



Economically justifying the limitation of the right to strike in the mining industry.

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Declaration

By submitting this dissertation, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly stated otherwise) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Dedication

I would like to dedicate this dissertation to my parents. This is for all the sacrifices and more.

Proud to be your son.

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Chapter 1: Introduction

1.1 Background and statement of purpose

The right of workers to withdraw their labour as a means of advancing their interests against an unwilling employer is an important feature of many industrial relations system including South Africa.¹ The right to strike has been noted to be an ‘indispensable component of a democratic society’ and a fundamental human right.² Kahn-Freund asserts that there can be no equilibrium in industrial relations without the right to strike for workers. However, where the right to strike is exercised violently it poses a danger not only to the employer, other employees, and mining operations but, also to the performance of the South African economy.

The World Health Organization (WHO) defines violence as the ‘intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community.’³ Violence often results in injury, death, psychological harm, maldevelopment, or deprivation. The WHO acknowledges that violence can be used as an instrument of power, thus expanding its conventional meaning to the intentional committing of violent acts to influence certain outcomes. Evidence suggests the existence of a strong relationship between levels of violence and potentially modifiable factors, in this dissertation the collective bargaining system in the mining sector.⁴

According to data collected and analysed in 2013 by the Department of Labour there was a rise in the number of strikes as compared to 2012.⁵ The Department recorded 114 industrial incidents in 2013, up from 99 recorded strikes in 2012. The mining industry continued to experience more working days lost, amounting to 515 971 during that year, than any other sector.⁶ Wages, bonus and other compensation disputes remains the main reason for work stoppages during the 2013 calendar year. In other reports,⁷ they indicate that 52% of the strikes in 2013 were unprotected as compared to 48% protected strikes. During the past twenty years there has been increasing incidences of labour disputes and clash of mutual

¹ L Madhuku ‘the right to strike in Southern Africa’ international Labour Review (1997) vol 136 no 4.

² Kahn- Freund and Hepple 1972 p4.

³ Krug et al., ‘World report on violence and health’, World Health Organization, 2002.

⁴ WHO / Liverpool JMU Centre for Public Health, ‘Violence Prevention: The evidence’, 2010.

⁵ Annual Industrial Action Report, 2013: Department of Labour, Strikes Statistics 2013 page 4

⁶ Stats SA (Statistics South Africa), Statistical Release Mining: Production and Sales, Technical Report. Pretoria: Stats SA, 2013.

⁷ DME (The Department of Minerals and Energy), 2014: The South African Mining Industry 2013/2014, The Department of Minerals and Energy

interests between employers and employees. According to Stats SA mining production by May 2014 had decreased by 6,5 % whilst the largest negative growth rate of -10,4 percentage points was recorded in the platinum sector.⁸ The negative impact of strike action, and concomitant low industrial production levels, affects the state of the economy and society at large. It has become apparent that when the mining industry strikes, it's not just their employers that are affected but, also society as a whole.⁹ The Marikana incident has cast the floodlights on such consequences of strike actions.

It is the purpose of this dissertation to show that violence and destructive exercise of the right to strike and picket is harming the mining sector and destabilising the South African economy. The study also aims to show that such violence and destruction of property during strikes and pickets is unlawful. This dissertation will attempt to identify the issues that result in the manifestation of violence and property destruction within the mining industry through an examination of legislation, case law, international law jurisprudence and scholarly debates around the issue of strike violence.

1.2 Rationale for the study

An investigation into the link between violent, unresolved strikes and economic downturn will seek to show how the mining industry in South Africa plays a very important part in the economy and generation of state revenue. The current disruptive industrial action in the mining sector affects government revenue, national budget allocations and the economy.¹⁰ It is the intention of this dissertation to show the link between disruptions to mining industrial production due to violent strike action and the economy. Without a vibrant economy the government would find it difficult to provide essential services such as education, health and housing. This means that the economy enables the realisation of constitutional rights. It is against this reasoning that this dissertation wishes to advance the proposition that the constitutional protection of the economy should be protected against unlawful and unreasonable strike action in the mining sector.

⁸ Statistical release P2041 Mining: Production and sales (Preliminary) May 2014

⁹ Explanatory Notes, available at <http://www.statssa.gov.za/Publications>, (accessed on 2 August 2014). 'The monthly mining production and sales survey is conducted by the Department of Mineral Resources (DMR), covering all mining establishments operating in the South African economy. The results of this survey are used to calculate the volume of mining production indices in order to estimate the gross domestic product (GDP) and its components, which in turn are used to develop and monitor government policy.'

¹⁰ The economy is the systematic organisation of production, exchange and consumption of goods and services in society.

The focus of this study is to investigate why the right to strike and picket has degenerated into violence and destruction in the mining industry. This will be established through an analysis of the current law relating to strikes in order to consider whether the current system is unwittingly creating favourable conditions for violence and prolonged industrial action.

The right to strike is not absolute, it is subjected to both the procedural and substantive requirements of the Labour Relations Act of 1995 and the constitutional limitation clause. Despite the presence of progressive legislative measures to regulate the right to strike, South Africa still has the highest strike rate in the world.¹¹ This dissertation will conduct an analysis into whether the current legal position can be altered to prevent abuse and consequently to regulate the exercise of the right to strike more productively.

1.3 Research problems and objectives

The research will establish the context in the mining industry, where strikes have become increasingly violent and destructive. This will be accomplished through statistical evidence that will show that the exercise of the right to strike and picket is becoming more frequent and a cause of great legal concern. The dissertation will attempt to establish a link between the strikes in the mining sector and the economy. This will be done through an analysis of the contribution of the mining sector to the economy of the country. This dissertation will then identify the issues associated with the exercise of the right to strike in the mining industry. Such issues will focus on the issue of violence, the collective bargaining system in the mining industry, the nature of the mining industry, the role of trade unions and transformation. It is the intention of this dissertation to advocate for the justifiable limitation of the right to strike when it endangers the existence of mining operations and the performance of the economy.

The dissertation will outline the legal principles, jurisprudence and framework that recognise and regulate the right to strike and picket, in order to identify the true nature of the exercise of the right to strike and picket. More importantly such diagnosis of the law will assist in the proffering of recommendations, if any, aimed at reducing criminality and unreasonable work stoppages in the mining sector.

In an attempt to address the issues that have resulted in the exercise of the right to strike becoming violent, this dissertation will conduct a comparative analysis to establish how other

¹¹ M Brassey 'Fixing the Laws that Govern the Labour Market' (2012) 33 *ILJ* 1.

governments have dealt with the problems associated with unlawful strikes and pickets. The comparators to be used in this dissertation will primarily be the United Kingdom (UK) under the Margaret Thatcher administration and Botswana. These countries have been chosen because of their respective intentions to protect their economy from the effects of unnecessary strike action.

In conclusion this dissertation will attempt to proffer solutions that can address the systemic problems besetting the collective bargaining system in the mining sector.

1.4 Literature Review

According to Hartford¹² the problems in the mining industry has resulted in increasingly negative mining investor sentiment and the loss of billions of rands in production and investment. However, Hartford suggests that the problems encountered can be attributed to the lack of transformation of the mining industry which continues to exploit the most vulnerable employees.

Hartford seeks to investigate and identify the underlying causes that have resulted in the decline of collective bargaining structures in the mining sector. He focuses on the Marikana strike as a key example to illustrate the problems in the mining collective bargaining system, arguing that at the ‘heart of the economic and social crisis in the mining sector is the migrant labour system, which has remained unaltered in post-apartheid South Africa.’¹³ It is this system, Hartford argues, that should be transformed to ensure the viability of mining in terms of future performance, productivity, job creation and as an attractive investment destination.

It is the opinion of Hartford that the South African transformation conversation has been ‘caught up in the narrow confines of employment equity plans for management and the inclusion of previously disadvantaged people on the boards of corporate SA.’¹⁴ Whilst this aspect of transformation may have some relevance, it has failed dismally to confront the real issues and concerns of underground employees. The gross poverty and inequality in democratic South Africa has provided the social, political and economic context to heightened expectations of wage increases and decent work. The plight of these underground

¹² G Hartford ‘The mining industry strike wave: what are the causes and what are the solutions?’ <http://groundup.org.za/content/mining-industry-strike-wave-what-are-causes-and-what-are-solutions> (accessed 20 September 2014).

¹³ Ibid.

¹⁴ Hartford (note 12 above).

employees is made unbearable through financial and work cycles that arise as a result of the ‘apartheid migrant labour system.’ These problems are then reflected in violent strike action. It is Hartford’s opinion that the institutions of collective bargaining, both in the form of the employer and the union structures and processes are found wanting in their ability to arrest and address the root causes of the social crisis.

The article by Hartford is important in the identification of the underlying causes of violence in the mining sector with particular reference to the platinum belt and the Marikana strike. However while Hartford focuses on the identification of the problems leading to industrial unrest, this dissertation will focus on the adverse effects violent strikes and pickets on the productivity of the mining sector and its contribution to the performance of the economy. This dissertation will adopt a dual approach to addressing strike violence and the effects of strikes on the performance of the economy. Firstly in keeping with Hartford’s suggestions, the dissertation supports the need to address the causes of strikes in the mining industry and the enforcement of the law by the police and the judiciary to prevent unlawfulness during strikes. Secondly it advocates the limitation of the right to strike, when it endangers the existence of mining operations and its contribution to the performance of the economy.

This dissertation will also draw on the opinion of scholars such as Freund and Hepple that have acknowledged the considerable variation of laws that govern industrial disputes attributable to the distinct political system of that state.¹⁵ This distinction is important and becomes essential in the formulation of reforms and solutions in limiting the right to strike, by a comparative analysis of how other countries have dealt with this right. Hanami¹⁶ conducts a comparative study of many geographically and politically different states. This is in an attempt to show that the involvement of the state or the implementation of an effective system can assist in the creation of an environment where the economy and the exercise of the right to strike can cooperatively exist.

It is the aim of this dissertation to show that the possible solutions to the issues of violence and limiting the effects of mining strikes on the performance of the economy requires more than just labour reforms but the involvement of government and political will. This perspective is acknowledged by Ramokgopa¹⁷ who brings in a theoretical perspective to the

¹⁵ JM Servais, *International Labour Law* 2 ed (2009) p57.

¹⁶ T Hanami, R Blanpain *Industrial Conflict Resolution in Market Economies A study of Australia, the Federal Republic of Germany, Italy, Japan and the USA* 2 ed (1989) p152.

¹⁷ K Ramokgopa ‘Political economy of development, strategy and sustainable development’ 2013 *JPA* 48.

role of government and policing in society and the economy. Ramokgopa refers to the political theories of Karl Marx and Adam Smith and the importance of understanding the political economy and policy development. Ramokgopa makes it clear that the needs of the people must be identified through open and transparent processes and the balancing of such interests against resources. The importance of Ramokgopa's article is in establishing an ideological Marxist approach to justify the involvement of government in the exercise of the right to strike. An ideological perspective will help shed light on the basics of representation of the working class and their voice being heard not only through leadership but, also through election of leaders through the ballot box.

This dissertation will conduct a comparative analysis of how other foreign jurisdictions and governments have dealt with the issue of industrial unrest that affects the economy and effectiveness of government policies. Clara Bartlett¹⁸ gives a scholarly view of the political power struggle between the British Prime Minister Margaret Thatcher and the trade unions during the 1980s. The article gives a chronological overview of legislation that was enacted specifically to curb the influence of mine trade unions in Britain on the economy at the time. The article not only serves as proof that trade unions can be controlled to the benefit of the public good but, how decisive political will and legislative reforms can effectively reduce the disastrous effects of industrial action on productivity. Despite the article being solely based on British politics and legislation it is useful in this dissertation as a comparison to show the possible role of government in curbing the effects of strike action on the economy.

1.5 Conceptual / theoretical framework

Capitalism is an 'economic system in which the means of production are largely or entirely privately owned and operated for profit.'¹⁹ Some of the attributes of this mode of production includes 'capital accumulation, competitive markets and wage labour.'²⁰ The South African mines are operated along this economic model. Marxists supports strikes by workers, holding the view that mining workers are exploited by capitalistic institutions. According to Marxists the only hope for workers is to strike or revolt so that they can have better working conditions and wages.²¹

¹⁸ C Bartlett 'Margaret Thatcher and British Trade Unions' 2012.

¹⁹ F Stilwell *Political Economy: the Contest of Economic Ideas*. First Edition 2002.

²⁰ Ibid.

²¹ R Hessen 'Capitalism' available at <http://www.econlib.org/library/Enc/Capitalism.html> (accessed 2 November 2014).

South Africa is a constitutional democracy that protects labour rights such as the right to strike. The rights entrenched in the Constitution are not inalienable and can be subjected to limitations in accordance with section 36. The violent and destructive exercise of the right to strike is adversely affecting the productivity and viability of mining operations in the country. As a result, the mining contribution to the performance of the economy is affected, thus endangering the economic wellbeing of everyone with interests in South Africa.

1.6 Research methodology

The dissertation will be based on desktop research. The research will focus on the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), the Labour Relations Act (hereinafter LRA), international instruments such as the International Labour Organisation (hereinafter ILO), case law and a comparative analysis of the interpretation of this right in other jurisdictions such as the United Kingdom and Botswana. Arguments in this dissertation will be forwarded in support of the constitutional protection of the economy against destructive and counterproductive forces. There will be an attempt to understand why the destructive and violent exercise of the right to strike has been frequent in a country which has comprehensive labour laws. This will be through an examination of government policies and legislation that have been passed to this effect.

1.7 Research Outline

This chapter has provided an explanation of the reasons for selection of this dissertation, together with the background of the research. The chapter has also briefly explained the most important terms and phrases to be used in the research and an examination of the origins of the right to strike and its evolution in South Africa.

Chapter 2 will provide the central focus of this dissertation. There will be a discussion of the significance of the mining industry and the economy of South Africa including an examination of the correlation between the right to strike and productivity in the mining industry. This will be attained through review of the scholarly articles and statistical data of the mining industry with relation to the economy. The aim of the chapter will be to show the significance of the mining industry in the economy and in the implementation of government policies.

In chapter 3 an examination of the laws that regulate and recognise the right to strike and picket action will be undertaken. This will be achieved through an analysis of the

Constitution, international instruments, conventions and obligations, the LRA and foreign laws. How the courts have interpreted the right to strike and reconciled the problem of violence will be discussed in chapter 4. This will be achieved through an analysis of judicial decisions dealing with violent strikes.

Chapter 5 will conduct a comparative analysis of how other foreign jurisdictions have dealt with and tried to curb the right to strike in the interests of economic stability. This analysis will be confined to the UK under the Margaret Thatcher administration and Botswana. The aim of this chapter is to highlight the measures that have been taken by these governments to address the effects of strike and picket action on their respective economies. Such a discussion is of the importance in providing precedence for the South African economy and mining industry which is facing the effects of unlawful strikes and pickets.

In chapter 6 the dissertation will dispel possible misconceptions that have been perpetuated and resulted in the prospective decline of the mining industry and performance of the economy and recommendations will be made in order to proffer feasible solutions to the labour unrest in the mining sector. Concluding arguments for the justification of limiting the right to strike based on economic reasons will be finalised.

Chapter 2: The South African mining industrial context

2.1 Introduction

This chapter will highlight the nature and extent of mining operations in South Africa. This will be done to show the significance of the mining industry to the economy of the country and how the current exercise of the right to strike and picket is economically damaging and disrupting the sector. The chapter will furthermore discuss the violent Marikana strike²² and the causal factors that resulted in the subsequent Marikana shootings. It will be argued that violence resulted in the Marikana strike and that violence continues to inspire many protected and unprotected strikes and pickets throughout the mining industry.

2.2 The Mining industry, companies and the extent of their operations

The employers at mines in South Africa are generally large multinational companies such as Anglo American, Rio Tinto, De Beers, Implats and Lonmin amongst many others. These foreign capitalistic companies apply for mining licences and in turn extract minerals in search of profit.²³ These mining companies have been in operation since the pre-apartheid years and they have remained largely unaffected by government policies.²⁴

2.2.1 Platinum mining

The Merensky Reef, stretches from the southern part of Zimbabwe to the platinum mining areas of Rustenburg and Pretoria in South Africa.²⁵ This platinum mineral rich area plays host to companies such as the Rustenburg Platinum Mines, Bafokeng Rasimone Platinum Mines, Impala and Amplats. This is the locale of the Marikana shootings.

South Africa possesses approximately '80% of the world's platinum group metal reserves.'²⁶ Along with Russia, platinum mining in South Africa supplies the total world demand of 90%

²² 'Strikes come in two varieties – protected and unprotected. Protected strikes are legal and occur when employees follow all the procedures laid out in the LRA to have their demands met. Employees who take part in protected strikes may not be dismissed, sued or considered to be in breach of their employee contracts.' 'Unprotected strikes are those that occur when employees do not follow the procedures of the LRA, and employees who participate in them are not protected from dismissal. See also Israelstam I, *Protesting could mean the end of your career*, The South African Labour Guide, available at <http://www.labourguide.co.za/general/protestingcould-mean-the-end-of-your-career-538> (accessed 2 October 2014).

²³ L Kearney 'Mining and minerals in South Africa', SouthAfrica.info, 9 August 2012.

²⁴ 'South Africa', CIA World Factbook, 26 March 2013.

²⁵ 'The story of South Africa: Mining', BBC World Service, 2013.

²⁶ PWC, 'SA Mine, Review of Trends in the South African mining industry', 2011, available at http://www.pwc.co.za/en_ZA/za/assets/pdf/sa-mining-2012.pdf (accessed 20 May 2013).

of platinum of approximately 130 tonnes per year.²⁷ The future of platinum mining is bright with various promising projects in the industry such as the establishment of the R7.1 billion Twickenham Expansion Project in Polokwane. This project alone will realise production of 250 000 tonnes per month of pure platinum.²⁸

2.2.2 Gold mining

Gold is also an important mineral mined in South Africa. Factually South Africa accounts for the world's largest gold reef deposits.²⁹ 'Over 50% of all gold reserves found in South Africa are located in the Witwatersrand area.'³⁰ In 2007 the gold industry billed 'R49 billion in foreign currency earnings.'³¹

As a result, gold mining continues to be a major contributor to the economy in South Africa. It is also a major economic force in the establishment of the nation's infrastructure.³² Hard rock mining is used as the most effective method of gold mining in South Africa. This is because of the nature of the gold reserves, which are typically fully encased in rocks deep underground. The introduction of industrial air cooling and air quality control systems has seen gold mines reach staggering depths of 3 900 metres underground, thus, highlighting the engineering feats being attained in mine exploration.³³

The Johannesburg Burnstone Mine which was recently opened has an estimated value of ZAR 3, 5 billion. This is on the basis that gold mining operations in South Africa typically have estimated lifespans of 25 years.³⁴ There are also other mining explorations such as the Doornkop South Reef Mine. This mine has the estimated value of R1 billion in which it is expected to produce 82.8 tonnes of gold within a 20 year period.³⁵ The emergence of such new projects amongst the whole fray of existing mines illustrates that gold mining in South Africa is still a viable and lucrative industry. As a result, companies like Anglo American,

²⁷ Chamber of Mines, 2014. Facts and Figures. Unpublished document.

²⁸ 'platinum mining in South Africa' available at <http://www.projects iq.co.za/platinum-mining-in-south-africa.htm> (accessed on 20 August 2014)

²⁹ P Leon 'Whither the South African mining industry?', *Journal of Energy and Natural Resources Law*, 30, 1, 2012, pp. 1–24.

³⁰ A Wilson, F McMahon & K Green, *Survey of Mining Companies 2012/2013*. Vancouver: Fraser Institute, 2013.

³¹ O Gajigo, E Mutambatsere, G Ndiaye (2012) *Gold Mining in Africa: Maximising economic returns for countries*. African Development Bank, Working paper No. 147.

³² 'gold mining in South Africa' available at <http://www.projects iq.co.za/gold-mining-in-south-africa.htm> (accessed on 20 August 2014)

³³ Goldfields, 2007: Mining Charter Table: Goldfields Annual Report 2007, www.goldfields.co.za/company/mining.

³⁴ 'gold mining in South Africa' (note 29 above).

³⁵ Ibid.

Harmony Gold and BHP Billiton amongst many others are deeply entrenched in this multi-billion rand, gold mining industry of South Africa.³⁶

2.2.3 Diamond mining

South Africa is one of the ‘most significant diamond producing countries in the world.’³⁷ In 2005 the South African diamond industry produced ‘approximately 15 8000 000 carats, about 3, 2 tonnes.’³⁸ The diamond industry is controlled by the De Beers Company. Other companies also involved with diamond mining in South Africa include Rio Tinto and BHP Billiton, along with other smaller firms.³⁹ De Beers Company has continued to play a pivotal role in the diamond trade and mining industry through its operation and control of nine large-scale diamond mining operations.⁴⁰

2.2.4 Coal mining

Coal mining in South Africa contributes significantly in the country’s economy through its contribution of nearly three quarters of Eskom’s fuel supply and its supplies of this fuel to other mining sectors.⁴¹ The industry is also ‘responsible for supplying the coal-to-liquids (CTL) industry, developed by the South African fuel company, SASOL, who produces around 35% of the country’s liquid fuel.’⁴²

South African coal mining is found in the Highveld, where approximately 60% of the country’s deposits are extracted from the Witbank surrounding areas. Companies such as Kumba Resources, BHP Billiton (Ingwe Collieries), Sasol Mining, Eyesizwe and Anglo American Thermal Coal are noted as the key active coal players in the coal mining sector of South Africa.⁴³

³⁶ Statistics South Africa (2010) Mineral Accounts for South Africa: 1980-2007. Pretoria: Statistics South Africa.

³⁷ ‘Diamond mining in South Africa’ available at <http://www.projects iq.co.za/diamond-mining-in-south-africa.htm> (accessed on 20 August 2014)

³⁸ Ibid .

³⁹ ‘Mining in South Africa’ available at <http://www.projects iq.co.za/mining-in-south-africa.htm> (accessed on 20 August 2014)

⁴⁰ Statistics South Africa (2010) Mineral Accounts for South Africa: 1980-2007. Pretoria: Statistics South Africa.

⁴¹ K Hall ‘South African mining threatened by electricity shortage’, Mining.com, 24 March 2013.

⁴² ‘Coal mining in South Africa’ available at <http://www.projects iq.co.za/coal-mining-in-south-africa.htm> (accessed on 20 August 2014)

⁴³ Knight Frank & Citi Private Bank, The Wealth Report: A Global Perspective on Prime Property and Wealth. London: Think, 2011.

The coal mining industry has key projects underway of great economic value. The Mafube Colliery project is projected to produce ‘1.1 million tonnes of coal per year for supply to the Arnot Power Station in Mpumalanga, making it worth ZAR 16 billion over its lifespan.’⁴⁴ These statistics make this coal mine one of South Africa’s largest coal mining exploration to date. The New Largo Project is the second largest operation in South Africa’s coal industry valued at 11 billion rands will produce nearly ‘15 million tonnes of coal per year for supply to the Kusile Power Station’ in eMalahleni.⁴⁵

2.3 Importance of mining operations on South African economy

It is evident from the sheer volume of mining operations, and investments involved, that the mining sector has a lot to lose from violent industrial action.⁴⁶ It is in the present and prospective foreign mining corporation’s best interests that labour matters be resolved amicably without adversely disrupting production.⁴⁷

There are economically significant mining operations underway in South Africa. The mining sector currently contributes about ‘20% to South Africa’s GDP, of which about 50% is contributed directly’. Due to the labour intensive nature of mining, the industry is amongst the country’s major employers. The mining sector employs over a one million people in mining-related employment. The industry has employed about 3% of the country’s economically active population. Moreover, ‘during the period 2002–2011, almost 100 000 new jobs were created in the sector.’⁴⁸ The industry also boasts a total annual income in excess of R330 billion.⁴⁹ In 2011 the sector contributed about ZAR21 billion in taxes to the government, accounting for about 15% of the corporate tax paid in 2011. In the same year, Anglo American contributed ‘USD2.5 billion in taxes and Impala Platinum paid ZAR1.9 billion in taxes and royalties.’⁵⁰ It is also well documented that the industry is the largest

⁴⁴ ‘Coal mines in South Africa’ (note 42 above).

