

**THE LIABILITY OF TRADE UNIONS FOR CONDUCT OF
THEIR MEMBERS DURING INDUSTRIAL ACTION**

by

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SUMMARY

South Africa has been experiencing a number of violent strikes by trade unions in recent times. The issue is not only to hold unions liable for damage caused during strikes, but also to reduce the number of violent strikes. This study investigates if victims of such violence can hold trade unions liable for the violent acts committed by their members during industrial action. The Labour Relations Act, 66 of 1995 (LRA) makes provision for the dismissal of employees who commit misconduct during an unprotected strike. It also provides the remedy of an interdict and a claim for just and equitable compensation which can be made against the union, during an unprotected strike. It is further possible to hold the union together with its members liable for damages in terms of the Regulation of Gatherings Act, 205 of 1993 (RGA). The study argues that a strike or conduct in furtherance of a strike that becomes violent could lose protection and the trade union should consequently be held liable, in terms of the LRA and/ or the RGA, for damages caused by its members. This study investigates the position in Canada, Botswana and Australia to determine if there could be any other basis upon which to hold trade union liable for the conduct of its members. The study recommends that the common law doctrine of vicarious liability should be developed by the courts to allow trade unions to be held liable for damages caused by members during violent industrial action. Policy considerations and changing economic conditions and the nature of strikes in the Republic favours the expansion of the doctrine of vicarious liability to trade union member relationship.

KEY TERMS

industrial action, strike, picket, violent conduct of members or participants, trade union liability, trade union denial, common law doctrine of vicarious liability, development of the common law, amendment of the Labour Relations Act, secret ballot requirement, majority requirement for ballot outcome, suspension of industrial action, limitation of participation in industrial action to union members, interest arbitration.

**This thesis is dedicated to my children -
Nkonzwenhle and Lifaletu.**

This thesis was submitted in April 2015 and reworked and re-submitted in October 2016. This thesis reflects the legal position as on 1 April 2015 when it was first submitted. In the final version only the most important changes in the position after 2015 have been indicated but the thesis essentially deals with the legal position as on 1 April 2015.

PREFACE

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LIST OF ACRONYMS

ABI	Amalgamated Beverage Industries
AC	Appeal Cases
AD	Appellate Division
AEC	Australian Electoral Commission
AG	Attorney General
AIPA	Australia and International Pilot Association
AIRC	Australian Industrial Relations Commission
ALAEA	Australia Licensed Aircraft Engineers' Association
ALL ER	All English Reports
ALR	Australian Law Reports
AMCU	Association of Mine and Construction Workers Union
AMPLATS	Anglo American Platinum Mines
ANC	African National Congress
ARB	Arbitration
Alta	Alberta
Alta L Rev	Alberta Law Review
AU	African union
BBBEE	Broad-based Black Economic Empowerment
BC	British Columbia
BCAC	British Columbia Appeal Cases

BCEA	Basic Conditions of Employment Act
BCLRB	British Columbia Labour Relations Board
BCSC	British Columbia Supreme Court
BCLR	Butterworths Constitutional Law Reports
BEE	Black Economic Empowerment
BLLR	Butterworths Labour Law Reports
BLR	Botswana Law Reports
BTU	Building Trade Union
BWCA	Botswana Court of Appeal
Can Bar Rev	Canadian Bar Review
CanLII	Canadian Legal Information Institute
CBD	Central Business District
CC	Constitutional Court
CCC	Canadian Criminal Cases
CCMA	Commission for Conciliation, Mediation and Arbitration
CCTV	Close Circuit Television
CEEA	Canadian Employment Equity Act
CEPU	Communications, Electrical and Plumbing Union
CFMEU	Construction, Forestry, Mining and Energy Union
CH or CH D	The Law Reports or Chancery Division
CIRB	Canada Industrial Relations Board
CLL	Contemporary Labour Law
CLR	Commonwealth Law Reports

COSATU	Congress of South African Trade unions
CRR	Canadian Rights Reporter
CTH	Commonwealth of Australia
CTS	Canadian Treaty Series
CWU	Communication Workers Union
DLR	Dominion Law Reports
ECC	Employment Conditions Commission
ECCAWU	Entertainment, Catering Commercial and Allied Workers Union
ECHR	European Charter of Human Rights
Ed	Edition
EEA	Employment Equity Act
EL	Employment Law
ELRRev	Economics and Labour Relations Review
ER	English Reports
ESC	Essential Services Committee
FAWU	Food and Allied Workers Union
FCA	Federal Court of Australia
FCAFC	Federal Court of Australia Full Court
FCR	Federal Court Reports
F SUPP	Federal Supplement
FWA	Fair Work Australia
FW Act	Fair Works Act

FWAFB	Fair Work Australia Full Bench
FWC	Fair Work Commission
GN	Government Notice
GSJ	South Gauteng High Court in Johannesburg
HCA	High Court of Australia
HEU	Hospital Employees Union
HL	House of Lords
IC	Industrial Court
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
ICESCR	International Convention on Economic, Social and Cultural Rights
IEC	Independent Electoral Commission
ILJ	Industrial Law Journal
ILO	International Labour Organisation
IR	Industrial Reports
JP	Judge President
JOL	Journal of Business Law
KZD	KwaZulu-Natal High Court, Durban
LAC	Labour Appeal Court
LC	Labour Court
LLM	Master of Laws
LRA	Labour Relation Act

LRAA	Labour Relations Amendment Act
LRB	Labour Relations Board
LRBR	Labour Relations Board Review
LRC	Law Reports of the Commonwealth
NBR	New Brunswick Reports
NEDLAC	National Economic Development and Labour Council
NEHAWU	National Health and Allied Workers Union
Nfld	Newfoundland
NIR Code	National Industrial Relations Code of Good Practice
NPD	Natal Provincial Division
NSSC	Nova Scotia Supreme Court
NUM	National Union of Mineworkers
NUMSA	National Union of Metal Workers of South Africa
NUW	National Union of Workers
NSW	New South Wales
NSWSC	New South Wales Supreme Court
OAU	Organisation of African Unity
Ont HC	Ontario High Court
PAC	Pan Africanist Congress
PAJA	Promotion of Just Administrative Act
Para	Paragraph
PELJ	Potchefstroom Electronic Law Journal
PPWAWU	Paper, Print, Wood and Allied Workers Union

POPCRU	Police and Prisons Civil Rights Union
PRASA	Passenger Rail Agency of South Africa
PSES Act	Public Service Essential Services Act
PSL	Premier Soccer League
PTWU	Professional Transport Workers Union
QB	Queen's Bench Division
RCS	Rapports de la Cour Suprem
RGA	Regulation of Gathering Act
RSA	Republic of South Africa
SA	South Africa
SABC	South African Broadcasting Corporation
SACCAWU	South African Commercial Catering and Allied Workers Union
SACR	South African Criminal Law Reports
SADC	Southern African Development Community
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPO	South African Post Office
SACR	South African Criminal Law Reports
SALGA	South African Local Government Association
SA Merc LJ	South African Mercantile Law Journal
SAMWU	South African Municipal Workers Union
SANDF	South African National Defence Force

SANDU	South African National Defence Union
SAPL	South African Public Law
SAPS	South African Police Service
SASLAW	South African Society for Labour Law
SATAWU	South African Transport and Allied Workers Union
SCA	Supreme Court of Appeal
SCC	Supreme Court of Canada
SCR	Supreme Court Reports
SFL	Saskatchewan Federation of Labour
SKQB	Saskatchewan Court of Queen's Bench
SPCA	Society for the Prevention of Cruelty to Animals
SPEA	Society of Professional Engineers Association
Stell LR	Stellenbosch Law Review
SWA	South West Africa
SydLawRw	Sydney Law Review
Tas R	Tasmara Reports
TAWUSA	Transport and Allied Workers Union of South Africa
TDA	Trade Dispute Act.
TES	Temporary Employment Services
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TLR	Times Law Reports
Tort L Rev	Tort Law Review
TPD	Transvaal Provincial Division

TS	Transvaal Supreme Court
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
TUA	Trade Union Amendment Act
TWU	Transport Workers Union
UBC	University of British Columbia
UBCL Rev	University of British Columbia Law Review
UDF	United Democratic Front
UDHR	Universal Declaration on Human Rights
UNTS	United Nations Treaty Series
VICSC	Victorian Supreme Court
Vol	Volume
VLR	Victorian Law Reports
VR	Victorian Reports
VSC	Supreme Court of Victoria
WCC	Western Cape High Court
WLR	Weekly Law Reports

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CHAPTER 1

GENERAL INTRODUCTION

Summary

The increased use of violence and resultant damage to people and property during industrial action is a great concern. It is often very difficult to identify and hold perpetrators responsible during group protests. The question as to who should be held liable for the consequences of industrial action if the culprits cannot be identified, is still unanswered. It has been suggested that the union could be held responsible for the unlawful action of its members committed during industrial action, which is not necessarily possible. To address this problem, the author investigates, discusses and analyses various legal principles to solve questions around liability for damage committed during industrial action.

1 BACKGROUND

The Constitution of the Republic of South Africa guarantees ‘everyone’ the right to freedom of association.¹ The right to freedom of association gives people the right to associate or disassociate with organisations of their choice. It allows individuals to make choices about how they want to arrange their lives and about their identities as people in relationships with others in a given society.² It gives individuals expressions in community with others.³

In the area of labour law, the right to freedom of association entails that workers have the right to join or form unions of their choice; and to participate in the activities of their trade unions.⁴ Workers are also given the liberty not to associate with a particular union or to quit membership of a union.⁵ Workers normally form or join trade unions with the purpose of achieving a particular goal, for example, to have a strong voice when

¹ Section 18 of the Constitution of the Republic of South Africa, 1996.

² *MEC for Education: KwaZulu-Natal and Others v Pillay* (2008) 1 SA 474 (CC) at 524E-G.

³ Ackerman L *Human Dignity: Lodestar for Equality in South Africa* (2012) at 109.

⁴ Section 23(2)(a) and (b) of the Constitution.

⁵ Section 4 of the Labour Relations Act 66 of 1995 (LRA).

negotiating with the employer or to back-up demands through strike, picket and sometimes protest action.

The right to participate in collective bargaining processes is another objective of joining a trade union or forming an association with other workers.⁶ Collective bargaining is a process whereby employers or employers' organisations bargain with employee representatives or trade unions about terms and conditions of employment and other matters of mutual interests.⁷ Collective bargaining is regulated in very broad terms in section 23(5) of the Constitution. This section provides that 'every trade union, employers' organisation and employer has the right to engage in collective bargaining.' The Constitution adds that 'national legislation may be enacted to regulate collective bargaining'⁸ and consequently, the Labour Relations Act⁹ (hereafter the LRA), as appropriate national legislation, was enacted.

In addition to the right to freedom of association, the Constitution protects the right of workers to go on strike.¹⁰ The right to strike is given to a 'worker' as individual,¹¹ although it cannot be exercised by a single employee acting alone but by employees acting as a collective entity.¹² However, it is not a prerequisite that employees must form or join a union in order to exercise the right to strike. It can be exercised by two or more people even if they are not unionised.¹³

The right to strike is preceded by section 17 of the Constitution which supports collective action by providing that 'everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.' There is no definition of 'picket' in the LRA. It, however, provides that a picket may be authorised by a registered trade union in support of a strike or in opposition to a lock-out.¹⁴ The right

⁶ Basson A, Christianson M, Dekker AH, Garbers C, Le Roux PAK, Mischke C, Strydom E *Essential Labour Law* (5th ed) (2009) at 248.

⁷ Van Niekerk A, Christianson MA, McGregor M, Smit N and Van Eck BPS *Law@work* (2nd ed) (2012) at 369.

⁸ Section 23(5) of the Constitution.

⁹ The Labour Relations Act 66 of 1995 replaced the Labour Relations Act 28 of 1956.

¹⁰ Section 23(2)(c) of Constitution.

¹¹ See section 23(2)(c) of the Constitution.

¹² See section 213 of the LRA for the definition of a strike.

¹³ *NEHAWU v Public Health & Welfare Sectoral Bargaining Council & others* (2006) 27 ILJ 1892 (LC) at 1898F-G.

¹⁴ Section 69(1) of the LRA.

to picket in labour relations can, therefore, be described as an act that ‘furthers strike action’.

When the rights to strike, picket and protest are put to action, they turn out to be industrial action because of their collective nature. As a result, the legal system in South Africa recognises four types of industrial action: namely strikes,¹⁵ lock outs,¹⁶ pickets¹⁷ and protest action.¹⁸ Both strikes and pickets are a means used by workers to express themselves and the seriousness of their demands on matters of mutual interest and/or terms and conditions of employment.¹⁹

When expressing themselves through one or more of these forms of expression, they are expected to be peaceful.²⁰ However, over the past few years, workers attempted to heighten the impact of their industrial action 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

¹⁵ Section 213 of the LRA defines a strike as ‘the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving dispute in respect of any matter of mutual interest between employer and employee, and every reference to “work” in this definition includes overtime work, whether it is voluntary or compulsory.’

¹⁶ Section 213 of the LRA defines a lock out as ‘the exclusion by an employer of employees from the employer’s workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees’ contract of employment in the course of or for the purpose of that exclusion.’

¹⁷ There is no definition for picketing in the LRA. The Constitution only makes provision for the right to ‘picket’ in section 17. Some authors attempted to give a definition of a ‘picket’. According to these authors a picket may be defined as a ‘public expression by employees, who are already on strike, of their grievances in order to make their grievances known to the general public and other relevant constituencies; and to solicit support for their cause from the public and those constituencies’, Du Plessis JV & Fouché MA *A Practical Guide to Labour Law* (7th ed) (2012) at 392; Van der Walt AJ, Le Roux R and Govindjee A *Labour Law in Context* (2012) at 213. See also *South African National Defence Union v Minister of Defence* (2004) 4 SA 10 (T) at 35D-36A, where the High Court relied on section 23(2)(b) of the Constitution to confer the right to picket on workers.

¹⁸ Section 213 of the LRA defines protest action as ‘the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of the workers, but not for a purpose referred to in the definition of *strike*.’

¹⁹ *South African National Defence Union & Others v Minister of Defence* (note 17, chapter 1) at 29G; and *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* (1986) 2 SCR 573 at 586.

²⁰ Section 17 of the Constitution.

businesses.²¹ There have been strike-related disruptions in almost every sector of the economy.²²

There have been several incidents where industrial action resulted in violence and disruption of the public peace.²³ Other examples include the torching of employers' property, intimidation and even the killing of non-striking workers.²⁴ During the truck drivers' strike which took place in September 2012, a number of drivers were attacked and killed during violent demonstrations.²⁵ During security workers' strikes in 2006 and 2013, shops were looted and damage was caused to the property of innocent bystanders, street vendors, spaza-shop owners and employers.²⁶ The Business Times reported that violent strikes in the country's platinum sector resulted in the death of more than 50 people.²⁷ In April 2016 SATAWU members on strike torched trains in Cape Town.²⁸

These strikes are counter-productive and destructive not only because they are violent but the parties, namely the employer and employees take long to resolve their dispute(s) or reach settlement. This create health hazards. For example, a strike by municipal workers could lead to the non-collection of waste and this poses a serious

²¹ Jansen M 'Security strike violence: Union leadership found wanting' (2006) 30(4) *South African Labour Bulletin* 18-20, at 18.

²² *The Times* reported that strikes by the South African Municipal Workers Union (SAMWU) wreaked havoc across the country, with workers tipping over rubbish bins, trashing business centres and intimidating non-strikers (*The Times* 'Cities on high alert: Extra security in place in case striking municipal workers turn violent' (15 August 2011) at 1.

²³ See in this regard *Security Services Employers' Organisation & others v SA Transport & Allied Workers Union & others* (2006) 27 ILJ 1217 (LAC); *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South Africa Workers Union & others* (2012) 33 ILJ 998 (LC); *Food & Allied Workers Union obo Kapesi & others v Premier Foods Ltd t/a Blue River Salt River* (2012) 33 ILJ 1779 (LAC); Landman AA 'No place to hide – A trade union's liability for riot damage: A note on *Garvas & others v SATAWU & Another Third Party*' (2010) 31 ILJ (WCC) 2125 (2011) 32 ILJ 834-846; Webster E & Simpson G 'Crossing the Picket Line: Violence in Industrial Conflict – the case of the Afcol strike' (1990) 11(4) *Industrial Relations Journal of South Africa* at 15.

²⁴ Rycroft A 'What can be done about strike related violence?'

Accessed at http://www.upf.edu/gredtiss/pdf/2013-LLRNConf_Rycoft.pdf on 3/09/2015.

²⁵ 'Truck driver strike turns violent'. Accessed at <http://www.news24.com/SouthAfrica/News/Truck-driver-strike-turns-violent-20120926> on 29/09/2015.

²⁶ Nkomo S 'Union held liable for strike damages.' Accessed at <http://www.iol.co.za/news/crime-court/union-held-liable-for-strike-damages-1.1318940#.VfghtHovIU> on 17/09/2015.

²⁷ *Business Times* 9 February 2014 'AMCU presses on for unaffordable hike' at 4.

²⁸ Gxumisa N 'Metrorail services resume after trains were torched.' Accessed at www.thenewage.co.za/metrorail-services-resume-after-trains-were-torched/ on 21/04/2016.

health risk.²⁹ The burning of tyres by demonstrators also leads to pollution and resultant health risks.

The harmful conduct resulting from industrial action affects not only the strikers or picketers, but also innocent members of the public, non-striking employees, employers and the economy at large.³⁰ In *Garvis & Others v SATAWU & others*,³¹ it was held that the majority of the population was subjected to the tyranny of the state in the past and such practices should no longer be tolerated.³²

The disorderly, disruptive and violent conduct by striking employees is contrary to the Constitution which states that these must be exercised peacefully.³³ Since the LRA is entrusted with the function of regulating labour matters,³⁴ it draws a distinction between protected (lawful) and unprotected (unlawful) strikes.³⁵ The purposes of the LRA include the advancement of economic development, social justice, labour peace and the democratisation of the workplace.³⁶ The LRA prescribes what action will constitute protective collective action and regulates the consequences of protected and unprotected industrial action.³⁷

The question that arises is what recourse do victims of violent industrial action have for damages arising from industrial action. If the perpetrator can be identified, he or she could face criminal charges and/or delictual claims for damages. Often, the perpetrators cannot be identified as a result of group misconduct during industrial action. Even where the individual perpetrator/s can be identified, they may not be able to pay for the extent of the damages and the question arises whether the trade union

²⁹ A strike by Pikitup employees affiliated to SAMWU in 2016 caused a health hazard in the street of Johannesburg and surrounding areas where waste was not collected for almost two months. Some members of the community were concerned that the uncollected and piling rubbish will cause health hazards to their children as they play around in dirt and germs. Randburg Sun 25 March 2016 'Pikitup strike is now a health hazard.' Accessed at www.randburgsun.co.za/286445/pikitup-strikes-is-now-a-health-hazard-and-human-right-issue/ on 19/04/2016.

³⁰ Mischke C 'Running Riot: Bystanders' claim for damages: Can third parties sue the union?' (2010) 20 *Contemporary Labour Law* at 14.

³¹ (2011) 32 *ILJ* 2426 (SCA).

³² At 2443A.

³³ Section 17 of the Constitution.

³⁴ See section 23(5) of the Constitution.

³⁵ See sections 64(1) and 65(1) of the LRA.

³⁶ Section 1 of the LRA.

³⁷ These types of industrial action are discussed in more detail in Chapter 2 below.

responsible for the industrial action, could be held responsible. The study investigates the appropriate legal basis for holding a trade union liable for the unlawful conduct of its members committed during industrial action.

2 CAUSES OF VIOLENCE DURING INDUSTRIAL ACTION

An investigation into the possible causes of increasing violence and disorder during industrial action and measures to prevent industrial action from turning violent, fall outside the scope of this study. It is, however, necessary to provide a brief overview of some of the most relevant reasons that could lead to increasing unorderly collective protests, namely: allowing supporters to participate in a picket, the absence of ballot requirement and interest arbitration in the LRA.

2.1 Trade union members and 'supporters' during a picket

The study acknowledges that the LRA allows members of a trade union and 'supporters' to join a picket.³⁸ This is the first deficiency in the collective bargaining system as the inclusion of the word 'supporters' in the LRA opens the industrial action platform for people without the interest of the employees at heart who could exploit the platform to further their own interest. Trade unions often deny liability for damage caused during industrial action on the ground that the people who committed unlawful acts were not their members, even if the people that commit such acts are seen in union regalia.³⁹ It is therefore difficult to insist that it was the members of the union that committed the unlawful acts since the LRA allows the possibility for non-members to join in the industrial action. The study proposes amendments to the existing legislation to ensure that trade unions will have to take responsibility for the conduct of their members and supporters during industrial action.⁴⁰ It is further argued that the situation can be addressed if participation in a picket can be restricted to registered union members. This will help to dispel the argument from unions that the people who committed the unlawful acts were not their members. It is argued that having a clause like this in the LRA will serve as deterrent to unions to allow non-members to participate in their industrial action.

³⁸ See section 69(1) of the LRA.

³⁹ Mabuza E 'Unions could be held liable for damages in freight strike' *Business Day*. Accessed at <http://www.bdlive.co.za/national/labour/2012/09/26/union-could-be-held-liable-for-damages-in-freight-strike> on 8/09/2015.

⁴⁰ Chapter 8.

The removal of the word 'supporters' in the LRA may play a vital role in reducing the incidents of violence and will promote certainty in establishing the liability of the union.

2.2 Ballot requirements and strike action

The second deficiency is the lack of a secret ballot-requirement prior to strike action. A secret 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. A certificate issued by the council or CCMA to the effect that a ballot has been properly conducted will serve as proof that the union has complied with the provisions relating to ballots.⁴¹

In terms of the LRA, unions are not obliged to have a ballot of their members before calling a strike unless the constitution of the union makes ballot a requirement.⁴² It is sufficient for the union to comply with sections 64 and 65 of the LRA for the strike to be protected. The Labour Relations Amendment Bill of 2012 had proposed a provision which would have required unions to hold a ballot prior to going on strike.⁴³ This provision was, however, withdrawn from the Bill. The reasons for its withdrawal was a strong criticism from trade unions particularly the Congress of South African Trade Unions (COSATU).⁴⁴

It could be argued that the old Labour Relations Act,⁴⁵ contained a secret ballot requirement and yet it did not deter unions from engaging in violent behaviour. The reason for this might be that prior to 1993 it was difficult to distinguish industrial strikes from political strikes.

The advantage of a secret ballot would be that a strike will only commence if the majority of the employees agree and that would lead to less intimidation of non-strikers and greater coherence among the strikers. If the re-introduction of a secret ballot could be given a chance, things might change for the better as the strike will go ahead only

⁴¹ Du Plessis & Fouche *Practical Guide to Labour Law* (note 17, chapter 1) at 387.

⁴² Section 95(5) of the LRA.

⁴³ See clause 9(a) of the Labour Relations Bill of 2012.

⁴⁴ Rycroft A 'Strikes and Amendments to the LRA' (2015) 36 *ILJ* 1 at 7.

⁴⁵ Section 65(2)(b) of the Labour Relations Act 28 of 1956.

if it is supported by majority of the members. However, Labour will have to be thoroughly consulted and be convinced that the aim is not to disadvantage them but to improve the economy and reduce the loss of jobs which is the normal consequence of prolonged, violent strikes and pickets.

2.3 Duration of the strikes

In addition to being violent, strikes in the Republic are often prolonged. There is no limit on the duration of protected strike action. After the unprecedented prolonged strike in the platinum sector in 2014, the LRA was amended and in terms of section 150(1) the Director of the Commission for Conciliation, Mediation and Arbitration (CCMA) may intervene in a strike either with the consent of the affected parties or even without, if the Director believes that it is in the public interest to do so.

This amendment introduces a positive measure of control that will compel trade unions and employers to go back to the negotiation table. Section 150 provides for compulsory conciliation. It is suggested that there should be a more forceful measure introduced to end industrial action which will have a negative effect on the economy or social welfare of the public,⁴⁶ and that is interest arbitration. This would mean that the issues on which agreement cannot be reached are referred to a third party (for example the CCMA) for resolution.⁴⁷ 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. The interest arbitration clause opens avenues for intervention in a strike that have protracted for a long period of time and where its impact on public interest for example, the economy becomes serious and noticeable.⁴⁸

⁴⁶ In his State of the Nation address, the President of the Republic of South Africa, 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* 21 July 2014 'Long strikes could be held in check with plan for interest arbitration' page 1. 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* 17 Aug 2014 'No magic bullet for strike scourge' page 5.

⁴⁷ *Greater Toronto Airports Authority*, (2005) (CanLII) 321 (CIRB) at 9 accessed at <http://www.canlii.org/en/ca/cirb/doc/2005/2005canlii63057/2005can;ii63057.html> on 16-09-2014.

⁴⁸ This is the view of the Department of Labour expressed at the 27th Labour Law Conference held in Sandton, 5-7 Aug 2014.

3 PROBLEM STATEMENT

The main purpose of a strike is to cause economic harm for the employer. In *VNR v Steel (Pty) Ltd v NUMSA*,⁴⁹ it was stated that the employees, by withholding their labour, hope to bring production to a halt and to cause the employer to lose business and to suffer economically because he sustains overhead expenses without the prospect of income. As a result of this pressure the employer will eventually accede to their demands.⁵⁰

There is, however, a perception amongst unions and employees that the withdrawal of labour on its own is not enough to convince the employer about the seriousness of their demands. The perception goes on to conclude that the effectiveness of industrial action depends on the degree of violence inflicted on the employer, non-striking employees and members of the public. According to the report released by the Social Change Research Unit of the University of Johannesburg, there were about 70 000 police-reported protests over the past 17 years – equalling an average of 11 protests per day,⁵¹ and nearly half of those were labour related.⁵² Statistics conducted in 2014 in the metal and engineering sector showed that about 246 cases of intimidation were reported, 50 violent incidents occurred and 85 cases of vandalism were recorded. According to a report of the South African Institute of Race Relations (21 January 2013) a total of 181 people have been killed in strike violence in South Africa in the past 13 years. During the same period, at least 313 people were injured and more than 3 058 were arrested for public violence. Of the 1 377 people arrested between 1 January 2009 and 31 July 2011, only 217 cases of public violence made it to court and only 9 people were convicted.⁵³

⁴⁹ (1995) 16 *ILJ* 1483 (LAC).

⁵⁰ At 1486D.

⁵¹ Runciman C, Alexander P, Mahlatse R, Maruping B, Moloto B, Khumalo E & Sibanda S 'Counting Police-recorded Protests: based on South African Police Service Data' (2016) *Social Change Research Unit of University of Johannesburg* at 46.

⁵² At 47.

⁵³ *Business Times* 30 November 2014 'Labour laws need overhaul to stop runaway strike train' at 2.

In the past few years there have been a lot of cases dealing with various aspects of strike violence. For example in *SA Chemical Catering & Allied Workers Union & others v Check one (Pty) Ltd*,⁵⁴ the striking employees were carrying various weapons ranging from sticks, pipes, planks and bottles. One of the strikers Mr Nqoko was alleged to have threatened to cut the throats of those employees who had been brought from other branches of the employer's business to help in the branch where employees were on strike. Such conduct was held not to be in line with good conduct of striking.⁵⁵

In *Security Services Employers Organisation & others v SA Transport & Allied Workers Union & others (SATAWU)*,⁵⁶ about twenty people were reported to have been thrown out of moving trains in the Gauteng Province and most of them were security guards who were not on strike and who were believed to be targeted by their striking colleagues. Two of them were killed, while others were admitted to hospitals with serious injuries.⁵⁷

Resorting to violence during industrial action is no longer exceptional in South Africa.⁵⁸ In fact violence has become normative in this country.⁵⁹ In his 2014 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 relations’ environment and the economy.”⁶⁰

⁵⁴ *SA Chemical Catering & Allied Workers Union & others v Check One (Pty) Ltd* (2012) 33 ILJ 1922 (LC).

⁵⁵ At 1933A.

⁵⁶ *Security Services Employers Organisation & others v SA Transport & Allied Workers Union & others (SATAWU)* (note 23, chapter 1).

⁵⁷ SABC news 25 May 2006 at 16h00.

⁵⁸ See *Tsogo Sun Casino (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (note 23, chapter 1 at 33; *Garvas & others v SATAWU* (2010) 31 ILJ 2521 (WCC); De Wet P ‘The Jury is Out on Strike Violence’ *Mail & Guardian* online. Accessed at <http://www.mg.co.za/article/2014-07-10-the-jury-is-out-on-strike-violence> on 5/02/2016.

⁵⁹ See *Food & Allied Workers Union obo Kapesi & 31 others v Premier Foods Limited t/a Blue Ribbon Salt River* (note 23, chapter 1) at 1659C-J; Rycroft A ‘The Legal Regulation of Strike Misconduct: The *Kapesi* Decisions’ (2013) 34 ILJ 859 at 860.

⁶⁰ Business Day 21 July 2014 ‘Long strikes could be held in check with plan for interest arbitration’ at 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.”⁶¹

Since industrial action is a collective conduct, it is often difficult to determine with certainty, the identities of perpetrators and consequently to hold anyone responsible for the unlawful conduct committed during such action. Even if perpetrators can be identified they would not be able to cover the costs resulting from the damages and the cost of litigation (since delictual claims are complicated) would often exceed the amount that can be recovered from the individual. As stated above, trade unions often deny liability on the ground that it was not their members that committed violent act(s) and it will be unfair to attempt to hold them liable for the conduct of people who are not union members.⁶² If it happens that a union can be held liable, it is uncertain on what basis such union can be held liable for the conduct of its members.

This study investigates who should take the responsibility for the consequences of industrial violence if the individual perpetrators cannot be identified or are men of straw. Policy or law makers cannot sit back and turn a blind eye while the situation is deteriorating. Something needs to be done to rescue the position of those affected by the worsening situation.

4 RESEARCH PURPOSE

The need has thus arisen for a uniformed approach providing for a remedy or remedies that could be used by victims of strike violence in the case of damage caused by participants at industrial action. This uniform approach will contribute to a stable and progressive society. Such a uniform approach will help to avoid inconsistencies in providing remedies to victims and prevent the blame for the damage from being shifted

⁶¹ *Business Times* 17 August 2014 ‘No magic bullet for strike scourge’ at 5.

⁶² Mabuza ‘Unions could be held liable for damages in freight strike’ (note 39, chapter 1).

between the group of perpetrators and the convening union, to the confusion of the victim or complainant as to who to hold responsible.

The study investigates different legal remedies that could be available to victims of this type of conduct:

Firstly, the study looks at the remedies provided by section 68 of the LRA. These are interdicts, claims for compensation for loss suffered as a result of a strike or conduct in contemplation or furtherance of a strike, and dismissals for misconduct committed during a strike.⁶³

Secondly, the study looks at the possible liability in terms of the Regulation of Gatherings Act⁶⁴ (RGA) as applied in the case of *SATAWU v Garvas*.⁶⁵ In this case, the union was held liable in terms of the RGA for damages caused during industrial action. The RGA does not regulate employment relations, since the industrial action and damage occurred in a public place, the matter was dealt with in terms of this Act.⁶⁶

Thirdly, the thesis examines whether the common law doctrine of vicarious liability can be extended to hold the trade union responsible.⁶⁷ This would imply that the common law should be developed to allow for this and the study will investigate whether this is possible in terms of the Constitution. It is acknowledged that the existence of vicarious liability is not based on any legal rule but on policy considerations and as such it applies to certain categories of relationships such as motor vehicle owner and driver, partnerships, and principal and agent relationships. A trade union-member relationship is not one of the relationships to which this doctrine applies. The study investigates whether the time has arrived for policy considerations to favour the extension of vicarious liability to apply to trade union-member relationship.

⁶³ Chapter 4.

⁶⁴ Act 205 of 1993.

⁶⁵ (2012) 33 *ILJ* 1593 (CC).

⁶⁶ Chapter 5.

⁶⁷ Chapter 7.

To achieve this, the study takes into account foreign law and transplant certain lessons on the application of vicarious liability onto South African labour law.⁶⁸ In Canada, for example, a union is held liable for the authorised conduct of its members.⁶⁹ A union can also be held liable for the unauthorised conduct of its members if the conduct is closely connected to the authorised act.⁷⁰ In Australia the Fair Works Act⁷¹ empowers the Fair Works Commission (FWC) to issue an order to suspend or prevent industrial action that is 'happening, or is threatening, impending or probable' in the course of an industrial dispute and to terminate or suspend industrial action that causes significant harm to others.⁷²

The study will also propose legal measures that could be introduced by the LRA to prevent strike-related violence. These include ballot requirement, interest arbitration and the removal of the word 'supporters' in section 69(1) of the LRA.⁷³ Lessons from Canada and Australia provide some insights on effective ballot requirement and interest arbitration.⁷⁴

The LRA fails to address, with certainty, the issue of liability and neglects to provide remedies where strikers or picketers commit unlawful acts while exercising their constitutionally protected rights to strike, picket and protests.⁷⁵

The primary aim of the study is to determine the legal basis for holding a trade union or its members liable for the conduct the latter commit during industrial action. Recent practice shows that there is a possibility that violent incidents will always be committed when employees have embarked on an industrial action unless urgent measures are taken to prevent this practice. The study submits that there is a need to determine and clarify the consequences which can flow from unlawful behaviour during industrial

⁶⁸ Chapter 6.

⁶⁹ *United Nurses of Alberta v Attorney General (Alta)* (1992) 92 CLLC para 14 (SCC); (1992) 1 SCR 901.

⁷⁰ See in this regard *B.P.A v Children's Foundation* (1997) (CanLII) 10834 (BC CA). Accessed at <http://canlii.ca/t/1nk48> on 4/04/201. See also *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council* (1999) BCJ No 2416 (SC).

⁷¹ Fair Works Act, 2009 as amended.

⁷² Sections 229 & 423 of the Fair Works Act.

⁷³ Chapter 8.

⁷⁴ Chapter 6.

⁷⁵ Section 68(1)(b) refers to the payment of 'just and equitable compensation' without specifying who must be held liable for such compensation between the union and its members.

action. The study investigates whether there is a room in the current legal system of South Africa to hold the trade union accountable for the unlawful conduct of their members during industrial action.

5 OUTLINE OF THE STUDY

It is true that violence, intimidation, physical assault, damage to property, the stoning of vehicles, loss of profit for employers and denying customers access to the premises of the employer, put immense pressure on employers and negotiating parties to reach consensus. The question that arises is to what extent employers would have given into the demands of strikers had the latter not resorted to violence? If employers succumb to the demands of unions because of the pressure put on them by strikers in the form of violence and intimidation, a precedent might be created in our labour law that violence pays.

The prevalence of violent industrial action in the Republic paints a picture that the current South African labour law is not clear on the question of liability if a strike becomes violent, destructive and affects not only employers and employees but also innocent civilians who are not part of the employment relationship and hence not involved in the industrial action. In confirming this statement, Le Roux PAK states that:

“The South African labour law concentrates on the regulation of two relationships. The first, and most important, is the relationship between employer and employee. The second is between trade unions and employers or employers’ organisations.”⁷⁶

The law does not address the regulation of the relationship between strikers and the public, non-strikers and replacement labour. In this sense labour law fails to pre-empt the negative consequences that may result when strikers interact with these groups of people. This shortcoming in our labour law impairs the relationship between striking workers and the public. Strikers and members of the community could be seen as adversaries during industrial action because of the hostile actions that members of the public suffer at the hands of the workers who participate in the strike.

⁷⁶ Le Roux PAK ‘When strike pickets get too noisy: The protection of third party interests’ (2010) 10 *Contemporary Labour Law* at 27.

The study recommends certain legal remedies to victims of violent strikes to ensure that liability for violent or unlawful conduct during industrial action has someone to hold liable or that blame is correctly allocated. This will assist trade unions, their members, law and policy makers and members of the public to prevent or deal with the negative consequences of industrial action, by identifying someone that can be held accountable for the loss or damage that occurs during such action. It is important to investigate these legal remedies so that everyone that may feel affected by the negative consequences of a strike or conduct in furtherance of a strike is afforded a remedy against the wrongdoer(s) or their union, for compensation or damages, or another form of redress, for the damage or loss caused by the conduct of participants at industrial action.

6 THE STRUCTURE OF THE THESIS

The thesis comprises a literature review. Various sources from different and relevant disciplines have been consulted and analysed to complete the study. The study is made up of nine (9) chapters including the conclusion. After this introductory chapter, the other chapters will take the following order:

Chapter 2: Definition, Requirements and Consequences of Strikes

Chapter 3: Constitutional framework and the impact of the 1996 Constitution on South African labour law

Chapter 4: Liability in terms of the Regulation of Gatherings Act

Chapter 5: Remedies in terms of the Labour Relations Act

Chapter 6: Comparative analysis and lessons for South Africa

Chapter 7: The accountability of employers and trade unions for the delictual acts of employees and members

Chapter 8: Recommendations

Chapter 9: Synopsis

7 CONCLUSION

The author investigates possible avenues for holding a trade union and/ or its members liable for the unlawful conduct the members commit during industrial action. The study holds that under normal circumstances, individual perpetrators can be held liable on the basis of criminal acts they commit provided the real perpetrator(s) can be identified.

However, if no one can be identified and consequently held liable, the study investigates various remedies that can help the victims of violent industrial action to hold someone liable for the damage suffered. These include liability in terms of section 68(1) of the LRA; liability in terms of the RGA; and liability in terms of the doctrine of vicarious liability.

If a union is allowed by law to call a strike, it will bring peace and stability to the labour relations' environment if the same union is held accountable to the victims of the industrial action it has convened. If a union is held accountable for the damage caused as a result of violent conduct perpetrated during a strike and it settles the claim, it should be granted the right of recourse against the member(s) who committed the act that caused the damage.

CHAPTER 2

DEFINITION, REQUIREMENTS AND CONSEQUENCES OF STRIKES

Summary

This chapter introduces the reader to the different types of industrial actions. It discusses the categories of industrial action that are recognised in the Republic. These include strikes, pickets and protests action. It discusses the nature of strikes, pickets and protest action, the requirements with which these types of industrial action have to comply in order to enjoy protection, and the consequences of compliance and/or non-compliance with these requirements.

1 INTRODUCTION

The purpose of this chapter is to look at the different types of industrial actions recognised in the South African labour law and their impact on or contribution to the question of liability for damage caused during strike action. The chapter reviews these types of industrial actions and the statutory provisions that regulate them, including the principles and regulations that apply to each of them, their components and the consequences that result from failure to comply with the rules applicable to them.

The types of industrial actions discussed in this chapter have their roots in the Constitution of South Africa, 1996 (Constitution) and other statutes such as the Labour Relations Act (LRA).¹ The Constitution recognises three categories of industrial action as fundamental rights. These are the right to strike,² to picket, and to demonstrate.³ The latter could be interpreted to include protest action.⁴ The rights to picket and protest are new to South Africa as they were only recognised in the new democratic dispensation. They were first introduced into the South African industrial law by the Interim Constitution,⁵ which laid the foundation or framework for the Final

¹ Act 66 of 1995.

² Section 23(2)(c) of the Constitution.

³ Section 17 of the Constitution.

⁴ Although the Constitution does not specifically refer to the right to protest, the LRA in section 77 regulates it as one of the types of industrial action.

⁵ Act 200 of 1993.

Constitution.⁶ The right to strike, however, has been part of industrial relations in South Africa before the new democratic order came into being.⁷

The rights to strike, picket and protest are not only recognised in the Constitution, but they are also entrenched.⁸ To ensure that workers who find themselves part of industrial action are not at risk of civil or even criminal prosecution as a result of their conduct, these rights must be exercised within the limits and ambit of the Constitution and other applicable law. One of these applicable laws, is the LRA. In this regard, the LRA distinguishes between protected and unprotected strikes, with different consequences attached to each type of strike. The LRA affords protection to employees against dismissal or any other civil action that their employer may want to take against them if the industrial action in which they take part is protected.⁹

Employees are, however, protected against action if the strike in which they participate is protected, and unions are protected because their activities are sanctioned by the law.¹⁰ The result is that unions escape liability for the conduct of their members when the union exercises a right granted by legislation, for example the right to strike and/or picket. This creates a wrong impression of how the law operates. If one acknowledges the fact that a trade union is formed and regulated in terms of the law of the Republic and its own constitutive documents, as required by the LRA,¹¹ as a consequence thereof, it must also be acknowledged that the union should accept liability for the conduct of its members committed during industrial action that it has called. In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others*, the court for example suggested that a strike may lose protection if strikers commit misconduct during a strike.¹² In *South African Transport & Allied Workers Union v Garvas & another*,¹³ the union and its members were held liable for the

⁶ See Document 35 – Constitutional principles Schedule 4 of the Interim Constitution.

⁷ Section 65 of the Labour Relations Act 28 of 1956.

⁸ This means that there is a certain procedure that must be followed for their amendment, see section 74(2) of the Constitution in this regard.

⁹ Section 67(5) of the LRA.

¹⁰ Section 23(2)(a) of the Constitution provides that ‘every worker has the right to form and join a trade union and (b) to participate in the activities and programmes of a trade union.’

¹¹ Section 95(1) of the Labour Relations Act, 1995.

¹² (2012) 33 *ILJ* 998 (LC) at 1004A.

¹³ (2012) 33 *ILJ* 1593 (CC).

damage caused during a violent protest that caused damage to property and injury to other people.

2 STRIKES

The Constitution recognises the right of workers to strike.¹⁴ The right to strike allows workers to protect their dignity and to ensure that it is safeguarded and maintained. The Constitution provides that national legislation be enacted to give effect to the labour rights and collective bargaining.¹⁵ As a result, the LRA was enacted in 1995. It defines a strike 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.”¹⁶

The right to strike is not only recognised in the domestic or national laws of countries, but also by international law, as fundamental to the protection of workers’ rights and interests.¹⁷ Both domestic and international law provide workers with mechanisms to seek and secure fair working conditions and obtain new rights they did not previously enjoy.¹⁸ Without the right to strike, the right of workers to freedom of association and to collective bargaining, for example, would have little or no significance. As a form of expression, the right to strike serves as a method of conveying workers’ messages to their employer. The message of a strike is that an unremedied grievance or the unresolved dispute between workers and the employer must be attended to and addressed or resolved for the situation to return to normal.

¹⁴ Section 23(2)(c) of the Constitution.

¹⁵ Section 23(5) of the Constitution.

¹⁶ Section 213 of the LRA.

¹⁷ This right is provided in the International Covenant on Economic, Social and Cultural Rights of 1996; the European Social Charter of 1961.

¹⁸ This is called a dispute of interest.

2.1 The 'no work no pay' rule during a strike

A contract of employment is a contract with reciprocal rights and obligations. The employee is under the obligation to make him or herself available for work and the employer is obliged to remunerate the employee in terms of the agreement between them. The employer is entitled to refuse to pay the employee if the latter refuses to do the work he or she was employed to do.¹⁹ This is known as the 'no work no pay' rule. The LRA also emphasises this common law rule by providing 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.'²⁰ However, the LRA makes one exception, that is, where an employee's remuneration includes payment in kind in the form of accommodation, food and other basic amenities of life.²¹ At the request of the employee, the employer may not discontinue this kind of remuneration.²² The LRA does provide, however, that the employer may, at the end of the strike, recover the monetary value of such remuneration by way of civil proceedings in the Labour Court.²³

On the question of whether the employer has to provide benefits such as medical aid, pension fund, and a housing subsidy to employees on strike, the Labour Court in *SAMWU v City of Cape Town*²⁴ answered this question in the negative. It held that it was not an unfair labour practice for an employer to apply a policy of 'no work, no pay, no benefits' because there was no difference between withholding a *pro rata* share of contributions in respect of benefits and withholding remuneration during a strike.²⁵

¹⁹ *Coin Security (Cape) v Vukani Guards & Allied Workers Union* (1989) 10 ILJ 239 (C) at 244J– 245A.

²⁰ Section 67(3) of the LRA.

²¹ *Idem* at section 67(3).

²² *Idem* section 67(3)(a).

²³ *Idem* at section 67(3)(b).

²⁴ (2010) 31 ILJ 724 (LC).

²⁵ At 732H–J.

2.2 Limitations on strike action

Striking is not an automatic consequence of failed or deadlocked negotiations. In addition to the fact that employees have the option of whether to embark on a strike or not, the LRA places certain prohibitions on strikes under certain circumstances.²⁶ It provides that no person may take part in industrial action under any of the following circumstances:

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

This prohibition applies if there is a collective agreement that was concluded between the employer or employers' organisation and the union(s) and which is still in force. It is crucial that the agreement is a collective agreement between union(s) and an employer or employers' organisation regulating the issue which was under negotiation.²⁷ Such agreement would bind all parties to it unless they withdrew from the agreement. The party or person who intends to withdraw from the agreement must give the other party reasonable notice of terminating the agreement.²⁸

A collective agreement regarding the issue in dispute must cover the dispute comprehensively in order to preclude the parties from embarking on a strike. In *BMW SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members*,²⁹ the Labour Appeal Court (LAC) held that since the National Bargaining Forum did not cover the issue in dispute (payment of a transport allowance to hourly paid employees) the union was entitled to embark on strike action provided it complied with the provisions of the LRA.³⁰ The court further found on the facts that the collective agreement did not regulate transport allowances for hourly paid employees, and was silent on the matter, so there was nothing that prohibited them from a strike.³¹

²⁶ Section 65 of the LRA.

²⁷ *National Union of Metalworkers of SA & others v Highveld Steel & Vanadium* (2002) 23 ILJ 895 (LAC) at 901B.

²⁸ Section 23(4) of the LRA.

²⁹ (2012) 33 ILJ 140 (LAC).

³⁰ *Idem* at 152A.

³¹ *Idem* at 146E-F.

In *Vodacom (Pty) Ltd v Communication Workers Union*,³² the union referred a dispute to the CCMA. The CCMA issued a certificate of outcome that the matter remained unresolved after conciliation. It appeared that there was a collective agreement that prohibited the parties from participating in a strike. The union nevertheless proceeded with their planned strike action. It was held that the LRA limited the right to strike if the strike breached one of the limitations listed in section 65.³³ The strike was held to be unlawful notwithstanding compliance with section 64.³⁴ It was also held that a certificate of outcome cannot trump the limitations of section 65 which clearly prohibits strike under such conditions.³⁵

The purpose of this prohibition is to prevent employees and employers from using strikes or lock-outs where the collective bargaining parties themselves have restricted the right to strike or to institute a lock-out. In *Air Chefs (Pty) Ltd v SA Transport & Allied Workers Union & others*,³⁶ the parties had entered into a recognition agreement in terms of which they agreed to reach a further agreement providing for a danger allowance, but they did not regulate how the matter would be addressed if no such further agreement was reached. When negotiations broke down, the union gave notice of proposed strike action over the issue. The LAC held that the issue was regulated by a collective agreement even though the latter did not specifically deal with the issue but it stated that it be dealt with by the bargaining council.³⁷ The matter was therefore capable of being resolved by industrial action and the proposed strike would be protected.³⁸

³² (2010) 31 *ILJ* 2060 (LAC).

³³ *Idem* at 2063J-2064A.

³⁴ *Idem* at 2064A.

³⁵ *Idem* at 2064B.

³⁶ (2014) 35 *ILJ* 3088 (LAC).

³⁷ *Idem* at 3095G.

³⁸ *Idem* at 129A-B.

2.2.2 If that person is bound by an agreement that requires the issue in dispute to be referred to arbitration

This provision of the LRA³⁹ is interpreted to mean that if the parties themselves have consented to arbitration as a method of resolving a dispute or as a deadlock-breaking mechanism, they may not take strike action or resort to a lock-out to resolve those disputes. They waive their right to strike by implication. Their agreement will then have to comply with the requirements for a binding arbitration agreement in terms of the Arbitration Act.⁴⁰ This means that the agreement must at least be in writing and cover the issue in dispute.⁴¹ The LRA places no limit on matters that the parties can refer to arbitration. Such agreements may therefore include matters regarded as 'interest disputes' in terms of the LRA.⁴²

2.2.3 If the issue in dispute is one that the party has the right to refer to arbitration or to the Labour Court in terms of the Act

Section 65(1)(c) seems to create a statutory division between the forms of dispute for which arbitration or adjudication is the solution and those for which the solution is strike action. It is difficult to distinguish between matters which require adjudication and those that require strike action. The solution to the problem lies in the legislature's distinction between disputes of rights⁴³ and disputes of interest.⁴⁴ The idea behind the division between these forms of disputes is that certain disputes are better settled or resolved through litigation, and not by industrial action.

³⁹ Section 65(1)(b) of the LRA.

⁴⁰ Act 42 of 1965.

⁴¹ Butler D and Finsen E *Arbitration in South Africa* (1993) at 37-41.

⁴² Grogan J *Collective Labour Law* (2007) at 149.

⁴³ Examples of disputes of right include freedom of association (section 9); agency and closed-shop agreements (section 24(6) and (7)); the interpretation and application of collective agreements (section 24); the admission to or expulsion from bargaining councils (section 56); picketing (section 69); workplace forum disputes concerning matters reserved for joint decision-making (section 86); and dismissals and unfair labour practices (section 191).

⁴⁴ Examples include disputes about organisational rights (section 22) disputes about essential services and bargaining councils (section 38).

Section 65(1)(c) prevents strike over disputes of right. This is clear from the reading of the provision which prohibits strikes over issues that a party to the dispute can refer to arbitration or adjudication. A dispute of right is one where the parties are in dispute as to the existence of and /or extent of a legally enforceable right.⁴⁵ Another possibility for strike action is over issues of organisational right disputes in terms of section 189A of the LRA. This section gives employees the right to elect to embark on strike action if they feel that their dismissal is unfair. These disputes may also be referred to adjudication.⁴⁶

In *Mawethu Civils (Pty) Ltd & another v National Union of Mineworkers & others*,⁴⁷ the court considered the limitations on the right to strike imposed by this section 65(1)(c) of the LRA and found that these related only to disputes that have to be arbitrated in terms of the LRA and excludes issues which may be adjudicated or arbitrated in terms of other labour legislation.⁴⁸

2.2.4 If the person is engaged in an essential or a maintenance services

2.2.4.1 Essential services

Employees engaged in the provision of essential services are prohibited from participating in strike action.⁴⁹ An essential service is defined as 'a 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.'⁵⁰ The employees and their employer can, however, reach agreement that minimum services will be provided in terms of section 72 of the LRA. This means that an agreement will be reached whereby certain employees identified in the agreement will provide minimum services. The other employees who are not identified as providing minimum service can go on strike unless the whole service has been

⁴⁵ Le Roux PAK 'Defining the Limits of the Right to Strike' (2004) 13 *CLL* 91 at 95.

⁴⁶ *Ibid.*

⁴⁷ (2013) 34 *ILJ* 2624 (LC).

⁴⁸ At 2627G.

⁴⁹ Section 65(1)(d) of the LRA.

⁵⁰ Sections 71(10) and 213 of the LRA.

designated as essential service.⁵¹ In *SAPS v POPCRU & Others*,⁵² the court held that not all employees of the SAPS render an essential service and are thus not all prohibited from participating in strike action.⁵³ The court only interdicted service members of the SAPS from striking and allowed those employees of the SAPS who did not perform essential services to participate in a strike. By implication, those who were precluded from striking could use the section 74 procedure. This entails that the matter will be referred to conciliation and if it cannot be resolved at that level, it must be resolved through compulsory arbitration by a bargaining council or the Commission for Conciliation, Mediation and Arbitration (CCMA) if no council has jurisdiction.⁵⁴

A special committee, the Essential Service Committee (ESC)⁵⁵ is entrusted with the task of determining whether a service should be designated an essential service and whether the whole or only part of any service should be designated an essential service. This means that some workers in the same enterprise may be essential service workers, while others might not. In such a case all those workers who have not been declared essential service workers may go on strike.

However, a trade union could call its non-essential service members out on strike in support of the demand of an individual employee who was part of an essential service.⁵⁶ At the same time the individual employee retained the right to have his dispute determined by way of essential service arbitration.⁵⁷

2.2.4.2 Maintenance services

A service is a maintenance service if the interruption of that service has the effect of material physical destruction to any working area, plant or machinery.⁵⁸ There should be a collective agreement regulating the provision of maintenance service if part of the

⁵¹ Section 71(8) of the LRA.

⁵² (Unreported decision: J1444/2007). Accessed at <http://www.saflii.org/za/cases/ZALC/2007/44.pdf> on 9/10/2015.

⁵³ At 16.

⁵⁴ Section 74 of the LRA.

⁵⁵ Section 70 of the LRA.

⁵⁶ See *NEHAWU & Another v Public Health & Welfare Sectoral Bargaining Council & others* (2006) 27 ILJ 1892 (LC) at 1900C-D.

⁵⁷ *City of Cape Town v SALGA* (2011) 32 ILJ 1318 (LC) at 1326C.

⁵⁸ Section 75(1) of the LRA.

employer has been designated a maintenance service. If there is no agreement, the employer may apply in writing to the ESC for a determination that the whole or a part of the employer's business or service is a maintenance service.⁵⁹ If the application is approved the employees will be declared maintenance service workers and will not be allowed to legally participate in a strike. Since these employees cannot strike,⁶⁰ their dispute is resolved through conciliation by a council with jurisdiction or the CCMA and finally through compulsory arbitration.⁶¹

2.2.5 When employees are bound by an arbitration award, collective agreement, ministerial determination or BCEA determination regulating the issue in dispute

The LRA provides that no person may embark on a strike or institute a lock-out if that person is bound by an arbitration agreement which regulates the issue in dispute, unless the parties have agreed otherwise.⁶² Since an arbitration award is binding, it is equivalent to a court order and any person who fail to comply with it can be in contempt of court.⁶³ The reason for prohibiting strikes under these circumstances is that once a decision has been taken by a judicial process, the decision is final and binding on the parties to the dispute. This means that the issue or dispute has come to an end and there is no issue on which one of the parties can strike. The result is that the disputing parties are not allowed to take any further action in order to obtain a different result. Grogan argues that:

"The Act does not include within the ambit of this prohibition issues that have been resolved by an order of the Labour Court. This seems to have been an oversight unless the legislature assumed that employees who strike over matters that are disposed of by court rulings would be guilty of contempt. The same reasons for disallowing strikes in matters determined by arbitrators clearly apply to those determined by Labour Court."⁶⁴

Section 65(3)(a)(i) of the LRA also limits the right to strike where a collective agreement regulating the issue in dispute, prohibits strike action. Parties must honour

⁵⁹ Section 75(2) of the LRA.

⁶⁰ *Idem* section 75(5).

⁶¹ *Idem* section 74.

⁶² *Idem* section 65(3)(a)(i).

⁶³ *Idem* section 141(6) of the LRA.

⁶⁴ Grogan *Collective Labour Law* (note 42, chapter 2) at 159.

a settlement agreement they entered into and should not be allowed to try and obtain a more favourable outcome through industrial action. Collective agreements will serve no purpose if employees were allowed to strike regardless of the existence of a binding collective agreement.

3 PROCEDURAL REQUIREMENTS

Under the Labour Relations Act of 1956, strikes were regarded as crimes against the State⁶⁵ and, consequently there was no freedom to strike.⁶⁶ According to section 65 of the 1956 legislation, strikes were prohibited unless the matter giving rise to the strike had been considered by the industrial council or by the conciliation board. The industrial council or conciliation board had to consider the matter and report on it or certain time periods had to have lapsed after referral to either of these bodies before the strike could commence.⁶⁷ Employees who took part in the strike could be dismissed, and were not afforded a fair procedure before their dismissal, as long as they had been issued with an ultimatum requiring them to return to work on a specific day. This Act⁶⁸ made no provision for protected or unprotected strikes.⁶⁹ It only provided that:

“no employee or other person shall instigate a strike or incite any employee to take part in or to continue with a strike or take part in a strike or in continuation of a strike, and no employer or other person shall instigate a strike: (a) during the period of the currency of any agreement, award or determination which in terms of this Act is binding on the employees or employers who are or would be concerned in the strike or lock-out and any provision of which deals with the matter giving occasion for the strike or lock-out; or (b) during the period of one year reckoned from the date of application of a notice under section 14(2) of the Wage Act 5 of 1957, in respect of a determination made under that Act, which is binding upon employees or employers who are or would be concerned in the strike or lock-out, and any provision of which deals with the matter giving occasion for the strike or lock-out.”⁷⁰

⁶⁵ Section 20 of the Internal Security Act 28 of 1982 empowered the Minister of Law and Order to prohibit any person who, in the opinion of the Minister, engages in activities calculated to endanger the security of the State or from participating in any gathering or class of gatherings.

⁶⁶ Section 65(3) of the Labour Relations Act 28 of 1956.

⁶⁷ *NUMSA v Elm Street Plastics t/a ADV Plastics* (1989) 10 ILJ 328 (IC) at 332D-E.

⁶⁸ Labour Relations Act 28 of 1956.

⁶⁹ See discussion that follows from this paragraph on the distinction between protected and unprotected strikes.

⁷⁰ Section 65(1) of the Labour Relations Act 28 of 1956.

Failure to comply with these provisions rendered the strike illegal.⁷¹

The position is, however, different under the 1995 legislation. Strikes are no longer regarded as either legal or illegal because when the current LRA was introduced it sought to decriminalise participation in strike action.⁷² The LRA refers to lawful strikes as protected strikes, and to unlawful strikes as unprotected strikes. A strike is protected if it complies with section 64(1) of the LRA which prescribes the procedures for a strike to be lawful or protected (unless the parties have agreed to a different procedure in a collective agreement), and if it does not contravene any of the prohibitions set out in section 65(1) of the LRA. Non-compliance with sections 64(1) and 65(1) render the strike unprotected.

3.1 Procedural requirements for a protected strike in terms of the LRA

3.1.1 Referral of the issue in dispute

Before employees can embark on a strike, a process of negotiations with the employer with the aim of finding a solution to the problem (cause of dispute) must precede the action.⁷³ If the parties fail to reach a settlement or agreement on the issues at the negotiating table, the LRA requires that the matter be referred to a bargaining or statutory council with jurisdiction over the sector and area in which the dispute arose, or to the CCMA for conciliation, if there is no bargaining or statutory council with jurisdiction.⁷⁴ The council or the CCMA must attempt to break the deadlock or resolve the dispute through the process of conciliation.⁷⁵ After the matter has been with the council or CCMA for a period of thirty (30) days, or after the council or CCMA has issued a certificate of non-resolution of the dispute, the process can continue.⁷⁶

⁷¹ Section 65(3) of the Labour Relations Act 28 of 1956 provides that any person who contravenes subsection (1) shall be guilty of an offence. See also *Paper Wood & Allied Workers Union v Uniply (Pty) Ltd* (1985) 6 ILJ 255 (IC) at 260H-I.

⁷² See sections 64(1) and 65(1) of the LRA regarding the requirements for a protected strike.

⁷³ *County Fair Foods v Oil Chemical General and Allied Workers Union & others* (2000) ZALC 40 (LC) at 4. Accessed at www.saflii.org/za/cases/ZALC/2000/40.pdf on 25/02/2016; and *SACCAWU v Edgars Stores Limited* (1997) 18 ILJ 1064 (LC) at 1075B.

⁷⁴ Section 64(1)(a) of the LRA.

⁷⁵ *Idem* section 115(1)(a).

⁷⁶ *Idem* section 64(1)(i) and (ii).

During this 30 day period, or before a certificate of non-resolution is issued, the grievance or issue in dispute must be considered by the council or CCMA with the view of finding a solution.⁷⁷ The issue of a certificate of non-resolution does not depend on other procedural processes.⁷⁸ This means that employees can go on strike after thirty days have lapsed or when a certificate is issued, whichever comes first regardless of whether further negotiations take place. The LRA allows the commissioner of a council or the CCMA to determine the process to be used when he or she attempts to resolve the dispute through conciliation.⁷⁹ This could include facilitation which is better suited for complex disputes.⁸⁰ Such a facilitation process entails a procedure whereby the presiding commissioner will try to assist the parties to reach consensus. The idea is that the solution must come from the parties themselves rather than that the commissioner imposes a resolution on the parties. This process encourages the parties to attempt to resolve their disputes at operational level rather than employing the skills of other people, or by engaging in lengthy and/or complicated processes that waste time and money.⁸¹

In *Edelweiss Glass & Aluminium (Pty) Ltd v National Union of Metalworkers of SA & Others*,⁸² NUMSA had demanded certain organisational rights from the employer. The employer was willing to grant some of these rights but not all of them. NUMSA referred the matter to the CCMA, after which the union lodged a number of other issues with the CCMA that had not been tabled in the earlier negotiations. One of the new issues was a demand that employees receive a 13th cheque. The union went on strike after the certificate of non-resolution in respect of the organisational rights had been issued, but not in respect of the 13th cheque. The employer took the view that the strike was unprotected because the demand regarding the 13th cheque had not been included in the certificate of non-resolution. The strikers were consequently dismissed on the basis of their participating in an unprotected strike. The Labour Court found that the

⁷⁷ *Road Accident Fund v SA Transport & Allied Workers Union & others* (2010) 31 ILJ 2168 (LC) at 2176A-B. See also *Strautmann v Silver Meadows Trading 99 (Pty) Ltd t/a Mugg and Bean Suncoast & others* (2009) 30 ILJ 2968 (LC) at 2971C; and *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v National Union of Mineworkers & others* (2010) 31 ILJ 371 (LC) at 376D.

⁷⁸ *Road Accident Fund v SA Transport & Allied Workers* (note 77, chapter 2) at 2176A-C.

⁷⁹ Section 135(3) of the LRA.

⁸⁰ *University of Witwatersrand Johannesburg v Commissioner Hutchinson & others* (2001) 22 ILJ 2496 (LC) at 2498B and *Eskom v NUMSA & others* (2002) 23 ILJ 2208 (LAC) at 2212D.

⁸¹ It provides a simple procedure for the resolution of labour disputes, see section 115(1) of the LRA.

⁸² (2012) 1 BLLR 10 (LAC).

strike was protected because the union had not dropped its demand regarding the granting of organisational rights.⁸³ The court then went on to make the point that parties trying to resolve a dispute that had spilled over into a strike, were entitled to place any proposal on the table in order to attempt to resolve the dispute.⁸⁴ The LAC confirmed the decision of the Labour Court and held that the articulation of the 13th cheque did not change the protected strike into an unprotected strike unless the strikers used the protected strike as leverage to achieve other objectives in respect of which no strike action could be taken.⁸⁵

The LRA provides that referral of the issue in dispute for conciliation to the CCMA or a council with jurisdiction, need not be complied with in the following circumstances:

“where the parties to the dispute are members of a bargaining council, and the dispute has been dealt with by that council in accordance with its constitution; where the strike complies with the procedure in a collective agreement; where employees strike in response to a lock-out by their employer that does not comply with the provisions of the LRA; where the employer locks out the employees in response to their taking part in a strike that does not comply with the LRA; or where the employer fails to comply with the requirements of subsections (4) and (5).”⁸⁶

3.1.2 The giving of notice

The LRA requires that employees give their employer forty-eight (48) hours written notice of their intention to commence a strike.⁸⁷ Where the issue in dispute relates to a collective agreement concluded in a council, notice must be given to that council.⁸⁸ If the employer belongs to an employers’ organisation that is party to the dispute, notice must be given to that employers’ organisation.⁸⁹ In such a case it is not necessary to give notice to the employer as well. Where a union had given notice of an industry-wide strike to the relevant bargaining council and to its employers’ organisation, but had not specifically given notice to the employer who fell within the

⁸³ *NUMSA & Others v Edelweiss Glass & Aluminium (Pty) Ltd* (2009) 11 BLLR 1083 (LC) at 1097E-1098B.

⁸⁴ At 1098F.

⁸⁵ *Edelweiss Glass & Aluminium (Pty) Ltd v National Union of Metalworkers of SA & Others* (note 83, chapter 2) at 20E-F.

⁸⁶ Section 64(3) of the LRA.

⁸⁷ *Idem* section 64(1)(b).

⁸⁸ *Idem* section 64(1)(b)(i).

⁸⁹ *Idem* section 64(1)(b)(ii).

registered scope of the council, the notice nevertheless complied with the requirements of s 64(1)(b) of the LRA 1995, and the applicant's employees are entitled to take part in the strike action.⁹⁰

By implication, the forty-eight (48) hour notice period applies to employees employed by any private enterprise. The LRA provides that where the State is the employer, it must be given a minimum of seven (7) days' notice.⁹¹ These notice periods are considered reasonable to allow employers to prepare themselves for the impending action and devise some means to avoid the strike and its harsh consequences. In preparing for a strike, the employer could consider hiring temporary workers or replacement labour to continue production⁹² or could consider acceding to the demands of the employees. These options available to employers were summarised in *Ceramic Industries Ltd t/a Betta Sanitary Ware & Another v NCBWU & Others*.⁹³ Here, the LAC argued that there were two reasons why notice of strike action had to be given:

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

In *Platinum Mile Investments (Pty) Ltd t/a Transition Transport v SA Transport & Allied Workers Union & others*,⁹⁵ employees were dismissed after they failed to attend the disciplinary hearing. The employees had participated in a strike to which the employer alleged was not protected. The appellant alleged that the reason for their dismissal was participation in a strike. The question was whether the strike was unprotected. The court held that the strike by employees was unprotected after the union had failed to comply with section 64(1)(b) read with section 64(2) of the LRA.⁹⁶

⁹⁰ *MAPC Trading (Pty) Ltd t/a Marauns Auto Paint Centre v National Union of Metalworkers of SA & others* (2011) 32 ILJ 940 (LC) at 943G-H.

⁹¹ Section 64(1)(d) of the LRA.

⁹² Section 76(1) of the LRA.

⁹³ *Ceramic Industries Ltd t/a Betta Sanitary Ware & another v NCBWU & Others* (1997) 18 ILJ 671 (LAC).

⁹⁴ At 676D-F. See also *SAA (Pty) Ltd v SATAWU* (2010) 31 ILJ 1219 (LC) at 1227J-1228A; and *Imperial Group (Pty) Ltd t/a Imperial Cargo Solutions v SA Transport & Allied Workers Union & others (1)* (2014) 35 ILJ 3154 (LC) at 3160E-F.

⁹⁵ (2010) 31 ILJ 2037 (LAC).

⁹⁶ At 2049C.

The question of whether employees employed by the same employer, but who do not belong to the trade union that called the strike, could join the strike without giving the employer a separate notice, or whether a separate or independent notice of their participation in the strike had to be given, was the matter for decision in the case of *SA Transport & Allied Workers Union & others v Moloto & Another*.⁹⁷ The Constitutional Court overruled the decision of the Labour Appeal Court in *Equity Aviation Services (Pty) Ltd v South African Transport & Allied Workers Union* which had held that employees who do not belong to a union that has given notice must each give their own notice to the effect that they too intend to strike.⁹⁸ The Constitutional Court held, through majority judgment, that SATAWU was recognised as bargaining agent for all the employees of the employer, unionised as well as the non-unionised employees.⁹⁹ It was also observed that SATAWU had entered into an agency shop agreement with the employer.¹⁰⁰ As a result SATAWU represented its members including the non-unionised employees who had then been dismissed for allegedly participation in an unprotected strike.¹⁰¹ It was held that the employer could not have been under the impression that the notice given by SATAWU was for its members only and nobody else.¹⁰² It was therefore unnecessary for the dismissed non-unionised employees to give their own notice to participate in the strike.

3.1.3 The content of the strike notice

The LRA does not specify what information should be contained in the strike notice. It only requires that the employer be given a written notice of 48 hours or seven (7) days in the case of the state.¹⁰³ Although it was unclear in the beginning what information would need to be included in order to constitute satisfactory notice, case law has given some direction in this regard. In *Public Servants Association v Minister of Justice & Constitutional Development & others*¹⁰⁴ the court held that it was not necessary to

⁹⁷ (2012) 33 ILJ 2549 (CC).

⁹⁸ At 185E-F.

⁹⁹ At 2568C.

¹⁰⁰ At 2568A.

¹⁰¹ At 2578E.

¹⁰² At 2578F.

¹⁰³ Section 64(1)(c) and (d) of the LRA.

¹⁰⁴ (2001) 22 ILJ 2303 (LC).

include the demand that formed the subject matter of the strike; the nature of the action that would be embarked upon; and the intended duration of the strike.¹⁰⁵

In *Ceramic Industries t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union*,¹⁰⁶ it was held that the 'strike notice must specify the precise day on which the strike will begin; it is not enough to state that the strike will commence at some future time'.¹⁰⁷ That the employees need not, however, specify the precise time of the day that the strike would commence was confirmed in the case of *County Fair Foods (A Division of Astral Operations Ltd) v Hotel, Liquor, Catering, Commercial & Allied Workers Union & others*¹⁰⁸ where the judge observed that a notice specifying that a strike will commence on a particular day but did not identify the time of commencement was not contrary to the LRA.¹⁰⁹

The above decision makes it clear that the minute or hour of the commencement of a strike need not be specified, although both cases endorse giving the employer a reasonably accurate idea of when the strike will commence. The employer must be able to ascertain from the notice period when the strike is likely to commence. The nature of the business of the employer also plays an important role in determining the time of giving notice of the commencement of the strike. Employees who work shifts, for example, will need to indicate that their strike will commence at the beginning of a particular shift.¹¹⁰ This will give the employer an indication which shift will be affected first and the opportunity to adjust his or her plans accordingly.

It is important that the notice of a strike should set out the issues with reasonable certainty to avoid ambiguities. The case of *Construction & Allied Workers Union & others v Modern Concrete Works*,¹¹¹ concerned the notice of a lock-out, but the court's findings apply to strike notices as well. The lock-out notice reads as follows:

¹⁰⁵ At 2321H-2322D.

¹⁰⁶ *Ceramic Industries t/a Betta Sanitary Ware v NCBWA* (note 93, chapter 2).

¹⁰⁷ At 676G-I. See also *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others* (1) (1998) 20 ILJ 260 (LAC) at 267G.

¹⁰⁸ (2006) 27 ILJ 348 (LC).

¹⁰⁹ At 361A. See also *Construction & Allied Workers Union & others v Modern Concrete Works* (1999) 10 BLLR 1020 (LC) at 1023D.

