Trade Union Liability for Unprotected Strike Action and Violence in Furtherance Thereof

by

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DECLARATION

I, Nolitha Tshentu, student number 198126590 hereby declare that the treatise for the Magister Legum (Labour Law) to be awarded is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

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SUMMARY

The right to strike is a constitutional right and is integral to the process of collective bargaining. Collective bargaining tends to focus on sensitive issues like wages, as well as terms and conditions of employment. Resolving these issues often requires compromise from both parties through the collective bargaining process. However, in the earlier stages of labour law there was no collective bargaining. There was a master and servant relationship, there was no compromise, and it was limited only to the individual contract of hire.

As much as a strikes are a constitutional right and are recognised by the law, they don't seem to happen without violence and destruction of property. There are some views that view violence as being synonymous with strikes in South Africa. The legal framework is very clear and supports the right to strike, and emphasises that any demonstrations and picketing should be peaceful. Section 68(1)(b) of the LRA should be a solution to the violence that comes with unprotected strikes. This section refers to just and equitable compensation, it does not equate to full loss suffered and it also depends on the merits of each case.

The ILO's approach to illegitimate actions linked to strikes should be proportionate to the offence of fault committed. The Constitution saw South Africa making a clean break with the past. The Constitution is focused on ensuring human dignity, the achievement of equality and advancement of human rights and freedoms.[1] According to the Constitution the right to assemble and demonstrate must be peaceful. According to Grogan the right is now seen as a necessary adjunct to collective bargaining and is constitutionally entrenched.[2]

The LRA supports participation in protected strikes. In cases of unprotected strikes allows employers to interdict that particular strike, sue for compensation in cases of damages and losses and also to discipline employees.

1 *South Africa Transport & Allied Workers Union v Garvis & Others* (007/11) [2011] ZASCA 152 par 47.
2 Grogan *Workplace Law* 9ed (2009) 367.

The Regulations of the Gatherings Act (RGA) was introduced to reconcile the right of assemblers with the state's interest in maintaining public order. Section 11 of this Act seeks to deter violence and discourages violation of others by ensuring that organisers are held liable.

The LRA holds the trade union and its members liable for the damages and violence that is accompanied by unprotected strikes. Section 68(1)(b) seeks just and equitable compensation for damages caused during an unprotected strike. However even though there is recourse for the damages suffered during the protest, unprotected strikes still continue and the violence is still part of the strikes. It is proper to ask if this section is really serving what it was intended. Surely the intention of this section was to deter strikers from embarking on unprotected strikes as the LRA is very clear on the procedure to be followed before a strike action takes place. Another intention of this section is to curb the violence during strikes. This section seems to have fallen on deaf ears.

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LIST OF ABBREVIATIONS

AEC	Australian Electoral Commission
AMCU	Association of Mineworkers & Construction Union
CCMA	Commission for Conciliation, Mediation and Arbitration
CFA	Committee on Freedom of Association
ILO	International Labour Organisation
IMATU	Independent Municipal and Allied Trade Unions
LRA	Labour Relations Act
NUM	National Union of Mineworkers
RGA	Regulations of the Gatherings Act
SAMWU	South African Municipal Worker's Union
SAPS	South African Police Services
ANC	African National Congress
IEC	Independent Electoral Commission
SATAWU	South African Transport and Allied Workers Union
COSATU	Congress of South African Trade Union
NEDLAC	National Economic, Development and Labour Council

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CHAPTER 1

INTRODUCTION

The right to strike is entrenched in South Africa's supreme law, the Constitution.[3] Additionally, the right is also essential to the process of collective bargaining. It is what makes collective bargaining work. It is to the process of collective bargaining what an engine is to a motor vehicle.[4] Conflict in industrial relations is almost inevitable because of the divergent interest and aspirations of the two parties in the relationship, the employer and employee. This most of the time touches very critical issues like wages and other terms and conditions of employment. Resolving these issues require negotiations, compromise and concessions. These are usually done through the process of collective bargaining.[5]

The early stages of labour law were based on the notion of master and servant relationship and limited only to the individual contract of hire. The master or employer unilaterally dictated the tune and the worker either danced or was at liberty to quit. There was no middle point. Eventually wage earners began to band together to resist the tyranny of the Master and to further collective bargaining with their employers for it was only by such unity that they could master the power needed to effectively bargain for the improvement of their working conditions thus the birth of early unionism.[6]

Strikes have not only been a norm in South Africa, they have also become violent and destructive. Strike action has over the years remained a thorny and highly contested issue for both employees and employers. In all matters of labour relations in the workplace, it has

3 S 23 of the Constitution.

4 Simelane *An Evaluation of Section 68(1)(b) of the Labour Relations Act 66 of 1995: How Effective is this Remedy?* (Master Treatise, University of Pretoria 2015) 20.

5 Ahmed "A Critical Appraisal of the Right to Strike in Nigeria" 2014 (4) 11(1) *International Journal of Humanities and Social Science* 300.

6 *Ibid*.

always stood above other matters as one issue which in many instances diluted a cordial relationship that may exist between employees and employers.[7]

A glance through the law reports will leave one with the distinct impression that violence has become synonymous with strikes in South Africa. The idea that protected strikes could lose their statutory protection in the event that they descended into violence has been mooted.[8] However this idea, by some accounts, a controversial one due to the constitutional protection of the right to strike and the generally accepted understanding that the right should not be curtailed unnecessarily.

The South African Constitution, 1996, the Labour Relations Act 66 of 1995 and other international instruments provides employees with the right to strike. Within the same ambits, employees are also obligated to exercise their right within particular frameworks, with discipline and in accordance with the democratic precepts of constitutional supremacy governance. Hence, it is asserted that employees and their trade unions should take into account the provisions of the law and respect other people's rights when exercising this right to strike.[9]

The law plays a specific role in each and every country as the main catalyst of social and economic makeup, South Africa as well, is no exception. Any system of labour which is meant to comply with the concept of freedom of association and collective bargaining needs to be empowered by a particular legislation. The LRA therefore plays a key role in regulating the requirements for a protected strike.[10]

The purpose of the treatise is to look at trade union liability when it comes to unprotected strikes and whether section 68(1)(b) of the LRA has provided a solution to curb violence,

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7 Mawasha *An Analysis of Legal Implications for Participating in an Unprotected Strike* (Master Treatise, University of South Africa 2013) 1.

8 http://www.labourguide.co.za/most-recent/2242-a-new-remedy-for-violent-strikes (accessed 2017-07-27).

9 Rapatsa "The Practice of Strikes in South Africa: Lessons from the Marikana Quagmire" 2014 3(5) *Journal of Business Management & Social Sciences Research* 114.

10 Mawasha *An Analysis of Legal Implications for Participating in an Unprotected Strike* 14.

damage to property and to minimise unprotected strikes. A comparative study will be done, where South Africa will be compared to other countries in terms of unprotected strikes.

The LRA provides a remedy to an employer or employees faced with strike or lock-out not in compliance with its provisions. It confers on the Labour Court the power to interdict a strike or lock-out or any conduct in contemplation of a strike or lock-out or any conduct in contemplation of a strike or lock-out that does not comply with the provisions of Chapter VI of the LRA.[11] It also confers courts on the Labour Court with the powers to order payment of just and equitable compensation, for any loss attributable to the strike or lock-out that does not comply with the provisions of Chapter VI of the LRA.[12] The gist of section 68(1)(b) of the LRA is that a trade union or its members, or both, can be held liable for losses occasioned. In terms of section 68 of the LRA, there should be consequences for unprotected strikes and lock-outs to ensure that the presumed instigators of the situation gets to account.[13]

However the South African Strike law can be traced back to the 1922 Rand Rebellion where a large number of white miners clashed with the police. This resulted in a number of people being killed and others wounded. Due to lack of strike regulation during that time, the government then decided in 1924 to pass the Industrial Conciliation Act which imposed limitations on the right to strike by making strike illegal unless the statutory requirements of attempting to settle the dispute in either the industrial council or conciliation board were adhered to.[14] In 1988 The Labour Relations Amendment Act was enacted and the right to strike became a legimitised right and the requirements and procedures were also set out.[15]

Since 1994 South Africa became a democratic country and the LRA at the time was overhauled into that which mirrors the current constitutional and democratic dispensation. Since then, South African industrial/strike actions continue to enjoy recognition by law; workers are now permitted to embark on strikes.[16] The LRA was passed to give effect to section 23 of the

11 S 68(1)(a)(i) and (ii).
12 S 68(1)(b).
13 Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 112.
14 Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 115.
15 Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 116.
16 *Ibid*.

Constitution and amongst other things to regulate the right to strike and the recourse to lock-out in conformity with the Constitution.[17] Section 69 of the LRA allows picketing in support of a protected strike, but employees must do so in accordance with the Code of Good Practice on Picketing. Therefore, section 69 of the LRA seeks to give effect to the Constitutional right to picketing in respect of a picket in support of a protected strike or a lock-out.[18]

According to Prof Cohen, there was high incidence of strikes in South Africa in 2013 which resulted in a total of 1 847 006 working days lost, of which 52% were unprotected strikes. Strike violence is endemic and there is alarming disregard for rule of law and orderly collective bargaining.[19]

Responses should be proportionate to be offence or fault committed. South Africa decriminalised strike and provided unfettered discretion to labour courts when considering responses for example dismissals, interdicts, compensation and contempt of court proceedings. Responses are not mechanical and are dictated by fairness. Dismissal must be executed fairly (procedurally and substantively). Court orders should also not be mechanical but should be proportionate to fault. Both unions and its members can be held liable for the damages. However it has proven to be quite difficult to prove and enforce against individual employees.[20]

Section 68(1)(b) refers to just and equitable compensation, there are views that the compensation should mean compensation should be fair, not punitive, reasonable and proportionate. It does not equate to full loss suffered and depends upon facts of the case, gravity of the breach and respective blameworthiness.

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17 *Ibid*.

18 Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 117.
Cohen "Liability, Sanctions and other Consequences of Strike Action" 28th Annual Labour Law in Transition: The Role of Labour, Business and Government 4–6 August 2015 (Sandton Convention Centre).

20 Cohen "Liability, Sanctions and other Consequences of Strike Action" 28th Annual Labour Law in Transition: The Role of Labour, Business and Government 4–6 August 2015 (Sandton Convention Centre).

CHAPTER 2

LEGISLATION

2.1 International Labour Organisation

The ILO and other human rights supervisory bodies have also made particular comments on the treatment of workers during apartheid and post-apartheid in South Africa.[21] South Africa joined the ILO in 1919, but it left the Organisation in 1966, because of the ILO position concerning the government's apartheid policy. It resumed membership in 1994. So far it has ratified 21 conventions of which 18 are in force for the country.[22]

The right to strike finds proponents from international instruments. Strikes are well recognised internationally as a human right.[23] According to the ILO the right to strike is protected and respected as long as it exercised in compliance with the laws of that particular country. This convention and others were ratified by South Africa.[24]

The preamble of the Constitution of the ILO in 1919 stated that freedom of association was of urgent importance that is consistent with the tripartite structure of an organisation that represents employers and workers, as well as governments.[25] "Freedom of association and the effective recognition of the right to collective bargaining" have further been recognised as fundamental rights under Article 2 of the ILO Declaration on Fundamental Principles and Rights at Work 1998 and again in the ILO Declaration on Social Justice for a fair Globalization 2008.[26]

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21 Hepple, Le Roux and Sciarra *Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* (2015) 45.

22 http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles (accessed 2017-09-15).

23 Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 117.

24 *Ibid*.

