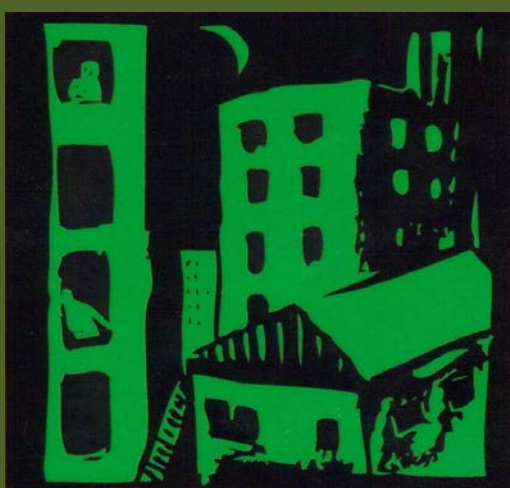


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## An investigation into the causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions

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### 1 INTRODUCTION

Workers have, over the past few 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 property of other people. These include the trashing of cities, vandalising property, forming picket lines at supermarkets, and preventing shoppers from doing business with their chosen businesses.<sup>1</sup> There have been strike-related disruptions in almost every sector of the economy with no one held responsible for the damage.<sup>2</sup> The

<sup>1</sup> Jansen M "Security strike violence: Union leadership found wanting" *Bulletin* (2006) 30 *South African Labour Bulletin* 18.

<sup>2</sup> COSATU said that the "four-week long strike in 2007 had driven home to workers the fact that extended industrial action was counterproductive as lost wages would not be covered by the increase demanded", *Mail & Guardian* "Why Strike Stopped" 10-16 September 2010, at 2.

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bargaining system in South Africa seems to be playing a contributory role in the eruption and escalation of these disruptions. There are certain factors that support this view. These include the lack of a ballot requirement in our bargaining system; the use of replacement labour during strike action; and the failure of the system to regulate protracted strike action accompanied by violence and harm to the economy.<sup>3</sup>

This article acknowledges that the issue of violent strikes is not unique to the South African industrial relations system as other countries experience riotous strikes in their jurisdictions. In India, for example, one of the country's biggest car manufacturers, Maruti Suzuki, saw two violent strikes in 2012. The cause of the industrial conflict was the refusal by the employer to employ, on a full-time basis, employees who were employed on contract terms. Despite the violent disruptions that took place, they did not lead to considerable change of the labour relations.

There may be many issues that the employer and trade union fail to reach agreement on. These include wages, unhealthy working conditions, dismissal and other issues affecting terms and conditions of employment. It is not the intention of this article to investigate the causes of disagreements between the negotiating team representing the employer and that representing employees. This article, however, investigates the factors that cause employees to use violence during a strike. The article investigates these factors and their implications for the future of industrial relations in South Africa.

To address the issue of violent strikes, the article suggests that the members of a trade union proposing a strike should be balloted.<sup>4</sup> On the issue of replacement labour, it suggests that changes to the existing labour law needs to be effected. The article also suggests that compulsory arbitration needs to be introduced into our law to allow responsible officials to intervene in protracted strikes by forcing the parties to the dispute into arbitration.<sup>5</sup> In doing this, the article looks at foreign law and proposes that certain lessons need to be learnt from their industrial law and suggests that certain clauses could possibly be transplanted into South African labour law.

## 2 THE RIGHT TO STRIKE

The Constitution of the Republic of South Africa, 1996 (the Constitution) entrenches the right of workers go to strike to strike.<sup>6</sup> The right to strike is not only recognised in the domestic or national laws of countries, but also by international law, as fundamental to

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<sup>3</sup> An example of the longest strikes in the history of South Africa was the strike that took place in the platinum industry where it took almost five months to bring the violent strike to an end. The strike had claimed the lives of more than 46 people. This strike was closely followed by a four week violent strike in the metal and engineering sector, signalling the latest example of instability in the labour market, Business Day "State mulls new strike laws, ban on scab labour" 7 August 2014, at 2.

<sup>4</sup> See para 3.1.1 below.

<sup>5</sup> See para 4.2 below.

<sup>6</sup> S 23(2) of the Constitution.

the protection of workers' rights and interests.<sup>7</sup> A strike is defined in the Labour Relations Act 66 of 1995 (LRA)<sup>8</sup> as:

The partial or complete concerted refusal to work, or the retardation 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 employees, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.

To constitute a strike, the action of refusing to work must be performed by employees acting together as a group, with the common purpose of attaining a common goal.<sup>9</sup> A strike cannot be performed by an employee acting as an individual. A single employee can obviously not act in concert with him- or herself. If a single employee decides to down tools, his or her conduct will fall short of the definition of a strike in terms of the LRA. To constitute a strike the action of refusing to work must be performed by employees acting together as a group.<sup>10</sup>

The purpose of a 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. In *SASTAWU & others v Karras t/a Floraline*,<sup>11</sup> the employees left the employer's premises, alleging that they had been threatened with a fire arm by the employer's domestic worker's boyfriend. The question was whether the conduct of the employees in leaving the place of employment constituted a strike. The Court found that the employees' refusal to work "fell short of qualifying as a strike in terms of the LRA because it was not for the purpose of remedying a grievance or resolving a dispute regarding a matter of mutual interest between the parties".<sup>12</sup>

In *FAWU & Others v Rainbow Chicken Farms*,<sup>13</sup> the employees, all Muslims, were employed based on their religious background to ensure that the meat was processed as required by the Muslim faith. The employees refused to work on a Muslim holiday, *Eid ul Fitr*. When their employer alleged that their conduct amounted to a strike, the Court concluded:

Even though their actions were collective, the individual applicants did not conduct themselves as they did to remedy a grievance or to resolve a dispute. They made no demand. The respondent was also not placed under the type of pressure which, for

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<sup>7</sup> This right is provided in the International Convention on Economic, Social and Cultural Rights of 1996; the European Social Charter of 1961; and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988.

<sup>8</sup> S 213 of the LRA.

<sup>9</sup> S 213.

<sup>10</sup> S 213. See also *SA Breweries Ltd v Food and Allied Workers Union* (1990) (1) SA 92 (A) at 100; *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union & others* (1996) 17 *Industrial Law Journal* 1094 (LC); *Lebowa & others v Trevenna* (1990) 11 *Industrial Law Journal* 98 (LC); and Grogan J *Collective labour law* (Cape Town: Juta 2007) at 127.

