Academy* (2001).

PRIMARY SOURCES

CASES

A

1. *Adcock Ingram Critical Care v CCMA & others* [2001] 9 BLLR 979 (LAC).
2. *Administrator of Transvaal & another v Theletsane & others* 1991 (2) SA 192 (A).
3. *Afrox Ltd v SA Chemical Workers Union & others (2)* (1997) 18 *ILJ* 406 (LC).
4. *Algoa Bus Company v SATAWU & others* [2010] 2 BLLR 149 (LC).
5. *Allied Workers Union & others v Umgeni Iron Works* (1990) 11 *ILJ* 589 (IC).
6. *Amalgamated Engineering v Minister of Labour* 1949 (4) SA 908 (A).
7. *AMAWU v Concor Construction West* (1988) 9 *ILJ* 839 (IC).
8. *Arenstein v Secretary for Justice* 1970 (4) SA 273 (T).
9. *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* (2006) 27 *ILJ* 1644 (LC).
10. *Aunde South Africa (Pty) Ltd v NUMSA*[2011] 10 BLLR 945 (LAC)

B

1. *Baderbop (Pty) Ltd v NUMSA & others* [2002] 2 BLLR 139 (LAC).
2. *BAWU& Others v Edward Hotel* (1989) 10 *ILJ* 357 (IC).
3. *Benefit Cycle Works v Atmore* 1927 TPD 524.
4. *Benoni Produce & Coal Co Ltd v Gundelfinger* 1918 TPD 453.

5. *BHT Water Treatment (a division of Afchem) (Pty) Ltd incorporating PWTSA v CCMA & others* [2002] 2 BLLR 173 (LC).
6. *Billiton Aluminium SA Ltd v National Union of Metalworkers of SA* (2001) 22 *ILJ* 2434 (LC).
7. *Black Allied Workers Union (SA) v Pek Manufacturing Co (Pty) Ltd* (1990) 11 *ILJ* 1095 (IC).
8. *Black Allied Workers Union & Others v Umgeni Iron Works* (1990) 11 *ILJ* 589 (IC).
9. *Bleazard & others v Argus Printing & Publishing Co Ltd & others* (1983) 4 *ILJ* 60 (IC).
10. *Blow Molders v NUMSA and others* (case NHN 12/3/316 unreported).
11. *BMW v Van der Walt* (2000) 21 *ILJ* 113 (LAC).
12. *Branford v Metrorail Services (Durban) & others* (2003) 24 *ILJ* 2269 (LAC)
13. *Bravo Group Sleep Products (Pty) Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union*(2009) 30 *ILJ* 1090 (LC).
14. *BTR Dunlop Ltd v National Union of Metalworkers of South Africa* (1989) 10 *ILJ* 701 (IC).

12. Business SA v COSATU & another [1997] 5 BLLR 511 (LAC).

C

1. *Ceramic Industries Ltd t/a Betta Sanitary ware & another v NCBAWU & others* [1997] 6 BLLR 687 (LAC).
2. *CEPPWAWU v Metrofile (Pty) Ltd* (2004) 25*ILJ* 231 (LAC).
3. *Chamber of Mines of SA v Association of Mineworkers & Construction Union* (2014) 35 *ILJ* 1243 (LC).
4. *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA* 1996 (4) SA 744 (CC).
5. *Chauke & others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 *ILJ* 1441 (LAC).
6. *Chemical Energy Paper Printing Wood & Allied Workers Union & others v CTP Ltd & another* (2013) 34 *ILJ* 1966 (LC).
7. *Chemical Energy Paper Printing Wood & Allied Workers Union & others v Metrofile (Pty) Ltd* (2004) 25 *ILJ* 231 (LAC).

8. *Chemical Workers Industrial Union (CWIU) v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 *ILJ* 321 (LAC).
9. *City of Johannesburg Metropolitan Municipality v SA Municipality Workers Union & others* (2008) 29 *ILJ* 650 (LC).
10. *City of Matlosana v SA Local Government Bargaining Council* (2009) 30 *ILJ* 1293.
11. *Coin Security Group (Pty) Ltd v Adams* [2000] 4 BLLR 371 (LAC).
12. *Coin Security Group v SA National union for Security Forces* 1998 (1) SA 685 (C).
13. *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA* [1997] 10 BLLR 1292 (LC).
14. *Consolidated Frame Cotton Corporation v President, Industrial Court* 1985 (3) SA 150 (N)
15. *Council of Mining v Chamber of Mines of South Africa* (1984) 6 *ILJ* 293.
16. *Country Fair Foods (A Division of Astral Operations Ltd) v Hotel Liquor Catering Commercial & Allied Workers Union & others* (2006) 27 *ILJ* 348 (LC).
17. *Country Fair Foods (Pty) Ltd v FAWU & others* [2001] 5 BLLR 494 (LAC).
18. *Curtis v Minister of Safety & Security & others* 1996 (3) SA 617 B (CC).
19. *Crocodile Valley Citrus Co v SA Agricultural Plantation & Allied workers* (case no ESC102, unreported).
20. *CWIU v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 *ILJ* 321 (LAC).

D

1. *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 5 BLLR 578 (LC).
2. *De Beer v Walker* 1948 (1) SA 340 (T).
3. *De Freitas and Another v Society of Advocates of Natal (Natal Law Society Intervening)*[998] 11 BCLR 1345 (CC).
4. *Dlali v Railit* (1989) 19 *ILJ* 353 (IC).
5. *Doornfontein Gold Mining Co Ltd v National Union of Mineworkers & others* (1994) 15 *ILJ* 527 (LAC).
6. *Durban City Council v Minister of Labour* 1948 (1) SA 220 (N).
7. *Durban City Council v Minister of Labour & Another*1953 (3) SA 708 (D).

