A CRITICAL STUDY OF THE LEGAL FRAMEWORK REGULATING STRIKES AND STRIKE VIOLENCE IN SOUTH AFRICA

BY

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DECLARATION

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LIST OF ACRONYMS

AD	Appellate Division
AMCU	Association of Mine and Construction Workers Union
AMPLATS	Anglo American Platinum Mines
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
COSATU	Congress of South African Trade Unions
CWU	Communication Workers Union
Ed	Edition
FAWU	Food and Allied Workers Union
GN	Government Notice
GSJ	South Gauteng High Court in Johannesburg
IC	Industrial Court
ICCPR	International Convention on Civil and Political Rights
ILJ	Industrial Law Journal
ILO	International Labour Organisation
IR	Industrial Reports
JP	Judge President
JOL	Journal of Business Law
KZD	KwaZulu-Natal High Court, Durban
LAC	Labour Appeal Court
LC	Labour Court
LLM	Master of Laws
LRA	Labour Relations Act
LRAA	Labour Relations Amendment Act
NEDLAC	National Economic Development and Labour Council
NEHAWU	National Education, Health and Allied Workers Union
NUM	National Union of Mineworkers
NUMSA	National Union of Metal Workers of South Africa
PELJ	Potchefstroom Electronic Law Journal
PPWAWU	Paper, Printing, Wood and Allied Workers Union
POPCRU	Police and Prisons Civil Rights Union

PTWU	Professional Transport Workers Union
RGA	Regulation of Gatherings Act
RSA	Republic of South Africa
SA	South Africa
SACCAWU	South African Commercial, Catering and Allied Workers Union
SADC	Southern African Development Community
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPO	South African Post Office
SA Merc LJ	South African Mercantile Law Journal
SAMWU	South African Municipal Workers Union
SAPS	South African Police Service
SASLAW	South African Society for Labour Law
SATAWU	South African Transport and Allied Workers Union
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review
TAWUSA	Transport and Allied Workers Union of South Africa
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TWU	Transport Workers Union
Vol	Volume

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CHAPTER 1: GENERAL INTRODUCTION

1 Introduction

The coming into effect of the Constitution[1] of South Africa ushered in a new political and legislative dispensation in South Africa (hereafter 'SA'). In the area of labour or industrial relations, the Constitution affords workers the rights to freedom of association, strike, engage in collective bargaining, assemble, demonstrate, picket, and present petitions.[2] To give effect to these labour rights, the Constitution mandated the legislature to enact legislation that specifically regulates them. As a result the LRA[3] was enacted in 1995. The purpose of the LRA is to advance economic development, social justice, labour peace, and the democratisation of the workplace.[4] This is also in keeping with international standards of recognising and protecting the right to freedom of association[5] and the right to strike,[6] which the Constitutional Court has confirmed the validity and importance of.[7]

It will be noted that the rights conferred by the Constitution and the LRA are not absolute, but may be limited in terms of s 36(1) of the Constitution taking into account public interest and the conflicting rights of others.[8]

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[1] Act No. 200 of 1993.

[2] Ss 23 and 17 of the Constitution of South Africa Act No. 108 of 1996 (Hereafter 'the Constitution') and s 64 of the Labour Relations Act 66 of 1995 (Hereafter 'the LRA'). See also A Basson et al. *Essential Labour Law* 5 ed (2009) 303.

[3] The LRA supra note 2.

[4] S 1 of the LRA.

[5] ILO Freedom of Association and the Right to Organise Convention of 1949.

[6] N Smith and E Fourie '*Equity Aviation v SATAWU* (*478/09*) *[2011] ZASCA 232*' (2012) 27 *De Jure* 426, 430.

[7] SB Gericke 'Revisiting the liability of trade unions and or their members during strikes: Lessons to be learnt from case law' (2012) 75 *THRHR* 566, 580.

[8] s36 Limitation of rights

'(1) The rights in the Bill of Rights may be limited only in terms of 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, also taking into account all relevant factors, including—

(a) the nature of the right;

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

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

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

2 The nature of strikes and strike violence

The right to strike is well entrenched in South Africa.[9] Strikes are essentially an arsenal in the employees' weaponry to collectively bargain with the traditionally much more powerful employer. Strikes attempt to balance the scales of power between employer and employee by allowing employees to withhold their labour, thus negatively impacting the employer's output, and ultimately, profits. Unlawful violence has come in many forms, including physical assaults on management and non-striking employees, vandalising and thrashing property, blockading entrances to business, intimidation.[10] The list does not end there. One only needs to recall the Marikana Massacre where 34 mineworkers were killed, 78 wounded and more than 250 people were arrested.[11]

Although inherently laudable, strikes have, however, been tainted with unlawful acts of violence which have tarnished the otherwise legitimate philosophy upon which legitimate strike action is premised. An investigation into this inadvertent nuisance, namely strike violence, forms the subject-matter of this dissertation.

Due to the prevalence of strikes in SA, one can argue that strike violence has become the norm. This was vividly demonstrated in the recent case of *NUM and Others v Power Construction (Pty) Ltd*[12] where a witness who had been a trade union organiser for over five years, whilst refusing to acknowledge that the employees had engaged in an unprotected strike, testified that:

> '*To me a strike is when people are damaging people's property, then holding sticks and stuff like that. That is why I do not agree with you. That is how I am explaining a strike*.'[13]

In reaction to this testimony, the court rightfully expressed its concerns thus:

[9] S 23(2)(c) of the Constitution.
[10] M Tenza '*causes of violent strikes in South Africa*' law democracy & development 211.
[11] *http://www.sahistory.org.za/article/marikana-massacre-16-august-2012*, accessed on 17 May 2017.
[12] (C85/2014) [2016] ZALCCT 24; (2017) 38 *ILJ* 227 (LC).
[13] *Ibid* para 57.

'*… It is, to say the least, shocking that a trade union organiser with five years' experience would equate a strike to wilful damage to property*.'[14]

This misconceived outlook on strikes has far-reaching consequences on the economy, the lives and physical well-being of the striking and non-striking employees, and those in the vicinity of the strikes, whether in person or property, and on the economy as a whole. Needless to say, it is imperative that solutions are found that will rid SA of this scourge.

3 Research Methodology

The study adopts a qualitative approach as well as a literature review on the subject. The Constitution and various relevant legislations will be considered in answering the research questions, which are primarily concerned with the causes of strike violence and the imputation of liability flowing therefrom. The legal framework regarding protected and unprotected strikes will be reviewed. There will also be a discussion of scholarly commentary and the jurisprudence handed down from the judiciary, both locally and internationally, pertaining to strike violence.

4 Rationale for the study

Strike violence is not conducive to any economy with growth ambition. There is evidence of flagrant lawlessness during these strikes which undermines the rule of law and must be stopped lest we fall into a state of anarchy.[15] The role that the legislature and the courts can play in curbing the violence is investigated. For instance, the courts are often reluctant to intrude in industrial action matters so as to give effect to the constitutional right to strike.[16] It is often difficult to identify the perpetrators of the violence during strike action and trade unions are happy to absolve themselves of any responsibility for any damages flowing from violence.

[14] *Ibid* para 58.
[15] See *Tsogo Sun Casinos* (*Pty*) *Ltd t/a Montecasino v Future of SA Workers Union & Others* (2012) 33 *ILJ* 998 (LC).
[16] SB Gericke (see note 7: 580). See also *Jumbo Products v NUMSA* (1996) 17 *ILJ* 859 (W) 878.

This dissertation will nonetheless critically analyse union liability regulation as per common law, the LRA, the Regulation of Gatherings Act[17] (hereafter 'the RGA') and recent court decisions.

5 Statement of the problem

It has been noted that recently strikers commit various unlawful acts during strikes with none being held liable for such conduct. Victims are always on the losing side as it is difficult to identify real perpetrators of the unlawful acts during strikes. The question that arises is: who should take the blame under such circumstances? The law is not clear in this regard, in particular, where industrial action is protected. The study investigates the liability for damage caused during strikes. The dissertation will thus deliberate on the liability (if any) of trade unions and the strikers, for straying outside the confines of the Constitution and the LRA by causing damage to others.

6 Purpose of the study

The purpose of the study is to investigate the liability for violent conduct committed during a strike or industrial action. The study further investigates whether unions can be held liable for the violence caused by its members. The outcomes of the study will help union organisers and workers better understand the consequences that violent conduct will attract. The study will at instances explore other areas of law beyond labour law in search of solutions to the menace of violence. One such example will be the RGA. The specific objectives of the study can be broken down into the research questions.

7 Research questions

This dissertation will seek to answer two main questions, each with its own sub-questions:

1. What are the causes of violence during strikes:
    a. Are there deficiencies in the bargaining framework?
    b. Is it the absence of a ballot requirement prior to a strike?

[17] Regulation of Gatherings Act 205 of 1993.

c. Is it the negative effects of structural violence coupled with the majoritarian principle?

2. Trade unions' liability for damages caused during strike action:
   a. Can unions be held liable in terms of the Labour Relations Act 66 of 1995?
   b. Can a trade union be held vicariously liable for the delicts committed by its members during a strike?
   c. Can trade unions be held liable in terms of the Regulation of Gatherings Act 205 of 1993?

8 Literature review

The right to strike is available to trade unions when there is a dispute of interest[18] with an employer and negotiations have reached a stalemate. The strikers must comply with the procedural requirements for a lawful strike in terms of s 64 of the Labour Relations Act ('the LRA').[19] In *VNR Steel* (*Pty*) *Ltd v NUMSA*,[20] it was stated that

> '*by withholding their labour*, *the employees hope to bring production to a halt*, *causing him* (*the employer*) *to lose business and to sustain overhead expenses without the prospect of income*, *in the expectation*, *that should the losses be sufficiently substantial*, *the employer will accede to their demands*.'

Section 5 of the LRA protects employees against victimisation and discrimination for exercising their LRA rights to collectively bargain. These include trade union membership and activity, and their dismissal for performing their mandate as trade union representatives is a direct violation of fair labour practices.[21] Employees are further protected from delictual and/or contractual claims for participation in a protected strike.[22] An employer is thus prohibited from

[18] Disputes of interest are contrasted with disputes of rights. Workers can only strike over disputes of interests and must refer matters where disputes of rights are concerned to arbitration. See for instance Rochelle le Roux 'Benefits: Have we found the way out of the labyrinth?' (2015) 36 *ILJ* 888.
[19] S Vettori 'The Labour Relations Act and the Protection of Trade Unions' (2005) 17 *SA Merc LJ* 304.
[20] *VNR Steel* (*Pty*) *Ltd v NUMSA* (1995) 16 *ILJ* 1483 (LAC).
[21] T Cohen et al. *Trade Unions and the Law in South Africa* (2009), 4.
[22] S 67(2)(a)–(b) of the LRA.

dismissing an employee participating in a lawful strike or for any lawful conduct in the furtherance thereof.[23]

Employers and employees may engage in Collective bargaining by virtue of Section 23(5) of the Constitution. Similarly, s 67 of the LRA immunises organising trade union or the striking employees against civil claims. This operates in conjunction with s 77 of the LRA which proscribes civil litigation against any union official for their participation in a protest action. The same protection applies to any lawful conduct that advances the objectives of a protected strike action. In *Premier Foods Ltd t/a Ribbon Salt River*,[24] the court held:

> '*It is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands. This type of vigilante conduct not only seriously undermines the fundamental values of our Constitution, but only serves to seriously and irreparably undermine future relations between strikers and their employer. Such conduct further completely negates the rights of non-strikers to continue working, to dignity, to safety and security and privacy and peace of mind*.'[25]

At the centre of this dissertation is the discussion around such violence and the legal framework that firstly, seeks to prevent the violence, and secondly, understand how legal liability is attached under such circumstances. Le Roux points out that at common-law the employer may institute delictual claims against a trade union and/or strikers for damages arising from a strike.[26] Rycroft points out that there is no provision in the LRA that provides for the revocation of a strike's protected status in the event of violence.[27] He postulates the view that a strike will lose its protected status on the bases that the violence becomes an end in itself and thus serves

[23] S 67(4) of the LRA (see note 2). See also SB Gericke (see note 7) and AA Landman 'No Place to Hide – a Trade Union's Liability for Riot Damage: A Note on *Garvis & Others v SA Transport & Allied Workers Union* (*Minister for Safety & Security, Third Party*) (2010) 31 *ILJ* (WCC) 2521' (2011) 32 *ILJ* 834–46.
[24] *FAWU obo Kapesi & Others v Premier Foods Ltd t/a Ribbon Salt River* (2010) 31 *ILJ* 1654 (LC) 4, 6.
[25] Ibid at 6.
[26] PAK le Roux 'Claims for compensation arising from strikes and lockouts' (2013) 23(2) *Contemporary Labour Law* 11.
[27] A Rycroft 'What Can Be Done about Strike-Related Violence?' (2014) 30 *IJCLLIR* (*International Journal of Comparative Labour Law and Industrial Relations*) (2)199, 7. See also Rycroft 'Can a protected strike lose its status?' (2012) *ILJ* 821. And Fergus 'Reflections on the (Dys)functionality of strikes to collective bargaining: Recent Developments' (2016) 37 *ILJ* 1537. And Grogan 'Riotous strikes Unions liable to victims' *Employment Law Journal* (October 2012) 11. And Wallis 'Now You Foresee It, Now You Don't — *SATAWU v Garvas & Others*' (2012) 33 *ILJ* 2257.

no bargaining purposes.[28] Rycroft relied on *Tsogo Sun Casinos*[29] for authority for the view that the protected status of a strike may be revoked unlawful conduct, such as violence, is perpetrated. The *ratio* went as follows:

> '*A court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy a protected status.*'[30]

Fergus questions whether a strike that then turns violent serves no bargaining purpose or only disrupts peaceful bargaining. The dissertation argues that the violence serves a bargaining purpose but the strike should nonetheless be declared unprotected on the grounds that the strikers seek to benefit from unlawful conduct. In *Shoprite Checkers* (*Pty*) *Ltd v CCMA*[31] the court held that, if the picket exceeds the bounds of peaceful persuasion or incitement to support the strike, to become coercive and disruptive of the business of third parties, the picket ceases to be reasonable and lawful.[32] Employees thus open themselves to delictual and contractual liability, including dismissal for breach of contract, by partaking in such unlawful strikes.

However, the protection that employees and trade unions enjoy does not extend to criminal acts committed during a strike by virtue of s 67(8) of the LRA as civil proceedings may be instituted against them for such criminal acts.[33] There is thus no immunity granted for criminal conduct, but there are still practical problems in implementing s 67(8), particularly in relation to pinpointing the identity of the perpetrators, which is often troublesome. A case where a union

[28] Rycroft 'Can a protected strike lose its status?' (2012) *ILJ* 821.
[29] *Tsogo Sun Casinos* (see note 15).
[30] *Ibid* at 13.
[31] *Shoprite Checkers* (*Pty*) *Ltd v CCMA* (2006) 27 *ILJ* 2681 (LC) 30.
[32] *Ibid*.
[33] SB Gericke (see note 7) 572. See also s 67(6) of the LRA.

was successfully sued for failing to persuade its members to cease their violent conduct is the *In2FOOD* (*Pty*) *Ltd v FAWU*[34] matter where *FAWU* was handed a R500 000 fine.

It is suggested that structural violence against employees is a significant contributor to the physical violence prevalent in strikes.[35] The major contribution of this research will be in investigating how the principle of majoritarianism[36] entrenched in the LRA is a form of legislated structural violence perpetrated against minority unions. This dissertation explores how the principle of *Ubuntu* can be utilised in interpreting the LRA provisions promulgating majoritarianism with the view of tailoring the principle of majoritarianism to the SA labour market. This will reduce the effects of structural violence and increase peace and collegiality in the workplace, thereby reducing strike violence. Writers like Kahn[37] and Cohen[38] advocate a revisiting of the majoritarian principle as it is inadequate, even antagonistic, towards the protection of minority interests. The views of the strikers and what drives them can be gleaned from the Farlam Commission Report.[39] It will further be investigated how tools like balloting can be used to mitigate the negative effects of majoritarianism and whether this could reduce strike violence. This dissertation also investigates the use of interdicts to curb strike violence and suggests a reform that will promote the respect for the courts and the rule of law, reducing incidents of contempt of court and strike violence.

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[34] *In2Food* (*Pty*) *Ltd v FAWU*, *Madisha*, *RS and 470 Others* (LC Case J350/13). See also *SA Transport & Allied Workers Union & Another v Garvas* (2012) 33 *ILJ* 1593 (CC). And *Algoa Bus Co* (*Pty*) *Ltd v Transport Action Retail & General Workers Union & Others* (2015) 36 *ILJ* 2292 (LC). *Food & Allied Workers Union v In2Food* (*Pty*) *Ltd* (2014) 35 *ILJ* 2767 (LAC).

[35] For a detailed discussion see Ngcukaitobi 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 *ILJ* 836. See also Hartford '*The mining industry strike wave*: *what are the causes and what are the solutions?*' (available at *http://groundup.org.za/content/mining-industry-strike-wave-what-are-causes-and-what-are-solutions*). And Theron et al. 'Organisational and collective bargaining rights through the lens of Marikana' (2015) 36 *ILJ* 849. And Webster 'The shifting boundaries of industrial relations: Insights from South Africa' 2015 *International Labour Review* Vol 154(1) 27. And Brassey 'Labour Law After Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?' (2013) 34 *ILJ* 823. And Du Toit 'The extension of Bargaining Council Agreements: Do the Amendments address the Constitutional Challenge' (2014) 35 *ILJ* 2637.

[36] Discussed by the Constitutional Court at length in *Association of Mineworkers and Construction Union & Others v Chamber of Mines of South Africa & Others* [2017] ZACC 3 para 44.

[37] Kahn 'A Chance to Reassess our System of Industrial Relations' *Business Day* 1 October 2012, available at *http://www.businesslive.co.za/bd/opinion/2012-10-01-a-chance-to-reassess-our-system-of-industrial-relations/*.

[38] Cohen 'Limiting Organisational Rights of Minority Unions: *POPCRU v Ledwaba* [2013] 11 BLLR 1137 (LC)' (2014) 17 *Potchefstroom Electronic Law Journal* 60. And Theron '*Decent Work and the Crisis of Labour Law in South Africa*' (2014) 35 *ILJ* 1829. N Coleman 'Towards new collective bargaining, wage and social protection strategies in South Africa' available at *http://www.cosatu.org.za/docs/misc/2013/ncoleman.pdf*.

[39] The Marikana (Farlam) Commission Report available at *http://www.sahrc.org.za/home/21/files/marikana-report-1.pdf*.

9 Structure of the research

The study is made up of six chapters. These chapters are interrelated yet distinctive to give the reader a complete picture of applicable law. It attempts to address burning issues of liability for violent strikes using legal remedies. After this introductory chapter (Chapter 1), the content of the dissertation will take the following direction:

Chapter 2: Overview of the right to strike in SA
Chapter 3: The causes of strike violence
Chapter 4: The liability of trade unions and members for strike-related violence
Chapter 5: Statutory remedies in terms of the LRA and the RGA
Chapter 6: Conclusions and Recommendations

CHAPTER 2: OVERVIEW OF THE RIGHT TO STRIKE IN SOUTH AFRICA

1 Introduction

The right to strike is one of the fundamental rights available to workers in terms of the Constitution.[40] The right to strike is a tool or weapon used during the collective bargaining process by employees against employers during heated labour disputes. It was given effect to in S 27(4) of the Interim Constitution[41] which provided that '*Workers shall have the right to strike for the purpose of collective bargaining*', and currently in S 23 of the Constitution and ss 64 and 65 of the LRA of 1995. In terms of labour legislation the right to strike and associated rights like the right to picket, are protected and immunised against civil and/or contractual liability that could be claimed by employers and third parties who suffer harm as a result of the strike. This chapter reminds the reader about the principles applicable to protected and unprotected strikes including consequences for each of these conducts.

2 Collective bargaining

a) Collective bargaining in South Africa

The LRA does not define collective bargaining. In short, academics have defined it as a process of negotiation between employers or employer's organisations and trade unions on the terms and conditions of employment and other matters of mutual interest with the purpose of reaching an agreement.[42] The LRA aims to democratise the workplace by providing a framework for collective bargaining.[43] In *SAPU and Another v National Commissioner of the South African Police Service and Another*,[44] the court held that:

> '*The very purpose of collective bargaining is to bring equality to the relationship. Collective bargaining organises and distributes contractual power by means of the power play inherent in the process*.'[45]

[40] S 23 of the Constitution.
[41] Act 200 of 1993.
[42] J Grogran *Workplace Law* 10 ed (2009) 343.
[43] S 1(c)(i) & (d) of the LRA.
[44] [2006] 1 BLLR 42 (LC).
[45] *Ibid* para 53.

The LRA seeks to achieve this purpose by creating a framework in which trade unions, employers or employer's organisations may negotiate terms and conditions or issues of mutual interest affecting them in the workplace. Unions are the primary vehicle through which the interests of the workers are expressed and negotiated. Unions are mandate driven organisations and can only act once mandated to do so. To capacitate unions to fulfil their duties, Chapter 3 of the LRA bestows upon them organisational rights that assist unions to effectively bargain with the employer or employer's organisation.

The LRA makes a distinction between the majority union and the sufficiently representative union,[46] with different rights available to each. The LRA does not prescribe what will constitute sufficiently representative but leaves it up to the employer and the majority trade union to make such a determination through a collective agreement.[47] Majority unions are afforded more rights and powers than minority unions, such as the right to demand that the employer disclose information that will enable the union to bargain effectively,[48] or the right to enter into collective agreements with the employer. Sufficiently representative unions will enjoy organisational rights contained in ss 12, 13 and 15 of the LRA. Several rights are associated with collective bargaining. This dissertation will confine itself to a detailed discussion of the right to strike.

3 The right to strike

As stated above, the right to strike is part and parcel of the process of collective bargaining. In *Stuttafords Department Stores v SA Clothing and Textile Workers Union*,[49] the LAC held:

> '*The very reason why employees resort to strikes is to inflict economic harm on their employer so that the latter can accede to their demands. A strike is meant to subject an*

[46] S 11 of the LRA.
In this Part, unless otherwise stated, 'representative trade union' means a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace.
[47] S 18(1) of the LRA.
[48] S 16 of the LRA.
[49] (2001) 22 *ILJ* 414 (LAC).

employer to such economic harm that he would consider that he would rather agree to the workers' demands than have his [*or her*] *business harmed further by the strike*.'[50]

It is used as a last resort by employees when employers fail to accede to their demands. As such it is regarded as a deadlock-breaking mechanism. The Constitution stipulates that '*every worker has the right to strike*'.[51] Section 64(1) of the LRA stipulates that '*Every employee has the right to strike …*'. Although each individual employee has a constitutional right to strike, that right must be exercised collectively.[52]

The Constitutional Court in *South African Transport and Allied Workers Union v Moloto*[53] reaffirmed that the right to strike is enshrined in the Constitution with no express limitations.[54] This is in conformity with international law which recognises the right to strike as essential to the protection of workers' rights and interests.[55]

The Constitutional Court in *South African Transport and Allied Workers Union v Moloto*[56] described the right to strike as a tool to redress the inequalities in the social and economic powers inherent in industrial relations.[57] It held further that the right can be used to bolster other social and political rights in the Constitution, including freedom of association.[58] In *NUMSA v Bader Bop*[59] the right to strike was described as a '*component of a successful collective bargaining system*'.[60] The court emphasised the importance of strikes for the protection of the workers' dignity that they may not be treated as forced workers and it is only through strikes that employees can exercise bargaining power in industrial relations.[61]

[50] *Ibid* at 422E–G.
[51] S 23(2)(C).
[52] See s 213 of the LRA.
[53] (2012) 33 *ILJ* 2549 (CC).
[54] *Ibid* para 43.
[55] The International Covenant on Economic, Social and Cultural Rights of 1996; The European Social Charter of 1961.
[56] See note 52.
[57] *Ibid* para 44.
[58] *Ibid*.
[59] 2003 (2) BCLR 182 (CC).
[60] *Ibid* at para 13.
[61] *Ibid*.

3.1 The right to strike in the LRA

The LRA gives effect to most of the labour rights mentioned in the Constitution. It 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*.'[62]

By definition then, a strike only comes into existence when there is a concerted effort by employees to withdraw their labour with the objective of resolving a grievance in respect of a matter of mutual interest with the employer. As stated above, the LRA draws a distinction between protected (lawful) and unprotected (unlawful) strikes. We now turn our attention to what constitutes protected and unprotected strikes.

