THE SUBSTANTIVE AND PROCEDURAL LIMITATIONS ON THE CONSTITUTIONAL RIGHT TO STRIKE

by

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PLAGIARISM DECLARATION

I, Johana Kambo Gathongo student number 205034501, hereby declare that the treatise submitted in partial fulfilment of the degree LLM (Labour Law) to be awarded is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

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SUMMARY

This treatise discusses the increasing of the procedural and substantive limitations on the employees' right to strike. The Constitution permits the right to strike to be limited in terms of the laws of general application. The Labour Relations Act (LRA) is a good example. Such limitation must be reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom. The study sought to investigate whether further increasing the existing limitations on the right to strike unduly breaches employees' Constitutional right to strike and the purpose of the LRA. Further, the study sought to find out whether the additional content requirements in the strike notice amount to importing into the LRA additional limitations on the fundamental right to strike that enjoys no textual support.

Through an extensive literature review, the findings arguably show that indeed further increasing the limitations on the employees' right to strike may unduly infringe their right to strike. Moreover, the increase of the content requirements in a strike notice creates an unnecessary hurdle to employees wishing to strike.

One of the most important finding made is that instead further increasing the limitations on the right to strike, going back to the basics of negotiation to alleviate strikes, particularly wage-related strikes is vital. To achieve this, it is important for employers to re-establish social and individual relationships with their employees, whereby they become aware of the issues that employees face on a daily basis. Also, establishing proper workplace dialogue and forums would assist employers in becoming aware of employees concerns. This would thereby prevent strikes, as problems can be dealt with beforehand. The findings above informed in the recommendations at the end of the study.

CHAPTER 1
INTRODUCTION

1.1 BACKGROUND AND RATIONALE FOR THE STUDY

The right to strike is the most visible form of collective industrial action that workers employ with a view to forcing employers to the bargaining table to agree to their demands.[1] An employer's task of planning to protect his business against an impeding strike[2] just became a little more complicated.[3] The sight of policemen brutally gunning down striking mineworkers at Marikana left the whole country appalled. Since then, the rights of striking employees and the unions they belong to, have once again come to the spotlight.[4]

It is worth noting from the onset is that the manner in which the Labour Relations Act[5] regulates strikes has remained practically unchanged since 1995.[6] Instead of suggestion that allows employees to exercise their constitutionally guaranteed right to strike, the Labour Relations Amendment Bill[7] only envisions to limit this right even further. In a similar reasoning the Department of Labour Deputy Director-General for labour policy and industrial relations Mr Kettledas, noted that the solution is not really amending the law, but rather in the proper implementation thereof.[8]

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1 Van der Walt, Le Roux and Govindjee *Labour Law in Context* (2012) 203. See also Grogan *Collective Labour Law* (2010) 141.

2 S 213 of the LRA defines 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".

3 Maharaj and Stuart "Strike notices: one for all or all for one?" 2012-10-08. http://www.golegal.co.za/courts/strike-notices-one-all-or-all-one-constitutional-court-settles-vexed-question (Accessed on the 25-12-2014).

4 *De Vos* "Constitutionally Speaking: Sharp Divisions on the Constitutional Court about the right to strike." 25 September 2012. http://constitutionallyspeaking.co.za/sharp-divisions-on-the-constitutional-court-about-the-right-to-strike/ (Accessed on 12/01/2014).

5 Act 66 of 1995. Hereinafter referred to as the LRA or the Act.

6 Du Toit and Ronnie *The Necessary Evolution of Strike Law* (2012) 200. See also Benjamin *A Review of Labour Markets in South Africa: Labour Market Regulation: International and South African Perspectives* (2005) 36.

7 Hereinafter referred to as the 2012 Bill.

8 Kettledas "Changing SA's Labour Law not the Answer" 2013 (2013-7-31) *Mining Weekly News* 7 http://www.miningweekly.com/article/changing-sas-labour-law-not-the-answer-says-ddg-2013-07-31.

South Africa is a member of the International Labour Organization (hereinafter the "ILO"). The Preamble to the ILO affirms that "whereas a universal and lasting peace can be established only if it is based upon social justice, and whereas conditions of labour exist involving injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled",[9] there can be no doubt that the right to strike is a very important instrument in the collective bargaining in order to ensure the economic right of workers. This therefore entails that a denial or undue limitation of this right would lead to a substantial weakening of the bargaining power of workers as they cannot equally match the strength of management in a case of an inevitable conflict of interests between the parties.

In recognition of the important role of a right to strike, the ILO's Committee on Freedom of Association maintains that "the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests".[10] These interests which workers seek to defend through the exercising of the right to strike not only concern better working conditions or collective claims of an occupational nature, but they also seek solutions to economic and social-policy questions and problems facing the undertaking which is of direct concern to the workers.[11] Kahn-Freund is of the view that it is through the exercise of the right to strike that workers attain more power to meet the needs of maintaining equilibrium in industrial relations.[12] This treatise supports that strike is the

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9 See Preamble to the Constitution of the International Labour Organization of 1919. Available at http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf (Accessed on 23/2/2014).

10 Committee on Freedom of Association, Digest, par 522. See also Grogan, (Labour Law/ Employment Law Journal/ 2013/ April/ Strike notices What must they contain?): Grogan indicates that employees use the right to strike as a weapon to prove to the employer that resisting to accepts their demands could be fatal and costly than acceding to them. See also *FGWU v Minister of Safety & Security* (1999) *ILJ* 1258 (LC) 1264 par 18 and *CEPPWAWU v Metrofile (Pty) Ltd* (2004) *ILJ* 231 (LAC) 246 par 53. See also Art 8 United Nations International Covenant on Economic, Social and Cultural Rights, which recognizes the important role of a right to strike in support of economic and social interests, provided that it is exercised in conformity with the laws of the particular country, in this case South Africa.

11 Committee on Freedom of Association, Digest, par 526.

12 Kahn-Freud and Hepple *Laws against Strikes* (1972) 5. Also Grunfeld note "if one set of human beings is placed in a position of unchecked industrial authority over another set, to expect the former to keep the interest of the latter constantly in mind and, for example, to increase the latter's earnings as soon as the surplus income is available…is to place on human nature a strain it was never designed to bear" 52. See Grunfeld, *Modern Trade Union Law* (London: Sweet and Maxwell, 1966) 33. See also Davies and Friedland, in Khan - Freund's *Labour and The Law* 3rd ed (1983) 292. Advancing support to necessity of the right to strike in collective

most powerful instrument normally adopted by the employees in order to achieve their demands.

The legality of the right to strike is derived from legislation, case law, international Conventions of the country, collective agreements and in some countries like South Africa, the Constitution. The ILO, particularly the Freedom of Association and Protection of the Right to Organise Convention[13] and the Right to Organise and Collective Bargaining Convention,[14] are the two leading instruments of international protection of freedom of association, collective bargaining and the right to strike. Although neither of these conventions expressly provides for a positive right to strike, the jurisprudence developed by the Committee of Experts on the Application of Conventions and Recommendations[15] and the Committee on Freedom of Association[16] respectively recognise the existence of the right to strike.[17]

Expressing a similar view on the rationale for strikes, Servais notes that "the ILO organs of control have had numerous occasions to take a position on the subject and as a result, they have built up a body of principles recognizing that the right to strike constitutes an intrinsic corollary to the right to organize and a fundamental right of workers and of their organisations".[18]

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bargaining, Lord Wedderburn of Charlton further rationalised: "To protect such a right is not to approve or disapprove of its exercise in any particular withdrawal of labour, it is to recognise the fact that the limits set to the right to strike and to lockout are one measure of the strength which each party can in the last resort bring to bear at the bargaining table. The strength of a union is bound to be related to its power and its right to call out its members, so long as any semblance of collective bargaining survives." See Wedderburn *The Worker and the Law* (1986), 245.

13 Convention No 87 of 1948.

14 Convention No 98 of 1949.

15 Hereinafter referred to as "the CEACR".

16 Hereinafter referred to as "the CFA".

17 Creighton and Stewart, *Labour Law* (2005) 4th ed 533 and Gernigon, Odero and Guido, ILO *Principles concerning the Right to Strike* International Labour Office, Geneva, 2000. The CFA was established in 1951. After a relatively slow beginning, the number of cases submitted to the CFA increased steadily for a number of years. Overall, the Committee has examined more than 2400 alleged breaches of the principles of freedom of association. It has also established an elaborate jurisprudence, the key features of which are set out in the ILO's Digest of decisions. It does not concern "case law" in the strict sense of the word: The examination of periodic reports on Conventions Nos 87 and 98 also constitutes an important part of the work of the CEACR. For example, in 2007, the Committee addressed "observations" to 103 of the 147 States that had ratified Convention No 87, plus direct requests to 55 States (including 30 that had also received an observation).

18 Servais "The ILO law and the freedom to strike" *Freedom of Association: Digest of Decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* Geneva, International Labour Office, 5th ed (revised) (2006) par 523.

South Africa emerges from a history where workers, and in particular African workers, did not enjoy a right to strike without consequences. However, following the advent of the Constitution, the right to strike is now guaranteed to every worker and indeed enjoys a high degree of protection in the South African Constitution.[19] In fact, the Constitutional Court has affirmed in *National Union of Metalworkers of SA v Bader Bop*[20] that this right is essential for the dignity of workers who in our constitutional dispensation may not be treated as coerced employees. In addition, the court acknowledges that it is by means of strike that workers are able to assert bargaining power in industrial relations.[21] Du Toit opines that there can be no equilibrium in industrial relations without the freedom to strike.[22]

Post 1994, South Africa adopted various new forms of labour legislation, including the LRA. The LRA gives form and content to the right to strike in the Constitution by establishing substantive and procedural requirements. Similarly, it establishes a set of limitations[23] imposed on a party wishing to participate in a strike in order for a

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19 S 23(2)(c) of the Constitution of the Republic of South Africa, 1996. Hereinafter referred to as the Constitution. Chapter 2 Bill of Rights in the Constitution particularly s 23(2)(c) recognises the right to strike which is guaranteed to every worker. See also Du Plessis and Fouche *Practical Guide to Labour Law* (2007) 355. See also *Re Certification of the Constitution of the Republic of South Africa* (1996) 4 *SA* 744 (CC).

20 (2003) 24 *ILJ* 305 (CC).

21 *Ibid.*

22 Du Toit, Woolfrey, Murphy, Godfrey, Bosch and Christie *Labour Relations Law* (1999) 236 237. See also Davies and Friedland, in Khan-Freund's *Labour and The Law* (1983) 292. Advancing support to necessity of the right to strike in collective bargaining, Lord Wedderburn of Charlton further rationalised: "To protect such a right is not to approve or disapprove of its exercise in any particular withdrawal of labour, it is to recognise the fact that the limits set to the right to strike and to lockout are one measure of the strength which each party can in the last resort bring to bear at the bargaining table. The strength of a union is bound to be related to its power and its right to call out its members, so long as any semblance of collective bargaining survives." See Wedderburn *The Worker and the Law* (1986) 245.

23 S 65 sets out the limitations on right to strike or recourse to lock-out and provides as follows:

(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if-

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

(b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;

(d) that person is engaged in-

(i) an essential service; or

(ii) a maintenance service.

strike to be considered as protected. In the same way, the ILO recognises that the right to strike is not absolute and may therefore be curtailed in relation to circumstances, participants, object and procedure.[24]

It is commonly accepted that for employees or unions to exercise this right, it must be preceded by certain generally acceptable procedural requirements spelt out in the Act. However, the Committee on Freedom of Association warns that such requirements should be reasonable and must not in any event cause substantial limitations on the means of action open to trade-union organizations.[25] Equally, in the case of *SATAWU v Moloto,*[26] the Constitutional Court emphasized that:

> "The right to strike is protected as a fundamental right in the Constitution without any express limitation. The constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them, and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning."[27]

Currently, the LRA provides three procedural requirements which must be satisfied by a trade union who wishes to embark on protected-strike action. The first

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(2) (a) Despite s 65(l)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lockout if the issue in dispute is about any matter dealt with in ss 12 to 15 (organisational rights.)

(b) If the registered trade union has given notice of the proposed strike in terms of section 64(l) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.

(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 s 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.

24 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), Article 3; General Survey on Freedom of Association and Collective Bargaining 151. See also International Labour Office, Labour legislation guidelines, Ch 5: Substantive provisions of labour legislation the right to strike, http://www.ilo.org/public/english/dialogue/ifpdial/llg/index.htm (Accessed 29 July 2014).

25 1996d. *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 4th ed (revised). Geneva par 498). Hereinafter referred to as the ILO, 1996d.

26 (2012) 33 *ILJ* 2549 (CC).

27 Par 44.

procedural requirement is compulsory and requires that the issue in dispute be referred to the Commission for Conciliation Mediation and Arbitration[28] for a conciliation meeting between the parties concerned. The courts have maintained that if the dispute is not referred to the CCMA, or bargaining council as the case may be, the strike is unprotected.[29] The main reason for conciliation is an attempt to resolve the dispute at the initial stage with the help of an appointed commissioner who facilitate the negotiation. If the dispute is settled at conciliation, strike action is averted.

However, if conciliation is unsuccessful or 30 days period has lapsed from date on which the dispute was referred to the council or the CCMA for conciliation, the Commissioner would subsequently issue a certificate stating that the issue in dispute remains unresolved.[30] It is the acquisition of this certificate which forms the second procedural requirement of protected strike action in terms of the Act. Thirdly, any employee and/ or union who, after the issuing of a certificate by the Commissioner, wish to go out on strike must give an employer at least 48 hours' notice in advance of the intended strike action or a 7 days' notice if the employer is the State[31] unless the court allows for a shorter period.[32]

Grogan notes that it is sufficient for a notice to be given to a bargaining council if the employer is bound by agreements of such council and the dispute relates to a collective agreement concluded in the council.[33] In terms of the LRA, such notice must be in writing.[34] This implies therefore that a strike notice made verbally may render the strike to be unprotected. As the law currently stand, as long as these three procedural requirements are fulfilled, the strike would be deemed to be protected.

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28 Hereinafter referred to as the CCMA.

29 *BP Southern African (Pty) ltd v Chemical Workers Industrial Union & Others* (1998) 3 LLD 317; *Pick 'n Pay v SA Commercial Catering & Allied Union & Others* (1998) 19 *ILJ* 1546 (LC.)

30 *Maritime Industries Trade Union of SA & Others v Transnet Ltd & Others* (2002) 23 *ILJ* 2213 (LAC); *Gillet Exhaust Technology (Pty) Ltd t/a Tenneco v National Union of Metalworkers of SA on behalf of Members & another* (2010) 31 *ILJ* 2552 (LAC). See also Grogan *Collective Labour Law* (2007) 136.

31 S 64(1)(b) of the Act.

32 Grogan *Labour Litigation and Dispute Resolution* (2010) 25. See also Chris Todd *Collective Bargaining Law* (2004) 60 61; *Gillet Exhaust Technology (Pty) Ltd t/a Tenneco v National Union of Metalworkers of SA on behalf of Members & another* (2010) 31 *ILJ* 2552 (LAC).

33 Grogan *Workplace Law* (2007) 384.

34 S 64(1)(c) of the LRA.

This view is also accepted and supported by the Committee on Freedom of Association.[35] Grogan observes that these procedural requirements are meant to ensure that strikes are not used as a first resort.[36]

As mentioned above, section 65 of the LRA sets out the limitations imposed on a party wishing to participate in a strike. The Bill, while maintaining the above three requirements, proposes the insertion of a further procedural requirement.[37] The proposed amendment to this section, particularly the provisions dealing with procedural limitations, has triggered great concern among trade unions.

1.2 PROBLEM STATEMENT

Understandably, the amendments in the Bill are intended to respond to unacceptable levels of unprotected industrial action and unlawful acts in support of industrial action, including violence and intimidation.[38] It needs to be stressed that these additional limitations to the traditional prerequisites merit further study. This is because, if employees could not, in the last resort, collectively refuse to work, they could not bargain collectively.[39] In fact, in the absence of a right to strike "collective bargaining" would only amount to "collective begging".[40] The amendments to the current LRA are undoubtedly imminent. Certainly, their adoption will contain principles that seek to severely restrict and limit the constitutional right to strike.

It is with particular interest that this treatise seeks to acquire more insight into these amendments specifically the extension of the limits on procedural and substantive requirements before employees could embark on a strike. Maserumule has observed that the LRA, rather than positively implementing the constitutional right to

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35 ILO, 1996d, par 500 – 510.

36 Grogan Labour Law/ Employment Law Journal/ 2013/ April/ "Strike notices What must they contain?" (Accessed on 20/2/2014).

37 The South African Labour Guide "New amendments on the Labour Relations Act and the Basic Conditions of Employment Act" available at *http://www.labourguide.co.za/most-recent-publications/new-amendements-on-the-labour-relations-act-and-the-basic-conditions-of-employment-act*. (Accessed on 26 January 2013).

38 *Ibid.*

39 Kahn-Freud *Labour and the Law* (1983) 292. See also John Brand *Strike Avoidance – How to Develop an Effective Strike Avoidance Strategy* Paper presented at the 23rd Annual Labour Law Conference, (August 2010) 7. http://www.lexisnexis.co.za/pdf/Workshop_3_3_Strike_Avoidance_presented_by_John_Brand.pdf (Accessed on 26-4-2014).

40 *Ibid*.

strike, serves to limit it and that the courts have, similarly, failed to protect the right to strike and have instead been "preoccupied with giving effect to the limitation of this right".[41] In *S v Zuma*[42] and also in *Numsa v Bader Bop*[43] the court emphasized that the right to strike should not be limited unduly, in fact this right should be limited as little as possible. Ben-Israel likewise confirms this assertion by emphasizing that restrictions on the right to strike are acceptable as long as they do not place substantial limitations on the means of action open to trade-union organisations.[44]

In an article written by Du Toit on the future of collective bargaining and labour law in South Africa,[45] employees who were interviewed therein following the 2007 strike action argued that they were not ignorant to the importance of labour legislation. Actually they portrayed a mindset cognisant of the limitations of the authority of the law when confronted with the importance of strike action. One worker was quoted saying that,

> "I do not think the law is wrong as such. Law is supposed to defend the right to strike and the rights of those not on strike. But how can we follow that law? *Thina*, how are we going to be successful in winning our demands? We can't always be upright. *Umthetho oyaphulwa, oyenzelwe oko phulwa* ('Laws were made to be broken'). We must follow the majority. The majority vote for a strike. We must find ways to make those others join the strike and the decision of the majority. You are working, we are on strike. You must be afraid for your safety."[46]

1.3 AIMS AND OBJECTIVES OF THE STUDY

The underlying theme for this study is that the right to strike should not be limited unduly. The primary aim of the study is to critically analyse the increasing of the procedural limitation on the constitutional right to strike. The treatise also aims to analyse and discuss the legal framework relating to strike notice and ballot requirement in order for a strike to be regarded as protected. In doing so, an in-depth

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41 Maserumule "A Perspective on Developments in Strike Law" 2001 22 *ILJ* 45 46.

42 (1995) 2 SA 642 (CC).

43 (2005) 2 BCLR 182 (CC). See also *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* 1990 *ILJ* 321 (LAC); *Business South Africa v The Congress of South African Trade Unions* [1997] 6 BLLR 681 (LAC).

44 Ben-Israel *International Labour Standards* (1998) 118.

45 Du Toit "What is the future of collective bargaining and labour law in South Africa?" (2007) 28 *ILJ* 1405 1423.

46 Von Holdt "Institutionalisation, Strike Violence and Local Moral Orders Transformation: Critical Perspectives on Southern Africa" 2010 72/73 *Peer reviewed journals* 142.

understanding of the meaning, purpose and content of a notice of strike as envisaged by the ILO,[47] and how this is translated in a South African context will be investigated.

1.4 RESEARCH QUESTIONS

With this intention in mind this study investigates the following questions to find out whether the proposed limitations are perhaps capable of meeting their stated objectives or whether they are inconsistent with the Constitution.

1) Do these additional procedural requirements not only amount to importing into the LRA additional limitations on the fundamental right to strike that enjoy no textual support?
2) Equally, are these additional requirements not just means of denying employees the exercise of their constitutional rights and therefore contravening the purpose of the Act in section 1?
3) What about the separation of power between the legislature and the judiciary?[48] Are the courts not assuming the role of the legislature by extending the limitations on right to strike by insisting that a strike notice should contain certain additional details? If the legislature wanted such limitations to be included in the Act it could have expressly done so.
4) Although the intention of these amendments for the future of strike law is plausible, the question is: will they meet their stated objectives of reducing the ever increasing incidences of strike violence? Are they sufficiently spot-on to address the true basic realities that lie behind strike violence?