¹¹⁰ *Ceramic Industries t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union* (note 93, chapter 2) at 677A-B.

¹¹¹ *Construction & Allied Workers Union & others v Modern Concrete Works* (note 109, chapter 2).

“As a result of our meeting at the CCMA which failed to resolve the current dispute, we hereby give formal notification of our intention to lock out your members. You are further informed that we will make ourselves available for round table discussions in respect of the current dispute.”¹¹²

The court found the notice lacking because it did not specify the date of commencement of the lock-out, but it did hold that embracing all the issues in the catch-all reference ‘the meeting at the CCMA’, complied with the requirements for the contents of a strike notice.¹¹³

3.2 Consequences of a protected strike

Under the common law any conduct by an employee or employees that involved the deliberate withdrawal of labour, such as participating in a strike, was treated as breach of contract.¹¹⁴ Once it was established that employees were in breach of their contracts of employment, the employer was entitled to terminate the contracts of those employees participating in the strike, and to sue the organisers and/or the strikers themselves for damage resulting from the breach of contract and for any loss suffered.¹¹⁵

In terms of the LRA, a person does not commit breach of contract by taking part in a protected strike or any conduct in contemplation or furtherance of a protected strike.¹¹⁶ In return for compliance with the provisions of the LRA, the legislature offers employees who organise, encourage or participate in protected strikes, various forms of immunity from the negative common law consequences of the withdrawal of their labour. This immunity is not absolute because striking employees remain vulnerable as they can be dismissed for misconduct committed during the strike, as well as dismissal on the basis of operational requirements of the business, regardless of whether these possibilities arise as a direct result of the strike.¹¹⁷

¹¹² At 1021F.

¹¹³ At 1023F-I.

¹¹⁴ Grogan *Collective Labour Law* (note 42, chapter 2) at 183.

¹¹⁵ *Ibid.*

¹¹⁶ Section 67(2) of the LRA.

¹¹⁷ Whitear-Nel N ‘Can Unidentified Protected Strikers Engaging in Misconduct be Retrenched? *FAWU on behalf of Kapesi & Others v Premier Foods Ltd t/a Blue River Salt River*’ (2011) 23 SA Merc LJ 269 at 276.

In terms of the LRA, the dismissal of an employee for participating in a protected strike, or for indicating an intention to participate in such a strike is automatically unfair, and there is no defence that the employer can successfully raise against such dismissal.¹¹⁸ The LRA provides that employees who participate in a protected strike are protected against civil liability.¹¹⁹ This means that the employer cannot dismiss employees for the sole reason of their participation or their intention to participate in the protected strike.¹²⁰ Neither can the employer claim damages for any loss suffered, nor compensation for expenses incurred as a result of the protected strike. The courts are bound to refrain from intervening in a protected strike and from influencing the outcome of the power-play inherent in a strike.¹²¹

Case law has held that participation in a protected strike does not constitute breach of contract, but suspension of the operation of the contract of employment.¹²² A protected strike results in a situation where employees are temporarily relieved of their obligation to render service in terms of their contracts of employment and the employer is temporarily relieved of its obligation to remunerate the employees.¹²³

4 UNPROTECTED STRIKES

An unprotected strike is a strike that does not comply with the provisions of sections 64 and 65 of the LRA. Unprotected strikes are treated the same way as strikes were treated in terms of the common law, that is, as breach of contract for which the participants can be interdicted, sued for damages, or dismissed for failing to follow the applicable and relevant laws that regulate the contract of employment.¹²⁴ If employees strike, they cannot offer their services to the employer which is the primary duty of the employee in terms of the contract of employment.

¹¹⁸ Section 187(1)(a) of the LRA.

¹¹⁹ Section 67(6) of the LRA.

¹²⁰ Such dismissal will also be contrary to section 5(2)(c)(iii) of the LRA.

¹²¹ See *Afrox Ltd v SA Chemical Workers Union & others (2)* (1997) 18 ILJ 406 (LC) at 410D-F. Similar sentiments were expressed in *Fidelity Guards Holdings (Pty) Ltd v PTWU & Others* (1997) 9 BLLR 1125 (LAC) at 1132I.

¹²² *Food & General Workers Union & others v Minister of Safety & Security & others* (1999) 20 ILJ 1258 (LC) at 1264G.

¹²³ Section 67(3) of the LRA.

¹²⁴ *Idem* section 68(5).

In *Modibedi & others v Medupi Fabrication (Pty) Ltd*,¹²⁵ the union had embarked on an unprotected strike in contravention of a peace agreement. The court held that their behaviour had made continued employment relationship intolerable. Their subsequent dismissal was held to be not unfair.¹²⁶

4.1 Consequences of an unprotected strike

If a strike is unprotected, the employer is at liberty to take action against the striking employees. The employer can claim compensation or damages from the employees, if loss or damages as a result of the strike can be proved.¹²⁷ The Labour Court has powers to restrain them from continuing with their unprotected action.¹²⁸ The employer can also dismiss the employees for the mere reason of participating in the unprotected strike.

Dismissal is the harshest action that the employer can take against employees who participate in an unprotected strike. In *Transport & Allied Workers Union of SA & others v Unitrans Fuel & Chemical (Pty) Ltd*,¹²⁹ when members of TAWUSA who were in the

¹²⁵ (2014) 35 ILJ 3171 (LC).

¹²⁶ At 3193B.

¹²⁷ Section 68(1)(b) of the LRA.

¹²⁸ Section 68(1)(a) of the LRA provides that:

“(1) 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 Chapter, the Labour Court has exclusive jurisdiction (a) to grant an interdict or order a restrain-

(i) any person from participating in a strike or any conduct in contemplation or in furtherance of a *strike*; or

(ii) any person from participating in a *lock out* or any conduct in contemplation of a lock out

(b) to order the payment of just and equitable compensation for any loss attributable to the *strike, lock out, or conduct*, having regard to –

(i) whether –

(aa) attempts were made to comply with the provisions of this chapter and the extent of those attempts;

(bb) the *strike or lock-out* or conduct was pre-mediated;

(cc) the *strike or lock-out* or conduct was in response to unjustified conduct by another party to the dispute; and

(dd) there was compliance with an order granted in terms of paragraph (a);

(ii) the interests of orderly collective bargaining;

(iii) the duration of the *strike or lock-out* or conduct; and

(iv) the financial position of the employer, trade union or employees respectively.”

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

¹²⁹ (2013) 34 ILJ 1785 (LC).

employ of the respondent company went on strike in respect of a wage cuts and discrepancies which was prohibited in terms of a collective agreement concluded at the National Bargaining Council for the Road Freight Industry, the court ruled that the strike was unprotected and the subsequent dismissal of employees was held to be not unfair.¹³⁰ In *Mndebele & others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)*,¹³¹ the court found that the employees' boycott of the launch of wellness day function constituted an unprotected strike.¹³² Their subsequent dismissal was held to be for a fair procedure.¹³³

The employer's action is not limited to a claim for damages, dismissal or compensation. In *In2food (Pty) Ltd v Food & Allied Workers Union & others*,¹³⁴ an unprotected strike had been marred by violence and damage to property and the respondent trade union and employees had ignored an interim order interdicting the strike. The court subsequently found the union and its office-bearers in contempt of court, and fined the union the amount of R500 000.¹³⁵ However, this decision was overturned in the Labour Appeal Court (LAC).¹³⁶ The LAC held that it is crucial that one has to look at what the court ordered the union to do for such union to be held liable.¹³⁷ This must be stated clearly and without any ambiguity. The interdict must state clearly what action is mandatory and not elide the union's obligations with those of its members.¹³⁸ If the union fails to comply with the order of the court, then it should be held liable.¹³⁹

¹³⁰ At 1803F-G. See also *Buscor (Pty) Ltd v Transport & Allied Workers Union of SA & Others; Transport & Allied Workers Union of SA & Others v Buscor (Pty) Ltd* (J2316/2010, J1604/2010 (dated October 2013).

¹³¹ JS1017/09 (2012) ZALCJHB 87. Accessed at <http://www.saflii.org/za/cases/ZALCJHB/2012/87.pdf> on 8/03/2016.

¹³² At 48.

¹³³ At 53.

¹³⁴ (2013) 34 ILJ 2589 (LC).

¹³⁵ At 2592C.

¹³⁶ *FAWU v In2food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC).

¹³⁷ At 2771F.

¹³⁸ At 2771H-J.

¹³⁹ At 2773J-2774A. See also *FAWU v Ngcobo NO & another* (2013) 34 ILJ 3061 (CC) at 3073E.

5 SECONDARY STRIKES

This is a strike in support of a strike by workers employed by another employer.¹⁴⁰ A secondary strike does not include a strike over a demand that has been referred to a council if the strikers are employed within the registered scope of the council and they have a material interest in the demand of the main strike. It is noted that with a secondary strike, the employees are not in dispute with their employer and their action is not aimed at forcing concessions from him or her, but to make life more difficult for the employer of employees on the primary strike. The employees embarking on a secondary strike must ensure that the legal requirement for a protected secondary strike are complied with. A secondary strike will be protected if:

- the main or primary strike is protected;
- the secondary strikers give their employer a notice of seven days prior to taking the action; and
- the nature and extent of the secondary strike must be reasonable in relation to the possible direct or indirect effect it may have on the business of the primary employer.

If there was compliance with the above requirements, the employer may not take civil action against the employees.¹⁴¹ If a secondary strike is not protected, the same remedies that are available if the primary strike is not protected will apply. This means that the employer may apply to the Labour Court for an interdict to prohibit them from continuing with their unprotected action or dismiss employees for breach of contract of employment.¹⁴²

¹⁴⁰ Section 66(1) of the LRA.

¹⁴¹ *Idem* section 67(2).

¹⁴² *Idem* section 66(3).

6 PICKET ACTION

The Constitution guarantees that 'everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions'.¹⁴³ The wording of the Constitution consequently confers the right to picket and the other associated rights on anyone who wants to exercise them 'peacefully'. The wording does not single out employees as the only category of people entitled to exercise the right to picket, as it does for example, with the right to strike, which is only conferred on workers,¹⁴⁴ but confers the rights to assemble, demonstrate, picket and present petitions to 'everyone'.

A picket may be defined as the public expression by employees, who are already on strike, of their grievances against their employer in an effort to make their grievances known to the general public and other relevant constituencies; and to solicit support for their cause from the public and those constituencies.¹⁴⁵ It takes place where workers involved in a strike do not stay away from their place of work, but remain there and picket inside or outside the employer's workplace to gain more support for their cause. The workers do this by disseminating information and trying to persuade non-striking workers not to work and not to comply with any part of their employment contracts.¹⁴⁶ Other actions include attempts to persuade others not to do business with the employer, to persuade the employer to give in to the demands of the strikers, and to carry and wave placards. During the process, picketers toyi-toyi, chant slogans and dance inside or outside the employer's premises.¹⁴⁷

In this regard, a picket will constitute a technique for putting moral pressure on those who may be reluctant to participate in the strike, to join it; on replacement labour to refrain from providing their services to the employer; and on members of the public to

¹⁴³ Section 17 of the Constitution.

¹⁴⁴ *Idem* section 23(2)(b) of the Constitution.

¹⁴⁵ Du Plessis & Fouché *A Practical Guide to Labour Law* (note 17, chapter 1) at 392; and Van der Walt, Le Roux and Govindjee *Labour Law in Context* (note 17, chapter 1) at 213.

¹⁴⁶ Carrothers AWR, Palmer EE and Rayner WB *Collective Labour Law in Canada* 2nd ed (1986) at 609-610. See also *Laurens Division of BTR Dunlop Ltd v National Union of Metalworkers of SA & others* (1992) 13 ILJ 1405 (T); and *SACCAWU v Check One (Pty) Ltd* (note 54, chapter 1).

¹⁴⁷ Van Niekerk *et al Law@work* (note 7, chapter 1) at 421.

show solidarity with them by not associating themselves with the activities of the employer.

From the point of view of the strikers, every individual non-striking worker ought to be morally bound by the majority decision to picket and consequently to join the picket. A peaceful picket by workers at the entrance of the workplace is designed to place this moral duty on everyone who intends doing business with the employer. Nevertheless, an individual employee is still free not to join the picket that is in progress. This is so because no collective moral appeal can force an individual worker not to perform his or her duties in the workplace in terms of his or her contract of employment.

The purpose of a picket is not different from that of a strike. As is the case with a strike, the aim of picket action is to put economic pressure on the employer, or to increase the economic pressure caused by the strike, and to cause the employer economic loss in order to compel him or her to accede to the demands of the employees.

In addition to the loss of production the employer may suffer as a result of the strike, he or she may suffer loss of profit as a result of the picket, as customers or clients may feel unsafe doing business with the employer during the picket. Customers may take their business elsewhere and may cancel their orders if some had already been made. In the end, the relationship between the business and its clients will be severely damaged.

6.1 Picketing in terms of the LRA

Picketing is regulated in section 69 of the LRA. In terms of the LRA, a picket can only exist as an extension of a strike or accessory to it.¹⁴⁸ This means that the existence and legitimacy or otherwise of a picket depends on the existence and legitimacy or

¹⁴⁸ Section 69(1)(a) provides that it must be in support of a protected strike.

otherwise of a strike. The LRA restricts the right to picket only to employees and supporters.¹⁴⁹

The LRA requires parties to a dispute to enter into a picketing agreement, that will include the rules of conduct of picketers during the picket.¹⁵⁰ It is expected that when they enter into picketing agreement, the parties will include the rules of conduct of picketers during picket. To supplement its provisions, the LRA contains a Code of Good Practice: Picketing (Code).¹⁵¹ The Code echoes the tone of the Constitution when it states that when they picket, picketers should not be allowed to infringe on the constitutional rights of other persons.¹⁵²

6.2 The impact of the Labour Relations Amendment Act of 2014 on picketing

The Amendment Act substitutes subsection (6) of section 69 of the LRA with a new paragraph (a). Section 69(6) now reads as follows:

“the rules established by the Commission may provide for picketing by employees (a) in a place contemplated in section 69(2)(a) which is owned or controlled by a person other than an employer, if that person has had an opportunity to make representations to the Commission before the rules are established; or (b) on their employer’s premises if the Commission is satisfied that the employer’s permission has been unreasonably withheld.”

This provision might have arisen as a result of uncertainty where the employer, for example, is a tenant conducting its business inside a mall. When employees want to picket their employer, the landlord or the owner or controller of the mall may refuse such picket. It also becomes impossible to raise labour relations rules as there is no relationship between landlords and picketing employees. This was the case in *Fourways Mall (Pty) Ltd & another v SA Commercial Catering & Allied Workers Union & others*.¹⁵³ It was held that the lack of any relationship either contractual or statutory between the mall owners and the members of the union meant that the nature of the

¹⁴⁹ Section 69(1) of the LRA states that: ‘a registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating in (a) support of any protected strike; or (b) in opposition to any lock out.’

¹⁵⁰ Section 69(4) and (5) of the LRA.

¹⁵¹ Item 4 of the Code.

¹⁵² See item 6(5), (6) and (7) of the Code.

¹⁵³ (1999) 20 ILJ 1008 (W).

dispute between them arose not out of employment law but out of delict and law of property.¹⁵⁴

The amendments further inserted into subsection (8) of section 69, the words 'including a person contemplated in subsection (6)(a)...' Rycroft argues that the owner or controller of the premises where a picket is to take place has to give jurisdiction to the CCMA and Labour Court to hear a dispute referred by a party who is neither employer nor trade union.¹⁵⁵

The Amendment Act further added new subsections in section 69. These are:

- “(12) If a party has referred a dispute in terms of subsection (8) or (11), the Labour Court may grant relief, including urgent interim relief, which is just and equitable in the circumstances and which may include –
- (a) an order directing any party, including a person contemplated in subsection (6)(a), to comply with a picketing agreement or rule; or
 - (b) an order varying the terms of a picketing agreement or rule;
- (13) The Labour Court may not grant an order in terms of subsection (12) unless:
- (a) 48 hours' notice of an application seeking relief referred to in subsection (12)(a) or (b) has been given to the respondent; or
 - (b) 72 hours' notice of an application seeking relief referred to in subsection (12)(c) or (d) has been given to the respondent.
- (14) The Labour Court may permit a shorter period of notice than required by subsection (13) if the –
- (a) applicant has given written notice to the respondent of its intention to apply for the order;
 - (b) respondent has been given a reasonable opportunity to be heard before a decision concerning the application is taken; and
 - (c) applicant has shown good cause why a period shorter than that contemplated by subsection (13) should be permitted.”

It must be noted that there is an administrative error in the Amendment Act. Subsection (13)(b) requires that a notice of 72 hours be given to the respondent in terms of subsection (12)(c) or (d). There is neither subsection (12)(c) nor (d) in the Act. It might have happened that the editors or drafters did not realise that the Portfolio Committee had removed these provisions from the Amending Act.

¹⁵⁴ At 1014B-D.

¹⁵⁵ Rycroft 'Strikes and the Amendments to the LRA' (note 44, chapter 1) at 13.

Despite this error, the Amendment Act gives the Labour Court powers to vary the picketing rules or order the defaulting party to comply with the rules while process is urgent and interim.¹⁵⁶ However, a notice of 48 hours is still needed to inform the respondent of intention to approach the Labour Court for a relief. The question is whether the 48 hours' notice is appropriate to an action that is urgent. However, subsection (14) makes an exception to the 48 hours' notice and requires that the respondent be given an opportunity to make representation before the Labour Court takes a decision concerning the application, provided certain requirements have been complied with.

6.3 Protected picket action

There are certain requirements with which a picket must comply in order to enjoy protection. The requirements for a protected picket are the following:

- the picket must be in support of a protected strike; or
- in opposition to any lock-out.¹⁵⁷

As picket is an action to further a strike, it is necessary for the strike that the picket supports, to be protected in order for the picket to enjoy protection.¹⁵⁸ If a picket complies with the above requirements, the picket is said to be protected and the employer cannot institute civil action against employees who participate in it.¹⁵⁹ Some of the actions that the employer will not be able to take against picketing employees include dismissal, action for breach of contract or any disciplinary action against them, unless they commit misconduct during the industrial action.¹⁶⁰

¹⁵⁶ Section 69(12) of the LRA as amended.

¹⁵⁷ Sections 69(1) of the LRA.

¹⁵⁸ See Chapter 2 above.

¹⁵⁹ Item 1(6) of the Code of Good Practice: Picketing.

¹⁶⁰ *Idem* section 67(4) and (5).

A picket will also be protected if it is in response to a lock-out by the employer.¹⁶¹ Our law distinguishes between offensive¹⁶² and defensive lock-out.¹⁶³ A picket will, however, be unprotected if the employees fail to comply with section 69(1) of the LRA. Participation in an unprotected picket can have adverse effects on employees. Some of the consequences of participation in unprotected picket would be that the employer can dismiss the picketing employees, ask the court for interdict to stop them from continuing with their unprotected picket and claim damages for the economic loss suffered as a result of the picket.¹⁶⁴

7 PARTICIPANTS OF A PICKET

The LRA provides that a registered trade union may authorise a picket by its members and supporters to support a protected strike or to oppose a lock-out.¹⁶⁵ This means that any person can join the employees on picket as a 'supporter' and participate in a picket because the intention of the picket is to persuade other members of the public to show solidarity with them by adding moral support to the picket that is underway.¹⁶⁶

It is believed that if this happens, the employer will feel the pressure and ultimately agree to the demands of the picketers. It is also possible that the wording of the LRA creates opportunities for 'would be' supporters to commit unlawful acts under the guise of supporting the picketers. The possibility of committing unlawful acts during such picket is high as supporters might not have interest in protecting the image of the union and relationship with the employer. In other instances, people have looted shops and none could establish with certainty under such circumstances that it was one or more of the members of the union or it was 'supporters' that caused the acts. In *Ekurhuleni Metropolitan Municipality v SATAWU & others*¹⁶⁷ a large number of essential service

¹⁶¹ *Idem* section 69(1)(b).

¹⁶² 'An offensive lock-out occurs where the employer, as part of the collective bargaining process, seizes the initiative and excludes employees from the workplace in order to compel them to accept its demands', see *Technikon SA v NUTESA* (2001) 22 ILJ 427 (LAC) at 431H.

¹⁶³ 'A defensive lock-out occurs where an employer excludes employees who have already embarked on a strike from the workplace in order to get them to accede to its demands', see *Technikon SA v NUTESA* (note 162, chapter 2) at 431I.

¹⁶⁴ Section 68(1) and (2) of the LRA.

¹⁶⁵ *Idem* section 69(1).

¹⁶⁶ Du Plessis & Fouché *Practical Guide to Labour Law* (note 17, chapter 1) at 362.

¹⁶⁷ (2011) 5 BLLR 516 (LC).

employees had joined a picket convened by SAMWU. The behaviour of many went well beyond the bounds of legitimate picketing. Vehicles were damaged, non-striking employees assaulted, an electricity substation and water pipes sabotaged, sewage permitted to flood streets and garbage strewn about.

The court, per Revelas J, referring to *Woolworths (Pty) Ltd v SACCAWU & Others*,¹⁶⁸ held that:

“The Labour Court has always been, and probably always will be, sympathetic to employers in a situation where violence has erupted during a strike. It is against such behaviour that the court would readily grant interdicts. However, there should be some limitation to the granting of such interdicts in situations where the respondents are not properly identified. The court should always take into account what attempts have been made to identify persons against whom it issues such orders..... even if just a few names were put forward, I would have been in a position to grant such an interdict, in the knowledge that the order is directed against at least some specific individuals who have been shown to behave in ways consistent with the allegations in the founding affidavit.”¹⁶⁹

In short, it becomes difficult to link a particular perpetrator as a member of the union that called the picket and for these reasons unions deny liability.

The Labour Relations Bill of 2012 had suggested that the word ‘supporters’ in subsection 69(1) in the current LRA be removed so that registered trade unions will be able to authorise picketing by its members only.¹⁷⁰ This proposed provision has since been rejected and was not included in the final legislation (the Labour Relations Amendment Act of 2014). This is due to the influential position of the Congress of South African Trade Unions (COSATU) at National Economic Development and Labour Council (NEDLAC) to influence proposed legislation. Union federation can influence proposed legislation. In this, COSATU was not comfortable with some of these proposal as it believes that they will take away workers’ right to participate in industrial action.¹⁷¹

Had this provision passed into the final legislation, it would have been applauded as a well-considered move by the legislature. Unions have been in the habit of placing

¹⁶⁸ (2006) 27 ILJ 1234 (LC).

¹⁶⁹ At 1236.

¹⁷⁰ See clause 9 of the Labour Relations Bill of 2012.

¹⁷¹ Rycroft ‘Strikes and the Amendments to the LRA’ (note 44, chapter 1) at 7.

liability for damage caused during industrial action on non-union members, and alleging that their members did not cause the damage.¹⁷² This unwillingness by trade unions to take responsibility has made it difficult for victims of such damage to prove that the perpetrators were indeed members of the union that organised the picket, because the victims would need to identify the wrongdoers.

This uncertainty regarding liability has created room for unions to escape liability because of the lack of evidence to link the union to the damage. Had the proposed amendment passed into the new labour amendment legislation, this position would have changed as labour legislation in conjunction with the Regulation of Gatherings Act¹⁷³ would have created accountability for the union that organised the strike or picket, something which has been lacking.¹⁷⁴ This would have put pressure on unions as conveners of strikes and pickets to ensure that 'only' registered members of the union participate in the picket they organise. They would also have to be more vigilant in monitoring the progress of the action of the picket and report or discipline any member who disturbs the peaceful running of the picket. One can assume that allowing 'only' members to participate in a picket, unions will minimise their chances of being accused of sanctioning unacceptable behaviour by the picketers.

8 LOCATION OF PICKETING

The LRA provides that 'a picket may be held in any place to which the public has access but outside the premises of an employer; or with the permission of the employer, inside the employer's premises'.¹⁷⁵ There is, however, no definition in the LRA of what constitutes an 'employer's premises'. It is, however, assumed that an employer's premises refer to the 'place where he or she conducts his or her business'.¹⁷⁶ The employer can be the owner of the place where he or she conducts

¹⁷² Mabuza 'Unions could be held liable for damages in freight strike' (note 39, chapter 1).

¹⁷³ Act 205 of 1993.

¹⁷⁴ Section 11(1) of the Regulation of Gatherings Act.

¹⁷⁵ Section 69(2) of the LRA.

¹⁷⁶ This is referred to as the workplace. A workplace is defined in section 213 of the LRA as 'the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.'

business,¹⁷⁷ or he or she can also be a tenant of the place where he or she conducts business.¹⁷⁸ If the employer is a tenant in the premises, for example, in a shopping mall, the Labour Relations Amendment Act provides that such owner or the landlord/lady must be given an opportunity to make representations to the Commission before the rules are established.¹⁷⁹

8.1 Outside the premises of the employer

Picketing usually takes place outside the employer's premises. Picketers do not need the permission of the employer to picket outside the premises of the employer.¹⁸⁰ It is necessary for the effectiveness of a picket that members of the public have access to the place where the picketing takes place.¹⁸¹ It is argued that the employees would be picketing outside the place of business of the employer if their action takes place outside the gate and don't prevent other workers or clients from entering the premises of the employer.¹⁸²

The fact that the picketing area must be accessible to the public affords picketers the opportunity of trying to persuade their audience not to do business with the employer. In this way, the picket gets publicity and media coverage at the expense of the employer whose reputation and business image may be damaged in the eyes of existing and potential customers and clients. If a picket, however, takes place outside the workplace and spills over into a public road, the municipal council needs to be notified and agreement on how picketers should conduct themselves might be imposed by the municipal council concerned.¹⁸³

Since picketing includes a variety of activities,¹⁸⁴ it is better if the chanting of slogans, waving of placards and all the other activities associated with picket action should be

¹⁷⁷ See *Fourways Mall (Pty) Ltd & another v SA Commercial Catering & Allied Workers Union & another* (note 153, chapter 2).

¹⁷⁸ See *Woolworths (Pty) Ltd v SACCAWU* (note 168, chapter 1); *Lomati Mill Barberton v (a division of SAPPI Timber Industries) v Paper Printing & Allied Workers Union & others* (1997) 18 ILJ 178 (LC).

¹⁷⁹ Section 69(6)(a) of the LRA as amended by the Labour Relations Amendment Act of 2014.

¹⁸⁰ Section 69(2)(a) of the LRA.

¹⁸¹ *Ibid.*

¹⁸² Item 6(7)(a) of the Code.

¹⁸³ See section 3(1) and (3) of the Regulation of the Gatherings Act.

¹⁸⁴ *Picardi Hotels Ltd v Food & General Workers Union & others* (1999) 20 ILJ 1915 (LC).

performed outside the premises of the employer because of the possibility that they could interfere with production if the workplace is a factory.¹⁸⁵

8.2 Inside the premises of the employer

Picketing outside the employer's premises seldom cause problems unless the conduct of picketers is contrary to the picketing rules. The problem arises, however, where employees want to picket inside the premises of the employer. Picketing inside the premises of the employer sometimes causes a lot of controversy. Employers are usually reluctant to allow picketers inside their premises.¹⁸⁶ Picketers, on the other hand, are often of the view that their picket will have more impact if they can picket inside the premises of the employer.

The LRA provides that:

"Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1) may be held: (a) in any place to which the public has access but outside the premises of the employer; or (b) with the permission of the employer, inside the employer's premises."¹⁸⁷

The phrase 'despite any law regulating the right of assembly' means that if there is another law that regulates the right of assembly, such as the Regulation of Gatherings Act and/or municipal by-laws that do not allow gatherings in particular places without the permission of the local authority, the LRA enjoys preference.¹⁸⁸ In addition, the Code provides that if a picket complies with the requirements of the LRA, the ordinary laws that regulate the right of assembly do not apply.¹⁸⁹ These laws include the common law, municipal by-laws and regulations issued in terms of the Regulation of Gatherings Act.¹⁹⁰

¹⁸⁵ Section 69(2) of the LRA.

¹⁸⁶ See *Fourways Mall (Pty) Ltd & another v SA Commercial Catering & Allied Workers Union & another* (note 153, chapter 2).

¹⁸⁷ Section 69(2)(a) of the LRA.

¹⁸⁸ See *Grogan Collective Labour Law* (note 42, chapter 2) at 308.

¹⁸⁹ Item 1(6) of the Code.

¹⁹⁰ *Ibid.*

As mentioned above, a picket may take place inside the employer's premises if the employer grants permission.¹⁹¹ This means that picketers do not enjoy an unqualified right to picket inside the employer's premises unless the parties had picketing rules in place which allow for this.¹⁹²

Permission to picket inside the employer's premises may not be unreasonably withheld by the employer.¹⁹³ In order to determine whether the decision to refuse permission to picket inside the premises is reasonable or unreasonable, the Code lists factors that should be taken into account, namely:

“the nature of the workplace, for example, a shop, factory, mine, etc.;

the particular situation of the workplace, for example, distance from place to which the public has access, accommodation of employees situated on the employer's premises, etc.;

the number of employees that will take part in the picket inside the employers' premises;

the areas designated for the picket;

the time and duration of the picket;

the proposed movement of persons participating in the picket;

the proposals by the trade union to exercise control over the picket; and

the conduct of the picketers.”¹⁹⁴

If the employer unreasonably refuses to permit picketing inside the premises, a CCMA commissioner may prescribe picketing rules which permit picketing inside the employer's premises.¹⁹⁵ Where there is a danger that picketing inside the employer's premises could be a threat to life or the property of the employer, or that it would interrupt production, the CCMA will seriously consider limiting the picket action outside the employer's premises.¹⁹⁶

The question of when the refusal by an employer would be regarded as 'unreasonable' is not yet clear. There are no reported cases in which 'reasonableness' in this context was addressed or explained in detail.¹⁹⁷ The absence of decided cases is probably

¹⁹¹ Section 69(2) of the LRA.

¹⁹² *Idem* section 69(4) and (5).

¹⁹³ *Idem* section 69(3).

¹⁹⁴ Item 5(1) of the Code.

¹⁹⁵ Section 69(6) of the LRA.

¹⁹⁶ *COWUSA & others v CCMA & others* Case No. JR3124/12 at 2.

Accessed at <http://www.saflii.org/cases/ZALCJHB/2013/6.pdf> on 9/03/2016.

¹⁹⁷ The *Concise English Dictionary* 5th ed (1964) Oxford Clarendon Press defines 'rational' as 'endowed with reason, reasoning; sensible; sane, moderate, not foolish or absurd or extreme; of or based on reasoning or reason, rejecting what is unreasonable or cannot be tested by reason in religion or custom.'

due to the fact that trade unions that are refused permission to picket inside the premises of the employer, have the immediate remedy of approaching the CCMA for the establishment of picketing rules.¹⁹⁸ Unions also have the right to approach the Labour Court to claim that their right to picket is being undermined.¹⁹⁹ The Labour Court will make an order that is just and equitable including issuing an order to force compliance with the picketing agreement or rule; or an order varying the terms of the agreement or rule.²⁰⁰

In order to determine what constitutes reasonable or unreasonable conduct, one has to make use of certain rules of administrative law in labour law. The rationality test,²⁰¹ as developed in administrative law through the cases, may be of assistance in this regard.²⁰² The rationality test as discussed in *Carephone (Pty) Ltd v Marcus NO & Others*²⁰³ and *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others*²⁰⁴ applies to the determination of the reasonableness or otherwise of the refusal of the employer. In terms of this test the decision by the employer not to allow picketing inside the premises must be justifiable in relation to the reasons given for it. In this regard, a decision would be irrational if no reasonable person would come to the same conclusion.²⁰⁵

The purpose of a picket, that of persuasion, will be defeated if permission to picket on the employer's premises is unreasonably withheld, as many people, especially those on duty, will not see the picket taking place, which will deprive picketers of the opportunity to influence those employees who are not on strike and to persuade them to join the strike and picket. In *Woolworths (Pty) Ltd v SACCAWU*,²⁰⁶ the court observed that to prohibit access to shopping malls would emasculate picketers if the

¹⁹⁸ Section 69(4) of the LRA.

¹⁹⁹ *Idem* section 69(8).

²⁰⁰ Section 69(12) of the LRA as amended by the Labour Relations Amendment Act of 2014.

²⁰¹ Such test must be an objective one. See *Laurens Division of BTR Dunlop Ltd v National Union of Metal Workers of SA and others* (note 146, chapter 2).

²⁰² *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 ILJ 1425 (LAC); *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (2001) 22 ILJ 1603 (LAC); and *Pharmaceutical Manufacturers Association of SA In Re: Ex Parte Application of the President of the RSA* (2000) 3 BCLR 241 (CC).

²⁰³ *Carephone (Pty) Ltd v Marcus NO & Others* (note 202, chapter 2).

²⁰⁴ *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (note 202, chapter 2).

²⁰⁵ *Carephone (Pty) Ltd v Marcus NO & Others* (note 202, chapter 2) at 1434B-E. See also *Council of Civil Service Unions v Minister of State for the Civil Service* (1985) AC 374 (HL) at 410; *Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Limited* (2004) 4 SA 490 (CC) at 515D.

²⁰⁶ *Woolworths (Pty) Ltd v SACCAWU* (note 168, chapter 1) at 1236H.

employer is housed in a mall. In *Fourways Mall (Pty) Ltd & Another v SACCWU & Another*,²⁰⁷ a dispute arose regarding the physical location of the picket. A protected strike was in progress against one of the tenants in the shopping mall and a picket was called in support of the strike. While picketing against the specific employer, the picketers also blocked the entrances to the mall and other shops in the mall, and they intimidated the customers, other tenants and other employees of the mall. The union was ordered to desist from interfering with vehicles and traffic entering or leaving the applicant's premises and also to desist from interfering with, assaulting or intimidating the replacement workers and any other employees who wished to work.²⁰⁸

In terms of the Code, the nature of the employer's workplace must be taken into account when the reasonableness of the refusal to picket inside the premises is considered.²⁰⁹ If the workplace is situated in the premises of someone else, for example a business located in a shopping mall, the danger exists that picketing on the premises could go beyond what was intended, but on the other hand, it must be remembered that the purpose of striking and later picketing, is to put pressure on the employer to accede to the union's demands through the withdrawal of labour.²¹⁰ If the business of the employer continues to run as normal with the picketing taking place outside the employer's premises, the pressure of the picket on the employer will be reduced to mere singing and the chanting of slogans, which might not contribute to a resolution of the dispute between the parties. This is one of the many reasons why employers situated in shopping malls have been very reluctant to grant unions the right to picket inside their premises.²¹¹

The Labour Relations Amendment Act of 2014 has, however, changed this position. It provides that a CCMA commissioner who is tasked with drawing up picketing rules, may provide for picketing in a place contemplated in section 69(2)(a) which is owned or controlled by a person other than the employer, if that person has had the opportunity to make representations to the Commission before the rules are

²⁰⁷ *Fourways Mall (Pty) Ltd & Another v SACCWU & Another* (note 153, chapter 2).

²⁰⁸ At 1017F-G.

²⁰⁹ See item 5(1) of the Code on the factors that must be taken into account to determine whether the employer's refusal to allow picketing inside his or her premises is reasonable.

²¹⁰ See the definition of a strike in section 213 of the LRA.

²¹¹ See *Lomati Mill Barberton (a division of SAPPI Timber Industries) v Paper Printing & Allied Workers Union & others* (note 178, chapter 2).

established.²¹² This amendment envisages the regulation of pickets in relation to third parties, such as, for example, the landlords of shopping malls. The proviso provides that the landlord must be given the opportunity to be heard before the rules are established.²¹³

9 PROTEST ACTION

The third type of industrial action discussed in this study is protest action. It is defined as the 'partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of a strike.'²¹⁴ One of the issues on which protest action can be based is, for example, high food prices. Unlike strikes, protest action is not confined to people who are employed by a particular employer, but involves people from society, in general, fighting for their socio-economic rights or interests. Protest action cannot be directed at an individual employer or a particular employers' organisation, but it is always directed at the makers of policies such as the government.

An example of protest action is the one that took place in 2012 which was convened by the COSATU against labour brokering and the e-toll system on the highway roads of the Gauteng Province. COSATU alleged that the system of labour brokering exploited workers, while e-tolling would affect the poor and divide society as it was affordable by only a certain class of people.²¹⁵

The purpose of protest action is limited to the promotion or defence of the socio-economic interests of people and excludes 'the remedying of a grievance or the resolving of a dispute in respect of any matter of mutual interest between employer and employee' which is the purpose of strike action. It is important that the matter

²¹² Section 69(6)(a) of the LRA as Amended by the Labour Relations Amendment Act of 2014.

²¹³ *Ibid.*

²¹⁴ Section 213 of the LRA.

²¹⁵ Saville M 'COSATU e-toll protest gains support.' Accessed at <http://www.iol.co.za/news/politics/cosatu-e-toll-protest-gains-support-1.1250343#.VfPeMBtUDIU> on 12/09/15.

promoted or defended must be of a socio-economic nature, and not of a political nature.²¹⁶

Protest action as a form of industrial action needs to be protected. In order to enjoy protection, it must comply with certain procedural requirements. These procedural requirements are that:

- employees must not be engaged in an essential service or maintenance service;
- the protest action must have been called or authorised by a registered trade union or federation;
- NEDLAC must have been given notice of the protest action, including the reasons for and the nature of the action;
- the matter giving rise to the protest action must have been considered by NEDLAC or any other appropriate forum in which the parties concerned are able to participate in order to resolve the matter; and
- the union or federation must give NEDLAC at least 14 days' notice of its intention to proceed with the protest action.²¹⁷

It is important to note that protest action can be called by a single union or a federation of trade unions. The union or federation of trade unions must serve notice on NEDLAC of its intention to call protest action and such notice must be considered by NEDLAC.²¹⁸ In *Business South Africa v COSATU*,²¹⁹ the court said the following about what should be considered by NEDLAC once the notice to call protest action is received:

²¹⁶ 'The distinction between strike and protest action is one which finds support in comparative international law where a differentiation is made between industrial action underpinning the collective bargaining process and a work stoppage for more 'political' purposes (such as the broad socio-economic interests of the workers) ...' *Business South Africa v COSATU & Another* (1997) 18 ILJ 474 (LAC) at 480C-D.

²¹⁷ Section 77(1) of the LRA.

²¹⁸ NEDLAC means the National Economic Development and Labour Council established by section 2 of the National Economic, Development and Labour Council Act 35 of 1994. One of its objectives as stated in section 5(1) is to consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament.

²¹⁹ (1997) 18 ILJ 474 (LAC).

“to enable the employer to weigh up the advantages of resolving the matter against the disadvantages of not doing so and to take steps to minimise the harm caused by protest action’ (in the words of s 77 (2)(b)(ii)). Protest action which is by definition the withdrawal of labour in one or another form, is pressure on the employer. By giving notice to NEDLAC in terms of section 77(1)(b) the trade union or trade union federation threaten to apply pressure. To the extent that it is within the power of the employer to resolve the matter, the employer must know, before it meets with the trade union or trade union federation at NEDLAC, at a minimum whether the pressure is to be applied to it, when the pressure will be applied, the nature of the pressure, and the duration of the pressure.”²²⁰

10 CONCLUSION

The right of workers to embark on and participate in industrial action is constitutionally entrenched.²²¹ In this chapter the principles that regulate the three types of industrial action (with the exclusion of the employer’s right to lock-out) are discussed. The discussion has noted that workers normally use their right to strike when there is disagreement or a deadlock in a dispute with their employer. In terms of the Constitution and the LRA, it is allowed that employees can show their unhappiness or dissatisfaction through strike action and picketing as it is considered a method of expression.²²² During the process, when they are exercising their right to strike or picket, the employer cannot unlawfully interfere with their actions, provided their conduct complies with certain prescribed statutory requirements and provided that there are no limitations that prohibit workers from embarking on a strike.²²³ If there was compliance with the prescribed requirements, their action will be protected, which means that no civil action can be taken against the strikers for any civil wrongs they may commit by taking part in the strike.²²⁴

Protection from civil liability entails that the employer cannot dismiss employees for not reporting to their work-stations during a protected strike and that the employer cannot claim damages for loss suffered as a result of work not being done. However, this immunity from liability applies only to the parties to the dispute and does not extend to people outside the industrial dispute, but who could, nevertheless, be partly or fully responsible for damage caused during a strike.

²²⁰ At 487F.

²²¹ Section 23(2)(b) of the Constitution.

²²² *Idem* section 16.

²²³ Sections 64(1) and 65(1) of the LRA.

²²⁴ *Idem* sections 67(6) and 69(7).

If there was non-compliance with the prescribed procedure, the strike or picket will be unprotected which means that civil action can be taken against those responsible.²²⁵

²²⁵ *Ibid.*

CHAPTER 3

CONSTITUTIONAL FRAMEWORK: THE IMPACT OF THE 1996 CONSTITUTION ON SOUTH AFRICAN LABOUR LAW

Summary

The Constitution contains the Bill of Rights where most fundamental rights including labour rights are entrenched. The rights to strike, picket as well as participation in union activities are derived from the Constitution. The Constitution is not the inventor of these fundamental rights as they are derived from international law. However, the rights in the Constitution are not absolute as they can be limited in terms of the limitation clause. The Labour Relations Act which is an example of a 'law of general application' limits the right of employees to participate in the activities of a trade union only to lawful activities. Such limitation will be justified as it will serve a legitimate purpose of preserving peace and ensuring that those who commit unlawful acts during industrial action bear the consequences. The victims will be able to claim damages for loss suffered and employers will be able to take any action against such employees which may include dismissal or seek a court interdict.

1 INTRODUCTION

The adoption of the Interim¹ and later the Final Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution) ushered in an innovative phase in the evolution of South African law.² The Constitution describes itself as 'supreme law' which provides the people of South Africa with the means to:

"heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights."³

Within the Constitution, there is a Bill of Rights which contains fundamental rights.⁴

¹ Act 200 of 1993.

² Van Niekerk *et al Law@Work* (note 7, chapter 1) at 35.

³ Preamble, to the Constitution. The transformatory character of the Constitution is further evidenced in its first section which describes the state as founded on the 'achievement of equality' (s 1), and s 7(2) which requires the state to 'respect and protect' as well as promote and fulfil the rights in the Bill of Rights.'

⁴ Chapter 2 of the Constitution.

The Constitution has made great changes in the area of labour law.⁵ Various pieces of legislation have been enacted to give effect to the constitutional ambitions of establishing a democratic society based on human dignity, freedom and equality.⁶ For example, the Labour Relations Act⁷ (LRA); Basic Conditions of Employment Act⁸ (BCEA) and Employment Equity Act⁹ (EEA) have been enacted to achieve the dream of a democratic society.

In addition, a perusal of recent judgments shows that labour law is one of the fastest developing area of law in the Republic.¹⁰ This leaves no doubt that labour law is an area which will be the subject of constitutional challenge more frequently in the future.

Although South Africa has made a remarkable transformation from an apartheid regime characterised by racial discrimination to a democratic form of government characterised by respect for human rights, the entire social and economic fabric is polluted by the exercise of rights in a way that unreasonably encroach on other peoples' rights. For example, the exercise by employees of freedom of association, in particular, the right to participate in the activities and programmes of a trade union affect the right of the members of society to not to be subjected to any form of violence.¹¹

The exercise of a right should not harm another person's right(s). So, the rights in the Bill of Rights are not absolute as they need to be exercised bearing in mind other peoples' rights. The Constitution makes provision for a method of limiting rights in the Bill of Rights where a need to limit such right(s) is necessary. The rights can only be

⁵ See section 23 of the Constitution.

⁶ Section 2 of the Constitution.

⁷ 66 of 1995.

⁸ Act 75 of 1997.

⁹ Act 55 of 1998.

¹⁰ See *SATAWU v Garvas and others* (2012) 33 ILJ 1593 (CC). . It should be noted that this matter was initially heard in the WCC as *Garvas & others v SA Transport & Allied Workers Union (Minister of Safety and Security, Third Party)* (2010) 31 ILJ 2021 (WCC). It then went on appeal to the SCA as *Garvis & others v SATAWU* (2011) 32 ILJ 2426 (SCA) and was finally decided by the CC as *South African Transport and Allied Workers Union and Another v Garvas and Others* (2012) 33 ILJ 1593 (CC). In the WCC case the applicant was cited as Garvas. In the SCA case Garvis was used and in the CC again Garvas. Also see *Xstrata South Africa v Association of Mineworkers and Construction Union and others* Case No J1239/13; *Mahlangu v SATAWU, Passenger Rail Agency of SA & Another, Third Parties* (2014) 35 ILJ 1193 (GSJ).

¹¹ Section 12(1)(c) of the Constitution.

limited in order to achieve a just society based on human dignity, equality and freedom.¹²

2 BACKGROUND TO THE CURRENT DEMOCRATIC ORDER

The history of South Africa is characterised by great divisions and discrimination on the basis of numerous grounds, but not limited to race, sex, marital status, religious beliefs, gender and ethnic or social origin. As a result, the South African society was divided between the white privileged society and the under-privileged black society. The result of these divisions was that white people enjoyed better quality of life while blacks had little opportunities to enhance their standard of living. Laws were made to discriminate against black people and advance the interests of the whites.¹³ The Explanatory Memorandum to the Employment Equity Bill provided that:

“Apartheid has left behind a legacy of inequality. In the labour market the disparity in the distribution of jobs, occupations and income reveals the effects of discrimination against black people. These disparities are reinforced by social practices which perpetuate discrimination in employment against these disadvantaged groups, as well as by factors outside the labour market such as the lack of education, housing, medical care and transport. These disparities cannot be remedied simply by eliminating discrimination. Policies, programmes and positive action designed to redress the imbalances of the past are therefore needed.”¹⁴

As a result of the apartheid regime, political parties and liberation movements that were active during such period resisted the system.¹⁵ Most of these political formations were, however, banned as they were seen as threat to the regime. This resulted in the eruption of political violence that claimed many lives during 1980s and early 1990s. During this period, the United Democratic Front (UDF) was formed and launched in Mitchells Plain in 1983.¹⁶ It was a united front made of churches, civic organisations, trade unions, student organisations and sports bodies. The main goal was to fight oppression.¹⁷

¹² *Idem* section 36(1).

¹³ Section 52 of the Constitution of South Africa Act 110 of 1983. See also Industrial Conciliation Act 11 of 1924; and Industrial Conciliation Act 28 of 1956.

¹⁴ GN 1840 GG 1840 of 1 December 1997 at 5.

¹⁵ These included the African National Congress (ANC), Pan Africanist Congress (PAC) and various other political formations such as the UDF around 1980s.

¹⁶ See www.sahistory.org.za/organisations/united-democratic-front-udf. Accessed on 2/03/2016.

¹⁷ *Ibid.*

The continued political violence and human rights violations which was a feature of the apartheid regime added pressure on the government to relook and perhaps revise its apartheid system. As a result of the pressure from various groups including international pressure through sanctions, political parties were unbanned in 1990 and political prisoners were released. The process of managing transition from the apartheid system to the new democratic order was an important aspect during this period. The Interim Constitution was then adopted to govern South Africa during the transitional period. The Interim Constitution sets out 34 principles with which the Constitution had to comply. After numerous negotiations, the Final Constitution was enacted with a Bill of Rights.¹⁸

Most of the individual rights are housed in the Bill of Rights. The most important rights in the area of labour law is the right to freedom of association, the right to strike, the right to picket and protest, as will be discussed below.

3 THE RIGHT TO FREEDOM OF ASSOCIATION

The right to freedom of association is the foundational right for any flourishing democracy.¹⁹ At the heart of the right to freedom of association lies the recognition of the communal nature of people and the need for people to exercise some of their rights as individuals in association with others of like disposition.²⁰ No man is an island and in fact, he or she must live in association with other people. This is often expressed in the Zulu phrase *umuntu umuntu ngabantu (ubuntu)* which literally means a person is a person because of support from other people. This Zulu phrase emphasises the communality and interdependence of the members of community and the fact that every individual is an extension of others.²¹ This means that people can better perform their duties well if they are placed in association with each other.

¹⁸ Chapter 2 of the Constitution.

¹⁹ De Vos P, Freedman W, Brand D, Garbers C, Govender K, Mailula D, Ntlama N, Sibanda S, and Stone L *South Africa Constitutional Law in Context* (2014) at 469.

²⁰ *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (1997) 2 SA 97 (CC) at 115F.

²¹ See *MEC for Education: Kwazulu-Natal and Others v Pillay* (note 2, chapter 1) at 524E-G.

The right to freedom of association supports and underpins many fundamental rights. For example, it may be difficult for people to present petitions, strike or protest if they do not have the right to freely associate or disassociate.

3.1 Freedom of association in international law

The entrenchment of labour rights in the Constitution signifies South Africa's commitment to respect international law.²² International law refers to a body of rules and principles which are binding on states in their relations with one another.²³ The Constitution contains specific provisions that emphasise the significance of international law in the Republic. Section 232 deals with the status of international law in relation to South African law and provides that 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' Section 233 requires a court, when it interprets legislation, to 'prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

Since international law forms part of our law, it is the duty of a municipal or national court to ascertain and administer the appropriate rule of international law. In *S v Makwanyane*,²⁴ the Constitutional Court held that:

"International law could be used as one of the tools of interpretation. International agreements and customary law provide a framework within which the Bill of Rights can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of the Bill of Rights."²⁵

²² See the International Covenant on Economic, Social and Cultural Rights of 1996 (hereafter the ICESCR) and the European Social Charter of 1961.

²³ Brierly JL *The Law of Nations* 6th ed (1963) at 1. See also Simpson G (ed) *The Nature of International Law* (2001) at 3.

²⁴ *S v Makwanyane* (1995) 3 SA 391 (CC).

²⁵ At 413J-414A. See also *Prince v President of the Law of Society, Cape of Good Hope* (1998) 8 BCLR 976 (C) at 98C-D; *Dawood & others v Minister of Home Affairs* (2000) 1 SA 997 (C) at 1033-1035; *Kirsh v Kirsh* (1991) All SA 193 (C) at 204; *Government of the RSA v Grootboom* (2001) 1 SA 46 (CC) at 63B-D.

Since the decision in *S v Makwanyane*, various courts in the Republic have turned to international instruments for guidance.²⁶

The Constitution as well as the LRA require the harmonisation of South African law with international law. One of the objectives of the LRA is 'to give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation.'²⁷ In addition, the LRA requires it to be interpreted in compliance with the public international law obligations of the Republic.²⁸

The United Nations' Declaration on Human Rights (UDHR) of 1948 recognises the positive and negative aspects of the right to freedom of association.²⁹ Article 20 provides that 'everyone has the right to freedom of association; and no one may be compelled to belong to an association.'

The most important international body in the area of labour is the International Labour Organisation (ILO). It deals with the rights of workers and relations amongst themselves or with their employer or employers' organisation. The ILO was created in 1919 as part of the Treaty of Versailles that ended World War I. It was formed out of humanitarian, security, political and economic considerations. Its Preamble states that the aim was to achieve peace using social justice.

It also proposed to secure peace against the background of worker exploitation in the industrialising nations of the time. Member states are bound to respect the principles contained in the ILO's Constitution. This is because freedom of association is a central element of the ILO's Constitution. The important ILO Conventions that specifically deal with the right of workers to organise are the Freedom of Association and Protection of

²⁶ *Ferreira v Levin NO* (1996) 1 SA 984 (CC); *S v Rens* (1996) 1 SA 1218 (CC); *Coetzee v Government of the RSA* (1995) 4 SA 631 (CC); *Bernstein v Bester* (1996) 2 SA 751 (CC); *Re Gauteng School Education Bill 1995* (1996) 3 SA 165 (CC); *National Coalition for Gays and Lesbian Equality v Minister of Justice* (1999) 1 SA 6 (CC); *Mohamed v President of the RSA* (2001) 3 SA 893 (CC); *Christian Education South Africa v Minister of Education* (2000) 4 SA 757 (CC); *Minister of Health v Treatment Action Campaign (No 2)* (2002) 5 SA 721 (CC).

²⁷ Section 1(b) of the LRA.

²⁸ *Idem* section 3(c). See also Rubin N 'International Labour Law and the Law of the New South Africa' (1998) 115 SALJ 685 at 686.

²⁹ Article 20.

the Right to Organise Convention³⁰ and the Right to Organise and Collective Bargaining Convention.³¹ South Africa has ratified both these conventions and bound to comply with their provisions.

The 87 Convention provides that:

“Workers and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.”³²

Convention 98 of 1949 provides that:

“Workers’ and employers’ organisations shall enjoy adequate protection against any acts of interference by each other or each other’s agents or members in their establishment, functioning or administration.”³³

There are other multilateral treaties that deal with the right to freedom of association. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR) of December 1966. Article 8(1)(a) of this Covenant protects ‘the right of everyone to form trade unions and join the union of their choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests.’ Article 22(1) of the International Covenant on Civil and Political Rights (ICCPR), also of December 1966, provides that ‘everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his or her interests’. Most countries, including South Africa, are party to the ICCPR.³⁴

³⁰ No 87 of 1948.

³¹ No 98 of 1949.

³² Article 3(1) of the Freedom of Association and Protection of the Right to Organize Convention.

³³ Article 2(1) of the Right to Organise and Collective Bargaining Convention.

³⁴ In 1998 South Africa ratified the International Covenant on Civil and Political Rights, Dugard J *International Law: A South African Perspective* 3rd ed (2005) at 316. Other countries that signed or ratified the convention include Algeria (1968), Argentina (1968), Belgium (1968) Botswana (2000), and Canada ratified in 1976.

3.2 The right to freedom of association and other labour rights in the Interim Constitution

The Interim Constitution of 1993 governed South Africa during the transitional period, that is, from April 1994 until February 1997. It laid the foundation for the drafting of the final Constitution which was adopted in December 1996 and came into effect on the 4th of February 1997.³⁵ The object of the Interim Constitution was held in *S v Makwanyane and Another*³⁶ as follows:

“The Interim Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”³⁷

The Interim Constitution contained 34 constitutional principles which served as guidelines to the constitution-makers and to which the final Constitution had to comply.³⁸ However, only principles XII and XXVIII are important for the labour relations rights. Principle XII provides that:

“Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.”

Principle XXVIII provides that:

“Notwithstanding the provisions of principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected.”

The right to self-determination and organisational control or autonomy heralded by these constitutional principles ensured that the old regime of racial oppression against the majority of the people of South Africa (Black Africans, in particular) under criminal penalty for the mere reason that they intend to form and/or join trade unions was

³⁵ *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (note 20, chapter 3).

³⁶ *S v Makwanyane and Another* (note 24, chapter 3).

³⁷ At 402E-F.

³⁸ Schedule 4 of the Interim Constitution.

abolished.³⁹ Under the current regime, unions and employers' organisations have the liberty to decide their processes and structural zones.⁴⁰ These rights have also found statutory embodiment in the LRA.⁴¹

3.3 Freedom of association in the 1996 Constitution

The Constitution of South Africa proclaims itself to be the supreme law of the Republic, a law or conduct that is contrary to one or more of its provisions is invalid.⁴² It provides that 'everyone has the right to freedom of association.'⁴³ In addition, the Constitution makes provision for the labour relations clause in section 23. It provides that:

- "(2) Every worker has the right –
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right –
 - (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation."⁴⁴

Other important rights that are guaranteed in the Constitution with bearing on labour rights include the right to equality,⁴⁵ dignity,⁴⁶ and freedom of assembly.⁴⁷

Moreover, the Constitution ensures that all the rights in the Bill of Rights may be enforced by the courts. Section 8 provides that:

- "(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b)

³⁹ The Industrial Conciliation Act 11 of 1924 was the first statute to provide for registration of employers' organisations and trade unions, but expressly excluded Black African workers from the definition of employee and were thus not allowed to join or form a trade union. This exclusion did not apply to Coloured and Indian workers. However, the Industrial Conciliation Act 28 of 1956 prohibited the registration of new non-racial unions and required existing non-racial unions to have racially separate branches and whites only executives.

⁴⁰ Section 23(4) of the Constitution. See also *Food & Allied Workers Union v Ngcobo NO & another* (note 139, chapter 2) at 3070E.

⁴¹ Section 8 of the LRA.

⁴² Section 2 of the Constitution.

⁴³ *Idem* section 8.

⁴⁴ *Idem* section 23.

⁴⁵ *Idem* section 9.

⁴⁶ *Idem* section 10.

⁴⁷ *Idem* section 17.

may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).”

This implies that all labour legislation are subjected to constitutional scrutiny to ensure that the rights of employees and employers are protected. While labour disputes are designed to be adjudicated by the responsible labour tribunal such as Commission for Conciliation, Mediation and Arbitration (CCMA); Labour Court (LC) and Labour Appeal Court (LAC); the Constitutional Court (CC) retains an important supervisory role to ensure that legislation giving effect to constitutional rights are properly interpreted and applied.⁴⁸

In labour relations, the right to freedom of association is the foundation of collective labour rights in the Constitution such as the right to strike, the right to picket and protest (Van Niekerk A, Christianson M, McGregor M & Van Eck *Law@work* 3rd ed (2015) at 366).

In the absence of the right to freedom of association the employees’ right to strike, picket and protest cannot be exercised as these rights can only be exercised by a group of workers.⁴⁹ These rights are communal in nature and can only be given effect to by a group of workers having the same goal. Similarly, the right to freedom of association will be of less value if the aim is not to achieve one or more of these other collective rights such as the right to strike, picket and protest.

The Constitutional Court has also emphasised the importance of the right to freedom of association in employment relations. Upon ratifying the Constitution, the importance of labour rights was confirmed by the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly*⁵⁰ in the following terms:

“Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanisms of strike action..... The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right.”⁵¹

⁴⁸ See section 172(1)(a) of the Constitution.

⁴⁹ See the definition of a strike in section 213 of the LRA.

⁵⁰ (1996) 4 SA 744 (CC).

⁵¹ At 795G-H.

The rights to strike, picket and protest are given to a 'worker' as individual but they are exercised as a concerted action. For example, to constitute a strike, the action of refusing to work must be performed by employees acting together as a group through a trade union or without a trade union, as long as they are more than one and the purpose is to attain a common goal.⁵² This takes the discussion to what constitutes a strike.

The LRA defines a strike 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."⁵³

A strike cannot be performed by an employee acting as an individual, since concerted action is required.⁵⁴ 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.

4 THE LABOUR RELATIONS ACT OF 1995

To give effect to the labour relations clause in section 23 of the Constitution, the latter mandated the legislature to enact legislation that will regulate collective bargaining and other labour matters.⁵⁵ As a result, the LRA was enacted in 1995. The main purpose of the LRA is to advance economic development, social justice, labour peace and the democratisation of the workplace.⁵⁶

Since its inception in November 1995, the LRA has made sweeping changes to the terrain of labour law in South Africa. Except that it seeks to advance labour peace and the democratisation of the workplace, the LRA attempts to give effect to section 27 of

⁵² See section 213 of the LRA.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Section 23(5) of the Constitution.

⁵⁶ Section 1 of the LRA.

the Constitution;⁵⁷ to give effect to international obligations incurred by South Africa as member state of the ILO;⁵⁸ and to serve as a statutory framework within which employees or their trade unions and employers or employers' organizations can collectively bargain to determine the terms and conditions of employment and other economic matters.⁵⁹

5 LIMITATION OF RIGHTS

The rights entrenched in the Bill of Rights in the Constitution are not absolute as they may be limited by the rights of others and/or the competing social interests.⁶⁰ This implies that when a person exercises one or more of the rights in the Bill of Rights, a careful consideration must be taken to not infringe or encroach on the rights of others unless there is justification for doing so. Depending on the circumstances, one's right may not be exercised as he or she wishes but account should be taken of other people's rights during such process.

The Constitution acknowledges that when two or more rights in the Bill of Rights are exercised, a measure of conflict may arise. In anticipation for this, the Constitution has in place the limitation clause amongst its provisions.⁶¹ The limitation clause makes provision for a justiciable method of limiting rights in the Bill of Rights.

It should be noted that the limitation clause is not the only method by which rights in the Constitution may be limited. In terms of the Constitution, there are two ways in which rights could be limited. In addition to section 36(1), the rights can have internal provisions that limit that particular right. This is catered for in section 7(3) of the Constitution. This section provides that 'the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.' Although

⁵⁷ *Idem* section 1(a).

⁵⁸ *Idem* section 1(b).

⁵⁹ Collective bargaining has been defined as a process in which workers and employers make claims upon each other and resolve through a process of negotiation leading to collective agreements that are mutually beneficial. It also serves as a source of reference and regulates the rights and obligations of the parties involved in employment relations including the employers or employer organisations, Van Niekerk *et al Law@Work* (note 7, chapter 1) at 369.

⁶⁰ *S v Makwanyana* (note 24, chapter 3) at 436B.

⁶¹ Section 36(1) of the Constitution.

it is not clear what is meant by 'elsewhere' in this section, one may conclude that it refers to internal limitations in some of the rights in the Bill of Rights.⁶²

5.1 Internal limitation

As stated above, the general limitation clause in section 36(1) of the Constitution is not the only method recognized in the Constitution whereby rights can be limited as some sections in the Constitution contain their own internal limitations or modifications.⁶³ De Vos argues that these internal modifications limit the scope and content of the right and must be considered before considering section 36(1).⁶⁴ For example, the right to freedom of expression in section 16 of the Constitution contains three internal limitations or modifications which states clearly what is excluded from the ambit of the right to freedom of expression.⁶⁵

When it comes to labour relations, there are no internal limitations or modifications in the labour relations clause in the Constitution and there is no need to spend much time on this type of limitation in this context.

5.2 Limitation in terms of section 36(1)

The Constitution makes provision for a reasonable and justifiable method for the limitation of right(s) in the Bill of Rights through the limitation clause in section 36(1). This section provides as follows:

- “(1) The rights in the Bill of Rights may be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;

⁶² Examples of the rights with internal limitations include sections 9, 15, 24, 25, 26, 27, 29, 30, 31 and 32 of the Constitution.

⁶³ *Ibid.*

⁶⁴ De Vos *et al South African Constitutional Law in Context* (note 19, chapter 3) at 382.

⁶⁵ The types of conduct excluded from the protection of freedom of expression are: propaganda for war, incitement to violence and hate speech, section 16(2) of the Constitution.

- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

It is during the process of interpretation that the question of ‘reasonable and justifiable’ limitation or otherwise of a right is best answered by a court of law. The process of interpretation of the rights in the Bill of Rights is regulated by section 39(1) of the Constitution. This section requires the courts, when interpreting the rights in the Bill of Rights, to ‘promote the values that underlie the system of a democratic society based on human dignity, equality and freedom.’⁶⁶ In fact, section 39(1) of the Constitution gives guidance as to the manner in which rights have to be interpreted.

To determine whether the limitation of a right is justifiable, the courts in the Republic have developed and followed a two-stage enquiry.⁶⁷

5.2.1 Stage 1: Is there a right that has been infringed?

During the first stage of the enquiry into the limitation of rights, the determination is whether a right in the Bill of Rights have been infringed. This is a simple process that requires the identification of a right in the Bill of Rights that is alleged to have been infringed. In *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*,⁶⁸ the court held that, at this stage, it is necessary that there be an examination of the content and scope of the relevant protected right; and the effect of the impugned enactment to see if there is any limitation of the right.⁶⁹

In *Harksen v Lane NO and Others*,⁷⁰ the issue before the court was the constitutionality of section 21 of the Insolvency Act⁷¹ which made provision for the unequal treatment of the property of solvent spouses in relation to the property of their insolvent spouses

⁶⁶ Section 39(1)(a) of the Constitution. See also *Ex Parte Minister of Safety and Security and others: In Re: S v Walters and Another* (2002) 4 SA 613 (CC) at 630G.

⁶⁷ *S v Makwanyana* (note 24, chapter 3). See also *Harksen v Lane NO and others* (1998) 1 SA 300 (CC); *S v Zuma and others* (1995) 2 SA 642 (CC); *S v Williams and Others* (1995) 3 SA 632 (CC); *Ex Parte Minister of Safety and Security and others* (note 66, chapter 3).

⁶⁸ (2002) 4 SA 613 (CC).

⁶⁹ At 630G-631E.

⁷⁰ *Harksen v Lane No and others* (note 67, chapter 3).

⁷¹ Act 24 of 1936.

where the insolvent spouse had dealings or relationship with other people.⁷² The first enquiry was whether section 21 of the Insolvency Act differentiated between people or categories of people and in doing so, act contrary to section 9 of the Constitution.⁷³ It was held that the section indeed differentiated between the property of these categories of people.⁷⁴

In *SATAWU v Garvas*,⁷⁵ the Court held that the right to freedom of assembly in section 17 of the Constitution will be limited when participants have no intention of acting peacefully.⁷⁶ This proposition has support from the European Court of Human Rights which noted that:

“An individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.”⁷⁷

If there is no right that has been infringed, the matter ends there and there will be no need to proceed to the next stage of the enquiry.⁷⁸ By implication, if the conduct or measure limits the right in the Bill of Rights, the next question would be whether such infringement is reasonable and justifiable.⁷⁹ This is answered by the determination of stage 2 of the enquiry into the justifiability of the limitation of the right.

5.2.2 Stage 2: Can such limitation be justified?

5.2.2.1 In terms of a law of general application

Section 36(1) provides that ‘any limitation of a right in the Bill of Rights must be in terms of a law of general application taking into account the values that underlie an

⁷² *Harksen v Lane No and others* (note 67, chapter 3).

⁷³ At 318J-319A.

⁷⁴ At 326F.

⁷⁵ (2012) 33 ILJ 1593 (CC).

⁷⁶ At 1608G.

⁷⁷ *Ziliberberg v Molodova* ECHR (Application No 61821/00) at para 2. *Cisse v France* ECHR (Application No 51346/99) at para 50; and *Christians Against Racism & Fascism v United Kingdom* (1998) 21 DR 138 (Application No 8440/78) at para 4.

⁷⁸ At 631B.

⁷⁹ *South African National Defence Union v Minister of Defence* (1999) 4 SA 469 (CC) at 480E.

open and democratic society based on human dignity equality and freedom.⁸⁰ The question that arises is what would constitute a 'law of general application'.

There is no definition in the Constitution of what constitutes a 'law of general application'. However, there is only one thing that is clear from the reading of this phrase, that is, the law that limits the right must be 'general' in its application. This means that any conduct that infringes upon a right in the Bill of Rights must be sourced in 'law of general application', that is, something recognised by court as law. Examples of law recognized in the Republic include common law, legislation, customary law, court decisions and international law.

The law of general application may be interpreted to refer to the rule of law in the Republic that must apply impersonally and not just to a particular group of people.⁸¹ The importance of the rule of law in South Africa is demonstrated by the fact that it is a founding value entrenched in the Constitution.⁸² Van Niekerk states that a law of general application could include legislation, the common law and customary law but would probably exclude policy or practice (Van Niekerk A, Christianson M, McGregor M & Van Eck *Law@work* 3rd ed (2015) at 49). Currie argues that the 'law of general application' is 'general' because it applies to all the rights in the Bill of Rights and that all the rights may be limited according to the same criteria.⁸³ In *Dawood v Minister of Home Affairs*,⁸⁴ it was held that the 'law of general application' must be clear, accessible to everyone without cumbersome procedures to those who are affected.⁸⁵ Makgoro J argued that to qualify as law of general application, a rule must be accessible, precise and of general application.⁸⁶ She further states that people should be able to know of the law, and should be able to conform their conduct to the law and law should not target certain individual.⁸⁷

⁸⁰ This part of section 36(1) is repeated here for convenience purpose.

⁸¹ See Van Niekerk A 'Marikana: The perspective of the Labour Court' (2012) *SASLAW National Conference*.

⁸² Section 1(c) of the Constitution.

⁸³ Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (2013) at 152.

⁸⁴ (2000) 3 SA 936 (CC).

⁸⁵ At 966F. See also *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* (2009) 1 SA 565 (CC) at 575A-B; and *Pharmaceutical Manufacturers Association of South Africa and others: in Re Ex Parte President of the Republic of South Africa and others* (note 202, chapter 2) at 695B.

⁸⁶ See *President of the Republic of South Africa v Hugo* (1997) 4 SA 1 (CC) at 44B.

⁸⁷ *Ibid.*

It is common knowledge that the LRA is a recognized labour statute that regulates labour or industrial relations in the Republic. According to the explanation of the 'law of general application' there is no doubt that it does qualify as 'law of general application'. The reason for this conclusion is that the LRA as a piece of legislation applies to everyone in the labour relations' environment uniformly without unjustified exclusions.⁸⁸

In order to determine whether the limitation of a labour relations' right is in terms of the law, one has to consider the purpose of the LRA which is to advance economic development, social justice, labour peace and democratisation of the workplace.⁸⁹ The Constitution permits the limitation of rights by 'law' but requires the limitation to be justifiable. This means that the limitation must serve a purpose that most people would regard as important and not unlawful.⁹⁰ It must be shown that the limitation of a right is designed to achieve a particular purpose and such purpose cannot be achieved without limiting the right in question.⁹¹ If the exercise of the right to participate in the activities of a trade union (which may include strikes and pickets) involves the commission of violence, such conduct will be contrary to the general purpose of the Act, that is, the advancement of labour peace. In addition, the LRA specifically limits the right of members to participate in lawful activities of the union.⁹² If the industrial action has turned violent, such action will be unlawful. Firstly because it is contrary to the general purpose of the LRA and secondly; because participants will not be participating in a lawful activity of the union.⁹³

Case law has held that a strike or picket that is marked by violence may be declared unlawful. In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South Africa Workers' Union & others*,⁹⁴ the union and its members were interdicted after they prevented vehicles and persons from entering or leaving the premises of the employer,

⁸⁸ Section 1 of the LRA commits the Act to the advancement of labour peace and social justice.

⁸⁹ Section 1 of the LRA.

⁹⁰ *Meyerson D Rights Limited* (1997) at 36-43.

⁹¹ See *S v Manamela* (2000) 3 SA 1 (CC) at 43G-H.

⁹² Section 4(2)(a) of the LRA.

⁹³ *Ibid.*

⁹⁴ (2012) 33 ILJ 998 (LC) at 1004A.

interfering with traffic, intimidating and assaulting persons and damaging property on or near the premises.