E

1. *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & others* (2004) 25 *ILJ* 2135 (LAC).
2. *East Asiatic Co (SA) Ltd v Midlands Manufacturing Co (Pty) Ltd* 1954 (2) SA 387 (C).
3. *East London (Pty) Ltd v National Union of Metalworkers of SA and others* (2007) 28 *ILJ* 642 (LC).
4. *East Rand Gold & Uranium Co Ltd v National Union of Mineworkers* (1989) 10 *ILJ* 683 (LAC).
5. *East Rand Plastics (Pty) Ltd v SACWU and others* (case NH 12/3/693 unreported).
6. *ECCAWUSA & others v Southern Sun Hotels (Pty) Ltd* (2000) 21 *ILJ* 1090 (LC).
7. *Edgars Stores Ltd v SA Commercial Catering and Allied Workers Union and others* (1992) 13 *ILJ* 177 (IC).
8. *Enforce Guarding (Pty) Ltd v National Security & Unqualified Workers Union & others* (2001) 22 *ILJ* 2457 (LC).
9. *Enforce Guarding (Pty) Ltd v NASUWU & others* [2003] 1 BLLR 9 (LC).
10. *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC).
11. *Equity Aviation Services (Pty) Ltd v SATAWU & others* (2009) 30 *ILJ* 1997 (LAC).
12. *Equity Aviation v SATAWU* (478/09) (2011) ZASCA 232 (30 November 2011).
13. *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & others* (2011) 32 *ILJ* 2894 (SCA).
14. *Eskom Holdings Ltd v National Union of Mineworkers & others (Essential Services Committee Intervening)* (2011) 32 *ILJ* 2904 (SCA).
15. *Ex Parte Consolidated Fine Spinners & Weavers Ltd* (1987) 8 *ILJ* 97 (D).
16. *Ex Parte Minister of Justice: In re R v Gerstnera* 1930 AD 420.

F

1. *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).
2. *Fakude v Kwikot (Pty) Ltd* (2013) 34 *ILJ* 2024 (LC).
3. *FAWU and SA Breweries* (1990) 11 *ILJ* 413 (ARB).

4. *FAWU v Cape Slaughtering, Flaying & Dressing Co Ltd* NHK 13/2/2175, unreported.
5. *FAWU v National Co-op Dairies (2)* (1989) 10 *ILJ* 490 (IC).
6. *FAWU v General Food Industries Ltd* [2002] 10 BLLR 950 (LC).
7. *FAWU v Rainbow Chicken Farms* [2000] BLLR 70 (LC).
8. *FAWU v Spekenham Supreme* (1988) 9 *ILJ* 627 (IC).
9. *FBWU v Hercules Cold Storage* (1989) 10 *ILJ* 457 (IC).
10. *Ferreira v Levin NO & others* 2011 (2) SA 473 (CC).
11. *FGWU v Minister of Safety & Security*(1999) 20*ILJ* 1258 (LC).
12. *FGWU & others v The Minister of Safety and Security & others* [1999] 4 BLLR 332 (LC)
13. *Fidelity Gaurds Holdings (Pty) Ltd v Professional Transport Workers Union & others (1)* (1998) 20 *ILJ* 260 (LAC).
14. *Floraline v SASTAWU* [1997] 9 BLLR 1223 (LC).
15. *Food & Allied Workers Union v Clover Dairies* (1986) 7 *ILJ* 697 (IC).
16. *Food and Allied Workers Union (FAWU) v TSB Sugar RSA Ltd & others* [2013] 10 BLLR 973 (LAC).
17. *Food & Allied Workers Union v Ngcobo* (2013)34 *ILJ* 1383 (SCA).
18. *Food & Allied Workers Union & others v C G Smith Sugar Ltd, Noodsberg* (1989) 10 *ILJ* 907 (IC).
19. *Food & General Workers Union & others v Minister of Safety & Security & others* (1999) 20 *ILJ* 1258 (LC).
20. *Food & Allied Workers Union obo Kapesi & others v Premier Foods Limited t/a Blue Ribbon Salt River* (2010) 31 *ILJ* 1654 (LC).
21. *Food & Allied Workers Union & others v Rainbow Chicken Farms* (2000) 21 *ILJ* 615 (LC).
22. *Food and Allied Workers Union obo Rala & others v Coca Cola Bottling & another* (2002) 23 *ILJ* 196 (CCMA).
23. *Food & Allied Workers Union v In2Food* (2014) 35 *ILJ* 2767 (LAC).
24. *Foodgro (A division of Leisurenet Ltd) v Keil* [1999] 9 BLLR 875 (LAC).
25. *Ford Motor Company of SA (Pty) Ltd v NUMSA & others*(P32/07 08/11/2007, unreported)
26. *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

27. *Fourways Mall (PTY) Ltd & another v SA Catering & Allied Workers Union & another* (1999) 20 *ILJ* 1008 (W).

G

1. *Gauteng ProvinisaleAdministrasie v Scheepers* 2000 21*ILJ* 1304 (LAC).
2. *Government of the Islamic Republic of Iran v Berends* 1998 (4) SA 107 (Nm).
3. *Government of the Western Cape Province v Congress of SA Trade Unions & another* (1999) 20 *ILJ* 151 (LC).
4. *Government of the Western Cape Province v COSATU & another* [1998] 12 BLLR 1286 (LC).
5. *Grafton Furniture Mfg (Pty) Ltd v Industrial Council for the Furniture Mfg Industry* 1982 3 *ILJ* 294.
6. *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union & others* (2010) 31 *ILJ* 2539.

H

1. *Independent Municipal and Allied Trade Union and others v Rustenburg Transitional Council* (2000) 21*ILJ* 377 (LC).
2. *Harksen v Lane NO and others* 1998 (1) SA 300 (CC).
3. *Henred Fruehauf Trailers (Pty) Ltd v National Union of Metalworkers of SA & others* (1992) 13 *ILJ* 593 (LAC).
4. *Hextex& other v SA Clothing & Textile Workers Union & others* (2002) 23 *ILJ* 2267 (LC).
5. *Hlongwane & others v Rector: St Francis College & others* 1989 (3) SA 318 (D).
6. *Hlope v Transkei Development Corporation Ltd* (1994) 15 *ILJ* 207 (ICTK).
7. *HOSPERSA v Northern Cape Provincial Administration* (2000) 21*ILJ* 1066 (LAC).