⁴⁵ ‘Coal mines in South Africa’ (note 42 above).

⁴⁶ NL Baartjes, KG Gounden ‘Causes of Mine Decline in South Africa’, (2012), Paper presented at the International Mining History Congress, 17-20 April 2012, Johannesburg, available at <http://www.imhc.co.za/assets/pdf/papers/Rural%20Mineral%20> (accessed 2 November 2014)

⁴⁷ A England ‘S African unrest puts off foreign investors’, *Financial Times*, 4 October 2012.

⁴⁸ National Treasury (2012) *Budget Review 2012*. Republic of South Africa. Available at <http://www.treasury.gov.za/documents/national%20budget/2012/review/FullReview.pdf> (accessed 25 August 2014).

⁴⁹ Republic of South Africa (2012) *South Africa’s Mineral Industry 2011/2012*. Department of Mineral Resources, Republic of South Africa

⁵⁰ In 2011, Anglo American contributed USD2.5 billion in taxes and Impala Platinum paid ZAR1.9 billion in taxes and royalties (*Financial Mail*, October 12–17 2012).

contributor by value to black economic empowerment in the economy.⁵¹ While the government's Black Economic Empowerment (BEE) programme was formulated to require mining companies to offer more opportunities to black South Africans,⁵² it is quite evident that the mining companies themselves have fallen short of adhering to the standards laid out by the programme.⁵³

In conclusion it is clear that the mining industry as a whole contributes significantly to the economy despite its lack of BEE transformation. The industry pays taxes, royalties and also engages in social projects amongst many others. It is also of importance to note that the mining sector employs a lot of people, and creates indirect employment for other services reliant on the mining industry.

2.4 The significance of mining in the politics and governance of South Africa

South Africa has been governed by the African National Congress since the constitutional dispensation. The ruling party is in a tripartite alliance with COSATU and the South African Socialist Party.⁵⁴ This alliance makes the ANC led government a pro worker political party with socialist and contrasting capitalistic principles.⁵⁵ In the mining sector labour unions hold a large membership base, of at least 78% of workers.⁵⁶ The ANC led government is not only the revolutionary party that brought an end to apartheid but it is the party that represents the black majority who are also the poor and the historically disadvantaged members of society. As a result, the government has invested a lot in public infrastructure, social grants and numerous government policies aimed at bettering the lives of the poor black majority who suffered under the apartheid.⁵⁷

⁵¹ Department of Mineral and Energy (DME), 2002, Broad-Based Economic Empowerment Charter for the South African Mining Industry. Unpublished document.

⁵² R Baxter, 'Mining in Africa is not a 'sunset industry'', Business Day, 9 May 2013, <http://www.bdlive.co.za/opinion/2013/05/09/mining-in-africa-is-not-a-sunset-industry> (accessed 3 October 2014).

⁵³ R Harvey 'Marikana as a Tipping Point? The Political Economy of Labour Tensions in South Africa's Mining Industry and How Best to Resolve Them' South African Institute of International Affairs p33

⁵⁴ 'Tripartite Alliance', <http://www.cosatu.org.za>.

⁵⁵ G Mantashe, 'Statement on the developments in the Mining Industry' 5 October 2012 <http://www.anc.org.za/show.php?id=9904> (accessed on 20 August 2014).

⁵⁶ L Sharp 'Cosatu and its unions slide towards a crisis of relevance', Business Day Live, 7 October 2013.

⁵⁷ D R Donovan, S Lukhele 'Fixing mining industry woes is essential for South Africa's domestic stability' August 2013 Edition Africa Conflict Monthly Monitor.

The tripartite alliance has led to uncertainty in the government policies regarding labour.⁵⁸⁵⁹ A visible ideological difference was noted when the general secretary of NUMSA, Irvin Jim, threatened to boycott support for the ANC if the National Development Plan (NDP) was not removed from the ANC's election manifesto.⁶⁰ The National Development Plan⁶¹ is a set of policies aimed at national development through privatisation and linking worker compensation to output. This stipulation clearly counters the attempts of COSATU to achieve uniformity in worker compensation as one way to reduce the gap between the rich and the poor that fuels so much social conflict in South Africa today.

Government's main source of income is through revenue generated from taxes and service delivery. It is as a result of this symbiotic relationship that the revenue generated from the mining industry is essential to the sustainability of government services. The SA economy 'remains highly dependent on the export of minerals and metals.'⁶² The sector accounts for at least one-third of the market capitalisation of the Johannesburg Stock Exchange, and continues to act as a magnet for foreign investment in the country.⁶³ Reduced levels of mining production caused by 'strike action threaten the trade account of the balance of payments and justify a weaker rand.'⁶⁴ 'The weaker rand then implies more inflation that makes it harder for the Reserve Bank to offer relief to the economy in the form of lower interest rates.'⁶⁵ The absence of low interest rates will result in a widening trade deficit.⁶⁶ It is this concern that becomes a general public concern and government's problem. Thus, this dissertation submits that it is the duty of government to formulate policies and pass legislation that will proffer a solution to the ailing mining industry and its collective bargaining system that is characterised by violent strikes.

⁵⁸ M De Waal, 'The ANC's deadly trinity: Politics, power, patronage', Daily Maverick, 5 December 2012, available at <http://www.dailymaverick.co.za/article/2012-12-05-the-ancs-deadly-trinitypolitics-power-patronage/#.UberVRYrzwv>. (accessed 5 June 2014).

⁵⁹ M Budeli 'Trade unions and politics: It's a love-hate relationship', UNISA, 3 August 2012.

⁶⁰ M Letsoalo, C Molele 'NUMSA issues ANC with NDP ultimatum', The Mail & Guardian, 6 September 2013.

⁶¹ NPC (National Planning Commission), National Development Plan: Vision 2030, 2012, available at <http://www.npconline.co.za/MediaLib/Downloads/Downloads/NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf>, p. 146, (accessed 28 August 2014).

⁶² C McPherson 'State participation in the natural resources sectors – evolution, issues, and outlook', (2010) in P Daniel, M Keen, and C McPherson (eds.) *The Taxation of Petroleum and Minerals: Principles, Problems and Practice*, p263-288.

⁶³ Donovan (note 57 above).

⁶⁴ Donovan (note 57 above).

⁶⁵ Donovan (note 57 above).

⁶⁶ M Schutte, S Lukhele 'The real toll of South Africa's labour aggressiveness Regular and prolonged violent strikes characterise endless labour strife' November 2013 Edition Africa Conflict Monthly Monitor.

The statistics released by the chamber of mines show not only the economic value of the mining sector but, the political mileage the industry has in terms of funding government and society.

- The creation of one million jobs, 500 000 direct and 500 000 indirect.
- The industry accounting for 13.2% of corporate tax receipts, R17-billion in 2010 and R6-billion in royalties.
- R13-billion on interest is repaid to the banks. R78.4-billion on salaries and wages for mine employees.⁶⁷
- The industry also accounts for 50% of the volume of Transnet's, a government parastatal, rail and ports transportation.
- 94% of electricity generation is through coal powered plants.
- 37% of the country's liquid fuels are also derived from coal.⁶⁸

The above mentioned statistics show the significance of the mining industry to the realisation of government policies. The government seeks to reduce unemployment, provide and preserve jobs.⁶⁹ But, the success of government policies lies not only in the government's willingness to implement but, also in the cooperation of relevant stake holders. It is against this backdrop that the mining industry is not just important to the economy but also crucial to the politics of the country.⁷⁰ Thus, less government tax revenue to fund service delivery and fewer jobs to address unemployment and poverty.

This uncertainty and potential risk of labour unrest and mine company migration has led to an investigation by the ANC into the possibility of nationalisation of the mining industry.⁷¹ In June 2012 an African National Conference symposium adopted an open-ended resolution,

⁶⁷ 'Annual Industrial Action Report 2013' available at <http://www.labour.gov.za/DOL/downloads/documents/annual-reports/industrial-action-annual-report/2013/industrialactionreport2013.pdf> (accessed 16 September 2014).

⁶⁸ Ibid.

⁶⁹ Times Live 'Illegal and violent strikes hurt South Africa: government' (2012), available at <http://www.timeslive.co.za/local/2012/10/11/illegal-and-violentstrikes-hurt-south-africa-government> [accessed 23 June 2014].

⁷⁰ G Mantashe, 'Statement on the developments in the Mining Industry' 5 October 2012 <http://www.anc.org.za/show.php?id=9904> (accessed on 20 August 2014).

⁷¹ D Maylie, 'Mining debate rattles South Africa', The Wall Street Journal, 15 May 2013.

deeming ‘strategic nationalisation.’⁷² This strategic resolution calls upon government to identify key strategic sectors of the economy and to form strategic partnership where necessary or simply declare such sectors as ‘strategic’. The mining sector and the agricultural sector are such identifiable areas that have been identified. This resolution was greatly supported by six of the nine provincial representatives including the ANC Youth League.⁷³ The immediate nationalisation of the industry poses a significant worry for investors. This is largely due to the fact that government will not be able to fairly compensate such mining companies. This determination was made through an ANC commissioned report by the State Intervention in the Minerals Sector (SIMS).⁷⁴ The report unequivocally stated ‘that outright nationalism of mining concessions is totally unaffordable if granted by full market value compensation.’⁷⁵ Thus, leaving a prospect that mines could be seized without compensation. This option was also noted by the SIMS report as being unconstitutional.⁷⁶

2.5 Strike violence Statistics

In the language of the South African President, we need a prosperous economy where the large majority of people can contribute but, ‘in no way can we have conflict that destroys the economy...’.⁷⁷

Despite the economic advantages and political pleas for peaceful dispute resolution, data collected and analysed in 2013 by the Department of Labour indicates a continuous rise in the number of strikes as from 2002. The Labour department recorded 114 industrial incidents in 2013 up from 99 recorded strikes in 2012. The mining industry continued to experience more working days lost amounting to 515 971 during that year than any other sector. Wages, bonus and other compensation disputes remains the main reason for work stoppages during the 2013 calendar year.⁷⁸ In other reports, they indicate that 52% of the strikes in 2013 were

⁷² C Paton ‘ANC commission backs ‘strategic nationalisation’ at Mangaung’ 19 December 2012 <http://www.bdlive.co.za/business/mining/2012/12/19/anc-commission-backs-strategic-nationalisation-at-mangaung> (accessed 9 September 2014).

⁷³ <http://www.citypress.co.za/business/government-considers-measure-prevent-strikes/> Dewald van Rensburg 21 January 2014 (accessed on 20 August 2014).

⁷⁴ P Leon, ‘South African mining industry at the cross roads’, Address to African Mining Network, 14 July 2012.

⁷⁵ Ibid.

⁷⁶ Maximising the Developmental Impact of the People’s Mineral Assets: STATE INTERVENTION IN THE MINERALS SECTOR (SIMS) POLICY DISCUSSION DOCUMENT POLICY DISCUSSION DOCUMENT (March 2012).

⁷⁷ Annual Industrial Action Report, 2013: (note 5 above) page 45.

⁷⁸ Annual Industrial Action Report, 2013: (note 5 above) page 4.

unprotected as compared to 48% protected strikes.⁷⁹ These statistics show how there is a distinct increase in the number of unprotected strikes.

This dissertation attempts to indicate that the current exercise of the right to strike and picketing is adversely impacting the mining industry because of violence. This is because the violence perpetrated during the strikes does not address the core problems affecting the industry and they cannot be resolved by the employers alone. Violence in the mining sector affects not only the mining corporations but also the economy and the government. Thus, the violent strikes need to be addressed through a pragmatic approach that incorporates legislative, economic, social and political intervention.

In 2012, a wave of violent, wildcat strikes rooted in the ‘turf war’ between AMCU and the National Union of Mineworkers (NUM) cost the platinum and gold producers more than R16-billion that year alone.⁸⁰ Terence Goodlace, CEO of Impala Platinum said that the strike in the platinum sector will have ‘absolutely dire’ consequences for the industry.⁸¹ Amplats has subsequently closed some of its mining operations and is selling those they have deemed unprofitable, in a move that will cost 14000 workers their jobs.⁸² The dire consequences in most cases include retrenchments of miners and shutting down of operations due to lack of operational capacity.⁸³ The consequent result is that the lowly paid rock drill operators without any other skills become unemployed and they swell the current unemployment rate which is at 25,5%.⁸⁴

2.6 Marikana Strike

The Marikana event is the biggest incident of police brutality since the advent of democracy and reflects poorly on the state of labour relations in South Africa. The unrest at the Lonmin mine began on 10th of August 2012, when more than 3,000 workers walked off the job over

⁷⁹ Stats SA (note 6 above).

⁸⁰ T Kermeliotis ‘New violence clouds future for South African mines’, CNN, 21 February 2013.

⁸¹ ‘South Africa mining to shed jobs in troubled times’, Reuters, 6 February 2013.

⁸² A Mbatha ‘South Africa risks losing 145,500 mine jobs by 2015, Nomura says’, Bloomberg Business Week, 18 June 2013.

⁸³ Amplats sale of its Rustenburg mines.

⁸⁴ G Jones ‘Mining: Starting again’, Financial Mail, 23 May 2013, available at <http://www.fm.co.za/fm/Features/2013/05/23/starting-again> (accessed 3 June 2014).

pay demands.⁸⁵ The management called this withdrawal of labour an illegal strike as there was a wage agreement which was signed and accepted by the majority union NUM.⁸⁶

The collective bargaining structures in place at Lonmin were not sufficient to facilitate wage negotiations.⁸⁷ The insistence of Lonmin management to uphold these structures was problematic as the majority union, the National Union of Mineworkers (NUM), was alleged to have lost the confidence of many mineworkers especially the rock drill operators. On 15th of August 2012, Minister of Mineral Resources, Susan Shabangu expressed her concern about the violent protests at Marikana.⁸⁸ The discussions between the striking mineworkers and the police were unsuccessful after the workers refused to disarm themselves. On the 16th of August 2012, the South African Police Service opened fire on striking mineworkers of Lonmin platinum mine at Marikana.⁸⁹ The fateful event left thirty four mineworkers dead, seventy eight wounded and at least two hundred and fifty picketers were arrested.⁹⁰ The protesting mineworkers were demanding a wage increase amongst many other demands.

The events leading up to the shootings were marked by reports and acts of intimidation and assaults between the rivalling trade union members.⁹¹ Ten people, amongst them two security guards and two policemen, were killed as the violence escalated between the rivalling National Union of Mineworkers (NUM) and the Association of Mineworkers and Construction Union (AMCU). The South African Police Service (SAPS) authorities claimed its officers were defending themselves,⁹² maintaining that they had been under attack by a group of mineworkers armed with dangerous weapons. According to the SAPS the picketers

⁸⁵ P De Wet 'Malema at Marikana: 'Many will die', (2012), from Mail & Guardian, 18 August, available at www.mg.co.za [Accessed: 7 August 2014].

⁸⁶ G Nicolaides 'Marikana: 'Reopening wage negotiations would've been illegal' <http://ewn.co.za/2014/09/15/Farlam-Commission-of-Inquiry-Lonmin-refused-to-reopen-negotiations> (accessed 15 October 2014).

⁸⁷ S Evans 'Key lessons for Lonmin as Marikana commission wraps up' 16 Sep 2014 <http://mg.co.za/article/2014-09-16-key-lessons-for-lonmin-as-marikana-commission-wraps-up> (accessed 20 September 2014).

⁸⁸ 'Marikana Massacre 16 August 2012' available at <http://www.sahistory.org.za/article/marikana-massacre-16-august-2012> (accessed 10 September 2014).

⁸⁹ 'Marikana Massacre 16 August 2012' available at <http://www.sahistory.org.za/article/marikana-massacre-16-august-2012> (accessed 10 September 2014).

⁹⁰ IOL, 'Lonmin massacre: a timeline' (2012), from Independent Online SA, 17 August, available at <http://www.iol.co.za> [Accessed: 13 August 2014].

⁹¹ News24, 'Faces of Marikana', from News24, available at www.m24.co.za [Accessed: 15 August 2014].

⁹² Aljazeera 'Dozens killed in South Africa mine shooting' (2012), from Aljazeera, available at <http://www.aljazeera.com> [Accessed: 14 August 2014].

and strikers yielded machetes, spears and clubs at the time the police opened fire on them with automatic weapons.⁹³

President Jacob Zuma cut short his attendance of the 32nd Southern African Development Community (SADC) Summit in Maputo, in order to visit the site of the incident.⁹⁴ The president subsequently announced the appointment of a commission of inquiry to probe the killings⁹⁵ and appointed retired Judge Ian Farlam as Chairman of the Marikana Commission of Inquiry. The Inquiry commission has heard extensive evidence that the RDOs were the main participants in the strike and had rejected union association, opting to represent themselves. This is against the popular belief that AMCU was the main driving force behind the strike. During the Commission of Inquiry, Advocate Dumisa Ntsebeza SC questioned management reasons for not engaging this disgruntled group of employees. Management's response was that this was not in accordance with the collective bargaining structures, referred to in argument as 'technocratic'.⁹⁶ Lonmin defended their position not to negotiate with these workers for several reasons. The most important reason being that negotiating under such circumstances would set a bad precedent in future strikes.

During the unprotected strike striking workers would infiltrate the production areas, assaulting on-duty employees. On one reported occasion an on duty employee was fatally wounded as the strikers proceeded to torch six motor vehicles at the plant.⁹⁷ It is the focus of this dissertation to show that such incidents of violence and property destruction should become socially, legally and morally unacceptable and be addressed effectively. This dissertation aims to show that the use of the strike option has become a weapon of destruction and violence which is not its intended purpose.

⁹³ A Perry 'South Africa's Police Open Fire on Striking Miners: The Video', (2012), from Time World, 16 August, available at www.world.time.com [Accessed: 14 October 2014].

⁹⁴ All Africa.com 'South Africa: Zuma Leaves SADC Summit to Visit Mine' (2012), from All-Africa, 17 August, available at <http://www.allafrica.com> [Accessed: 13 September 2014].

⁹⁵ 2014.09.26: GG 38030 Proc 66 Commissions Act 8 of 1947: Amendment of terms of reference of commission of inquiry into the tragic incidents at or near the area commonly known as the Marikana mine in Rustenburg, North West Province, South Africa published in Proc 50 in GG 35680 of 12 September 2012 published with effect from 30 September 2014.

⁹⁶ S Evans 'Key lessons for Lonmin as Marikana commission wraps up' 16 Sep 2014 <http://mg.co.za/article/2014-09-16-key-lessons-for-lonmin-as-marikana-commission-wraps-up> (accessed 20 September 2014).

⁹⁷ News24, 'Faces of Marikana', from News24, available at <http://www.m24.co.za> [Accessed: 15 August 2014].

2.7 Causes of the Marikana Strike: microcosm of the macrocosm of the Mining industry

2.7.1 The Rock Drill Operators

As noted above, it was not AMCU who was the main proponent of the Marikana strike but rather the rock drill operators (RDOs). There are various kinds of jobs in the mining industry. The RDO's are the people responsible for the direct extraction of the mineral ore from the rock sediment underground. The RDOs armed with a hand held drill, perform the physically demanding task of extraction. They form the core of the cheap labour force in the mining industry. According to Hartford⁹⁸, the job of RDO can be summarily characterised as tough and dangerous. Despite these hazards the RDO is the most production critical, core mining function. But, the RDO is the lowest paid worker and there is no prospect of any career progression. This is mainly because of the 'functionally illiterate status and the structure of the mining work team in respect of job categories.'⁹⁹ A RDO needs just a blasting certificate as a minimum qualification.¹⁰⁰

Hartford argues that the RDO's represent the personification of all the worst features of low literacy skills and a poverty driven migratory labour. It is upon these features that the apartheid mining system was founded upon. This dissertation agrees with this notion and further remarks that it is such workers that have benefited the least from the 1994 democratic dispensation. Rock drill operators are mostly the black African workers who have been categorised as historically disadvantaged South Africans. The Marikana commission heard evidence that there was still segregation in the mines based on race and that there was no single white person who worked as a RDO.¹⁰¹ Since the advent of the Constitution it is a fact that most strikes have been associated with wages and monetary increments of some sort.¹⁰² There continues to be vast inequity in the remuneration structuring. This has led to CEO's and owner's earnings ratio being a thousand times more than that of the entry level miner, the rock drill operator.¹⁰³ The gross poverty and inequality in SA and in the mining industry

⁹⁸ Hartford (note 12 above).

⁹⁹ Hartford (note 12 above).

¹⁰⁰ Mining Qualifications Authority, Analysis of Workplace Skills Plans, draft report 31 March 2012.

¹⁰¹ 'Lonmin treats white employees better – Marikana witness' <http://www.citypress.co.za/politics/lonmin-treats-white-employees-better-marikana-witness/> (accessed 29 August 2014).

¹⁰² Donovan (note 57 above).

¹⁰³ The World Bank Data Bank 'GINI Index'.

environment provides for the social and economic context to which heightened expectations of wage increases are based.¹⁰⁴

2.7.2 The Migrancy Labour System

Due to the nature of the mining industry, mines are mostly located in remote areas where these minerals are found. Mining is labour intensive and as a result, a lot of labourers are migrants.¹⁰⁵ Approximately 80% of the migrants are South Africans who come from the Eastern Cape regions of Lusikisiki or Flagstaff and Pondoland.¹⁰⁶ Other migrant workers come from foreign countries like Swaziland, Lesotho and Mozambique. During the apartheid years the mining companies built single-men's hostels as a way of accommodating their migrant workers. However, with the dawn of democracy, unions such as National Union of Mineworkers began advocating for decent home ownership for mine workers.¹⁰⁷ Unions argued that mine workers should not be forced to stay in these hostels. According to the unions, hostels deprived mineworkers the comfort and support of their families.

The inherent problem associated with migrant labour is that of decent housing. Accommodation and decent living conditions become a concern as the workers need to reside near their places of employment. Various social developments arise with the emergence of such living conditions.¹⁰⁸ The mine companies then took the initiative through 'a home ownership bond subsidy offered to employees to purchase a family unit.'¹⁰⁹ The mine employers sought to remedy the needs of the migrants workers by offering them 'a living out allowance.'¹¹⁰ This cash form allowance of 'live out', was seen as a remedy to the migrant hostel system.

¹⁰⁴ 'Speech on the Mineral Resources Budget Vote: CiC Julius Malema' available at <http://effighters.org.za/speech-on-the-mineral-resources-budget-vote-cic-julius-malema/> (accessed on 20 August 2014)

¹⁰⁵ Hartford (note 12 above).

¹⁰⁶ Department of Labour (2007) Labour Migration and South Africa: Towards a fairer deal for migrants in the South African Economy. *Labour Market Review*.

¹⁰⁷ Donovan (note 57 above).

¹⁰⁸ Hartford (note 12 above).

¹⁰⁹ G Mantashe, 'Statement on the developments in the Mining Industry' 5 October 2012, available at <http://www.anc.org.za/show.php?id=9904> (accessed on 20 August 2014)

¹¹⁰ Hartford (note 12 above).

Migrants took this allowance, preferring the cash reward to supplement their pay packets, and headed for the shack lands to create their temporary homes.¹¹¹

Hartford argues that as a result, of the living out allowance, the migrants took on a secondary home. This secondary home came also with social and economic consequences such as second or third wives who live with and care for migrants in these new shack lands. According to Hartford the mineworkers were not economically equipped to deal with the costs of living out that required the purchasing of household items and basic services.¹¹² As a result the South African migrant worker now had two families to support on the single low level entry wage. This new socio-economic condition added significant pressure onto the low wages of the migrant worker. The migrant miners who are mostly the rock drill operators became worse off in respect of the wage remittances to their rural homes in the post-apartheid era.¹¹³

The living conditions of mineworkers have and continue having a strong impact on their employment interests.¹¹⁴ A lot of commentary has emerged focusing on the appalling housing conditions of the migrant miners and the gross inequality and poverty.¹¹⁵ As a result of the living conditions in the shack communities, service delivery protests have been intertwined with labour demands. This is because these communities have both a 'primary and direct interest in wage settlement outcomes.'¹¹⁶

2.7.3 The Apartheid Mining Labour system

This dissertation argues that the migrant labour system, which has remained unaltered post-apartheid South Africa, is one of the key problems of the mining industry. According to Hartford, the mining labour system is exploitative. One such exploitative practise can be seen through the 12 long months miners work. They are only afforded the Christmas and Easter breaks. This practise has remained unaltered throughout the apartheid years into democracy. There have been no attempts to transform the mining labour system. Hartford declares that

¹¹¹ 'Speech on the Mineral Resources Budget Vote: CiC Julius Malema' available at <http://effighters.org.za/speech-on-the-mineral-resources-budget-vote-cic-julius-malema/> (accessed on 20 August 2014).