The limitation of the right to participate in the activities of a trade union to 'lawful activities only' will serve a legitimate purpose, that is, to preserve peace.

5.2.2.2 Factors to be taken into account when limiting a right in the Bill of Rights

Section 36(1) requires that certain factors must be taken into account to establish reasonableness and justifiability of the limitation of a right in the Bill of Rights. This is referred to as the proportionality principle because it requires a consideration of the harm caused by the non-limitation of the right and the benefit to be gained from its limitation. These factors were developed by Chaskalson P in *S v Makwanyane* and later integrated into the Constitution.⁹⁵ They are the nature of the right; the importance of the purpose of limitation; the nature and extent of limitation; the relation between the limitation and its purpose; and the less restrictive means to achieve the purpose. The court in *S v Makwanyane* stressed that these factors are not exhaustive but indications as to whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity and freedom.⁹⁶ These factors are now discussed.

(a) *The nature of the right*

The Constitution does not specify that certain rights are more important than others, the so called hierarchy of rights but in practice, some rights weigh more heavily than others. For example, a right that gives more value to the ambitions of the Constitution will carry more weight than the right that does not promote such values.⁹⁷ Eventually, all rights in the Bill of Rights should aim to achieve one common goal, that is, the creation of an open and democratic society based on human dignity, freedom and

⁹⁵ *S v Makwanyane* (note 24, chapter 3) at 436H.

⁹⁶ *Idem* at 436E-F.

⁹⁷ The values of the Constitution are the enhancement or creation of an open and democratic society based on human dignity, freedom and equality will carry more weight in the exercise of balancing rights against justifications for their infringement.

equality.⁹⁸ In *S v Makwanyane* the court was faced with the task of determining the constitutionality of the death penalty in light of the existence of the right to life in section 11 of the Constitution. The Court examined the factors that are now listed in section 36(1)(a)-(e) and held that the death penalty infringed the right to life, human dignity and freedom from cruel, inhuman or degrading punishment.⁹⁹ It held that the right to life and dignity are the most important of all human rights and source of all other personal rights in the Bill of Rights.¹⁰⁰ So, given the importance of human dignity in the Constitution, its cruel punishment carries less weight.

(b) *The importance of the purpose of limitation*

This provision is self-explanatory in that the measure that limits the right must have a legitimate purpose that it intends to protect. To justify the limitation of the right it must be proved that the purpose of the limiting measure is to comply with an obligation laid down in the Constitution or is closely connected to the fulfilment of a right in the Bill of Rights.¹⁰¹ To have a blanket limitation that serves no purpose will not comply with the spirit of a reasonable and just society. The measure will, therefore, be unreasonable and unjustifiable.¹⁰²

A legitimate purpose would be the one that promotes or contribute to an open and democratic society based on human dignity, equality and freedom. In *Harksen v Lane*,¹⁰³ it was held that the distinction between the property of the solvent spouse from that of the insolvent one in terms of section 21 of the Insolvency Act¹⁰⁴ served a legitimate government purpose, that is, to prevent collusion between spouses that will have a detrimental effect on the creditors of the insolvent spouse.¹⁰⁵ It was further held

⁹⁸ Section 2 of the Constitution.

⁹⁹ At 451C-D.

¹⁰⁰ At 436C.

¹⁰¹ See for example, *South African National Defence Union v Minister of Defence* (note 79, chapter 3) at 479B-F where the aim was to comply with section 200(1) of the Constitution which provides that the South African National Defence Force must be structured and managed as a disciplined military force.

¹⁰² See in this regard *Richter v Minister of Home Affairs* (2009) 3 SA 615 (CC) at 640F. See also *Centre for Child Law v Minister for Justice and Constitutional Development* (2009) 6 SA 632 (CC) at 651B-C.

¹⁰³ (1998) 1 SA 300 (CC).

¹⁰⁴ Act 34 of 1936.

¹⁰⁵ At 326C.

that this provision assists the trustee in determining which property in the possession of spouses belong to the insolvent estate.¹⁰⁶

(c) *The nature and extent of limitation*

Currie argues that this factor assesses the way in which the limitation affects the right concerned.¹⁰⁷ He submits that this factor is concerned with comparing between the seriousness or otherwise of the limitation of the right which is a necessary part of the proportionality principle.¹⁰⁸ The question is whether such limitation causes more damage to the right than is reasonable to achieve its purpose. If the answer is in the affirmative, then it will imply that such limitation is unreasonable and unjustifiable.

(d) *The relation between the limitation and its purpose*

As stated above, the aim with limitation of any right in terms of the Constitution is to achieve a legitimate purpose which advances the values of an open and democratic society based on human dignity, freedom and equality.¹⁰⁹ This means that the measure that limits the right must be based on strong reasons and there must be a causal connection between the measure and the purpose that the law is designed to achieve.

South Africa's history was characterised by violence. The use of violence was believed to be a weapon to fight the apartheid regime. The determinant feature of the apartheid regime was the infringement of human rights. The lessons of our history which informs the right to peaceful assembly and demonstration in the Constitution are at least twofold. Firstly, they remind us that the right of ordinary people and freedom in all its forms must never again be taken away.¹¹⁰ Secondly, they remind us about the value

¹⁰⁶ At 326E-F.

¹⁰⁷ Currie and De Waal *The Bill of Rights Handbook* (note 83, chapter 3) at 164.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Richter v Minister of Home Affairs* (note 101, chapter 3) at 640F.

¹¹⁰ *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* (1996) 3 SA 165 (CC) at 186D-E.

attached to freedom of assembly and demonstration as tools for democracy and which is often used by people to constitute one voice to be counted.¹¹¹

Consequently, any act or conduct that could take the country back to the era of violence will have to be avoided at all cost. The prevailing peace gets affected if strikers or picketers are allowed to instigate violence through strike or picket action.

(e) *The less restrictive means to achieve the purpose*

This factor entails that the proportion between the costs of limiting the right must not exceed the benefit of limiting the same right. The limitation will be disproportionate if there are other means that could be employed to achieve the same results with a lesser negative effect on the right in question. If there is a less restrictive method of limiting the right with similar effects, such method must be preferred. For example, in *S v Makwanyane*, the argument was about the retention of death penalty as deterrent to crime. It was found that there are less restrictive means that can be used to combat crime rather than taking away the right to life guaranteed in the Constitution.¹¹² The alternative to death penalty was an imprisonment of offenders for a longer period of time or life time imprisonment.¹¹³

In the case of violent strikes, the purpose of the limitation would be to ensure that victims get compensated for the loss they suffer as a result of strikes. So, a balance between the right of employees to strike and the right of victims to be compensated for damage caused to them, need to be struck.

6 LIMITATION OF RIGHTS AND THE LABOUR RELATIONS ACT

As stated above, the purpose of the LRA is to advance economic development, social justice, labour peace and democratisation of the workplace.¹¹⁴ These objectives can

¹¹¹ Woolman S 'My Tea Party, Your Mod, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in *Garvas v SATAWU (Minister for Safety & Security, Third Party)* (2010) 6 SA 280 (WCC)' (2011) 27 SAJHR 346 at 348.

¹¹² *S v Makwanyane* (note 24, chapter 3) at 445G-H.

¹¹³ *Ibid.*

¹¹⁴ Section 1 of the LRA.

only be achieved if there is fair and good faith bargaining between the employer and employees. A written agreement between the employer or employers' organisation and the employees or trade union on matters of mutual interest is a collective agreement because such agreement binds the members of the union as well as members of the employer's organisation regardless of whether they were personally signatories to the agreement as long as the requirements for the extension of such agreement are met.¹¹⁵ It is also clear that once a trade union has concluded a collective agreement with the employer, such union as representative of members has a duty to ensure that its members comply with the provisions of the LRA in relation to such employer. For example, if the agreement was about picketing rules, the union has a duty to educate its members about the implications of such rules and how they should conduct themselves during picketing.

The conclusion of a collective agreement between an employer or employers' organisation and a trade union/s on matters of mutual interests serves a lawful purpose, that is, to create a culture of negotiations which can also result in tolerance and mutual understanding where the parties differ. Eventually, peace as one of the primary aims of the LRA will prevail at the negotiating table and such peace will have a positive influence on the conduct of employees who are out on strike or picket. It is, therefore, essential that negotiating parties must reach agreement on disputed issues on the table and avoid strike.

6.1 Limiting the right to participate in the activities and programmes of a trade union – reflection on the limitation clause

The right to freedom of association in trade union-member relationship includes the right to participate in the activities of the union.¹¹⁶ It is important to determine what constitutes 'activities and programmes of a trade union.' There is no definition of the concepts 'activities and programmes' of a trade union in the LRA. However, this is understood to include strikes and pickets which a union can convene as a collective voice of workers. As indicated in the previous chapter, the LRA regulates these types

¹¹⁵ See section 213 of the LRA.

¹¹⁶ Section 12(1)(c) of the Constitution.

of industrial action and put measures in place that need to be complied with for their protection.¹¹⁷ The question that arises is whether one or more of these rights can be limited.

6.1.1 Limitation of the right to strike or conduct in furtherance of a strike

The right to strike or conduct in contemplation or in furtherance of the right to strike must be in line with the Constitution, that is, it must be peaceful and participants unarmed.¹¹⁸ The right to live in a society free of violence is protected in the Constitution.¹¹⁹ For purposes of this study, a violent free society may be given a broader meaning to include an environment where residents or citizens' freedom of movement is exercised without any fear of intimidation or threat as a result of violence by strikers or picketers.¹²⁰

In addition, a strike accompanied by violence could be contrary to section 4(2)(a) of the LRA. The LRA requires participation by members only in lawful activities and programmes of the union. By implications, an unlawful activity will be contrary to the Constitution. Any act contrary to this will have negative effect on other people and their fundamental rights.

6.1.2 Justification of such limitation

As stated above, the Constitution requires the limitation of any right in the Bill of Rights to be in terms of the 'law of general application'.¹²¹ It has also been explained above what the 'law of general application' entails.¹²² The LRA which requires compliance with sections 64(1) and 65(1) is an example of a law of general application because it applies to everybody without unfairly singling out certain people. In addition, the limitation of the right to strike or picket and to not disturb peace in communities is

¹¹⁷ Sections 64(1), 65 and 69(1) of the LRA.

¹¹⁸ Section 17 of the Constitution.

¹¹⁹ *Idem* section 12(1)(c).

¹²⁰ See Ngcukaitobi T 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 *ILJ* 836 at 846.

¹²¹ Section 36(1) of the Constitution.

¹²² Van Niekerk 'Marikana: The perspective of the Labour Court' (note 81, chapter 3).

sourced from the Constitution which is the supreme law of the country.¹²³ Consequently, the Constitution declares that a practice or law that is contrary to one or more of its provisions is invalid.¹²⁴

The limitation of the right to strike or picket that has turned violent will serve a legitimate purpose, that is, to achieve peace as demonstrated by section 17 of the Constitution and section 1 of the LRA. The right of workers to strike cannot be given more weight than the right of communities to live in an environment that is peaceful and free of violence. This country fought for decades to attain the peace that we enjoy today. So, to let such peace be washed away by striking employees will be against the foundational values of the Constitution.¹²⁵ The limitation of the right to strike or picket that has turned violent will serve a legitimate purpose of maintaining peace in the workplace and in the Republic.

Despite the fact that these rights are protected in the Constitution, a strike or picket affects production. If a strike is violent, participants cause damage to property and people sometimes even lose their lives.¹²⁶ In fact, limiting the right to strike where it has become violent will mean that workers will go back to their work stations and production or delivery of services continues and intimidation of non-strikers will stop. In the long run, dismissal may be averted because if the strike continues for a long period and due to operational requirements, the employer may retrench workers (provided a fair procedure is followed).¹²⁷

Another benefit is that the business will not lose customers and members of the public and non-striking employees will be free to exercise their right to freedom of movement without fear.¹²⁸ Therefore, there will be more advantages attached to prohibiting employees to not continue with their industrial action once it becomes violent.

¹²³ Section 1 of the Constitution.

¹²⁴ *Idem* section 2.

¹²⁵ If we let violence to persist, it will be difficult to achieve the values in section 1 of the Constitution.

¹²⁶ *Garvis & others v SA Transport & Allied Workers Union (Minister of Safety and Security, Third Party)* (2010) 31 ILJ 2021 (WCC).

¹²⁷ Section 189 of the LRA.

¹²⁸ *Idem* section 21(1).

The less restrictive means to achieve the same result which is peaceful industrial action will be to ask union leaders to engage in a continuous educational project to teach members about the consequences of their conduct. That the same results can be achieved without the use of violence.

On the question of how to limit these rights, the study suggest that the Labour Court should be approached to declare the strike unprotected on the ground that participants have committed acts of misconduct.¹²⁹ Once the strike has been declared unprotected, the LRA provides remedies to affected parties.¹³⁰ These remedies are discussed in chapter 5 below.

7 CONCLUSION

The Constitution contains the Bill of Rights whereby most of the guaranteed rights are enshrined.¹³¹ The rights in the Bill of Rights are given effect by way of legislation.¹³² Since the Constitution is the supreme law of the Republic any legislation or provision in such legislation needs to comply with the Constitution.¹³³ However, the rights in the Bill of Rights are not absolute as they may be limited by the right of others and in terms of section 7(3) or in terms of section 36(1) of the Constitution.

A limitation of a right in terms of section 36(1) requires that the limiting mechanism or conduct must be in terms of the law of general application and thereafter certain factors need to be investigated to see whether the limitation of the right will give a more meaningful purpose than allowing the right to continue unlimited.¹³⁴ The right to strike or picket may be limited as there are more advantages to limiting it once it has become violent. The rights of people to live peacefully and unharmed outweighs the employees' right to participate in the activities of the union. The demands or grievances of employees which are subject of violent strikes can be achieved on the negotiating table without having to commit violence.

¹²⁹ *Idem* section 68(1).

¹³⁰ Section 68(1) read with section 158(1)(a) of the LRA.

¹³¹ Chapter 2 of the Constitution.

¹³² See section 23(5) of the Constitution.

¹³³ *Idem* section 2.

¹³⁴ *Idem* section 36(1)(a)-(e).

Participation in the activities of a trade union could also be limited if such action is not lawful. The LRA limits such conduct only to 'lawful activities' of a union.¹³⁵ The limitation by the LRA could be justified as it is an example of 'law of general application which is the kind of law required by the Constitution.'¹³⁶ The purpose of this limitation is legitimate, that is to protect the right of others from unlawful activities of unruly or rowdy members of the union which is in line with the values of the Constitution of establishing a society based on human dignity equality and freedom.

¹³⁵ Section 4(2)(a) of the LRA.

¹³⁶ See De Vos *et al Constitutional law in Context* (note 19, chapter 3) at 82.

CHAPTER 4

LIABILITY IN TERMS OF THE REGULATION OF GATHERINGS ACT

Summary

The Regulation of Gatherings Act regulates gatherings and demonstrations that take place in public places with the exclusion of industrial action which is regulated by the LRA. Pickets may become riotous with the behaviour of picketers affecting not only the parties to the dispute but also members of the public. If a picket becomes riotous to such an extent that it affects other people and their property, it should lose the protection afforded by the LRA. This would pave the way for the laws that normally apply to collective conduct that fall outside the regulative ambit of labour relations such as the RGA, to apply.

1 INTRODUCTION

The purpose of the Regulation of the Gatherings Act, 1993 is to regulate gatherings and demonstrations in public places and to achieve this purpose, the RGA makes a distinction between a demonstration and a gathering.¹ It further recognises everyone's right to assemble and protest peacefully with authorities having a duty to facilitate this through negotiations with organisers of protests. It requires that the organiser and participants at the gathering be jointly and severally liable for riotous conduct committed during their gathering.²

The question that arises is whether the RGA applies to industrial action. The LRA is not clear on this other than to provide that civil action may be taken against people who participate in unprotected strike action.³ In addition, the Code of Good Practice: Picketing (Code) specifically excludes a picket convened in terms of the LRA from the application of the RGA, provided that the picket is protected.⁴ It should therefore be determined whether the RGA should apply to a strike or conduct in contemplation or in furtherance of a strike that has become violent.

¹ Section 1 of the Regulation of the Gatherings Act 205 of 1993.

² *Idem* section 11(1)(b).

³ Section 67(6) of the LRA.

⁴ Item 1(6) of the Code.

It is argued that a picket that takes place on a public road or place with participants of more than fifteen people meet the requirements of a 'gathering' in terms of the RGA and the latter should regulate such gathering.⁵ It is further argued in this chapter that the 'joint and several' liability principle of the RGA should be used to hold the union liable as organiser of the gathering. Members can also be held liable as participants in the same gathering when they engage in acts of violence and cause damage to property. This was the case in *SATAWU v Garvas*⁶ where the court held the union and its members 'joint and severally' liable for riotous damage caused during protest action.

2 THE REGULATION OF GATHERINGS PRIOR TO THE REGULATIONS OF GATHERINGS ACT

Prior to the coming into operation of the RGA, public gatherings in South Africa were generally regulated by the Internal Security Act.⁷ This Act empowered the Minister of Law and Order to prohibit any person who in the opinion of the Minister engaged in activities calculated to endanger the security of the State from participating in any gathering or class of gatherings.⁸ Non-compliance with the requirements of the Act could have resulted in incarceration.⁹

Not only were public gatherings regulated by the Internal Security Act, some were subject to the National Key Point Act.¹⁰ The latter legislation was introduced in 1980 to counter the threat of sabotage being carried out within the borders of South Africa.¹¹

⁵ Section 1 of the RGA defines a 'gathering' as "any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (29 of 1989), or any other public place or premises wholly or partly open to the air-

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

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

⁶ (2012) 33 *ILJ* 1593 (CC).

⁷ Internal Security Act 74 of 1982.

⁸ Section 20 of the Internal Security Act.

⁹ *Idem* section 50(1)(b).

¹⁰ National Key Point Act 102 of 1980.

¹¹ See generally, the introduction into the Act.

The National Key Point Act empowers the Minister of Defence to declare any area or place a national key point if it appears to him or her that the area or place is so important that its loss, damage, disruption or immobilization may prejudice the Republic.¹² Currently there are 204 national key points ranging across the Reserve Bank, South African Broadcasting Corporation (SABC), provincial and national legislatures, oil pipelines, Union Buildings, court buildings and other strategic buildings. The Minister of Defence is allowed to declare any place or area to be a 'national key point' and to impose certain security requirements on it.¹³

The Public Safety Act¹⁴ also have had an impact on the gatherings of people. It provided that 'the Commissioner may, for the purpose of the safety of the public, issue orders whereby any particular gathering, or any gathering of a particular nature, class or kind, is prohibited at any place or in any area specified in the order'.¹⁵ The Suppression of Communism Act¹⁶ which was later incorporated into the Internal Security Act (74 of 1982) allowed the Minister of Justice to prohibit a gathering or assembly whenever there was, in his or her opinion, reason to believe that the objects of communism would be furthered at such a gathering.¹⁷

Only the National Key Point Act is still applicable today out of all the various laws mentioned above that regulated gatherings or assemblies of people. However, Parliament has resolved that this Act be removed from the statute book and will be replaced by the Critical Infrastructure Protection Bill of 2016.¹⁸

¹² Section 2(1) of the National Key Point Act.

¹³ *Idem* section 2(2).

¹⁴ Act 3 of 1953

¹⁵ Regulation 7(1), Proclamation 109 of 1986 issued in terms of the Public Safety Act 3 of 1953.

¹⁶ Section 9 of the Suppression of Communism Act 44 of 1950.

¹⁷ See *S v Meer* (1981) 4 SA 604 (A) at 613F.

¹⁸ Item 2 of Schedule 6 of the Constitution provides that: "(1) All law that was in force when the new Constitution took effect, continues in force, subject to-(a) any amendment or repeal; and (b) consistency with the new Constitution."

3 THE REGULATION OF GATHERINGS ACT AND THE RATIONALE FOR EXTENDING THE APPLICATION TO PICKETS

The RGA came into existence as a direct response to the harsh provisions of the different statutes that regulated the holding of gatherings in public places.¹⁹ It was enacted during the transitional period, from apartheid to the new democratic South Africa in 1993. It was introduced to attempt to reconcile the right of assemblers with the state's interest to maintain order in society.²⁰ It paved the way for South Africans to assemble and to express their views on social, political or economic issues that affect them. The right to assembly was later included in the Constitution.²¹

The purpose of the RGA is to regulate the holding of public gatherings and demonstrations at certain places and to provide for matters connected therewith.²² The act does not apply to industrial action in the form of a picket.²³ In terms of the Code, if a picket complies with certain requirements, such picket will remain regulated by the LRA and cannot be regulated by any other ordinary laws that regulate gatherings and demonstrations.²⁴ These other laws include the 'common law, municipal by-laws and the RGA'.²⁵ This creates the opportunity for an interpretation that, should a picket fail to comply with the requirements for a protected picket or becomes unlawful or loses protection, the common law, criminal law, municipal by-laws and the RGA would apply.

The mere fact that the Code excludes the application of the RGA from certain conduct can be dispensed with if good grounds are shown or provided. This is confirmed in item 1(7) of the Code of Good Practice: Picketing which states that:

¹⁹ These include the Suppression of Communism Act 44 of 1950; Internal Security Act 74 of 1982; and the Public Safety Act 3 of 1953.

²⁰ De Vos *et al South African Constitutional Law in Context* (note 19, chapter 3) at 556.

²¹ See section 17 of the Constitution.

²² See the introduction into the RGA.

²³ See item 1(5) of the Code.

²⁴ These requirements are provided in item 1(5) of the Code as:

“(a) the picket must be authorised by a registered trade union;
(b) only members and supporters of the trade union may participate in the picket;
(c) the purpose of the picket must be to peacefully demonstrate in support of any protected strike or in opposition to any lock-out; and
(d) the picket may only be held in a public place outside the premises of the employer or, with the permission of the employer, inside its premises.”

²⁵ Item 1(6) of the Code of Good Practice: Picketing.

“A picket with purposes other than to demonstrate in support of a protected strike or lock-out is not protected by the Act. The lawfulness of that picket or demonstration will depend on compliance with the ordinary laws.”

A code is not binding and can be overlooked if good grounds can be shown for non-compliance with its provisions. In this regard the prevention of violence would be a good rationale for extending the application of the RGA to pickets that takes place in public places. If participants in such pickets cause damage to property and loss or injury to other people with the latter having no recourse for compensation or damages the RGA should apply to attempt to address the situation. Wallis supports this view and states that:

“the scope of the definition of gathering is such that virtually any march, demonstration, protest, rally or picket in a public street or other public place involving more than 15 people is a gathering. A trade union organising a march pursuant to a strike is mobilising and demonstrating support for the views of the union in the context of that labour dispute and opposition to the views of the affected employees. A trade union or trade union federation planning a march or demonstration or picket in a public place needs to look carefully at the Gatherings Act.”²⁶

The RGA sets out certain procedural requirements that the organiser of a gathering that take place in a public place have to comply with. These requirements include the giving of notice of the gathering or demonstration,²⁷ and it prescribes the conduct of participants during a gathering or demonstration.²⁸ It also provides a sanction for non-compliance with its provisions.²⁹ In *Garvas v SATAWU*,³⁰ the union had organised a march in the Cape Town City Bowl in support of its strike against the security industry employer. This was intended to be a protest march as part of a protracted strike by members of the union. Although the action spiralled out of control, the union had complied with all the procedural requirements prior to protest action and obtained permission to the protest in terms of the RGA.³¹

²⁶ Wallis M “Now You Foresee It, Now You Don’t – *SATAWU v Garvas & Others*” (2012) 33 *ILJ* 2257 at 2259.

²⁷ Section 3 of the RGA.

²⁸ *Idem* section 8.

²⁹ *Idem* section 12(1)(j).

³⁰ *SATAWU v Garvas* (note 10, chapter 3).

³¹ Section 3(1) of the RGA.

Before the RGA can apply to a picket which qualifies as a gathering, it must be proved that the applicable LRA provisions for a protected picket were complied with.³² In the absence of proof that the action started as a strike and complied with the applicable provisions of the LRA, the RGA cannot apply.

In *ADT Security (Pty) Ltd v National Security & Unqualified Workers & others*,³³ the union failed to get a recognition agreement. Unhappy with this outcome, it approached the Cape Town Municipality for permission to march on the premises of the employer in terms of the RGA. The union did not attempt to follow the power-play processes prescribed in terms of the LRA. The court held that the union cannot dispense with the provisions of the LRA and apply the provisions of the RGA which is an extension of section 17 of the Constitution.³⁴ So, the union was refused permission to march in terms of the RGA.

3.1 Liability for damage caused

The RGA is clear on the liability for damage caused during a gathering or demonstration. Section 11 provides that:

- “(1) if any riot damage occurs as a result of-
- (a) a gathering, every organisation on behalf of or under the auspices of which held, or, if not so held, the convener;
 - (b) a demonstration, every person participating in such demonstration, shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organisation or person who is liable therefor in terms of this subsection.”

Le Roux argues that section 11 of the RGA creates statutory liability in addition to any other common law liability based on delictual principles that may exist.³⁵ This statutory liability does not require the usual element of fault in the form of either negligence or intention to cause the riot damage, which is contrary to the position of liability based

³² Section 69(1) of the LRA.

³³ (2015) 36 *ILJ* 152 (LAC).

³⁴ At 161I-J.

³⁵ Le Roux PAK ‘The Rights and Obligations of Trade Unions: Recent Decisions Clarify Some Limits to Both’ (2012) 22 *CLL* 31 at 32.

on delictual principles.³⁶ It is necessary for the plaintiff or victim to prove that he or she had suffered a loss as a result of riot damage.³⁷

In terms of section 11, any person who convened or participated in a gathering, may be individually or together with others who are linked to the gathering by virtue of being participants or organisers, 'jointly and severally' liable for damage caused. The principle of 'joint and several liability' entails that the victim may claim the full amount of damage from both / any of the persons liable.³⁸ If one of the workers responsible for the commission of the act complained of, settles or pays the claim in full the victim's claim against the other responsible people is ceded to the person that settled the claim. The latter can then claim a *pro rata* share from each of the other persons liable.³⁹

It may not be unreasonable for the victim of damage to claim the full amount of compensation from the organiser of a gathering and leave it to the organisation to claim from the member(s) responsible for the conduct that caused damage. This is also a norm in our law in terms of the Apportionment of Damages Act.⁴⁰

This chapter argues that the organising trade union of a strike or picket that has degenerated into violence should be held 'jointly and severally' liable with its members for the damage caused during the gathering on the ground that the organiser called the gathering and the participants (members of the union) are liable because they caused the damage. All that a claimant has to do in order to hold a union liable is to prove that the damage occurred as a result of the gathering.⁴¹ He or she must prove the link between the damage caused and the gathering.⁴² If a link between the two is established, the union should be liable, subject only to its successfully raising any

³⁶ *Ibid.*

³⁷ Section 1 of the RGA defines riot damage as "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."

³⁸ Sharrock R *Business Transactions Law* 7th ed (2007) at 180-181.

³⁹ Section 11(3) of the RGA.

⁴⁰ Act 34 of 1956. See also Nagel CJ *Commercial Law* 3rd ed (2006) at 100-101; and Sharrock (note 38, chapter 4) at 180-181.

⁴¹ Wallis 'Now You Foresee It, Now You Don't' *SATAWU v Garvas & others* (WCC) (note 26, chapter 4) at 2261.

⁴² *Mahlangu v SATAWU, Passenger Rail Agency of SA & another, Third Parties* (note 10, chapter 3) 35 ILJ 1193 (GSJ) at 1205D. See also *International Shipping Co (Pty) Ltd v Bentley* (1990) 1 SA 680 (A) at 700E-F; and *First National Bank of SA Ltd v Duvenhage* (2006) 5 SA 319 (SCA) at 324J – 325B.

defence that may be available.⁴³ This was emphasised in *Xstrata v AMCU and other*⁴⁴ where the court held that the 'union must not wash its hands off but must take steps to prevent members not to disregard the law'.⁴⁵ If it fails to do so and members commit unlawful acts, it may be held liable.

The approach adopted by Parliament when enacting the RGA was that, except for limited instances, organisations must live with the consequences of their actions, with the result that any harm triggered by their decision to organise a gathering would be placed at their doorstep.⁴⁶

If the convener or organiser of the gathering or demonstration is to be held liable for the conduct of other people, the liability will be strict.⁴⁷ A strict liability offence, does not require proof of the element of fault, either in the form of negligence or intent.⁴⁸ As an example, vicarious liability is defined as the strict liability of one person for the delict of another.⁴⁹ Vicarious liability is, however, an exception to the principle that a person is responsible for his or her conduct because it is not the actual perpetrator who is held liable but another person. With this doctrine, a person is held liable without being at fault.⁵⁰

In order to hold the union liable on the basis that its members committed unlawful acts when they demonstrated in a public place, the plaintiff will need to prove that there was riot damage caused by demonstrators; that he or she suffered loss as a result thereof; and that the demonstration was convened by the union to which its members were participants. The Constitution places an obligation on the convening union to ensure a peaceful gathering without the risk of damage to persons and property.⁵¹ If a convener or other person or both are charged with contravening the provisions of the

⁴³ *Ibid.*

⁴⁴ (2014) ZALCJHB 58 No. J1239/13 (25 February 2014).

Accessed at <http://www.saflii.org/za/cases/ZALCJHB/2014/58.pdf> on 22/06/2016.

⁴⁵ *Idem* at 17.

⁴⁶ *SATAWU & Another v Garvas & others* (CC)(note 10, chapter 3) at 1605C.

⁴⁷ Strict liability is the liability of a person without having to prove the element of fault against the wrongdoer, Burchell J *Principles of Delict* (1993) at 249.

⁴⁸ *F v Minister of Safety & Security* (2012) 1 SA 536 (CC) at 547F.

⁴⁹ Neethling J, Potgieter JM, Visser PJ *Law of Delict* 6th ed (2010) at 365.

⁵⁰ Vicarious liability is discussed in detail in Chapter 7 of this study.

⁵¹ Section 17 of the Constitution.

RGA, such convener or person who is held liable in terms of the RGA is given the opportunity to defend him- or herself against charges of the commission of riotous act(s) or for the damage caused during the gathering or demonstration. The RGA requires the convener and any other person charged to prove:

“that it did not permit or connive at the act or omission which caused the damage in question; and
that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and
that he or it took all reasonable steps within his or its power to prevent the act or omission in question: provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.”⁵²

The RGA prescribes a penalty of R20 000 or imprisonment or both for any failure to comply with one or more of its provisions.⁵³ The penalties prescribed by the RGA do not exclude other legal remedies that might be applicable in terms of any other law.⁵⁴

A claim for riot damage seems to constitute an additional remedy to the ones that exist at common law. Section 11(4) provides that the provisions of section 11 do not affect in any way the right under common law or any other law, of a person or body to recover the full amount of damages arising from the negligent or intentional act or omission, or delict of whatever nature committed by or at the behest of any other person.⁵⁵

The fact that the demonstration took place spontaneously can be raised in defence against a charge of non-compliance with the Act. If the gathering started spontaneously, there would be a failure to comply with the prescribed requirements for a gathering in terms of the RGA as time will not be sufficient to comply with the procedural requirements for holding a gathering. This will take place, for example, in a crisis zone situation. The nature of the situation will tell whether compliance with the procedural requirements will do justice or will cause more damage. An example of a crisis zone is found in *Lefu v Western Areas Gold Mining Co Ltd*.⁵⁶ In this case, the

⁵² Section 11(2) of the RGA.

⁵³ *Idem* section 12(1)(j).

⁵⁴ *Idem* section 11(4).

⁵⁵ See also Landman ‘No Place to Hide – a Trade Union’s Liability for Riot Damage: A Note On *Garvas & Others v SATAWU (Minister for Safety & Security, Third Party)* (note 23, chapter 1) at 838.

⁵⁶ (1985) 6 ILJ 307 (IC).

employer's mine was ransacked over a two day period by a major riot in which nine people lost their lives, 349 were injured and damages to buildings and equipment totalled millions of rands. The employer isolated 205 employees whom its officials had identified positively as having been amongst those who had encouraged, incited or actively participated in the violence, and dismissed them summarily and without any proper procedure. Such dismissal without following the necessary procedures was needed to save the situation and the company.⁵⁷

A union or convener may also not be expected to comply with these requirements where the situation is so dangerous that complying with the procedural requirements will not do justice to them or other people. This is for example the shooting of employees who were on strike at the Marikana Platinum Mines in 2012. Such an occurrence may cause frustration amongst the other picketers who may spontaneously start to demonstrate against those responsible for the attack, without first following the procedures required by the RGA.

4 THE DECISION OF *SATAWU v GARVAS & OTHERS*

In *SATAWU v Garvas & others*⁵⁸ a gathering (pursuant to a strike) was held in Cape Town in May 2006 and organised by the *South African Trade & Allied Workers Union (SATAWU)* in protest against certain issues affecting the security industry. The gathering complied with the initial procedures prescribed by the RGA, in that the union was granted permission by the local authority and that it had appointed about 500 marshals to manage the movement of the crowd. It apparently advised its members to refrain from any unlawful and violent conduct and requested the local authority to clear the roads of vehicles and erect barricades along the prescribed route on the day of the gathering. Despite all these attempts by the union, the demonstration got out of hand. In the union's own words it 'descended into chaos' with extensive damage to vehicles and shops along the route.⁵⁹ Several people were also injured. The total damage caused to property (private and owned by the City of Cape Town) was estimated at R1, 5 million. Consequently, claims for damages were instituted against

⁵⁷ At 313C-E.

⁵⁸ *SATAWU v Garvas & Others* (note 10, chapter 3).

⁵⁹ *SATAWU v Garvis & Others* (SCA)(note 10, chapter 3) at 2429H.

SATAWU in terms of section 11(1) of the RGA.

The union denied the claims for damages and relied on the provisions of section 11(2)(b) of the RGA which reads that the convenors of a gathering cannot be held responsible if the damages were 'not reasonably foreseeable'. The union alleged that if it were to be held liable, the defence in section 11(2)(b) would be rendered incoherent and irrational. The union argued that this part of the provision should be removed so that the defence becomes 'real'. The Constitutional Court had to consider whether the defence afforded by section 11(2) was as illusory and unattainable as the union argued. It held that the defence in section 11(2) could be interpreted to:

“provide for the statutory liability of organisations, so as to avoid the difficulties experienced with the common law remedy, that is, proving the existence of a legal duty on the organisation to avoid harm;
afford the organiser a more comprehensive defence, allowing it to rely on the absence of 'reasonably foreseeability' and the taking of reasonable steps as a defence against liability;
and
place the onus on the defendant to prove this defence, instead of requiring the plaintiff to prove the defendant's wrongdoing and fault.”⁶⁰

Regarding the meaning of 'reasonable steps to prevent the danger', the Court held that:

“there is an interrelationship between the steps that are taken by an organiser on the one hand and what is reasonably foreseeable on the other. The section requires that reasonable steps within the power of the organiser must be taken to prevent an act or omission that is reasonably foreseeable. If the steps taken at the time of planning the gathering are indeed reasonable to prevent what was foreseeable, the taking of these preventive steps would render that act or omission that subsequently caused riot damage reasonably unforeseeable. Both sections 11(2)(b) and 11(2)(c) would be fulfilled.”⁶¹

After considering a number of factors, the Court confirmed the ruling of the Supreme Court of Appeal which had held the convening union (SATAWU) liable for the damage caused to vendors by demonstrators.⁶² The Court found that section 11(2) was rational. The limitation of the right to freedom of assembly was found to be reasonable and justifiable in terms of the limitation clause in section 36(1) of the Constitution. The

⁶⁰ *SATAWU v Garvas & Others & others* (CC)(note 10, chapter 3) at 1605E-F.

⁶¹ At 1606C-D.

⁶² At 1633F.

limitation was held to serve a legitimate purpose of protecting members of society including those who do not have the resources or capacity to identify and pursue the perpetrators of riot damage and get to seek compensation. The union was ordered to pay damages to the victims.

This is a landmark ruling and a victory to the victims of industrial action who could not claim compensation and had no other recourse in the case of loss or damage caused by violent industrial action taking place in a public place. In this case the Constitutional Court addressed the question of whether the trade union could be held liable for the damage and loss caused by its members during a march on public land. This decision created a precedent for pickets that are not regulated by the LRA, either because a picket became violent and lost protection or because it did not fall within the regulative ambit of labour legislation.⁶³

In order for the organiser of the gathering to escape liability, it must show that the specific act or omission which caused the damage was reasonably unforeseeable.⁶⁴ In other words, the damage-causing event should not only be reasonably foreseeable but reasonable steps should also be taken continuously during the demonstrations to prevent the damage-causing event from taking place.

The gathering organised by SATAWU started as a strike of the security guards in Cape Town called by SATAWU and ended in demonstrations which took place on public roads in the Western Cape. When the action spilled over to the public roads, the union should have foreseen that damage to property would take place and should have taken steps to prevent it. However, the Court did not give an indication of what steps the union should have taken to avoid violence and damage to property. Wallis submits that the following steps need to be taken to avoid the damage:

⁶³ Item 1(7) of the Code of Good Practice: Picketing.

⁶⁴ Landman 'No Place to Hide- A Trade Union's Liability for Riot Damage: A Note on *Garvis & others v SA Transport & Allied Workers Union (Minister for Safety & Security, Third Party)* (note 23, chapter 1) at 843.

“The organisers will have to ensure that there are means of communicating with authorities, such as the police, political functionaries or union officials, who may play a role in ensuring that matters do not get out of hand. The availability on short notice of additional marshals, perhaps through other unions or a federation such as COSATU or community organisations supporting the particular industrial action will be something of which the organisers will be aware.”⁶⁵

4.1 Comment on the matter of *SATAWU v Garvas and others*

The fact that the Court gave advice and guidance to organisers of a gathering on how to take and keep control of industrial action, is a positive development. It was hoped that unions as organisers and their members as participants to a picket that take place on public places would use this decision and the relevant provisions of the RGA as a framework for organising industrial action in such a way that violence is avoided and proper discipline maintained. Despite this, the levels of violence during industrial action has dramatically increased since the ruling was made. The number of strikes has been growing over the years – from 51 strikes in 2009 to 114 strikes in 2013 with a number of them being violent.⁶⁶

Although the decision can be hailed as a landmark ruling, there are some questions that the Court did not address. One such question is whether the organiser(s) should call off the gathering if participants do not adhere to the conditions set for the action or whether they should admit that the situation is out of control and allow law enforcement officers to arrest participants who commit unlawful acts. It would have been helpful if the Court had provided guidelines on what it would consider as ‘adequate steps’ to prevent demonstrations from becoming violent. It is consequently important for organisers to know exactly what is expected of them.

Some of the measures that the union can take to deal with the strike is to suspend the strike and investigate the causes of disturbance. If it transpires from the investigation that one or more of its members participated in the commission of unlawful or riot acts, it should take disciplinary action against the responsible member. If the investigation reveals no wrongdoing on the part of the members of the union and the union is of the

⁶⁵ Wallis ‘Now You Foresee it, Now you don’t – *SATAWU v Garvas & others*’ (note 26, chapter 4) at 2266.

⁶⁶ *Sunday Times* 30 November 2014 ‘Labour laws need overhaul to stop runaway strike train’ at 2.

opinion that the action can continue without any form of violence, the industrial action may continue. However, the union must make sure that measures are in place to deal with violence or conduct of such nature if it erupts.

The court referred to the 'reasonable' steps that an organiser should take to prevent damage from occurring.⁶⁷ It is difficult to determine what would be 'reasonable' in this context. There is no single meaning for the concept 'reasonableness', in South African law. 'Reasonable' has different meanings in different contexts. In the law of delict, reference is made to the standard of a 'reasonable man' to determine the reasonableness or otherwise of the conduct of the wrongdoer. The reasonable man or person is a fictitious or abstract concept that expresses the standard according to which one measures the reasonableness of a defendant's conduct.⁶⁸ The reasonable person does not represent a particular standard of exceptional skill, giftedness or care, nor does it represent a standard of underdeveloped skill, recklessness or thoughtlessness.⁶⁹ In *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Storage (Pty) Ltd*,⁷⁰ the Supreme Court of Appeal reiterated that the benchmark is what a reasonable person would have done in the same circumstances 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.⁷¹ The reasonable person criterion is therefore an expression of what society expects of its members in their everyday life.

⁶⁷ At 1606E-G.

⁶⁸ The various meanings of reasonableness in the context of socio-economic rights, administrative law, section 36 of the Constitution and the area of 'general public duties', are explored by Steinberg C *Can Reasonableness Protect the Poor?: A Review of South Africa's Socio-economic Rights Jurisprudence* (unpublished research report, University of the Witwatersrand, (2005) 22FF and to a lesser extent in the published version of the paper in (2006) 123 SALJ 264. See also Pillay A 'Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action?' (2005) 122 SALJ 419 and Rautenbach IM 'The Limitation of Rights and "Reasonableness" in the Right to Just Administrative Action and the Rights to Access to Adequate Housing, Health Services and Social Security' (2005) TSAR 627; and *Nel NO v The Master* (2005) 1 SA 276 (SCA).

⁶⁹ *Weber v Santam Versekeringsmaatskappy* (1983) 1 SA 381 (A) 410-411.

⁷⁰ (2000) 1 SA 827 (SCA).

⁷¹ *Herschel v Mrupe* (1954) 3 SA 464 (A) at 490E.

In *Ngubane v South African Transport Services*, the court held that:

“there are four basic considerations in each case which influences 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.”⁷²

Wallis answers the question of what steps should be taken by a union to prevent the action from degenerating into chaos by means of an example. He states:

“When one starts to organise a concert it is reasonably foreseeable that the stage on which performers are to appear may collapse if it is not adequately supported. However, once proper supports have been obtained and put in place the organisers will not reasonably foresee, when the concert commences, that the stage may collapse. The same is true of a gathering. It may be reasonably foreseeable in South Africa that people will bring sticks and clubs to a protest or demonstration and that, if nothing is done about this, there is a possibility that they may use them to inflict injury or damage to property. However, if the organisers set up a system at the assembly point to ensure that sticks and clubs and other weapons are left behind in safe keeping, to be collected after the march, it seems difficult to say that, when the march commenced, they reasonably foresaw that people would have such items with them and use them to cause injury or damage.”⁷³

It is clear that the steps that the organiser is expected to take refers to conduct prior to their action. The union is expected to close all the angles that can result to violence or damage to property. It is also necessary that there is an ongoing educational project on the risks associated with strike which are not peaceful.

In terms of the New Dangerous Weapons Act,⁷⁴ participants in a gathering are not permitted to carry dangerous weapons.⁷⁵ This is criminalised if carried by any person during any gathering except during cultural and religious gatherings.⁷⁶ Unions must see to it that participants are not in possession of dangerous weapons as defined in this Act. If members or participants are armed attempts must be made to disarm them

⁷² (1991) 1 SA 756 (AD) at 779I-J.

⁷³ Wallis ‘Now You Foresee It, Now You Don’t – *SATAWU v Garvas & others*’ (note 26, chapter 4) at 2265

⁷⁴ Act 15 of 2013.

⁷⁵ Section 1 of the Dangerous Weapons Act defines a dangerous weapon as “any object, other than a firearm, capable of causing death or inflicting serious bodily harm, if it were used for an unlawful purpose.”

⁷⁶ Section 3(1) of the New Dangerous Weapons Act.

as the Constitution states that such people must be unarmed.⁷⁷

If this succeeds, the levels of violence during industrial action will be reduced because in most cases where violent conduct erupts, people are found to have weapons in their possession. If any act of violence is committed, the individual, or the group of which he or she is part, could be held accountable for the deed.⁷⁸

5 THE VIEW OF THE COURT IN *MAHLANGU V SATAWU*

In *Mahlangu v SATAWU, Passenger Rail Agency of SA & Another, Third Parties*,⁷⁹ the court arrived at a different conclusion after striking members of the trade union assaulted the claimant. The facts indicated that members of SATAWU, who were on a protected strike, assaulted a replacement worker. They stripped her naked and threw her out of a moving train in Springs in the Gauteng Province. The victim laid charges against SATAWU claiming that the people who assaulted her were dressed in SATAWU uniform (T-shirts) and were therefore its members.

The court did not dispute that the wrongdoers were members of the union but nonetheless held the union not liable for the conduct of its members. It held that the reference by the Act to ‘demonstrations at certain places’ suggests that it was not the intention of the legislature to hold an organisation liable if a person has suffered riot damage which occurred as a result of a gathering organised by that organisation at a particular and/or specific places.⁸⁰ It further stated that it could never have been the intention of the legislature to hold such an organisation liable for acts of its members resulting in damage suffered by a person at a location and/or place which was not designated for a gathering: Moekoena J argued that:

“it would be absurd and senseless to require an organisation to disclose a place where the gathering is to be held and decide to hold that organisation liable for conduct which occurred far from the contemplated gathering location, provided for in the notice.”⁸¹

⁷⁷ Section 17 of the Constitution.

⁷⁸ *Ibid.*

⁷⁹ (2014) 35 *ILJ* 1193 (GSJ). Also see note 42, chapter 4.

⁸⁰ At 1212D.

⁸¹ At 1214E.

The incident took place in Springs which is about 48 km away from Johannesburg where the actual gathering was scheduled to take place. On that basis the court declined the applicant's claim for recourse from SATAWU for the conduct of its members.

As a result of this decision, it is necessary that the phrase 'immediately before or after the gathering' should be interpreted broadly to include all instances in which trade union members committed unlawful conduct to and from their desired destination. If this were to be interpreted narrowly to entail that the organiser is liable for unlawful acts that takes place at the exact point of gathering, the union will always escape liability even in situations where it should not. The law will be failing vulnerable people like street vendors if organisers will simply escape liability because damage did not take place at the exact point of gathering. It must be stressed that the 'but for test' needs to be thoroughly examined to link the conduct of the member which has caused damage to the call by the organiser to go to a gathering. This means that one has to ask him- or herself the question of whether the union had not called the strike would this would have happened? If the answer is in the affirmative the union will obviously be liable.⁸²

The judge in this case (*Mahlangu v SATAWU*) failed to make use of the opportunity to protect vulnerable members of society against violent conduct of members of trade unions. The court should have used the opportunity to insist on the need to protect other people's rights, for example, the right to dignity. The court should also have used the opportunity as a test point for unions and organisers of gatherings to educate members on how to respect other people's rights. In no way did the court deal with this issue in its judgment. I submit that this decision was appealable and could have been turned down on appeal considering the ruling in *SATAWU v Garvas & others*.

⁸² Wallis 'Now You Foresee It, Now You Don't – *SATAWU v Garvas & others*' (note 26, chapter 4) at 2261.

6 AMENDMENT TO THE RGA

The LRA only regulates protected industrial action (strikes, pickets, lock-outs and protests). This is suggested by the Code of Good Practice on Picketing which states that if a picket has complied with the applicable procedures for a protected picket other laws such as the common law and the RGA must not apply.⁸³ By implication, the RGA can apply if the picket does not comply with these requirements mentioned in the Code. The LRA does not regulate unprotected industrial action but leave this to other branches of the law.⁸⁴ For example, where a delict has been committed during an unprotected industrial action, civil action may be taken against those responsible and the law of delict should offer some assistance in this regard. Where a crime has been committed, criminal law must offer some remedies.

Due to the nature of pickets and/or industrial action in general, and the conduct of picketers in recent years, it is recommended that the legislature amends the RGA to extend its application to pickets that take place in public places and meet the requirements of a gathering as defined in section 1 of the Act. The rationale for such development has been discussed above to include the lack of proper compensation for the damage caused to victims of industrial action; the LRA does not regulate the relationship between strikers or picketers and members of the public; and the fact that the LRA only regulates protected industrial action.⁸⁵

The power to make laws is vested in Parliament.⁸⁶ Such power is also vested in nine provincial legislatures⁸⁷ and various municipal councils across the whole of South Africa.⁸⁸ On the question of how to amend existing legislation or introduce a Bill in Parliament, the Constitution regulates such matters. It makes provision for different procedures for Bills that amend the Constitution,⁸⁹ ordinary Bills not affecting

⁸³ Item 1(6) of the Code.

⁸⁴ *Idem* item 1(7).

⁸⁵ Section 67(1) and (2) of the LRA.

⁸⁶ Section 44 of the Constitution.

⁸⁷ *Idem* section 104.

⁸⁸ *Idem* section 156.

⁸⁹ *Idem* section 74.

provinces,⁹⁰ ordinary Bills affecting provinces,⁹¹ and money-related Bills.⁹² It is important that a Bill first has to be classified into one of these four categories to determine which procedure should be followed in amending or enacting it.⁹³ The Bill considered here will fall under the second mentioned category, namely an ordinary Bill not affecting provinces. Both the National Assembly and the National Council of Provinces must agree on the amendments to be effected on the existing legislation before the Bill is sent to the President for signature.

However, before a labour matter goes to Parliament, it needs to be referred to the National Economic Development and Labour Council (NEDLAC). NEDLAC is a representative, specialist and state-funded body created out of the realisation that labour legislation is unique and requires a collaborative tripartite initiative.⁹⁴ NEDLAC provides a platform where interaction between the State, organised labour and organised business takes place. This interaction is important to ensure that all role players are involved in policy making and in envisaged legislation that could have an impact on employers and employees.⁹⁵ The ultimate aim is to make economic decisions more inclusive, and to promote the goals of economic growth and social equity.

NEDLAC's work is conducted in four chambers which discuss different aspects of social and economic policy. The chamber that is tasked with new labour law and changes to existing law is the Labour Market Chamber. A proposal to amend the LRA to include a provision that will enable victims to claim directly from the union for strike-related violence, will have to go via NEDLAC. It will have to be discussed at NEDLAC with some proposal for Parliament to consider when a Bill is eventually tabled.

⁹⁰ *Idem* section 75.

⁹¹ *Idem* section 76.

⁹² *Idem* section 77.

⁹³ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (2010) 6 SA 214 (CC) at 234C.

⁹⁴ Parsons R 'Steps Towards Social Dialogue and the Development of NEDLAC in a Democratic South Africa 1979 - 2001' (2001) 16 *South African Journal of Economic History* 139 at 171; Parson R 'The Emergence of Institutionalised Social Dialogue in South Africa' (2007) *South African Journal of Economics* 1 at 21.

⁹⁵ Section 5 of the National Economic Development and Labour Council Act 35 of 1994.

NEDLAC has, however, been criticised for wasting time in its deliberations and the inability of the parties to reach consensus on recommendations.⁹⁶ Some authors feel that the council is at a 'tipping point' since it has become less effective and more adversarial in recent years.⁹⁷ The reasons for the latter are that representatives from government and labour are not mandated by their principals to take decisions, and that not all parties are represented at NEDLAC.

7 CONCLUSION

This chapter investigates whether the RGA could be used to hold trade unions liable for the conduct of picketers if the picket takes place on a public road or in a public place with 15 or more participants. If the picket is protected and no unlawful behaviour takes place, the LRA regulates the conduct of picketers.⁹⁸ A problem arises when a picket exceeds the limits of legitimate picketing, that is, where it takes place beyond the demarcated picketing area onto public places. The study argues that such picket should be recognised as a gathering or demonstration as defined in the RGA.⁹⁹ In such a case the picket will be subject to the rules provided by the RGA.

To establish whether the RGA will apply to a picket, a two-stage enquiry will need to be undertaken. Firstly, it will have to be established whether the picket complied with the requirements mentioned in the Code. If the answer is in the affirmative, the RGS will not apply. If it is in the negative, the RGA should apply. The second leg of the inquiry would be whether the picket takes place in a public place. If this question is answered in the affirmative, the RGA should apply. Once this have been established, the union will have to comply with the requirements for holding gatherings in public places in terms of the RGA.¹⁰⁰ If the convener or participants fail to comply with these procedural requirements or any of the relevant provisions of the RGA, they are subject to heavy penalties.¹⁰¹

⁹⁶ Gostner K & Joffe A 'Negotiating the future: Labour's Role in NEDLAC' (1998) 2 *Law Democracy & Development* 131 at 139-140.

⁹⁷ Smith A 'Addressing South Africa's labour market challenges – a future role for social dialogue and tripartism?' (2014) *The Dispute Resolution Digest* 81 at 92.

⁹⁸ Section 69 of the LRA.

⁹⁹ See section 1 of the RGA.

¹⁰⁰ *Idem* section 3.

¹⁰¹ *Idem* section 12(1)(j).

In addition, if a riot damage occurs during the gathering the victims of a demonstration or gathering will be able to hold the convening union liable, together with its members who participated in the demonstration.¹⁰²

Although the ruling in the case of *Mahlangu v SATAWU* had not held SATAWU liable for the conduct of its members, a different decision was arrived at in the case of *SATAWU v Garvas*. The latter held that unions are liable for unlawful conduct committed during industrial action that has become violent and riotous.¹⁰³ As a result of this decision (*SATAWU v Garvas*), trade unions will have to ensure that their proposed demonstrations in furtherance of a strike or for any other reason are organised in a manner that minimises the likelihood of disobedience, vandalism and violent conduct. Unions have a duty to take reasonable steps to prevent the eruption of violence during industrial action.¹⁰⁴ This is, however, not the case as violent strikes continue to be a common feature in our industrial relations despite these court decisions. Thus, more needs to be done to root them out. Amending the RGA to specifically apply to a picket that takes place on a public road or places is one possible proposition which may be considered by the legislator.

¹⁰² Section 11(1) of the RGA.

¹⁰³ *SATAWU v Garvas* (WCC)(note 10, chapter 3) at 1608C.

¹⁰⁴ *Ibid* at 1607D.

CHAPTER 5

REMEDIES IN TERMS OF THE LABOUR RELATIONS ACT

Summary

The LRA is not silent on the issue of workers who conduct themselves contrary to its provisions. It provides that an interdict may be obtained against those who act contrary to one or more of its provisions. It seems, however, that the LRA is failing on this remedy as most of the Labour Court decisions that might be a solution to continued violent strikes are ignored and no one is held liable for contempt of court. An order for the payment of just and equitable compensation and dismissal is another remedy provided by the LRA to attempt to address any conduct that is contrary to its provisions.

1 INTRODUCTION

It has been mentioned in previous chapters that the main cause of disturbance during industrial action is when the strike or conduct in contemplation or furtherance of a strike (a picket) turns violent. The nature of a picket allows picketers to perform various activities such as toyi-toying, singing, chanting of slogans and carrying of placards. However, picketers and supporters often use the opportunity to commit other conduct which translates into non-peaceful conduct. It is this type of conduct that causes frustration to and intimidation of other workers and members of the public. It is important to determine what remedies the law put in place if participants in collective action cause damage to property, intimidate non-striking employees, members of society or cause general unrest.

Violent industrial action has far reaching consequences. It affects the employer and his or her business or property; non striking employees; neighbouring businesses and other people who are not party to the labour dispute such as members of the public.¹ The following examples prove this:

¹ *Growthpoint Rustenburg Catering & Allied Workers Union & others* (2010) 31 ILJ 2539 (KZD).

- the 2006 security guards' strike in Cape Town resulted in damage to municipal and private property;²
- during a march by SATAWU in Johannesburg in February 2011 union members smashed the windows of 10 trucks and pulled drivers out of their vehicles to force them to join their march;³
- during the NUMSA strike in July 2011 workers vandalised factory property and intimidated and assaulted non-striking factory workers;⁴
- the SAMWU strike in August 2011 resulted in widespread damage to public property including the smashing of shop and car windows, looting and destruction of plastic bins in Cape Town;⁵
- during a picket near Impala Platinum's Rustenburg Mine in February 2012 thousands of mineworkers including NUMSA members burnt tyres, torched a police office and stoned police officers and private vehicles;⁶
- during 2012, SATAWU members who were protesting against the Passenger Rail Agency of South Africa (PRASA) allegedly torched six trains in Johannesburg;⁷
- in May 2012, protesting members of the *Communication Workers Union* (CWU) employed by the South African Post Office attacked a Post Office van in central Johannesburg, and pelted it with stones;⁸
- during the strike by truck drivers who were members of *South African Transport & Allied Workers Union* (SATAWU), which started on 24 September 2012, cars were stoned and trucks set alight across South Africa;⁹ and

² Nkomo S 'Union held liable for strike damages.' Accessed at <http://www.iol.co.za/news/crime-court/union-held-liable-for-strike-damages-1.1318940#.VfghttHovIU> on 17/09/2015.

³ Makhafola G 'Police out in force as strike turns ugly.' Accessed at <http://www.sowetanlive.co.za/news/2011/02/16/police> on 17/09/2015.

⁴ Anderson A 'Metal strike turns ugly as unions dig in heels.' Accessed at <http://www.bdlive.co.za/articles/2011/08/metal-strike-turns-ugly-as-unions-dig-in-heels> on 17/09/2015.

⁵ Cape Town granted interdict against SAMWU sabcnews. Accessed <http://www.sabc.co.za/news/a/9025978048011befbaaafbe8f03b7af/Cape-town-granted-interdict-against-samwu-20110818> on 17/09/2015.

⁶ Reuter 'Impala strike turns violent.' Accessed at http://www.miningmx.com/news/platinum_group_metals/Impala-strike-turns-violent.htm on 18/09/2015.

⁷ Six trains torched in Johannesburg. Accessed at <http://www.railwaysafrica.com/news/six-trains-torched-in-johannesburg> on 18/09/2015.

⁸ SAPA 'Protesting CWU members attack Post Office van' <http://www.timeslive.co.za/local/2012/05/16/protesting-cwu-members-attack-post-office-van> on 18/09/2015.

⁹ Damba N 'Seven trucks set alight in Cape Town during SATAWU strike.' Accessed at

- During March 2016 SAMWU members employed by waste management company Pikitup trashed bins and attacked workers employed to clean the waste on the streets of Johannesburg and surrounding areas.¹⁰

All of these acts and others not listed above show that the conduct of union members during industrial action does not only affect the parties to a labour dispute but had, in most cases, affected other people as well. The question that arises is what the consequences are if strikers commit these acts during a protected strike.

If the strike or conduct in contemplation or furtherance of a strike is protected, no civil action can be taken against the union or participants in such action.¹¹ In *Lomati Mill Barberton (a division of SAPPI Timber Industries) v Paper Printing & Allied Workers Union & others* the court held that:¹²

“if in the course of a protected strike employees breach the strike rules and this breach is conduct in contemplation or furtherance of a protected strike, it will not, in terms of section 67(2), constitute breach of contract.”

It was further held that the Labour Court was precluded from hearing any such complaint as the aggrieved party was not entitled to institute civil legal proceedings in terms of section 67(6) of the LRA.¹³ Section 67(2) provides that:

“a person does not commit a delict or breach of contract by taking part in- (a) a protected *strike* or a protected *lock-out*, or (b) any conduct in contemplation or in furtherance of a protected *strike* or a protected *lock-out*.”

This section does not imply that strikers or picketers are at liberty to commit unlawful acts during protected collective action but what it entails is that no action will be taken against them for reason of them participating in a protected strike. It is thus the protected status of the action that shields them from being prosecuted.¹⁴ However, if they commit criminal acts, they will be prosecuted in terms of criminal law. The effect is that any strike or action in contemplation or furtherance of a strike that constitutes

<http://www.westcapenews.com/?=5202> on 18/09/2015.

¹⁰ Goba N ‘Rubbish collection hearings at Rand Stadium’ *The Times* 30 March 2016 at 4.

¹¹ Section 67(6) of the LRA.

¹² (1997) 18 *ILJ* 178 (LC).

¹³ At 184.

¹⁴ Section 67(6) of the LRA.

an offence is exempted from the protection offered by the LRA.¹⁵ The liability in terms of criminal law is not within the scope of this thesis and will not be investigated further since the focus is on the possible civil remedies available to aggrieved parties as a result of violence during industrial action.

The LRA assists with civil remedies only if the collective action is not protected.¹⁶ The matter becomes more complicated where protected industrial action turns violent. The question is whether the law provides sufficient civil remedies.

The LRA provides remedies and creates avenues to hold perpetrators liable. These remedies include an interdict, and a claim for compensation or damages.¹⁷

2 REMEDIES IN TERMS OF THE LRA

The LRA is clear on the consequences of an unprotected strike or action in contemplation or furtherance of a strike. It states that an affected person may take action against those responsible for harmful conduct.¹⁸ Section 68 reads:

- “(1) in the case of any strike or lock-out, or any conduct in contemplation or furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction
- (a) to grant an interdict or order to restrain –
 - (i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike, or
 - (ii) any person from participating in a lock-out or any conduct in contemplation or in furtherance of a lock-out.
 - (b) to order the payment of just and equitable compensation for any loss attributable to the *strike, lockout, or conduct*, having regard to –
 - (i) whether –
 - (aa) attempts were made to comply with the provisions of this chapter and the extent of those attempts;
 - (bb) the *strike or lock--out* or conduct was pre--mediated;;
 - (cc) the *strike or lock--out* or conduct was in response to unjustified conduct by another party to the dispute; and

¹⁵ *Idem* section 67(8).

¹⁶ Section 68(1) of the LRA.

¹⁷ See *Post Office Ltd v TAS Appointment and Management Services CC & Others* (2012) 6 BLLR 621 (LC); and *Kgasako & others v Meat Plus CC* (1999) 5 BLLR 42 (LAC).

¹⁸ Section 68(1) and (5) of the LRA.

- (dd) there was compliance with an order granted in terms of paragraph (a);;
 - (ii) the interests of orderly collective bargaining;
 - (iii) the duration of the *strike* or *lock-out* or conduct; and
 - (iv) the financial position of the employer, trade union or employees respectively.
- [...]
- (5) participation in a *strike* that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that *strike*, may constitute a fair reason for *dismissal*. In determining whether or not the *dismissal* is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.”¹⁹

2.1 Interdict

Section 68(1)(a) of the LRA allows an employer or any interested person to apply for an interdict.²⁰ An interdict can be defined as an urgent court order whereby applicants approach the court *ex parte* to obtain a temporary order restraining the defendants from continuing its wrongful activities.²¹ It is a court order aimed at protecting applicants from suffering irreparable damage caused by the wrongful activities of defendants. The remedy of an interdict is available where a person with an interest in the matter foresees or realises that the other party acts or intends to act contrary to the law or infringe his or her rights.²² This means that actual conduct need not exist, as a mere reasonable expectation that the conduct will take place is sufficient for an innocent party to apply for this remedy.

The applicant applies *ex parte* to court, often on an urgent basis to obtain a court order to stop a continuing wrongful act.²³ The court usually issues an interim interdict ordering the party against whom the interdict is ordered to show good reasons why a

¹⁹ *Idem* section 68(1)(a).

²⁰ Grogan J *Workplace Law* (2009) at 395 states that ‘if members of the public or businesses other than the employer suffer any loss or irreparable harm to property due to the strike, they may seek an interdict in the High Court.’

²¹ McCall K ‘Interdicts and Damages Claims in Collective Disputes’ in Benjamin P, Jacobus R & Albertyn C (eds) *Strikes, Lock-outs & Arbitration in South African Law* (1989) 41-52. See also *Thompson v Voges* (1988) 1 SA 691 (AD) at 711; *Knox D’Arcy Ltd v Jamieson and others* (1996) 4 SA 348 (SCA); and *Atkin v Botes* unreported (566/2010) (2011) ZASCA 12 (9 September 2011).

²² Rycroft ‘What Can Be Done About Strike-Related Violence?’ (note 24, chapter 1).

²³ *Ibid.*

final order against them should not be made. In *In2Food (Pty) Ltd v Food & Allied Workers Union & others*,²⁴ the court argued as follows:

“The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands off the violent actions of their members..... These actions undermine the very essence of disciplined collective bargaining and the very substructure of our labour relations regime.”²⁵

The requirements of an interdict were held in *NCSPCA v Openshow*²⁶ as follows:

“A *prima facie* or clear right: what is required here is proof of facts that establish the existence of a right in terms of substantive law;
A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
Balance of convenience favours the granting of an interim interdict; and
The applicant has no other satisfactory remedy.”²⁷

In *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers & others*,²⁸ the applicant company had obtained a rule *nisi, inter alia*, ordering the respondent trade union and employees to refrain from inciting or encouraging its members to demonstrate unlawfully and contrary to picketing rules. The court held that the company met the requirements for an interdict. In this case someone had been injured as a result of the action. Striking employees had further gathered in areas which were off limits in terms of the picketing rules and their unlawful conduct threatened the commercial relationship between the company and its clients.²⁹ An order for an interdict was granted.

²⁴ (2013) 34 ILJ 2589 (LC).

²⁵ At 2591H-I. See also *Security Services Employers' Organisation & others v SATAWU & others* (2007) 28 ILJ 1134 (LC).

²⁶ (2008) 5 SA 339 (SCA).

²⁷ At 347B.

²⁸ (2012) 33 ILJ 448 (LC) at 449F.

²⁹ At 453I). See also *Polyoak (Pty) Ltd v Chemical Workers Industrial Union and others* (1999) 20 ILJ 392 (LC); *General Motors of SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members employed by applicant and Others* Case No P470/11 (18 November 2011); *Nampak Metal Packaging Ltd t/a Bevcan v National Union of Metalworkers of SA & others* (2009) ILJ 1610 (LC); *Growthpoint Properties Ltd v SACCAWU & Others* (note 1, chapter 5); *Ripple Effect 40 (Pty) Ltd t/a Mkuze Bus Service v SATAWU and others* Case No D440/09; and *Lourenco & others v Ferela (Pty) Ltd & others* (1998) 3 SA 281 (T).

In *SA Post Office Ltd (SAPO) v TAS Appointment & Management services CC & others*,³⁰ the SAPO applied to the Labour Court for an interdict to prevent an unprotected strike by a number of employees supplied to the Post Office by temporary employment services from taking place. The Labour Court had to determine whether the SAPO had *locus standi* to bring an application for an interdict. It noted that the LRA does not specify who may apply for an interdict and the only requirements set by the LRA for the SAPO, in order to establish *locus standi*, were to show that the strike was unprotected and that it infringed one or more of the SAPO's legal rights.³¹ The interdict was consequently granted.³²

In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South Africa Workers' Union & others*,³³ the union prevented vehicles and persons from entering or leaving the premises of the employer, interfering with traffic, intimidating and assaulting persons and damaging property on or near the premises. The court granted an interdict restraining the union and its members from obstructing vehicles and persons from entering or leaving the premises in breach of picketing rules.

Van Niekerk, J criticised the union and held the following:

"This court must necessarily express its displeasure in the strongest possible terms against the misconduct that the individual respondents do not deny having committed, and against unions that refuse or fail to take all reasonable steps to prevent its occurrence. Had the applicant not specifically confined the relief sought to an order for costs on the ordinary scale, I would have had no hesitation in granting an order for costs on the scale as between attorney and own client."³⁴

The granting of an interdict is not always an automatic consequences of non-compliance with a binding rule or order. The application for an interdict may be refused in certain instances. In *Makhado Municipality v SA Municipal Workers Union & others*,³⁵ the Labour Court accepted that section 69(8) of the LRA, which lists the issues a party can refer to the CCMA, supersedes section 69(1). The court refused to

³⁰ (2012) 33 *ILJ* 1958 (LC). See note 17, chapter 5.

³¹ At 1964H.

³² At 1865A.

³³ (2012) 33 *ILJ* 998 (LC). See note 94, chapter 3.

³⁴ At 1003J – 1004A.

³⁵ (2006) 27 *ILJ* 1175 (LC).

grant the employer a final interdict because it had not referred the dispute to the CCMA.³⁶ The parties must first exhaust internal or primary remedies if they are in existence before applying for an interdict. An interdict will obviously also not be granted if the applicant cannot prove that he or she complied with the requirements for an interdict, or satisfy the court that the remedy should be granted.³⁷

The remedy of interdict is not only available to the parties in connection with a matter of mutual interest but it may be used by other people who are affected by the conduct of strikers. In *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union & others*, it was held that members of the public affected by noisy picketing can also apply for an interdict to stop the picket.³⁸

However, interdicts issued by the Labour Court prohibiting industrial action are often not respected in the Republic, and they do little to change the dynamics of the strike.³⁹ In an almost month long strike by employees employed by Pikitup in the city of Johannesburg, two interdicts were issued against the employees calling them to stop their strike and to return to work. This order was ignored by striking employees and they continued with their illegal collective action.⁴⁰ The effect of a disregard of the Labour Court's orders or any other court order in the Republic is that the credibility and standing of the Labour Court or courts, in general, as an institution is undermined.

In *In2Food (Pty) Ltd v Food & Allied Workers Union & others*,⁴¹ the workers of the respondent employer embarked on an unprotected strike. The strike was characterised by violence. The employer approached the court for an interdict against the union and individual strikers which interdict was granted. Despite the interdict, the violent strike continued. The question was whether the conduct of strikers and the

³⁶ At 1182A-B. See note 1, chapter 5.

³⁷ See in this regard *Public Servants Association of SA v Minister: Department of Home Affairs & others* J2096/11 dated 12 October 2011; and *HOSPERSA & others v Member of the Executive Council for Health, KwaZulu-Natal & another* (D919/11 dated 28 October 2011).

³⁸ *Growthpoint Properties Ltd v SACCAWU & Others* (note 1, chapter 5) at 2545J.

³⁹ Rycroft 'What can be done about strike-related violence?' (note 24, chapter 1) at 5. See also Hepple B, Le Roux R and Sciarra SA *Laws against Strikes: The South African Experience in an International and Comparative Perspective* 1st ed (2016) at 112.

⁴⁰ Goba 'Rubbish collection hearings at Rand Stadium' (note 10, chapter 5) at 4.