<sup>11</sup> *SASTAWU & Others v Karras t/a Floraline* (1999) 10 BLLR 1097 (LC).

<sup>12</sup> *SASTAWU & Others v Karras t/a Floraline* para [29].

<sup>13</sup> *FAWU & Others v Rainbow Chicken Farms* (2000) 21 *Industrial Law Journal* 615 (LC).

instance, would accompany a wage demand prior to a strike. The respondent was also not placed in a position where, if it acceded to a demand of individual applicants, that they would resume work. That would be the case in a strike situation. A strike would then be called off if the demand was met or the grievance was remedied or individual applicants simply refused to work on Eid because of their religious beliefs. Their conduct was similar to the conduct of any employee who decided to be absent from work for whatever reason. The fact that the individual applicants gave prior notice of their absenteeism makes no difference.<sup>14</sup>

In summary, the concerted refusal to work must be for remedying a grievance or resolving a dispute in respect of a matter of mutual interest between the employer and employees or trade union.<sup>15</sup> 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 a strike as defined in the LRA.<sup>16</sup>

### **3 WHAT CAUSES VIOLENT STRIKES IN SOUTH AFRICA?**

This part investigates various causes of violent strikes in South Africa. It limits its investigation to causes of violent strikes as a result of the deficiencies in our bargaining system. It argues that the current bargaining system is a significant contributor to violent strike action. It argues, further, that the absence of a ballot requirement prior to strike action fails to democratise industrial relations in South Africa. The second factor that this part discusses is the use of replacement labour. There have been many cases of violence that have been reported when striking workers and replacement labour come into contact during industrial action. It is not only that the contact between replacement workers and striking employees becomes a concern during a strike, but that the contact between striking employees and non-striking employees of the same employer also results to violent clashes.

#### **3.1 Deficiencies in the bargaining system**

##### *3.1.1 Ballot requirement*

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 complied with the provisions relating to ballots.<sup>17</sup> The ballot by members before a strike takes place was a requirement under the old Labour Relations Act.<sup>18</sup> It is to be noted that the mere fact that there was a ballot requirement at that time did not deter

<sup>14</sup> *FAWU & Others v Rainbow Chicken Farms* at 621D-F.

<sup>15</sup> *Nkutha & others v Fuel Gas Installations (Pty) Ltd* (2000) 21 *Industrial Law Journal* 218 (LC).

<sup>16</sup> S 213.

<sup>17</sup> Du Plessis JV *A Practical guide to labour law* 7<sup>th</sup> ed (Durban: LexisNexis 2012) at 387.

<sup>18</sup> S 65(2)(b) of the Labour Relations Act 28 of 1956.

unions from engaging in violent strikes. The question that arises is what impact the inclusion of a ballot requirement will have on industrial relations if it was once tried and failed. It could be argued, however, that the reason for the failure of the ballot requirement to deter unions from engaging in violent strikes can be attributed to the fact that under the 1956 legislation, strike action was inseparable from political violence. As such, the ballot requirement under the old Labour Relations Act failed to serve its purpose, that 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.

Now that political violence has diminished, the article argues that the reintroduction of a ballot requirement in our labour legislation may play a positive role in addressing the issue of strike related violence. The representatives of government have also shared the same sentiments on the role that a ballot requirement could play in addressing violent strikes. The Deputy President, Cyril Ramaphosa, has stated that the duration of strikes in the platinum and manufacturing industries this year was worrying; and their damaging effects have renewed calls for changes to labour legislation.<sup>19</sup>

The article further argues that the aim of a ballot by members before a strike takes place is to prevent industrial action that has little or no support. Violence is likely to occur during industrial action that enjoys little support. If the workforce of the employer splits into two groups, that is, those who want to go on strike and those who do not want to go on strike, with the majority of employees opting not to participate in a strike but to provide normal services to the employer, those employees who are on strike will feel that the employer does not feel the economic pressure from the strike if it continues with operations as usual. If, on the other hand, a sizeable number of employees go on strike, few employees will remain to do the work, and the employer is more likely to feel the economic pressure. The employees will feel confident that the dispute will be resolved if there is evidence that the employer is not doing normal business - an indication of economic harm to the employer.

To assess whether going on strike enjoys the majority support of workers in the workplace, the union needs to conduct a ballot. When conducting a ballot, the privacy and confidentiality of the ballot must be preserved. Every vote cast has to be secret. A secret ballot is a fair, effective and simple process for determining whether a group of employees in the workplace want to take industrial action. The purpose of keeping votes secret is to avert victimization of employees for voting against the proposed strike. Keeping votes secret will also ensure that the right to a protected strike is not abused by union officials pushing agendas unrelated to the interests of the workers at the workplace concerned. A secret ballot will not impede access to lawful protected action, but will provide a mechanism to ensure that protected action is a genuine choice of the employees concerned.

If a secret ballot is held, it will serve to avoid pressure by union leaders on employees to vote in favour of a strike. This allows them the freedom to vote against the

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<sup>19</sup> Business Day "Nedlac members need to address trust deficit" 8 September 2014, at 4.

proposed strike. The union will be bound by the decision of the majority of members regardless of whether this was in favour of or against the proposed strike. Only if the majority of members vote in favour of the strike does the union have the go-ahead for the strike.<sup>20</sup> In a scenario where a ballot requirement is legislated, if the majority of members vote against the strike and the union disregards the result of the ballot and proceeds with its strike action; the strike will be unprotected as it will be contrary to law.<sup>21</sup> The consequences that flow from an unprotected strike will automatically affect the union and those members participating in the unprotected strike.<sup>22</sup> Budeli argues that a “failure to conduct a ballot would render the strike unprocedural while cumbersome strike requirements would weaken the union’s power to call for a strike”.<sup>23</sup> The employer may apply for an interdict to stop the union from calling a strike.

### 3.1.2 *Ballots in other countries*

#### 3.1.2.1 *Australia*

In Australia, the labour relations system compels unions to hold a ballot of members before they commence industrial action.<sup>24</sup> A union cannot just ballot its members but must first get permission to conduct a ballot from the labour tribunal.<sup>25</sup> The voting process must satisfy further detailed criteria, and a majority of members must vote in favour of the proposed strike. The voting process is supervised by a third party, usually the Australian Electoral Commission (AEC) or an independent ballot agent.