¹¹² Hartford (note 12 above).

¹¹³ M Taal, S Patel, T Elsley 'A Mineworker's Wage: The only argument against the R12 500 is greed.' *Labour Research Service*. (2012) available at <http://www.lrs.org.za/docs/A%20Mineworkers%20Wage.pdf> (accessed on 20 August 2014).

¹¹⁴ 'EFF statement on second Anniversary of the Marikana massacre' available at <http://effighters.org.za/eff-statement-on-second-anniversary-of-the-marikana-massacre/> (accessed on 20 August 2014)

¹¹⁵ Hartford (note 12 above).

¹¹⁶ Hartford (note 12 above).

there have been no efforts to find new ways ‘to effect a more humane system of migrancy.’¹¹⁷ Some of the best migrant labour systems in the world include shorter migration cycles and better wages. The failure to address the system has led to minimum remittances to the rural homes, the significant increase in the propensity of HIV infections, squalor living conditions, low employee morale and stereotyping of the mining industry.

The mining industry according to Hartford has remained a captive of its apartheid past. This is because of the perpetuation of cheap labour from migrants and the RDOs, an exploitative annual work cycle and all the social ills associated with that cycle. It is the argument of this dissertation that a holistic approach needs to be formulated to keep mining viable and less exploitative on the underground employees. This is because mining is a labour intensive operation that also requires large capital investment and as a business operation seeks to get return of investment. Hartford states how the South Africa’s mining industry is stringent and based on inflexible economics of global commodity prices. The mining industry is also constrained by a fixed and inflexible input cost structure mainly composed of labour costs, electricity, water and taxes.¹¹⁸ As a result of the mining economics, Hartford argues that mines have only one option to remain economically viable thus they need to increase productivity and keep the cost of labour as low as possible.¹¹⁹

It is the need of mining companies to keep labour production cost low that has resulted in the perpetuation of the Apartheid mining system which exploited black underground workers. The cumulative effect of poverty, pay inequities of the migrant labour system, the double family burden and their working conditions which are physically demanding and dangerous. All these factors have led to migrant workers and rock drill operators to go to the forefront of the strike waves. It is this dissertations submission that the working conditions and economic frustrations faced by mine workers have made them become easily susceptible to unions taking advantage to them and being used for purely union objectives.

¹¹⁷ Hartford (note 12 above).

¹¹⁸ Hartford (note 12 above).

¹¹⁹ Hartford (note 12 above).

2.7.4 The role of Unions.

The trade union is the official representative of the workers and they negotiate on behalf of the workers.¹²⁰ According to the LRA the principal function of a trade union is to regulate the relationship between employees and employer.

The exercise of the right to strike is one such regulatory method used by unions within the collective agreement system.¹²¹ The majoritarian system of collective bargaining endorsed by the LRA appears to be problematic. Majoritarianism is a recognised LRA policy that allows unions with the largest membership base to sign and agree to collective agreements. According to the LRA the collective agreement has the ability to regulate any matter of mutual concern between the employer and employees. This brief discussion of the majoritarian principle is to highlight the fact that a majority union has the ability to influence the workplace to its own advantage at the detriment of minority unions and non-union members.

The majoritarian practice is underpinned by the following core characteristics.¹²² There is a 'high degree of centralisation of bargaining at company level.'¹²³ Mining companies have a heavy reliance on the majority union's ability to manage employee interests and expectations. In instances of unions pursuing a majoritarian status, the merging of bargaining units has in turn created semi closed shop environments for the majority union.¹²⁴ Other majoritarian practises have also involved the unreasonable raising of thresholds for entry of minority unions to gain recognition in an attempt to make itself a sole bargaining partner. The notion that a collective bargaining system which enforces 'unreasonable and unattainable agreements with the majority union' is more stable and effective is rejected by this dissertation.

The mining industry has seen the emergence of inter union rivalries because of the stifling of minority unions under these statutory extended collective agreements. The one of particular application is the rivalry between AMCU and NUM in the publicised Marikana shootings.¹²⁵

¹²⁰ LRA s 213

¹²¹ Hartford (note 12 above).

¹²² Hartford (note 12 above).

¹²³ Hartford (note 12 above).

¹²⁴ L Kolver, 'Winner takes all principle significant challenge facing labour relations sector', Mining Weekly, 28 August 2013, available at <http://www.miningweekly.com/article/winner-takes-all-principlesignificant-challenge-facing-labour-relations-sector-2013-08-28>. (accessed 8 August 2014).

¹²⁵ J De Lange 'AMCU as a force for violence is a misconception', Mining MX, 24 May 2013, available at <http://www.miningmx.com/page/opinion/columnists/1626222-Amcu-as-force-for-violenceis-a>

The commission heard evidence indicating that AMCU were not the leaders of the strike.¹²⁶ However, this chapter argues that it is this inter union rivalry and disgruntlement with representative unions that is fuelling the escalation of violence and criticism towards the collective bargaining system.¹²⁷ The Marikana strike has led to suggestions that NUM, a COSATU affiliated union in the mining sector has lost touch with the lowly workers especially the RDOs.¹²⁸ This has led to the formation of transformative unions such as AMCU that have called for higher wages for the RDOs, more benefits and employee engagement in management and the share of profits.¹²⁹ According to AMCU there is need for a living wage that reflects not only the demands of workers but the wealth South Africa enjoys.¹³⁰

This dissertation does not agree with the exclusion of minority unions and non-unionised employees. This argument has yet to be adjudicated upon by the courts. It is this papers argument that further limitations to labour rights must not be justified. This is because of the turmoil and turbulence that has crippled the collective bargaining system in the mining sector which is under majoritarian influence.

2.7.5 The Comfort Zone

The above mentioned practises have transformed collective bargaining system in the mining industry to favour the union with the highest numbers of supporters, known as majoritarianism.¹³¹ The LRA has given statutory recognition to these practises with the view that they promote labour peace but, in this chapter it will be argued that this is a false illusion

misconception#.UcQC6xYrzww: 'To expect a swing in union membership in these communities without intimidation and often violence would be naïve.' (Accessed 14 August 2014).

¹²⁶ Evans (note 81 above).

¹²⁷ De Lange (note above) 'AMCU was established in 1997, according to its national organiser, Dumisani Nkalitshana, and now boasts approximately 140 000 members (prior to Marikana it only had 60 000).' 'It is headed by Joseph Mathunjwa, a former NUM supervisor at BHP Billiton's Douglas colliery, who reportedly formed AMCU after a serious dispute with NUM. AMCU is the recognised union at the Two Rivers platinum mine on the eastern limb of the Bushveld Complex owned by Impala Platinum and Patrice Motsepe's African Rainbow Minerals (ARM), and has also been active on chrome mines in Mpumalanga province. It is making significant inroads into the gold sector too.'

¹²⁸ Schutte (note 66 above).

¹²⁹ A.J van Vuuren , K Crowley 'Amplats Mines disrupted as 5,600 South Africa workers strike', Bloomberg, 8 July 2013. The AMCU is a breakaway union in contradiction of the long-standing National Union of Mineworkers (NUM). The NUM is closely allied with the African National Congress (ANC). Due to this connection, many workers felt they were too closely tied to government and big mining companies, so they joined the AMCU. The AMCU has been linked to much of the violence that has occurred during 'wildcat' strikes, including clashing with NUM workers and officials.

¹³⁰ 'South African miners demand to leap to living wage', Reuters, 10 July 2013

¹³¹ Hartford (note 12 above).

based on suppression of minorities and non-unionised employees.¹³² This has led to the belief that there is an illusion and a false ‘comfort zone’ of labour control and subservience between the ‘mine bosses’ and the majority unions.¹³³ There has also been a growth of production line management. This has resulted in the abandonment of employee communications in favour of reliance on human resource departments and majority union to drive communication to employees.

This ‘comfort zone has the following features at company and industry level’ in the mining sector and can be identified by the significant material benefits to labour union representatives.¹³⁴ Direct employee engagement has effectively been severed due to management’s heavy reliance on union driven collective bargaining processes. The ‘comfort zone’ has led to little actual verification of union constituencies based on accountability to its membership. This has further resulted in an almost complete absence of independent verification of employee sentiment and views.

The ‘comfort zone’ has initiated a system of stakeholder engagement forums at sector, company, mine and shaft level. Such engagement has ‘dismally failed to probe and hear the signals of arising discontent amongst employees.’¹³⁵ This is because of the lack of genuine concern of these union representatives as they focus on their own interests rather than underground operations. This dissertation submits that when a union loses its capacity to democratically account for and promote the views of its members, it loses the authenticity of its mandate. As a result, the union is unable to regulate the relationship between employees and the employer, the lack of legitimacy of the union makes it also unable to be accountable for the conduct of employees. This notion has been evident in the Marikana strike, with unions denying both full or partial accountability and responsibility for the violent historic acts.

2.7.6 Democratic worker control and impact on the office of Shop Steward

The practise of the democratic worker control principle by COSATU and its affiliates for nearly three decades has been forgotten.¹³⁶ A key example of the disregard of the democratic worker control principle has been the transformation of the office of shop steward and other

¹³² Hartford (note 12 above).

¹³³ Hartford (note 12 above).

¹³⁴ Hartford (note 12 above).

¹³⁵ Hartford (note 12 above).

¹³⁶ Hartford (note 12 above).

branch level union representatives. This single most significant change in the election of the office shop steward has led to the collapse of the legitimate constituency based representation of its members.¹³⁷ The alteration of the principle and the democratic election processes ever since the democratic dispensation has resulted in the formation of union aristocracy and an appeasing union representative leadership of stewards.¹³⁸

It is against this backdrop that this dissertation seeks to question the legitimacy of the union's mandate to call for the exercise of the right to strike on behalf of its members and also its genuine representation of the interests of its lowly paid workers. The office of the shop steward is in the shaft level electorate.¹³⁹ Hartford argues that there is a problem in that shop stewards no longer account directly to their membership constituencies. Instead now shop stewards answer to union offices. As a result, Hartford is of the opinion that there is weakened accountability to members as such office bearers now feel obligated to report to account leaders higher up in the Union echelons.¹⁴⁰

Top union branch members are being converted into full time shop stewards. This has resulted in the elevation of their pay grades and their removal from production or underground work. The shop steward becomes housed in air conditioned offices where they have large unrestricted movement across the mining operations and access to a whole range of facilities. These union officials begin to receive a wide range of perks and benefits including significant time off for external union duties. These once former RDOs also get a houses and car ownership. All these benefits seem to happen instantaneous.¹⁴¹ The office of the shop steward has significant influence. Shop stewards can enforce operational stoppages (s54 safety stoppages). They are also involved in certain tender procurements and in some instances recruitment of new employees. They also have the ability to identify and at times remove unpopular managers.¹⁴²

In an environment of scarce resources, deep inequalities and limited options for BEE empowerment for employees, Hartford notes how this appointment of shop steward has become a sought after union post. Once in office the former underground miners or rock drill

¹³⁷ Donovan (note 57 above).

¹³⁸ Schutte (note 66 above).

¹³⁹ Hartford (note 12 above).

¹⁴⁰ Kolver (note 124 above).

¹⁴¹ M Schutte, S Lukhele 'The real toll of South Africa's labour aggressiveness *Regular and prolonged violent strikes characterise endless labour strife*' November 2013 Edition Africa Conflict Monthly Monitor

¹⁴² Kolver (note 124 above).

operators begin to use this union office as a place to uphold and defend to protect these newly acquired benefits and lifestyle advantages.¹⁴³ This has led to the emergence of a union aristocracy that is intent on the promotion of union leadership interests above those of the RDOs and other equally paid mineworkers.¹⁴⁴ It is presented in this dissertation that it is such appeasement practises that have led to the union's institutional failures especially in the post democratic South Africa.¹⁴⁵

The collapse of democratic checks and balances to ensure fairness, representation and electoral processes to such offices has led to self-aggrandising union leadership.¹⁴⁶ Interesting to note is how the top union members are the most skilled, literate and financially sound in the pool of African labourers. These same people dominate in the union leadership posts. More so they, through the union, ignorantly speak and bargain on behalf of all the workers especially rock drill operators. The lowly paid employees such as the rock drill operators are either absent or have minority representation in the decisions regarding their work conditions underground.¹⁴⁷ As noted earlier on, the company negotiates and meets only with the majority union representatives. But, this is regardless of the fact that the lowly (graded A) mine workers are not effectively represented in the top union positions despite their large electorate composition in the union.

It is this lack of genuine representation of the lowly paid underground miners has led to the emergence of militant aggressive unions rising up to advocate for transformation of the wages and living conditions of the rock drill operators.¹⁴⁸ As noted in the Marikana strike, the miners elected to represent themselves citing how they did not feel represented by the majority union NUM.

¹⁴³ Hartford (note 12 above).

¹⁴⁴ L Kolver, 'Winner takes all principle significant challenge facing labour relations sector', Mining Weekly, 28 August 2013, available at <http://www.miningweekly.com/article/winner-takes-all-principlesignificant-challenge-facing-labour-relations-sector-2013-08-28>. (accessed 8 August 2014).

¹⁴⁵ G Marinovich 'Conflict of Interest, Inc: Mining unions' leaders were representing their members while in corporations' pay', *Daily Maverick*, 24 April 2013, available at <http://www.dailymaverick.co.za/article/2013-04-24-conflict-of-interest-inc-mining-unions-leaders-were-representingtheir-members-while-in-corporations-pay/#.Ubm0YhYrzwx>. NUM responded scathingly to the article, questioning Marinovich's credentials as a journalist and disputing the article. However, the union did not tackle any of the substantive points raised, and the *Daily Maverick* stood by Marinovich's story <http://www.dailymaverick.co.za/article/2013-04-25-num-reacts-angrily-tomarinovichs-expos-daily-maverick-stands-by-its-story>. (Accessed 10 October 2014).

¹⁴⁶ M Schutte, S Lukhele 'The real toll of South Africa's labour aggressiveness *Regular and prolonged violent strikes characterise endless labour strife*', November 2013 Edition Africa Conflict Monthly Monitor

¹⁴⁷ Hartford (note 12 above).

¹⁴⁸ Donovan (note 57 above).

2.8 The effects of the Marikana factors.

The above elaborated causes of the Marikana strike resulted in the shootings that have become universally known as the Marikana massacre. The Commission of Inquiry is yet to conclude and give its findings. But, this paper has observed that the Marikana strike violence and subsequent shootings is a product of the factors that influence the collective bargaining system.

Hartford states that no amount of employment equity plans and empowerment transactions can remedy the industrial flaws of the mining industry which are social, economic and political. The violence is fuelled by ambitious emerging unions, employee frustrations, better social living conditions and economic expectations. The right to strike has also incorporated some protesting by workers of social conditions and service delivery.¹⁴⁹ There is also the aura of nationalisation of the mineral resources and the engagement of fighting against the exploitative forces preventing economic freedom for all.¹⁵⁰ The trend and rise of illegal unprotected strikes show how the right to strike is no longer a tool in labour interest dispute resolution but, now a socio economic tool in the workers fight for political control of their economic future.¹⁵¹

It is submitted in this chapter that the causes of the Marikana strike and subsequent shootings are reflective of the violent labour relations between employees and employers in South Africa. Thus, there is a great likelihood of these violent acts re-occurring, hence it is the objectives of this dissertation to try address these problems. The major identified problem is the issue of violence that has become synonymous with the exercise of the right to strike and picket. Unions now associate the success of their strike to their ability to bring production to a halt and prevention of production

2.9 Conclusion

This chapter has been a discussion on the impact and significance of the right to strike in the mining industry. It has been shown that violence in the mining industry is a serious concern and has grave socio economic and political consequences. This chapter has attempted to highlight the factual background that has resulted in the manifestation of the violent exercise

¹⁴⁹ 'EFF statement on second Anniversary of the Marikana massacre' (note 106 above).

¹⁵⁰ 'Economic Freedom Fighters Constitution' available at <http://effighters.org.za/documents/constitution/> (accessed on 20 August 2014).

¹⁵¹ 'EFF statement on second Anniversary of the Marikana massacre' (note 106 above).

of the right to strike and picket. This chapter has further dealt with the cause and effects of violent strikes on the economy and the government. It is the submission of this paper that exercise of the right to strike has become violent and destructive to the economy.

In the following chapter, this dissertation will discuss the rule of law regulating the right to strike and to picket in an attempt to understand the nature and extent of the right to strike. This will be achieved in order to ascertain whether violence, destruction and disruptions are legally acceptable traits of the exercise of the right to strike and picket.

Chapter 3: The legal jurisprudence regulating the right to strike

3.1 Introduction

As discussed in the previous chapter, violence and its associated forms during strikes has become a serious growing concern in the South African mining industry and is negatively affecting the economy. This violent behaviour resulted in the deaths and injury of both mineworkers and police officers and the destruction of property during the Marikana strike of 2012.¹⁵² However, in this chapter the focus will be on identifying the true legal nature and extent of the right to strike. This chapter will focus on the rule of law in an attempt to understand the principles governing the nature and the acceptable exercise of the right to strike. This dissertation submits that the violent and economically destructive exercise of this right is a systemic problem that requires a thorough legal diagnosis of the root causes which includes legal jurisprudence on the true nature of the right to strike.

To ‘strike’ means

the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee.¹⁵³

Striking is one of the most effective weapon at the disposal of unions when collective bargaining fails. According to the ILO¹⁵⁴, strike action by workers during labour disputes is a visible form of collective action and in the pursuance of their demands, seen as a last resort. In an effort to prevent ‘collective begging’,¹⁵⁵ the right to strike needs to be protected. Myburgh¹⁵⁶ notes that the right to strike is integral to sound industrial relations and collective bargaining. Without the adequate recognition and protection of the right to strike trade unions will become obsolete whilst the rule of management becomes increasingly absolute.¹⁵⁷

The South African Constitution accords every worker the right to strike. Everyone is guaranteed the rights to assemble, demonstrate, picket, and present petitions by the Constitution. However, the exercise of these s17 rights must be peaceful and participants

¹⁵² E Manamela, M Budeli ‘Employees right to strike and violence in South Africa’ 2013 *XLVI CILSA* page322.

¹⁵³ S213 of the LRA.

¹⁵⁴ ILO General Survey, ‘Freedom of association and collective bargaining’ 1994 par 136.

¹⁵⁵ Blanpain *Labour law, human rights and social justice* (2001) 190.

¹⁵⁶ Myburgh ‘100 years of strike law’ (2004) 25 *ILJ* 962 at 966.

¹⁵⁷ Manamela(note 139 above) page309.

must be unarmed. The right to strike is an essential component of the freedom of association for workers.¹⁵⁸ Ben-Israel notes that freedom to strike is a complementary freedom which is intrinsically connected with freedom of association in an attempt to equalize the employer-employee relationship in collective bargaining.¹⁵⁹

The strikes conducted in South Africa are mainly organized by trade unions when collective bargaining fails to resolve issues of mutual interest.¹⁶⁰ Strikes may take various forms, but of most legal significance is whether the strike is protected or unprotected. It will be argued in this chapter that such a distinction though significant in law has not deterred violence, but rather perpetuated such conduct. This current exercise of the right to strike has led to notions that workers are now abusing this right. This chapter aims to show that the violent exercise of the right to strike is not legally recognized by international, regional, and domestic laws.

Furthermore, despite the prohibition of violence during strikes, violence has continued to be prominent. Thus, the question to be answered in this dissertation is whether South African labour legislation is adequately formulated to address this issue of violent strikes.

3.2 International law

International law is essential in the understanding of the right to strike. However, it is pertinent to start off by making it expressly clear that there is no definitive mention of the right to strike under the UN treaties and ILO conventions.

3.2.1 International Conventions

The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁶¹ recognises the right to strike. However, the ICESCR qualifies the existence of the right to strike in accordance with the specific municipal law of the state party. Hence state parties to the ICESCR guarantee such accommodation of the right to strike within their national laws.¹⁶²

The International Covenant on Economic, Social and Cultural Rights provides that

¹⁵⁸ Manamela (note 139 above) page 308.

¹⁵⁹ Ben-Israel *International labour standards: the case of the freedom to strike* (1987) 93.

¹⁶⁰ Budeli 'Understanding the right to freedom of association at the workplace: its components and scope' (2010) vol 31/1 *Obiter* at 28–29.

¹⁶¹ The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) links within Article 8 the 'right of everyone to form trade unions' with 'the right of trade unions to establish ... federations', 'the right of trade unions to function freely', and 'the right to strike'

¹⁶² Article 8(1)(d).

1. The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations; (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) And the right is exercisable in conformity of the laws of the particular country

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.¹⁶³

The above ICESCR quotation proves to show that state parties can limit or restrict the right to strike for interests of national security, public order and protection of the right and freedoms of others. Important to note is that each country has the right to formulate its own laws regarding the exercise of the right. In South Africa, the violence and destruction to the economy and mining industry surely calls for limitations. However, in terms of the covenant such prohibitions should be progressive and appropriate. This explicit recognition further emphasises the position of this dissertation that violent and destructive strikes are not legally recognised as they are neither progressive nor appropriate.

¹⁶³ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

The *International Covenant on Civil and Political Rights*¹⁶⁴ states that everyone has the right to freedom of association with others. This Covenant has been interpreted generously to include the right to form and join trade unions for the protection of such collective interests.

3.2.2 The ILO Conventions

It is important to point out that there is no explicit definition in the ILO Conventions to the right to strike.¹⁶⁵ This prevents definitive and possibly restrictive conclusions to be made regarding the understanding of the different ways the right to strike may be exercised in various countries.¹⁶⁶ There are two Conventions of the International Labour Organization¹⁶⁷, which are crucial in understanding the right to strike founded from the above mentioned United Nations covenants. Firstly, the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and secondly the International Labour Organization's Right to Organize and Collective Bargaining Convention 98 of 1949.¹⁶⁸

There have been significant ILO conferences where policies have been drafted for the recognition of the right to strike in member states.¹⁶⁹ The 'Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation' called for the adoption of laws that would ensure the effective and unrestricted exercise of trade union rights and the right to strike by workers.¹⁷⁰ In another resolution conference, 'Resolution Concerning Trade Union Rights and their Relation to Civil Liberties' advocated for universal measures to ensure that the right to strike is fully respected and internationally enforced.¹⁷¹

¹⁶⁴ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, Article 22. See also the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, 1950, *entered into force* Sept. 3, 1953, Article 11.

¹⁶⁵ (Gernigon, 1998). article Kola Okedu 'Overview of right to strike'

¹⁶⁶ ILO principles concerning right to strike

¹⁶⁷ Here in referred to as ILO.

¹⁶⁸ Basson et al *Essential Labour Law* p282.

¹⁶⁹ The right to strike was mentioned several times in that part of the report describing the history of the problem of freedom of association and outlining the survey of legislation and practice. See ILC, 30th Session, 1947, Report VII, Freedom of Association and Industrial Relations, pp. 30, 31, 34, 46, 52, 73–74.

¹⁷⁰ International Labour Office, (1957), p. 783.

¹⁷¹ ILO, 1970, p735–736; See also B. Gernigon, A. Odero, and H. Guido, ILO Principles Concerning the Right to Strike 137(4) International Labour Review (1996) p. 1.

3.2.3 The Role and Significance of the Committees of Experts and Freedom of Association

The Experts play a crucial role in the formulation of basic minimal standards which must be observed if a member state wishes to comply with its ILO obligations. The Committee of Experts was formed by the Governing Body of the ILO, under the resolution adopted by the International Labour Conference in 1926.¹⁷² The purpose of this committee is to evaluate and make recommendations on government reports regarding the application of ILO Conventions or treaties and other obligations relating to labour standards set out in the ILO Constitution and guidelines. Importantly the Committee of Experts' task includes indicating the extent to which the national laws and practices in each member State is in adherence to the ratified Conventions. The committee also monitors the obligations which the State has under the ILO Constitution. They determine whether the requirements of certain Conventions are being met. It is against this backdrop that the Committee of Experts and the Committee on Freedom of Association assist in the interpretation and formulation of minimum guidelines in the protection and understanding of the right to strike and freedom of association.