⁴¹ *In2Food (Pty) Ltd v Food & Allied Workers Union & others* (note 24, chapter 5). See also *Security Services Employers' Organisation & others v SATAWU & others* (2007) 28 ILJ 1134 (LC); and *Supreme Spring – A Division of Met Industrial v MEWUSA* (J2067/2010).

union were in breach of the court order and therefore in contempt? The trial court held the union liable and fined it R500 000 for failure to heed to the interdict. However, this decision was overturned in the Labour Appeal Court (LAC).⁴² The LAC held that it is crucial that one looks at what the court ordered the union to do in order for such union to be held liable.⁴³ The interdict must state clearly what action is mandatory and not confuse the union's obligations with those of its members.⁴⁴ If the union fails to comply with the order of the court, then it should be held liable.⁴⁵

In *Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River*,⁴⁶ several incidents of violence were committed during a strike. Non-strikers were harassed and intimidated, vehicles were damaged, one female non-striker was dragged from her home at night and assaulted with pangas and sjamboks. An interdict was obtained at the Labour Court. However, this interdict was ignored and violence persisted and the company consequently suffered damages. In *Ram Transport SA (Pty) Ltd v SA Transport & Allied Workers Union & others*,⁴⁷ after several incidents of violence and damage to property by unidentified perpetrators, the court held that:

"This court is always open to those who seek the protection of the right to strike. But those who commit acts of criminal and other misconduct during the course of strike action in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose."⁴⁸

If a person or an organisation fails to comply with a court order that has been granted, such person or organisation entitles the affected party to institute contempt of court proceedings. Contempt of court is committed not by a mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority.⁴⁹ A failure to comply with a court order may have other consequences, which

⁴² *Food and Allied Workers Union v In2food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC).

⁴³ At 2771F.

⁴⁴ At 2771H-J.

⁴⁵ At 2773J-2774A. See also *FAWU v Ngcobo NO & another* (note 139, chapter 2) at 3073E.

⁴⁶ (2012) 33 ILJ 1779 (LAC).

⁴⁷ (2011) 32 ILJ 1722 (LC).

⁴⁸ At 1727C.

⁴⁹ *Fakie NO v CCII Systems (Pty) Ltd* (2006) 4 SA 326 (SCA) at 333E. See also *Security Services Employers' Organisation and Others v SA Transport and Allied Workers Union and Others* (2007) 28 ILJ 1134 (LC).

may include the imposition of criminal sanctions such as a fine,⁵⁰ imprisonment, or suspended imprisonment with conditions.⁵¹

If the remedy of an interdict can be disregarded by the people against whom it was issued, then the question arises whether an interdict is a rightful remedy in South Africa bearing in mind the nature and prevalence of strikes.

Insistence on respect for an interdict which is in turn respect for the rule of law will help to address the on-going violent strikes in the Republic. The rule of law is a foundational value in the Constitution⁵² and therefore, it is not a mere option for the courts to hold anyone liable for disrespect of its rulings, but they are duty bound by the Constitution to do so.⁵³

Perhaps things might change for the better after the Labour Court decision in *Pikitup Johannesburg (Pty) Ltd (Pikitup) v South African Municipal Workers Union (SAMWU) & others*.⁵⁴ In this case, an interdict prohibiting an unprotected strike by members of the union employed by Pikitup was issued by the Labour Court. The order also prevented employees from participating in the unprotected strike committing various unlawful acts aimed at interfering with Pikitup's waste collection business. The interdict was not heeded to. The employees continued with their strike despite the court order. In addition, union officials showed support for the disregard of the court order and issued public statements that endorsed the continuation of the strike. The Labour Court fined SAMWU an amount of R80 000 suspended for 24 months on condition that the union was not found guilty of contempt of any Labour Court order. The general secretary of the union was also found guilty of contempt of court and fined R10 000 suspended for a period of 24 months on the same conditions as his union.

⁵⁰ See *In2Food (Pty) Ltd v Food & Allied Workers Union & others* (note 24, chapter 5) where the union was ordered to pay R500 000 for being in contempt of court. However, in *Food & Allied Workers Union & others v In2Food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC), the LAC reduced the fine from R500 000 to R100 000.

⁵¹ Rycroft A 'Being Held in Contempt for Non-compliance with a Court Interdict: *In2Food (Pty) Ltd v Food & Allied Workers Union & others* (2013) 34 ILJ 2589 (LC) 2499 at 2501. See also *SA Police Service v Police & Civil Rights Union & others* (2007) 28 ILJ 2611 (LC).

⁵² Section 1(c) of the Constitution.

⁵³ *Idem* section 165(2).

⁵⁴ (2016) 37 ILJ 1710 (LC).

The remedy of applying for an interdict is further criticised for not allowing both parties an opportunity to present their cases prior to the court granting relief. An interdict is granted on an urgent basis, giving the other party on the return date an opportunity to show cause why a permanent interdict should not be granted.⁵⁵ The principles of civil procedure and also the rules of natural justice require that both parties must be given an opportunity to present their cases prior to a court or tribunal making a decision.⁵⁶ The judge waives this rule when he or she makes an order for an interdict.

O'Regan argues that 'the substantive law relevant to labour injunctions favours employers and gives little weight to the legitimacy of strike action in the bargaining process.'⁵⁷ Wedderburn argues that in labour disputes, interdicts will become an engine for oppression against workers and their unions.⁵⁸

2.2 Claims for compensation

Section 68(1)(b) of the LRA makes provision for the payment of 'just and equitable compensation for any loss attributable to the strike, lock-out or conduct in furtherance of a strike.' The LRA does not define or explain the meaning of 'just and equitable' in the context of loss suffered as a result of the conduct of participants in an unprotected strike. Du Toit submits that the effect of section 68(1) is to create a *sui generis* cause of action.⁵⁹ Unlike the position at common law, the plaintiffs are not entitled to the full measure of their damage but only to compensation that is just and equitable.⁶⁰ In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*,⁶¹ the court held that the words 'just and equitable' mean no more than that compensation awarded must be fair.⁶²

⁵⁵ McCall 'Interdicts and Damages Claims in Collective Disputes' (note 21, chapter 5) at 41- 52. See also *Thompson v Voges* (note 21, chapter 5) at 711; *Knox D'Arcy Ltd v Jamieson and others*; and *Atkin v Botes* unreported (566/2010) (note 21, chapter 5).

⁵⁶ *Ibid.*

⁵⁷ See O'Regan C 'Interdicts restraining strike action- implications of the Labour Amendment Act 83 of 1988' (1988) 9 *ILJ* 959 at 959.

⁵⁸ Lord Wedderburn *Worker and the Law* 3 ed (1986) at 686.

⁵⁹ Du Toit D, Woolfrey D, Bosch C, Godfrey S, Christie SH, Cooper C, Giles G *Labour Relations Law: A Comprehensive Guide* (6th ed)(LexisNexis 2015) at 360.

⁶⁰ *Ibid.*

⁶¹ *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (2001) 22 *ILJ* 2035 (LC).

⁶² At 2036E.

Section 68(1)(b) gives the Labour Court exclusive jurisdiction to order 'just and equitable' compensation for the loss caused by the strike, or lock-out or conduct in furtherance of a strike. It is given powers to exercise discretion in considering what is 'just and equitable'. In exercising its discretion, the Labour Court must take the following into account:

"whether

- attempts were made to comply with the provisions of this Chapter and the extent of those attempts
- the strike or lock-out or conduct was premeditated
- the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and
- there was compliance with an order granted in terms of paragraph (a);

the interests of orderly collective bargaining;

the duration of the strike or lock-out; and

the financial position of the employer, trade union or employees respectively."⁶³

The above factors are important in determining whether liability should be imposed on a trade union and the extent of any liability that is found to exist.⁶⁴ However, this list of factors is not exhaustive as the court may consider other factors it deems necessary when determining whether the order of the payment of compensation is 'just and equitable'.⁶⁵ The court will have to make a subjective assessment of all the relevant circumstances, and facts before deciding what is a 'just and equitable' amount.⁶⁶ Section 68(1)(b) envisages that persons who suffer a loss as a result of an unprotected strike or lock-out can institute claims for compensation against the union, employees or employer concerned.⁶⁷

An award for compensation may be made against the employer, trade union as well as the employee(s) or any other relevant party. In the case of employees, they will be liable because they participated in the strike that caused damage or loss to the

⁶³ Section 68(1)(b) of the LRA.

⁶⁴ Grogan *Collective Labour Law* (note 42, chapter 2). See also Le Roux PAK 'Claims for Compensation arising from Strikes and Lockouts' (2013) 23 *CLL* 11.

⁶⁵ Tom PY 'A Trade Union Liability for Damages caused During A strike: A Critical Evaluation of the Labour Relations Act and Recent Judgments' *Partial Master's Thesis*: University of KwaZulu-Natal (2015) at 15. See also Cohen T, Rycroft A, & Whitcher B *Trade Unions and the Law of in South Africa* (2009) at 85.

⁶⁶ *Ibid.*

⁶⁷ Le Roux 'Claims for compensation arising from strikes and lock-outs: Common law and LRA' (note 64, chapter 5) at 11.

employer.⁶⁸ A trade union could be held liable for breach of the many duties entrusted to it, for example to carry the mandate from its members. The trade union members or employees may stipulate their demands and interests and the union is expected to take such demands to the employer or employers' organisation.⁶⁹ In performing these duties, the union is expected to act in the best interest of its members.⁷⁰ Such union can be held delictually liable if it breaches such mandate from its members and such breach causes loss to members and is due to the fault of the union or its official.⁷¹

In addition, it must be shown that the said union actually called the strike or supported the strike that caused the loss. This can take place if the union does not distance itself from the conduct of its members or supported the unlawful conduct of strikers or its members.⁷² Le Roux argues that in most cases, the employer will seek to sue a trade union or an employee in order to recover the loss.⁷³ Such employer must prove that the strike is not protected. Secondly, he or she must demonstrate that she or he sustained injuries or suffered loss which is attributable to the strike or action in furtherance of a strike. Lastly, it must be demonstrated that the party sought to be held liable for compensation, participated in the strike or committed acts in contemplation or in furtherance of a strike.⁷⁴ Once all this is proved, the employer can apply to the Labour Court for 'just and equitable' compensation.⁷⁵

An employee can also utilise section 68(1)(b) of the LRA against the employer. In *Kgasako and others v Meat Plus CC*,⁷⁶ the Labour Appeal Court appears to have accepted that employees who have not been paid their wages during the course of an unprotected lock-out can, in principle, claim compensation in terms of section 68(1)(b) of the LRA.⁷⁷

⁶⁸ See *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (note 61, chapter 5) at 2043C.

⁶⁹ Cohen *et al The Unions and the Law in South Africa* (note 65, chapter 5) at 88.

⁷⁰ *Ibid.*

⁷¹ *Ibid* at 83.

⁷² *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (note 61, chapter 5) at 2042G.

⁷³ Le Roux 'Claims for compensation arising from strikes and lockouts: Common law and LRA' (note 64, chapter 5) at 14.

⁷⁴ *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (note 61, chapter 5) at 2041D-E.

⁷⁵ Section 158(1)(iv) of the LRA.

⁷⁶ (1999) 5 BLLR 424 (LAC).

⁷⁷ At 577G.

A person who wants to use this section as basis for his or her claim needs to prove to the satisfaction of the court that he or she suffered a loss. The said loss should be attributable to an unprotected strike or lock-out, or conduct in furtherance of a strike. The LRA does not specify what kind of loss a person must prove. So, the loss may be physical, monetary or even loss of support.

The Labour Court has a wide discretion to determine the amount of compensation that will be awarded. It is however, noticeable that the court has awarded relatively small amounts as compensation in the few cases dealing with claims for compensation.⁷⁸ In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*,⁷⁹ the applicant had claimed an amount of R15 million from the union for losses suffered as a result of a strike convened by the union. The amount ended up being reduced by the court to R100 000.⁸⁰ During the course of the court proceedings, three things were held to be prerequisites for section 68(1)(b) to apply. Firstly, the strike or lock-out, or conduct in support of a strike must be unprotected. Secondly, the applicant seeking to use this section must have suffered loss as a result of the strike or lock-out or conduct in furtherance of a strike. Thirdly, the party against whom the claim is made must have participated in the strike or committed acts while furthering the strike.⁸¹ The union was ordered to pay the said amount in monthly instalments of R5 000.⁸²

In *Algoa Bus Company v SATAWU and others*,⁸³ the unions went on an unprotected strike which affected the respondent's transport operations on most of its routes. The applicant quantified the loss caused by the strike as R1.4 million. It then claimed compensation from the respondent unions, namely the South African Transport and Allied Workers Union (SATAWU) and the Transport, Action, Retail & General Workers Union (TARGWU). The court found the strike to be unprocedural, premeditated and had caused loss to the applicant.⁸⁴ The court considered the provisions of section 68(1)(b) of the LRA and ordered that the unions pay 'just and equitable' compensation

⁷⁸ Le Roux 'Claims for compensation arising from strikes and lockouts: Common law and LRA' (note 64, chapter 5) at 11.

⁷⁹ *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (note 61, chapter 5).

⁸⁰ At 2045I.

⁸¹ At 2042G-H.

⁸² At 2046A.

⁸³ (2015) 36 ILJ 2292 (LC).

⁸⁴ At 2295C.

for the loss suffered which means compensation which the court considered to be 'fair'. An amount of R1.4 million was payable in monthly installments of R5 280 (payable by the union) and R214.50 (payable by every member by way of a salary deduction).⁸⁵

The Labour Court's practice of awarding small amounts of money as compensation for these types of wrongdoings does not discourage unions and their members from continuing with the unlawful conduct in the future. The Labour Court should be willing to award more substantial amount of compensation for unprotected strikes because the process leading to a protected strike is not cumbersome. The ruling of the court should be a deterrent to trade unions and their members not to embark on an unprotected strike in the future. It should also send a message that unprotected strikes cannot be tolerated.

On the question of whether a trade union can still be held liable for the conduct of its members where the union did not call the strike, one would need to establish whether the union did take positive steps to stop the strike or conduct in furtherance of a strike. This question was answered in the case of *Mangaung Local Municipality v SAMWU*⁸⁶ where the union and its employees had embarked on an unprotected strike which caused loss to the employer. The Court held that:

"Where a trade union has a collective bargaining relationship with an employer, and its members embark on an unprotected strike action and the trade union becomes aware of such unprotected strike and is requested to intervene and fails to do so without just cause, such trade union is liable in terms of section 68(1)(b) of the Act to compensate the employer who suffers losses due to such unprotected strike. Similarly, if a trade union elects to delegate the responsibility to resolve the strike to its shop stewards employed by the employer facing an unprotected strike, and such shop stewards fail to discharge the same obligation that the trade union has, the trade union is also liable to compensate the employer for any losses that it has suffered as a result of such strike."⁸⁷

The court awarded 'just and equitable' compensation in the amount of R25 000. In arriving at the above conclusion, the court took into account the fact that the trade union failed to discharge its responsibilities in terms of item 6 of the Code of Good

⁸⁵ At 2296J-2297A.

⁸⁶ (2003) 24 ILJ 405 (LC).

⁸⁷ At 415J-416AB.

Practice on Dismissal in Schedule 8 of the LRA which determines that where employees are engaged in an unprotected strike and the employer, when trying to get employees to return to work, is required to solicit assistance from trade union officials and to discuss the proposed course of action with them, a consequent refusal by the trade union official will amount to dereliction of her or his duties. The union official or union representative is expected to make use of this opportunity to discourage the conduct of its members and encourage them to return to work. Where the trade union fails to discharge this responsibility, the liability to compensate the employer, arises.⁸⁸

2.3 Dismissal

Employees who participate in a strike whether protected or not, commit a breach of contract of employment. The contract of employment requires them to avail themselves to discharge their obligations in exchange for remuneration by the employer. However, the employer may not take action against them if the strike is protected unless the operational requirements of the business compels him or her to do so or where the employee is guilty of misconduct, for example acts of intimidation, damage to property, and interfering with the employer's business operations.⁸⁹

The rationale for protecting strikers against dismissal was explained by the Labour Appeal Court in *Black Allied Workers Union and others v Prestige Hotels CC t/a Blue Waters Hotel*⁹⁰ as follows:

“If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts, then the strike would have little or no purpose. It would merely jeopardise the rights of the employment of the strikers. The strike would cease to be functional to collective bargaining and instead it would be an opportunity for the employer to take punitive action against the employees concerned.”⁹¹

An employer who suffers loss as a result of an unprotected strike or conduct in contemplation or furtherance of a strike may dismiss employees for breach of contract

⁸⁸ At 15J-416B.

⁸⁹ Item 6(1) of the Code of Good Practice: Dismissal to the LRA. See also Van Jaarsveld SR, Fourie JD, and Olivier MP *Principles and Practice of Labour Law* (2010) at 29.

⁹⁰ (1993) 14 ILJ 963 (LAC).

⁹¹ At 972D.

of employment.⁹² In *Ram Transport (Pty) Ltd v SA Transport & Allied Workers Union & others*,⁹³ the court noted that the Labour Court is always open to those who seek the protection of the right to strike to the exclusion of those who commit criminal acts and other misconduct during the course of strike action. Those who breach an order of the court must accept in future to be subjected to the severest penalties that this court is entitled to impose.⁹⁴

A dismissal under these circumstances must be substantively and procedurally fair. In ensuring that dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.⁹⁵

The aim and object of a fair process is to comply with the constitutional requirement of fair labour practices, including, within the limits of the law and equity, the preservation of job security. To that end, a real and genuine effort should be made to avoid harmful consequences for workers engaged in a strike or conduct in contemplation or furtherance of a strike.

Participation in an unprotected strike, amounts to misconduct but like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be considered in the light of the facts of the case including:

“(a) the seriousness of the contravention of this Act; (b) attempts made to comply with this Act; and (c) whether or not the strike was in response to unjustified conduct by the employer.”⁹⁶

Schedule 8 of the Code of Good Practice: Dismissal also contains guidelines to ensure procedural fairness.⁹⁷ The guidelines in terms of Schedule 8 are as follows:

⁹² Section 69(12) of the LRA as amended by the Labour Relations Amendment Act 6 of 2014.

⁹³ (2011) 32 ILJ 1722 (LC).

⁹⁴ At 1727C-D.

⁹⁵ Sections 68(5) of the LRA.

⁹⁶ See *Coin Security Group (Pty) Ltd v Adams & Others* (2000) 21 ILJ 924 (LAC) where employees who (wrongly) believed the strike was protected could not be fairly dismissed. See also *NUMSA & others v Pro Roof Cape (Pty) Ltd* (2005) 26 ILJ 1705 (LC) where the court indicated that they will take the harm suffered by employer into account when considering the fairness of the dismissal.

⁹⁷ Section 68(5) of the LRA.

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

The application of the *audi alteram partem*-rule in the context of an unprotected strike or picket would entail that, before a person can be found guilty of the commission of the misconduct, he or she or the trade union representative, should be given the opportunity to state their side of the case against him or her and respond to the allegations levelled against him or her.⁹⁸ The advantage of giving employees an opportunity to state their side of the story before any action is taken against them, is that they can try and convince the employer that action should not be taken against them. After a hearing the employer may be more amenable to not act against the relevant employees, if he had made up his mind before the hearing to do so.⁹⁹

The employees are expected to use this opportunity to persuade the employer that they are not guilty and advance reasons why action detrimental to them should not be instituted or taken. Even if the facts are known beforehand, a hearing can shed new light on the facts and the conduct complained of.

The process up to and during the hearing must be fair and *bona fide* and must be conducted prior to any action being taken against the accused unless the situation makes a hearing impossible, or unless the accused waives the right to a hearing.¹⁰⁰

⁹⁸ Item 6(2) of the Code of Good Practice: Dismissal, provides that, ‘prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt.’ *Transport & General Workers Union & Others v Coin Security Group (Pty) Ltd* (2001) 22 ILJ 968 (LC) at 979E.

⁹⁹ *Paper Printing & Allied Workers Union & Others v Solid Doors (Pty) Ltd* (2001) ILJ 292 (IC) at 293B; and *Modise & others v Steve’s Spar Blackheath* (2000) 21 ILJ 519 (LAC) at 551F.

¹⁰⁰ *National Union of Metalworkers of SA & others v Elm Street Plastics t/a ADV Plastics* (note 67, chapter 2) at 338A-D.

3 THE POSSIBLE LOSS OF PROTECTIVE STATUS OF A STRIKE WHEN IT BECOMES VIOLENT

The LRA offers protection to strikes and strikers where the procedure for a protected strike has been followed (ss 64(1) and 65(1) of the LRA). Non compliance with the requirements for a protected strike renders the strike and any conduct in connection with such strike, unprotected (s 68 of the LRA).

A strike or conduct in contemplation or furtherance of a strike which is protected is beyond the jurisdiction of the Labour Court and every other court of law in the Republic.¹⁰¹ Workers enjoy immunity from civil prosecution if the strike or conduct in furtherance of a strike is protected.¹⁰² Protection is given against delictual claims by the employer and against claims for breach of contract. The employer is prevented from interdicting anyone taking part in such action (s 67(6) of the LRA). He or she is also prevented from claiming damages for any conduct in contemplation or furtherance of a strike or any other civil action (*Coin Security Group (Pty) Ltd v SANUSO* (1998) 19 ILJ 43 (C)).

One can conclude that the intention of the legislature with section 67 of the LRA was to leave it to the economic muscle of the parties involved to resolve their issues with minimal or no interference from the courts, where a strike is protected.

However, the immunity from civil prosecution during a protected strike is not absolute. The commission of violence, intimidation and sometimes the killing of people will always attract criminal prosecution.¹⁰³ In addition, the protection against civil action does not extend to unlawful actions arising out of a protected strike action, such as criminal offences. Section 67(8) of the LRA specifically excludes from protection any conduct which is an offence (these may include criminal or delictual conduct). In terms of section 67(8) a union and its members lose the protection afforded by a protected

¹⁰¹ See *Afrox Ltd v SACWU and others 2* (note 121, chapter 2) at 410E.

¹⁰² Section 67(6) of the LRA.

¹⁰³ It has been argued that industrial action in South Africa is characterised by violence and the killing of people, see Runciman C, Alexander P, Mahlatse R, Maruping B, Moloto B, Khumalo E & Sibanda S 'Counting Police-recorded Protests: based on South African Police Service Data' (2016) *Social Change Research Unit of University of Johannesburg* at 46.

strike against delictual acts committed, breach of contract and/or civil action. It states that 'the provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a strike...if that act is an offence'. If this is established, the affected party has the right to institute civil action against any person involved in the strike or if any act in furtherance of a strike constitute a criminal offence (Gericke SB 'Revisiting the Liability of Trade Unions and or their Members During Strikes: Lessons to be Learnt from Case Law' (2012) 75 *THRHR* 566 at 575).

Section 67(8) has the effect of neutralising the immunity against dismissal and civil claims where workers engage in violent acts during a protected strike. In other words despite the fact that the strike is protected, claims can be instituted and workers may be dismissed in instances where their behaviour constitute 'an offence'. In *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Printing Wood & Allied Workers Union & others* (2005) 26 *ILJ* 1458 (LC) at 1468), the employer instituted a claim for delictual damages against the union for the loss the company had suffered as a result of the unlawful switching off of its machinery at its mill by members of the union during a protected strike. The court held that it was necessary for the company to show that the act upon which it relies for its claim for damages was an offence (at 1468).

Section 67(8) is not often relied upon by employers probably because of the difference in the burden of proof in civil and criminal matters. The former requires proof beyond reasonable doubt while the latter requires proof on balance of probabilities. The question that arises is which law can be used to hold the union or its members liable. Le Roux argues that it is better to take action against strikers or their union on the basis of delictual liability than on the basis of criminal liability because it is difficult ascribe liability to a union in terms of criminal law (Le Roux *Claims for Compensation arising from strikes and lockouts*' at 11; see also Tom PY *A Trade Union Liability for Damages caused during a Strike: A Critical Evaluation of the Labour Relations Act and Recent Judgments* (2015) Master's Dissertion at 27 http://researchspace.ukzn.ac.za/bitstream/handle/10413/12361/Tom_Pumla_Yvette_2014.pdf?sequence=1&isAllowed=y on 02 May 2017).

For delictual liability to arise in terms of section 67(8), it is necessary that all the elements that give rise to liability must be met before the protection under section 67(6) is lost. This means that for sections 67(6) and 67(8) to apply it must be established that the conduct of workers constituted a strike or picket in support of a strike or in opposition to a lock out. In addition, it must be established that such strike or conduct in contemplation or in furtherance of the strike turned violent or caused damage to property or harm to members of society or non-striking workers. In the absence of evidence showing this conclusion, the provisions of these sections will have no application (*Eskom Ltd v National Union of Mineworkers* (2001) 22 ILJ 618 (W) at 623).

Where unlawful acts have been committed, the common law provides that an employer may have a delictual claim against the trade union or employees for the damage caused during a strike (*Le Roux 'Claims for Compensation arising from strikes and lockouts'* at 11). In order to hold union liable, the victim must further establish that the wrongdoer is a member of the union or otherwise authorised to act on behalf of the union. In *NUMSA v Jumbo Products CC* (1997) 18 ILJ 107 (W), the court held that a union can be held liable in delict for losses suffered as a result of an unlawful strike.

An employer who wants to sue the union in delict must prove the principles of delict (see Chapter 7). He or she must prove either that (i) the trade union members committed a delict against him or her for which the union was vicariously liable or (ii) the trade union itself committed a delict against the employer. He or she must sue to recover the loss which he or she has suffered as a result of the wrongful conduct of another (*Trotman v Edwick* 1951 (1) SA 443 (A) at 449B-C).

The union can also be held liable on the basis of agency. In terms of the contract of agency, the union is perceived as the principal because it issues instructions while the member(s) is an agent implementing instructions (*Tom PM Trade Union Liability for Damages caused during a Strike: A Critical Evaluation of the Labour Relations Act and Recent Judgments*). For a claim against the union on the basis of agency to succeed, the victim must prove that the agents (members of the union) acted within their scope of authority and for the advancement of their principal's interests.

Contrary to the common law position, section 68(1)(b) creates an avenue for a claim for compensation. The question that arises is whether a claim for compensation replaces a claim for damages or whether it replaces the common law claim for damages? A claim for damages and one for compensation are separate causes of action (Le Roux 'Claims for Compensation arising from strikes and lockouts' at 13). A claim for common law damages is based on delictual principles. The law of delict plays a fundamental role in protecting constitutional rights of victims of unlawful and culpable actions (*Fose v Minister of Safety and Security* (1997) 3 SA 786 (CC) at 818). In order to succeed with a delictual claim, the plaintiff must establish that he or she suffered patrimonial loss caused by an unlawful conduct accompanied by *culpa* in the form of either intent or negligent act or omission of another party (*Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 496 – 497; *NUMSA v Jumbo Products CC* (1997) 18 ILJ 107 (W) at 121; and *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Printing Wood & Allied Workers Union & others* (2005) 26 ILJ 1458 (LC) at 1468). If these requirements are met, the plaintiff is entitled to recover the full loss suffered (Le Roux 'Claims for Compensation arising from strikes and lockouts' at 13).

On the other hand, a claim for compensation is based on section 68(1)(b) of the LRA. The Labour Court has the exclusive jurisdiction over such claims (s 68(1) of the LRA). A person who sues for compensation in terms of section 68(1)(b) must be able to establish that the strike or conduct in furtherance of a strike is unprotected otherwise the Labour Court will not have jurisdiction to make an order for compensation (*Stuttafords Department Stores Ltd v SACTWU* [2001] 1 BLLR 46 (LAC) at 55). It is also necessary that the victim must show that he or she suffered loss which was attributable to an unprotected strike convened by the union (*Manganung Local Municipality v SA Municipal Workers Union* (2003) 24 ILJ 405 (LC)).

Section 68 does not specify who should pay compensation. It is, however, clear that either a trade union or its members or both could be held liable for the loss suffered as a result of an unprotected strike. The union could be held liable for failure to keep the strike protected or allowing members to participate in an unprotected strike. In addition, where a union has a collective bargaining relationship with the employer and its members embark on an unprotected strike action and the union becomes aware of

such an action, and is requested to intervene but fails to do so without just cause, such union is liable in terms of section 68(1)(b) to compensate the employer who suffers loss as a result of the unprotected strike (*Manganung Local Municipality v SA Municipal Workers Union* at 407).

The Labour Court is empowered to grant 'just and equitable compensation' (s 68(1)(b)). In determining the just and equitable compensation, the court is given a wide discretion (*Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* at 94). This means that the court will have to satisfy itself that at least three requirements are met before it decides whether compensation could be awarded for the loss suffered, namely: (i) that the strike does not comply with the provisions of the LRA; (ii) that the applicant suffered loss; and (iii) the party against whom relief is sought participated in the strike or committed acts in furtherance thereof (*Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (2002) 1 BLLR 84 (LC) at 89). A claim for compensation will succeed if the requirements of section 68(1)(b) are met.

The question that arises is whether a strike or conduct in furtherance of a strike that is an offence or has become violent should lose protection. There is no specific answer to this question. However, various arguments have been raised in favour of loss of protection. A support for the view that a violent strike should lose protection can be found in section 67(8) of the LRA which clearly states that any unlawful activity whether during a protected or unprotected strike cannot be tolerated as it constitutes an offence. The commission of an offence or unlawful act during a strike or conduct in furtherance of a strike remains a delict or breach of contract and is subject to civil or criminal legal prosecution (*SAPPI Fine Papers (Pty) Ltd (Adamas Mill) v PPWAWU & others* at 1383).

In terms of the functionality principle, an unlawful strike does not promote orderly collective bargaining as required by the LRA (s 1(d) of the LRA). The Constitution and the LRA do not make provision to the effect that strikes must be functional to collective bargaining. It is only in the Interim Constitution that one can pick up this provision (s 27(4) of the Interim Constitution of 1993). Section 27(4) provides that '[w]orkers shall have the right to strike for the purpose of collective bargaining. As already stated, this provision was, however, not retained in the Constitution of 1996.

The fact that the Constitution and the LRA make no provision for the functionality requirement for a protected strike does not mean that this principle should not be attached to such strikes. Fergus insists that the functionality requirement of a strike is still necessary in our industrial relations system (Fergus E 'Reflections on the (Dys)functionality of Strikes to Collective Bargaining: Recent Developments (2016) *ILJ* 1537). The author argues that one needs to borrow from the Interim Constitution of 1993.

The Constitution protects victims of violent strikes. It gives everyone the right to be free from all forms of violence from both public and private sources (s 12(1)(c) of the Constitution). Fergus argues that since the LRA does not offer protection to those who suffer at the hands of violent strikers, creates a room for it LRA to be developed in line with the Constitution (Fergus 'Reflections on the (Dys)functionality of Strikes to Collective Bargaining').

The question that arises is when do we say that a strike is functional to collective bargaining. In *SA Federation of Civil Engineering Contactors obo Members & others v National Union of Mineworkers & another* (2010) 31 *ILJ* 426 (LC), it was held that a strike is functional to collective bargaining if it is concerned with matters of relevance to the relationship between employers and employees (at 435).

In *Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA & others* (2014) 35 *ILJ* 3241 (LC), the applicant employer sought to prevent its employees from embarking on a strike. On the papers, the employer alleged that the union's demands were unfair, unreasonable and not conducive to functional collective bargaining. The court held that the 'courts have no role in determining the merits of any demand made during the bargaining process, nor are they empowered to make any value judgement as to whether a demand promotes or secures the common good of the enterprise. The court is empowered to intervene if and only if a demand made in support of a strike or lock-out does not comply with the substantive and procedural limitations established by the Act. In other words, the court is concerned only with the lawfulness of the demands in a strict sense and can make no judgment as to their merits or consequences' (at 3246B).

In *NUMSA v Vetsak Co-operative Ltd & others* (1996) 17 ILJ 455 (A), the court found the dismissal of striking workers to have been fair on the basis that their otherwise lawful strike was no longer functional to collective bargaining (at 464). A strike, which involves gratuitous violence or aggression, is dysfunctional in the sense that it is not proceeding in an ideal or normal way (Fergus 'Reflections on the (Dys)functionality of Strikes to Collective Bargaining' at 1548). The ideal way is that a strike must be orderly and peaceful (s 1 of the LRA). For the functionality requirement of a strike to exist it must be clear that the demands by employees are legitimate (*Police & Civil Right Union v Ledwaba NO & others* (2014) 35 ILJ 1037 (LC) at 1056). However, there has been no consensus on the question of whether the functionality principle should be made a requirement for a lawful strike.

A strike is an essential element of collective bargaining. If a right to strike does not accompany collective bargaining, it is little more than a collective begging. In *SAPPI Fine Papers (Pty) Ltd (Adamas Mill) v PPWAWU & others* ((1997) 10 BLLR 1373 (SE)), the union and its members had embarked on disruptive and intimidatory toyi-toyi processions; assaulted non-striking employees, displayed banners indicating that it was their intention not to allow other employees to work; inserted wire, a half-cutter, and other contaminating foreign objects into a pulping machine; sabotaged electrical switching devices on a paper machine; and shown complete disregard the principles of a lawful behaviour during a strike. The question was whether the union and its employees enjoy immunity from civil and other action even if they commit these acts. In answering this question, the court took into account section 1(d)(i) of the LRA which states that the purpose of the LRA is to 'promote orderly collective bargaining' and 'effective resolution of labour disputes. It held that unlawful conduct, in contemplation or in furtherance of a strike, by persons participating in a strike or a picket could never be said to be conducive to orderly collective bargaining nor be effective resolution of labour disputes (at 1385). The prevention of such conduct by means of an interdict will therefore promote orderly collective bargaining and the effective resolution of disputes between employer and the striking or picketing employees (at 1385).

Case law has held that if a strike is characterised by violence, damage to property and intimidation, it could forfeit protection. In *FAWU & others v Hercules Cold Storage (Pty) Ltd*,¹⁰⁴ the employees went on strike demanding an increase in wages. It was common knowledge that the employer had raised financial difficulties as the reason why it was unable to meet the employees' demands. The employees went on strike without giving the employer appropriate notice. However, before they went on strike they removed all frozen products from the cold storage. Several invitations were issued to employees and their union representative to return to negotiations and ultimatums were issued to ask them to return to work to no avail. There was evidence to the fact that the employer had wanted to reinstate all of the dismissed employees but all these attempts by the employer fell on deaf ears. They were then dismissed. The court held that the conduct of taking the meat out of the cold storage caused maximum loss to the employer.¹⁰⁵ The court held that:

"The strike action was fair in so far as it compelled the respondent to re-open negotiations. Having achieved this any further justification for the strike ceased. By refusing to negotiate with the respondent the employees' conduct became unfair and unreasonable. By conduct they waived their claim to equitable relief and brought their present predicament upon themselves."¹⁰⁶

In *Afrox Ltd v SACWU and others*,¹⁰⁷ the applicant employer applied to the Labour Court to interdict a strike by the union and its members. The applicant contended that the strike should not fall within the definition of a strike in terms of the LRA since the grievance or issue in dispute had disappeared. The dispute related to a staggered shift system that the employer had implemented. The employer stopped insisting on the staggered shift system by any of its employees after a certain number of employees had been retrenched. The employees and the union continued with their strike action despite these developments. The court held that once the dispute giving rise to a strike is resolved, the strike must come to an end. It explained that a strike engaged in by respondents was protected.¹⁰⁸ The strike can be terminated even while employees are on strike. The court listed various ways in which this can happen. It held that a

¹⁰⁴ (1990) 11 ILJ 47 (LAC).

¹⁰⁵ At 51A.

¹⁰⁶ At 51E-F.

¹⁰⁷ *Afrox Ltd v SACWU and others* 2 (note 121, chapter 2).

¹⁰⁸ At 409J.

strike can be terminated where strikers abandon the strike and unconditionally return to work; and where the substratum has disappeared, and if the employer can accede to the demands by employees or removes the grievance. It held that under these circumstances the strike falls away as it was:

“no longer functional; it has no purpose and it terminates. When the strike terminates so does its protection. It is in the interests of labour peace for strike action to be continued in such circumstances even in the case of a protected strike.”¹⁰⁹

It is clear from reading of these decisions that a point can arise where a strike loses protection for various reasons.¹¹⁰ The principle that industrial action must be functional to collective bargaining would be a determining factor. This principle has long been in existence but must yet be applied to a set of facts where strikers or picketers engage in unlawful activities.¹¹¹ The right to strike was designed to achieve a particular purpose, that is, to be functional to collective bargaining.¹¹² Some older cases have emphasised that:

“only functional strikes, that is, those which have as their concern the industrial or economic relationship between employer and employee, are protected.”¹¹³

Case law has held that the rights to strike, assemble, demonstrate, and picket do not encompass conduct that is violent or riotous in nature. In *SA Transport & Allied Workers Union v Garvis & others*,¹¹⁴ the court said:

“in the past the majority of the population was subjected to the tyranny of the state. We cannot now be subjected to the tyranny of the mob.”¹¹⁵

¹⁰⁹ At 411A.

¹¹⁰ Rycroft A ‘What can be done about strike related violence’ at 8.

Accessed at https://www.upf.edu/gredtiss/pdf/2013-LLRNConf_Rycroft.pdf on 31/05/2016.

¹¹¹ See *National Union of Mineworkers & others v Free State Consolidated Gold Mines (Operations) Ltd-President Steyn Mine; President Brand Mine; Freddie's Mine* (respondent's heads of argument) (1996) 1 SA 422 (A) at 438B.

¹¹² Rycroft A ‘Can A Protected Strike Lose its Status? *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others*’ (2012) 33 ILJ 821 (LC) at 822.

¹¹³ *National Union of Mineworkers & others v Free State Consolidated Gold Mines (Operations) Ltd President Steyn Mine; President Brand Mine; Freddie's Mine* (note 111, chapter 5) at 438B.

¹¹⁴ (2011) 32 ILJ 2426 (SCA).

¹¹⁵ At 2441B-C.

In *Tsogo Sun Casino (Pty) Ltd t/a Montecasino v Future of South Africa Workers Union and others*,¹¹⁶ the employees who were on strike obstructed vehicles and persons from entering or leaving the applicant's premises. This happened despite a picketing agreement which prohibited them from protesting or being present in Montecasino Boulevard, interfering with traffic and persons entering or leaving Montecasino Boulevard, picketing within 500 metres of the premises, intimidating and assaulting persons or damaging property at or near the premises. The union was asked to intervene, which it failed to do, nor did its officials demonstrate any form of leadership under such conditions. It was held that:

"This court will always intervene to protect both the right to strike and peaceful picketing. This is an integral part of the court's mandate conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status."¹¹⁷

This opens the gates for arguments and conclusion that a strike characterised by misconduct loses protection.¹¹⁸ This means that the consequences for participation in an unprotected strike or conduct in contemplation or in furtherance of a strike will have to follow. A claim for compensation or damages can be instituted against the union and an affected person can approach the Labour Court for an interdict or the employees may be dismissed for committing misconduct during industrial action.¹¹⁹

In *Shoprite Checkers (Pty) Ltd v CCMA & others*¹²⁰ the court said the following while acknowledging that the conduct of picketers was contrary to law:

"Peaceful picketing is not limited to non-violent conduct only. Placards that invoke violence, racial hatred or are defamatory can be neither peaceful nor lawful. Chanting and singing would cease to be peaceful if they are so loud as to become a nuisance to third parties or impair their ability to go about their business normally. If the picket exceeds the bounds of peaceful persuasion or incitement to support the strike, to become coercive and disruptive of the business of third parties, the picket ceases to be reasonable and lawful."¹²¹

¹¹⁶ (2012) 33 *ILJ* 998 (LC).

¹¹⁷ At 1003J – 1004A.

¹¹⁸ Rycroft A 'What Can Be Done About Strike-Related Violence?' (note 110, chapter 5) at 9.

¹¹⁹ Section 68(1)(a)(b) and (5) of the LRA.

¹²⁰ (2006) 27 *ILJ* 2681 (LC).

¹²¹ At 2689I – J.

Rycroft also supports the view that a strike could lose protection if participants behave unreasonably.¹²² He states that a strike marred by misconduct loses its protected status with the result that the protection of employees from dismissal falls away and the strikers could be sued for financial loss.¹²³

Since the LRA does not make express provision for the loss of protection of strikes as a result of violence, one can argue that a solution can lie in the powers given to the Labour Court. The Labour Court is empowered to make a 'declaratory order'.¹²⁴

If a protected strike becomes violent, it should be possible to make an application to the Labour Court in terms of section 158(1)(a)(iv) of the LRA to declare the strike unprotected. The Labour Court will make the order on the basis of evidence provided and depending on the degree of evidence provided. The question that arises is the degree or extent of violence that is needed to convince the court to make such declaratory order. Rycroft argues that the following questions have to be asked:

"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? In answering this question the court would have to weigh the levels of violence and efforts by the union concerned to curb it."¹²⁵

In *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v NUFBWSAW & others* (2016) 37 ILJ 476 (LC), the court was willing to accept in principle that the court could intervene by declaring an otherwise lawful strike unprotected if the degree of violence in which the striking workers had engaged justified such intervention (the loss of protection principle). The court held that the court should weigh the degree of violence committed by the striking workers against the attempts of the union (if any) to prevent or reduce the violence (at 488 - 489).

¹²² Rycroft A 'Can a Protected Strike Lose its Status? *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (note 112, chapter 5) at 823.

¹²³ At 826.

¹²⁴ Section 158(1) of the LRA.

¹²⁵ Rycroft A 'Can a Protected Strike Lose Its Status? *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & Others* (note 112, chapter 5) at 827.

Thompson argues for an alternative order of suspension of a strike or conduct in furtherance of a strike. She argues that the suspension can also help to deal with violence during industrial action. He argues as follows:

“Violence in private sector labour relations has also reached new post-1994 heights. Here, too, there is a need to introduce procedural obligations that go beyond pro-forma picketing rules. And a case can be made for the right to industrial action to be open to suspension by the Labour Court if that action is accompanied by egregious conduct.”¹²⁶

Once the strike has been declared unprotected, several remedies could then become available in terms of section 68(1) of the LRA such as an interdict,¹²⁷ an order for the payment of 'just and equitable' compensation¹²⁸ and possible dismissal.¹²⁹ The remedy of dismissal is only available to the employer while compensation and interdict are available to any victim of violent industrial action. Section 68 does not restrict the the remedies of interdict and compensation to employers, creating an opportunity for employers or members of the public to institute action in terms of the section. The remedy is even available to employees who can prove that the loss they suffered is attributable to a lock-out by the employer.

The fact that an otherwise protected strike may be declared unprotected means that the right to strike can be limited and such limitation has to comply with section 36(1) of the Constitution (see chapter 2 where this is discussed). Employers have all the powers to discipline workers who take part in misconduct while on strike and to claim damages for loss suffered on account of criminal conduct during strikes (ss 67 and 68 of the LRA).

However, participants may defy the court order and continue with their action resulting in more damage to property or inflict harm to other people.¹³⁰ The question that arises is who should be held liable for harm caused to members of the public. The LRA does not deal with this issue in its provisions. It is suggested that the RGA should provide

¹²⁶ Cheadle H, Thompson C, Le Roux P 'Reform of Labour Legislation Needed Urgently' *Business Day* 15 November 2011.

¹²⁷ Section 68(1)(a) of the LRA.

¹²⁸ *Idem* section 68(1)(b).

¹²⁹ *Idem* section 68(5)(a) and (2)(b).

¹³⁰ See *Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (note 46, chapter 5); and *In2Food (Pty) Ltd v Food & Allied Workers Union & others* (note 24, chapter 5).

answers to this question as it did in *SATAWU v Garvas & others*.¹³¹ The RGA makes clear provisions as to who should be held liable under these circumstances.¹³²

4 CONCLUSION

The right to strike implies that employees are given the right to inflict economic harm on the employer within the limits of the LRA. The Constitution provides that 'every employee has the right to participate in the activities and programmes of a trade union and to strike'.¹³³ For this to happen, a strike must comply with the pre-requisites for a protected strike in the LRA.¹³⁴ In return for compliance with these requirements, the law offers immunity from civil prosecution.¹³⁵ The infliction of economic harm outside the prerequisites of the LRA will not enjoy immunity from civil prosecution and the employer and even members of the public could take legal action for recovery of the loss suffered.

The point of departure in the case of industrial action (picket action, in particular) is that it must be exercised in a peaceful manner by people who are not armed.¹³⁶ The failure of unions and their members to keep the strike or conduct in furtherance of a strike peaceful is one of the recurring problems in terms of the current legal provisions. If participants to collective action fail to keep their action peaceful and allow violence to develop, there should be some redress for people affected by the violence and who suffer damage. If the action started off as protected and later becomes violent, the study submits that it should lose protection and a declaration for the action to be unprotected should be sought. If this succeeds, the remedies available to an unprotected strike or conduct in furtherance of a strike could be pursued. This will pave the way for the liability of a convening union and its members. The remedies available to the injured person include an interdict, a claim for just and equitable compensation and dismissal.

¹³¹ (2012) 33 *ILJ* 1593 (CC).

¹³² These remedies are discussed in detail in Chapter 5 of this study.

¹³³ Section 23(2)(b) of the Constitution.

¹³⁴ Sections 64 and 65 of the LRA.

¹³⁵ *Idem* section 67(8).

¹³⁶ Section 17 of the Constitution.

It is obvious that the first person to be affected by the withdrawal of labour is the employer. It is expected that such employer will be able to use one or more of these remedies if he or she can prove that the loss she or he suffered is as a result of the strike or conduct in contemplation or furtherance of the strike. He or she can direct the claim against the union and/ or its members.¹³⁷ The union and members can also use section 68(1) remedies against their employer for losses suffered as a result of an unprotected lock-out by employer. It is also possible for union members to institute action against the union for the loss suffered in relation to an unprotected strike where the union had caused members to believe the strike was protected while it was not and where they were subsequently dismissed.

¹³⁷ Le Roux 'Claims for compensation arising from strikes and lockouts' (note 64, chapter 5).

CHAPTER 6

COMPARATIVE ANALYSIS AND LESSONS FOR SOUTH AFRICA

Summary

The right to strike and the right to protest are fundamental rights. The Constitution of South Africa acknowledges the importance of foreign law in the interpretation of the rights in the Bill of Rights. In terms of the Constitution, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom and must consider international law; and may consider foreign law. The study investigates the rules that regulate industrial action in Australia, Botswana and Canada in order to establish whether lessons can be learnt from them with regard to the correct allocation of liability for violent conduct that could occur during industrial action.

1 INTRODUCTION

It is important to determine the correct basis to hold a union liable for the unlawful conduct of its members committed during industrial action.¹ This chapter investigates the labour laws of three countries (foreign law) to establish whether and to what extent they hold a trade union liable for unlawful conduct committed during industrial action in their jurisdictions. The purpose is to draw some lessons from the ways in which these countries deal with violent industrial actions in their jurisdictions. Section 39(1) of the Constitution states that:

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

The Constitution therefore acknowledges the importance of foreign law and the role it can play in shaping or supplementing our law. Foreign law is any law enacted and in force in a foreign state or country.² The Constitution further provides that:

“international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”³

¹ The types of industrial action that are recognised in South Africa are discussed in Chapter 2 above.

² Dugard J *International Law: A South African Perspective* 3rd ed (2005) at 56.

³ Section 232 of the Constitution. See also section 233 of the Constitution.

In addition, when interpreting the Bill of Rights, our courts are bound to take into account international law.⁴

South Africa has experienced a number of violent strikes in the recent past.⁵ Violent industrial action in South Africa is becoming problematic, with the current domestic law seemingly unable to address the problem.⁶ In order to find a solution there is an increasing need to examine the laws of other countries for guidance on how to solve the problem of industrial violence in the Republic. The point of departure is to establish whether violent industrial action also occurs in Australia, Botswana and Canada, the countries selected for comparative study, or whether such violence is unique to South Africa. The study also investigates how these countries prevent or address violence during industrial action in their jurisdictions; and if violence and damage to property do occur, who they hold liable for the damage and on what basis.

2 THE COUNTRIES CHOSEN FOR THE COMPARATIVE STUDY

2.1 General

Three countries have been selected for the comparative study on the issue of liability for violent industrial action, namely Australia, Botswana and Canada. There are certain commonalities between these countries and South Africa. The first and most important similarity is that all three countries are constitutional states deriving powers from their respective constitutions.⁷ Secondly, South Africa, Canada and Australia have decentralised governments, consisting of national, provincial and local spheres while Botswana has two levels of government, namely national and local governments.

Australian and Canadian law have certain provisions in their statutes or labour codes that play a role in preventing or resolving disputes before they degenerate into disruptions and become violent.

⁴ Sections 39(1)(b) of the Constitution.

⁵ See Chapter 1 above.

⁶ *Ibid.*

⁷ The Constitution of the Republic of South Africa, 1996; the Constitution of Australia, 1900 and the Constitution Canada, 1982.

Botswana is one of the fastest growing democracies in Africa with a stabilised economy and a stable democracy.⁸ Since their independence in 1966, Botswana has been doing very well, maintaining a very high economic growth.⁹ According to Cook and Sarkin other countries can learn valuable lessons from Botswana in many respects such as the country's economic policies.¹⁰

2.2 South Africa and Australia

Australia is a federal state with powers held by three levels or spheres of government.¹¹ Each sphere of government is responsible for specific matters assigned to it by the Constitution.¹² Labour relations' matters are the responsibility of both the federal government and the states.¹³ If there is conflict between the federal law and the law of the state, for example, the federal law prevails.¹⁴

In South Africa the powers are held by three spheres of government, that is, national, provincial and local government. Each of these spheres has its own competences and has jurisdiction in respect of those matters assigned to it by the Constitution.¹⁵ In certain functional areas the national government have concurrent legislative powers with provincial governments.¹⁶ Labour matters are dealt with by the national government.¹⁷

⁸ Somolekae G 'Democracy, Civil Society and Governance in Africa: The Case of Botswana' (1998) 19. Accessed at <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN009287.pdf> on 29/03/2016.

⁹ Lewin M 'Botswana's Success: Good Governance, Good Policies, and Good Luck' (2011). Accessed at <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=0D7A4D396EEFD245EB0364BD1FF18846?doi=10.1.1.370.6568&rep=rep1&type=pdf> on 29/03/2016.

¹⁰ Cook A and Sarkin J 'Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development' (2010) 19 *Transnational Law & Contemporary Problems* 453 at 459.

¹¹ In Australia the national government is called the federal government and the equivalent of South Africa's provinces are called 'states'. The third level of government is local government.

¹² The Constitution of Australia.

¹³ Section 51(35) of the Constitution of Australia.

¹⁴ Section 109 of the Constitution of Australia.

¹⁵ See Schedule 4 and 5 of the Constitution.

¹⁶ Schedule 4 of the Constitution.

¹⁷ By implication, section 23(6) of the Constitution is read to provide that the national government is responsible for labour relations matters. This section provides that "national legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36(1)."

The most important legislation with regard to labour matters in Australia is the Fair Works Act 28 of 2009 (FW Act), while in South Africa it is the LRA. Both countries make provision for workers to form or join unions of their choice and to participate in the activities of their unions.¹⁸ There are, however, differences in the way labour disputes are resolved.

The Australian labour law differs from the South African labour law with regard to industrial action in especially two aspects. In the first place the courts or similar structures are empowered to intervene in industrial dispute that could cause significant harm or have a threatening effect on the lives of people or their property.¹⁹ The Fair Works Commission (FWC) is entrusted with this task. It is empowered to suspend or terminate such industrial action.²⁰ In South Africa the Labour Court can only intervene in industrial disputes if one of the parties, usually the employer, applies for an interdict to stop the action from continuing.²¹ This is not a general remedy available to the employer as he or she can only approach the court for an interdict if the strike is not protected unless the conduct constitute a crime.²²

Australian labour law also requires a ballot of members by the union before a strike can take place.²³ A ballot gives members the opportunity of showing whether they support the proposed strike or not. The FW Act requires that before the ballot is conducted, the union or its representative must apply to the FWC for permission to conduct the ballot.²⁴ It is believed that the aim of this application is to warn the FWC that a strike might be taking place so that measures can be taken to monitor the action once it happens. The FW Act also provides that all ballots must be conducted in secret.²⁵ It can be argued that a support for the strike by the majority of union members will mean a decline in production and might compel the employer to rethink its decision not to heed the demands of the employees.

¹⁸ In Australia this is regulated by section 19 of the FW Act of 2009 as amended by the Fair Works Act of 2012. In South Africa these are regulated by sections 4(1), 64(1), 65(1), 69(1) and 77(1) of the LRA. See also Chapter 2 above, where the different types of industrial action are discussed.

¹⁹ Section 423 of the FW Act.

²⁰ *Ibid.*

²¹ Section 68(1) of the LRA.

²² *Idem* section 68(1)(a)(i).

²³ Sections 435 - 437 of the FW Act.

²⁴ *Idem* section 409(2).

²⁵ *Idem* section 437.

In South Africa, there is no requirement for a compulsory ballot of its members by the union before the calling of a strike. This does not, however, prevent a union from holding a ballot in terms of its own constitution. Since this requirement is not legislated, a failure by a union to conduct a ballot does not render the strike unprotected.

2.3 South Africa and Botswana

South Africa and Botswana are both part of the Southern African Development Community (SADC). Like South Africa, Botswana is a democratic state with features similar to those of a unitary state. As stated above, Botswana has a two tier system of government with powers shared between the national government and local government.²⁶ It is a peaceful country and strikes are uncommon in Botswana. They resolve most of their labour disputes amicably at the negotiating table.

Although Botswana has a labour system that does not create a fertile ground for industrial action, the lack of robust industrial relations can be attributed to some factors including the prohibition of public service employees to exercise their rights; and the fact that the government remains the biggest employer in the country. The most important statute in the area of labour law that regulates industrial action is the Trade Dispute Act²⁷ (TDA). The TDA prescribes the requirements that a union have to comply with prior to embarking on a strike and the consequences for non-compliance with the prescribed requirements.²⁸

2.4 South Africa and Canada

There are constitutional similarities between Canada and South Africa. For example, our courts have turned to the Canadian sources for the decisions affecting constitutional matters during the early stages of our constitutional democracy.²⁹ There

²⁶ Cohen T and Matee L 'Public Servants' Right to Strike in Lesotho, Botswana and South Africa – A Comparative Study' (2014) 17 *PER/PELJ* 1631 at 1650.

²⁷ Act 15 of 2004.

²⁸ Section 39(1) and 42(2) of the TDA.

²⁹ For example, in *re: National Education Policy Bill No 83 of 1995 (South Africa)* (1996) 4 BCLR 518 (CC); *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Mphakanyiswa Amendment Bill 1995, Ex Parte Speaker of the KwaZulu-Natal Provincial*

are more than 200 references to Canadian cases and over 80 references to Canadian sources in South African Constitutional Court judgments.³⁰ The South African Bill of Rights³¹ is similar to the Canadian Charter of Rights and Freedoms (the Charter).³² South Africa also borrowed from Canadian labour law – the Employment Equity Act³³ is an example of a South African statute that is based on Canadian law.³⁴

As in most constitutional states, Canada follows a decentralised system of governance with powers divided between three spheres of government. These spheres are the national government, provincial and local governments. Each sphere of government enjoys a certain measure of autonomy and has powers with respect to matters assigned to it by the Constitution. In certain instances, the provincial government has the power over matters assigned to local government. The same also applies to national government over provincial government.

In the case of labour law, there is the Canadian Labour Code³⁵ (Canadian Code) which is the source of labour law in Canada. Most labour statutes derive their powers from the Canadian Code.³⁶

When it comes to union recognition, labour law in Canada recognises more than one union in the workplace provided they meet a certain level of representation.³⁷ This is similar to the South African system of multi-union representation in the workplace where unions are recognised as bargaining agents provided they meet a certain measure of representation. These countries have similar bargaining systems, except that South Africa does not have the ballot requirement and interest arbitration.³⁸

Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Mphakanyiswa Bill of 1995 (1996) 7 BCLR 903 (CC), (1996) 4 SA 653 (CC).

³⁰ Chaskalson A 'Constitutional courts and supreme courts – a comparative analysis with particular reference to the south african experience'.

Accessed at http://www.ecln.net/elements/conferences/book_berlin/chaskalson.pdf on 10/09/2016.

³¹ The Bill of Rights is found in Chapter 2 of the Constitution.

³² The Canadian Charter of Rights and Freedoms is part 1 of the Canadian Constitution of Act, 1982.

³³ 55 of 1998.

³⁴ The EEA is similar in its provisions to the Canadian Employment Equity Act of 1985 (CEEA).

³⁵ Canadian Labour Code R.S.C 1985.

³⁶ For example, the CEEA of 1985.

³⁷ Carter DD, England G, Etherington BD, Trudeau G, Norwell MA *Labour Law in Canada* (2002) at 51.

³⁸ See section 64(1) of the LRA.

Canada has a ballot requirement that forces unions to ballot members before going on strike. They also have interest arbitration which is a mechanism that forces the parties to a dispute into arbitration if the strike has protracted for an unreasonable long period.³⁹

3 AUSTRALIA

3.1 Background and structure of government

Australia became an independent nation on 1 January 1901 when the British Parliament passed legislation allowing the six Australian colonies⁴⁰ to govern in their own right as part of the Commonwealth of Australia.⁴¹

This central government is known as the Commonwealth of Australia.⁴² Each former colony retained some autonomy with regard to its own territory. This power-sharing arrangement has not changed and the power is still divided between the national government and the states. The word 'state' usually refers to an independent country, but is used in some instances to refer to provinces, such as in the case of Australia. In Australia the federal form of government entails that the legislative power is shared between the national or federal government and the former colonies. The colonies are responsible for legislation with regard to matters in respect of their colonies, such as police, labour, health care services, education and public transport. The federal government is responsible for taxation, foreign relations, trade, defence and immigration, and postal and telecommunications services.⁴³

In addition to the federal and state governments, Australia has a third layer of government, namely local government, which deals with community needs such as

³⁹ Section 80 of the Canadian Labour Code of 1985.

⁴⁰ The six Australian territories are Queensland, New South Wales, Victoria, Tasmania, South Australia, and Western Australia.

⁴¹ Section 1 of the Constitution of Australia provides that "the legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives".

⁴² 'Cth' means Commonwealth of Australia. It is usually added to Federal Acts of Australia indicating that the Act is valid for the whole country.

⁴³ Section 51 of the Constitution of Australia.

waste collection, town planning and public recreation.⁴⁴ The local level of government has the power to enact by-laws with regard to their cities, towns or municipalities.⁴⁵ This position is comparable to that of South Africa, which is a constitutional state with certain elements of a federal system of government.⁴⁶ It consists of three spheres of government, that is, the national, provincial and local spheres of government.⁴⁷ The national government is empowered to legislate for the entire Republic on certain matters,⁴⁸ whereas the nine provinces are empowered to legislate on certain other matters⁴⁹ and to pass their own constitutions.⁵⁰ The provincial constitutions regulate matters pertaining to that particular province.⁵¹ Local government consists of municipalities that are established throughout the Republic.⁵² Municipalities are empowered to govern the affairs of their own communities but subject to the Constitution.⁵³

Even though the spheres of government enjoy a certain measure of autonomy, the national government performs an oversight function over provincial and local governments.⁵⁴ If there is conflict between the provincial and national provisions, the national legislation prevails.⁵⁵

⁴⁴ Part B of Schedule 5 of the Constitution of Australia.

⁴⁵ Section 156(2) of the Constitution of South Africa.

⁴⁶ Although this is not expressly acknowledged in the Constitution of South Africa, the structure of government is that of a constitutional state with federal features. Section 1 provides that 'South Africa is one, sovereign, democratic state'. This is so in spite of the fact that the provinces have the power to make laws and their own constitutions, section 142 of the Constitution.

⁴⁷ Section 40(1) of the Constitution of South Africa.

⁴⁸ The National Parliament has the power to legislate on all matters or areas, except those listed in schedule 5 of the Constitution. Schedule 5 matters include abattoirs, ambulance services, archives other than national archives, libraries other than national libraries, liquor licences, museums other than national museums, provincial planning, provincial cultural matters, provincial recreation and amenities, provincial sport, provincial roads and traffic, veterinary exercises excluding the regulation of the profession.

⁴⁹ Section 104(1)(b) of the Constitution of South Africa.

⁵⁰ *Idem* sections 142 and 143.

⁵¹ Currently, the Western Cape Province is the only province in South Africa with its own constitution.

⁵² Section 151(1) of the Constitution of South Africa.

⁵³ *Idem* section 151(3).

⁵⁴ Section 44(1)(a)(ii) and (2) of the Constitution of South Africa.

⁵⁵ *Idem* section 147.

3.2 The right to freedom of association

The right to freedom of association is not expressly granted in the Australian Constitution. It is, however, implied in the right to freedom of communication with respect to political or public affairs.⁵⁶ The fact that there is no explicit recognition of the right to freedom of association in Australia does not prevent the government from granting this right to its citizens and inhabitants because it has ratified various international covenants and ILO Conventions concerning freedom of association. Australia is bound to comply with their provisions. The international conventions that Australia has ratified include the ICCPR,⁵⁷ the ICESCR,⁵⁸ and ILO Convention 87 (Freedom of Association and Protection of the Right to Organise). McCallum argues that the law of Australia needs to reflect the international position in this regard. If a country has ratified a convention it should incorporate the provisions of such convention in its domestic law.⁵⁹

Even though there is no explicit right to freedom of association in the Australian Constitution, the FW Act does make provision for the right to freedom of association for workers, by recognising their right to participate in lawful industrial action.⁶⁰ This means that workers can freely join or refuse to join unions of their choice without fear that they may be victimised for associating themselves with a particular employee organisation.

⁵⁶ *Nationwide News v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times* (1994) 124 ALR 1; *Stephens v WA Newspapers* (1994) 124 ALR 80; *Cunliffe v Commonwealth* (1994) 124 ALR 120.

⁵⁷ Article 22 of the ICCPR guarantees the right to freedom of association, which includes the right to form and join a trade union.

⁵⁸ Article 8 of the ICESCR protects the right to strike.

⁵⁹ McCallum RC 'The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993' (1994) 16(1) *Sydney Law Review* 122 at 134.

⁶⁰ Part 3-1(b) of the FW Act protects freedom of association and involvement in lawful Industrial activities.

4 BOTSWANA

4.1 Background and structure of government

Botswana was colonised by the British as Bechuanaland Protectorate.⁶¹ The law relating to industrial action in Botswana was similar to that of the United Kingdom.⁶² Botswana became independent within the Commonwealth on 30 September 1966 and has ever since been a stable representative democracy.

The Constitution of Botswana provides for a republican form of government.⁶³ The head of the government is the President.⁶⁴ It has been stated above that Botswana has a two tier-system of government. It has national and local governments only as opposed to South Africa, for example, which has three spheres of government.⁶⁵ However, the local sphere of government in Botswana is not provided for in the country's Constitution but is created in terms of Acts of Parliament, for example, Local Government Act⁶⁶ and the Township Act.⁶⁷ This means that the local government can only perform its functions and exercise those powers vested in it by these statutes. Since they are created by Parliament, it can also exercise its discretion to abolish this sphere of government.

The local sphere of government in Botswana refers to District Councils,⁶⁸ District Administration,⁶⁹ Tribal Administration and Land Boards.⁷⁰ The District Council and District Administration are responsible for, amongst other things, primary health care, primary education and rural village water supply.⁷¹ The Tribal Administration and Land

⁶¹ Bechuanaland Protectorate was established on 31/03/1885 and upon gaining independence on the 30/09/1966, it became the Republic of Botswana as it is known today.

⁶² Lange M *Lineages of Despotism and Development: British colonialism and state power* (University of Chicago Press 2009) at 7.

⁶³ Section 1 of the Constitution of Botswana 1966 provides that 'Botswana is a sovereign Republic.'

⁶⁴ Section 30 of the Constitution.

⁶⁵ Section 40 of the Constitution of South Africa provides that 'the government of the Republic is constituted as national, provincial and local spheres of government which are distinctive, interrelated and interdependent.'

⁶⁶ Of 1965 as amended.

⁶⁷ Of 1965 as amended.

⁶⁸ Section 4 of the Local Government (District Councils) Act 18 of 2004.

⁶⁹ Section 2 of the Township Act 19 of 2004.

⁷⁰ Section 3 of the Establishment of Subordinate Land Board Order 53 of 2002.

⁷¹ Section 32 of the Local Government Act

Boards are responsible for amongst other things, hearings, granting or refusal of applications to use land for building residences or extensions thereto; disputes about grazing cattle; ploughing; and communal use in the village.⁷² Subordinate Land Boards hear and adjudicate disputes concerning customary land grants or rights within their jurisdiction.⁷³ They receive and make recommendations to the Tribal Land Boards in respect of applications for common law grants.⁷⁴

The Constitution does not specify the powers of the central government. By implication this means that the central government is responsible for the other matters not assigned to local spheres and has overriding powers over local governments. This makes the local government a mere appendage of the national government as it is subjected to the central government for regulatory and supervisory roles. The central government comprises of various ministries and has executive powers. By implication, the central government has the supreme power relating to the promotion of growth, supervision and overall control of the management of the national economy. It seems, all other functions that the local government cannot do due to lack of expertise and or resources, the national government retains the ultimate authority to perform such functions and exercise powers not referred to in the statutes creating local government.

The government is the largest employer and the most powerful player in industrial relations.⁷⁵ Section 13(2)(c) of the Constitution provides that the right to freedom of assembly and association may be restricted for public officers, employees of local government bodies, or teachers. This position was, however, changed with the amendment of the Trade Dispute Act 15 of 2004.⁷⁶ In terms this Act the definition of an 'employee' was extended to cover public officers so that they may enjoy the right to form and join trade unions in accordance with Convention 87 of the ILO. Excluded from this right is the armed forces, police and prisons services.⁷⁷ The TDA removed the previous restrictions pertaining to trade union membership, trade union leadership,

⁷² Section 4(1) of the Establishment of Subordinate Land Board Orders (note 70).

⁷³ *Idem* section 4(2).

⁷⁴ *Idem* section 4(4).

⁷⁵ Mwatcha MP 'Botswana's Labour Relations System: Lessons from 2011 Public Sector Strike' (2015) Master's Thesis at 20.

⁷⁶ Act 15 of 2004.

⁷⁷ Section 2 of the TDA.

collective bargaining and trade union recognition.⁷⁸ The reasons advanced for imposing these restrictions were that labour organisations had the potential to break down the economy of the country.⁷⁹ In terms of the TDA, trade unions and employers' organisations have the right to choose their leaders in full freedom and may decide who should become an officer of their union.⁸⁰

4.2 The right to freedom of association

The right to freedom of association is entrenched in the Constitution of Botswana. The Constitution provides that:

“Except with his own consent, no person shall be hindered in the enjoyment of his right to freedom of assembly and association, that is to say his right to assemble freely and associate with other persons and in particular to form or belong, to a trade union for the protection of his interest.”⁸¹

In the context of labour relations the right to freedom of association entails that employees are free to join unions of their choice or to form their own unions with the aim of protecting their interest.⁸² The protection of interest in the context of employment relations may have different meanings: employees may use their right to freedom of association to participate in a strike, they can also use it to negotiate the terms and conditions of employment with the employer or employer's organisation.⁸³

Although it is assumed that the right to freedom of association includes both the positive and negative aspects, that is, the right to join or form a union and the right to disassociate or not join a union, section 13 of the Constitution of Botswana does not expressly make provision for the negative aspect of this right. A purposive

⁷⁸ Magalakwe M 'State-Labour Relations in an Emergent Capitalist Democracy: The Case of Botswana' (1995) 28 *Labour Capitalist and Society* 146 at 155.

Accessed at http://www.jstor.org/stable/43158541?seq=1#page_scan_tab_contents on 9/08/2016.

⁷⁹ Botswana Daily News 18 June 1969.

⁸⁰ Section 22 of Act 16 of 2004.

⁸¹ Section 13(1) of the Constitution.

⁸² *Ibid.*

⁸³ Runeson S 'A Global Governance Shift in Development: A Study on how Transitional Corporation's CSR Initiative can Address Freedom of Association and Collective Bargaining and how can that Facilitate Development. Accessed at <http://www.diva-portal.org/smash/record.jsf?pid=diva2%3A899601&dswid=2681> on 08/08/2016. See *Attorney General v Unity Dow* (1992) LRC 623.

interpretation may conclude that the negative aspects should be read into the positive aspect of the right to freedom of association.⁸⁴

In addition, section 13 refers to a 'person' in singular. This, however, does not mean that the right to freedom of association is made available to employees as individuals. A functional interpretation needs to be used when interpreting this right as it cannot be exercised by an employee acting alone but as a group, for example, during a strike. To give section 13 of the Constitution of Botswana a different interpretation could reduce workers freedom of association to mere freedom of assembly.⁸⁵

5 CANADA

5.1 Background and structure of government

Most areas of Canada were colonised by the British and the French. In 1867 a proposal to form a federation of Canada was approved at a conference held on the 1st of July that year in London.⁸⁶ The Constitution of Canada came into effect in 1867.⁸⁷

Canada obtained sovereignty from the United Kingdom in 1982 when the British parliament, with the assent of the Canadian parliament, passed the Canada Act of 1982. The latter formally absolved the United Kingdom of any remaining responsibility for, or jurisdiction over, Canada.⁸⁸

There are three levels of government in Canada – national (federal), provincial and local government.⁸⁹ The national government deals mostly with matters of national interest. Parliament has the exclusive authority to make laws with respect to the

⁸⁴ Tshosa O 'The Application of Non-discrimination in Botswana in Light of *Attorney –General of Botswana v Unity Dow*: Judicial Approach and Practice' (2001) 5 *International Journal of Discrimination and the Law* 189 at 198.

⁸⁵ Molatlhegi B 'Workers Freedom of Association in Botswana' (1998) 42 *Journal of African Law* 64 at 67.

⁸⁶ Blanpain R (editor in chief) *International Encyclopaedia for Labour and Industrial Relations* (loose leaf) (2001) 4 Canada 9-12; Whyte JD, Lederman WR & Bur DF *Canadian Constitutional Law Cases, Notes and Materials* 3 ed (1992) 2-15.

⁸⁷ *Ibid.*

⁸⁸ Tidridge N *Canada's Constitutional Monarchy: An Introduction to Our Form of Government* (2010) at 54.

⁸⁹ Sections 91 and 92 of the Constitution Act of 1867.

regulation of trade and commerce, raising money by any mode or system of taxation, navigation and shipping, the sea coast and inland fisheries and anything not under exclusive provincial jurisdiction.⁹⁰ The federal government has exclusive jurisdiction over employment in specific industries for example in sectors such as banking, radio and TV broadcasting, inland and maritime navigation and shipping, inland fishing, as well as any form of transportation that crosses provincial boundaries.