3.2 Protected and unprotected strikes

Protected strikes are those strikes that comply with certain procedural requirements[63] and substantive requirements[64] set out in the LRA, whilst an unprotected strike is one that is not in compliance with the LRA.

Under the common law of contract, employees who withdrew their labour were said to be in breach of their contract of employment.[65] Employers were then at liberty to terminate such contract(s) on the basis of the said breach and had the added option of suing the strikers and organisers of the strikes for damages emanating from the breach of contract.[66] However, the introduction of the LRA changed the common-law position.

[62] S 213 of the LRA.
[63] S 64 of the LRA.
[64] S 65 of the LRA. S 65(2)(b) of the Labour Relation Act No. 28 of 1956 had the added requirement of a secret ballot. See chapter 3 below.
[65] Grogan note 41 at 183.
[66] *Ibid*.

3.2.1 *Consequences of a protected strike*

The introduction of the LRA changed the common-law position. The significance of a protected strike is that strikers and strike organisers are afforded protection against dismissal and/or civil liability.[67] The dismissal of a striker for partaking, or for expressing an intention to partake, in a protected strike is automatically unfair.[68] See Chapter 4 for an in-depth discussion.

3.2.2 *Consequences of an unprotected strike*

Unprotected strikes do not enjoy the protection associated with protected strikes. The strikers in an unprotected strike are as vulnerable as strikers at common law.[69] The employer can claim damages[70] and the Labour Court can interdict the strike.[71] The courts have found dismissal of strikers who participate in unprotected strikes to be fair.[72] See Chapter 5 for an in-depth discussion.

3.3 Limitation on the right to strike

The right to strike is not only subject to the general limitation clause contained in s 36 of the Constitution,[73] it is also subject to procedural limitations set out in s 64 of the LRA, and substantive limitation as per s 65 of the LRA. The Constitutional Court in *Transport and Allied Workers Union of South Africa v PUTCO Limited*,[74] clarified s 64(1) of the LRA as follows:

[67] S 67(6) of the LRA provides protection against civil liability. See *Afrox Ltd v SA Chemical Workers Union & others* (*2*) (1997) 18 *ILJ* 406 (LC) 410D–F.
[68] S 187(1)(a) of the LRA.
[69] In terms of s 187(1)(a), a dismissal is automatically unfair if:
> '*… if the reason for the dismissal is—* (*a*) *that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV*.'

[70] S 68(1)(b) of the LRA.
[71] S 68(1)(a) of the LRA.
[72] See *Transport & Allied Workers Union of SA & Others v Unitrans Fuel & Chemical* (*Pty*) *Ltd* (2013) 34 *ILJ* 1785 (LC) and *Mndebele & Others v Xstrata SA* (*Pty*) *Ltd t/a Xstrata Alloys* (*Rustenburg Plant*).
[73] The 'limitations clause'. See note 8.
[74] *Transport and Allied Workers Union of South Africa v PUTCO Limited* (CCT94/15) [2016] ZACC 7; (2016) 37 *ILJ* 1091 (CC); [2016] 6 BLLR 537 (CC); 2016 (4) SA 39 (CC); 2016 (7) BCLR 858 (CC) (8 March 2016).

'*The dictates of section 64(1)(a) are clear. No industrial action can be undertaken until there has been an attempt at conciliation. This provision also makes pertinent that an* "*issue in dispute*" *arises prior to a matter being referred for conciliation. Only once a dispute has arisen can it be referred to a bargaining council for conciliation. Moreover, industrial action can only be taken in the event that an attempt at conciliation fails, either because a certificate by the bargaining council states that the issue in dispute remains unresolved, or because a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the bargaining council. Referral to conciliation is not merely a perfunctory procedural step that has to be complied with in order to obtain a licence to lock out or to embark on a strike. The object of section 64(1)(a) is to bring together the parties at the negotiations, and encourage them to seek solutions to issues of mutual concern, thereby reinforcing a collective bargaining culture.*'[75]

And:

'*This Court has previously recognised that the right to* "*collective bargaining between the employer and . . .* [*employees*] *is key to a fair industrial relations environment*"*. The LRA is concerned with the power imbalance between the employer and employees. It sanctions the use of power by employers and employees, but only as a last resort, and only after the issue in dispute between the parties has been referred for conciliation. Collective bargaining therefore implies that each employer-party and employee-party has the right to exercise economic power against the other once the issue in dispute has been referred for conciliation, and only if that process fails in one of the manners described above.*'[76] (Authorities omitted.)

The LRA requires that the dispute be referred for conciliation and, if that fails, the employer must be issued with a notice of intention to strike. These are considered below.

[75] *Ibid* at para 45.
[76] *Ibid* at para 46.

a) Referral of the dispute to conciliation

This requirement entails that a strike must be preceded by a process of negotiation between the employer and employees.[77] If such negotiations do not yield a resolution, the dispute must then be referred to a bargaining or statutory council with jurisdiction.[78] If there is no bargaining or statutory council with jurisdiction the matter must be referred to the CCMA.[79] The council or the CCMA is mandated to attempt to resolve the matter through conciliation[80] and within a period of 30 days or issue a certificate of non-resolution which may be before the expiry of the 30-day period.[81] In the event of conciliation not bearing the desired results, the workers may proceed to the next stage once the council or the CCMA has either issued a certificate of non-resolution or the 30-day period has lapsed.[82] In *Betafence South Africa* (*Pty*) *Ltd v National Union of Metalworkers of South Africa and Others*[83] the court held:

> '*The CCMA or Bargaining Councils were not meant to be mere vending machines expected to dispense of certificates of outcome on demand. The parties prior to embarking on any form of industrial action, must have through the assistance of conciliators/mediators, embarked on a genuine process of conciliation, or at the very least, made some concerted effort in that regard.*[84] *To the extent that the other party to the dispute may show scant regard to that process by either frustrating it or refusing to participate in it at all, the provisions of section 64* (*1*) (*a*) (*ii*) *would then take effect*.'[85]

[77] *County Fair Foods v Oil Chemical General and Allied Workers Union & Others* (2000) ZALC 40 (LC) 4.
[78] *Ibid*.
[79] S 64(1)(a) of the LRA.
[80] S 115(1)(a) of the LRA.
[81] *Road Accident Fund v SA Transport & Allied Workers Union & Others* (2010) 31 *ILJ* 2168 (LC) 2176A–B.
[82] See *City of Johannesburg Metropolitan Municipality & Another v SAMWU & Others* (*Johannesburg Metropolitan Municipality*) [2011] 7 BLLR 663 (LC) para 15.
[83] (C194/2016) [2016] ZALCCT 33 (15 September 2016).
[84] See also *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07.
[85] *Betafence* note 83 at para 19.

b) The notice of intention to strike

The workers must give the employer, or the employers' organisation, at least forty-eight (48) hours' written notice of the commencement of the strike.[86] A seven-day notice is however applicable where the employer is the State.[87] The LRA does not specify what information the notice should contain; our courts have however provided guidance in that regard. The notice should set out the subject-matter of the strike, that is, the strikers' demands.[88] The strike notice must be specific of the day the strike will take place.[89] Generally, the notice need not specify the time of day the strike will take place,[90] however, depending on the nature of the business, for instance one where staff work in shifts, then the time of day will have to be specified in the notice.[91]

The purpose of serving the employer or employers' organisation with a reasonable notice is to give them sufficient or adequate time to prepare for the impending strike. Such preparations may include the hiring of replacement labour to mitigate against the loss of productivity.[92] The LAC in *Ceramic Industries Ltd t/a Betta Sanitary Ware and Another v NCBAWU and Others*[93] pointed out two reasons why this notice has to be issued:

> '*to enable the employer to decide whether to prevent the strike by giving into the union's demands*; *and to enable the employer to take steps to protect the business when the strike started*.'[94]

[86] S 64 (1)(b) of the Labour Relations Act 66 of 1995.
[87] S 64(1)(d) of the LRA.
[88] *Betafence* note 83 at para 25. See also *Construction & Allied Workers Union & Others v Modern Concrete Works* [1999] 10 BLLR 1020 (LC) 1023D. *Ceramic Industries Ltd t/a Better Sanitary Ware v National Construction Building and Allied Workers Union* (1997) 18 *ILJ* 671 (LAC); *SA Airways* (*Pty*) *Ltd v SATAWU* [2010] 3 BLLR 321 (LC) paras 26–7, and *Metsimaholo Local Municipality v South African Municipal Workers Union* (JA123/2014) [2016] ZALAC 19.
[89] *Ceramic Industries* note 87 at 676g–i. See also *Fidelity Guards Holdings* (*Pty*) *Ltd v Professional Transport Workers Union & others* (*1*) (1998) 20 *ILJ* 260 (LAC) at 267g.
[90] *County Fair Foods* (*A Division of Astral Operations Ltd*) *v Hotel, Liquor, Catering, Commercial & Allied Workers Union & Others* (2006) 27 *ILJ* 348 (LC) at 361A. See also *Construction & Allied Workers Union & Others v Modern Concrete Works* [1999] 10 BLLR 1020 (LC) at 1023D.
[91] *Ceramic Industries t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union* (1997) 18 *ILJ* 671 (LAC) at 677a–b.
[92] S 76(1) of the LRA.
[93] Note 91.
[94] *Ibid* at 676d–f. See also *SAA* (*Pty*) *Ltd v SATAWU* (2010) Note 87 at 1227j–1228a; and *Imperial Group* (*Pty*) *Ltd t/a Imperial Cargo Solutions v SA Transport & Allied Workers Union & Others* (*1*) (2014) 35 *ILJ* 3154 (LC) at 3160e–f.

In *Equity Aviation Services* (*Pty*) *Ltd v South African Transport and Allied Workers Union,*[95] the LAC held that employees who wish to join a sanctioned strike must also issue their own notice otherwise their participation will be unlawful. In *SATAWU v MOLOTO*, the Constitutional Court overruled the LAC when it held that s 64 does not require more than one notice in relation to the single strike.[96]

In *SATAWU v Moloto*,[97] SATAWU issued a notice to commence a strike and once the strike had commenced, some SATAWU non-members joined SATAWU members by participating in that strike. The employer dismissed the non-members for unauthorised absence from work based on the failure to provide notice of intention to strike. On the particular facts of *Moloto*, the Constitutional Court held that *'SATAWU was recognised as a bargaining agent for all the employees of the employer…'*, irrespective of whether or not they were unionised.[98] The court thus found that SATAWU represented its members as well as the non-unionised employees and, as such, the notice to strike in effect encapsulated the non-unionised members and the employer was thus adequately notified.[99]

It appears that the position in *Equity Aviation*, being that all employees intending to strike must issue a notice that covers them, represents the current legal status. The Constitutional Court in *Moloto* did not overturn this decision, it merely decided that on the facts of the particular case that the one notice was wide enough to cover all the employees who went on strike.

[95] ([2009] 10 BLLR 933 (LAC); (2009) 30 *ILJ* 1997 (LAC)) [2009] ZALAC 35; [2009] ZALAC 3 (14 May 2009).
[96] Note 53 at para 64.
[97] Note 53.
[98] *Ibid* at 2568c.
[99] *Ibid* at 2578f.

c) Exceptions to s 64 requirements (*Alternative procedures*)

The requirements set out above do not always have to be complied with. The LRA makes provision for alternative means in the following instances where the above requirements do not have to be adhered to:

i) Where the parties to the dispute are members of a bargaining council and the dispute has been dealt with by that bargaining council in accordance with its constitution;[100]

ii) Where the strike or lock-out is in line with the procedures in a collective agreement;[101]

iii) Where the employees strike in response to a lock-out (by their employer) that does not comply with the provisions of Chapter 4 of the LRA;[102]

iv) Where the employer is not compliant with ss 64(4)[103] and 64(5).[104] That is, where the employer has unilaterally altered the terms and conditions of employment and fails to remedy the situation within 48 hours, then the employees can embark on a strike without complying with the requirements set out above.

In addition to the s 64 limitations, the LRA sets s 65 limitations which may be characterised as substantive limitations as they set limits on issues that form the substratum of the grievance that is the subject of the strike. The limitations are set on: the issues that permit employees to

[100] S 64(3)(a) of the LRA.
[101] S 64(3)(b) of the LRA.
[102] S 64(3)(c) of the LRA.
[103] S 64(4) provides that:
'*Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection* (*1*)(*a*) *may, in the referral, and for the period referred to in subsection* (*1*)(*a*):
(*a*) *require the employer not to implement unilaterally the change to terms and conditions of employment*; *or*
(*b*) *if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change*.'
[104] S 64(5) provides that:
'*The employer must comply with a requirement in terms of subsection* (*4*) *within 48 hours of service of the referral on the employer*.'

embark on a protected strike; and the types of employees who may embark on a strike. It will not suffice to comply only with s 64 for a strike to be protected, s 65 must also be complied with.[105]

d) A collective agreement prohibiting a strike on the issue in dispute

For a collective agreement to have any bearing on the parties to a dispute, it must have been in existence and in force at the time of the strike and must have regulated the issue in dispute.[106]

In *Vodacom* (*Pty*) *Ltd v Communication Workers Union*,[107] the union referred a dispute to the CCMA for conciliation. The CCMA issued a certificate of non-resolution. It was clear from the presentation of the parties that there was a collective agreement in place that prohibited the parties from embarking on a strike. The union nevertheless proceeded to strike. The court held that the LRA limited the right to strike if s 65 was not adhered to, notwithstanding compliance with s 64.[108] The court held further that the limitations of s 65 cannot be undermined with a certificate of outcome.[109]

The collective agreement must be drafted in such a way that it reflects the true intentions of the parties and avoids ambiguity. In *BMW SA* (*Pty*) *Ltd v National Union of Metalworkers of SA on behalf of Members*,[110] there was a dispute on whether or not the National Bargaining Forum covered the issue of payment of a transport allowance to hourly paid employees.[111] The court found that there was no agreement to that effect and, therefore, there was nothing prohibiting a strike as the collective agreement did not regulate the issue at hand, being transport allowances for employees paid on an hourly rate.[112]

In *Early Bird Farm* (*Pty*) *Ltd v FAWU and Others*,[113] the company had farming and processing divisions. The workers from the processing plant sought a wage increase and embarked on a

[105] *Vodacom* (*Pty*) *Ltd v Communication Workers Union* (2010) 31 *ILJ* 2060 (LAC) para 10.
[106] *National Union of Metalworkers of SA & Others v Highveld Steel & Vanadium* (2002) 23 *ILJ* 895 (LAC) at 901b.
[107] Note 105
[108] *Ibid* at 2063j–2064a.
[109] *Ibid* at 2064b.
[110] (2012) 33 *ILJ* 140 (LAC).
[111] *Ibid* at 152a.
[112] *Ibid* at 146e–f.
[113] (2004) 25 *ILJ* 2135 (LAC).

strike. Their colleagues in the farming division joined the strike with the view of obtaining a wage increase for themselves. The LAC held that the workers from the farming division were bound by a collective agreement and thus were not entitled to strike over wage demands on their own behalf.[114]

It may become necessary to determine the actual issue in dispute in order to determine whether it is a dispute which the employees may strike on. In *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building and Allied Workers Union and Others*[115] the Labour Appeal Court emphasised this point by stating:

> '*... The refusal of a demand, or the failure to remedy a grievance, always needs to be examined in order to ascertain the real dispute underlying the demand or remedy. The demand or remedy will always be sought to rectify the real, underlying, dispute. It is the nature of that dispute that determines whether a strike in relation to it is permissible or not ...*'[116]

In short, workers will not be allowed to strike if the matter in dispute is regulated by a collective agreement that is still in force.

e) An agreement that requires the issue in dispute to be referred to arbitration

Section 65(1)(c) of the LRA permits parties to enter into an agreement as to which issues they choose to refer to arbitration and once such agreement is entered into, parties will be bound according to the tenor of their agreement. There is no express limit on the issues that the parties can agree on and it has been submitted that such matters include those regarded as 'disputes of interest'.[117]

Other instances where striking is prohibited is when the dispute relates to allegations of unfair dismissal, automatically unfair dismissals, unfair labour practices, victimisation, the interpretation and application of a collective agreement, picketing, agency and closed shop

[114] *Ibid*.
[115] Note 91.
[116] At 703F–H
[117] J Grogan *Collective Labour Law* (2007) at 149.

agreements, and admission or expulsion from a bargaining council.[118] These are disputes of rights and should be referred for adjudication.[119]

f) The issue in dispute is one that the party has the right to refer to arbitration or to the Labour Court

The issue here turns on the differentiation of disputes of rights and disputes of interest, where the former must be referred to arbitration and the latter may be resolved through a strike.[120] A dispute of right is where the existence of a right is in dispute whereas disputes of interest are concerned with creating new rights through collective bargaining.[121]

g) Essential services (*type of employee*)

According to s 65(1)(d)(i) of the LRA, employees who provide essential services are prohibited from striking. The LRA defines an essential service as:

> '*a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population …*'[122]

And:

> '*The Parliamentary service and the South African Police Service are deemed to have been designated an essential service in terms of this section*.'[123]

In *SAPS v POPCRU and Others*, the court held that not all employees of the SAPS are prohibited from striking since only a portion of the SAPS workforce actually provides essential services.[124]

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[118] T Cohen, A Rycroft & B Whitcher *Trade Unions and the Law in South Africa* (2009) 47 at 57.
[119] *Ibid*.
[120] S 65(1)(C). See also *Mawethu Civils* (*Pty*) *Ltd & Another v National Union of Mineworkers & Others* (2013) 34 *ILJ* 2624 (LC).
[121] PAK le Roux 'Defining the Limits of the Right to Strike' (2004) 13 *CLL* 91 at 95.
[122] S 213 of the LRA.
[123] S 71(10) of the LRA.
[124] (2011) 32 *ILJ* 1603 (CC).

h) Maintenance services

According to s 75(1) of the LRA, a service constitutes a maintenance service if the interruption of that service has the effect of material physical destruction to any working area, plant or machinery. Employees who provide such service are restricted from striking.[125]

Since employees providing essential services and maintenance services are prohibited from striking, their disputes are resolved through conciliation by a council with jurisdiction or the CCMA, and ultimately through compulsory arbitration.[126]

i) Where an arbitration award, collective agreement, ministerial determination or BCEA determination regulates the issue in dispute

Section 65(3) of the LRA prohibits a strike on an issue regulated by an *arbitration award, collective agreement, ministerial determination or BCEA determination*.[127] An arbitration award has the legal force of a court order and non-compliance with it amounts to a contempt of court.[128] As such, the award brings finality to the matter and there would thus be no valid reason to strike.[129]

[125] S 65(1)(d)(ii).
[126] S 74 of the LRA.
[127] S 65(3) reads as follows:
'(3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out—
(a) if that person is bound by—
(i) any arbitration award or collective agreement that regulates the issue in dispute; or
(ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or
(b) any determination made in terms of the Wage Act and that regulates the issue in dispute, during the first year of that determination.'
[128] S 141(6) read with s 142(8) of the LRA.
[129] Grogan *Collective Labour Law* note 42 at 159.

4 Conclusion

Strikes are a powerful tool for enforcing workers' rights in the workplace and also in redressing the inequalities in bargaining power in the workplace. The right to strike is entrenched s 23(2)(c) of the Constitution and is given effect by ss 64 and 65 of the LRA. Section 64 provides the procedure for a protected strike while s 65 deals with the substantive issue, the subject-matter, of a strike. The effect is that the strike is either protected or unprotected and consequences will follow depending on that status. Civil liability will follow an unprotected strike, with possible dismissals and civil liability; strikers must adhere to these limitations. In Chapter 3, I examine the possible causes of violence during strikes.

CHAPTER 3: THE CAUSES OF STRIKE VIOLENCE

1 Introduction

The trend in recent years has seen workers attempt to bolster and intensify their collective bargaining power by resorting to violence during strikes. This has a negative impact on those in the vicinity of the violence such as non-striking workers, as well as members of the community, and the economy in general.[130] It is contended that the manifestation of physical violence during strikes is a direct result of structural violence.[131] This chapter defines and analyses the broad concept of structural violence. The discussion will then investigate the role of narrower factors that may contribute to structural violence. These factors are majoritarianism, replacement labour, and the use of ballots before the commencement of a strike. It has been suggested that our collective bargaining laws have played a significant contributory role in the eruption of this violence.[132]

This chapter critically analyses selected provisions of the LRA that deal with the principle of majoritarianism and argue that these provisions place insurmountable obstacles in the way of minority unions, thereby unjustifiably encroaching on their constitutionally entrenched rights.[133] It further argues that the current interpretation and application of these provisions, including those relating to replacement labour, perpetuate structural violence by being antagonistic to the struggles of workers to emancipate themselves economically, thus creating conditions fertile for strike violence to occur. In addition, it is argued that the LRA inadvertently defeats its own objectives of promoting orderly collective bargaining.[134] This can be corrected by acknowledging the structural violence committed against workers and then interpreting the LRA in a manner that eradicates structural violence.

[130] See for instance M Tenza 'An investigation into the causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions' *Law, Democracy & Development* Vol 19 (2015) 211.
[131] See for instance T Ngcukaitobi 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 *ILJ* 836, 839–40.
[132] M Tenza Note 130 at 212.
[133] J Kruger & CI Tshoose 'The impact of the Labour Relations Act on minority trade unions: A South African perspective.' *PER* Vol 16 n.4 Potchefstroom April 2013.
[134] S 1 of the LRA.

2 Factors that cause violence during strikes

2.1 Structural violence

The most overt form of violence is physical violence, which includes damage to property, assault and intimidation. Violence is defined as *'Behaviour involving physical force intended to hurt, damage, or kill someone or something.'*[135] Snyman defines public violence as the

> '*unlawful and intentional commission, together with a number of people, of an act or acts which assume serious dimensions and which are intended forcibly to disturb the public peace and tranquillity or to invade the rights of others*'.[136]

This chapter is concerned with the more subtle but devastating form of violence, namely, structural violence. Professor Johan Galtung was the first to coin the phrase 'structural violence'.[137] The concept provides a useful framework for the understanding of how societal structures violate human rights ensuring that human needs are unattainable.[138] Galtung asserts that structural violence entails that '*... the violence is built into the structure and shows up as unequal power and consequently as unequal life chances*.'[139] He defines it as:

> '*avoidable impairment of fundamental human needs or, to put it in more general terms, the impairment of human life, which lowers the actual degree to which someone is able to meet their needs below that which would otherwise be possible*.'[140]

He further states that '*when the potential is higher than the actual* [*it*] *is by definition avoidable and when it is avoidable, then violence is present*.'[141] Ngcukaitobi expresses structural violence as '*a form of violence where some social structure or social institution purportedly harms people by preventing them from meeting their basic needs*.'[142] In the collective bargaining

[135] Available at *https://en.oxforddictionaries.com/definition/violence*, accessed on 27 October 2017.
[136] CR Snyman *Criminal Law* 5 ed (2008) 321.
[137] Johan Galtung 'Violence, Peace, Peace Research' (1969) 6.3 *Journal of Peace Research* 167.
[138] Kathleen Ho 'Structural Violence as a Human Rights Violation' *Essex Human Rights Review* Vol 4 No. 2 September 2007.
[139] Note 137 at 171.
[140] Galtung '*Kulturelle Gewalt*' (1993) 43 Der Burger im Staat at 106.
[141] Note 137 at 169.
[142] T Ngcukaitobi Note 35 at 841.

context, this entails that if workers could achieve an objective by striking and they are denied that right to strike without alternative means of achieving that objective, they are being subjected to structural violence.

The preamble of the Constitution reads:

> '*We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to —*
>
> > *... Improve the quality of life of all citizens and free the potential of each person ...*'

Structural violence is thus the antithesis of what the Constitution seeks to achieve, being to '*... Improve the quality of life of all citizens and free the potential of each person ...*'.[143] Being economically productive is probably the single most popular way of improving the quality of life of people and freeing their potential. The *dictum* of the Namibian Supreme Court in *Africa Personnel Services* (*Pty*) *Ltd v Government of the Republic of Namibia*[144] finds profound application in an argument regarding structural violence against workers. The court said:

> '*Labour is ... the means through which human beings provide for themselves, their dependants and their communities*; *a way through which they interact with others and assert themselves as contributing members of society*; *an activity through which to foster spiritual wellbeing, to enhance their abilities and to fulfil their potential*. *All these elements must be brought into the equation of labour relationships if social justice and fairness are to be achieved at the workplace*; *if social security, stability and peace are to be maintained*.'[145]

Further, according to the International Labour Organisation ('the ILO') the concept of decent work '*is based on the understanding that work is not only a source of income but more*

[143] Preamble of the Constitution.
[144] *Africa Personnel Services* (*Pty*) *Ltd v Government of Republic of Namibia & Others* (SA 51/2008) [2009] NASC 17; [2011] 1 BLLR 15 (NmS); (2011) 32 *ILJ* 205 (NmS).
[145] *Ibid* para 70.

importantly a source of personal dignity, family stability, peace in community, and economic growth that expands opportunities for productive jobs and employment.'[146]

Indeed as the antithesis of the Constitution, structural violence, particularly in the labour arena, must be eradicated. Work is the means through which people build up and protect their dignity and sense of worth. It is a mechanism through which one can raise one's self from a life circumstance that they aspire to grow out of and build a better quality of life. The right to strike is one of the drivers of such change and self-improvement.