I

1. *Islamic Unity Convention v Independent Broadcasting Authority*[2002] 5 BLLR 433 (CC).
2. *Independent Municipal and Allied Trade Union and others v Rustenburg Transitional Council*(2000) 21*ILJ* 377 (LC).
3. *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC).
4. *In2Food (Pty) Ltd v Food & Allied Workers Union & others* (2013) 34 *ILJ* 2589 (LC).
5. *Islamic Unity Convention v Independent Broadcasting Authority*[2002] 5 BLLR 433 (CC).
6. *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & General Workers Union & others* (2009) 30 *ILJ* 1099 (LC).

J

1. *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 *ILJ* 89 (LAC).

K

1. *Kauesa Minister of Home Affairs* 1996 (4) SA 965 (Nm).
2. *Keen & 24 others v Durban City Council* 1950 (1) PH K26.
3. *Kem-Lin Fashions CC v Brunton* (2001) 22 *ILJ* 109 (LAC).
4. *Keshwar v SANCA* (1991) 12 *ILJ* 816.
5. *Khosa and Others v Minister of Social Development and Others*[1999] (6) BCLR 615 (CC).
6. *Khumalo& others v Holomisa* (2003) 24 *ILJ* 305 (CC).
7. *KZN Furniture Manufacturer's Association v National Union of Furniture & Allied Workers of South Africa* [1996] 8 BLLR 964 (N).

L

1. *Lomati Mill Baberton (A Division of Sapp Timber Industries) v Paper Printing Wood & Allied Workes Union* (1997)18*ILJ* 178 (LC).
2. *Langeveldt v Vryburg Transitional Local Council & others* [2001] 5 BLLR 501 (LAC).

3. *Liberty Box & Bag Manufacturing Co (Pty) Ltd v Paper Wood & Allied Workers Union* (1990) 11 *ILJ* 427 (ARB).
4. *Lomati Mill Baberton (A Division of Sapp Timber Industries) v Paper Printing Wood & Allied Workes Union* (1997) 18*ILJ* 178 (LC).
5. *Lomati Mill Barberton (A division of Sappi Timber Industries) v PPWAWU & others* (1997) 4 BLLR 415 (LC).

M

1. *Mzeku & others v Volkswagen SA (Pty) Ltd & others* (2001) 22 *ILJ* 1575 (LAC).
2. *Mackay v ABSA Group & another* [1999] 12 BLLR 1317 (LC).
3. *Macsteel (Pty) Ltd v NUMSA*(1990) 11 *ILJ* 995 (LAC).
4. *Majavu* 1994 (4) SA 268 (CK).
5. *Manguang Local Municipality v SA Municipality Workers Union* (2003) 24 *ILJ* 405 (LC).
6. *Marble Hall Spar v SACWU& others* [1997] 10 BLLR 1311 (LC).
7. *Marievale Consolidated Mines Ltd v President of the Industrial Court & others* 1986 7 *ILJ* 152 (T).
8. *Markhams (A Divion of Foshini Retail Group (Pty) Ltd) v Matji NO & others* [2003] 11 BLLR 1145 (LC).
9. *Marutha v Sember CC T/A Review Printers, Pietersburg* (1990) 11 *ILJ* 804 (IC).
10. *Masilela& others v Reinhart Transport (Pty) Ltd & others* (2010) 31 *ILJ* 2942 (LC).
11. *Mawethu Civils (Pty) Ltd v National Union of Mineworkers* (2013) 34 *ILJ* 2624 (LC).
12. *MAWU v Natal Die Castings Co (Pty) LTD*(1986) 7 *ILJ* 520 (IC).
13. *Mazubuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC).
14. *Mbiyane v Cembad t/a TA Art Centre* (1989) 10 *ILJ* 468 (IC).
15. *Mcosini v Mancotywa & another* (1998) 19 *ILJ* 1413 (TK).
16. *Media Workers Association of SA & others v The Argus Printing & Publishing Co Ltd* (1984) 5 *ILJ* 16 (IC).
17. *Media Workers Association of SA, The & others v Facts Investors Guide (Pty) Ltd & another* (1986) 7 *ILJ* 313 (IC).
18. *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and others* 1998 (4) SA 1157 (CC).

19. *Metal & Allied Workers Union v Hart Ltd* (1985) 6 *ILJ* 478 (IC).
20. *Metal & Electrical Workers Union of SA v National Panasonic Co* (1999) 12 *ILJ* 533 (C).
21. *Midland Chamber of Industries Staff Committee v Midland Chamber of Industries* [1995] 5 BLLR 74 (IC).
22. *Minister for Labour & Minister for Justice* (1941) TPD 108.
23. *Minister of Safety & Security v Sekhoto* 2011 (5) SA 367 (SCA).
24. *MITUSA & others v Transnet Ltd & others* [2002] 11 BLLR 1023 (LAC).
25. *MITUSA v Transnet (Pty) Ltd*(2009) 23 *ILJ* 2213 (LAC).
26. *Modise & others v Steve's Spar Blackheath* (2000) 21 *ILJ* 519 (LAC).
27. *Mondi Paper (a Division of Mondi Ltd) v Paper, Printing Wood and Allied Workers Union & others* (1997) 18 *ILJ* 84 (D).
28. *Mondi Ltd (MondiKraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union & others* (2005) 26 *ILJ* 1458 (LC).
29. *Moses Nkadimeng & others v Raleigh Cycles (SA) Ltd* (1981) 2 *ILJ* 34 (IC).
30. *Msomi v The Claims Officer & another* (1980) 1 *ILJ* 292 (N).
31. *Mthimkhulu v Commission for Conciliation, Mediation & Arbitration & another* (1999) 20 *ILJ* 620 (LC).
32. *Murray & Roberts Buildings (Cape Town) Pty Ltd v SA Allied Workers Union* (1987) 8 *ILJ* 325.
33. *Mutual & Federal Insurance Co Ltd v Banking Insurance Finance & Assurance Workers Union* (1996) 17 *ILJ* 241 (A).
34. *Mvumvu and others v Minister for transport and another* 2011 (2) SA 473 (CC).
35. *MWASA v Perskor* (1989) 10 *ILJ* 441 (IC).
36. *Mynwerkersunie v O'Okiep Copper Co Ltd* (1983) 4 *ILJ* 140 (IC).
37. *Mzeku & others v Volkswagen SA (Pty) Ltd & others* (2001) 22 *ILJ* 1575 (LAC).
38. *Mzeku v Volkswagen SA (Pty) Ltd* [2001] 8 BLLR 857.