Employment that is not subject to federal jurisdiction is governed by the second level of government, namely the provincial government. The powers and competencies of the provincial government are outlined in section 92 of the Constitution of Canada. The laws of the province or territory where the employment takes place will govern the employment relationship. The provincial government deals with matters that affect the interests of the province.⁹¹ In certain instances, a matter can be regulated concurrently by the national and provincial government.⁹² For example, the federal government, as well as each of the provinces, with the exception of Quebec, has a special adjudicatory body to administer the applicable labour statutes.⁹³

In Canada there is not one centralised institution tasked with the administration of labour law. There are several institutions vested with the power to regulate labour relations, namely the Federal Labour Relations Board as well as the Labour Relations Boards in the provinces.⁹⁴ They are established in terms of the Labour Relations Code.⁹⁵ The functions of the Federal and Provincial Labour Relations Boards are to adjudicate on labour matters. The Labour Board of British Columbia enjoys the widest range of powers of all the provinces and territories. These include authority over

⁹⁰ Vaillancourt F and Bird RM 'Changing with the Times: Success, Failure and Inertia in Canadian Federal Arrangements, 1945-2001' *Centre for Research on Economic Development and Policy Reform: Working Paper No 151* (August 2002).

⁹¹ Section 92 of the Constitution of Canada.

⁹² *Ibid.*

⁹³ 'Each jurisdiction has a labour board established by statute to enforce and administer that jurisdiction's labour laws. Quebec has its own Labour Court which adjudicates labour disputes that arise within the Quebec provincial borders', Schreiber PM 'Potential Liability of New Employers to Pre-Existing Collective Bargaining Agreements and Pre-Existing Unions: A comparison of Labour Law Successorship Doctrine in the United States and Canada' (1992) *Northwestern Journal of International Law & Business* 571 at 574.

⁹⁴ Lynk M 'Union Democracy and the Law in Canada' (2002) 1 *Just Labour* 16-30. Accessed at <http://www.justlabour.yorku.ca/volume1/pdfs/jl-lynk.pdf> on 11/05/2016.

⁹⁵ Section 9(1) of the Canadian Code.

conciliation, strikes, picketing and grievance arbitration.⁹⁶ The Labour Boards in the other Canadian jurisdictions enjoy only some of the labour relations powers.⁹⁷

The third sphere of government is the local or municipal government. This sphere of government is lower than the provincial government. Local government is a creature of statute.⁹⁸ They have jurisdiction over certain matters assigned to it by the Federal Act and such matters fall within their area of jurisdiction.⁹⁹ It is regarded as autonomous, responsible and accountable layer of government.¹⁰⁰ Some of the functions of municipalities include service delivery especially, transport facilities, protection, environment, recreation facilities, housing and regional planning.¹⁰¹

5.2 The right to freedom of association

The right to freedom of association is expressly entrenched in the Constitution of Canada.¹⁰² The Charter of Rights and Freedoms (Charter) provides that 'everyone has the right to freedom of association.'¹⁰³ The inclusion of the right to freedom of association in the Charter is in line with international standards. Canada supported the adoption of the two most important international instruments on the right to freedom of association: the Right to Organise and Collective Bargaining Convention¹⁰⁴ and the Freedom of Association and Protection of the Right Organise Convention.¹⁰⁵ In March 1972, Canada ratified these two Conventions.¹⁰⁶

To ensure compliance with these international standards, the Constitution of Canada, through the Charter of Rights and Freedoms makes provision for the right to freedom of association.¹⁰⁷ In addition to the right to freedom of association, the Charter

⁹⁶ See Guide to the British Columbia Labour Relations Code (2003) at 2. Accessed at <http://www.lrb.bc.ca/codeguide/guide.pdf> on 08/08/2016.

⁹⁷ Mitchell CM and Murray JC 'Changing Workplaces Review: Special Advisors' Interim Report' (2016) at 99. Accessed at https://www.labour.gov.on.ca/english/about/pdf/cwr_interim.pdf on 08/08/2016.

⁹⁸ Section 92(9) of the Canadian Constitution.

⁹⁹ For example, the City of Toronto Act of 1997 and Community Charter Act of 2003.

¹⁰⁰ McAllister ML *Governing Ourselves? The Politics of Canadian Communities*, (2004) at 112-113.

¹⁰¹ Tindal CR & Tindal SN *Local Government in Canada* 5th ed (1999) at 252.

¹⁰² The Charter of Rights and Freedoms is in section 1 of the Constitution of Canada, 1982.

¹⁰³ Section 2(d) of the Constitution of Canada.

¹⁰⁴ No 98 of 1949.

¹⁰⁵ No 87 of 1948.

¹⁰⁶ See Chapter 2 above on the important provisions relating to labour in these Conventions.

¹⁰⁷ Section 2(d) of the Charter.

guarantees a set of liberal rights such as freedom of expression, religion, association and assembly;¹⁰⁸ the rights of the arrested and charged with crimes;¹⁰⁹ prohibition of cruel and unusual punishment;¹¹⁰ the right to vote;¹¹¹ and the right to equality.¹¹² All of these rights are found in international instruments and member states are expected to legislate them in their national law. Fudge argues that the Charter is presumed to provide at least as great a level of protection as is found in international human rights documents that Canada has ratified.¹¹³

The right to freedom of association is aimed at protecting unions and their members against employer interference.¹¹⁴ The objective of the Canadian Code is to facilitate production and delivery of services by controlling strikes and lockouts, occupational safety and health, and other employment matters.¹¹⁵ It provides that 'every employee is free to join a trade union of his or her choice and to participate in its lawful activities.'¹¹⁶

In the case of labour law, the right to freedom of association refers to the right to join or not to join trade unions and participate in union activities. It also includes the right to engage in collective bargaining, strikes, pickets and protest action.¹¹⁷ The inclusion of the right to strike, picket and protest forms an integral part of the right to freedom of association. Fudge confirms this when she states that the guarantee of freedom of association should also include the right to protect objects of the association (in the case of collective bargaining) and the means by which those objects are pursued (in the case of striking).¹¹⁸

¹⁰⁸ *Idem* section 2.

¹⁰⁹ *Idem* sections 7- 14.

¹¹⁰ *Idem* section 12.

¹¹¹ *Idem* section 3.

¹¹² *Idem* section 15.

¹¹³ Fudge J 'The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support Case in Canada and Beyond' (2008) 37(1) *Industrial Law Journal* 25 at 42.

¹¹⁴ Nell MM 'Unions and the Charter: The Supreme Court of Canada and Democratic Values' (2003) 10 *Canadian Labour & Employment Law Journal* 3 at 13.

¹¹⁵ See Preamble to the Canadian Code.

¹¹⁶ Section 8(1) of the Canadian Code.

¹¹⁷ Nel 'Unions and the Charter: The Supreme Court of Canada and Democratic Values' (note 114, chapter 6) at 31.

¹¹⁸ Fudge J 'Labour is Not a Commodity: The Supreme Court of Canada and the Freedom of Association' (2004) 67 *Saskatchewan Law Review* 425 at 430.

If an employee or the union feels that this right is infringed, they can approach the relevant Labour Board for redress.¹¹⁹ In *Saskatchewan v Saskatchewan Federation of Labour*,¹²⁰ a new provincial government was elected in Saskatchewan in 2007. Six weeks later, the Public Service Essential Services Act¹²¹ (the PSES Act) and the Trade Union Amendment Act¹²² (the TUA Act) were passed. The Saskatchewan Federation of Labour (the SFL) and the unions challenged the constitutional validity of these Acts on the ground that they infringed the rights and freedoms guaranteed by the Charter in a manner that could not be justified under section 1 of the Charter.¹²³ The court held that the PSES Act infringed the rights protected by section 2(d) of the Charter, and could find no justification in terms of section 1 for the infringement of the right to freedom of association. The court declared the PSES Act null and void, but suspended the invalidity for twelve months.

In Canadian labour law, the right to freedom of association includes the right not to be dismissed for exercising the right.¹²⁴ To be able to exercise their right to freedom of association without fear, employees need to be protected from negative consequences that may result from being a member of a union or associating themselves with the activities of a union. In a 1987 Alberta case, *Reference re Public Service Employee Relations Act (Alberta)*¹²⁵ the court confirmed that section 2(d) of Public Service Employee Relations Act (Alberta)¹²⁶ protected workers' freedom to associate 'without penalty or reprisal'.¹²⁷ In *Delisle v Canada (Deputy AG)*,¹²⁸ the court repeated its message that the Charter guaranteed workers' freedom to establish an independent employee association of their own choosing without reprisal.¹²⁹ Therefore, workers should not be exposed to the threat of losing their jobs for

¹¹⁹ Section 19(1) of the Canadian Code.

¹²⁰ (2012) (CanLII) 62 (SKQB). Accessed at <http://www.canlii.org/en/sk/skqb/doc/2012/2012skqb35/2012skqb35.htm> on 18/08/2014.

¹²¹ Of 2008.

¹²² Of 2008.

¹²³ Section 1 of the Charter provides that: "the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

¹²⁴ As in South Africa in terms of section 18 of the Constitution and section 4(1) read with section 187(1)(a) of the LRA.

¹²⁵ (1987) 1 SCR 313 at 391.

¹²⁶ Chapter P-43.

¹²⁷ At para 178.

¹²⁸ (1999) 2 SCR 989, 176 DLR (4th) 513 at para 32. See also *Dunmore v Ontario (AG)* (2001) SCC 94, (2001) 3 SCR 1016 at para 20.

¹²⁹ See *Dunmore v Ontario (AG)* (note 128, chapter 6) at para 20.

exercising their constitutional right to associate with co-worker(s) and making collective representations to the employer.¹³⁰

The rights protected in the Charter, including the right to freedom of association, are not absolute as they can be limited in terms of the law.¹³¹ Here, Canada followed the models of international human rights instruments adopted since the Second World War, in particular, the International Covenant on Civil and Political Rights of 1966 (ICCPR) and the European Convention on Human Rights of 1950. Section 1 of the Canadian Constitution provides that:

“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

This implies that a right can only be limited by law. Such law must serve a sufficient important purpose, and does so in a way that does not infringe the right more than necessary.¹³² The limitation of a right involves a balancing exercise whereby competing rights are weighed against each other to see which side weighs heavier than the other. During this process, the principle of proportionality plays a crucial role.

It requires that before a right is limited, there must be a rational connection between the purpose of law and the means employed by the legislature to achieve its objective.¹³³ To achieve this there must be a fair balance of competing interests. Both the underlying objective of a measure and the effects that actually results from its implementation needs to be proportional to the deleterious effects that measure has on fundamental right and freedoms.¹³⁴ In South Africa these factors are listed in section 36(1) of the Constitution as:

¹³⁰ Dorrey DJ ‘Graduated Freedom of Association: Worker Voice Beyond the Wagner Model’ (2013) 38 *Queen’s LJ* at 525. Accessed on 3/07/2014 at <http://queensu.ca/lawjournal/issues/pastissues/06-Dorrey.pdf> on 08/08/2016.

¹³¹ Section 1 of the Constitution of Canada.

¹³² Hogg PW ‘Canadian Law in the SA Constitutional Court’ (1998) 13 *SAPR/PL* 1 at 5.

¹³³ *Dagenais v Canadian Broadcasting Corporation* (1994) 3 SCR 835 at 887.

¹³⁴ Grimm D ‘Proportionality in Canada and German Constitutional Jurisprudence’ (2007) 57(2) *University of Toronto Law Journal* 383 at 386.

“the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.”

In limiting the rights guaranteed in the Charter, Canadian Courts have developed a two-staged approach.¹³⁵ The South African Bill of Rights is similar to the Canadian Charter of Rights and Freedom. The reason for this similarity is that most of the Canadian Charter’s fundamental rights have been adopted by the drafters of the Constitution of South Africa¹³⁶ to such an extent that these two look similar and only differ slightly in language.¹³⁷ Since the Canadian limitation clause is similar to South Africa’s limitation clause, the reader is referred to Chapter 2 above where the limitation clause in South Africa is discussed in more details.

6 TYPES OF INDUSTRIAL ACTION

6.1 Australia

The Australian definition of ‘industrial action’ is contained in section 19(1) of the FW Act, where it is defined as:

- “(a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
- (b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
- (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work; and
- (d) the lockout of employees from their employment by the employer of the employees.”

Section 19(2), however, excludes certain conduct from the definition of industrial action:

- “(a) action by employees that is authorised or agreed to by the employer;
- (b) action by an employer that is authorised or agreed to by or on behalf of employees of the employer;

¹³⁵ See *R v Oakes* (1986) 1 SRC 103 at 138-139.

¹³⁶ Constitution of the Republic of South Africa, 1996.

¹³⁷ See *S v Makwanyane* (note 24, chapter 3); *S v Coetzee* (1997) 4 BCLR 437 (CC); and *Case v Minister of Safety and Security* (1996) 5 BCLR 609 (CC).

- (c) action by an employee if:
 - (i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and
 - (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace that was safe and appropriate for the employee to perform.”

6.1.1 Strikes

The source of the right to strike is the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR). Article 8(d) of the ICESCR in which the right to strike is expressly guaranteed, makes provision for protected industrial action. Australia ratified this Convention as well as other related conventions, and consequently has a moral duty to comply with its provisions.¹³⁸ In *Minister of State for Immigration and Ethnic Affairs v Teoh*,¹³⁹ the court confirmed the legal position of Australia in relation to international law, namely that international obligations had to be observed or complied with consistently. The court stated that by being a signatory to international conventions, Australia created the legitimate expectation that the conventions would be taken into account when decisions affecting workers within its borders were taken.¹⁴⁰

In Australia, a strike is defined as ‘a temporary stoppage of work by a group of employees in order to express a grievance or enforce a demand’.¹⁴¹ Griffen explains that the term ‘strike’ embraces a broader range of conduct including work bans, boycotts, go-slows, picketing, occupation of the workplace and acts of industrial sabotage.¹⁴² The same is found in South Africa, the action by a group of employees is regarded as a legitimate suspension of the operation of their contracts of employment until certain demands or grievances are met or a particular agreement is reached between the employees and the employer or employers’ organisation.¹⁴³

¹³⁸ *Coal & Allied Operations (Pty) Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* (1997) 73 IR 311.

¹³⁹ (1995) HCA 20; (1995) 183 CLR 273.

¹⁴⁰ *Idem* at 291.

¹⁴¹ Griffen *J Strikes: A study in quantitative economics*, Columbia University Press, New York (1993), at 20, quoted in Creighton B and Stewart S *Labour Law*, The Federation Press, 4th ed (2005).

¹⁴² At 534-535.

¹⁴³ See section 213 of the LRA.

As is the case with South Africa,¹⁴⁴ the principle of ‘no work no pay’ applies in Australia. Employers are prohibited from paying employees who are on strike. The FW Act provides that ‘if an employee engaged, or engages in protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to the total duration of the industrial action on that day.’¹⁴⁵ The employer may not, however, stop paying other employee entitlements to employees on strike.¹⁴⁶

6.1.1.1 Protected

Australian law makes provision for protected strikes.¹⁴⁷ For people to participate in a strike, they need to comply with certain requirements. Compliance with such requirements gives their action a protected status. The consequence of a protected strike is that no action can be taken against employees who participate in the action. Neither the employees will be in breach of contract of employment,¹⁴⁸ nor may they be dismissed for participation in such action.¹⁴⁹ A strike will be protected if:

- It occurred in a protected bargaining period.¹⁵⁰ A bargaining period is a period where the union or employer, who wants to negotiate a collective agreement, gives notice of intention to negotiate to the other party to the proposed negotiations and to the FWC (labour tribunal).¹⁵¹ Such bargaining period will come to an end if an agreement is reached; or the party that initiated the bargaining period gives notice to the other negotiating party that it no longer wishes to reach an agreement, or if the FWC suspends or terminates the bargaining period.¹⁵²

¹⁴⁴ See *Coin Security (Cape) v Vukani Guards & Allied Workers Union* (note 19, chapter 2) at 244J–245A.

¹⁴⁵ Section 470(1) of the FW Act.

¹⁴⁶ *Ibid.*

¹⁴⁷ Section 415 of the FW Act.

¹⁴⁸ Section 67(2) of the LRA.

¹⁴⁹ *Idem* section 67(6).

¹⁵⁰ Sections 173 and 228(1)(f) of the FW Act.

¹⁵¹ *Idem* section 229.

¹⁵² See (ii) below on the powers of the FWC.

- The action was directed against the employer or the employers' organisation.¹⁵³ This is obviously the aim of the strike.
- The trade union conducted a ballot.¹⁵⁴ The Australian Electoral Commission (AEC) is the official ballot agent for industrial action ballots in Australia.¹⁵⁵ The balloting process can also be conducted by an independent ballot agent. A union that wants to call a strike must apply to the FWC for an order to undertake a protected action ballot. If the application is approved the union will go ahead with its planned ballot. The applicant may also want to use the services of an independent agent. In such case, an application must be made to the FWC. The FWC may only appoint another person who is fit and proper to conduct the ballot.¹⁵⁶ The application for a ballot must include all the necessary information required by the FW Act.¹⁵⁷ A protected strike may go ahead only if 50% plus 1 of the persons eligible to vote voted and approved the action.¹⁵⁸ 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.¹⁵⁹ It is clear that the purpose of including the ballot requirement for protected industrial action is to achieve a fair, simple and democratic process to determine whether employees wish to engage in a particular protected action.¹⁶⁰

Case law has also insisted that the ballot by members prior to strike action is a requirement for a protected strike. In *JJ Richards & Sons (Pty) Ltd v Transport Workers Union of Australia*,¹⁶¹ the aggrieved employer argued that the FWC was not at liberty to issue a ballot order because the union failed to comply with the other requirements for a protected strike such as failure to commence bargaining with the employer. The full bench of the FWC found that a union could seek a ballot for protected industrial action despite the fact that bargaining

¹⁵³ Section 409(1)(b) of the FW Act.

¹⁵⁴ *Idem* section 436.

¹⁵⁵ Part 3-3, Division 8 of the Fair Work Regulations 2009 (Cth) prescribes regulations for the conduct of a secret ballot by the AEC.

¹⁵⁶ Section 444(1)(b)(ii) of the FW Act read with Regulation 3.11 of the Fair Works Regulations.

¹⁵⁷ See section 437 of the FW Act.

¹⁵⁸ Section 478 of the Fair Work Regulations.

¹⁵⁹ *Idem* section 467(1)(b).

¹⁶⁰ *Idem* section 436.

¹⁶¹ (2011) FWA FB 3377.

for an enterprise agreement had not commenced with the employer. Moreover, the FWC found that protected action ballots were available even if the employer was unwilling to bargain.

- The employer must be given the notice of commencement of the strike. Written notice of 72 hours or three days, setting out the nature of the intended action, must be given to the employer.¹⁶² The 72 hours or three days-notice may be extended to seven days if the FW Act authorises such extension.¹⁶³ It is believed that during the extended period, the parties will attempt to reach agreement on the disputed issues before the strike commences. This will also give the parties the opportunity to talk and try to influence one another on the issues that form the basis of the proposed industrial action. In *National Workforce (Pty) Ltd v Australian Manufacturing Workers Union*,¹⁶⁴ three unions had not served the employer with the required strike notices. The unions were held liable in the applicant's civil action because they failed to give their employer the required notices. The court held that the serving of notice was a precondition for the commencement of a protected action. It further held that the giving of notice plays a significant role in the progression of an industrial dispute.¹⁶⁵

The right to strike in Australia is, however, not without limitations and/ or exclusions. Employees may not strike:

- in support of unlawful terms and conditions of employment.¹⁶⁶ An unlawful term is defined in section 194 of the FW Act as any term of an agreement that is '*...discriminatory, objectionable, unfair to employees, a term that is inconsistent with the provision for industrial action...*';
- the negotiation of non-union agreements;¹⁶⁷ and

¹⁶² Section 443 of the FW Act.

¹⁶³ *Ibid.*

¹⁶⁴ (1997) VSC 44; (1997) VICSC 44.

¹⁶⁵ *Ibid.*

¹⁶⁶ Sections 408-409 of the FW Act.

¹⁶⁷ *Idem* section 172.

- a strike that is prohibited by an existing collective agreement.¹⁶⁸

If a strike complies with these requirements, any action taken in support of or in relation to such strike will be protected against any action under any law.¹⁶⁹ An action may, however, be taken against participants in a strike if they commit unlawful acts such as injury to other people, damage to property.¹⁷⁰ It seems that if the action is taken contrary to the statutory provisions, the participants may be subject to legal sanction, arising either from common law breach of contract or civil litigation arising from participation in an unprotected strike.

Compliance with the statutory requirements for a protected strike ensures that the right to strike is available to workers but such right cannot be exercised without following due processes. Failure to comply with the law regulating lawful or protected strikes will render the action unprotected and the consequences for an unprotected action will follow which may include civil litigation.

6.1.1.2 Unprotected

As stated above, a strike is unprotected where one or both parties fail to comply with the prescribed statutory requirements for a protected strike.¹⁷¹ There could be two reasons for employees not complying with the statutory requirements for a protected strike. The first reason entails that the employees deliberately or unintentionally fail to comply with the requirements. The second reason is that the action was taken without reference to the statutory requirements. Regardless of whether the non-compliance was deliberate or negligent, the strike will not enjoy immunity and the employees will be liable for breach of contract as they will not enjoy the immunity provided to protected strikes.¹⁷²

¹⁶⁸ Sections 409(1)(c) and 417 of the FW Act. This is similar to sections 65(1)(a) of the LRA in South Africa.

¹⁶⁹ Section 415 of the FW Act.

¹⁷⁰ See in this regard, *National Workforce (Pty) Ltd v Australian Manufacturing Workers Union* (1998) 3 VR 265 at 267.

¹⁷¹ Section 415 of the FW Act.

¹⁷² Section 415 of the FW Act protects employees who participate in a protected strike. If employees participate in an unprotected strike, the immunity provided by section 415 is obviously not available to them. See also *Ansett Transport Industries v Australian Federation of Air Pilots* (1991) 1 VR 637 cf *Re Federated Storemen and Packers Union of Australia, NSW Branch* (1987) 22 IR 198.

In *Telstra Corporation Ltd v Community and Public Sector Union*,¹⁷³ the respondent and other unions were involved in negotiations for a collective agreement to replace the one that would soon expire. The unions purported to serve notice on Telstra (the employer) in relation to the proposed industrial action. According to Telstra, the notice served by the union was defective and could not be said that there was proper compliance with the law. The employees proceeded with their proposed industrial action as indicated in the notice. The court held that the industrial action was not protected on two grounds: first, the correct notice period had not been given and, second, the notice was void for lack of specificity. The action was therefore open to a section 127 order provided all other requirements were met. One of the orders a court can make is an interdict to stop the union and its members from continuing with their action.

Section 127 of the Work Relations Act of 1996 was replaced by section 423 of the FW Act. Section 423 of the FW Act grants the FWC the power to stop or terminate industrial action where it is causing, or threatening to cause significant harm to a person regardless of whether the action was protected. It is a requirement for the application of this section that the action is happening, threatening to happen, impending, or probable in the course of the industrial dispute. This means that the courts in Australia can intervene where it is foreseeable that the industrial action will cause violence. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v AG Coombs Fire Protection*,¹⁷⁴ it was held that the Australian Industrial Relations Commission (AIRC) (which has now been replaced by FWC) could only grant an order in terms of section 127 (now section 423) if these requirements were met.

The onus was on the applicant to satisfy the Commission that the order to stop or terminate the industrial action had to be made, except where the matter commenced on the Commission's own motion.¹⁷⁵ The applicant needed to do something more than

¹⁷³ (2001) 107 FCR 93.

¹⁷⁴ (1998) 88 IR 110.

¹⁷⁵ *Coal & Allied Operations (Pty) Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (note 138, chapter 6) at 321.

merely relying on an entitlement to section 423 to seek such an order.¹⁷⁶ The applicant had to be able to point to some objective evidence that indicated a likelihood that the industrial action would cause harm.¹⁷⁷ These remedies were available regardless of whether the action was protected or not; as long as there was proof that the requirements of section 423 had been complied with, the FWC was empowered to stop or terminate the action.

The aim of section 423 is to provide effective legal remedies to those who suffer harm from industrial action.¹⁷⁸ It gives the Commission discretion to stop or terminate industrial action. If the FWC is satisfied that the action threatens the life, personal safety or health and welfare, of the population or a part of it, or cause significant damage to the Australian economy or an important part of it, it is bound to suspend or terminate industrial action.¹⁷⁹ The application to suspend or terminate industrial action can be made by the Minister responsible for workplace relations or by an employer who is affected by the industrial action or by any person prescribed by the regulations.¹⁸⁰ In *Australia and International Pilots Association v Fair Works Australia and others*,¹⁸¹ the Commonwealth Minister applied to the FWC for an order to suspend or terminate an industrial action by the Australia Licensed Aircraft Engineers' Association (ALAEA), the Transport Workers union (TWU), and the Australian and International Pilots Association (AIPA). The Minister's application was further perpetuated by the fact that after the unions had commenced with their industrial action, Qantas Airways responded by grounding its flights an act which the Minister considered dangerous to the tourism industry. The Fair Work Australia (FWA),¹⁸² as it was then called, observed that there was no likelihood that the protected industrial action taken by the three unions (ALAEA, TWU, and AIPA) was threatening to cause significant damage to the tourism and air transport industries.¹⁸³ The FW Act, nonetheless, terminated the industrial action by unions as well as the action by Qantas

¹⁷⁶ See *Gordon & Gotch (Pty) Ltd v National Union Workers* (1999) 95 IR at 3.

¹⁷⁷ *Pryor v Coal & Allied Operations (Pty) Ltd* (1997) 78 IR 300.

¹⁷⁸ Reith P *Commonwealth, Parliamentary Debates, House of Representatives*, (23 May 1996) at 1302.

¹⁷⁹ See *Coal & Allied Operations (Pty) Ltd* (1998) 80 IR 14.

¹⁸⁰ *Australia and International Pilots Association v Fair Works Australia* (2012) FCAFC 65.

¹⁸¹ *Ibid.*

¹⁸² FWA is a labour tribunal, see sections 575 and 577(a)-(d) of the FW Act.

¹⁸³ At para 10.

Airways and all other activities associated with the industrial action were also terminated.

The FW Act provides for 'other instances' where an order to stop or prevent protected action could be granted by the FWC. This may happen where there is lack of good faith during the bargaining process, or where a bargaining period is initiated and used as a tactic to protect an underlying claim.¹⁸⁴ It will be difficult to establish whether one of the parties to the negotiation process is negotiating in bad faith. Section 228 of the FW Act sets out the requirements for good faith bargaining.¹⁸⁵ The section adopts a simplified procedure to ensure good faith bargaining.¹⁸⁶

The FWC can also make an order for civil penalties.¹⁸⁷ The FW Act provides that a person commits an offence if he or she intentionally¹⁸⁸ engages in conduct in contravention of an FWC order.¹⁸⁹ The punishment for this is imprisonment of a maximum of 12 months.¹⁹⁰

¹⁸⁴ Section 228 of the FW Act.

¹⁸⁵ In terms of section 228(1) of the FW Act bargaining representatives must meet the following good faith requirements:

- (a) attending, and participating in, meetings at reasonable times;
- (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner,
- (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representatives response to those proposals;
- (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
- (f) recognising and bargaining with the other bargaining representatives for the agreement.

(2) the good faith bargaining requirements do not require:

- (a) a bargaining representative to make concessions during bargaining for the agreement; or
- (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

¹⁸⁶ See in this regard Dorsett S and Lafferty G 'Good Faith and the Fair Work Act: Its Potential, in Light of the New Zealand Experience' (2010) 21 *Economic and Labour Relations Review* 53 at 55.

¹⁸⁷ Section 539 of the FW Act.

¹⁸⁸ The requirement of intent is imported into this section by the Criminal Code (Cth), section 56(1).

¹⁸⁹ Section 675(1) of the FW Act.

¹⁹⁰ Section 4D of the Crimes Act of 1900 determines that where an offence is created in a Commonwealth Act and a penalty is specified, the offence is punishable on conviction by a penalty 'not exceeding the penalty so set out in the Act'.

6.1.2 Pickets

In Australia, picket action does not fall within the definition of industrial action.¹⁹¹ The reason for this is that picketing does not constitute a ban, limitation or restriction on the performance of work in terms of the definition of industrial action.¹⁹² As a result, it is uncertain whether picket action constitutes industrial action. In terms of the definition of industrial action, it seems as if it does not, but in court cases the possibility was created that it could be. In *Coal and Allied Operations Ltd v Construction, Forestry, Mining and Energy Union*,¹⁹³ it was held that picketing did not constitute industrial action. It is also evident from subsequent cases that this area of the law has not been settled.¹⁹⁴

The problem with the exclusion of 'picket action' from the definition of 'industrial action' is uncertainty about the variety of conduct that could constitute picketing. In *Dauids Distribution (Pty) Ltd v National Union Workers*,¹⁹⁵ a picket in the industrial relations setting was defined as a 'person who stands outside an establishment to make protest, to dissuade or to prevent employees, suppliers, clients or customers of the employer from entering the establishment'.¹⁹⁶ The Federal Court held that picketing could range from a protest, in which the picketers do no more than communicate their views to persons entering or leaving the particular premises, through various degrees of hindrances to the total prevention of access to the premises.¹⁹⁷ The court further held that had picketing been intended to be included in the definition of 'industrial action' this would have been expressly stated in the legislation. This means that the statutory provisions for protected action do not apply to picketing unless the conduct also constitutes some other form of 'industrial action' which does comply with the definition

¹⁹¹ Section 19 of the FW Act.

¹⁹² *Dauids Distribution (Pty) Ltd v National Union Workers* (1999) 91 FCR, 463 at 509.

¹⁹³ *Coal and Allied Operations Ltd v Construction, Forestry, Mining and Energy Union* (note 138, chapter 6) at 32.

¹⁹⁴ In *Saint Gobain Warehousing (Pty) Ltd v NUW* (2006) NSWSC 1210, the court referred to the observations of Finkelstein J in a federal court decision *CEPU v Australian Postal Corp*, unreported (judgment, 26 February) 2004 which had raised the possibility that picketing might be a 'ban, limitation or restriction' on the performance of work.

¹⁹⁵ *Dauids Distribution (Pty) Ltd v National Union Workers* (note 192, chapter 6) at 490.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Idem* at 486.

of section 19 of the FW Act. According to the decision in this case a picket was not an industrial action.¹⁹⁸ It held further that the Australian common law does not, however, regard picketing as unlawful *per se*, unless:

“it goes beyond the distribution of information and the communication of grievances, to include the commission of unlawful offences such as obstruction, intimidation and interference with contractual relations.”¹⁹⁹

Like strikes, pickets are collective in nature, consisting of conduct by employees or persons as a group, expressing their demands. This collective nature of a picket may be a crucial factor in the commission of certain unlawful acts such as violence or intimidation. In certain instances, picketing actions may even constitute delicts, if, for example, picketers hinder the free flow of traffic to and from the premises of the employer.²⁰⁰ In such a case it will attract civil remedies such as a claim for damages for the loss suffered.

The fact that picketing is not included in the definition of ‘industrial action’ in the FW Act, implies that picketing does not come within the protections afforded under the protected industrial action provisions.²⁰¹ It may, however, be subject to common law causes of action.

6.2 Canada

6.2.1 Strikes

In Canada, the right to strike is regarded as one of the characteristics of freedom of association in the workplace.²⁰² It is a right available to workers as industrial citizens. Industrial citizenship is not different from other discipline-related entitlements. Political citizenship, for example, requires that citizens should have certain rights such as the

¹⁹⁸ *Ibid.*

¹⁹⁹ Wallace-Bruce N *Outline of Employment Law* 2nd ed (1999) at 212.

²⁰⁰ In *Bovis Lend Lease (Pty) Ltd v CFMEU (No 2)* (2009) FCA 650, the CFMEU was fined \$7, 000 for contempt of court after breaching the terms of an injunction. An injunction in South Africa would be equivalent to an interdict. This order directs the employees to cease obstructing and interfering with the passage of vehicles into a construction site.

²⁰¹ Section 415 of the FW Act.

²⁰² Brym R, Bauer LB and McIvor M ‘Is Industrial Unrest Reviving in Canada? Strike Duration in the Early Twenty-First Century’ (2013) 50 *Canadian Review of Sociology* 227 at 229.

right to vote. The same applies to industrial citizenship. Industrial citizenship requires that union members must have rights that are applicable to them as workers such as the right to strike.²⁰³

In Canadian law, a strike is defined as the 'cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to restrict or limit production or output.'²⁰⁴ It is clear that 'without the right to strike, the capacity of workers to defend their rights and protect their dignity is eroded, undermining the basic tenets of industrial democracy and internationally recognised worker rights.'²⁰⁵

As is the case in South Africa, the right to strike in Canada is not without restrictions or limitations.²⁰⁶ One of such limitations is that unions may not take industrial action if the employer's service has been declared an essential service.²⁰⁷ Workers may not participate in industrial action if the issue in dispute is regulated by a collective agreement and such agreement is still in force.²⁰⁸ If the dispute is regulated by a collective agreement that is in force, it must be resolved through arbitration.²⁰⁹ In South African law, a strike can only take place if there is no collective bargaining agreement that covers the issue in dispute.²¹⁰

In the instance of workers not being prohibited from going on strike by any of the limitations, the Canadian collective bargaining law requires the parties to exhaust²¹¹ or comply with specific dispute resolution procedures before going on strike.²¹² These dispute resolution procedures, which form the requirements for protected action, are:

²⁰³ *Ibid.*

²⁰⁴ Section 3(1) of the Canadian Code.

²⁰⁵ See Article 8(d) of the International Covenant on Economic, Social and Cultural Rights of 1976.

²⁰⁶ See para 2.2 of Chapter 2 above where these limitations are discussed.

²⁰⁷ Charlotte AB 'In defence of the Right to Strike' (2009) 59 *University of New Brunswick LJ* 128 at 131.

²⁰⁸ Section 88(1) of the Canadian Code. See also Schreiber 'Potential Liability of New Employers to Pre-Existing Collective Bargaining Agreements and Pre-Existing Unions: A Comparison of Labour Law Successorship Doctrines in the United States and Canada' (note 93, chapter 6).

²⁰⁹ *Ibid.*

²¹⁰ See section 65(1)(a) of the LRA.

²¹¹ For example, conciliation is aimed at assisting the parties to reach agreement on disputed issues but at the same time it is one of the procedural requirements with which the union must comply before going on strike.

²¹² Carter *Labour Law in Canada* (note 37, chapter 6).

6.2.1.1 Protected

Canadian law makes provision for protected strikes, provided the correct procedures are followed.

As is the case in South Africa, conciliation is regarded as important tool in the resolution of labour disputes. It is defined as:

“the process whereby a neutral third person who is knowledgeable in effective negotiation procedures is hired to help the parties to reach agreement on disputed issues.”²¹³

All Canadian jurisdictions recognise that conciliation plays an important role in resolving labour disputes.²¹⁴ The same is true of South Africa.²¹⁵ The effect of a conciliation procedure is to delay the commencement of a strike thereby giving the parties time to iron out their differences. Thus, the conciliation process needs to bring about a solution to the issue in dispute. If conciliation fails, the union may take their action to the next level of the bargaining process.

If conciliation fails, the next step is for the union to hold a strike ballot. In Canada, it is a requirement that unions must ballot members prior to industrial action.²¹⁶ In South Africa, there is no statutory obligation that compels a union to ballot its members prior to strike action. Unions, however, do hold a ballot of members in terms of their own internal rules but this is not an obligation in terms of the law.

In Canada, where it is a requirement for unions to ballot members, the union will go ahead with the strike if the majority of employees voted in support of the strike. If, however, the majority of the members of the union vote against the proposed strike, the strike cannot proceed. To require a union to ballot its members could help to stop a union that does not have mandate from calling a strike; protect the business of the

²¹³ Conciliation: A Guide for Employer and Union Committees.
Accessed at <http://novascotia.ca/lae/conciliation/conciliation.asp> on 30/06/2014.

²¹⁴ *Ibid.*

²¹⁵ Section 115 of the LRA.

²¹⁶ This is the case in Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario and Quebec, Carter D *Labour Law in Canada* (note 212) at 293.

employer against the harm caused by a strike, and also protects 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 is prevented.

To protect the victimisation of employees by other fellow-employees or union leaders, the process of casting a vote needs to be secret. In *Johnston Packers Ltd v United Food and Commercial Workers International Union Local 1518*,²¹⁷ the employer complained that the union failed to conduct a pre-strike vote in accordance with sections 39 and 60 of the British Columbia Labour Relations Code and Labour Relations Regulation.²¹⁸ The employer alleged that the employees were not provided with a private area to mark ballots as a result of which the privacy and secrecy of the ballots were compromised. The employer sought a declaration that the voting process was invalid.

The LRB observed that Schedule 1 of the Labour Relations Code of British Columbia required that a place be allocated for voting and that no person other than the voter be permitted in the space for the time it takes to vote. The Regulations placed an onus on the officer in charge of the voting process to ensure compliance with these requirements. It did not place the onus on employees to construct their own private space through physical performance to shield their ballots. The Board held that the voting environment should be prepared long before the voting process commences as required by the Code.²¹⁹

In *Hospitality Industry Relations v Unite Here, Local 40*,²²⁰ the employees were not provided with a voting table nor were they provided with a private space to exercise their vote. The employer alleged that such conduct was sufficient to constitute a fatal breach of the Labour Relations Code and Regulations of British Columbia. The Labour Relations Board held that the fact that voters had not been provided with a segregated table within the voting space to complete their ballots also constituted a violation of the provisions of the various Codes and Regulations regarding the privacy of the voter

²¹⁷ (2001) (CanLII) 33021 (BC LRB). Accessed at www.canlii.ca/t/a260 on 11/04/2016.

²¹⁸ Section 13(2)(f) and Schedule 1(3) of the Regulations of 1993.

²¹⁹ Section 39(1) of Code.

²²⁰ (2013) (CanLII) 51443 (BC LRB). Accessed at www.canlii.ca/t/g01gx on 11/04/2016.

and the secrecy of the ballot.²²¹ As a result of these irregularities the Board declared the pre-strike vote to have been of no force or effect.²²²

Before the ballot, the union must notify all the people who will be affected by the strike action.²²³ The union must use all the means of communication in the workplace such as informing employees during meeting, as well as using internal notice boards to display the notice to participate in the voting process.²²⁴

Since the ballot by members prior to embarking on a strike is a statutory requirement in Canada, non-compliance will be a violation of a statute and will render the strike unprotected. Then the danger exists that the pre-strike ballot may render the negotiating process unnecessarily rigid and protracts negotiations by postponing the use of economic sanctions until a majority vote has been reached. On the other hand, this delay could result in the would-be strikers changing their minds about going on strike, or of the employer reconsidering the demands of the employees and even making the employees a better offer which might change their minds about the need to go on strike.

The legal systems of the Canadian provinces differ regarding the giving of notice prior to the commencement of a strike. Certain provinces require the notice to be given to the employer while other provinces require the notice to be given to the Minister of Labour. The provinces that require notice to be given to the employer are Alberta, British Columbia, New Brunswick, Nova Scotia and Saskatchewan, whereas the others require notice to be given to the Minister of Labour.²²⁵

The purpose of serving notice is to inform the employer or the Minister of Labour that the strike will commence on the date indicated in the notice, or on another date, depending on the agreement between the parties. In *Candu Energy Inc v Society of Professional Engineers and Associates (SPEA)*,²²⁶ the union, after it had conducted a

²²¹ At 11.

²²² *Ibid.*

²²³ At 12.

²²⁴ See *Clark v Teamsters Local Union* (1998) (CanLII) 6441 (BC AC).

²²⁵ *Carter Labour Law in Canada* (note 37, chapter 6) at 293.

²²⁶ (2012) (CanLII) 650 (CIRB).

vote in which 94% of the employees had voted in favour of the strike, gave the employer 72 hours' notice of commencement of the strike, in terms of section 87.2 of the Canadian Code.²²⁷ The employer contended that the notice was invalid because it had been given more than 60 days after the date on which the union had conducted its strike vote. The employer therefore argued that the notice to go on strike was unlawful, as it was contrary to section 87.2(1) and 87.3(1) of the Canadian Code. These sections provide that the notice must be given to the employer within 60 days of the ballot and the employer or the Minister must be given a notice of 72 hours prior to commencement of the strike.

The court held that the purpose of the 72 hours' notice requirement was to allow the other party to make appropriate preparations. The court held that the union had complied with the requirements of section 87.2 and the purpose of the strike notice, which was to allow the employer to make appropriate preparations for work stoppage. The employer's application for a declaration that the strike was unlawful was, therefore, dismissed.

The minimum period of notice to be given either to the employer or the Minister of Labour is 72 hours.²²⁸ A strike that fails to meet the pre-strike requirements, is illegal, as are any other activities associated with the strike.²²⁹ The consequences of a strike that does not comply with the required procedures are that the employer may dismiss the employees and claim damages for any loss suffered.²³⁰

In South Africa, a union is required to serve the employer with a notice of 48 hours prior to the commencement of a strike. If the employer is the state or government department, it must give the employer a notice of 7 days. The purpose of serving the other party with a notice is to warn him or her of the upcoming industrial action so that he or she will prepare for the action.²³¹ The serving of notice also helps to promote

²²⁷ Section 87(2) of the Canadian Code.

²²⁸ *Ibid.* See also *Thomson v Saskatoon School Division* (1995) 13 (CanLII) 618 (SK QB); *Canada Steamship Lines Inc* (2002) (CanLII) 201 (CIRB); *Natural Glacial Waters Inc v Brewery, Winery and Distillery Workers Union, Local 300*, (2000) (CanLII) 27838 (BC LRB); *Lifelabs BC Lp v B.C Government and Service Employees' Union* (2013) (CanLII) 2938 (BC LRB).

²²⁹ *Ibid.*

²³⁰ See Chapter 2 above.

²³¹ See *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union* (2) (1997) 18 ILJ 671 (LAC) at 701H – 70G-H.

orderly collective bargaining as failure to give such notice may undermine the orderliness of the process.²³² Seady and Thompson explains that the purpose of strike notice is to inform the other party that the words are about to escalate in to deeds; that he or she may use this opportunity to avoid financial loss; and reduces health and safety risks to employees and the public.²³³ The Supreme Court of Appeal in *SATAWU v Moloto NO and Another*,²³⁴ held that the protection of the striking employees' conduct is rendered lawful by a proper strike notice.²³⁵

6.2.1.2 Unprotected

Strike action will be unlawful where the above procedural requirements are not met or where there is no union involved in the industrial action.

Unions and employer alike are not allowed to begin a strike or lockout before they have complied with the above dispute settlement mechanisms.

Any collective action or other concerted work stoppage by employees arising from a dispute in the work place is unlawful if it occurs before the right to strike or lockout has been acquired.

6.2.2 Pickets

In Canada picketing has been defined as the communication of information in order to secure a sympathetic response from third parties.²³⁶ These third parties include customers, prospective replacement employees, or companies doing business with the employers subject to the strike or picket, and members of the public. This is the

²³² *Ibid.*

²³³ Seady H and Thompson C 'Strikes and Lockouts' (in Thompson and Benjamin *South African Labour Law: Loose-leaf*) (Juta) vol 1 at AA1-314).

²³⁴ (2012) 33 *ILJ* 2549 (CC).

²³⁵ At 2561G.

²³⁶ Carrothers AWR 'Recent Developments in the Tort Law of Picketing' (1957) 3 *Can. Bar Rev.* 1005.

same as South Africa. A picket is an act in support or furtherance of a strike.²³⁷ Picketers use various tactics to compel the employer to agree to their demands. A picket will be lawful or protected if it is in support of a lawful strike. Since a picket can only exist if there is a strike, the picket will be unlawful and consequently forbidden if the strike is unlawful.²³⁸ Where a strike is lawful, picketing is also presumed to be lawful.²³⁹

The general rule in South Africa²⁴⁰ and elsewhere, including Canada, is that pickets must be exercised peacefully.²⁴¹ The Supreme Court of Canada has once stated that a peaceful picketing is *prima facie* protected under the Charter's guarantee of freedom of expression, as contained in section 2(b).²⁴² If a picket is not peaceful, but involves violence or threats of violence, such picketing may constitute the crime of assault. The perpetrators of such a crime could be guilty of an offence and liable to imprisonment of a maximum of five years.²⁴³

In South Africa, the Labour Relations Amendment Act of 2014 requires the parties to a picketing agreement to consult the mall owner or the landlord if the employer is housed in a shopping mall.²⁴⁴ This is believed to be an attempt to involve all the parties that might be affected when the action of a picket is conducted. The end result is that the picket remains peaceful and all attempts must be geared towards that.

²³⁷ See section 69(1) of the LRA.

²³⁸ Carter *Labour Law in Canada* (note 37, chapter 6) at 332.

²³⁹ *Victoria Shipyards Co Ltd v British Columbia (Attorney General)* (2004) (CanLII) 65407 (CBC LRB) at 10. Accessed at <https://www.canlii.org/en/bc/bclrb/doc/2004/2004canlii65407/2004canlii65407.html?searchUrlHash=AAAAQAycHJvdGVjdGVkIHBPY2tldHMgaW4gc3VwcG9ydCBvZiBhIHByb3RlY3RlZCBzdHJpa2UAAA AAAQ&resultIndex=4> on 08/08/2016.

²⁴⁰ Section 17 of the Constitution of South Africa.

²⁴¹ *Sobey v UFCW Local 175* (2013) (CanLII) 1207 (ONSC). See also *Industrial Harwood Products (1996) Ltd v Industrial Wood and Allied Workers of Canada Local 2693 et al* (2001) (CanLII) 2407 (ONSC).

²⁴² *Ibid.*

²⁴³ Section 264(1) of the Canadian Criminal Code R.S.C (1985) C-46.

²⁴⁴ Section 69(6)(a) of the LRA as amended by the Labour Relations Amendment Act of 2014.

6.3 Botswana

6.3.1 Strikes

Except in terms of the legislation,²⁴⁵ the right to strike is not expressly stated in the Constitution of Botswana. Instead, the Constitution makes provision for the right to 'freedom of association'.²⁴⁶ The right to freedom of association in the context of labour relations will mean nothing in the absence of the right to strike. Therefore, a purposive interpretation of the 'right to freedom of association' requires that the right to strike be included in the section. Such interpretation is said to be in line with international standards. This was stated in the case of *Retail Wholesalers v Government of Saskatchewan*,²⁴⁷ where the *Saskatchewan* Court of Appeal held that:

"the freedom to bargain collectively of which the right to withdraw services is integral, lies at the very centre of the existence of an association of workers. To remove their freedom to withhold their labour is to sterilise their association."²⁴⁸

The judiciary in Botswana has also adopted a purposive interpretation when interpreting constitutional provisions in general. In *Attorney General v Unity Dow*²⁴⁹ the court stated that it found it difficult, if not impossible to believe that the word sex was left out of the Constitution because Botswana wanted sexual discrimination to be permitted. The court confirmed its belief by placing reliance on Botswana's status as a signatory to the then Organisation of African Unity (OAU) now Africa Union (AU) Convention on Non-Discrimination adopted on the 10 of September 1969.²⁵⁰ The court acknowledged that the terms of the convention could not be dictated on the law of Botswana but the latter had obligations under international treaty. It held that it was difficult to let Botswana deliberately discriminate against women in its legislation while at the same time it supports the international convention against discrimination on women. Therefore, it was held that the law of Botswana should be interpreted in line with international law.

²⁴⁵ Section 39 of the TDA.

²⁴⁶ Section 3(b) of the Constitution.

²⁴⁷ *Retail Wholesalers v Government of Saskatchewan* (1985) 19 DLR 609.

²⁴⁸ At 613.

²⁴⁹ (1992) BLR 119 (CA).

²⁵⁰ Article (iv) of the AU Convention on Non-Discrimination (10 September 1969).

Prior to the coming into effect of the Trade Dispute Act, public service employees were not allowed to go on strike. In terms of the repealed Trade Union and Employers' Association Act,²⁵¹ it was illegal for public officers to join and / or form trade unions as they were excluded from the definition of an employee.²⁵² The Act defined employee as any individual:

“who has entered into a contract of employment for the hire of his labour provided that such individual is not a public officer or somebody employed by a local authority unless he belongs to the industrial class or workers for the public corporation or parastatal.”²⁵³

However, the coming into effect of the Trade Dispute Act²⁵⁴ (TDA) changed the situation. The Act provides that every party to a dispute of interest has the right to strike or lock-out provided the procedure for a lawful strike set out by the Act has been complied with.²⁵⁵ The TDA also changed the definition of an employee to include public officers. It defines an employee as ‘any person who has entered into a contract of employment for the hire of his labour.’²⁵⁶ This definition excludes members of the disciplined forces (Defence Force, Police Services and Local Police Service).²⁵⁷

In *Botswana Public Employees Union v The Minister of Labour and Home Affairs*,²⁵⁸ public service employees embarked on an unprecedented industrial action that lasted almost two months from 18th April 2011 and was suspended on the 10th of June 2011.²⁵⁹ This prompted the Minister of Labour to pass a *Statutory Instrument*²⁶⁰ to amend the TDA. This was done seven days after the strike ended. The effect was to designate some services as essential services to prohibit the employees employed in such services from embarking on strike. This was subsequently annulled by Parliament and replaced verbatim by Statutory Instrument 57 of 2011. On application

²⁵¹ Trade Union and Employers' Association Act of 1984.

²⁵² Section 2(1) of the Trade Union and Employers' Association Act, 1984.

²⁵³ *Idem* section 2(2).

²⁵⁴ Act 15 of 2004

²⁵⁵ Section 39 of the TDA. See also *Botswana Land Board and Local Authorities Workers Union and others v Attorney General* MAHLB-000631-11 (unreported) at 3.

²⁵⁶ Section 2 of the TDA.

²⁵⁷ *Ibid.*

²⁵⁸ MAHLO-000674-11 (unreported).

²⁵⁹ Baakile M and Tshukudu T 'Deep Rooted Conflicts and Industrial Relations Interface in Botswana' (2012) 3 *Journal of Public Administration and Governance* 118 at 127.

²⁶⁰ No 49 of 2011.

to the High Court to nullify *Instrument 57*, the court held that the reading of section 49 does not authorise a Minister to pass a statutory instrument that is inconsistent with international law or Botswana's international law obligations.²⁶¹

This decision emphasises the fact that since the right to strike is internationally recognised, and Botswana cannot, without good reason, ignore international law to which it has ratified and opt for what it thinks can work for them which is contrary to international law, that is, refusing certain categories of workers the right to strike.

The TDA draws a distinction between protected and unprotected strikes.²⁶²

6.3.1.1 Protected

In Botswana, the TDA was designed to deal with labour related matters including settlement of trade disputes.²⁶³ and for settlement of disputes in essential services and for the control and regulation of industrial action and related matters.²⁶⁴ The TDA defines a strike as the 'cessation of work by a body of employees in any trade or industry acting in combination or under a common understanding or a concerted refusal or a refusal under a common understanding by such body of employees to continue to work.'²⁶⁵

The TDA requires that a person who wants to participate in a strike need to comply with the prescribed requirements for a protected strike.²⁶⁶ Firstly, the matter which is

²⁶¹ At 76. See also Baakile and Tshukudu 'Deep Rooted Conflicts and Industrial Relations Interface in Botswana' (note 259, chapter 6) at 127.

²⁶² Section 39(1) of the TDA.

²⁶³ A trade dispute is defined in section 2 of the TDA as:

"An alleged dispute, a dispute between unions, a grievance, a dispute of interest, and any dispute over:

- (a) the application or the interpretation of any law relating to employment
- (b) the terms and conditions of employment of any employee or class of employees, or the physical conditions under which such employee or class of employees may be required to work;
- (c) the entitlement of any person or group of persons to any benefit under any existing collective agreement;
- (d) the existence or non-existence of any collective agreement
- (e) the dismissal, employment, suspension from employment of any person or group of persons or
- (f) the recognition or non-recognition of an organisation seeking to represent employees in the determination of their terms and conditions of employment."

²⁶⁴ See sections 7(1) and 8(1) of the TDA.

²⁶⁵ *Idem* section 2.

²⁶⁶ *Idem* section 39(1).

the subject of dispute must be referred, in the prescribed form, to the Commission for Conciliation, Mediation and Arbitration (CCMA) or to the relevant bargaining council.²⁶⁷ The CCMA or bargaining council must attempt to settle the dispute within 30 days of receiving the dispute. If one or both parties are unable to attend the mediation, the period of 30 days may be extended for a further 30 days commencing from the date of the hearing.²⁶⁸ If, after 30 days the dispute is not resolved, the union can forthwith serve the Commissioner, in the prescribed form, and other parties to the dispute with a notice of 48 hours of intention to commence a strike.²⁶⁹ The giving of notice is important in this regard as failure to do so could render the strike unprotected. In *Debswana Diamond Company (Pty) Ltd v Botswana Mining Workers' Union (2)*,²⁷⁰ it was held that a failure to put the notice of the strike in a 'prescribed form' does not render the strike unlawful as long as the notice complied with the other requirements such as date and time of commencement of the strike, 48 hour notice, the demand was set out clearly during negotiations leading up to the strike and the categories of employees that were to participate in the strike were clearly stated.

The parties may agree to a different procedure for the resolution of their dispute and such procedure needs to be followed. This would be a procedure alternative to that provided by the Act and will bind the parties thereto.²⁷¹ This means that before resorting to a strike, members of the union need only to comply either with the terms of the Act or with the terms of the agreement. In both instances, it is compulsory that they comply with the procedure prescribed by the statute or by agreement otherwise the strike will not be protected. In *Morupule Colliery Ltd v Botswana Mining Workers' Union*,²⁷² the parties had concluded a collective agreement which specified the procedure to be followed if the parties could not reach an agreement on disputed issues. A dispute about wages arose and was not resolved. The union gave the Commissioner of Labour a notice of 48 hours to commence a strike. The applicant argued that the agreed procedure for resolution of disputes was not followed by the union and that the strike be interdicted as it would be unlawful and therefore

²⁶⁷ *Idem* sections 39(1) read with section 7(1).

²⁶⁸ *Idem* section 39(2).

²⁶⁹ *Idem* section 39(1)(b).

²⁷⁰ (2004) 2 BLR 161 (IC).

²⁷¹ Section 37(1) of the TDA.

²⁷² (1995) BLR 224 (IC).

unprotected strike. The court held that the strike was unlawful for want of compliance with the provisions of the collective labour agreement and the Act.²⁷³ It held that all the practical means for reaching a settlement by way of procedures prescribed by the collective agreement and the Act had not been exhausted.²⁷⁴

The implications or consequences for participation in a protected strike are that the participants in such a strike do not commit a delict or breach of contract of employment.²⁷⁵ In addition, there are no legal action that can be taken against those employees who participated in such a strike.²⁷⁶ This means that the employer may not dismiss such employees on the mere ground that they participated in a strike. The employer may also not claim damages for loss suffered as a result of the employees going or participating in a strike. However, the employer is not compelled to remunerate an employee for services he or she did not render during a strike.²⁷⁷

6.3.1.2 Unprotected

The TDA does not specifically make provision for unprotected strikes. Section 37 of the TDA states that:

“No person may take part in strike or lockout if:

- the strike or lockout
 - (i) is not in compliance with the provisions of this Part or an agreed procedure; or
 - (ii) is in breach of a peace clause in a collective agreement;
- the subject matter of the strike or lockout is
 - (i) not a trade dispute;
 - (ii) regulated by a collective agreement;
 - (iii) a matter that is required by this Act to be referred to arbitration or to Industrial Court for adjudication; or
 - (iv) a matter that the parties to the dispute have agreed to refer to arbitration.”

By implications, a strike convened without following the prescribed procedure could be an unprotected strike.²⁷⁸ As stated above, the parties might have a collective

²⁷³ At 228.

²⁷⁴ *Ibid.*

²⁷⁵ Section 41(1) of the TDA.

²⁷⁶ *Idem* section 41(2).

²⁷⁷ *Idem* section 41(3).

²⁷⁸ Section 42(1)(a)(i) of the TDA.

agreement that prescribe the procedure for the resolution of trade disputes.²⁷⁹ The agreed procedure serves as alternative to the provisions of the Act with regard to protected strikes and the parties must comply with such procedure.²⁸⁰

The Act may prescribe that the matter will be resolved through arbitration or the matter be referred to the Industrial Court for adjudication. In such instances employees, cannot go on strike as their action will not be protected.

If a strike is not protected, the National Industrial Relations Code of Good Practice²⁸¹ (the NIR Code) published by the Minister of Labour and Home Affairs in line with section 51 of the TDA, lists the possible consequences, namely:

“Participation in a strike that does not comply with the provisions of the Act (the TDA) is serious misconduct that may justify dismissal. The fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including-

- the seriousness of the contravention of the Act, and attempts made to comply with it;
- whether the strike was in response to unjustified conduct by the employer, and whether the strike was the only reasonable option available to employees concerned;
- whether the parties have made genuine attempts to negotiate the resolution of the dispute giving rise to the strike;
- the manner in which the employees have conducted themselves during the strike, and, in particular, whether the strike was conducted in a peaceful manner or accompanied by violent behaviour; and
- the impact of the strike on the employer’s business.”

If workers participate in an illegal strike, such action constitute misconduct and the employees may be dismissed for committing such misconduct.²⁸² However, dismissal is not an automatic remedy for misconduct, the courts have insisted that certain procedural steps should be taken by an employer before dismissing employees.²⁸³ These include consultation with the relevant trade union and the issuing of an ultimatum in clear and unambiguous language. In the public service, the Public Service

²⁷⁹ *Idem* section 37(1).

²⁸⁰ *Idem* section 42(1)(a)(ii). See also *Morupule Colliery Ltd v Botswana Mining Workers’ Union* (note 272) at 228.

²⁸¹ GN No. 483/2008.

²⁸² Section 27 of the Public Service Act 30 of 2008. See also *Phirinyane v Spie Batignolles* (1995) BLR 1 (IC) at 5.

²⁸³ *Botswana Landboards & Local Authorities Workers Union & others v Attorney General* MAHLB000631-11 at 48. Accessed at www.worldpsi/sites/default/files/attachment/news/judgment.pdf on 15/03/2016.

Act²⁸⁴ makes provision for dismissal of employees who commit misconduct. It provides that:

“Participation in an unlawful strike is a serious misconduct and should be dealt with in terms of section 37. This section provides that: (1) An employee who is guilty of serious misconduct shall be summarily dismissed from the public service.”²⁸⁵

In addition to dismissal, there is also a remedy of interdict that can be used to stop strikers from continuing with illegal action.²⁸⁶ A court can be approached for an interdict to stop a strike that did not comply with the provisions of the Act.²⁸⁷ In *Botswana Railways Organisation v Setsogo & others*,²⁸⁸ the employees went on strike which disrupted the railway transport service. The employer issued an ultimatum asking the employees to comply with their contract of employment and return to work. They ignored the ultimatum and continued with the strike. Their action was held to be unlawful and violated the right of the Ministry to conduct its affairs free of violent disruptions.²⁸⁹

6.3.2 Pickets

The TDA recognise the right of employees to picket in support or in furtherance of a strike.²⁹⁰ The Act requires the parties, with the assistance of a mediator appointed in terms of section 7(5) to reach agreement on the rules that will regulate the conduct of picketers during the picket.²⁹¹ The rules may also be established by the mediator if the parties are unable to reach agreement on such rules.²⁹² In formulating picketing rules, the guidelines in terms of section 51 of the TDA must be taken into account.²⁹³

²⁸⁴ Act 30 of 2008.

²⁸⁵ Section 40(g) of the Public Service Act.

²⁸⁶ See section 42(2)(a) of the TDA.

²⁸⁷ *Botswana Mining Workers Union v Debswana Diamond Company (Pty) Ltd* CA Case No. 24/2004 at 4. Accessed at <http://www.saflii.org/bw/cases/BWCA/2004/9.pdf> on 18/03/2016.

²⁸⁸ (1996) BWCA 3. Accessed at www.saflii.org/cgi-bin/disp.pl?File=bw%2f3.html;query=violent%20industrial%20action#disp1 on 12/03/2016.

²⁸⁹ At 93. See also *National Amalgamated Local and Central Government and Parastatal Manual Workers Union v Attorney General* (1995) BLR 48 (CA) at 56; and *Phirinyane v Spie Batignolles* (1995) BLR (IC) at 5.

²⁹⁰ Section 40(2) of the TDA.

²⁹¹ *Idem* section 40(1)(a).

²⁹² *Ibid.*

²⁹³ *Ibid.*

However, the TDA prohibits employees from picketing the premises of the employer during a strike or lock-out if certain conditions are in place. These include a situation where there is an agreement on the provision of minimum services during a strike²⁹⁴ or lock-out; or within 14 days of the commencement of the strike or lock-out.²⁹⁵

7 TRADE UNION LIABILITY

7.1 Australia

If all the procedural requirements for a protected industrial action have been satisfied, it is assumed that the action is protected. The focus then shifts to the conduct of the persons who participate in the industrial action. The way workers conduct themselves during industrial action has been a subject of industrial relations tribunals in Australia.²⁹⁶ It does happen in Australia that strikers and persons who participate in industrial action cause damage to property that belong to other people and generally commit unlawful activities. Picketers or strikers sometimes prevent the movement of vehicles to and from the premises of the employer. Any of these acts by picketers could be found to be contrary to law.²⁹⁷ The question then arises as to who should be held criminally accountable or liable for the damage or for the unlawful acts that have been committed.

If the employer as a victim or potential victim of industrial action can present a *prima facie* case that the action by employees does or will amount to unlawful interference with its business relations, it can approach the court to attempt to maintain the *status quo*. The court has the power to suspend or stop the industrial action until it is found that the action is not unlawful.²⁹⁸ If the legality of industrial action is still questionable after it has been reviewed by the court, the latter will suspend or terminate the industrial action.²⁹⁹

²⁹⁴ Section 40(b)(a) of the TDA.

²⁹⁵ *Idem* section 40(4)(b).

²⁹⁶ *Patrick Stevedores No 1 Ltd v Maritime Union of Australia* (1998) 79 IR 239 at 247.

²⁹⁷ See *ACI Operations (Pty) Ltd v AMWU* (2000) 96 IR 228.

²⁹⁸ *NWL Ltd v Woods* (1979) 1 WLR 1294 at 1305-1307.

²⁹⁹ See section 423 of the FW Act on the powers given to the FWC.

An unlawful act can open the door for common law claims in this regard. In *Thomas v National Union of Miners*,³⁰⁰ a group of striking miners were permitted to stand close to the gates of the colliery to persuade the replacement employees not to work. No physical acts of violence occurred although the replacement labourers suffered verbal abuse. The High Court invented a new tort in this matter in order to grant relief. The tort was based on the fact that the participants unreasonably interfered with the rights of others by unreasonably harassing the co-employees in the exercise of their right to use the highway to go to work (even if no damage was caused by the interference).³⁰¹ This approach by Scott was severely criticized in later judgements and commentary.³⁰²

Usually, where an offence is committed, action can be brought against the individual perpetrators.³⁰³ In a situation where the act was committed by a group of people, the issue of identification of the actual wrongdoer is a problem. To overcome this problem, the FW Act put in place measures to prevent industrial action by employees from becoming violent or causing damage to property. The Act empowers the FWC, which is tasked with enforcing these measures, to issue an order to suspend or prevent industrial action that is 'happening, or is threatening, impending or probable' in the course of an industrial dispute.³⁰⁴ The FWC is also empowered to terminate a bargaining period involving a protected action on the grounds of significant harm.³⁰⁵ A bargaining period entails a period during which the application to negotiate terms of employment is lodged with the FWC in terms of the law.³⁰⁶

The factors that the FWC take into account to decide whether to terminate industrial action are the extent to which the protected industrial action threatens to damage the

³⁰⁰ *Thomas v National Union of Miners (S Wales Area)*(1985) 6 *Ind Rel LR* 136.

³⁰¹ Davidson A 'A new tort for mass picketing: The *Thomas* case and its implications for Australia (Part One)' (1988) 4 *University of Western Australia Law Review* at 138.

³⁰² '...a complete rejection of Scott J's new tort would have been more satisfactory. It is hoped that such a repudiation will occur in a future case decided more authoritatively by the Court of Appeal or House of Lords.' In *News Group Newspapers Ltd. & Ors v Society of Graphical and Allied Trades '82 & Others* (No.2) (1987) 75 *Ind.Cas.R.* 181.

³⁰³ *Dollar Sweet (Pty) Ltd v Federated Confectioner Association of Australia* (1986) VR 383; *R v Commissioner of Police (Tas), ex-parte North Broken Hill Ltd (Trading as Associated Pulp and Paper Mills)* (1992) 1 Tas R 99.

³⁰⁴ Section 423 of the FW Act.

³⁰⁵ *Idem* section 423(2).

³⁰⁶ *Idem* section 229.

ongoing viability of a business carried on by the person; the disruption in the supply of goods or services to an enterprise or business and the failure of the employees to fulfil their contractual duties in terms of the contract of employment with the employer which result in economic loss.³⁰⁷

That industrial action must be taken in conformity with the interests of the public, is acknowledged in the public interest clause³⁰⁸ and the powers given to the FWC to terminate or suspend industrial action that causes significant harm to others. The public interest clause requires a balance to be struck between the right of workers to engage in collective bargaining which results in violent conduct and the welfare of the public.³⁰⁹ This means that where there is a likelihood that the rights of the members of the public will be affected by the conduct of individuals who advance their own private interests, the rights of the public will prevail.³¹⁰ The public interest and public safety are the most important factors for consideration in the granting of an order as relief against industrial action that is destructive. It is believed that the inclusion of the public interest clause minimises the effect of the adverse consequences of industrial action.

It must be determined what 'significant harm' means. There is no clear definition in the FW Act of what constitutes 'significant harm'. Section 426, however, provides that for 'significant harm' to exist, the FWC must be satisfied that the protected industrial action is having adverse effects on employees, employers or third parties. In *CFMEU v Woodside Burrup (Pty) Ltd*,³¹¹ the court interpreted 'significant harm' as '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, as such, an order will only be available under such ground in very rare areas'. Harm is significant if it is more serious than merely a loss, inconvenience or delay. It is, therefore, expected that the FWC will suspend industrial action on the latter interpretation. Where industrial action is suspended or terminated, any further action

³⁰⁷ Section 423(1) of the FW Act.

³⁰⁸ *Idem* section 418.

³⁰⁹ *Coal & Allied Operations (Pty) Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* (note 138, chapter 6) at 51-52.

³¹⁰ Di Felice V 'Stopping or Preventing Industrial Action in Australia' (2000) 24 *Melbourne University Law Review* 310 at 323.

³¹¹ (2010) FWA 6021.

taken in support of such action will not enjoy protection.³¹² In *CFME v Woodside Burrup (Pty) Ltd and another*,³¹³ the FWA³¹⁴ (now the FWC) 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 to a third party. The threatening harm which is serious needs to be significant.³¹⁵

It is not a requirement that the action by employees 'causes harm', but the mere probability that it might cause harm will be sufficient for the FWC to make an order for the termination or suspension of the industrial action. In *Pryor v Coal & Allied Operations (Pty) Ltd*,³¹⁶ there was sufficient evidence to support the court's conclusion that damage as a result of industrial action was probable.³¹⁷ The court's reasoning indicated that although industrial action need not be taking place at the time of the application, but a likelihood of damage as a result of industrial action in the future, had to be shown based on some objective evidence.

Once it has been established that the action indeed threatens to cause 'significant harm', the question that arises is what form of redress is available to the victims. The first form of redress is an injunction which is a court order prohibiting or preventing the commencement or continuation of the industrial action threatening to cause significant harm.³¹⁸ This court order, usually in the form of an interdict, seems to work only if the person who suffers loss is the employer. The court in *National Workforce (Pty) Ltd v AMWU*,³¹⁹ found that loss and damage had been caused to the appellants by strikers, and that the rights of the appellants had been infringed. The court found no evidence to justify the infringement, and considered that the loss of profit, unfulfilled contracts and the loss of clients all justified the granting of an order to prevent them from going ahead with their action.

³¹² Section 413(7) of FW Act.

³¹³ *CFMEU v Woodside Burrup (Pty) Ltd and another* (note 311, chapter 6).

³¹⁴ The FWA is a labour relations tribunal created in terms of the FW Act of 2009.

³¹⁵ *CFMEU v Woodside Burrup (Pty) Ltd and another* (note 311, chapter 6) para 69.

³¹⁶ *Pryor v Coal & Allied Operations (Pty) Ltd* (note 177, chapter 6).

³¹⁷ At 309.

³¹⁸ 'The aim of an injunction is to prevent industrial action from continuing once it has been established that it is destructive', see *Shell Refining (Australia) (Pty) Ltd v Australian Workers' Union* (1999) VSC 297 (Unreported, Beach J, 13 August 1999).

³¹⁹ (1998) 3 VR 265, 272.

The *National Workforce (Pty) Ltd v AMWU*,³²⁰ decision hints at the possibility that the victims of industrial action could also bring an action for damages against the union. The plaintiff has a number of grounds available if he or she wants to claim damages for the loss sustained as a result of the industrial action. These include actions for interference with contractual relations, intimidation, conspiracy and unlawful interference with trade or business.³²¹

The law of Australia is designed in such a manner that any disruptive industrial conduct is dealt with by the FWC. It does not allow industrial action to escalate into violence. It seems, in terms of the Australian labour law, that only in rare instances does industrial action by employees result in violence or unlawful acts, since the mere possibility of harm or damage to other people and/or their property is sufficient to allow the FWC to terminate or suspend the action.

7.2 Botswana

In Botswana, the basic principle in the area of labour relations is the furtherance, maintenance and securing of good industrial relations, a premise which is manifested in the Trade Dispute Act of 2004.³²² The establishment and maintenance of good industrial relations has its foundation in two parts. Part 1 deals with the recognition of trade unions or employee organisations as bargaining agents in various industries in the country in terms of the Trade Unions and Employers Organisations Act of 1984. Part 2 deals with conducting of negotiations between such unions and employers in all matters bearing upon relations between members and trade union and employers.³²³ The end result is the achievement of a harmonised and sound industrial relations which is an ideal aim in many countries.³²⁴

Motshwega argues that for a number of years Botswana has been regarded as the Switzerland of Africa because of the peaceful industrial relations in the country while

³²⁰ *Ibid.*

³²¹ *Ibid* at 273.