The AEC is the default ballot agent for all protected action ballots in Australia.<sup>26</sup> In terms of the Fair Work Regulations “if an applicant for a protected action ballot requests permission to use the services of an alternative ballot agent, the Fair Works Commission (FWC) (which is a labour tribunal) may only appoint another person as a ballot agent provided such a person is fit and proper to conduct the ballot”.<sup>27</sup> He or she must also make sure that any other requirements specified by the Fair Work Regulations are met.<sup>28</sup> A protected strike may continue only if 50 per cent of the persons eligible to vote have voted and approved the action.<sup>29</sup>

<sup>20</sup> See the Memorandum of objects on Labour Relations Amendment Bill 2012.

<sup>21</sup> S 64 of the LRA.

<sup>22</sup> S 68(1) of the LRA.

<sup>23</sup> Budeli M “The Impact of the amendments on unions and collective bargaining” Paper presented at the 27<sup>th</sup> Annual Labour Law Conference in Sandton Convention Centre (Johannesburg) on the 5-7 August 2014.

<sup>24</sup> S 436 of the Fair Works Act of 2009.

<sup>25</sup> Regulation 5(4) in terms of Industrial Relations (Pre-Strike Ballots) 1997.

<sup>26</sup> Part 3-3, Division 8 of the Fair Work Regulations 2009 (Cth) sets out regulations for the conduct of secret ballots by the AEC.

<sup>27</sup> Regulation 3.11 of the Fair Works Regulations.

<sup>28</sup> Regulation 3.11 of the Fair Works Regulations.

<sup>29</sup> Part 3-3, Division 8 (436) of the Fair Works Regulations.

The persons eligible to vote will be those employees of the relevant employer, who are employed on the day that the ballot order is made, who may be subject to the proposed employee collective agreement.<sup>30</sup> Clearly, the purpose of including the ballot requirement prior to industrial action is to achieve a fair, simple and democratic process to determine whether employees wish to engage in a particular protected action.

It is a statutory requirement that the ballot of members prior to industrial action be undertaken otherwise the action will be unlawful, and an affected person can approach the FWC. In *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia*,<sup>31</sup> the aggrieved employer had argued that it was not open to the FWC to issue a ballot order because the union did not commence the bargaining process with the employer and so the FWC could not be satisfied that the union had genuinely tried to reach agreement. The full bench of the FWC, hearing an appeal from an earlier decision, found that a union could seek a ballot for protected industrial action although bargaining for an enterprise agreement had not commenced with the employer. The full bench also found that protected action ballots are available even if the employer is unwilling to bargain.

### 3.1.2.2 Canada

There are quite a number of Canadian jurisdictions that require employees to cast votes prior to participating in a strike.<sup>32</sup> If a majority of the employees balloted vote in support of the strike, the strike will take effect. However, if a majority of employees or members of the union that were balloted vote, against the proposed strike, such strike will not take effect. To require the union to ballot members helps to stop an otherwise over-zealous trade union leadership from jumping to a conclusion with regard to calling a strike without taking into account the views of its members.<sup>33</sup> It also helps to protect the interests of the employer against precipitate strike action, and the interests of individual workers against strikes which are not democratically mandated. In the end, the loss of wages as a result of the “no work, no pay” rule will be prevented.

Since the ballot requirement is a statutory requirement in Canada, non-compliance with it will be a violation of the law and can, in principle, give rise to a quasi-criminal sanction.<sup>34</sup> There is some danger that the requirement of a strike vote may lend an unnecessary rigidity to the negotiating process as such requirement tends to protract negotiations by postponing the use of economic sanctions until a majority vote has been taken. This delaying tactic can have the consequence of changing the minds of

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<sup>30</sup> Part 3-3, Division 8 (453) of the Fair Works Regulations.

<sup>31</sup> [2011] FWAFB 3377.

<sup>32</sup> Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec. Ontario and British Columbia also allow employers to require an employee vote on their last offer. Carter D & Arthurs HW *labour Law in Canada* (The Hague: Kluwer International 2002) at 293.

<sup>33</sup> Weiler PC *Reconcilable differences* (Carswell: Toronto 1980) at 70.

<sup>34</sup> *Keddy v R* (1961) 130 CCC 226 (N.S.S.C).

would-be strikers not to go on strike or can change the mind of the employer to reconsider the demands of the employees.

### 3.1.3 *Lessons from Australia and Canada*

South Africa can learn from the labour law of other countries even though its labour law is hailed as having the most developed and protective labour rules.<sup>35</sup> Having the ballot requirement as one of the requirements for a protected strike will prevent industrial action from taking place in circumstances where it does not enjoy majority support. The existence of a ballot requirement will also quell violence and intimidation of non-strikers as the voting process will indicate how many people support the strike, which will, in turn, show whether the employer will continue with its business as usual or not. The involvement of the independent electoral body or agent will ensure that voting is fair, transparent and not biased towards or against one of the rival factions, for example, those who want to go on strike and those who do not want to go on strike. The ballot also ensures that the intended industrial action has the trust of the parties to the dispute as well as the trust of the public.

Since South Africa regularly experiences violent strikes, and no successful attempts have been made so far by the law or policy makers to root out strike related violence, the inclusion of a ballot as one of the requirements for a protected strike will play a vital role in reducing the levels of violent strikes. The ballot of members as a requirement for a protected strike, with oversight exercised by an independent body will go a long way towards ensuring that industrial action is peaceful. If legislated, the voting process in South Africa should be chaired by an independent electoral body like the Independent Electoral Commission (IEC)<sup>36</sup> or an authorised independent agent. The involvement of the IEC in union elections will not be entrusting it with extra work since one of its primary duties is to conduct elections in the Republic. The IEC can be asked via a legislative intervention to oversee the pre-strike ballot in the Republic.<sup>37</sup>

If the balloting of members during a proposed strike is conducted by the IEC, the author believes 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.

Before an independent body could be called on to oversee pre-strike ballots, the law will have to introduce compulsory ballots, which it seems loath to do, judging by Parliament's withdrawal of the suggested provision in the Labour Relations Amendment Act 6 of 2014. The introduction of a compulsory ballot may be considered by Parliament sometime in the future as an important method for reducing the levels of

<sup>35</sup> S 8(1) of the Constitution provides that "the Bill of Rights applies to 'all law', and binds the legislature, the executive, the judiciary and all organs of state".

<sup>36</sup> The IEC is an independent body created in terms s 3(1) of Electoral Commission Act 51 of 1996.

<sup>37</sup> The legislature would be asked to amend the LRA to include a provision regulating the balloting requirement prior to strike action.



violence during industrial action. A ballot before a protected strike not only ensures transparency and fairness, but 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.