N

1. *NUMSA v Vetsak Co-Operative Ltd & others* (1996) 17 *ILJ* 455 (A).

2. *NAPTOSA & others v Minister of Education, Western Cape & others* (2001) 22 *ILJ* 889 (C).
3. *Natal Die Casting v President, Industrial Court & others* (1987) 8 *ILJ* 245 (D).
4. *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 1999 (1) SA 6 (CC).
5. *National Education Health & Allied Workers Union obo Cornelius & others and High Rustenburg Hydro* (2004) 25 *ILJ* 1339 (CCMA).
6. *National Employers Forum v Minister of Labour & others* (2003) 24 *ILJ* 954 (LC).
7. *National Police Services Union & others v National Negotiating Forum & others* (1999) 20 *ILJ* 1081 (LC).
8. *National Union of Metalworkers of SA v Hendor Mining Supplies* (2007) 28 *ILJ* 1278 (LC).
9. *National Union of Metalworkers of SA & others v Atlantis Forge (Pty) Ltd* (2005) 26 *ILJ* 1984 (LC).
10. *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* 2003 (3) SA 513 (CC), (2003) 24 *ILJ* 305 (CC).
11. *National Union of Metalworkers of SA & others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd* (2003) 24 *ILJ* 2171 (LC).
12. *National Union of Metalworkers of SA & others v Highveld Steel & Vanadium* (2002) 23 *ILJ* 895 (LAC).
13. *National Union of Mineworkers v East Rand Gold & Uranium* (1989) 10 *ILJ* 103 (IC).
14. *National Union of Mineworkers & others v Deelkraal Gold Mining Co Ltd* (1994) 15 *ILJ* 1316 (IC).
15. *National Union of Mineworkers v Eskom Holdings Soc Ltd* (2012) 33 *ILJ* 669 (LC).
16. *National Union of Mineworkers & others v Free State Consolidated Gold Mines (Operations) Ltd-President Steyn Mine; President Brand Mine; Freddies Mine* 1996 (1) SA 422 (A).
17. *Ncgobo v FAWU* [2012] 10 BLLR 1035.
18. *Ndamana v Marble Lime & Associated Industries* (1991) 12 *ILJ* 148 (IC).
19. *NEHAWU v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC).
20. *Nene & others v Durban Transport Management Board* (1992) 13 *ILJ* 684 (IC).

21. *New National Party of SA v Government of the Republic of SA & others* 1999 (5) BCLR 489 (CC).
22. *NEWU v Mtshali & another* [2000] 3 BLLR 337 (LC).
23. *NEWU v Mtshali & Another* (2000) 21 *ILJ* 1166.
24. *Ngewu, Masondo v Union Cooperative Bark and Sugar Co Ltd* 1982 (4) SA 390 (N).
25. *Ngobo v Durban Transport Management Board* (1991) 12 *ILJ* 1094 (IC).
26. *Nomaqumbe & others v Multi Office (Pty) Ltd* (1992) 13 *ILJ* 152 (IC*).*
27. *North East Cape Forests v SAADAWU & others* [1997] 5 BLLR 578 (LC).
28. *North East Cape Forests v SAAPAWU & others (2)* [1997] 6 BLLR 711 (LAC)
29. *North West Star (Pty) Ltd (under Judicial management) v Serobatse & Another* (2005) 26 *ILJ* 56 (LAC).
30. *NPSU & others v The National Negotiating Forum & others* [1999] 4 BLLR 361 (LC).
31. *NUFAWU of SA v New Era Products (Pty) Ltd* (1999) 20*ILJ* 869 (IC).
32. *NUM v Black Mountain Mineral Development Company (Pty) Ltd* (1994) 15 *ILJ* 1005 (LAC).
33. *NUM v CCMA* (2011) 32 *ILJ* 2104 (LAC).
34. *NUM v East Rand Gold and Uranium Co Ltd* (1991) 12*ILJ* 221 (A).
35. *NUM v Goldfields Security Ltd* (1999) *ILJ* 1553 (LC).
36. *NUM v Libanon Gold Mining Co* (1988) 9 *ILJ* 832 (IC).
37. *NUM & Others v Billard Contractors CC & Another* [2006] 12 BLLR 1191 (LC).
38. *NUMSA v Boart MSA* [1996] 1 BLLR 13 (LAC).
39. *NUMSA v Elm Street Plastics t/a Adv Plastics* (1989) 10 *ILJ* 328 (IC).
40. *NUMSA v G M Vincent Metal Sections (Pty) Ltd* (1999) 20 *ILJ* 2003 (SCA).
41. *NUMSA & others v Highveld Steel & Vanadium Corporation Ltd* [2002] 1 BLLR 13 (LAC).
42. *NUMSA & others v Nalva (Pty) Ltd* (1992) 13 *ILJ* 1207 (IC).
43. *NUMSA v Three Gees Galvanising* (1993) 14 *ILJ* 372 (LAC).
44. *NUMSA v Vetsak Co-Operative Ltd & others* (1996) 17 *ILJ* 455 (A).
45. *NUTW v Stag Packings (Pty) Ltd* (1982) 3 *ILJ* 285 (IC).
46. *Nyamakazi v President of Bophuthaswana* 1992 (4) SA 540 (BG).