The importance of the Committee of Experts is evident from the divergent views held by the various member states. Thus it is important that a norm be set as to the definition and exercise of the right to strike. However the Committee of Experts aligns itself with the notion that the right to strike is 'one of the essential means available to workers' and their organisations for the promotion and protection of their economic and social interests'.¹⁷³ The experts have also said that the right to strike can be used as a tool to facilitate 'solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to workers'.¹⁷⁴

The Committee on Freedom of Association is a tripartite body of the ILO's Governing Body, which examines complaints with regard to the right to freedom of association and breaches of trade union rights. This is because of the importance of trade unions in the exercise of the right to strike and picket in most countries. Whereas, the independent Committee of Experts monitors the compliance of ratified ILO Conventions by member states.

¹⁷² Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4A), ILC, 73rd Session, 1987, para. 24.

¹⁷³ Freedom of Association: 1985 Digest, para 200.

¹⁷⁴ Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Report 111 (4B), International Labour Conference 69 Session, Geneva 1983, para. 200; *Supra*, note 10, p.199.

The Committee on Freedom of Association has consistently stressed the importance of the right of employees to strike as a crucial component to the right to freedom of association and existence of trade union rights.¹⁷⁵ The committee of experts consider the right to strike as the essential tools available to workers and their collective groups, in the peaceful promotion and protection of their economic and social interests.¹⁷⁶

It must be understood that these distinct supervisory committees provide a dual input of jurisprudence on issues and ensures an appropriate international approach to the right to strike. As a result of the relationship between the two committees, a broad and realistic consensus has emerged concerning vital aspects of the right to strike. A vital aspect that has been acknowledged is that strike action must not be violent.¹⁷⁷ In the absence of a definitive meaning and guidelines concerning the right strike, these bodies have become standard-bearers, authority and credibility of an international and universal organization.¹⁷⁸ It is against this backdrop that this paper finds it difficult to accept that the exercise of the right to strike must be violent and destructive.

The importance of the independent bodies such as the Committee of Experts in monitoring the application of international standards, their observations, recommendations and considerations has been noted as having great persuasive weight in international law. Decisions of the ILO's supervisory bodies especially those of the Committee of Experts on the Application of Conventions and Recommendations are further proof of the ILO's support of the right to strike. In *Republic of Guinea v. Democratic Republic of the Congo*¹⁷⁹ the ICJ made a clear statement in support of its 'deference' to such supervisory bodies. The court was of the strong opinion that it should assign 'great weight' to the interpretation sanctioned by the independent body that was established specifically to supervise the application of that treaty. In *Botswana Public Employees' Union v. Minister of Labour and Home Affairs*¹⁸⁰ the court rejected the government's list of 'essential services' which prohibited the right to strike in such services as a violation of that country's Constitution and international obligations. In

¹⁷⁵ Committee on Freedom of Association, Second Report (1952), Case No 28 (Jamaica), in Sixth Report of the International Labour Organisation to the United Nations (Geneva), Appendix 5, 181, par 27.

¹⁷⁶ 1983 Report of the Committee of experts, par 2000.

¹⁷⁷ *NUMWSA v Bader POP (pty) Ltd and Minister of Labour* 2003 (2) BCLR 182 (CC). para 33

¹⁷⁸ Body of principles on the right to strike

¹⁷⁹ Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*) Judgement of 30 Nov. 2010, p. 664, para. 66, available at <http://www.icj-cij.org/docket/files/103/16244> (accessed 15 August 2014).

¹⁸⁰ High Court of Lobatse, *Botswana Public Employees' Union and others v. Minister of Labour and Home Affairs and others*, MAHLB-000674-11, 9 August 2012.

reaching its decision the court held that it was incumbent upon it to interpret the prohibitive section in a consistent manner with international law.

The Botswana High court¹⁸¹ further emphasised the inseparableness of the right to freedom of association in international law and the right to strike. In defending its reasoning the judgement stated how international law did not condone the limitation of the right to strike in order to safeguard economic interests as a reasonably justifiable cause in a democratic society. The court derived its reasoning from the ILO Committee of Experts interpretation of essential services and principles relating to the right to strike and the freedom of association in a democratic society.

3.2.4 The African Charter

The African Charter on Human and Peoples Rights¹⁸² recognises the existence and need for the freedom of association. Article 10 of the charter in summary acknowledges that every individual has the right to free association provided that they abide by the national laws of their respective countries. The charter states that no one should be compelled to join an association.¹⁸³ Article 10 does not overtly recognize the right to form trade unions as a result of the right to freedom of association.¹⁸⁴ However, a trade union by definition is an association. Thus, the right to form a trade union is unavoidably guaranteed by a State's obligation to uphold the right to freedom of association enshrined in Article 10.¹⁸⁵

In conclusion the African charter recognises the general right to freedom of association. But, the Charter does not make explicit reference to the existence of the right to strike, hence violent strikes cannot be condoned. It is important to note, apart from the African Charter, there is no other widely recognised African instrument which protects the right to strike at the workplace directly or indirectly.¹⁸⁶ However, some African countries have recognised the fundamental importance of the right to strike by entrenching the right in their Constitutions such as South Africa, Nigeria and Kenya.

¹⁸¹ High Court of Lobatse, Botswana Public Employees' Union and others v. Minister of Labour and Home Affairs and others, MAHLB-000674-11, 9 August 2012.

¹⁸² African Charter on Human and Peoples' Rights (1981/86) available at <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf> (accessed 10 September 2014).

¹⁸³ Text available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed 10 September 2014).

¹⁸⁴ F Ougougoz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) at 170.

¹⁸⁵ African Charter, Art. 10.

¹⁸⁶ Manamela (note 139 above) page 320.

3.2.5 The right to strike in foreign jurisdictions

An analysis of the international discourse shows the existence of the right to strike being a customary international law norm. There is scholarly support for the premise that the ILO principles have become integral in the formulation of customary international law.¹⁸⁷ The right to strike is almost universally recognised either in the countries respective constitutions or in the legislative provisions. The religious recognition of the right to strike by the Catholic Church is evidence of the international customary acceptance of the rights existence. Pope John Paul II, in *Laborem Exercens*, said that one of the methods used by unions in pursuing the ‘just rights’ of their members is the strike against employers. The exercise of striking is recognized by the Catholic social teachings as legitimate in the right conditions and within justifiable ambits.¹⁸⁸

The right to strike is recognised universally from predominantly capitalist America to Communist China. It is this basic recognition of the existence of this right that makes the right a custom in international law. However, the exercise of the right varies greatly based on the socio political ideologies practised in each respective country.

In the United States of America, section 13 of the National Labour Relations Act states how nothing should interfere with or impede or diminish the right to strike or limit it. The Act states how such limitations must be specifically stated in the Act itself, including the interpretation of the right.¹⁸⁹ In Vietnam, Article 5 of the Labour Code allows for an employee to be on strike. However, Article 209 makes qualifications that the strike is temporary and voluntary. It also recognises the organizational stoppage of work by collective labour in the collective bargaining process over settlement of labour disputes.¹⁹⁰ In 1982 China excluded the right to strike from its Constitution, but adopted a trade union laws that indirectly recognise the right to strike. In a situation of a ‘go slow’ strike in a workplace the trade union is entitled to hold consultations with employers or such authority. It is at this consultation that unions present their opinions and demands and proposals of solutions. Employers are encouraged to satisfy reasonable demands made by workers. The union must

¹⁸⁷ C W Jenks, *The International Protection of Trade Union Freedom* (1957) at pp 561-2 ; see ILO, *International Labour Standards*, 3rd ed., 1990 at p.106

¹⁸⁸(1981), Section 20 ‘The Importance of Unions’ Text available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html. (accessed 10 September 2014).

¹⁸⁹ National Labor Relations Act of 1935 § 13, 29 U.S.C. § 163 (2006).

¹⁹⁰ Labour Code of Vietnam, Law No. 10/2012/QH13 (2012).

also assist in the restoration of normal working order and production once demands are met.¹⁹¹

As noted in China, Vietnam and USA the existence of the right to strike has become a norm which is recognised universally. However, the exercise of the right to strike varies in accordance with the national laws and the maintenance of peaceful industrial relations.¹⁹² It is the aim of this dissertation to show that this variation must extend to the exercise of the right in South Africa. This is because of the riotous exercise of the right to strike that is causing the economy to be unstable, giving rise to lack of investor confidence and the eventual collapse of the mining industry amongst many other national problems.

3.3 The Constitution of the Republic of South Africa

International law obligations are constitutionally important in the interpretation of labour laws regarding the right to strike in South Africa. South Africa has ratified Convention 87.¹⁹³ Section 39 (1) (b) states that international laws must be considered in the interpretation of the Bill of Rights. Section 232 of the Constitution provides that international customary law is also law in South Africa unless such customs are inconsistent with national laws. Section 23(2) (c) of the Constitution of the Republic of South Africa¹⁹⁴ provides for the right to strike for every worker. The Constitution guarantees this right without limitation. This differs with the interim Constitution¹⁹⁵ which provided for the right to strike only for the purposes of collective bargaining. As a result of this significant change workers now have the right to strike over a wide range of interests including social and economic concerns.¹⁹⁶

The Interim Constitution expressly included the employer's right to a lock out.¹⁹⁷ But, the final Constitution excluded this right. Thus, the Constitution clearly acknowledges the significance of workers' rights by affording them Constitutional protection. In *Certification of Constitution*¹⁹⁸ the court held that the exclusion of employer's right to lock out was because of the availability of other collective bargaining tools at the disposal of the employer and that the legislature had given statutory protection to this right through the LRA.

¹⁹¹ Trade Union Law of the People's Republic of China, Article 27 (2001).

¹⁹² as time frameworks for bargaining, mandatory use of mediation, advance notice of strikes, maintaining minimum services

¹⁹³ Erasmus and Jordan 'South Africa and the ILO: Towards a new relationship'(1993/1994) 19 *SAJIL* 65.

¹⁹⁴ The Constitution of the Republic of South Africa Act 108 of 1996.

¹⁹⁵ Interim Constitution of the Republic of South Africa Act 200 1993.

¹⁹⁶ Du Toit 'Labour and the Bill of Rights' in (1997) *Bill of Rights Compendium* at 4B26.

¹⁹⁷ S 27(5) of the interim Constitution.

¹⁹⁸ In re: Certification of the Constitution of the Republic of South Africa, 1996 (10) *BCLR* 1253 (CC) para 64.

3.4 The Labour Relations Act

The Labour Relations Act is drafted in accordance with Convention 87¹⁹⁹ and section 23 of the Constitution. The Act gives effect to employees' international and constitutional right to strike. It also grants employers the statutory recourse to lock out employees. Section 213 of the LRA²⁰⁰, defines the right to strike.

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.²⁰¹

This is important because the Constitution does not define the right to strike and it is the LRA that then gives effect to this right. The definition of the right to strike is wide enough to include every person that has been employed by the employer.

A single employee cannot individually embark on a strike. The LRA makes it implicit that the right to strike must be exercised collectively. But, the Constitution does not impose any such limitation on the right of every worker to strike. This formulation of a concerted refusal to work by the LRA has been submitted to be a justifiable limitation of s23 (2) (c) of the Constitution.²⁰² This is because the right to strike has been formulated in the LRA to promote collective bargaining. It is this dissertation's submission that the collective exercise of the right to strike is not serving its intended purpose. Strike violence and property destruction undermines the Constitution, the objectives of the LRA and industrial relations.

The LRA notes that strike action must be a concerted refusal, retardation or an obstruction of work. It is difficult to identify the form of a strike but a purposive approach must be taken when employees withdraw their labour against the work they are contracted to perform. This is to promote labour peace and collective bargaining.²⁰³ But the effectiveness of this purposive approach has become questionable, with the high frequency of violent and destructive strikes.

¹⁹⁹ SA has ratified Convention 87 on Freedom of Association

²⁰⁰ Labour Relations Act 66 of 1995.

²⁰¹ Section 213 of the LRA.

²⁰² C Thompson, P Benjamin (2003) *South Africa Labour Law*, Volt 1 (Revision Service 45) AA1-307.

²⁰³ Du Toit et al (2003) *Labour Relations Law* (4th ed) p275.

It is submitted that the refusal to work should be judged by the intention of the striking employees. Hence employees must have the goal of remedying the dispute.²⁰⁴ The LRA states that the objectives of a strike must be for the purpose of remedying a grievance or resolving a dispute. The strike definition under the 1956 LRA only acknowledged strike action that was aimed at inducing or compelling compliance with demands or proposals.²⁰⁵ The new definition under the LRA widens the scope of the application of the strike provisions, such that strikers can even strike if the strikers perceive a unilateral change in work conditions or rumours of workplace reforms that they have an interest in.²⁰⁶

Thus, the LRA gives effect to the right to strike, encourages orderly, rational and lawful strikes, regulation of collective bargaining and the procedures required to conduct a strike. As a result, of the LRA employees have the right to demonstrate displeasure, vent grievances, support demands or place pressure on the employer to achieve collective work related goals.²⁰⁷

3.4.1 The employer's recourse to lockout.

The recourse to lock out under s213 defines the exclusion of employees from the employer's workplace for the purposes of compelling employees to accept demands. The exclusion of the lockout as a right in the Constitution and its reference to recourse under the LRA means that a right enjoys special protection. Under s5 and s7 of the LRA it is clear that the employees right to strike enjoys preference over the recourse to lockout by the employer.²⁰⁸

3.4.2 The procedural requirements for industrial action

Section 64 of the LRA sets out requirements which must be satisfied before the exercise of the right to strike and recourse of lock out. An issue is only strikeable once conciliation has been conducted to resolve the dispute in question. The courts have decided to look beyond the formal declaration of the issue and attempt to address the real underlying dispute.²⁰⁹ Once the dispute has been referred for arbitration or conciliation, all the members of that union

²⁰⁴ *Simba (Pty) Ltd v FAWU* 1997 (5) *BLLR* 602 (LC) para 612.

²⁰⁵ *MWASU v Facts Investors Guide (Pty) Ltd* 1986 (7) *ILJ* 313 (IC).

²⁰⁶ A Myburgh, R Wade 'Meaning of strike – The new strike definition' (1996/1997) 13 *Employment Law* 22 pg 25.

²⁰⁷ Du Toit et al *Labour Relations Law* (2003) (4th ed) p278

²⁰⁸ P Glock Requirements of industrial action in South Africa and Germany – A comparison 2005 LLM University of Western Cape.

²⁰⁹ *Fidelity Guard Holdings (Pty)Ltd v Professional Transport Workers Union* 1997 (9) *BLLR* 1125 (LAC) 1129.

employed by the employer can strike despite the fact that they work in different workplaces.²¹⁰

The notice of strike must be given to the employer.²¹¹ The issue of timing of the commencement of the strike has been a matter of much judicial debate with certain judgements ruling that notices are not important.²¹² In *Ceramic Industries Ltd v National Construction & Allied Workers Union*²¹³ the court had to judge whether notice had been lawfully given when it stated the strike would commence ‘any time after 48 hours from date of notice’. The court held that the notice must be specific. This was because the primary reason for such notice was to enable the employer to prepare and ensure adequate protection of the business.²¹⁴ Despite this judgement being criticized as being restrictive, it seems to make economic sense. Especially because the right to strike is being exercised in a violent and destructive manner towards the employer’s property.

The current Labour Relations Act does not impose a general duty to bargain in an attempt to promote voluntarism.²¹⁵ But, s64 (2) of the Act states that arbitration is compulsory if the issue in dispute is a refusal to bargain. It must be noted that the award that is issued at the end of the arbitration is not binding, it is merely a formality that must be followed.²¹⁶ Thus, a party can take industrial action even if the arbitration award is against them. It is argued that the presence of mandatory formalistic procedures have eroded the good faith bargaining and such willingness to resolve the dispute without resorting to strike action.²¹⁷

Section 64 (3) of the LRA provides for a number of procedural statutory exemptions especially through party agreements. This is due to the fact that the Act seeks to promote voluntarism. Through this section, the Act respects and acknowledges the agreed upon procedural requirements set out by the parties. But, the parties are obliged to follow these agreed upon procedures. The section also provides for ‘self-help’ provision that entitles both the employees and employers to exercise their rights and recourse with disregard to procedure.

²¹⁰ *Afrox v SA Chemical Workers Union* (1) 1997 (18) ILJ 399 (LC).

²¹¹ LRA s 64(1)(b).

²¹² *Tiger Wheels Babelagi (Pty)Ltd v NUMSA* 1998 JOL 4081 (LC) para21.

²¹³ *Ceramic Industries Ltd v National Construction & Allied Workers Union* 1997 (6) BLLR 697 (LAC).

²¹⁴ *Ibid* para 702.

²¹⁵ C Thompson, P Benjamin (2003) *South African Labour Law*, Vol One (Revision Service 45) at AA1- 316.

²¹⁶ *Ibid*.

²¹⁷ M Brassey ‘Fixing the laws that Govern the Labour Market’ 2012 ILJ 33

3.4.3 Pre-strike ballots and the LRA

The balloting provision of section 65 (2) (b) under the 1956 LRA allowed employers to interdict strike action if it failed to meet the legislated provisions. However, under the provisions of s 95 (5) of the new LRA, there is no mandatory pre strike ballot to ensure the legality of the action. The Act leaves the issue of pre-strike ballots to the discretion of unions through their own constitution. As a result, the issue of ballots is an internal issue between trade unions and its members. Furthermore, section 67(7) states that

The failure by a registered trade union or a registered employers' organisation to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a strike or lockout may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the strike or lockout.²¹⁸

The above quoted provision clearly highlights the intentional disregard of democratic principles even those written by the union itself. It is the presence of such provisions in a democratic country that bring into question whether the calling of a strike is supported by the majority of the union or rather an elitist few that have their own self aggrandising interests. This lack and disregard of mandate identification and verification procedures reflects poorly on the true representative objectives of the LRA and the collective bargaining structures.

A democracy is a form of governance in which the decision making powers are vested in the people. The people exercise their power directly or indirectly through a system of representation known as elections.²¹⁹ Voting gives people the ability to express their opinions about the issues concerning governance. It makes the leaders accountable to the people that they represent.²²⁰ Voting is a key characteristic of democracy. The LRA seeks to democratise the workplace. In its provisions the LRA explicitly states how it wishes to promote employee participation in decision making through the establishment of workplace forums and to provide for their regulation to ensure democratic practices.²²¹ Thus, unions must be democratic hence having pre strike ballots should be mandatory. With the exercise of the

²¹⁸ LRA section 67(7).

²¹⁹ B Brewster 'The Importance of Voting to Democracy' available at https://www.sec.state.vt.us/kids/contest/2005/9_12_winner_2005.htm (accessed 12 October 2014).

²²⁰ DT Masiloane 'Guaranteeing the safety of non-striking employees during strikes: the fallacy of Policing' 2010 *Acta Criminologica* 23(2).

²²¹ Preamble of LRA and s 1 of the LRA 'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act '

right to strike becoming violent, employees should have the right not to decide whether to participate in a strike and its consequences.²²² Union members should be able to express their disapproval through a vote and elect union leadership.

3.4.4 The substantive limitations of the right to strike

Section 65 of the LRA provides for the substantive limitations to the exercise of the right to strike. Section 65 further states that the exercise of the right to strike involves ‘any conduct in contemplation or furtherance of the strike or lockout’. This qualification means that any conduct is acceptable as long as it is in support of the strike.²²³ This wide scope is problematic especially with the violent behaviour that has plagued the exercise of the right to strike.

Section 65(1) (a) of the LRA makes provisions for collective agreements to prohibit strike action. The far reaching legal nature of these collective agreements has led to much legal controversy and is a source of union rivalry.²²⁴ Firstly the concern is that a collective agreement, when read with s65 (1) (a) and s23 (1) (d), may prevent non signatory unions and employees from exercising their Constitutional right to strike over such agreed upon matters.²²⁵ This means that a union with the largest membership is able to formulate collective agreements that favour its position at the detriment or benefit of non-parties to the collective agreement. This is in keeping with the LRA support for majoritarian trade union representation.

The constitutionality of the far reaching intrusive effect of such majority concluded agreement is yet to be adjudicated upon. However, it is submitted that it is the deprivation of minority unions and its members and non-unionized employees of their workers’ rights that has also fuelled the violent exercise of the right to strike. In *Vista University v Botha*²²⁶, the court held that the employees could not strike because they were bound by the collective agreement that prevented the issue in dispute from being struck upon. The court reasoned these employees were bound to this agreement despite having resigned from the union.

²²² R.P Korzeniewicz, ‘The Labour Politics of Radicalism: The Santa Fe Crisis of 1928’. *The Hispanic American Historical Review*, (1993) 73(1) pg 1-32.

²²³ *Coin Security Group (Pty) Ltd v SANUSO* 1998 (19) ILJ 43 (C) para 48.

²²⁴ Du Toit (note 207 above) pg290.

²²⁵ Section 23(2)(c) of the Constitution of the Republic of South Africa.

²²⁶ *Vista University v Botha* 1997 (18) ILJ 1040 (LC).

Section 65(1) (c) differentiates between disputes over interest and rights. The right to strike is applicable to interest disputes and the courts have minimal or no interference in this power play. The distinction between a rights and interest dispute is not always easily determined.²²⁷ In *Ceramic Industries Ltd v NCBAWU*²²⁸ the court formulated a test that distinguished the two, based on the nature of the dispute to ascertain if the parties can strike. The court accepted how additional tests included the demands and remedies could assist the court, but it is the true nature of the dispute that is the decisive test.²²⁹

The LRA prohibits the right to strike in essential and maintenance services. Section 65 (3) (a) (i) of the LRA prevents strikes on issues that are regulated by collective agreement. This provision has been hailed as a basis for industrial peace during the agreements validity. The judgements of *South African National Security Employer's Association v TGWU*²³⁰ and *PSA v Minister of Justice and Constitutional Development*²³¹ have both, it is submitted, erroneously held that collective agreements that prohibit the right to strike over specific issues in dispute create a peaceful workplace. This is disputed in this dissertation due to the statutory extension of unreasonable and unattainable collective agreements to non-parties.

3.4.5 Secondary strikes and Protest actions

When employees simply go on strike in support of the objectives or demands of a primary strike of other employees belonging to a different employer, such a strike is known as a secondary strike. Section 66 of the LRA gives the definition of such a strike and its requirements. In *Afrox v SA Chemical Workers Union*²³² the court held that the strike could only take place once the requirements of s66 of the LRA had been fully complied with.

Section 77 of the LRA permits the striking of employees over socio economic interests. Such strikes are referred to as protest strikes. As a result, employees can withdraw labour to advance political demands which may be unrelated to the employer. In *Greater Johannesburg Transitional Metro Council v IMATU*,²³³ where employees embarked on a protest action over the privatization of certain services, the court found it difficult to distinguish whether this was a socio economic interest or a mutual interest. The court granted

²²⁷ Du Toit (note 211 above) p291.

²²⁸ *Ceramic Industries Ltd v NCBAWU* 1997 (6) BLLR 697 (LAC).

²²⁹ 1997 (6) BLLR 697 (LAC) at 703.

²³⁰ *South African National Security Employer's Association v TGWU* 1998 (4) BLLR 364 (LAC).

²³¹ *PSA v Minister of Justice and Constitutional Development & others* 2001 (11).

²³² *Afrox v SA Chemical Workers Union* (1) 1997 (18) ILJ 399 (LC).

²³³ *Greater Johannesburg Transitional Metro Council v IMATU* 2001(9) BLLR 1063 (LC).

the employees the right to strike despite the ambiguity of whether it was a strikeable interest. In *Government of Western Cape v Cosatu*²³⁴ the court held that employees could strike over their children's education in an attempt to address the historical injustices the apartheid system had inflicted on the educational system.

The decisions in these courts show how the right to strike has become more accessible to a whole wider range of interest disputes that might not even affect collective bargaining. The vulnerability of employers becomes more imminent as they possibly face more likelihood of facing infrastructural damage as result of violent strikes.