25 Hepple *et al Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* 46.

26 *Ibid*.

The Committee on Freedom of Association (CFA) was established in 1951, by resolution of the Governing Body of the ILO. The CFA is tripartite, and comprises nine members (three government, three employer, and three worker representatives).[27] The right to strike is regarded by the Committee on Freedom of Association (CFA) as one of the essential means through which workers and their organisations may promote and defend their economic and social interests and an 'intrinsic corollary to the right to organise protected strike by Convention No. 87.[28] This is not a right that is unqualified, being a subject, for example, to restriction in respect of public servants exercising authority in the name of the state, in essential services the interruption of which would endanger the life, personal safety or health of the whole or part of the population and in the event of an acute national emergency and for a limited period of time.[29]

Prerequisites, such as balloting or notice requirements, can be imposed by law, but the legitimacy of such conditions must be assessed with reference to the extent to which they "place a substantial limitation on the means of action open to trade union organisations or in other words, on the exercise of the right to strike".[30]

The ILO supervisory bodies approach to lawful strikes is applied to the analysis of what sanctions and remedies are appropriate in relation to unlawful (or illegitimate) collective action. The overriding principle is that all penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed.[31]

2.2 The Constitution of South Africa

At the dawn of democracy, the right to strike was initially envisaged in the Interim Constitution.[32] The Constitution of South Africa was adopted on 10 May 1996 and came into

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27 Christianson, Mcgregor and Van Eck *Law@Work* 3ed (2015) 27.
28 Christianson, Mcgregor and Van Eck *Law@Work* 48.
29 *Ibid*.
30 Hepple *et al Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* 48.
31 Hepple *et al Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* 49.
32 Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 116.

effect on 4 February 1997. The Constitution is the supreme law of the land and is binding on all organs of State at all levels of government. South Africa is a state founded on the principles of a constitutional democracy. The 1996 Constitution is the successor of the earlier interim Constitution, which was brought into effect on the 27 April 1994, following the first democratic elections in South Africa.[33]

The Constitution of the Republic of South Africa (1996) entrenches the right of workers to strike. The right to strike is recognised in the domestic or national laws of countries and also by international law, as fundamental to the protection of worker's rights and interests.[34] The Constitution saw South Africa making a clean break with the past. The Constitution is focused on ensuring human dignity, the achievement of equality and the advancement of human rights and freedoms.[35] The Constitution (1996) obliges courts, tribunals or forums when interpreting the Bill of Rights to consider international law.[36]

In terms of section 17 of the Constitution the holders of this right must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection.[37] During the apartheid era the right to assemble was banned. 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 is provided as an outlet for their frustrations. This right will in many cases be the only mechanism available to them to express legitimate concerns.[38]

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33 http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles (accessed 2017-09-15).

34 Tenza "An Investigation into Causes into the Causes of Violent Strikes in South Africa: Some Lessons from Foreign Law and Possible Solutions" 2015 19 *Law, Democracy & Development* 211 212.

35 *South African Transport & Allied Workers Union v Garvis & Others supra* par 47.

36 Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 117.

37 *South African Transport & Allied Workers Union v Garvas & Others* (112/11) [2012] ZACC 13 (13 June 2012) par 53.

38 *South African Transport & Allied Workers Union v Garvas & Others supra* par 61.

2.3 The Labour Relations Act

The LRA was passed primarily to give effect to Section 23 of the Constitution.[39] Section 3 of the LRA states that provisions of the LRA must be interpreted in compliance with international law obligations of South Africa.[40] In essence section 69 of the LRA seeks to give effect to Constitutional right to picketing in respect of a picket in support of a protected strike or lock-out.[41]

According to Grogan the right to strike is now seen as a necessary adjunct to collective bargaining and is constitutionally entrenched. The LRA at once gives statutory protection to the constitutional right to strike and limits its exercise.[42]

The aim of the LRA is plainly to make a protected strike a simple endurance contest to gauge whether the employer can do without services of the strikers for longer than they can do without wages.[43] According to Grogan the purpose of granting protection to strikers is to encourage employees to comply with the statutory provisions before and while resorting to industrial action. Under the 1956 LRA, non-compliance with legislation relating to strikes was visited with criminal liability as well as possible dismissal. However the current LRA merely discourages strikes that do not comply with the statutory requirements by strengthening the hand of the employer and the act does this in three ways:[44]

- By giving the Labour Court jurisdiction to interdict strikes that are not in compliance with the Act
- Enabling employers to sue for compensation for losses occasioned by an unprotected strike
- By treating participation in an unprotected strike as a form of misconduct

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39 Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 116.
40 Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 117.
41 *Ibid*.
42 Grogan *Workplace Law* 367.
43 Grogan *Workplace Law* 390.
44 Grogan *Workplace Law* 392.

As stated before the Act recognises the employee's right to strike and sets out procedures to be followed, because a strike in its nature involves a gathering by employees. The Regulation of Gatherings Act then becomes necessary to further regulate the activities, conduct and actions of the employees.[45]

The gist of section 68(1)(b) of the LRA is that a trade union or its members, or both, can be held liable for losses occasioned. In terms of section 68 of the LRA, there should be consequences for unprotected strikes and lock-outs to ensure that the presumed instigators of the situation gets to account.[46] Another alternative is for the employer to dismiss strikers that have embarked on an unprotected strike; they can be dismissed for participating in an unprotected strike or dismissal due to operational requirements. Any dismissal must be done in accordance with the required procedure as per the LRA.

2.4 Regulation of the Gatherings Act

The Regulations of the Gatherings Act (RGA) was introduced as an attempt to reconcile the right of assemblers with the state's interest in maintaining public order. The RGA distinguishes between a demonstration and a gathering. A demonstration refers to "any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action".[47] A gathering, as defined in section 1 of the RGA, means any assembly, concourse or procession of more than 15 persons or in any public road.[48]

However, in terms of section 11 of the RGA, participants in the gathering can be held liable where the riot results in damage. Section 11(1) provides for the recovery of riot damage. This section provides that

> "If any riot damage occurs as a result of a gathering, every organisation on behalf of, or under the auspices of which, the gathering was held will be jointly and severally liable for that riot

[45] Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 115.
[46] Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 121.
[47] Tom *A Trade Union's Liability for Damages Caused during a Strike: A Critical Evaluation of the Labour Relations Act and Recent Judgements* (Master Treatise, University of KwaZulu-Natal 2014).
[48] S 1 of the RGA.

damage, together with any other person who unlawfully caused or contributed to the riot damage or any other organisation who is held liable in terms of section 11(1)."[49]

Riot damages are any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering.[50] Riot damage would not include damages suffered from an inability to trade as a result of the gathering.[51]

The purpose of section 11 is not only to protect rights. It should also be viewed in the light of promoting order and the rule of law. It seeks to deter violence. It aims at restricting unlawful, violent behaviour that violates the rights of others and ensuring that organisers of those gatherings are held liable.[52]

In 2015, there was an outcry from lobbyist and civil organisations who attended the City of Cape Town's information session on public gatherings that applying for permission to march or protest is unconstitutional.

According to chapter two, section 17 of the Constitution (Bill of Rights) everyone has the right to peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions. Chapter one of the Gatherings Act states that convener of a picket or march with more people is required to give notice in writing, no later than seven days in advance.[53]

When individuals or organisations applying for a march they have to meet certain requirements first, for example name of a convener and deputy convener and their ID copies must be included, their contact details and addresses, detailed reasons for the march, the number of participants and marshals and a detailed route.[54]

Once the application has been received, it is circulated to all the parties concerned (police, metro police or any organisation that is involved) for comment and they have two days to comment. If there are no concerns the application is granted. If there is a concern, a meeting is called between all the

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49 S 11(1) of the RGA.

50 S 1 of the RGA.

51 Tom *A Trade Union's Liability for Damages Caused during a Strike: A Critical Evaluation of the Labour Relations Act and Recent Judgements*.

52 Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 121.

53 https://www.groundup.org.za/article/how-constitutional-are-regulations-public-gatherings (accessed 2017-07-27).

54 *Ibid.*

parties including the conveners. The application is granted as per the agreements in the meeting or denied if no resolution could be found. Special permission is required should then a procession plan take place nearby a national key point such as Parliament, the courts or the Provincial Legislature.

During a march it is the responsibility of the convener and the organisation to arrange for parking space, toilet facilities and rubbish removals on the day of a march. If there is any litter left behind after the march or damages caused to council property, organisers could be prosecuted, fined and or get up to a year in prison. All the measures are put in place to regulate the gatherings and to ensure public safety of those who are not part of the gathering as well as those who are participating in the gathering.

2.5 Conclusion

The right to strike is there for the employees for the purpose of collective bargaining, and in return the employer will have the right to lock-out the striking workers. All the above mentioned legislation are very clear with regards to gatherings or strikes that they should be peaceful, unarmed and respect the rights of others (or public). In all pieces of legislation, the right to strike or protest is guaranteed, however violence and damage to property is not tolerated, because it violates human dignity, equality and freedom.

Strike action needs to be protected and there are certain requirements that all parties need to abide by before embarking on a strike. It should be emphasised that the Constitution and other laws require demonstrators, assemblers and picketers to exercise their rights peacefully and unarmed.[55]

[55] Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 118.

CHAPTER 3

PROTECTED AND UNPROTECTED STRIKES

3.1 Protected and Unprotected Strikes

The Labour Relations Act (LRA) regulates the right to strike and lock out. The LRA defines a strike as a 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.[56] A strike in general is the action of refusing to work and must be performed by employees acting together as a group, with a common purpose of attaining a common goal. A strike cannot be performed by an employee acting as an individual.

The purpose of refusal to do the work must be for the purpose of remedying a grievance or resolving a dispute regarding a matter of mutual interest between the parties.[57] If the refusal to work is not aimed at remedying a grievance or resolving a dispute between the employer and employees, the conduct of the employees cannot be regarded as a strike as defined in the LRA. The work stoppage must entail a refusal to do work which the employees are contractually obliged to perform and which is legal to perform.[58]

The right to strike has the benefit of explicit protection in section 23(2)(c) of the Constitution.[59] A protected strike falls within the ambits of the LRA section 64 and unprotected strike is the opposite; it does not fall within the requirements of this section. However this right does not extend the exercising of this right to include infringing the rights

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56 S 213 of the LRA.

57 Tenza 2015 19 *Law, Democracy & Development* 213.

58 Grogan *Workplace Law* 368.

59 Simelane *An Evaluation of Section 68(1)(b) of the Labour Relations Act 66 of 1995: How Effective is this Remedy?* 19.

of the employer or third parties by damaging their property.[60] During a protected strike employees are immune to any civil action and their services cannot be terminated for taking part in the strike action, however they can be dismissed for misconduct or unlawful conduct during the strike.

On the other hand an unprotected strike is seen as unlawful and viewed as a breach of contract, the strike can be interdicted or sued for compensation by the employer, employees can be dismissed. Employers often resort to dismissal when strikes are unprotected or coupled with unlawful conduct. In *Ram Transport (Pty) Ltd v SA Transport & Allied Workers Union & Others*,[61] the court noted that the labour court is always open to those who seek the protection of the right to strike. The court qualified this statement by saying, "but those who commit acts of criminal and other misconduct during the course of a strike action are in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose.[62]

Courts have always expressed their dissatisfaction with regards to unprotected strike action and view unprotected strike action coupled with serious misconduct in a very serious light and should therefore not readily come to the assistance of unprotected strikers who ignored repeated warnings and ultimatums to resume employment. Courts have gone further to say that damage to the very workbenches which provided daily work for the employees was destructive action which invited serious censure from the court.[63]

A lock out is defined as an exclusion by the employer of the employees from the employer's workplace for the purposes of compelling the employees to accept a demand in respect of any matter of mutual interest.[64]

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60 Simelane *An Evaluation of Section 68(1)(b) of the Labour Relations Act 66 of 1995: How Effective is this Remedy?* 20.