In the year 2012, the country witnessed what started out as a labour strike over better wages and living conditions by Lonmin miners, degenerate into brutal killings of miners and police alike. The police fatally shot 34 miners and 78 others were injured.[147] Leading up to the strike, the miners had been heavily exploited. Their shifts last some 9 to 15 hours a day, 12 months a year with a break only on Easter and Christmas day.[148] Even after long service, 25 to 35 years, prospects of promotion are very slim for most of the miners and earnings remain low.[149] It has been said that the cause of the violence is the earning disparity between the miners and management.[150] So, clearly miners were striking for better conditions, for a better life.

As the Constitution seeks to '*... Improve the quality of life of all citizens and free the potential of each person ...*',[151] it follows then that any influential factor on the working conditions of our citizens must help workers achieve a better quality of life and realise their potential. Everything else must be stigmatised as structural violence if the result is that the workers' ability to fully realise their potential at the workplace is obstructed. The question that arises is whether the legal framework regulating strikes and associated violence is aligned with the constitutional vision to '*... Improve the quality of life of all citizens and free the potential of each person ...*', or whether it should be categorised as structural violence and accordingly rejected.

[146] ILO 2010 *www.ilo.org*.
[147] T Ngcukaitobi Note 35 at 837.
[148] G Hartford Note 35.
[149] *Ibid*.
[150] *Ibid* at 6.
[151] Preamble to the Constitution.

2.2 Majoritarianism

This section contextualises the concept of majoritarianism and demonstrates how, in its current form, it constitutes a powerful weapon utilised in a constitutionally repugnant manner by the orchestrators of structural violence against the vulnerable minority unions and their members, resulting in the dearth of justice, fairness, stability and peace for the workers.

The LAC in *Kem-Lin*[152] described majoritarianism as follows:

> '*... One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism.*'[153]

Majoritarianism envisages a democratic environment where the will of the majority trumps that of the minority. However, an important facet of majoritarianism is how the minority is protected. Pluralism and diversity must be respected in a democracy; they are, however, severely stifled through a cynical and simplistic application of majoritarianism.[154] Mogoeng CJ in *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [155] quoted with approval Sachs J's *dictum* in *Masondo*:

> '[*T*]*he Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. ... It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not towards exercising* (*or blocking the*

[152] [2000] ZALAC 25; (2001) 22 *ILJ* 109 (LAC); [2001] JOL 7711 (LAC).
[153] *Ibid* para 19. See also *Transport and Allied Workers Union of South Africa v Putco Ltd* Note 73 at para 52.
[154] J Kruger & CI Tshoose Note 132
[155] (CCT16/12) [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) (9 October 2012).

exercise) *of power for its own sake, but at achieving a just society where, in the words of the Preamble,* "*South Africa belongs to all who live in it ...*"'[156]

Majoritarianism is a recurring theme in the LRA evidenced in ss 18, 23 and 65, read with ss 1 and 213. Section 23(1)(d)[157] permits majority unions to enter into collective agreements with employers which, *inter alia*, prohibit strike action on issues of their choosing. The parties to this collective agreement are permitted to bind whoever they want to extend it to in the workplace, provided that; (a) everyone bound is identified in the agreement; (b) the agreement expressly binds them; and (c) the trade unions party to the agreement '*have as their members the majority of employees employed by the employer in the workplace*.' In *Sasol Mining* (*Pty*) *Ltd v Association of Mineworkers and Construction Union and Others*[158] the Court held:

'*Section 23*(*1*)(*d*)(*ii*) *is clear. It requires the agreement expressly to bind employees who are not members of any trade union or members of the trade union not party to the agreement. This principle was confirmed by the Labour Appeal Court in Concor Projects* (*Pty*) *Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation & Arbitration & others when it held that reliance on s 23*(*1*)(*d*) *was misplaced where the agreement does not state that it binds employees who are not members of the trade unions that are signatories to the agreement*.'[159]

In effect, the majority union negotiates on behalf of everyone at the workplace, including rival unions, whom they are in fierce competition with. It can further negotiate with the employer to set thresholds of representation as per s 18.[160] What constitutes the majority union, in addition

[156] *Ibid*.

[157] S 23(1)(d) provides:

'A collective agreement binds—

..

(d) employees who are not members of the registered trade union or trade unions party to the agreement if—

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.'

[158] (2017) 38 *ILJ* 969 (LC).

[159] *Ibid* at para 47.

[160] 's 18. *Right to establish thresholds of representativeness*

(*1*) *An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement*

to holding a 50% plus 1 of the membership of the employee at the workplace, will often depend on the interpretation of the definition of '*workplace*' in s 213 of the LRA.[161] The substance of the effect of these provisions is felt most harshly by the minority unions through the operation of s 65(1) and (3) of the LRA which prohibits the exercise of the right to strike.[162] In the recent case of *South African Airways* (*Soc*) *Ltd v South African Cabin Crew Association and Others*[163] the cabin crew's strike over higher meal allowances was declared unprotected because the issue was regulated by a collective agreement that was extended to the minority union via s 23(1)(d) of the LRA, which the minority had refused to sign.

In so far as the LRA relies on a numbers game and ignores other fundamental factors that impact on the minorities' rights to dignity, equality and freedom, it should be downcast as an instrument of oppression. The LRA permits the employer and the majority union to negotiate for rival factions at the workplace and curtails their right to strike on whatever issues the employer and majority union deem fit, whether or not their agreement is in the best interests of the minority. It is submitted that majoritarianism may be used as an implement of oppression in this regard by pushing the aspirations, needs and grievances of the minority into obscurity, which, by definition, amounts to structural violence. Take for instance where the minority vote

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establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.

(*2*) *A collective agreement concluded in terms of subsection* (*1*) *is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection*.'

[161] S 213 defines 'workplace' as:

'(*c*) *in all other instances means the place or places where the employees of an employer work*. *If an employer carries on or conducts two or more operations that are independent of one another by reason of their size*, *function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation*'.

[162] S 65(1) provides:

'*No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if—*

(*a*) *that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute*.'

S 65(3) provides:

'*Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out—*

(*a*) *if that person is bound by—*

(*i*) *any arbitration award or collective agreement that regulates the issue in dispute*; *or*

(*ii*) *any determination made in terms of section 44 by the Minister that regulates the issue in dispute*; *or*

(*b*) *any determination made in terms of Chapter Eight of the Basic Conditions of Employment Act and that regulates the issue in dispute*, *during the first year of that determination*.'

[163] (J949/17) [2017] ZALCJHB 158 (10 May 2017) para 20.

against the use of violence during a strike. It should not be that, all in the name of majoritarianism, their views are silenced and they are forcibly subjected to violence they have expressly denounced. In *S v Lawrence*; *S v Negal*; *S v Solberg*,[164] the following was said:

> '*One of the functions of the Constitution is precisely to protect the fundamental rights of non-majoritarian groups, who might well be tiny in number and hold beliefs considered bizarre by the ordinary faithful. In constitutional terms, the quality of a belief cannot be dependent on the number of its adherents nor on how widespread or reduced the acceptance of its ideas might be, nor, in principle, should it matter how slight the intrusion … is*.'[165]

As an example of the effects of majoritarianism, we return to the Marikana Massacre. The miners at Marikana call their committee the '*Amadoda*',[166] a Xhosa word which means 'men'. Ngcukaitobi[167] highlights the significance behind the choice of this name. He says '*its power lies in its symbolism of strength, power or fearlessness. This symbolism arises from the fact that the term is used to distinguish* "*boys*" *from* "*men*" *…*'.[168] The underlying message here is insightful. The Amadoda rightfully demand to be treated with dignity, respect and equality. It is a great insult to them to be told that they, or their views, do not matter simply by virtue of being the minority. It is a humiliating and demoralising treatment, almost dehumanising, for them to face the prospect of having to resign themselves to living in deplorable conditions and their pleas for better conditions and housing being ignored in the name of majoritarianism.[169] Faced with the choice to simply accept the status quo for the sake of majoritarianism and agree that nothing will be done whilst their children are left susceptible to contracting illnesses associated with mine spills,[170] or show defiance to the laws that seek to silence them and embark on unlawful strikes, the workers at Marikana chose to refuse to be silenced amidst deplorable working and living condition and continued striking illegally. As *Amadoda*, they felt duty bound to fight to improve their lives, and when fighting does not take any legal form

[164] [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC).
[165] *Ibid* para 160.
[166] K Sosibo 'Emboldened "Five Madoda" Issue Fresh Wage Demands' *Mail and Guardian* 28 September 2012, available at *http://mg.co.za/article/2012-09-28-00-emboldened-five-amadoda-issue-fresh-wage-demands*.
[167] T Ngcukaitobi 'Strike Law, Note 35 at 836.
[168] *Ibid* at 839.
[169] Majoritarianism is discussed in the next section below.
[170] The Bench Marks Foundation 'Communities in the Platinum Minefields' *Policy Gap* 6 August 2012 95 (Bench Marks Report), available at *http://www.bench-marks.org.za*.

because the LRA, in the name of majoritarianism, stacks the odds firmly against them in favour of the employer who colludes with majority unions and the police[171] to suppress the minority, the fighting spills out into physical violence. Viewed in this light, the insistence of majoritarianism in its current form is untenable.

In this regard, majoritarianism should be viewed as a conduit through which role players in the labour market use to grab the high-lying fruit with the intention of fulfilling their socio-economic goals. Majoritarianism in South Africa, from the point of view of the minority, is analogous to a fish that leaps out of the river to grab the low-lying fruit. Its success takes nothing away from the fact that it is an inept climber. On the other hand, from the point of view of the majority union, it is an obese monkey sitting comfortably at the top of the fruit tree throwing objects at the already handicapped fish trying to jump higher to grab a share of the high-lying fruit. As such, majoritarianism is an implement of oppression as it arms the fat monkey with objects to throw at and keep the minority in the lower echelons from which they seek to liberate themselves.

Majoritarianism is not, in itself, repugnant to the laws of the Republic. However, there is a desperate need to develop and tailor this principle to make it work in the South African labour environment.

a) The pitfalls of majoritarianism in South Africa

i) Employers and majority unions

Collective bargaining is meant to address and remedy the power imbalances prevalent between employer and employee. Brassey correctly observes that power imbalances are heavily distorted in the employer's favour, and crucially that '*the worker as an individual has to accept the conditions which the employer offers*'.[172] This is in accordance with Klare's assertions that

[171] Available at *https://www.youtube.com/watch?v=ssPrxvgePsc,* accessed on 9 May 2017. The video demonstrates how Lonmin management collaborated with the SAPS to silence the strikers.
[172] Martin Brassey 'Labour Law After Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?' (2013) 34 *ILJ* 826.

the market, by reason of the intervention of the law, is a social construct in which capitalists are strongly favoured.[173] Collective bargaining is meant to address these power imbalances.

It is evident then that workers, as individuals, have very little bargaining power. It is only when individual workers band together and bargain collectively that they gather some bargaining power to counter-balance that of the employer. This is explained by Kahn-Freund, in *Labour and the Law*,[174] who asserts that employers bargain from a position of strength. He explains that '*the individual employee or worker ... has normally no social power because it is only in the most exceptional cases that, as an individual, he has any bargaining power at all*'.[175]

As a result of this inequality in collective bargaining, there is a likelihood that employers may collude with a majority union to exclude certain workers from the bargaining process, for instance through closed shop agreements,[176] or through s 65 of the LRA which permits employers to enter into collective agreements that preclude identified unions and its members from striking on specific matters when certain conditions are met.[177] The effect is that the employer and the majority union can enter into agreements with each other on certain issues that may not necessarily be in the best interest of the minority and then prohibit the minority from striking in pursuit of what is in their best interest. In this manner the employer can silence the minority unions whilst further alienating them from their colleagues. This alienation translates to an effective stifling of the minority's aspirations. The matter is further exacerbated by the operation of s 18 of the LRA which allows the employer and majority unions to set inordinately high thresholds for representation. The message to workers not affiliated to the majority unions is that they should join the majority union, or suffer the humiliation of the constraints of a straitjacket and hannibal mask, thwarting any hopes of voicing and realising their aspirations. By creating rivalry and using majoritarianism, the employer can succeed, not only in alienating and thus weakening some factions of workers, but also in breeding a common

[173] K Klare 'The Public/Private Distinction in Labour Law' (1982) 130 *U Penn LR* 1358 at 1370.
[174] O Kahn-Freund *Labour and the Law* 3 ed (1977).
[175] *Ibid* 5–7
[176] S 26 read with s 24 of the LRA.
[177] S 65 read:
'...
(3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out—
(a) if that person is bound by—
(i) any arbitration award or collective agreement that regulates the issue in dispute; ...'

ground for infighting amongst workers, with the result that workers are competing with and fighting amongst themselves, when their true power lies in banding together and working for the common good. By hampering the minorities' right to bargain collectively, in its current construct, majoritarianism perpetuates this injustice and therefore is an instrument for perpetuating structural violence as it deprives the minority of the ability to pursue what is in their best interests, and puts them at the mercy of their rival, being the very majority union that seeks to protect its own hegemony in the workplace.

ii) Relationship between workers and unions

Another factor that must be considered in assessing the appropriateness of majoritarianism in the workplace is the relationship between workers and unions as unions are essentially the mouthpiece for, and the vanguard of the workers' aspirations. Brassey[178] opines that this relationship has changed since the 1970s. He exclaims that unions fought laboriously for the rights of employees often at great personal sacrifice for the union officials, but union officials and stewards are currently handsomely rewarded and they are more interested in fighting for their personal luxuries, whilst union head office makes decisions on behalf of the members, and the bond between them has become tenuous.[179] Brassey sums it up thus:

> '*Majoritarianism, the leitmotief of both industry bargaining and plant-level organizational rights, is too crude to give proper expression to the interests of minority unions, which frequently represent skilled or semi-skilled workers but, as the Marikana experience demonstrates, who may simply be acting on behalf of workers who feel alienated from the majority union*.'[180]

The above excerpt demonstrates that employees can very quickly find themselves in the minority when they are disillusioned with the ineffectiveness of the majority union in spearheading their cause, and realise that it no longer serves their interests to be part of the majority union. It further makes sense that the employers would staunchly support majoritarianism because, through the application thereof, the employer can act as the catalyst

[178] M Brassey Note 172 at 826.
[179] *Ibid* at 834.
[180] *Ibid*.

in fostering complacency in majority unions by entering into agreements with it that effectively shield the majority union from competition from other unions vying for supremacy, and pampering the union official with luxuries in order to separate them from the sufferings of the workers, thereby reducing the zeal the officials once had for fighting for the workers. The workers who become disillusioned with the majority union should not lose the ability and protection afforded to protected strikers, to pursue their interests through collectively bargaining.

The weapon of choice in this regard is s 18 of the LRA.[181] The evidence is that s 18 is used by employers in cohorts with majority unions to set very high thresholds for representivity, thereby effectively excluding minority unions from the bargaining table.[182] By virtue of s 18, the majority effectively knocks the teeth right out of the minority union's mouth. This affects the workers' freedom of association because no one will rely on a toothless dog to guard its interests.

Placing shackles on minority unions and denying them the right to strike based on a numbers game fosters a deep sense of frustration and desperation. It turns workers into beasts.[183] For instance, it cannot be justifiable, in an open and democratic society, to protect the hegemony of a trade union at the expense of silencing employees whose children are falling ill due to mine dump spills, particularly when such employees could effectively collectively bargain with the employer on the issue.[184] The objective of controlling the proliferation of unions in the workplace cannot supersede or justify the gross violation of fundamental rights that workers suffer at the hands of those who will suppress them through structural violence. This scenery of structural violence brings to mind the old Russian adage that '*even the bullet fears the brave*',

[181] S 18. *Right to establish thresholds of representativeness*
'(1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.
(2) A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection.'

[182] See also *South African Post Office Ltd v Commissioner Nowosenetz* [2013] 2 BLLR 216 (IC). In this case the union was denied organisational rights after the employer and majority union raised the threshold in a fresh agreement. This resulted in precluding the minority union from claiming rights acquired under the earlier agreements.

[183] T Ngcukaitobi Note 35 at 842.

[184] As was the case at Marikana.

where workers adopt the '*come what may*' attitude when engaging in violence. In *Pikitup Johannesburg* (*Pty*) *Ltd* ('*Pikitup*') *v South African Municipal Workers*' *Union* ('*SAMWU*') *and Others*[185] the court referred to a press statement issued by SAMWU Head Office and appearing on the SAMWU website on 1 December 2015, under the heading 'SAMWU to intensify Pikitup strike', where the relevant excerpt reads:

> '*... We are very worried about the excessive force which we have seen being applied by the police on unarmed workers, workers who pose no threat to anyone. Surely the police have not learned from the mistakes they made in Marikana. We shall not be deterred by such acts of police brutality, in fact the police cannot take away workers*' *constitutional right to embark on a strike action ...*'[186]

The stance of the Union demonstrates how the State has become viewed as the enemy to the proletarian. The gruesome scenes of the State supressing workers is not a new phenomenon. It is appropriate to pause here and reflect on the structural violence that has historically been inflicted on workers in South Africa and the physical violence that flowed therefrom. Buitendag and Coetzer[187] have observed that:

> '*Marikana was not the first time that executive power was used to intervene in industrial action. In 1914, the Union Government of South Africa employed the armed forces to bring a strike over attempts to retrench employees to an end. A few years later the infamous Rand Rebellion, which started as an industrial dispute, resulted in the deaths of some 230 people* (*mostly miners*). *The Great Strike of 1946 was organised by the African Mineworkers Union in response to the disparity in wages between white and black miners. The strike led to what became known as* "*Bloody Tuesday*" *when at least nine miners were gunned down by the police. In 1973 some 200 000 black workers engaged in a series of rolling strikes. While the strikes were largely peaceful, 12 strikers were killed and 38 injured by police at the Western Deep Levels Mine ... The manner of dealing with industrial action by the Union Government in the early part of the 20th century and the National Party government thereafter serve as more suitable*

[185] (J2362/15) [2016] ZALCJHB 149; (2016) 37 *ILJ* 1710 (LC) (19 April 2016).
[186] *Ibid* para 15.
[187] Nico Buitendag & Neil Coetzer 'History as a system of wrongs — Examining South Africa's Marikana Tragedy In A Temporal Legal Context' *Strategic Review for Southern Africa*, Vol 37, No 2.

comparators to the actions of the ANC in 2012. It is a pity that these events seem to have been forgotten or overlooked in the debate around Marikana.'[188]

The physical violence seems to flow directly from the structural violence, more specifically in the form of majoritarianism which hampers workers from improving the quality of their lives and realising their potential. The Constitutional Court in *AMCU v Chamber of Mines of South Africa and Others* seems to have taken a different stance on majoritarianism.

b) *AMCU v Chamber of Mines of South Africa and Others*

The Constitutional Court in *AMCU v Chamber of Mines of South Africa and Others*[189] recently considered the constitutionality of the majoritarianism principle. The court, as per Cameron J, explained the doctrine as both a premise of and recurring theme throughout the LRA.[190] He noted that the provisions promulgating majoritarianism are not invulnerable to constitutional attack, but '*it is only to point to them as piquantly instancing the scheme of the statute as a whole*.'[191] He also remarked that AMCU is correct that majoritarianism, as per s 23(1)(d) of the LRA limits the right to strike, but found that it was justified as it benefits orderly collective bargaining.[192] Cameron J held that:

'*What section 23*(*1*)(*d*) *does is to give enhanced power within a workplace, as defined, to a majority union*: *and it does so for powerful reasons that are functional to enhancing employees*' *bargaining power through a single representative bargaining agent*.'[193]

Cameron J found that the enforcement of the majoritarian system allows minority unions freedom of association. He noted that AMCU enjoyed the rights, including organisational rights, under ss 8, 12, 13, 14, 15, 16, 27 and 28 of the LRA. The learned Judge then arrived at the conclusion that the LRA does not make majoritarianism an implement of oppression as it

[188] *Ibid* at 94.
[189] (CCT87/16) [2017] ZACC 3; (2017) 38 *ILJ* 831 (CC); 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC); [2017] 7 BLLR 641 (CC) (21 February 2017).
[190] *Ibid* at Para 43.
[191] *Ibid* at Para 43.
[192] *Ibid* at Para 50.
[193] *Ibid* at Para 44.

does not entirely suppress minority unions.[194] Ultimately, Cameron J concluded that '*this means that the LRA, though premised on majoritarianism, does not make it an implement of oppression. It does not entirely suppress minority unions*.'[195]

Borrowing from the guard dog analogy, what Cameron J seems to be saying is that the dog's teeth are not extracted. It should be noted that the usefulness of the rights enjoyed by a minority union in the workplace is severely hampered when divorced from the right to strike. This is because the minority's ability to bite is neutralised by the breaking its jaw, full of bright white teeth which the employer can shun as incapable of inflicting harm. In this manner, minority unions are rendered impotent to actualise the aspirations of their members. The LAC in *Black Allied Workers Union and Others v Prestige Hotels CC t/a Blue Waters Hotel*[196] put it thus:

> '*The Act contemplates that the right to strike should trump concerns for the economic losses which the exercise of that right causes. That is because collective bargaining is necessarily a sham and a chimera if it is not bolstered and supported by the ultimate threat of the exercise of economic force by one or other of the parties, or indeed by both*.'[197]

Thus stripped of the threat to inflict economic harm, we see that the view '*collective bargaining unaccompanied by the right to strike is little more than* "*collective begging*"',[198] aptly demonstrates the degradation that minorities are forced to suffer, all in the name of majoritarianism.

It should be noted further that through s 20 of the LRA,[199] the majority union and the employer have an unfettered discretion to allow or disallow organisational rights through a collective agreement. As such, it is a weapon that can, and is, being used to oppress minority unions.

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[194] *Ibid* at Para 55.
[195] *Ibid*.
[196] (1993) 14 *ILJ* 963 (LAC).
[197] *Ibid* at 972a–d.
[198] See for instance E Fergus 'Reflections on the (Dys)functionality of strikes to collective bargaining: Recent developments' (2016) 37 *ILJ* 1537 and M Brassey et al. *The New Labour Law* (1987).
[199] S 20 reads: '*Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights*.'

Further, having organisational rights divorced from the right to strike does not make for an effective union. The court in *POPCRU v Ledwaba*[200] put it thus:

> '*Organisational rights must have a purpose and no such purpose can be achieved by affording organisational rights to a minority trade union where an employer and a majority trade union have already fully regulated all their affairs relating to their relationship, and the structure of collective bargaining, in a collective agreement made binding on all the employees in the employer. To simply afford organisational rights without a purpose or reason would make organisational rights an end in itself and not a means to an end, which is not what is intended by the LRA.*'[201]

Cameron J adopted a very narrow approach in assessing only the particular circumstances of *AMCU* without considering the broader implications of majoritarianism in SA. Indeed s 39(2) of the Bill of Rights mandates the judiciary, more so the Constitutional Court, to interpret and develop the law. The judiciary must promote the spirit, purport and objects of the Bill of Rights. Cameron J missed an opportunity to assess majoritarianism, especially in light of the ample evidence that the principle of majoritarianism must be developed and brought in line with the spirit and purport of the Constitution in order to curb structural violence and the concomitant violations of fundamental rights, such as the rights to equality and dignity.