South Africa can learn from Canada and Australia that the voice of individual employees (through the casting of a ballot) may play an important role in reducing the number of strikes. A legislated ballot requirement may be necessary to enable workers to determine whether they want to go on strike or not. This will need to be formalised, through an election process, to ensure that the outcome of the election is transparent and fair to all those involved.

### **3.2 The use of replacement labour**

Another factor that disturbs the peace during strike action, is the use of replacement labour by the employer of employees who are on strike. It is expected that the employer will suffer economic loss during strike action. In order to avert the negative consequences, such as loss of profit, that come with industrial action, the employer usually makes alternative arrangements to keep its business going. One of these alternatives available to the employer is hiring the services of replacement labour to carry on with production while the whole or part of its workforce is on strike. It was hoped that allowing an employer to employ replacement labour would not be seen as posing any problem because this is statutorily regulated.<sup>38</sup> This has turned out to be the root cause of the violent strikes. Employers have, however, used replacement labour whenever they feel that their business cannot run normally because the workforce is out on strike.

#### *3.1.2.1 Replacement labour fuels tensions within the employer's workforce*

The use of replacement labour (sometimes called scab labour) remains an issue of public concern because of its potential to trigger violence, and anger striking employees.<sup>39</sup> It delays labour dispute settlements, increases hostility, and transforms disputes over pay and working conditions into exercises in union busting. The fact that employers are statutorily allowed to maintain production at reasonable levels by taking into employment the services of replacement labour, may seem to be painful to employees on strike. This raises concerns about: (a) the safety of replacement workers when they come into contact with employees on strike; and (b) the effectiveness of workers' constitutional right to strike if it can easily be weakened by continued production on the part of the employer when engaging the services of replacement labour during a strike. Does the right to strike serve any purpose in this regard?

The replacement labour clause entails that employers cannot use replacement labour during the course of a lock-out unless the lock out is in response to a strike,

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<sup>38</sup> S 76 of the LRA.

<sup>39</sup> Du Toit D *Labour relations law: A comprehensive guide* (Durban: LexisNexis 2003) at 315.

irrespective of whether the strike is protected or unprotected.<sup>40</sup> The employer will also not be allowed to employ any person to continue or maintain production during a protected strike, if the whole or part of an employer's service has been designated as a maintenance service.<sup>41</sup> A service is a maintenance service if the interruption of that service has the effect of material or physical destruction of any working area, plant or machinery.<sup>42</sup> An employee is not allowed to go on strike if the service is a maintenance service and there will be no need for the employer to consider employing replacement workers.

A strike is usually accompanied by picket action.<sup>43</sup> Bearing in mind the nature of a picket, employers lock out employees who are already on strike for fear of their safety, and to prevent damage to their property. According to the LRA, it is under these conditions that the employer is permitted to make use of replacement labour.<sup>44</sup> Therefore, a brief interpretation of the clause is that it is biased in favour of employers because, in most instances, it is employees who initiate strikes to which employers respond and obviously the employer statutorily will be allowed to hire replacement workers.

During a strike the principle of "no work, no pay" rule applies.<sup>45</sup> This rule affects employees as they are not offering their services, yet the employer does not feel any harm as it is able to proceed with production through the employment of replacement workers. It seems that the employer does not feel obliged to commit faithfully to resolve the issues between it and the trade union as it suffers little or no harm if production continues. It is, therefore, believed that the hiring of scab labour under such fragile conditions provokes striking employees, and the latter seem to use every opportunity to fight replacement workers.<sup>46</sup> The fight is believed to be out of frustration and anger towards their employer for not being faithful to the collective bargaining process by involving foreign workers in issues that need only two parties, that is, the trade union or employees and the employer.

The striking employees would think that their employer is undermining their action by giving work to scab workers and this breeds anger. This seems to be the root cause of the friction between replacement workers and strikers. This article suggests that the issue of anger and frustration amongst striking workers should be looked at

<sup>40</sup> See *Technikon SA v NUTESA* (2001) 22 *Industrial Law Journal* 427 (LAC).

<sup>41</sup> S 76(1)(a) of the LRA.

<sup>42</sup> Du Plessis (2012) at 386.

<sup>43</sup> "A picket can be defined as the public expression by employees, who are already on strike, of their grievance against their employer, in an effort to make their grievance known to the employer, the general public and other relevant constituencies; and to solicit support for their cause from the public and those constituencies", Du Plessis JV et al *A practical guide to labour Law* 6<sup>th</sup> ed (Durban: LexisNexis 2006) at 362; Van der Walt AJ & Le Roux R *Labour law in context* (Cape Town: Pearson 2012) at 213.

<sup>44</sup> S 76(1)(b) of the LRA.

<sup>45</sup> S 67(3) of the LRA provides that 'an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or protected lock-out'.

<sup>46</sup> See, generally *SATAWU v Garvas & others* (2012) 33 *Industrial Law Journal* 1593 (CC); and *Mahlangu v SATAWU, Passenger Rail Agency of SA & Another* (2014) 35 *Industrial Law Journal* 1193 (GSJ).

and addressed by the union leadership as most of the decisions taken by strikers, such as fighting against scab labour, are as a direct result of anger and frustration. The article recommends that it may bring about better results if unions adopt a uniform and principled approach when dealing with the issue of tension and anger amongst striking workers. In doing this, the union will have to seek the services of experts, such as legal advisers, who may be contracted to advise strikers on the legality of each move they embark on; and psychologists who may, for example, counsel the strikers and deal with the frustrations that may exist among them. The idea is to deal with labour disputes and arrive at solutions in a peaceful manner and in a peaceful environment not clouded by violence and fear.

In *Mahlangu v SATAWU*, the plaintiff was employed as a replacement worker. The employer's domestic worker was participating in a strike called by her union (SATAWU). One day, on the way to work, the replacement worker was approached by unknown people who offered her a full time job in Johannesburg. It transpired during the court proceedings that among the people who promised her full time employment was the employee whom the replacement worker had replaced because she was on strike. On the way to Johannesburg, the replacement worker was victimised, stripped naked, and thrown out of a moving train in Springs by members of SATAWU, and consequently suffered serious injuries. She instituted an action for damages against SATAWU alleging that the people who victimised her were members of the union. The Court held that SATAWU was not liable for the damage and injury to the plaintiff. Advancing reasons for not holding SATAWU liable, the Court stated that Springs was not within close proximity to Johannesburg and that the union was not liable for the conduct of its members committed outside the designated area of gathering.<sup>47</sup>

The union and the employer should attempt to address the friction between replacement workers and strikers at the negotiating table and attempt to iron out differences, if any, at that level as it may seem difficult to deal with the issue of friction once it has developed into a real fight between employees on strike and replacement workers. The author argues that by employing scab labour and allowing non-strikers to continue with production while the majority of the workforce is on strike, employers are risking the lives of the employees who offer their services. Employers must be proactive and monitor the situation as it develops and take all "reasonable" and necessary steps to avoid blame on their side. One of the steps that the employer may take is not to allow replacement workers to offer their services if the situation becomes violent.