3.4.6 Replacement labour and the Effectiveness of a strike

Section 76 of the LRA regulates the issue of replacement labour. This is a problematic issue as it compromises the interests of labour and has the perception of undermining the strike action.²³⁵ But, the use of violence has made it difficult for replacement labour to access the workplace or even perform their jobs. Replacement labour is often unable to break through the picket lines. In most cases these 'scabs' are intimidated and threatened from entering the workplace. This chapter acknowledges the undermining role replacement labour may pose on the furtherance of collective demands, but, this does not justify strike violence and intimidation against such employees.

In Masiloane's article there is the development of an argument that is crucial in this dissertation.²³⁶ The safety of non-striking employees is crucial in the understanding of violence and more importantly replacement labour. The study by Masiloane²³⁷ analyses the phenomenon of violence and intimidation during strike actions and explores limitations of policing to provide adequate security. Attempts are made to understand whether violence during a strike is usually an irrational act perpetrated by opportunistic offenders, or is it rather an outcome of a rational act designed to influence the effectiveness of the strike action? The article defines the concepts relating to the issue of striking and those who chose to work. Violence is broadly defined as any behaviour that is aimed at denying or restricting another person's rights. Masiloane suggests that violence is any action or behaviour that is directed at

²³⁴ *Government of Western Cape v Cosatu* 1998 (12) BLLR (LC).

²³⁵ M Brassey 'Labour Law After Marikana: Institutionalized Collective Bargaining in South Africa Wilting? If So, Should we Be Glad or Sad' 2013 34 *ILJ* 826–834;

²³⁶ Masiloane (note 220 above).

²³⁷ Masiloane (note 220 above).

influencing another person's behavior which limits an employee's freedom of choice.²³⁸ As a result, such employees seem to be deprived from freely exercising their right not to strike and not to participate in the activities of the trade unions during such strike actions.

According to Masiloane the increasing violence and intimidation of non-striking employees have become prominent features of any strike action in South Africa. As a result, of this increasing violence, there is an erosion of the employee's individual freedom to choose whether to strike or not and the safety and security of the non-striking employees. Masiloane argues that it is against this backdrop that maintenance of order is a challenge for the police during strikes, and guaranteeing the safety of individuals who are not participating in a strike has always been a somewhat unattainable mission.²³⁹ This is because of the systemic infiltration of violence in the collective bargaining system and its influence to the outcomes of the bargaining negotiations.

Baird further emphasises that the denial of employees' right to choose whether to strike or not is an essential requirement of any successful strike.²⁴⁰ Thus, the role of unions and union leaders is questionable if the issue of violence is to be answered holistically. Baird is of the opinion that there is nothing unusual about violence during a strike. The incidents of violence include and are not just limited to assault, malicious damage to property, murder, attempted murder, intimidation, and public violence. Korzeniewicz is of the opinion that the success and effectiveness of a strike is to a certain extent dependent on public sympathy and support. According to Korzeniewicz that is why union leaders often deny that their members are involved in acts of intimidation or violence.²⁴¹

Masiloane weighs in on the ongoing debate in order to understand whether violence that occurs during a strike is the result of sporadic incidents perpetrated by opportunistic criminals, or rather constitutes a systematic attempt to influence the effectiveness of a strike. This dissertation prescribes to the 'systematic approach' of strike violence to influence the collective bargaining system. It is against this viewpoint that lawlessness is not an inexplicable set of circumstances, but, rather a purposeful action designed to ensure that

²³⁸H Wallace, 'Family Violence: Legal, Medical, and Social Perspectives.' (1996).

²³⁹ I Cerrah, 'Crowds and Public Order Policing: An Analysis of Crowds and Interpretations of their Behaviour Based on Observational Studies in Turkey, England and Wales'. (1998).

²⁴⁰ C.W Baird 'Columns: Unions Drop Their Mask. *The Freeman: Ideas on Liberty*' (1991)

www.fee.org/publications/the-freeman/article.asp?aid+737.

²⁴¹ Korzeniewicz (note 222) pg 1-32.

operations in an industry are halted.²⁴² According to Baker a successful strike objective is to bring the industry operations to a halt and violence is the most effective rational means. It is this 'rational' means that this dissertation is against, because violence deprives other people their right of freewill and constitutes unlawful conduct. This is why any strike situation potentially poses a threat to law and order such that it becomes logical, reasonable and desirable that it should be policed.²⁴³ But, this dissertation seeks to argue that policing of the strikes should be done to protect the mining operations and the economy.

Masiloane's article is important as it exposes the fallacy of safety that is associated with those who refuse to strike because they keep the production going, thus undermining the objective demands of the strike. But, this does not justify the use of violence, simply because other employees have freely exercised their choice to continue working. There needs to be respect of other employee's choices regarding whether to participate in a strike or not. The issue of policing becomes of paramount importance in ensuring the safety of those employees who chose to work

3.5 The Code of Good Practise and Picketing

The right to strike and picket are synonymous in South Africa, this is because when employees strike they also picket at the same time.²⁴⁴ Picketing has been described as the persuasive activities of persons situated near the business of the employer to persuade other employees to join in the strike. Picketing is a constitutionally protected right.²⁴⁵ It is also expressly recognized by section 69 of the LRA.

The exercise of the right to picket is expressly qualified with the requirement that it must be peaceful and must not amount to intimidation and violence. The Code of Good practice s7 states the activities that picketers may not do.²⁴⁶ The Code of Good Practice²⁴⁷ on picketing is a practical guide to assist employees, employers and registered trade unions when exercising the right to picket. The guide helps in the identification of people who may participate in the picket and the regulation of such associated conduct.

²⁴² D P Waddington 'Flashpoints: Studies in Public Disorder'. (1989).

²⁴³ D Baker 'The Fusion of Picketing, Policing and Public Order Theory within the Industrial Relations Context of the 1992 APPM Dispute at Burnie'. *Australian Bulletin of Labour* (2001) 27(1): 61-77.

²⁴⁴ M Brassey 'Labour Law After Marikana: Institutionalized Collective Bargaining in South Africa Wilting? If So, Should we Be Glad or Sad' 2013 34 *ILJ* 826-834.

²⁴⁵ S 16 & s17 of the Constitution.

²⁴⁶ Item 6 (7) of the Code of Good Practise Picketing.

²⁴⁷ Ibid.

The code does not impose any legal obligations because it is merely a guideline.²⁴⁸ The code is only applicable to pickets that are authorised by a registered trade unions and where only members and supporters of the trade union participate. The code states that ‘a registered trade union must authorise the picket in writing.’ This means that there must be a resolution authorising the picket which must ‘then be served on the employer before commencement of picket.’ The code implores the union and employers to agree on picketing rules. According to the code this should include an agreement on the number of picketers, the duration of the picket, the location of the picket and communication between marshals and employers. There should also be agreements that facilitate the exercise of the right to picket such as access to the employer’s premises in order to access toilets or telephones. According to the code, it is important that ‘the picketers conduct themselves in a peaceful, unarmed and lawful manner and may carry placards, chant slogans and sing and dance.’²⁴⁹ The code prevents the physical prevention of members of the public from gaining access to or leaving the employer’s premises.²⁵⁰ Picketers are prohibited by the code from committing any acts which are unlawful or which may be perceived to be violent.

The police have a general duty to uphold the law and may take reasonable measures to keep the peace.²⁵¹ The police have a responsibility to enforce the criminal law. They may arrest picketers for participation in violent conduct or attending a picket armed with dangerous weapons. The failure to police pickets has resulted in the indirect condonation of violence.

3.6 Conclusion

It has become very clear that the right to strike is very important and fundamental to industrial relations and collective bargaining. The exercise of the right to strike and picket is not only recognized internationally but is also constitutionally protected in South Africa. However violent strikes and pickets are clearly not in accordance with the law and constitute unlawful conduct by employees. This dissertation submits that these violent strikes and pickets undermine industrial relations and collective bargaining and in the process damage the mining industry and the economy.

In the next chapter, this paper will examine how the judiciary has interpreted the violent and destructive exercise of the right to strike and picket. Strike action can be protected or

²⁴⁸ Code of Good Practise Picketing, Item 1 (1-7) .

²⁴⁹ Code of Good Practise Picketing, Item 3 (1).

²⁵⁰ Code of Good Practise Picketing, Item 6 (6-7).

²⁵¹ Code of Good Practise Picketing, Item 7 (1-3).

unprotected according to its compliance with the LRA. Employees involved in protected strikes enjoy certain immunities which are denied to employees who engage in unprotected strikes.²⁵² The concept of protected and unprotected strikes and pickets will be discussed in further detail in the next chapter.

²⁵² Section 68 of LRA

Chapter 4: The Judicial interpretation of the violent exercise of the right to strike

4.1 Introduction

The focus in this chapter will be the judicial interpretation of the exercise of the right to strike, especially when it becomes violent and destructive. The courts play an important role in the interpretation and application of the law. It is the aim of this chapter to show that the distinction between protected and unprotected strikes is superficial and have not deterred striking employees from being violent.

4.2 Violence and Protected strikes

Where the requirements of the LRA have been met, the strike is accorded the status of 'protected'. During a protected strike employees are granted statutory protection. Section 67(2) of LRA stipulates that participation in a protected strike does not amount to a breach of contract despite the withdrawal of labour constituting a breach of contract at common law. The reasoning is that the legislature views protected strike as functional to collective bargaining process and the existence of peaceful labour relations.

This protected status of a strike and immunity is important because the right to strike has is fundamental to 'the purpose of collective bargaining'.²⁵³ According to *Health Services & Support-Facilities Subsector Bargaining Association v British Columbia*²⁵⁴ this is because collective bargaining 'enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work'.²⁵⁵ Employees may not be dismissed for going on strike in terms of section 67(4) of the LRA. The main purpose of a strike action is to cause an employer economic harm in order to comply with the employee's demands. Thus, dismissal of disgruntled employees would undermine the collective bargaining system. However, the common law rule of 'no work no pay' is recognised by the LRA. Thus, an employer does not have to pay an employee participating in a protected strike.

²⁵³ section 27(4) of the Bill of Rights

²⁵⁴ *Health Services & Support-Facilities Subsector Bargaining Assn v British Columbia* (2007) SCC 27.

²⁵⁵ *Ibid*, para 82.

However, sections 67(5) (4) and 189 of the *LRA* also states that employees may be dismissed for operational reasons. But application of s189 must be in accordance with the *LRA* provisions regarding dismissal based on the employer's operational requirements. This means that the employer has to properly consult stake holders including employees and unions, consider alternatives, apply fair selection criteria and pay severance benefits.²⁵⁶ But, more importantly section 67(5) of the *LRA* states that an employee may be dismissed for misconduct during a strike, such as intimidation or violence. An employer who decides to dismiss employees under 67(5) of the *LRA* must ensure that dismissal is fair and in accordance with statutory requirements for a fair dismissal for misconduct. But s 67 (5) conflicts with s67 (4) of the *LRA* which is vague as to the conduct that is dismissible during the furtherance of a strike. The concept of 'any conduct in contemplation or in furtherance of a protected strike' has led to a wide interpretation of which conduct can be deemed as furthering the strike. This has led to criminal offences such as violence, intimidation and destruction of property being seen as conduct furthering the strike.

Section 67(2) of the *LRA* states that no civil legal proceedings may be instituted against any person because of that person's participation in a protected strike and conduct in contemplation or in furtherance of a protected strike is also protected against civil liability. As a result, employers may not institute civil legal proceedings against employees on strike such as a claim of damages for lost production during the strike.²⁵⁷

A court interdict cannot stop a protected strike. However, the employer can apply for a court interdict to prevent unlawful action, such as damage to machinery.²⁵⁸ As a result, of this interdict provision there has been a growing groundswell of judicial sentiment that strike violence and property destruction during strikes cannot continue to be tolerated. In *Tsogo Sun Casinos Montecasino v Future of SA Workers Union*,²⁵⁹ there was a protected strike which was marred by violent and unlawful conduct. The picketing that occurred in support of the strike was not peaceful with strike conduct including assault, theft, malicious damage to property and blocking access to and from the casino's premises.²⁶⁰ The court in this matter noted that:

²⁵⁶ Sections 67(5)(4) & s 189 and 189A of the *LRA*

²⁵⁷ Section 67(6)

²⁵⁸ Section 68(1)a

²⁵⁹ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 ILJ 998 (LC).

²⁶⁰ *Ibid* para 5.

This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA. But, the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus, whether it continues to enjoy protected status.²⁶¹

This judgement shows how the Labour Court was open to being persuaded to intervene in a violent and destructive protected strike. This is because according to s69 of the LRA the picketing rules state that a picket must be peaceful and unarmed. Furthermore, the granting of Labour Court jurisdiction to interdict an unprotected strike strengthens this interventionist approach.²⁶²

The *Tsogo Sun Casinos Montecasino v Future of SA Workers Union* judgement evinces a shift in attitude and intolerance towards violence and destruction during strikes.²⁶³ However this interventionist approach is not a solution to the systemic infiltration of violence in the collective bargaining system. The courts should be punitive in their approach towards strike violence and property destruction under the guise of 'promoting collective bargaining' not interventionist.

Recent cases have held that the rights to assemble, demonstrate, and picket do not encompass gatherings that are violent or riotous in nature. In *Garvis v SA Transport & Allied Workers Union*,²⁶⁴ there was a protracted and violent strike in the security sector in Cape Town. The union organized a protest march in support of their strike which descended into chaos and caused extensive damage to vehicles and shops. The court in passing its judgement noted how in the past the majority of the population had been subjected to the 'tyranny of the state'. The court emphasised that people cannot now be subjected to the tyranny of the 'mob'.²⁶⁵

²⁶¹ *Tsogo Sun Casinos (Pty) Ltd v Future of SA Workers Union & others* (2012) 33 ILJ 998 (LC) Para 13.

²⁶² *Ibid.*

²⁶³ A Rycroft 'Can a Protected Strike Lose Its Status?' (2012) 33 ILJ 821 p821.

²⁶⁴ *Garvis & others v SA Transport & Allied Workers Union & others*(2011) 32 ILJ 2426 (SCA).

²⁶⁵ *Ibid* ,para 50.

In *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union*,²⁶⁶ it was held that members of the public affected by noisy picketing can interdict the picket. Thus, according to this rationale a picket may lose its protection if picketers behave unreasonably. The court in *Growthpoint Properties* ordered that striking employees cease committing a nuisance at the premises of a shopping mall. The court found that noise was part and parcel of picketing but that there was a level of tolerance that was to be expected especially in consideration to third parties in the mall. Hence the court ruled that by shouting, chanting loudly, ululating or using any kind of instrument or object with which to make any loud noise in the vicinity of the entrances to the mall such conduct constituted a nuisance. The court then authorized the SA Police Service to assist in the enforcement of the order and ordered the employees to pay the costs of the application.²⁶⁷

In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration*²⁶⁸, the court held that where a picket exceeded the bounds of peaceful persuasion and becomes coercive and disruptive to the business of third parties, the picket would cease to be reasonable and lawful'. The court denied the employees to picket in store. In this case, Shoprite resisted in-store picketing because the nature of its business was such that it operated hundreds of stores. The employer argued that that it would be difficult for the union and security forces to control pickets and that it would be hugely disruptive of the business. Shoprite also submitted that in store picketing would afford SACCAWU an unfair collective bargaining advantage. The employer also drew from previous strike action and picketing experience which had resulted in the stores being trashed and customers intimidated and threatened. The employer argued that in-store picketing would be seen as an opportunity to disrupt the businesses operations, which SACCAWU would not be able to control. Furthermore, it was argued that the rights of third parties such as landlords, tenants and customers in shopping malls would be adversely affected.²⁶⁹

In *Ram Transport (Pty) Ltd v SA Transport & Allied Workers Union*,²⁷⁰ the court held that it will be accessible to assist those who seek protection of their right to strike, but the court qualified this statement by stating how those who commit acts of criminal and other

²⁶⁶ *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union & others*(2010) 31 ILJ 2539 (KZD).

²⁶⁷ Ibid, para 66.

²⁶⁸ *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*(2006) 27 ILJ 2681 (LC).

²⁶⁹ Ibid, para 30.

²⁷⁰ *Ram Transport (Pty) Ltd v SA Transport & Allied Workers Union & others*(2011) 32 ILJ 1722 (LC).

misconduct would not be protected. The court warned that transgressors of the law would be subjected to the severest penalties that this court is entitled to impose.²⁷¹ Importantly the court expressed its regret that the South African industrial relations landscape had now been blighted by incident of violence and damage to property perpetrated by unidentified persons.²⁷² In this case²⁷³ the company received a strike notice relating to a dispute concerning a unilateral change to terms and conditions of employment. The employer immediately approached the Labour Court for an interim order interdicting the proposed strike action. The employer argued that no dispute had been referred to the bargaining council and that all the affected employees had agreed to the change in working hours. An interim order interdicting acts of violence and other misconduct was granted by the court, but no order was made with regard to the violent acts perpetrated due to lack of sufficient evidence.

4.3 Unprotected strikes and Violence

A strike will not be protected if it does not comply with the requirements of the LRA. Section 68 of the LRA provides remedies for employers faced with unprotected strikes and pickets. Section 68 of the LRA grants the Labour Court exclusive jurisdiction to grant an interdict or order restraining any person participating in a strike or any conduct in contemplation or in furtherance of a strike. According to the LRA participation in an unprotected strike constitutes a fair reason for dismissal but, other requirements such the fairness of the dismissal must be considered.²⁷⁴

Item 6 of the *Code of Good Practice in Schedule 8* of the LRA provides a guideline for dismissal for participation in an unprotected strike and lists both the substantive and procedural fairness requirement of the dismissal which have to be evaluated. Thus, employees who participate in unprotected strike are being given protection against dismissal by the courts through the application of Schedule 8 of the LRA.²⁷⁵ This is because their dismissal ought to be fair and reasonable in the circumstances. It is against this fairness provision that dismissal is often found to be a harsh punishment.

It is against this backdrop that the courts have failed to send an unequivocal message that shuns strike and picket violence which is resulting in serious economic damage to the

²⁷¹ *Ram Transport (Pty) Ltd v SA Transport & Allied Workers Union & others*(2011) 32 ILJ 1722 (LC) para 9.

²⁷² *Ibid* .

²⁷³ (2011) 32 ILJ 1722 (LC).

²⁷⁴ Item 6 of the Code of Good Practice in Schedule 8 of the LRA.

²⁷⁵ *NUM and Others v Goldfields Security Ltd* 1999 20 ILJ 1553 (LC); *CAWU and Others v Klapmut. Concrete (Pty) Ltd* 1996 17 ILJ 725 (IC).

economy of this country. The mere fact that a strike is unprotected amounts to misconduct which should warrant a procedurally fair dismissal. Hence the addition of violence, intimidation and property destruction should automatically warrant dismissal as an appropriate sanction. But, the courts have not judged accordingly and have thus, indirectly, promoted strike and picket violence.

In *SATAWU v Moloto*,²⁷⁶ the court dealt with a matter in which non signatory employees to a collective agreement had failed to send a strike notice in accordance with section 65. Thus, their participation in the strike was unprotected and amounted to misconduct which justified dismissal. In this case the employer had entered into a recognition agreement in terms of which the union SATAWU was the recognised bargaining agent of ‘all the workers’ employed by Equity Aviation. When negotiations failed the matter was referred to conciliation. When conciliation failed the union sent the employer a strike notice stating that they intended to embark on strike action. Equity Aviation argued that this notice was sent only on behalf of SATAWU members and that non-members had failed to send a notice. The Supreme Court of Appeal and the minority judgement in the Constitutional Court found in favour of the employer. They agreed with the employer that a purposive interpretation of the provisions is necessary. 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 according to the two judgements promotes orderly collective bargaining. This is because it enables the employer to reasonably determine the extent of the strike and adequately prepare. But, the majority in the Constitutional Court disagreed. The majority judgement reasoned that the legislature was clear in its intentions. The court looked at the language used by the legislature which expressly required that only notice of the commencement of the strike is to be given to the employer by ‘anyone involved in the dispute’. The court also concluded that this did not oblige every participating employee to issue the notice to exercise the right to strike.²⁷⁷ In the majority judgement it was held that a literal interpretation of the section meant it would be less intrusive of the right to strike. The court held 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 the Constitution. The reasoning of the court was that the economic and social power was already generally tilted in favour of employers.

²⁷⁶ *SATAWU & Others v Moloto NO & Another* (2012) 33 ILJ 2549 (CC).

²⁷⁷ *Ibid*, para 88.

The majority judgement held that the union, which represented the dismissed strikers in the wage negotiations and attempted conciliation under section 64(1) (a) before embarking on strike action, was competent also to give the single notice. The judgement also noted that to hold otherwise would place a greater restriction on the right to strike of non-unionised employees and minority union employees than on majority union employees.

It is respectfully submitted that the majority judgement erred in its assumption that the right to strike should be limited as little as possible. This is because it has become evident that unions through strikes can cause irreparable damage which is both economic and physical to the operations of the employer. It is accepted that the collective bargaining structures generally favour employers, but, violence and destruction of property has allowed unions to manipulate the outcomes of the bargaining system unfairly.

The minority judgement of *SATAWU v Moloto* noted that

If a notice gives an employer no indication of which of its employees might strike, it is nigh impossible to conceive how the employer will prepare properly for the impending power play. How will it make an informed decision as to whether or not to yield to the employees' demands? And, if it resists, how will it take proper steps to protect its business, the employees and the public and engage meaningfully in pre-strike regulatory discussions regarding issues such as picketing rules?²⁷⁸

The minority judgement seems to be rather more sympathetic to employers and big business. This dissertation shares this same sympathy because employers are powerless in the face of an unlawful, violent and destructive strike led by unions commanding thousands of members. There is a systematic disregard for the rule of law, which has left employers fearful and at the mercy of violent and destructive employees.

In *FAWU Kapesi v Premier Foods*,²⁷⁹ the employees partook in a violent strike which resulted in a number of non-strikers being beaten. The employer instead of conducting disciplinary proceedings for misconduct dismissed the violent strikers based on operational reasons.²⁸⁰ It was common cause that the strike was a 'particularly violent one' in which non-strikers and management were harassed, beaten and intimidated. It even reached the extent of employees being visited at their homes by persons who threatened them with

²⁷⁸ *SATAWU & Others v Moloto NO & Another* (2012) 33 ILJ 2549 (CC) Para 62.

²⁷⁹ *FAWU obo M Kapesi And 31 Others v Premier Foods LTD* Case no: CA7/2010.

²⁸⁰ section 189 of labour Relations Act 66 of 1995.

physical harm and death.²⁸¹ The court held that the employer could choose to dismiss violent strikers for operational reasons as oppose to misconduct. But, the court found that the employer's selection criterion was unfair as it could not be proven that the employees who were retrenched committed violence during the strike. The principle applied by the court was that sufficient proof needs to be established to dismiss employees under operational reasons. But, in this case many witnesses were either afraid to testify or were missing.

It is the submission of this paper that the fact that criminal charges were laid with the police and that the police were unable to apprehend these violent strikers should have enabled the courts to take a more decisive stance in shunning violence and property destruction under the guise of a strike. Instead the court ordered the reinstatement of such employees.

4.4 Protected or unprotected violence

It is the submission of this dissertation that the distinction between protected and unprotected strikes is superficial and is no deterrent to violence and destruction of property.²⁸² Violence in strikes has actually increased over the past years as has the number of unprotected strikes. The fact that dismissal of employees engaged in a violent strike needs to be fair has blurred the distinction between protected and unprotected strikes.²⁸³

The mere fact that employees are violent and destructive should be fair reason enough to justify dismissal. This is why this paper will not focus on the legal status of a strike being protected or not. This dissertation seeks to understand why the courts have failed to deter violence and destructive strikes through the available remedies. The courts have played a passive role in this negative trend by applying the law generously and favourably to the striking employees who are violent and destructive. It can be confidently said that violent and unlawful actions of these miners is going unpunished. As a result of strike and picket violence the mines are gradually becoming economically unviable and this has an adverse impact on the performance of the economy.

4.5 Liability and compensation

Section 68(1) (b) enables persons who have suffered losses as a result, of an unprotected strike or lock-out to be able to institute claims for compensation against the union, employees

²⁸¹ *FAWU obo M Kapesi And 31 Others v Premier Foods LTD* Case no: CA7/2010 paragraphs 5-8 detail the violence and intimidation that occurred during the strike.