P

1. *Prinsloo v Van der Linde and another* 1997 (6) BCLR 759 (CC).
2. *Paper Wood & Allied Workers Union v Uniply (Pty) Ltd* (1985) 6 *ILJ* 255 (IC).
3. *P.E. Bosman Transport Works Committee & Others* 1980 (4) SA 801 (T).
4. *Peter v Peter & others* 1959 (2) SA 347 (A).
5. *Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Union & others* (1995) 16 *ILJ* 233 (IC).
6. *Performing Arts Council (Transvaal) v Paper Printing Wood & Allied Workers Union & others* (1992) 13 *ILJ* 1439 (LAC).
7. *Picardi Hotels Ltd v FGWU & others* [1999] 6 BLLR 601 (LC).
8. *Pick n Pay (Pty) Ltd v SA Commercial Catering & Allied Workers Union & others* 1998 19 *ILJ* 1546 (LC).
9. *Pikitup (SOC) Ltd v SA Municpal Workers' Union on behalf of Members & others*(2014) 35 *ILJ* 983 (LAC).
10. *Plaschem (Pty) Ltd v CWIU* (1993) 14 *ILJ* 1000 (LAC).
11. *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others* (1999) 20 *ILJ* (LC).
12. *POPCRU v LEDWABA*[2013] 11 BLLR 1137 (LC).
13. *Poswa v Member of the Executive Council Responsible for Economic Affairs, Environment & Tourism, Eastern Cape* 2001 (3) SA 582 (SCA).
14. *Potgietersrus Platinum Ltd v CCMA & others* (1999) 20 *ILJ* 2679 (LC).
15. *PPWAWU & others v Tongaat Paper Co (Pty) Ltd* (1992) 13 *ILJ* 393 (IC).
16. *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).
17. *Principal Immigration Officer v Bhula* 1931 AD.
18. *Prinsloo v Van der Linde and another* 1997 (6) BCLR 759 (CC).
19. *Public Servants Association of SA v Minister of Justice & Constitutional Development & others* (2001) 22 *ILJ* 2303 (LC).

R

1. *R v Canqan & others* 1956 (3) SA 366 (E).
2. *R v Mtiyana* 1952 (4) SA 103 (N).
3. *R v Smit* 1995 (1) SA 239 (K).

4. *Raad van Mynvakbondde v Die Kamer van Mynwese* (1984) 5 *ILJ* 344 (IC).
5. *Raad van Mynvakbonde v Minister van Mannekragen n ander* 1983 (4) SA 29 (T).
6. *Ram Transport SA (Pty) Ltd v SA Transport & Allied Workers Union & others* (2011) 32 *ILJ* 1722 (LC).
7. *Ramotsepane & others v Barmot Truck Hire* ([002] 6 BLLR 525 (LAC).
8. *Rand Tyres & Accessories v Industrial Council for the Motor Industry* 1941 TPD 108.
9. *Ray's Forge & Fabrication (Pty) Ltd v NUMSA & others* (1989) 10 *ILJ* 762 (IC).
10. *RSA v Hugo* 1997 (6) BCLR 708 (CC).
11. *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC).

S

12. *S v Gelderblom* 1962 (1) SA 497 (C).
13. *S v Gwadiso* 1996 (1) SA 388 (CC).
14. *S v Makwanyane* 1995 (3) SA 391 CC.
15. *S v Mamabolo (E TV and others Intervening)* 2001 (3) SA 409 (CC).
16. *S v Pennington and Another* 1997 (4) SA 1076 (CC).
17. *S v Zuma & others* 1995 (2) SA 642 (CC).
18. *SA Agricultural Plantation & Allied Workers Union & others v Premier of the Eastern Cape & others* (1997) 18 *ILJ* 1317 (LC).
19. *SAAPAW Free State & Others v Fourie & Another* [2007] 1 BLLR 67 (LC).
20. *SA Breweries Ltd v Food & Allied Workers Union & others* (1989) 10 *ILJ* 844 (A).
21. *SA Catering & Allied Workers Union & others v Pep Store* (1998) 19 *ILJ* 1226 (LC).
22. *SACCAWU v Edgars Stores Ltd & another* (1997) 18 *ILJ* 1064 (LC).
23. *SA Chemical Workers Union and others v Sentrachem Ltd* (1998) 9 *ILJ* 410 (IC).
24. *SA Clothing & Textile Workers Union v Free State & Northern Cape Clothing Manufacturers' Association* (2001) 22 *ILJ* 2636 (LAC).
25. *SA Clothing & Textile Workers Union v Yarntex (Pty) Ltd t/a Bertrand Group* (2010) 31 *ILJ* 2986 (LC).
26. *SA Clothing & Textile Workers Union v Yarntex (Pty) Ltd t/a Bertrand Group* (2013) 34 *ILJ* 2199 (LAC).

27. *SACTWU & others v Novel Spinners (Pty) Ltd* [1999] 11 BLLR 1157 (LC).
28. *SACWU & others v Afrox Ltd* [1997)]4 BLLR 382 (LC).
29. *SACWU v Noristan Holdings (Pty) Ltd & others* (1987) 8 *ILJ* 682 (IC).
30. *SACWU v Pharm Natura (Pty) Ltd* (1986) 7 *ILJ* 696 (IC).
31. *SA Defense Union v Minister of Defense & another* (1999) 20*ILJ* 2265 (CC).
32. *SA Democratic Teachers Union v Minister of Education* (2001) 22*ILJ* 2325 (LC).
33. *SA Diamond Workers' Union v The Master Diamond Cutters' Association* (1982) 3 *ILJ* 87 (IC).
34. *SA Federation of Civil Engineering Contractors on behalf of its members v National Union of Mineworkers & another* (2010) 31 *ILJ* 426 (LC).
35. *SA Laundry, Dry cleaning, Dyeing & Allied Workers Union v Advance Laundries t/a Stork Napkins* (1985) 61 544 (IC).
36. *Samancor Ltd & another v National Union of Metalworkers of SA* (1999) 20 *ILJ* 2941 (LC).
37. *Samancor Ltd v National Union of Metalworkers of SA & others* (2000) 21 *ILJ* 2305 (LC).
38. *Samancor Ltd v NUMSA & others* (2000) 8 BLLR 956 (LC).
39. *SA Municipal Workers Union v SA Local Government Association* (2010) 31 *ILJ* 2178 (LC).
40. *SA National Defence Union v Minister of Defence* (2006) 27 *ILJ* 2276 (SCA).
41. *SANSEA v NUSOG* [1997] 4 BLLR 486 (CCMA).
42. *Sapeko Tea Estates (Pty) Ltd v Maake & others* [2002] 10 BLLR 1004 (LC).
43. *SA Police Service v Police & Prisons Civil Rights Union & others* (2007) 28 *ILJ* 2611 (LC).
44. *SA Police Service v Police & Prisons Civil Rights Union & another* (2011) 32 *ILJ* 1603 (CC).
45. *Sappi Fine Papers (Pty) Ltd (Adams Mill) v PPWAWU & others* [1997] 10 BLLR 1373 (SE).
46. *SA Security Employers Association v TGWU & others* (2) [1998] 4 BLLR 436 (LC).
47. *SA Scooter & Transport Allied Workers Union & others v Karras t/a Floraline* (1999) 20 *ILJ* 2437 (LC).

