



A critical analysis of the constitutionality of section 68(1)(a)(i) of the Labour Relations Act 66 of 1995

By

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Declaration

I, Blessing Sicelo Makhathini, hereby declare that:

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3. The work is entirely my own, except where other sources are acknowledged.
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THUS DATED AT PIETERMARITZBURG ON THIS 29th DAY OF JANUARY 2021

Acknowledgements

“The Lord is my Shepherd”- Psalm 23:

First and foremost, my gratitude goes to the one and only Supreme Being, the Lord. His presence in the beginning, in the process and in the conclusion of this dissertation is unmatched.

Umuntu ngumuntu ngabantu- I am because you are:

An undertaking to pursue post graduate studies is not always an easy one. As a result, courage, determination and commitment are often at the centre of this undertaking. However, these factors do not, on their own, always complete the journey towards a successful dissertation.

I may have had my own courage, determination and commitment, but this dissertation would not have been completed on record time had it not been for the all-inclusive support I received from my mother, Audrey Makhathini. I thank you for believing and supporting my ambitions. You maintained the belief and support from the day I shared my idea with you until I submitted this dissertation. My father, George Makhathini may be late, but his immense influence and support during my undergraduate studies had the effect of shaping my mind in a manner which was instrumental throughout the completion of this dissertation. This work is, therefore, specially dedicated to him and my son, Sicelo Junior Makhathini.

Indlela ibuzwa kwabaphambili: This is a Zulu maxim to the effect that those who have walked the path have a better knowledge of that path:

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CHAPTER 1

General introduction

1.1 Introduction

The issue of remedies for non-compliance or other transgressions during strikes has been a concern to many circles of labour relations in South Africa.¹ The Labour Relations Act 66 of 1995² (LRA) provides remedies for unprotected strikes or “conduct in contemplation or in furtherance of a strike” in section 68.³ One of these remedies is section 68(1)(a)(i)⁴ which denotes that the Labour Court may be approached by the employer to seek an interdict against a union or employees who embark in a strike or conduct in furtherance of a strike without complying with procedural and substantive requirements in terms of section 64⁵ and 65⁶ of the LRA respectively.

Section 68(1)(a)(i) of the LRA expresses that:

“(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of strike or lock-out, that does not comply with the provisions of this Chapter,⁷ the Labour Court has exclusive jurisdiction-

(a) To grant an interdict or order to restrain-

(i) Any person from participating in a strike or any conduct in contemplation or in furtherance of a strike.”⁸

It is clear that section 68(1)(a)(i) of the LRA exists as a sanction against unprotected strikes. A strike is unprotected if it is not in compliance with section 64 and 65 of the LRA. The focus will,

¹ E Tenza *The Liability of Trade Unions for Conduct of their Members During Industrial Action* (unpublished PhD Thesis, University of South Africa, 2016) 104.

² Labour Relations Act 66 of 1995.

³ Ibid s68.

⁴ Ibid s68(1)(a)(i).

⁵ Ibid s64.

⁶ Ibid s65.

⁷ Chapter IV of the LRA.

⁸ Ibid s68(1)(a)(i).

however, be confined to section 68(1)(a)(i) as it relates to section 64(1)(b) of the LRA. The latter expresses that:

“Every employee has a right to strike...if-

(b) in the case of a proposed strike, at least 48 hours’ notice of the commencement of the strike, in writing, has been given to the employer... .”⁹

It is submitted that section 64(1)(b) of the LRA is a legislative demarcation which subjects the right to strike to a notice to be provided by employees or a union to the employer or employer organization 48 hours’ prior to the strike.¹⁰ The significance of the 48 hours’ notice is, for present purposes, guarded by section 68(1)(a)(i) of the Act insofar as it opens the door for employers to seek an interdict in the instance of a strike that is not in accordance with such requirement.¹¹

1.2 Background

The LRA has been seen as the turning point in the South African labour relations environment.¹² This view is premised on South Africa’s long history of inequality, segregation and exclusions that dominated the labour industry in the country.¹³ Various pieces of legislation which were promulgated during and after the mid-1900’s shared a common purpose of enforcing inequalities in the labour sector.¹⁴ Accordingly, the LRA was envisaged to be a significant legislative framework that had to give effect to section 23 of the Constitution of South Africa¹⁵ (Constitution) and transform the labour spectrum.

⁹ Ibid s64(1)(b).

¹⁰ Section 64(1)(b)(i) of the LRA further provides that if the disputed “...issue relates to a collective agreement to be concluded in a council, in which case, notice must be given to that council; or (ii) the employer is a member of an employers’ organisation that is a party to the dispute, in which case, the notice must be given to that employers’ organization”.

¹¹ Section 64(3) of the LRA provides for instances where the 48 hours’ notice may be dispensed with, however these instances fall outside the scope of this dissertation.

¹² J Grogan *Workplace Law* 11 ed (2014) 366.

¹³ Ibid.

¹⁴ After South Africa became a union in 1910, a number of statutes were promulgated to deal with industrial relations. These laws included, but not limited to: the Wage Act 27 of 1925; the Industrial Conciliation Act 36 of 1937; the Black Labour Relations Regulation Act 48 of 1953 and the Labour Relations Act 28 of 1956.

¹⁵ The Constitution of the Republic of South Africa, 1996.

One of the notable constitutional developments in South Africa is the inclusion of the right to strike.¹⁶ Section 23(2)(c) of the Constitution's labour relations clause expresses that "every worker has the right to strike".¹⁷ The Constitution further expresses that "national legislation may be enacted..." to give effect to the rights in section 23.¹⁸ As a result the LRA was promulgated to regulate strike law in South Africa.¹⁹ A strike is generally described as the employees' collective withdrawal of their labour.²⁰ Section 213 of the LRA provides a more detailed definition of the concept.²¹ The right to strike has accordingly been considered as a vital adjunct of the right to bargain collectively.²² Without the enjoyment of the right to strike, collective bargaining has been aligned to collective begging.²³

The South African labour relations environment has seen various protected and unprotected strikes in recent years.²⁴ In the negative, these strikes are often characterised by violence and long duration before they are resolved. One prominent violent strikes of post-apartheid South Africa is the unprotected Marikana strike.²⁵ As a response to the unfortunate situation of the death and injuring of mining employees and security personnel, the then president of the Republic of South Africa (Jacob Zuma) established a commission of inquiry which was tasked to investigate the ordeal.²⁶ Following a process of enquiring, the commission eventually released its report of definitive factual findings.²⁷ It has been accordingly submitted that the magnitude of the Marikana strike necessitate that any intellectual engagement about South African strike law must take place with reference to it.²⁸ Ngcukaitobi further submits that this reference will be for a while, at least until

¹⁶ Ibid s23(2)(c).

¹⁷ Ibid.

¹⁸ S 23(5) of the Constitution.

¹⁹ LRA op cit note 2 s1.

²⁰ J Grogan 'Labour Relations' in I Currie and J De Waal 6 ed *The Bill of Rights Handbook* (2013) 495.

²¹ Strike is "...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 included overtime work, whether it is voluntary or compulsory".

²² Grogan op cit note 12 at 495.

²³ Ibid.

²⁴ E Fergus "Reflection of the (Dys)functionality of strikes to collective bargaining: Recent Developments" (2016) 37 *ILJ* 1537.

²⁵ T Ngcukaitobi "Strike Law, Structural Violence and Equality in the Platinum Hills of Marikana" (2013) 34 *ILJ* 836.

²⁶ GN 50 of GG No. 35680, 12 September 2012.

²⁷ I G Farlam *Marikana Commission of Inquiry: Report on Matters of Public National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province* (2015).

²⁸ Ngcukaitobi op cit note 25.

the incident is properly examined and the implications for labour law and the constitutional order are understood.²⁹

1.3 Purpose of the study

This dissertation seeks to provide a critical assessment of the constitutionality of section 68(1)(a)(i) of the LRA. In essence, the purpose is to critically assess and thereafter establish that the interdict entrenched in the impugned provision is not in line with the Constitution as the supreme law of the Republic.³⁰ The purpose will be achieved by applying a two-stage approach formulated in the Interim Constitution³¹ and applied in *S v Makwanyane*³² before it was entrenched in the final Constitution.³³

Stage one seeks to establish if there is a constitutional right that has been or is likely to be infringed. Section 23(5) of the Constitution provides that any legislation seeking to impose a limitation on the right enshrined in section 23 must comply with section 36(1) of the Constitution.³⁴ The Constitution permits the limitation of fundamental rights by way of general limitation clause.³⁵ In this regard, the purpose is to establish that the impugned provision imposes a limitation on the right to strike. A successful establishment of the limitation is, however, not the end of the enquiry. It is accepted that not all limitations of fundamental rights are unconstitutional.³⁶ Hence, the need to proceed to and apply the second stage.

For the purposes of the second stage, a limitation of rights may nevertheless be permissible to the extent that it is a legitimate limitation as envisaged in section 36(1) of the Constitution.³⁷ In this

²⁹ Ibid.

³⁰ Section 2 of the Constitution provides that “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

³¹ Constitution of the Republic of South Africa Act 200 of 1993.

³² *S v Makwanyane* 1995 (3) SA 391 (CC).

³³ The Constitution op cit note 15.

³⁴ Ibid s36(1).

³⁵ Ibid.

³⁶ I Currie and J De Waal *The Bill of Rights Handbook* 6 ed (2013) 151.

³⁷ Section 36(1) provides that “(1) The rights in the Bill of Rights may be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

instance, the purpose will be to establish that the limitation indicated in stage one is not permissible to the extent that it cannot be “reasonable and justified in an open democratic society based on human dignity, equality and freedom”. The achievement herein requires a thorough analysis and application of the proportionality inquiry as envisaged in section 36(1) of the Constitution and as it was applied, although in the context of the Interim Constitution,³⁸ in *Makwanyane*.³⁹

While the purpose of critically analysing the constitutionality of the impugned provision would have been achieved through the application of the two aforementioned stages, it is imperative that the constitutional defect be remedied. For this reason, this dissertation will seek to propose and formulate an approach which can assist to cure the unconstitutionality of the impugned provision. In essence, an appropriate⁴⁰ and just and equitable remedy⁴¹ will be advanced in order to contribute to an objective and uniform legislative approach for a better enforcement of the interdict under section 68(1)(a)(i) of the LRA.

1.4 Rationale for the study

Section 2 of the Constitution’s founding provisions invalidates “any law or conduct that is inconsistent with the Constitution”.⁴² Hence, owing to the supremacy of the Constitution⁴³ and the positive achievement of the intended purpose of this study, section 68(1)(a)(i) of the LRA may be deemed to be contrary to the Constitution to the extent that it is found not to fulfil the obligations imposed by the Constitution, particularly to eliminate invalid laws.⁴⁴ As a result of the unfortunate rise in violent strikes, the Labour Court has seen a rise in a number of cases being brought in terms of the impugned provision.⁴⁵ It is submitted that the overbroad nature of section 68(1)(a)(i) of the

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

³⁸ Interim Constitution op cit note 31.

³⁹ *Makwanyane* supra note 32 para 104.

⁴⁰ The Constitution op cit note 15 s38.

⁴¹ Ibid s172.

⁴² Ibid s2.

⁴³ Ibid.

⁴⁴ Section 172(1)(a) of the Constitution expresses that “...a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”.

⁴⁵ *Tenza* op cit note 1 at 108 - 114.

LRA has opened the door for adjudication of cases whereby the employer seeks an urgent interdict against employees who allegedly breached the section 64(1)(b) of the LRA, particularly the 48 hours' notice requirement. Hence, there is a need for an objective and uniform approach that will not only protect constitutional rights, but will also assist the Labour Court when called upon to adjudicate on the interdict.⁴⁶

The significance of the 48 hours' notice is not questioned in this study. In fact, the notice is seen as an important tool to contribute to orderly collective bargaining and to curb the spread of violence during a strike.⁴⁷ However, the concern and the issue of constitutionality vest with the sanction of an interdict that is structured in an "overbroad" manner.⁴⁸ Despite the important nature of the right to strike, the enjoyment therein remains vulnerable and threatened by section 68(1)(a)(i) of the LRA. As a result, it is essential that the legislature be called upon to revisit the wording of the impugned provision or the higher courts be approached to address the issue of its constitutionality.⁴⁹

1.5 Research Questions

The study is founded on two main questions. These questions are guided by section 36(1) of the Constitution and the constitutional *locus classicus* of *Makwanyane*.⁵⁰ The first question is whether section 68(1)(a)(i) of the LRA limits the rights to strike. In essence, the study will seek to establish the limitation caused by the impugned provision to the employees' right to strike in pursuit of their workplace demands or grievances. The second question is dependent on the affirmative response to the first question.⁵¹

⁴⁶ Tenza (ibid) examines the challenges that come with section 68(1)(a)(i) of the LRA at 263 – 265.