61 *Ram Transport(SA)(PTY)Ltd v South African Transport Allied Workers Union* (2011) ILJ 1722 LC par 30.

62 Tom *A Trade Union's Liability for Damages Caused during a Strike: A Critical Evaluation of the Labour Relations Act and Recent Judgements* 35.

63 Tom *A Trade Union's Liability for Damages Caused during a Strike: A Critical Evaluation of the Labour Relations Act and Recent Judgements* 36.

64 http://www.ilo.org/ifpdial/information-resorces/national-labour-law-profiles (accessed 2017-09-15).

3.2 Violence and damages during strike action

There is a pandemic of strike violence in South Africa.[65] This is borne out by the fact in a 2012 poll; around half of COSATU members surveyed saw violence "as necessary to achieve an acceptable result".[66] Workers have, over the past years attempted to heighten the impact of their strikes by using various tactics during industrial action, tactics which have a negative impact on the lives and the property of other people.[67] The violence in strikes has negative effect on collective bargaining, in fact it tends to undermine the purpose that was intended for collective bargaining.

The violence and the damages during strike action scares one, it can be viewed as a scare tactic as it has managed to scare away the replacement labour, non-strikers and even employers. Strikers are not friendly towards scab labour and resort to physically assaulting them to prevent them from breaking the strike. Over the years this has resulted in the deaths of some workers, who often through economic desperation are on the wrong side of class conflict.[68] It puts employers in a corner, in a way that it forces employers to settle or to give in to the demands. This disrupts the balance as intended by the Labour Relations Act; it skews in favour of the strikers.

The phenomenon of strike violence; which has been rightly described by the ILO as an abuse of the right to strike[69] and by the Labour Court as "collective brutality".[70] The violence cannot be split from the strike itself, because the violence is the means used to accelerate the effectiveness of the strike.[71]

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65 *National Union of Food Beverage Wine Spirits & Allied Workers v Product Network (Pty) Ltd v National Union of Beverage Wine Spirits & Allied Workers* (2016) 37 ILJ 476 (LC) par 37.

66 Eleventh COSATU Congress Secretariat Report par 10.8.3.

67 Tenza 2015 19 *Law, Democracy & Development* 211.

68 Jansen "Violence in the Security Strike: Union Leadership Found Wanting" 2006 (30) *In The Workplace*.

69 As Gernigon, Odero and Guido "ILO Principles Concerning the Right to Strike" 1998 137 *International Labour Review* 42: "Abuses in the exercise of the right to strike may take different forms [including] damaging or destroying premises or property of the company and physical violence against persons".

70 *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA workers Union & Others* (2012) 33 ILJ 998 (LC) par 11.

71 Myburg "Interdicting Protected Strikes on Account of Violence" 2017 Global Business Solutions Annual Employment Conference.

3.3 Deficiency in the bargaining system

A ballot by members means that all members of the union who are eligible to vote must vote either in favour of or against a proposed strike. After a ballot has been conducted a certificate issued by the Commission for Conciliation, Mediation and Arbitration (CCMA) or a council to the effect that it has been properly conducted will be proof that a union has compiled with the provisions relating to ballots.

The ballot system before a strike action takes place was a requirement under the old Labour Relations Act.[72] Sadly though even at the time of the ballot system violence was still part of the strikes, because under the 1956 legislation, strike action was inseparable from political violence. The purpose of a strike ballot is to democratise the right to participate in a strike and to give members of the union an opportunity to have a say in the decision to go on strike.

A ballot system might help to prevent violence during strike action, because strikes that have little support they tend to be violent. As the purpose of the strike is to hurt the employer by putting financial pressure; however if the majority of the workers are working not striking the employer will not feel the pressure hence the group that goes on strike tends to intimidate and resort to violence.[73] There must be a secret ballot to ensure privacy and confidentiality; to avoid intimidation. However whether the strike ballot takes place or not, as per section 67(7) of LRA, it doesn't affect the legality of the strike.

3.4 The role of trade unions in strikes

According to Jansen trade unionism is about strengthening bargaining power to defend workers' interest and win demands to improve living standards and working conditions.[74] Within traditional collective bargaining, when the bosses and unions are unable and unwilling to compromise, they resort to pressurising each other. From the union's side the strike is the ultimate weapon to pressurise employers. The power of the strike depends upon the unity

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72 Tenza 2015 19 *Law, Democracy & Development* 215.
73 *Ibid*.
74 Jansen 2006 (30) *In The Workplace*.

and political commitment by strikers and importantly the effect of the strike on company's operations. The power of workers must ensure maximum disruption of company operations to severely affect business and profitability.[75]

In *SA Municipal Workers Union v Jada*, the Court held that the contract of mandate obliges a trade union to perform its functions faithfully, honestly and with care and diligence.[76]

Trade unions exist to represent the collective interests of workers, and the effective use of collective interests. There is a general assumption that a strike is a last resort, preceded by good faith bargaining and a willingness to compromise during conciliation. In 2013, 52 percent of strikes were unprotected, meaning that in the majority of the disputes the referral of a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or a bargaining council and an attempt to conciliate the dispute was avoided; either to seize the advantages of a wildcat strike, or because the consequences of an unprotected strike are not seen as a deterrent.[77]

According to some writers collecting bargaining in South Africa is viewed as being not progressive, its seen as underdeveloped and yet good faith bargaining is not a legal requirement. The duty to bargain is seen as having two legs, one leg reinforces the employer to recognise the other bargaining agent. Secondly the duty to bargain helps to instil rational and informed discussions which decrease unnecessary industrial conflict. The decision of the drafters of the Labour Relations Act of 66 of 1995 (LRA) to exclude a duty to bargain in good faith was partly because pre-strike conciliation was seen as an appropriate process for facilitated negotiation in the presence of a neutral outsider.[78] Still with the process of pre-strike conciliation, unions still do not go through this process and embark on unprotected strikes. However in terms of the LRA there is no duty to bargain. This means that the employer can refuse to bargain with the union, therefore, there is a no legally enforceable duty on an

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[75] Jansen 2006 (30) *In The Workplace*.

[76] Hepple *et al Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* 114.

[77] Hepple *et al Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* 110.

[78] Hepple *et al Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* 111.

employer to bargain with the union, therefore, there is no legally enforceable duty on an employer to bargain, unless the employer agreed to recognise and bargain with the union in a recognition agreement. Without such an agreement, the union must use its collective muscle to get the employer to the bargaining table.[79]

A strike ballot is an essential instrument of industrial democracy, but the experience in South Africa in the 1980's and early 1990's has resulted in a deep suspicion by unions that strike ballots are an oppressive device.[80] Before the 1995 Labour Relations Act (LRA), employers could interdict strikes that didn't comply with the strike ballot requirements. Then a strike ballot was part of the criteria to ensure legality of the strike, a number of strike action were delayed and some employees were dismissed for embarking in unprotected strike action. However, the 1995 Labour Relations Act (LRA) doesn't require a strike ballot in order for the strike to be protected.

According to M Jacobs, there is a sustained call in South Africa to revisit the basic purposes of the strike ballot: not only is it a democratic way of testing whether a majority of trade union members are in favour of a strike, but from the trade union's perspective the ballot can prevent the embarrassing failure of a strike.[81] A majority decision to strike also serves the purpose of signalling to the employer that there is a collective determination to withhold labour, and this may well shift the employer's bargaining position on the issues in dispute.[82]

The tyranny of the mob remains an urgent concern, undermining democratic processes and rational negotiations. It adds to the complexity of the strike resolution; invariably, the disciplining of strikers accused of misconduct forms part of final negotiations. If employers resolve not to waive their right to discipline strikers, further grounds for resentfulness and alienation will persist in the post-strike period.[83]

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79 https://www.jrattorneys.co.za/south-african-labour-law-articles/collective-rights-and-strikes/organisational-rights-v-the-right-to-bargain.html.

80 Hepple *et al Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* 114.

81 *Ibid.*

82 Hepple *et al Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* 116.

83 Hepple *et al Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* 122.

The relationship between the right to strike and continuation of the employment relationship has always been challenging. Nonetheless, international law dictates that the employment relationship should in one way or another, survive legitimate strike action. The rationale for a strike, which has been repeatedly endorsed by the International Labour Organisation (ILO), is to address the working, social and economic conditions for the workers. So this right will become meaningless if its use could routinely result in the termination of employment.[84]

Picketing in the current legislation in South Africa, picketing is allowed. However parties have to adhere to the picketing rules drawn up by the CCMA or bargaining council. However, violent or intimidation acts and displaying placards inciting violence or racial hatred are not protected, even if the underlying strike is protected.[85] The Code of Good Practice on Picketing requires picketers to conduct themselves in a peaceful, lawful and unarmed manner, they may carry placards, chants slogans and sing and dance but may not physically prevent members of public including customers, other employees and service providers from entering or leaving the employer's premises or commit any action that is, or maybe perceived to be violent. Thus, workers picketing unlawfully can be dismissed for misconduct or maybe held civilly liable for the damages incurred by a third party in specific circumstances, although the latter action is more likely directed at the union.[86]

The ILO has cautioned that sanctions for strike action (either against the union or individual employees) should be proportionate and that monetary penalties (particularly aimed at recovering common-law damages) that could potentially destroy unions or inhibit freedom of association should be avoided.[87] Litigation in respect of strike action is therefore limited to civil litigation in respect of unprotected strikes. Common law remedies are still possible in the case of unprotected strikes, in practice employers rely almost exclusively on the relief provided for in the LRA.

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84 Hepple *et al Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* 145.

85 Hepple *et al Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* 148.

86 Hepple *et al Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* 149.

87 Digest (n 1) pars 658 – 70.

The labour court has exclusive jurisdiction to award compensation under the LRA. Furthermore the labour court has concurrent jurisdiction with the courts to award common-law damages in the case of delict or breach of contract as result of conduct in furtherance of a strike.[88] Common law claims arising from delict or a breach of contract are claims for damages. The claim for compensation is one created by statute. The claim for damages is a claim based on common law principles. The LRA has impliedly ousted any potential claim for damages. To permit such a claim for damages would be at odds with the clear intention of the legislature.[89]

3.5 Section 68(1)(b) of the LRA

Cause of action under common law principles is distinct from section 68(1)(b), the plaintiff is entitled to recover the full loss suffered. It should not be forgotten that a strike or a lock-out could also give rise to a claim based on breach of contract. An employee who embarks on a strike is refusing to comply with his contractual obligation to tender his services to the employer. The employer who locks out an employee is refusing to pay the employee his wage due in terms of his contract of employment.[90]

The effect of section 68(1)(b) of the Labour Relations Act 66 of 1995 (LRA) is to create a *sui generis* cause of action. Unlike the position at common law, plaintiffs are not entitled to the full measure of their damages, subject to mitigation, but only to compensation that is "just and equitable".[91]

As per section 68(1)(b) in the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out that does not comply with the provisions of this

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88 S 77(3) of the Basic Conditions of Employment Act 75 of 1997.