1.5 SIGNIFICANCE OF THE STUDY

In line with the above research questions, the study hopes to present a comprehensive understanding of what the purpose of a strike notice really is, since the LRA does not specifically deal with the issue in detail. It also endeavours to find

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47 South Africa was re-admitted as a member of the ILO on 26 May 1994. This followed a period of 30 years of isolation from international labour forums after the country withdrew from the ILO in 1964 as a result of political pressure.

48 Rautenbach *Constitutional Law* (2003) 78 notes that Legislative authority is charged with the power to make, amend and repeal rules of law while judicial authority has the power; if there is a dispute, to determine what the law is and how it should be applied in the disputes.

out what information should be contained in the notice because as the law currently stands, it is left up to the courts to decide. To achieve this, particular focus will be on case-law analysis up to the very recent legal position. More importantly, such a study is vital and desirable as it will help to prevent the over-limitation of this entrenched constitutional right to strike.

Equally so, this study seeks to provide an insight as to whether the increase of content in a strike notice is not just a means of denying employees their constitutional right other than to promote labour peace as emphatically advocated by the Act.

In closing it will be submitted that, within the South African context, these limitations particularly the ones extended by the courts, infringe the right to strike by causing undue or unreasonable limitations on the right to strike. The separation of powers between the legislative and judicial authorities is also interfered with as the courts in this regard seem to have assumed the role of the legislature because if the legislature desired such limitations to be included in the Act it could have expressly done so.

1.6 RESEARCH METHODOLOGY

The research encompasses an extensive review of qualitative literature which hence constitutes the basis for this research. Both primary and secondary sources will be used. A collection of data in the form of legislation both national and international, cases both reported and unreported, ILO reports, journal articles, textbooks, existing data bases, policies, codes, the world-wide web, task-team reports, law-commission reports, conference speeches and presentations on strike notices have been gathered. The collected data for the research will be analysed to achieve the anticipated outcome of the research. The analysis, data collection and process will take place simultaneously throughout the research to avoid the risk of data overloading, as well as to allow the researcher to approach the data analytically. The findings, recommendations and suggestions for improvements will be addressed throughout the research. A comparative analysis with other jurisdictions may be considered where necessary.

1.7 OUTLINE OF THE RESEARCH

The research consists of five chapters including the foregoing chapter.

CHAPTER 2

Chapter 2 explores the history and development of a strike-notice requirement. Development, tracing back from the late 1980s up to the current legal position will be done.

The study will consider the importance and the general purpose that strike notice serves. The significance of the strike notice, both to the employer/employer's organisation and employees' union will be highlighted. It will also critique the effectiveness of strike notice and whether it still serves a useful purpose in the contemporary South African labour-relations landscape. More importantly the research puts under the magnifying glass the debate surrounding the contents of the notice. The study endeavours to present a comprehensive understanding as to what information should be contained in the strike notice, since the LRA does not specifically deal with the issue in detail. As the law currently stands, it is left up to the courts to decide.

Particular emphasis will be to find out the following:

- Who must give the notice and to whom the notice must it be given? It also considers what happens in case of delay and extension of notice period.
- What and how much information should be contained in the notice?
- Does the notice have to indicate the date and exact time at which the strike will commence?
- Does the notice have to clearly articulate the issue(s) in dispute?

These further increase to the contents in a strike notice by our courts will be measured against the Constitution.

CHAPTER 3

Chapter 3 investigates the current prescribed statutory limitations on the right to strike. The consequences of a protected and an unprotected strike under the LRA will be placed under the magnifying glass.

CHAPTER 4

Chapter 4 considers at whether a need for further limitation on the employees' right to strike in really the best solution, as opposed to engaging in a meaningful collective bargaining process for the purposes of reaching a collective agreement.

CHAPTER 5

Whether or not the right to strike in chapter IV of the LRA, as well as in the proposed amendment, is too limited as compared to the objectives of other jurisdiction and the ILO, is discussed in this chapter.

CHAPTER 6

Conclusion and Recommendations

CHAPTER 2
THE HISTORICAL DEVELOPMENT OF A STRIKE NOTICE REQUIREMENT AND THE CONTENT REQUIRED THEREIN

2.1 INTRODUCTION

As noted in chapter one above, any employee and/ or union which, after the issuing of a certificate by the Commissioner, wishes to go out on strike must give an employer at least 48 hours' notice in advance of the intended strike action or a 7 days' notice if the employer is the State unless the court allows for a shorter period. However, section 64(1)(b)(i) and (ii) contain an exception which requires that, where the issue in dispute relates to a collective agreement to be concluded in a council, such a notice must have been given to that council, or to where the employer is a member of an employers' organisation that is a party to the dispute, the notice must have been given to that employers' organisation.

The focus of this chapter is to establish the role of a strike notice as one of the procedural requirements prior to a protected strike. The chapter will take us through the statutory law, case law and common law regarding strike-notice requirement.

This chapter concludes with an evaluation of Bill 2012 proposal to be included in the contents of a strike notice and its consequences.

The ILO Committee on Freedom of Association places an obligation to parties who wish to embark on strike to issue a written prior notice to the employer indicating their intention to strike.[49] Likewise, in the South African context, it forms a vital procedural requirement in terms of the LRA.[50] This procedural requirement dates back as far as the late 1980s in the Industrial Court's decision in the case of *Metal and Allied Workers Union v BTR Sarmcol* [51] and *BAWU v Palm Beach Hotel*.[52] In both cases the employees who had been dismissed for striking, referred unfair labour-practice

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49 ILO, The Committee on Freedom of Association 1996d, par 502-504.

50 S 64(1)(b) of the Act. As discussed in Chapter 1 above.

51 (1987) 8 *ILJ* 815 (IC).

52 (1988) *ILJ* 1016 (IC) 1023g.

claims against their employers under the provisions of the 1956 Act.[53] The Industrial Court found that employees who had gone on strike without giving any notice of strike to their employer had acted unfairly towards their employer. The decisions in both these cases have revealed that the Industrial Court played a pivotal role in the development of the strike notice as a procedural requirement for protected industrial action in South Africa.

It is at this background that this chapter discusses the history and development of the strike-notice requirement. In order to effectively do so, it is essential to trace back these developments through case laws and court decisions up to the current legal position. This will assist in discovering how the courts have construed the constitutionality of this requirement.

2.2 *METAL AND ALLIED WORKERS UNION v BTR SARMCOL*[54]

In this case, BTR Sarmcol[55] employed 2160 employees. Owing to the downturn in the general economy of the country as well as the rationalization of the production in the plants at BTR, an extensive and a prolonged retrenchment occurred. As a result, between 1981 and 1985, only 1108 employees had remained with a further reduction of 102 weekly-paid employees by 1985. This massive retrenchment gave rise to much dissatisfaction and uneasiness on the part of the workers. The court considered various aspects of the union's behaviour prior to, during the strike, as well as after the dismissal of the employees for participation in the strike. Particularly, the court found that the conduct and the manner in which the principal strike was conducted by the strikers was unreasonable and unfair due to failure to give a prior written notice indicating when the strike would commence.

In fact the court observed that, not only were the machines left running, but the strikers also intimidated some of the monthly-paid staff.[56]

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53 Act 28 of 1956. Hereinafter referred to as the "1956 Act".

54 (1987) 8 *ILJ* 815 (IC).

55 Hereinafter referred to as the BTR.

56 (1987) 8 *ILJ* 815 (IC) 386G.

2.3 *BAWU v PALM BEACH HOTEL*[57]

Just a year after BTR was decided, the court was faced with a similar situation in *BAWU v Palm Beach Hotel.* In this case, the applicants were dismissed by Palm Beach Hotel following a strike on the 2nd May 1988. They approached the court seeking for an order in terms of section 43(4)(b)(i) of the 1956 Act for their reinstatement on terms and conditions not less favourable to them than those which governed the employment of the individual applicants. Similar in *BTR Samcol*, the court found that the conduct of the strikers was unreasonable and unfair in that they had not given a strike notice indicating when the strike would begin. More importantly, the Industrial Court held that the failure to give notice was a serious failure, bearing in mind that the respondent [was] a hotel with obligations to its guests as the hotel had been fully booked for the Easter holidays, a fact that *BAWU* was most likely aware of.[58] Further, the court noted that the applicants had no right to inconvenience the guests in this way and to gather in the foyer, thus further embarrassing the hotel guests.[59]

Subsequent to *BTR Samcol* and *BAWU* decisions, wealth of judicial authorities were handed down by the Industrial Court to the same effect leading up to the late 1980s to mid-1990s.[60] In the years that followed, the old Labour Appeal Court created under the 1956 Act,[61] and the then Appellate Division of the Supreme Court also gave their endorsement to the notion that it could be unfair to the employer if

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57 (1988) *ILJ* 1016 (IC) 1023G. Hereinafter referred to as the *BAWU*.

58 (1988) *ILJ* 1016 (IC) 1020F.

59 (1988) *ILJ* 1016 (IC) 1020G. See also Zondo Thesis on "The Requirement of Notice of Industrial Action in South African Labour Law" (2009) 7 10.

60 See also the decisions in the following cases: *Ray's Forge & Fabrication (Pty) Ltd v NUMSA & others* (1989) 10 *ILJ* 762 (IC) par 773J; *SACWU v SASOL Industries (Pty) Ltd & Another* (2) (1989) 10 *ILJ* 1031 (IC) 1037C-E; *BAWU & others v Asoka Hotel* (1989) 10 *ILJ* 167 (IC) 177H-178C; *BAWU & others v Edward Hotel* (1989) 10 *ILJ* 357 (IC); *MWASA & others v Perskor* (1989) 10 *ILJ* 1062 (IC) 1068-1069D; *BTR Dunlop Ltd v NUMSA* (2) (1989 10 *ILJ* 701 (IC) at 707E-H; *NTE v SACWU & others* (1990) 11 *ILJ* 43 (N*); FAWU v Middevrystaatse Suiwel Ko-operasie Bpk* (1990) 11 *ILJ* 776 (IC); *FBWU & others v Hercules Cold Storage* (Pty) Ltd (1990) 11 *ILJ* 47 (LAC*); FBWU & others v Hercules Cold Storage* (Pty) Ltd (1989) 10 *ILJ* 457 (IC); *Mercedes-Benz of SA (Pty) Ltd v NUMSA* (1991) 12 *ILJ* 667 at 672 (an arbitration award); *NUMSA & others v MacSteel* (Pty) Ltd (1992) 13 *ILJ* 826 (A) at 835B; *NUMSA & others v Malva (Pty) Ltd* (1992) 13 *ILJ* 1207 (IC) at 1216D-E; *CWIU v Reckett Household Products* (1992) 13 *ILJ* 622 (IC); *NUMSA v Three Gees Galvanizing* (1993) 14 *ILJ* 372 (LAC); *Doornfontein Gold Mining Co Ltd v Num & others* (1994) 15 *ILJ* 527 (LAC) at 542B; *SACWU & others v BHT Water Treatments (Pty) Ltd* (1994) 15 *ILJ* 141 (IC) at 163F-164A; *NUMSA & others v Maranda Mining Co Ltd* (1995) 16 *ILJ* 1155 (IC); *FWCSA & others v Casbak Burger Box CC* (1996) 17 *ILJ* 947 (IC) 955C-I*; NUMSA & others v Datco Lighting (Pty) Ltd* (1996) 17 *ILJ* 315 (IC).

61 S 17 of the 1956 Act.

employees went on strike without giving any prior written notice or warning to the employer of their intention to embark on strike.[62]

In 1990 a technical committee of the National Manpower Commission was established to consider various proposals which had been made for the amendment of the 1956 Act. That technical committee recommended that there be a statutory requirement for the giving of 24 hours' written notice of the commencement of the strike for a strike to be regarded a lawful strike.[63] In fact, two pieces of legislation were passed in 1993 which seems to suggest what could have been the first ever statutory requirement for a strike notice in the history of South African labour law. These were contained in sections 15(5) of the Education Labour Relations Act[64] and section 19(4) of the Public Service Labour Relations Act.[65] Expressing a similar view, Olivier wrote an article in which he evaluated the PSLRA against international labour standards as determined by the ILO, and discovered that a requirement for a strike notice was acceptable provided that the notice, especially the period, was reasonable.[66]

Notably, under the 1956 Act there was no requirement that a union should issue the employer with a strike notice prior to embarking on a strike action. However, in 1995, after the Act was passed, it contained a requirement in various sections for some or other notice to be given before a strike could be resorted to.[67] This marked the first time in the history of South African labour law that a statute of general application[68] laid down such a requirement. Worth noting is that, even though, prior to the Act, such a requirement was provided for in both the ELRA and the PSLRA as mentioned

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62 See *FBWU & others v Hercules Cold Storage (Pty) Ltd* (1990) 11 *ILJ* 47 (LAC); *NUMSA & others v MacSteel (Pty) Ltd* (1992) 13 *ILJ* 826 (A) 835B; *NUMSA v Three Gees Galvanising* (1993) 14 *ILJ* 372 (LAC*); Doornfontein Gold Mining Co Ltd v Num & others* (1994) 15 *ILJ* 527 (LAC) 542B.

63 Smit and Fourie "Technical Committee of the National Manpower Commission: Proposals for the Consolidation of the Labour Relations Act" (1990) 11 *ILJ* 285 297).

64 Act 146 of 1993.

65 Act 102 of 1993. Hereinafter referred to as the PSLRA. See also an Explanatory Memorandum (1995) 16 *ILJ* 278 at 302.

66 Olivier "Labour Relations for the Public Service" 1371 1388. See also Ben-Israel *International Labour Standards* 118.

67 See fn 1 above. See also ss 66(2)(b) and 77(1)(b) and (d) of the Act.

68 For instance, the Act is a law of general application within the meaning of s 36 of the Constitution and builds on the foundations of the Constitution by providing that: "Every employee has the right to strike and every employer has the right to lock-out as a recourse…"

above. Those were, however, not statutes of general application, since their application was limited to the education sector and the public service respectively.

2.4 CONTENT OF A STRIKE NOTICE

Ever since the advent of the LRA in 1995, the key issues that have clouded our courts with regard to strike notices related to the increase in the content details therein and particularly, whether it specified the commencement and the scope of the proposed industrial action sufficiently. As a consequence, this raised a discomfort amongst trade unions which strongly oppose that the ever increasing contents in the strike notices unduly limits the right to strike and should thus be subjected to the constitutional scrutiny.

Besides the debate surrounding the contents of strike notice, other crucial questions have occasionally been central to the debate. For example; who must give notice? And to whom must notice be given? Should the details and the identity of the strikers be included in the strike notice? Can a strike be commenced at a later stage than the date or time given in the notice? What is the real purpose of a strike notice?

This treatise does not intend to discuss in detail the court's exposition in each one of these questions.

However, it is suffice to point out that they do not cause many constitutional-interpretation obstacles when considering the employees' exercising of their constitutional right to strike. Having said that, nonetheless, one key question that has sparked debate and that requires constitutional attention forms the core of this chapter is:

- What information must be contained in the strike notice? In other words, what information in the strike notices could be considered as sufficient and therefore does not severely restrict the employees' constitutional right to strike?

To effectively answer the above question, it is vital to firstly re-visit the interpretive provisions of the Act relating to strike notice in order to determine its meaning, scope

and application. The interpretive provisions are contained in sections 39(1), (2) and (3), 232 and 233 of the Constitution, as well as section 1 read together with section 3 of the Act.[69]

The above provisions therefore oblige any person interpreting the Act to do so in light of the Constitution and South Africa's international obligations.[70] This leaves the courts with a crucial role in ensuring that the rights guaranteed in section 23(1) of the Constitution are honoured. Equally, the courts have an important supervisory role to

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69 S 39(1) of the Constitution deals with the interpretation of the Bill of Rights. It reads: "(1) 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 case law."

S39(2) of the Constitution reads: "When interpreting any legislation and 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."

S39(3) recognizes the existence of other rights other than those in the Bill of Rights. It reads:

> "(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

S232 of the Constitution deals with the role and place of customary international law in South Africa. It reads:

> "s232. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

S233 of the Constitution deals with the role of international law in the construction of legislation in South Africa. It reads:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

S1 of the Act states the purpose of the Act. It provides that the purpose of the Act is to "advance economic development, social justice, labour peace and the democratization of the workplace". It seeks to achieve this purpose by fulfilling the primary objects of the Act. The primary objects of the Act, as set out in s 1 thereof, include:

(a) giving effect to and regulating the fundamental rights conferred by s 23 of the Constitution.

(b) giving effect to obligations incurred by the Republic as a member state of the ILO

(c) the provision of a framework for employees and trade unions, on the one hand, and employers and employers' organizations, on the other, to bargain collectively to determine wages, terms and conditions of employment and other matters of mutual interest.

(d) the promotion of orderly collective bargaining, and

(e) the effective resolution of labour disputes.

S3 of the Act deals specifically with the interpretation and application of the Act. It provides that: "Interpretation of this Act – Any person applying this Act must interpret its provisions –

(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international law obligations of the Republic."

70 S 3 of the Act.

ensure that legislation giving effect to Constitutional rights is properly interpreted and applied. Du Toit observes that it is trite that the Act be interpreted in compliance with the framework of the Constitution and with South Africa's public international-law obligations.[71] Several courts' decisions draw special attention to the fact that security of employment forms a core value of the Act. Section 3 of the Act thus bears testimony to the purposive approach[72] in that it explicitly requires a court to interpret the provisions of the Act in compliance with the Constitution.[73]

To return to the content of the strike notice, usually, as mentioned above, the key issues raised in our courts revolve around the contents of a strike notice. Something therefore seems to be lacking in the Act when the contents required in a notice of strike are considered. The reason for mentioning this is that the Labour Court and the Labour Appeal Courts have, over the past year or so, handed down a series of judgments that effectively create new additional rules to the procedural requirements as regards the notice of strike. Closely read, sections 64(1)(b) and 64(1)(c) of the Act do not really indicate much regarding the strike notice. In fact, these provisions require only that a trade union intending to go on a strike, must give 48 hours' written notice of the strike or 7 days' where the State is the employer.[74] Apart from these time-periods, the Act is completely silent as to what must be included in the notice, the form it must take, the purpose thereof and whether it should clearly articulate the issue(s) to which dispute the strike relates.

For this reason, all the above determinations are left to the discretion of the court to decide. That being so, the question then arises: does this discretion to determine the contents required in the strike notice not amount to importing into the Act additional

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71 See also Du Toit *et al Labour Relations Law* 66*.* See also fn 22 above and *Chirwa v Transnet Ltd and others* [2008] 2 BLLR 97 (CC).

72 Purposive approach requires that the Labour Legislation must be interpreted in a manner which best accords with the primary objective of the statute and s 39 of the Constitution. See *Equity Aviation Survives (Pty) Ltd v SATAWU & others* [2009] 10 BLLR 933 (LAC), *NUMSA v Bader Bop (Pty) Ltd & Another* (2003) 24 *ILJ* 305 (CC), *SA Airways (PTY) Ltd v Aviation Union of SA & others* and *Mondi Packaging (Pty) Ltd v Director General: Labour & others* (2013) 31 *ILJ* 2558 (LAC). See also the minority judgement in *SATAWU & Others v Moloto NO & Another* (2012) 33 *ILJ* 2549 (CC).

73 De Waal *et al the Bill of Rights Hand Book* 131.

74 Basson *Essential Labour Law* (2009) 318-319. See also *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v National Union of Metalworkers of SA* (1999) 20 *ILJ* 677 (LC).

procedural limitations on the fundamental right to strike, and an unnecessary hurdle to the employees wishing to exercise their constitutional right to strike?

2.5 WHAT INFORMATION MUST BE CONTAINED IN THE STRIKE NOTICE? SHOULD A STRIKE NOTICE INCLUDE THE EXACT TIME AND DATE ON WHICH THE STRIKE IS TO BE EXERCISED?