⁴⁷ DC Subramanien and JL Joseph "The Right to Strike under the Labour Relations Act 66 of 1995 (LRA) and Possible Factors for Consideration that Would Promote the Objectives of the LRA" (2019) 22 *PER/ PELJ* 23 - 27.

⁴⁸ The study will illustrate, in detail, that the impugned provision is overbroad to the extent that it does not recognize nor differentiate between the following: degrees of non-compliance, intentional and unintentional breach, peaceful and violent strikes and other conducts that often characterize strike action.

⁴⁹ Section 8(1) of the Constitution (op cit note 15) expresses that "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".

⁵⁰ *Makwanyane* supra note 32.

⁵¹ Currie and De Waal op cit note 28 at 153.

The second question is whether the limitation is “reasonable and justifiable” as envisaged in section 36(1) of the Constitution. The aim is thus to ascertain whether the limitation imposed by the interdict can be permissible “... in an open democratic society based on human dignity, equality and freedom...”.⁵² It is a negative response to the question of reasonableness and justification that will confirm the unconstitutionality of the impugned provision.

Although the assessment of constitutionality would have been completed in the above two questions, but the rationale drives the study to the question of an appropriate remedy to cure the constitutional defect. It is common that the impugned provision cannot be disregarded until set aside by a court on the basis of invalidity⁵³ or amended by the legislature.⁵⁴ As a result, the determination of the remedy will be linked to both judicial and legislative powers so as to align the impugned provision with the Constitution as the supreme law of the Republic.

1.6 Methodology of the Study

The study will be undertaken through a doctrinal approach.⁵⁵ The underlying method of the study is largely drawn from section 36(1) of the Constitution and the *Makwanyane* case.⁵⁶ In essence, the questions in this study will be answered through a critical analysis of primary sources of law such as the Constitution; case law; legislation; common law and the Marikana Report.⁵⁷ In addition, secondary sources will include journal articles, textbooks and other relevant academic

⁵² The Constitution op cit note 15 s36(1).

⁵³ Ibid s172.

⁵⁴ Section 55(1)(a) of the Constitution (ibid) provides the National Assembly with power to amend any legislation.

⁵⁵ Hutchinson and Duncan describe doctrinal research as “...a systematic exposition of the rules governing a particular legal category, analysis of the relationship between rules, explanation of areas of difficulty and, perhaps, the prediction of future developments” (see Hutchinson, T and Duncan, N “Defining and describing what we do: doctrinal legal research” [2013] *Legal Education Digest* 32). Other Scholars have described the essence of doctrinal research as focusing on resolving practical issues, identifying underlying authority and debate of the correct authority to resolve practical issues (see Coetsee, D and Buys, P “A doctrinal research perspective of master’s degree students in accounting” (North West University).

⁵⁶ *Makwanyane* supra note 32 above.

⁵⁷ Farlam op cit note 27. Reference will be confined to relevant labour related issues only.

writings. The necessary research is possible through the use of desktop⁵⁸ research and without venturing into the empirical domain.⁵⁹

1.7 Conclusion

When interpreting the provisions of section 68(1)(a)(i) of the LRA, the Labour Court has a constitutional duty to “promote the spirit, purport and objects of the Bill of Rights”.⁶⁰ In the same vein, the LRA provides for a duty to interpret the Act “in compliance with the Constitution; and in compliance with the public international law obligations of the Republic”.⁶¹ However, as a result of the current wording of section 68(1)(a)(i) of the LRA, the hopes of achieving the desired interpretation are embattled with constitutional challenges. These challenges, when left unaddressed, would diminish the ambitions of establishing a constitutional order that reflects positively on human dignity, equality and freedom.

⁵⁸ This includes the use of physical copies and online databases to locate the said primary and secondary sources.

⁵⁹ The method of empirical research is said to come about from “practical observance and/ or measuring social phenomena” (op cit note 55).

⁶⁰ The Constitution op cit note 15 s39(2).

⁶¹ LRA op cit note 2 s3(b) and (c).

CHAPTER 2

Understanding section 68(1)(a)(i) of the LRA

2.1 Introduction

The South Africa's constitutional era owes its foundation to the rule of law.⁶² The 48 hours' notice in section 64(1)(b) of the LRA is, for present purposes, an example of the rule of law which must be adhered to. In order to guard against non-adherence, section 68(1)(a)(i) of the LRA was promulgated. The aim herein is to avail a relief to an employer in the event whereby employees or a union engage in an unprotected strike. In this regard, an employer may seek an interdict from the Labour Court which would have the effect of interdicting the unprotected strike from carrying on. However, this empowering provision is submitted to be overbroad for reasons to be ventilated hereunder.

2.2 Background

The sanction of an interdict is not novel in the South African labour law. The repealed LRA (the LRA of 1956)⁶³ provided the industrial court with the authority to grant an interdict as a result of non-compliance with procedural requirements.⁶⁴ The current LRA has endowed the Labour Court with relatively similar jurisdiction in the instance of non-compliance with procedural requirements as envisaged in section 64(1) of the LRA. The introduction of the LRA in 1995 changed the way industrial action was regulated in SA. It introduced the concepts protected (legal) and unprotected (illegal) strikes. Compliance with section 64(1)(b) of the LRA is, for present purposes, the difference between the two types of strikes. As a result of non-compliance, unprotected strikes do not enjoy protection by the law.

⁶² The Constitution op cit note 15 s1(c).

⁶³ LRA op cit note 14.

⁶⁴ Section 17 of the LRA of 1956 (ibid) provided "for the establishment and functions of the Industrial Court". In this regard, section 17(11)(aA) provided that the functions of the Industrial Court shall be to grant an interdict of any action that is prohibited under section 65 of the LRA of 1956. As part of the regulations, section 65 provided for prohibition of strikes and lock-out in certain circumstances. Among other notable regulations was the ballot requirement in ss (4).

2.3 Why section 68(1)(a)(i) of the LRA is overbroad? - Issues of constitutional concern

2.3.1 General

The distinction between protected and unprotected strikes is submitted to be beneficial to strike law. This is so because the South African constitutional era is, as stated above,⁶⁵ founded on the rule of law which must be observed with due diligence. Thus non-compliance may not be swept under the carpet. The sentiment herein is further shared with the importance of condemning threatening, violent and illegal behaviour that often characterises a number of strikes in the Republic. However, the LRA does not distinguish between violent and peaceful strikes nor does it provide for instances of threats and incitement of violence during strike action. As a result, these varying incidents have, notwithstanding damning differences, suffered from a similar sanction, being an interdict. The impugned provision is thus the source of the constitutional concern.

2.3.2 Degrees of non-compliance with section 64(1)(b) of the LRA

Section 68(1)(a)(i) of the LRA is silent on the degrees of non-compliance with section 64(1)(b) of the LRA. As a result, an employer can invoke the provisions of section 68(1)(a)(i) regardless of the degree of non-compliance on the part of the union or employees. Although the significance of the 48 hours' notice is not impugned, there is a need to treat each case on its own merits. The circumstances surrounding reasons for the failure to comply with section 64(1)(a)(i) of the LRA are crucial in this regard. The behaviour of striking employees will often demonstrate whether such non-compliance was motivated by malice or was not intended.

In the absence of malice, there appears to be a greater need for caution in the instance of unintended non-compliance and peaceful strikes. A strike that falls short of section 64(1)(a)(i) of the LRA, but is staged in good faith and is peaceful, ought to be treated differently from a strike that is accompanied by unlawful acts. In the negative, the Labour Court in *SVR Mills Services (Pty) Ltd v National Union of Metalworkers of South Africa*⁶⁶ held that the Act does not allow degrees of

⁶⁵ See note 62 above.

⁶⁶ *SVR Mills Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others* (2001) 22 ILJ 1408 (LC).

compliance and the slightest departure from the regulations will suffice for the employer to seek an interdict. The court cannot be faulted as it interpreted the provision as it is.

It is submitted that the degree of non-compliance with procedural requirement is an essential indication of the *bona fides* or *mala fides* of the union, striking employees or those endowed with the duty to ensure compliance. The non-distinction of degrees is concerning in light of the principles laid down by the Constitutional Court in *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another*.⁶⁷ The court held that when the majority union gives a notice to strike, it cannot be expected that minority unions and non-unionised employees will all furnish separate notices of their own.⁶⁸ The implication herein is that the consequences of non-compliance also impair on minority unions and non-unionised employees. It therefore appears that non-unionised employees and those belonging to minority unions who may be paying urgency fees to the majority union are not spared from the interdict. This is so even where the majority union acted in good faith and did not intend to defy the procedural requirements. These events take place to the prejudice of employees who may have reasonably believed that their peaceful strike was protected.

The non-differentiation of degrees of non-compliance can affect all unions, but minority unions and non-unionised employees are often the most prejudiced. Although the LRA entrenches the majoritarian principle,⁶⁹ the impugned provision, as is, does not support a proper application of the principle. It could therefore not be appropriate to invoke the majoritarian principle to sanction all employees on the basis of the majority union's failure to comply and more so when non-compliance was not intended and when the strike was peaceful and staged in good faith. This situation indicates non-compliance at a lesser degree. However, the constitutional impairment caused by treating all forms of non-compliance in a similar manner is understated. As a result, the ambit of section 68(1)(a)(i) of the LRA remains overbroad so as to allow the aforementioned to materialize.

⁶⁷ *South African Transport and Allied Workers Union v Moloto* (2012) 33 ILJ 2549 (CC).

⁶⁸ *Moloto Ibid* at 2551C.

⁶⁹ LRA op cit note 2 chapter III.

2.3.3 The Risk of Collective Guilt

It is not uncommon for employers to encounter a challenge in identifying wrongdoers in the instance of violent strikes. As a result, employees are often left vulnerable to being held liable despite lack of evidence to prove their involvement. Hence, the courts have had to guard against subjecting employees to collective guilt.⁷⁰ This is so because in *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & Others*,⁷¹ the court held that our law knows no concept of collective guilt.

The threat of collective guilt appears more on non-compliant, but peaceful strikes in which the only reason for an interdict is any form of failure to follow section 64(1)(a)(i) of the LRA. From the reasoning in *Moloto*,⁷² it follows that non-unionised employees and minority unions who may have relied on the notice by the majority union would be equally and collectively interdicted from striking. As a result, the employer would act against all employees who would have engaged in the unprotected strike. Owing to the peaceful nature of the strike, it is discomfoting that the impugned provision is framed in a manner which extends to all striking employees regardless of the absence of malice, threats, incitement of violence and actual violence amid non-compliance with section 64(1)(b) of the LRA.

In *Woolworths (Pty) Ltd v Commercial Catering and Allied Workers Unions*,⁷³ the court discharged an interim interdict on the basis that the employees who were allegedly involved in misconduct could not be identified. While there were alleged incidents of misconduct, the finding is commendable as the confirmation of the interim order would have led to the unwanted collective guilt. Owing to the peaceful nature of a strike, the possibility of identifying the wrongdoers is slim compared to a violent strike. As a result, employers often approach the Labour Court with an intention to interdict all employees from striking. This appears to suggest that all employees are treated as wrongdoers when there was a failure to comply with section 64(1)(b) of the LRA.⁷⁴

⁷⁰ Collective Guilty is the punishment of all employees for the wrongdoing of some (see J Grogan *Collective Labour Law* ed (2007) 224).

⁷¹ *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & Others* (1997) 20 ILJ 392 (LC) 395.

⁷² *Moloto* supra note 67.

⁷³ *Woolworths (Pty) Ltd v Commercial Catering and Allied Workers Union & Others* (2006) 27 ILJ 1234 (LC).

⁷⁴ While the employees may be given an opportunity to identify wrongdoers, this does not only create tensions among employees, it also does not cure the overbroad nature of the impugned provision.

In *Polyoak*⁷⁵ the court held that it is improper to seek an interdict against all employees when not all of them were at fault. However, the ambit of the impugned provision continues to open the door for collective blameworthiness of all striking employees. While the Labour Court has the power to guard against collective guilt, the structure of the impugned provision is still the cause of the setback. Therefore, the wide application of the interdict is inevitably prejudicial to employees who strike peacefully and are without malice.