89 Le Roux "Claims for Compensation Arising from Strikes and Lockouts" 2013 23(2) *Contemporary Labour Law* 13.

90 Le Roux 2013 23(2) *Contemporary Labour Law* 14.

91 http://nortonrosefulbright.com/knowledge/publications/43454/unprotected-strikes-remedies-available-to-employers (accessed 2018-11-25).

chapter, the Labour Court has exclusive jurisdiction to order the payment of just and equitable compensation for any loss attributable to the strike, lock-out, or conduct.

According to Le Roux section 68(1)(b) creates a statutory cause of action in addition to any other cause of action a person may have. In order to invoke this remedy the claimant will, in the first place, have to show it suffered a loss and that this loss was attributable to an unprotected strike or lock-out, or attributable to conduct in contemplation or furtherance of such a strike or lock-out. The section does not specify who such a claimant must be or, who the defendant can be, in this type of action.[92]

The compensation is based on the following criteria:

- Attempts to comply with the LRA
- The premeditated nature of the strike
- Whether the strike was provoked
- Whether there was compliance with an interdict restraining the strike
- Court must consider the interests of orderly collective bargaining
- Duration of the strike and the financial position of the union and the strikers.

Union liability for calling an unprotected strike or failing to take steps to bring the strike to an end (and for the losses incurred as a result) is a consequence for the collective bargaining relationship between the union and the employer, which presupposes the union's duty to ensure that its members comply with the provisions of the LRA. A failure to do so, by omitting to intervene in an unprotected strike or be delegating this responsibility to shop stewards who fail to discharge this obligation, can render the union liable for losses suffered.[93]

92 Le Roux 2013 23(2) *Contemporary Labour Law* 14.
93 *Mangaung Local Municipality v SAMWU* [2003] 3 BLLR 268 (LC).

3.6 Challenges with application of section 68(1)(b)

An employer may encounter challenges with applying this section for example quantifying the exact financial loss of the damages caused by the unprotected strike. An estimation may not be accurate due to a number of factors, for instance the actual calculations of damages may be time consuming or not possible. Certain financial losses such as loss of future income may also be difficult to quantify.

Identifying the perpetrators when there has been damage to property, however video footage can prove to be helpful interdicting unprotected strike action.[94] One will need to place extensive evidence before the court, including a video footage of employees who have been identified as members of the striking union engaging in various acts of misconduct including blocking the entrances to the company's entrances. Such evidence could be used in a disciplinary hearing against employees who were specifically identified. Obtaining witnesses who are willing to testify is another challenge encountered by employers in identifying and prosecuting the perpetrators.[95]

3.7 Conclusion

So far the courts are of the view that this issue seems to imply that a strike's protected status is only capable of being impugned if and when the levels of violence pass a certain threshold. The exact threshold is, however, not clear. The courts will be slow to intervene in circumstances where the strike remains functional to collective bargaining, even in the presence of violence.[96]

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94 Simelane *An Evaluation of Section 68(1)(b) of the Labour Relations Act 66 of 1995: How Effective is this Remedy?* 31.

95 *Ibid*.

96 http://www.labourguide.co.za/most-recent/2242-a-new-remedy-for-violent-strikes (accessed 2017-07-27).

CHAPTER 4

CASE LAW

4.1 *Algoa Bus Company v SATAWU & Others* [2010] 2 BLLR 149 (LC)

Section 68(1)(b) of the LRA deals with compensation for losses sustained in an unprotected strike and applying the principles when determining the compensation. In this case interdicts and notices of intention to claim damages were used as basis for order.

The strike action started on the 23 January 2013 (midday) and ended on 30 January 2013. The applicant claimed loss in sales revenue and a loss of government transport subsidies during the period of the strike. The respondents did not dispute the losses as per the submitted affidavit. Damages on the buses were successfully claimed from the insurance they were not part of the compensation awarded.

The union was made aware by the applicant that they would be claiming for the damages incurred during the strike action. Based on the evidence that was submitted the union did little if anything to discourage its members from participating in the strike or to distance itself from the strike.[97]

In *PTAWU obo Khoza, Bongani & 1054 Others v New Kleinfontein Goldmine (Pty) Ltd* the union was not made aware by the applicant at the start of the strike action that they will be claiming for damages in terms of section 68(1)(b).[98] In this matter the court was concerned that the issue of liability for compensation was only raised with it after the event, at a stage when PTAWU could not have done anything to minimise it exposure to such liability. Had it been made aware of the potential liability faced at an earlier stage that might well have concentrated the minds of the union leadership to consider more seriously the wisdom of

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97 *Algoa Bus v SATAWU & Others* [2010] 2 BLLR 149 (LC).

98 *PTAWU obo Khoza, Bongani & 1054 Others v New Kleinfontein Goldmine (Pty) Ltd* 2015 (LC) par 33.

persisting with strike action.[99] However even though the court feels that the union was not notified in time with regards to the liability for damages, however it must be highlighted that there is no legal requirement that dictates that the union should be informed of the potential liability claim against them. In this matter the union was made aware a number of times that they were embarking on an unprotected strike. They should have known the consequences of embarking on an unprotected strike. The court should erred in not entertaining section 68(1)(b) claim against the union and its members, because the applicant did loose out in terms of production for the two (2) days of strike action.

The strike was interdicted on the 25 January 2013 and the consequence of the strike was made known to the respondents, however the interdict fell on deaf ears and it continued regardless. The reason for the strike was disciplinary action that was taken against some of the union members; the strike was definitely not spontaneous. The disciplinary action in the circumstances was legitimate and that process should have run its course without pressure of industrial action. There was no case to be made that the strike was in response to unjustified conduct by the applicant.[100] There was no unjustified conduct by the applicant. The strike was seven and a half days long, which was long enough for the respondents to change their course of action and adhere to the court order.

The Court awarded the first and further respondents are jointly and severally liable to pay the applicant the sum of R1 406 285.33. The first respondent was ordered to pay at least R5 280.00 per month and the further respondents were ordered to pay R214.50 deducted from their salaries per month which deductions were authorised in terms of section 34(1)(b) of the basic Conditions of Employment Act 75 of 1997.[101]

[99] *PTAWU obo Khoza, Bongani & 1054 others v New Kleinfontein Goldmine (Pty) Ltd supra* par 5.
[100] *PTAWU obo Khoza, Bongani & 1054 others v New Kleinfontein Goldmine (Pty) Ltd supra* par 5.
[101] *PTAWU obo Khoza, Bongani & 1054 others v New Kleinfontein Goldmine (Pty) Ltd supra* par 2.

4.2 *South African Transport & Allied Workers Union v Garvis & Others* (007/11) [2011] ZASCA 152 (27 September 2011)

SATAWU contended that the right to freedom of assembly and protest entrench in section 17 of the Constitution infringed by the creation of statutory liability without providing a viable defence – submitted that holding organisations that organised assemblies and marches liable would have a chilling effect.[102] The union had organised a protest action as defined as in the Regulation of Gatherings Act 205 of 1993. The march turned out to be chaotic; damages were caused on vehicles and shops (on the route of the march). Due to the chaos that happened on the day the union was taken to court by members of the public that had suffered damaged due to the march and one of the members of the public was assaulted during the protest action. The damages incurred resulted in huge amounts of money.

The union had to prove the following in order to escape liability as per section 11(2) of the Regulation Gathering Act:

(a) he or it did not permit or connive at the act or omission which caused the damage in question;
(b) the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable;
(c) that he or it took all reasonable steps within his or its powers to prevent the act or permit the act or omission in question. Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.[103]

Section 11(2)(b) of RGA places a great burden on trade unions and other organisations and individuals who intended to assemble to protest publicly. The main dispute raised by SATAWU, section 11(2) of the Regulation of Gathering Act does this section meet the constitutional requirement of rationality. If the defence is rational, does it limit the rights contained in section 17 of the constitution?

[102] *South African Transport & Allied Workers Union v Garvis & Others supra* par 2.
[103] S 11(2) of the RGA.

The union argued that section 11(2)(b) of RGA was unconstitutional in that it offended against the right entrenched in section 17 of the Constitution in terms of which everyone has the right "peacefully and unarmed", to assemble, demonstrate, picket and to present petitions.[104]

The protest action that was organised by SATAWU was to register employment related concerns of its members. Unfortunately this gathering was the culmination of a protracted strike action in the course of which 50 people allegedly lost their lives, private property of the city was damaged (damage was estimated to +/-15 million). Precautionary steps were taken by SATAWU before the start of the gathering.[105]The union tried to blame the SAPS for the chaos and damage that was caused during the protest action, according to the union the police were negligent.

The court was not convinced that section 11(2)(b) offended section 17 of the Constitution. The union was of the view if this section was allowed to stand it would lead to the end of public assembly and protest.[106] The union was blamed for continuing to organise the protest action after there had been signs of violence and signs that the protest action could degenerate into a riot, liability cannot be escaped when that happens. Public demonstrations and marches are a regular feature of present day in South Africa. I accept that assemblies, pickets, marches and demonstrations are an essential feature of a democratic society and that they are essential instruments of dialogue in society.[107]

The respondents took action against SATAWU as per section 11 of the Regulation of Gatherings Act or alternatively common law. The respondents had their stalls/property damaged and vandalised, while other respondents had their vehicles damaged during the protest action.

[104] *South African Transport & Allied Workers Union v Garvis & Others supra* par 3.
[105] *South African Transport & Allied Workers Union v Garvis & Others supra* par 5.
[106] *South African Transport & Allied Workers Union v Garvis & Others supra* par 10.
[107] *South African Transport & Allied Workers Union v Garvis & Others supra* par 16.

The Court held that the scope of the right to freedom of assembly does not extend to persons who assemble in a manner that is not peaceful or unarmed. It found that the scheme of the Act, including section 11, is aimed at restricting unlawful, violent behaviour that violates the rights of others and ensuring that organisers of those gatherings are held liable.[108] The constitutional validity of section 11(1) of the Regulation of the Gatherings Act which states that organisers of the gathering must be held liable for the riot was not challenged by the applicants; however they challenged section 11(2). This case had serious implications on the exercise of the right to assemble, the applicants and the public.

The somewhat unusual defence created for an organisation facing a claim for statutory liability appears to have been made deliberately tight. Gatherings, by their very nature, do not always lend themselves to easy management. They call for extraordinary measures to curb potential hard. The approach adopted by parliament appears to be that, except in the limited circumstances defined, organisations must live with the consequences of their actions, with the result that triggered by their decision to organise a gathering would be placed at their doorsteps.[109]

The fact that every right must be exercised with due regard to the rights of others cannot be over emphasised. The organisations always have a choice between exercising the right to assemble and cancelling the gathering in the light of reasonable foreseeable damage. On the other hand the victims of riot damage do not have any choice in relation to what happens to them or to their belongings.[110]

SATAWU argued that section 11(2) of the Gatherings Act was irrational as it required the organisers of a gathering to take all reasonable steps to prevent the act or omission in question even when that act or omission was not reasonably foreseeable. SATAWU further argues section 11(2) also limited the right to freedom of assembly and that this limitation was not reasonable and justifiable.[111] The court rejected the union's argument that since it had

[108] *South African Transport & Allied Workers Union v Garvis & Others supra* par 8.
[109] *South African Transport & Allied Workers Union v Garvis & Others supra* par 13.
[110] *South African Transport & Allied Workers Union v Garvas & Others supra* par 29.
[111] Tom *A Trade Union's Liability for Damages Caused during a Strike: A Critical Evaluation of the Labour Relations Act and Recent Judgements*.

foreseen the damage causing act and taken reasonable steps to prevent it, it would have been impossible for it to prove that the act was not reasonably foreseeable. The court found that the protest had been preceded by violent march and therefore it was foreseeable that it would be a riot.[112] The appeal was therefore dismissed.