48. *Sasol Industries v SACWU* (1990) 11 *ILJ* 1010 (LAC).
49. *SATAWU v Coin Reaction* (2005) 26 *ILJ* 150 (LC).
50. *SATAWU and Another v Garvas and others* 2013 (1) SA 83 (CC).
51. *SA Transport & Allied Workers Union v Garvas & others* (2011) 32 *ILJ* 2426 (SCA).
52. *SA Transport & Allied Workers Union v Garvis* (2012) 33 *ILJ* 1593 (CC).
53. *SA Transport & Allied Workers Union & others v Ikhwezi Bus Service (Pty) Ltd* (2009) 30 *ILJ* 205 (LC).
54. *SA Transport & Allied Workers Union & others v Moloto No & another* (2012) 33 *ILJ* 2549 (CC).
55. *SAWU v Cape Lime* (1988) 9 *ILJ* 441 (IC).
56. *Schoeman v Samsung Electronics (Pty) Ltd* [1997]10 BLLR 1364 (LC).
57. *Scholtz v Stadsraad van Mangaung* (NH 11/2/5494, 23 January 1992).
58. *Sealy of SA (Pty) Ltd & others v Paper Printing Wood & Allied Workers Union* (1997) 18 *ILJ* 392 (LC).
59. *Secunda Supermarket CC t/a Secunda Spar & another v Dreyer NO & others* [1998] 10 BLLR 1062 (LC).
60. *Security Services Employers Organization & others v SA Transport & Allied Workers Union & others* (2006) 27 *ILJ* 1217 (LC).
61. *Security Services Employers' Organisation & others v SATAWU & others* (2007) 28 *ILJ* 1134 (LC).
62. *Semenya & others v CCMA & others* (2006) 27 *ILJ* 1627 (LAC).
63. *Sentraal-Wes (Kooperatief) Bpk v Food & Allied Workers Union & others* (1990) 11 *ILJ* 977 (LAC).
64. *Seven Abel CC t/a The Crest Hotel v HARWU* (1990) 11 *ILJ* 504 (LAC).
65. *Shezi (1) Nxumalo (2) Zuke (3) v Consolidated Frame Cotton Corporation Ltd* (1984) 5 *ILJ* 10.
66. *Shishonga v Minister of Justice & Constitutional Development & another* (2007) 28 *ILJ* 195 (LC).
67. *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2001) 22 *ILJ* 1603 (LAC).
68. *Sibidli & others v Western Province Preserving Co Ltd* (NHE 11/2/106 (EL), 4 March 1992).

69. *Simba (Pty) Ltd v Food & Allied Workers Union & others* (1998) 19 *ILJ* 1593 (LC).
70. *Sithole v Nogwaza NO* (1999) 20*ILJ* 2710 (LC).
71. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).
72. *South African Post Office Ltd v Commissioner Nowosenetz* [2013] 2 BLLR 216 (LC).
73. *South African National Security Employers Association v TGWU & others (1)* [1998] 4 BLLR 364 (LAC).
74. *Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union & another* (2000) 21 *ILJ* 1315 (LAC).
75. *Stewart Wrightson v Thorpe* 1977 (2) SA 943 (A).
76. *Steel Mining & Commercial Workers Union & others v Brano Industries (Pty) Ltd* (2000) 21 *ILJ* 666 (LC).
77. *Stuttafords v SACTWU* [2001] 1 BLLR 47 (LAC).
78. *Supreme Spring-A Division of Met Industrial v MEWUSA* (J2067/2010, unreported).

T

1. *TSI Holdings (Pty) Ltd & others v NUMSA & others* [2004] 6 BLLR 600 (IC).
2. *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO & others* (2007) 28 *ILJ* 1827 (LC).
3. *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v National Union of Metalworkers of SA & others* (1999) 20 *ILJ* 677 (LC).
4. *Towels, Edgar Jacobs Ltd v The President of the Industrial Court & others* 1986 (4) SA 660 (C).
5. *Transnet Ltd v SATAWU* [2011] 11 BLLR 1123 (LC).
6. *Transnet Soc Ltd v National Transport Movement* [2014] 1 BLLR 98 (LC).
7. *Transport & Allied Workers Union of SA & another v Putco Ltd* (NH 11/2/5494, 23 January 1992).
8. *Transport & Allied Workers Union of SA (TAWUSA) & others v Unitrans Fuel & Chemical (Pty) Ltd* (2013) 34 *ILJ* 1785 (LC).
9. *Trident Steel (Pty) Ltd v John NO & others* (1987) 8 *ILJ* 27 (W).
10. *TSI Holdings (Pty) Ltd & others v NUMSA & others* [2004] 6 BLLR 600 (IC).

11. *TSI Holdings (Pty) Ltd v National Union of Metalworkers of SA & others* (2006) 27 *ILJ* 1483 (LAC).
12. *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 *ILJ* 998 (LC).