A leading case on the issue of collective guilty is *NUMSA obo Nganezi v Dunlop Mixing*.⁷⁶ Facts of the case indicate that workers had engaged in a protected strike which later turned violent. As a result, the employer obtained an urgent court interdict which, however, did not stop the violence. In response thereto, the employer dismissed all striking employees. This included those whom were not directly involved in specific acts of misconduct, but their dismissal was prompted by their failure to disclose the actual participants. The latter instance is termed derivative misconduct. The Constitutional Court accordingly noted the harshness in invoking the duty to disclose as the sole reason for dismissing workers who were not party to the actual misconduct.⁷⁷ The court held further that this duty to disclose could have an impact on the right to strike.⁷⁸ This is so because workers would be deterred from participating in a strike if they could possibly be sanctioned simply for not disclosing information about wrongdoers. Accordingly, the court concluded that only in exceptional circumstances can this duty be upheld.⁷⁹ On the facts, it was, however, rejected because the collective bargaining power would have been compromised. This is so because the employer did not take any reciprocal steps to meet the workers halfway.⁸⁰

The rejection of collective guilty by the courts is a clear indication of the danger that it poses on the right to strike. From the foregoing, it is thus concerning that a legislative provision is now contributing to the risk of collective guilty. The struggle of finding wrongdoers in the instance of violent strikes indicates that there would be a much greater struggle when dealing with non-violent

⁷⁵ *Polyoak* supra note 71.

⁷⁶ *National Union of Metalworkers South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others (Casual Workers Advice Office as Amicus Curiae)* (2019) 40 ILJ 957 (CC).

⁷⁷ *Ibid* para 45.

⁷⁸ *Ibid* para 70.

⁷⁹ *Ibid* para 76.

⁸⁰ *Ibid* para 78.

strikes. This is so because in the latter instance there is no positive conduct of violence nor threat thereof, instead the interdict is sought to put an end to the strike itself.

2.3.4 Section 68(1)(a)(i) of the LRA and the effect on court order

Even though the court may exercise its discretion on the order itself, but the broadness of section 68(1)(a)(i) of the LRA has contributed to confusing, vague and unjustified interdicts. When the court is approached in terms of the impugned provision, the wording itself allows the court to impose an interdict solely as a result of non-compliance with the regulations. In this regard, the interdict is intended to command the striking workers to refrain from striking and return to work. The impugned provision usually attracts urgent matters due to violence, threats and unlawful activities. In this latter instance, the court is accordingly requested to issue an order which would restrain workers from engaging in violence; threats; and unlawful acts. In this instance the purpose is legitimate. Unlike this latter instance, an interdict founded only on minor unintended deviation has an implication on the rights to strike⁸¹ in respect of all employees whom may have been covered by such notice.

Although the courts have attempted to be cautious when interpreting the impugned provision, but such caution does not save the provision from being overbroad. Existing case law indicates that the broadness is creating a challenge on clarifying the ambit of court orders.⁸² It is submitted that this challenge is exacerbated by the lack of distinction between peaceful and violent strikes and the failure to explicitly cater for various instances that often characterize strike action. It has been rightfully submitted that an order that is broadly framed to prevent workers from striking would amount to an unreasonable restriction on their right to strike.⁸³

2.3.5 Contempt of court (Quasi-criminal proceedings)

The outcome of interdict applications has often led to vagueness on the ambit and extent of the restriction or directive. The vagueness herein has also led to the floodgate of litigation of contempt

⁸¹ The Constitution op cit note 15 s23(2)(c).

⁸² Infra heading 2.3.5 below.

⁸³ Grogan op cit note 70 at 207. The limitation will be analysed further in chapter three below.

of court applications. In *AMCU v KPMM*⁸⁴ the strike was protected, however the interdict was rightfully sought to restrain illegal acts of violence such as assault, intimidation and blocking of access routes. Notwithstanding the clear and legitimate purpose of the interdict (to curb violence), the Labour Appeal Court (LAC) concluded that the strikers were not guilty of contempt of court due to the vagueness in the Labour Court's order.

In *FAWU v In2Food*⁸⁵ the strike action was unprotected. As a result of violence, the employer accordingly applied for and obtained an interdict which was however ignored by employees. On contempt of court proceedings, the issue became the vagueness of the court order. The terms of the order were held to have been too broad and vague in the first instance and therefore the union and its members could not be held in contempt of court, especially this being a quasi-criminal sanction.⁸⁶

The essence herein is that the courts are battling as a result of the broad nature of section 68(1)(a)(i) of the LRA. It is, however, concerning that the impugned provision paves the way to these uncertainties. While the court may acquit employees, as it did in *In2food*,⁸⁷ the implications of being subjected to quasi-criminal proceedings are not erased. The impairment on dignity and the right to strike of employees is not eliminated by the subsequent acquittal. However, this constitutional defect has also not received the attention it deserves.

2.3.6 Abuse of court processes

While everyone has the right to access the courts under section 34 of the Constitution,⁸⁸ it is contrary to the ambitions of the Constitution to approach the court with sinister motives or to use the court with an ulterior motive arising from the labour bargaining table. Importantly, the Labour Court cannot intervene in matters of collective bargaining unless there is an issue which is justiciable.⁸⁹ On the face of it, the impugned provision permits employers to assume that a matter

⁸⁴ *Association of Mineworkers and Construction Union and Others v KPMM Road and Earthworks (Pty) Ltd* (2019) 40 ILJ 297 (LAC).

⁸⁵ *Food Allied Workers Union v In2food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC).

⁸⁶ *In2food* ibid para 13. The quasi-criminal aspect is invited by the adoption of the standard of proof which applies particularly in criminal proceedings, mainly to prove beyond a reasonable doubt.

⁸⁷ *In2food* supra note 85.

⁸⁸ The Constitution op cit note 15 s34.

⁸⁹ *SA Union of Journalists v South African Broadcasting Corporation* (1999) 20 ILJ 2840 (LAC).

is justiciable even though union and employees were bargaining in good faith and without malice. Though the courts have attempted to intervene in the instance of an unjustified conduct by the employer,⁹⁰ the impugned provision remains available for exploitation by employers.

In *Swissport v SATAWU*,⁹¹ the union had issued a notice to go on strike owing to the employer's unilateral change of the shift roster, but the latter brought an urgent application to interdict the proposed strike. illustrates a potential abuse of the court process by employers. Although the Labour Court has often endeavored to safe guard the right to strike, but the employers are still, through section 68(1)(a)(i) of the LRA, enjoying the liberty to seek an interdict even when there is no reasonable legal basis. The court concluded that the applicant had not adduced all the information when the interdict was granted.⁹² The fact that most interdicts are granted *ex parte*, peaceful employees (mainly non-unionised and minority) are prejudiced together with the majority union even where they did not share the common purpose in regard to non-compliance. Although it later appeared that the union had complied with the regulations,⁹³ but the right to strike was already compromised through an abuse of section 68(1)(a)(i) of the LRA by the employer. Thus a matter of constitutional concern.

2.4 The Marikana strike as a constitutional concern

While the reference to Marikana leads to a wide range of issues of law, but this study is confined to issues of strike action and the role of four major players thereto. The major players were Lonmin (employer), National Union of Mineworkers (NUM), Association of Mineworkers and Construction Union (AMCU) and the employees of Lonmin.

It is common cause that the main demand of strikers, particularly Rock Drill Operators (RDO) was for a wage increase to R 12 500.00 and improved living conditions.⁹⁴ The then majority union, mainly NUM, had distanced itself from the demand on the grounds of a collective agreement which

⁹⁰ In *Doornfontein Gold Mining Co Ltd v National Union of Mineworkers & Others* (1994) 15 ILJ 527 (LAC), the court held that the employer's refusal to allow the union to meet striking employees was unjustified.

⁹¹ *Swissport (South Africa) (Pty) Ltd v South African Transport Allied Workers Union and Others* (C600/2010) [2010] ZALCCT 3 (30 November 2010).

⁹² *Swissport* *ibid* para 17.

⁹³ *Swissport* *ibid* para 13.

⁹⁴ Farlam *op cit* note 27 at 43.

had been concluded on 02 December 2011.⁹⁵ Importantly and according to NUM, the agreement provided that the dispute of wages could not be the subject of strike action until the agreement had lapsed on 30 September 2013.⁹⁶

Owing to NUM's disapproval of the demand, the workers opted to proceed with their demand outside the recognized collective bargaining structures.⁹⁷ Indeed, the unprotected strike was staged on 9 August 2012.⁹⁸ Importantly, the provisions of section 68(1)(a)(i) were invoked by Lonmin on 10 August 2012.⁹⁹ Nonetheless, the strike, intimidation, threat and incitement of violence and actual violence persisted. It is submitted that the interdict was meant to serve a legitimate purpose of not only to promote adherence to the underlying collective agreement, but also to end the spread of intimidation, threat and incitement of violence and actual violence.

It is crucial to note, as evident from the Farlam report, that the Commission did not scrutinise much of the details around the failure to give the 48 hours' notice, the interdict itself and the subsequent defiance thereof by the workers. It can nonetheless be deduced from the same report that Marikana displays circumstances whereby it would matter the most to seek an interdict from the Labour Court. The extensive degree of non-compliance, intimidation, threats, incitement and actual violence warranted the interdict. The strike was characterized by intentional transgression of procedural requirement for a protected strike. Accordingly, in the event that the interdict was sought to stop the aforesaid incidents, the implication on the right to strike would have been reasonable and justified. In the result, any constitutional concern arising from the granting of such interdict would have been permissible.

2.5 Conclusion

The wide ambit of section 68(1)(a)(i) of the LRA has been acknowledged.¹⁰⁰ However, such undertaking was only for illustrating the inclusion of a conduct in furtherance of a strike and not for constitutional purposes. From the foregoing, the current form of section 68(1)(a)(i) of the LRA

⁹⁵ Ibid para 4.2.

⁹⁶ Ibid.

⁹⁷ Ibid at 52.

⁹⁸ Ibid.

⁹⁹ Ibid at 495.

¹⁰⁰ Grogan op cit note 70 at 206.

is, on the face of it, submitted to lead to matters of constitutional concerns as referred to above. To the extent that the Constitution is the supreme law of the Republic, these concerns cannot be ignored. The aforementioned matters, except Marikana, require that the enforcement of the interdict be relaxed in the instance of an unintended bona fide non-compliance and peaceful strike that is staged in good faith and with less degree of non-compliance. However, the impugned provision remains an obstacle towards this aspiration. Therefore, it is hoped that the success in curing the overbroad nature of the impugned provision will cure the corresponding constitutional concerns.

CHAPTER 3

An overview of the limitation of rights

3.1 Introduction

Section 7(3) of the Constitution expresses that “the rights in the Bill of Rights are subject to limitations referred to in section 36(1) of the Constitution, mainly the general limitation clause”. In essence, constitutional rights and freedoms are not absolute as they may be limited in terms of section 36(1) of the Constitution.¹⁰¹ The limitation clause was first introduced in South Africa by the Interim Constitution.¹⁰² The limitation clause in the Interim and Final Constitutions are similar in structure and language to the one found in the Canadian Constitution.¹⁰³ The similarity included the limitation clause in terms of section 33 of the Interim Constitution which is now section 36 in the final Constitution.¹⁰⁴ These resemble section 1 of the Canadian Constitution.¹⁰⁵ This chapter focuses on the limitation of the right to strike.

In *Makwanyane*,¹⁰⁶ the court was called upon to decide on the constitutionality or otherwise of the death penalty. Section 277(1) of the Criminal Procedure Act authorized the death penalty in relation to serious crimes such as murder.¹⁰⁷ Hence, the issue was “whether, in the context of our Constitution, the death penalty is cruel, inhuman or degrading, and if it is, whether it can be justified in terms of section 33” of the Interim Constitution.¹⁰⁸ The court unanimously concluded that the death penalty was no longer fitting in the new constitutional order. A similar interpretation of the limitation clause is fitting for this study.

3.2 The limitation of rights in the Bill of Rights

¹⁰¹ Currie and De Waal op cit note 36.

¹⁰² Interim Constitution op cit note 31.

¹⁰³ PW Hogg “Canadian Law in the Constitutional Court of South Africa” (1998) 13 *SAPR/PL* 1.

¹⁰⁴ Interim Constitution op cit note 31 s33.

¹⁰⁵ Hogg op cit note 103 at 7.

¹⁰⁶ *Makwanyane* supra note 32.

¹⁰⁷ Criminal Procedure Act 51 of 1977 s277(1).