The court found that SATAWU's claim was based on the wrong section, by citing section 11(2) on its own; they could have based the claim on section 11(1) and then used section 11(2) as a defence. Therefore SATAWU's claim of constitutional invalidity was ill conceived. It was found that SATAWU had failed to show that section 11(2) constituted a limitation of section 17 of the constitution, appeal was dismissed. The High Court held that section 17 of the Constitution is not implicated by section 11(2)(b) of the Regulation of Gatherings Act because the right to freedom of assembly does not extend to gatherings which are not peaceful and section 11(2)(b) does not have a chilling effect on the exercise of the right.[113]

At the Constitutional Court, Mogoeng CJ reasoned that "An organisation will escape liability only if the act or omission that caused the damage was not reasonably foreseeable and if it took reasonable steps within its power to prevent that act or omission".[114] The limitation of the right to strike and assemble peacefully is a justifiable limitation in terms of section 36 of the Constitution. The imposition of liability is reasonable and necessary in order to protect the constitutional rights of the public, which are worthy of constitutional protection at all times.[115]

4.3 *Mangaung Local Municipality v SAMWU* [2003] 3 BLR 268 (LC)

The applicant sought payment of compensation in terms of section 68(1)(b) of the LRA for losses allegedly suffered as result of an unprotected strike by members of the respondent.[116] The respondent didn't appear in court even though the statement of claim was served and the court was happy that there was proper service in terms of the rules. On the 14–15 January

[112] *Ibid*.
[113] Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 121
[114] *Ibid*.
[115] *Ibid*.
[116] *Mangaung Local Municipality v SAMWU supra* par 1.

2002 employees in the electrical department at Bloemfontein commenced with an unprotected strike action by refusing to work and also blockaded the entrance to and exit from the applicant's electrical department, with the result that some 300 vehicles and employees could not leave the premises to go and render electrical services to residences and business. The striking employees demanded that they be addressed by applicants councillors.[117]There was a meeting that was held with the shop stewards of the electrical department, unfortunately the meeting didn't yield a positive result.

On the 16 January 2016, the applicant had written a letter and met with the respondent addressing its concern namely; they were not even aware what the reason for the work stoppage was. The applicant was willing to engage and negotiate with the respondent to try and resolve the grievance. The applicant requested a list of grievances which led to the strike and for the respondents to report for duty and the no work, no pay rule would apply. However after these attempts the strike continued and it spread to the administrative staff.

Applicant approached the court and was granted an interdict by the court against the respondent, MESHAWU and the striking employees. The prayers sought and granted interdicted all the respondents from participation in the strike "or in any conduct in contemplation or furtherance of such strike" and ordered the respondents to return to work and fulfil their obligations in terms of their employments contracts.[118] Due to the strike the applicant's claim resulted in compensation of R272 541.84.

The applicant was claiming compensation from the respondent only not from its members who participated on the strike, none of whom have been joined as respondents. The applicant was convinced that the respondent union was solely responsible for the compensation; however there was no evidence to support this. The applicant was of the view that they had requested the respondent to intervene in the strike and persuade the strikers to return to work, however this did not happen. There was no action really from the respondent; the strike came to an end due to the court interdicts.

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[117] *Mangaung Local Municipality v SAMWU supra* par 2.
[118] *Mangaung Local Municipality v SAMWU supra* par 4.

The court was of the view that where a trade union has a collective bargaining relationship with an employer, and its members embark on unprotected strike action and the trade union becomes aware of such unprotected strike and is requested to intervene but fails to do so without just cause, such trade union is liable in terms of section 68(1)(b) of the Act to compensate the employer who suffers losses due to such an unprotected strike.[119] The provisions of Item 6 of Schedule 8 indicate that a trade union shoulders some responsibility with regard to participation by its members in an unprotected strike. Therefore this responsibility extends to liability to compensate an employer where the trade union fails to discharge its duty of intervening during unprotected strikes by at least attempting to secure a return to work of its members.[120]

The court decided that the respondent was liable for the loss of the applicant, however it ordered compensation to the value of R25 000.00 payable within 30 days of the date of judgement and also pay the applicants costs.

In this case the court held that the union's liability arose from its failure to take steps to bring the unlawful strike to an end.[121] It was suggested by the court a strong message should be sent to parties who embark on strikes (or lock out) with blatant disregard of the provisions of the LRA.[122]

4.4 *Rustenburg Platinum Mines Limited v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC)

The applicant had several mines in the North West area; however these mines operated separately in terms of day to day management issues. The applicant worked a three shift system. The respondent was a registered trade union and was a majority union within the workplace and had concluded recognition and a procedural agreement with the applicant. The majority union embarked on an unprotected strike and the applicant sustained loss in consequence of it in an amount of at least R15 000 000.00. There were allegations that they

119 *Mangaung Local Municipality v SAMWU supra* par 15.
120 *Ibid*.
121 Grogan *Workplace Law* 395.
122 Le Roux 2013 23(2) *Contemporary Labour Law* 18.

intimidated employees who wanted to attend to work. NUM members who wanted to report for duty were intimidated and they stayed away from work.

The court held that in order to obtain the compensation award the applicant had to satisfy three requirements. These three requirements entail that the strike constitute an unprotected strike, that the applicant suffered loss and that the party against whom the relief is sought must have participated in the strike or committed acts in furtherance thereof.[123]

There were allegations that the strike had been instigated by the respondent's executive members. The court was also convinced that the respondent instigated the strike of the 21st April 1999 and thereafter committed acts in furtherance thereof. This falls squarely within the provisions of section 68(1)(b).[124] This section is not penal in character. However various factors which must be considered in the exercise of discretion make it plain that if compensation is awarded need not necessarily equate to a full indemnity for the loss suffered.[125]

The Court based their judgment on section 68(1)(b) that the strike was not in compliance with the provisions of chapter IV of the LRA. The strike was premeditated, it was not spontaneous, and it was not a coincidence that two mines which are 26 kilometres apart went on strike at the same time. The conduct of the respondent was unjustified, as the strike was not provoked in any way. Two interdicts were obtained by the employer; however they didn't deter employees from striking.

According to the court the strike was a serious one, the respondent was an instigator thereof and, to be sure, its conduct was highly irresponsible and totally erosive of orderly collective bargaining. According to the court the respondent needed a reminder that the interests of security in the workplace are best promoted by stable and ordered action in terms of procedures sanctioned by law.[126] The strike lasted two days, it was determined that the

[123] Simelane *An Evaluation of Section 68(1)(b) of the Labour Relations Act 66 of 1995: How Effective is this Remedy?* 25.
[124] *Rustenburg Platinum Mines Limited v Mouthpiece Workers Union* [2002]1 BLLR 84 (LC) par 14.
[125] *Rustenburg Platinum Mines Limited v Mouthpiece Workers Union supra* par 14–15.
[126] *Rustenburg Platinum Mines Limited v Mouthpiece Workers Union supra* par 19.

respondent was barely solvent and the court was aware that an award for compensation will bear heavily on it.[127] The applicant reduced its claim to R100 000.00. The respondent was liable to pay the sum of R100 000.00 in monthly instalments of R5 000.00 and they were also liable of the legal costs.

In this matter, according to Grogan while provisions providing for compensation for unprotected industrial action were designed to compensate an aggrieved party for losses actually suffered, however the compensation awarded need not necessarily do so. Not many employers have resorted to section 68(1)(b) as often as might have been expected.[128]

4.5 *Verulam Sawmills (Pty) Ltd v AMCU* [2015] J 1580/15 (LC)

The courts have made it clear that the right to engage in a protected strike is a not a licence to engage in misconduct.[129] A protected strike over wages was called by AMCU (respondent), it commenced at the company's premises in Mpumalanga (applicant) on the 28 July 2015. On the 23 July 2015, and in the run up to the strike, the parties concluded a picketing rules agreement in terms of section 69 of the LRA with the assistance of the CCMA. In terms of the the agreement, which incorporated the Code of Good Practice on Picketing and Mr Mazibuko was appointed as the strike control "convenor" and was to be available to be contacted at all times.[130] In terms of the Code of Good Practice, item 3: the purpose of the picket shall be to peacefully encourage non-striking employees and members of the public to oppose a lock-out or to support strikers involved in a protected strike. The nature of that support can vary. It may be to encourage employees not to work during the strike or lock-out. It may also be to persuade members of the public or other employers and their employees not to do business with the employer.[131]

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127 *Rustenburg Platinum Mines Limited v Mouthpiece Workers Union supra* par 18.

128 Grogan *Workplace Law* 395.

129 *Chemical Energy Paper Printing Wood and Allied Workers Union v Metrofile (Pty) Ltd* (2004) 25 ILJ 231 LAC par 53.

130 *Verulam Sawmills (Pty) Ltd v AMCU* 2015 (LC) par 2.

131 Code of Good Practice on Picketing, Item 3 of the Code.

Although the picket maybe held in any place to which the public has access, the picket may not interfere with the constitutional rights of other persons.[132] The conduct includes picketers not to physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employers premises and not to commit any action which maybe unlawful, including but not limited to ant action which is, or may be perceived to be violent.[133]

On the 4 August 2015 the applicant launched an urgent application and enrolled the matter for a hearing on the 7 August 2015. On the same day the respondents delivered an answering affidavit in which it indicated that it did not oppose the relief sought by the company, save for the punitive costs order, and sought to defend itself against such an order.[134]

Basically at the commencement of the strike which was the 28 July 2015, the strikers had failed to adhere to the picketing rules as per the agreement. On that day and those days that followed in the run up to the urgent application, the strikers contravened the picketing rules by: carrying weapons, picketing outside the designated area; moving into the main road, stopping vehicles and removing commuters from public transport, prohibiting employees from entering the workplace, blockading the entrance to the company's premises, and damaging a vehicle belonging to the company.[135] On the 3 August the company had no choice but to shut down its operation as the strikes / disruptions got out of hand. There were threats that were made towards the MD of the company, police (riot squad) were called, however they were reluctant to intervene as there was no court order.

Non-strikers (including employees of suppliers and contractors) and replacements labourers have, inter alia, the constitutional right to the freedom and security of the person, which includes the right "to be free from all forms of violence from either public or private sources".[136] Where strikes turn violent and they are intimidated, assaulted and sometimes killed, this right is infringed. Given that the right to strike must be exercised with due regards

[132] Code of Good Practice on Picketing, Item 6(5) of the Code.
[133] Code of Good Practice, Item 6(6)(b) of the Code.
[134] *Verulam Sawmills (Pty) Ltd v AMCU* par 2.
[135] *Ibid*.
[136] S 12(1)(c) of the Constitution.

to the right of non-strikers and replacement labourers to the freedom and security of the person, this, again, goes to show that the right to strike must be exercise peacefully; otherwise it will trammel the rights of non-strikers and replacement labourers.[137]

From the first day of the strike, numerous letters detailing the series of events had been sent to the strike convenor (Mr Mazibuko) and his urgent intervention had been requested by the applicant and it was stated clear on the letters that the respondent (AMCU) would be held liable for the costs associated with the enforcement of the enforcement of the picketing rules. It was further stated in some of the letters that the applicant would approach the court for an interdict, unless the situation was brought under control. After all the attempts made by the company, a decision was made to shut down its operation due to fears of intimidation and the conduct of strikers as they were carrying weapons and were chanting intimidating slogans.