²⁸² Rycroft (note 263 above) p821.

²⁸³ Rycroft (note 263 above) p821.

or employer concerned. Under the common law, an employer who suffers a loss as a result, of a strike can institute a delictual claim against the union or the employees concerned in order to recover such losses. This delictual principle applies to acts or omissions committed during the course of a strike such as malicious damage to property and assault.

In practise it is easier to succeed with a delictual against the actual strikers or the person(s) who maliciously damage the property or assault other people. This is because it is difficult to hold a union liable. In *Mondi Paper v Chemical Energy Paper Printing Wood & Allied Workers Union*²⁸⁴, the court held that the failure by the employer to adduce evidence that the union, as principal, authorized, instigated or ratified commission of the delict meant that the union would not be held liable. The court further noted that the failure to identify the perpetrators or establish the commission of criminal offence weighed against the employer. This case shows how the employer has a great evidentiary burden to prove to the court. However, recovering damages from striking employees is likely to be futile but there are better chances claiming against the union.

Section 67 of the LRA prohibits claims where the strike complies with the provisions of the LRA. Any actions in contemplation or furtherance of a protected strike will not result in civil liability. However, ‘any actions in contemplation or furtherance of a strike’ that constitute criminal offences do not enjoy immunity protection.²⁸⁵ This means that an employer can recover losses resulting from intentional criminal acts such as malicious damage to property.

Section 68 of the LRA stipulates the legal consequences that emanate from an unprotected strike and a lock-out. The section contains no prohibition of claims to be recovered as result of an unprotected strike or lock-out. It is submitted in this paper that such an omission was intentional. This is because the provisions of the LRA are not very onerous such that a failure to comply must warrant any claims that flow. Section 68 also provides for compensation claims that can be instituted in the occurrence of an unprotected strike or lockout. The Labour Court is given exclusive jurisdiction in the granting of ‘just and equitable’ compensation for any loss attributable to the strike or lock-out. This also includes conduct that is in contemplation or furtherance of such a strike or lock-out.²⁸⁶

²⁸⁴ *Mondi Paper (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union & others*(2005) 26 ILJ 1458 (LC).

²⁸⁵ section 67(8).

²⁸⁶ Section 68(1)(b).

It is generally accepted that any claims for damages can be instituted through the common law or the LRA. But, most scholars and the courts have agreed that it is safer to use the LRA as it is a statutory legislation that should be complimented by the common law.²⁸⁷

The court in applying section 68 exercises its own discretion and is not limited to the mechanical calculation of losses actually suffered by the employer. The court takes into account various factors such as the compliance with LRA provisions, the premeditation of such conduct by organisers, justification of conduct, interdict procedures, serving the interests of collective bargaining, duration of strike and the financial position of the parties.²⁸⁸ After consideration of the above mentioned factors the courts determines what it considers as fair quantum. There are limited reported cases of employers pursuing this statutory remedy. This is because of the relatively low compensation awarded in comparison to the actual losses suffered.²⁸⁹ However, this dissertation argues that the courts must not reward violence but, rather deter violence through costly awards that inflict financial punishment.

In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*²⁹⁰, the court held that the union was liable on the basis of the acts and omissions of the senior officials and office-bearers of the union. The employer was seeking damages of R15 million as a result of an unprotected strike. As the trial progressed the employer's claim was then limited to R100 000 for reasons not disclosed in the judgement. However, the court ordered that the R100 000 claim be paid by the union in R5 000 per month instalments. It is interesting to note that the judge commented that this claim was within the upper limit of fair compensation based on the circumstances.

In another case of compensation, *Algoa Bus Company v SATAWU*²⁹¹, the Court was prepared to order employees to pay compensation to an employer. The court granted a R100 000 compensation claim to be paid in monthly R50 instalments. The employer had sought a claim of R465 000 of damages that were as a result, of a strike that lasted 2 days. However a more recent case of *Algoa Bus Company (Pty) Ltd v South African Transport & Allied Workers*

²⁸⁷ Brassey, 'Commentary on the Labour Relations Act' Vol 3 A4:51; Thomson and Benjamin, in *South African Labour Law* AAI-347 ; Grogan *Collective Labour Law* 208; *Post Office Ltd v TAS Appointment and Management Services CC & Others* [2012] 6 *BLLR* 621 (LC).

²⁸⁸ P.A.K. le Roux 'Claims for compensation arising from strikes and lockouts Common law and the LRA' *Contemporary Labour Law* Volume 23 No. 2 September 2013.

²⁸⁹ S Harrison 'Damage during a strike - can employers get their money back?' 08 Aug 2011 employment ENSight available at <http://www.ensafrica.com/news/damage-during-a-strike-can-employers-get-their-money-back?Id=492&STitle=employment%20ENSight> (accessed 9 September 2014).

²⁹⁰ [2002] 1 *BLLR* 84 (LC).

²⁹¹ [2010] 2 *BLLR* 149 (LC).

*Union*²⁹² case has been decided in which the employer instituted a claim for damages amounting R13 55095.00 against the union SATAWU. The claim was based on the provisions of section 68 (1) (b) of the LRA. The employer pleaded and provided evidence that the damages arose from the unprotected strike actions by the members of the union in 2011. However the court found that the employer had not pleaded all the other requirements of section 68 dealing with the issue of quantum of damages.²⁹³ Thus the court held that justice would be done if the matter were to be referred to oral evidence as concerning the remaining matters in section 68.²⁹⁴

In *Manguang Local Authority v SA Municipal Worker's Union*²⁹⁵ the union was held liable for the actions of its shop stewards. This was because certain responsibilities had been delegated to these officials. The failure by the union and its officials to intervene and to take steps to end the unprotected strike made the union liable. The employer was only awarded R25 000 as compensation. In this matter the employer had instituted a claim of R272 541.84 against SAMWU (union) for the losses it alleged it had suffered during the course of the strike. The court then discounted part of the losses for technical reasons such as the fact that some of the losses had arisen from the actions committed in furtherance of the strike, such as the blockade.

It can be noted from the above claims that the Labour Courts have awarded small amounts as compensation. Myburg argues that Labour Court judges must be willing to award more substantial amounts as compensation if they wish to deal with the scourge of unprotected strikes.²⁹⁶ Adv. Myburg SC also criticises the Labour Courts for failing to take a more activist approach in the deterrence of violent strikes regardless of the strike action being protected or not.²⁹⁷ This is because the Labour Court uses the s 68(1) (b) claim process and takes into consideration grounds that negate the unlawfulness of such violence.²⁹⁸ Thus, the courts have indirectly condoned strike and picket violence. Violent and destructive strikes should be distinguished from peaceful strikes and pickets that promote collective bargaining.

²⁹² *Algoa Bus Company (Pty) Ltd v South African Transport & Allied Workers Union and Others* [2014] 8 BLLR 786 (LC).

²⁹³ section 68(1) (b) (i), (ii), (iii) and (iv) of the LRA.

²⁹⁴ [2014] 8 BLLR 786 (LC) para 35.

²⁹⁵ *Manguang Local Authority v SA Municipal Worker's Union* (2003) 2 All SA 573.

²⁹⁶ P.A.K. le Roux 'Claims for compensation arising from strikes and lockouts Common law and the LRA' *Contemporary Labour Law* Volume 23 No. 2 September 2013.

²⁹⁷ Tim Mills Memorial Talk published in *CLL* (Vol 23 No 1).

²⁹⁸ P.A.K. le Roux 'Claims for compensation arising from strikes and lockouts Common law and the LRA' *Contemporary Labour Law* Volume 23 No. 2 September 2013.

4.5.1 The Regulation of Gatherings Act and SA Transport & Allied Workers Union v Garvis

In *SA Transport & Allied Workers Union v Garvis*,²⁹⁹ there was a protracted and violent strike in the security sector in Cape Town. The union organized a protest march in support of their strike which descended into chaos and caused extensive damage to vehicles and shops. All victims of the violence perpetrated during the march, instituted action in the High Court for damages against the union in terms of s 11 of the Gatherings Act.

The Regulation of Gatherings Act,³⁰⁰ ('the Gatherings Act') is the South African law that regulates matters associated with gatherings that express any form of protest, contest or criticism in a public space. A public space is a street or road, a park, a public square, the steps or grounds of a building or other similar space. Such protest may be directed at an individual or an institution, such as a government minister, a police official, a private company or a government department. The protest may also be about an issue, for example, water delivery, electricity rates or specific laws and government policies. The Gatherings Act explains in detail exactly what must be done in order for a gathering to be considered legal by the authorities.

Section 11(1) provides:

If any riot damage occurs as a result, of -

(a) a gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener;

(b) A demonstration, every person participating in such demonstration,

shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection.³⁰¹

²⁹⁹ (2012) 33 *ILJ* 1593 (CC).

³⁰⁰ Act 205 of 1993.

³⁰¹ S 11 (1) &(2)Act 205 of 1993.

The legislature through its Regulation of Gatherings Act³⁰² sought to impose liability on the perpetrators of destruction during gatherings which are inclusive of strikes. Section 11(2) states how any riot damage liability resultant from a gathering or demonstration will be attributed to the organisers responsible. This provision also calls for joint and several liability for such contributors to unlawful damage.³⁰³

SATAWU challenged the constitutional validity of the law that imposed liability on organisers. The Union contended that the defence allowed by the law unjustifiably limits the right to freedom of assembly in section 17 the Constitution. It argued that one could not take reasonable steps to prevent damage if the damage was not reasonably foreseeable. The Constitutional Court decision of *South African Transport and Allied Workers Union (SATAWU) v Garvas*³⁰⁴ accepted this interpretation. In a majority judgment, Mogoeng CJ held that organisers of demonstrations and strikes could be held jointly and severally liable for damages caused by the demonstrations. The organisers can escape liability if they show that they did not reasonably foresee that the demonstration would turn violent. Also if the organisers can show that they took all reasonable steps to prevent such damage from occurring.³⁰⁵

The Constitutional court in reaching its judgment held that the defence provided for by the law is viable and that the limitation on the right to freedom of assembly in section 17 of the Constitution is reasonable and justifiable. The court reasoned that when a gathering degenerates into violence and threatens the physical integrity, lives and property of vulnerable people, organisations that are responsible for the gathering must be liable. Hence it is clearly established in this case that a trade union would be liable for damage caused during protest organised by the union if they fail to take reasonable steps to prevent such damage.

Jafta J delivered a minority judgement which noted that

Accordingly, it is incorrect to read s 11(2) as providing a defence to claims for damages which arise from violent gatherings only. Nor do I find support in the text of s 11 of the Act for the view that it was ‘designed to prevent unlawful violent behaviour’ as the

³⁰² Act 205 of 1993.

³⁰³ (Note 288 above).

³⁰⁴ (2012) 33 *ILJ* 1593 (CC).

³⁰⁵ P De Vos ‘Protests may just have become more expensive’ June 14th, 2012 Constitutionally Speaking available at <http://constitutionallyspeaking.co.za/2012/06/14/> (accessed 9 September 2014).

Supreme Court of Appeal held. If that was the case, then it could have meant that SATAWU's claim fails at the starting line because s 17 of the Constitution guarantees peaceful gatherings only. A provision that prevents violent gatherings cannot be held to be limiting the right of assembly in s 17 of the Constitution.³⁰⁶

The minority judgement of Jafta J clearly expresses the submissions of this dissertation that violent exercise of the right to strike and picket is unlawful and should not receive any legal condonation. This is important because there has been a judicial misinterpretation of violent strikes and pickets being constitutional, fulfilling the LRA objectives and being beneficial to employment issues. This dissertation submits that this is not so, violent strikes and pickets are unlawful and should be treated as such.

4.6 Conclusion

The distinction between protected and unprotected strikes has failed to deter employees from engaging in misconduct. Employers are unable to summarily dismiss such violent and destructive employees and the courts have failed to award employers substantial compensation against the unions and their members involved in such destructive strikes. But, there has been a groundswell of judicial sentiment that the right to strike must not be violent, however, this is not enough as it is happening at a slow pace.

In conclusion this chapter has shown how the courts have unimpressively adjudicated cases involving violent and destructive strikes. It has been argued in this chapter that the courts' failure to decisively outlaw this behaviour has actually perpetuated violence which is resulting in the collapsing of the mining industry and economy. Violent and destructive strikes and pickets are unlawful and the courts have failed to apply the full measure of the law. This dissertation supports and aligns itself with the minority judgement of Jafta J which explicitly identifies such strike conduct as unconstitutional and unlawful.

³⁰⁶ *SA Transport & Allied Workers Union & another v Garvas & others*(2012) 33 ILJ 1593 (CC) para 135.

Chapter 5: Comparative analysis of the UK and Botswana approach to strike effects

5.1 Introduction

In the previous chapters this dissertation has firmly established that the right to strike is not definitively defined under the ILO provisions and that each country is free to regulate the exercise of the right to strike. In the previous chapters it has been shown that the violent exercise of the right to strike is unlawful both internationally and domestically. Despite the unlawfulness of such violent strike conduct South Africa continues to experience a gradual increase in strike violence in the mining sector which is damaging the economy.

In this chapter a comparative study will be conducted with the United Kingdom (UK) and Botswana. This chapter will analyse how these governments have regulated or enforced their laws in order to achieve an acceptable exercise of the right to strike that is destructive.

5.2 The UK position

It is difficult to compare South Africa and the UK with regards to the legality of the right to strike. This is because of the constitutional departure that these two countries embark from. Unlike the UK, South Africa constitutionally recognises the right to strike whereas the United Kingdom has no written constitution and Parliament is sovereign.³⁰⁷ There is no 'right to strike' under English law and no such right has ever existed. As a result, of this, any rights associated with strike and industrial action are not protected in any superior document but is rather regulated by statute and common law.³⁰⁸ The law in the UK does however grant immunity from liability for civil wrongs that are committed during a strike. These immunities are subject to restrictions and mandatory rules contained in the Trade Unions and Labour Relations (Consolidation) Act 1992 (TULRCA).³⁰⁹ Nonetheless both countries have experienced the disastrous effects of strikes with similarities between the battle of Orgreave and the Marikana shooting. This chapter will show how the UK under the Thatcher administration managed to curb the union power of striking.

³⁰⁷ High Court of Lobatse, *Botswana Public Employees' Union and others v. Minister of Labour and Home Affairs and others*, MAHLB-000674-11, 9 August 2012 para 89.

³⁰⁸ S Honeyball, J Bowers, *Textbook on Labour Law*, 8th edition (2004), p. 388.

³⁰⁹ section 219 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA),

The right to strike in the UK is defined as the 'withdrawal of labour by a group of workers who are in dispute with their employer.'³¹⁰

Honeyball and Bowers have noted that

It is virtually impossible in modern Britain to take industrial action which is lawful. ... The consequences of this are naturally serious. To take part in industrial action may mean the worker can be dismissed or lose pay and lack qualification for job seeker's allowance or other benefits. This is so even if the employer is totally to blame for the breakdown in relations that leads to the action.³¹¹

It is against this quotation that it can be reasonable deduced that violent strikes in the UK will not be tolerated. This is because, according to Hepple there is no positive right to strike in the United Kingdom.³¹² Collective industrial action has traditionally been shunned in the economic sphere and as a result, laws have been accordingly formulated with that skeptical mindset.³¹³ The British economy and laws have resulted in industrial action being almost obsolete. Workers not satisfied with their wages and working conditions cannot easily engage in strike action because there are regulatory bodies that ensure that purchasers of labour are not exploitative through their investigations and mandatory remedies.³¹⁴

5.2.1 The Influence of National Union of Mineworkers on British politics

The British economy has prospered greatly and has seen a decline in strikes over the past decades. But, this was not always the case in the 1980s during the Margaret Thatcher administration. The coal industry at that time was crucial to the British economy.³¹⁵ The National Union of Mineworkers (NUM) was extremely powerful and influential and had played a major role in bringing down the Conservative government led by Prime Minister Heath due to coal mining reforms thereby strengthening its position and influence on politics, economic policy and governance.³¹⁶

³¹⁰ H Collins, K D Ewing, A McColgan, *Labour Law Text and Materials* (2005, 2nd ed) 863

³¹¹ Honeyball (note 295 above) pg 388.

³¹² B Heppel, Freedman S, *Labour Law and Industrial Relations in Great Britain* (1992), pp. 474–475

³¹³ S Leader, *Freedom of Association: A Study in Labour Law and Political Theory* (1992), p. 182

³¹⁴ A Lilico available at <http://blogs.telegraph.co.uk/finance/andrewlilico/100027624/there-is-no-right-to-strike-in-britain-and-there-never-has-been/> (accessed July 10th, 2014).

³¹⁵ M Clement 'Thatcher's civilising offensive: The Ridley Plan to decivilise the working class' available at <http://www.shu.ac.uk/research/cresr/sites/shu.ac.uk/files/thatchers-civilising-offensive-clement-24.10.13.pdf> (accessed 10 September 2014).

³¹⁶ N Elias 'The Civilizing Process' (2000) Oxford Blackwell p.463.

Due to the events that resulted in the ousting of the Heath government, an internal report was conducted by Conservative MP Nicholas Ridley. Known as the ‘Ridley plan’ it focused on how a major strike in a nationalised industry could be averted, controlled or prevented.³¹⁷ According to the Ridley plan trade union power in the UK was interfering with market forces, causing inflation and preventing the implementation of certain fiscal policies not favourable to unions. The report also concluded that trade unions had undue political power which needed to be checked to restore the UK’s economy.³¹⁸ During this time the UK faced a growing problem as government subsidised coal mines had become economically unviable. It was expensive to extract the coal due to the labour costs (over manning) and there was an oversupply of coal in the market. The government intended to make the mines more economically viable through mechanisation and focusing on a few pits with the result being that twenty thousand jobs in these twenty mining communities would be lost. To the NUM this was a serious concern as this would lead to unemployment and the termination of the primary source of income in the mining towns and communities.³¹⁹

The problem the UK government faced at the time was that the withdrawal of labour by coal workers would cause socio economic and political problems for the country. The coal industry during this time was crucial in the production of thermal electricity generation. The coal industry was also a significant exporter of the mineral to Europe and the largest unionised industry in Europe.³²⁰ But, the government subsidised coal mining industry was becoming an economic burden that the government could not continue affording.

5.2.2 The Thatcher Administration

According to Burns transformational leadership is ‘the process whereby an individual engages with others and creates a connection that raises the level of motivation and morality in both the leader and follower.’³²¹ This form of leadership was essential in governing the UK and reforming its labour relations. This paper supports this view that there was need for reform. Unions cannot be seen to exert political pressure on government through their exercise of the right to strike. The UK needed transformation and Margaret Thatcher proved to be such a leader to change the industrial landscape of the country. She served as British

³¹⁷ Clement (note 315 above).

³¹⁸ J Peck , A Tickell *Conceptualising neo-liberalism, thinking Thatcherism*(2007), in H. Leiner, J. Peck and E. Sheppard (eds.) *Contesting neo-liberalism: Urban Frontiers* pp.26-50.

³¹⁹ Clement (note 302 above).

³²⁰ *Digest of UK energy statistics: 60th Anniversary Report*. Retrieved 16 February 2014.

³²¹ P Northouse, *Leadership: Theory and Practice* p131.

Prime Minister from 1979 to 1990 and was the first female leader of the UK and in the western democracies.³²² She would go on to be the longest serving British leader of the modern century. Despite her decisive and controversial policies this dissertation concurs with the opinion that she was an effective leader in her generation.³²³

According to Margaret Thatcher, trade unions were by definition a ‘coercive collective organization which targeted employers’.³²⁴ This was despite the fact that trade unions had historical significance in British Industrial relations and British history. Trade unions had played an important part in World War II for England and it is this contribution of workers to the war that entrenched the influential position of unions in British culture. The significance of trade unions in British culture was further strengthened by the Labour government which repealed the 1927 Trade Disputes and Trade Union Act.³²⁵ Under this Act unions could not be associated with political parties, civil servants could not strike and union funds were restricted. As expected unions began to expand and equally grow in influence.³²⁶ By 1979 over half of the British workforce was unionized which was the highest in Europe at the time.³²⁷

As the Thatcher government took office, they criticized trade unions for being monopolistic in the public sector which was resulting in low productivity, over-manning, restrictive practices, and strikes.³²⁸ Margaret Thatcher had, in her general election manifesto, used the ‘Winter of Discontent’ to win the 1979 election.³²⁹ The ‘Winter of Discontent’ had been a sudden influx of public sector strikes and picketing that had resulted in the closing of schools and disruptions hospital services.³³⁰ Public opinion had swayed in favour of the conservative view against unions.³³¹

It is submitted in this dissertation that the leadership of Margaret Thatcher was instrumental in the curbing of union power. Margaret Thatcher promised trade union reforms aimed at

³²² ‘Essential Margaret Thatcher,’ accessed February 21, 2012, available at <http://www.margaretthatcher.org/essential/biography.asp>. (accessed 22 September 2014).

³²³ Ibid. A recent biopic entitled ‘The Iron Lady’ was made about Thatcher. Meryl Streep won the 2012 Academy Award of Best Actress in a Leading Role for her portrayal of the Prime Minister in this film.

³²⁴ S Hall and M Jaques, *The Politics of Thatcherism* p178.

³²⁵ J.R. Shackleton, ‘Industrial Relations Reform in Britain since 1979’, *Journal of Labor Research* 19, no. 3 (1998): 582.

³²⁶ D Kavanagh, *Thatcherism and British Politics: The End of Consensus?* 1990, p47.

³²⁷ Shackleton, (note 325 above)p582.

³²⁸ Kavanagh,(note 326 above) pg 234.

³²⁹ Kavanagh,(note 326 above) pg 235.

³³⁰ Kavanagh,(note 326 above) pg133.

³³¹ Kavanagh,(note 326 above) pg130.

weakening closed shops, restrictive picketing and strike ballots.³³² Margaret Thatcher did not just rely on legislation as a tool for reducing union power, but, also exhibited her abilities and skills as proficient crisis management leader.³³³

5.2.3 Law reforms under the Thatcher Administration

The Employment Act of 1980 was the first legislative action taken by the Thatcher administration. This Act was amongst others aimed at the regulation of strike ballots and the provision of public funds for payment of trade union expenses.³³⁴ The provisions of the Act required 80% approval by workers to the conclusion of a closed shop agreement and the compensation of workers excluded from a closed shop agreement.³³⁵ The Act also restricted secondary action and limited lawful picketing to the union's own work place grounds.³³⁶ As a result, this legislation gave many workers greater incentive from becoming unionised.³³⁷

The Thatcher administration then passed the Employment Act, 1982 which generally restricted the definition of a lawful strike as one 'wholly or mainly between workers and their own employers.'³³⁸ The Act increased the compensation afforded to non-unionized workers dismissed in contravention of the Act. The Act also reaffirmed the importance of the strike ballot.³³⁹ The Employment Act, 1982 introduced union liability for trade union industrial action which was unlawful.

The Trade Union Act, 1984 was a comprehensive act that dealt primarily with trade election ballots, pre-strike ballots and trade union funds.³⁴⁰ The Act stated that union executives were to be elected every 5 years through a secret ballot.³⁴¹ The Act effectively took the political influence away from the union executives by placing the decision making powers in the hands of union members. By virtue of this legislation the Margaret Thatcher led administration was empowering union workers to have more of a voice in the decisions made

³³² Wrigley, *British Trade*, p19.

³³³ A Boin, P Hrt, E Stren, B Sundelius *The Politics of Crisis Leadership: Public Leadership Under Pressure* 2005, p2.

³³⁴ *Employment Act 1980*. A2.1. available at <http://www.legislation.gov.uk/ukpga/1980/42/contents> .(accessed 20 August 2014)

³³⁵ P Riddell, *The Thatcher Era and its Legacy*, p47.

³³⁶ *Ibid* pg 55.

³³⁷ Shackleton, (note 325 above) page 586.

³³⁸ Shackleton, (note 325 above) page 38.

³³⁹ Riddell (note 335) pg 47.

³⁴⁰ *Trade Union Act 1984*, available at

http://www.legislation.gov.uk/ukpga/1984/49/pdfs/ukpga_19840049_en.pdf (accessed 2 August 2014).