¹⁰⁸ *Makwanyane* supra note 32 para 78.

3.2.1 Overview of section 36(1) of the Constitution

Section 36(1) of the Constitution provides for a particular criterion in terms of which rights in the Bill of Rights may be limited. It reads as follows:

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

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”¹⁰⁹

Limitation refers to the infringement of a right or freedom as enshrined in the Bill of Rights.¹¹⁰ Section 36(1) of the Constitution provides that a right in the Bill of Rights may be legitimately limited by a “law of general application”. The question that arises is what constitute “law of general application”? It is argued that the law is deemed to be of general application if it applies uniformly to everyone.¹¹¹ The defining factors have been that the law must apply impersonally, equally and without being arbitrary. As a result, a law which seeks to target a particular group or class of people is deemed to be arbitrary.¹¹²

In this study the focal point is whether the limitation of the right to strike by the imposition of an interdict in terms of section 68(1)(a)(i) of the LRA complies with section 36(1) of the Constitution. The answer to this question lies on whether section 68(1)(a)(i) of the LRA is a law in itself.¹¹³ To determine whether the abovementioned section is “law” one will need to locate the impugned provision within the scheme of different forms and categories of law in South Africa. These categories involve common law, customary law and legislation. The wording of the Constitution implies that only if the limitation is authorized by one of these categories of law that the limitation

¹⁰⁹ The Constitution op cit note 15 s36(1).

¹¹⁰ Currie and De Waal op cit note 36 at 151.

¹¹¹ Ibid.

¹¹² *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

¹¹³ Currie and De Waal op cit note 36 at 155 – 156.

will pass the constitutional master. It is common cause that section 68(1)(a)(i) is a legislative provision under the LRA.

Furthermore, the provision applies uniformly to employees and unions who breach the procedural requirement of giving the 48 hours' notice to the employer, therefore constitutes the law as envisaged in the limitation clause. It is noted that the LRA of 1995, particularly section 68(1)(a)(i) applies generally in the labour relations environment except for the exclusions in section 2 of the Act.¹¹⁴ The general judicial application of the law by the courts is, in this analysis, not a determiner of generality of the law, rather the focus is on the form, sufficient clarity and accessibility and the nature of the law in question.¹¹⁵ From the foregoing, it is submitted that section 68(1)(a)(i) of the LRA, based on its form, character, quality and nature, qualifies as a "law of general application".

3.2.2 Limitation of the Right to Strike

The right to strike is enshrined in section 23(2)(c) of the Constitution.¹¹⁶ This right is, on the face of section 23(2), available to every worker. However, in practice this right can be exercised by employees acting as a group.¹¹⁷ When employees collectively withdraw their labour in pursuit of a grievance or any other matter of mutual interest, they are exercising the right to strike.¹¹⁸ The LRA 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 purpose of remedying a grievance or resolving a *dispute* in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory."¹¹⁹

¹¹⁴ Section 2 of the LRA (op cit note 2) provides that "this Act does not apply to members of the National Defence Force and the State Security Agency".

¹¹⁵ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) 47.

¹¹⁶ The Constitution op cit note 15 s23(2)(c).

¹¹⁷ This is so because one cannot strike alone.

¹¹⁸ Grogan op cit note 12 at 495.

¹¹⁹ LRA op cit note 2 s213.

This provision has retained the three underlying requirements, mainly the withdrawal of labour, carried out by a group of employees, and in pursuit of a grievance or matter of mutual interest. According to *Chemical Workers Industrial Union v Plascon*,¹²⁰ the first requirement is the withdrawal of labour. This can either be complete or partial refusal to work. Secondly, the withdrawal of labour must be carried out by a collective of employees. In essence, one cannot strike alone. Lastly, there must be an underlying matter of mutual interest or grievance which motivated the strike.

The vital nature of the right to strike was highlighted in *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of South Africa*.¹²¹ The case involved an argument to the effect that a lock out should be given the same standard as the right to strike.¹²² However, Chaskalson J held against such argument. He accordingly found the right to strike to be of high importance compared to a lock out.¹²³ This is so in light of “the acknowledgement that employers have always possessed superior social and economic power over their workers”.¹²⁴ It is common for parties in a labour setting to invoke economic power as means to counter each other.¹²⁵ Hence, the court in *FAWU v Spekenham Supreme* held that collective bargaining is enforced to counteract the imbalances between employer and employee.¹²⁶

In *NUMSA v Bader Bop*, O’Regan J identified the right to strike as a vital mechanism in terms of which employees could assert their bargaining power in the working environment.¹²⁷ In order to protect employees from impairment of dignity, the court held further that the right to strike serves as an instrument for asserting the demands of employees whom may otherwise face intimidation from the employer.¹²⁸

¹²⁰ *Chemical Workers Industrial Union v Plascon* (1999) 20 ILJ 321 (LAC).

¹²¹ *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

¹²² *Chairperson of the Constitutional Assembly* Ibid paras 840C-D.

¹²³ Ibid paras 841C.

¹²⁴ Ibid 841A.

¹²⁵ Subramanien and Joseph op cit note 47 at 4.

¹²⁶ *FAWU v Spekenham Supreme* (1988) 9 ILJ 628 (IC).

¹²⁷ *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (2003) 24 ILJ 305 (CC) 13.

¹²⁸ *Bader Bop* Ibid.

Limitation has often been given a meaning similar to infringement.¹²⁹ More precisely, “a law that limits a right infringes that right”.¹³⁰ A limitation may further be defined as a restriction.¹³¹ For present purposes, the study examines the limitation of the right to strike. Furthermore, section 64(1) of the LRA envisages that, subject to procedural requirements, every employee has a right to strike. While the requirement of giving the 48 hours’ notice may in itself impair on a smooth enjoyment of the right to strike, such impairment is accepted to be necessary. This is so because the South Africa constitutional era owes its origins to the rule of law which is the foundation for compliance with the regulations.¹³²

In *SATAWU v Garvas*¹³³ it was accordingly held that a mere regulation is not a limitation.¹³⁴ This case involved a constitutional challenge of section 11(2) of the Regulation of Gatherings Act¹³⁵ (RGA). The challenge was based on the submission that section 11(2) of the RGA constituted an unjustified limitation of the freedom of assembly under section 17 of the Constitution.¹³⁶ This submission was based on the fact that section 11(2)(b) of the RGA required a person who sought to avoid liability under section 11(1) of the RGA to prove that the act or omission (wrongdoing) was not reasonably foreseeable. The Constitutional Court concluded that the alleged “...limitation is reasonable and justifiable as envisaged in section 36(1) of the Constitution”.¹³⁷

From the foregoing, compliance with the 48 hours’ notice for a strike is largely encouraged, but the adverse effect of an interdict as a sanction for non-compliance cannot be ignored. A distinction must be drawn between a limitation or restriction and complete deprivation or forfeiture of a constitutional right. On the face of it, the enforcement of an interdict resembles a complete deprivation and forfeiture of the right to strike. When an interdict is imposed, the relevant employees cannot strike whatsoever in relation to that interdict, failing which *quasi*-criminal

¹²⁹ Currie and De Waal op cit note 36 at 151.

¹³⁰ Ibid.

¹³¹ R Allen “Oxford Mini School Dictionary” (2007) *Oxford University Press* 339.

¹³² The Constitution op cit note 15 s1.

¹³³ *South African Transport and Allied Workers Union and Another v Garvas and Others* (2012) 33 ILJ 1593 (CC).

¹³⁴ Ibid para 55.

¹³⁵ Regulation of Gatherings Act 205 of 1993 s11(2).

¹³⁶ *Garvas* supra note 133 para 4. Section 17 of the Constitution (op cit note 15) provides that “Everyone has the right, peacefully and unarmed, to demonstrate, to picket and to present petitions”.

¹³⁷ *Garvas* ibid para 84.

proceedings of contempt of court may be instituted.¹³⁸ Although the order is initially granted as an interim relief, such does not alter the reality of employees who are left without their only weapon in collective bargaining. The same ordeal is true even for slight departure from procedural requirements and during peaceful strikes.

Although the Labour Court in *Polyoak*¹³⁹ has warned against an order that would have the effect of prohibiting strikers from approaching within a specified distance of the employer's premises, but such judicial leniency does not negate the broadness of the impugned provision. In *Woolworths*,¹⁴⁰ the Labour Court had discharged an order restraining employees from approaching within 500 metres of the workplace. In its reasoning, the court noted that the fact that the right to strike has to be earned by following procedures does not take away the fact that this same right is guaranteed in the constitution and all forms of limitations should be scrutinised. Furthermore, the court held, on the facts, that the strike would not serve its purpose if employees were not allowed to be within 500 metres of the employer's premises.¹⁴¹

This order may have redeemed the right to strike in that particular case, however the interim order had already been granted against employees. The fact that it was subsequently discharged does not negate the deprivation suffered by striking employees when it was granted. This latter instance will persist as a result of the continued existence of the impugned provision.

However, it seems that the position would accordingly differ where there is a reasonable belief that workers would approach a particular range to perform illegal acts or have already commenced on such acts. The court in *Woolworths*¹⁴² further warned against an order that would have the effect of removing employees entirely from the scene. This type of an order amounts to an extensive limitation of the right to strike. Notwithstanding the evidence of caution by the Labour Court, the floodgates of litigation and abuse of court processes are still opened to employers as a result of the broadness of the impugned provision. It must be noted that a strike is, by definition, not a violent conduct. The violence becomes an additional criminal activity. When the interdict is invoked for

¹³⁸ These proceedings are termed *quasi*-criminal due to the standard of proof that applies, mainly beyond a reasonable doubt.

¹³⁹ *Polyoak* supra note 71.

¹⁴⁰ *Woolworths* supra note 73.

¹⁴¹ *Ibid* para 8.

¹⁴² *Ibid*.

flimsy reasons despite slight non-compliance and definite peace, the employees are stripped off their only weapon at collective bargaining. From the foregoing, section 68(1)(a)(i) of the LRA infringes on the right to strike as envisaged in section 36(1) of the Constitution.

3.3 The right to strike in international law

3.3.1 South Africa's Commitment to international Law: General

“Customary international law and the ratification and accession to international agreements is dealt with in section 231 of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law provide a framework within which... [the Bill of Right] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provision.”¹⁴³

From this reasoning of the Constitutional Court, it is evident that reference to international law is permissible and helpful in terms of shaping the understanding and providing guidance on the progressive interpretation of the impugned provision. This understanding is strengthened by the binding nature of section 39(1)(b) of the Constitution.¹⁴⁴ Thus, there is logic in resorting to applicable international law.¹⁴⁵ While a failure to assent to international law would not preclude reference when necessary,¹⁴⁶ it bears mentioning that South Africa is a member state to the International Labour Organisation (ILO).¹⁴⁷

¹⁴³ *Makwanyane* supra note 32 para 35.

¹⁴⁴ Section 39(1) of the Constitution provides that “when interpreting the Bill of Rights, a court, tribunal or forum-
(a) ...;
(b) Must consider international law”.

¹⁴⁵ Currie and De Waal op cit note 36 at 147.

¹⁴⁶ Ibid.

¹⁴⁷ ILO website available at <https://www.ilo.org/africa/countries-covered/lang--en/index.htm> (Accessed on 09 May 2020).

In support of section 39(1) of the Constitution, section 3(c) of the LRA provides that any person applying the Act must consider and comply with “the Constitution and public international law obligations of the Republic”. Accordingly, it is compelling that section 68(1)(a)(i) be tested in light of the international standards governing labour law.

3.3.2 Influence of international law on the right to strike

It is common cause that the right to strike is not explicit in the Constitution of the ILO and same is true with Conventions.¹⁴⁸ This omission is, in light of the importance of the right to strike, said to be surprising. However, the ILO still recognizes the importance of the right to strike through the resolutions of the International Labour Conference.¹⁴⁹ The right to strike has been rightfully deemed to be inalienable from the right to freedom of association.¹⁵⁰ As a result, the Committee on Freedom of Association has declared strike action to be a correct and principal means for employees to legitimately promote and defend their interest.¹⁵¹ The Committee further recognised the conditions for exercising the right to strike. One notable condition is to give prior notice.¹⁵² This is accordingly in accordance with the obligation under section 64(1)(b) of the LRA. These international law factors illustrate the high standard of protection as afforded to the right to strike.