2.5.1 *CERAMIC INDUSTRIES LTD T/A BETTA SANITARY WARE & ANOTHER v NATIONAL CONSTRUCTION BUILDING ALLIED WORKERS UNION & OTHERS*[75]

Notably, in some decisions the courts have emphasised that the strike notice must be fairly specific and must, for example, indicate the time of the commencement of the strike. Additionally, other decisions seem to suggest that that alone is not enough. They suggest that the identity of the strikers must be mentioned in the notice. Be that as it may, the question that still lingers is: how much information must be contained in the notice, taking into consideration not to unduly limit the employees' constitutional right to strike? Clearly, a balance needs to be found due to Act's silence regarding this issue.

In *Ceramic*, the union served a notice on the employer informing it that "a strike shall start at any time after 48 hours from the date of this notice". The LAC held that the strike notice was invalid on the ground that it did not specify the precise day on which the strike will commence. More importantly, the court pointed out that it is not sufficient to indicate on the strike notice that the strike will commence "at some future time". Grogan and Cheadle[76] observe that the time to commence the strike need not be specified to the minute or hour, since strike notice could vary depending on the nature of the business.[77] The court reiterated that section 64(1)(b) of the LRA must be interpreted and applied in a manner that best gives effect to the primary objectives of the LRA. Similarly, it was emphasised in this judgment that the primary purpose of the strike notice is to give the employer advance warning of the proposed strike in

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75 [1997] 6 BLLR 697 (LAC). Hereinafter referred to as *Ceramic*. See also Snyman, Van Heerden, De Jager and Heynes *South African Labour Relations Explained* (2008) 179; *Fidelity Guard Holdings (Pty) Ltd v Professional Transport Workers Union & Others* (1998) 20 *ILJ* 260 (LAC) and Du Toit *et al Labour Relations Law: A Comprehensive Guide* (1999) 237.

76 Cheadle et al *Current Labour Law* (2001) 73.

77 In Grogan *Collective Labour Law* (2010) 168 for example Grogan observes that shift workers would need to state in their strike notice that the strike will commence from the start of a particular shift.

order that it might prepare for the ensuing power-play,[78] or as Grogan puts it, a strike notice serves to warn the employer that "words are about to escalate into deeds".[79] The court concluded therefore, that this purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence.

Subsequently, the court in *Western Platinum Ltd v National Union of Mine Workers*[80] clarified the *Ceramic Industries*. Here, *NUMSA* notified the employer that the strike would commence on Wednesday, 15 March 2000 "on or before 15:00". While relying on *Ceramic Industries*, the employer argued that there was no compliance with section 64(1)(b) of the Act because the notice did not specify the exact time of the commencement of the strike. The Labour Court differentiated between the two cases and found that in *Ceramic Industries,* the trade union did not specify the date and time but in this case, the date and time were specified. It further argued that the purpose of the strike notice identified in *Ceramic Industries* was achieved. The court was therefore satisfied that the strike notice complied with section 64(1)(b) of the Act.

2.5.2 *COUNTY FAIR FOODS v HOTEL LIQUOR CATERING & ALLIED WORKERS UNION*[81]

In this case, the employees engaged in a strike over the employer's refusal to bargain with the trade union because it no longer represented the majority of employees in the workplace. The union referred its dispute for conciliation and after the 30 day period gave the employer more than 13 days' notice of its intention to strike. The issue before the court was whether this strike notice gave the employer proper warning and the opportunity to take other steps to protect its business. The court held that it would be "formalistic in the extreme" to declare the notice invalid because it failed to specify the time of commencement. Therefore the court concluded that a strike notice need not specify the precise time of the day when the strike will start. Technically, the court noted that, if that would be the case, then a

78 [1997] 6 BLLR 697 (LAC). See also in *Ceramic* 701-702, where the court pointed out that the warning serves for two purposes: firstly, it allows the employer to prevent the intended power play by giving in to the employees demands or secondly, it cautions the employer to take steps to protect his/her business when the strike starts.

79 Grogan *Strike notices: What must they contain* 1. See also Seady and Thompson "Strikes and Lockouts in South African Labour Law" *De Jure* 314.

80 (2000) 21 *ILJ* 2502 (LC).

81 (2006) 27 *ILJ* 348 (LC).

notice specifying that a strike will start on a specific day means that a strike will commence at the stroke of midnight.

2.6 WHEN THE STRIKE DOES NOT START AT THE EXACT INDICATED TIME, DOES IT BECOME STALE OR LAPSE?

2.6.1 *SOUTH AFRICAN AIRWAYS v SOUTH AFRICAN TRANSPORT ALLIED WORKERS UNION*[82] *(SATAWU)*

While referring to *Ceramic Industries,* the court in *SA Airways v SATAWU* reaffirmed that, although a strike is fundamental in its importance and purpose, it is not an end in itself. The requirement of 48 hours' notice of intended strike action is to afford the employer an opportunity to deliberate on the implications of the proposed action and to decide whether to resist or to accede to the employees' demands. The notice must therefore not only articulate the union's and employees' demands sufficiently for that purpose, but should also specify the date and the time at which the strike would begin.[83] The court further noted that failure to do so would undermine orderly collective bargaining, a value to which the Act expressly subscribes.[84]

What seems clear from the foregoing case law is that it is not sufficient to only state in the strike notice the date on which the strike will be embarked on. A further requirement which in my opinion enjoys no textual support in the LRA is proposed, i.e. the inclusion of the exact or precise time at which the strike will commence. The question that arises is: does the failure to indicate the exact time at which strike will commence really undermine orderly collective bargaining? The answer should be negative because this requirement amounts to importing into the Act an additional limitation on the exercising of the constitutional right to strike.

Furthermore, the court's decisions in *Ceramic Industries and South African Airways* drive home a point that the inclusion in the strike notice of the exact time that a strike will commence is vital. However, be that as it may, what happens if the strike does

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82 (2010) *IJL* 1219 (LC).

83 Par 26. See also *Construction and Allied Workers Union & others v Modern Concrete Works* [1999] 10 BLLR 1020 (LC) where a notice of an intended lock out was held to be deficient because it made reference only to a meeting at the CCMA and a failure to resolve "the current dispute".

84 Par 28.

not start at the exact indicated time? Will that lead to an indication that the strikers have waived their right to strike, or does the notice lapse?

Concerning this issue, the leading case of *Tiger Wheels Babelegi TSW International v NUMSA*[85] will be considered.

2.6.2 *TIGER WHEELS BABELEGI (PTY) LTD TSW INTERNATIONAL v NUMSA*

In this case, the Labour Appeal Court took a somewhat more liberal view on strike-notice requirement. The court had to decide among other issues on the status of the strike notice. The key question was whether the strikers who had failed to commence their strike on the day indicated on the strike notice, *ie* 1 September 1999, were entitled to commence their intended strike 3 days after the day specified in the notice, *ie* 4 September 1999.

Grogan and several other case laws seems to suggest that employees intending to go on strike are not obliged to embark on strike on the day indicated in the notice and similarly, their right to strike is not waived as long as it was preceded by proper referral.[86]

In the *Tiger Wheels Babelegi case,* the court found that nothing in the Act obliged the employees to commence their strike on the time or date stipulated in the notice provided that it is within a reasonable time thereafter.[87] It was noted further that the Act only requires at least a 48 hours' written notice be served to the employer prior to the commencement of the strike. The court emphasised that the question whether employees had waived their right to strike under the circumstances was a question of

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85 (1999) 20 *ILJ* 677 (LAC). See also *Transport Motor Spares v National Union of Metalworkers of SA* (1999) 20 *ILJ* 690, *SA Clothing & Textile Workers Union v Stuttafords Department Stores Ltd* (1999) 20 *ILJ* 2692 (LC).

86 Grogan *Collective Labour Law* 168. See also *Chamber of Mines of SA v NUM & others*(1987) 8 *ILJ* 68 (A) and *Free State Consolidated Gold Mines (operations) Ltd operating as President Brand Mine v NUM & others* (1987) 8 *ILJ* 606 (O) 610F, *Transportation Motor Spares v National Union of Metalworkers of SA and Others* (1999) 20 *ILJ* 690 (LC).

87 Chicktay *26th Annual Labour Conference* Paper presented at Santon Convention Centre on Case Updates Johannesburg (30 July – 1 August 2013) 20. See also Du Toit et al *Labour Relations Law; A Comprehensive Guide* (1999) 384 385. *See also Free State Consolidated Gold Mines (Operations) Ltd operating as President Brand Mine v NUM & others* (1987) 8 *ILJ* 606 (O) 610F and Smith and Thomas *Smith and Woods Industrial Law* (1996) 609.

fact that had to be determined *inter alia* by the length of the delay in commencing the strike.

The court concluded that the employees and their union did not waive their right to strike, and as a result they were entitled to commence their strike on the 3rd day. Further, the court found that the delay was not unreasonable since the delay did not defeat the purpose of giving notice which was to give the employer advance warning in order to prepare for the power play that would follow. However, in *Western Platinum Ltd v National Union of Mineworkers,*[88] the court warned that a delay of over a year and a half was unreasonable and may render the dispute stale and consequently unprotected particularly since the union had never indicated a serious intention to strike.

Aligning itself with *Tiger Wheels Babelegi,* the Labour Court in *Public Servants Association of South Africa v Minister of Justice and Constitutional Development*[89] restated the principle that failing to commence the strike on the specified day in the strike notice does not invalidate the strike. Further, unlike in the *Western Platinum Ltd v National Union of Mineworkers* case above, the court concluded in *Public Servants Association of South Africa v Minister of Justice and Constitutional Development* that taking into account all surrounding circumstances, a delay of 19 months to take a strike action was not unreasonable. The court noted with caution that there was no any indication, evidence or act on the part the union that suggested that it had waived or abandoned its right to strike.[90]

A similar question arose in *Transport Motor Spares v National Union of Metalworkers of SA,*[91] where employees had commenced their strike on the day indicated in the strike notice, but had suspended the strike the following day in order to participate in retrenchment consultations with the employer. Some 9 days later, the employees resumed the strike without giving a further notice of strike to the employer. For that

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88 (2002) 21 *ILJ* 2502 (LC).

89 [2001] 11 BLLR 1250 (LC). See also *Transportation Motor Spares v National Union of Metalworkers of SA and Others* (1999) 20 *ILJ* 690 (LC) where it was held that if employees who have already commenced striking temporarily suspend the strike, they need not issue a fresh notice to strike or refer the dispute for conciliation again.

90 689C-D.

91 (1999) 20 *ILJ* 690 (LC).

reason, the employer argued that the strike was unprotected. The court disagreed, finding that the employees who suspend a strike need not give a further notice before they resume the strike especially if the initial notice was properly given.

Given the above conspicuous disparities many questions are left unanswered. For instance, if failure to commence the strike on the specified day does not defeat the purpose of orderly collective bargaining as decided in the *SATAWU* judgment above, then, how can failure to indicate the exact time at which the strike will commence be said to defeat the purpose of the notice? Even if it is said that it is not compulsory to commence a strike at the time or on the day given in the notice, and that the strike can commence on some later day, the follow-up question will be: would this interpretation of the statute not defeat the purpose of a strike notice as articulated by the court in the *Ceramic Industries* case?

It is submitted that, where a strike notice indicates the date, failure to indicate the exact time does not undermine orderly collective bargaining. To demand that a notice must not only indicate the date but also the exact time at which the strike will commence amounts to importing an additional requirement which unreasonably limits the fundamental right to strike.

2.7 DOES THE ISSUE IN DISPUTE AS WELL AS THE IDENTITY OF ALL THE STRIKERS HAVE TO BE CLEARLY ARTICULATED IN THE STRIKE NOTICE?

2.7.1 *PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT*

The employer argued that the notice was defective because it did not clearly set out the “subject matter of the dispute”. The court rejected this and held that the grievance need not be set out in the strike notice as the notice will have been preceded by negotiations and at conciliation meetings where opportunities would have been created to explore the nature and ambit of the demand or the dispute. The court noted further that the demand that the notice should clearly articulate the issue in dispute would amount to a “mere formality”.

In *SAA v SATAWU* [92] (discussed below) the court differed from the *Public Servants Association of South Africa* decision above. The Labour Court stated that the employer must be in a position to know with some degree of precision which demands a union and its members intend to pursue through strike action, and what is required to meet those demands.[93] The court held that, if a notice fails to clearly articulate the issue in dispute it renders the notice invalid because it undermines orderly collective bargaining.

A view appears to have developed that an additional requirement is being introduced which further limits the employees constitutional the right to strike, as the court goes further than the *Public Servants Association case* above. To demand that a notice must clearly articulate an issue in dispute overlooks the fact that during conciliation the issue in dispute and most key issues are examined. Furthermore, it is to be noted that when the notice is issued the employer is already aware of the issue in dispute.

2.7.2 *SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION (SATAWU) AND OTHERS v LEBOGANG MICHAEL MOLOTO NO AND ANOTHER*[94]

In this case, the respondents were the liquidators of Equity Aviation Services which rendered services to various airports within South Africa. The majority of its employees were members of *SATAWU*.

SATAWU issued a strike notice after the parties had failed to resolve a wage dispute through conciliation. The strike notice stated that:

> "We intend to embark on strike action on 18 December 2003 at 08H00."

Employees who were not members of *SATAWU* participated in the strike notwithstanding their failure to comply with the provisions of section 65 of Act relating to protected strike action. Accordingly, those employees who did not give the

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92 (2010) *JOL* 24947 (LC).

93 Par 27.

94 [2012] ZACC 19 (CC).

required notice were subsequently dismissed for their unauthorized absence from the workplace.

Both the SCA and the minority judgment in the Constitutional Court found in favour of the employer. They agreed with the employer that a purposive interpretation of the provisions is necessary and that is to warn the employer of the impending power play to enable it to make informed decisions.

The court noted that in order to serve any purpose at all, the notice must be issued by, or on behalf of the parties who intend to strike. This approach promotes orderly collective bargaining as it enables the employer to reasonably determine the extent of and properly prepare for the impending strike.

The majority in the Constitutional Court disagreed with the above reasoning and held that the SCA had prescribed an incorrect meaning to section 64(1)(b) of the Act. In terms of section 64(1)(b) of the Act every employee has the right to strike and every employer has recourse to lock-out, if in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike has been given to the employer in writing.

The Constitutional Court also emphasised that the language used by the legislature expressly requires only notice of the commencement of the strike to be given to the employer by anyone involved in the dispute, and does not oblige every participating employee to issue the notice to exercise the right to strike.

The court stressed that, in interpreting the section to mean what it expressly says is less intrusive of the right to strike, it creates greater certainty than an interpretation that requires more information in the notice which serves the purpose of the Act particularly that of orderly collective bargaining, and gives proper expression to the underlying rationale of the right to strike, namely the balancing of social and economic power. The court further noted that to require more information than the time of its commencement in the strike notice from employees, in order to strengthen the position of the employer, would run counter to the underlying purpose of the right

to strike in our Constitution, namely to level the playing fields of economic and social power already generally tilted in favour of employers.

The right to strike is a fundamental right in our Constitution. The Act contains no express requirement that every employee who intends to participate in a strike must personally or through a representative issue a notice. There is no need for the non-union members to issue a separate notice, and therefore according to the Constitutional Court's decision other trade unions' members or non-union employees are entitled to piggyback on a strike notice which has not been issued on their behalf.

CIRCUMSTANCES UNDER WHICH PARTIES MAY DISPENSE WITH SECTION 64(1) STATUTORY PROCEDURE

Section 64 (3) of the Act provides an employer or employee, as the case may be, with four exceptions requiring no need to give the prescribed 48 hours' strike notice and conciliation. These are discussed below.

- In terms of section 64(3)(a) of the Act, there will be no need for a further strike notice if 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. However, such provisions in the bargaining council's constitution must be valid.[95] In *Security Services Employers' Organisation & others v SA Transport & Allied workers Union,*[96] for example, the employer approached the Labour Court seeking for an interdict against a strike by the security guards, based on an addendum to the council's constitution. The addendum provided that disputes should be settled by a majority vote instead of proportional representation. 12 unions had engaged in the strike. However, after the strike was called off, save for only 1 union (SATAWU), the other 11 unions agreed on a wage agreement between them and the employer. Evidently, the rule for settlement by majority vote would have stripped of SATAWU its voting power, which had been based on its having had as members an overwhelming majority of employees falling within the council's jurisdiction The employer, without success, appealed to the LAC against the decision of the Labour Court

95 Grogan *Collective Labour Law* 171.

96 [2006] *ZALAC* 3.

which had found that the Council's purported adoption of the amendment was in breach of its constitution and therefore void.

- Under section 64(3)(b) of the Act parties may enter into a collective agreement in terms of which they agree on a procedure to be followed prior to embarking on a strike. This agreement may include that a notice or an alternative method of notification be used, and hence the strike will be considered protected. The Labour Court noted in *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA*[97] that strikers have two avenues of ensuring that their strike is protected. One is to comply with the provision of section 64(1); the other is to comply with the procedure contained in a collective agreement. The court added that the choice rests with the would-be strikers. Once they have complied with the provision of section 64(1), even though they failed to comply with the collective agreement, the strike will be protected. Similarly, this reasoning was followed by the LAC in *Country Fair Foods (Pty) Ltd v Food & Allied Workers Union and Others.*[98]

- Where the employees strike in response to an unprotected lock-out by the employer, in terms of section 64(3)(c) of the Act, such employees are exempted from following the procedural requirements. In the same way, if employees embark on an unprotected strike, the employer may respond by means of an automatically protected lock-out, despite non-compliance with section 64 procedures.[99] Grogan observes that it would be time-consuming to go through the prescribed procedures if the employees or the employer as the case seek to retaliate for an unlawful strike or lock-out respectively.[100]

- In terms of section 64(3)(e) read together with section 64(4) and (5) of the Act, no notice of a strike need be given where the employer has unilaterally

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97 [1997] 10 BLLR 1292 (LC).

98 (2001) 22 *ILJ* 1103 (LAC). See also *Chubb Guarding SA (Pty) Ltd v SATAWU* (2005) 26 *ILJ* 1670 (LC) where the court declined to follow the approach in *Country Fair Foods (Pty) Ltd v Food & Allied Workers Union and others* above by finding that the number of workers who participated in the secondary strike was disproportional to the number engaged in the primary strike.

99 Basson *et al Essential Labour Law* 323.

100 Grogan *Collective Labour Law* 172 173.

changed the employees' terms and conditions of employment or threatens to introduce such changes, and the employer has failed to comply with a request that it revoke the changes or through an interdict refrain from implementing them.[101] Section 64(4) of the Act is often referred to as the *status quo* provision. The section requires that an employee or trade union referring a dispute concerning a unilateral change of terms and conditions of employment to a bargaining council or to the CCMA, in the referral, and for the period of conciliation process,[102] requires the employer not to implement unilaterally the change to the terms and conditions of service, or if the employer has already done so, to restore the *status quo*.

Notably, the relief afforded under section 64(5) of the Act is only temporary since the employer is precluded from implementing the change only until that moment when the employees acquire the right to embark on strike. This means therefore that, as soon as the certificate is issued or 30 days since the referral, the changes may be implemented unilaterally by the employer.[103]

2.8 CONCLUSION

As discussed above, the procedural requirement of a strike notice prior to strike dates back as far as the late 1980s in the Industrial Court's decision.

Section 64(1)(b) and (c) of the Act do not indicate much about the strike notice. The Act only requires that a trade union intending to embark on a strike must give a 48 hours' strike notice (or 7 days' if the employer is the State). Besides this, the Act is silent regarding the content, the form it must take and whether it should specify the

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101 See *Staff Association for the Motor and Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd* (1997) 18 *ILJ* 374 (LC) where the court found that a unilateral change to an employee's motor benefit scheme fell within the ambit of s 64(4) and (5) of the Act and the conduct of the employer accordingly contravened these provisions . Contrary, in *NUMSA & others v Alfred Teves Technologies (Pty) Ltd* [2002] 10 BLLR 995 (LC), the court dismissed an application for an interdict restraining the employer from implementing the new shift system and from disciplining the employees who refused to comply with it. The court found that a change in shift arrangements was not a unilateral amendment to the workers' terms and conditions of employments.

102 *Kgasago v Meat Plus CC* [1999] 5 BLLR 424 (LAC).

103 See *SATAWU v Natro Freight (Pty) Ltd* [2006] 8 BLLR 749 (LC). See also *Monyale v Bruce Jacobs t/a LV Construction* (1998) 19 *ILJ* 75 (LC) where similarly the court confirmed that the notice operates until a certificate is issued or until 30 days period has elapsed.

issue in dispute. Building on earlier case law, the Labour Court confirmed that the two main purposes of a strike notice is, firstly, to enable the employer to decide whether its interests are best served by giving in to the union's demand and, second, to take steps to protect its business. This means that a strike notice must specify the date and time at which the strike action was to commence as this would enable the employer to take whatever steps it wished to take in order to protect its business at the time the strike commences.