Further, consistent with the narrow approach, Cameron J's focuses his enquiry on whether or not there is a need for majoritarianism. This need is evident. The question is whether, in its current construct, majoritarianism is appropriate in the South African labour market? In so far as majoritarianism is antithetical to the legitimate aspirations of the workers that could be realised through strike action, and thwarting the constitutional aspiration to '*... Improve the quality of life of all citizens and free the potential of each person ...*', it is submitted that the answer is that our labour laws need an urgent overhaul to tailor majoritarianism to the South African labour market. The principle of majoritarianism should not be allowed to trump the fundamental right to strike, that is, to fight for one's dignity and family aspirations and quality of life, particularly where poverty is concerned. It is the right to strike that allows the citizenry

[200] [2013] 11 BLLR 1137 (LC).
[201] *Ibid* at 1149.

of a country to '*... Improve the quality of life of all citizens and free the potential of each person ...*'.[202]

Further, Cameron J makes the important observation that majoritarianism, as a means of enhancing collective bargaining, is internationally recognised.[203] It is submitted that the current implementation of majoritarianism renders it an implement of untenable oppression. In so far as the LRA does not provide for adequate checks and balances, majoritarianism is constitutionally objectionable. The ILO Collective Agreement Recommendation Cameron J refers to does not envisage a 'one size fits all' approach. It states that:

> '*Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement*.' (Emphasis added.)

Section 1(b) of the LRA states that the purpose of the LRA is to give effect to South Africa's obligations as a member of the ILO.[204] As the ILO envisages a tailoring of the national laws, had Cameron J considered this, he would have realised that the LRA, as required by the ILO, fails to provide for adequate measures to tailor majoritarianism to be autochthonous to the South Africa labour market. Majoritarianism, by silencing and marginalising the minority, also violates the LRA's purposes of promoting employee participation in decision-making in the workplace[205] and effective resolution of labour disputes.[206] Issues raised by the minority cannot be effectively dealt with by refusing them an audience simply because they are the minority. Cohen says:[207]

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[202] Preamble to the Constitution.

[203] *AMCU v Chamber of Mines* Note 188 Para 56. The reference was to the ILO Collective Agreements Recommendation, 1951 (No. 91) (Collective Agreements Recommendation) at article 5(1):
'*Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement*.'

[204] S 1(b) of the LRA reads: '*To give effect to obligations incurred by the Republic as a member state of the International Labour Organisation*.'

[205] S 1(d)(iii) of the LRA.

[206] S 1(d)(iv) of the LRA.

[207] T Cohen Note 38.

> '*... the Marikana experience and the strike violence that has marred the South African labour market in recent times reveal the flaws in the majoritarian framework and the changed dynamic of the collective bargaining environment. It may be time to return to the drawing board*.'[208]

There are academic calls for the harmonisation of Western and African values.[209] The tailoring of majoritarianism in the South African context should have, as its substratum, the principle of *Ubuntu*. Cameron J missed an opportunity to contribute to the transformative interpretation jurisprudence.

c) A transformative interpretation — the death and resurrection of *Ubuntu*

The Constitution is said to have set itself the mission of transforming society in both the public and private sphere.[210] It sets out to transform the South African society from one deeply divided by racism and inequality, to one based on democracy, social justice, equality, dignity and freedom.[211] Put differently, the Constitution seeks to remove structural violence and promote peace and prosperity. That transformation, to a large extent, is yet to take place in the South African labour market. In discussing the counter majoritarian dilemma, De Vos *et al* emphasise that judges, as non-elected officials, must apply the Constitution, instead of imposing their will or personal convictions on the majority of citizens, whilst pursuing the Constitution's transformative agenda.[212] They correctly argue that:

> '*... democracy, when viewed substantively and especially in a plural political society, is never simply majority rule. While the elected representative of the political majority must exercise political power in a democratic society, this does not necessarily give the majority a blank cheque to govern in whatever way it desires*.'[213]

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[208] *Ibid* at 2222.
[209] Keep & Midgley 'Emerging Role of Ubuntu-botho' 47–9.
[210] P de Vos. ... et al. *South Africa Constitutional Law in Context* (2014) at 27.
[211] *Ibid*. See also D Davis *Democracy and Deliberation*: *Transformation and South African Legal Order* (1999) at 44.
[212] P de Vos Note 210 at 72–75.
[213] *Ibid*.

By putting in place checks and balances, such as judicial review, the drafters of the Constitution make a concession that democracy does not entail relying simply on a numbers game and then allowing the majority to treat the minority in whatever manner it pleases. As it stands, the LRA is being implemented in this undesirable manner. De Vos continues:

> '*Democracy entails more than conferring power on a particular majority on any given day. It also necessarily entails finding a balance between enabling those in the majority to govern and limiting the things that they can do while in power, especially where such power can be used to violate the rights of others or undermine the very nature of democracy*.'[214]

Indeed the current form of majoritarianism undermines democracy. It provides for the protection of the hegemony of a majority union and empowers that union to place almost insurmountable obstacles in the way of minority unions, and strips them of the right to strike on many issues. As discussed above, without the right to strike, the minority union becomes a toothless dog, left to collectively beg for crumbs falling off the table of the majority union. This affects freedom of association as employees will be less inclined to associate with a union that is powerless to remedy their grievances. The undemocratic nature of the current regime can be seen in *dictum* of the court in *POPCRU v Ledwaba*[215] where the court held that the purpose of s 18 of the LRA is:

> '*to regulate the admission of trade unions to the bargaining relationship with the employer so as to avoid a situation of proliferation by a multitude of small trade unions in one employer and in particular where there is already an established relationship with a majority trade union*.'

Not only is this stance undemocratic, it fosters an ideology underlying the legal framework regulating strikes in South Africa that is adversarial, where the yielding of power is used to oppress and subjugate the vulnerable minority. If strike violence is to be uprooted, a fundamental shift of ideology is required that will bring a move away from the current adversarial position to one of collegiality and cooperation predicated upon the concept of

[214] *Ibid*.
[215] *Ledwada* Note 200.

Ubuntu. Consider for instance the words of Cele J in *Chamber of Mines of SA v Association of Mineworkers & Construction Union*:[216]

> '*If the minority employees represented at the workplace by AMCU were to succeed and have a new wage agreement to come about and to supplant the existing collective agreement, the minorities would be governing for the majority in the workplace. That result is certainly undesirable*.'[217]

Earning better wages is not the undesirable part, surely employees want that, but the issue is in the 'who' succeeded in obtaining those better wages. This demonstrates the adversarial 'us' and 'them' way of thinking that the LRA fosters, there must be a paradigm shift toward a 'one for all, all for one' approach. It is proposed that infusing *Ubuntu* into the interpretation of the LRA will produce the desired effect.

Langa DP (as he was then) said a '*spirit of transition and transformation characterises the constitutional enterprise as a whole*'.[218] No human being is an island but all live in association with other people. This is often expressed in the Zulu phrase *umuntu ngu umuntu ngabantu*, which literally means that a person is a person because of support from others. This Zulu phrase emphasises the communality and interdependence of the members of the community and that every individual is an extension of others.[219] In addition, the phrase teaches people that in certain instances, individuals can better perform their duties if they collaborate and join forces with each other, for example through the formation of unions in the labour relations environment.

It is difficult to define the concept of *Ubuntu*, so it has been described according to its characteristics. Relevant to this discussion is the description offered by Mokgoro J who said:

> '*While* [*ubuntu*] *envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense*

[216] (2014) 35 *ILJ* 1243 (LC).
[217] *Ibid* at 1257.
[218] *Investigating Directorate*: *Serious Economic Offences v Hyundai Motor Distributors* (*Pty*) *Ltd*: *In re Hyundai Motor Distributors* (*Pty*) *Ltd v Smit* 2001 (1) SA 545 (CC).
[219] See *MEC for Education*: *KwaZulu-Natal & Others v Pillay* 2008 (1) SA 474 (CC) at 524E.

it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.'[220]

In the same case, Langa J stated that an '*outstanding feature*' of *Ubuntu* is the value it places on life and human dignity and that '*the life of another person is at least as valuable as one*'*s own*' where '*respect for the dignity of every person is integral to this concept*'.[221] More fittingly, he explained that:

'*During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of ubuntu. Thus heinous crimes are the antithesis of ubuntu. Treatment that is cruel, inhuman or degrading is bereft of ubuntu*.'[222]

As Chief Justice Langa quoted with approval the words of Kwame Gyekye that '*an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons*'.[223]

Cameron J in *AMCU v Chamber of Mines* missed an opportunity to enforce the transformative agenda of the Constitution and test the collective bargaining framework, particularly majoritarianism, in light of *Ubuntu*. It is submitted that adding this distinctly African flavour to our collective bargaining legal framework cannot be gainsaid as it will eradicate structural violence and concomitant strike violence, whilst strengthening the economy of the country as a whole.[224]

2.3 Use of replacement labour and non-striking employees

2.3.1 *Replacement labour*

A blatant form of structural violence against workers is the LRA's provision that permits the use of replacement labour during a strike.[225] The employer is permitted to enforce the '*no work,*

[220] *S v Makwanyane* 1995 (3) SA 391 (CC) para 307.
[221] *Ibid* para 225.
[222] *Ibid*.
[223] *MEC for Education*: *KwaZulu-Natal & Others v Pillay* 2008 (1) SA 474 (CC) para 53.
[224] For similar arguments, see Keep & Midgley 'Emerging Role of Ubuntu-botho' 48.
[225] S 76. Replacement labour.

no pay' rule[226] to inflict economic harm on employees. At the same time employers are permitted to carry on production during a strike, through non-striking employee and/or replacement workers, thus undermining, if not totally eradicating, the economic pressure the workers are trying to exert on the employer by striking.[227] It only seems inevitable that this structural violence is going to escalate to physical violence when striking workers come into contact with the replacement workers or non-striking employees, and in some instances, even against management.[228]

In *Mahlangu v SATAWU, Passenger Rail Agency of SA & Another*,[229] the employer responded to a strike called by SATAWU by employing a replacement worker, namely Mahlangu, the plaintiff in this matter. Whilst commuting to work, Mahlangu was approached by people unknown to her whom she later claimed to be members of SATAWU, one of them being the employee Mahlangu had replaced. They lured Mahlangu to the city with a promise of a lucrative job. On this journey to the promised land, Mahlangu was attacked by these SATAWU members. They ultimately stripped Mahlangu naked and threw her off a moving train, suffering serious injuries as a result. She claimed damages against SATAWU.

The court found against Mahlangu stating that the place where the assault occurred was not in close proximity to the designated area for the strike gathering and that the union could not be held liable for acts of its members committed outside of such designated area.[230]

The court failed to address the underlying structural violence, which in essence caused the physical violence in the matter. It is also doubtful that this proximity test applied by the court is good law. The preferred test is the one enunciated in *Ngubane v South African Transport*

'(*1*) *An employer may not take into employment any person—*
(*a*) *to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or*
(*b*) *for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike*.
(*2*) *For the purpose of this section, "take into employment" includes engaging the services of a temporary employment service or an independent contractor*.'

[226] S 67(3) of the LRA.
[227] See M Tenza note 130 at 219.
[228] *Ibid*.
[229] (2014) 35 *ILJ* 1193 (GSJ).
[230] *Ibid* para 91.

Services,[231] where the court held there are four basic considerations in each case which influence the reaction of a reasonable man to a situation posing a foreseeable risk of harm to others:

(a) The degree or extent of the risk created by the actor's conduct;
(b) The gravity of the possible consequences if the risk of harm materialises;
(c) The utility of the actor's conduct; and
(d) The burden of eliminating the risk of harm.

2.3.2 *Non-striking employees*

In Marikana, a non-striking employee was stripped naked and beaten before being stabbed and burnt to death by his striking colleagues, and the reason forwarded for such barbarism was that the deceased chose to work whilst others were striking.[232] This was not an isolated incident. A non-Marikana example was in *Food and Allied Workers Union obo Kapesi v Premier Foods*,[233] where evidence was placed before the court to the effect that strikers subjected several non-striking employees and members of management to physical assaults, death threats were issued, and their homes and cars were firebombed. The death threats were carried out by fatally shooting one employee who identified his assailants, and a further plot to assassinate a director was uncovered in time to save the director.

The court could do no more than mention the obvious, that strikers do not act criminally with impunity. There can be very little doubt that the strikers themselves were aware of this fact, but they vehemently carried on with unprecedented tenacity. This is evidence of a need to tackle the underlying issues of structural violence that is turning our workers into beasts.

The study argues that replacement labour provisions should be repealed and replaced with a proportionality provision. Such provision will entail that wages that the workers would have received for the period of the strike are reduced by the percentage of the workforce that the workers made available to the employer i.e. if the workers and the employer agree that during

[231] 1991 (1) SA 756 (AD) at 779I–J.
[232] M Tenza note 130 at 219.
[233] (2010) 32 *ILJ* 1654 (LC).

a strike, 50% of the workers will work, then the total amount of wages for the period is reduced by 50%. The rest of the 50% is shared among the entire workforce, not just those who worked.

This is in conformity with the *Ubuntu* principle and creates a win–win situation for all. Firstly, it will remove the need to hire replacement labour whom the employer may even still need to train because there will be an agreement (either on an ad hoc basis, or through a collective agreement, or to be compulsorily agreed upon at conciliation before a certificate of non-resolution is issued, or through a ministerial promulgation regulating an industry) that a certain percentage will work in order to preserve the business so that strikers still have a job to go after the strike. Consistent with *Ubuntu*, employer and employee will recognise and embrace their dependence on one another, thereby removing the adversarial paradigm, and promptly replacing it with the interdependence, *Ubuntu* way of thinking. Tensions will be eased fostering a spirit of inter-dependence and community in the workplace.

Instead of being at opposing ends, all of the employees depend on one another to emerge from the strike better off. Non-striking workers will benefit from the concessions extracted from the employer by the strikers. Striking workers depend on the non-striking workers to preserve the business and provide some income that would otherwise have gone to replacement workers. It also means that the employees 'take ownership', so to speak, of the business because they recognise the need to preserve it, which will mean less vandalism and/or malicious interruptions of the business by striking workers. Gruesome scenes of violent attacks between strikers against replacement workers or non-striking workers will be no more.

2.4 Balloting

The system of balloting is not new in the SA labour environment. Under the 1956 legislation ballots were a requirement and did not help eradicate violence until the Act was repealed in 1995/4.[234] It did not succeed in curbing strike violence and Tenza attributes this to the inextricable relationship between strikes and political protest which characterised the liberation struggle against the apartheid government.[235] The argument is that given the relative political

[234] S 65(2)(b) of the Labour Relations Act 28 of 1956.
[235] M Tenza Note 130 at 215.

calm of the modern era, this democratisation of the workplace should yield the desired fruit of bringing peace to the workplace.[236]

It is submitted that in order to give true meaning to majoritarianism, all workers, notwithstanding union affiliation, should be permitted to vote on an issue raised by workers. The LRA should be amended to create this purer application of majoritarianism. It is a fallacy to assume that a majority union will hold the majority view on a particular point as employees may be indifferent to the views of the union's leaders and they can express their own voice through a ballot. This will also serve to remind union leaders that they are there to serve the workers and should not use the power vested in them to push ulterior agendas, thus restoring trust between workers and unions. An added benefit is that those who are the minority are not simply shunned when they raise an issue simply because they are the majority. They will be given an audience among colleagues, who will then vote after applying their minds. The result will be reduced frustrations and tension in the workplace, which in turn should reduce strike-related violence.

A further ancillary benefit will be that balloting will result in workers realising the value of creating allies, rather than rivalries, with one another, irrespective of union affiliation. This will make for a peaceful and more fruitful working environment. The current form of majoritarianism creates an adversarial environment where it is a case of 'join us or we will oppress you'. This form of majoritarianism will be more in line with principles of *Ubuntu*, which are enshrined in our Constitution,[237] which in this context entails '*Motho ke motho ka batho*', a Sotho saying which translates 'a person is a person through other people'.[238] It encapsulates the value that by banding together, all stakeholders account for the common growth and prosperity of all. The current status quo promotes the stance that for one to grow, someone else must fall, which is repugnant to the values of the Constitution. It should also be borne in mind that most of the strikers are black Africans who are brought up with values of *Ubuntu* and when they reach the workplace, they find this adversarial form of majoritarianism,

[236] *Ibid*.
[237] See C Himonga, M Taylor & A Pope 'Reflections on Judicial Views of Ubuntu.' *PER/PELJ* 2013 (16)5 at 372.
[238] *MEC for Education*: *KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 53. See also Mokgoro 1998 *PELJ* where Mokgoro J described the phrase as a 'metaphorical' expression, 'describing the significance of group solidarity on survival issues so central to the survival of communities'.

hence the need to tailor our majoritarianism to suit our culture and *Ubuntu*. The words of the Constitutional Court in *Mayelane v Ngwenyama*[239] bear repeating in this context:

> '*… the inherent flexibility of customary law provides room for consensus-seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements*; *and …* [*that*] *these aspects provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions like ubuntu*.'[240]

This is the approach that the legislature, and Cameron J in *AMCU v Chamber of Mines,* should have adopted in labour disputes. It was this spirit of camaraderie that ultimately won the freedom of South Africa from its oppressors; it is this spirit that will economically emancipate the down trodden.

3 Conclusion

The chapter has described structural violence as the antithesis of the constitutional aspiration to '*… Improve the quality of life of all citizens and free the potential of each person …*'. Structural violence is the denial of freedom and liberty of people to seek a better life and fulfil their potential. When structural violence is perpetrated on workers, it fosters a spirit of defiance and frustration, leading to physical violence. The chapter demonstrated how majoritarianism is an implement of structural violence and how it contributes to physical violence. A further form of structural violence is that the LRA's permission for employers to use replacement labour, leads to violent confrontations with strikers and such workers. The chapter further explores the use of ballots and how they can create a more tailored form of majoritarianism and end the violence. The chapter identifies the principle as the key to eradicating violence in the workplace and creating an environment conducive for the prosperity of all concerned.

[239] 2013 (4) SA 415 (CC).
[240] *Ibid* para 24.

CHAPTER 4: THE LIABILITY OF TRADE UNIONS AND MEMBERS FOR STRIKE-RELATED VIOLENCE

1 Introduction

Given the prevalence of strike-related violence in South Africa, there is a need to address the issue of liability flowing from such conduct and how to appropriately compensate those who suffer damages as a consequence of violent conduct. Currently the law is not very clear as to who should take responsibility for the loss incurred during industrial action, whether in the form of a strike, picket or protest action. The LRA does, however, state that certain conduct may create grounds for taking action against those responsible. This may require the Labour Court to take active steps to deter such conduct and award compensation to victims for loss suffered as a result thereof.

The chapter looks at misconduct as a ground for taking action against wrongdoers and argues that the whole group involved in the commission of misconduct may be dismissed on the ground of derivative misconduct if the employer is unable to identify the actual perpetrator. It further investigates the possibility of extending the application of the doctrine of vicarious liability to apply to a trade union and member relationship. The objective is to have someone answerable for the unlawful conduct perpetrated during strikes when no one is willing to shoulder the blame.

2 Grounds for holding union and/or members liable

2.1 Liability on the basis of misconduct

Under common law, organisers and strikers alike are exposed to potential delictual and contractual liability.[241] This is due to the application of the principle of sanctity of contract which requires that parties to a contract be bound to perform according to the terms of their contract(s). Under common law, a person who organises or partakes in a strike may be in breach of the employment contract and thus the employer may terminate the contract and claim

[241] See *Atlas Organic Fertilizers v Pikkewyn Ghwano* 1981 (2) SA 173 (T) at 202G.

damages arising from the breach where losses have been incurred. The employer may also opt to sue for other damages suffered during the strike, provided the elements of the delict are met.[242]

However, where such a strike is protected, the LRA exempts participants from contractual and civil liability.[243] It states that such employees or members of the union are not in breach of contract; they are also not committing delict by virtue of being part of a protected strike.[244] The exception applies if any act in the furtherance of a strike constitutes a criminal offence, the victim(s) will have the right to institute civil action against any person involved in the strike as per s 67(8) of the LRA, which effectively provides that immunity does not extend to conduct that constitutes an offence.[245] Persons affected by violence are then at liberty to approach the Labour Court for remedies, which may include interdicts, laying criminal charges, and civil claims for contractual and delictual damages.

2.1.1 *Misconduct and the sanction of dismissal*

Misconduct may constitute a fair reason for dismissal.[246] Like any other form of dismissal, a dismissal for misconduct must be substantively and procedurally fair.[247] From the cases discussed throughout this study, it is noted that the most common forms of misconduct during strikes are:

a) Damage to property

According to item 3(4) of the Code, it is a serious misconduct to wilfully damage the property of the employer. The same seriousness should apply regarding malicious damage caused to the property of third parties as such conduct constitutes criminal conduct for which a sanction of dismissal may be appropriate.

[242] *Atlas Organic Fertilizers v Pikkewyn Ghwano* 1981 (2) SA 173 (T) at 202G.
[243] S 67 of the LRA.
[244] ss 67(2)–(6) of the LRA.
[245] S 67(8) of the LRA.
[246] S 188 of the LRA.
[247] Code of Good Practice: Dismissal ('the Code').

b) Assault

Assault is defined as the unlawful and intentional application of force, or the threat thereof, to a person.[248] The crime of assault is wide enough to include pushing and shoving.[249] According to item 3(4) of the Code, physical assault on the employer, colleagues, clients, or customers, constitutes serious misconduct. Strikers who engage in such criminal conduct do so at the risk of facing dismissal.

c) Intimidation

It is a common practice for strikers to issue threats against management, non-striking colleagues and replacement workers, with an intention to terrify or frighten to a state of timidity.[250] Such conduct constitutes intimidation.[251] The words uttered need not be directed at any particular individual.[252] Strikers must refrain from such conduct lest they themselves face the threat of dismissal.

Strikes must be peaceful and free of misconduct. The implication include two things. Firstly, strikers must be cognisant of the provisions of item 6 of the Code of Good Practice: Dismissal, so as not to commit misconduct during strikes. Secondly, s 67(5) of the LRA allows for the dismissal of strikers for misconduct committed during a strike. Section 67(5) reads:

> '(*5*) *Subsection* (*4*) *does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee*'*s conduct during the strike*, *or for a reason based on the employer*'*s operational requirements*.'

[248] See *Ntshangase v Alusaf* (*Pty*) *Ltd* (1984) 5 *ILJ* 336 (IC).
[249] See Mischke 'Assault in the workplace: the role of provocation as a defence' (2010) 20/2 *CLL* 11.
[250] *Adcock Ingram Critical Care v CCMA & Others* (2001) 22 *ILJ* 1799 (LAC). *Transport and General Workers Union & Another v Durban Transport Management Board* (1991) 12 *ILJ* 1113 (IC); *National Union of Mineworkers & Others v Deelkraal Gold Mining Co Ltd* (*2*) (1994) 15 *ILJ* 1327 (IC).
[251] See *Metal & Allied Workers Union & Others v Transvaal Pressed Nuts*, *Bolts and Rivets* (*Pty*) *Ltd* (1988) 9 *ILJ* 129 (IC); *Food & Allied Workers Union & Another v BB Bread* (*Pty*) *Ltd* (1987) 8 *ILJ* 704 (IC).
[252] *Adcock Ingram Critical Care v CCMA & Others* Note 250.

In *RAM Transport* (*SA*) (*Pty*) *Ltd v South African Transport Allied Workers Union*[253] the court said:

> '*This court is always open to those who seek the protection of the right to strike*. *But those who commit acts of criminal and other misconduct during the course of strike action in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose*.'[254]

It is often difficult for employers to gather evidence and impute liability on individual strikers. This is because misconduct can be committed by an individual or by a number of individuals acting collectively. The onus rests on the employer to prove misconduct.[255] The issue for employers arises when a number of employees are involved in the commission of misconduct during strikes and the individual perpetrator cannot be identified. A simpler challenge arises when there is evidence against the actual perpetrators. For instance, in *City of Cape Town v South African Municipal Workers Union obo and Others*,[256] metro police officers blockaded the N2 freeway, City bound thus causing traffic, during morning peak hours. Through the aid of cameras installed along the freeway, the employer was able to identify 117 employees who participated in the blockade. The employer convened a joint disciplinary hearing and dismissed all 117 employees on the strength of the evidence against each perpetrator. It gets complicated when there is a lack of evidence implicating specific perpetrators.

A study of case law reveals that three possible distinct routes have been utilised by employers to dismiss groups of offenders. The criminal law principle of common purpose has been borrowed into the labour arena. Second is the principle of derivative misconduct, and lastly, misconduct has been fused with retrenchments to dismiss offenders. These are each discussed below:

a) Doctrine of common purpose

The criminal law doctrine of common purpose will apply to impute liability on a group of offenders if the employer can prove that each of the strikers actively associated himself or

[253] (2011) 32 *ILJ* 1722 (LC).
[254] *Ibid* at Para 9.
[255] *NULAW & Others v Bader Bop Ltd & Others* [2004] 8 BLLR 799 (LC) at 804J.
[256] (CA7/08) [2012] ZALAC 30 at 4.

herself with the actual perpetrators. This is almost an insurmountable hurdle for employers. In *NSCAWU and Others v Coin Security Group t/a Coin Security*[257] the court found that 74 of the dismissed employees could not possibly have committed the misconducts and the employer furnished insufficient evidence that those employees had actively associated themselves with the actual perpetrators, whoever they may have been.