More recently, the ILO issued a “final report of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level”.¹⁵³ The Findings of the meeting were that had the effect that workers and employers are, in terms of International

¹⁴⁸ B, Gernigon et al... “ILO Principles Concerning the Right to Strike” *International Labour Review*, Vol. 137 (1998) Available at http://ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms087987.pdf (Accessed on 9 May 2020).

¹⁴⁹ Ibid at 7.

¹⁵⁰ Ibid at 9.

¹⁵¹ Ibid 11.

¹⁵² Ibid 25.

¹⁵³ Appendix 2 “Final Report Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level”, Geneva (2015). Available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/relconf/documents/meetingdocument/wcms_351480.pdf (Accessed on 09 May 2020). See also Appendix 3 available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351512.pdf (Accessed on 09 May 2020).

Labour Organisation, free to exercise their right to pursue industrial action in order to enforce their legitimate interests.¹⁵⁴

The findings of the report purport to reinforce that the right to strike was and continues to underpin democracy and insofar as it is an essential option for workers facing protracted opposition to collective bargaining, unsafe workplace and exploitation.¹⁵⁵ However, the impugned provision does not, as a result of the circumstances surrounding the limitation of the right to strike, adhere to the aspirations of international labour law.

3.4 Conclusion

From the foregoing, section 36(1) of the Constitution permits limitation of rights in the Bill of Rights. It is submitted that section 68(1)(a)(i) of the LRA interferes with the enjoyment of the rights to strike. This interference amounts to a limitation for the purposes of section 36(1) of the Constitution. This stems from the overbroad nature of the impugned provision. The principles of international law, to which South Africa is a member, envisage an utmost need to safeguard the rights to strike. As a result, it would be futile to the rule of law if the obligations imposed by the Constitution and international law are not given utmost cognisance when interpreting section 68(1)(a)(i) of the LRA. The affirmative findings herein propel a critical analysis of the second stage of the limitation clause, mainly the justification, reasonableness or otherwise of the limitation.

¹⁵⁴ Ibid (Joint statement 2).

¹⁵⁵ Ibid.

CHAPTER 4

The limitation of the right to strike: whether it is reasonable and justifiable in terms of section 36(1) of the Constitution?

4.1 Introduction

As stated above,¹⁵⁶ the structure of section 36(1) of the Constitution, similar to the Canadian Constitution, allows certain limitations to be absolved from invalidity. The permissibility of a limitation of a right goes beyond requiring the law to be of general application. The limitation must further be reasonable and justifiable. In essence, the proportionality test is invoked in order to determine the existence or otherwise of legitimate reasons to support the limitation. Like all other constitutional rights, the right to strike is subject to section 36(1) of the Constitution.¹⁵⁷

4.2 Proportionality as a yardstick of reasonableness and justification

Once it has been established that a right in the Bill of Rights has been infringed and that the infringing law qualifies as “law of general application”, the next phase is to determine whether the limitation or infringement is reasonable and justifiable. This is done by applying the factors listed in section 36(1)(a)-(e) of the Constitution. It is accepted that the law which purports to authorise the limitation of a right “should not invade rights any further than it needs to in order to achieve its purpose”.¹⁵⁸ This implies a balancing approach between harm caused by the impugned law and the benefits thereof. Drawing from *Makwanyane*, the court held that rights in the Constitution may

¹⁵⁶ See note 103 above.

¹⁵⁷ S Van Eck and T Kujinga “The Role of the Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 ILJ 476 (LC)” (2017) 20 *PER / PELJ* 3.

¹⁵⁸ Currie and De Waal op cit note 36 at 162 – 163).

be limited if the purpose is reasonable and necessary in a democratic society following the process of weighing up competing values, and the elements of proportionality.¹⁵⁹

For the present analysis, the harm done by the infringing law, being s 68(1)(a)(i) of the LRA, is to be weighed up or measured against the benefits it seeks to achieve. For the purposes of guiding and facilitating the analysis, the limitation clause¹⁶⁰ asserts that “all relevant factors” must be considered, particularly “(a) the nature of the right;¹⁶¹ (b) the importance of the purpose of the limitation;¹⁶² (c) the nature and extent of the limitation;¹⁶³ (d) the relation between the limitation and its purpose;¹⁶⁴ and (e) less restrictive means to achieve the purpose”.¹⁶⁵ The court in *Makwanyane*¹⁶⁶ had, though based on the Interim Constitution,¹⁶⁷ identified similar factors as making up the proportionality enquiry.

4.2.1 *The nature of the right*

One of the leading constitutional ambitions is “to create an open and democratic society based on human dignity, freedom and equality”.¹⁶⁸ In order to achieve this ambition, all rights enshrined in the Bill of Rights are of a particular weight and importance.¹⁶⁹ It is essential that the degree of weight and importance of a particular right should correspond with the protection afforded to such right. Since the South African Constitution is transformative,¹⁷⁰ the right to strike draws much of its weight and importance from the aspirations to “achieve economic development, social justice, labour peace and democratization of the workplace”.¹⁷¹

¹⁵⁹ *Makwanyane* supra note 32 para 104.

¹⁶⁰ The Constitution op cit note 15 s36(1).

¹⁶¹ Ibid s36(1)(a).

¹⁶² Ibid 36(1)(b).

¹⁶³ Ibid 36(1)(c).

¹⁶⁴ Ibid 36(1)(d).

¹⁶⁵ Ibid 36(1)(e).

¹⁶⁶ *Makwanyane* supra note 32.

¹⁶⁷ Interim Constitution op cit note 31.

¹⁶⁸ Currie and De Waal op cit note 36 at 164.

¹⁶⁹ Ibid.

¹⁷⁰ D Davis and K Klare “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 *SAJHR* 404.

¹⁷¹ LRA op cit note 2 s1.

Before the adoption of the Constitution, the achievement of equilibrium in industrial relations was already deemed impossible in the absence of freedom to strike.¹⁷² For this reason, the transition into the constitutional era and the adoption of the LRA of 1995 may have accordingly been expected to reinforce the mechanisms to establish and retain the much desired equilibrium. The Constitution has provided the right to strike with utmost independence. This differs from other jurisdictions where the right to strike is derived from freedom of association.¹⁷³ Modern day scholars have also accepted that:

“The right to strike is generally considered a vital adjunct of the right to bargain collectively. According to a famous aphorism, without the right to strike, collective bargaining is nothing more than collective begging.”¹⁷⁴

In consideration of the wide range of powers at the disposal of the employer, it remains difficult for employees to challenge the usually unbalanced bargaining table. To the extent that the right to strike is the heart of collective bargaining, the harm inflicted by the impugned provision appears deadly to the already unstable collective bargaining.¹⁷⁵ Accordingly, the right to strike shall not be infringed for flimsy reasons. The courts have often adopted a cautious and generous approach to acknowledge the nature of the right to strike in favour of employees.

In *Chairperson of the Constitutional Assembly*,¹⁷⁶ the court accepted the important nature of the right to strike in that it is one primary tool in terms of which employees exercise collective power.¹⁷⁷ In *Universal Product Network*,¹⁷⁸ the court had been called upon to confirm a rule nisi which had been granted in relation to an allegedly violent strike. On return date, the court refused to confirm the rule as “the alleged violence did not justify a confirmation of the rule nisi”. In essence, confirmation of the rule would have placed an undue limitation of the right to strike.¹⁷⁹ The judgment accordingly recognizes the important nature of the right to strike.

¹⁷² P Davis & M Friedland Kahn-Freund’s Labour Law 3ed (1983) 292.

¹⁷³ Germany resembles such practice (see Van Eck and Kujinga op cit note 152 at 10).

¹⁷⁴ Grogan op cit note 12 at 495.

¹⁷⁵ See J, Theron “Organisational and collective bargaining rights through the lens of Marikana” (2015) 36 *ILJ* 849.

¹⁷⁶ *Chairperson of the Constitutional Assembly* supra note 116.

¹⁷⁷ Ibid at 66.

¹⁷⁸ *National Union of Food Beverages Wine Spirits and Allied Workers and Others v Universal Product Network (Pty) Ltd* (2016) 37 *ILJ* 476 (LC).

¹⁷⁹ Van Eck and Kujinga op cit note 157 at 10.

*Bader Bop*¹⁸⁰ is also another authority which illustrates the extent of the court's approach to the important nature of the right to strike. This case concerns an attempt by a minority union to use a strike to enforce organisational rights even though the LRA did not afford such right to minority unions. O'Regan J relied on the ILO principles and the Constitution to find that the alleged statutory provisions did not explicitly preclude the minority union from exercising their right to strike.¹⁸¹ The court went further to state that if the LRA is capable of being interpreted in a manner that does not limit the constitutional rights, then such interpretation should be preferred.¹⁸²

As it was held in *Makwanyane*, the important nature of the rights to dignity and to life dictated that there be very compelling reasons to justify the limitations.¹⁸³ Similarly, the rights to strike is also of utmost importance so as to require the existence of compelling reasons to justify the limitations thereof.

4.2.2 *The importance of the purpose of the limitation*

The standard of reasonableness requires that there be a purpose to justify a limitation.¹⁸⁴ The said purpose must be in line with the constitutional order by adhering to the aspirations of human dignity, equality and freedom.¹⁸⁵ Hence, a purpose that falls short of these aspirations would not be important for the purposes of justifying the limitation. Importantly, the important nature of the purpose of the limitation is not, on its own, sufficient to justify the limitation. The court in *Makwanyane*¹⁸⁶ was in agreement that deterrence and prevention of violent crimes were important purposes of the death penalty. However, this was not to be a decisive criterion as other elements were not met. The similar approach is applicable to section 68(1)(a)(i) of the LRA. Among other founding values of the constitutional order is the "supremacy of the Constitution and the rule of law".¹⁸⁷ The supremacy of the Constitution entails that no law or conduct should contradict the Constitution while the rule of law seeks to encourage compliance with legal principles.

¹⁸⁰ *Bader Bop* supra note 127.

¹⁸¹ *Ibid* para 36.

¹⁸² *Ibid* para 37.

¹⁸³ *Makwanyane* supra note 32 paras 142 – 143.

¹⁸⁴ Currie and De Waal op cit note 36 above at 166).

¹⁸⁵ *Ibid*.

¹⁸⁶ *Makwanyane* supra note 32 para 117.

¹⁸⁷ The Constitution op cit note 15 s1(c).

Accordingly, the need for compliance with the Constitution and the LRA cannot be ignored, at least not in the absence of compelling reasons. In order to regain the society's trust in the legal system, it is essential that non-compliance with lawful provisions be condemned and discouraged through the enforcement of the rule of law. In this context, section 68(1)(a)(i) of the LRA exists as a sanction for non-compliance with section 64(1) of the LRA. This may well be a purpose that "a democratic society based on freedom and equality would consider worthwhile and important". This purpose may also be linked to the ambitions of orderly collective bargaining as enshrined in section 1(d)(i) of the LRA.

According to Grogan, the purpose of granting a strike the protected status is "to encourage employees to comply with statutory provisions while resorting to industrial action".¹⁸⁸ As a result, non-compliance is subjected to sanctions. On the face of it, it appears that the legislature enacted the impugned provision with the purpose of reinforcing the importance of adhering with the procedural requirements of a strike. In this regard, the workers and unions are aware that if they stage an unprotected strike, the employer may seek an interdict to that effect. On the face of it, the purpose itself is accepted to be legitimate. In essence, this is the "purpose that an open and democratic society based on freedom and equality would consider worthwhile and important". However, the legitimacy and the importance of the purpose will be better understood once the said constitutional concerns on the current structure, the ambit, the extent and the broadness of section 68(1)(a)(i) of the LRA have been remedied.

4.2.3 The nature and extent of the limitation

While a strike that falls short of the provisions of section 64(1) of the LRA is unprotected and should generally be condemned, the process of condemnation and its effects cannot be ignored. The focus turns to the effect of the limitation on the affected right, being the right to strike.¹⁸⁹ The essence of proportionality is that the infringing law should not inflict more harm than it is necessary to achieve the purpose.¹⁹⁰ Accordingly, the inquiry is whether there is proportionality between the harm inflicted by the interdict, being the infringement of the right to strike and the purpose it seeks

¹⁸⁸ Grogan op cit note 12 at 460.

¹⁸⁹ Currie and De Waal op cit note 36 at 168.

¹⁹⁰ Ibid.

to achieve, being to encourage compliance with procedure and to promote orderly collective bargaining.