³⁴¹ Riddell (note 335) pg 2.

on their behalf.³⁴² As a result, many unions changed their election procedures in accordance with the legislative requirements.³⁴³ Union leadership consequently changed from a left wing stance resulting in less union opposition towards government depending on the electorate.³⁴⁴

The most extensive and aggressive piece of legislation passed by the Thatcher administration was the Employment Act, 1988.³⁴⁵ Not only did this act reiterate the issues regarding ballots and liability of unions, it further empowered union members with the right to a pre-strike ballot which could be enforced in a court of law and the right not to be disciplined for refusing to strike.³⁴⁶ A Commissioner for the Rights of Trade Union Members was established through this Act, thus, showing the concern the Thatcher government had for union members. As a result, it became more difficult for unions to strike, thus limiting their political influence. Furthermore, by giving union members the right to vote through the ballot system, unions were democratized.³⁴⁷ Whilst some resented the trade unions reforms by Thatcher, it must be understood that amongst the general electorate they were very popular.³⁴⁸

The last legislative act with regards to labour law and union activity was the 1990 Employment Act.³⁴⁹ Despite the Act reaffirming the unlawfulness of trade union discrimination, it passed significant provisions which effectively abolished the legal protection of pre entry closed shop agreements.³⁵⁰ The Office of the Commissioner for the Rights of Trade Union Members was also significantly empowered to be more active and involved with union activities.³⁵¹ The Commissioner could now ensure that no breaches of rules with regards to trade unions occurred especially ballot procedures.³⁵² Through this empowerment union members could now exercise their union rights under the protection of the law.

³⁴² Riddell (note 335) pg 48.

³⁴³ Riddell (note 335) pg 50.

³⁴⁴ Riddell (note 335) pg 48.

³⁴⁵ Employment Act 1988, 1. 'to make provision with respect to trade unions, their members and their property, to things done for the purpose of enforcing membership of a trade union, to trade union ballots and elections and to proceedings involving trade unions.'

³⁴⁶ Riddell (note 335) pg 47.

³⁴⁷ D Marsh, *British Industrial*, p298.

³⁴⁸ Evans, *Thatcher*, 39.

³⁴⁹ Shackleton, (note 325 above), p 586.

³⁵⁰ Marsh, *British Industrial*, p299.

³⁵¹ *Employment Act 1990*, 1, available at <http://www.legislation.gov.uk/ukpga/1990/38/contents>.

³⁵² *Ibid*.

Contrary to popular view that Margaret Thatcher was unpopular,³⁵³ opinion polls reflected that her trade union reforms were well received even amongst the major unions.³⁵⁴ The public ratings showed an overwhelming approval of approximately 82% for strike ballots and 69 % of the public were in agreement on the restrictive conditions on closed shop agreement. There was also 88% support for voting ballots to elect union leadership.³⁵⁵

In conclusion it is evident that the Thatcher Administration was committed to curbing union power and making sure that they exercise their power in accordance with their members. This paper submits that unions should be accountable to its members and this will encourage responsible unionism. Hence it is essential to formulate legislation that regulates the exercise of power in a union especially based on the fact that unions have power that can be violent and destructive if exercised irresponsibly.

5.2.4 The Coal miners' strike of 1984 and the issue of Picketing

The coal miners' strike of 1984 was triggered by the decision of the National Coal Board to reduce government subsidies to the mines in the North of England, Scotland and Wales. The reasoning behind the National Coal Board's decision was that the coal mines had become economically unviable as it was expensive to extract the coal due to high labour costs (over manning) and the oversupply of coal in the market. It was the board's intention to make the mines more economically viable through mechanisation and focusing on a few pits.³⁵⁶ This meant that twenty thousand jobs in twenty mining communities would be lost. This was a serious concern as this would lead to unemployment and the termination of the primary source of income in these mining towns and communities. In essence the closure of the coal mines would directly affect the livelihood of the mining communities and such associated culture.

The NUM was led by Arthur Scargill, a vocal critic of Margaret Thatcher's government. Scargill was of the strong opinion that the policies of the government were clear, the destruction of the coal industry, coal miner's livelihood and the NUM.³⁵⁷ On 12 March 1984, Arthur Scargill called on a national coal miners' strike in all coal fields.³⁵⁸ As a result, of this

³⁵³ A Beckett, *The Reckoning' When the Lights went out: Britain in the seventies* London, (2009)

³⁵⁴ D Marsh 'British Industrial Relations Policy Transformed - the Thatcher Legacy', *Journal of Public Policy* 11, no. 3 p62.

³⁵⁵ Shackleton, *Industrial Relations*, p 588.

³⁵⁶ Clement (note 315 above).

³⁵⁷ '1983: Macgregor named as coal boss'. BBC News. 28 March 1983.

³⁵⁸ A Callinicos, M. Simons 'The Great Strike: The miner's strike of 1984-5 and its lessons' (1985)

the NUM strike and pickets had a militant approach influenced by socialist and communist ideals.³⁵⁹ During the coal dispute mass picketing and flying pickets³⁶⁰ proved to be a central issue for the National Union of Mineworkers, the police and Margaret Thatcher led government.³⁶¹ The Thatcher administration was intent on making the strike unsuccessful and ineffective. As a result, there was a concerted effort to ‘criminalise’ the presentation of mass picketing as anti-social and a threat to law and order by the government.

Picketing involves more than just the desire to persuade others to support industrial action. A picket involves the dissemination of information and the demonstration or display of support.³⁶² Picketing is an integral part of the organisation of the right to strike³⁶³ Picketing is necessary in ensuring that the right to strike has practical significance.³⁶⁴ Picketing has many forms which have always been variedly comprehended as either being lawful or unlawful depending on what is reasonable in the circumstances to mobilise support against an employer. But, what has been generally permitted is the assembly of workers in dispute to persuade other workers to support the dispute.³⁶⁵ This is the recognised meaning of picketing.

Due to the absence of the explicit rights to strike and picket in the UK, there has always been substantial discretion by the police in what conduct they allow on the picket lines. It must be appreciated that large pickets pose a criminal threat which often result in arrests over a variety of offences. In conclusion the discretion afforded to police effectively allows them to control the activities and movements of pickets in industrial disputes.³⁶⁶

The Thatcher government’s strategy was simple, laws would be passed that would remove the immunities of trade unions. In essence trade union would become as ‘everyman’ before the law.³⁶⁷ Changes were introduced by the Employment Acts 1980, 1982 and the Trade Union Act 1984. The series of laws were, according to the Tory government, aimed at

p36.

³⁵⁹ Scargill, Arthur (interview) (July–Aug 1975). ‘The New Unionism’. *New Left Review*. Retrieved 19 April 2013.: ‘Q: could you tell us how you became a militant trade unionist?’ A: ‘Well, my initiation wasn’t in the trade union at all. It was in the political movement’ [...] ‘So that was my initial introduction into socialism and into political militancy’

³⁶⁰ A flying picket is when picketers are mobilized and moved to picketing points when required. The significance being that they overwhelm the area with the intention of making the area impregnable.

³⁶¹ R East, H Power, P A. Thomas ‘The Death of Mass Picketing’ *Journal of Law and Society* 1985vol 12, no 3,

³⁶² N. Blake, ‘Picketing, Justice and the Law’ in *Policing the Miners’ Strike* (1985; eds. B.Fine and R.Millar) p104.

³⁶³ T. Bunyan, ‘The Police Against the People’ (vol.XX I I I) *Race and Class* 158.

³⁶⁴ *Ibid.*

³⁶⁵ Blake (note 349 above) pg105.

³⁶⁶ ‘The Offence of Obstruction’ *Crim.Law Rev*(1983). 25-26.

³⁶⁷ H.Beynon and P.McMylor, ‘Decisive Power - The New Tory State Against the Miners’ in *Digging Deeper* p.34.

ensuring that unions acted ‘responsibly’. It is this responsible behaviour that this paper is advocating for union to exercise. Unions must be accountable for the violence and destruction that result from the exercise of their collective right to strike and picket. This dissertation agrees with the position that Margaret Thatcher and her government took against the coal mining union in their attempts to resist sound economic reforms in the coal mining industry. This is because unions were striking to preserve a lifestyle and an archaic coal mining system which was no longer economically viable.

5.2.5 The Battle of Orgreaves

The mass pickets at Orgreave best illustrate what has been coined in British trade union history as the extreme manifestation of policing tactics. Despite the conflicting government reports and union statements it is clear that the Orgreave picket is worthy of examination when one looks at the exercise of the right to strike.³⁶⁸

The clash between ten thousand striking miners and five thousand police officers on June 18, 1984 is known as the Battle of Orgreave.³⁶⁹ The clash was a result of a call by the leader of the NUM Arthur Scargill to the coal miners to picket at the plant in an effort to stop British Steel’s coke convoys entering the Orgreave Coking Plant near Rotherham. The police were in strategic formations surrounding the miners in order to prevent them from interrupting the coke deliveries. The picketing strikers hurled bricks and stones and the police responded with mounted charges into the picketing lines.

After the confrontations at Orgreaves, there were in total ninety three arrests. The injury toll was fifty one picketers and seventy two police. In response to the much criticised police tactics in policing the picket lines, Mrs Thatcher was quoted as saying that the police were upholding the law. What is clear from the interviews given by Margaret Thatcher is that she would not allow mob rule, intimidation and violence in industrial action.³⁷⁰

Richards notes that

She planned it very, very clever- you’ve got to admire her... It all fit in, in that ten year from ‘74 to ‘84... she was determined that, at any cost... she wasn’t going to be

³⁶⁸ East (note 348 above).

³⁶⁹ K Perry ‘The Battle of Orgreave: how events unfolded’ 31 Jan 2014 available at <http://www.telegraph.co.uk/news/politics/margaret-thatcher/10608896/The-Battle-of-Orgreave-how-events-unfolded.html> (accessed 10 September 2014).

³⁷⁰ Ibid ‘You saw the scenes on television last night. I must tell you that what we have got is an attempt to substitute the rule of the mob for the rule of the law and it must not succeed’.

humiliated and defeated the same way Ted Heath was... it was all geared up for her to smash the National Union of Mineworkers – and by God, it worked. It's hard to say it, but, it worked.³⁷¹

Looking back on the strike, Margaret Thatcher said it had been about more than uneconomic closure of pits. It had become a political strike where Marxists wanted to defy the law of the land and economics.³⁷² This dissertation agrees with Margaret Thatcher's opinion. This is because the National Union of Mineworkers had changed itself into a political movement aimed at preserving a mining system which was at odds with the government and defied economic logic. The defeat of the NUM miners' strike of 1984–85 in the coal industry was a defining moment in British industrial relations. For Margaret Thatcher and the Conservative Party, the defeat of the NUM was seen as a major political victory. The ability of the Thatcher administration to defeat the NUM led coal miners' strike enabled the government to realise its fiscal objectives. In the process Margaret Thatcher curbed trade union power.

The government had the intention not to yield to the coal miner's demands not to close the economically unviable pits.³⁷³ The appointment of Lawson by Margaret Thatcher was such an indicator. Lawson the then Secretary of State Energy clandestinely built up coal stockpiles at power stations, promoted the use of oil electricity generators and special transportation systems of raw materials.³⁷⁴ In essence Lawson ensured that the government had sufficient resources to invalidate the effects of the coal miners' strike in accordance with Margaret Thatcher's plan. A serious concern of the Thatcher government was the possibility of secondary strikes or sympathy strikes by other industries (steelworkers and electricians) in support of the coal miners. The government had formulated legislation to curb such a possibility and also relied on the negotiation and skillful concessions to such industries.³⁷⁵ As a result, one of the union leaders of the Iron and Steel Trades Confederation refused to come to the aid of the coal mine workers who had called for the prevention of rail transportation of coal. Bill Sire is quoted saying that he was not willing to sacrifice his industry at the altar of the coal strike.³⁷⁶ Such isolation of the coal miners due to concessions given to the railway

³⁷¹ A Richards, *Miners on Strike Class, Solidarity and Division in Britain* (1996), p. 125.

³⁷² Callinicos (note 345) p36.

³⁷³ Callinicos (note 345) , The arrangements to transport chemicals were made in secret, and were kept so confidential that even members of his own cabinet did not know of them. p44.

³⁷⁴ Vinen, *Thatcher's Britain*, p160.

³⁷⁵ Ibid ,pg 167.

³⁷⁶ Vinen (note 374) p170-5This move would have cost jobs in the steel industry.

men and other industries that would have naturally allied with the coal miners greatly impacted the effectiveness of the strike.

5.2.6 The effect of Margaret Thatcher's industrial reforms

On the 1st of March 1985 the NUM called the strike off with no agreement made between them and the government.³⁷⁷ But, the question that needs to be answered is whether Margaret Thatcher was successful in changing industrial relationships in the UK regardless of ending the coal mine strike. It is clear that she passed effective legislation and effectively managed the strikes that plagued her terms in office.

A statistical look at the effect of Margaret Thatcher's policies show that government and trade union interaction through meeting fell from 1979's 27% to 10% in 1988.³⁷⁸ These statistics might show less association between the government and trade unions, but, they reflect the political reality that unions no longer had power or the ability to influence legislation passed by the Conservative government led by Margaret Thatcher. As a result, of the policies of Thatcher and the defeats of the coal miners' strike amongst many others union activity in the UK dropped. Total union density dropped from 58.7% in 1978, to 46.5% in 1988.³⁷⁹ The total number of trade unionists decreased from 13.5 million in 1979 to 10.5 million in 1986 in particular 72% of NUM members left between 1979 and 1986.³⁸⁰ Due to the significant critical drop in their ranks trade unions began to merge.³⁸¹

This chapter through its comparative study has demonstrated how the Thatcher administration managed to curb the power of trade unions in the UK. This was achieved through the use of legislative material and the asserting of government authority over strikers and unions. South Africa must be willing to adopt the same determined approach the Thatcher administration took in curbing union power.

³⁷⁷ Vinen (note 374), p170.

³⁷⁸ Marsh (note 347 above) pg 299.

³⁷⁹ Marsh (note 347 above) pg 301.

³⁸⁰ Evans, *Thatcher*, p40.

³⁸¹ Marsh (note 347 above) p302.

5.3 The UK laws and international law

There is great legal debate as to whether the labour reforms passed by Margaret Thatcher adhered to the ILO principles. In *RMT v the UK in the European Court of Human Rights*³⁸², the Court ruled that the UK laws banning secondary industrial action did not violate the right to freedom of association under the European Convention on Human Rights. Furthermore, the court established that UK law did not interfere with the human rights of trade union members, albeit it does not violate them.³⁸³ The unanimous decision by the Court that there was no breach of Article 11 of the Convention, which guaranteed the right to freedom of peaceful assembly and of association with others, was upheld. The European Court decided that the ballot claim was ‘manifestly ill-founded’ and not admissible. Consequentially the court did not then decide whether the ballot notice provisions did in fact breach the ECHR.³⁸⁴ The court dismissed the claim by the union that pre-strike ballots would be unnecessary burdensome considering the huge size of their members.³⁸⁵

The court accepted that banning secondary strikes was an infringement of the right of freedom of association. The court was however, satisfied with the justification that the government was pursuing a legitimate cause. This is because industrial action will be taken against the employer’s suppliers, customers and other employers in the sector, as it does in other countries. In its extreme form secondary action has the capability of turning into a large sector strike known as a general strike. Thus, the protection of the rights of others workers, employers and the general public in the protection of the economy and the disruptions that ensue were held to be legitimate justifications.³⁸⁶ The courts acknowledgement of protecting the economy is very significant to this paper. This is because the economy is crucial to the existence and security of a State. Hence government should be able to outlaw strike action that irreparably threatens the economy.

In conclusion the laws passed under the premiership of Margaret Thatcher were restrictive and aimed at preventing riots, irresponsible strike action and promoting legitimate strike action. It is submitted that a strike should not be violent and destructive. It must be peaceful, legitimate, electorally supported by employees through a ballot and promote orderly

³⁸² *The National Union of Rail, Maritime & Transport Workers v The United Kingdom* [2014] ECHR 366.

³⁸³ N Huffer ‘UK law on industrial action does not violate human rights, Court says’ available at <http://www.clarkslegal.com/PrintArticle/1928> (accessed 7 September 2014).

³⁸⁴ *RMT v. the UK* (note 382 above) para 45.

³⁸⁵ *RMT v. the UK* (note 382 above) para 45.

³⁸⁶ *RMT v. the UK* (note 382 above) para 88 & 100.

collective bargaining. The strikes and pickets in the UK during the reign of Margaret Thatcher were the complete opposite. Strikes in the UK especially in the mining sector were damaging the economy as indicated. Margaret Thatcher was determined not to condone or sympathise with such behavior under the guise of strike action.

5.4 The Botswana position

It is argued in this dissertation that strike action has the potential to irreparably harm the economy of a country with social and economic effects. The truth of this argument is evident when we look at the effects on countries that are heavily dependent on particular sectors of their economy. Botswana is one such example that economically depends on its diamond mining industry.³⁸⁷ This dissertation submits that Botswana would be adversely affected by a long protracted violent and destructive strike in its diamond mining sector. This concern to minimize the harm caused by strikes was one of the arguments presented by the government of Botswana in a court case challenging its propositions to limit the right to strike in key economic sectors of Botswana.

It was the government's argument that limiting the right to strike in key economic sectors such as the diamond industry was in the best interests of the Botswana people. Government went on to show how the wealth derived from the diamond industry contributed a significantly large portion of the national budget. The national budget according to the government paid for services such as health, education and various social security programs enjoyed by the majority of people in Botswana.³⁸⁸ It's against this key economic significance that the government was quite clear in its proposals to prevent strike actions in such 'essential industries'. This is because a prolonged strike in the diamond industry would have enormous adverse effects on the lives of the general population. The government also went on to show how the effects of the previous prolonged strikes had negatively impacted the mining industry. The government stated how it had a duty to safeguard the economic future of the country.³⁸⁹

³⁸⁷BCM Meeting Attachments available at <http://www.bcm.org/bw/reports.html> (accessed 4 June 2014).

³⁸⁸ 'Botswana presidents office response' 08/07/11 available at <http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Office-of-the-President/Tools--Services/NewsPress-Releases/Government-disappointed-by-annulment-of-Statutory-Instrument-on-Essential-Services-/> (accessed 5 September 2014).

³⁸⁹ High Court of Lobatse, *Botswana Public Employees' Union and others v. Minister of Labour and Home Affairs and others* para 45.

The government would express its open disappointment in the judgment passed against it by the High Court. In *Botswana Public Employees' Union v. Minister of Labour and Home Affairs*³⁹⁰, the court had to decide whether the decision by the government broadening of the essential service list to include Veterinary services, diamond industry and teaching was valid according to s 49 of the Trade Disputes Act.³⁹¹

5.4.1 Botswana Public Employees' Union v. Minister of Labour and Home Affairs

In *Botswana Public Employees' Union v. Minister of Labour and Home Affairs*, the union applicants argued that amendments to section 49 of the TDA were not compatible with the Botswana ILO obligations.³⁹² The court stated that it was bound to interpret constitutional and statutory provisions in accordance with international law.³⁹³

In the courts judgment it narrated how Botswana had ratified two ILO Conventions, Convention 87 on Freedom of Association and Protection of the Right to Organize and Convention 98 on the Right to Organize and Collective Bargaining. The court applied the interpretation of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), which defines essential services as being limited to 'services the interruption of which would endanger life, personal safety or the health of part of or the whole population'.³⁹⁴ The court accepted the definition and the recommendations of the CEACR as a general source of international law.³⁹⁵ The court also noted how the experts had expressed its opinion to the Government that such additions to the list of essential services was not acceptable and an amendment was necessary in line with ILO obligations.³⁹⁶

The union further argued that the current list of essential services was a breach of the constitutional right to freedom of assembly and also that the justification for such limitation of the right to strike was unreasonable in a democratic society. In response to these arguments the court was explicit in stating how it was unclear under Botswana law if the right

³⁹⁰ High Court of Lobatse, *Botswana Public Employees' Union and others v. Minister of Labour and Home Affairs and others*, MAHLB-000674-11, 9 August 2012.

³⁹¹ Trade Disputes (Amendment) Act, 23 of 1992.

³⁹² Ibid, para. 28.4.

³⁹³ (see note 389) para. 192.

³⁹⁴ ILO: Freedom of Association and Collective Bargaining, General Survey of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 81th Session, Geneva, 1994, Report III(4B), para. 159.

³⁹⁵ Ibid, para. 223 of the decision, which also refers to an identical conclusion in the *Botswana Railways v Botswana Railways Train Crew Union*, Civil Appeal No. CA CACLB -042-09.

³⁹⁶ Observation by the Committee of Experts on the application by Botswana of ILO Convention No. 87 published in 2012.

to association included the right to strike. But, the court held that it was bound to interpret section 13 of the right to freedom of assembly in consistency with international law.³⁹⁷ Thus, the court authoritatively held that the right to strike is included in section 13.³⁹⁸ The court further went on to state how international law did not recognise the limitation of the right to strike based on safeguarding economic interests. This is because of the ILO committee of experts acceptance of limiting the right to strike based on essential services.³⁹⁹ The court then held that the additions to the list of essential services were in breach of Section 13 of the Constitution and should be accordingly struck down as unconstitutional.⁴⁰⁰

5.4.1.1 Criticism of the judgement

The judgement passed by Dingake J is not convincing and does not seem to fully appreciate the consequences of strikes as elaborately stated by the government. The judgement is of great significance to South Africa due to the similarities of the legal systems and also the international obligations. Hence it is most likely that should South Africa decide to safeguard its economic interests through limiting the right to strike, the court might be influenced by the reasoning in the Botswana judgement and the Constitutional guarantees.

The Botswana judgement should be criticised for its failure to appreciate the danger that exists when industrial action is unchecked and the effect on the economy. The importance of the economy is essential in securing the economic lives of not just the people but, business enterprises in which hospitals are included. The assumption that economic interests serves capitalists at the expense of labour is inaccurate. The argument forwarded by Botswana is in the best interest of the general public. Prolonged violent strikes are not in the best interest on the general population of Botswana. This is because strikes in the diamond sector in Botswana affect the economy of the country. There for it is against this backdrop that the court should have applied the rationality or proportionality tests in order to balance conflicting rights.

³⁹⁷ *Botswana Public Employees' Union and others v Minister of Labour and Home Affairs and others*, para249.

³⁹⁸ *Ibid*, para 250.

³⁹⁹ (see note 395), para. 250.

⁴⁰⁰ (see note 395), para 257.

5.5 Conclusion

This dissertation argues that the right to strike must benefit of everyone and promote national interests. The exercise of the right to strike must not be destructive to the economy. The right to strike and picket must be protected and fostered in every industrial country. However, there should be no right to strike and picket which is characterised by violence and destruction. This chapter has shown how the irresponsible use of the right to strike and picket was not condoned by Margaret Thatcher. According to Margaret Thatcher such conduct was not picketing but, instead was unlawful conduct which deprived others of their lawful rights. The chapter has also highlighted the disappointment of the Botswana government over a court decision that did not appreciate their intention to limit the right to strike in economically sensitive sectors such as the diamond mining industry.

In the next chapter, this dissertation will elaborate more on the economic justification of limiting the right to strike and conclude with the possible remedies to prevent further strike violence in the mining industry.

Chapter 6: Limiting the right to Strike and Transforming the mining industry: Conclusion and Recommendations

6.1 Introduction

Throughout this dissertation the aim of this research has been to show the significance of the mining sector to the economy and government revenue. However, the dissertation has shown that strikes in the mining sector pose a significant risk to the performance of the economy particularly when violent and prolonged. In this concluding chapter, the focus of this dissertation will be to justify the limiting of the right to strike based on economic reasons in a bid to proffer solutions and recommendations that may be helpful in transforming labour relations in the mining sector.