What, however, stands out in all of these cases is the fact that it is the purpose of the strike notice to give the employer a chance to reflect on the proposed action and their response thereto. Section 64(1)(c), read in its proper context and read against at least two of the primary objectives of the Act, which is to promote collective bargaining and to promote the effective resolution of labour disputes, must be interpreted to mean that the 48 hours' notice serves as an opportunity to parties to reflect on the consequences of the strike or lock-out notice. Any other reading of this section would undermine the primary objectives of the LRA as set out in section 1 of the Act.

The Labour Appeal Court decision in *Equity Aviation Services v SATAWU* dealt with the question whether the employer was entitled to know exactly who would participate in a strike. The majority in this court held that the employer is entitled only to notice the commencement of the strike, and it is not entitled to be informed of the identity of the employees who will participate in the strike.

It must be borne in mind that most decisions discussed in this chapter have extensively extended the requirements of the strike notice, as laid down in section 64(1) of the Act. It is no longer sufficient for the union merely to give notice; our courts now require a lot more detail. There are judicial uncertainties as demonstrated in case law at this stage, such as how much precision will be required of a trade union when it formulates a strike notice. But one requirement that stands out clearly is that the unions can no longer just notify the employer of the date and time at which the strike will commence. No doubt, further developments on this point can be expected.

Notably, the proposed amendments intend to achieve their purpose by further limiting the circumstances within which strike action can be taken. It is proposed that, if the dispute is one which can be referred to arbitration or the Labour Court in terms of any employment law, strike action is prohibited.

Therefore, although the Labour Relations Amendment Bill 2012 attempts to create some form of structure regarding the purpose of and execution of industrial action, just as with any other proposed amendments, ambiguity must first be eliminated to ensure successful implementation of the suggested changes, particularly regarding the issue of strike notice in section 64 (1)(b) (c) of the Act.

CHAPTER 3
STATUTORY LIMITATIONS OF RIGHT TO STRIKE AND CONSEQUENCES OF A PROTECTED AND AN UNPROTECTED STRIKE UNDER THE LRA

3.1 INTRODUCTION

As it was noted in Chapter 2, strike notice forms a very important procedural requirement prior to embarking on a strike. Much debate concerning the purpose it serves to the employer and the employee continues to spark even more discussion. Similarly, the ever increasing content required in a strike notice by our courts arguably still poses some unnecessary limitations for the employees wishing to exercise their constitutional right to strike.

Against this backdrop, this chapter continues to discuss this field of law that has undergone dramatic changes over the last few years. Besides the limitations imposed by means of the contents in a strike notice, this chapter explores other limitations imposed on the right to strike as spelt out in the LRA. This is in consequence of the increasing of the already existing limitations that form the foundation upon which more complex limitations on the right to strike have been constructed by our courts over the last few years. Indeed, the various limitations all serve to promote the overt purpose of the Act in order to orderly collective bargaining. In the end, the consequences of engaging in an unprotected strike as well as protected strike are explained.

As pointed out earlier, the right to strike is entrenched and guaranteed to every worker in terms of section 23 of the Constitution. However, like any other right in the Bill of Rights, this right is not unlimited.[104] Despite the fact that it is constitutionally

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104 However, s 36 of the Constitution contains a limitation clause. It stipulates that "The rights in the Bill of Rights may be limited only in terms of law of general application (the LRA is a good example 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, 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

protected, the right to strike must be exercised in accordance with the provisions of the Act. Section 65 of the LRA imposes limitations to the right to strike. When read together with section 23 of the Constitution, section 64 of the Act sets out the procedures required to be followed in order to regard the strike as protected. However, the court has found that in certain circumstances, even if the procedural requirements set out in section 64 above have been complied with, a strike may still be unprotected.[105]

3.2 LIMITATIONS OF RIGHT TO STRIKE IN TERMS OF THE LRA

Because the right to strike is so important, a limitation of some kind needs to be justified and, to be justified it needs, among other things, to be limited.[106] The provisions of section 65, perhaps unfortunately worded, impose limitations on the right to strike in subsection 1, and then places further limitations in subsection 3. All ought to have been combined into subsection 1. Be that as it may, the provision of section 65 imposes an absolute prohibition on strikes based on six grounds. These grounds, which will be discussed separately where:

- The person is bound by collective agreement that prohibits a strike in respect of the issue in dispute.
- An agreement requires the issue in dispute to be subjected to compulsory arbitration.
- The issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of the Act, for example dismissal for misconduct, unfair discrimination and retrenchment.
- That person is engaged in an essential service, or a maintenance service.
- There is an arbitration award, a collective agreement that regulates the issue in dispute, or any determination made by the Minister that regulates the issue in dispute.

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e) less restrictive means to achieve the purpose.

Moreover, except as provided in ss (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

105 See *Bader National Union of Metal Workers of SA & Others v Bader Bop (Pty) Ltd & Another* (2003) 24 *ILJ* 305 (CC).

106 Brad *How the law could better regulate the right to strike in South Africa* Paper presented at the 27th Annual Labour Law Conference: The changing face of Labour Law (August 2014) 38.

- There is a determination made in terms of the Wage Act during the first year of that determination which regulates the issue in dispute.

3.2.1 COLLECTIVE AGREEMENTS THAT PROHIBIT A STRIKE

Section 65(1)(a) of the Act prohibits a person bound by a collective agreement from embarking upon a strike action if the collective agreement prohibits a strike. What this essentially implies is that the employer and a registered trade union cannot contract out of the right to strike by way of collective agreement. Basson[107] reasons that this prohibition prevents employees and employers from strikes and lock-outs respectively, where the collective bargaining parties themselves have restricted the right to strike or recourse to lock-out. Noteworthy is that the agreement prohibiting the strike must be a collective agreement as defined in section 213 of the Act.[108] For this reason therefore, only a trade union may waive employee's right to strike. The Act does not envisage an individual employee contracting out of his/her right to strike simply because a single employee is considered too vulnerable to employer power to allow them the "liberty" to contract away their rights, unlike when the union acts in the employee's stead. Similarly, such an act from the employee could in any event be unenforceable as a breach of section 5(4) of the Act.[109]

Grogan opines that the scope of section 65(1)(a) of the Act depends typically on the terms agreed upon.[110] A further observation shows that collective agreements in which employees abandon the right to strike in respect of all disputes are not common since such a peace clause applies only in respect of a specific kind of dispute. In *Vista University v Botha and Others*,[111] for example, there was a

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107 Basson *et al Essential Labour Law* 131.

108 In terms of s 213 of the Act, a collective agreement means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

(a) one or more employers;

(b) one or more registered employers' organisations; or

(c) one or more employers and one or more registered employers' organisations; "council" includes a bargaining council and a statutory council.

109 This section stipulates that "A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by this Act."

110 Grogan *Collective Labour Law* (2010) 176.

111 (1997) 18 *ILJ* 1040 (LC). Further, it was held in this case that employees who were members of a trade union at the time it concluded a collective agreement with an employer, will be bound for

collective agreement concluded that no strike was to be allowed in cases of dispute of rights as defined in the agreement itself. After interpreting the definition, the court found that the issues in dispute fell within the terms of the peace clause and that the strike was accordingly unlawful. By the same token, the court held in *Cape Gate (Pty) Ltd v NUMSA & Others*[112] that union parties to a council agreement that required bargaining to be concluded at sectoral level could not strike over disputes regarding the residue issues left for bargaining at plant level.

On the contrary, the Labour Court in *Enforce Guarding (Pty) Ltd v National Security & Unqualified Workers Union & others*[113] declined to accept that a collective agreement governing shift arrangement precluded the union from calling a strike over overtime. Also, the Labour Court has found in its subsequent decision that a written undertaking by employees that they would abandon their demand that a supervisor be disciplined constituted a collective agreement, and therefore they were precluded from striking over that issue.[114]

3.2.2 AN AGREEMENT REQUIRES THE ISSUE IN DISPUTE TO BE SUBJECTED TO COMPULSORY ARBITRATION

In terms of section 65(1)(b) of the Act, the right to strike will be precluded if the parties to a dispute agree that a particular dispute that is likely to be the subject of a strike, be resolved by way of arbitration.

Worth mentioning is that, unlike section 65(1)(a) above, the reference here is the existence of a written "agreement" and not a collective agreement. Therefore an agreement referred here could include both a collective agreement as well as individual agreements between employers and employees, for instance employment contracts or settlement agreements to settle a particular dispute by arbitration.[115]

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the life of the agreement, even if they cease to be members of the union. Any strike prohibition contained in such agreement will therefore continue to bind them.

112 (1997) 18 *ILJ* 1040 (LC).

113 (2001) 22 *ILJ* 2457 (LC).

114 *NUMSA v Hendor Mining Supplies (a division of Marschalk Beleggings* (Pty) Ltd) (2003) 24 *ILJ* 2171 (LC).

115 Grogan *Collective Labour Law* 178.

Grogan observes that the Act does not limit the issues that may be reserved for arbitration in an agreement.[116] For that reason, an employee may agree to refer both rights and interests disputes to arbitration, and will be prohibited from striking in respect of such disputes for the duration of the agreement. Arguably, whether this provision is constitutional or unconstitutional remains contentious since enforcing agreements where an individual employee contracts away his/her right to strike constitutes an impediment and unreasonable limitation on the employee's constitutional right to strike.

3.2.3 THE ISSUE IN DISPUTE IS ONE THAT A PARTY HAS THE RIGHT TO REFER TO ARBITRATION OR TO THE LABOUR COURT IN TERMS OF THE ACT

This is arguably one of the most significant of the limitations on the right to strike. With certain exceptions,[117] section 65(1)(c) of the Act provides that a person may not participate in a strike if the issue in dispute is one that the party has a right to refer to arbitration or to the Labour Court in terms of the Act. In other words, where employees have an existing right that they are able to enforce against the employer through litigation, strike action is absolutely prohibited.[118]

A similar line of thought was articulated by the Constitutional Court in *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another,*[119] where the Constitutional Court stressed that section 65(1)(c) of the Act prohibits a strike where a party has a right to refer the dispute to arbitration or the Labour Court.

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116 *Ibid.*

117 S 65(2) (a) of the LRA creates an exception to this rule. It provides that: Despite section 65(1)(c), a person may take part in a strike or lock-out or in any conduct in contemplation or in furtherance of a strike if the issue in dispute is about organisational rights dealt with in sections 12 to 15.

(b) If the registered trade union has given notice of the proposed strike in terms of section 64(1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.

118 See *TSI Holdings (Pty) Ltd & Others v National Union of Metalworkers of SA & others* (2004) 25 *ILJ* 1080 (LC); although on Appeal in *TSI Holdings (Pty) Ltd & Others v National Union of Metalworkers of SA & others* (2004) 27 *ILJ* 1483 (LAC) par 27, the LAC found that the strikers had actually demanded that the supervisor be dismissed come what may. The LAC without referring to *Ceramics* appears to have rejected the view expressed in that judgement that the Labour Court should look beyond the actual demand to identify the true issue in dispute. *Early Bird Farm (Pty) Ltd v Food and Allied Workers Union & others* (2004) 25 *ILJ* 2135 (LAC); *National Union of Metalworkers of SA & others v Highveld Steel & Vanadium Corporation Ltd* (2002) 23 *ILJ* 895 (LAC).

119 (2003) 24 *ILJ* 305 (CC).

More importantly, Grogan correctly observes that in order to determine whether a strike action is hit by the proscription, the court must first identify the issue in dispute and the dispute-resolution provisions provided for in the Act.[120] This has proved to be a daunting task as found in *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union (1),*[121] in which the union had referred three disputes to the CCMA, one of which the Labour Court found was arbitrable, the others not. Subsequently in *Ceramic Industries Ltd t/a Betta Sanitary-ware v National Construction Building & Allied Workers Union (2)*[122] the LAC had the following to say:

> "The Union's initial complaint was the alleged harassment of the union official and employees … [T]hat were a justiciable rights dispute with a specific remedy to be pursued in the Labour Court. The union could not convert the nature of that underlying dispute into a non-justiciable one simply by adding a demand for a remedy falling outside those provided for by the Act. The tail cannot wag the dog. If such an approach is allowed, an underlying rights dispute normally justiciable or arbitrable in terms of the Act could be transformed into a strike-able issue simply by adding a demand for a remedy not provided for in the Act. That would be unacceptable. Even if the issue in dispute is not articulated as a substantive complaint coupled with a specific demand, but rather in the form of a complaint about the refusal of the specific demand itself, the position would not change. 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."

Another formulation was developed in *Fidelity Guard Holding (Pty) Ltd v PTWU,*[123] where the LAC held that the fundamental enquiry was to establish what the demand, the grievance or the dispute is that forms the subject matter of the strike. The court achieved this by looking at the following factors:

- Prior negotiations between the parties.
- The correspondence between the parties immediately prior to the referral to the CCMA.
- The correspondence between the parties and the CCMA after conciliation, and

120 Grogan *Collective Labour Law* 178.

121 (1997) 18 *ILJ* 671 (LC) 23.

122 (1997) 18 *ILJ* 671 (LAC) 14.

123 [1997] 9 BLLR 1125 (LAC) 32.

- The advisory award made in this case by the CCMA.

Contrary to the LAC's judgment in *Fidelity Guard Holding* above, the LAC's in *Adams & Others v Coin Security Group (Pty) Ltd*[124] found that the approach adopted in *Fidelity Guard Holding* on the issue was inconsistent. The court stressed that it is the court's duty to ascertain the true or real issue in dispute.[125]

In practice the Act bars employees from striking in disputes concerning the following matters:

- Freedom of associations rights contained in section 9.
- Organisational rights save for matters falling within section 12 to 15.
- The interpretation or application of a collective agreement in section 24.
- An agency-shop and closed-shop agreement in section 24(6) and (7) respectively.
- Admission of parties to council or expulsion from the bargaining councils in terms of section 56.
- Picketing in terms of section 69.
- Disputes concerning matters reserved for joint decision-making under section 86.
- Dismissal disputes with the exclusion of certain retrenchments.
- Alleged unfair dismissals and unfair labour practices in terms of section 191.

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124 (1999) 20 *ILJ* 1192 (LAC) 16.

125 See also *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union & others* (2) (1997) 18 *ILJ* 671 (LAC); *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others* (1) (1998) 19 *ILJ* 260 (LAC). In conducting that enquiry a court looks at the substance of the dispute and not at the form in which it is presented (Fidelity at 269G-H; Ceramic at 678C). The characterization of a dispute by a party is not necessarily conclusive (Ceramic at 677H-I; 678A-C). In the Court's view, there was no difference in the approach of these decisions. In each case the court was concerned to establish the substance of the dispute. The importance of doing this lies in s 65 of the Act which provides that no person may take part in a strike if "the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act …". The phrase 'issue in dispute' is, in relation to a strike, defined as 'the demand, the grievance, or dispute that forms the subject matter of the strike"**.**

It has been observed that all disputes not covered within the ambit of the above provisions are regarded as “matters of mutual interest” and accordingly, neither the Labour Court nor the arbitrator may determine the merits of such matters.[126]

3.2.4 THE PERSON IS ENGAGED IN AN ESSENTIAL SERVICE, OR A MAINTENANCE SERVICE

Section 65(1)(c) of the Act provides that, where the employer is engaged in either an essential service[127] or a maintenance service,[128] strike is prohibited. However, the employer must first be declared an essential service or a maintenance service by the Essential Service Committee (ESC) in terms of sections 70 to 73 of the Act. In terms of section 72 of the Act, the ESC may approve and ratify a collective agreement that provides for the maintenance services in a service designated as an essential service. The effect of such agreement is that only workers who are in the designated minimum service may strike, the rest must refer the matter to a compulsory arbitration. According to Grogan, the reason for these prohibitions is to limit strike action where the effect of such action would be to endanger life, health or safety of the public or create major social dislocation.[129]

In *SA Police Services v Police & Prisons Civil Rights Union,*[130] the question was whether the prohibition on strikes in essential services applies to all employees in the services concerned or only to those who performed work directly linked to the provisions of the essential service. The Labour Court held that only members of the South African Police Service (SAPS) employed under the South African Police Service Act (SAPSA)[131] were engaged in essential services under the LRA.

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126 Grogan *Collective Labour Law* 178.

127 In terms of s 231 of the Act, an "essential service" (more narrowly defined as compared to the previous Act (1956 Act) means

“(a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;

(b) the Parliamentary service;

(c) the South African Police Services.”

128 S 75(1) of the Act provides that a service is a maintenance service if the interruption of that service has the effect of material physical destruction to any working area, plant or machinery.

129 Grogan *Collective Labour Law* 190. See also Basson *et al Essential Labour Law* 314 and Du Plessis & Fouche *A Practical Guide to Labour Law* (2007) 357.

130 (2007) 28 *ILJ* 2611 (LC).

131 Act 68 of 1995.

The decision of the Labour Court was subsequently appealed to LAC. In *SA Police Services v Police & Prisons Civil Rights Union,*[132] the LAC confirmed the decision of the Labour Court that only members and deemed members of the SAPS employed under the SAPSA and engaged in police duties were actually prohibited from striking by the provisions of section 65 read with section 71(10) of the Act. Accordingly, the personnel employed by the SAPS in terms of the Public Service Act (PSA),[133] including prison officers, are not prohibited from striking.

The SAPS appealed against the decision of the LAC to the Constitutional Court. In *SA Police Services v Police & Prisons Civil Rights Union and Another*[134] the Constitutional Court had to consider the proper interpretation and meaning of "essential service" as defined in section 213, read with sections 65(1)(d)(i) and 71(10) of the Act, in the context of the right to strike provided for in section 23(2)(c) of the Constitution.

The Constitutional Court held that a restrictive interpretation of essential service should, if possible, be adopted so as to avoid impermissibly limiting the right to strike. The court remarked that defining "essential service" too broadly would impermissibly limit the right to strike.[135]

After considering the meaning of "essential services", the Constitutional Court concluded that persons who were engaged in essential service, and prohibited from striking in terms of section 65(1)(d)(i) of the Act, are members of the SAPS, and this included the "personnel employed" in the SAPS and designated as members in terms of section 29 of the SAPSA.[136] The Constitutional Court re-affirmed that the LAC could not be faulted in holding that not all SAPS employees were engaged in an essential service, and confirmed the judgment of the LAC.

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132 (2010) *ILJ* 2844 (LAC) .
133 Proclamation 103 of 1994.
134 (2011) 32 *ILJ* 1603 (CC).
135 Par 31.
136 Par 30.

3.2.5 AN ARBITRATION AWARD OR A COLLECTIVE AGREEMENT REGULATES THE ISSUE IN DISPUTE OR ANY DETERMINATION MADE BY THE MINISTER THAT REGULATES THE ISSUE IN DISPUTE

In terms of section 65(3)(a)(i) of the Act, employees may not strike if the issue in dispute that may form the subject of a strike is regulated by a collective agreement. The reasons for this limitation are two-fold. In the first place the dispute has been resolved and the award given is final and binding. The second reason is to uphold the sanctity of the collective agreement since parties should remain bound by the terms of the settlement.[137] Consequently, the court has noted that parties should not be entitled to have two bites at the cherry, in other words, if the result of the arbitration is not of their liking, they ought not to seek to obtain a more favourable result through strike.[138]

3.2.6 ANY DETERMINATION MADE IN TERMS OF THE WAGE ACT AND THAT REGULATES THE ISSUE IN DISPUTE, DURING THE FIRST YEAR OF THAT DETERMINATION

Section 65(3)(b) states that, where the Minister has made a determination in terms of the Wage Act,[139] that regulates the issue in dispute, employees may not take part in in a strike during the first 12 months of the existence of this determination. Section 8(1)(a) to (c) of the Wage Act regulates only the minimum rates of remuneration and hence opens to the parties the right to strike over improved wages in the ordinary bargaining. Worth mentioning is that, after the LRA came into operation, the Wage Act was repealed by the Basic Conditions of Employment Act (BCEA), and therefore Basson points out correctly that section 65(3)(b) of the Act will have to be reconsidered.[140]

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137 See *Samancor Ltd v National Union of Metalworkers of SA & Others* (2002) 21 *ILJ* 2305 (LC); *SA Motor Industry Employers Association & Another v National Union of Metalworkers of SA & Others* (1997) 18 *ILJ* 1301 (LAC).