In *S v Manamela*, the Constitutional Court held that the infringing law “should not use a sledgehammer to crack a nut”.¹⁹¹ While the extensive nature of the impugned provision may be welcomed in the instances of *mala fide* defiance, intentional non-compliance, threat and incitement of violence and actual violence, these instances are not expressly addressed in the LRA. As a result, section 68(1)(a)(i), in its current form, is submitted to be a sledgehammer in relation to *bona fide*, unintended/ trivial non-compliance and peaceful strike. In *Makwanyane*,¹⁹² the court assessed the degree of harm in order to determine the seriousness of the infringement on the rights to life and to dignity. The grave and irreparable effect on the right to life was held to be severe in that the death penalty is irrevocable.¹⁹³

In *Universal Product Network*,¹⁹⁴ the court recognized that the interim interdict has “deceptive ability not to be truly interim in nature, but rather has a permanent impact on the dynamics of collective bargaining”.¹⁹⁵ It is submitted that the ambit and structure of the interdict has far reaching effects on the right to strike and essentially on the prospect of bargaining on a somewhat equal footing. By infringing on the employee’s only weapon (strike), the vulnerability increases. As noted above,¹⁹⁶ the current structure and ambit of the interdict leads to an order directing employees not to strike and thereby resulting in a deprivation of the right to strike. This deprivation is worsened by the fact that the degree and circumstances of non-compliance are not distinguished in the impugned provision.

The previous regime under the LRA of 1956 was notorious for imposing a criminal offence in the instance of non-compliance. However, a thorough evaluation of the repercussions warranted the removal of the sanction entirely. For present purposes, the repercussions of section 68(1)(a)(i), in its current form and structure are, notwithstanding the importance of the purpose, extensive.

¹⁹¹ *S v Manamela and Another (Director of Justice Intervening)* 2000 (3) SA 1 (CC) 34.

¹⁹² *Makwanyane* supra note 32.

¹⁹³ *Ibid* at 127.

¹⁹⁴ *Universal Product Network* supra note 178 para 7.

¹⁹⁵ Van Eck and Kujinga op cit note 157 at 7.

¹⁹⁶ See sub-heading 234 above.

Although the purpose represents a constitutional obligation of adhering to the rule of law, but such can still be achieved without severe limitation of constitutional rights.

In *S v Bhulwana*,¹⁹⁷ it was held that:

“In sum, therefore, the court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more the inroad into fundamental rights, the more persuasive the ground of justification must be.”¹⁹⁸

From the foregoing, the inroad into the right to strike is severe and the LRA does not offer a justification to that effect. As much as the rule of law is held in high regard, there is a need to guard against imposing harsher sanctions than necessary. This is more so when constitutional rights are on the line. Essentially, albeit in a different context, the need to avoid the risk of alienating the Constitution from the people has been endorsed.¹⁹⁹

4.2.4 The relation between the limitation and its purpose

As legitimate and acceptable the purpose may be, it would still not pass the test of proportionality if it cannot be linked with the limitation. The aim is to establish the nexus between the infringing law and its purpose. In order to satisfy the proportionality test, there must be a rational connection between the means (interdict) and the ends (compliance and orderly collective bargaining).²⁰⁰

The connection must be sufficient to justify the limitation of fundamental rights.²⁰¹ In *Makwanyane*, this was held to be a factual approach requiring evidence to establish the presence or the absence of the rational connection.²⁰² According to Didcott J,²⁰³ the significance of the rights at stake required that nothing less be expected when establishing the necessary connection. As a result, a mere marginal contribution to the achievement of the purpose would not suffice when

¹⁹⁷ *S v Bhulwana* 1996 (1) SA 388 (CC).

¹⁹⁸ *Ibid* para 18.

¹⁹⁹ C Albertyn and D Davis “Legal Realism, Transformation and the Legacy of Dugard” (2010) 26 *SAJHR* 213.

²⁰⁰ Currie and De Waal *op cit* note 36 at 169.

²⁰¹ *Ibid*.

²⁰² *Makwanyane* *supra* note 32 para 184.

²⁰³ *Ibid*.

weighty rights are at stake.²⁰⁴ This is to say that, even if, through the limitation of the rights to strike, there appears to be a slight achievement of the purpose, such appearance cannot be an adequate satisfaction of the proportionality test. Section 68(1)(a)(i) resembles this situation in that it, at first glance, appears to be achieving the purpose of encouraging compliance when it is instead inflicting extensive harm on constitutional rights. It is accurately argued that, for various reasons, more strikes are taking place in the absence of procedural compliance.²⁰⁵

Notwithstanding the extensive nature and extent of the limitation, there is still an increasing number of unprotected strikes and violent strikes in South Africa.²⁰⁶ The much desired end of utmost compliance and orderly collective bargaining is still not guaranteed. But the interdict (as the means) remains applicable on a broader extensive scale. The question then turns to the effectiveness of the infringing law. It is submitted that not all forms of non-compliance with section 64(1)(b) of the LRA are sinister or are in bad faith. Hence, the effectiveness of considering the merits of each case outweighs the effectiveness of the interdict in achieving the purpose.

It may also be argued that a mere encouragement and aspirations of orderly collective bargaining do not always prevent non-compliant and violent strikes. This has been evident when protected strikes have been characterized by violence and illegal activities. This has been the case notwithstanding the extensive nature and extent of the limitation. Hence, to attribute strike violence to the failure to comply with section 64(1)(b) of the LRA may not always be accurate. Furthermore, the granting of an interdict, does not always persuade employees to abandon the strike. Although this conduct is not in line with the rule of law, but it remains an unfortunate reality.

*KPMM Road and Earthworks*²⁰⁷ resembles a procedurally compliant strike which was later interdicted for illegal activities. Notwithstanding the interdict, the strike persisted. This is crucial to illustrate that the interdict is not, despite infringement of constitutional rights, always guaranteed to achieve compliance and orderly collective bargaining and that violent strikes are not caused by non-compliance with section 64(1)(b) of the LRA. Rather, the causes of non-compliant and violent

²⁰⁴ Currie and De Waal op cit note 36 at 169.

²⁰⁵ Grogan op cit note 70 at 205.

²⁰⁶ P, Mfusi *An investigation into the effectiveness of trade unions in advancing the cause of workers during strikes in the face of an emerging culture of violence and criminality* (unpublished LLM Thesis, University of KwaZulu-Natal, 2019) at 11 - 12.

²⁰⁷ *KPMM Road and Earthworks (Pty) Ltd* supra note 84.

strikes are more fundamental than an unintended and slight failure to follow procedural requirements.²⁰⁸ In *Tsogo Sun Casinos v FSAWU*²⁰⁹ a wage dispute led to the staging of a protected strike. The protection, however, did not prevent the strike from escalating to violence. As a result, an interim interdict was rightfully granted to prevent illegal acts. Although the impugned provision is silent on violence and related circumstances, but these cases indicate a clear role of the interdict, mainly to prevent violence and to achieve orderly collective bargaining.

In *Makwanyane*,²¹⁰ the court found that there was a rational connection between the limitation and the purpose of prevention. This is so because death penalty was to ensure that the offender does not live to commit any violent crime again. However, this finding was not adequate to pass the proportionality test because other elements of the test were not met. For present purposes, the limitation on the right to strike remains a concern because the purpose for which it is intended to serve remains elusive. Hence, the absence of the causal link between the limitation and the purpose is contrary to the constitutional obligations of establishing an “open, democratic society based on human dignity, equality and freedom”.

4.2.5 Less restrictive means to achieve the purpose

For emphasis, it bears mentioning that the promulgation of the impugned provision for the purposes of encouraging procedural compliance and orderly collective bargaining cannot be faulted. However, appropriate circumstances for a suitable application of the interdict will be suggested. For the purposes of achieving the purpose, it would not be in line with the constitutional ambitions if appropriate less restrictive means are side-lined in favour of the infringing means. The availability of the former will indicate the absence of proportionality between the latter and the purpose.

The enforcement of criminal sanctions under the LRA of 1956 did not only come with extensive repercussions, it also existed alongside various less restrictive means of achieving the similar

²⁰⁸ For fundamental causes of violent strikes, see E Tenza “An investigation into the causes of on causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions” (2015) 19 *Law, Democracy and Development* 211 – 231.

²⁰⁹ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers Union and Others* (2012) 33 ILJ 998 (LC).

²¹⁰ *Makwanyane* supra note 32 para 106.

purpose. These included claim for damages, just and equitable compensation, lock out and the interdict. Amid the transition to the LRA of 1995, on the face of it, the legislature treated the interdict as less restrictive means compared to criminal means and thereafter retained the provision. At a first glance, this legislative undertaking may have, at that time, appeared as a progressive step for labour relations, but for the recent over-changing labour dimensions, the proportionality of the impugned provision has fallen. Although these means are not without their own critiques and problems,²¹¹ but the aim herein is only to indicate their less restrictive nature compared to section 68(1)(a)(i) of the LRA. Hence, the court in *Makwanyane* held that “while a life imprisonment would also be an infringement of rights, but would not be as extensive as the death penalty”.²¹² The following less restrictive means will be analysed: Lock-outs; just and equitable compensation and dismissal.

(a) Lock-out

As a counterpart to a strike, employers may invoke a lock-out.²¹³ However, the said availability of a lock-out does not nearly suggest equilibrium between the employer and employees. This is so because the employer remains in the driving seat in terms of financial means and resources. In *Ex parte Chairperson of the Constitutional Assembly*,²¹⁴ the court held that these two phenomenon are not equivalent, a strike being a right whilst a lock-out is a recourse. The lock-out is an addition to a range of weapons at the employer’s disposal. As a result, the status *quo* of power remains uninterrupted.

A lock-out is defined in the LRA as:

“...the exclusion by an employer of employees from the employer’s workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employees, whether or not the employer breaches those employees’ contracts of employment in the course of or for the purpose of that exclusion.”²¹⁵

While a lock-out is an addition to a range of weapons at the employer’s disposal, but it does not entirely deprive employees from their rights to strike, instead, the rights are restricted to be

²¹¹ See Tenza op cit note 1 at 263 – 267.

²¹² *Makwanyane* supra note 32 at 106.

²¹³ Grogan op cit note 70 at 256.

²¹⁴ *Ex parte Chairperson of the Constitutional Assembly* supra note 121.

²¹⁵ LRA op cit note 2 s213.

exercised outside the employer's workplace. In this way, the right to strike is not forfeited, but it is limited for reason of non-compliance with procedural requirements. Hence, the infringement inflicted by a lock-out to a non-compliant strike will not be as extensive as an interdict in its current form. Therefore, the lock-out is submitted to be an appropriate less restrictive approach to a non-compliant strike.

(b) Just and equitable compensation

It is common cause that employees do not have as much economic means as the employer. As a result, the remuneration that employees receive from the employer is often the main source of income for the former. Similarly, the unions often generate their finances through the fees collected from their members.²¹⁶ Notwithstanding the concerns surrounding this relief,²¹⁷ the aim herein is not to seek perfect means, but it is to establish that it is less restrictive than section 68(1)(a)(i) of the LRA. As it is with an interdict, the relief of just and equitable compensation is also determined by the Labour Court.²¹⁸

Section 68(1)(b) of the LRA is essentially providing the much needed guidance to the Labour Court by setting out the kind of assessment criteria for a just and equitable compensation. The same cannot be said with the current form of the impugned provision. Hence, the concerns of ambiguities and over broadness. The wording of section 68(1)(b) of the LRA does not contain the words "...or conduct in contemplation or furtherance of a strike...". Unlike section 68(1)(a)(i) of

²¹⁶ Ibid s13.

²¹⁷ See Tenza op cit note 1 at 265.

²¹⁸ Section 68(1) of the LRA (op cit note 2) provides that "In the case in the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-

(a) ... ;

(b) to order the payment of just and equitable compensation for any loss attributable to the strike, lockout, or conduct, having regard to-

(i) whether-

(aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(bb) the strike or lock-out or conduct was premeditated;

(cc) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and

(dd) there was compliance with an order granted in terms of paragraph (a);

(ii) the interests of orderly collective bargaining;

(iii) the duration of the strike or lock-out or conduct; and

(iv) the financial position of the employer, trade union or employees respectively".

the LRA, liability is limited to “any loss attributable to the strike...”. The court in *Mangaung Local Municipality v SAMWU*²¹⁹ held that this exclusion could be interpreted to mean that unions and employees who engage in an unprotected strike may only be liable for damages arising from the strike itself and not ancillary conducts in contemplation or furtherance of the strike. Therefore, this provision has accordingly narrowed the ambit of liability.