³²² *Botswana Mining Workers Union v Debswana Diamond Company (Pty) Ltd* (note 270, chapter 6) at 13.

³²³ *Ibid.*

³²⁴ Van Jaarsveld SR and Van Eck BPS *Principles of Labour Law* (1998) at 315.

neighbouring countries experienced labour unrest.³²⁵ He further argues that the reasons for peaceful industrial action in Botswana was the fear of intimidation by employers with the majority of people not in full time employment.³²⁶ There might be several other factors that contribute to the peaceful industrial relations environment such as the low level of industrialisation inherited from colonial rule; low levels of wages until 1980s; poor levels of unionism and weak labour movements; poor organisation and lack of effective leadership affected the effectiveness of trade unions; and the fixed minimum wages.³²⁷

The courts are also cognisance of the fact that Botswana is a peaceful country. In *Attorney-General v NALCGPWU*,³²⁸ the court stated that:

“The Act is specifically designed to ensure that trade disputes are, as far as possible settled peacefully and amicably. It provides the appropriate machinery for the resolution of a dispute like the one that led to workers going on strike. It is not, in my view, made to enable one side with the power to settle the dispute to its advantage. In any case, the Act does not contemplate wholesale dismissal of workers who take part in an illegal strike.”³²⁹

Although Botswana is a democratic country, its labour law has not yet been tested by situations where disagreements between employers and trade unions have resulted in damage to property, injury to people or any other unlawful acts by strikers that affect the public and other non-striking employees. The most important contributor to peaceful industrial relations in Botswana is the continued respect for the rule of law. Court orders are obeyed promptly and without a debate. If there is a debate, it should be debated later at an appeal.³³⁰ For example, if an interdict has been granted to stop participants in a strike from doing acts which are contrary to law, such interdict is heeded to. Once granted, there is no way that it cannot be complied with. If it is not complied with, it can be enforced through contempt proceedings.³³¹

³²⁵ Motshegwa B 'Deep Rooted Conflicts and Industrial Relations Interface in Botswana' (2012) 2 *Journal of Public Administration and Governance* 118 at 127.

³²⁶ *Ibid.*

³²⁷ Tsie B 'The Political Context of the Botswana's Development Performance' *Journal of Southern African Studies* (1996) 22(2) 599 at 607.

³²⁸ (1995) BLR 48 (CA).

³²⁹ At 79H-80A.

³³⁰ *Attorney General v Botswana Landboards & Local Authorities Workers Union* (2013) 6 BLLR 433 (BWCA) at 555E.

³³¹ At 555D-E.

In *Botswana Mining Workers Union v Debswana Diamond Company (Pty) Ltd*³³² the union and its employees served their employer with a notice to strike after a certificate of non-resolution had been issued by the Commissioner in terms of section 81 of the TDA. It appeared that there was a collective agreement in place that regulated the resolution of trade dispute between the employer and the union and the union did not follow this route. In response to the notice of intention to strike, the employer applied to the Industrial Court for an interdict to declare the contemplated strike unlawful and in breach of section 42(1) of the TDA.³³³ Contrary to the order of the Industrial Court, the employees and the union proceeded with their strike action. The company went to court for a committal of contempt of a court order. The spokesperson and 31 union members were arrested for contempt of court.

The object of collective bargaining is the attainment of industrial peace.³³⁴ The legislature's aim through the enactment of the Act that regulates industrial relations is to discourage strike action by obliging trade unions and employers or employers' organisations to attempt to resolve their dispute through collective bargaining before resorting to industrial action.³³⁵ Therefore, if a strike is not protected or has become unprotected, an affected person can approach the court for an interdict.³³⁶ This is further confirmed by section 49(1)(a)(i) of the TDA which prohibits people from taking part in a strike that does not comply with an agreed procedure.

The existence of respect for the rule of law closes an opportunity for violent strikes to erupt and give the sense that Botswana has peaceful industrial relations because concerned people can use the courts to arrest the situation before it gets out of hand. Eventually, the liability of a trade union for the conduct of members during a strike can be controlled through the enforcement of the law. If a union is not happy with the decision of the Industrial Court, the matter is taken on appeal.³³⁷

³³² (2004) BWCA 9 (28 September 2004).

³³³ Section 42(1) of the TDA provides that 'no person may take part in a strike or lock-out that is not in compliance with the provisions of this Part or an agreed procedure.'

³³⁴ Section 42(2)(2) of the TDA.

³³⁵ *Steel & Engineering Industries Federation & others v NUMSA (1)* (1993) 1 SA 190 (T) at 195.

³³⁶ Section 42(2)(a) of the TDA.

³³⁷ See *Botswana Bank Employees Union and Others v Barclays Bank of Botswana Ltd* (1995) BWCA 37; 1995 BLR 459; and *Botswana Building Society v Bolokwe* (1999) BLR 459.

However, the fact that strikes are uncommon in Botswana does not mean that Botswana is totally immune from industrial action. An unprecedented industrial action by public service employees (including those employed in essential services) took place in 2011 when these employees took their unresolved issues to the streets.³³⁸ Immediately after the strike had ended, the Minister intervened and introduced a *Statutory Instrument* No 57 of 2011 to prevent essential services workers from participating in a strike. In terms of this Instrument, the Minister sought to amend the list of essential services. The following category of services were added onto the list of essential services: veterinary services, teaching services, cutting and selling services, and all other services connected therewith which added onto the prohibited list also employees engaged in essential services. This was rejected by the unions on the grounds that the conduct of the Minister was unconstitutional and referred the matter to the High Court.³³⁹ The High Court held that the Minister was not authorised to pass a statutory instrument that is inconsistent with international law or Botswana's international law obligations.³⁴⁰

7.3 Canada

7.3.1 Vicarious Liability

The doctrine of vicarious liability is recognised in Canada. The rationales underlying the doctrine of vicarious liability include the need to prevent recurrence of tortious conduct (deterrence); to give greater assurance of compensation for the victim; and to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that give rise to the injury.³⁴¹

The issue of whether a trade union can be held liable for the conduct of its members has long been settled in Canada. The vicarious liability of a trade union for the conduct of its members is similar to vicarious liability of employers for the conduct of

³³⁸ *Botswana Public Employees Union v The Minister of Labour and Home Affairs* MAHLB-000674-11.

³³⁹ Section 86 of the Constitution of Botswana makes provision for the delegation by Parliament of its legislative powers.

³⁴⁰ *Botswana Public Employees Union v The Minister of Labour and Home Affairs* at 76.

³⁴¹ Hall M 'After Waterhouse: Vicarious Liability and the Tort of Institutional Abuse' (2000) 22(2) *Journal of Social Welfare and Family Law* 159 at 166.

employees.³⁴² The *Salmond's* test was designed to attribute liability to employers for the conduct of employees.³⁴³ However, due to increased industrialisation and the introduction of new labour laws giving more rights to employees, the Labour Relations Board has used the *Salmond's* test to extend the application of vicarious liability to trade unions where their members have committed unlawful acts.

In order for this form of liability to arise, generally, one of two grounds (two branches of *Salmond's* test) must be present. The first branch of the test entails that the union can be held liable for acts authorised by the union; or secondly, unauthorised acts connected with the authorised acts that they may be regarded as modes (albeit improper modes) of committing an authorised act. The first requirement is a question of fact as it requires the union officials to have supported or authorised the action by members. The second requirement entails that the members or participants committed assaults or any other illegal acts while advancing their call or action and such assaults or other illegal acts were not independent acts but connected to the authorised action.³⁴⁴ A useful focus for the second branch of the *Salmond's* test is the closeness of the connection between authorised acts and the injurious acts.³⁴⁵ If the method used by the union is closely connected to the injurious conduct, that it can be said that their strategy fostered and promoted the unlawful activity, unions attract vicarious liability for their members.³⁴⁶

Some old decisions have held unions vicariously liable for the conduct of members committed during industrial action. In *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council*,³⁴⁷ TNL Construction Ltd was awarded contracts in 1994 to perform construction work at the MacMillan Bloedel in Port Alberni. The Building Trade Unions (BTU) protested against the employment of the TNL Construction and other TNL employees who performed work on the construction site. They protested against the presence of the TNL employees on the construction

³⁴² *Bazley v Curry* (1999) 2 SRC 534 (SCC) at 42. Accessed at <http://canlii.ca/t/1fq1w> on 04/04/2016.

³⁴³ *Ibid.*

³⁴⁴ At 44.

³⁴⁵ See in this regard *B.P.A v Children's Foundation* (1997) (CanLII) 10834 (BC CA). Accessed at <http://canlii.ca/t/1nk48> on 4/04/2016.

³⁴⁶ At 45.

³⁴⁷ (1999) (CanLII)15170 (BCSC). Accessed at <http://www.canlii.org/en/bc/bcsc/doc/1999/1999canlii15170/1999canlii15170.html> on 20/06/2016.

site with some of the protesters blockading the front gate of the construction site to prevent TNL employees from entering the premises. TNL applied to the LRB for an order declaring the picket unlawful. Pursuant to section 135 of the Labour Relations Code, the LRB granted the order, which order was subsequently ignored by protesters. There were further several incidents of violence, intimidation, harassment and verbal abuse aimed at TNL employees.

The plaintiffs (TNL and its employees) argued that the defendants (BTU) were vicariously liable for damage committed against them by BTU members. The latter admitted liability for civil disobedience, but argued that they did not authorise actions beyond peaceful protest and could therefore not be held vicariously liable for such acts. The defendants claimed that any acts of violence or threats of violence to persons or damage to property was done by persons who were not its members and such persons not acting within the scope and authority of their employment with the defendant.

In holding BTU vicariously liable for the conduct of their members, the Board took into account the two branches of the *Salmond's* test.³⁴⁸ It objected to the defendants' position that the BTU did not authorise the unlawful conduct of their members and had taken all reasonable steps to prevent such conduct. It held that, according to the evidence, the plaintiffs were threatened, intimidated and constantly harassed by BTU's members while their representatives who clearly had knowledge of the activities of their members either participated in the activities or took no steps to stop their members' conduct. The main aim of the defendants was to make their lives a living and engage in psychological warfare with them.³⁴⁹ As a result, the defendants were held vicariously liable on the basis of the first branch of the *Salmond* test and award of damages was ordered against the unions.

In *Canadian Forest Products Ltd v Hospital Employees Union*,³⁵⁰ the union and its members protested against health care employers over the terms of a new collective agreement. The legislature intervened in an attempt to end the dispute. It enacted the

³⁴⁸ Salmond JW, Heuston RFV and Buckley RA *The Law of Torts* 19th ed (1987).

³⁴⁹ At 17.

³⁵⁰ (2007) (CanLII) 56419 (BC LRB). Accessed at <http://canlii.ca/t/1v97m> on 05/04/2016.

Health Sector Collective Agreement Act (Bill 37). The legislation imposed terms of a new collective agreement in the hope to end the stalemate. The Hospital Employees Union (HEU) and its members did not return to work but continued with their picket action for a number of days. During the picket, members of the HEU waved placards in which they wrote things like 'Bill 37 No'. The HEU logo was either covered or displayed at the back of the placards.

In its application, Canfor Northwood Pulp Mill argued that by picketing at Canfor's Mill on April 30 2004, HEU contravened section 67 in Part 5 of the Code.³⁵¹ It wanted a declaration order to the effect that HEU and its members had breached Part 5 of the Code and would want to recover damages in line with section 137(4) of the Code.³⁵² It further argued that HEU was directly or vicariously liable for the picketing and therefore in breach of the Code.

The original decision³⁵³ had held that the HEU was not liable for the effects of picketing outside the mill. It, however, left the question of vicarious liability open as it held that it did not have jurisdiction under the Code to determine the issue of liability. The British Columbia Labour Relations Board remitted the issues back to the original panel for the reconsideration of the merits of the union's position and holding it vicariously liable. Before sending the matter back to the original panel, it gave a direction to the effect that the Board does have jurisdiction to find a union liable for breach of the Code where its members have engaged in illegal picketing.³⁵⁴ It held that HEU should be found guilty of vicarious liability for breach of the Code by its members even if it did not authorise illegal picketing.³⁵⁵ The liability arises from the failure of the union to take steps to ensure that the illegal picket does not continue.³⁵⁶ It further held that it was immaterial whether the picket was not authorised by the union.³⁵⁷ It quoted *Matusiak*

³⁵¹ Section 67 provides that 'a person must not picket in respect of a matter or dispute to which this Code applies.'

³⁵² Section 137(4) of the Code states that "a court of competent jurisdiction may award damages for injury or losses suffered as a consequence of conduct contravening Part 5 if the board has determined that there has been a contravention of Part 5".

³⁵³ (BCLRB) No. B312/2006.

³⁵⁴ At 17.

³⁵⁵ *Ibid.*

³⁵⁶ At 18-19.

³⁵⁷ At 19.

v British Columbia and Yukon Tertiary Building and Construction Trades Council where the Board stated:

“Where the strategy employed by unions engaging in protest is so closely connected to the tortious conduct that it can be said that their strategy fostered and promoted the unlawful activity, Unions may attract vicarious liability for the actions of their members.”³⁵⁸

The union is bound to take all reasonable measures at its disposal to stop industrial action that is violent. In *Mainland Sawmills Ltd v USW Union Local*,³⁵⁹ the plaintiff sought to hold the union liable for the conduct of its members. The plaintiff argued that the wrongful acts were sufficiently connected to the conduct authorised by the union. It was common knowledge that during the picket one of the officials of the union Mr Ghag participated in the assault that took place in Mainland. In holding the union liable the court took into account the two branches of the test for vicarious liability developed by *Salmond’s*.³⁶⁰

The court held that the officers and executive board members of the union supported Mr Ghag who was leading the group of employees who committed assaults and vandalised property in Mainland.³⁶¹ It held that despite the assaults that had taken place at Mainland, the officers had enough information about the incidents or assaults taking place and by implication supported Mr Ghag and members’ tortious conduct. Vicarious liability was imposed on the union on the basis of the second branch of the *Salmond’s* test.³⁶² The court also held that the conduct of the strikers was closely connected to the authorised act for the liability to be attributed to the union.³⁶³ It held that the assaults committed were not entirely independent acts but constituted an unauthorised mode of performing the authorised act and there was a connection between the strike and the wrong that justified the imposition of vicarious liability.³⁶⁴ The union and its members were held jointly liable for damages proportionate to their degree of participation on the commission of the unlawful acts.

³⁵⁸ Para 91.

³⁵⁹ (2007) (CanLII) 1433 (BCSC). Accessed at <https://www.CanLII.org/en/bc/bcsc/doc/2007/2007/bcsc1433/2007/bcsc1433.html> on 13/08/ 2014.

³⁶⁰ *Salmond, Heuston and Buckley Salmond and Heuston on the Law of Torts* (note 348) at 43.

³⁶¹ At 45.

³⁶² *Ibid.*

³⁶³ At 46.

³⁶⁴ *Ibid.*

However a different conclusion was reached in *Fullowka v Pinkerton's of Canada Ltd.*³⁶⁵ The facts of the case are as follows: During a strike at a mine in 1992, riotous acts, damage to property and injury to security guards occurred. The victims sued the union, arguing that it was vicariously liable because one of its executives had effectively controlled the strike. The Supreme Court of Canada said that in order to establish vicarious liability, a consideration of two things needed to be undertaken: first, whether the issue had been determined entirely by precedent. If the answer is in the negative, the second stage is to show whether the relationship between the wrongdoer and the person against whom liability is sought is sufficiently close; and the wrongful act is sufficiently connected to the conduct authorised by the party against whom liability is sought. In this case the court found that the facts did not support the allegation that the union had been in control of the strike. The court also rejected allegations by the victims that the relationship was such as to create vicarious liability.

It seems that for a union to avoid liability, it needs to show that it took steps or made some attempt to disassociate itself from the unlawful conduct of its members. This will happen if the union, for example, publicly announces its attitude with regard to the prevailing industrial action that causes danger to other people and their property.

7.3.2 Interest arbitration to stop violent strike

If a strike continues longer than expected with no solution forthcoming, Canadian law provides certain mechanisms for ending the dispute.³⁶⁶ The Canadian Labour Code confers certain powers on elected officials to intervene where there is a compelling public interest in doing so.³⁶⁷ Interest arbitration as a remedy is used in periods of prolonged strikes, particularly where a work stoppage has the potential to interfere with 'public safety, public health or the general economic health of the nation.'³⁶⁸

³⁶⁵ (2010) 1 SCR 132.

³⁶⁶ The Canadian Labour Code, and the Labour Relations Codes or Acts of various provinces and territories require collective agreements to make provision for the settlement of disagreements such as grievances and disputes.

³⁶⁷ Section 80 of the Canadian Labour Code.

³⁶⁸ Spano S 'Collective Bargaining under the Canada Labour Code – Remedies when Parties Fail to Resolve Labour Dispute' *Parliamentary Information and Research Services: Legal Division* (2009) at 9. Accessed at <http://www.loppar.gc.ca/content/loppar/researchpublications/prb0846-e.pdf> on 12/08/2016. *Greater Toronto Airports Authority*, (2005) (CanLII) 321 (CIRB) at 9. Accessed at <http://www.canlii.org/en/ca/cirb/doc/2005/2005canlii63057/2005canlii63057.html> on 16/09/2014.

The parties to a dispute have to first agree on an arbitrator and if they fail to do so, the Minister of Labour will appoint an arbitrator in terms of legislation.³⁶⁹ The Minister has a discretion to refer the matter regarding the maintenance of industrial peace to either the Canadian Industrial Relations Board or direct the Board to do what he or she deems necessary as authorised by the Canadian Labour Code.³⁷⁰ The Minister is also empowered to do what he or she deems expedient to maintain industrial peace and promote conditions favourable to the settlement of industrial disputes.³⁷¹

In the case of arbitration, a distinction must be drawn between rights and interest arbitration.³⁷² Rights arbitration involves the arbitration of disputes concerning the interpretation of an existing collective agreement. An independent third party, the 'rights arbitrator' is called upon to resolve the dispute within the framework of an existing collective agreement. The arbitrator is called upon to take a decision on a matter within the framework of a pre-existing arrangement between the parties and is thus limited in terms of such agreement; put differently, the arbitration process is bound to follow applicable rules and procedures as agreed to by parties to the dispute.³⁷³ The interest arbitration, on the other hand, takes place where the parties are unsuccessful in negotiating the terms of a collective agreement. The issues on which the parties have deadlocked are referred to a third party, an 'interest arbitrator', for resolution.³⁷⁴ Such an arbitrator will determine the manner in which the affairs of the parties will be dealt with in the future.³⁷⁵

³⁶⁹ Section 107 of the Canadian Labour Code.

³⁷⁰ *Ibid.*

³⁷¹ Spano 'Collective Bargaining under the Canada Labour Code – Remedies when Parties Fail to Resolve Labour Dispute' *Parliamentary Information and Research Services: Legal Division* (note 368, chapter 6) at 9.

³⁷² *Greater Toronto Airports Authority* (note 368, chapter 6).

³⁷³ *Idem* at 10.

³⁷⁴ *Idem* at 9.

³⁷⁵ *Ibid.*

8 LESSONS FOR SOUTH AFRICA

There are certain lessons that can be learnt from Australia, Botswana and Canada to help prevent and reduce the incidents of violence and damage to property that often characterise industrial action in South Africa. These are the inclusion of a ballot requirement as one of the procedural requirements for a protected strike, the commitment to peaceful negotiations and compulsory interest arbitrations for prolonged disputes and giving more powers to the Labour Court. Should damages occur as a result of industrial action, the trade union can be held liable in Canada on the basis of vicarious liability;³⁷⁶ and in Australia on the basis of a tort of the common law of unreasonably harassing other co-employees or other persons, the conduct of employees on strike having effect on them.³⁷⁷ In Botswana industrial action can hardly degenerate into chaos as the principle of the rule of law takes priority over the right to strike or industrial action, in general. There is no strike season and violence and destruction to property during industrial action is almost unknown in Botswana.³⁷⁸

8.1 Ballot prior to industrial action

Both Australia and Canada require a ballot before a strike.³⁷⁹ This requirement means that non-compliance will render the strike unprotected or unlawful. Therefore, any conduct in furtherance of or participation in such unprotected or unlawful conduct will attract civil or criminal action.

There is no provision for a compulsory ballot requirement in the current LRA. However, unions can hold ballot of their members prior to embarking on a strike in terms of their constitution and a failure to hold such ballot does not render the strike unprotected.³⁸⁰

³⁷⁶ See *671122 Ontario Ltd v Sagaz Industries Canada Inc* (2001) 2 RCS 995 (CCC).

³⁷⁷ Anastasios A 'Can Victorian Union Members be Personally Liable for the Unlawful Conduct of their Members?' (1995) *Master's Research Thesis*. Accessed at <http://hdl.handle.net/11343/35648> on 12/08/2016.

³⁷⁸ *Attorney General v Botswana Landboards & Local Authorities Workers Union* (note 330, chapter 6) at 555C.

³⁷⁹ See section 415 of the FW Act and Schedule 1 of the Labour Relations Code of British Columbia.

³⁸⁰ Section 95(5)(o) of the LRA.

The inclusion of a secret ballot prior to a strike in the Labour Relations Bill of 2012 was widely lobbied.³⁸¹ Clause 6 of the Labour Relations Bill 2012 provided that:

- “(iii) the trade union or employers’ organisation as the case may be has conducted a ballot of its members in good standing who are entitled to strike or lock-out in terms of this section, in respect of the issue in dispute; and
- (iv) a majority of the members of the trade union or employers’ organisation who voted in that election have voted in favour of a strike or lock-out.”

Although the ballot requirement was scrapped from the Labour Relations Bill of 2012, which later became the Labour Relations Amendment Act³⁸² due to strong criticism from labour, it is believed that the intention behind its original inclusion was in response to the unacceptably high levels of violent industrial action. The removal of the ballot requirement was a disappointment to those who wanted to see strikes with less violence. Rycroft argues that the removal of this requirement was not expected as it ‘showed to be ineffective and not threatening.’³⁸³ He further argues that ‘all that was required by this proposed provision was a ballot of members in good standing; such members being eligible to vote with respect to the issue in dispute; and a majority of members who voted in that election had voted in favour of the strike.’ This means that what was required in terms of the now defunct ballot provision was that the majority of those members who voted must have elected to go on strike. It did not mean that the majority of union members should have voted in favour of the strike.

A secret ballot is no longer a statutory requirement for a protected strike or lock-out as it was in terms of the 1956 LRA. Although the reintroduction of ballots was discussed before the introduction of the Labour Relations Amendment Act 6 of 2014 (LRAA), the LRAA has not introduced any new requirements in this regard (Van Niekerk A, Christianson M, McGregor M & Van Eck *Law@work* 3rd ed (2015) at 393). It can be argued that by removing the ballot requirement from the Amendment Act the legislature lost an opportunity to refashion and refresh strike law taking into account the contemporary social and economic realities.³⁸⁴

³⁸¹ The issue of including a ballot requirement in the Labour Relations Amendment Act was referred to NEDLAC for a possible future amendment of the Labour Relations Act 1995.

³⁸² Act 6 of 2014.

³⁸³ Rycroft ‘Strikes and Amendments to the LRA’ (note 44, chapter 1) at 10.

³⁸⁴ To support this view, see Du Toit D & Roger R ‘The Necessity Evolution of Strike Law’ *Acta Juridica* (2012) 195 at 218.

8.2 Empowering the Labour Court to stop a violent strike

In Australia, the FWC is empowered to stop or terminate a strike that has degenerated into violence or threatens peace and order in society. There is not much evidence that is required for the FWC to act swiftly against violent industrial action as long as proof is offered to the effect that public peace is in danger, it would be sufficient for the FWC to suspend or terminate industrial action.

The Labour Court has exclusive jurisdiction on all matters affecting labour in the Republic.³⁸⁵ A proposal for a new procedural requirement can be made in this study whereby the Labour Court can be empowered to intervene and suspend an industrial action that is accompanied by violence that has assumed serious proportions and caused damage to people and property. This is echoed by Cheadle when he states that this would be possible where the action is 'accompanied by egregious conduct.'³⁸⁶ On the question of how will this work in practice, the author proposes that an affected party may make an urgent application to the Labour Court in terms of section 158(1)(a)(iv) to declare the action unprotected as a result of damage and chaos and anarchy it has caused. On the basis of evidence provided before the court including the degree of violence, the court may exercise its discretion to declare or not declare the strike unprotected. Most importantly, the task of the court will be to determine if the strike is still functional to collective bargaining or not. If the answer is in the negative, chances are that it will grant an order declaring the strike unprotected and the consequences for participating in an unprotected strike will follow.

³⁸⁵ Section 157(1) of the LRA.

³⁸⁶ Cheadle, Thompson & Le Roux 'Reform of Labour Legislation Needed Urgently' (note 126, chapter 5).

8.3 Through common law claim for damages

In Australia, it is not only civil action that can be instituted against wrongdoers, criminal action may be taken against them if they commit criminal acts during the course of industrial action.³⁸⁷ If a person commits a crime in Australia, such crime is considered to have been committed against society. So, the victim does not institute action on his or her own but the state does.³⁸⁸ The state is represented by a prosecutor. The prosecutor is usually appointed by the province with jurisdiction on the matter.³⁸⁹

In South Africa, the employer or any person affected by the conduct of employees on strike may institute the common law claim for damages for the loss he or she has suffered as a result of employees' conduct. The common law claims for damages arises either from a breach of contract of employment or from a delict as a result of the loss the victim sustained.³⁹⁰ On the other hand, the LRA makes provision for an order for the 'payment of just and equitable compensation for any loss attributable to a strike or conduct in contemplation or furtherance of a strike'.³⁹¹

The Act does not refer to 'damages' but to 'compensation' for the loss suffered. The question that arises is whether section 68(1)(b) of the LRA replaces the common law claim for damages. Academics have different views on this. Brassey argues that the claim for damages and compensation are different.³⁹² He states that the former is created by common law while the latter is created by statute and the LRA seem to have ousted the common law in this regard. Accordingly, any claim for damages needs to be pursued in terms of the LRA and will eventually have to go to the Labour Court.³⁹³

³⁸⁷ *Director of Public Prosecutions v Johnston* (2004) 10 VR 85, which deals with the conviction of the State Secretary of the AMWU for Victoria on two counts of public violence, one count of assault and another count of intentionally and unlawfully damaging property in the context of industrial action.

³⁸⁸ Section 64 of the Constitution of Australia.

³⁸⁹ *Ibid.*

³⁹⁰ Le Roux 'Claims for Compensation arising from strikes and lockouts: Common law and the LRA' (note 64, chapter 5) at 13.

³⁹¹ Section 68(1)(b) of the LRA.

³⁹² Brassey M *Commentary on the Labour Relations Act* (1999) at 51.

³⁹³ Grogan *Collective Labour Law* (note 42, chapter 2) at 208.

Le Roux is of the view that a claim for damages in terms of the common law delictual principles is based on a cause of action that is separate from that found in section 68(1)(b) of the LRA.³⁹⁴ He states that delictual liability under common law requires the plaintiff to prove that he or she suffered loss caused by unlawful and intentional or negligent conduct of another party.³⁹⁵ If these requirements are met, the plaintiff is entitled to recover the full loss suffered.³⁹⁶ On the other hand a claim for compensation in terms of section 68(1)(b) of the LRA requires compliance with the requirements specified in the section. The court will have a wide discretion in arriving at what amount would be just and equitable after taking into account various factors.³⁹⁷

However, case law seems to suggest that there is no difference between the common law claims for damages and the statutory claims for compensation in terms of section 68(1)(b) of the LRA as they are one and the same thing.³⁹⁸ In *NUMSA v Jumbo Products CC*,³⁹⁹ the employees affiliated to NUMSA were dismissed after they went on an unprotected strike. Three years later, Jumbo Products claimed damages to the tune of R1,7 million from NUMSA for the loss it had suffered as a result of the strike. It had transpired during evidence stage that NUMSA had induced the employees to breach their contract of employment to cause loss to the employer.⁴⁰⁰ It was held that a trade union can be held liable in delict for losses the employer suffered as a result of an unlawful strike.⁴⁰¹

It is clear that an action for 'just and equitable compensation' in terms of the LRA is available to victims. The LRA does not, however, state who should utilise section 68(1)(b). A person applying for such an order needs to demonstrate not only that the strike is one that is not protected in terms of section 67(1) of the LRA. He or she also needs to prove that one or more of his or her rights have been infringed or aggrieved

³⁹⁴ Le Roux 'Claims for Compensation arising from strikes and lockouts: Common law and the LRA' (note 64, chapter 5) at 13.

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

³⁹⁷ *Idem* at 14.

³⁹⁸ *Post Office v TAS Appointment and Management Services CC & others* (note 17, chapter 5) at 624I.

³⁹⁹ (1997) 18 ILJ 107 (W).

⁴⁰⁰ At 121F.

⁴⁰¹ At 122E. See also *Post Office v TAS Appointment and Management Services CC & others* (note 18, chapter 5) at 624B; and *Jumbo Products CC v NUMSA* (1996) 18 ILJ 859 (W).

by the conduct of strikers and can provide evidence to the effect that such conduct can be attributed to the strike or conduct in contemplation or furtherance of a strike.

8.4 Through peaceful means and respect of the rule of law

The settlement of labour disputes at negotiations table and respect for the rule of law is the pillar of Botswana's peaceful industrial relations. The achievement of labour harmony and sound labour relations on a collective basis is an ideal to which Botswana aim to achieve.⁴⁰² Strikes are not common in Botswana. The Court had the following to say in *Attorney General v Botswana Landboards & Local Authorities Workers' Union*:

"In Botswana, strikes are not a common occurrence. We have no "strike season", and violence and destruction to property during industrial action is almost unknown. Generally, industrial relations are good, with mutually acceptable salary increases being sensibly negotiated from time to time, both in private sector and public sector. This is also expected in a country that has enjoyed peace and stability for more than forty-five years since independence....Botswana is also a country where the rule of law is universally respected, as every Botswana knows. Disagreement can be debated later, on appeal. Court orders are to be obeyed, promptly and without debate. No exception is made in the case of strikers and their unions."⁴⁰³

South Africa is founded on the principles of the supremacy of the Constitution and the rule of law.⁴⁰⁴ The Constitution further provides that the court orders are binding on the parties to whom they relate.⁴⁰⁵ In the area of labour law, the Labour Court is tasked with the obligation of upholding the provisions of the LRA. To do this, it is empowered to issue interdicts against unprotected strikes and strike violence.⁴⁰⁶ Like High Court orders, Labour Court orders are binding and enforceable by way of contempt of court proceedings.⁴⁰⁷ The reading of the Constitution and the LRA paint a picture of an envisaged society and industrial relations community regulated by the rule of law. However, in practice, this is not the case as Labour Court orders are ignored during strikes.

⁴⁰² *Attorney General v Botswana Landboards & Local Authorities Workers' Union* (note 330, chapter 6) at 555.

⁴⁰³ *Attorney General v Botswana Landboards & Local Authorities Workers' Union* (note 330, chapter 6) at 555C-F.

⁴⁰⁴ Section 1 of the Constitution.

⁴⁰⁵ *Idem* section 165.

⁴⁰⁶ Section 157(1) of the LRA.

⁴⁰⁷ *Idem* section 163.

Myburgh argues that South Africa is far from having a system where the rule of law is completely upheld as court interdicts are sometimes not heeded to by unions and their members.⁴⁰⁸ He states that:

“As a nation, we are notorious for our perpetual strikes season, the violence and destruction of property that goes with it, and the disregard by strikers of court orders interdicting unprotected strikes and strike violence.”⁴⁰⁹

This is in reflection to two cases where court orders had been ignored during violent industrial action and this according to Myburgh poses a threat to the rule of law. The sharp difference between the enforcement of our industrial court decisions and that of Botswana with regard to court orders is demonstrated by two recent decisions of the Labour Court and Labour Appeal Court, that is, *Food & Allied Workers Union obo Kapesi & Others v Premier Foods Ltd t/a Blue Ribbon Salt River*⁴¹⁰ and *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others*.⁴¹¹ In both these cases the court had granted an interdict to stop the union and workers from continuing with their action which was violent. The orders were ignored by the union and its members and violent strike continued despite the court order. None was arrested for contempt of court and imprisoned. This raises many questions about the rule of law in the Republic if court orders can be ignored by people at will.

As is the case with Botswana upholding the rule of law must not be an option, anyone who fails to follow a court order needs to be charged with contempt of court and be fined or imprisoned. If one party is not happy with the ruling of the Labour Court, the matter need to be referred to the Labour Appeal Court rather than to boycott the court order.

⁴⁰⁸ Myburgh A ‘The Failure to Obey Interdicts Prohibiting Strikes and Violence’ (2013) 23 *CLL* 1 at 2.

⁴⁰⁹ *Ibid.*

⁴¹⁰ (2012) 33 *ILJ* 1779 (LAC).

⁴¹¹ (2012) 33 *ILJ* 998 (LC).

8.5 Introduction of the interest arbitration clause

In terms of the LRA amendments which came into effect on 1 January 2015, section 150(1)(b) of the LRA was added which gives the Director of the CCMA the right to get involved in labour disputes if the director believes it is in the public interest to do so. This gives the Director of the CCMA power to try to force the parties back to the bargaining table to try and mediate the dispute. This amendment is commendable but is still not interest arbitration.

Borrowing from Canada the concept of interest arbitration, South Africa will have to amend the Labour Relations Act to include such a provision. Interest arbitration gives the parties an option to agree on mechanisms that will terminate industrial action once it becomes violent or cause damage to property. The author suggests that this will assist in reducing the number of protracted strikes and the negative impact that these strikes have on the economy.

However, the introduction of interest arbitration in our labour law will not be easy and will face some challenges. The first challenge is its compatibility with the Constitution. The fact that the introduction of interest arbitration will have the effect of bringing a strike or industrial action to an end has constitutional implications. The right to strike is entrenched in the Bill of Rights. The Constitutional Court has also ruled that it is not for the courts to restrict the scope of collective bargaining tactics which are legitimately robust.⁴¹²

The question is whether the introduction and implementation of interest arbitration would be constitutional. The study argues that the answer to this question will be found in section 36(1) of the Constitution.⁴¹³ To force the parties to abandon their right to

⁴¹² *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board* (2014) 3 SA 544 (CC) at 598G-599B.

⁴¹³ See Chapter 3 above where the limitation of rights in terms of the Constitution is discussed.

strike for arbitration will require compliance with section 36(1). Section 36(1) provides that:

“any limitation of the right in the Bill of Rights must be in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”

Before limitation can be said to be justifiable the factors listed in section 36(1)(a)-(e) have to be taken into account. These factors allow the person or institution that intends to limit the right to weigh the advantages and disadvantages of limiting the right. In weighing the advantages and disadvantages of limiting the right to strike, it can be taken into account that interest arbitration as prescribed by law of general application could be sufficient to meet the situation and constitute the less restrictive means to achieve the purpose of orderly collective bargaining, generally, and of avoiding adverse effects of protracted industrial action.⁴¹⁴ It is submitted that there will be more advantages to ending violent strikes and limiting the right to strike will save the economy compared to allowing the strike to continue with negative consequences on the economy and on employees as they will lose more wages while employers lose more profit.

Secondly, the implementation of interest arbitration might be contrary to the ILO recommendations. The ILO provides that where compulsory arbitration prevents strike action, it is contrary to the right of trade unions to organise freely their activities and could only be justified in the public service or in essential services.⁴¹⁵

Thirdly, the parties to the dispute will be reluctant to make reasonable attempts to resolve the dispute and leave it to the third party (arbitrator) to resolve the dispute for them. The parties will take extreme positions without any compromises to meet each other under the hope that the arbitrator will come up with a settlement. The disadvantage of relying on a third party will thus affect the ability of the parties to negotiate productively and improve their negotiating skills. This will also have the possibility of prolonging the strike rather than shortening it as it will take time to obtain an arbitrator with the required skills.

⁴¹⁴ *Ibid.*

⁴¹⁵ *ILO Digest* (1996) paras 518-521.

Lastly, the issue of lengthy strike action is problematic as it is not clear what would constitute a 'lengthy' strike. There is no prescribed maximum period for a strike.⁴¹⁶ It is hoped that if interest arbitration is made into law, this will be clearly stated. In the absence of a clear provision to this effect, employers could therefore, potentially approach the Labour Court prematurely.

The author argues that the introduction of interest arbitration will, in the long run, not only serve the interest of the business or the employer as well as the economy, but it may also save the employees from the negative impact that may result from a protracted strike, like the possibility of retrenchments. During a strike the employer may consider arranging negotiations for retrenchments in terms of section 67(5) of the LRA. This will be a signal to the employees of the devastating effects of the strike on the business. This will also give the parties a warning call to settle their dispute or find ways of ending the strike.

8.6 Holding unions liable on the basis of vicarious liability

It is clear that in Canada a union can be held vicariously liable for the unlawful conduct of its members. The classic *Salmond's* test for vicarious liability is used to hold employers liable for the conduct of members committed within the course and scope of the activity of the union. The same test has been developed to hold unions vicariously liable for conduct of its members.

The author suggests that South Africa should follow the Canadian example to hold unions liable for the conduct of their members.⁴¹⁷ The two well established grounds for holding unions liable for the conduct of members should be followed as is the case with Canada. The first one is that in order to hold a union liable for the conduct of its members during industrial action, such members must be authorised to participate in the industrial action. This will be the case if the action (strike, picket or protest) is

⁴¹⁶ Budeli M 'The Impact of the Amendments on Unions and Collective Bargaining' Paper presented at the 27th Annual Labour Law Conference in Sandton Convention Centre (Johannesburg) on 5-7 August 2014.

⁴¹⁷ This is further discussed in Chapter 7 below.

protected.⁴¹⁸ In terms of the Canadian law, this is enough to attribute liability to the union.⁴¹⁹ The union may, however, ratify the conduct of its members by either participating in the action or in any other way that shows support for industrial action that causes damage.⁴²⁰ Such conduct will strengthen the case against union liability.

In terms of this branch of the test for vicarious liability, the union will be liable even if it argues that the acts of violence or damage to property was committed by people who are not its members and such persons acted contrary to its instructions.⁴²¹ What is important is that the union must have authorised the action in which people or its members participated and committed unlawful acts. In that regard, there is a duty on the union to do all it can to prevent such action from degenerating into violence or any act which is contrary to law as failure to do so could result to liability.

The second requirement is that the participants must commit unauthorised acts during the protected industrial action. The unauthorised conduct of the members during industrial action must be closely connected to an authorised act or be seen or regarded as a way of executing an authorised act.⁴²² This does not imply that the union will not be liable if the strike was not protected. The union will still be liable if it can be shown that, it is the union that led such action and the unauthorised conduct was taken in connection with such unprotected strike. Vicarious liability is therefore appropriate where there is a significant connection between the creation or enhancement of the risk and the wrong that accrues therefrom, even if unrelated to the employer's desire.⁴²³

It seems that where the strategy employed by the union is so connected to the unlawful conduct that it can be said that their strategy promoted the unlawful activity, the union could attract vicarious liability for the actions of its members. The test is not whether or not the harm or assaults were foreseeable. It seems that the mere signs or

⁴¹⁸ See Chapter 2 above where these types of industrial action are discussed.

⁴¹⁹ *Mainland Sawmills Ltd v USW Union Local; Adams Laboratories Ltd v Retail Wholesale & Department Store Union Local* 580 (note 263, chapter 7); *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council* (note 70, chapter 1).

⁴²⁰ Salmon, Heuston & Buckley *The Law of Torts* (note 348, chapter 6) at 520-522.

⁴²¹ *Matusiak v British Columbia and Yukon Territory Building and Construction Trades Council* (note 70, chapter 1).

⁴²² *Ibid.*

⁴²³ *Bazley v Curry* (note 342, chapter 6) at 560.

indications of risk associated with the union's activity and the conduct of its members will be sufficient to transfer liability to the union.

Protected industrial action, in most cases, takes place under the leadership of a union. As a result, the union has the duty to control the movement of the picketers or protesters. Since a union has the power to call off a strike or suspend it, the union should use this power if the strike becomes violent. If it fails to do so the impression is created that the union supports the unlawful conduct or conduct closely connected to the unlawful act, which ought to render the union vicariously liable to the victims of such conduct. These actions by unions are aimed at preventing industrial action from degenerating into something else, never planned at the beginning. Such conduct by the union is equivalent to 'reasonable steps' that a union needs to take to prevent violent action in Canada.⁴²⁴ There need to be evidence to show that the union indeed took reasonable steps to prevent the action or the damage from taking place. These will include communication with the members and the employer that the action has been suspended or terminated. The union will need to take this further and state clearly that any further action in connection with the suspended strike will not be in the name of the union.

In view of these facts and the quoted Canadian decisions, the author suggests in Chapter 7 below that in South Africa vicarious liability could serve as the basis for holding unions liable for the conduct of their members.

9 CONCLUSION

The aim of conducting a comparative analysis is to find solutions for problems South Africa face in the area of industrial relations.⁴²⁵ The fact that South Africa often faces violent industrial action which cannot be addressed in terms of the current South African law, shows that certain aspects of our labour law needs to be improved. The law must devise legal solutions for these problems that impact on our communities.

⁴²⁴ See *Mainland Sawmills Ltd v USW Union Local* (2007) (CanLII) 1433 BCSC. Accessed at <https://www.CanLII.org/en/bc/bcsc/doc/2007/2007/bcsc1433/2007/bcsc1433.html> on 13/08/ 2014.

⁴²⁵ See Chapter 1 above.

Although the interpretation clause of the South African Constitution allows for the consideration of international and foreign law when courts make decisions,⁴²⁶ such law could play an important role in the process of building our labour law in relation to current industrial relations and the economy at large. The law of other countries does not allow workers to engage in conduct that will negatively affect the economy, cause damage to property or endanger human life.⁴²⁷ In Australia, for example, the courts are empowered to suspend or terminate industrial action that endangers or threatens to endanger or cause significant harm to people.⁴²⁸ This power to intervene in labour disputes is statutorily regulated.⁴²⁹ The study suggest that protracted industrial action in the Republic can be addressed if the Labour Court can be empowered to suspend it once it is clear that no solution is found and has taken too long to get resolved. This may be a justified limitation since the purpose that will be served by such act by the Labour Court will be legitimate, that is, to serve the economy and perhaps jobs that might be at stake. Section 36(1) of the Constitution will serve to guide this eventuality.⁴³⁰

Another measure that can play a role in reducing the levels of violent industrial action is the ballot of members prior to industrial action. This will enable the union to determine how many workers are in favour of the strike. If the majority of employees vote in support of the strike, there might be fewer incidents of violence as the employer might consider the withdrawal of labour seriously and reconsider his or her position in the negotiation's process. However, it must be noted that the ballot of members was a requirement prior to the coming into effect of the LRA of 1995 and did not have any impact in reducing the levels of violence during industrial action. The political conditions during that period could not allow for a reduction in the number of violent strikes as it was difficult to draw a line between political strikes and industrial strikes. The fact that political conditions have changed, it can be argued that the ballot requirement needs to be given another chance to play its role in violent industrial actions.

⁴²⁶ See section 39(1)(b)-(c) of the Constitution.

⁴²⁷ Section 423 of the FW Act.

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ Chapter 2.

Another method that could be used to deal with the negative consequences of industrial action is to hold someone vicariously liable if damage does occur or if someone is injured. In Canada, unions are held vicariously liable for the unlawful conduct of their members.⁴³¹ The liability of trade unions for the conduct of members is based on the premise that unions control the strikes in which their members participate and that the industrial action proceeds according to the guidance of the union. The union is also held liable to the victims on the basis that it authorises the industrial action and any unauthorised conduct committed in relation to the authorised conduct. A union can, however, escape liability if it can prove that it took reasonable steps to prevent the damage from being caused by the employees on strike, but that the damage nevertheless took place.

These measures should be introduced to improve the situation in South Africa. However, it will not be necessary that measures were taken to prevent or stop industrial action, the union should do whatever it can to prevent any damage to third parties.

It is a fact that Labour Court orders are often not respected in the Republic. A number of cases have been quoted above where Labour Court decisions have been ignored and no one had been held accountable for such conduct. An insistence on the respect for the rule of law and compliance with court decisions is crucial in order to use law to arrest the situation of violence during industrial action. If a party to the dispute is not happy with the decision of the Labour Court, they should be encouraged to appeal to the Labour Appeal Court. This is practised in Botswana and the latter set an exemplary nature of a peaceful democratic country and stable economy.

Although it is clear that certain solutions can be borrowed from foreign law, it must be stressed that heavy reliance will have to be placed on South Africa's own circumstances and that the Constitution and relevant labour statutes will have to serve

⁴³¹ See *Adams Laboratories Ltd v Retail, Wholesale & Department Store Union, Local 580* (8 June 1979), Vancouver C79000 (BCSC). See also *Matusiak v British Columbia and Yukon Territory Building and Construction Trades Council* (note 345, chapter 6); and *Mainland Sawmills Ltd v USW Union Local* (note 424, chapter 6).

as the primary sources of guidance on issues of industrial conflict and other issues of public and private concern.

CHAPTER 7

THE ACCOUNTABILITY OF EMPLOYERS AND TRADE UNIONS FOR THE DELICTUAL ACTS OF EMPLOYEES AND MEMBERS

Summary

The doctrine of vicarious liability has been used for decades to hold certain categories of persons including the employer liable for delictual conduct of persons under their control. This doctrine applies in the case of certain relationships such as the employment relationship, principal and agent relations and vehicle-owner and driver relationships but does not, to date apply in the case of a trade union-member relationship for the damage the members commit during industrial action. The author argues for the expansion of the doctrine of vicarious liability to hold unions liable for delictual conduct of its members committed during industrial action. The changing political and economic conditions including the need to ensure justice in society could favour this development in our labour law.

1 INTRODUCTION

In terms of the common law doctrine of vicarious liability certain persons can be held liable for the unlawful conduct or delictual acts of others.¹ This doctrine would for example be applied in the case of marriage, the contract of agency, the contract of mandate, the contract between the driver and owner of a vehicle, a partnership, contract of insurance and the contract of employment.² In the case of an employment relationship, the employer can be held liable for the conduct of its employee(s), in which case it is a requirement that an employment relationship must exist between the employer and employee.³ If the alleged wrongdoer is not an employee, the employer can deny liability on the ground that there is no contractual relationship between the employer and the wrongdoer, and consequently there will be no basis for holding the employer vicariously liable.⁴

In the case of a trade union-member relationship, the situation is different as unions are not held liable for delictual acts committed by members during industrial action.

¹ See *Grobler v Naspers Bpk en 'n ander* (2004) 25 ILJ 439 (C).

² *Ibid.*

³ Neethling, Potgieter & Visser *Law of Delict* (note 49, chapter 4) at 365-367.

⁴ *Langley Fox Building Partnership (Pty) Ltd v De Valence* (1991) 1 SA 1 (A) at 8D.

Trade unions are reluctant to take responsibility for the consequences of the conduct of their members. In fact, there is no clarity on the grounds that can be used to hold a trade union liable for delictual conduct of members committed during industrial action. The fact that the union is not held liable for the conduct of its members is a concern to many people who are negatively affected by these acts.⁵

This chapter investigates whether the doctrine of vicarious liability could be developed to hold unions liable for delictual conduct committed by their members during industrial action. To expand the application of vicarious liability in this way, the chapter considers factors such as the 'risk-creating factor' and the 'close connection factor' to argue for the vicarious liability of a union for the conduct of its members as is the case with other relationships to which the doctrine applies.⁶

Despite the various relationships to which the doctrine of vicarious liability applies, this chapter discusses the employment relationship to indicate how the doctrine works.⁷ It then uses the liability of the employer as a framework for holding a trade union liable for the conduct of its members. It draws an analogy between the employer-employee relationship and the trade union-member relationship, in order to determine whether it is feasible to extend the application of vicarious liability to the latter relationship in the same way as for an employer-employee relationship. The chapter concludes that if the union is held liable or both the union and the members are held liable, then the victim of delictual act could have someone to look to for compensation and it would inevitably lead to less industrial action related violence.

⁵ In several cases people have suffered as a result of violent strikes, property has been damaged through violent conduct of strikers and or picketers. See in this regard *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (note 94, chapter 3) at 1001A-C.

⁶ See *Minister of Police v Rabie* (1986) 1 SA 117 (A) at 134D-E.

⁷ Employment relationship is one of the many relationships to which vicarious liability can find application. See in this regard Wicke H 'Vicarious Liability: Not Simply a Matter of Legal Policy' (1998) 1 *Stell LR* at 24-25.

2 THE REGULATION OF VICARIOUS LIABILITY

Vicarious liability has a long but uncertain pedigree in the South African law.⁸ Initially foreign to our law, the doctrine was imported from English law where it had been introduced in the late seventeenth century.⁹

In South Africa, the operation of this doctrine has, up to now, been regulated by the common law,¹⁰ customary law¹¹ and developed by the courts in terms of the Constitution.¹² Since the Constitution is the highest law in the land, any doctrine, principle or any law that does not conform to it must be declared invalid.¹³ For example, if the common law deviates from the spirit, purport and objects of the Bill of Rights in the Constitution,¹⁴ the courts have an obligation to develop it by removing the deviation.¹⁵ If the courts are unable to develop the common law or any other law that falls short of the Constitution such law must be declared invalid and the status of such law will be of no force or effect in the Republic.¹⁶

Courts in the Republic are obliged by the Constitution to develop the common law where the latter is not consistent with it. Section 39(2) of the Constitution provides that:

⁸ For a brief discussion of the origin of this doctrine in our law, see *Hirsch Appliance Special v Shield Security Natal (Pty) Ltd* (1992) 3 SA (D) 643 at 647-648; Neethling, Potgieter & Visser *Law of Delict* (note 49, chapter 4) (edited by Knobel JC) at 338-339; McKerron RG *The Law of Delict* 7th ed (1971) at 89-90; Fleming J *The Law of Torts* 9th ed (1998) at 409-411.

⁹ *Masuku v Mdlalose* (1998) 1 SA 1 (A) at 13J – 14B. See also Neethling, Potgieter & Visser *Law of Delict* (note 49, chapter 4) at 365; Calitz K 'Vicarious Liability of Employers: Reconsidering Risk as the Basis for Liability' (2005) *TSAR* 215 at 217; and *Grobler v Naspers Bpk* (note 1, chapter 7) at 277E-F.

¹⁰ Smit N and Van der Nest D 'When Sisters are Doing it for Themselves: Sexual Harassment Claims in the Workplace' (2004) 3 *TSAR* 520 at 531.

¹¹ For example, a kraal head is liable for all the delictual acts of inhabitants of the kraal, see the discussion in Bennett TW *A Sourcebook of Customary Law for Southern Africa* (1991) at 351ff and Bekker JC *Seymour's Customary Law in South Africa* (1989) at 82ff.

¹² Section 39(2) of the Constitution provides that 'when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' This was the case with regard to the doctrine of vicarious liability in *K v Minister of Safety & Security* (2005) 26 *ILJ* 120 (CC), (2005) 6 SA 419 (CC). See also *RH Johnson Crane Hire v Grotto Steel Construction* (1992) 3 SA 907 (C) 908F.

¹³ Section 2 of the Constitution.

¹⁴ Section 7 of the Constitution provides that 'the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'

¹⁵ *Carmichele v Minister of Safety and Security* (2001) 4 SA 938 (CC) at 954A.

¹⁶ Section 2 read with section 172(1) of the Constitution.

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

Although the courts have attempted to develop the common law doctrine of vicarious liability through the cases,¹⁷ there has been no initiative by the legislature to comprehensively regulate this area of law. This has been done to a certain extent in the Employment Equity Act¹⁸ (EEA) which provides that:

“if it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee’s employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.”¹⁹

The employer is then bound to consult the relevant parties and take steps to eliminate the alleged conduct.²⁰ If the employee contravened the provision(s) of the EEA, and the employer fails to take the necessary steps to prevent the contravening behaviour from continuing, the employer will be deemed to have contravened the relevant provisions of the EEA.²¹

The question that arises is whether the provision in the EEA, that holds an employer liable for the conduct of an employee constitute a form of statutory vicarious liability. Case law and some academics are of the view that liability in terms of this section of the EEA is not vicarious. In *Police v Old Mutual Life Association Co (SA) Ltd & others*²² an employee lodged a complaint with her employer about alleged sexual harassment by another employee. The matter went to the Labour Court after it transpired that the employer failed to act as required by the EEA.²³ Her application to hold the employer liable on the basis of section 60 of the EEA was unsuccessful. The court however, ordered the payment of damages on the basis of an unfair labour practice. This decision was criticised by Ngcukaitobi when he says:

¹⁷ See *K v Minister of Safety & Security* (note 12, chapter 7) at 428G-429A-F and 432F-433A-D.

¹⁸ Act 55 of 1998.

¹⁹ Section 60(1) of the EEA.

²⁰ *Idem* section 60(2).

²¹ *Idem* section 60(3).

²² (2007) 28 ILJ 897 (LC).

²³ Section 60(2) of the EEA.

“The provisions of the LRA were not the subject of *New Clicks [Minister of Health & another NO v New Clicks SA (Pty) Ltd & others (Treatment Action Campaign & another as amici Curiae)* (2006) 2 SA 311 (CC)]. By analogy, however, challenges to breaches of the EEA ought to be located in the first instance in the EEA, and not the constitutional right to fair labour practices. If an employee complains that the remedies provided in the EEA are inadequate, it appears that he or she could challenge the constitutionality of the EEA on the basis that it fails to give effect to the constitutional right to fair labour practices; but it appears to be inappropriate to permit an employee to go beyond the provisions of the EEA.”²⁴

In *F v Minister of Safety & Security*,²⁵ the State was held liable for the delictual conduct of a police officer. In holding the employer liable on the basis of vicarious liability he or she need not be at fault or to have committed a wrongful act.²⁶ Liability in terms of the EEA requires the employer to have been notified or told about the unlawful act and fail to take steps to rectify the situation.²⁷

In *KO and Kusasa Commodities 332 CC t/a Twin Peak Spur Steak Ranch*,²⁸ the court, referring to *SATAWU obo Finca v Old Mutual Life Assurance Co (SA)*,²⁹ held that a distinction needs to be drawn between a statutory liability of an employer in terms of section 60 of the EEA and liability where the employer’s conduct in failing to protect a harassed employee amounts to discrimination by the employer.³⁰

Le Roux argues that the purpose of section 60 of the EEA is to penalise the employer for failing to address equity in the workplace and not intended to remedy delictual harm.³¹ She further argues that it is better to regard it as a form of direct liability than as a form of vicarious liability.³² Thus, liability in terms of section 60 of the EEA is not a form of true vicarious liability.

²⁴ Ngcukaitobi T ‘Direct Application of the Constitution in the Labour Court: A Note on *Piliso v Old Mutual Co (Pty) Ltd & Others*’ (2007) 28 ILJ 897 (LC) at 2180.

²⁵ See *F v Minister of Safety & Security* (2012) 1 SA 536 (CC).

²⁶ *Ibid* at 547F.

²⁷ Section 60(3) of the EEA.

²⁸ (2016) 37 ILJ 735 (CCMA).

²⁹ (2006) 27 ILJ 1204 (LC).

³⁰ At 740G.

³¹ Le Roux R, Rycroft A, Orleyn T *Sexual Harassment in the Workplace: law, policies and processes* (2005) at 94.

³² *Ibid*.

In the absence of legislation that deals with the issue of vicarious liability directly, this area of the law is mainly regulated by the common law.³³ As a result of violent industrial action that characterises the labour relations' environment in the Republic, the author submits that the time has arrived to develop this doctrine to cater for new situations that comes with social and political changes. New trends in labour relations whereby employees express their grievances using a variety of methods and means demand that there should be changes in the way industrial action is conducted or its consequences are addressed, hence the need to expand its application to a trade union member relationship.

It is further argued that if trade unions are to be held liable for the conduct of their members, such development will not be unique to South Africa. There are other examples such as sporting codes where clubs are held responsible for the damage caused by their supporters during club activities. This liability is, however, not on the basis of vicarious liability but in terms of the Premier Soccer League's (PSL) rules.³⁴ In terms of the PSL rules, soccer clubs are held liable for the conduct of their supporters or fans if they commit misconduct during official soccer games. These PSL rules have been applied and implemented on various occasions when supporters caused damage during soccer matches. The rules make it clear that the club is liable as long as the fans were dressed in the club's attire when they committed the unlawful act. If wrongdoers are dressed in the club's uniform, it serves as an indication that they are supporters of the club, and that the club could be held liable for their conduct during official soccer matches.

An example where a soccer club was held liable for the conduct of the club's fans was during a soccer match between Orlando Pirates and Supersport United that took place in August 2012. Orlando Pirates lost 3-0. Unhappy with the result, a faction of Orlando Pirates supporters threw objects onto the pitch during and after the game, and injured

³³ *Grobler v Naspers Bpk & another* (note 1, chapter 7) at 493B. See also Smit & Van der Nest 'When Sisters are doing it for themselves: Sexual Harassment Claims in the Workplace' (note 10, chapter 7) at 531; Le Roux R 'Sexual Harassment in the Workplace: Reflecting on *Grobler v Naspers*' (2004) *ILJ* 1897 at 1906; Whitcher B 'Two Roads to an Employer's Vicarious Liability for Sexual Harassment: S *Grobler v Naspers Bpk en Andere* and *Ntsabo v Real Security CC*' (2004) *ILJ* 1907 at 1912.

³⁴ Rule 53.2.3 of the National Soccer League Rules of 2012.

at least one supporter and a photographer. The PSL fined Orlando Pirates an amount of R100 000.

As soccer supporters became violent, the PSL found it necessary to change its rules to accommodate the situation. The ruling in this matter indicates that the rules that regulate strikes and pickets can be revisited and improved to address new challenges that have arisen in the industrial relations' environment. In the same way labour law could renew its rules as the situation seems to be demanding change to the rules.

3 THE NATURE OF VICARIOUS LIABILITY WITH PARTICULAR REFERENCE TO THE EMPLOYER-EMPLOYEE RELATIONSHIP

The doctrine of vicarious liability applies where a delict has been committed.³⁵ A delict is defined as an unlawful, blameworthy act or omission by a person which causes damage to another person or property or injury to personality and for which a civil remedy for recovery of damages is available.³⁶ Neethling defines a delict as a 'civil wrong to an individual for which damages can be claimed as compensation and for which redress is not usually dependent on a prior contractual undertaking to refrain from causing harm.'³⁷

For conduct to be regarded as a delict, it must meet certain requirements, namely: an act or omission, unlawfulness, fault, causation and loss.³⁸

It is a generally accepted principle in law that the person who commits the delict should be held liable, and nobody else.³⁹ Vicarious liability is, however, an exception to this rule because it is not the actual perpetrator who is held liable for the delict committed but another person. The application of vicarious liability means that a person may be held liable for the wrongful act(s) or omission of another even though the former did not directly engage or participate in the commission of any wrongful conduct.⁴⁰ A

³⁵ Kopel S *Guide to Business Law* 4th ed (2010) at 209.

³⁶ Burchell *Principles of Delict* (note 47, chapter 4) at 10.

³⁷ Neethling, Potgieter & Visser *Law of Delict* (note 49, chapter 4) at 365.

³⁸ Burchell *Principles of Delict* (note 47, chapter 4) at 22.

³⁹ Du Plessis & Fouché *A Practical Guide to Labour Law* (note 17, chapter 1) at 27.

⁴⁰ *F v Minister of Safety & Security* (note 25, chapter 7) at 547F.

person is held liable without being at fault.⁴¹ However, the actual person who committed the delict must have been at fault (intent or negligence) otherwise there will not be a delict to give rise to vicarious liability. It is the person to be held liable (employer for delict of an employee) that is not at fault. Moreover, it is not the only fault element of delict that is absent when attributing liability in the form of vicarious liability, but also the conduct which is committed by another person (the employee) in the case of the employment relationship.⁴² In this sense, vicarious liability is an example of strict liability.⁴³

Vicarious liability arises by reason of a relationship between the parties.⁴⁴ There are many relationships that can give rise to vicarious liability for example the contract of agency.⁴⁵ It is, however, not the intention of this chapter to discuss the particular requirements for vicarious liability in all of these possible relationships.⁴⁶ Only the application of the doctrine of vicarious liability in the employment relationship will be discussed to set the framework for future application of vicarious liability to a trade union.

The reason for choosing the employer-employee relationship is the fact that it shares some common characteristics with the trade union-member relationship, namely both the employer-employee and trade union-member relationships have an employee as point of departure for their existence. Trade unions operate within a work environment. It is the 'employees' of an employer that are statutorily allowed to join trade unions.⁴⁷ Therefore, it is difficult to separate unions from an employer's business as they recruit members from the employer's workforce.⁴⁸ In addition, one of the benefits of being an employee is the right to join a trade union. The consequence is that the activities of the union of which the employee is a member, could have an impact on the relationship between the employer and its employees.

⁴¹ The fault of the perpetrator is, however, required.

⁴² Wicke 'Vicarious Liability: Not Simply a Matter of Legal Policy' (note 7, chapter 7) at 24-25.

⁴³ See Neethling, Potgieter & Visser *Law of Delict* (note 49, chapter 4) at 365. See also *Stein v Rising Tide Productions CC* (2002) 5 SA 199 (C) at 205.

⁴⁴ Wicke 'Vicarious Liability: Not Simply a Matter of Legal Policy' (note 7, chapter 7) at 22.

⁴⁵ *Ibid.*

⁴⁶ The circumstances in which vicarious liability will arise were described by the High Court in the case of *Minister of Law & Order v Ngcobo* (1992) 4 SA 822 (A).

⁴⁷ Section 4(1) of the LRA.

⁴⁸ *Idem* section 12(1).

Another important feature of the doctrine of vicarious liability is that the liability is secondary – it only arises if the wrongdoer with whom the employer has a relationship commits a delict. To constitute a delict, the conduct must meet certain requirements. These requirements were listed above as conduct, unlawfulness, fault, causation and loss.⁴⁹ The requirements for a delict are different from the requirements for attribution of liability in other relationships to which the doctrine applies.⁵⁰ The requirements for transferring liability are:

- (a) The act or omission of the wrongdoer must comply with the requirements for a delict.⁵¹ This includes harm that must have been caused to another person or his or her property.⁵²
- (b) A relationship must exist between the wrongdoer and the person to whom liability is transferred. These relationships were listed above to include: marriage, the contract of agency, the contract of mandate, contract between the driver and owner of a vehicle, a partnership, contract of insurance, and contract of employment.⁵³
- (c) The delictual conduct must fall within the ambit of the defendant's instructions, or fall within the risk created by the defendant.⁵⁴ In an employment relationship, the liability will be transferred from the employee to the employer if the act was committed within the course and scope of his or her employment duties.⁵⁵

⁴⁹ Burchell *Principles of Delict* (note 47, chapter 4) at 22.

⁵⁰ *Ibid.*

⁵¹ The delictual elements set out must have been met. The elements of delict are: conduct, fault, unlawfulness and causation, Burchell *Principles of Delict* (note 47, chapter 4) at 23.

⁵² *Ibid.*

⁵³ Wicke 'Vicarious Liability: Not Simply a Matter of Legal Policy' (note 7, chapter 7) at 22.

⁵⁴ Section 297A of the Criminal Procedure Act 51 of 1977. See also *Lindsay v Stofberg* (1988) 2 SA 462 (C); and Wicke 'Vicarious liability in Modern South African Law' (note 7, chapter).

⁵⁵ Le Roux, Orleyn, and Rycroft *Sexual Harassment in the Workplace: law, policies and processes* (note 31, chapter 7) at 83.

- (d) It must be proven that it was the employee or the agent of the principal or employer who caused the conduct complained of.⁵⁶

4 THE RATIONALE FOR THE EXISTENCE OF VICARIOUS LIABILITY AND ITS APPLICATION ON THE EMPLOYER

The social and economic changes that have taken place over centuries have given rise to varying explanations for the existence and survival of vicarious liability.⁵⁷ The fact that someone (the employer) is held liable for the conduct of another person (the employee) is at odds with the established principles of delict.⁵⁸ The departure from this rule of the law of delict requires some explanation as this is not accepted as a legal rule but a practice that is based on policy considerations of public policy.⁵⁹

Policy considerations have resulted in the establishment of liability of people who did not really commit the unlawful conduct but were indirectly involved through the giving of instructions which linked the wrongdoer to the commission of the act.⁶⁰ However, different policy considerations exist for the different relations to which vicarious liability applies. There are no common policy considerations that influence the extension of vicarious liability to all the different relationships to which it applies. For example, the policy consideration underlying vicarious liability in the employment relationship may not necessarily be relevant in another category, for example, amongst partners.⁶¹ There are different requirements for the application of vicarious liability in each of the different categories to which it applies. What attributes liability of a spouse to another spouse in a marriage is different from what attributes liability to a vehicle owner-driver relationship. The motive behind such development is that the victim should not be left

⁵⁶ See *Mahlangu v SATAWU, Passenger Rail Agency of SA & another, Third Parties* (2014) 35 ILJ 1193 at 1205D-E.

⁵⁷ Wicke H 'Vicarious Liability for Agents and the Distinctions between Employees, Agents and Independent Contractors' (1998) *THRHR* 609ff.

⁵⁸ Burchell *Principles of Delict* (note 47, chapter 4) at 10.

⁵⁹ See *Mhlongo and another NO v Minister of Police* (1978) 2 SA 551 (A) at 567H; *Messina Associated Couriers v Kleinhaus* (2001) 3 SA 868 (SCA); and *Grobler v Naspers and Another* (note 1, chapter 7) at 494F-H.

⁶⁰ Hughes J *Vicarious Liability in Todd (ed): The Law of Torts In New Zealand* (2009) at 1029. See also *Kooragang Investments (Pty) Ltd v Richardson & Rench Ltd* (1982) AC 462 at 471J-472A.

⁶¹ Wicke 'Vicarious Liability: Not Simply A Matter of Legal Policy' (note 7, chapter 7) at 22.

without any form of recourse.⁶² It is also necessary to provide the plaintiff with a party worth suing for loss incurred.⁶³

In addition, several theories have endeavoured to explain the basis for vicarious liability. These include the fault, the interest and profit, the solvency, and the risk and danger theories.⁶⁴ The debate on the matter has, however, become academic since vicarious liability is part of our law and certain persons can be held liable for the delictual acts of others.⁶⁵

The fact that vicarious liability is part of our law does not mean that employers will always admit to liability for the conduct of their employees. They often deny liability for delicts committed by employees on the basis that the employee or agent was not authorised when he or she committed the act or acted outside the scope of his or her employment duties or that there was no relationship to serve as basis for such liability.⁶⁶ If the employer denies liability on the ground that there is no employment relationship between him or her and the wrongdoer, it becomes necessary to establish whether such relationship exist.

Although an employment relationship can be established in many ways, but for vicarious liability to exist or find application, it is important that the worker must be an employee as defined in the LRA.

“(a) any person, *excluding an independent contractor*, who works for another person or for the State and who receives, or is entitled to receive any remuneration; and
(b) any other person who *in any manner assist* in carrying on or conducting the business of an employer.”⁶⁷

⁶² *Minister of Law and Order v Ngcobo* (note 46, chapter 7) at 833H.

⁶³ Potgieter JM ‘Preliminary Thoughts on whether Vicarious Liability to the Parent-Child Relationship’ (2011) *Obiter* 189 at 194

⁶⁴ For a detailed discussion on these theories, see Potgieter ‘Preliminary Thoughts on whether Vicarious Liability should be Extended to the Parent-Child Relationship’ (note 63, chapter 7) at 191-192.

⁶⁵ Neethling, Potgieter & Visser *The Law of Delict* (note 49, chapter 4) at 365.

⁶⁶ See *K v Minister of Safety and Security* (note 12, chapter 7).

⁶⁷ Section 213 of the LRA.

Once it has been established that the person who committed the delict is an employee of the employer and the other requirements for vicarious liability have been complied with,⁶⁸ it is assumed that the employer will be held liable.⁶⁹ In instances where employers are held vicariously liable, they initially deny liability arguing that the employee exceeded the scope of authorisation or was not authorised.⁷⁰ It then becomes necessary to investigate the factors that play a role in holding employers liable regardless of the scope of authorisation.⁷¹ These factors include the creation of risk of harm and the close connection factors.⁷²

These factors are discussed below and are supported by case law in arguing that the liability of members of a trade union can be attributed to the union in the same way that liability of an employee is attributed to the employer.⁷³ Although these factors are similar to the theories of vicarious liability,⁷⁴ they are discussed here not as theories of vicarious liability but as factors that could result in liability being attributed to the principal, such as the employer as well as on novel situations such as the trade union as being responsible for the actions of its members.⁷⁵

4.1 Risk-creating harm

When the employee performs his or her obligations in terms of the contract between him or her and the employer, it often happens that the employee interacts with third parties.⁷⁶ During such interaction, the employee could exploit the employment situation for his or her own purposes.⁷⁷ The possibility of causing harm to third parties exists. The harm can also be caused to a co-employee and then the employer could

⁶⁸ These requirements are the conduct, unlawfulness, causation, fault and loss.

⁶⁹ In *Media24 Ltd v Grobler* (2005) 6 SA 328 (SCA) at 349, the court did not express its opinion on vicarious liability but it held that the employer is directly liable for the plaintiff's damage on account of his own wrongful and negligent failure to protect her against the harassment.

⁷⁰ See *Minister of Police v Rabie* (note 6, chapter 7).

⁷¹ *Feldman (Pty) Ltd v Mall* (1945) 743 (AD) at 741.

⁷² See *Minister of Police v Rabie* (note 6, chapter 7) at 134D; and *Mkhize v Martens* (1914) AD 382.

⁷³ Although there may be many factors, but the study decided to discuss only two of these factors, that is, the close connection and the risk-creating factors.

⁷⁴ Neethling, Potgieter & Visser *The Law of Delict* (note 49, chapter 4) at 365.

⁷⁵ The union is equated with principals in this study because it gives out orders or instructions, strike or picket action is conducted under its guidance, and it is the union that decides to suspend or call off the strike.