In *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Storage (Pty) Ltd*,<sup>48</sup> the Supreme Court of Appeal reiterated that the benchmark is what a reasonable person would have done in the same circumstance as the defendant. It is the standard of an individual who takes reasonable chances and reasonable precautions to protect interests, while expecting the same conduct from others.<sup>49</sup> The reasonable person

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<sup>47</sup> *Mahlangu* case para 91.

<sup>48</sup> 2000 (1) SA 827 (SCA).

<sup>49</sup> *Herschel v Mruoe* 1954 (3) SA 464 (A) at 490.

criterion is therefore an expression of what society expects of its members in their everyday life. In *Ngubane v South African Transport Services*,<sup>50</sup> the Court held:

There are four basic considerations in each case which influence the reaction of a reasonable man to a situation posing a foreseeable risk of harm to others: (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm.

Our law should strike a balance between the rights of employees to take industrial action in support of their claims for better conditions of work, and the rights of employers to operate their businesses without violence being thought of by strikers. If employers, for example, are not allowed to continue production in order to give way to a strike or are not allowed to follow other avenues to prevent loss of profit, that would be unfair as this would amount to encroaching on their autonomy. On the other hand, allowing employers to take into service replacement workers to continue production during a strike weakens the effectiveness of strike action, thereby leaving employees with little or no voice.

Trying to strike a balance between the two may not be an easy task and it requires the intervention of the legislature. Thus, if the use of replacement labour does not bring about healthy labour relations between employees themselves (striking workers, non-striking workers and replacement workers), the provision that permits the use of replacement labour should be revisited and reviewed in order to cater for or adapt to prevailing social conditions and circumstances. The legislature may be expected to amend the section that regulates the use of replacement labour to ensure that the interests or concerns of all parties that may feel affected by it are addressed. The legislature may also, as an option, consider removing the provision regulating the use of replacement labour because, currently, it seems that it is more biased towards employers. For example, under normal circumstances, it is the employees who commence the strike as they are the ones who feel the heat in the workplace. It is very rare that the employer initiates the locking out of employees, an act which prohibits it from hiring replacement labour.<sup>51</sup>

### 3.1.3 *Contact between striking and non-striking employees*

It is not only the contact between striking employees and replacement workers that causes violence during a strike but the contact between those employees of the same employer who decided not to participate in a strike while others are on strike.

It must be understood, however, that when employees embark on a strike, whether protected or unprotected, they are in breach of their contract of employment.<sup>52</sup>

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<sup>50</sup> 1991 (1) SA 756 at 779I-J.

<sup>51</sup> S 76(1)(b) of the LRA.

<sup>52</sup> "A contract is defined as a lawful agreement made by two or more persons within the limits of their contractual capacity, with serious intention of creating a legal obligation, communicating that intention without vagueness to each other, and being of the same mind as to the subject matter, to perform positive

When a person refuses or fails to perform as he or she agreed to, the contract is said to have been breached.<sup>53</sup> The contract of employment requires employees to put their services at the disposal of the employer. If employees fail to comply with this duty, they will be in breach of the contract of employment. Particular care should be taken to ensure that the strike does not involve calls for a breach of, or interference with, the performance of contracts by employees who are not involved in the dispute with the employer or who are not at all likely to be participating in a pending strike action. Obeying this principle will help avoid consequences which might otherwise be damaging and disruptive to good industrial relations, as the non-striking employees are honouring their contracts of employment.

Experience has shown that violence most often occurs when non-striking workers and strikers come into contact with each other in a heated labour dispute. In Marikana, a miner was reported to have been stripped naked, beaten, burnt and stabbed by strikers. The reason for his death was alleged to be that he went to work while other employees were on strike.<sup>54</sup> In *Food & Allied Workers Union obo Kapesi v Premier Foods*,<sup>55</sup> certain of the workers at the Salt River plant chose not to participate in the strike. Several of these workers as well as members of management were thereafter subjected to violent acts of a severe criminal nature. The Court heard that during the strike, several non-striking employees and members of the management were subjected to violent criminal acts, employees were threatened with physical harm and death and assaulted, homes were firebombed, cars were set alight, one employee who identified his attackers, was shot and killed, and a conspiracy to assassinate a director was uncovered. The Court held that strikers should not be allowed, with impunity, to terrorise and harm non-striking workers.<sup>56</sup>

## 4 POSSIBLE SOLUTIONS

### 4.1 Changes to labour legislation to include ballot requirement

The article argues that if a ballot requirement can be a solution to strike violence, a proposal to amend the LRA has to be considered by the National Economic Development and Labour Council (Nedlac) and a Bill introduced in Parliament. If legislated, any failure to comply with the ballot requirement will render the strike unprotected and the consequences that flow from an unprotected strike will have to follow.<sup>57</sup>

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or negative acts which are possible of performance”, Kopel S *Guide to business law* 3<sup>rd</sup> ed (Oxford: University Press 2007) at 41.

<sup>53</sup> Kopel (2007) at 76.

<sup>54</sup> Available at <http://timeslive.co.za/local/2014/06/24/1-used-my-panga-to-strike-him-marikana-s-mr-x> (accessed on 21 April 2015).

<sup>55</sup> *Food & Allied Workers Union obo Kapesi v Premier Foods* (2010) 32 *Industrial Law Journal* 1654 (LC). See also *Mahlangu* case.

<sup>56</sup> *FAWU* case para 56

<sup>57</sup> S 68(1) of the LRA.