After everything had been deliberated in court, AMCU did not see the basis for the award of a punitive cost order. The approach of union responsibility accords the approach adopted in other jurisdictions. In the USA, for example, the National Labour Relations Board has held as follows:

> "Where a union authorises a picket line, it is required to retain control over the picketing. If a union is unwilling or unable to take the necessary steps to control its pickets, it must bear the responsibility for their misconduct. Similarly, if pickets engage in misconduct in the presence of a union agent, and that agent fails to disavow that conduct and take corrective measures, the union maybe held responsible".[138]

The strikers were found to have materially breached the picketing rules agreement and engaged in various acts of unlawful conduct and AMCU was found not to have taken reasonable steps to prevent such conduct and ensure compliance with the picketing rules agreement[139]. The court ordered costs against AMCU and the strikers as a mark of disapproval by their conduct.

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137 Myburg 2017 Global Business Solutions Annual Employment Conference 18.
138 *Verulam Sawmills (Pty) Ltd v AMCU supra* par 9.
139 *Verulam Sawmills (Pty) Ltd v AMCU supra* par 13.

"Although the picketer may be held in any place to which the public has access, the picket may not interfere which the constitutional rights of other persons. The Code requires picketers to conduct themselves in a peaceful, unarmed and lawful manner".[140] The conduct includes picketers not to physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employers premises and not to commit any action which may be unlawful, including but not limited to any action which is, or maybe perceived to be violent. In this case the striking employees had contravened the required conduct when it comes to picketing in terms of code of good practise.

In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South Africa Worker's Union & Others* had conducted themselves contrary to the legislation and picketing agreement as they were obstructing vehicles and persons from entering or leaving the applicant's premises, protesting or being present in Montecasino Boulevard, interfering with traffic or persons entering or leaving Montecasino Boulevard, picketing within 500 metres of the premises, intimidating or assaulting persons or damaging property at or near the premises.[141] Section 17 of the Constitution states everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions. Section 17 places an obligation to union members and the union, the union leadership (including shop stewards) have a responsibility during a strike action to lead and guide their members and advise them to behave accordingly during the strike action until the end of the strike.

A picket constitute a "conduct in contemplation or furtherance of a strike". In terms of the Code police may arrest picketers for participation in violent conduct or attending a picket armed with dangerous weapons. They may take steps to protect if they are of the view that the picket is not peaceful and is likely to lead to violence.[142]

In *SATAWU v Garvis & Others*, it was decided that every right must be exercised with due regard to the rights of others. The fact that South Africa is a society founded on the rule of

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[140] Code of Good Practice, Item 6(2) of the Code.
[141] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA workers Union & Others supra*.
[142] Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 118.

law demands and that the right is exercised in manner that respects the law.[143] The Act does not absolve or protect criminal acts committed by employees while embarked on either protected or unprotected strike.[144]

It should be emphasised that the Constitution and other laws require the demonstrators, assemblers and picketers to exercise their rights peacefully and unarmed.[145]

4.6 Conclusion

Violence has become part of strikes or protest action in South Africa. Violence and damage to property has been used by strikers or protestors as a weapon to send a loud message to the employers to force them to meet their demands. It seems in South Africa that violence is seen as an answer or a tool to express one's frustrations. We have seen even students at universities nationally have resorted to violence to voice their concerns and disputes. The courts have made it quite clear in the above mentioned judgments that tyranny of the mob will not be condoned.

According to the code the police may arrest picketers for participation in violent conduct or attending a picket armed with dangerous weapons. They may take steps to protect the public if they are of the view that the picket is not peaceful and is likely to lead to violence.[146] The Act does not absolve or protect criminal acts committed by employees while embarked on either protected or unprotected strike.[147]

The minute there is misconduct for instance damage to property, intimidation and violence, the strike should loose its protection status, because there is no room in our legislation that tolerates violence. There should be no level of violence that should be accepted, there should be zero tolerance. When the strike gets violent, it is destructive to collective bargaining and it undermines the freedom of association.

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[143] *South African Transport & Allied Workers Union v Garvas & Others supra* par 67.
[144] *South African Transport & Allied Workers Union v Garvas & Others supra* par 68.
[145] Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 118.
[146] Code of Good Practice, Item 7(3) of the code.
[147] Rapatsa 2014 3(5) *Journal of Business Management & Social Sciences Research* 118.

The courts have always stated in a numbers of occasions that violence and unruly conduct is the antithesis of the aim of a strike, which is to persuade the employer through the peaceful withholding of work to agree to the union's demands.[148] In *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd*, a question was posed how much violence will misconduct would have to have occurred before the court intervenes. Prof Rycroft suggested that the courts should ask "Has misconduct taken place to an extent that the strike no longer promotes functional collective bargaining and is therefore no longer deserving of its protected status?" He suggests that the court should weigh the levels of violence and efforts by the union concerned to curb it.[149] However I disagree with this proposed approach, violence should not be accommodated at all as our legislation is very clear on the right to strike. Both the right to strike and to picket should be peaceful, there is no room to tolerate a certain level of violence as it is against the law and it infringes on the right of others. Acts of wanton and gratuitous violence appear inevitably to accompany strike action whether protected or unprotected. Strike related misconduct is a scourge and a serious impediment to the peaceful exercise of the right to strike and picket. More than that, it is a denial of the rights of those at whom violence is directed, typically those who elect to continue working and suppliers of those employers who are the target of strike action, and poses serious risks to investment and other drivers of economic growth.[150]

In my view this section has not really been effective in deterring strikers from damaging property and resorting to violence during strike action. The question that comes to mind, are trade unions really feeling the financial knock when they have to pay for the damages as instructed by the courts. Based on the various judgments the perpetrators are not being really held accountable for the actual damage that has been incurred. I guess it brings us to the fact that the section focuses on a just and equitable compensation, but is the section really serving the purpose.

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148 *National Union of Food Beverage Wine Spirits and Allied Workers v Universal Product Network (Pty) Ltd* 2015 (LC) par 16.

149 *National Union of Food Beverage Wine Spirits and Allied Workers v Universal Product Network (Pty) Ltd supra* par 17.

150 *National Union of Food Beverage Wine Spirits and Allied Workers v Universal Product Network (Pty) Ltd supra* par 19.

The interpretation of just and equitable compensation has resulted in employer's receiving considerably less compensation than that which was claimed. Subsequently section 68(1)(b) does not seem to achieve the legislature's aim to deter the violence which results in damage, but appears to be an insignificant slap on the wrist of the liable parties.[151]

[151] Simelane *An Evaluation of Section 68(1)(b) of the Labour Relations Act 66 of 1995: How Effective is this Remedy?* 32.

CHAPTER 5

COMPARATIVE STUDY REGARDING BALLOTING IN STRIKES

5.1 Approaches in developed countries

Australia

It is the requirement of the labour relations system to hold a ballot of members before the commence industrial action. Before a ballot the union must get permission to conduct a ballot from the labour tribunal. The majority of the members must be in favour of the proposed strike. The voting process is supervised by a third party, usually the Australian Electoral Commission (AEC) or independent ballot agent. The AEC is the default ballot agent for all protected action ballots in Australia. A protected strike may continue only if 50% of the persons eligible to vote have voted and approved the action. Eligible persons mean employees of the relevant employer who are under the employ of that particular employer on the day of the ballot.[152] The purpose of including the ballot requirement prior industrial action is to achieve a fair, simple and democratic process to determine whether employees wish to engage in a particular protected action. If these requirements are not met the industrial action could be viewed as unprotected or unlawful.

Canada

In Canada, contrary to Australia, majority of employees have to vote in favour of the strike, in order to go ahead with the strike. A ballot system in Canada is a statutory requirement; no compliance would be a contravention to the law, which will be quasi-criminal sanction. A ballot system helps in the sense that the union can get views of all members who would like to go on strike. It helps and protects the interests of the employer against precipitate strike

[152] Tenza 2015 19 *Law, Democracy & Development* 216.

action. It also helps against strikes which are not democratically mandated and no work, no pay will be prevented.[153]

Lessons from Australia and Canada

Ballot system requirement will prevent strikes that don't have majority support and it will minimise the violence and the intimidation of non-strikers as the voting will determine how many employees are in support of the strike and will give the employer a clear indication whether business will continue as normal. Having an independent party involved in the ballot voting system will ensure that the voting is fair, transparent and not biased towards or against one of the rival factions and it will ensure that industrial action is peaceful. In order for an independent party to be involved in the election process, compulsory ballots will have to be introduced.

If the balloting of members during a proposed strike is conducted by a third party, for example the IEC, there are beliefs that the dignity of strikes and industrial action, in general, will be restored. This will also ensure that employees go on strike because the majority of them want to voice their demands in a certain way. The involvement of the IEC will also ensure that the results are credible and can be trusted as a genuine outcome of the voting process since the voting process has been credible. It will ensure that strikes and pickets are taken seriously, and not just seen as the actions of uncivilised hooligans because of the current concomitant damage to property, intimidation of people and even, in some cases, deaths.[154]

Certain services need particular protection against disruption; hence and these essential services differ from one country to another. In certain countries essential services extend to all activities which government may consider appropriate or all strikes that maybe contrary to public order, the general interest or economic development.[155]

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153 Tenza 2015 19 *Law, Democracy & Development* 217.

154 *Ibid*.

155 Mawasha *An Analysis of Legal Implications for Participating in an Unprotected Strike* 20.

The British perspective identifies five categories as essential services namely; police, armed forces, merchant seaman, postal workers telecommunications. Strikes in all of the British essential services are restricted in terms of section 5 of the Conspiracy and Protection of Property Act of 1875. It provides framework within which legislation impacts on workers' participation in an unprotected strike.[156]

5.2 Approaches in developing countries

Nigeria

The right to strike is perhaps next in importance to the right to life. The right to strike influences the balance of relations, not only between employers and employees and their organisations in the various sectors of the economy but also the capacity of the civil society, which includes trade unions, in acting as a counter power likely excesses that state may display in the governance process. Therefore the right to strike determines not just the prospects for enjoying improvements in working and living conditions of employees but it is also a precondition for sustenance of society on a just and democratic basis and enjoyment of other fundamental socio-economic and political rights. However the right to strike tends to be restricted in labour laws and practically suppressed in the course of actual strike actions in Nigeria[157]. ILO Committee of Experts maintains that any work stoppage, however brief or limited, may generally be considered as a strike.[158]

Legislation in Nigeria shows that there are too many stringent conditions which have almost denied the worker his right to strike, particularly those giving wide powers to the employer to terminate the employee for breach of contract or deny the employee statutory benefits.[159] The right to strike in Nigeria stems from the position of common law and a strike by employees is seen as a breach of the employment contract.

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156 *Ibid.*

157 http://fermiaborisade.blogspot.co.za/2012/10/theright-to-strike-in-nigeria-and-ilo.html (accessed 2017-10-30).

158 *Ibid*.