138 See *Chemical Workers Industrial Union v Bevaloid* (Pty) Ltd (1988) 9 *ILJ* 447 (W); *Afrox Ltd v SA Chemical Workers & others* (1) (1997) 18 *ILJ* 399 (LC) 406; Grogan (2007) *Workplace Law* 392. See also Basson *et al Essential Labour Law* 314 and Du Plessis & Fouche *A Practical Guide to Labour Law* (2007) 318.

139 Act 5 of 1957.

140 Basson *et al Essential Labour Law* 317. According to Basson the BCEA provides for a system of sectorial determination regulating basic conditions of employment made by the Minister on the advice of the Employment Conditions Commission which are equivalent to wage determinations made in terms of the Wage Act.

Despite the limitations in section 65, the proposed amendments to section 65 of the Act seek to broaden the restrictions on employees and trade unions taking strike action. Worth noting is that the LRA Amendment Bill, section 65(1)(c), now provides that no person may participate in a strike if that party has a right to refer the dispute to arbitration or to the Labour Court in terms of the Act *or any other employment law*. Any other employment law would include, for instance, the Employment Equity Act[141] which will deal with unfair discrimination disputes. The proposed amendments to the LRA suggests that this extension strives to eliminate the anomalous distinction between disputes that can be adjudicated under the Act in respect of which strike is currently restricted, and those under other employment laws in respect of which there is no equivalent restriction. This further proposed limitation should be revisited since it broadens the scope and limits unnecessarily the employees' constitutional right to strike.

3.3 THE LEGAL CONSEQUENCES OF PROTECTED STRIKE IN TERMS OF THE ACT

Section 67 of the Act provides for the extent of a protected strike. This entails that employees may not be dismissed for striking if they comply with the requirements discussed above.[142]

3.3.1 IMMUNITY FROM CIVIL LIABILITY AND BREACH OF CONTRACT

Section 67(2) of the Act provides an indemnity against civil liability and breach of contract to employees who engage in a protected strike or any conduct in contemplation or participation in a protected strike.[143] In spite of this protection, section 67(3) of the Act indicates that an employer, subject to two limitations,[144] is not obliged to remunerate an employee for services that the employee does not render during protected strike and may employ replacement labour. Grogan opines that, if a

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141 Act 55 of 1998.

142 See the discussion in *Fidelity Guards Holdings (Pty) Ltd v PTWU & Others* [1997] 9 BLLR 1125 (LAC) 1132 and in *Afrox Ltd v SA Chemical Workers Union & Others* (2) (1997) 18 *ILJ* 406 (LC) 410D-E.

143 *SA Chemical Workers Union & Others* v *Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC).

144 S 67(3)(a) "if the employee's remuneration includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the employee, must not discontinue payment in kind during the strike or lock-out; and (b) after the end of the strike or lock-out, the employer may recover the monetary value of the payment in kind made at the request of the employee during the strike or lock-out from the employee by way of civil proceedings instituted in the Labour Court".

party commits an act that is a criminal offence, for instance assault, intimidation, malicious damage to property and the like, this protection will be forfeited and the party committing the criminal act will be liable for damages.[145]

3.3.2 PROTECTION AGAINST DISMISSAL

Probably one of the most meaningful protections afforded to the employees participating in a protected strike is found in section 67(4) of the Act. In fact, this section prohibits an employer from dismissing an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.[146] The courts have held that a dismissal for any of these reasons is automatically unfair in terms of section 187(1)(a) of the Act, and an award of reinstatement and up to 24 months' salary in compensation may be ordered.[147]

However, the protections afforded in sections 67(4) and 187(1)(a) of the Act are not absolute. This is because section 67(4) limits the rights of strikers not to be dismissed by holding that, despite sections 67(4) and 187(1)(a), an employer may fairly dismiss an employee in accordance with the provisions of Chapter VIII for a

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145 Grogan (2007) *Workplace Law* 396. See also *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union & Others* (2005) 26 *ILJ* 1458 (LC); *Stuttafords Department Stores Ltd v SA Clothing & Textiles Workers Union* (2002) 22 *ILJ* 414 (LAC) and *Lomati Mill Barbaton v Paper Printing Wood & Allied Workers Union* (1997) 18 *ILJ* 178 (LC).

146 For the rationale for protecting strikers against dismissal, see *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 *ILJ* 963 (LAC) 972.

147 See *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & Others v* and also *SA Transport & Allied Workers Union v Platinum Miles Investments (Pty) Ltd t/a Transition Transport* (2008) 29 *ILJ* 1742 (LC).

reason related to the employee's conduct during the strike,[148] or for a reason based on the employer's operational requirements.[149]

3.4 THE LEGAL CONSEQUENCES OF UNPROTECTED STRIKE IN TERMS OF THE ACT

Employees' failure to comply with the required procedure and limitations will render the strike unprotected. Accordingly, the employer will have remedies in terms of the Act. The Act provides the employers with the remedies of interdict, compensation for loss, and dismissal in instances where employees participate in unprotected strikes.

Usually, in practice most strike cases that go to the Labour Courts commence with the employer applying for an interdict contending that the strike is unprotected in one way or another. However, in exceptional instances the trade union approaches the court first. For example, in the *Public Service Association* decision discussed earlier, it was the trade union that approached the Labour Court requesting protection after the employer had issued an ultimatum and threatened to dismiss the striking workers.

Where a strike does not comply with the provisions of the Act relating to strike, it will be unprotected and the following legal consequences will apply:

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148 See *Chemical Energy Paper Printing Wood & Allied Workers Union & others v Metrofile (Pty) Ltd* (2004) 25 *ILJ* 231 (LAC) 53; *Picardi Hotels Ltd v Food & General Workers Union & others* (1999) 20 *ILJ* 1915 (LC) 25; *CEPPWAWU & Others /Tugela Mill (a division of SAPPI Kraft (Pty) Ltd* (2002) 12 *BALR* 1249 (CCMA); *Doorwise SA CC V PPWAWU & others* [1997] 6 BLLR 748 (LC); *Morkels Stores (Pty) Ltd v Woolfrey NO & another* [1999] 6 BLLR 572 (LC) 6; *Adams & others v Coin Security Group (Pty) Ltd* (1999) 20 *ILJ* 1192 89-90; *Mabinana & others v Baldwins Steel* [1999] 5 BLLR 453 (LAC); *NSCAWU & others v Coin Security Group t/a Coin Security* (1997) 15 *ILJ* 1257 (A); *NUMSA v G Vincent Metal sections (Pty) Ltd* [1995] 8 BLLR 85 (IC); *Chauke & others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 *ILJ* 1441 (LAC); *Food and Allied Workers Union & others v Amalgamated Beverage Industries Ltd* (1992) 13 *ILJ* 1552 (LC); *SACTWU & others v Novel Spinners (Pty) Ltd* [1999] 11 BLLR 1157 (LC); *National Union of Metalworkers of SA & others v Atlantis Forge (Pty) Ltd* (2005) 26 *ILJ* 1984 (LC); *SACWU v Afro Ltd* (1998) 19 *ILJ* 62 (LC) and *SACCAWU obo Machipa/ Dennis Pizza* (2002) 12 *BALR* 1356 (CCMA).

149 *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* (1994) 15 *ILJ* 1005 (LAC); *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 *ILJ* 963 (LAC) 972F; *Cobra Watertech v National Union of Metalworkers SA* (1995) 16 *ILJ* 607 (LAC) 616A; *General Food Industries Ltd v Food & Allied Workers Union* (2004) 25 *ILJ* 1260 (LAC); *SA Chemicals Workers Union & other v Afrof Ltd* (1999) 20 *ILJ* 1718 (LAC); *National Union of Metalworkers of SA & others v Dorbyl & another* (2007) 28 *ILJ* 1585 (LAC); *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (2001) 22 *ILJ* 2264 (LAC) 19; *SA Clothing & Textile Workers Union v Discreto* (1998) 19 *ILJ* 1451 (LAC) 8 and *Northern Cape Allied Workers Union obo Sethlogo & others v CCMA & others* (2009) 30 *ILJ* 1299 (LC).

3.4.1 INTERDICT

Under the 1956 Act, the Industrial Court was empowered to grant interdicts with respect to unlawful industrial action.[150] Strike that did not comply with the requirements of the 1956 Act regulating strikes was deemed illegal and carried criminal consequences. Now section 68(1) the Act gives the Labour Court exclusive jurisdiction to grant an interdict restraining any person from participating in a strike or any conduct in contemplation or in furtherance of a strike if the strike does not comply with the provisions of the Act. Failure to comply with such an interdict or order is a factor which the Labour Court may take into account in ordering just and equitable compensation.

The Labour Court may not grant or restraining order unless 48 hours' notice has been granted to the respondent. A shorter notice period may be permitted if a party shows a good cause and if a union has been given a written notice of the application and has been allowed a reasonable opportunity to be heard.[151] In *New Tyre Manufacturers Employers Association v National Union of Metalworkers of SA*[152] and *Automobile Manufacturers Employers Association v NUMSA,*[153] the Labour Court held that good cause will have to be established on grounds equivalent to those in urgent applications.[154] Grogan observes that if it is established that the employer has made insufficient attempts to serve the notice of the application to each strikers, the court will not grant an interdict.[155]

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150 S 17(11)(b) of Act 28 of 1956.

151 S 68(2)(a) to (c) of the Act. See also Grogan *Workplace Law* (2007) 404.

152 (1999) 20 *ILJ* 189 (LC).

153 [1998] 11 BLLR (LC).

154 These grounds include; the establishment of a prima facie right to the relief sought; a well-grounded appreciation of irreparable harm to the applicant if the relief sought is not granted; and finally is that the applicant has no other satisfactory remedy.

155 Grogan *Workplace Law* 404. See also *Makhado Municipality v SA Municipal Workers Union & others* (2006) 27 *ILJ* 1175 (LC); *Woolworth (Pty) Ltd v SA Commercial Catering & Allied Workers Union* (2006) 27 *ILJ* 1234 (LC) and *Security Services Employer Organisation & others v SA Transport Workers Union & others* (2006) 27 *ILJ* 1217 (LC).

3.4.2 COMPENSATION

In addition to granting of an interdict, section 68(1)(b) of the Act, grants the Labour Court the jurisdiction to order the payment of just and equitable compensation for any loss attributable to an unprotected strike.

In deciding whether the order of the payment of compensation is just and equitable the Labour Court must have regard to section 68(1)(b)(i) of the Act. These are:

- whether attempts were made to comply with Chapter IV of the Act and the extent of those attempts;
- whether the strike was premeditated;
- whether the strike was in response to an unjustified conduct by the other party to the dispute;
- the duration of the strike;
- the financial position of the employer, trade union, or employees.

In practice, employers have not resorted to section 68(1) as often as might have been expected. Nevertheless, the first case calling for the application of section 68(1) came about in *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*.[156] In this case, the employee had initially applied for compensation in the amount just more than R15 million, emanating from a loss of production and profits following a series of unprotected strikes, but subsequently limited its claim to R100 000. Although noting that the financial position of the union was weak, the court ordered it to pay the full amount claimed. The court mentioned that the amount of R100 000 fell well within the upper limit of what it would consider fair, and ordered the R100 000 be paid in monthly instalments of R5 000.

3.4.3 THE DISMISSAL OF STRIKERS

Participation in an unprotected strike may in terms of section 68(5) of the Act constitute a fair reason for dismissal. In deciding whether a dismissal was fair the

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156 (2001) 22 *ILJ* 2035 (LC). See also *Algoa Bus Company v SATAWU & others* [2010] 2 BLLR 149 (LC); *Mangaung Local Municipality v SA Municipal Workers Union* (2003) 24 *ILJ* 405 (LC); *Country Fair Foods (Pty) Ltd v FAWU & others* (2001) 22 *ILJ* 1103 (LAC) and *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA* (1998) 19 *ILJ* 279 (LC).

provisions of the Code of Good Practice dealing with dismissals, as contained in schedule 8 of the Act, must be taken into account. Item 6 of the Code of Good Practice states clearly that participation in an unprotected strike constitutes misconduct. However, the Code also states that as in the case with any other act of misconduct participation in an unprotected strike does not necessarily justify dismissal. For a dismissal to be fair, such dismissal must be substantively and procedurally fair.

- **Substantive fairness**

It does not follow as a matter of course that the dismissal of strikers who participated in an unprotected strike is fair. The substantive fairness of such a dismissal depends on all the circumstances surrounding the strike. Item 6 of the Code of Good Practice requires that the substantive fairness of the dismissal of strikers who participated in an unprotected strike must be evaluated in the light of the facts of the case. Item 6 of the Code as well as court decisions[157] requires that the following factors must be taken into account:

- The seriousness of the failure to comply with the provisions of the Act pertaining to protected strike.

- The attempts made by the employees to comply with the Act. For instance a genuine attempt to issue a 48 hours' strike notice, but a defective formulation of the notice makes it impossible for the employer to know when the strike will commence.[158]

- Whether or not the strike was in response to unjustified conduct on the part of the employer. For instance, in *National Union of Metalworkers of SA & Others v Pro Roof Cape (Pty) Ltd,*[159] the Labour Court noted that the employer's

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157 See *Liberty Box & Bag Manufacturing Co (Pty) Ltd v Paper Wood & Allied Workers Union* (1990) 11 *ILJ* 427 (ARB); *Doornfontein Gold Mining Co Ltd v National Union of Mineworkers of SA & others* (1994) 15 *ILJ* 527 (LAC); *Henred Fruehauf Trailers (Pty) Ltd v National Union of Mineworkers of SA & others* (1992) 13 *ILJ* 593 (LAC) and Performing Arts Council v *Paper Wood & Allied Workers Union* (1992) 13 *ILJ* 1439 (LAC).

158 *Adams & others v Coin Security Group (Pty) Ltd* (2000) 21 *ILJ* 924 (LAC).

159 (2005) 26 *ILJ* 1705 (LC).

provocative conduct by, amongst other things, not paying a bonus due to the employees, meant that the dismissal was unfair.

Besides the above requirements, the courts have held that, where the employees during the course of the strike engage in unacceptable conduct and as a result the employer suffers harm, they may be dismissed fairly.[160]

- **Procedural fairness**

The dismissal of strikers who have embarked on an unprotected strike will also have to be procedurally fair. Investigation should take place as soon as possible. Procedural fairness rests on the following pillars:

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- This does not need to be a formal investigation or a formal disciplinary hearing or enquiry. However, in *Avril Elizabeth Home for the Mentally Handicapped v CCMA*[161] the Labour Court noted that the code specifically states that the investigation preceding a dismissal "need not be a formal inquiry". The Code requires no more than that before dismissing an employee, the employer should conduct an investigation, give the employee or his/her representative an opportunity to respond to the allegation after a reasonable period, take a decision and give the employee notice of that decision. This approach represents a significant change from what may be termed the "criminal-justice" model developed by the erstwhile Industrial Court under the 1956 Act.

- The employer should then notify the employee of the allegations, using a form and language that the employee can reasonably understand. This notice should set out the charges and the employee's rights during the hearing.

- The charges should be detailed enough for the employee to determine the charge and to be able to defend himself/herself against it.

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160 *National Union of Furniture & Allied Workers of SA v New Era Products (Pty) Ltd* (1999) 20 *ILJ* 869 (LC); *National Union of Metalworkers of SA & others v Pro Roof Cape (Pty) Ltd* (2005) 26 *ILJ* 1705 (LC) and *National Union of Metalworkers of SA & others v Atlantis Forge (Pty) Ltd* (2005) 26 *ILJ* 1984 (LC).

161 [2006] 9 BLLR 833 (LC).

- The employee is entitled to a reasonable time (at least 2 clear working days) to prepare his defence; and the employee is entitled to the assistance of a trade-union representative or a fellow employee.

- The employee is entitled to be present during a hearing and to present his defence by cross-questioning the employer's witnesses, presenting his own evidence and by stating his own defence. This constitutes the core rights of an employee when suspected of misconduct (*audi alterem partem*).

- If the employee is found guilty, the employee has the right to present mitigating circumstances before a sanction is given.

- After the enquiry, the employer should communicate the decision taken to the employee and preferably furnish the employee with written notification of that decision.

If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute-resolution procedures established in terms of a collective agreement.

3.5 CONCLUSION

As noted above, the legal mechanism aimed at further limiting the scope of the right to strike has recently become a highly contested issue, particularly among trade unions.

As the law currently stands, section 65(1)(c) of the Act holds that no person may take part in a strike if the issue in dispute is one that a party may refer to arbitration or to the Labour Court in terms of the Act. This has become a well-established and accepted limitation in our labour law for years.

Now the proposed amendment to section 65(1)(c) of the Act seeks to further limit the right to strike by excluding this right in circumstances where the issue in dispute is

one that could be referred to arbitration or to the Labour Court in terms of the Act, or in terms of any other employment law.

Although this amendment is to be appreciated for its aim, which is to try and address the increasing levels of unprotected strikes, this extension to further limit the scope of the right to strike creates an unnecessary hurdle to employees wishing to exercise their constitutional right to strike. Therefore this amendment should be revisited for the simple reason that the right to resort to strike action is a pivotal tool for trade unions to balance the relationship between management and the workforce.

The consequences of protected and unprotected strike were also elaborated in this chapter.

On the one hand, it was found that, although the right to strike is recognised under the laws of South Africa, section 68 of the Act explicitly provides for the consequences of a strike action embarked upon against the spirit and purport of the law and particularly the Act and the Constitution. In other words, the law provides the employers with the remedies of interdict, compensation for loss and dismissal (only if it is procedurally and substantively fair) against an unprotected strike. On the other hand, it was established that the consequences of a protected strike are well articulated in section 67 of the Act, and include immunity from civil liability and breach of contract as well as protection against dismissal.

CHAPTER 4
FURTHER LIMITATION ON THE EMPLOYEES' RIGHT TO STRIKE v COLLECTIVE BARGAINING FOR THE PURPOSES OF REACHING A COLLECTIVE AGREEMENT: STRIKING A BALANCE IN SOUTH AFRICA

4.1 INTRODUCTION

Thus far we have been concerned with the various limitations imposed on the employees' constitutional right to strike. In this chapter we turn to an area in our law which is no less important in practice. More importantly, the chapter attempts to establish whether the further limitations proposed in the amendments to the LRA on the employees' right to strike are indeed necessary as compared to rather engaging in a meaningful collective bargaining with the objective of reaching and concluding a collective agreement.

The statutory mechanisms for institutionalization of conflict through the medium of collective bargaining made its appearance in South African Labour Law in the early 1920s.[162] Despite the provision of a legislative framework for collective bargaining, there was still an underlying philosophy of voluntarism underpinning the legislation.[163] The voluntarism took the form of the employer and employee parties being able to freely regulate their relationship. The role of the State was to encourage collective bargaining by providing the framework for it. In 1979 the Wiehahn Commission Report stated that the role of the State was limited to setting the broad framework within which the employer and employee should have the maximum degree of freedom to regulate their various relationships.[164]

In the last few months, South Africa has experienced a most escalating wave of strikes in history. As a result, South Africa has been dubbed "the protest capital of

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162 Industrial Conciliation Act of 1924.

163 Davis *Voluntarism and South African Labour Law* (1990) 45 50.

164 Wiehahn Commission Report Part V par 4.11.5.

the world".[165] Arguably, no day goes by in South Africa without strikes or employees from different sectors threatening to go on strike. If left unattended, this wave of development will soon have dire consequences for South Africa, a country that is already experiencing a fragile economy. South Africa's desire to encourage foreign investments will be seriously endangered since no serious foreign investor will be willing to invest in a country constantly faced with vicious strikes indicating a nose-diving economy.[166] A good example is the five-month long platinum strike that almost pushed the economy to the brink of recession in the first half of this year.[167]

Strikes may be detrimental for a number of reasons. In their very nature they are calculated to harm not only the employer but also the employer's customers and suppliers and even non-striking employees.[168] Strike action has also been viewed as unjust since it causes inconvenience and perhaps hardship to the general public, and under some circumstances may be injurious to the entire economy. Strikes often inflict serious economic loss, not only upon the employer and the individual employees engaged in the activity, but it also stirs up hate and disrupts the solidarity of the community at large.[169] The right to strike is, nevertheless, an indispensable element of the right to bargain collectively. It represents the power which, even if not used, constitutes the foundation of the union's bargaining position.[170] Any undue limitation of the right involves the danger of weakening the very basis of collective bargaining. It is for these reasons that perhaps collective bargaining needs to

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165 Rodrigues "'Black Boers' and other revolutionary songs" 5 April 2010. http://www.thoughtleader.co.za/chrisrodrigues/2010/04/05/on-revolutionary-songs/ (Accessed 2014-03-12).