It should be borne in mind though, that difficult as it is to prove the association aspect, the standard of proof, unlike in criminal law where it is beyond a reasonable doubt, in the labour context, is on a balance of probabilities. In *Moahlodi v East Rand Gold & Uranium Co Ltd*,[258] the court said:

> '*an employer need not be satisfied beyond reasonable doubt that an employee has committed an offence. The test to be applied is whether the employer had reasonable grounds for believing that the employee has committed the offence. It is sufficient if, after making his own investigations, he arrives at a decision on a balance of probabilities, that the offence was committed* [*by the employee*] *provided that he affords the employee a fair opportunity of stating his story in refutation of the charge*.'

That said, it will be difficult to prove which employees associated themselves with the actual perpetrators when it is already difficult to identify the actual perpetrator. A possible avenue for employers is invoking the principle of derivative misconduct, as discussed next.

b) Derivative misconduct

The relationship between employer and employee is essentially one of trust and confidence, and, even at common law, conduct breaching such trust may warrant dismissal.[259] In *Robinson v Randfontein Estates Gold Mining Co Ltd*,[260] the court held that the duty owed to an employer by an employee is analogous to a fiduciary duty where the employee stands in a position of

[257] [1997] 1 BLLR 85 (IC).
[258] (1988) 9 *ILJ* 597 (IC) at 601i–j.
[259] *Council for Scientific and Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A) at 26d–e. See also in *Murray v Minister of Defence* 2009 (3) SA 130 (SCA); (2008) 29 *ILJ* 1369 (SCA). *Daewoo Heavy Industries* (*SA*) (*Pty*) *Ltd v Banks & Others* (2004) 25 *ILJ* 1391 (C); *Premier Medical & Industrial Equipment* (*Pty*) *Ltd v Winkler* 1971 (3) SA 867 (W).
[260] 1921 (AD) 168.

confidence to protect the interests of the employer.[261] When employees are aware of conduct not in the best interest of the employer, including the failure to assist the employer to bring the guilty to account, demonstrates bad faith on the part of the employee and violates the relationship of trust.[262] In *Council for Scientific and Industrial Research v Fijen*[263] Harms JA said:

> '*It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the* "*innocent party*" *to cancel the agreement*.'[264]

Perpetrators of misconduct during strikes are often difficult to identify as a result of insufficient evidence implicating any specific employee. It then becomes difficult for the employer to take disciplinary action. The doctrine of derivative misconduct can be invoked by employers to discipline employees who withhold information and/or evidence that the employer could use against the actual perpetrators.

In *Chauke and Others v Lee Service Centre t/a Leeson Motors*[265] the court defined derivative misconduct as:

> '*The situation where employees possess information that would enable an employer to identify wrongdoers and those employees who fail to come forward when asked to do so, violate the trust upon which the employment relationship is founded*.'

The facts in *Chauke* are that, disgruntled by the dismissal of a shop steward for gross negligence, unidentified workshop staff members sabotaged the business by scratching newly repaired and sprayed cars. Following failed attempts to solicit information from the staff regarding the saboteurs, the employer issued an ultimatum to the staff that if the sabotage does not end, the entire workshop staff would be dismissed. The sabotage did not stop and the employer made good on the promise to dismiss the entire staff compliment. The staff, through

[261] *Ibid* paras 177–80.
[262] *Ibid*.
[263] (1996) 17 *ILJ* 18 (A)
[264] *Ibid* at 26.
[265] (1998) 19 *ILJ* 1441 (LAC).

their union, contested that dismissal was contingent on proving individual culpability, to which the Industrial Court held that those who hold such a view are '*living in a dream world*'.[266] The LAC as per Cameron JA, as he then was, further condemned the chimerical defence by stating that the misconduct '*was perpetrated by the workers collectively, or on behalf of, and with the approval of the collectivity*'.[267] The court explained, with reference to *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd*,[268] that there are two reasons justifying the dismissal of the collective in such circumstances. The first is the breach of a duty of good faith toward the employer, resulting in a breach of trust and therefore warranting dismissal. The second was that they '*knew who was responsible, and deliberately chose to associate himself with him or them through silence*',[269] which in essence is the doctrine of common purpose.

In *FAWU v ABI* a large group of workers assaulted and seriously injured a replacement worker, a driver. As the trend goes, the workers were not forthcoming regarding the identity of the culprits. The employer reasoned that all the workers who had clocked in must have been in the vicinity of the strike and should have information and since such information was not forthcoming, the employer charged and dismissed all such workers. None of the employees disclosed any information throughout the disciplinary hearing or even at the Industrial Court. Nugent J held that:

> '*In the field of industrial relations, it may be that policy considerations require more of an employee than that he merely remained passive in circumstances like the present, and that his failure to assist in an investigation of this sort may in itself justify disciplinary action*.'[270]

And:

> '*Though the dismissal is designed to target the perpetrators of the original misconduct, the justification is wide enough to encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence*.'[271]

[266] See Grogan '"Derivative misconduct" Not a trap to snare the (apparently) innocent' *Employment Law Journal,* October 2015.
[267] Chauke Note 265 at para 39E.
[268] (1994) 15 *ILJ* 1057 (LAC).
[269] Grogan note 41.
[270] *FAWU v ABI* Note 266 at 1063b.
[271] *Ibid*.

In *RSA Geological Services* (*A Division of De Beers Consolidated Mines Ltd*) *v Grogan NO and others*,[272] an anonymous whistle blower informed the employer that a large quantity of mineral samples was hidden down a borehole on the laboratory property. The employer retrieved the samples and started questioning the laboratory staff regarding the said samples. Initially all of this staff denied any knowledge of the samples but one employee later admitted that he and three other colleagues were involved with dumping the said samples. The employer then charged these four employees along with other staff members who had worked overtime during the time the dumping occurred on the basis that they ought to have reported the perpetrators to the employer. The employer then dismissed all of these employees. In the arbitration findings,[273] Grogan stated that two factors must be present for a successful derivative misconduct dismissal. Firstly, it must be proven that the employee knew or could have known of the wrongdoing. Secondly, the employee unjustifiably failed to disclose, or assist the employer to acquire that knowledge. On review, the Labour Court confirmed Grogan's findings that the dismissals for derivative misconduct were fair.

Applied too broadly, the use of derivative misconduct could result in the innocent being implicated. The leading case regarding curtailing the operation of derivative misconduct is the *Western Platinum Refinery Ltd v Hlebela and Others* ('*Hlebela*').[274] The facts are briefly that the employee was dismissed largely based on circumstantial evidence as direct evidence implicating the employee could not be found. Theft was rife at the employer's business and the employee was identified by the South African Police Service as a suspect because the employee's lavish lifestyle did not accord with his meagre salary. The court pointed out that the employee was charged with failing/refusing to disclose his personal information, rather than for information regarding the actual stock theft. The court held:

> '*Even an unreasonable refusal to disclose the employee's personal finances and a reasonable inference that he did so to conceal the manner of their acquisition is not capable of being logically linked to the fact that he has actual knowledge of wrongdoing*

[272] (2008) 29 *ILJ* 406 (LC).
[273] *National Union of Mineworkers & Others and RSA Geological Services* (*A Division of De Beers Consolidated Mines Ltd*) (2004) 25 *ILJ* 410 (ARB).
[274] (2015) 36 *ILJ* 2280 (LAC); (2016) 37 *ILJ* 86.

by others. When the employer is thwarted by a non-disclosure to procure information, it cannot be argued that the employer can infer proof of what it suspects.'[275]

The court went on to hold that there was no case against the employee. From the judgment, the following factors for assessing the appropriateness of dismissal for derivative misconduct can be extrapolated:[276]

1) The withheld knowledge must be actual. The lack of good faith is derived from the deliberate choice to withhold the information. Imputed knowledge will not suffice;
2) The seriousness of the misconduct the employee failed to disclose;
3) The effect of the non-disclosure on the employer's ability to stop or mitigate against the effects of the misconduct;
4) The employee's rank does not affect culpability, but may be aggravating or mitigating depending on the circumstances of the case;
5) The duty to disclose is triggered when the information is acquired, not when the employer asks. It will be aggravating when the information is withheld even after the employer's request.

In the recent case of *Dunlop Mixing and Technical Services* (*Pty*) *Ltd and Others v National Union of Metalworkers of South Africa* (*NUMSA*) *obo Nganezi and Others*,[277] NUMSA and its members embarked on a protected strike over a wage dispute. The strike degenerated into violence where strikers damaged property and violently confronted management and employer representatives. The employer successfully approached the Labour Court for an interdict prohibiting the unlawful conduct of the employees. Ignoring the interdict, the strikers continued with their misconduct. Ultimately the employer dismissed the strikers for derivative misconduct. The CCMA in its award emphasised that derivative misconduct is premised on the failure of employees to be forthcoming with information that can assist the employer identify perpetrators of the acts of misconduct during a strike and went on to find that the dismissal was both substantively and procedurally fair for some employees, but not for others on the basis of insufficient evidence. The employer took the matter on review and the LC reiterated that

[275] *Ibid* at para 28.
[276] See *Bassuday* 'Derivative misconduct and an employee's duty of good faith: *Western Platinum Refinery Ltd v Hlebela & others* (*2015*) *36 ILJ 2280* (*LAC*)' (2016) 37 *ILJ* 86.
[277] [2016] ZALCD 9 (11 May 2016).

employees have a duty of good faith toward the employer, the breach of which warrants dismissal. The LC overturned the decision of the CCMA and found that the dismissal was fair.

There is accordingly scope to argue that workers who commit, or witness others committing, misconduct during strikes are duty bound to inform the employer or face dismissal based on the grounds of breach of the duty of good faith and/or acting in common purpose.

It may be that the common-law duty to disclose is not invulnerable to a constitutional challenge for encroaching on the rights to remain silent and to be presumed innocent.[278] To a large extent the information required may be self-incriminating evidence such as in the *Hlebela*[279] case, or *FAWU v ABI*.[280] In *RSA Geological*[281] the whistle blowers were dismissed on the strength of the evidence that they provided the employer. However, it is submitted that the said curtailment of these constitutional rights are justified in terms of s 36 of the Constitution, given a) the relationship of trust between employer and employee b) the general problems employers face, for instance, in controlling shrinkage through theft, c) and more specifically for our purposes, in curbing strike violence which has led to the deaths of many people, whilst negatively impacting the economy of the country as a whole.

c) The fusion of misconduct and operational requirements

An avenue worth exploring for employers is dismissal based on operational requirements[282] arising from misconduct during a strike.[283] The employer must however prove that the

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[278] S 35 of the Constitution stipulates:

'(*3*) *Every accused person has a right to a fair trial, which includes the right—*

...

(*h*) *to be presumed innocent, to remain silent, and not to testify during the proceedings*;

(*j*) *not to be compelled to give self-incriminating evidence*.'

[279] *Hlebela* Note 274.

[280] *FAWU v ABI* Note 268.

[281] *RSA Geological* Note 272.

[282] S 213 of the LRA reads:

'"*operational requirements*" *means requirements based on the economic, technological, structural or similar needs of an employer*; ...'

[283] See Cohen et al. *Trade Unions and the Law in South Africa* (2009) 71. Section 67(5) reads:

> '(*5*) *Subsection* (*4*) *does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements.*')(emphasis added).

dismissal was as a result of operational requirements based on the economic viability of the business, as opposed to misconduct. The provisions of s 189 of the LRA must be adhered to for this form of dismissal.

In *Food and Allied Workers Union on behalf of Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River*,[284] following a two-month long violent strike, the employer suspended employees suspected of misconduct pending disciplinary action. It became impossible to hold the said disciplinary hearing as witnesses were not prepared to give evidence due to intimidation. One key witness for the employer suddenly disappeared before the disciplinary hearing and had not resurfaced even five years down the line at the time of the LAC hearing.

Having no evidentiary basis for dismissals based on misconduct, the employer was advised to pursue the operational requirement route and retrench the employees suspected of involvement in the misconduct. The employer implemented this advice, a CCMA facilitator was appointed, and due process was followed in dismissing the employees.[285] The court considered the definition of an operational requirement,[286] and held that the definition is sufficiently broad to include a situation where unmanageable instability in the workplace threatened the subsistence of the business. As such, the LAC was willing to accept that the employer could go the retrenchment route, but the matter turned on the selection criteria for retrenching employees, namely whether or not employers can select employees based on untested allegations of misconduct. The LAC ordered the reinstatement of the employees on the basis that the implementation of the selection criteria, namely suspicion of misconduct, resulted in unfairness where employees could not contest the evidence, if the employer even had any.[287]

In *SA Commercial Catering and Allied Workers Union and Others v Pep Stores*,[288] the court held that where the employee's misconduct during strikes threatens the viability of the

[284] (2012) 33 *ILJ* 1779 (LAC).
[285] *Ibid* para 6.
[286] S 213 of the LRA reads:
'"operational requirements" means requirements based on the economic, technological, structural or similar needs of an employer; ...'
[287] *Kapesi* note 284 Para 32.
[288] (1998) 19 *ILJ* 1226 (LC).

business, the employer can, in principle, retrench employees. The employees would be retrenched in order to save the business, not for their misconduct *per se*.[289]

In *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO and Others*[290] the employer, faced with serious threats and intimidation from striking workers, decided to shut down its business pending the finalisation of the retrenchment proceedings. The court confirmed the dismissals on operational grounds notwithstanding the elements of misconduct.

Mischke observes that it is now clear that there is some scope for an employer to dismiss employees on the basis of operational requirements instead of dismissing them for misconduct committed during strikes.[291]

There is however a circularity to this approach that does not advance the employer's objectives. In most instances, it will precisely be because the employer is unable to obtain evidence of the misconduct that dismissal for operational requirements is resorted to. The fair selection criteria then becomes a seemingly insurmountable obstacle when the evidence of misconduct is not forthcoming, and when such evidence is forthcoming, then there is no need to resort to retrenchments. The retrenchment route may be well suited to circumstances such as in *Tiger Food Brands Ltd t/a Albany Bakeries* where the employer temporarily shuts down the business amidst the strike violence and retrenches the employees. In most instances this will not be an option for most employers. It is submitted that, in such circumstances, employers are better off exploring the derivative misconduct option.

[289] N Whitear-Nel 'Can Unidentified Protected Strikers Engaging in Misconduct be Retrenched? *FAWU on behalf of Kapesi & Others v Premier Foods Ltd t/a Blue River Salt River*' (2011) 23 *SA Merc LJ* 269 at 275.
[290] (2007) 28 *ILJ* 1827 (LC).
[291] C Mischke 'Strike violence and dismissal: When misconduct cannot be proven — is a dismissal for operational requirements a viable alternative?' *Contemporary Labour Law* Vol 22. No.2 September 2012.

2.2 Liability on the basis of vicarious liability

The doctrine of vicarious liability was imported into our law in the late seventeenth century from English law.[292] This doctrine is regulated by the common law,[293] customary law[294] and developed by the courts to bring it in line with the Constitution.[295] The doctrine is motivated by considerations of public policy, which demand that persons who have been harmed by the wrongs of others should not be left without a claim.[296]

Vicarious liability can only be invoked once a delict has been committed.[297] A delict is committed when an unlawful act or omission by a blameworthy person causes damage to another person who has a civil remedy for recovery of such damages.[298] The elements of a delict are:

a) An act or omission;
b) Unlawfulness;
c) Fault;
d) Causation; and
e) Loss.[299]

The general rule is that only the person who commits the delict should be held liable.[300] Vicarious liability is the exception to this rule since it permits for others to be held liable for

[292] *Masuku v Mdlalose* 1998 (1) SA 1 (A) at 13J–14B. See also Neethling, Potgieter & Visser *Law of Delict* (note 49, Chapter 4) at 365; K Calitz 'Vicarious Liability of Employers: Reconsidering Risk as the Basis for Liability' (2005) *TSAR* 215 at 217; and *Grobler v Naspers Bpk* (note 1, Chapter 7) at 277E–F.
[293] N Smit & D van der Nest 'When Sisters are Doing it for Themselves: Sexual Harassment Claims in the Workplace' (2004) 3 *TSAR* 520 at 531.
[294] TW Bennett *A Sourcebook of Customary Law for Southern Africa* (1991) 351*ff* and JC Bekker *Seymour's Customary Law in South Africa* (1989) 82*ff*.
[295] S 39(2) of the Constitution provides that 'when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' This was the case with regard to the doctrine of vicarious liability in *K v Minister of Safety & Security* (2005) 26 *ILJ* 120 (CC); 2005 (6) SA 419 (CC). See also *RH Johnson Crane Hire v Grotto Steel Construction* 1992 (3) SA 907 (C) 908F.
[296] R le Roux 'Vicarious Liability: Revisiting an Old Acquaintance' 2003 *ILJ* 1879–1883 at 1879. D Millard & EG Bascerano 'Employers' Statutory Vicarious Liability in Terms of *the Protection of Personal Information Act*' *PER/PELJ* 2016 (19) 16 — DOI http://dx.doi.org/10.17159/1727-3781/2016/v19i0a555.
[297] S Kopel *Guide to Business Law* 4 ed (2010) 209.
[298] Burchell *Principles of Delict* (1993) 10. See also Neethling, Potgieter & Visser *Law of Delict* 6 ed (2010) 365 where delict is defined as '*civil wrong to an individual for which damages can be claimed as compensation and for which redress is not usually dependent on a prior contractual undertaking to refrain from causing harm*.'
[299] *Ibid*.
[300] Du Plessis & Fouché *A Practical Guide to Labour Law* 7 ed (2012) 27.

delictual acts of others.[301] Vicarious liability is premised upon the relationship between the actual perpetrator and the person actually being held liable.[302] It is submitted that vicarious liability should be extended to include the union-member relationship for purposes of holding unions liable for delicts committed by their members during a strike.

Our law does not specify that unions can be held liable for the conduct of members during industrial action. There are no reported cases where the doctrine of vicarious liability was extended to include the trade union-member relationship. So far the doctrine of vicarious liability applies to certain relationships such as insurance contracts, employer-employee relationship, driver and owner of motor vehicle etc.

Given the malice of strike violence and its concomitant negative effect on the economy, it is submitted that public policy considerations dictate that the doctrine of vicarious liability be applied to the union-member scenario. Support for this conclusion is found in s 39(2) of the Constitution, which reads:

> '*when interpreting the Bill of Rights, a court, tribunal or forum* (*a*) *must promote the values that underlie an open and democratic society based on human dignity, equality and freedom*; (*b*) *must consider international law*; *and* (*c*) *may consider foreign law*.'

It is thus proposed that courts take a serious look into the operations of vicarious liability and declare its operation on the union-member relationship.[303] Such extension will be based on two tenets. The first is that the union has a sufficiently controlling relationship on its members. The second is that the union creates the risk of harm to others when convening a picket.

a) The risk creating factor

[301] *Grobler v Naspers Bpk en 'n ander* (2004) 25 *ILJ* 439 (C).
[302] Wicke *Vicarious Liability*: *Not Simply a Matter of Legal Policy* (1998) 22. Examples marriage, the contract of agency, the contract of mandate, contract between the driver and owner of a vehicle, a partnership, contract of insurance and employment relationship.
[303] For a thorough discussion on vicarious liability, see Chapters 7 and 8 in EM Tenza *The liability of trade unions for conduct of their members during industrial action* (LLD thesis, University of South Africa, 2016) 109 ('Tenza').

In the employer-employee relationship, it is trite law that the employer can be held liable for the delicts committed by the employee. Over a century ago in *Mkhize v Martens*,[304] the employer's servant negligently started a fire that caused damage on the neighbouring farm. The court held that by having servants who prove to be '*negligent or inefficient or untrustworthy*',[305] the master creates the risk of harm to others and should be held vicariously liable for the harm caused to others by that servant.[306] Brassey says '*employers are likely to be held liable if they provided the opportunity or conditions for the injurious act to occur or had the power to prevent it*.'[307]

Similarly, trade unions are aware that, due to the acrimonious nature of strikes, there is a risk that their members may resort to violence during a strike as is normally the case recently. They convene the strike notwithstanding this risk. In *Xstrata SA* (*Pty*) *Ltd v AMCU and Others*[308] the court held:

> '*It has become noticeable that unions are readily and easily prepared to lead employees out on any form of industrial action, whether lawful or not. The perception that a union has no obligation whatsoever to control its members during such activities, which are invariably violent in nature cannot be sustained*.'[309]

And:

> '*there is a relationship of guardianship between the union and its members. The leadership, be it shop stewards or the national leadership, were elected on the basis that the members trust them to lead and guide them. In as much as the members can be guided on whether to embark on a strike action or some other protest action, in the same vein, the leadership, including shop stewards, should also lead and guide members and advise them to behave lawfully during actions undertaken. Leadership*

[304] 1914 (AD) 382.
[305] *Ibid* at 390.
[306] *Ibid*.
[307] M Brassey 'Employment and Labour Law' (2000) 1 *Employment Law* 30 at 33.
[308] (J1239/13) [2014] ZALCJHB 58 (25 February 2014).
[309] *Ibid* at 16.

and guidance by the union should persist until the end of the action undertaken, and not end at the point that the action commences.'[310]

Although a union is a mandate-driven organisation, it leads its members into a strike, and therefore into a risky situation. The union-member relationship is such that the union can exercise a sufficient degree of control over its members. If the union does not take steps to prevent harm to others, then the author argues that the convening union should be held vicariously liable for the harm arising out of the risk they created.

b) Close connection

This factor concerns itself with the remoteness of the harm-causing act, to the conduct expected or authorised by the union. If the harm-causing act falls within the ambit of what was foreseen or authorised by the union, then the union should be held liable.

c) South African and foreign case law

In *Mondi Ltd* (*Mondi Kraft Division*) *v Chemical Energy Paper Printing Wood and Allied Workers Union*[311] the employees embarked on a protected strike but whilst on the strike, they unlawfully switched off machinery at its mill, resulting in the employer suffering damages. The employer claimed these damages from the trade union based on vicarious liability for delicts of its members. The employer claimed that the delict was committed with the support and encouragement of the members of the shop stewards council. The Labour Court turned its attention on the union-member relation to determine whether it is one where vicarious liability applies. It held that the relationship is not comparable with the employment relationship and that the only other basis for liability could be that of agency. It held that the employer failed to prove the union was the principal and the members its agents.

The court's application of vicarious liability demonstrates the urgent need to develop the principle in our law. The court should have recognised the union-member relationship as a category unto itself of the set of relationships known to attract vicarious liability. The court's

[310] *Ibid*.
[311] (1994) 15 *ILJ* 778 (LAC).

approach has led to an untenable situation where unions can create risk and sit back, or even encourage, the materialisation of that risk knowing they will be absolved from liability. In *In2Food* (*Pty*) *Ltd v Food and Allied Workers Union and Others*[312] the Labour Court said:

> '*The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members.*'[313]

The LAC in same case of *FAWU v In2Food* (*Pty*) *Ltd*[314] added that:

> '*The respondent's thesis that a trade union, as a matter of principle, has a duty to curb unlawful behaviour by its members indeed enjoys merit. Indeed, the principle of union accountability for its actions or omissions is beginning to gain recognition*.'

And:

> '*... when there is evidence to implicate the union vicariously in the unlawful acts of its members, there may well be an action available to the respondent for redress ...*'[315]

For this to happen, it is argued that the following requirements must be met for such transference of liability:

(a) A delict must have been committed by striking employees.

(b) The striking employees in (a) must have been members of the defendant union.

(c) The delict falls within the purview of the union's instructions, or the risk created by such union.[316]

[312] (JA61/2013) [2014] ZALAC 31; (2014) 35 *ILJ* 2767 (LAC) (12 June 204).
[313] *Ibid* at 2591h–i.
[314] Note 34.
[315] *Ibid* para 12.
[316] Tenza Note 303 at 236. See also A Price 'The Impact of the Bill of Rights on State Delictual Liability for Negligence in South Africa' in *The Influence of Human Rights on State Liability for Negligence in England and South Africa* (2010) 2.