The latest amendments to the LRA initially included the ballot requirement when the Act was still a Bill (Labour Relations Amendment Bill 2012). This has since been withdrawn from the Labour Relations Amendment Act of 2014.<sup>58</sup> Although the ballot requirement was withdrawn from the Labour Relations Amendment Bill due to strong criticism from labour, it is believed that the primary intention of its inclusion in the Bill was a response to the unacceptably high levels of unprotected industrial action and unlawful acts in support of industrial action, including violence, intimidation and even the loss of the lives of many people.<sup>59</sup> The removal of the ballot requirement provision from the Bill and later the Act was a blow to people who want to see strikes in South Africa less violent or free from violence. The author feels that removing the ballot requirement from the Bill was a step back to the pre-1994 era. The current era should be characterised by dialogue and exchange of ideas in an environment of conciliation and democracy.

However, the removal from the Labour Relations Amendment Act of 2014 of the provision that would have required a ballot of members before a strike could be called, should not be interpreted to imply that this article is of the opinion that the legislature has, by this removal, undone all the good work it has done over the past years to improve the labour laws of this country. This article argues that the legislature has, however, shown little interest in addressing the problem of industrial violence. The article wishes to emphasise that it is economic pressure rather than violent conduct that is likely to convince the employer to change its mind to the advantage of employees and give in to their demands. The myth spread by picketers and employees that the employer will only take their demands seriously if their action is accompanied by violence, is without basis or foundation.

Although South Africa does not have a statutory requirement that compels unions to hold a ballot of members before calling a strike, it is conceivable that unions may want to be seen to be democratic and operating democratically. Some unions prefer to hold at least a meeting and have a show of hands before calling a strike. This, however, does not have any impact on the status of a strike<sup>60</sup> and the union can go ahead with the strike, and as long as they have complied with the other requirements for a protected strike in terms of sections 64 and 65 of the LRA, the strike will be protected.

If the union does hold a ballot before calling a strike, and the ballot is in favour of the strike, the union will be confident that it has a mandate and sufficient support from its members to go ahead with the proposed strike.<sup>61</sup> Therefore, the author assumes that the inclusion of a provision in the labour legislation that would compel a union to conduct a ballot of its members could reduce the number of violent incidents, because the majority of employees will go on strike and very few, if any, will be providing

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<sup>58</sup> Act 6 of 2014.

<sup>59</sup> Business Day (8 September 2014).

<sup>60</sup> S 67(7) of the LRA.

<sup>61</sup> *Food & Allied Workers Union v Ngcobo & another* (2013) 34 *Industrial Law Journal* 1383 (SCA) at 1397.

services to the employer, something that seems to be of concern to strikers and becomes the root cause of violence.

A strike ballot will have to be undertaken in the context of strengthening organised labour, not to give employers another tool to gain the upper hand over unions. Conducting a ballot of members will also give the union leadership the opportunity to advise its members on how to conduct themselves during industrial action, an opportunity which the union must exercise faithfully, honestly and with care and diligence, bearing in mind that it could be held accountable for the actions of its members during the strike.<sup>62</sup> The union must also advise its members that the use of violence has the danger 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. The possibility of violence erupting in such conditions is probably minimal as the employees will be in agreement by way of the ballot, rather than acting as fragmented factions of the whole. As indicated above, if a strike enjoys majority support, it is assumed that there will be less violence because the possibility of harm to the employer and its property is greater if the strike has little support and the employees are divided. It is also believed that because there is usually less damage to the property of the employer if the strike enjoys majority support, that this is so because there was less violence.

#### **4.2 The courts must be empowered to stop violent strikes**

Since South Africa has never had the rule that authorises the labour court to stop violent industrial action, this article suggests that it will serve the country better if it learns lessons from other countries where this principle is in use. If the rule is necessary, as it seems to be, the article proposes that the rule should be transplanted into our labour law with the aim of dealing with violent strikes that hamper the economy.

In Australia, for example, if an employer as a victim or potential victim of industrial action, can successfully present a *prima facie* case that the industrial action does or will amount to a tortious interference with its business relations, it can approach the court to restrain the industrial action until its legality has been tested by the court.<sup>63</sup> The court will have the power to suspend or stop the industrial action until it is found that participating in the industrial action is not unlawful.<sup>64</sup> If the legality of industrial action is questionable after it has been reviewed by the court, it will terminate the industrial action concerned.<sup>65</sup>

The FW Act empowers the FWC to issue an order to suspend or prevent industrial action that is “happening, or is threatening, impending or probable”

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<sup>62</sup> *David Trust & Others v Aegis Insurance Co Ltd & others* 2000 (3) SA 289 (SCA) para 20; and *Bloom's Woollens (Pty) Ltd v Taylor* 1962 (2) SA 532 (A) at 539G-H.

<sup>63</sup> *NWL Ltd v Woods* [1979] 1 WLR 1294 at 1305-1307.

<sup>64</sup> *Beecham Group Ltd v Bristol Laboratories (Pty) Ltd* (1968) 118 CLR at 618. The test adopted by the House of Lords in *American Cyanamid Co Ltd v Ethicon Ltd* [1997] AC 396 is whether there is a serious question to be tried.

<sup>65</sup> S 423 of the FW Act.

throughout an industrial dispute.<sup>66</sup> The powers of the FWC are not only limited to orders suspending industrial action but can also terminate a protected industrial action on the grounds of “significant harm”.<sup>67</sup> The most important criterion in suspending or terminating industrial action is whether it threatens to cause “significant harm”. In *CFMEU v Woodside Burrup Pty Ltd*,<sup>68</sup> the Court read the “significant harm” requirement to indicate harm that is exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context, and that such an order will only be available on such ground in very rare cases.<sup>69</sup> Where industrial action is suspended or terminated, any further industrial action that takes place in relation to the suspended industrial action will not be protected.<sup>70</sup> The Court held that the meaning of “threatening” to cause harm in the context of section 426 of the FW Act means that the protected industrial action is likely to injure, or to be a source of danger of harm to, a third party. The threatening harm which is serious needs to be significant.<sup>71</sup>

The Explanatory Memorandum to the Fair Work Bill 2008 states that the purpose of the clause in section 426 which requires “threatening” action to cause harm is to provide the FWA (now the FWC) with a means to address significantly serious impacts that industrial action is having on the welfare of third parties. It allows a respite from industrial action which is causing them significant harm. The harm to the third party would need to be significant; that is a more serious matter than the mere suffering of a loss, inconvenience or delay. Therefore, it is anticipated that the FWC would suspend industrial action on this basis. In the CFMEU Case discussed above, it found that the threatening harm was more than an inconvenience, and was serious.<sup>72</sup>

The FWC has discretionary powers, enabling it to consider all relevant factors before making a direction under the section.<sup>73</sup> These factors include the extent to which the protected industrial action threatens to damage the ongoing viability of an enterprise carried on by the person(s); to disrupt the supply of goods or services to an enterprise carried on by the person(s); to reduce the person’s capacity to fulfil a contractual obligation; or to cause other economic losses to the employer.<sup>74</sup>

The powers given to the FWC to suspend or terminate industrial action imply that industrial action must be taken in conformity with the interests of the public. This

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<sup>66</sup> S 423 of the FW Act.