6.2 The economic justification and the European Court of Justice (ECJ).

This dissertation has proposed the limitation of the right to strike in sensitive areas that are crucial to the performance of the national economy. The peaceful withdrawal of labour can be disruptive to the productivity of a mining operation and a prolonged continuous disruption may have adverse effects on the economy's performance. It is on this basis that the Margaret Thatcher administration aimed to curb union powers and the Botswana government to pass legislation that prevented strikes in key economic sectors. In *Botswana Public Employees' Union v. Minister of Labour and Home Affairs*,⁴⁰¹ the court dismissed the government's argument stating that international law did not recognise the limitation of the right to strike based on safeguarding economic interests. This is in keeping with the ILO Committee of Experts view that the right to strike should be limited only in the case of essential services.⁴⁰²

In *Botswana Public Employees' Union v. Minister of Labour and Home Affairs* the court held that the government's intention to limit the right to strike in certain sectors of the economy was a violation of s 1 (c) (d),⁴⁰³ of the International Covenant on Economic, Social and

⁴⁰¹ High Court of Lobatse, *Botswana Public Employees' Union and others v. Minister of Labour and Home Affairs and others*, MAHLB-000674-11, 9 August 2012.

⁴⁰² Ibid, para. 250.

⁴⁰³ (c) *The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;* (d) *And the right is exercisable in conformity of the laws of the particular country*

Cultural Rights.⁴⁰⁴ This is because there is no definitive definition of the right to strike that stipulates the nature and extent of how the right to strike may be exercised. However, the Committee of Experts are there to provide guidelines by prescribing minimal rules and are merely suggestive and should recognise the varying nature that the exercise of the right to strike may take in various countries. Mining in South Africa (SA) is of great importance to the performance of the SA economy and source of government tax. In light of this importance it is suggested that the right to strike should be limited due to the economic consequences it poses to the South African people.

Though the Botswana judgement and opinion of the Committee of Experts disagree with such economic limitations of the right to strike, the European Court of Justice has adopted a different authoritative opinion. The European Union (EU) is a unique economic and political partnership between 28 European countries. The EU began as a purely economic union but, has evolved into an organisation spanning policy areas, from development aid to environment. This evolution is marked by the change from the European Economic Community (EEC) to the European Union (EU) in 1993. The single market principle is the EU's main economic engine which enables most goods, services, money and people to move freely.⁴⁰⁵ This brief background is important in the understanding and application of the principles derived from the case of *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* (Viking),⁴⁰⁶ which has attracted critical commentary in the understanding of free movement law within the European Union.

The facts of Viking are that

In the Viking case, a Finnish company sought to re-flag one of its ships (the Rosella, which operated on the route between Tallinn and Helsinki) under the Estonian flag, so that it could hire an Estonian crew and pay those workers less than the existing Finnish crew. The International Transport Worker's Federation (ITF), which had an explicit 'Flag of Convenience' policy and to which the Finnish Seaman's Union (FSU, of which the Rosella's crew were members) was affiliated, instructed the FSU and other affiliates to engage in industrial action to prevent the realisation of Viking's plans. Following the

⁴⁰⁴ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

⁴⁰⁵ 'How the EU works' available at http://europa.eu/about-eu/index_en.htm (accessed 1 November 2014).

⁴⁰⁶ *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779. Case C- 438/05.

breakdown of negotiations, which had included an undertaking from Viking that no redundancies would be effected during the initial re-flagging phase, Viking sought an injunction in the English High Court against the ITF and the FSU for both actual and threatened strike action, on the basis that the strike actions constituted restrictions on its right of establishment under (then) Community law.⁴⁰⁷

The court held that the right to take collective action is acknowledged to be a fundamental right within Community law, but, the exercise is subject to limitations laid down in both national and Community law.⁴⁰⁸ In determining this issue the court also held that collective action such as that taken by union falls within the scope of the EC Treaty provisions on both services and establishment.⁴⁰⁹ The actions taken by the union were found to constitute *prima facie* restrictions on the freedoms of establishment and services. The court then introduced the justification and proportionality test to assess whether the union had demonstrated that their actions were justifiable on public interest grounds and proportionate to Viking's market rights.⁴¹⁰ In *Viking* the Court was very clear that action taken by the union (ITF) to prevent the Viking company from registering vessels in other Member States could not be justified.⁴¹¹ The court held that collective action could be justified in the context where working conditions were being jeopardised, which was not the case.⁴¹² The court further held that even when collective action is justifiable the unions must satisfy the proportionality test. The union's actions must be necessary and suitable for the attainment of objective goals. The proportionality test also includes the use of less restrictive available means of collective bargaining.⁴¹³

The European Courts decision can be summed up in its ground ruling which notes

That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

⁴⁰⁷ 'Settling Dust? Reflections on the Judgments in Viking and Laval' *European Business Law Review*, 21(5), p. 683-701 (accessed 06. Nov. 2014).

⁴⁰⁸ Viking (note 406 above) paras 43-44; 79.

⁴⁰⁹ Viking (note 406 above), paras 60-66 ; 75.

⁴¹⁰ Viking (note 406 above) para 75.

⁴¹¹ Viking (note 406 above) paras 88-90.

⁴¹² Viking (note 406 above) para. 81.

⁴¹³ Viking (note 406 above) para. 87.

It is from this European judgement in *Viking* inspires the possibility of limiting the right to strike based on economic reasons. It is clear from this judgement that the court was influenced by the economic purpose of the European Union and the need for labour laws to confirm with free market principles. Advocate General Maduro's opinion best articulates the court's reasoning in that a degree of responsibility needs to be assumed by workers to realise the full benefits of economic integration.⁴¹⁴

6.3 Applying the ECJ decision to the South African context

In South Africa, section 36 of the Constitution (limitations clause) must be applied when competing rights are balanced against each other and limited. It is the argument of this dissertation that the right to strike, in key economic sectors such as mining, must be limited when it becomes detrimental to the performance of the economy and interests of South African citizens.

Section 36 provides that:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. The factors include the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.⁴¹⁵

As in the ECJ judgement in *Viking*, the South African judiciary can also attempt to limit the right to strike based on economic reasons by applying sections 39 and 233 of the Constitution.⁴¹⁶ The approach in *South African Transport and Allied Workers Union v Garvas*,⁴¹⁷ where court limited the right to freedom of association by extending civil liability

⁴¹⁴ 'How the EU works' (note 392 above).

^{414a} 'Settling Dust? Reflections on the Judgments in *Viking* and *Laval*' *European Business Law Review*, 21(5), p. 683-701 (accessed 06. Nov. 2014) page22; para59 of the Opinion: 'workers throughout Europe must accept the recurring negative consequences that are inherent to the common market's creation of increasing prosperity, in exchange for which society must commit itself to the general improvement of their living and working conditions, and to the provision of economic support to those workers who, as a consequence of market forces, come into difficulties'.

⁴¹⁵ Section 36 of the Constitution.

⁴¹⁶ Section 39 and 233 state how the court must reasonably interpret and apply both foreign and international law.

⁴¹⁷ *South African Transport and Allied Workers Union and Another v Garvas and Others* (2012) 33 ILJ 1593 (CC).

to unions is important in the determination of whether the same judicial reason can be applied to limit the right to strike based on economic considerations.

The Court noted in *Garvas* that:

The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights.⁴¹⁸

The peaceful exercise of the right to strike is important in labour relations and empowering workers to collectively bargain effectively against exploitative mining companies. However, the importance of the economy cannot be understated because the economy is essential in the fulfilment of the Constitutional provisions and governments' ability to provide essential services. It has been argued throughout this dissertation that the mining operations and revenue generated through taxes supplements the national budget significantly. Disruptions in the mining sector translate to poor economic performance and government having limited resources to provide for essential services.⁴¹⁹ It is on this basis that the dissertation argues that the exercise of the right to strike should be limited when employee demands are unreasonable, no longer serve the purpose of collective bargaining and threaten the existence of mining operations.

As noted by many scholars and the unions, the right to strike is their only tool in the collective bargaining system.⁴²⁰ This dissertation does not support this view because strike action must be the tool of last resort of employees. The notion that strike action is the only tool or weapon is indicative of employees as powerless without the option of striking is

⁴¹⁸ (2012) 33 ILJ 1593 (CC), para 61.

⁴¹⁹ E Nel 'Local Economic Development: A Review and Assessment of its Current Status in South Africa', *Urban Studies*, (2001) 38:1003-1024.

⁴²⁰ Brassey (note 11 above).

inaccurate.⁴²¹ There are various methods unions and employees can use to influence management for better working conditions apart from striking. The LRA prescribes these alternate options through dispute resolution mechanisms such as conciliation, mediation, arbitration and adjudication. Unions and employees alone cannot be expected to resolve all their demands alone, the courts, the public and government should participate in the negotiation of better working conditions.

It is suggested that government should play a more active role in negotiations where employees and employers in key sectors of economy fail to resolve their grievances. It is the role of government to ensure that employers adhere to fair labour practises and protect the interests of their citizens against capital exploitation. Government has the means and capacity to enforce better working conditions through the creation of positive obligations on the employer.⁴²² Though further regulation of the labour market is not appreciated, the government can make such exceptions where it is obvious that the employer is being driven by greed and lack of human consideration of important principles like pay equality and human dignity. The option of taxing is also an alternative that should be considered by governments when they enter into such mining agreements with these companies.⁴²³ In the pursuit of better working conditions such mining companies should get tax incentives. Companies that fail to offer acceptable working conditions, government should tax more and ensure that those taxes benefit the employees and mining communities. The government should partner with these mining companies and local authorities to provide better housing and provision of basic services similar to the Marikana housing initiative.⁴²⁴ All these options need to be explored in an effort to highlight the notion that employees are not alone and without options apart from striking.

6.4 The need for transformation in the mining sector

South Africa has noted a groundswell of judicial sentiment against the effects of strikes. In an article by Rycroft who suggests that a violent strike may lose its legal protection (following

⁴²¹ M O'Riordan 'The Transport Workers' Union of America - The Irish Connection' Irish Labour History Society <http://www.jstor.org/stable/23195994> (accessed 1 November 2014).

⁴²² 'Reducing the risk of Policy failure: Challenges for regulatory compliance' OECD, 2000 <http://www.oecd.org/gov/regulatory-policy/46466287.pdf> (accessed 2 November 2014).

⁴²³ K McPhail 'How Oil, Gas and Mining Projects Can Contribute to Development', *World Bank Report*, (2000) 37:46-49.

⁴²⁴ A Pule 'R460-million for housing for Marikana miners' 30 June 2014 <http://www.southafrica.info/about/social/mining-300614.htm> 'The provincial government, in partnership with mining company Lonmin and the Rustenburg Local Municipality, will build 2 000 housing units over a period of three years.'

the *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* judgement)

Rycroft notes that:

This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA. But, the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus, whether it continues to enjoy protected status.⁴²⁵

Though the article by Rycroft focuses on violence being a ground for the withdrawal of protection, this dissertation suggests that once a strike is violent it automatically ceases to be functional in collective bargaining and it becomes a criminal matter and should be dealt as such. However, protection status of peaceful striking employees should be withdrawn when it becomes clear that their demands cannot be met or have become unreasonable. The right to strike is 'for the purpose of collective bargaining' and the legislative LRA protection is to promote collective bargaining.⁴²⁶ South African is supportive of collective bargaining because it 'enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work'.⁴²⁷

However, where collective bargaining demands and peaceful exercise of the right to strike threatens the existence of a company, industrial sector and the economy such industrial action must lose protection. In *Buthlezi v Labour for Africa*,⁴²⁸ the court was of the opinion that it could only consider the nature of the demand in extreme cases, when an unconscionable or outrageous demand led to an inference that there was no intention to negotiate. It is against this backdrop that the peaceful exercise of the right to strike must not unreasonably harm the economic viability of the mining sector. The demands of the employees must be reasonable, attainable and economically feasible based on the mining operations capacity. There is no explicit provision in the LRA which expressly provides for a strike to lose its protected status.

⁴²⁵ Rycroft (note 250 above) and see (2012) 33 ILJ 998 (LC), para 13.

⁴²⁶ s 27(4) of the Bill of Rights.

⁴²⁷ *Health Services & Support-Facilities Subsector Bargaining Assn v British Columbia* (2007) 2 SCR 391; (2007) SCC 27 para 82.

⁴²⁸ *Buthlezi & others v Labour for Africa (Pty) Ltd* (1991) 12 ILJ 588 (IC) 592G-H.

But, the Labour Court under s 158(1) (a) (iv) grants the court implied powers it may deem appropriate to remedy a labour dispute through a declaratory order. Hence the Labour Court could declare a peaceful strike, which is accompanied by unreasonable demands, unprotected. Through an analytical interpretation of the law, this dissertation affirmatively concludes that strike violence is unlawful conduct and should not be condoned by the courts and law enforcement.

Jafta J delivered a minority judgement which perfectly articulates this viewpoint that:

Accordingly, it is incorrect to read s 11(2) as providing a defence to claims for damages which arise from violent gatherings only. Nor do I find support in the text of s 11 of the Act for the view that it was ‘designed to prevent unlawful violent behaviour’ as the Supreme Court of Appeal held. If that was the case, then it could have meant that SATAWU’s claim fails at the starting line because s 17 of the Constitution guarantees peaceful gatherings only. A provision that prevents violent gatherings cannot be held to be limiting the right of assembly in s 17 of the Constitution.⁴²⁹

The minority judgement of Jafta J clearly expresses the submissions of this dissertation that violent exercise of the right to strike and picket is unlawful and should not receive any legal condonation. The UK under the premiership of Margaret Thatcher underwent a series of transformative labour reforms that demanded both political will and leadership aimed at curbing union power and industrial economic inefficiency.⁴³⁰ According to Van Wyk⁴³¹ the SA mining sector needs to be transformed in order to address problems such as gross inequality, poor working and living conditions which are similar irrespective of gold, coal or platinum mining. But, Van Wyk argues that these working conditions are dependent on the laws and governments of the country these companies are operating in. Van Wyk cites the Zimbabwean Impala managed mines of Ngezi and Mimososa which have proper working and living conditions which is a stark contrast to the South African Impala, Platinum and Aquarius mines. Van Wyk attributes this to Government attitude in the enforcement of laws and policies.

⁴²⁹ *SA Transport & Allied Workers Union & another v Garvas & others*(2012) 33 ILJ 1593 (CC) Para 135.

⁴³⁰ Clement (note 302 above).

⁴³¹ ‘Interview with Bench Marks Foundation chief researcher David van Wyk’ Amandla Issue 26/27 <http://www.amandla.org.za/amandla-magazine/124-amandla-issue-2627/1591-interview-with-bench-marks-foundation-chief-researcher-david-van-wyk> (accessed 1 November 2014).

It's not who's sitting on their boards. Who are they scared of? That's the question. And I can tell you they're scared of the Zimbabwean government, so they do everything by the book in Zimbabwe.⁴³²

Politicians are flaunting the laws of South Africa in an effort to maximise their investment returns in the already exploitative mining companies. According to Van Wyk this is evidenced by the presence of prominent political families in mining operations such as Lonmin and Cyril Ramaphosa, Aquarius mine and the Sisulus and the Mandelas and Anglo Platinum and Vali Moosa to mention a few. According to Van Wyk the mining industry is polluting the air, water and land degradation but, now there is also 'political pollution of our democracy'. Such pollution has led to Marikana shootings where the police were allegedly called in to 'protect private capital as if they are the private security company of the mine'.⁴³³

It is against this backdrop that Van Wyk calls for transformation of the mining industry and the enforcement of the laws regulating the industry. Van Wyk advocates for this systematic transformation and setting the conditions for investment by noting that

Yes, it should be systemic. And it should be human-rights focused. And we should not worry about foreign investment, foreign investment, foreign investment. Zimbabwe indigenised the mining sector by demanding 51 percent ownership, etcetera. Did Anglo run, did Aquarius run? No, they didn't run. They simply, meekly agreed. So we can actually be much stronger because we have 80 percent of this mineral. No one else has this mineral – between us and Zimbabwe, we control this mineral.⁴³⁴

Crime and disorder in the mining sector are generated through a mixture of social, economic and political factors. The police are called in to suppress such criminal conduct when established interests are threatened. In South Africa the prevention of crime and maintaining public order are the Constitutional responsibilities of the police.⁴³⁵ However, if crime or disorder occurs as the result of a breakdown of legislative systems such as the mining collective bargaining system there is little the police can do to prevent violence from taking place. This is because the violence in the mining sector is being determined by the collective bargaining structures beyond the control of the police. But, regardless of this, this dissertation

⁴³² Interview with Bench Marks Foundation chief researcher David van Wyk' (note 429).

⁴³³ Interview with Bench Marks Foundation chief researcher David van Wyk' (note 429).

⁴³⁴ Interview with Bench Marks Foundation chief researcher David van Wyk' (note 429).

⁴³⁵ Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) s 205 (3).

affirms that violence in strikes is unlawful and should be treated accordingly with the police executing their constitutional mandate.

However, the police alone cannot change this violent behavioural practise that appears to manipulate the collective bargaining system in the employees favour. That is why this dissertation calls for a concerted effort by all arms of government especially the judiciary and police. Despite this, little has been done to deter unions from leading violent strikes. The courts have failed to award significant compensation claims lodged by employers who have suffered from property destruction at the hands of riotous employees. This has led to the perception that violence is essential in the effectiveness of the strike. Despite the politicians publicly criticising violent strikes little has been done to pass legislative reforms to implement the desired changes to peaceful democratic dispute resolution. It is the view of this dissertation that the unlawfulness of violent and destructive strike and pickets in the mining sector requires a collective concerted effort aimed at ensuring that this conduct is not rewarded and the perpetrators are held accountable to the full extent and measure of the law.

6.5 Solutions and Recommendations

This dissertation acknowledges that strike violence is a consequence of the socio economic and political context coupled with the inadequacies of the collective bargaining system to resolve the expectations of mineworkers. Such frustration leads to violence which cannot be merely resolved by police suppression as evident in the Marikana shootings. Labour laws must be reformed to better address the issues that give rise to favourable conditions for violence, intimidation, unnecessary prolonged disruptions and property destruction.

According to Brassey⁴³⁶ deeper structural changes are required in the labour law market to address all the problems faced. Brassey calls for fundamental changes in the laws that govern the labour market including repealing labour legislation that unreasonably extends statutory bargaining agreements to non-parties.⁴³⁷ Brassey calls this extension of collective agreements as means of keeping big companies and unions in a non-competitive environment from small unions and smaller companies that cannot afford to meet the threshold requirements. Though collective agreements have advantages it is clear from this dissertation that they have resulted in an increasing number of strikes. This shows us that the current collective bargaining system is not effective and needs to be readdressed to consider the plight of small unions,

⁴³⁶ Brassey (note 11 above).

⁴³⁷ Brassey (note 11 above) pg 1.

smaller companies and non-unionised employees. This dissertation suggests that collective agreements be recognised and their extension should not ‘unreasonably’ infringe other employees right to fair labour practises.

According to Brassey, South Africa has the highest strike rate in the world. Brassey states that, in an environment where wage settlements are realistically pitched, workers will have significantly reduced motive to strike due to understanding and reason. Brassey finds the structures and processes of strikes satisfactory as they are mostly in compliance with the Constitution and the ILO.⁴³⁸ However, the problem with the labour laws, Brassey contends, is in their application and enforcement. Failure to apply and enforce strike laws has resulted in violent strikes and pickets. It is against this backdrop that the labour laws need to at least be enforced in order to identify possible flaws in the legislation.

Under the 1956 LRA strike ballots were mandatory. It is accepted that this provision had a chilling effect on strike action, was costly and complex. But the technological advances will make strike ballots more efficient, transparent and faster to conduct. Similar to the Margaret Thatcher labour reforms voting should be seen as the democratisation of the workplace and union to prevent minority leftists from hijacking the unions and jeopardising the livelihood of fellow employees. Voting ensures accountability and reflects the magnitude of discontent. Union members should have the right to elect their representatives and leaders through conducted ballots. It is against this backdrop that section 67 (7) of the LRA should be repealed as it sends a message that a union can disregard its own internal democratic provisions. The legislature must ensure that unions are accountable to members through the guaranteeing of the respect of their right to vote on matters of interest such as leadership and representation. But, unions have castigated such proposals citing them as ‘revival of Apartheid remnants’, this has led to several LRA drafts excluding this procedural requirement.⁴³⁹

The issue of union liability under the LRA and the Regulation of Gatherings Act is adequate in the regulation of the right to association. But, what needs to be done is for the law to be applied effectively. Brassey gives the example of strict liability to football clubs for stadium hooliganism and this has resulted in reduced incidents of hooliganism through stadium

⁴³⁸ Brassey (note 11 above) pg 10.

⁴³⁹ South African Labour News ‘Union federations reject introducing strike ballot’ 04 August 2014 available at <http://www.salabournews.co.za/index.php/home/archives/19370-union-federations-reject-introducing-strike-ballot.html>.

enforcement and other rules that have contributed to this change. The same approach needs to be adopted for unions to prevent deniability for incidents such as the Marikana shooting or any strike related violence.⁴⁴⁰ Unions must be held vicariously liable for the unlawful damages that are as a result, of their member's actions.

Hartford argues that 'the mining strike wave crisis emerges from gross inequality and poverty.'⁴⁴¹ The additional financial and work cycle burdens arising from the apartheid migrant labour system have made it intolerable for mining employees to continue working under the same conditions. According to Hartford 'the institutions of collective bargaining, both in the form of the company and the union structures and processes have displayed signs of inability to address the root causes of the employee grievances.'⁴⁴² The restoration of the mining industry according to Hartford requires leadership in government, labour and corporate SA, who must have the will to modernise and transform the industry.

Hartford suggests the following measures:

'Transform and invest in the migrant labour system to modernise labour migrancy through a new migratory labour model founded on:

- human dignity and promotion of the mining industry as an employment attractor
- short work cycles and continuous operations
- significant pay rewards in a flatter remuneration structure on re-organised work processes
- modern, world class, living quarters for migrants underpinned by an efficient (flight, rail or road) migrant commuter transport network
- restoration of the migrant nuclear family to good health
- banking to facilitating maximum remittances to rural areas

Overhaul stakeholder relationships and transform/capacitate the front line manager:

- Freedom of association, worker democracy and management people problem resolution capacity should guide all choices on union rights, levels of bargaining, recognition procedures and the like

⁴⁴⁰ Brassey (note 11 above) pg 17.

⁴⁴¹ Hartford (note 12 above).

⁴⁴² Hartford (note 12 above).

- Ensure constituency-based union accountability and democracy
- Deepen freedom of association and democratic processes for union accountability in bargaining units, rights of shop stewards and threshold representation levels
- Rapidly transform line management function to create language synergy and strong people problem resolution skills
- Restore line function to be accountable for people problem resolution and employee communication
- Measure and reward line management for effective people problem resolution and effective communications⁴⁴³

Hartford's ideas are based on the constitutional provision of equality and human dignity as a standard that needs to be observed throughout the mining industry. This dissertation concurs with Hartford's solutions to the mining industry in order to prevent further strike violence. Though this is long term solution to the problem, this dissertation is more concerned about the mining industry because of its importance to the economy.

6.6 Conclusion

This dissertation has highlighted the problem of strike violence in the mining industry as an unlawful problem caused by employees and trade unions that do not observe the law. This disregard of the law does not require the LRA or any labour provisions to be re-enacted but, rather that the police and the court apply and enforce the law in an effort to deter employees from engaging in such practises.

In conclusion the regulation of the right to strike is in most respects sufficient. However, it is the enforcement of the law and political will that needs to be realigned with the objectives of the Constitution and the LRA. The inclusion of voting procedures in unions will assist in the democratisation of union structures and call for union accountability. The non-extension of 'unreasonable' collective agreements to non-members would greatly relieve the competition between majority and minority unions and allow for more access to fair labour practices. The empowering of Labour court to withdraw a strike protected status when it fails to fulfil its collective bargaining purpose and in the determination of unreasonable demands. Addressing

⁴⁴³ Hartford (note 12 above).

workers at a May Day rally the late former President Nelson Mandela held mineworkers and their trade unions in high regard stating that:

Workers and their trade unions are at the economic heart of our country. It is you who mine the minerals and produce the exports that fuel our growth. It is you who put the food on our tables and build the facilities that deliver the services our people need.⁴⁴⁴

It has been the objective of this dissertation that the plight of miners be addressed, without need for violence but, with the active participation of all who share in the economic prosperity of South Africa.

⁴⁴⁴ South African History Online 'Speech by President Nelson Mandela to a May Day rally Kimberley', 1 May 1998 available at <http://www.sahistory.org.za/article/speech-president-nelson-mandela-may-day-rally> (accessed 28 November 2014).

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