Essentially, it is reasonable to expect employees and unions to guard against being financially liable to the already economically elite employers. The thought of being held liable for harsh compensation is crucial to encourage compliance. In this regard, the court in *Mangaung Local Municipality* held that the sanction of just and equitable damage was designed to send a clear message to the effect that unprotected strikes will not be tolerated.²²⁰ On the face of it, the considerations in section 68(1)(b) of the LRA indicate that the court may condone minor transgressions of the Act. As a result, the sanction of a just and equitable compensation is less restrictive compared to the interdict where there is no consideration of degrees of non-compliance and the circumstances which often characterize a strike. It is thus submitted that the costs of the limitation that may possibly be imposed by a just and equitable remedy are more proportional to the benefit than section 68(1)(a)(i) of the LRA.

(c) Dismissal

The enhancement of job security is an important objective of the LRA of 1995.²²¹ In the absence of adequate facts indicating otherwise, a dismissal is generally deemed to be a harsh form of sanction.. Thus a dismissal is often regarded as a measure of last resort and thus reserved for serious forms of workplace transgressions.²²² However, this general perception is not absolute. In essence, it may be rebutted by adducing sufficient reasons to warrant a dismissal. Section 68(5) of the LRA provides that an employee may be fairly dismissed for participating in a strike that falls short of the substantive and procedural requirement. This includes conduct in contemplation or in furtherance of a strike. The section further imposes an obligation to determine the fairness or

²¹⁹ *Mangaung Local Municipality v South African Municipal Workers Union* [2003] BLLR 268 (LC) 272.

²²⁰ *Ibid* para 269.

²²¹ Grogan *op cit* note 12 at 164.

²²² *Ibid* at 231.

otherwise of the dismissal by imposing a corresponding mandatory duty to consider the Code of Good Practice: Dismissal in Schedule 8 the LRA.²²³

Although a dismissal is a threat to job security, but the obligation to use the Code of Good Practice²²⁴ (Code) may be a mitigating factor. It is clear from the Code that each case is considered on its own merits. Item 3(3) of Schedule 8²²⁵ provides that “dismissal should be reserved for cases of serious misconduct or repeated offences”. This is crucial to indicate that the employer is not at liberty to dismiss employees for flimsy reasons relating to a strike. As a result, the importance of job security is not surrendered without a just and reasonable cause. In addition, Item 6 of the Code²²⁶ deals specifically with dismissals and industrial action. While subparagraph (1) acknowledges that non-compliance with procedural requirements is misconduct, it further binds the employer to consider the following:

- “(a) The seriousness of the contravention of the Act;
- (b) Attempts made to comply with the Act; and
- (c) Whether the strike was or was not in response to an unjustified conduct by the employer.”

These considerations have the effect of mitigating the seemingly extensive nature of a dismissal. The impugned provision does not have the *express* nor implied benefit of these considerations. The repercussions therein have the effect of establishing the impugned provision as an extensive, unreasonable and unjustified infringing law. This effect is submitted to be contrary to the aspirations of “an open and democratic society based on human dignity, equality and freedom”. Because a dismissal is feared by the working class, it may well achieve the purpose of discouraging non-compliance without limiting constitutional rights more than it is reasonably necessary.

4.3 Whether section 68(2) of the LRA is a mitigating factor?

Section 68(2) of the LRA provides that:

²²³ LRA op cit note 2 s68(5).

²²⁴ Ibid schedule 8.

²²⁵ Ibid Item 3(3) of the Code of Good Practice.

²²⁶ Ibid Item 6 of the Code of Good Practice.

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

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

This provision speaks to the right to be heard which apply in all forms of fair court proceedings. The right to be heard gives the alleged wrongdoer a chance to assert his or her version with a belief that the employer might change his or her position. However, several applications under section 68(1)(a)(i) of the LRA are still granted on *ex parte* basis.²²⁷ This indicates the flexibility that is permitted by the Labour Court when adjudicating on interdicts. As a result, the flexibility favours the applicant (employer). In the instance of high degree and *mala fide* non-compliance, threat and incitement of violence or actual violence, it may well be understandable to approach the court on *ex parte* basis owing to the urgency of the matter. But in the instance of a peaceful strike with minimum degree of unintended *bona fide* non-compliance, it does not make a reasonable legal basis not to furnish the notice. While this provision is crucial to safeguard the impugned provision, but it does not cure the constitutional concern of over broadness. Hence, it does not negate the extensive nature of the limitations imposed by the interdict in its current form and structure.

4.4 Conclusion

From the foregoing, it is clear that the important nature of the right to strike demands that a limitation should not infringe more than it is reasonably necessary and more so in the absence of adequate compelling reasons. The promotion of the rule of law by sanctioning the failure to comply therein is submitted to be in line with constitutional ambitions of an open democratic society

²²⁷ See Tenza op cit note 1 at 108.

founded on human dignity, freedom and equality. However, the sanction cannot be left to defeat constitutional ambitions by inflicting unreasonable harm to constitutional rights. To the extent that section 68(1)(a)(i) seeks to promote compliance with the law and advance the aspirations of orderly collective bargaining, it is submitted to be a legitimate and important purpose. However, the importance of the purpose is not conclusive.

The limitation has been shown to be drastic and excessively wide in nature. This means a blow to the proportionality between the infringement and the benefit. The former is more severe than the latter. Notwithstanding the severe limitation and the important nature of the purpose, there is a disconnection between the infringement on the right to strike, compliance with procedural requirements and orderly collective bargaining. This disconnection may well suggest that it is not fitting for the current section 68(1)(a)(i) to apply in an overbroad manner. The blow on proportionality is further exacerbated by the availability of other means which have been established to be less restrictive. In essence, a lock-out; just and equitable compensation and dismissal do not, despite their own flaws, infringe on constitutional rights as extensive as the section 68(1)(a)(i) interdict. These findings are indicative of a negative outcome on the question of reasonableness and justification of the limitation. Accordingly, the impugned provision is submitted to be overbroad and thus unconstitutional for an unjustified infringement of the right to strike.

CHAPTER 5

How to remedy the unconstitutionality?

5.1 Introduction

The finding of unconstitutionality does not, on its own, cure the constitutional concern. Further positive steps are necessary to remedy the unconstitutionality.²²⁸ The Constitution has endowed the courts and the legislature with powers to effect the necessary remedies. Because the constitutional concern lies with a legislative provision, the cure may well be sourced from the legislature.²²⁹ In the absence of such needed legislative intervention, the higher courts of the Republic may be approached to adjudicate solely on the question of constitutionality.²³⁰

5.2 Constitutional Remedies: Judicial intervention

While the legislature is better positioned to deal with legislative reforms and amendments, but it does not always invoke such powers until there is a push factor. The ruling of the Constitutional Court may well be the much needed push factor. Section 38 of the Constitution provides for the enforcement of rights.²³¹ A competent court may, when approached by competent litigants, accordingly grant an appropriate relief to remedy the infringement of a right in the Bill of Rights. The following persons may approach a court:

- “(a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and

²²⁸ C Okpaluba “Of ‘forging new tool’ and ‘shaping innovative remedies’: Unconstitutionality of legislation infringing fundamental rights arising from legislative omissions in the new South Africa” 2001 *Stell LR* 477.

²²⁹ The National Assembly (parliament) has, in terms of s55(1)(a) of the Constitution, powers to consider, pass, amend or reject any legislation tabled before it.

²³⁰ Section 172(1)(a) of the Constitution provides that a court when deciding a constitutional matter must declare a law or conduct to be invalid to the extent that it is inconsistent with the Constitution.

²³¹ The Constitution op cit note 15 s38.

(e) an association acting in the interest of its members.”²³²

The ambit of section 68(1)(a)(i) of the LRA involves both the employees in their own capacities and unions in representative capacities. Therefore, the employees may well invoke section 38(a) of the Constitution²³³ to the extent that they are acting in their own interest. Similarly, the unions may also institute action because they represent the interests of a group or class of persons as envisaged in section 38(c) of the Constitution.²³⁴ For present purposes, it is suggested that an appropriate relief is one that will vindicate the right to strike. This will be discussed below.

Upon adjudication, the court is bound, in terms of section 39(2) of the Constitution²³⁵ to interpret section 68(1)(a)(i) of the LRA in a manner that will “promote the spirit, purport and objects of the Bill of Rights”. However, as noted above, the current form and structure of section 68(1)(a)(i) of the LRA is not capable of such interpretation. This gap necessitates that steps be taken to give the impugned provision an interpretation that will be in accordance with section 39(2) of the Constitution, mainly “the spirit, purport and objects of the Bill of Rights”. In *Fose v Minister of Safety and Security*,²³⁶ the court held that section 2 of the Constitution demands that unconstitutional law be automatically deemed to be a nullity.²³⁷ However, such unconstitutional law would remain applicable until set aside by a court.²³⁸ In *Dawood*,²³⁹ it was held that it is not enough to find that a legislative provision is unconstitutional, but the court has a further obligation of declaring such provision to be invalid due to its inconsistency with the Constitution.²⁴⁰

After the declaration of invalidity, the court may, in terms of section 172(1)(b) of the Constitution,²⁴¹ make any order that it deems just and equitable in the circumstances. It is noted that the Constitution does not prescribe a particular remedy for a violation of constitutional rights. In *Hoffmann v South African Airways*,²⁴² the court held that the determination of an appropriate remedy necessitates a careful analysis of “...the nature of the constitutional infringement, and

²³² Ibid.

²³³ Ibid s38(a).

²³⁴ Ibid s38(c).

²³⁵ Ibid s39(2).

²³⁶ *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC).

²³⁷ Ibid para 94.

²³⁸ Currie and De Waal op cit note 36 at 179. See also s172(2)(a) of the Constitution.

²³⁹ *Dawood* supra note 115.

²⁴⁰ Ibid paras 17 and 59.

²⁴¹ The Constitution op cit note 15 s172(1)(b).

²⁴² *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

strike effectively at its source”.²⁴³ The analysis in chapter two, three and four has shown that the source of the infringement is the form and structure of section 68(1)(a)(i) of the LRA. In essence, the provision contains and misses’ words which currently contribute to the unconstitutionality. These inclusions and omissions can generally be addressed, by a court, through constitutional remedies known as severance and reading-in.

5.2.1 Severance

In *Van Rooyen v The State*,²⁴⁴ the court held that:

“Where legislation is found to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance or reading-in so as to bring the law within acceptable constitutional standards.”²⁴⁵

As a result, a declaration of complete invalidity may well be invoked when severance and reading-in are not possible. Severance was held, in *South African National Defence Union v Minister of Defence*,²⁴⁶ to be a cure for any constitutional defects. Actual severance is defined as the removal of words or phrases from a statutory provision, whereas notional severance does not alter the wording per se, instead it seeks to subject the application of the provision to a condition.²⁴⁷ The latter is often invoked in, as it is with section 68(1) of the LRA, the instance of an overbroad provision.²⁴⁸ In *Coetzee v Government of the Republic of South Africa*,²⁴⁹ the court adopted a two staged test to determine whether severance was appropriate.²⁵⁰ First, whether the bad can be separated from the good. Secondly, whether the remainder of the provision will still give effect to the purpose thereof.

²⁴³ Ibid para 45.

²⁴⁴ *Van Rooyen and Others v The State and Others (General Council of the Bar intervening)* 2002 (5) SA 246 (CC).

²⁴⁵ Ibid para 88.

²⁴⁶ *South African National Defence Union v Minister of Defence and Others* (2007) 28 ILJ 1909 (CC).

²⁴⁷ Currie and De Waal op cit note 36 at 185.

²⁴⁸ Ibid.

²⁴⁹ *Coetzee v Government of the Republic of South Africa, Matiso and Others Commanding Officer Port Elizabeth Prison and Others* 1995 (10) BCLR 1382 (CC).

²⁵⁰ Ibid para 16.

In accordance with *South African National Defence Union*,²⁵¹ severance may well be invoked to cure the constitutional defects in the impugned provision. The provisions of section 68(1)(a)(i) were enacted with a legitimate underlying purpose, mainly to encourage compliance and orderly collective bargaining. As a result, the provision need not be entirely invalidated. However, the disconnection between the infringing provision and the purpose suggests that the ambit of section 68(1) needs to be subjected to conditions which would eliminate the current concern. As it stands, the impugned provision allows an interdict to be sought for any form of non-compliance with the provisions of Chapter IV of the LRA.