U

13. *UAMAWU v Fodens (SA) (Pty) Ltd* (1983)4 *ILJ* 212 (IC).
14. *UASA- The Union v BHP Billiton Energy Coal: South Africa* (JS 1082/09) [2012] ZALCJHB 97, [2013] 1 BLLR 82 (LC).
15. *United African Motor & Allied Workers Union v Fodens (SA) (Pty) Ltd* (1983) 4 *ILJ* 212 (IC).
16. *United Association of SA v BHP Billiton Energy Coal SA Ltd* (2013) 34 *ILJ* 2118 (LC).
17. *United Association of South Africa-The Union v Impala Platinum Ltd* (Case no: JS 1082/09).
18. *University of the Witswatersrand Johannesburg v Commissioner Hutchinson* (2001) 22 *ILJ* 2496 (LC).

V

1. *Van Lingen v Est Van Lingen* 1946 (2) PH F 54.
2. *Vidar Rubber Products (Pty) Ltd v CCMA & others* [1998] 6 BLLR 634 (LC).
3. *Vista University v Botha & others* [1997] 5 BLLR 614 (LC).
4. *Vista University v Botha & others* (1997) 18 *ILJ* 1040 (LC).
5. *Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC).

W

19. *Western Platinum Ltd v National Union of Mineworkers and Others* (2000) 21 *ILJ* 2502 (LC).
20. *WG Davey (Pty) Ltd v National Union of Metalworkers of SA* (1999) 20 *ILJ* 2017 (SCA).
21. *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union & others* (2006) 27 *ILJ* 1234 (LC).

22. *Workers Union of SA v Crouse No & Another* (2005) 26 *ILJ* 1723 (LC).

INTERNATIONAL CASES

A

1. Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*) Judgment of 30 Nov. 2010, p. 664.
2. *Anderson Fed'n of Teachers v School City of Anderson*, 252 Ind. 558, 251 N.E.2D 15 (1969).
3. *Attorney-General v Moagi* 1982 (2) Botswana LR 124, *S v Zuma & others* 1995 (2) SA 642 (CC).

B

1. *Baena-Ricardo et al v Panama*, Inter-American Court of Human Rights, Merits, Reparations and Costs, Judgment of Feb. 2, 2001, Series C No. 72.
4. *Baena-Ricardo et al v Panama*, Inter-American Court of Human Rights, Merits, Reparations and Costs, Judgment of Feb. 2, 2001, Series C No. 72.
5. *Baena-Ricardo et al v Panama*, Inter-American Court of Human Rights, Merits, Reparations and Costs, Judgment of Feb. 2, 2001, Series C No. 72.
6. *Black v Law Society of Alberta*, [1986] 3 W.W.R 590 (Alta. C.A.).
7. *Board of Education v Shanker* 54 Misc. 2d 941, 283 N.Y.S. 2d 548 (Sup. Ct. 1967).
8. *Brotherhood of R.R. Trainmen v Jacksonville Terminal Co*., 394 U.S. 369 (1969).
9. *B.R. Singh v Union of India* [1999] Lab I.C. 389 (396) (S.C.).

C

1. *City of Cleveland v Division* 268, 41 Ohio Op. 236, 90 N.E.2D 711 (1949).
2. *Ciraklar v Turkey, 80 DR 46* (1995) (Application No 19601/92).
3. *Cisse v France ECHR* (Application No 51346/99) (9April 2002).
4. *City and Country of San Francisco v Cooper* (1975) 13 Cal.3d 898.

5. *City of Cleveland v Division* 268, 41 Ohio Op. 236, 90 N.E.2D 711 (1949).
6. *Collymore v Attorney-General*, [1970] A.C. 538.
7. *Commission of the EC v Luxembourg* [2008] ECR I-4323.
8. *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564 [214 Cal.Rptr. 424, 699 P.2d 835].
9. *Crofter Harris Tweed Co. v Veitch*, [1942] 1 ALL ER 142 (HL).

D

1. *Davis v Henry*, 555 So. 2d 457- La: Supreme Court 1990.
2. *Demir and Baykara v Turkey* [2009] IRLR 766; 48 EHRR 54.
3. *Dolphin Delivery Ltd v Retail Wholesale & Department Store Union, Local* 580 (1984), 10 D.L.R (4^{th}) 198 (B.C.C.A).

E

1. *El Rancho Unified School Dist. v National Education Assn*., 33 Cal.3d 946.
2. *Enerji Yapi- Yol Sen v Turkey*, Application No 68959/01, Decision 21 April 2009.

F

1. *Francis Corallie Mullin v Administrator of Delhi* AIR 1981 SC 746.

G

1. *G v Federal Republic of Germany*, (1989) 60 DR 256.
2. German Federal Labour Court (Bundesarbeitsgericht) Judgment 10 June 1980 (Case 1 AZR 822/79).
3. *Gujarat Steel Tubes v Its Mazdoor Sabha* AIR 1980 SC 1896.

H

1. *Hand Woven Harris Tweed Co. Ltd v Veitch* (1942) A.C 435.
2. *Health Services and Support-Facilities Subsector Bargaining Ass'n v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391.

3. *Health Services and Support-Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391.
4. *Helvering v Gerhardt*, 304 U.S. 405, 427 (1938).
5. *Hunter v Southam Inc*., [1984] 2 S.C.R. 145.

I

1. *In Re Berry* (1968) 68 Cal.2d 137.
2. *International Union, U.A.W.A. v Wisconsin Employment Relations Board*, 336 U.S 245 (1949).
3. *ITWF v Viking Line ABP* [2008] IRLR 143 (C-438/05).

K

1. *Kairbitta Estate v Rajmanickam* [1960] II L.L.J. 275 (S.C.).

L

1. *Laval un Partneri v Svenska Byggnadsarbetareforbundet*, Judgment of 18 Dec. 2007 [2007] ECR I-11767.
2. *Lavigne v Ontario Public Service Employees Union* (1991) 81 DLR (4th) 545.
3. *Los Angeles Met. Transit Authority v Brotherhood of Railroad Trainmen* (1960) 54 Cal.2d 684.