These judgments reveal an inclination by the courts to hold unions accountable for the unlawful conduct of their members. This is a welcome stance given the menace of strike violence. Unions will have to take steps to mitigate against the risk they create and to control their members.[317]

These judgments are also compatible with international trends. In Canada it is settled law that unions can be held liable for delictual acts of their members.[318] In the United States of America the National Labor Relations Board has held as follows:

> '*Where a union authorizes a picket line, it is required to retain control over the picketing. If a union is unwilling or unable to take the necessary steps to control its pickets, it must bear the responsibility for their misconduct. Similarly, if pickets engage in misconduct in the presence of a union agent, and that agent fails to disavow that conduct and take corrective measures, the union may be held responsible*.'[319]

Unions must take reasonable steps to prevent the harm. Such steps may include suspending or calling off the strike at the point where it degenerates into violence.[320] In this regard it is suggested that the LRA needs to be amended to give the LC this power. Although this may not go down well with unions, it will save jobs and businesses since damage will be reduced to a minimum.

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[317] 'Picketing rules: Punitive costs against union', available at *https://www.gilesfiles.co.za/picketing-rules-punitive-costs-against-union/*, accessed on 17 November 2017.

[318] *Bazley v Curry* (1999) 2 SRC 534 (SCC) at 42. Accessed at *http://canlii.ca/t/1fqlw on 17/11/2017*. See also *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council* (1999) (CanLII) 15170 (BC SC). Available at *http://www.canlii.org/en/bc/bcsc/doc/1999/1999canlii15170/1999canlii15170.html on 17/11/2017*. *BPA v Children's Foundation* (1997) (CanLII) 10834 (BC CA). Available at *http://canlii.ca/t/1nk48*, accessed on 17 November 2017. *Canadian Forest Products Ltd v Hospital Employees Union* (2007) (CanLII) 56419 (BC LRB). Available at *http://canlii.ca/t/1v97m on 05/04/2016*. *Mainland Sawmills Ltd v USW Union Local* (2007) (CanLII) 1433 (BC SC). Available at *https://www.CanLII.org/en/bc/bcsc/doc/2007/2007/bcsc1433/2007/bcsc1433.html*, accessed on 17 November 2017.

[319] *Ibid*. *Plumbers, Local 195* (*McCormack-Young Corp*) 233 NLRB 1087 (1977), quoted in Gorman et al. *Labour Law Analysis and Advocacy* Juris Publishing, (2013) 353, para 10.6. See for a comparable UK case, the judgment of the Employment Appeal Tribunal in *News Group Newspapers Ltd and others v SOGAT '82 and others* [1986] IRLR 337, commented on by Deakin et al. *Labour Law* Hart Publishing, (2012) 1059, para 11.22.

[320] Tenza note 303 at 246.

2.3 Revocation of protection

It will be recalled that when a strike is protected, the strikers enjoy immunity from civil and contractual liability. If a strike, by virtue of strikers choosing to become violent, loses its protected status, then the immunity will be removed and the union and its members will be exposed to common law and statutory remedies, particularly s 68 of the LRA, available to those who have suffered harm as a result of the violent strike. This section examines arguments canvassed by commentators on the issue.

Sections 157 and 158 of the LRA dealing with the jurisdiction and powers of the Labour Court respectively, do not make a direct provision for the removal of the protected status of a strike. The Labour Court is empowered to issue interdicts,[321] however, as discussed in chapter 2 above, a protected strike cannot be interdicted. As such, the focal point for the removal of the protected status of a strike has been around the 'purpose' and 'functionality' principles. There is an intricate connection between 'purpose' and 'functionality' in collective bargaining. In *Afrox Ltd v SA Chemical Workers Union and Others*,[322] the court held that once the dispute giving rise to the strike is resolved, the strike must end and the right to strike falls away. The court said that in these circumstances, the foundations of the strike fall away:

> '*The strike is no longer functional*; *it has no purpose and it terminates*. *When the strike terminates so does its protection*. *It is not in the interests of labour peace for a strike action to be continued in such circumstances even in the case of a protected strike*.'[323]

[321] '158. *Powers of Labour Court*
(1) The Labour Court may—
(a) make any appropriate order, including
(i) the grant of urgent interim relief;
(ii) an interdict;
(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;
(iv) a declaratory order;
(v) an award of compensation in any circumstances contemplated in this Act;
(vi) an award of damages in any circumstances contemplated in this Act; and
(vii) an order for costs; ...'

[322] (1997) 18 *ILJ* 406 (LC).

[323] *Ibid* at 411A.

It appears from the *Afrox* decision that the purpose of a strike is to pressure the employer to accede to the demands of the workers.[324] That purpose is not merely to strike for the sake of it; it must be linked to an objective, and that objective becomes the purpose of the strike. Section 27(4) of the Interim Constitution[325] provided that '*Workers shall have the right to strike for the purpose of collective bargaining*.'[326] The same notion is captured in the definition of strike in the LRA.[327] Functionality simply means acts made in the furtherance or advancement of that purpose.

In *Tsogo Sun Casinos* (*Pty*) *Ltd t/a Montecasino v Future of SA Workers Union and Others*[328] the court held that:

> '*… When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status*.'[329]

From that last sentence, Rycroft concludes that strike violence is an end in itself, and on that basis, argues that a strike may lose its protected status.[330] The Labour Court cited this reasoning with approval in the recent decision in *Universal Product Network* (*Pty*) *Ltd v National Union of Food Beverage Wine Spirits and Allied Workers* ('*NUFBWSAW*'),[331] where it held that the courts would intervene to declare a strike unprotected depending on the degree of violence perpetrated by the strikers.[332] Cognisant of the need to curb strike violence, the court cited and aligned itself with Rycroft's suggestion that a strike that has become violent, to a sufficient

[324] This is also in line with s 27(4) of the Bill of Rights.
[325] Act 200 of 1993.
[326] *Ibid.*
[327] S 213 of the LRA provides:
'"*strike*" *means 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, <u>for the purpose of remedying</u> a grievance or resolving a dispute in respect of any matter of mutual interest between employer*.' (Emphasis added.)
[328] Note 15.
[329] *Ibid* para 13.
[330] Rycroft note 28.
[331] *National Union of Food Beverage Wine Spirits and Allied Workers* (*NUFBWSAW*) *& Others v Universal Product Network* (*Pty*) *Ltd*; *In re*: *Universal Product Network* (*Pty*) *Ltd v National Union of Food Beverage Wine Spirits and Allied Workers* (*NUFBWSAW*) *& Others* (J2182/2015) [2015] ZALCJHB 421; (2016) 37 *ILJ* 476 (LC); [2016] 4 BLLR 408 (LC). See also Fergus Note 27.
[332] *Universal Product Network* note 75 para 38.

degree, no longer promotes functional collective bargaining and should be stripped of its protection.[333]

To that it is persuasive to respond:

> '*Always bear in mind that the people are not fighting for ideas, for the things in anyone's head. They are fighting to win material benefits, to live better and in peace, to see their lives go forward, to guarantee the future of their children*.' (*Amilcar Cabral*.)[334]

Whilst the debate regarding the justifiability of using violence to obtain one's objectives is beyond the scope of this paper — save to mention that because one is disagreeable to the means chosen, does not follow that there is no legitimate end — with all due respect, the conclusion that violence strips a strike of its purpose or functionality is not correct.[335]

The functionality aspect is not a requirement for a protected strike. Fergus traces the origins of this principle to the pre-constitutional era,[336] which on its own speaks volumes of its underlying philosophy of structural violence. Considering that strikes were '*one of the few mechanisms which disenfranchised black workers had at their disposal to voice their contempt for the apartheid regime and to contest their socio-economic circumstances*',[337] Du Toit makes the observation that the functionality requirement was a weapon in the hands of conservative courts used to quash the aspirations of workers.[338]

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[333] *Ibid* para 32, citing Rycroft Note 27.
[334] Neil Coleman *Towards new Collective Bargaining, Wage and Social Protection Strategies in South Africa – Learning from the Brazilian Experience*.
[335] See also E Fergus Note 27 at 1547 where she correctly questions: '*Does violence during a strike necessarily mean that the strikers are no longer pursuing objectives which may not be pursued by way of protected industrial action? In at least some cases, it is precisely in the frustrated pursuit of 'legitimate' bargaining objectives that the violence is committed*.' (Emphasis added to point out the link between structural violence and physical violence.)
[336] E Fergus Note 27 at 1539 referring to the decision in *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (*BAWU*) (1993) 14 *ILJ* 963 (LAC).
[337] E Fergus Note 27 at 1542.
[338] D du Toit et al. *Labour Relations Law*: *A Comprehensive Guide* 6 ed (2015) 514–15.

Whilst it is logical that acts associated with the strike must be functional to collective bargaining, in the sense that they must advance the purpose or objectives of the strike, the trend has become that functionality has become a legal requirement for a strike to enjoy protection. For instance Rycroft argues that a strike that has turned violent to a sufficient degree becomes dysfunctional to collective bargaining and should therefore lose its protection. Indeed the violence may be calculated, whether justifiably or not, at advancing the objectives of the strike and for that reason is functional, obviously not peacefully, but is functional nonetheless as it is aimed at realising the objectives of the strike. Fergus' view that violence may not be functional to 'peaceful' collective bargaining, but may be functional to collective bargaining, is the preferred view.[339] In any event, the LRA does not make 'functionality' a requirement for the protection of a strike and the courts should distance themselves from such views.

The notion that a strike that turns violent should lose its protected status is incontestable. The reason for such retraction of protection should not be that the strike has lost its bargaining purpose or has become dysfunctional. The correct approach for the withdrawal of protection should be based on the principle that no one is permitted to benefit from unlawful conduct. More about that later. For now the pitfalls of telling strikers that their strike is dysfunctional or has no purpose should be noted. It is counter-productive for the courts to hold that there is no bargaining purpose to a strike that has turned violent as that creates an impression in the minds of the workers that the court is antagonistic to the plight and struggles of the workers, leading to a collective spirit of defiance by the workers by becoming even more violent.[340] In *Hotz v UCT*,[341] Wallis JA made the following observation:

> '*The history of civil disobedience by outstanding historical figures such as Mahatma Ghandi, Martin Luther King, and Archbishop Desmond Tutu, to mention but a few, is an honourable one. At times it involved breaches of the law, such as Rosa Parks*' *dignified and steadfast refusal to sit on the bus in the seats reserved for Black people, or the thousands in this country who burnt the hated dompas in protest against the Pass Laws, that were imposed by an undemocratic government on an oppressed majority,*

[339] E Fergus Note 27 at 1547.
[340] See the discussion on the failure of interdicts in Chapter 5.
[341] (730/2016) [2016] ZASCA 159 (20 October 2016).

and lacked any moral content. Civil disobedience by those individuals was a challenge to an unjust or oppressive political and legal system, which is not present in our constitutional dispensation.'[342]

Workers may perceive any notion that their strikes serve no purpose as patronising and hostile and it is submitted that the courts steer clear of that approach as it might incite further violence and civil disobedience as evidenced by the erosion of the respect for the rule of law, similar to the trend during the apartheid era where people refused to recognise unjust laws. The courts would do well to be cognisant of their role as neutral arbiters in this power game of collective bargaining and take care not to portray an impression, even if only perceived, of exacerbating structural violence by further placing obstacles in the way of the workers and unduly supporting and protecting the capitalist at the expense of those who already suffer from structural violence.

The approach of the Constitutional Court in *Unitrans,*[343] comes as a welcome relief. Zondo J said that a strike can only lose its protected status when:

'*Where the concerted refusal to work is resorted to in support of a demand made by a trade union or workers to an employer, the employer would need to comply fully and unconditionally with the demand in order for a protected strike to turn into an unprotected strike. Once the employer has remedied the grievance or complied with the demand or once the dispute has been resolved, the workers may not continue with their concerted refusal to work because the purpose for which they would have been entitled to withhold their labour would have been achieved. Any continued refusal to work would lack an authorised purpose. Therefore, the strike would be unprotected. Another way in which a protected strike would cease to be protected would be if the union or employees abandoned the authorised purpose of the concerted refusal to work and sought to achieve a different purpose that is not authorised. Yet another way would be if the employer and the union or workers were to reach an agreement that settles the dispute even if the employer has not complied fully and unconditionally with the original demand of the union and the workers. Absent any of these methods of turning*

[342] *Ibid* at Para 72.
[343] *Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 Others v Unitrans Fuel and Chemical* (*Pty*) *Limited* [2016] ZACC 28.

a protected strike into an unprotected strike, a protected strike remains protected ...'[344] (Emphasis added.)

Zondo J did not directly pronounce on whether or not violence during a protected strike will rob it of its protected status. It however appears that he enumerated the set of circumstances causing a strike to lose its protected status, violence not being one of them. Since employees use violence to achieve the authorised purpose of the strike, as argued above, it does not follow that by resorting to violence, the strikers have abandoned the authorised purpose of the strike, and thus, pursuant to Zondo J's judgment, the strike does not lose its protection.

Be that as it may, it is still submitted that violent strikes should lose their protection. The grounds for such removal should flow from well-established principles of our law. The SCA in *Comwezi Security Services v Cape Empowerment Trust*[345] said '*it is a fundamental principle of our law that no man can take advantage of his own wrong*'.[346]

It is trite law that one cannot benefit from their illegal conduct which s 67(8) of the LRA ostensibly endorses by removing protection where offences are committed during a strike. Even though the legitimate purpose of the strike does not fall away simply because violence is involved, strikes should nonetheless lose their protection by virtue of the fact that the strikers seek to benefit from illegal conduct as they seek to benefit through the forbidden bolstering of their bargaining power through the unlawful use of violence.

A two-stage interdict process is proposed in order to remove the protected status of a strike without pushing the strikers to further violence and defiance of the rule of law.

a) Two-stage interdict system

Fergus makes the valid point that interdicting a strike is distinct to interdicting conduct during the strike, particularly when that (mis)conduct may well be confined to a small group of striking workers.[347] From the 'means' being distinct from the 'ends' discussion above, it stands to

[344] *Ibid* at paras 119–20.
[345] (182/13) [2014] ZASCA 22 (28 March 2014).
[346] *Ibid* at Para 12.
[347] Fergus Note 27 at 1548.

reason that in order to limit the infringement upon the right to strike, the courts could confine themselves to interdicting the unlawful component of the strike whilst permitting the strikers to pursue the lawful objectives of the strike.

The separation and dichotomising of the lawful and unlawful components of strikes for purposes of issuing interdicts may present practical difficulties given the particularly brazen violence related to strikes. The idea should however not be readily dismissed. It opens the door to considering a two-stage interdict approach where courts could issue an initial interdict proscribing the misconduct. This interdict could serve as a form of ultimatum that the misconduct cease, failing which an interdict declaring the strike unlawful would be issued together with a contempt order where hefty fines would be imposed. This may be useful in curbing, not only the intrusion into the right to strike, but in appeasing the workers that the courts are cognisant of the structural violence causing them the very frustrations inciting them to violence and that the courts are taking steps to mitigate this structural violence.

The exact operations of this system will have to be developed over time and practice. The underlying rationale of the approach would be to restore credibility of the courts in the eyes of strikers. The courts achieve this by issuing a first interdict in which it makes no pronouncements on the purpose of the strike, but merely interdicts the illegal conduct. Only when the first interdict is not adhered to, does the court step in and interdict the actual strike on the basis that strikers seek to unlawfully benefit from unlawful conduct.

The benefit of the system will be that instead of telling the strikers they have no objectives because they resorted to unlawful conduct, a course historically adopted by the apartheid government, the court will now be making it clear that the strikers' objectives are legitimate and worthy of protection, however they must refrain from the unlawful acts. The consequence will be a less-frustrated proletarian with a lowered disposition towards violence. This will also restore faith and respect for the courts and the rule of law.

Integrating these virtues of *Ubuntu* should be seamless as the vast majority of workers are black workers whose upbringing is largely premised on these principles.

The words of Wallis JA further resonate with the two-stage interdict suggested as a solution in this dissertation. He says:

> '*I stress that they were not being asked by the university not to engage in protest action. That the university was always willing to accept as legitimate. It was the manner in which the right to protest was exercised that gave rise to the university's application.*'[348]

The first stage of the interdict would prohibit the unlawful aspects of the strike whilst permitting the strike to continue on the warning that further unlawful conduct would be met with an interdict stopping the otherwise legitimate strike coupled with a contempt of court sanction and a damages order as though the strike was never protected. The acknowledgement of the legitimacy of the strike will ease tensions and frustrations, whilst the possible hefty sanctions will act as a deterrence, and together, possibly reduce incidents of strike violence.

Once the strike is declared unprotected then the s 68 remedies become available to victims. These remedies are discussed in the following Chapter 5.

3 Conclusion

The chapter demonstrates that members of the union can be held liable for misconduct during protected strikes. It has been argued that strikes should lose protection when they turn violent, which will open up an array of remedies that strikers are immune to during protected strikes. Different options for dismissing strikers who commit misconduct during a strike are discussed, including the no fault option of operational requirements. A burning issue is holding unions liable for the delict of its members, which was also traversed in the chapter. In the next chapter, we deal with statutory remedies applicable to unprotected strikes.

[348] *Hotz v UCT* Note 341 at para 74.

CHAPTER 5: STATUTORY REMEDIES IN TERMS OF THE LRA AND THE REGULATIONS OF GATHERINGS ACT

1 Introduction

Victims of unprotected strike are afforded remedies as per s 68 of the LRA. The selection of a remedy will depend on the nature of the harm actually incurred. The victim(s) can bring an application for an interdict prohibiting the strike, claim compensation for loss linked to the strike, and/or enforce the sanction of dismissal if the victim is an employer.

The question that arises is whether these remedies are sufficient to curb strike violence or deter participants from continuing with their action which adversely affects other people or their property. This chapter investigates and attempts to come up with answers to this question. In addition, remedies in terms of the RGA are also investigated with a view to finding a solution to the recurring problem of violence during strikes.

2 Remedies in terms of section 68 of the LRA

2.1 Interdict

Section 68(1)(a) of the LRA bestows upon the Labour Court exclusive jurisdiction to interdict any person from participating in an unprotected strike. As discussed in Chapter 2 above, a strike that does not comply with the substantive and procedural requirements of the LRA, namely ss 64 and 65 of the LRA, is an unprotected strike. This means that the employer and/or members of the public, such as business owners in the vicinity of the strike, who suffer loss as a result of the unprotected strike, may apply for an interdict.[349] An interdict is an urgent temporary court order restraining wrongful conduct.[350] In *NCSPCA v Openshaw*[351] the court set out the requirements for obtaining an interdict as follows:

[349] J Grogan *Workplace Law* (2009) 395.

[350] K McCall 'Interdicts and Damages Claims in Collective Disputes' in P Benjamin, R Jacobus & C Albertyn (eds) *Strikes, Lock-outs & Arbitration in South African Law* (1989) 41–52. See also *Thompson v Voges* 1988 (1) SA 691 (AD) at 711; *Knox D'Arcy Ltd v Jamieson and others* 1996 (4) SA 348 (SCA); and *Atkin v Botes* unreported (566/2010) [2011] ZASCA 12 (9 September 2011).

[351] 2008 (5) SA 339 (SCA). See also *Setlogelo v Setlogelo* 1914 AD 221 at 227, *Van Deventer v Ivory Sun Trading 77* (*Pty*) *Ltd* 2015 (3) SA 532 (SCA); [2014] ZASCA 169 para 26, and *Red Dunes of Africa v Masingita Property*

'*A prima facie or clear right*: *what is required here is proof of facts that establish the existence of a right in terms of substantive law*; *A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted*; *Balance of convenience favours the granting of an interim interdict*; *and the applicant has no other satisfactory remedy*.'[352]

Once these factors are established, the courts say that there is no general discretion to refuse the relief sought.[353] In *Hotz v UCT*[354] the SCA, as per Wallis J, explained that:

'*That is a logical corollary of the court holding that the applicant has suffered an injury or has a reasonable apprehension of injury and that there is no similar protection against that injury by way of another ordinary remedy*. *In those circumstances*, *were the court to withhold an interdict that would deny the injured party a remedy for their injury, a result inconsistent with the constitutionally protected right of access to courts for the resolution of disputes*'[355]

Interdicts have been described as being '*foundational to the stability of an orderly society*' as they '*ensures the peaceful*, *regulated and institutionalised mechanisms to resolve disputes without resorting to self-help*' and they are '*a bulwark against vigilantism*, *and chaos and anarchy*'.[356]

The court in *Hotz v UCT* went on to explain that the purpose of an interdict is to end conduct in breach of the applicant's right. The court said:

Investment Holdings [2015] ZASCA 99 para 19. They were affirmed by the Constitutional Court. *Pilane & Another v Pilane & Another* [2013] ZACC 3; 2013 (4) BCLR 431 (CC) ('*Pilane*') para 38.

[352] *Ibid* at 347B.

[353] *Lester v Ndlambe Municipality & Another* 2015 (6) SA 283 (SCA) paras 23–4; *United Technical Equipment Co* (*Pty*) *Ltd v Johannesburg City Council* 1987 (4) SA 343 (T) at 347F–H.

[354] Note 341.

[355] *Ibid* at Para 29. Quoted with approval in *Rhodes University v Student Representative Council of Rhodes University & Others* (1937/2016) [2016] ZAECGHC 141; [2017] 1 All SA 617 (ECG) (1 December 2016).

[356] *Chief Lesapo v North West Agricultural Bank & Another* 1999 (12) BCLR 1420 (CC); 2000 (1) SA 409 (CC); [1999] ZACC 16 para 22, citing with approval *Concorde Plastics* (*Pty*) *Ltd v NUMSA* 1997 (11) BCLR 1624 (LC) at 1644F–1645A.

'*The applicant invokes the aid of the court to order the respondent to desist from such conduct and, if the respondent does not comply, to enforce its order by way of the sanctions for contempt of court*.'[357]

If a strike or conduct in the furtherance, or in contemplation, of a strike is characterised by violence it will not be conducive to orderly collective bargaining. In this regard, the remedy of interdict can serve to remedy the situation and to preserve orderly collective bargaining. The LRA does not specify who may use this remedy.[358] In *Growthpoint Properties Ltd v SA Commercial Catering and Allied Workers Union and Others*,[359] the court held that members of the public can also obtain interdicts when affected by noisy pickets.[360] In *SA Post Office Ltd* (*SAPO*) *v TAS Appointment and Management Services CC and Others*,[361] the temporary employment services staff working at SAPO were about to embark on an unprotected strike when SAPO applied for an interdict prohibiting such strike. In deciding whether SAPO had *locus standi* to bring the application, the Labour Court found that SAPO had *locus standi* on the basis that the strike was unprotected and that it infringed SAPO's legal rights.[362] The interdict was granted.[363]

a) The efficacy of interdicts in South Africa

The next issue to be discussed is the effectiveness of interdicts to stop unlawful conduct during industrial action/strikes as experience has shown that interdicts are often disregarded at will by unions and members or participants.[364] Examples drawn from case law indicate that interdicts are not really respected in South Africa. The court in *Betafence* noted that employees frequently disregard interdicts prohibiting strikes simply because they do not like them.[365] In *Food and Allied Workers Union on behalf of Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River*[366] the strike was characterised by gruesome violence. The police intervened and

[357] *Hotz v UCT* note 341 Para 36.
[358] EM Tenza note 303 at 109.
[359] (2010) 31 *ILJ* 2539 (KZD).
[360] *Ibid* at 2545j.
[361] (2012) 33 *ILJ* 1958 (LC).
[362] At 1964h.
[363] At 1865a.
[364] See EM Tenza Note 303 at 111. See also Rycroft Note 27 at 5. B Hepple, R le Roux & SA Sciarra *Laws against Strikes*: *The South African Experience in an International and Comparative Perspective* 1 ed (2016) 112.
[365] *Betafence* Note 83 at para 54.
[366] (2012) 33 *ILJ* 1779 (LAC).

failed to calm the situation. The court issued an interdict prohibiting the strike and the violence, the death threats issued to management and non-striking employees.

In *In2Food* (*Pty*) *Ltd v Food and Allied Workers Union and Others*,[367] the employer successfully applied for an interdict prohibiting an unprotected and violent strike the employees had embarked on. The employees persisted with the violent strike despite the interdict. The trial court held the union in contempt of court and imposed a fined of R500 000. However, the LAC overturned this decision.[368] It held that the specificities of the interdict, clear of ambiguity as to what is required of the parties interdicted, must be examined in order to determine whether they were complied with.[369]

In *Pikitup Johannesburg* (*Pty*) *Ltd* (*Pikitup*) *v South African Municipal Workers Union* (*SAMWU*) *and Others*[370] SAMWU and its members ignored an interdict that prohibited them from embarking on an unprotected strike. Union officials issued public statements that supported the blatant disregard of the court order and supporting the continuation of the strike. In light of this contempt, the sanction issued by the Labour Court was a suspended fine for SAMWU of R80 000, suspended for 24 months on condition that SAMWU was not found guilty of the same offence within that period. SAMWU's general secretary was also fined R10 000 suspended for the same period and conditions as the union.