<sup>67</sup> S 423(2) of the FW Act.

<sup>68</sup> *CFMEU v Woodside Burrup (Pty) Ltd* [2010] FWAFB 6021.

<sup>69</sup> *CFMEU* case para 44.

<sup>70</sup> S 413(7) of FW Act.

<sup>71</sup> *CFMEU* case para 69.

<sup>72</sup> *CFMEU* case para 70.

<sup>73</sup> As to the exercise of a discretion, see *Coal Operations (Pty) Ltd v Automotive, Food, Metals, Engineering Printing and Kindred Industries Union and others* (1997) 73 IR 311.

<sup>74</sup> S 423(1) of the FW Act.



is referred to as the public interest clause.<sup>75</sup> The public interest clause provides that the right of workers to engage in collective bargaining and industrial action in a system of voluntary collective bargaining must be balanced against the welfare of the general community. This means that where the public interest is great enough, no other private interest will automatically override it.<sup>76</sup> The issue of the public interest clause was emphasised in *Australian Capital Television Pty Ltd v Commonwealth [No 2]*<sup>77</sup> where it was held that a distinction should be made between restrictions on communication, which target ideas or information, and those which restrict an activity or mode of communication by which information or ideas are transmitted.<sup>78</sup> The courts may impose injunctions if the industrial action gets out of hand. When issuing an injunction, the task of the court would be to look at the regulation of industrial action beyond the interests of the parties themselves.<sup>79</sup>

Any person affected by industrial action can lodge his or her complaint with the FWC.<sup>80</sup> The FWC will contrast the interests of the public with the right of workers to take industrial action. Such contrast should elevate the public interest to minimise the adverse consequences of industrial action on the general public. The object is to signal a more inflexible approach to unprotected action, ensuring that any illegitimate or unprotected action is appropriately dealt with, which may mean an end to such conduct if it has a negative effect on other people, rather than a more industrially sensitive approach like conciliation.

Unlike Australia, it may not be easy to apply preventive measures in South Africa because the right to strike is entrenched in the Constitution, and a particular procedure is required to change the Constitution and to allow the Legislature to amend it.<sup>81</sup>

The courts in South Africa do not have automatic rights to adjudicate on or stop an industrial action or any matter unless an affected person approaches or makes an application to a court.<sup>82</sup> If South Africa wants to follow this route, the LRA will need to

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<sup>75</sup> McCrystal S “Shifting the balance of power in collective bargaining: Australian law, industrial action and work choices” (2006) 16(2) *The Economic and Labour Relations Review* 193 at 198. Available at <http://www.austlii.edu.au/au/journals/ELRRRev/2006/9.html> (accessed on 18 July 2014).

<sup>76</sup> Di Felice V “Stopping or preventing industrial action in Australia” (2000) 24 *Melbourne University Law Review* 310 at 323.

<sup>77</sup> *Australian Capital Television (Pty) Ltd v Commonwealth [No 2]* [1992] HCA 45; (1992) 177 CLR 106.

<sup>78</sup> *Australian Capital Television* case at 143.

<sup>79</sup> *National Workforce Pty Ltd v AMWU* [1998] 3 VR 272.

<sup>80</sup> S 426 of the Fair Works Act.

<sup>81</sup> S 74 of the Constitution provides that: “(2) Chapter 2 may be amended by a Bill passed by-

(a) the National Assembly, with a supporting vote of at least two thirds of its members; and  
(b) the National Council of Provinces, with a supporting vote of at least six Provinces”.

<sup>82</sup> S 38 of the Constitution provides that: “Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The person who may approach a court are-  
(a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members”.

be amended to include a clause or provision that empowers a labour court to take proactive steps to prevent, stop or suspend an industrial action that, in the eyes of the court, threatens life or will cause damage to the property belonging to other people. This will be a difficult exercise since any amendment of a provision in the Bill of Rights requires a two-thirds majority of the members in the National Assembly and six of the nine provinces in the National Council of Provinces voting in favour of such amendment.<sup>83</sup>

The Labour Relations Amendment Act of 2014 provides that the labour courts should be given wide powers, which may include powers to order the suspension of a strike in appropriate circumstances.<sup>84</sup> A labour court may also suspend a lock-out or even suspend an employer from engaging replacement labour during a strike or lock-out. However, the fact that a labour court may suspend a strike, may be abused by employers during long strikes because there is no prescribed period beyond which a strike may not extend. The employers may quickly approach a labour court to claim that the strike has been going on for a long period even if the application is without proper basis or premature. In response to these implications of the Labour Relations Amendment Act of 2014, the article argues that unions should take steps to prevent their members from engaging in violence during strikes.

The use of the word “may” in the Labour Relations Amendment Act of 2014 implies that the court may not just intervene, but that certain considerations have to be put forward. Unfortunately, the Labour Relations Amendment Act of 2014 failed to shed light on this when it used the permissive word ‘may’. The provision makes no difference as it reinforces the old rule which does not give courts automatic powers to stop strike action that is seen to be dangerous to the economy and harms the public. A labour court will still need to be approached by affected parties to be able to stop a strike or picket.

### **4.3 The parties have to be compelled to end protracted disputes**

Recently, the South African government has been lobbying stakeholders to help them understand the need to introduce a clause into the labour legislation that will compel trade unions and employers to end a strike that is having a negative impact on the economy or the social welfare of the public.<sup>85</sup> This clause is called “interest arbitration clause.” The interest arbitration clause is part of the arbitration process which, in turn, is part of the collective bargaining process. Arbitration may be defined as a legal process for resolving legal disputes by recourse to a neutral third party tribunal chosen by the parties involved in a dispute.

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<sup>83</sup> S 74(2) of the Constitution.

<sup>84</sup> S 69(12) of the Labour Relations Amendment Act 6 of 2014.