In light of the above, the following is hereby recommended:

For the purposes of achieving a proper application of section 68(1), notional severance may be invoked. This is so because, in *National Coalition for Gay and Lesbian Equality*²⁵² the court held that notional severance may be used in the instance of a provision that is too extensive and thus constitutionally offensive. The extensive nature of section 68(1) can, it is submitted, be cured by the inclusion of the following conditions:

- (a) Distinction between degrees of non-compliance;
- (b) Consideration of bona/mala fides of the wrongdoers;
- (c) Consideration of the attempts made to comply; and
- (d) Consideration of reasons for non-compliance.

The inclusion of conditions can be left open and not be rigid. The former will give the court powers to exercise its discretion to access other relevant considerations as they may be necessary on a case by case basis. An explicit inclusion of the aforementioned conditions will serve to eliminate the overbroad application of the interdict. This is so because strikes take place under different circumstances. Therefore, it is recommended that intentional, negligent, *mala fide* and *bona fide* types of defiance be treated in accordance with the magnitude of transgression that they each possess. Intentional and *mala fide* type of non-compliance resembles a higher degree of defiance and thus justifies a higher degree of a sanction such as an interdict. However, slight, unintended

²⁵¹ *South African National Defence Union* supra note 246.

²⁵² *National Coalition for Gay and Lesbian Equality* supra note 112.

and *bona fide* transgressions should be subjected to the aforementioned conditions before they are sanctioned by a sledgehammer in the form of an interdict.

From the current application of the impugned provision, it is only section 68(1) that will be capable of notional severance and not subparagraph (a)(i). This is so because the said subparagraph can be cured by the inclusion of omitted words. This is known as reading-in. In *National Coalition for Gay and Lesbian Equality*,²⁵³ the court held that an invalidity that results from an omission cannot be cured by notional severance.²⁵⁴ This instance may also be seen as a lack of legislative guidance which has also been divorced from notional severance by the court in *Dawood*.²⁵⁵

5.2.2 Reading-in

Reading-in is accepted to be applicable to cure the inconsistency that is caused by an omission.²⁵⁶ This omission necessitate the reading-in of words or phrases to the provision so as to eliminate the inconsistency.²⁵⁷ The undertaking to add words or phrases into a statute does not suggest that the court undertakes legislative powers. In *National Coalition for Gay and Lesbian Equality*,²⁵⁸ the court held that:

“...when reading-in...a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even when the remedy of reading-in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion.”

As a result of separation of powers, it may not always be appropriate to invoke the reading-in when seeking to eliminate the constitutional defect.²⁵⁹ In *Dawood*,²⁶⁰ the court refused to apply the reading-in remedy on the basis on separation of powers. The essence herein was that where the legislature is better placed to cure the legislative provision, then it would not be appropriate for the court to invoke the reading-in. For present purposes, subparagraph (a)(i) is constitutionally

²⁵³ Ibid.

²⁵⁴ Ibid 63 – 64).

²⁵⁵ *Dawood* supra note 115 para 61.

²⁵⁶ Currie and De Waal op cit note 36 at 187.

²⁵⁷ Ibid.

²⁵⁸ *National Coalition for Gay and Lesbian Equality* supra note 112 para 75.

²⁵⁹ Okpaluba op cit note 228 at 469.

²⁶⁰ *Dawood* supra note 115 para 64.

defective for lacking words which would eliminate the extensive nature of the provision through minimum, reasonable and justified limitation. In order to avoid the intrusion into the legislative domain, the addition of these words will be recommended for the parliament instead.

5.3 Legislative intervention

“When a court strikes down a statute or reads words into it, its choice is not necessarily the final word on the issue. A legislature may respond by amending the statute and even, within the limits of the Constitution, undo a court’s order if dissatisfied with it.”²⁶¹

Section 55 of the Constitution provides for Powers of the National Assembly.²⁶² Some relevant powers include considering, passing, amending or rejecting any legislation that is tabled before the Assembly.²⁶³ Furthermore, the National Assembly may well initiate or prepare legislation.²⁶⁴ These powers may be exercised in conjunction with National Legislative Process provided for in section 73 of the Constitution.²⁶⁵ The essence herein is that a Bill may be introduced in the National Assembly by Cabinet members, Deputy Minister or member of a committee of the National Assembly.²⁶⁶

From the foregoing, the following intervention is recommended for the legislature:

The legislature is not precluded from enacting the conditions referred to above under notional severance. As a result of separation of powers, it is more flexible for the legislature to enact these and more conditions that it deems fit in the circumstances. The concern with subparagraph (a)(i) of section 68(1) is submitted to require the addition of words to the text. Because, according to *National Credit Regulator v Opperman*,²⁶⁷ the court should not venture into patch-work legislating, the addition of these words may well be considered through the National Legislative Process in terms of section 73 of the Constitution.²⁶⁸

²⁶¹ Currie and De Waal op cit note 36 at 184.

²⁶² The Constitution op cit note 15 s55.

²⁶³ Ibid s55(1)(a).

²⁶⁴ Ibid s55(1)(b).

²⁶⁵ Ibid s73.

²⁶⁶ Ibid s73(2).

²⁶⁷ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) 84.

²⁶⁸ The Constitution op cit note 15 s73.

The current formation of subparagraph (a)(i) of section 68(1) of the LRA permits the Labour Court to interdict “any person from participating in a strike or any conduct in contemplation or in furtherance of a strike”. In addition to the conditions recommended for subsection (1) above, the following is suggested for subparagraph (a)(i):

- (a) Subject to the conditions recommended for subsection (1) above, any person may still be interdicted “from participating in a strike or any conduct in contemplation or in furtherance of a strike”.
- (b) The provision must *explicitly* incorporate the “jurisdiction to interdict any person” from threatening or inciting violence, committing actual violence and perpetuating intimidation during strike or in contemplation or in furtherance thereof (based on the standard of reasonable apprehension).
- (c) An employer who approaches the Labour Court in the absence of the factors in (a) and (b) should, in the interests of justice, be subjected to a harsh cost order for the abuse of court processes.

The recommendation in (a) will facilitate a proper application of the interdict with minimum limitation on the right to strike. The said minimum limitation will also be reasonable and justifiable in an open democratic society as envisaged in section 36(1) of the Constitution.²⁶⁹ Furthermore, an explicit inclusion of various instances under recommendation (b) is crucial to deal with the realities of strikes that fail to be peaceful. While the rise in these strikes has been shown to be more fundamental than a mere non-compliance with the 48-hour notice, recommendation (b) will ensure that an interdict is sought and granted for a legitimate purpose such as interdicting threats or incitement of violence, actual violence and perpetuation of intimidation that is based on reasonable apprehension. The Legislature may well add more instances that it deems necessary for this provision. Although in a different context, but the Constitutional Court in *Barkhuizen v Napier*²⁷⁰ correctly held that “the hands of justice can never be tied under our constitutional order”.²⁷¹

The rights to strike under section 23(2)(c) and to assembly under section 17 of the Constitution have been accepted to share one underlying purpose, mainly to give a voice to powerless

²⁶⁹ Ibid s36(1).

²⁷⁰ *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

²⁷¹ Ibid para 73.

individuals.²⁷² However, the level of protection afforded to section 23(2)(c) of the Constitution does not match that of its counterpart, section 17. This is partly so because section 17 is demarcated by the Constitution itself whereas section 23(2)(c) is threatened by the impugned provision. In essence, the right to freedom of assembly remains available to the public as long as the participants remain peaceful and unarmed.²⁷³ While the RGA²⁷⁴ proposes sanctions for non-compliance, but the demarcation ensures that the enjoyment of freedom of assembly is not forfeited for flimsy reasons. In the contrary, the right to strike has no special demarcation. It is thus hoped that the inclusion of the recommended conditions, words and phrases into section 68(1)(a)(i) of the LRA will provide the much deserved protection on the right to strike.

5.4 Future Aspirations

It has been commendably submitted that:

“The Constitution requires an examination of the past in order to move forward into a constitutional future.”²⁷⁵

It is common cause that the sanction of interdict for non-compliance was passed from the old regime²⁷⁶ to the LRA of 1995. The need for examination of the past imbalances has accordingly been identified as the core of transformation.²⁷⁷ From this premise, there is a corresponding compelling need for deconstruction of past laws to the extent that they do not advance the constitutional ambition of a society that is based on human dignity, equality and freedom. The constitutional values and ambitions may be vulnerable to violation when post-apartheid legislations such as the LRA of 1995 are approached with an assumption that they fully represent transformation in the labour relations spectrum. In essence, the constitutional era does not automatically qualify legislations to be constitutionally compliant. The situation may deteriorate

²⁷² *Garvas* supra note 133 paras 61 – 63.

²⁷³ *Mlungwana and Others v S and Others* 2019 (1) SACR 429 (CC) 43.

²⁷⁴ RGA op cit note 135.

²⁷⁵ *Albertyn and Davis* op cit note 199.

²⁷⁶ LRA op cit note 14.

²⁷⁷ *Albertyn and Davis* op cit note 199.

further when signals of constitutional glitches are, as it is with section 68(1)(a)(i) of the LRA, vivid and still ignored.

Prior to the adoption of the Constitution and the LRA of 1995, the right to strike did not enjoy legislative protection it deserved. Hence, the common law practice of treating a strike as misconduct often prevailed.²⁷⁸ As a result, imbalances were an unfortunate norm in collective bargaining. Even though the new constitutional order and the LRA of 1995 envisage a vision of a transformed and progressive labour law, but the current form of section 68(1)(a)(i) has been shown to have retained the status *quo*. In light of the history of imbalances, it is inconceivable that the legislature would have intended to give the employer more ammunition whilst taking away the employees' only ammunition, even if it is on an interim basis.

It has also been commendably submitted that:

“...The challenge to transform the legal system after 1994 required a sustained internal critique of all existing rules within the South African legal system in order to commence the further work of development of the existing system in the image of the principles contained within the constitution.”²⁷⁹

To achieve transformation, the Act ought to vividly move the justiciability of non-compliance from the subjective viewpoint of employers. Instead, a more objective approach will benefit the system of collective bargaining and will also assist the courts in at least two important ways. Firstly, the court roll will not be clogged with matters that are not objectively justiciable. These would be matters that are outside of the recommended conditions, reasonable apprehension of threats or incitement of violence, actual violence and perpetuating of violence. Secondly, upon adjudication, the Labour Court will have a clear invitation to grant an interdict against breach of conditions, threat or incitement of violence, actual violence and perpetuation of intimidation (based on reasonable apprehension). In this way the limitation of the right to strike will be reasonable and justified.

²⁷⁸ Grogan op cit note 12 at 429.

²⁷⁹ Albertyn and Davis op cit note 199.

5.5 Conclusion

Although the LRA of 1995 may be fairly transformative compared to the old regime, however limitations by the impugned provision appear not to be a fair confirmation of such transformation. In the negative and in the failure to adopt transformative measures, the risk on associational life of employees and unions will remain upon collective bargaining.

Notwithstanding the utmost need and value of complying with procedural requirements, the consideration of varying circumstances can offer more benefits than prejudice. Furthermore, a more focused and direct purpose of the LRA makes an explicit provision for various circumstances that often characterize strike action. These include threat or incitement of violence, actual violence and perpetuation of intimidation that is based on reasonable apprehension. This is essential in order to avail the sanction of interdict only where it matters the most and not for flimsy reasons. In this way, the floodgates of litigation will not be open to abuse. This approach will accordingly serve to contribute to “spirit, purport and objects of the Bill of Rights” without inflicting unjustified harm on the right to strike. However, this approach is not possible with the current wording of section 68(1)(a)(i) of the LRA.

Albertyn and Davis correctly, though worryingly, acknowledge that the legal fraternity has generated little debate on how inherited private law reinforces power relations in society.²⁸⁰ From the foregoing, it is clear that the impugned provision was inherited from the old regime and thus reinforces power in favour of the inherently powerful employer. The critical assessment of the constitutionality of section 68(1)(a)(i) has identified constitutional inconsistencies and their possible constitutionally compliant recommendations. The recommended intervention by the court and the legislature ought not, in the interests of a progressive and transformed labour spectrum, be delayed any longer. In order to guard against situations such as Marikana, it hoped that the impugned provision will be revisited so as to bring it within the ambit of the Constitution.

²⁸⁰ Ibid at 216.

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Dear Mr Blessing Sicelo Makhathini,

Protocol reference number: 00006513

Project title: A critical analysis of the constitutionality of section 68(1)(a)(i) of the Labour Relations Act 66 of 1995.

Exemption from Ethics Review

In response to your application received on 03/08/2020, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

Mr Simphiwe Peaceful Phungula
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School Of Law

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