A failure to comply with a ruling by a court is contempt of court.[371] This is not only an offence but a breach of a foundational value in the Constitution which states that South Africa is founded on the rule of law.[372] The rule of law entails that court decisions must be respected. In *Pheko and Others v Ekurhuleni Metropolitan Municipality*[373] Nkabinde J held that:

[367] (2013) 34 *ILJ* 2589 (LC).
[368] *Food and Allied Workers Union v In2food* (*Pty*) *Ltd* (2014) 35 *ILJ* 2767 (LAC).
[369] *Ibid* at 2771f–j.
[370] (J2362/15) [2016] ZALCJHB 149 (19 April 2016).
[371] Other examples from case law where interdicts were not obeyed include *Tsogo Sun Casinos* (*Pty*) *Ltd t/a Montecasino v Future of SA Workers Union & Others* (2012) 33 *ILJ* 998 (LC); *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC); *Betafence South Africa* (*Pty*) *Ltd v National Union of Metalworkers of South Africa & Others* (C194/2016) [2016] ZALCCT 33 (15 September 2016).
[372] S 1 of the Constitution.
[373] 2015 (6) BCLR 711 (CC).

> '*The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced*.'[374]

The incessant disobedience of court orders has varied and undesirable consequences as this undermines the rule of law. *In Modise and Others v Steve's Spar Blackheath*[375] in upholding the dismissal of strikers who had failed to comply with an interdict prohibiting a strike, the court held:

> '*It is becoming distressingly obvious that court orders are, by employers and employees alike, not invariably treated with the respect they ought to command. … Obedience to a court order is foundational to a state based on the rule of law*.'[376]

Indeed a society that allows such disobedience of court orders would '*in no time be a society of chaos and lawlessness*.'[377]

For a contempt to exist certain requirements must be complied with. These include:

a) There must have been a court order in existence;
b) The order must have been properly served on the other parties bound by it; and
c) There must have been non-compliance with the order.[378]

[374] *Ibid* para 1.
[375] (2000) 21 *ILJ* 519 (LAC).
[376] *Ibid* para 120.
[377] *North West Star* (*Pty*) *Ltd* (*Under Judicial Management*) *v Serobatse and another* (2005) 26 *ILJ* 56 (LAC) para 17.
[378] *Fakie NO v CCII Systems* (*Pty*) *Ltd* 2006 (4) SA 326 (SCA).

The legal effects of a failure to comply with a court order include the imposition of criminal sanctions such as a fine,[379] imprisonment, or suspended imprisonment with conditions.[380]

In *North West Star* (*Pty*) *Ltd* (*Under Judicial Management*) *v Serobatse and Another*[381] the court expressed similar sentiments in saying:

> '*The correct principle is that, if a court has issued an order against you and you are unhappy with it, you must take that decision to a court higher than the one that issued such order and which has competent appellate or review jurisdiction and seek to have such order set aside. If there is no such court, for example, where there is no appeal or review available against that court or against such order or if the court which issued the order is the court of final jurisdiction in such matters or is the highest court in the land, then you have no choice but must simply comply with the order. A person cannot say*: "***I don't like this court order; it is wrong; therefore I will not comply with it.***" *If we want to deepen our democracy, promote the rule of law, discourage self-help and encourage those who have disputes to take them to the courts of the land and not to seek to resolve them through physical fights or violence, the whole society must frown upon anyone who disobeys an order of court or who, either by word or deed, encourages or incites another or others to disobey an order of court*.'[382]

In *Dunlop Mixing and Technical Services* (*Pty*) *Ltd and Others v National Union of Metalworkers of South Africa* (*NUMSA*) *obo Nganezi and Others*[383] NUMSA and its members embarked on a protected strike over a wage dispute. The strike degenerated into violence where there was damage to property and strikers violently confronting management and employer representatives. The employer successfully approached the Labour Court for an interdict prohibiting the unlawful conduct of the employees. Ignoring the interdict, the strikers continued with their misconduct.

[379] See note 23 above.
[380] A Rycroft 'Being Held in Contempt for Non-compliance with a Court Interdict: *In2Food* (*Pty*) *Ltd v Food & Allied Workers Union & others* (2013) 34 *ILJ* 2589 (LC)' 2499 at 2501. See also *SA Police Service v Police & Civil Rights Union & Others* (2007) 28 *ILJ* 2611 (LC).
[381] (2005) 26 *ILJ* 56 (LAC).
[382] *Ibid* para [18].
[383] Note 277.

In addition, the credibility of the courts will be affected. In *S v Mamabolo* (*ETV and Others intervening*)[384] the Constitutional Court, referring to the authority and credibility of the courts, held:

> '*... Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the State*.'[385]

And further:

> '*... In the final analysis it is the people who have to believe in the integrity of their Judges. Without such trust, the Judiciary cannot function properly*; *and where the Judiciary cannot function properly the rule of law must die*.'[386]

In addition, disobedience of interdicts distorts collective bargaining. The insistence on ignoring interdicts and perpetuating unlawful conduct during collective bargaining shifts the focus from economic bargaining to violent duress, with the result that the issue shifts from the subject-matter of the strike to the violence itself, and the employer capitulates to the demands of the strikers not as a result of the economic pressure, but due to the desire to end the violence. In *Food and Allied Workers Union on behalf of Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River*[387] the remarks expressed this notion thus:

> '*Strikes that are marred by this type of violent and unruly conduct are extremely detrimental to the legal foundations upon which labour relations in this country rest. The aim of a strike is to persuade the employer through the peaceful withholding of work to agree to their demands. As already indicated, although a certain degree of*

[384] 2001 (3) SA 409 (CC).
[385] *Ibid* para 16.
[386] *Ibid* paras 18–9.
[387] (2010) 31 *ILJ* 1654 (LC).

disruptiveness is expected, it is certainly not acceptable to force an employer through violent and criminal conduct to accede to their demands.'[388]

b) Absence of an alternative remedy

Applicants for an interdict are typically required to state that, short of dismissal, there is no available alternative remedy other than seeking an urgent interdict. But even the interdict is no longer a viable remedy as it is not worth the paper it is written on.[389]

The next question is how best to remedy the situation and restore the credibility and weight of interdicts. Ngcukaitobi[390] suggests the answer lies beyond legal institutions, but are squarely in the political arena. He put it thus:

'*… The prevalence of violence in industrial action caused by this instability means that there remains a limited role that the law can play. The solution then becomes one of a political nature*.'[391]

Van Niekerk J expressed similar views by saying:

'*… When citizens or a group of citizens decide that their interests are better advanced by flouting the law, then there is very little to say about the role and perspective of courts …*'[392]

Myburgh also opines that there is little the courts can do because:

[388] *Ibid* para 6. See also *Shoprite Checkers* (*Pty*) *Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2006) 27 *ILJ* 2681 (LC) para 30. And Martin Brassey SC 'Fixing the Laws that Govern the Labour Market' (2012) 33 *ILJ* 1 at 16.
[389] Myburgh 'The failure to obey interdicts prohibiting strikes and violence: The implications for labour law and the rule of law' *Contemporary Labour Law* Vol. 23 No.1 August 2013 at 5.
[390] T Ngcukaitobi Note 35.
[391] *Ibid* at 858.
[392] J van Niekerk Keynote address at the 2012 SASLAW national conference ('*Marikana*: *The perspective of the Labour Court*').

'*With its orders already being disobeyed, the Labour Court may well be setting itself up for failure if it now seeks to impose novel legal solutions*.'[393]

This does not, however, imply that courts should fold their arms and wait for others to do something about the problem. Some of the obvious things the courts can do is to heavily castigate transgressors, as is evidenced in the *Transport SA* (*Pty*) *Ltd v SA Transport and Allied Workers Union and Others*[394] where the court said:

'*This court is always open to those who seek the protection of the right to strike*. *But those who commit acts of criminal and other misconduct during the course of strike action in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose*.'[395]

This will include awarding costs against unions. It is submitted that a solution may lie in the manner of treating the strikers. It is suggested that courts adopt a less antagonistic approach towards litigants, even if it is only perceived. This stems from the structural discussion in Chapter 3. The approach and language chosen by the courts has given workers the impression that there is a general trend of seeking ways to place stumbling blocks in the path of the workers on their journey to economic and social emancipation through, among other, collective bargaining and striking.

The *dictum* in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others*,[396] demonstrates the perceived antagonistic stance adopted by the courts. In this case workers were dismissed following participation in a protected strike. The Appellate Division, as it then was, held that the dismissals of workers were justified because the strike had no longer been functional to collective bargaining.[397]

'*The longer a strike lasts, the more the financial stress on those concerned, the greater the incentive for continued bargaining with a view to compromise and settlement*.

[393] Myburgh 'The failure to obey interdicts prohibiting strikes and violence: The implications for labour law and the rule of law' *Contemporary Labour Law* Vol. 23 No.1 August 2013 at 6.
[394] (2011) 32 *ILJ* 1722 (LC).
[395] *Ibid* para 9.
[396] (1996) 17 *ILJ* 455 (A).
[397] *Ibid* at 464.

Parties' relative bargaining strengths and weaknesses ultimately determine the lengths to which they are prepared to go.'[398]

Workers may perceive such decisions as the Appellate Division blatantly turning a blind eye to their plight and grievances whilst protecting the interests of the employer. The court found it preferable to perpetuate the structural violence and relegated the employees to the ranks of the unemployed. This was in 1996, when the country was still in transition and the new constitutional ethos was still in its infancy, but the roots of the perceived bias reached further into history. In *Food and Beverage Workers Union and Others v Hercules Cold Storage* (*Pty*) *Ltd*,[399] the court found that the purpose of a strike was getting the employer to the negotiating table. The employer offered to negotiate during the strike but was mocked. This was after the employees removed frozen carcasses into the sun. The court said:

'*We are of the view that the strike action was fair insofar as it was directed to compel the respondent to re-open negotiations. Having achieved this any further justification for the strike ceased. By refusing to negotiate with the respondent the employees' conduct became unfair and unreasonable. By conduct they waived their claim to equitable relief and brought their present predicament upon themselves*.'[400]

Rycroft[401] correctly points out that the court concluded that the strike should end the moment the strike achieved the desired effect. That moment was when the employer was no longer intransigent and had become amenable to negotiating. There was however no offer to settle.[402] The court ignored the fact that collective bargaining is about power, and not only when power is in the hands of the employer, but even when it is seized by the employees.[403] It is noteworthy that Rycroft's criticism of the judgment downplays to some extent the underlying issue of structural violence and attributes the decision to a mere 'failing to understand'. He writes '*The court failed to understand that a strike is ultimately about power, even if it is called at a moment when the employer is particularly vulnerable*.'[404] The worker, who has been at the receiving

[398] *Ibid* at 478.
[399] (1990) 11 *ILJ* 47 (LAC).
[400] *Ibid* at 51e–f.
[401] Rycroft Note 28 at 821.
[402] *Ibid* at 824.
[403] *Ibid*.
[404] *Ibid*.

end of structural violence, is more likely to assume that the LAC is too competent to fail to arrive at such a comprehension of collective bargaining, but rather that the court's decision was a deliberate thwarting of the aspirations of the proletarian, being overwhelmingly black Africans, as was the general trend at the time. The court would be perceived as deliberately taking up the role of protecting the status quo and firmly placing power in the hands of one party in the workplace, regardless of the obviously detrimental consequences thereof.

A further example of how the courts may be perceived as antagonistic by the proletarian is in the manner that strikes are declared unprotected as discussed in Chapter 4.

Over two decades into our democracy the negative perceptions of the courts may, like other remnants of the apartheid regime, are still be firmly embedded in the minds of the people, especially those at grass roots level. It is not enough to sit back and assume that the perception will change without deliberate efforts; perhaps it will through the effluxion of time, but that would take too long. The courts must be more proactive in winning back the trust of the workers. One opportunity of so doing is to implement the two-stage interdict system which steers away from telling workers that their strike has no purpose, towards an approach that demonstrates to the workers that the courts are alive to the legitimacy of their grievances, and are only prohibiting the strike because of the unlawful conduct associated with the strike.

2.2 Just and equitable compensation

As discussed above, s 67 of the LRA shields strike organisers and striking employees who take part in a protected strike from the common law civil and delictual liability flowing from the strike.[405] Those who participate in an unprotected do not enjoy this immunity, both unions and union members can be held liable under s 68 on condition that they participated in an unprotected strike or took steps in the furtherance of such strike. The LRA is clear that the loss must be attributable to a strike or conduct in the furtherance of a strike.[406] Case law[407] also expands on this and adds that there must be proof that the applicant suffered loss, that such loss

[405] S 67(2) reads:
'(2) A person does not commit a defect or a breach of contract by taking part in—
(a) a protected strike or a protected lock-out; or
(b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.'
[406] S 68(b).
[407] *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC).

occurred during an unprotected action, that there is a connection between the loss and the unprotected strike and that the defendant participated in the unprotected strike or committed acts in furtherance or in contemplation of a strike.[408]

Once these requirements are proven, the court, in exercising its discretion, will consider the following factors in determining what is 'just and equitable' compensation to award as per s 68(1)(b)(i) to (iv):[409]

a) Reported cases

The LRA does not specify what constitutes 'just and equitable' compensation. It is also not clear from the Act whether 'just and equitable' compensation replaces the common-law remedy of damages.[410] Assistance is sought from case law in this regard.[411]

In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*[412] the employer's claim was for the amount of approximately R15 million in respect of losses arising from an unprotected strike. The court held that 'just and equitable' simply means that the award for compensation must be fair. On the facts, the court found that although the strike was of a relatively short duration, the union had made no attempt to comply with the provisions of Chapter IV of the

[408] *Ibid* at 2042g–h.

[409] '(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to—
(i) whether—
1. attempts were made to comply with the provisions of this Chapter and the extent of those attempts;
2. the strike or lock-out or conduct was premeditated;
3. the strike or lock-out, or conduct was in response to unjustified conduct by another party to the dispute; and
4. 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.'

[410] According to common law delictual claims, the plaintiff will ordinarily be entitled to an award equal to the loss claimed. However, the LRA gives the court discretion to decide what a 'just and equitable' amount would be. As seen in this chapter, the courts have awarded just and equitable amounts that were meagre compared to the actual loss suffered.

[411] See EM Tenza Note 303 at 118.

[412] Note 371.

LRA and that the strike was premeditated. The court awarded only R100 000 in compensation payable by the Union in monthly instalments of R5 000.[413]

In *Mangaung Municipality v SAMWU*,[414] the court made it clear that a union can be held liable for the conduct of its members. It held:

> '*Where a trade union has a collective bargaining relationship with an employer, and its members embark on an unprotected strike action and the trade union becomes aware of such unprotected strike and is requested to intervene and fails to do so without just cause, such trade union is liable in terms of section 68(1)(b) of the Act to compensate the employer who suffers losses due to such unprotected strike. Similarly, if a trade union elects to delegate the responsibility to resolve the strike to its shop stewards employed by the employer facing an unprotected strike, and such shop stewards fail to discharge the same obligation that the trade union has, the trade union is also liable to compensate the employer for any losses that it has suffered as a result of such strike.*'[415]

The court took cognisance of item 6 of the Code of Good Practice in Schedule 8 of the LRA, which requires that the trade union heed the employer's call to discuss the employees' participation in an unprotected strike with the view of preventing such strike and, as such, the refusal by the trade union to heed such call amounts to a violation of item 6 the Code of Good Practice and the liability to compensate the employer for losses arises.[416] The employer's losses amounted to approximately R270 000 but it was awarded 'just and equitable' compensation of R25 000.

In *Algoa Bus Company v SATAWU and Others*[417] the employer's claim for compensation was R1.4 million arising out of an unprotected strike. The court held that the defendants were liable because the strike was unprocedural, premediated and directly caused the employer's loss.[418] The court found that it was 'just and equitable' for the union to compensate the employer for

[413] *Ibid* at 2045i.
[414] (2003) 24 *ILJ* 405 (LC).
[415] *Ibid* at 415j–416ab.
[416] *Ibid*. Item 6(1) of the Code of Good Practice: Dismissal to the LRA. See also SR van Jaarsveld, JD Fourie, & MP Olivier *Principles and Practice of Labour Law* (2010) 29.
[417] (2015) 36 *ILJ* 2292 (LC).
[418] *Ibid* at 2295c.

R1.4 million payable in monthly instalments of R5 280 by the union and R214.50 by every member of the union.[419]

In *Professional Transport and Allied Workers Union obo Khoza and Others v New Kleinfontein Gold Mine* (*Pty*) *Ltd*[420] the court found that the strike was unprotected because the issue in dispute was regulated by a peace clause in a collective agreement entered into by the employer and the majority union at the employer's workplace, NUM. The PTAWU and its members had engaged in this unprotected strike which had caused the employer's loss.

The employer placed evidence before the court to the effect that, but for the strike, approximately 32.52 kilograms of gold would have been mined which would have sold for R426 000 per kilogram. After operational costs, the employer's loss totalled just below R10 million. The union could not contest these computations. The employer offered that it would accept 30% of the damage as compensation.

The court considered the precedent in *Algoa* but refused to follow such precedent after placing heavy reliance on the fact that the employer had not advised the union, either prior to or during the unprotected strike, of its intention to institute a damages claim as per s 68(1)(b) of the LRA. The court, in considering the union's financial statements and its ability to repay any compensation, held:

> '*While unions cannot escape liability simply because it would be onerous financially, it is important that compensation claims are not used as a device to cripple a union's ability to operate or to deal it a terminal blow. While I am reluctant to allow a union to escape the consequences of pursuing the unprotected strike, I am also concerned that the issue of liability for compensation under s68(1)(b) was only raised with it after the event, at a stage when PTAWU could not have done anything to minimise its exposure to such liability. Had it been made aware of the potential liability faced at an earlier stage that might well have concentrated the minds of the union leadership to consider more seriously the wisdom of persisting with the strike action*.'[421]

[419] *Ibid* at 2296j–2297a.
[420] [2016] ZALCJHB 121; (2016) 37 *ILJ* 1728 (LC) (30 March 2016).
[421] *Ibid* at Para 79.

The court concluded that it would not be 'just and equitable' to award any compensation to the employer. The court's decision to superimpose this new requirement into s 68(1)(b) seems dubious. It amounts to legislating through interpretation and creates a precedent that liability will only be incurred once there has been a notice of intention to take legal action against unlawful action. It is, however, doubtful that this approach will be followed in future cases.

2.3 Dismissal

Participation in an unprotected strike constitutes a breach of the employment contract.[422] Section 68(5) of the LRA reads:

> '(5) *Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal*. *In determining whether or not the dismissal is fair, the Code of Good Practice*: *Dismissal in Schedule 8 must be taken into account*.'

According the Code of Good Practice: Dismissal in Schedule 8, dismissals must be procedural and substantively fair. The requirement for fairness is in accordance with the constitutional right to fair labour practice and the preservation of job security.[423]

a) Substantive fairness

In *National Union of Metalworkers of SA v Tek Corporation Ltd and Others*[424] the LAC said '*the illegality of the strike is not* "*a magic wand which when raised renders the dismissal of strikers fair*".' The employer bears the onus of proving the fairness of the dismissal.

In *Coin Security Group* (*Pty*) *Ltd v Adams and Others*[425] the court found that dismissal was too harsh where employees, engaged in an unprotected strike, genuinely believed that the strike was protected. The court considered the following factors:

[422] EM Tenza Note 303 at 119.
[423] *Ibid* at 120.
[424] (1991) 12 *ILJ* 577 (LAC).
[425] (2000) 21 *ILJ* 924 (LAC).

(a) the seriousness of the contravention of this Act;
(b) attempts made to comply with this Act; and
(c) whether or not the strike was in response to unjustified conduct by the employer.

In *NUMSA and Others v Pro Roof Cape* (*Pty*) *Ltd*[426] the court found that a significant factor to consider is the extent of the harm suffered by the employer.

b) Procedural fairness

The employer must comply with procedural requirements before dismissing employees engaged in an unprotected strike. Item 6(2) of the Code provides that:

> '*Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt*. *The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum*. *The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it*. *If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them*.'

The court in *Association of Mineworkers and Construction Union* ("*AMCU*") *and Others v Australian Laboratory Services* (*Pty*) *Ltd*[427] explained the interplay between item 6(1), which addresses non-compliance with statutory requirements for the commencement of a strike, and item 6(2), which deals with the employer's response to the unprocedural strike. The court said:

> '*Item 6, attempts to encapsulate important aspects of the respective conduct of the employer and employee parties in the course of the strike which must be considered in deciding whether any ensuing dismissals were substantively fair or not*. *Item 6* (*1*) *is concerned with the extent to which strikers, and by implication any union they belong*

[426] (2005) 26 *ILJ* 1705 (LC).
[427] (JS315/12) [2017] ZALCJHB 398 (1 November 2017).

to, have departed from the legal requirements for protected strike action and how they conducted themselves during the strike itself. Item 6 (2) is concerned with the extent to which the employer party gave strikers a reasonable opportunity to abandon their unprotected action. Unfortunately, the object of the guidelines has often been lost sight of by parties engaged in unprotected strike conflicts and there is a tendency for both parties to focus on whether the employer formally complied with item 6 (2) since this is often the easiest factual question to evaluate and is one of the important requisites for a fair dismissal of unprotected strikers. Similarly, there is a tendency to ignore the extent to which workers or the union party makes any meaningful efforts to end the unprotected strike, because item 6 (1) tends to emphasise the non-compliance with the statutory requirements for commencing strike action. In focusing in a checklist fashion on these factors, an underlying concern of item 6, which is to evaluate how both parties dealt in good faith with resolving the unprotected strike action is sometimes lost sight of.'

In *National Union of Metalworkers of South Africa* (*NUMSA*) *v CBI Electric African Cables*[428] the LAC held that in addition to item 6, item 7 should also be considered.[429] The court further held that item 6 expresses in general terms some factors to be considered but is not an exhaustive list. The consideration of the fairness of strikes is much broader than the factors enumerated in item 6.[430]

In the recent case of *SACCAWU obo Mokebe and Others v Pick 'n Pay Retailers*[431] 61 employees were dismissed for engaging in an unprotected strike for about one hour on 24 September 2010. The strike notice indicated that the strike would start at 19:00. The employees started the strike at 15:00. The dismissed employees' shifts ended at 16:00 for some, and at 16:30 for others. The union contended that the dismissal was too harsh considering the

[428] [2014] 1 BLLR 31 (LAC).

[429] *Ibid* at 36.

'Item 7. *Guidelines in cases of dismissal for misconduct*.—
Any person who is determining whether dismissal for misconduct is unfair should consider – Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and If a rule or standard was contravened, whether or not – the rule was a valid or reasonable rule or standard; the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; the rule or standard has been consistently applied by the employer; and dismissal was an appropriate sanction for the contravention of the rule or standard.'

[430] At 38–9 paras [29]–[30].

[431] (JA36/16) [2017] ZALCJHB 345 (26 September 2017).

unprotected strike only lasted for about an hour. The employer contended that it suffered considerable harm due to the strike since the strikers purposefully chose to strike during a very busy hour during heritage day and about 100 customers abandoned their trolleys.[432] Further, the strikers were already on a final written warning for similar misconduct and were warned by management that the strike would be unprotected if they started at 15:00, but the strikers went ahead regardless. They showed no remorse thus rendering a continued working relationship intolerable.[433]

The Labour Court found that the dismissals were both substantively and procedurally fair. The LAC, as per Kathree-Setiloane AJA, found that even though the employer attempted to dissuade the employees from embarking on the strike, it failed to issue an ultimatum despite having been aware from 12:30 on 24 September 2010 that the employees intended embarking on the strike at 15:00. The LAC, in dismissing the argument that there was no obligation to issue an ultimatum where the employer had informed the employees that the strike would be unprotected, quoted *Modise v Steve's Spar Blackheath*[434] where the court said:

> '*The purpose of an ultimatum is … to give the workers an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not*.'[435]

Kathree-Setiloane AJA explained that '*an ultimatum is as much a means of avoiding a dismissal as a prerequisite to affecting one*'[436] and that it has a bearing on both procedural and substantive fairness as it is aimed at avoiding dismissal.[437] The learned judge found that:

> '*It is unlikely, on the probabilities, that they would have proceeded to participate in the unprotected strike had they been furnished with a written ultimatum which expressly*

[432] *Ibid* para 2.
[433] *Ibid*.
[434] Note 375.
[435] *Ibid* at para 73
[436] Quoting with approval *Mveltrans* (*Pty*) *Ltd t/a Bojanala Bus Services v Pule & Others* (JA 72/13) [2014] ZALAC 63 (23 October 2014) para 55.
[437] *SACCAWU obo Mokebe & Others v Pick 'n Pay Retailers* Note 421.

spelt out the consequences of doing so, such as no payment for the duration of the strike and disciplinary action that could result in the termination of their services.'[438]

Further, the company convened a disciplinary hearing where only the union officials and shop stewards were permitted to participate and did not give the employees a chance to submit written submissions as to why they should not be dismissed despite an undertaking by the employer to afford the employees such an opportunity. Kathree-Setiloane AJA found this to be procedurally unfair.