<sup>85</sup> In his State of the Nation address, President Jacob Zuma said “social partners had to meet and deliberate on the violent nature and duration of strikes, given the effect of the untenable labour relation environment and the economy”, Business Day “Long strikes could be held in check with plan for interest arbitration” 21 July 2014 at pages 1-2. The Minister of Labour has said: “South Africa has been hit by an increase in strikes over the past four years with stoppages rising from 51 in 2009 to 114 in 2013” according to the Department of Labour’s Annual Industrial-Action Report, Business Times of the Sunday Times: 17 August 2014, at 5.

When dealing with issues of arbitration, a distinction needs to be drawn between interest arbitration (collective agreement arbitration) and rights arbitration (grievance arbitration). Rights arbitration involves the arbitration of disputes concerning the interpretation of an existing collective agreement. The rights arbitrator is called upon to resolve a dispute within the framework of an existing collective agreement, with the consequent limitation on the extent of the arbitrator's authority.<sup>86</sup> In rights arbitration, the arbitrator is called upon to decide on a finite matter within the framework of a pre-existing arrangement between the parties. The arbitrator also relies on legal principles and procedures to assist in rendering a decision.<sup>87</sup>

Interest arbitration involves the establishment of the terms and conditions of a collective-bargaining agreement. It occurs where the parties are unsuccessful in negotiating the terms of a collective agreement. The third party is invited to intervene to resolve the issues that the parties fail to reach agreement on. The interest arbitrator is called upon to determine how the future affairs of the parties will be governed and thus involves a much broader mandate.<sup>88</sup> The interest arbitration clause also opens avenues for the government to intervene in labour disputes or protracted strikes where clearly there is no immediate solution to end a strike. It seems that the effect of a strike or industrial action on the economy and the impact on the public will be the criteria for the intervention of the government in an unresolved industrial dispute.<sup>89</sup> In *Greater Toronto Airports Authority*, it was observed that "the depth of the issues to be resolved in interest arbitration should be persuasive".<sup>90</sup>

In Canada, interest arbitration is an entrenched feature of the bargaining landscape. It applies, mostly, in first agreement or first contract situations when it is considered that a union (immediately after obtaining recognition) is most vulnerable to delaying tactics by an employer who might frustrate the making of a collective agreement. These provisions enable a union or employer involved in unsuccessful negotiations for an agreement to apply to a federal or provincial labour board, to have an agreement imposed through interest arbitration. Interest arbitration can be facilitated by either a sole arbitrator or a tripartite arbitration process. In Ontario, rights arbitration is referred to a single arbitrator, while interest arbitration disputes can be referred either to a single arbitrator or a tripartite panel.<sup>91</sup>

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<sup>86</sup> *Greater Toronto Airports Authority*, 2005 CIRB 321 (CanLII) at 9. Available at <http://www.canlii.org/en/ca/cirb/doc/2005/2005canlii63057/2005can;ii63057.html> (accessed on 16 September 2014).

<sup>87</sup> *Greater Toronto Airports Authority* case at 10.

<sup>88</sup> *Greater Toronto Airports Authority* case at 9.

<sup>89</sup> See the statement made by the Deputy Minister of Labour, Phathekile Holomisa in his address to the 27<sup>th</sup> Annual Labour Law Conference held in Sandton Convention Centre (Johannesburg) 5-7 August 2014.

<sup>90</sup> *Greater Toronto Airports Authority* case at 92.

<sup>91</sup> S 53(1) of the Fire Protection and Prevention Act 1997.

If a strike continues longer than was expected with no solution to address the problem, there is provision for mechanisms to end a protracted industrial dispute.<sup>92</sup> The Canadian Labour Code confers certain powers on elected officials to intervene where there is a compelling public interest in doing so. Resort to interest arbitration 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 the nation.<sup>93</sup>

In Canada, the parties to a dispute would agree on the arbitrator, but if they fail to do so, the Minister would appoint the arbitrator as set out in the legislation.<sup>94</sup> Section 107 of the Canadian Labour Code broadly grants discretionary powers to the Minister of Labour to do what he or she deems expedient to maintain industrial peace and promote conditions favourable to the settlement of industrial disputes. The Minister may refer any question in relation to the maintenance of industrial peace to the Canadian Industrial Relations Board, or direct the Board to do what the Minister deems necessary to resolve the dispute and maintain industrial peace.<sup>95</sup> The Minister may intervene where labour disputes threaten or cause loss of services, including economic harm disproportionate to the interests of the immediate parties to the dispute, as well as loss of services posing immediate threats to public order, safety or health. The interest arbitrator is called upon to determine how the future affairs of the parties will be governed.

## 5 CONCLUSION

The possibility of resorting to industrial action remains the cornerstone of the collective bargaining system in South Africa. Strikes that are characterised by violence and the unruly behaviour of strikers are detrimental to the legal foundations upon which labour relations in this country are founded, and to the economy at large. The aim of a strike is to persuade the employer, through peaceful withdrawal of labour, to agree to the employees' demands. Although a certain degree of disruption may be expected, it is not acceptable to force employers, through violent and/or other conduct, to accede to unions' demands as this would render their conduct unlawful. Any conduct of that nature seriously undermines the fundamental values upon which the Constitution was founded. Such conduct further negates the rights of non-striking workers to continue working with dignity, in safety and security, in privacy, with peace of mind, and honouring their contracts of employment.

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<sup>92</sup> The Canadian Labour Code, and the Labour Relations Code or Acts of various provinces and territories require collective agreement to make provisions for the settlements of disagreements such as grievances and disputes.

<sup>93</sup> Spano S "Collective Bargaining under the Canada Labour Code – Remedies when Parties Fail to Resolve Labour Dispute" (2009). Available at [www.parl.gc.ca/content/lop/researchpublications/prb0846-e.pdf](http://www.parl.gc.ca/content/lop/researchpublications/prb0846-e.pdf) (accessed on 01 September 2014).

<sup>94</sup> S 107 of the Canadian Labour Code of 1985.

<sup>95</sup> Spano (2009) para 13.

The article recommends that it is important that institutionalised ways should be developed to deal with disputes of this kind. These include the inclusion of a ballot requirement, the proper regulation of the use of replacement workers, and compulsory arbitration. The inclusion of a ballot requirement in our labour legislation will ensure that strike action enjoys majority support from workers. In addition, an interest arbitration requirement will give the government or the Ministry of Labour powers to intervene in labour disputes, thereby allowing the Minister to compel the parties to resolve their issues through arbitration. A proper regulation of the use of replacement labour will ensure that all parties to the dispute feel the harm, thereby expediting the dispute resolution process.