M

1. *Miles v Wakefield Metropolitan District Council* (1997) 2 ALL E.R 1081.
2. *Mounted Police Association of Ontario v Canada,* 2005 SCC 1.

N

1. *NAACP v Clairborne Hardware C* (458 US 886 (1982).
2. *Nat'l Labour Relations Bd. v Jones & Loughlin Steel Corp*., 301 U.S. 1 (1938).
3. *Newspapers Ltd v Wilson, Palmer and others* [1995] 2 A.C. 454.
4. *Nicol and Selvanayagam v United Kingdom*, Judgement of the court, 11 January 2001.
5. *NLRB v Mackay Radio & Telegraph Co* 304 US. 333 (1938).

O

1. *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3.
2. *OU Viking Line Esti* [2007] ECR I-10779 (Viking Line).

R

1. *Re Alberta Union of Provincial Employees and the Crown in Right of Alberta* (1980) 120 DLR (3d) 590 (Alta. Q.B).

2. *Rechtsanwalt Dr. Dirk Ruffert v Land Niedersachsen* [2008] ECR I-1989.

3. *Reference Re Public Service Employee Relations Act* [1987] 1 SCR 313.

4. *Regina v Oakes* [1986] 1 SCR. 103.

5. *R v Genereux* 88 DLR (4th) 110 (SCC).

6. *Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985) 19 DLR (4^{th}) 609.

7. *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing 4 Home* (1983) ONSC 4 DLR (4^{th}) 231.

S

8. *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4.
9. *Schechter Poultry Corp. v United States,* 295 U.S 495 (1935).
10. *School Committee of the Town of Westerly v Westerly Teachers Ass'n*, 299 A.2D 441 (1975).
11. *Shammagar Jute Factory v Their Workmen* (1950) *Law Institue Journal* 235 (IT).
12. *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60(ACHPR 2001).

13. *State v Traffic Telephone Workers Federation of New Jersey* (66 A.2D 616).
14. *Sunday Times Case* 30 EUR, Ct. H.R. (Ser. A) 1 (1979).
15. *Syndicate Bank v K. Umesh Nayak* [1994] II L.L.J. 836 (S.C.).

T

1. *Texas & New Orleans R.R. Co v Brotherhood of Ry. And S.S Clerks*, 281 U.S. 548, 570 (1930).
2. *The Gypsy Council v United Kingdom*, Judgment of the Court, 14 May 2002.
3. *The Rail, Marine, and Transport Workers v U.K* 1045/10-Chamber Judgment [2014] ECHR 366 (8 April 2014).
4. *Tramp Shipping Corporation v Greenwich Marine Incorp* [1975] 2 ALL E.R. 989 (C.A).
5. *Ts'epe v IEC and Others* (2005) AHRLR 136 (LeCa 2005).

U

1. *United Fed'n of Postal Clerks v Blount*, 325 F. Supp. 879 (D.D.C),AFF'D, 404 U.S. 802 (1971).
2. *United States v United Mine Workers* 330 U.S. 258 (1947).

W

1. *Werhof v Freeway Traffic Services GmbH & Co KG.*
2. *Wilson v UK* 2002 35 EHRR 523.

Z

1. *Ziliberberg v Moldova ECHR* (Application NO 61821/00) (4 May 2004).

LEGISLATION

SOUTH AFRICA

1. Bantu Affairs Administration Act 111 of 1984

2. Black Authorities Act 58 of 1951
3. Black Labour Act Black Labour Act 67 of 1964
4. Bantu Labour Regulation Act 70 of 1973
5. Black Labour Relations Act 48 of 1953
6. Black Labour Settlement of Disputes Act 48 of 1953
7. Black (Urban Areas) Consolidation Act 25 of 1945

    s 10
8. Electoral laws Consolidation Act 46 of 1946
9. Indemnity and Undesirables Special Importation Act 1 of 1914
10. Industrial Conciliation Act 11 of 1924

    s 12

    s 24
11. Industrial Conciliation Act 28 of 1956

    s 1

    s 7

    s 17

    s 44

    s 45

    s 46

    s 77

    s 78
12. Industrial Conciliation Act 24 of 1930
13. Industrial Disputes Prevention Act 20 of 1909

    s 5

    s 6

    s 25

14. Manpower Training Act of 1981
15. Mines and Wage Act 12 of 1911
16. Mines and Works Amendment Act 25 of 1926
17. Native Labour Regulations Act 15 of 1911

    s 13

    s 14

18. Native Labour (Settlement of Disputes) Act 48 of 1953

    s 7

19. Promotion of Black Self- Government Act 46 of 1959
20. Riotous Assemblies and Criminal law Act 27 of 1914
21. Riotous Assemblies and Criminal Law Amendment Act 25 of 1914
22. South African Police Services Act 68 of 1995

    s 38

23. The Constitution of the Republic of South Africa; 1996

    s 15

    s 17

    s 18

    s 23

24. The Defense Act 44 of 1957

    s 126

25. The Labour Relations Act 83 of 1988
26. The Labour Relations Act 66 of 1995

    s 12

    s 23

s 31

s 64

s 65

s 66

s 67

s 68

s 69

s 70

s 71

s 72

s 77

s 95

s 96

s 97

s 133

s 187

s 200

s 213

27. The Republic of South Africa Constitution Act 32 of 1961
28. The Republic of South African Constitution Act 110 of 1983
29. The Suppression of Communism Act 44 of 1950

30. Wage Act 27 of 1925

s 1

31. Workman's Compensation Act 27 of 1914

THE UNITED STATES OF AMERICA

32. National Labour Relations Act 29 USC 151 (2006)

s 7

s 13

CANADA

33. Public Services Act Proc 103 of 1994

34. Public Service Essential Services Act, S.S. 2008

c. P-42.2

35. The Constitution Act, 1982

36. The Trade Union Amendment Act, S.S. 2008

c. 26