Kathree-Setiloane AJA further found that the final written warning issued to the employees was not for a similar offence as committed 24 September 2010. The company disciplinary code recommends a written warning for the offence committed on 24 September 2010. The strikers who were on a final written warning on 24 September 2010 were dismissed, whilst those who were not on a final written warning, were issued with a written warning instead of dismissal. Kathree-Setiloane AJA ultimately found that the dismissals were procedurally and substantively unfair and reinstated the employees with back pay.

The first criticism that could be levelled against this judgment is that it did not answer the question put before the court, that is, could a reasonable decision-maker have arrived at the same decision that the commissioner arrived at.[439] Kathree-Setiloane AJA just simply replaced the decision of the court *a quo* with what she believed should have been the correct decision.

The second criticism is levelled against her ostensibly draconian approach to the item 6(2) procedural requirement. It is ironic that Kathree-Setiloane AJA criticised the employer of inflexibility in the application of its disciplinary hearing procedures, and then went on to adopt a very draconian stance that a 'written' ultimatum must be issued to the employees for them to assimilate and arrive at an informed choice as to whether or not to carry on with the strike. The legislature itself adopted a flexible approach by not insisting on a written ultimatum. Item 6(2), which Kathree-Setiloane AJA seems to have ignored, states that '…*If the employer cannot*

[438] *Ibid* at Para 48.

[439] The standard of review as per S*idumo & Another v Rustenburg Platinum Mines Ltd & Others* (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007).

reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.'

It is not contended that the employer could not have been expected to issue a written ultimatum, but rather that there need not be a strict requirement of a written ultimatum, and that each case should be considered on its merits. In this case, the employees were aware that they would be disciplined for unlawful industrial action. This is from their knowledge of the employer's disciplinary code, and because the employer had previously issued final written warnings for unlawful industrial action. On 24 September 2010, management informed the employees that their intended strike would be 'illegal'. They were well aware of the contents of the strike notice and that they were legally obliged to abide by it. On those facts, the employees could not have expected anything other than to be disciplined, which expectation flowed from the entirety of the circumstances, particularly the conduct of the employer.

Kathree-Setiloane AJA's opinion that the employees would not have embarked on the strike had they been issued with a written ultimatum is inconsistent with the facts. The employees embarked on the unprotected strike not because they were not aware of the consequences of their actions, a written ultimatum would not have informed them of anything they were not already well aware of. A more realistic explanation is that the employees embarked on the strike because they were acting defiantly, not only towards the employer, but also towards the rule of law. Excusing the strikers of liability based on the absence of a written warning under such circumstances is tantamount to condoning the flouting of the rule of law. It is thus submitted that the employer fulfilled its item 6(2) requirement and the method of fulfilling that requirement, whether verbal or written, is neither here nor there. Further, it is trite that the courts must give effect to substance, rather than form.[440] The narrow approach adopted by Kathree-Setiloane AJA violates this century-long principle of our law.[441] The question the court should ask is simply whether or not the employees were aware that the employer was averse to their planned unlawful course of action and that the employer intended taking action against them should they proceed with the unlawful course of action. The onus being on the

[440] *Commissioner for South African Revenue Service v NWK Ltd* (27/10) [2010] ZASCA 168; 2011 (2) SA 67 (SCA); [2011] 2 All SA 347 (SCA) (1 December 2010).
[441] First introduced by Innes J in *Zandberg v Van Zyl* 1910 AD 302.

employer to ensure that the employees are aware of such. How they came to that knowledge, with respect, is superfluous.

The basic requirement is that the employer should give the employee an opportunity to state his/her side of the story, in accordance with the *audi alteram partem* principle.[442] The employee may use the opportunity to successfully dissuade the employer from terminating the employment contract.[443] The employer will usual convene a disciplinary hearing for purposes of giving the employee an opportunity to challenge evidence and present evidence in his/her own defence. The process during, and leading up to, the disciplinary hearing must be fair, unless the accused employee waives the right to a hearing.[444]

3 Liability in terms of the RGA

The preamble to the Regulation of Gatherings Act[445] ('the RGA') stipulates that the purpose of the RGA is to regulate the liability of offenders during a public gathering. It was promulgated to protect and promote the constitutional right to freedom of assembly.[446] It came into operation on 15 November 1996. As such, it is a product of a new constitutional era. It also promotes other constitutional rights such as freedom of opinion,[447] freedom of expression,[448] freedom of association,[449] and the right to make political choices and campaign for a political cause.[450]

Of particular importance for the purpose of this study is s 11 of the RGA which provides as follows:

> '(*1*) *If any riot damage occurs as a result of—*
>
> *(a) a gathering, every organisation on behalf of or under the auspices of which that gathering is held, or, if not so held, the convener*;

[442] *Transport & General Workers Union & Others v Coin Security Group* (*Pty*) *Ltd* (2001) 22 *ILJ* 968 (LC) at 979e.
[443] *Paper Printing & Allied Workers Union & Others v Solid Doors* (*Pty*) *Ltd* (2001) *ILJ* 292 (IC) at 293b. See also *Modise & Others v Steve's Spar Blackheath* note 375 at 551f.
[444] *National Union of Metalworkers of SA & Others v Elm Street Plastics t/a ADV Plastics* (note 67, Chapter 2) at 338A–D.
[445] Act 205 of 1993.
[446] S 17 of the Constitution.
[447] S 15(1).
[448] S 16(1).
[449] S 18.
[450] S 19(1).

(*b*) *a demonstration, every person participating in such demonstration, shall subject to subsection* (*2*), *be jointly and severally liable for that riot damage as a jointly wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956* (*Act 34 of 1956*), *together with any other person who is liable therefor in terms of this subsection*.'[451]

The definition of gathering[452] is broad enough to include any march, demonstration, protest, rally or picket in a public street or other public place involving more than 15 people.[453] The RGA, in s 11, concerns itself with the legal ramifications flowing from damage caused during such gathering. As a result of s 11, unions are exposed to potential claims for riot damages[454] whenever they organise strikes that involve more than 15 people and they choose to picket in a public place.[455]

The legislature has not provided a definition of 'picket'. According to commentators, it may be defined as a—

'*public expression by employees, who are already on strike, of their grievances in order to make their grievances known to the general public and other relevant constituencies; and to solicit support for their cause from the public and those constituencies*'.[456]

[451] S 11 of the RGA.

[452] '*as meaning any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989* (*Act 29 of 1989*), *or any other public place or premises wholly or partly open to the air*

(*a*) *at which the principles, policy, actions or failure to act of ally government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted, or propagated*; *or*

(*b*) *held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution*.'

[453] Tenza Note 303 at 90. See also M Wallis 'Now You Foresee It, Now You Don't — *SATAWU v Garvas & Others*', 33 *ILJ* (Juta) 2257 (2012) at 2259.

[454] S 1 of the RGA defines Riot damage as:

'*Any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during, or after, the holding of a gathering*.'

[455] Tenza and Wallis Note 453.

[456] JV du Plessis & MA Fouché *A Practical Guide to Labour Law* 7 ed (2012) 392; AJ van der Walt, R le Roux & A Govindjee *Labour Law in Context* (2012) 213.

With this definition, it is apparent that strikes that include pickets with such pickets taking place in public place, including public roads, will fall to be regulated by the RGA. In that case, the LRA may cease to regulate the picket and the strikers will have to comply with the provisions of the RGA. Section 12 of the RGA provides for the requirements of a valid notice, such as informing authorities of an impending gathering at a particular public place. The organisers of the strike are therefore required to comply with these provisions.

With the proliferation of violent strikes and protest action in the country, one would have expected an equal proliferation of litigation based on the RGA but that has not been the case. Litigation came in the form of the *locus classicus* discussed next:

South African Transport and Allied Workers Union and Another v Garvas and Others[457]

Facts:

On 16 May 2006 the SATAWU held a protest march in the Cape Town City Bowl as part of a protracted strike in the security sector by members of SATAWU. The strike attracted widespread attention for, *inter alia*, the violence involved which the union's provincial secretary described as being characterised by a high level of acrimony. Approximately 50 people lost their lives whilst many others suffered bodily injuries. There was rampant damage to property, including the looting of stores. The resulting damage was estimated to be in the region of R11.5 million. Some of the victims brought claims against SATAWU on the basis of s 11(1) of the RGA.[458]

a) *Direct attack*

SATAWU did not bring a direct constitutional challenge against s 11(1). Wallis suggests that s 11 is vulnerable to a constitutional attack on the grounds that the victim(s) of the riot damage only has/have to prove a connection between the damage incurred and the gathering in question, thus requiring a no fault liability.[459] Further, considering that the definition of riot

[457] (2012) 33 *ILJ* 1593 (CC).
[458] *Ibid* paras 9 – 20.
[459] See also PAK le Roux 'The Rights and Obligations of Trade Unions: Recent Decisions Clarify Some Limits to Both' (2012) 22 *CLL* 31 at 32.

damage is worded so broadly to encapsulate 'any' loss, the potential damages that the union may be liable for could potentially be substantial. Wallis suggests that this may be at odds with s 17 of the Constitution, which reads '*Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions*' and s 23, which guarantees the right to strike. Given the acrimonious nature of strikes where relations are strained and tempers are prone to boil over, as the argument goes, the exercise of these rights is hampered by the unfettered potential of paying damages for 'any' loss.

A different ruling was meted out in the case of *Mahlangu v SATAWU, Passenger Rail Agency of SA and Another*[460] where striking SATAWU members lured an unsuspecting replacement worker away from work with false promises of a better job in the city of Johannesburg. Whilst commuting on a train to the city and far from the site of the actual picket, the SATAWU members assaulted the replacement worker and threw her off the train after stripping her naked, sustaining serious injurious. Whilst accepting that the plaintiff's assailants were SATAWU members involved in the strike, the court refused a claim for damages based on the proximity of where the picket was held and where the assault occurred.[461] It is submitted that once a connection between the harm and the strike is established, this proximity test should not be a consideration; it is certainly not a requirement of the RGA. It cannot be that strikers can draw a line in the sand determining the geographic area of where liability will be incurred, and outside of that line, have *carte blanche* to do as they please, even assault and throw human beings off moving trains.

It is doubtful that Wallis' argument would have succeeded. The argument basically asks the court to weigh the s 17 right against, for instance, the right to human dignity[462] and bodily integrity[463] of everyone else not to be subjected to violence during gatherings, including strikes. In so doing, it asks the court to strike a balance between affording the freedom to gather whilst restricting the potential liability for damages, so as not to create a system that will be too cumbersome for unions to exercise these rights. In simple terms, on the one hand, meagre sanctions would promote the exercise of the right, but it also provides little incentive for unions to take steps to curb violence. On the other hand, substantial sanctions send a 'chilling effect'

[460] (2014) 35 *ILJ* 1193 (GSJ).
[461] *Ibid* at 1212D.
[462] S 10 of the Constitution.
[463] S 12(2) of the Constitution.

to unions given the potential for liability, but this is a disincentive to exercise the right. It is submitted that given the levels of violence during strikes, which includes the violation of the fundamental right to life,[464] this warrants heavy sanctions that will send out a strong message to would-be offenders that violence will not be tolerated and for that reason it submitted that the Constitutional Court would have found that the s 11 of the RGA restrictions are justifiable under s 36 of the Constitution. Further, Mogoeng CJ held that s 17 of the Constitution will be limited by the participants' willingness to breach the peace.[465] Therefore, the sanctions are aimed at limiting the willingness to be violent, not at discouraging the exercise of the right of assembly, as parties are still at liberty to assemble peacefully. The European Court of Human Rights has held:

> '*An individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour*.'[466]

SATAWU did not even bother with this direct attack.

b) *Indirect attack*

SATAWU's attack was premised on the argument that the defence provided to convenors of gatherings, namely s 11(2), is actually not a defence at all as it is so inadequate that any attempt to invoke it is bound to fail.[467] Section 11(2) requires the convenors of gatherings to prove three things:

> '(*a*) *that he or it did not permit or connive at the act or omission which caused the damage in question*; *and*

[464] S 11 of the Constitution.
[465] *Garvas* (CC) para 35. Quoted with approval by Wallis J in *Hotz v UCT* (730/2016) [2016] ZASCA 159 (20 October 2016) para 63. See also *Rhodes University v Student Representative Council of Rhodes University & Others* (1937/2016) [2016] ZAECGHC 141; [2017] 1 All SA 617 (ECG) (1 December 2016).
[466] *Ziliberberg v Molodova* ECHR (Application No 61821/00) para 2; *Cisse v France* ECHR (Application No 51346/99) para 50; and *Christians Against Racism & Fascism v United Kingdom* (1998) 21 DR 138 (Application No 8440/78) para 4.
[467] *Garvas* (CC) para 35.

(*b*) *that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable*; *and*
(*c*) *that he or it took all reasonable steps within his or its powers to prevent the act or omission in question*: *Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question*.'

The crux of SATAWU's contention in *Garvas* was that it cannot prove that the damage in question was not reasonably foreseeable and also prove that it took reasonable steps to prevent that very damage that was not foreseeable.[468] It said '*any reasonable organizer who takes reasonable steps to guard against an act or omission materializing could never prove that it was not reasonably foreseeable*'.[469] It contended that the result was irrational and was an impermissible restriction of its rights under s 17 of the Constitution. To this the Constitutional Court, as per Mogoeng CJ, held that what is reasonably foreseeable is inextricably connected to steps taken by convenors of the gathering to prevent damage.[470] It held that an act or omission that caused damage would be unforeseeable if steps were taken to prevent such act or omission. In support of this decision Wallis writes:

'*It may be reasonably foreseeable in South Africa that people will bring sticks and clubs to a protest or demonstration and that, if nothing is done about this, there is a possibility that they may use then to inflict injury or damage to property. However, if the organizers set up a system at the assembly point to ensure that sticks and clubs and other weapons are left behind in safe keeping, to be collected after the march, it seems difficult to say that, when the march commenced, they reasonably foresaw that people would have such items with them and use them to cause injury or damage. This suggests that when the issue of foreseeability is under consideration the court is primarily concerned with what was foreseeable at the commencement of the gathering, not with what might have been foreseen and catered for at some earlier stage in the organization of and preparation for the gathering*.'[471]

[468] *SATAWU* para 35.
[469] *SATAWU* para 42.
[470] *SATAWU* para 43.
[471] Wallis Note 27 at 2265.

This decision must be lauded for taking a major stride toward combatting the scourge of strike violence. It requires of conveners of gatherings to constantly take steps to prevent harm. This is also in keeping with the intended purpose of the RGA reinforcing the coexistence of the citizen's right of assembly with the State's duty to maintain law and order.[472] In *Xstrata v AMCU and Others*,[473] trade unions have in the past denied any wrongdoing on their own part or on the part of their members for unlawful actions of their members during violent strikes, to which the court held '*union must not wash its hands off but must take steps to prevent members not to disregard the law*'.[474] Unions are required to proactively take steps to prevent harm on a continuous basis to prevent harm to others or face a claim in terms of the RGA.

4 Conclusion

This chapter took a critical view at statutory remedies as per the LRA and the RGA. It was noted that interdicts are not as effective as they should be, given that they are often ignored by employees during violent strikes. It was submitted in the chapter that the courts adopt a more proactive and activist approach in attempting to restore respect to the courts and the rule of law by firstly, avoiding being perceived as antagonistic to the employees by telling them their strike serves no purpose, but rather by advising them that they seek to benefit from unlawful conduct. Secondly, the courts should be willing to be stricter on those who are guilty of contempt of court.

We further noted that the courts have been excessively lenient on the unions in awarding 'just and equitable' compensation. The evidence lends itself to the view that the remedies have left employers in a precarious position where attaining meaningful recompense is but an illusion. Interdicts are but a mere chimera. With the exception of *Algoa*, the courts are awarding 'just and equitable' compensation that is far less than the loss actually incurred by employers. This does little towards stemming the flow of violence and it is time the courts relook at how they interpret 'just and equitable' compensation. We further analysed the employer's remedy of dismissal. The dismissal should be both substantively and procedurally fair.

[472] P de Vos. ... et al. *South Africa Constitutional Law in Context* (2014) 556.
[473] [2014] ZALCJHB 58 No. J1239/13 (25 February 2014). Available at *http://www.saflii.org/za/cases/ZALCJHB/2014/58.pdf*, accessed on 7 November 2017.
[474] *Ibid* at 17.

It is fitting that the chapter ended with the landmark case of *Garvas*. The Constitutional Court assessed s 11 of the RGA and arrived at a decision that should go a long way towards curbing strike violence by confirming that during a picket that meets the requirements of the RGA, unions will be held liable for the delicts committed by their members when certain requirements are satisfied.

CHAPTER 6 CONCLUSION AND RECOMMENDATIONS

1 Introduction

At the heart of this dissertation lies the right to strike and the role it plays in the collective bargaining system in South Africa. The right to strike is one of the fundamental rights available to workers in terms of the Constitution,[475] and given effect to in ss 64 and 65 of the LRA of 1995. Chapter 3 gives an in-depth analysis of the consequences of a protected strike, whilst Chapter 4 deals with the consequences of an unprotected strike.

Strike violence taints the role played by strikes and solutions are sought to rid South Africa of strike-related violence. Perhaps one of the most devastatingly violent strikes is the Marikana Massacre where 34 mineworkers were killed, 78 wounded and more than 250 people were arrested.[476] Strikes have become synonymous with violence in South Africa and solutions must be found as a matter of urgency.

In the search of solutions, the dissertation critically outlined the legal framework regulating strikes. It was found that the framework does not make provision for balloting, provides for the use of replacement labour, and provides for the issuing of interdicts under certain circumstances. In Chapter 3, it was submitted that these factors contribute to structural violence, which causes strikers to retaliate with physical violence. A major factor that contributes to the structural violence is the current interpretation of majoritarianism. An alternative approach to majoritarianism, informed by *Ubuntu*, is proposed. The *Ubuntu* approach also informs the suggestion that the provision for replacement labour be repealed and replaced with a proportionality system. Let us consider these factors in turn below.

[475] S 23 of the Constitution.
[476] Available at *http://www.sahistory.org.za/article/marikana-massacre-16-august-2012*, accessed on 17 May 2017.

2 Majoritarianism – *Ubuntu*

In Chapter 3, following a discussion about structural violence, majoritarianism was identified as an implement of oppression against members of the minority unions. The Constitutional Court in *AMCU v Chamber of Mines of South Africa and Others*[477] recently considered the constitutionality of the majoritarianism principle and found that it is not an implement of oppression. It was submitted that the court did not adopt the correct approach and missed an opportunity to expand on the transformative interpretation jurisprudence, by including *Ubuntu* in the interpretation of the provisions of the LRA promoting majoritarianism. *Ubuntu* would see a move from an adversarial system, where opposing parties would use whatever is at their disposal to inflict harm on one another, to a communal system that promotes collegiality and peace in the workplace. *Ubuntu* is thus crucial for the creation of an environment conducive for prosperity and peace. Consistent with this form of majoritarianism premised on *Ubuntu*, is the use of ballots.

3 Balloting

The dissertation suggests that the LRA revert back to the position under s 65(2)(b) of the Labour Relations Act 28 of 1956, where ballots were a requirement before the commencement of a strike. Its failure to curb strike violence is attributed to the political unrest of the time, but should produce the desired effects now that the political climate is relatively calm.[478]

It is submitted that in order to give true meaning to majoritarianism, all workers, notwithstanding union affiliation, should be permitted to vote on an issue raised by workers. The LRA should be amended to create this purer application of majoritarianism. This will also serve to remind union leaders that their purpose is to serve the workers and should not use the power vested in them to push ulterior agendas, thus restoring trust between workers and unions. An added benefit is that those who are in the minority are not simply shunned when they raise an issue simply because they are the minority. They will be given an audience among colleagues, who will then vote after applying their minds. The result will be reduced

[477] (CCT87/16) [2017] ZACC 3; (2017) 38 *ILJ* 831 (CC); 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC); [2017] 7 BLLR 641 (CC) (21 February 2017).
[478] Tenza Note 130 at 215.

frustrations and tensions in the workplace, which should in turn should reduce strike-related violence. Workers will be more inclined to create allies, rather than perpetuating rivalries and conflict, with one another, irrespective of union affiliation. This will make for a peaceful and more fruitful working environment. The current form of majoritarianism creates an adversarial environment where it is a case of 'join us or we will oppress you'.

It should also be borne in mind that most of the strikers are black Africans who are brought up with values of *Ubuntu* and when they reach the workplace, they come into contact with this adversarial form of majoritarianism, hence the need to tailor our majoritarianism to suit our culture and *Ubuntu*. This is the approach that the legislature, and Cameron J, in *AMCU v Chamber of Mines*, should have adopted in labour disputes. It was this spirit of camaraderie that ultimately won the freedom of South Africa from its oppressors; it is this spirit that will economically emancipate the downtrodden.

4 Replacement labour

The use of replacement labour is identified as one of the causes of strike violence as it is a blatant form of structural violence against workers.[479] The employer is permitted to enforce the 'no work, no pay' rule[480] to inflict economic harm on employees, and employers are permitted to carry on production during a strike, thus undermining, if not totally eradicating, the economic pressure the workers are trying to exert on the employer by striking.[481] The same rationale applies to non-striking employees.

The proportionality system, being informed by *Ubuntu*, envisaged a win-win solution where all stakeholders are forced to work together for the common good. In short, the system entails that the amount paid to employees is reduced by the percentage in the reduction of productivity.

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[479] S 76. *Replacement labour*

'(*1*) *An employer may not take into employment any person—*

(*a*) *to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or*

(*b*) *for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike*.

(*2*) *For the purpose of this section, "take into employment" includes engaging the services of a temporary employment service or an independent contractor*.'

[480] S 67(3) of the LRA.

[481] Tenza Note 130 at 219.

The amount paid out is shared among the entire staff complement in proportion to their normal salary/wages, regardless of who was on strike or who was working. An agreement (either on an ad hoc basis, or through a collective agreement, or to be compulsorily agreed upon at conciliation before a certificate of non-resolution is issued, or through a ministerial promulgation regulating an industry) will be put in place that a certain number, or percentage, of the staff complement will work during a strike in order to preserve the business so that strikers still have a job to return to after the strike.

The system will promote collegiality among all the employees, strikers and non-strikers. Instead of viewing one another as adversaries, the spirit of inter-dependence will reign where the strikers rely on non-strikers to generate some income and sustain the business, whilst the non-strikers rely on the strikers to brave the elements and toyi toyi, garner support for their cause, negotiate with the employer and hopefully succeed in winning better working conditions for staff members. With the implementation of this system, gruesome scenes of violent attacks between strikers against replacement workers or non-striking employees will be a thing of the past.

The employer will not need to hire replacement workers — whom the employer may even need to train and upskill for the job — so it will also benefit the employer. Consistent with *Ubuntu*, employers and employees will recognise and embrace their dependence on one another, thereby removing the adversarial view or objective of proving to each other that they are invaluable. This approach overall benefits both employers and employees.

5 Two-stage interdict

This recommendation seeks to limit the infringement of the right to strike. The legitimate objectives of a strike are distinct from the unlawful acts carried out by strikers in attempting to obtain those legitimate ends. Interdicts that prohibit a strike that has turned violent stifles, not only the unlawful conduct, but the legitimate objectives of the strike, leading to defiance, contempt of court, and more violence.

The purpose is to stop the unlawful aspects of the strike, not the legitimate ends. It may be more effective for the court to issue an interdict prohibiting the unlawful conduct, whilst

permitting the strikers to pursue the legitimate objectives of the strike. This will be the first interdict, which comes with a stern warning that the court will not permit anyone to gain any advantage from their own unlawful conduct and, as such, if the unlawful conduct does not stop, a second interdict will be issued, putting an end to the strike.

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