⁷⁶ *Ibid.*

⁷⁷ *Feldman (Pty) Ltd v Mall* (note 71, chapter 7); and *Ess Kay Electronics (Pty) Ltd and Another v First National Bank of Southern Africa Ltd* (2001) 1 All 315 (A).

be liable to the injured employee.⁷⁸ The employer is under the obligation to ensure that no injury befalls others as a result of the employee's improper or negligent conduct while carrying out his or her occupational duties.⁷⁹ Employee are the hands of through which employers do their work. Should the employee act negligently, inefficiently or in an untrustworthy manner, the employer creates the risk of harm to third parties.⁸⁰ The true basis for liability in such cases is the failure of the employer, acting through the employee, to avoid or prevent harm that might occur as a result of the risk the employer created.⁸¹

In *Mkhize v Martens*,⁸² the servant of the defendant negligently lit a fire which burnt grass and trees on the farm of the plaintiff (Martens) and the plaintiff consequently suffered damages. The court held that the master who uses servants creates the risk of harm to others if the servant proves to be 'negligent or inefficient or untrustworthy.'⁸³ Brassey also holds that:

"employers are likely to be held liable if they provided the opportunity or conditions for the injurious act to occur or had the power to prevent it."⁸⁴

The employer has a statutory and common law duty to take reasonable care for the safety of its employees and to provide a safe working environment.⁸⁵ In *Media24 Ltd & another v Grobler*,⁸⁶ the Supreme Court of Appeal (SCA) had held that the common law duties of employers may, where appropriate, include the taking of steps to protect employees from the psychological harm caused by the effects of sexual harassment.⁸⁷

⁷⁸ See *Police v Old Mutual Life Association Co (SA) Ltd & others* (2007) 28 ILJ 897 (LC); *Grobler Naspers BPK & Another* (note 1, chapter 7). Ngcukaitobi T 'Direct Application of the Constitution in the Labour Court: A Note on *Piliso v Old Mutual Co (Pty) Ltd & Others* (2007) 28 ILJ 897 (LC)' (note 24, chapter 7) at 2180.

⁷⁹ *Feldman (Pty) Ltd v Mall* (note 71, chapter 7) at 741.

⁸⁰ *F v Minister of Safety and Security* (note 25, chapter 7) at 547.

⁸¹ Scott WE 'The Theory of Risk Liability and its Application to Vicarious Liability' (1979) 12 *CILSA* at 44.

⁸² *Mkhize v Martens* (note 72, chapter 7).

⁸³ *Idem* at 390.

⁸⁴ Brassey M 'Employment and Labour Law' (2000) 1 *Employment Law* 30 at 33.

⁸⁵ Sections 8(1) and 9(1) of the Occupational Health and Safety Act 85 of 1993. See also Ngcukaitobi 'Direct Application of the Constitution in the Labour Court: A Note on *Piliso v Old Mutual Co (Pty) Ltd & Others* (note 24, chapter 7) at 2180.

⁸⁶ (2005) 26 ILJ 1007 (SCA).

⁸⁷ At 1024E. See also *Van Deventer v Workman's Compensation Commissioner* (1962) 4 SA 28 (T) at 31B-C; and *Vigario v Afrox Ltd* (1996) 3 SA 450 (W) at 463F-I.

4.2 Close connection factor

Another important factor which helps to attribute liability to another person is the existence of a close connection between what the employee did and what he or she was supposed to do.⁸⁸ It may be difficult to establish a sufficiently close connection between what the employee did and what he or she was supposed or authorised to do. The circumstances of a case will determine whether a close connection did exist between the two. If it can be proved that there is indeed a close connection between what the employee did and what he or she was authorised to do, the employer is held liable.

In *F v Minister of Safety & Security & another*, a police officer, Mr V who was off-duty but on standby, offered a lift to a young girl (F) and then raped her. F was 13 years old at the time when the crime was committed. After attaining majority, she laid a charge against the Minister of Safety and Security for compensation for the loss suffered as a result of Mr V's conduct. It was clear from the evidence led in court that when the police officer raped the girl he was not furthering the interests of the employer but his own interest.⁸⁹

The court had to determine whether the Minister should be held vicariously liable for damages arising from the brutal rape of a girl by a policeman who was on standby duty. The court had to establish whether the conduct of the police officer even though not authorised by the employer, was closely connected to the business of the employer to render the employer liable.⁹⁰ In answering this question, the Constitutional Court referred to the decision in *K v Minister of Safety and Security* where O' Regan J considered three factors to be important in her conclusion that the State was vicariously liable for the conduct of police officers, which factors were that:

⁸⁸ See *Minister of Police v Rabie* (note 6, chapter 7) at 134C-E.

⁸⁹ *F v Minister of Safety & Security & another* (note 25, chapter 7) at 547H. See also *K v Minister and Security* (note 12, chapter 7) at 436D-E.

⁹⁰ At 565B.

“both the State and the policemen had a statutory and constitutional duty to assist the applicant, and that the conduct of the policemen which caused harm constituted a simultaneous commission and omission, the omission being their failure to protect her from harm.”⁹¹

It was further held that the Constitution mandates members of the police service to protect members of the community and to prevent crime and as a result of this duty the public trusts that the police are there to protect them.⁹² As a result both the state and police officer failed on their duty to protect members of the public. The State was, therefore, held vicariously liable for the conduct of the police officer.⁹³

In *Minister of Defence v Von Benecke*,⁹⁴ the Minister of Defence was held liable for damages suffered by the victim during a robbery in which the robber used a fire arm stolen by one of its employees (Mr Motaung). One of the questions that the court had to give answers to was whether the Minister of Defence could be held vicariously liable for the actions of Mr Motaung and certain employees of the Department of Defence. Even though Mr Motaung was not authorised to steal and his conduct was outside the scope of employment when he engaged in such conduct, the court found that the employees’ conduct was sufficiently close or directly linked to the harm for legal liability to arise.⁹⁵ The employer was held to be in the best position to prevent future wrongful conduct by its employees if it was found vicariously liable.⁹⁶

5 DELICTUAL LIABILITY OF AN EMPLOYER

Vicarious liability in the context of the employer-employee relationship entails that the liability for delicts committed by an employee is transferred from the employee to the employer by virtue of the wrongdoer being an employee of the employer.⁹⁷

To hold the employer liable, it is important to establish whether there was an employment relationship between the employer and employee when the delict

⁹¹ *Idem* at 562C – 562G.

⁹² See *K v Minister of Safety and Security* (note 12, chapter 7) at 443H-I.

⁹³ *Idem* at 444B-C.

⁹⁴ *Minister of Defence v Von Benecke* (2013) 34 ILJ 275 (SCA).

⁹⁵ *Minister of Police v Skosana* (1977) 1 SA 31 (A) at 34G.

⁹⁶ *Ibid.*

⁹⁷ See *K v Minister of Safety & Security* (note 12, chapter 7).

occurred and that the delict was caused by the employee.⁹⁸ If this is established and all the other requirements for delictual liability have been proved, the possibility is that the employer will be liable for the delicts committed by a person in its employ and such person acting within the course and scope of his or her employment duties.⁹⁹

A causal link between the employee's conduct and the damage must also be proved.¹⁰⁰ This means that it must be proved that the employee's conduct caused injury or damage to the third party.¹⁰¹ It is this requirement that links the victim to the employer of the employee who committed the unlawful act. Unless this requirement is present, it is unlikely that the employer could be held liable.¹⁰²

Vicarious liability does not, however, mean that the employee who committed the wrongful act is free from any form of prosecution, as the wrongdoer and the employer are held liable together as co-defendants *in solidum* (as joint wrongdoers).¹⁰³ If the employer pays the full amount of damages to the third party, it will have a right of recourse against the responsible employee.¹⁰⁴ Such recourse is, however, subject to certain statutory restrictions.¹⁰⁵

⁹⁸ There must be proof that all the elements of a delict have been complied with. These elements are conduct, unlawfulness, fault, causation and loss, Burchell J *Principles of Delict* (note 47, chapter 4) at 23.

⁹⁹ See, for example, *Ess Kay Electronics (Pty) Ltd and Another v First National Bank of Southern Africa Ltd* (note 77, chapter 7) at 1218F-G; and *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* (2001) 1 SA 372 (SCA) at 378B-D.

¹⁰⁰ Neethling, Potgieter & Visser *Law of Delict* (note 49, chapter 4) at 175.

¹⁰¹ *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* (note 99, chapter 7) at 383G-H.

¹⁰² See Neethling, Potgieter & Visser *Law of Delict* (note 49, chapter 4) at 175.

¹⁰³ Sharrock R *Business Transactions Law* 7th ed (2007) at 180.

¹⁰⁴ McGregor M, Dekker AH, Manamela ME, Manamela TE, Budeli-Nemakonde M, Germishuys W and Thoose C *Labour Law Rules* 2nd ed (2014) at 32. See also Van Niekerk *et al Law@work* (note 7, chapter 1) at 91.

¹⁰⁵ Sections 34(1) and (2) of the Basic Conditions of Employment Act, 75 of 1997 provide that "an employer may not deduct money from an employee's remuneration, unless the employee has agreed in writing to such deduction or if it is permitted by court order. Deductions made in consideration of a written agreement are only permitted if damage occurred in the course of employment, if the employee had the opportunity to show why the deductions should not be made and if the amount does not exceed one-quarter of the employee's weekly or monthly remuneration."

However, the employer may, in certain instances, prefer to discipline the employee for misconduct instead of claiming a contribution.¹⁰⁶ If it decides to take disciplinary action, the employer must follow a fair process.¹⁰⁷

5.1 Employment relationship

The primary basis for holding the employer liable for the conduct of its employee(s) is the existence of an employment relationship established in terms of an employment contract.¹⁰⁸ The existence of a contract of employment is the foundation for an employment relationship. Grogan defines a contract of employment as:

“an essential agreement between two parties in terms of which one of the parties (the employee) undertakes to place his or her personal services at the disposal of the other party (the employer) for an indefinite or determined period in return for a fixed or ascertainable remuneration, and which entitles the employer to define the employee’s duties and to control the manner in which the employee discharges them.”¹⁰⁹

Neethling explains that an employer-employee relationship exists when one person (the employee) makes his or her working capacity available to another person (the employer) in such a way that the latter exercises control over the employee.¹¹⁰ Basson argues that ‘employment relationship is a broad concept that includes a number of aspects.’¹¹¹ These include ‘loyalty, dedication and friendship and personal relationships, care, and respect.’¹¹²

¹⁰⁶ “The law does impute to an employee the duty to exercise reasonable care in his or her handling of his or her employer’s property. It is the fact of such employment that places the employer’s property within the employee’s control; and if, as must be the case, he or she owes a general duty to all concerned, not to be negligent in his or her exercise of that control, it would be a surprising anomaly that, merely because there was a contractual relationship between him- or herself and his or her employer the standard of his or her obligation to his or her employer were to be somehow lower than the standard of his or her obligation to the outside world”, Hodge JB *Vicarious Liability or Liability for the Acts of others* 1st ed (1986) at 44.

¹⁰⁷ Section 68(5) of the LRA.

¹⁰⁸ See Grogan J *Employment Rights* (2010) at 46.

¹⁰⁹ *Idem* at 44.

¹¹⁰ Neethling J ‘Vicarious Liability of the State for Rape by Police Official’ (2011) *TSAR* 186 at 190.

¹¹¹ Basson *et al Essential Labour Law* (note 6, chapter 1) at 21. See also Du Plessis & Fouché A *Practical Guide to Labour Law* (note 17, chapter 1) at 27.

¹¹² Basson *et al Essential Labour Law* (note 6, chapter 1) at 52.

This means that an employment relationship may continue even after the contract of employment has been terminated but such relationship cannot give rise to vicarious liability.¹¹³ It is also the employment relationship that can determine whether a person should be protected by the labour law.¹¹⁴

The author uses 'employment relationship' to refer to a relationship where a person is an employee of the employer. If there is an employment relationship between the employee and employer, the latter is legally responsible for the negligent or intentional conduct of the employee, because the employee is held to be the agent of the employer, with the latter acting as principal and in a position of authority.¹¹⁵ The employer is assumed to accept any risks that may result from the employee's duties without fault on his or her part.

The fact that the employer is liable without fault does not mean that this element is completely ignored. The wrongdoer (the employee) must be found to have complied with all the requirements for delictual liability such as the commission of an act or omission, he or she must have caused harm to the third party through his or her fault.¹¹⁶ If these elements are not met, there would be no reason to hold the employer liable as there will be no delict committed.

As stated above, the contract of employment is the foundation of the employment relationship.¹¹⁷ To establish whether there is a contract of employment for the purpose of transferring delictual liability to the employer, the person who commits a delict must be an 'employee' of the employer as the employer cannot be held liable for the unlawful conduct of a person who is not an employee, for example, an independent

¹¹³ *National Automobile and Allied Workers Union (now known as National Union of Metal Workers of South Africa) v Borg-Warner SA (Pty) Ltd* (1994) 3 SA (AD) at 25D-F.

¹¹⁴ See in this regard *State Information Technology Agency (Pty) Ltd v CCMA & others* (2008) 29 ILJ 2234 (LAC) at 2239G; *Kylie v CCMA & others* (2010) 31 ILJ 1600 (LAC) at 1612J; *Discovery Health v CCMA & others* (2008) 29 ILJ 1480 (LC) at 1498B. See also Bosch C 'Can Unauthorised Workers be regarded as Employees for the Purpose of the Labour Relations Act?' (2006) 27 ILJ 1342 at 1352; Norton D 'Workers in the Shadows: An International Comparison on the Law of Dismissal of Illegal Migrant Workers' (2010) 31 ILJ 1521 at 1547; Le Roux R 'The Meaning of "Worker" and the Road Towards Diversification: Reflecting on *Discovery*, *SITA* and "*Kylie*"' (2009) 30 ILJ 49 at 63.

¹¹⁵ *Ibid.*

¹¹⁶ *Media24 Ltd & another v Grobler* (note 69, chapter 7) at 1024A-C.

¹¹⁷ See *Grogan Employment Rights* (note 108, chapter 7) at 44.

contractor.¹¹⁸ This will also be a requirement if vicarious liability for a trade union is to be established. It would then require that the person who commits delictual acts during industrial action must be a member of the union to whom liability would be transferred or attributed. In terms of the right to freedom of association in the employment context, it is an employed person (employee) who can join a trade union.¹¹⁹

Although the LRA provides a clear definition of an 'employee',¹²⁰ it has, however, been difficult to draw a distinction between an employee and an independent contractor. As a result, our courts have over the years developed three tests to make a distinction between these two types of workers.¹²¹ These tests are control, organisational and dominant impression tests. Although these tests are not directly relevant to the ultimate goal of the study, that is, to attribute liability to the union, but they are important in determining the position of the wrongdoer towards the employer which in turn will help to establish whether the person qualifies to be a member of the union.

These three tests were applied in *Protect a Partner (Pty) Ltd v Machaba-Abiodun & others*.¹²² The Labour Court was required to determine whether a non-executive director who had joined the applicant's business as a BEE partner was an employee as defined in the LRA. Applying the 'reality test' adopted by the Labour Court in *Workforce Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*,¹²³ the court used the three old tests to determine whether an employment relationship existed. These tests were the employer's right of supervision and control; whether the employee formed an integral part of the organisation and the extent to

¹¹⁸ Kopel *Guide to Business Law* (note 35, chapter 7) at 208.

¹¹⁹ Section 4(1)(b) of the LRA.

¹²⁰ *Idem* section 213.

¹²¹ *Smith v Mountain* (1977) 3 SA 9 (W); *Dickson v Acrow Engineers (Pty) Ltd* (1954) 2 SA 63 (W); *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* (1979) 3 SA 267 (W); *Rosebank Television & Appliances Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* (1969) 1 SA 300 (T); *Midway Two Engineering & Construction Services v Transnet Bpk* (1998) 3 SA 17 (SCA); *Ongevallekommisaris v Onderlinge Versekeringsgenootskap AVBOB* (1976) 4 SA 446 (A); *Smit v Workmen's Compensation Commissioner* (1979) 1 SA 51 (A); *Metwa v Minister of Health* (1989) 3 SA 600 (D); *Linda Erasmus Enterprise (Pty) Ltd v Mhlongo & Others* (2007) 6 BLLR 530 (LC); *Workforce Group (Pty) Ltd v CCMA & Others* (2012) 33 ILJ 738 (LC); *Denel (Pty) Ltd v Gerber Denel* (2005) 26 ILJ 1256 (LAC); *Workforce Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 738 (LC); *Pam Golding Properties (Pty) Ltd v Erasmus & another* (2010) 31 ILJ 1460 (LC); and *State Information Technology Agency (Pty) Ltd v CCMA & Others* (2008) 29 ILJ 2234 (LAC).

¹²² (2013) 34 ILJ 392 (LC).

¹²³ (2012) 33 ILJ 738 (LC).

which the employee was economically dependent on the employer (the dominant impression test). The court found that the respondent satisfied the first two tests and to some extent satisfied the third. The employee had therefore discharged the onus of proving that she was an employee.¹²⁴

The 2002 amendments to the LRA acknowledged the existence of a problem with regard to the distinction between an employee and other types of workers, by providing that if certain factors are present, the worker is presumed to be an employee. The presumption provides that:

“Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person’s hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom he or she works or render services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.”¹²⁵

However, these presumptions do not apply to any person who earn in excess of the amount determined by the Minister in terms of the Basic Conditions of Employment Act¹²⁶ (BCEA). The BCEA provides that

“the Minister must, on the advice of the Commission, make a determination that excludes the application of this Chapter or any provision of it to any category of employees earning in excess of an amount stated in that determination.”¹²⁷

If, after the above tests and statutory presumptions have been applied, it is still impossible to establish if the person is an employee, the employer can escape vicarious liability for the conduct of such person for lack of an employment relationship.

¹²⁴ *Workforce Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (note 121, chapter 7) at 742H. See also *Pam Golding Properties (Pty) Ltd v Erasmus & another* (note 121, chapter 7) at 1470G; and *State Information Technology Agency (Pty) Ltd v CCMA & Others* (note 121, chapter 7) at 2238H-I.

¹²⁵ Section 200A of the LRA.

¹²⁶ Act 75 of 1997.

¹²⁷ Section 6(3) of the BCEA.

If it is established, however, that the person is an employee of the employer, the latter would be liable provided the other requirements for vicarious liability are met.

5.2 The delict must have been committed within the scope of the employee's employment duties

Once it has been established that the person who committed the delict is indeed an employee of the employer, the next question is whether the delict was committed within the course and scope of the employee's employment duties.¹²⁸

To ascertain whether the employee acted within the course and scope of his or her employment duties, certain factors need to be considered such as the place where the delict was committed and the extent of the employee's authorisation that resulted in the commission of the delict.¹²⁹ These will inform the conclusion of whether the employer is liable for the conduct of such employee. For example, if the employee committed the unlawful act while he or she was advancing his or her own interests, generally, the employer would not be liable.¹³⁰ This is a traditional stance on the question of liability for vicarious liability.

Traditionally, if the conduct was so far removed from the duties of the employee that it effectively 'removed' the employee from his or her duties, the principal was not held liable.¹³¹ The reason for this was the lack of a sufficiently close connection between the delict and the work that the employee was supposed to perform. The 'standard test' for vicarious liability was whether the delict had been committed by the employee while acting within the course and scope of his or her employment.¹³² If the answer was in the negative, the employer was not liable because the employee would have been furthering his or her own interests and not those of the employer.¹³³

¹²⁸ Le Roux, Rycroft & Orleyn *Sexual Harassment in the Workplace: law, policies and processes* (note 31, chapter 7) at 83.

¹²⁹ See generally, *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* (note 99, chapter 7).

¹³⁰ *Feldman (Pty) Ltd v Mall* (note 71, chapter 7) at 756.

¹³¹ Loubser M, Midgley R, Mukhebir A, Perumal D and Niesing L *Deliktereg in Suid-Afrika* (2010) at 389.

¹³² See *Minister of Law and Order v Ngcobo* (note 46, chapter 7) at 827B.

¹³³ *Feldman (Pty) Ltd v Mall* (note 71, chapter 7) at 756.

However, the courts have held that the liability of the employer is not limited to instances where the delict was committed by employee acting within the course and scope of employment.¹³⁴ The court have attempted to relax the traditional test to vicarious liability in favour of the risk creating principle.¹³⁵ Neethling states:

“it is commonly accepted that at least one rationale for the existence of the rule of vicarious liability is that the employer creates the risk of harm and should thus be held liable when the harm occurs.”¹³⁶

Because the employer has created the risk for its own ends, he or she is under the obligation to ensure that no one is injured by the employee’s improper conduct in carrying out his or her duties.¹³⁷ To do this, it is necessary for the employer to clearly define the roles and rules that the employee must follow when performing his or her duties. These will serve as guidelines to the employee and will assist him or her to see whether he or she is still within his or her scope of duties when performing the work.

In *Isaacs v Centre Guards CC t/a Town Centre Security*,¹³⁸ the employer of a security guard who shot and injured the plaintiff was held vicariously liable for the damage caused by the employee even though, according to the employer, the security guard was not permitted to carry and use a firearm at work. The employer denied that the employee was acting within the scope of his employment. The court drew a distinction between a prohibition that limits the scope of employment, on the one hand, and a prohibition which only deals with conduct within the sphere of employment, on the other hand. It held that the general rule was that an employee who disregarded a prohibition which limited the sphere of his employment was not acting within the course of his employment, but an employee who disregarded a prohibition which only deals with his conduct within the sphere of his employment, was acting inside the course of

¹³⁴ See *S v Rabie* (note 6, chapter 7); *K v Minister of Safety and Security* (note 12, chapter 7); *F v Minister of Safety & Security & another* (note 25, chapter 7); and *Minister of Defence v Von Benecke* (note 94, chapter 7).

¹³⁵ See *De Lange v Absa Makelaars (Edms) Bpk* (2010) 31 ILJ 885 (SCA).

¹³⁶ Neethling, Potgieter & Visser *Law of Delict* (note 49, chapter 4) at 338-339. See also Scott TJ ‘Some reflections on vicarious liability and dishonest employees’ in Scott and Visser *Developing Delict- Essays in Honour of Tobert Feenstra* (2000) at 278-279; Loubser M and Reid E ‘Vicarious liability for intentional wrongdoing: after *Lister* and *Dubai Aluminium* in Scotland and South Africa’ (2003) *Juridical Review* 156 at 158; Van der Walt JC & Midgley JR *Principles of Delict* 3rd ed (2005) at 37; Neethling J ‘Risk-creation and the vicarious liability of employers’ (2007) *THRHR* 527 at 535 – 537.

¹³⁷ *Minister of Safety & Security v F* (2011) 32 ILJ 1856 (SCA) at 1864G.

¹³⁸ (2004) 25 ILJ 667 (LC).

his employment.¹³⁹ Provided the employee was engaged in an activity reasonably necessary to achieve the objectives of his or her employer, the latter will be liable.¹⁴⁰

Not all instances where the employee acts outside the scope of his or her duties and commits a delict, will transfer liability to the employer. In *Bezuidenhout NO v Eskom*,¹⁴¹ the driver of a vehicle had given a lift to a person in the employer's vehicle. The terms of employment prohibited the employee from carrying unauthorised passengers, and obliged him to drive without negligence. The employee failed to comply with these requirements by carrying a passenger without authorisation and therefore exceeded the scope of his employment. The court held that it would have been unfair to hold the employer liable to a passenger who associated himself, albeit innocently, with the forbidden conduct.¹⁴²

The employer can also be held liable for the conduct of employee where there was a close connection between what the employee did and what he or she was supposed to do.¹⁴³ This takes place during the so called deviation cases. The liability of an employer under such conditions depends on the nature and extent of the deviation. The same is true of the inquiry whether the deviation has ceased and the employee has resumed the business of his or her employer.¹⁴⁴ However, if the deviation is of such a nature that it cannot reasonably be held that the employee was still performing the functions of his or her employer, the latter will not be liable.¹⁴⁵

In most cases where deviation is at issue, the employee starts out on the business of the employer, then deviate from this to attend to his or her own business.¹⁴⁶ In *Viljoen*

¹³⁹ At 673D-F. See also *Plumb v Cobden Flour Mills Ltd* (1914) AC 62 at 67; referred to with approval in *Feldman v Mall* (note 71, chapter 7) at 762; and *Ngubetole v Administrator, Cape & another* (1975) 3 SA 1 AD at 11A-H.

¹⁴⁰ *Estate Van der Byl v Swanepoel* (1927) AD 141 at 145-146.

¹⁴¹ (2003) 24 ILJ 1084 (SCA).

¹⁴² *Bezuidenhout NO v Eskom* (2003) 24 ILJ 1084 (SCA) at 1094H. See also *South African Railway & Harbours v Marais* (1950) 4 SA 610 (A); *Middleton v Automobile Association of SA* (1932) NPD 451; *Rossouw v Central News Agency* (1948) 2 SA 267 (W); and *Twine v Bean's Express Ltd* (1946) 1 ALL ER 202 at 204D.

¹⁴³ *Ibid.*

¹⁴⁴ *Minister of Safety & Security v Jordaan t/a Andre Jordaan Transport* (2000) 4 SA 21 (SCA) at 25C-D.

¹⁴⁵ *Union Government v Hawkins* (1944) AD 556 at 563; *Viljoen v Smith* (1997) 1 SA 309 (A) at 316E-317A; and *Bezuidenhout NO v Eskom* (note 142, chapter 7) at 1095G-1096B.

¹⁴⁶ *Ibid.*

v Smith, the Appellate Division held that a farm worker who had climbed through a fence to the neighbouring farm to relieve himself and who had then caused a fire when he lit a cigarette, had not abandoned his place of work, and that he was still acting within the course and scope of his employment.¹⁴⁷ His employer was thus held liable for the damage suffered by the neighbour as a result of the fire.¹⁴⁸

A lesson for attributing liability while the employee was not acting within the scope of his or her business but nonetheless the employer held liable was in *Minister of Police v Rabie* where Jansen JA said:

“By approaching the problem whether [an employee’s] acts were done within the course or scope of his employment from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and [his] work, to the dominant question of whether those acts fall within the risk created by [his employer].”¹⁴⁹

In *Minister of Defence v Von Benecke*,¹⁵⁰ the court found the Minister to be vicariously liable for the conduct of a member of the defence force who stole parts of an assault rifle and made the parts available for use in an armed robbery. The court found it to be no longer necessary, as a result of the dictates of the Constitution, to limit the employer’s liability to those cases where the employee, although deviating from the course and scope of his employment, was still acting in furtherance of the employer’s business.¹⁵¹

In *Commissioner for the South African Revenue Service and other v TFN Diamond Cutting Works (Pty) Ltd*,¹⁵² the company purchased diamonds from a New York company. The diamonds were stolen while detained at the Johannesburg Airport, now called OR Tambo International Airport. The question was whether the company was vicariously liable for the employee’s (Matshiva) conduct. The court held that in stealing

¹⁴⁷ See *Viljoen v Smith* (note 145) at 316E-317A. See also Andrews J in *Palsgraf v Long Island Railroad Co* 59 ALR 1253 cited by Watermeyer CJ in *Feldman (Pty) Ltd v Mall* (note 71, chapter 7) at 750; *Minister of Law & Order v Ngcobo* (note 46, chapter 7); *Mkhize v Martens* (note 72, chapter 7) at 382; and *Estate Van der Byl v Swanepoel* (note 140, chapter 7) at 141.

¹⁴⁸ For more on this point, see *Ntsabo v Real Security CC* (2004) 1 BLLR 58 (LC); *Minister of Justice v Khoza* (1966) 1 SA 410 (A); and *Mhlongo v Minister of Police* (1978) 2 SA 55(A).

¹⁴⁹ At 134I-J.

¹⁵⁰ (2013) 34 ILJ 275 (SCA).

¹⁵¹ At 282A.

¹⁵² (2005) 5 SA 113 (SCA).

the diamonds Matshiva did not act within the course and scope of his employment. His company was, nonetheless, held vicariously liable.

Okpaluba argues that the old test for vicarious liability has since been reformulated by the Constitutional Court (Okpaluba C and Osode P *Government Liability: South Africa and Commonwealth* (2010) at 382). In some of the cases where it had to decide on matters of vicarious liability in deviation cases, employers have been held liable. This is in line with section 39(2) of the Constitution which requires any interpretation or development of the law to echoe the spirit and objectives of the Constitution. The breath of frsh constitutional air that courts are enjoined by section 39(2) of the Constitution to infuse into our common law requires that vicarious liability in deviation cases be developed to accord with the dictates of the Bill of Rights.

In *Minister of Safety v Luiters* (2007) 2 SA 106 (CC), the the plaintiff brought an action for damages against the Minister for injuries sustained from gunshot wounds at the hands of an un-uniformed off-duty police constable in apparent pursuit for robbers. The Constitutional Court held that once an off-duty police officer has put himself on duty as he or she is empowered by his or her employer. For the purposes of vicarious liability, they were in exactly the same legal position as police officers who were ordinarily on duty. The employer was then held liable for the injuries caused to the plaintiff.

In *K v Minister of Safety and Security* (2005) 6 SA 419 (CC), it was held that the question to be asked in deviation cases with a view to hold the employer vicariously liable for the conduct of its employee, is whether the delict committed is sufficiently connected to the business of the employer to render it the employer liable (at 436).

“The question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless sufficiently close link between the employee’s acts for his own interests and the purposes of the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is ‘sufficiently close’ to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit and, purport and objects of the Bill of Rights.”

The court held that the opportunity to commit the crime would not have arisen but for the trust that applicant placed in the three men because they were policemen, a trust that harmonises with the Constitutional mandate of the police and the need to ensure that the mandate is successfully fulfilled. When the policemen on duty and in uniform raped the applicant, they failed to protect her, instead they infringed her rights to dignity and security of the person (Okpaluba and Osode *Government Liability: South Africa and Commonwealth* at 383). In committing this crime they failed to fulfil their employer's obligation (and theirs) to prevent crime and protect members of the public (*K v Minister of Safety and Security*). The opportunity to commit the crime would not have arisen but for the trust the applicant placed on these officers by mere reason that they were police. The connection between their conduct and their employment was sufficiently close to render the employer vicariously liable to the applicant (Okpaluba and Osode *Government Liability: South Africa and Commonwealth* at 384).

In *K v Minister of Safety and Security*, the court made it clear that the test is applicable to all deviation cases, regardless of the identity of the employer or the status of the employee (at 433-441). This paves way for the test to be applied to trade unions where members have deviated from the authorised acts.

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The above authority confirms the position that it is not only when the person or employee acts within the scope of his or her business that liability will be attributed to

the employer. The employer will be liable as long as it can be proved that there was connection between what the employee did and what he or she was supposed to do. It will also be held liable if it created a risk of harm and such harm or damage eventually occurred.¹⁵³ If the employee despite acting outside the scope of his or her employment duties continued to use employment accessories such as official vehicles, uniform, and other accessories to facilitate his or her wrongdoings, the employer will not escape liability.¹⁵⁴

Once the employer has settled the claim or acquitted, no fresh charges needs to be instituted against the employee or the employer for the same offence (*Mondi Paper Co Ltd v PPWAWU* (1994) 15 ILJ 778 (LAC)). In labour law the principles relating to double-punishment or recharging of an employee are known as double jeopardy (Ponelis F 'Double Jeopardy: When can an employee be recharged for the same offence' (2011) 21(3) 21 at 22). Since labour law is based on the principles of fairness, it will not be fair if the employee is charged on the same facts to which the employer had paid damages or was acquitted.

6 ATTRIBUTING VICARIOUS LIABILITY TO A TRADE UNION

There is difficulty in holding union liable for the conduct of its members as there is no law in the Republic that makes provision for such liability. The author argues that if the conduct was committed by members of the union and the source of such conduct is a strike or picket, the union should be held liable as a result of the risk of harm the union creates when it calls a strike (*F v Minister of Safety and Security* note 25, chapter 7 at 548). If it is also proved that there is a close connection between what the members did and what they were supposed to do, the union could be held liable (*F v Minister of Safety and Security* note 25, chapter 7 at 555).

Applying the same approach to a trade union-member relationship will serve the interest of justice as victims will have someone to hold liable and get compensated for

¹⁵³ See *F v Minister of Police* (note 89, chapter 7).

¹⁵⁴ *Ess Kay Electronics (Pty) v First National Bank of Southern Africa Ltd* (note 77, chapter 7) at 1220H-I. See also Neethling J 'Risk-Creation and vicarious liability under South African Law' in National and Kapodistrian University of Athens (eds) *Essays in Honour of Konstantinos D Kerameus* (2009) 887-894; and Neethling, Potgieter & Visser *The Law of Delict* (note 49, chapter 4) at 371.

the loss suffered. It will therefore be left to the union whether it wants to defend the claim against it or admit liability for the conduct of members, subject to disciplinary action being taken by the union against the responsible member(s).

In order to attribute liability to a trade union, it is necessary to prove that the perpetrator was a member of the union and acted in a way which is approved or supported by the union. In addition, there must be proof to the effect that it is the conduct of the member(s) of the union that caused the damage or unlawful act. This is a difficult exercise because industrial action is a collective act. It is also difficult with a picket because it is not only members of the union that participate in a picket. To make matters worse, the law allows supporters to be part of the picket.¹⁵⁵ In essence, it is difficult to establish a clear link between the act of the member(s) and the damage or harm caused.

In *Mondi Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union*,¹⁵⁶ the court held that liability for damages during a protected strike cannot readily be attributed to the trade union but one has to first prove the vicarious liability of the trade union.¹⁵⁷ It further held that in order to burden a party with vicarious liability, the relationship between the actual wrongdoer and the person sought to be held liable, must be established to see if the relationship falls within the class of relationships to which the law allows liability to be imposed on an innocent party.¹⁵⁸

6.1 The rationale for extending vicarious liability to a trade union-member relationship

The doctrine of vicarious liability applies to certain relationships such as marriage, employment and in partnerships. Trade union-member relationship is not one of such relationships which is why the author argues for the expansion of vicarious liability to apply to this relationship. Policy consideration remain the basis for establishing and/or extending the application of the doctrine of vicarious liability to novel situations.¹⁵⁹ The

¹⁵⁵ Section 69(1) of the LRA.

¹⁵⁶ (2005) 26 ILJ 1458 (LC).

¹⁵⁷ At 1470I-J.

¹⁵⁸ *Idem* at 1470G.

¹⁵⁹ Fleming J *The Law of Torts* (1998) at 410.

question is whether it would be legally possible to impose vicarious liability on a trade union for the delicts committed by its members. Smit and Van der Nest submit that when a new problem arises the nature of the specific relationship needs to be analysed in comparison with other relationships.¹⁶⁰ It is then that a decision can be taken whether the law should bring the behaviour within the scope of vicarious liability because the behaviour is closely related to or falls within the risk that was created by the relationship.¹⁶¹ Le Roux supports this conclusion when he states that vicarious liability is not a rigid legal principle but a fluid concept founded on policy considerations that aims to ensure effective compensation and to deter future harm and flexible enough to take account of changing social and economic circumstance as well as the changing nature of employment.¹⁶²

In *Lillicrap Wassenaar & Partners v Pilkington Brothers SA (Pty) Ltd*,¹⁶³ it was pointed out that in cases where pure economic loss is sought to be recovered, the concept of 'wrongdoer' involves an assessment of policy considerations for the purposes of determining whether liability should be limited.¹⁶⁴ It was further pointed out that our law of delictual liability is not extended to new situations unless there are positive policy considerations which favour such an approach.¹⁶⁵

Foreign law has also acknowledged the growing tendency to expand vicarious liability outside the strict confines of the traditionally recognised relationships. In *671122 Ontario Ltd v SAGAZ Industries Canada Inc*,¹⁶⁶ the Canadian Supreme Court stated that although vicarious liability is most prevalent in employment relationships, the categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed. Some legal writers conclude that the doctrine of vicarious liability

¹⁶⁰ Smit and Van der Nest 'When Sisters are Doing it for Themselves: Sexual Harassment Claims in the Workplace' (note 10, chapter 7) at 531. See also *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* (2003) 24 ILJ 1337 (SCA) at 1343E-G.

¹⁶¹ Smit and Van der Nest 'When Sisters are Doing it for Themselves: Sexual Harassment Claims in the Workplace' (note 10, chapter 7) at 531. See also *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* (note 160, chapter 7) at 1343E-G.

¹⁶² Le Roux PAK 'Sexual Harassment in the Workplace: Reflecting on *Grobler v Naspers*' (note 33, chapter 7) at 1899.

¹⁶³ (1985) 1 SA 475 (A).

¹⁶⁴ *Idem* at 497C-505F.

¹⁶⁵ *Idem* at 500G. See also *National Union of Metalworkers of SA v Jumbo Products CC* (1997) 18 ILJ 107 (W) at 122D-E.

¹⁶⁶ (2001) 2 RCS 995 (SCC).

has a flexible characteristic which enables court to identify new categories of relationships to fall within the scope of candidate for its applications when society's political, social and economic atmosphere demands.¹⁶⁷ Therefore, the recognition of a new category of vicarious liability such as the trade union-member relationship will require compelling social and legal policy reasons.

The basis for extending vicarious liability to a trade union member relationship is the desire to afford claimants efficacious remedies for harm suffered. The need to set legal remedies to incite unions and their officials to take active steps to prevent their employees from harming members of the community during industrial action would also add to the reasons for the idea of extending the application of vicarious liability.¹⁶⁸ In this regard, the union is understood to be in a better solvent position to meet the demands or claims from the victim(s) and is bound to prevent harm if it foresees that liability could take place.¹⁶⁹ Another basis would be that the person who puts a risky venture into the community may be held responsible fairly when those risks materialise and cause loss or injury.

The union is equated with a principal or employer because it issues instructions to members and is assumed to provide guidance to members during industrial action.¹⁷⁰ Under normal circumstances the principal or the employer is liable for the conduct of agents or employees committed while furthering the authorised activity. In employment relationship where an employee exceeds or deviate from his or her scope of employment, courts have held employers liable by using the risk-creating harm and close connection factors.¹⁷¹ The risk and close connection factors could also be used to hold unions liable for the conduct of members even if they exceeded or deviated

¹⁶⁷ Loots C 'Sexual Harassment and Vicarious Liability: A warning to Political Parties' (2008) 19(1) *Stell LR* 143 at 147.

¹⁶⁸ See the discussion of these principles in *Bazley v Curry* (note 342, chapter 6) at 548-549; and *Jacobi v Griffiths* (1999) SCR 570 at para 67.

¹⁶⁹ Le Roux, Rycroft & Orleyn *Sexual Harassment in the Workplace: law, policies and processes* (note 31, chapter 7) at 80.

¹⁷⁰ One may argue that the body (union) takes instructions from members not that the union gives instructions to members. This is correct at the beginning of the process leading to industrial action. However, when it comes to the procedural and substantive steps towards a strike or picket, it is the union that leads the way. During the strike or picket, it is the union that monitors the movement of members and calls or suspends the action in certain circumstances. Therefore, it gives instructions.

¹⁷¹ See *Minister of Police v Rabie* (note 6, chapter 7) at 135C; *F v Minister of Safety & Security & another* (note 25, chapter 7) at 556F; *K v Minister of Safety and Security* (note 12, chapter 7) at 444B-C.

from the scope of authorisation, that is, to strike or picket peacefully. The hope is that holding a union liable will encourage the union and its members to take steps to reduce the risk of harm in the future. In the end, this will serve as a deterrent against the commission of unlawful acts.

To extend the application of vicarious liability to new situations will not be a new phenomenon in South Africa as courts have done it in the past. In *K v Minister of Safety & Security*,¹⁷² the Minister was held liable for rape of a girl by a policeman who was on duty. In *Grobler v Naspers Bpk*,¹⁷³ the employer was held liable for the sexual conduct of a manager who harassed a trainee employee. Vicarious liability was also extended in the case of *Minister of Finance v Gore*.¹⁷⁴ The Minister was held liable for the intentional delicts committed by its employees on the issues related to the issuing of tenders.

It is clear that the approach that needs to be adopted when extending the application of vicarious liability, except for limited instances, is that, organisations must live with the consequences of their actions, with the result that any harm triggered by their decision to organise a strike or conduct in contemplation or furtherance of a strike would be placed at their doorstep.¹⁷⁵ If a union is to be held liable for delictual acts committed by its members, certain factors needs to be present before liability is transferred. These are the trade union-member relationship, the risk of harm and the close connection factors.

6.1.1 Trade union-member relationship

If a trade union is to be held liable for the delictual conduct of its members committed during industrial action, the first question that will have to be asked is whether there is a trade union-member relationship between the trade union and the wrongdoer. In *Xstrata v AMCU and others*, it was held that:

¹⁷² (2005) 6 SA 419 (CC).

¹⁷³ (2004) 4 SA 220 (C).

¹⁷⁴ (2007) 1 SA 111 (SCA).

¹⁷⁵ *SATAWU & Another v Garvas & others* (WCC)(note 10, chapter 3) at 1605C.

“there is a relationship of guardianship between the union and its members. The leadership, be it shop stewards or the national leadership, were elected on the basis that the members trust them to lead and guide them. In as much as the members can be guided on whether to embark on a strike action or some other protest action, in the same vein, the leadership, including shop stewards, should also lead and guide members and advise them to behave lawfully during actions undertaken. Leadership and guidance by the union should persist until the end of the action undertaken, and not end at the point that the action commences.”¹⁷⁶

A person who wants to hold the convening union liable must prove that the acts were committed by the members of the union and that the union was legally liable for the conduct committed by its members.¹⁷⁷

The LRA makes the right to join unions available to people who are employees.¹⁷⁸ Obviously a person who is not an employee cannot join a trade union and participate in its activities, according to this provision of the LRA. However, a person who is not an employee may lawfully associate him- or herself (as a supporter) with the activities of the union during a picket.¹⁷⁹

The simplest way of establishing whether a person or employee is a member of the union that called the industrial action could be to look at the clothes the culprits were wearing during the commission of the delict.¹⁸⁰ This is, however, not a decisive factor as many people wear union regalia in their own personal capacities. Wearing union clothes may have a contributory role towards establishing the relationship between the union and the member(s). An example of a situation where regalia played a vital role in holding the principal vicariously liable, albeit in different context, was in *F v Minister of Safety and Security*.¹⁸¹ In this case, it was held that the police officer who was accused of raping a girl, used the vehicle of the employer, dressed in police uniform while committing the unlawful act.¹⁸² Wearing SAPS uniform and trade union T-shirt

¹⁷⁶ *Xstrata South Africa v Association of Mineworkers and Construction Union and others* (note 44, chapter 4) at 16.

¹⁷⁷ See *Eskom Ltd v National Union of Mineworkers* (2001) 22 ILJ 618 (W).

¹⁷⁸ Section 4(1) of the LRA.

¹⁷⁹ *Idem* section 69(1).

¹⁸⁰ Members usually wear the garb of the union, such as T-shirts.

¹⁸¹ *F v Minister of Safety and Security* (note 25, chapter 7).

¹⁸² At 556F.

may be two unrelated projects but both points to the way the public associate the wearing of such regalia and the principal, that is, the union.¹⁸³

Another possibility of establishing whether the employee is a member of the union, could be to consult the membership register of the trade union concerned. To keep a register of members is not a legal requirement, but it is expected that a trade union will have it for its own records. If there is no register of members or there is no access to such documents, the human resource department of the employer will help to establish if the employee pays union subscriptions and to which union. If the union regards their constitutive documents and register of members as confidential, it may be difficult to have access to such information, unless they are bound to give such information in terms of the Promotion of Access to Information Act.¹⁸⁴

There are also other factors that can help in establishing relationship between union and the member. For example, the Department of Labour can be of assistance in trying to establish whether an employee is a member of the union; and the fact that a person is usually seen attending meetings of the union will serve as strong indication that he or she is a member of the union.

6.1.2 The use of a close connection factor to hold union liable

In the relationships that give rise to vicarious liability, the principal or the master is held liable if it can be proved that the agent or employee would not have committed the delict had it not been for the instructions or orders from his or her principal.¹⁸⁵ This means that there must be a causal connection between the conduct of the employee and what he or she was instructed to do.¹⁸⁶ In *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies)*,¹⁸⁷ Mr Coetzee had brutally attacked the applicant. He was charged and released on bail. The applicant informed

¹⁸³ See, generally, Neethling J 'Risk-Creation and vicarious liability under South African Law' in National and Kapodistrian University of Athens (eds) *Essays in Honour of Konstantinos D Kerameus* (note 154, chapter 7).

¹⁸⁴ Act 2 of 2000.

¹⁸⁵ *K v Minister of Safety & Security* (note 12, chapter 7) at 444A-C; *F v Minister of Safety & Security* (note 25, chapter 7) at 547G; *Minister of Police v Rabie* (note 6, chapter 7) at 130B-C; and *Minister of Safety and Security v Luister* (2007) 2 SA 106 (CC).

¹⁸⁶ See *Mahlangu v SATAWU, Passenger Rail Agency of SA & Another* (note 10, chapter 3) at 1205D.

¹⁸⁷ *Carmichele v Minister of Safety and Security* (note 15, chapter 7).

the police that Mr Coetzee was seen moving around the place where she lived and asked that he be returned to custody. She was told that taking the respondent back into custody was not possible. She then asked the police for protection and later asked the prosecutor to arrange protection for her. She was attacked again by Mr Coetzee. She then brought a delictual action against the Minister of Justice as well as the Minister for Safety and Security for the acts or omissions of prosecutors as well as the police. The Constitutional Court held that had the bail not been given, Mr Coetzee would not have committed the second offence.¹⁸⁸ This means that there was a causal connection between the act of the State to release him on bail and the delictual act he later committed.¹⁸⁹

In the case of unions and their members on strike, it cannot be said that the commission of unlawful acts forms part of industrial action called by the union because unions are, generally, not liable for the conduct of members. The question that arises is whether the union can be held liable for their conduct despite the fact that it did not authorise the commission of such act. In an employer-employee relationship, case law has held employers liable despite the fact that the employee lacked authority to commit the act or deviated from his or her employment duties if there is a close connection between what the employee was supposed to do and his or her actual conduct.¹⁹⁰

In the case of liability of a trade union for the conduct of members, it is argued that a member of a trade union will be acting outside the scope of the action authorised by his or her union if he or she commits delictual acts during industrial action. It is not necessary that the union must have authorised the commission of the unlawful act, as long as it was committed during a strike or picket convened or authorised by the union to which it is expected to monitor and ensure that it runs peacefully, the union may be held liable on the ground that the conduct of members is closely related to the main action to such an extent that the wrongful act and the strike or picket are inseparable.

¹⁸⁸ At 968E-F.

¹⁸⁹ *Mahlangu v SATAWU, Passenger Rail Agency of SA & Another* (note 10, chapter 3) at 1205D.

¹⁹⁰ *F v Minister of Safety & Security & another* (note 25, chapter 7).

To establish whether the member(s) acted within the scope of authorised union activity, one needs to look at the picketing rules.¹⁹¹ These are the rules established to regulate the conduct of picketers during picket action.¹⁹² A union is duty bound to educate members about the content of picketing rules and to ensure that the conduct of members is within the legal limits. In this regard the union should guide the members from the beginning of the action until the end.¹⁹³

It has to be proven that there is a link between the delict committed and participation in a strike or picket. If a sufficiently close link between the member's conduct and what the union authorises the member to perform is established, the union should be vicariously liable. This means that the commission of the act should be closely connected to the orders or instructions that the union give to members to such an extent that the two are inseparable. This link entails that the employee would not have committed the delict had it not been through a strike or conduct in contemplation or furtherance of a strike called or authorised by the union.

Applying this to a strike or picket means that even if strikers or picketers deviate from peaceful picketing to the commission of delictual acts, the union will still be held liable as long as there is proof that their conduct was linked to the original intention of the strike or picket. In other words, if it can be proved that there would have been no damage or disruption had the strike not started.

6.1.3 The risk-creating factor

One of the policy considerations for the attribution of liability of one person to another is the possibility of causing the risk of harm to a third party. This is referred to as the risk of harm theory.¹⁹⁴ With this theory, one can argue for a risk creating factor on the side of the union in the same way that the employer creates when acting through his or her employee.¹⁹⁵ In holding the employer liable for the sexual harassment

¹⁹¹ Section 69(4) and 69(5) of the LRA.

¹⁹² Item 1 of the Code of Good Practice: Picketing.

¹⁹³ *Xstrata v AMCU and others* (note 44, chapter 4) at 16.

¹⁹⁴ Potgieter 'Preliminary Thoughts on Whether Vicarious Liability Should be Extended to the Parent-Child Relationship' (note 63, chapter 7) at 191.

¹⁹⁵ *Feldman (Pty) Ltd v Mall* (note 71, chapter 7) at 741.

committed by its employee to another employee of the same employer, the court in *Grobler v Naspers* acknowledged that the nature of the relationship between a manager and a secretary was clearly one that creates or increases the risk of sexual harassment.¹⁹⁶ The court further held that the deciding factors in this regard were that the relationship was more intense compared to ordinary relationships that exist between co-workers; that the employees spend more time together; that it is more physical in the sense of the immediate work environment and more personal in the sense that the secretary is not merely one of a group.¹⁹⁷

To determine the connection between the risk created and the wrong committed, the following factors need to be considered:

- The opportunity that the enterprise of the union (picket) afforded members an opportunity to abuse the authorisation;
- The extent to which the unauthorised action may have furthered the union's aim;
- The extent to which the wrongful act caused the friction or confrontation with third parties; and
- The vulnerability of potential victims to the wrongful act.

As stated above, this principle states that the person who is held liable must have created the risk of harm and, in the process, failed to take reasonable steps to prevent such risk from taking place.¹⁹⁸ By calling a strike and a picket of members in an environment characterised by strike-related violence, unions create a risk of harm to other people. It has also been stated that industrial action in South Africa is often characterised by violent strikes.¹⁹⁹ Examples of these include the torching of employers' property, intimidation and even the killing of non-striking workers. One of the effects of violent conduct is a threat to peace and harm to members of society.²⁰⁰ If a union calls a strike or authorise a picket, it has a duty to take appropriate steps to

¹⁹⁶ *Grobler v Naspers and Another* (note 1, chapter 7) at 296l.

¹⁹⁷ At 238l.

¹⁹⁸ Scott 'The Theory of Risk Liability and its Application to Vicarious Liability' (note 81, chapter 7) at 44.

¹⁹⁹ Chapter 1.

²⁰⁰ Mischke 'Running Riot: Bystanders' claim for damages: Can third parties sue the union?' (note 30, chapter 1) at 14.

avoid or prevent such harm from taking place.²⁰¹ The union owes the employer, non-striking employees and the public a duty of ensuring peaceful industrial action.²⁰² However, it is not expected that the union will go out of its way trying to prevent harm. It is sufficient if it can be shown that it took reasonable steps to alleviate the danger or harm from taking place.²⁰³

The fact that a trade union has the capacity to and responsibility to instruct, supervise, guide and control the conduct of its members during industrial action is a strong argument supporting the imposition of vicarious liability where members cause damage or loss to other people and their property. The question is what should the union do to avoid liability being transferred to it once the risk of harm has been created.

Despite the fact that the right to strike is constitutionally protected,²⁰⁴ if a union calls a strike under such conditions, it creates a risk of harm to third parties or the employer because of the possibility that his or her property and that of neighbouring businesses may be damaged during industrial action.

In employment relationship the risk creating principle will be considered in answering the question of whether the employee acted within the scope of employment when the crime was committed.²⁰⁵ The same should apply when the doctrine of vicarious liability is attributed to a union. The application of the risk-creating principle will mean that the union will be held liable for the delicts committed by its members during industrial action regardless of whether they were still performing the authorised act, that is, to picket peacefully in support of a strike.²⁰⁶

The risk creating factors would be the fact that community or non-striking employees are more vulnerable to damage if one bears in mind the nature of violent strikes in

²⁰¹ *Xstrata South Africa (Pty) Ltd v AMCU and others* (J123/13) at 18.

²⁰² Section 17 of the Constitution.

²⁰³ *Xstrata South Africa (Pty) Ltd v AMCU and others* (J123/13) at 18.

²⁰⁴ Section 23(2)(c) of the Constitution.

²⁰⁵ *Govan v Skidmore* (1952) 1 SA 732 (N) at 734A-D; *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* (1982) 2 SA 603 (A) at 614; *Minister of Safety & Security v Jordaan t/a Andre Jordaan Transport* (note 144, chapter 7) at 26G-H; Loubser & Reid 'Vicarious Liability for intentional wrongdoing: after *Lister* and *Dubai Aluminium* in Scotland and South Africa' (note 136, chapter 7); Neethling J 'Risk-creation and the vicarious liability of employers' (2007) *THRHR* 527 at 535-537.

²⁰⁶ Section 69(1)(a) of the LRA.

recent years. It is important to note that vicarious liability requires no fault on the party to be held liable. For example, an employer is held liable for the delict of an employee while the employer did not commit the act and was not at fault. However, delictual requirements need to be complied with before the other party is burdened with vicarious liability.²⁰⁷ In order to take action against the union under delictual liability, the plaintiff or the employer must prove that the union's conduct or the conduct of its members caused him or her patrimonial loss; such conduct was unlawful, that is, it breached the union's duty towards the employer.²⁰⁸ The union owes the employer a duty of care as strikes and pickets needs to be conducted in a peaceful manner.²⁰⁹

Where a trade union creates a considerable increase in the risk or danger of causing harm, there is sufficient justification for holding it liable for the damage caused on the grounds of fairness and justice even in the absence of fault from the union.²¹⁰ In addition, it is much easier to commit misconduct during a collective action.

The steps that the union may take to avoid liability include the suspension of a strike or to call off the strike. If the union decides to suspend the strike, it may resume it at a later date. However, before it resumes such strike, it would be necessary that the union put measures in place that will deal with harmful conduct of strikers or picketers in case they arise. This will be when the first remarks of intimidation are made by the participants against non-striking workers and/or civilians.²¹¹ If the union decides to terminate the strike, there will be no other act expected from it except that it will have to prepare itself for the incidents of violence or other harmful effects of industrial action if it calls a strike again in future. These measures will ensure that the union does not condone unlawful conduct of strikers and it will be unfair to hold the union liable for the conduct that it did not support.

²⁰⁷ Smit & Van der Nest 'When Sisters are Doing it for Themselves: Sexual Harassment Claims in the Workplace' (note 10, chapter 7) at 535.

²⁰⁸ Price A 'The Impact of the Bill of Rights on State Delictual Liability for Negligence in South Africa' in *The Influence of Human Rights on State Liability for Negligence in England and South Africa* (2010) at 2. Accessed at http://www.academia.edu/116116/The_impact_of_the_Bill_of_Rights_on_State_Delictual_Liability_for_Negligence_in_South_Africa on 17/07/2016.

²⁰⁹ Section 17 of the Constitution.

²¹⁰ See Potgieter 'Preliminary Thoughts on whether Vicarious Liability Should be Extended to the Parent-Child Relationship' (note 63, chapter 7) at 197.

²¹¹ See *South African Transport & Allied Workers Union & another v Garvas G* (note 20, chapter 3) at 1628F.

7 THE DEVELOPMENT OF THE COMMON LAW DOCTRINE OF VICARIOUS LIABILITY

The doctrine of vicarious liability cannot just be made applicable to the union but it should be developed in line with the requirements of modern labour law and the Constitution.²¹² The application of the doctrine of vicarious liability should be extended to include relationships that share the characteristics of the relationships to which it applies, such as the union-member relationship.²¹³ The extension of vicarious liability to a new situation requires that policy considerations and the interest of justice should dictate that there is indeed a need for such extension.²¹⁴ In this regard social and political conditions entail that vicarious liability should be expanded to union-member relationship being a social ill if it persists without any form of control.

The issue of violent industrial action in the Republic is so serious that it needs urgent intervention.²¹⁵ So, policy considerations and interest of justice could be in favour of extending vicarious liability to new situations such as trade union-member relationship. The Constitution provides that everyone has the right to freedom and security of the person which includes the right to be free from all forms of violence.²¹⁶ Holding the union liable for the delictual conduct of its members for the damage they cause can enhance the protection of individual rights in terms of the Constitution.

7.1 The development of the common law and the Constitution

²¹² Section 39(2) of the Constitution.

²¹³ Both the employer-employee and trade union-member relationships has an employee as point of departure for vicarious liability. In trade union-member relationship such employee must be a member of the union. The employee or member must act outside the scope of authorisation for delictual liability to arise.

²¹⁴ *NUMSA v Jumbo Products CC* (1997) 18 ILJ 107 (W) at 122D-E. See also *Lillicrap Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* (1985) 1 SA 475 (A) at 497C-505F.

²¹⁵ According to a report by South African Institute of Race Relations (21 January 2013), 'a total of 181 people have been killed in strike violence in South Africa in the past 13 years. During the same period, at least 313 people were injured and more than 3 058 were arrested for public violence. Of the 1 377 people arrested between 1 January 2009 and 31 July 2011, only 217 cases of public violence made it to court and only nine people were convicted.'

²¹⁶ Section 12(1)(c) of the Constitution.

The Constitution recognises the existence of the common law.²¹⁷ Such recognition is subject to common law being in line with the provisions of the Constitution.²¹⁸ In three sections, the Constitution sanctions the courts to develop the common law, where it is necessary and in the interests of justice to do so.²¹⁹

Section 39(2) prescribes *how* the common law must be developed. It reads:

“When interpreting any legislation, and when developing the common law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

The bodies that must develop the common law are indicated in section 173 of the Constitution which reads as follows:

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own processes, and to develop the common law, taking into account the interests of justice.”

The third section of the Constitution that deals with the development of the common law is section 8. It provides in subsection 8(1) that:

“the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state.”

It further provides in subsection 8(2) that:

“a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

Sub-section 8(3) gives the court power when applying a provision of the Bill of Rights to:

“(a) apply or if necessary to develop the common law to the extent that legislation does not give effect to that right;
(b) may develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1).”

²¹⁷ Section 232 provides that “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”. See also the remarks of Sachs J on section 232 of the Constitution in *S v Basson* (2005) 1 SA 171 (CC) at 216B.

²¹⁸ Section 2 of the Constitution.

²¹⁹ Sections 8(2), 8(3), 39(2) and 173 of the Constitution.

These provisions imply that the common law can be used to complement the law where it does not provide adequate protection for the rights guaranteed in the Bill of Rights. The interpretation of these sections of the Constitution should be understood to mean that the courts are mandated to scrutinise the common law to see if it is in line with the Constitution and whether it needs to be changed or developed.

The Constitution does not specifically address the issue of protection of members of society against unlawful conduct of participants in industrial action other than to say that people are entitled to live in a violence-free society.²²⁰ It, however, enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.²²¹ Therefore, the doctrine of vicarious liability would be contrary to the Bill of Rights²²² if it does not protect the rights of members of society against the unlawful conduct of strikers and picketers.

If the doctrine of vicarious liability does not protect the rights of members of society or is contrary to any provision in the Bill of Rights, the doctrine will need to be developed by the courts.

7.2 Development by the courts

The Constitution mandates the courts to develop the common law in the Republic where it is necessary to do so.²²³ The Constitution provides that when developing the common law, the courts must promote the spirit, purport and the objects of the Bill of Rights.²²⁴ The Constitutional Court, the Supreme Court of Appeal and the High Courts in the Republic have the inherent power to develop the common law taking into account the interest of justice.²²⁵ When developing the common law, the courts are compelled to eliminate any common law deviation or deficiencies that is contrary to the spirit and objects of the Constitution.²²⁶ In *Carmichele v Minister of Safety and Security*, the Constitutional Court confirmed this when it said: ‘where the common law

²²⁰ Section 12(1)(c) of the Constitution.

²²¹ *Idem* section 7.

²²² The Bill of Rights is in Chapter 2 of the Constitution.

²²³ Section 39(2) of the Constitution.

²²⁴ *Ibid.*

²²⁵ *Idem* section 173.

²²⁶ *Idem* section 39(2).

deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop the common law by removing that deviation.²²⁷

On the question of how the courts ought to develop the common law, the author realises that the matter must be before a court of law for adjudication, and should the need then arise, develop the common law.²²⁸ The author argues that lessons can be learned from the Canadian case of *John Doe v Bernnett*²²⁹ where the court held that an approach to the extension of vicarious liability requires a two stage approach. Firstly, a court should establish whether there are precedents which unambiguously determine whether the case should attract vicarious liability. If there is no answer to this effect, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.

Where the common law as it stands is deficient in promoting the objectives of section 39(2), the courts are under a general obligation to develop it appropriately.²³⁰ The first step in the development of the common law is to consider whether the existing common law contradicts or falls short of any provision of the Constitution or the values that underlie the Constitution.²³¹ If the answer is in the negative, the inquiry will come to an end. If the answer is in the affirmative, the inquiry continues.

The next step is to inquire whether the shortfall can be solved by the development of the common law, and whether such development would bring the common law in line with the Constitution or its values. If the answer is in the affirmative, the common law will have to be developed to comply with the provision in the Bill of Rights.²³²

The common law can also be developed to limit the rights granted by the Constitution. If the common law protects the right more than the Bill of Rights, the common law will have to be read down to make it comply with the affected provision in the Bill of Rights

²²⁷ *Carmichele v Minister of Safety and Security* (note 15, chapter 7) at 954A.

²²⁸ See *Masiya v Director of Public Prosecutions (Pretoria) & others* (2007) 5 SA 30; (2007) BCLR 827 (CC).

²²⁹ (2004) 1 SCR 436 (SCC). See also *Bazley v Curry* (note 342, chapter 6) at 559-560.

²³⁰ *Carmichele v Minister of Safety and Security* (note 15, chapter 7) at 955G.

²³¹ Section 1 of the Constitution.

²³² *Idem* at section 39(2).

and the Constitution in general.²³³ If all these attempts to develop the common law are unsuccessful, the constitutional provision will prevail since the Constitution is the supreme law.²³⁴ In doing this both sections 39(2) and 8(3) needs to be read together.

In *K v Minister of Safety & Security*,²³⁵ three uniformed policemen offered a lift to a 13 year old girl who was left stranded at night after she had a quarrel with her boyfriend. She asked the policemen to take her home. On their way, they raped her. A case was opened and the policemen were found guilty. The applicant claimed damages from the Minister of Safety & Security for the loss she suffered at the hands of the policemen. The State objected to her claim saying that when they committed the crime, the policemen were not advancing the interest of the employer but their own interest. The question was whether the state (the employer) was vicariously liable for the damage suffered by the applicant. The Supreme Court of Appeal (SCA) held that the state was not liable for the conduct of the policemen.²³⁶ It held that the Minister was only liable if it was proved that the policemen were acting within the scope of their employment when they committed the act which was not the case with these policemen.²³⁷

The applicant appealed to the Constitutional Court against the decision of the SCA.²³⁸ The grounds on which her application was based were that the SCA erred in its application of the standard test for vicarious liability and if the SCA did not err; the principle of vicarious liability should be developed in light of section 39(2) of the Constitution to align it with the spirit, purport and objects of the Constitution.

²³³ The following authorities give examples of how to read down legislation to comply with the Constitution, *National Coalition for Gays and Lesbian Equality v Minister of Home Affairs* (note 26, chapter 3); *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors v Smit* (2000) 10 BCLR 1079 (CC); (2001) 1 SA 545 (CC); *Laugh if Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* (2005) 8 BCLR 743 (CC); (2006) 1 SA 144 (CC); *Du Toit v Minister of Transport* (2005) 11 BCLR 1053 (CC); (2006) 1 SA 279 (CC); and *National Director of Public Prosecutions v Mohamed* (2002) 9 BCLR 970 (CC); (2002) 2 SACR 196 (CC).

²³⁴ Section 2 of the Constitution.

²³⁵ *K v Minister of Safety and Security* (note 12, chapter 7).

²³⁶ *Idem* at 188C-D.

²³⁷ *Ibid* at 188E.

²³⁸ *K v Minister of Safety and Security* (note 12, chapter 7) 6 SA 419 (CC).

On the question of whether the State should be held liable for the acts (commission of rape) or omissions (failure to protect her) of these policemen who, according to the defendant, were no longer furthering the interest of the employer, there were varying arguments as to whether the state should be held liable for the acts. One such argument was that it should be asked whether the wrongful acts were committed solely for the employee's own interests.²³⁹ This was held to require subjective consideration of the employee's mind.²⁴⁰

The question went further asking whether the employer may still be held liable even if the second objective test was answered in the affirmative. The objective test requires that even though the employee was furthering his own ends but his or her conduct was sufficiently close to the business of the employer.²⁴¹ It was observed that in answering this question the court should consider the need to give effect to the objects of the Bill of Rights.²⁴²

After a thorough consideration of foreign judgments,²⁴³ the Court held that the close connection between the deviant conduct and the employment obligations of the policemen approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well.²⁴⁴ In this case, the policemen committed rape which was a clear deviation from the mandate of protecting the people or inhabitants enshrined in the Constitution²⁴⁵ and the Police Act.²⁴⁶ In committing the delict they were not furthering the interest of the employer but their own.

The next question was whether the employer would nevertheless be held liable? This brought in the close connection factor, that is, whether their conduct was so close to that of the employer to render the latter liable for their conduct. It was held that in determining whether the employer is liable, the courts must take into account the

²³⁹ *Idem* at 436C.

²⁴⁰ *Idem* at 436D.

²⁴¹ *Idem* at 436E.

²⁴² *Ibid.*

²⁴³ See *Lister and others v Hesley Hall Ltd* (2002) 1 AC 215 (HL); *Jacobi v Griffiths* (1999) 174 DLR (4th) 71; and *Premeaux v United States* (1999) 181 F 3d 876.

²⁴⁴ *K v Minister of Safety and Security* (note 12, chapter 7) at 441H.

²⁴⁵ Section 205(3) of the Constitution.

²⁴⁶ Preamble to the South African Police Act 68 of 1995.

importance of the constitutional role entrusted to the police and the trust of the community in the police to which the applicant did.²⁴⁷ The police, while on duty, failed to protect her from harm something which they bore a general duty to do.²⁴⁸ The Court held that there was a close connection between the conduct of the policemen and their employment and on that basis the state was liable.²⁴⁹

Then the argument went on to say that if the state is not liable for damages after proper application of vicarious liability, the doctrine should be developed to render it consistent with the spirit, purport and objects of the Bill of Rights. The court answered the question of when should the common law be developed. In developing vicarious liability the following rights of the applicant had to be considered: the right to be free from all forms of violence either from public or private sources,²⁵⁰ the rights to dignity,²⁵¹ privacy²⁵² and equality.²⁵³

The court referred to the decision of *S v Thebus*²⁵⁴ where the Constitutional Court argued that there are at least two instances where the need to develop the common law in terms of section 39(2) may arise.²⁵⁵ The first one would be where the common law rule is inconsistent with the Constitution. If this is the case, the repugnancy compels the courts to adapt the common law to resolve the inconsistency.²⁵⁶ This court will remove the part of the common law that is contrary to the Constitution so that the common law will be in line with the highest law in the Republic.

The second possibility arises when a rule of the common law is not inconsistent with a constitutional provision but fall short of the spirit, purport and object of the Constitution.²⁵⁷ In that regard the common law needs to be adapted so that it grows in

²⁴⁷ *K v Minister of Safety and Security* (note 12, chapter 7) at 433A.

²⁴⁸ *Idem* at 444B-C.

²⁴⁹ *Idem* at 444C.

²⁵⁰ Section 12 of the Constitution.

²⁵¹ *Idem* section 10.

²⁵² *Idem* section 14.

²⁵³ *Idem* section 9.

²⁵⁴ (2003) 6 SA 505 (CC).

²⁵⁵ At 525E.

²⁵⁶ *Ibid*. See also *Shabalala and Others v Attorneys-General of Transvaal and Another* (1996) 1 SA 725; *National Coalition for Gays and Lesbian Equality and Others v Minister of Home Affairs and Others* (note 26, chapter 3).

²⁵⁷ *S v Thebus* (note 254, chapter 7) at 525F.

harmony with the spirit, purport and object of the Constitution.²⁵⁸ It is clear that the purpose is to ensure that our common law is infused with the values of the Constitution with the result that the influence of the Constitution is felt throughout the common law.

In the case of extending vicarious liability to a trade union-member relationship, it is clear that vicarious liability falls short of the spirit, purport and objects of the Constitution if it fails to hold the union liable for damage caused during strikes and let the victim claim compensation for the loss she or he suffered. If this is the case their dignity is also affected. In this regard, it will be in the interest of justice for the courts to develop this common law rule to render it consistent with the spirit purport and object of the Bill of Rights. This will provide appropriate remedy for damage caused during industrial action.

If the doctrine of vicarious liability is developed and made to apply to a trade union-member relationship, such development will satisfy the demands of communities and society at large, as there will be someone to hold liable for damage caused by strikers or picketers. Developing the common law as required by the Constitution, will ensure that the law takes into account the prevailing conditions in which communities live.²⁵⁹ The interests of the people and, in particular, the interests of law abiding citizens ought not to be infringed by unruly members of trade unions who participate in industrial action. If the common law doctrine of vicarious liability is developed to apply to a trade union-member relationship, it will ensure redress for victims of unlawful behaviour. This will give effect to one of the aims of the Constitution that we are 'all equal before the law and have the right to equal protection and benefit of the law.'²⁶⁰ In this way the principle of the rule of law will be upheld. A new form of liability which never existed before will apply.²⁶¹

²⁵⁸ *Ibid.*

²⁵⁹ See *R v Salituro* (1991) 3 SCR 654. See also *S v Thebus* (note 254, chapter 7).

²⁶⁰ Section 9(1) of the Constitution.

²⁶¹ In *SATAWU v Garvas* (WCC)(note 10, chapter 3) at 1629G, the Court held that section 11(1) of the RGA created a new form of liability which was previously not recognised in our law.