159 Ahmed 2014 (4) 11(1) *International Journal of Humanities and Social Science* 300.

Occasions where the legality of strike actions has been tested against the network of the legal rules are few and far between that it can be said that they are peripheral to the practice of labour relations law in Nigeria. It is rare to find employers or other workers suing workers, trade unions and their officials alleging liability for economic torts of conspiracy, inducing breach of contract and or intimidation.[160]

However in the 1940's Nigeria had enjoyed the right to strike under the colonial government without any serious restrictions or consequences. The most significant strike in the Nigerian Labour History in terms of coverage and effect is the general strike of 1945 and it was very successful strike. Statutory restrictions began in Nigeria in 1968 in the heat of civil war. The promulgation of the Trade Disputes (Emergency Provisions) Act, the government placed an outright ban on strikes.[161] This Act bans all strikes and lock-outs unless the laid down procedures have been exhausted. The Act further prevents workers from going on strike and employers from imposing a lock out while negotiation or arbitral proceedings are in progress; neither can any industrial action be taken or initiated after the tribunal might have finally determined the issues in controversy.[162]

There is a requirement in the Nigerian legislation that every registered trade union must have a provision in its rule book to the effect that no strike shall take place unless a majority of the members have in a secret ballot voted in favour of the strike. However this requirement has proven to be almost impossible to organise a strike action, as virtually every company has branches all over the country, as well as union members scattered in various states.[163]

It is doubtful whether any company will give all its employees' time off to assemble at one place for the purpose of voting by secret ballot on a strike action. An alternative is to post ballot papers to various branches of the union for secret voting.[164] However the efficiency of the postal in Nigeria in questionable, therefore momentum of the strike or the reason for the

[160] Ahmed 2014 (4) 11(1) *International Journal of Humanities and Social Science* 305.
[161] Ahmed 2014 (4) 11(1) *International Journal of Humanities and Social Science* 306.
[162] Ahmed 2014 (4) 11(1) *International Journal of Humanities and Social Science* 307.
[163] Ahmed 2014 (4) 11(1) *International Journal of Humanities and Social Science* 308.
[164] *Ibid*.

strike could lose its urgency. Employer must be made aware of the notice to strike and the results of the secret ballot no later than seven (7) days before the day of the strike.

Nigeria has a very wide definition when it comes to essential services, as it includes almost all the different categories of employees. Essential Services are prohibited from striking as their occupation is seen as very important in the community at large and the disruption will have particularly harmful consequences to the community. All these make the right to strike in Nigeria to be only a theoretical possibility. However despite all the restrictions that has been put in place in Nigeria, not a single day passes without the news of a strike action or an impending one either in the public or private sector.[165]

Brazil

Strike wave began just as Jose Sarney became Brazil's first civilian president since 1964. One of the Brazilian ruling class motivations for opting for civilian rule after two decades of military dictatorship was the hope it will diffuse the mounting labour and political ferment that the general were no longer able to contain.[166] The strikes were a continuation of the struggle they had originally launched under the former military regime. However these strikes were still illegal under the former military regime's anti-strike legislation.[167] There was selective repression that was applied against strikers. Historically, the period between 1938–1943 strikes in Brazil were criminalised. At times workers were suspended and dismissed for taking part in strikes. From 1946 strikes were no longer considered criminal and were protected by law. The 1967 Constitution ensured the right to strike of private sector workers only, not for public sector employees.

Workers in the public service in Brazil were not entitled to a collective working relationship with the public administration until the promulgation of the 1988 Constitution, nor could they organise and they had no right to strike and they could not join trade unions. They were

[165] Ahmed 2014 (4) 11(1) *International Journal of Humanities and Social Science* 309.
[166] http://www.sahistory.org.za/sites/default/files/DCLaJu185.0377.5429.010.008.Jul1985.23.pdf (accessed 2018-11-24).
[167] *Ibid.*

denied any form of expression of their common interests and desires, as well as the practical means to struggle for them.[168] The 1988 Constitution recognised the right to strike for employees in the public and private sector.

1 April 1980 workers embarked on a 41-day strike for better working conditions and pay. The reaction of the employers and the government was extremely repressive, 1,507 strikers were dismissed and 14 trade unions leaders were arrested and sentenced to a number of years in prison by a military court.[169] Throughout history in Brazil, strikes became a vehicle to better working conditions and promotion of social rights for workers.

Even with the incorporation into national law of the principles of the ILO Convention 151 in Brazilian jurisprudence we can note an excessive restriction of the right to strike of public servants, with judgements that not only expand the list of essential services and this makes it practically impossible for them to exercise the right to strike.[170] Brazilian parliament adopted a draft bill without consultation of the relevant affected parties that dealt with the regulation of the right to strike of public servants. The draft was adopted in 2014 and it dealt with the right to strike of public sector servant employees and its aim was to restrict the right to strike. It required employees should give ten (10) days notification before strike action; however trade unions considered seventy two (72) hour notification to be sufficient.

The draft defines the strike, as partial paralysis, prescribes non-payment of days off, considers the days on strike not worked, and intends to penalise workers on probation, forcing them to compensate the days not worked so as to complete the service time required by law. The unions view this as a deliberate construction of a precedent to break the strength of joint positions and opens space for summary dismissals.[171] The draft considers ninety percent (90%) of public services as essential services. Strikes in Brazil occur due to resolutions of disputes and lack of consistency when dealing with disputes.

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168 http://news.xinhaunet.com/english/2017.04/28c_136243572.htm (accessed 2018-11-24).

169 http://column.global-labouruniversity.org/2015/06freedom-of-association-and-the-right-to-strike.html (accessed 2018-11-10).

170 http://news.xinhaunet.com/english/2017.04/28c_136243572.htm (accessed 2018-11-24).

171 *Ibid.*

5.3 Common and divergent perspectives

The right to strike has been widely recognised as a fundamental element of stable collective bargaining. Industrial action is one of the essential means available to employees to promote and protect their economic and social interests and resolve industrial disputes.[172] South African labour legislation is viewed as having favoured employees rather than employers. However Nigeria and Brazil's legislation is repressive towards employees. Nigeria protects general services and business interest of employers.

In Nigeria and Brazil most employees are considered as essential service. In Brazil 90% of public servants are considered as essential service. In Nigeria almost all occupation across the various sectors are declared as essential service. Nigeria and Brazil are quite repressive in their approach with regards to strikes. In South Africa, section 213 of the LRA, an essential service is defined as service, the interruption of which endangers the life, personal safety or health of the whole or any part of the population, the parliamentary service, and the South African Police Services (SAPS). Even within SAPS not all employees are declared as essential service. Essential Service employees are prohibited from striking.

In South Africa employees should give employers 48 hours written notice before commencement of strike or lock-out. However if the state is the employer, the employer must be given 7 days' notice before commencement of the strike. In Brazil workers are requested to give 10 days notification before a strike takes place.

5.4 Conclusion

The concept of a ballot system seems to be a worldwide phenomenon, however it hasn't yielded positive results really. It has been viewed as a repressive tool by the labour movement. In South Africa it was seen as a tool used by employers to destroy solidarity amongst workers and in fact it is still seen that manner.

[172] Odeku "An Overview of the Right to Strike Phenomenon in South Africa" 2014 5(3) *Mediterranean Journal of Social Sciences* 695.

CHAPTER 6

LABOUR RELATIONS ACT AMENDMENTS

6.1 Advisory Arbitration Panel and Awards

Amendments came from a process of engagement through NEDLAC on the state of the labour relations environment and, in particular, to address violent and protracted strikes by introducing advisory award panel which assists in resolving the unresolved disputes.[173]

Section 150A(1) and (4) of the LRA allows the Director of the CCMA to appoint an advisory arbitration panel (Senior Commissioner, Employer and Trade Union party) in the public interest, either independently or on application to facilitate a dispute. Alternatively CCMA could be instructed by the Minister or request by a party but only if he or she has the reason to believe that the strike is no longer functional to collective bargaining in that it has continued for a protracted period and no resolution appears to be imminent.[174] If there is an imminent threat that constitutional rights maybe or are being violated by strikers or their supporters through the threat or use of violence or the threat of or damage to property. Alternatively if the strike causes or has the imminent potential to cause or exacerbate an acute national or local crisis.[175]

The panel must seek to resolve the dispute through consensus, however if a consensus cannot be reached, therefore the senior commissioner (who is a chairperson) can issue the award within seven (7) days unless an extension has been granted. The award must include recommendations for the resolution of the dispute and, although it is advisory. The parties have to indicate whether they accept or reject the award and are given seven days to do so. If the award is rejected by any of the parties within the panel, they have to motivate. The

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[173] Department of Labour Presentation *Labour Law Reform: National Minimum Wage Bill, BCEA & LRA Amendment Bills, 2017* Presentation to Nelson Mandela University 2018.

[174] https://www.ensafrica.com/Uploads/Images/news/CUsersTS017DesktopENSafricaemploymentupdateseminar20June2018 (access 2018-11-25).

[175] *Ibid*.

award must rejected only if the party has consulted with its members. In terms of Section 150C(7) of the LRA the Minister is required to publish the award for public dissemination four days after it is issued.[176] Section 150D the award will be binding to all parties as if it had been a collective agreement and maybe extended in terms of section 32 of the LRA, it will be binding even to the parties who are not in agreement with the award.

It's very clear that the amendment are written with the spirit to curb violence, destruction to property and to put an end to protracted strikes, however the whether the CCMA has the capacity to handle this extra load, it still remains to be seen. The advisory arbitration panel will promote dialogue between the instead of resorting to violent strikes.

6.2 Picketing

The LRA Amendments go together with a Code of Good Practice: Collective Bargaining, Industrial Action and Picketing and an Accord on Collective Bargaining and Industrial Action.[177] The Code is intended to provide practical guidance on collective bargaining, the resolution of disputes of mutual interest and the resort to industrial action.[178] The prohibition of pickets without picketing rules in place, going forward CCMA Commissioners will have the power to establish rules where the parties are not able to agree on the rules.[179]

The right to strike is a crucial weapon in the armoury of organised labour. The right is a result of several years of struggle by the working class. The history of this struggle is one of constant class battles, fierce reprisals by the management and the authorities against strikers who had to make heroic sacrifices.[180] The right to strike is thus so important to the functioning of a democratic society that its suppression would be unjustified. The right is now accepted as an

[176] https://www.ensafrica.com/Uploads/Images/news/CUsersTS017DesktopENSafricaemploymentupdateseminar20June2018 (access 2018-11-25).

[177] Department of Labour Presentation *Labour Law Reform: National Minimum Wage Bill, BCEA & LRA Amendment Bills, 2017* Presentation to Nelson Mandela University 2018.

[178] https://www.ensafrica.com/Uploads/Images/news/CUsersTS017DesktopENSafricaemploymentupdateseminar20June2018 (access 2018-11-25).

[179] *Ibid*.

[180] Ahmed 2014 (4) 11(1) *International Journal of Humanities and Social Science* 300.

indispensable component of a democratic society and a fundamental human right.[181] Therefore Section 150B(7) of the LRA which is the appointment of an arbitration panel does not interrupt or suspend the right to strike.

The thrust of the amendments to section 69 of the LRA id to prohibit a picket unless there are picketing rules. The purpose underlying these amendments is to require trade unions to take responsibility for pickets and to ensure that the constitutional rights of others to freedom and security of person, freedom of association, fair labour practises and property are not infringed.[182] However section 68(1)(b) was also written with the same motive to hold trade unions accountable financially for the destruction caused by their members meant with the hope that it will destruction and violence during strikes, but it didn't. It still remains to be seen if these amendments will yield the positive result as intended.

During the 30 day conciliation period, a commissioner will attempt to conciliate the dispute and under the amendments, he or she will have to consider whether the parties have any binding agreement between them, which contains picketing rules. If there are no picketing rules in place, the commissioner will attempt to secure an agreement between the parties. The 30 day conciliation can be extended only if it will lead to a meaningful conciliation process and if an agreement appears likely. A request to extend the 30-day period must not be unreasonably withheld.[183]

6.3 Ballots for Strikes or Lock-outs (duty to keep records)

The historical precedent for the use of secret strike ballots as part of a campaign to weaken trade unions. The Conservative Party government headed by former United Kingdom Prime Minister Margaret Thatcher, sought to weaken the trade union movement, an intention

[181] Ovunda "Derogations and Restrictions on the Right to Strike under the International Law: The Case of Nigeria" 2009 (13)4 *The International Journal of Human Rights* 553.