166 http://ewn.mobi/2014/08/10/numsa-vows-to-fight-for-right-to-strike. see also http://m.engineeringnews.co.za/article/sacci-calls-for-introduction-of-strike-limitations-following-violence-2014-06-11.

167 Stephen Grootes "End of South Africa's platinum mine strike signals end of ANC domination" 25 June 2014 http://www.theguardian.com/world/2014/jun/25/south-africa-platinum-miners-strike-anc. (Accessed 2014-03-12). See also Solomons, I. (2014). Platinum strike consequences starting to take shape. Available at: http://www.miningweekly.com/article/platinum-strike-consequences-starting-to-take-shape-2014-08-22 [accessed on 21 October 2014].

168 Grogan *Collective Labour Law* (2010) 142.

169 Hobson "The Conditions of Industrial Peace" cited in Cockar, "The Industrial Court and Labour Relations in Kenya" 1996 2 *East African Law Journal* 257 258.

170 "…the threat to strike, and the strike itself, are the prods which stimulate management and unions to find a peaceful solution to the problems of employment. Indeed, the strike is an integral part of the collective bargaining process. Without it, collective bargaining cannot function effectively as the vehicle of joint determination of the issues of the employment relationship." Witney *Government and Collective Bargaining* (1951) 3.

develop effective strike avoidance strategies in order to encourage industrial peace in labour relations.

4.2 THE NATURE OF COLLECTIVE BARGAINING AND THE RIGHT TO STRIKE

At the heart of any industrial-relations system, lies the concept of collective bargaining. As legal scholar, Tucker, has noted that this notion has a very long history, which he traces back as far as 1921, being popularised in the 1940s.[171]

For employers, the motivation behind collective bargaining is to maintain industrial peace and for employees, it is a motivational force to sustain "certain standards of distribution of work, of rewards and of stability of employment".[172] Interesting to note is that "It is one of the ironies of collective bargaining that its very object, industrial peace, should depend on the threat of conflict."

In South Africa collective bargaining has particular importance with its legacy, deeply ingrained in the South African history. The current legislative framework allows for a voluntary system of collective bargaining backed by the freedom of parties to resort to coercive power. It is the mechanism through which regulated flexibility is achieved. In other words, the ability of collective bargaining to set wages and conditions that balance employees' needs with those of employers is essential for development of a new labour-relations structure to balance the imperatives of equity and economic development.

Collective bargaining is a "process by which employers and organised groups of employees seek to reconcile their conflicting interests and goals through mutual understanding".[173] Its main objective is to reach a mutually acceptable agreement through compromises or negotiations made by both parties on matters of joint

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171 Tucker, "Can Worker Voice Strike Back?" in Bogg and Novitz *Voices at Work: Continuity and Change in the Common Law* World (Oxford, OUP, 2014, forthcoming) 6.

172 Davies & Freedland in Kahn-Freund's *Labour and the Law*' (1983) 69.

173 Grogan *Collective Labour Law* 86. The author also states that "the central objective of all modern industrial relations legislation is to promote collective bargaining as a means of regulating relations between employers and employees and for resolving disputes between them".

interest.[174] Du Toit observes that the LRA attempts to advance collective bargaining as a means of securing labour peace, social justice, economic development and employee equality. He also notes that collective bargaining is not only concerned with securing an agreement over wages or conditions, it maintains labour peace, promotes equality and plays a social and economic role.[175] For that reason, if the legislative framework is to provide a sustainable and lasting foundation for encouraging mutually beneficial relations, it must strike a fair balance between employees' and employers' interests and also encourage more voluntary collective bargaining. Unnecessary lobbying of the legislative framework which allows the power balance to tip heavily towards either employers or employees may hinder the fundamental compromises and self-determination which are the essential foundations of effective bargaining but will also undermine the development of mature, cooperative relationships.

The nature and extent of the right to engage in collective bargaining were extensively dealt with in the popular cases of *South African National Defence Union v Minister of Defence,*[176] *SANDU v Minister of Defence*[177] and *Minister of Defence v SANDU.*[178] It is not the intention of this study to discuss these cases in detail. Nevertheless, it is worth mentioning that the most common core issue in all the cases was whether the South African National Defence Force[179] had a justifiable duty to engage in collective bargaining with the South African National Defence Union,[180] a union set up by and comprising members of the defence force, which allowed them to function as a union by the decision of the Constitutional Court.

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174 Bendix *The Basics of Labour Relations* (2000) 138. See also Kahn-Freund *Labour and the Law* (1977) 5 who similarly explains the purpose of collective bargaining as follows; "[B]y bargaining collectively with organised labour, management seeks to give effect to its legitimate expectations that the planning of production, distribution … should not be frustrated through interruptions of work. By bargaining collectively with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secure."

175 Du Toit *Labour Relations Law A Comprehensive Guide* (2000) 123.

176 (2003) 3 *SA* 239 (T). Hereinafter referred to as *SANDU 1.*

177 (2004) 4 *SA* 10 (T) Hereinafter referred to as *SANDU 2.*

178 (2007) 1 *SA* 422 (SCA) Hereinafter referred to as *SANDU 3.*

179 Hereinafter referred to as *SANDF*.

180 Hereinafter referred to as *SANDU*.

The Constitutional Court held that the constitutional right of workers to engage in collective bargaining imposes a correlative obligation on employers to bargain with unions which have the right to bargain. In this case, the court held that soldiers could be classified as similar to employees and therefore "workers" for the purposes of section 23 of the Constitution. The provision of the Defence Act and its regulations that prohibited soldiers from belonging to trade unions were held to be unconstitutional and were therefore declared invalid. After some acrimony, an order was requested compelling the SANDF to bargain with the union. The application was dismissed. The court held that, although section 23(5) of the Constitution grants trade unions the right to engage in collective bargaining or the freedom to bargain collectively, it does not impose an obligation to bargain on the other side.

In another Constitutional court judgment, *In re Certification of the Constitution of South Africa*[181] the court found that:

> "Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargaining effectively with employers. Workers exercise collective power primarily through the mechanism of strike action."

In other foreign jurisdictions, for instance the UK, in 1942, the House of Lords in *Crofter Hand Woven Harris Tweed v Veitchheld*[182] held that the "right of employees to strike is an essential element in the principle of collective bargaining". In Canada, the Supreme Court has held in *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia* that:

> "… to take away an employee's ability to strike so seriously detracts from the benefits of the right to organize and bargain collectively as to make those rights virtually meaningless."[183]

4.3 COLLECTIVE BARGAINING UNDER THE ILO

The primary goal of the ILO under its Constitution is "social justice", which is to take precedence over other economic goals.[184] It is imperative to point out that the ILO

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181 (1996) 4 SA 744 par 66.

182 [1942] AC 43 Lord Wright p 463.

183 [2007] 2 *SCR* 391.

Constitution that provides for social justice involves the improvement of conditions of work and the ability of workers to participate in making the decisions which affect their working lives, either by means of collective bargaining or tripartite (Government, employer and worker representatives) consultation.

It must be emphasised that the ILO describes collective bargaining as a process in which workers and employers make claims upon each other and resolve them through a process of negotiations leading to collective agreements that are mutually beneficial. In fact, under most of the international legislative framework, it is regarded as a labour right. For example employees, joining together, allow them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. In the process, different interests are reconciled. For employers, free association enables firms to ensure that competition is constructive, fair and based on a collaborative effort to raise productivity and conditions of work.[185]

The ILO is viewed as the pre-eminent authority or bench mark on international labour standards. This organisation considers the right to collective bargaining as one of the core rights that is essential to the ILO's mission. The significance of this right has been acknowledged by the ILO Committee on Freedom of Association through Conventions and Recommendations. In 1960 the Committee declared that:

> "The right to bargain freely with employees with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means to seek to improve the living and working conditions of those whom the trade unions represent and public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof."

Even way back before 1960, the 1944 Declaration of Philadelphia which is now part of the ILO Constitution, had already acknowledged the role of the ILO in the promotion of collective bargaining. The Declaration affirmed "the solemn obligation of the International Labour Organisation to further among the nations of the world

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184 See Preamble to Part XIII of the Treaty of Versailles 1919 and Declaration of Philadelphia 1944, Article II (c).

185 Van Niekerk *et al Law at Work* (2008) 341.

programmes which will achieve the effective recognition of the right of collective bargaining".[186]

In the years that followed, particularly in 1949, the ILO Convention 98 on the Right to Organise and Collective Bargaining was adopted and to date it remains the main source of employees' right to collective bargaining. Apart from Convention 98, there are numerous other Conventions and Recommendations which promote collective bargaining between employees and their employers, such as Convention No. 154 Collective Bargaining Convention 1981, Convention No 135 Workers' Representative Convention 1971 and Convention No 151 on the right of public employees to organise.[187]

4.4 COLLECTIVE BARGAINING UNDER THE CONSTITUTION AND THE LRA FRAMEWORK

As noted earlier, the right to strike for the purposes of collective bargaining is one of the cardinal rights protected in section 23(5) of the Constitution. The Constitutional Court also confirmed the importance of collective bargaining in the case of *Numsa v Bader Bop.*[188] The court held that

> "... it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system".

Actually, the right to strike is the only basic human right that "forces" others to do what they wish not to do, through an expression of a collective voice of employees.[189]

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186 ILO*: Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference* Geneva (1998) 23 24.

187 See also Recommendation 91: Collective Agreements Recommendation 1951, Recommendation 92: Voluntary Conciliation and Arbitration Recommendation 1951, Recommendation 94: Co-operation at the Level of the Undertaking Recommendation 1952, Recommendation 113: Consultation (Industrial and National Levels) Recommendation 1960, Recommendation 130: Examination of Grievances Recommendation 1967, Recommendation 143: Workers' Representatives Recommendation 1971, Recommendation 163: Collective Bargaining Recommendation 1981, Recommendation 129: Communication within the Undertaking Recommendation 1967 and OECD Guidelines for Multinational Enterprises 1976; revised in 2000.

188 (2003) 24 *ILJ* 305 (CC). The court also said that "section 23 of the Constitution recognizes the importance of ensuring fair labour relations.

189 Mc Farlane *The Right to Strike* (1981) 184.

Notably, the LRA removed the duty to bargain collectively which the Industrial Court earlier imposed on contending parties in the exercise of its unfair labour-practice jurisdiction. This means that an employer is at liberty to refuse to engage with a trade union and in turn, the trade union may exercise its right to strike in respect of such a refusal to bargain. However, by extending and bolstering the right to strike, the legislature has effectively empowered unions to have recourse to the strike as an integral aspect of the collective bargaining process.

Interesting to note, is that the relationship between the right to strike and collective bargaining dates back years ago before the adoption of both the Constitution and the LRA.[190] It is a right that is extremely important for collective bargaining to function effectively in maintaining industrial peace.[191] Budeli observes that the employees' right to strike is a key component of their right to freedom of association, and one of the weapons wielded by trade unions when collective bargaining fails.[192] It therefore remains a powerful tool in the hands of workers to persuade their employer to bargain collectively.

Similarly, the right to freedom of association would remain ineffective if the right to bargain collectively and to strike were not well recognised.[193] Grogan equates "the relationship between collective bargaining and industrial action much like the relationship between war and diplomacy".[194] Bendix opines that it is the central process emanating from the conduct of a collective labour relationship.[195]

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190 See *Food & Allied Workers Union v Spekenham Supreme* (2) (1988) 9 *ILJ* 628 (IC); See also *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 *ILJ* 1221 (A) 1237 1238.

191 Brand *Strike Avoidance – How to Develop an Effective Strike Avoidance Strategy* 23rd Annual Labour Law Conference, Johannesburg (August 2010) 1.

192 Budeli "Understanding the right to freedom of association at the workplace: its components and scope" 2010 31 *Obiter* 27 28.

193 Olivier 'Statutory employment relations in South Africa' in Slabbert *et al managing employment relations in South Africa* (1991) 5 61.

194 Grogan *Collective Labour Law* (2010) 141. The author also states that "collective bargaining in the employment arena is much the same as bargaining that takes place in other spheres of life". See also Basson *et al Essential Labour Law* 276 277 where Basson define collective bargaining as a process through which one or more trade unions engage in negotiations which one or more employers or one or more employers' organisations with the purpose of regulating terms and conditions of employment or matters of mutual interest. Fourie and Olivier *Principle of Labour Law* (2004) 533 defines collective bargaining as "a voluntary process by means of which employees in an organised relationship, with regard to employment conditions or disputes arising therefrom with the object of reaching an agreement on these matters."

195 Bendix *Industrial Relations in South Africa* (1989) 76.

Further, in the South African context, the right to strike is an integral part of collective bargaining and freedom of association in pursuit of common cause for the betterment of the members of the striking employees, non-striking employees and the employers.

While strike may be used for trade negotiation, collective bargaining offers a better solution and it is also the right of the employees to bargain collectively. This is tacitly recognised in the LRA and constitutionally approved in 1996 in South Africa. The right to collective bargaining and, by implication, including the right to strike are guaranteed under the ILO and other international instruments.[196] In effect, collective-bargained agreements often involve transformation. Transformation works best when both sides agree to the future direction. That is the reason why collective bargaining is so appropriate to organizations undergoing change. An imposed change can be resisted and undermined in subtle but corrosive ways by those who feel that change was imposed without their consent.[197]

Unlike the 1956 LRA which contained a provision for a duty to collective bargaining, the current LRA retained a voluntarist approach to bargaining in which the parties would determine their own bargaining arrangements through the exercise of power.[198] The removal of the duty to bargaining was balanced by the introduction of a set of organisational rights in chapter III of the LRA, and the concerted promotion of collective bargaining, particularly at the sectoral level. Underpinning collective bargaining is a protected right to strike that is given to unions that follow the statutory procedure.

The significance of this right was recognized in South Africa even before the enactment of the Interim and final Constitutions as well as the LRA. The old Industrial Court in giving content to unfair labour practices, held that the right to bargain collectively existed in South African labour law. Whether or not the right to

196 Bendix *Industrial Relations in South Africa* (2010) 24.

197 Task Force to Review Part I of the Canadian Labour Code,*Seeking a Balance: Review of the Canada Labour Code Part 1*, 1995, Chapter 1, http://www110.hrdc.gc.ca/sfmc_fmcs/lcctr_tclcr/ondex_e.html. (Accessed 9 August 2014.

198 Van Jaarsveld *Principles of Labour Law* (2005) 791.

engage in collective bargaining entails within it a corresponding duty to bargain which is legally enforceable remains a question this study seeks to answer.

4.5 THE *NEXUS* BETWEEN COLLECTIVE BARGAINING AND INDUSTRIAL ACTION

The right to collective bargaining is closely related to the right to strike. It may not be effective without a reliable threat of a strike. In effect, strikes and collective bargaining help to redistribute the unequal power between the parties. Employees use economic pressure through strikes in order to strike a balance in the unequal bargaining powers between an employer and an employee. This in return enhances social justice in the workplace. Collective bargaining between the employees' union and the employer deals with the terms and conditions under which labour will be supplied by employees and purchased by employers. Since the employers have both powers and rights in law and practice over property and capital, they are able through collective bargaining to propose the terms upon which they will purchase labour for its operations. In turn, if there is a failure to collectively agree, the employees have the collective right to withdraw their labour rather than to accept the employer's offer.

As a consequence, a strike initiated by a union will inevitably affect both sides. The employer's operation may be shut down with the attendant loss of revenue, and the employees will suffer hardship because they will be out of work and will be deprived of their salaries and wages. The workers resort to industrial action in order to force the employer to reach a mutually acceptable agreement about the terms and conditions of employment. In this sense the economic purpose of strike action plays an important role in collective bargaining.[199] Therefore any attempt to limit this right further as proposed in the amendment Bill is indeed taking away the employees' fundamental right to strike guaranteed by the Constitution. It is considered as one of the necessary conditions for collective bargaining to exist as it was built into the bargaining process.[200]

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199 Ben-Israel *International Labour Standards: the Case of the Freedom to Strike* (1987) I.

200 Myburg "100 Years of Strike Law" 2004 25 *ILJ* 966.

Additionally, the right to strike is not only a logical step in the collective-bargaining system but is also part of the price paid for industrial self-regulation of conditions of employment. Particularly, it forms an integral part of the process toward securing adjustment of expectations of economic realities. The ILO's Committee on Freedom of Association maintains that "the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests".[201]

Today the right to strike is essential to a democratic society, so one might justifiably wonder why this constitutional right should be limited even further.

There can be little doubt that the right to strike is an integral part of any system of collective bargaining in order to guarantee the economic right of employees.[202] A denial of this right would lead to an enormous weakening of the bargaining power of employees as they cannot equally match the strength of management in the inevitable conflict of interests between the parties. The right to strike will allow the employees more power to meet the needs of maintaining equilibrium in industrial relations. Kahn-Freund has expressed a similar view when he said that:

> "In the context of the use of the strike as a sanction in industrial relations, the equilibrium argument is the most important… the concentrated power of accumulated capital can only be matched by the concentrated power of the workers acting in solidarity."[203]

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201 See fn 23 of ch 1. See also the Committee on Freedom of Association, Digest 522. See also Grogan "Labour Law/ Employment Law Journal/ 2013/ April/ Strike notices What must they contain?" where Grogan indicates that employees use the right to strike as a weapon to prove to the employer that resisting to accepts their demands could be fatal and costly than acceding to them. See also *FGWU v Minister of Safety & Security* 1999 *ILJ* 1258 (LC) 1264 par 18 and *CEPPWAWU v Metrofile (Pty)* Ltd 2004 *ILJ* 231 (LAC) 246 par 53.

202 Patel (ed) Workers Rights: From Apartheid to Democracy -What Role for Organised Labour (1994) 22.

203 Kahn-Freud and Hepple *Laws against Strikes* (1972) 5. Grunfeld noted that "…if one set of human beings is placed in a position of unchecked industrial authority over another set, to expect the former to keep the interest of the latter constantly in mind and, for example, to increase the latter's earnings as soon as the surplus income is available…is to place on human nature a strain it was never designed to bear" 52. See Grunfeld, *Modern Trade Union Law* (1966) 33.

The right to strike is the only or if not one of the reasonable weapons which strengthen the power of the employees at the bargaining table.[204] And if employees could not, in the last resort, collectively refuse to work, they could not bargain collectively.[205] It is therefore called for in order to achieve a collective agreement. Certainly, bargaining without the right to strike would be no more than "collective begging".[206]

4.6 CONCLUSION

This chapter has discussed the right to strike and collective bargaining. It may be argued that strikes damage economic performance, reduce living standards and destroy jobs, and therefore limitations on the constitutional right to strike are needed. However, this right remains an important instrument in resolving conflicts of interest. In particular, it can force a party who is refusing to negotiate, to join the negotiating table.

This chapter finds that, rather than further limiting an already over-limited right to strike, a peaceful resolution of industrial disputes through rational discussion and exchange of views should be regarded as the preferred means of settling work related disputes. If not, South Africa could be heading in the direction of the United Kingdom where no right to strike exists. Actually, a recent decision of the UK Court of Appeal in *Metrobus Ltd v Unite the Union*[207] shows that the right to strike is simply a legal metaphor, and that a strike by employees (for whatever reason) will typically constitute a breach of contract by the employees involved and give rise to liability on

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204 Lending support to necessity of the right to strike in collective bargaining, Lord Wedderburn of Charlton further rationalised: "To protect such a right is not to approve or disapprove of its exercise in any particular withdrawal of labour, it is to recognise the fact that the limits set to the right to strike and to lockout are one measure of the strength which each party can in the last resort bring to bear at the bargaining table. The strength of a union is bound to be related to its power and its right to call out its members, so long as any semblance of collective bargaining survives." See Wedderburn *The Worker and the Law* (1986) 245.

205 Kahn-Freud *Labour and the Law* 292.

206 See Jacobs "The Law of Strikes and Lock-outs" in Blanpain and Engels (eds) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (1993) 423. Perrins asserts that it is an arguable question whether industrial action should be allowed only as a last resort and whether collective bargaining is the best means of settling terms and conditions of employment. He however agrees that collective bargaining necessarily involves the freedom to take industrial action, see Perrins *Trade Union Law* (1985) 22.

207 [2009] EWCA Civ 829.

the part of the union for inducing the employees to break their contracts of employment.

The role of the State is to create a legal framework within which parties may address their labour concerns. As such, developing effective and stable collective-bargaining institutions are proposed. This can be achieved fairly in the context where the rules of the game are specified within a fair and balanced legislative structure. The chapter has also looked at the position of the ILO, the Constitution and the LRA with regards to collective bargaining. Whether this is what the proposed amendments' limitations intend, remains to be seen. It is vital that the LRA properly reflects the intentions of the Constitution, particularly in relation to employees' and trade unions' right to strike.

The overwhelming conclusion in this chapter is that the legislative framework that finds an appropriate balance between employees, employer and broader social interests, as far as the regulation of strike is concerned, is an effective collective-bargaining process instead of having a more complex and onerous set of provisions that are designed to impede and impair access to a right to strike.

In reviewing and revising these provisions it is essential that policy makers have regard to the requirements of stable, voluntary collective-bargaining systems. There is a need to strike a fair balance between the interests of employers and employees in order to avoid unnecessary regulatory burdens and complexity in accessing the employees' constitutional right to strike. In this case, the conventions, established by the ILO through its tripartite processes, and the principles, established by its supervisory bodies in interpreting the application of those conventions, could provide useful guidance in establishing a stable, lasting foundation for encouraging mutually beneficial and cooperative relations. In fact, the ILO has indicated that research shows that countries with highly-coordinated collective bargaining tend to have less wage inequality, lower unemployment and fewer and shorter strikes than countries where collective bargaining is less established.[208]

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[208] International Labour Organisation "Collective bargaining" available at *http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/collective-bargaining/lang--en/index.htm*. (Accessed on 23 October 2014.

CHAPTER 5
IS THE RIGHT TO STRIKE IN TERMS OF THE LRA TOO LIMITED? SOUTH AFRICA'S POSITION IS COMPARED TO THE ILO'S JURISPRUDENCE

5.1 INTRODUCTION

In Chapter 4 reference was made to the importance of developing structures that support a meaningful collective-bargaining system as an alternative to further limiting the right to strike. Importantly, the chapter established that the LRA views collective bargaining as a preferred method of resolving labour disputes. This chapter compares the South African position regarding the legal protection of the right to strike to that of the ILO's jurisprudence.

The International Labour Organization (ILO) represents a specialized organization of the United Nations that has a special place in shaping labour in general internationally. South Africa became a member state to the ILO in 1919 but withdrew in 1966 due to the impact of the apartheid regime at the time. Subsequently, following the democratic dispensation in 1994, South Africa resumed its membership.[209] Because South Africa is a member state of the ILO, it is important to test the provisions of the LRA against the principles developed by the ILO's bodies. In fact, one of the primary reasons why the LRA was enacted is to give effect to the obligations incurred by the Republic as a member state of the ILO.[210] Similarly, section 39 of the Constitution makes it peremptory for a court to take international laws into account and the way courts in other countries have decided on similar cases.

A very good example of how the international labour standards have played a pivotal role in shaping our labour laws was in the case of *National Union of Metalworkers*

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209 Budeli *Freedom of association and trade unionism in South Africa: from Apartheid to the democratic constitutional order* (LLD Thesis, University of Cape Town 2007) 256.

210 S1(b) of the LRA.

and Others v Baderbop.[211] The court held that the conventions ordinarily interpreted, afford trade unions the right to recruit members and to represent those members at least in workplace grievances and to recognise the right to strike in order to enforce collective-bargaining demands. The jurisprudence of the ILO's supervisory bodies suggested that a reading of the LRA which permitted minority unions the right to strike over the issue of shop-steward recognition, would be more in accordance with the principles of freedom of association entrenched in international labour standards.

5.2 INTERNATIONAL LAW AND EMPLOYEES' RIGHT TO STRIKE

5.2.1 INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

It is remarkable to note that the right to strike has become so important that it has been recognised and protected by many member states of the ILO. This right is embodied in some of the significant international human-rights instruments, including:

- The Universal Declaration of Human Rights (UDHR of 1948);
- the International Covenant on Civil and Political Rights (ICCPR of 1966); and
- the International Covenant on Economic, Social and Cultural Rights (ICESCR of 1966).

In order to understand the scope of the right to strike under these instruments, a cursory discussion of each will follows.

5.2.1.1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The UDHR was adopted by the UN's General Assembly Resolution 217a(III) in Paris on 10 December 1948. It was adopted for common standards of achievement for all peoples and all nations.[212] However, the UDHR does not mention the right to strike directly. This right derives indirectly from the right of "everyone to peaceful assembly and association". It plays a significant role to the ILO by promoting and defending human rights. It sets out, for the first time, the fundamental human rights to be

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211 [2003] 2 BLLR 103 (CC). See also Basson *et al Essential Labour Law* 267. Chicktay "Democracy, Minority Unions and the Right to Strike: A Critical Analysis *Numsa v Bader Bop (Pty) Ltd (*2003) 2 *BCLR* (CC)" 2007 28 *Obiter* 159.

212 See the preamble of the UDHR. http://www.un.org/en/documents/udhr/ (Accessed on the 20-9-2014).

universally protected. In effect the ILO's Committee of Experts on the Application of Conventions and Recommendations has emphasised that:

> "The Universal Declaration ... is generally accepted as a point of reference for human rights throughout the world, and as the basis for most of the standard setting that has been carried out in the United Nations and in many other organizations since then. ... The ILO's standards and practical activities on human rights are closely related to the universal values laid down in the Declaration, ... [T]he ILO's standards on human rights along with the instruments adopted in the UN and in other international organizations give practical application to the general expressions of human aspirations made in the Universal Declaration, and have translated into binding terms the principles of that noble document."[213]

Worth noting is that the UDHR is not a treaty and therefore no binding obligations arising from it affect the member states. However, it was felt that its adoption would provide an important guideline to all those who strive to raise man's material standards of living. More importantly, its constant reaffirmation in subsequent universal and regional instruments, as well as national constitutions, has led to some of its provisions achieving the status of customary international law.[214] For instance, Article 23, paragraph 4 of the UDHR proclaims that:

> "Everyone has the right to form and to join trade unions for the protection of his interests. This is a more specific manifestation of the right laid down in article 20 of the Universal Declaration to the right of freedom of peaceful assembly and association."

The right to strike is not expressly protected by the European Convention on Human Rights and does not expressly provide for the right to strike.[215] However, its Article 11 provides that:

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213 ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 86th Session, 1998, Geneva, 16-17, par 56-58.

214 Manamela and Budeli "Employees' right to strike and violence in South Africa" 2013 46 *Comparative and International Law Journal of Southern Africa* 311. Waldock "Human rights in contemporary international law and the significance of European convention" 1997 11 *Comparative and International Law Journal of Southern Africa* 121. See also Dugard "International Law: A south African Perspective" 2000 34 *Comparative and International Law Journal of Southern Africa* 241.

215 Ewing and Hendy "The Dramatic Implications of Demir and Baycara" 2010 39 *ILJ* 2. http://www.echr.coe.int/Documents/Convention_ENG.pdf (Accessed 0-10-2014).

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his/her interests.

2. No restrictions shall be placed on the exercise of these rights other than prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

5.2.1.2 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

South Africa ratified the ICCPR in December 1998 and it is therefore bound by its provisions. Like Article 22 of the ICCPR and Article 23(4) of the Universal Declaration declare that "[E]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."[216] Although both the UDHR and the ICCPR do not expressly refer to the right to strike, a positive inference may be drawn since they protect related rights, such as peaceful assembly, protected under Article 21 and of course Article 22 quoted above. Of particular importance is Article 22(2) which stresses that no restrictions may be placed on the exercise of this right "other than those which are prescribed by law and which are necessary in a democratic society" and allow "lawful restrictions on members of the armed forces and of the police in their exercise of this right".

5.2.1.3 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

The ICESCR is a multilateral treaty adopted by the UN's General Assembly on 16 December 1966 and came to force in 1976. It has its roots in the same process that led to the UDHR. It obliges its parties to work toward the granting of social, economic and cultural rights, including Article 8 which protects labour rights. Article

[216] Article22 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

8(1)(d) guarantees the states' parties "the right to strike, provided that it is exercised in conformity with the laws of the particular country".[217] In the South African context, therefore, the right to strike has to comply with the provisions of sections 64 and 65 of the LRA. The ICESCR recognizes the imposition by a court of lawful limitations on the right to strike. It allows these rights to be limited for members of the armed forces, police, or government administrators. As a consequence, any exercise of this right outside the framework of the LRA will be in violation of not only the LRA but also Article 8 of the ICESCR.

5.3 EUROPEAN REGIONAL INSTRUMENTS PROVIDING AN EXPRESS RIGHT TO STRIKE

The European Council has adopted several legal instruments that directly or indirectly regulate the right to strike. The most important legal instrument adopted by the Council of Europe, which expressly makes provisions for the protection of the right to strike, can be found in three of the main European Instruments. The instruments include: The European Social Charter (1961), revised in (1996), The Community Charter of the Fundamental Social Rights of Workers (1989) and The American Convention on Human Rights (Pact of San José, 1969).

5.3.1 THE EUROPEAN SOCIAL CHARTER (1961) REVISED IN (1996)

The European Social Charter was passed in 1961 and subsequently revised in 1996. It is one of the most prominent Charters, because it takes an approach similar to that of the ILO's standards. Article 6(4) of this Charter contains the first express authorization in an international instrument of the right to strike. The Charter section that regulates the right of collective bargaining explicitly states that:

> "workers and employers have the right to collective action in cases of conflicts of interest, including the right to strike in accordance with the obligations that may arise from the collective agreement the parties have previously entered into."

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217 Ratification information sourced from Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, 8 February, 2002. Online, Available: http://www.unhchr.ch/pdf/report.pdf. For discussion of Article 8 see *Fenwick, Minimum Obligations with Respect to Article 8 of the International Covenant on Economic, Social and Cultural Rights, in Chapman and Russell, (Eds.) Core Obligations: Building a Framework for Economic, Social and Cultural Rights, Intersentia, Antwerp* (2002) 53.

Heppele observes, however, that despite this express provision, the Charter has been "little known, rarely referred to and often ignored in practice".[218]

Notably, the UK ratified the Charter on 11 July 1962 and has accepted 60 out of 72 provisions, including Article 6(4).[219]

5.3.2 THE COMMUNITY CHARTER OF THE FUNDAMENTAL SOCIAL RIGHTS OF WORKERS (1989)

This is another important piece of European instrument to expressly provide for the right to strike.[220] Of importance to the right to strike are Articles 13 and 14 of this Charter. Article 13 regulates the right to organize collective action in cases of conflicts of interests. It provides that

> "The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements."

Article 14 permits the State Party to determine under which conditions and to what extent it will apply the right to strike in the armed forces, police and civil service.

Notably the Charter was not incorporated into Community Law as a binding instrument. However, it has been invoked by the European Court of Justice as an interpretative tool.[221]

Both the Community Charter 1989 and the European Social Charter 1961 subject the right to strike to national regulations and collective agreements. Such requirement

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218 Hepple "25 years of the European Social Charter" 1989 10 *Comparative Labour Law Journal* 460.

219 The United Kingdom and the European Social Charter, Table of Accepted provisions (June 2010),http://www.coe.int/t/dghl/monitoring/socialcharter/countryfactsheets/UK_en.pdf Article 6(4) provides that the Contracting Parties undertake to consider themselves bound by the obligations laid down in the following articles and paragraphs and also the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into. The European Social Charter of 18 October 1961 http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm.

220 Community Charter of the Fundamental Social Rights of Workers of 9 December 1989. http://www.eesc.europa.eu/resources/docs/community-charter--en.pdf.

221 Barnard *Employment Law* (2006) 13.

would reduce the influence of these European instruments on certain Member States, for instance the United Kingdom.

5.3.3 THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2000), REVISED IN (2007)

The other European legal instrument to expressly provide for the right to strike is the Charter of Fundamental Rights of the European Union, adopted in 2000 and revised in 2007.

Article 28 states that:

> "Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

This Charter also emphasizes that the primary purpose of a strike should be to put pressure on the employer in the course of negotiations of employment matters.[222]

The European Courts of Human Rights (ECtHR) have also been in the forefront in trying to lead the evolution and protection of the employees' right to strike. In *UNISON v UK*,[223] the ECtHR stated that "the ability to strike represents one of the most important means by which trade unions can fulfil the function of protecting the occupational interests of their members".

Similarly, in *Wilson and Palmer v the United Kingdom*,[224] the issue was discrimination against trade union members who refused to surrender trade-union representation. The ECtHR was even clearer since it stated that the essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps, including if necessary, industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests.

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222 *Ibid.*

223 (2002) *ECHR* 2002-VI 301, European Court of Human Rights (ECtHR) 320.

224 *Wilson and Palmer v The United Kingdom* (2002) par 46. Applications nos. 30668/96, 30671/96 and 30678/96.

In the leading case of *Metrobus v Unite the Union* case,[225] the UK Court of Appeal, the court acknowledged that Article 11 did not recognise expressly either a right to collective bargaining or a right to strike. However, the court emphasised that a balance needs to be struck between the rights and interests of workers and their trade unions. An objective test needs also be applied in order to determine whether the limitations on the right to strike go too far because of their complexity, detail and rigidity, which in return deny the exercise of Article 11 rights.

In *Demir v Turkey,*[226] the case concerned an annulment of a collective agreement. In holding unanimously that there had been a breach of Article 11, the Grand Chamber expressly repudiated the jurisprudence of the 1970s, emphasising that "the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights".[227]

The ECtHR ruled in favour of the union and held that at both international and national levels the practice of contracting states in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the right to form and to join trade unions for the protection of one's interests. For the trade union it is an essential means to promote and secure the interests of its members. The annulment of the collective agreement in question constituted interference with the applicants' rights under Article 11.

A year later in *Enerji Yapi-Yol Sen v Turkey*[228] the case related to a circular from the Prime Minister's Public-Service prohibiting public-sector employees from taking part in a national one-day strike organised by the Federation of Public Sector Trade Unions "to secure the right to a collective bargaining agreement". For the first time,

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225 [2009] *IRLR* 851, CA. See also Ruth Dukes "the right to strike under UK law: Not much more than a slogan?" 2010 39 *ILJ* 82.

226 [2009] IRLR 766 ECtHR .

227 [2009] IRLR 766 ECtHR par 146.

228 Application No 68959/01, judgment dated 21 April 2009 http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2712212-2963054#{"itemid":["003-2712212-2963054"]} (Accessed 8-10-2014).

the court recognised that Article 11 protects the right to strike and that State interference with that right must be justified in accordance with Article 11(2). The court stated that the right to strike was not "absolute" and could be subject to "restrictions". However, the court found that the adoption and application of the circular did not answer a "pressing social need" and that there had been disproportionate interference with the applicant union's right to strike.

More recently the trilogy on strike law in Europe came to the court in *Karacay v Turkey,*[229] *Kaya and Seyhan v Turkey*[230] and *Çerikçiv Turkey.*[231] In these cases, public servants each participated in days of strike action called by their union. Each was subjected to a disciplinary inquiry and subsequently disciplined for leaving their workplaces without authority. Each was given a written warning "to be more attentive to the accomplishment of his/her functions and in his/her behaviour". The court found that this constituted a breach of their right of freedom of association under Article 11(1), emphasising once again that a restriction on the right to strike will infringe Article11(1). This in itself is a remarkable conclusion with wide implications, given the subject matter of the strikes, which does not appear to have been directly related to collective bargaining.

5.3.4 THE AMERICAN CONVENTION ON HUMAN RIGHTS (PACT OF SAN JOSÉ, 1969)

In America, Article 16 of the American Convention on Human Rights provides for freedom of association. The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San José, 1988) develops this freedom of association in Article 8, which closely resembles the provisions of the International Covenant on Economic, Social and Cultural Rights. It contains one provision not found in any of the other standards examined here, affirming that no one may be compelled to belong to a trade union. This makes trade-union security clauses or practices contrary to the Protocol.

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229 Application 6615/03, 27 March 2007, definitive version of the judgment on 27 June 2007 148.

230 Application 30946/04, 15 September 2009 149.

231 Application33322/07, 13 October 2010 153.

5.4 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (1981)

In the African context, the African Charter on Human and Peoples' Rights (1981) contains no provision directly on freedom of association for employers or workers. Nevertheless, it does contain significant provisions in Article 10 and 11. They respectively provide a general assertion for the protection of the right to free association provided that employers and workers abide by the law and the right to freedom of assembly.

After examining the express right to strike in European and international instruments, the next sub-section will focus on the Protection of employees' right to strike under the international labour law.

5.5 THE ABOLITION OF FORCED LABOUR CONVENTION 1957

It is suggested that the freedom from forced labour should also be accepted as one of the grounds for international and European protection of a right to strike. Since 1945, forced labour has come to be seen a means of political and social coercion and has fallen within the protection of human rights.[232]

Particularly, Article 1 of this Convention states that forced or compulsory labour should be suppressed as:

a) a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;

b) a method of mobilising and using labour for purposes of economic development;

c) a means of labour discipline;

d) a punishment for having participated in strikes; and

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[232] Lammy Betten, International Labour Law, Selected Issues (Kluwer Law and Taxation Publishers, The Netherlands 1993). http://vufind.carli.illinois.edu/vf-uiu/Record/uiu_3545085 (Accessed 12-10-2014).

e) a means of racial, social, national or religious discrimination.

As regards the protection of the right to strike, no criminal sanction is imposed anymore for the failure to perform an employment contract. However, injunctions against trade unions restraining from calling for strikes or dismissal of participants might be construed as compulsion to work.[233]

In such extent, the right to strike can be linked to the fundamental freedom from forced labour and requires International and European protection.

5.6 PROTECTION OF EMPLOYEES' RIGHT TO STRIKE UNDER THE INTERNATIONAL LABOUR LAW

The basis of international labour law is the International Labour Conventions adopted by the ILO.

However, the lack of an express mention of the right to strike in the ILO Conventions has resulted in major inconsistency in the interpretation application of this right by member States. This is probably due to this absence which has led to a number of members not implementing this right properly and adequately and giving effect or protection to this right.[234] Perhaps, due to this absence, member States have sought to unduly over limit this right to the extent that it has become practically inaccessible and not exercisable. Therefore, the ILO's supervisory bodies have had to deal with this question more often than any other subject in labour relations, and it is by means of this supervisory process that the ILO's principles have developed.

The CFA recognises strikes for the purposes of promoting and defending the interests of workers. This Committee has emphasised that the conditions that have to be fulfilled under the law in order to render a strike protected should be reasonable and in any event not such as to place a substantial limitation on the means of action

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233 Ben-Israel "International Labour Standards: The Case of Freedom to Strike" (Deventer: Kluwer, 1988) 25; Tonia Novitz, International and European Protection of the Right to Strike (OUP, New York 2003) 69.

234 http://column.global-labour-university.org/2014/04/the-right-to-strike.html.

open to trade-union organizations.[235] The Committee has further acknowledged that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests.[236]

The ILO, primarily Article 3 and 10 of the Freedom of Association and Protection of the Right to Organise Convention[237] and the Right to Organise and Collective Bargaining Convention[238] are the two leading international instruments providing protection to the right to strike. Both of these instruments were ratified by South Africa.[239] In terms of these conventions, the general principle is that "the right to strike is an intrinsic corollary of the right of association protected".[240] For that reason strike action cannot be seen in isolation from industrial relations as a whole. In fact, in most countries strikes are recognised as a legitimate weapon of trade unions in furtherance of their members' interests.[241]

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235 ILO, 1996d, par. 498.

236 Servais "ILO standards on freedom of association and their implementation" 1984 123(6) *International Labour Review* 765-781. http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09Servais.pdf (accessed 24 June 2014). See also Committee on Freedom of Association, Digest, par 522. See also Grogan "Strike notices: what must they contain?" 2013 *Employment Law Journal* 14. Grogan indicates that employees use the right to strike as a weapon to prove to the employer that resist to accept their demands could be fatal and costly than acceding to them. See also *FGWU v Minister of Safety & Security* 1999 *ILJ* 1258 (LC) 1264 par 18 and *CEPPWAWU v Metrofile (Pty) Ltd* 2004 *ILJ* 231 (LAC) 246 par 53. See also Art 8 United Nations International Covenant on Economic, Social and Cultural Rights, which recognizes the important role of a right to strike in support of economic and social interests, provided that it is exercised in conformity with the laws of the particular country, in this case South Africa.