[182] https://www.ensafrica.com/Uploads/Images/news/CUsersTS017DesktopENSafricaemploymentupdateseminar20June2018 (access 2018-11-25).

[183] *Ibid*.

which is documented in cabinet papers released in 2013. One of the measures taken by the government was the requirement of secret strike ballots, in the Trade Union Act.[184]

The proposed new section 95(9) of the LRA extends the meaning of ballot for a strike or lockout to include any voting by members that is recorded in secret, for the purposes of section 95(5) of the LRA. This amendment serves to provide for new technologies of balloting at the same time ensuring good governance and secrecy.[185]

Ballots before strikes and lockouts have been a requirement in terms of the LRA and this has always been a requirement by the department of labour for trade unions and employer organisations. However the only change in the amendments is the clarification of the secret or confidential nature of a ballot and this is in line with South Africa's voting traditions as it reinforces worker control of unions.[186] The LRA clearly states section 67(7) failure by a registered trade union or a registered employer's organisation to comply with a provision in its constitution requiring it conduct a ballot of those of its members in respect of whom it intends to call a strike or lock-out 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.

6.4 Conclusion

There is a strong perception that these amendments it will be used by employers to take punitive action against workers for embarking on strike action and this could have a chilling effect on the exercise of the right to strike. The effect could be weakening of the bargaining of workers and ultimately the hampering of the Constitutional imperative of transformation.[187] According to some writers the use of violence during strike action has the

[184] https://www.ensafrica.com/Uploads/Images/news/CUsersTS017DesktopENSafricaemploymentupdateseminar20June2018 6 (access 2018-11-25).

[185] Chennels "Collective Bargaining, Industrial Action & Picketing: Amendments to the LRA, The Draft Code & The Accord" 2018 *Maserumule Corporate Employment Law*.

[186] https;//www.iol.co.za/business-report/opinion/opinion-parliament-gives-new-labour-laws-the-green light-15246902 (accessed 2018-11-25).

[187] https;//www.iol.co.za/business-report/opinion/opinion-parliament-gives-new-labour-laws-the-green light-15246902 7 (accessed 2018-11-25).

potential of shifting the public focus from the real issues affecting the parties to the dispute to non-labour issues, such as damage to property, thereby inviting legal challenges.[188]

These amendments are compelling strikers to end protracted strikes through the advisory arbitration panel. The arbitrator is called upon to determine how the future affairs of the parties will be governed.

Resorting to advisory arbitration panel as a remedy becomes necessary during periods of prolonged strikes or lock-outs, particularly where a work stoppage has the potential to interfere with public safety, public health or the general economic health of nation. Therefore this gives the government or the Minister of Labour powers to intervene in labour disputes, thereby allowing the Minister to compel the parties to resolve their issues through advisory arbitration. For example the municipal strike by South African Municipal Worker's Union (SAMWU) and Independent Municipal and Allied Trade Unions (IMATU) members that lasted for eight(8) days that took place in Port Elizabeth. However it was a protected strike, but it interfered with public health of the Nelson Mandela Bay community. The CCMA intervened and mediated between the parties and a deal was struck between the two parties. The dispute stems from money owed to workers after the former Uitenhage Despatch and Port Elizabeth municipalities merged to form Nelson Mandela Bay in 2000. Before the 2016 municipal elections, then the ANC led council agreed to pay workers long-service pay bonuses.[189]

It appears regardless that the strike is protected or not, violence and the destruction to property is still a matter of concern. Recently there has been quite a number of strikes and they have been clouded by violence, looting, destruction to property and intimidation. There seems to be a common denominator which is violence, intimidation and destruction to property. Strikes don't just happen, they are normally triggered by unresolved disputes, it is very clear in order to curb strikes there has to be willingness on both parties to come to the negotiation table and discuss disputes openly and strike for a win-win approach. One can

[188] Tenza 2015 19 *Law, Democracy & Development* 225.

[189] Siyabonga Sesant "Metro Coughs up R44m to end Bay Strike" Saturday 23 June 2018 *Weekend Post* 1–2.

never be sure if the amendments will be a solution to the violent strikes even section 68(1)(b) of the LRA doesn't seem to provide a solution really to all this violence and destruction. Unprotected strikes violate the law, and even more so when they are coupled with violence and destruction to property. There should be consequences for such conduct. However consequences of section 68(1)(b) are not severe and accountable. If the consequences of this section were felt, public disorder, violence and so much destruction to property would not be on the rise. South Africa's legal frame work is very clear it echoes gatherings that are orderly, and peaceful. Violence and damage to property violates human dignity and equality. Violence in strikes is seen as a means to accelerate the demand and or effectiveness of the strike. Hence the amendments are necessary in order to restore order and to respect the rights of non-strikers and public and will provide labour market stability.

BIBLIOGRAPHY

Statutes

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

The Labour Relations Act 66 of 1995

The Regulation of Gatherings Act 205 of 1993

Websites

http://www.labourguide.co.za/most-recent/2242-a-new-remedy-for-violent-strikes (accessed 2017-07-27)

https://www.groundup.org.za/article/how-constitutional-are-regulations-public-gatherings (accessed 2017-07-27).

http://www.ilo.org/ifpdial/information-resorces/national-labour-law-profiles (accessed 2017-09-15).

http://fermiaborisade.blogspot.co.za/2012/10/theright-to-strike-in-nigeria-and-ilo.html (accessed 2017-10-30).

https://www.iol.co.za/business-report/opinion/opinion-parliament-gives-new-labour-laws-the-green light-15246902 (accessed 2018-11-25).

http://nortonrosefulbright.com/knowledge/publications/43454/unprotected-strikes-remedies-available-to-employers (accessed 2018-11-25).

https://www.ensafrica.com/Uploads/Images/news/CusersTSO17Desktop ENSafricaemploy.mentupdateseminar20June2018.pdf (accessed 2018-11-25).

http://www.sahistory.org.za/sites/default/files/DCLaJu185.0377.5429.010.008.Jul1985.23.pdf (accessed 2018-11-24).

http://news.xinhaunet.com/english/2017.04/28c_136243572.htm (accessed 2018-11-24).

http://column.global-labouruniversity.org/2015/06freedom-of-association-and-the-right-to-strike.html (accessed 2018-11-10).

https://www.jrattorneys.co.za/south-african-labour-law-articles/collective-rights-and-strikes/organisational-rights-v-the-right-to-bargain.html (accessed 2019-01-11).

Treatise

Mawasha, MB *An Analysis of Legal Implications for Participating in an Unprotected Strike* (Master Treatise, University of South Africa 2013).

Simelane, T *An Evaluation of Section 68(1)(b) of the Labour Relations Act 66 of 1995: How Effective is this Remedy?* (Master Treatise, University of Pretoria 2015).

Tom, PY *A Trade Union's Liability for Damages Caused during a Strike: A Critical Evaluation of the Labour Relations Act and Recent Judgements* (Master Treatise, University of KwaZulu-Natal 2014).

Articles

Robert Krause, Palesa Madi, Sheena Swemmer, Basetsana Koitsioe Comments regarding the Labour Relations Amendment Bill [B 32 – 2017] 16 March 2018 Centre for Applied Legal Studies. Faculty of Commerce, Law and Management University of the Witwatersrand

Case Law

Algoa Bus v SATAWU & Others [2010] 2 BLLR 149 (LC)

Chemical Energy Paper Printing Wood and Allied Workers Union v Metrofile (Pty) Ltd (2004) 25 ILJ 231 LAC.

Mangaung Local Municipality v SAMWU [2003] 3 BLLR 268 (LC).

National Union of Food Beverage Wine Spirits & Allied Workers v Product Network (Pty) Ltd v National Union of Beverage Wine Spirits & Allied Workers (2016) 37 ILJ 476 (LC) .

National Union of Food Beverage Wine Spirits and Allied Workers v Universal Product Network (Pty) Ltd (2015) 37 ILJ 476 (LC).

PTAWU obo Khoza, Bongani & 1054 others v New Kleinfontein Goldmine (Pty) Ltd (2016) 37 ILJ 1728 (LC).

Ram Transport (SA)(PTY)Ltd v South African Transport Allied Workers Union (2011) ILJ 1722 (LC).

Rustenburg Platinum Mines Limited v Mouthpiece Workers Union [2002]1 BLLR 84 (LC).

South African Transport & Allied Workers Union v Garvis & Others (007/11) [2011] ZASCA 152 (27 September 2011)

South African Transport & Allied Workers Union v Garvas & Others (112/11) [2012] ZACC13 (13 June 2012)

Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South Africa Workers' Union & Others (2012) 33 ILJ 998 (LC).

Verulam Sawmills (Pty) Ltd v AMCU 2015 J1580/15 (LC).

Books

Basson AC *et al* Essential Labour Law 5ed (2009) Labour Law Publication.

Christianson MA, Mcgregor M, van Eck BPS *Law@Work* 3ed (2015) LexisNexis.

Grogan J *Workplace Law* 9ed (2009) Juta.

Hepple B, Le Roux R, Sciarra S, *Laws Against Strikes: The South African Experience in an International and Comparative Perspective Franco Angeli* (2015).

Conference

Eleventh COSATU Congress Secretariat Report.

"Liability, Sanctions and other Consequences of Strike Action" by Prof Tamara Cohen (UKZN) 28th Annual Labour Law in Transition: The Role of Labour, Business and Government 4–6 August 2015 (Sandton Convention Centre).

Myburg, A "Interdicting Protected Strikes on Account of Violence" 2017 Global Business Solutions Annual Employment Conference.

Journals

Ahmed AB "A Critical Appraisal of the Right to Strike in Nigeria" 2014 (4) 11(1) *International Journal of Humanities and Social Science* 300.

Chennels M "Collective Bargaining, Industrial Action & Picketing: Amendments to the LRA, The Draft Code & The Accord" 2018 *Maserumule Corporate Employment Law*.

Gernigon, B; Odero, A and Guido, H "ILO Principles Concerning the Right to Strike" 1998 137 *International Labour Review*.

Jansen, M "Violence in the Security Strike: Union Leadership Found Wanting" 2006 (30) *In The Workplace*.

Le Roux, PAK "Claims for Compensation Arising from Strikes and Lockouts" 2013 23(2) *Contemporary Labour Law* 13.

Odeku AK "An Overview of the Right to Strike Phenomenon in South Africa" 2014 5(3) *Mediterranean Journal of Social Sciences* 695.

Ovunda VC "Derogations and Restrictions on the Right to Strike under International Law: The Case of Nigeria" 2009 (13)4 *The International Journal of Human Rights*.

Rapatsa MJ "The Practice of Strikes in South Africa: Lessons from the Marikana Quagmire" 2014 3(5) *Journal of Business Management & Social Sciences Research* 112.

Tenza, M "An Investigation into Causes into the Causes of Violent Strikes in South Africa: Some Lessons from Foreign Law and Possible Solutions" 2015 19 *Law, Democracy & Development* 211.

Newspaper Articles

Siyabonga Sesant "Metro Coughs up R44m to end Bay Strike" Saturday 23 June 2018 *Weekend Post* 1–2.

Slide Presentations

Department of Labour Presentation *Labour Law Reform: National Minimum Wage Bill, BCEA & LRA Amendment Bills, 2017* Presentation to Nelson Mandela University 2018.