237 Convention No 87 of 1948. Article 3 of this Convention states "organizations of workers and employers have the right to adopt their own statutes and rules, complete freedom to choose their representatives, to organize their administration and activities and to shape their programs".

238 Convention No 98 of 1949. Article 1 of this Convention indirectly discusses the right to strike. It states that "workers should use adequate protection (strike as a method of protection) against all acts of discrimination in employment, which could be detrimental to union freedom" especially if a worker is fired because he or she is member of a union or participate in union activities outside working hours.

239 South Africa was re-admitted as a member of the ILO on 26 May 1994. This followed a period of 30 years of isolation from international labour forums after the country withdrew from the ILO in 1964 as a result of political pressure. An agreement between the South African Government and the ILO was signed in Geneva on 5 June 1995 and it was ratified by Parliament on 11 October 1995. http://www.dfa.gov.za/foreign/Multilateral/inter/ilo.htm (Accessed on 12 August 2014).

240 *General Survey*, 1994, par 179. South Africa ratified both the ILO Convention No 87 of 1948 and No. 98 of 1949 on the 12 February 1996. The provisions of Convention No 87 which give a legal basis for the general principle are Arts 3, 8 and 10.

241 CFA: Fourth Report (1953), Case No. 5 (India), in *Seventh Report of the International Labour Organisation to the United Nations* (Geneva), Appendix 5, p. 181, par 27. See also International Labour Office, Freedom of Association and Collective Bargaining, General Survey by the Committee of Experts on the Application of the Conventions on Freedom of Association, the

While neither of these conventions expressly provides for a positive right to strike, the jurisprudence developed by the Committee of Experts on the application of Conventions and Recommendations[242] and the CFA recognizes the existence of the right to strike.[243]

5.7 CONDITIONS AND RESTRICTIONS FOR EXERCISING THE RIGHT TO STRIKE

The supervisory bodies consider that the right to strike is not an absolute right. It may be limited by law and under certain conditions.[244]

- A general prohibition of collective action can only be justified in the event of an acute, in particular economic, national emergency and for a limited period of time.

- The duty to prohibit a strike on the grounds of national security or public health should not lie with the Government, but with an independent body.

- Demonstrations, go-slows, work-to-rule, overtime bans and other forms of primary strike action should be permitted.

- Sympathy strikes should be permitted when the primary strike is lawful.

Right to Organise and Collective Bargaining and the Convention and Recommendation concerning rural workers organisations, Report III (Part 4B), International Labour Conference (1983) 69th Session 200 and 205.

242 Hereinafter referred to as the CEACR.

243 Creighton and Stewart *Labour Law* (2005) 533 and Gernigon, Odero and Guido, ILO *Principles concerning the right to strike*, International Labour Office, Geneva, 2000.The CFA was established in 1951. After a relatively slow beginning, the number of cases submitted to the CFA increased steadily for a number of years. Overall, the Committee has examined more than 2400 alleged breaches of the principles of freedom of association. It has also established an elaborate jurisprudence, the key features of which are set out in the ILO' Digest of decisions. It does not concern "case law" in the strict sense of the word: The examination of periodic reports on Conventions Nos. 87 and 98 also constitutes an important part of the work of the CEACR. For example, in 2007, the Committee addressed "observations" to 103 of the 147 States that had ratified Convention No. 87, plus direct requests to 55 States (including 30 that had also received an observation).

244 ILO General Survey "Freedom of association and collective bargaining" 1994 par 164. Hereinafter referred to as the General Survey 1994 par 176.

- A minimum safety service may be imposed in all cases of strike action when such minimum service is intended to ensure the safety of persons, the prevention of accidents and the safety of machinery and equipment.

- A minimum operational service may be established in the case of strikes in public-utility services and in public services of fundamental importance; employers' and workers' organisations and the public authorities should be able to participate in determining this minimum service.

It is also noted that the right to strike should be exercised in line with other fundamental rights of other citizens and employers.[245] As a consequence, any strike that fails to meet this prerequisite may be declared unprotected and may amount to unfair labour practice. Parties involved in such strike incur civil-liability and disciplinary sanctions.[246]

The ILO supervisory body has accepted that in most countries the law permits them to impose a series of preconditions to be met in order to render a strike protected. The preconditions must, however, be reasonable, and not substantially limit the means of action open to trade-union organisations.[247]

The large number of Committee decisions on this issue may be attributed to the fact that some 15 per cent of the cases submitted to it concerns the exercise of the right to strike.[248] Most recent cases before the ILO supervisory bodies relating to Canadian provinces concern the denial or restrictions of collective bargaining and of the corollary right to strike in the public sector and other services.[249]

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245 Gernigon, Odero, and Guido "ILO principles concerning the righto strike" ILO Geneva (2000) 42. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087987.pdf.

246 General Survey 1994 par 176.

247 ILO 1996d par 498. For instance, giving a prior written notice of strike to the employer before embarking on strike, the holding of a secret ballot, utilising the machinery of compulsory conciliation and arbitration if required.

248 Gernigon, Odero & Guido "ILO principles concerning the righto strike" ILO Geneva (2000)43.

249 Case no 2467 (Canada/Quebec), report no 344, ILO Official Bulletin, vol. XC, 2007, Series B, no1,461-587; cases no 2314 and no 2333 (Canada/Quebec), report no340 , ibid., vol. LXXXIX, 2006, ,Series B, no1,373- 432; case no 2405 (Canada/British Columbia), report no340, 318-338 and report no 343 , ibid.,no3, 433-457; case no 2430 (Canada/Ontario), report no343, 339-363; case no 2324(Canada/British Columbia), report no 336, vol. LXXXVIII, 2005, Series B,

Also, certain procedural and substantive requirements set by the CFA and accepted under the ILO must be met prior to strike.[250] These include:

- The obligation to give the employer a prior written notice;[251]

- the obligation to have recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes as a prior condition to declaring a strike, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage;[252]

- the obligation to observe a certain quorum and to obtain the agreement of a specified majority;[253]

- the obligation to take strike decisions by secret ballot;[254]

- the adoption of measures to comply with safety requirements and for the prevention of accidents;[255]

- the establishment of a minimum service in particular cases;[256] and

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no1, 233- 284; case no 2277(Canada/Alberta), report no 333, vol. LXXXVII, 2004, Series B, no1, 240- 277; report no 337, no2, vol.LXXXVIII, 2005, Series B, no2, 343- 360; case no 2349 (Canada/ New Foundland and Labrador), report no337, 361- 407; cases no 2343, no 2401, no2403 (Canada/Quebec),) report no 338, ibid., no3, 536-603; case no2257, report no 335, vol. LXXXVII, 2004, Series B, no3, 412- 470; case no 2305 (Canada/Ontario), report no 335, 471-512. See Langille, "Can We Rely on the ILO?" *Canadian Journal of Labour and Employment Law*, 2007, vol. no 13; Etherington "The B.C. Health Services and Support-Decision – The Constitutionalization of a Right to bargain collectively in Canada: where did it come from and where it lead?" *Comparative Labour Law and Policy Journal* 2009 30(4) 740 741.

250 International Labour Office, *Labour legislation guidelines*, Chapter 5: Substantive provisions of labour legislation the right to strike. http://www.ilo.org/public/english/dialogue/ifpdial/llg/index.htm (Accessed 9 August 2014). See also Gernigon, Odero and Guido, ILO Principles concerning the right to strike, International Labour Office, Geneva, 2000 21 and also Romeyn "The Need for Further Reform of the Law Relating to Industrial Action: striking a balance: the need for further reform of the law relating to industrial action" Research Paper no. 33 2007–08 25 June 2008 (Accessed on 27 August 2014).

251 ILO, 1996d par 502 504.

252 ILO, 1996d par 500 and 501.

253 ILO, 1996d par 506-513.

254 ILO, 1996d par 503 and 510.

255 ILO, 1996d par 554 and 555.

256 ILO, 1996d par 556-558.

- the guarantee of the freedom to work for non-strikers.[257]

As it was noted in Chapter 2, before 1994, strikes that were not in compliance with the requirement in the 1956 Act were declared illegal and as such, invited criminal sanctions. Now, with our constitutional dispensation, the right to strike is fully guaranteed to all employees in section 23 of the Constitution. However, employees who wish to embark on strike must comply with both procedural and substantive requirements as provided for under section 64 of the LRA that the strike must be considered protected. Failing which, the unprotected strike can lead to disciplinary hearings and ultimately to dismissal.

5.8 THE POSITION IN SOUTH AFRICA

The LRA, besides giving effect to the constitutional right to strike, imposes certain limitations prior to embarking on strike action. These limitations are set out in sections 64 and 65 of the LRA.

Generally section 64 of the LRA provides that the strike will only be protected if:

- the issue in dispute has been referred to a bargaining council or the Commission for Conciliation, Mediation and Arbitration (CCMA);

- a certificate stating that the dispute has been unresolved is issued or a period of 30 days has elapsed since the CCMA has received the referral of the dispute; and

- the employer has been given 48 hours' notice of the strike.

Section 65 of the LRA prohibits strike on six grounds. These includes, if:

- the person is bound by collective agreement that prohibits a strike in respect of the issue in dispute;

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257 ILO, 1996d par 586.

- an agreement requires the issue in dispute to be subjected to compulsory arbitration;

- the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of the Act, for example dismissal for misconduct, unfair discrimination and retrenchment;

- that person is engaged in an essential service, or a maintenance service;

- there is an arbitration award, a collective agreement that regulates the issue in dispute or any determination made by the Minister that regulates the issue in dispute; and

- there is any determination made in terms of the Wage Act which regulates the issue in dispute during the first year of that determination.

5.9 CONCLUSION

This chapter has noted that the right to strike forms an integral part of collective bargaining. Despite the lack of an express provision affording protection to this right under the ILO, it plays a vital role in the employer-employee relationship.

The chapter has also pointed out that most of the international instruments and regional conventions expressly protect the employees' right to strike. Importantly, the majority of the member states provide for the protection of the right to strike in their national legislation. Furthermore, the ILO's supervisory body has accepted that in most countries, the law permits them to impose a series of preconditions to be met in order to render a protected strike. South Africa is a good example as it provides for the protection of this right in the Constitution and the LRA gave effect to this right.

Perhaps, what has been at the core of many disputes in many member states is the limitation placed prior to the exercise of this right. The ILO suggests that the limitations should not be unduly and unreasonably limited. The rationale being that it

is a weapon used by the employees to force the employer to accede to their demand. Arguably, there are two reasons why it is important for the LRA to follow the same principles. Firstly, South Africa is a member State of the ILO. Secondly, section 1 of the LRA sets the primary objects of the LRA, and that is the peremptory requirement to consider international law.

The recent increase of the limitations on the right to strike has come to the spotlight in the past months. It is debatable, whether the current South African labour-legislative framework offers a sound environment for employees to exercise their constitutional right to strike need to be measured and evaluated again against the ILO's jurisprudence.

CHAPTER 6
CONCLUSION AND RECOMMENDATION

Following the transition to the new political dispensation and the dawn of democracy in South Africa several remarkable legislations were enacted. Key amongst them was the Constitution which recognises the right to strike as an important bargaining tool for trade unions. The LRA which gives effect to the Constitution and to the numerous obligations acquired by South Africa by virtue of its membership of the ILO also protects this right. The constitutionalisation of the right to strike was a major achievement for labour movement. More importantly, it contains a set of limitations to the right to strike. This marked a shift from the old labour-relations dispensation where the right was heavily limited with employees enjoying limited protection for participating in strike actions.

Arguably the current LRA depicts one of the remarkable legal transformations in the post-apartheid South Africa. It is structured in a way which brings about a wholesome change in South Africa's statutory industrial-labour system. These in turn help to level the playing field by empowering employees with numerous rights, including the right to strike.

This treatise has examined and shed some light on whether increasing the current limitations on the employees' right to strike is constitutionally and internationally justified in terms of the ILO. Throughout, this study has observed and suggested that, instead of increasing the limitation on the right to strike, the development of a proper and effective collective-bargaining structure needs to be established. It is clear that some similarities with the ILO and also disparities have become evident.

A key question posed in this treatise is whether increasing the limitation on the employees' right to strike protected by the Constitution and the LRA read with the Amendments in the Bill, creates an unnecessary hurdle to the employees wishing to strike.

In order to unlock this question, the procedural requirements, particularly those of strike-notice requirement has been discussed. The study has observed that the LRA requires only employees to issue a 48 hours' written strike notice be given to the employer prior to strike or 7 days' notice in case of the State as the employer. The LRA is silent on the content required in the notice. There have been notable developments through court judgments that have increasingly sought to limit this constitutional right even further. This has been so particularly through the increase of the content in a strike notice before employees may embark on a strike. Arguably, this severely limits employees from exercising their constitutional right to strike.

Currently, section 65(1)(c) of the LRA holds that no person may take part in a strike or a lock-out if the issue in dispute is one that a party may have referred to arbitration or to the Labour Court in terms of the LRA.

The proposed amendment to section 65(1)(c) seeks to further limit the right to strike or lock-out by excluding this right in circumstances where the issue in dispute is one that could be referred to arbitration or to the Labour Court in terms of the LRA, or in terms of any other employment law.

It is clear from court judgments that the challenge, controversy and uncertainty of the courts to maintain a balance between the constitutional right to strike and the limitations provided for in the Act continue.

As Maserumule points out that the courts and the Act itself have failed to protect the right to strike that is guaranteed by the Constitution.[258]

> "… the labour courts have failed to protect the right to strike guaranteed by s 23 of the Constitution. It will further be argued that they have, instead, been preoccupied with giving effect to the limitations of that right, as reflected in chapter IV of the Act, and, in particular, the provisions of ss 64-66 and 77. The result has been that the jurisprudence that has developed around strike law is not on how to give effect to the right to strike but how to give effect to the limitation of that right that is prescribed by the LRA."

[258] Maserumule "A perspective on developments in strike law" (2001) 22 *ILJ* 45 at 46.

The right to strike forms an integral part of collective bargaining. It is an effective and powerful bargaining tool for employees to back up their demands. International, regional, and national laws of most countries offer protection to this right. In the South African context, the importance of this right is illustrated by the fact that section 23(2)(c) of the Constitution expressly provides every employee with the right to strike.

However, like any other right in the Bill of Rights, the right to strike is not absolute. It is limited in terms of section 36 of the Constitution which is a general limitation clause for all rights in the Bill of Rights. It is also limited in terms sections 64 and 65 of the LRA. As pointed out earlier, section 64 of the LRA contains the procedural requirements for a strike, which employees should follow in order for a strike action to be protected. If the requirements are complied with, the strike will be protected against the legal consequences. However, this protection may be waived and employees dismissed if they engage in violent acts of misconduct, e.g. assault, intimidation and damage to property. Participation of unprotected strike constitutes misconduct and the employer will have a remedy for compensation for loss suffered or may apply for an interdict. The employer may even dismiss the employee as long as both substantive and procedural requirements are complied with.

On the international front, the protection of the right to strike is guaranteed under the objectives of the ILO with the view to pursuing social justice for all. The study has noted that most international and regional conventions raise this right to the pedestal of universal human rights. South Africa is a member of the ILO and therefore such it must comply with its obligation in line with the ILO. Section 39 of our Constitution in fact contains a peremptory provision that obliges courts, tribunals or forums when interpreting the Bill of Rights, to consider international law. Equally, section 3 of the LRA sets out the primary objects of the LRA, and key amongst them is the peremptory requirement to consider international law. In addition case law (*Bader Bop case*) has made it clear for the Labour Court judges and arbitrators to review their interpretation of the Act in regard to constitutionally guaranteed rights, including the right to strike. This decision will cause judges to deviate from interpreting the Act narrowly when dealing with strike law without considering the Constitution and International Conventions of the ILO.

Although this right is not expressly provided for by the ILO Conventions, the jurisprudence developed by the ICEACR and the CFA recognises the existence of the right to strike. Two Conventions which are of particular importance to South Africa are the Freedom of Association and the Protection of the Right to Organise Convention 35 (1948) and the Right to Organise and Collective Bargaining Convention (1949).

The supervisory bodies consider that the right to strike is not an absolute right. It can be exercised only under certain conditions. However, a general prohibition of this right is normally not acceptable. It may be justified in a situation of acute national crisis, but only for a limited period and to the extent necessary to meet the requirements of the situation.

But above all the ILO position remains that this right should not be unduly and unreasonably limited. The rationale being that it is almost the only weapon used by the employees to force their employer to accede to their demand. Importantly, is also because the ILO views this right as an intrinsic corollary to article 3(1) of Convention No 87, which accepts the right of the trade union and employer‘s organisation to organise activities and to formulate programmes.

For the right to strike to be well structured, the need to be a realisation that it is not a goal to be achieved at once but rather that various structures need to be put into place to facilitate the progressive protection of this right. This would go a long way in providing the employer-employee relationship, resulting in a stable working environment.

A key factor which perhaps needs to be considered and which may go an extra mile in improving laws regulating the right to strike is the modernization of the current labour law to comply with the changing needs of employees at work. Most important could be the establishment of a Code of Good Practice negotiated by labour and business at NEDLAC, which will highlight guidelines that must be followed when disputes relating to strikes arise, could be ideal. The government should also play an active role in creating a more stable collective-bargaining structure.

Strikes are indeed ill winds which blow neither the employers nor employees any good. Recently, South Africa has been confronted with a high level of violent strikes. This impacts negatively on the image of the country internationally, and also affects its economy as investors may be hesitant to do business in the country. Fortunately South Africa has one of the most progressive labour-legislation regimes in the world which makes dispute-resolution processes available to parties.

Clearly legislation in South Africa strengthens collective bargaining. This study suggests that perhaps to achieve industrial peace in South Africa employers should promptly review, negotiate and implement collective agreements entered with workers concerning improvements in wages and general working conditions. More importantly, employers must accept and respect the fact that collective bargaining is the only viable and practical means of ensuring labour peace in the workplace. Employees and their trade unions must use these processes instead of resorting to violence. Lawlessness should not be allowed to infiltrate and pollute the right to strike. Otherwise we shall continue to exercise fears over the continuous threats of strikes, and strike in the industrial sector because workers will continue to use strike as a weapon of last resort in collective bargaining.

Whether this is the point of view that will eventually prevail or whether the SCA or even the Constitutional Court will also be called upon to decide on this issue, remains to be seen. What is clear, however, is that there is still scope for considerable controversy on this point.

Trade unions have also failed in their mandate to employee. This could perhaps be due to how they are run and managed like political parties. They have failed, not only in upholding the principles of responsible trade unionism but also in educating their members about their rights and obligations in terms of the constitution, the LRA and the ILO regarding the right to strike. This is typified by what happened in the Marikana tragedy.

Perhaps impliedly, it seems it has now become acceptable in South Africa that strike action has become part of the dispute-resolution mechanism since labour-related issues cannot be addressed without strike action. This is indeed a dangerous

situation. Business and other social partners should negotiate this unprecedented development at NEDLAC.

As Brad correctly suggests, social parties need to be trained in modern good-faith negotiation and risk-analysis skills. With regard to collective bargaining, structures need to be well financed and be given sufficient and reliable economic information.

The law also needs to be developed regarding the consequences and liabilities of trade unions which fail to uphold the mandate. Two key issues can be inferred, not only from the Marikana tragedy, but also strikes in South Africa in general. It seems that some trade unions do not perform their duties correctly to ensure peaceful strikes in compliance with the LRA. Trade unions should therefore take responsibility to ensure that their members conduct themselves properly during strikes, whether protected or not.

Secondly, they may be knowledgeable of the law but deliberately choose to ignore the last-mentioned or lack the relevant knowledge, in which case training becomes vital.

Trade-union representatives should be well trained, particularly on issues relating to procedural requirements prior to a strike in terms of the LRA. Disregard by the shop stewards to liaise with the employees on these procedural issues should make them personally liable, or at least the trade union he represents should be held accountable if employees go on an unprotected strike.

Finally, in closure, the right to strike is an important tool for employees during collective bargaining and as such should not be over-limited.

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