8 ADOPTING THE CANADIAN PRINCIPLES OF VICARIOUS LIABILITY IN SOUTH AFRICA

In Canada, public and policy consideration forced the courts to extend the application of vicarious liability to trade unions for the conduct of their members.²⁶² The classic *Salmond's* test that is used to hold employers liable for the conduct of members committed within the course and scope of employment is also used to hold unions liable for the activity of the union.²⁶³ In terms of the *Salmond's* test, the employer is liable for the authorised conduct of an employee(s) committed within the course and scope of employment.²⁶⁴

In the context of vicarious liability of a trade union, the application of this test entails that the union will be liable for the authorised acts of members who are on a protected industrial action. In South Africa, the practice is that most protected industrial actions are called by unions. An authorised industrial action in this context refers to a protected strike or picket.²⁶⁵ Liability in terms of this branch of *Salmond's* test is not only limited to conduct expressly authorised, but any conduct that shows support for the action from the union or its official is sufficient to ratify the conduct and transfer liability to the union.²⁶⁶ In *Mainland Sawmills Ltd v USW Union Local*,²⁶⁷ the union had objected to a claim of vicarious liability saying it had not authorised the assaults by Mr Ghag. The Board however, held that even though the union did not explicitly authorise assaults but local union officers directed members to go to Mainland and ensure that workers came out and shut down the Mill. In short union leadership supported the unauthorised conduct by members and the union was held liable.

²⁶² See in this regard *B.P.A v Children's Foundation* (1997) (CanLII) 10834 (BC CA). Accessed at <http://canlii.ca/t/1nk48> on 4/ 04/ 2016. See also *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council* (1999) BCJ No 2416 (SC).

²⁶³ *Mainland Sawmills Ltd v USW Union Local* (2007) (CanLII) 1433 (BCSC) at 44.

²⁶⁴ *Bazley v Curry* (note 342, chapter 6) at 556.

²⁶⁵ See sections 64, 65 and 69 of the LRA.

²⁶⁶ *Mainland Sawmills Ltd v USW Union Local* (note 263, chapter 7) at 42.

²⁶⁷ *Idem* at 42-43.

If the union authorises the act, the same union must be prepared to own up to the consequences of the act it has authorised. This gives the union an opportunity to prevent damage if it foresees that it might occur and take appropriate action such as to call off the action or suspend it.

The second branch of the *Salmond's test* requires that the conduct committed by union members(s) must be so connected to the authorised acts that they are the means (albeit improper ones) of doing the authorised act.²⁶⁸ The second requirement entails that the participants must commit unauthorised acts during the protected industrial action. The unauthorised conduct of the members during industrial action must be closely connected to an authorised act or be seen or regarded as a way of executing an authorised act.²⁶⁹ This does not imply that the union will not be liable if the strike was not protected. The union will still be liable if it can be shown that, it is the union that led such action and the unauthorised conduct was taken in connection with such unprotected strike.²⁷⁰

In *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council*,²⁷¹ the defendant unions were found vicariously liable for intentional wrongs committed on both branches of the *Salmond test*. In this case, the members of the defendant unions engaged in an illegal picketing. In the process, they assaulted, intimidated and harassed the plaintiffs. It was found that the union representatives were aware of the actions by their members and either participated in the action or took no steps to stop them and were thus held liable.²⁷² In holding the union liable on the second branch of the test Cohen J, acknowledged that unions are different in purpose, form and structure from other non-profit organisations and ordinary employers:

²⁶⁸ *Canadian Forest Products Ltd v Hospital Employees Union* (2007) (CanLII) 56419 (BC LRB) at 18-19.

²⁶⁹ *Ibid.*

²⁷⁰ *Bazley v Curry* (note 342, chapter 6) at 560.

²⁷¹ (1999) (CanLII) 15170 (BCSC). Accessed at <http://canlii.ca/t/1wn2c> on 05/04/2016.

²⁷² *Idem* at para 46.

“However, where a strategy employed by unions engaging in protest is so closely connected to the tortious conduct, that it can be said that their strategy fostered the unlawful activity, the unions may attract vicarious liability for the actions of their members.”²⁷³

The author submits that South Africa should follow the Canadian example to hold unions liable for the conduct of their members. The two well established grounds for holding unions liable for the conduct of members should be followed as is the case with Canada. The first one is that in order to hold a union liable for the conduct of members during industrial action, such members must be authorised to participate in the industrial action. This will be the case if the action (strike or conduct in contemplation or in furtherance of a strike) is protected.²⁷⁴ In terms of the Canadian law, this is sufficient to attribute liability to the union.²⁷⁵ The union may, however, ratify the conduct of its members by either participating in the action or in any other way that shows support for industrial action that causes damage.²⁷⁶ Such conduct will strengthen the case of the victims or plaintiffs to hold it liable.

In terms of this branch of the test for vicarious liability, the union will be liable even if it argues that the acts of violence or damage to property was committed by people who are not its members and such persons acted contrary to its instructions.²⁷⁷ What is important is that the union must have authorised the action in which people or its members participated and commit unlawful acts. In that regard, there is a duty on the union to do all it can to prevent such action from degenerating into violence or to prevent any act which is contrary to law. Failure to do so and resultant damage could be claimed from the union on the basis of vicarious liability.

Protected industrial action, in most cases, takes place under the leadership of a union. A trade union act not only as the agent of its members but also as a principal. Often a trade union does not have a specific mandate from its constituents as its mandate results from membership of the organisation, whose constitution empowers it to

²⁷³ *Idem* at para 91.

²⁷⁴ Sections 64(1), 65(1), and 69(1) of the LRA.

²⁷⁵ *Mainland Sawmills Ltd v USW Union Local* (note 263, chapter 7); *Adams Laboratories Ltd v Retail Wholesale & Department Store Union Local 580* (note 419, chapter 6); *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council* (note 70, chapter 1).

²⁷⁶ Salmon, Heuston & Buckley *The Law of Torts* (note 348, chapter 6) at 520-522.

²⁷⁷ *Matusiak v British Columbia and Yukon Territory Building and Construction Trades Council* (note 70, chapter 1).

perform several duties, including negotiating terms and conditions of employment that will be binding on its members. As a result, the union has the duty to control the movement of the picketers or protesters. Since a union has the power to call off a strike or suspend it, the union should use this power if the strike becomes violent. If it fails to do so the impression is created that the union supports the unlawful conduct or conduct closely connected to the unlawful act, which ought to render the union vicariously liable to the victims of such conduct.

By calling a strike, a union creates risk of consequential damage to third parties. The relationship between the trade union and member(s) is that the union is in control of the conduct of members being able to tell members what and what not to do. The question that needs to be asked is whether the wrongful acts were sufficiently related to the conduct authorised by the union. As stated above, where the strategy employed by the union is so connected to the unlawful conduct that it can be said that their strategy promoted the unlawful activity, the union could attract vicarious liability for the actions of its members.²⁷⁸ The test is not whether the harm or assaults were foreseeable as the mere signs or indications of risk associated with the union's activity and the conduct of its members will be sufficient to transfer liability to the union.

To escape liability, the union will have to produce evidence to show that the union indeed took reasonable steps to prevent the action or the damage from taking place. These will include communication with the members and the employer that the action has been suspended. The union needs to take this further and state clearly that any further action in connection with the suspended strike will not be in the name of the union.

9 CONCLUSION

Vicarious liability is a form of strict liability because the liability of the wrongdoer is transferred to a person who is without fault in the matter. Vicarious liability does not replace individual liability.²⁷⁹ The wrongdoer reimburses the principal if the latter has

²⁷⁸ See *SATAWU v Garvas* (CC)(note 10, chapter 3).

²⁷⁹ Hall 'After Waterhouse: Vicarious Liability and the Tort of Institutional Abuse' (note 341, chapter 6) at 163.

settled the claim or both the union and the members may be jointly and severally liable for the claim.

For the principle of vicarious liability to apply, a particular kind of relationship is required before liability can be imputed to the second person.²⁸⁰ These include marriage, partnership, employer-employee and the owner-driver relationships.

The question of whether this kind of liability can be expanded to apply to the relationship between a trade union and its members is investigated in this chapter. It is argued that policy considerations are the main indicators in this regard. The consideration of social implications of violent strikes dictates that vicarious liability be extended to trade union-member relationship. Violent strikes infringe upon the fundamental rights of the members of the public to live in a violent free society. A failure to hold union liable will perpetuate these infringements while there will be an advancement of the interest of justice if the doctrine is extended to this novel situation. Holding unions liable will serve as a deterrent and will encourage them to take active steps to discourage members from continuing with their unlawful action.

In Canada they follow this approach using the *Salmond's* test. With this test a distinction is made between the commission of unauthorised acts during authorised industrial action and the commission of unlawful acts during unauthorised industrial action. In both instances, the trade union is held liable.

The author recommends that the same route that is followed in Canada should be used to hold unions liable in the Republic. Due to the nature of industrial action in South Africa which are mostly violent, there is no doubt that when a union convene a strike it creates a risk to third parties. The risk creating principle is applied to show that if the union creates the risk of harm to third parties, it will be held liable regardless of

²⁸⁰ Wicke 'Vicarious Liability: Not Simply a Matter of Legal Policy' (note 7, chapter 7) at 22.

the scope of authorisation.²⁸¹ Lessons to this effect are drawn from case law where this principle was applied in employment relationships.²⁸²

If members on strike or picket commit delicts, such conduct is not authorised and they will be acting outside the scope of the authorised action. The close connection factor is also discussed which entails that where there is close connection between the conduct of the member and the strike or conduct in contemplation or in furtherance of a strike, there will be no doubt that the union will have to answer to the question of liability if it arises.²⁸³ For this close connection to exist, it must be shown that the source of delict was the strike or picket. In other words, had it not been for the strike or picket, there would not have been damage or delict committed.

The extension of the application of vicarious liability to a trade union-member relationship would have to be done by the courts since the Constitution mandates them to handle this task if it is in the interest of justice to do so.²⁸⁴ The author submits that it will serve the interest of justice and help victims of industrial violence if vicarious liability is developed to apply to trade unions and their members in terms of the Constitution.²⁸⁵ Such development will serve to accommodate new situations that did not exist and to which the doctrine did not apply. The development should be to bring vicarious liability in line with the spirit and object of the Constitution.

This will not be a unique situation in the Republic as soccer clubs are held responsible for the damage caused by supporters during official matches.²⁸⁶ Although their liability is not founded on the doctrine of vicarious liability but in terms of PSL rules it exists.

²⁸¹ *Ess Kay Electronics (Pty) Ltd and Another v First National Bank of Southern Africa Ltd* (note 77, chapter 7).

²⁸² See *Feldman (Pty) Ltd v Mall* (note 71, chapter 7) at 733; *K v Minister of Safety & Security* (note 12, chapter 7); *F v Minister of Safety & Security* (note 66, chapter 7); and *Minister of Police v Rabie* (note 6, chapter 7).

²⁸³ *Ibid.*

²⁸⁴ Sections 39(2) and 173 of the Constitution.

²⁸⁵ Sections 8(2), 8(3) and 39(2) of the Constitution.

²⁸⁶ Rule 53.2.3 of the National Soccer League Rules of 2012.

CHAPTER 8

RECOMMENDATIONS

Summary

This chapter suggests how the investigated legal principles could be used to address the problem of liability for damage caused during industrial action. The recommendations provide victim(s) with legal remedies to hold the wrongdoer or anyone liable for the harmful conduct committed during industrial action. The victim can choose the remedy that best suits his or her circumstances. In addition to providing the victims with legal remedies for damage caused, the suggested solution to the problem of liability for violent industrial action provides a solid foundation and platform for discussion on the subject. The recommended solution(s) serve as a starting point for the liability of trade unions for acts committed by their members during industrial action. It is also hoped that with this development in our labour law, debates in academia and other relevant sectors could be stimulated.

1 INTRODUCTION

Violent strikes have been a common feature in South Africa in the recent years affecting employers, non-striking employees, members of the public, neighbouring businesses and the strikers themselves.¹ Over the past few years, it has been difficult to hold a convening union liable for the conduct of its members because unions usually reject any charges or claims on the basis that the people who committed the unlawful acts were not their members.² The inability to establish liability has resulted in uncertainty for the victims of unlawful conduct regarding the person(s) or organisation they should hold responsible for the damage they suffered as a result of violent industrial action.

The question that the study has attempted to give answers to, is who should be held liable for the unlawful conduct of union members committed during industrial action.

¹ *Food & Allied Workers Union obo Kapesi & 31 others v Premier Foods Limited t/a Blue Ribbon Salt River* (note 46, chapter 5) at 1659C-J; *Tsogo Sun Casino (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (note 94, chapter 3); *Garvas & others v SATAWU (CC)*(note 10, chapter 3). See also Rycroft A 'The Legal Regulation of Strike Misconduct: The *Kapesi* Decisions' (note 59, chapter 1) at 860.

² Mabuza 'Unions could be held liable for damages in freight strike' (note 39, chapter 1).

To answer this question, the study establishes grounds for holding the convening union and/ or its members liable for the damage caused during industrial action. The investigation covers certain sections or principles of labour law, common law and other branches of the law in the hope that they provide solutions to the issue of liability for damage caused during industrial action. This study establishes a number of principles that will assist in providing an answer to the question of liability, despite the shortcomings, as alluded to in the thesis.

As part of the solution, it is proposed that certain sections of the Labour Relations Act³ of 1995 be amended to deal with the new challenges that the country faces. If successful, compliance with the new provisions will play an important role in reducing industrial violence in the Republic as there will be a clear-cut position on the person to hold liable for unlawful conduct committed during industrial action.

2 LIABILITY IN TERMS OF SECTION 68 OF THE LRA

Liability in terms of section 68 of the LRA arises if employees participate in an unprotected strike. The LRA is clear on the consequences of failure to comply with the procedural requirements for a protected strike. It states that an interdict can be used to stop or prohibit a strike that is not protected.⁴ It further provides that an affected person may claim 'just and equitable compensation' for the loss attributable to the strike or conduct in contemplation or in furtherance of a strike.⁵ Lastly, it provides that the employees who are involved in the commission of misconduct during a strike or conduct in contemplation or in furtherance of a strike may be dismissed.⁶

However, the LRA does not state who should use these provisions. The investigation in Chapter 5 indicates that the relief in this section is open to any person who has been affected by the conduct of employees on strike. The employer can use the provisions of section 68(1) (application for an interdict) against the union and its members if he or she can prove that he or she suffered loss and such loss is attributable to the

³ Act 66 of 1995.

⁴ Section 68(1)(a) of the LRA.

⁵ *Idem* section 68(1)(b).

⁶ *Idem* section 68(5).

unprotected strike or conduct in contemplation or in furtherance of an unprotected strike. The trade union can also use the section to claim 'just and equitable compensation' against the employer for an unprotected lock-out. The union needs to prove that it had suffered loss as a result of the lock-out by the employer and such lock-out had not been protected.

Employees who have been locked out and did not get paid because of the 'no work no pay' rule can sue their employer for breach of contract of employment.⁷ The union and employees will need to prove loss suffered as a result of the lock-out. The members can also use section 68(1) to claim compensation from their union if they were misled by the union to believe that the strike or conduct in contemplation or furtherance of a strike was protected while it was not protected and acted on the strength of such misrepresentation. If they are dismissed as a result thereof, it seems the members will have a case against the union.⁸

2.1 Challenges on the use of section 68 remedies

2.1.1 *Interdict*

When an employer is faced with a situation where employees embark on an unprotected strike, the LRA states that he or she can apply to the Labour Court for an interdict to prohibit them from engaging in an unprotected strike.⁹ The Labour Court has exclusive jurisdiction to issue interdicts in all labour related matters in South Africa.¹⁰ As court order, an interdict must be honoured. It should be respected not only because it is a court order but as one of the founding values in our Constitution. The Constitution provides that it is the 'supreme law of the Republic' founded on the respect for human rights and the rule of law.¹¹ The Constitution further provides that court orders are binding on the parties to whom they relate.¹² Ignorance of a court

⁷ *Kgasako & Others v Meal Plus CC* (note 17, chapter 5).

⁸ See *Mangaung Local Municipality v SAMWU* (2003) 3 BLLR 268 (LC).

⁹ Section 68(1)(a) of the LRA.

¹⁰ *Idem* section 157(1) of the LRA.

¹¹ *Idem* section 1.

¹² *Idem* section 165(5).

order is a sign of disrespect for the rule of law and therefore contrary to the Constitution.¹³

Recent violent industrial action has shown a disrespect for the rule of law where interdict had been issued against unions and their members to discontinue with their violent strikes but went ahead with their violent action despite the court order with none being held in contempt of court. In *Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River*,¹⁴ an interdict was secured with the Labour Court after several acts of violence and damage to property occurred during a strike. However, this interdict was ignored and violence persisted and the company was made to suffer the consequences as none was held in contempt of court.

In *In2Food (Pty) Ltd v Food & Allied Workers Union & others*,¹⁵ the workers of the respondent employer embarked on an unprotected strike which was also violent. The employer approached the court for an interdict against the union and individual strikers which was granted. Despite the interdict, violent-strike continued. The question was whether the conduct of strikers and the union were in breach of the court order and therefore in contempt? The trial court held the union liable and was fined R500 000 for failure to heed to the interdict. However, this decision was overturned in the Labour Appeal Court (LAC).¹⁶ The LAC held that it is crucial that one has to look at what the court ordered the union to do for such union to be held liable.¹⁷ The interdict must state clearly what action is mandatory and not confuse the union's obligations with those of its members.¹⁸ If the union fail to comply with the order of the court, then it should be held liable.¹⁹

¹³ Section 2 of the Constitution provides that 'any law or conduct that is contrary to the Constitution is invalid.'

¹⁴ (2012) 33 ILJ 1779 (LAC). See also *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South Africa Workers' Union & others* (note 94, chapter 3); *Security Services Employers' Organisation & others v SATAWU & others* (note 25, chapter 5); *Supreme Spring – A Division of Met Industrial v MEWUSA* (note 41, chapter 5).

¹⁵ (2013) 34 ILJ 2589 (LC).

¹⁶ *Food and Allied Workers Union v In2Food (Pty) (Ltd)* (2014) 35 ILJ 2767 (LAC).

¹⁷ At 2771F.

¹⁸ *Idem* at 2771H-J.

¹⁹ *Idem* at 2773J-2774A. See also *FAWU v Ngcobo NO & another* (note 139, chapter 2) at 3073E.

The question that arises is whether interdict is a rightful remedy in South Africa to deal with violent strikes if it can be ignored at will by unions and their members. The study advocates that the Botswana-example should be followed. Botswana has peaceful industrial relations with no prevalence of strike violence. In fact strikes are very rare in Botswana.²⁰ One of the reasons for this is the insistence on respect for the rule of law.²¹ Once an interdict has been issued, it must be complied with as a matter of urgency. If there are further disputes, those must be referred to appeal while the industrial action is suspended pending the outcome of the appeal judgement. If a person attempts to ignore a court order he or she commits contempt and is punished accordingly.²²

Our law should follow the same suite as Botswana. If strikers ignore an interdict, swift action should be taken against those who continue with the prohibited action based on contempt of court. However, there is a promise that things might change in the future after the recent decision of the Labour Court in case of *Pikitup Johannesburg (Pty) Ltd (Pikitup) v South African Municipal Workers Union (SAMWU) & others*.²³ The Labour Court ruled against SAMWU and its members who were employees of Pikitup for their continued industrial action despite a court order. The union was fined R80 000 while its general secretary was fined R10 000 for condoning the acts of violence and issuing public statements in support of the strike that had been interdicted.

2.1.2 Just and equitable compensation

The question of what constitutes 'just and equitable compensation' has been a difficult one for the court to determine. The Labour Court exercises its discretion when determining what is 'just and equitable'. In addition, the Labour Court is mandated to take into account various factors before arriving at what it considers to be 'just and equitable compensation'.²⁴ In *Algoa Bus Company v SATAWU and others*,²⁵ the

²⁰ *Attorney General v Botswana Landboards & Local Authorities Workers Union* (note 330, chapter 6) at 555E.

²¹ Motshewa B 'Deep Rooted Conflicts and Industrial Relations Interface in Botswana' (2012) 2 *Journal of Public Administration and Governance* 118 at 127.

²² *Ibid.*

²³ (2016) 37 *ILJ* 1710 (LC).

²⁴ See section 68(1)(b) of the LRA.

²⁵ (2015) 36 *ILJ* 2292 (LC).

employer's transport operations was affected after the unions (Transport and Allied Workers Union (SATAWU) and Transport, Action, Retail & General Workers Union (TARGWU)) went on an unprotected strike. The court ordered TARGWU and SATAWU to pay a 'just and equitable' amount of R1.4 million in monthly instalments of R5 208. The members were also ordered to pay a monthly installment of R214.50 by way of a deduction.²⁶

In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*,²⁷ the applicant had claimed an amount of R15 million from the union for loss it suffered as a result of a strike convened by the union. The amount ended up being reduced to R100 000.²⁸ During the course of the court proceedings, three things were held to be prerequisites for section 68(1)(b) to apply. Firstly, the strike or lock-out, or conduct in support of a strike must be unprotected. Secondly, the applicant seeking to use this section must have suffered loss as a result of the strike or lock-out or conduct in contemplation or in furtherance of a strike. Thirdly, the party against whom the claim is made must have participated in the strike or committed unlawful acts while furthering the strike.²⁹ The union was ordered to pay R100 000 in monthly instalments of R5 000.³⁰

It will remain with the court to determine what is just and equitable. The claimant needs to know that the amount may be reduced or increased by the court after taking into account various factors and if it is in the interests of justice to do so.

2.1.3 Dismissal

It is true that employees who participate in a strike commit breach of contract of employment which requires them to discharge their services towards the advancement of the business of the employer. It becomes worse if the employees commit misconduct during a strike or conduct in contemplation or in furtherance of a strike. If

²⁶ At 2296J-2297A.

²⁷ *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (note 61, chapter 5).

²⁸ *Ibid.*

²⁹ At 2042G-H.

³⁰ *Idem* at 2046A.

the employees commit misconduct, the LRA provides the employer with the remedy to dismiss such employees.³¹

However, dismissal is not an automatic remedy available to the employer as he or she is still expected to comply with certain procedural requirements in Schedule 8 of the Code of Good Practice: Dismissal.³² The accused or his or her trade union representative, should be given the opportunity to state the other side of the case against him or her, of which the opposing party might not have been aware of.³³ The process up to and during the hearing of his or her side of the story must be fair and *bona fide* and conducted prior to any action being taken against the accused unless the situation makes a hearing impossible, or unless the accused waives the right to a hearing.³⁴

Such process may take long as some witnesses may be called to give evidence in support or against the employer.

3 LIABILITY IN TERMS OF THE REGULATION OF GATHERINGS ACT

The Regulation of Gatherings Act³⁵ (RGA) regulates liability for the conduct of the people who gather in public places for a particular purpose.³⁶ The RGA does this by ensuring that organisers of a gathering and participants comply with specified requirements and by providing sanctions for failure to comply with the prescribed requirements.³⁷ It creates statutory liability for the organisers of gatherings together with their members in the event of any riot damage arising from such a gathering or demonstration.³⁸

³¹ Section 68(5) of the LRA.

³² Section 68(5) of the LRA.

³³ *Transport & General Workers Union & Others v Coin Security Group (Pty) Ltd* (2001) 22 ILJ 968 (LC) at 979E.

³⁴ *National Union of Metalworkers of SA & others v Elm Street Plastics t/a ADV Plastics* (note 67, chapter 2) at 338A-D.

³⁵ Act 205 of 1993.

³⁶ Preamble to the RGA.

³⁷ Section 12(1)(j) of the RGA.

³⁸ *Idem* section 11(1).

The question that arises is whether the RGA applies to strikes or conduct in contemplation or in furtherance of a strike. The Code of Good Practice: Picketing clearly states that the RGA does not apply to a picket that is protected in terms of the LRA.³⁹ The exclusion from the regulative ambit of the RGA of a protected picket could be interpreted to include protected strikes as pickets is an act in support of a strike. However, the nature of the Code is that it is not binding and can be overlooked on good grounds shown. This means that a union can be held liable in terms of the provisions of the RGA despite the existence of the code which excludes its application to a picket. There are two important court decisions which have paved the way for action to be taken against the union.

The first one is *SATAWU v Garvas*.⁴⁰ In this case, the employees affiliated to SATAWU went on a strike which later became protest action. The court held that the union was liable in terms of section 11(1) of the RGA.⁴¹

The second one, although not based on the RGA, is *Xstrata (Pty) Ltd v AMCU and others*.⁴² Here, the employees conducted themselves contrary to the court order which had prohibited them from participating in an unprotected strike. The court ordered the union to take steps to ensure that such unlawful acts were not committed by its members. The court held that it was not necessary that the union should physically remove or prevent the members from engaging in unlawful acts but it has to show that it did whatever that it could do and within its means and powers to ensure that its members do not commit unlawful acts and comply with the court order.⁴³

Moreover, a strike or conduct in contemplation or in furtherance of a protected strike that has become violent could lose protection paving the way for the RGA to apply.⁴⁴ So, if a union calls a strike or authorises a picket that turns out to be violent, with participants of more than fifteen people, and such picket taking place on a public place

³⁹ Item 1(6) of the Code of Good Practice: Picketing and the LRA.

⁴⁰ (2012) 33 ILJ 1593 (CC).

⁴¹ At 1613F.

⁴² *Xstrata (Pty) Ltd v AMCU and others* (note 44, chapter 4).

⁴³ At 18.

⁴⁴ Rycroft A 'Can A Protected Strike Lose its Status? *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (note 112, chapter 5) at 822; and Rycroft A 'What can be done about strike related violence' (note 24, chapter 1) at 8.

such as public roads, the RGA applies to such conduct.⁴⁵ In terms of the RGA, if any conduct by strikers or picketers cause damage to a third person, such person has a recourse against the organiser as well as the member(s) concerned as they will be jointly and severally liable for the damage caused.⁴⁶ In short, for the RGA to apply the action must be unprotected, participants must be fifteen or more and take place in a public place.

It is acknowledged that the recommendations in the thesis, namely that the RGA should apply to industrial action, will not be popular with unions. Unions may argue that the liability in terms of the RGA would put unnecessarily onerous burden on them and would discourage them from exercising their statutory rights to collective bargaining.⁴⁷ In response, it is argued that demonstrations or industrial action should continue to be allowed to take place. Picketing, demonstrations and other forms of gathering should be seen as an integral part of a vibrant democracy, and as long as demonstrators keep their conduct within the boundaries of the law, and without infringing the rights of others. These mass actions should be viewed as healthy contributions to a participatory democracy, as guaranteed in the Constitution.⁴⁸

The convening union needs to ensure that the action remains peaceful. If industrial action remains violent despite any attempts by the organisers to keep it peaceful, the union or organisers can, regardless of whether the RGA applies or not, take steps to suspend or call off the strike or conduct in contemplation or in furtherance of a strike.⁴⁹ There is nothing in the current law that prohibits a union from suspending a strike or conduct in contemplation or furtherance of a strike. A union can therefore suspend such action if it realises that it is getting out of hand. Such suspension could give the union an opportunity to review the course of action it has embarked upon and the conduct of its members and to take remedial action regarding the derailed action. If, during the suspension, and after consultation with its members, the union is of the opinion that the action should be called off, it should do so. The union could also lift

⁴⁵ See section 1(vi) of the RGA for the definition of a gathering to which the Act applies.

⁴⁶ Section 11(1) of the RGA. See also *SATAWU v Garvas & others* (WCC)(note 10, chapter 3) at 1609C-D.

⁴⁷ See section 4 of the LRA.

⁴⁸ Section 1 of the Constitution provides that South Africa is one, sovereign, democratic state.

⁴⁹ See *Transportation Motor Spares v NUMSA & Others* (1999) 20 ILJ 690 (LC).

the suspension and resume the action provided it has put measures in place to prevent the irregular activities it had foreseen before suspending the action.

If a union fails to suspend or call off industrial action that has turned violent, the courts must be empowered to intervene and take appropriate action including declaring the action unlawful.⁵⁰ Evidence will have to be led before the court takes a decision to this effect. It is assumed that the degree of violence will help the court to arrive at its decision whether to declare the strike or conduct in contemplation or in furtherance of the strike, whether unprotected or not.

4 HOLDING THE UNION LIABLE IN TERMS OF THE DOCTRINE OF VICARIOUS LIABILITY

Vicarious liability is used, amongst others, to hold the principal liable for the unlawful acts of his or her agent.⁵¹ The doctrine of vicarious liability is investigated in Chapter 7 to ascertain whether it could be expanded to hold a trade union liable for the conduct of its members.⁵² It is stated that the existence of vicarious liability is not based on the principles of law but on policy considerations which are dictated by social, political and economic changes.⁵³

Since the advent of democracy with more rights made available to workers and their unions, our labour relations environment has changed drastically. The collective rights of workers (strikes, pickets, assembly and protests) needs to be monitored closely since violence often erupts when these rights are exercised with none being held liable for damage caused.

The author recommends that unions should be held liable for the unlawful conduct of members through the doctrine of vicarious liability. There are many reasons behind the need to expand the application of vicarious liability to trade unions for the conduct

⁵⁰ *Tsogo Sun Casino (Pty) Ltd t/a Montecasino v Future of South Africa Workers Union and others* (note 94, chapter 3) at 1003J – 1004A.

⁵¹ Chapter 7 above.

⁵² *Ibid.*

⁵³ Potgieter 'Preliminary Thoughts on Whether Vicarious Liability should be Extended to the Parent-Child Relationship' (note 63, chapter 7). See also Todd S (ed) *The Law of Torts in New Zealand* (2012) at 1029.

of their members. Firstly, the nature of industrial relations in South Africa has become volatile to violence and damage to property occurs when employees engage in violent industrial action. Many people and their property become vulnerable to violent industrial action.⁵⁴ So, when a union calls a strike, the same union creates the risk of harm to third parties as the possibility of damage or loss is high bearing in mind the nature of industrial action in recent years (they are often violent, emphasis added).

If union members or strikers commit violent acts or misconduct during industrial action, they will be acting contrary to the instructions of the union unless the union showed support for such misconduct. This is referred to as deviation cases in employment relationship and the employer is held liable regardless of such deviation. In *K v Minister of Safety & Security*,⁵⁵ the question was whether the Minister was vicariously liable to the applicant for the conduct of policemen who raped a young girl. The court held that the State was vicariously liable on the basis of three factors: both the State and the policemen had a statutory and constitutional duty to assist the applicant; the conduct of the policemen which caused the harm constituted a simultaneous commission and omission; and as a result of his omission, he failed to protect her from harm.⁵⁶

The question is whether the same approach should be used to hold unions liable for the unauthorised delictual conduct of members during industrial action. In answering this question, one needs to take lessons from Canada where the law is certain about holding a union vicariously liable for the delicts of its members.⁵⁷ Canada relies on the *Salmond's* test, a principle originally developed to hold employers vicariously liable for the conduct of employees but was later developed by the courts to hold unions liable for the conduct of employees.⁵⁸ Today, unions are held vicariously liable for the conduct of its members. The liability arises from the fact that the union gives instructions and is expected to take steps to ensure that the action continues peacefully.⁵⁹ Sometimes unions do not instruct members but ratify their unlawful

⁵⁴ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (note 94, chapter 3) at 1001A-C.

⁵⁵ *K v Minister of Safety and Security* (note 12, chapter 7).

⁵⁶ At 442-445.

⁵⁷ *671122 Ontario Ltd v SAGAZ Industries Canada Inc* (2001) 2 RCS 995 (SCC).

⁵⁸ *Mainland Sawmills Ltd v USW Union Local* (2007) (note 263, chapter 7) at 44.

⁵⁹ *Canadian Forest Products Ltd v Hospital Employees Union* (note 268, chapter 7) at 18-19.

conduct by either participating in the action or in any other way to show support for the action and this creates liability for the union.⁶⁰

Secondly, if the commission of unlawful conduct is closely related to the authorised conduct to such an extent that doing the unauthorised is inseparable from the authorised act, the union could be held liable.⁶¹ The fact that the union did not authorise the commission of unlawful conduct does not save it from liability. In terms of the second leg of the *Salmond's* test, the union will be liable for the actions of members' unauthorised acts connected with the authorised acts. The test is that these two must be so close to such an extent that they may be regarded as modes (albeit improper modes) of committing an authorised act.⁶² Case law has also held that if union leaders showed support for the action or did not take steps to stop the action from degenerating into chaos, the union could be held liable despite the fact that it did not authorise the action.⁶³

In South Africa, the practice is that most protected industrial actions are called by unions. An authorised industrial action in this context refers to a protected strike or picket.⁶⁴ A union that calls industrial action owes the people of South Africa a duty to ensure that the action is peaceful.⁶⁵ In the context of vicarious liability of a trade union, the application of this test (*Salmond's* test) entails that the union will be liable for the authorised acts of members who are on a protected industrial action.

The study proposes that the same route should be followed to attribute liability to a union for damage caused by members in the Republic. It will not matter if members conduct themselves outside the scope of authorisation, as long as there is a close connection between what they do and their industrial action.⁶⁶ For this to happen, it must be proved that there would not have been injury or damage had the union not

⁶⁰ Salmon, Heuston & Buckley *The Law of Torts* (note 348, chapter 6) at 520-522.

⁶¹ See *John Doe v Bennett* (note 229, chapter 7) and *Bazley v Curry* (note 342, chapter 6).

⁶² See *Bazley v Curry* (note 342, chapter 6) at 557.

⁶³ *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council* (note 70, chapter 1), *Mainland Sawmills Ltd v USW Union Local* (note 263, chapter 7).

⁶⁴ See sections 64, 65 and 69 of the LRA.

⁶⁵ Section 17 of the Constitution.

⁶⁶ *Minister of Defence v Von Benecke* (note 94, chapter 7); *K v Minister of Safety & Security* (note 12, chapter 7); *F v Minister of Safety & Security* (note 25, chapter 7); *Carmichele v Minister of Safety and Security* (note 15, chapter 7).

called the strike or authorised a picket.⁶⁷ All that the plaintiff has to show in order to hold the union liable is that the damage occurred as a result of the strike or conduct in contemplation or in furtherance of a strike. This is referred to as the 'but for test'.⁶⁸ If the claimant passes the 'but for test' then the second enquiry would be whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to arise.⁶⁹ If the applicant does this successfully, the union will be liable unless it successfully raises defences that may be available.

In addition, it will not be a unique circumstance that unions are held liable for the conduct of members as soccer clubs are also held liable for the damage caused during official soccer matches. With this liability, the club does not instruct the fans to commit the unlawful act. In fact the club is without fault but is nonetheless held liable.⁷⁰

The suggestion to extend the application of vicarious liability to other relationships not initially designed for such doctrine, is also suggested by Potgieter.⁷¹ He moots the possibility of extending vicarious liability to the parent and child relationship.⁷² Some of the grounds that he advances in his argument include the risk created by the parents in bringing the child into the world; the fact that the parent rather than the child is usually better suited to pay the loss caused by the child, and the notion that possible liability for a child's conduct may cause the parent to instruct, control, supervise, guide and discipline the child more thoroughly regarding potential damage causing behaviour.⁷³ This illustrates that the law can be changed in line with the prevailing conditions in which people find themselves.

Le Roux supports this conclusion when she states that vicarious liability is not a rigid legal principle but a fluid concept founded on policy considerations that aims to ensure

⁶⁷ *Mahlangu v SATAWU, Passenger Rail Agency of SA & Another, Third Parties* (note 56, chapter) at 1205D.

⁶⁸ See *Intenational Shipping Co (Pty) Ltd v Bentley* (1990) 1 SA 680 (A) at 700. See also *First National Bank of SA Ltd v Duvenhage* (2006) 5 SA 319 (SCA) at 324J-325A.

⁶⁹ *International Shipping Co (Pty) Ltd v Bentley* (note 68, chapter 8) at 7001.

⁷⁰ Vicarious liability requires no fault on the person to be held liable. The fault of the perpetrator is, however, required.

⁷¹ Potgieter 'Preliminary Thoughts on whether Vicarious Liability should be Extended to the Parent-Child Relationship' (note 53, chapter 7).

⁷² At 193.

⁷³ *Idem* at 197.

effective compensation and to deter future harm and flexible enough to take account of changing social and economic circumstances as well as the changing nature of employment.⁷⁴ The policy considerations of fairness and justice underlying vicarious liability in general, may have a bearing on the question of whether vicarious liability should be extended to the trade union-member relationship. Deakin states that the expansion of vicarious liability is in 'tune with the current trend, prevalent in modern tort law, liberally to compensate physical injuries at the same time as widening the category of risks for which defendants with deep pockets can be deemed responsible.⁷⁵

The extension of application of vicarious liability to a trade union-member relationship cannot just happen overnight but courts are required by the Constitution to develop the common law.⁷⁶ When developing the common law, the first thing that the court needs to ask is whether the common law rule (the doctrine of vicarious liability) fails to protect or is contrary to a right in the Bill of Rights. Section 12(1)(c) of the Constitution provides that people should not be subjected to any form of violence. Obviously, a violent strike will have the potential of taking away this constitutional right. In addition, the fact that the victims of violent strikes are not compensated for the loss they suffered as a result of industrial action is not compatible with the rules of fairness which requires that there be justice between men.⁷⁷

The Constitution does not explicitly provide that unfair conduct towards victims of violent industrial action will be contrary to the Bill of Rights. However, it can be argued that such conduct is contrary to the values and objects of the Constitution, in that the right to dignity of victims get affected by a violent strike.⁷⁸ The right to dignity is one of the founding values of our Constitution.⁷⁹ Therefore, if the doctrine of vicarious liability fails to hold the union liable for the conduct of its members, it can be argued that it falls short of the Constitution and needs to be developed to be compatible with it.⁸⁰

⁷⁴ Le Roux 'Sexual Harassment in the Workplace: Reflecting on *Grobler v Naspers*' (note 33, chapter 7) at 1899.

⁷⁵ Deakin J and Markesinis B *Markesinis' and Deakin's Tort Law* (2008) at 697.

⁷⁶ Section 39(2) of the Constitution.

⁷⁷ See *Johnson Crane Hire (Pty) Ltd v Grotto Steel Construction (Pty) Ltd* (note 12, chapter 7) at 908G.

⁷⁸ Section 10 of the Constitution.

⁷⁹ *Idem* section 1(a).

⁸⁰ See Chapter 7 above.

The development of the common law doctrine of vicarious liability will lead to the relaxation of its operation to cater for situations not previously anticipated, such as violence, damage and vandalism that occur during strikes and/or pickets. The question is whether courts will be willing to develop the doctrine to apply to trade union-member relationships. It is suggested that should the issue of holding a trade union vicariously liable for the delicts of its members committed during industrial action come before the court, the latter should be prepared to develop the doctrine in light of fact that, at present, the extensive damage caused by strikers and picketers is generally not compensated. Failure to develop the common law would fail to address the unfairness to victims of such violence that they currently experience.

The author further submits that since the courts are the custodians of justice,⁸¹ they are bound to develop the doctrine of vicarious liability to ensure that justice prevails. The right to strike is protected in the Constitution⁸² and the extension of this doctrine will enhance the protection of members of the public to live in a violent free environment. It is submitted that it will be in the interest of justice if policy considerations could favour the extension of vicarious liability to new situations such as trade union-member relationship in the same way that liability is transferred to the employer for the delicts of employees as these two types of relationships share certain common features.

If vicarious liability is extended as suggested, it will send a message to all participants, that they will be held accountable in one way or another for the conduct committed during industrial action. It is then expected that participants in such action would feel bound to respect the law and not to embark on unlawful conduct on the understanding that it will be difficult to hold anyone liable. The responsibility of ensuring peaceful industrial action will no longer be in the hands of the union alone, but in the hands of all participants as the union will have right of recourse if it pays for the damage caused.

⁸¹ See section 165(2) of the Constitution.

⁸² *Idem* section 23(2)(c).

5 AMENDMENTS TO THE LABOUR RELATIONS ACT

Despite the remedies in section 68(1) and (5) of the LRA violent industrial action continue to be a norm in the South Africa. These remedies fail to deter unions and members from committing violent acts during industrial action. Urgent measures in the form of amendments to the existing LRA need to be taken to curb or prevent the scourge of violent strikes.

Prior to the coming into effect of the Labour Relations Amendment Act,⁸³ the legislature had proposed two important amendments to the LRA to deal specifically with the issue of industrial action and the unlawful acts that often accompany such action.⁸⁴ These clauses dealt with the issue of a pre-strike ballot and restriction of unions to permit only registered members to participate in a picket in support of a strike. Unfortunately, these proposed amendments were scrapped from the Bill due to strong opposition from COSATU. The study also suggests that an interest arbitration will play an important role in reducing the period a strike takes before a solution is found.

It was hoped that the introduction of these provisions would help to lessen violence during industrial action, which would, in turn, reduce the challenges victims of violent conduct face when they endeavour to establish liability for the consequences of the unlawful conduct of picketers. The study argues that if these changes are re-introduced, there is likelihood that unions will object to their implementation as they did with the 2012 amendments. To counter this from taking place again, the study suggests that labour needs to be consulted extensively on these issues and be convinced that their implementation if successful will benefit both employer and the labour as the absence of violence results to order in work environment as well as in society.

The study suggests that the following amendments be included in the LRA after extensive consultation with labour:

⁸³ The Labour Relations Amendment Act 6 of 2014 came into operation on 1 January 2015.

⁸⁴ Labour Relations Amendment Bill of 2012.

5.1 A pre-strike ballot

The ballot by members of any union prior to a strike is one of the ways of testing whether the proposal to go on strike will have the majority support of workers. If the majority of members who voted vote against the strike, it will not go ahead. It is the majority members of the union that proposes to go on strike that will be eligible to vote. Members of other unions that are not in dispute with the employer and do not want to go on strike, may not vote. The majority rule applies in determining whether the union can proceed with preparations for a strike or not. This means that if the majority of employees who voted in a particular workplace vote in favour of the strike, it will go ahead.

In Australia it is a statutory requirement that members cast votes in favour or against a proposed strike.⁸⁵ The vote is exercised through a secret ballot supervised by the Australian Electoral Commission (AEC) or an authorised independent ballot agent.⁸⁶ The strike will only go ahead if a vote of 50% plus 1 in favour of the proposed strike has been obtained by all the members who voted. If the majority of employees who voted, voted against the proposal to go on strike, it would not go ahead. The same applies in Canada. The majority of Canadian jurisdictions require employees to cast their votes prior to a strike.⁸⁷ Non-compliance with the requirement of a ballot prior to a strike will render such strike unprotected and attract legal remedies.⁸⁸

The advantage of having a ballot prior to a strike is that it may prevent an ambitious union leadership from taking a decision without consulting its members. It can help to protect the interests of the employer against harmful strike action, and the interests of individual workers against strikes which are not democratically mandated.

The study recommends that a compulsory secret ballot provision be added into the LRA. Secrecy in the conduct of a ballot is necessary because of the inherent

⁸⁵ Section 436 of the FW Act.

⁸⁶ Part 3-3, Division 8 of the Fair Work Regulations 2009 (Cth) sets out regulations for the conduct of secret ballots by the AEC.

⁸⁷ Alberta, British Columbia, Canada, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec. Carter *Labour Law in Canada* (note 37, chapter 6) at 293.

⁸⁸ *Ibid* at 293.

intimidation and fear of victimisation if it is conducted by a show of hands.⁸⁹ A secret ballot before a protected strike will also ensure that strikes and pickets are taken seriously, and not just be viewed as actions of ‘uncivilised hooligans’ because of the current concomitant damage to property and intimidation and killing of people. If a ballot requirement is to be re-introduced, a proposal to amend the LRA will have to be considered by NEDLAC and a bill introduced to Parliament.

An independent electoral body like the Independent Electoral Commission (IEC) or an authorised independent agent may conduct or oversee such ballot. However, due to the volume of work in which the IEC is involved, it might be practically impossible to oversee trade union ballots. It is then proposed that an independent ballot agent (for example, representative from the CCMA) could be a suitable alternative. Having a compulsory ballot requirement as one of the requirements for a protected strike in the Republic will not only bring democracy into the workplace but from the trade unions’ perspective, it can prevent the disappointment that can result from a failed strike because of lack of support from other employees. Jacobs argues that in a 2011 wage strike by municipal workers, only 16166 out of 208 359 municipal workers nationally supported the strike.⁹⁰ The strike failed for lack of support.⁹¹

The study suggests that all the members of the union will have to be balloted prior to the strike, and they will have to be balloted again after two or three weeks unless the strike has ended. Balloting members every two or three weeks after the original ballot will help to establish if the appetite for workers to actually go on or continue with the strike still exist.

However, the inclusion of a ballot requirement as one of the requirements for a protected strike could hamper the negotiations process, and drags the process over a period of time. Such delay could, however, have good results because in the process, strikers can change their minds about the proposal to go on strike or the employer can change its mind about the demands of the employees. So, it seems that this may be

⁸⁹ Rycroft A ‘Strikes and Amendments to the LRA’ (2015) 36 *ILJ* 1 at 7.

⁹⁰ Jacobs M *What contributed to the failure of 2011 municipal strike?* LLM dissertation University of Cape Town (2013) at 42-43.

⁹¹ *Ibid.*

viewed as both an advantage and a disadvantage depending on who is considering the issue.

5.2 The barring of 'non-registered' members of a union from taking part in a picket

The current LRA makes provision for a registered trade union to authorise a picket by its 'members' and 'supporters'.⁹² The words 'supporters' casts the net wide, because any person may claim to be a 'supporter' including people with ulterior motives. This often includes persons who have different aims than those of the members of the trade union, which is to resolve a dispute between the union and employer. It is thus obvious that not all 'supporters' necessarily have an interest in the matter between the employer and employees.

If section 69 of the LRA is amended to exclude 'supporters' from persons who are authorised to picket, the assumption will be created that unlawful acts are committed by one or more of the members of the union that authorised the picket. This assumption will exist until the contrary is proved. If there is no proof to the effect that the persons who committed the unlawful acts were not members of the union that called the industrial action, unions will then be statutorily obliged to ensure that no persons other than their members take part in the picket. This could prevent denials by unions that it was not their members that committed unlawful acts as they will now have the obligation to monitor who participates in the action. In fact, the union owes the public a duty in terms of section 17 of the Constitution to provide a peaceful picket.

Should non-members of the union endeavour to participate in or join the picket, the union will have to refuse them access to the action. One of the ways of refusing non-members access to a picket would be to take a register of persons present in the picket. If this process can ensure that *only* members of the convening union participate in the picket, although it might still be difficult, the union will not be able to use the defence that the alleged wrongdoer is not a member of the union.

⁹² Section 69(1) of the LRA.

It is hoped that such amendment would be welcomed by unions as one of the measures to clear their names from being associated with unlawful activities committed by persons who are 'not its members'. It is likely that a union will probably not allow a situation to develop where non-union members could damage its reputation by committing acts of violence. Unions will want to guard against damage to its name and reputation by persons who are not its members. Unions will have to educate their members and train marshals on how to control large crowds, prevent non-union members and criminals from infiltrating activities of the unions.

5.3 Empowering the Labour Court to stop violent industrial action

The only court recognised to deal with labour related matters in the Republic is the Labour Court.⁹³ Currently, the Labour Court only act once approached by an affected person.⁹⁴ Courts in the Republic do not have the inherent right to adjudicate or stop industrial action or to interfere in any other manner unless an affected person makes an application to court and such person having an interest in the matter or right that has been or is about to be affected.⁹⁵

In Australia, the FWC is empowered to issue an order to suspend or prevent industrial action that is 'happening, or is threatening, impending or probable' in the course of industrial dispute.⁹⁶ Moreover, the powers of the FWC are wider in that they also include the termination of industrial action on the ground of 'significant harm' or if it has a potential to cause injury to a third person.⁹⁷

Due to a number of violent strikes in the Republic, it might be a positive development in the area of labour relations if the Labour Court is given more powers to enable it to deal with strike related violence. These powers should include the power to declare industrial action unprotected, suspend or termination of an industrial action that threatens the lives of the people or causes public violence. Other authors support this view. Cheadle, Le Roux and Thompson have argued that:

⁹³ Section 157(1) of the LRA.

⁹⁴ Section 69(12) of the Labour Relations Amendment Act.

⁹⁵ See section 38 of the Constitution.

⁹⁶ See section 423 of the FW Act as Amended by the Fair Works Act of 2012.

⁹⁷ *Forestry Mining and Energy Union (CFMEU) v Woodside Burrup (Pty) Ltd* (note 311, chapter 6).

“Violence in private sector labour relations has reached new post-1994 heights. Here too there is a need to introduce procedural obligations that go beyond pro- formal picketing rules. And a case can be made for the right to industrial action to be open to suspension by the Labour Court if that action is accompanied by egregious conduct.”⁹⁸

If South Africa adopts preventative measures, as is the case in Australia, the LRA will need to be amended to include a provision that empowers the Labour Court to take proactive steps to suspend or terminate industrial action that, in the eyes of the court, threatens life or will cause damage to property.⁹⁹ The criteria that the court could use to determine whether to suspend or terminate industrial action, should include the degree of violence and intimidation, the extent of the damage to property and the seriousness of the threats on the lives of people that is occurring during the action. This would be the case where industrial action is no longer functional to collective bargaining.¹⁰⁰

If the courts are given the power to suspend or terminate industrial action, the study submits that such conduct need not be seen as anti-unions but as means to address violent strikes. It is believed that unions would be given a chance to counter-argue a move to suspend their action and convince the court why their action should not be suspended. If the court decides to suspend industrial action and during suspension the court is of the view that allowing the strike to resume again will further deteriorate the relationship between striking workers and members of the public and/or the employer, the court should be given the power to terminate such action.

⁹⁸ Business Day 15 November 2011.

⁹⁹ The court hinted that this might happen in the case of *Tsogo Sun Casino (Pty) Ltd t/a Montecasino v Future of South Africa Workers Union and others* (note 94, chapter 3). However, this need to be formalised.

¹⁰⁰ See *National Union of Mineworkers & others v Free State Consolidated Gold Mines (Operations) Ltd – President Steyn Mine; President Brand Mine; Freddie Mine* (note 111, chapter 5) 1 SA 422 (A) at 438B.

5.4 The introduction of interest arbitration into the bargaining system

To address the issue of lengthy strikes in South Africa, the study proposes that an interest arbitration clause should be introduced into our labour law. Interest arbitration is part of the arbitration process aimed at resolving issues between parties. It is a voluntary process which means that the parties must agree to refer the matter for an arbitration process.

If the interest arbitration clause is introduced into our law and made one of the solutions to resolve protracted strikes, the parties will be compelled to resolve their dispute at an arbitration process.¹⁰¹ The interest arbitrator will be given the power to issue an arbitration award which will be binding on the parties. The decision of the arbitrator in normal arbitration proceedings is final with a status of a court order. The same effect would apply to interest arbitration orders. Any person who disregards the arbitration award will be charged with contempt in the same way that a person is charged for failure to obey a court order.

In Canada, if a strike continues for an unreasonable long period of time without a settlement, and where it is clear that the economy of the country is going to be affected, the public safety and/or health will be compromised, the Canadian Labour Code confers certain powers on elected officials to intervene.¹⁰² The Minister of Labour appoints an arbitrator in terms of legislation.¹⁰³ The Minister has a discretion to refer the matter regarding the maintenance of industrial peace to either the Canadian Industrial Relations Board or direct the Board to do what he or she deems necessary as authorised by the Canadian Labour Code.¹⁰⁴

Borrowing from Canada the application of interest arbitration, South Africa will have to amend the LRA to include such a provision. Having an interest arbitration made into

¹⁰¹ Section 1 of the Arbitration Act 42 of 1965 defines arbitration as a 'written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether the arbitrator is named or designated therein or not.'

¹⁰² Section 80 of the Canadian Labour Code.

¹⁰³ *Idem* section 107.

¹⁰⁴ *Ibid.*

law in the Republic, will open avenues for government to intervene in protracted strikes or conduct in contemplation or furtherance of a strike where it is clear that there is no immediate solution for ending the strike. This will also assist in reducing the number of protracted strikes and the negative impact that these strikes have on the economy. The effect of a strike or industrial action on the economy and the impact on the public safety and health will be the criteria for government to intervene.¹⁰⁵

5.4.1 Challenges to interest arbitration

The introduction of interest arbitration in our labour law will not be an easy task as it will face some challenges. The first challenge is its compatibility with the Constitution. The fact that the introduction of interest arbitration will have the effect of bringing a strike or industrial action to an end has constitutional implications. The Constitutional Court has confirmed this in *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board*¹⁰⁶ when it ruled that it is not for the courts to restrict the scope of collective bargaining tactics which are legitimately robust.¹⁰⁷

The question is whether the introduction and implementation of interest arbitration would be constitutional. The study argues that the answer to this question will be found in section 36 of the Constitution. To force the parties to abandon their right to strike for arbitration will require proper justification in terms of section 36(1). Section 36(1) provides that 'any limitation of the right in the Bill of Rights must be in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.' In addition, certain factors need to be taken into account to ensure that the limitation of the right to strike serves a legitimate purpose, for example eradication of violence during industrial action.¹⁰⁸

¹⁰⁵ See the statement made by the Deputy Minister of Labour, Phathekile Holomisa, in his address to the 27th Annual Labour Law Conference held in Sandton Convention Centre (Johannesburg) 5-7 August 2014.

¹⁰⁶ *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board* (2014) 3 SA 544 (CC).

¹⁰⁷ At 598G-599D. See also Rycroft A 'Insubordination and Legitimate Trade Union Activity' (2014) 35 *ILJ* 2689 at 2695.

¹⁰⁸ See Chapter 3 above.

Secondly, the implementation of the interest arbitration will be contrary to the ILO recommendations. The ILO provides that where compulsory arbitration prevents strike action, it is contrary to the right of trade unions to freely organise their activities and could only be justified in the public or in essential services.¹⁰⁹

Thirdly, the parties to the dispute will be reluctant to make reasonable attempts to resolve the dispute and leave it to the third party (arbitrator) to resolve the dispute for them. The parties will take extreme positions without any compromises to meet each other under the hope that the arbitrator will come up with a settlement. The disadvantage of relying on a third party will thus affect the ability of the parties to negotiate productively and improved their negotiating skills. This will also have the possibility of prolonging the strike rather than shortening it as it will take time to get an arbitrator with the required skills.

Lastly, the issue of lengthy strikes is problematic as it is not clear what would constitute a 'lengthy' strike. There is no prescribed maximum period for a strike.¹¹⁰ It is hoped that if interest arbitration is made into law, this will be clearly stated. For example, a strike that has been going on for more than three weeks will be regarded as a lengthy strike and entitle the relevant bodies to intervene. In the absence of a clear provision to this effect, employers could therefore, potentially approach the Labour Court prematurely.

The author advocates that the introduction of interest arbitration will, in the long run, not only serve the interest of the business or the employer as well as the economy, but will also save the employees from the negative impact that often result from a protracted strike, like the possibility of retrenchments.¹¹¹

¹⁰⁹ *ILO Digest* (1996) paras 518-521.

¹¹⁰ Budeli 'The Impact of the Amendments on Unions and Collective bargaining' (note 419, chapter 7).

¹¹¹ See section 67(5) of the LRA.

6 JUSTIFYING THE LIMITATION OF RIGHTS

In the previous chapters, the author argued that the right to strike or picket may be exercised provided this does not go beyond certain limitations. It has been argued that the right to participate in a strike or conduct in contemplation or in furtherance of a strike are not absolute as they may be limited by the LRA,¹¹² RGA¹¹³ and common law doctrine of vicarious liability.¹¹⁴ In addition, the author proposes certain amendments to the LRA which may potentially limit these rights. These are the introduction of a ballot requirement, interest arbitration, and limiting the right to picket to registered members of the union only.

The question that arises is whether the limitation of these fundamental rights of workers is justifiable. The answer to this question is found in section 36(1) of the Constitution.¹¹⁵ Section 36(1) requires that a right in the Bill of Rights may only be limited in terms of the 'law of general application'. Examples of law recognized in the Republic include the common law, legislation, customary law, court decisions and international law.¹¹⁶ It is now common knowledge that an Act of Parliament like the LRA and RGA are examples of 'law of general application' because they come from the law making body.¹¹⁷ In addition, these apply uniformly and impersonally to all employees including applicants for employment, unions, employers and employers organisation.¹¹⁸

To justify the limitation of a right in the Bill of Rights, it must be proved that the limitation serves a particular purpose that is legitimate. A legitimate purpose would be the one that promotes or contributes to an open and democratic society based on human dignity equality and freedom.¹¹⁹ A limitation that serves no purpose will not comply with the spirit of reasonable and just society and will, therefore, be unreasonable and

¹¹² Chapter 5.

¹¹³ Chapter 4.

¹¹⁴ Chapter 7.

¹¹⁵ Chapter 3.

¹¹⁶ Chapter 2.

¹¹⁷ Section 43(a) of the Constitution.

¹¹⁸ Van Niekerk A 'Marikana: The perspective of the Labour Court' (2012) *SASLAW National Conference*.

¹¹⁹ Section 1 of the Constitution.

unjustifiable.¹²⁰ In *SATAWU v Garvas* it was held that the purpose imposed by section 11 of the RGA served to protect members of society, including those who do not have the resources or capability to identify and pursue the perpetrators of riot damage to which they seek compensation.¹²¹

In most cases a purpose is legitimate if it is sourced in law, for example, a peaceful picket is sourced from the Constitution.¹²² One of the purposes of the Constitution is to 'establish a society based on democratic values, social justice and fundamental human rights.'¹²³ To have someone held liable for the damage caused is in line with the rules of fairness as the labour laws are founded on the principles of fairness and justice.

The purpose of the limiting measure or provision or conduct should be to force compliance with an obligation laid down in the Constitution or is closely connected to the fulfilment of a right in the Bill of Rights.¹²⁴ The LRA also compliment the Constitution when it states that its purpose is to 'achieve social justice, labour peace and democratisation of the workplace.'¹²⁵

To allow violent industrial action to continue will be contrary to the goals of the Constitution¹²⁶ and the LRA.¹²⁷ In fact, there are more advantages associated with the limitation of the right to participate in violent industrial action than to let the action to continue to cause more damage and loss of lives as it has been seen when violent strikes erupts.¹²⁸ To limit the right to participate in industrial action where it turns violent or poses danger to society will serve to preserve peace which is essential in this country bearing in mind the history of violence and its resultant damage and cost to

¹²⁰ See in this regard *Richter v Minister of Home Affairs* (2009) 3 SA 615 (CC) at 640F. See also *Centre for Child Law v Minister for Justice and Constitutional Development* (2009) 6 SA 632 (CC) at 651B-C.

¹²¹ *SATAWU v Garvas* (WCC)(note 46) at 1612B.

¹²² Section 17 of the Constitution.

¹²³ See Preamble to the Constitution.

¹²⁴ See for example, *South African National Defence Union v Minister of Defence* (note 79, chapter 3) at 479B-F where the aim with limitation of the right was to comply with section 200(1) of the Constitution which provides that the South African National Defence Force must be structured and managed as a disciplined military force.

¹²⁵ Section 1 of the LRA.

¹²⁶ See the Preamble to the Constitution.

¹²⁷ See section 1 of the LRA.

¹²⁸ See Chapter 5 above.

society and victims. It will also help to protect the interest of people who might be affected by violent industrial action.

Holding unions and their members liable will be legitimate as it will be sourced or authorised in terms of the common law, RGA and the LRA. To have someone responsible for the conduct of union members will pave the way for compensation to victims ensuring that social justice prevails in society.

Lastly, it will help to warn other transgressors of the law who may hide behind the veil of collective action that someone or certain people could be held liable even if the unlawful act was committed during industrial action.

7 CONCLUSION

The study has proposed various methods of holding unions and members liable for damage caused during violent strikes. The LRA provides remedies for damage caused by unprotected strikes or conduct in contemplation or in furtherance of a strike. These remedies include interdict, just and equitable compensation and dismissal for the misbehaviour during a strike.¹²⁹

To be eligible for one of these remedies, the plaintiff will have to convince the court or whoever is making a ruling that he or she suffered loss and such loss is attributed to the industrial action called by the union that he or she wants to hold liable. This is a condition in terms of section 68(1) of the LRA.

The plaintiff can also rely on vicarious liability as developed by courts in Canada and argue that the same applies in the Republic.¹³⁰ Holding a union liable on the basis of vicarious liability has not yet been made law in the Republic. However, there is nothing that prevents the courts from developing this common law doctrine to hold union liable if policy consideration justifies such move and if it is in the interest of justice to do so.

¹²⁹ Section 68(1) of the LRA.

¹³⁰ Section 39(1)(c) of the Constitution.

The RGA also creates room for the liability of a trade union together with its members.¹³¹ This has happened in the case of *SATAWU v Garvas*.¹³² The Court held that the union must foresee the possibility of damage taking place and take steps to alleviate such damage. This is the duty of a union in terms of section 17 of the Constitution. A failure to take such steps should render the union and its members liable for the damage caused.

¹³¹ Section 11(1) of the RGA.

¹³² (2012) 33 *ILJ* 1591 (CC).

CHAPTER 9

SYNOPSIS

The industrial relations' environment in South Africa is negatively affected by strikes which are not only violent but take a long period of time to get resolved.¹ This must, however, be seen in context: the use of violence by people to express their concerns have a long history in the Republic. Violence was a feature of the South African society during the period that led up to the birth of democracy in 1994. It played an important role in overthrowing a government which was characterised by racial discrimination and which committed other atrocities in the name of apartheid. Now that liberation has been achieved, with the rule of law prevailing to guard against transgressions of the law,² the need to use violence to fight industrial disputes should become a thing of the past.

The attainment of democracy and the adoption of the Constitution of the Republic of South Africa in 1996 ushered in a new era in the area of labour law and labour relations. The Bill of Rights in the Constitution entrenched the rights of workers to form or join unions of their choice and the right to participate in activities of the union.³ The Constitution further provides workers with the right to strike⁴ and to picket.⁵ The right to strike and other associated rights such the right to picket are further given details by the LRA.⁶

The LRA makes a distinction between a protected and unprotected strike. A strike is protected if there is compliance with the procedure laid down in sections 64(1) and 65(1) of the LRA. The LRA requires that when a union and its members want to convene a strike, they must comply with certain requirements so that their action will enjoy protection. The trade union and its members enjoy immunity from civil action

¹ An example of the longest strike in the Republic since the dawn of democracy in 1994 is the one that took place across all big Platinum producers such as Anglo Platinum, Lonmin, and Impala Platinum. The strike lasted for almost five months.

² The rule of law is one of the founding values in section 1 of the Constitution.

³ Section 23(2)(b) and (c) of the of the Constitution.

⁴ Ibid.

⁵ Section 17 of the Constitution.

⁶ See sections 64(1) and 69(1) of the LRA.

that may be instated against workers on strike.⁷ All the other conduct in contemplation or in furtherance of the strike will be protected if the strike is protected. It, therefore, seems that a protected strike is a foundation for all the other rights that tends to add pressure on the employer such as picket.⁸

The problem arises when the trade union fail to comply with the requirements for a protected strike rendering their strike unprotected. Workers who participate in a strike that is not protected do not enjoy immunity in same way as participants would in a protected strike.⁹

Even if their action is protected, workers tend to exercise these rights beyond legal limits and commit damage to property or cause injury to people.¹⁰ The study acknowledges that this practice is now a common feature of many industrial actions in the Republic.¹¹ Whenever there is a dispute between a union and employer, the possibility exists that violence will erupt. There have been several instances where strikers have caused violence during industrial action with the consequence that people get injured or sometimes killed, damage to property takes place, stoning and torching of vehicles including trains.¹²

It investigates the causes of violent conduct during industrial action. The study states that the bargaining system in the country causes strikes to take long causing frustration to strikers and consequently create a fertile environment for the eruption of violence. The absence of interest arbitration to stop industrial action that has taken long to get resolved is one such problem. In addition, the inclusion of 'supporters' during picket action is also an issue since not all supporters come to support the picket in good faith. The fear that the employer will continue with its production and making of profit as normal without feeling the economic harm that the employees want to inflict, also causes friction between striking and non-striking employees. This will probably happen where industrial action enjoys little support or if employers use replacement

⁷ Section 67(6) of the LRA.

⁸ Section 69(1) of the LRA.

⁹ Section 68(1) of the LRA.

¹⁰ Chapter 5.

¹¹ Chapters 1 and 5.

¹² Chapter 4.

labour during industrial action. The lack of a ballot requirement prior to a strike to determine the level of support for industrial action also adds to the problem of violence. Rycroft argues that the lack of a ballot requirement would not have made a difference but he is not against its inclusion in the LRA.¹³

The author also investigates existing legal principles to determine whether it can adequately solve the problem of violent industrial action. It comes to the conclusion that there are remedies available to victims in terms of the LRA,¹⁴ the RGA¹⁵ and the common law doctrine of vicarious liability if the latter can be extended beyond its current application.¹⁶

In terms of the LRA, the union and its members will be liable for damage attributable to a strike or conduct in contemplation or in furtherance of a strike. An interdict can be used to prohibit violent industrial action that is threatening an existing right or interest.¹⁷ Although interdicts are not honoured by unions and their members, unions need to be reminded that interdicts are court orders, a failure to obey an interdict is a total disregard of the rule of law which is a founding value in the Constitution.¹⁸ The Labour Court needs to seriously look into the issue of contempt of court orders as is the case with Botswana. A union and its members should be prosecuted for being in contempt of court and fined if found guilty. In *Pikitup Johannesburg (Pty) Ltd (Pikitup) v South African Municipal Workers Union (SAMWU) & others*,¹⁹ an interdict prohibiting unprotected strike by members of the union employed by Pikitup was issued by the Labour Court which was ignored by the union and employees. The Labour Court fined SAMWU an amount of R80 000 suspended for 24 months on condition that the union was not found guilty of contempt of any Labour Court order. The general secretary of the union was also found guilty of contempt of court and fined R10 000 suspended for a period of 24 months on the same conditions as his union.

¹³ Rycroft 'Strikes and Amendments to the LRA' (note 44, chapter 1).

¹⁴ See Chapter 4 above.

¹⁵ See Chapter 5 above.

¹⁶ See Chapter 7 above.

¹⁷ Section 68(1)(a) of the LRA.

¹⁸ Section 1 of the Constitution.

¹⁹ (2016) 37 *ILJ* 1710 (LC).

The LRA also gives an affected person the right to claim compensation.²⁰ The court may not award the affected person the full amount that is equivalent to the loss he or she has suffered but the court award what it considers to be a 'just and equitable compensation'.²¹ It could also be a problem if a union is found guilty and liable for the payment of large sums of money as damages or compensation as they may not have such amounts at their disposal. In arriving at what is just and equitable, the court takes into account various factors such as attempts the union made to comply with the Act, whether the strike was in response to unjustified conduct by another party to the dispute; and whether the strike was premeditated.²² After considering these and other factors the court will award an order that it considers just and equitable.²³

The trade union could also be held liable in terms of the RGA if the conduct of strikers takes place in a public place. The RGA holds anyone liable together with accomplices for any misconduct that takes place in a public place.²⁴ Before holding the union and its members liable for misconduct committed, their conduct must qualify as gathering in terms of section 1 of the RGA. In *SATAWU v Garvas*,²⁵ the union was held liable in terms of section 11(1) of the RGA for damage caused to members of the public during a protest march in Cape. However, in the case of *Mahlangu v SATAWU*, the court refused a claim for damage against SATAWU for injuries sustained by plaintiff after she was assaulted by members of SATAWU on their way to a protest march in Johannesburg.

Depending on the facts of each case, the RGA should apply to violent strikes that take place in public places and where participants are more than fifteen.²⁶ The law should put off all stops in dealing with the issue of violent industrial action as this have a negative effect on the economy.

The study recommends that the common law principle of vicarious liability must be extended to hold the convening union liable for the damage caused to others by its

²⁰ Section 68(1)(b) of the LRA.

²¹ *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (note 61, chapter 5) at 2041D-E.

²² Section 68(1)(b) of the LRA.

²³ *Algoa Bus Company v SATAWU and others* (2015) 36 ILJ 2292 (LC).

²⁴ Section 11(1) of the RGA.

²⁵ (2012) 33 ILJ 1593 (CC).

²⁶ Section 1(iv) of the RGA.

members during industrial action. Since vicarious liability is not an established rule, policy considerations of fairness and justice should favour the extension of vicarious liability to a trade union member relationship. The fact that victims of industrial violence are left with no one to hold liable after damage to their property during strikes is a social issue that needs relevant stakeholders to address. This will entail a need to establish a clear ground for holding perpetrators liable and there will be none other than vicarious liability.

The author recommends that when claims for damages resulting from industrial violence are referred to the Labour Court on the ground of vicarious liability, the latter could develop the common law in line with the objects, purport and spirit of the Bill of Rights, to hold unions vicariously liable for the damage caused by the conduct of their members during industrial action. In developing the common law, the court will take into account foreign law, for example in Canada unions are held vicariously liable for the conduct of their members.²⁷

If the application of vicarious liability is broadened to cater for other relationships, such as the trade union-member relationship under discussion, justice will be served as the victims of violent conduct will be able to hold unions accountable for the damage they suffered. Victims of industrial violence will know exactly who to hold liable for the conduct of strikers and picketers a situation which is not clear currently.

The ultimate aim of holding someone liable for the conduct of strikers or picketers is to afford victims a sound legal basis to claim compensation for the damage caused. If unions are held liable, I submit that industrial action will likely to be peaceful resulting to a peaceful environment for the negotiation of terms and conditions of employment. This will serve as deterrent to unions and their members as they will be active to take every step to prevent industrial action from degenerating into violence. Such an environment is one that is free of violence, intimidation and death threats or actual deaths. The author also submits that if industrial action is peaceful, the value of strike as a method of expression will be restored and the issue of liability is less likely to

²⁷ Chapter 7.

arise, as there is less possibility of damage occurring. Thus, the need to hold someone accountable might cease to exist in time.

The unions must endeavour to engage in peaceful industrial action. A peaceful industrial action will be achieved if unions perform their obligation to educate their members on the consequences of committing unlawful acts during industrial action and take appropriate steps to stop violent industrial action. A mere taking of steps to prevent damage from taking place without stopping the unlawful conduct will not be sufficient to exempt the union from liability as was suggested in *Xstrata South Africa v AMCU and others*.²⁸ In this case the court held that the union can do what it can to prevent the commission of unlawful acts during a strike. If a union fails to discharge these obligations with a resultant damage to property, it is suggested that the union should nonetheless be held liable as it has failed to discharge its duty of providing a peaceful action in terms of section 17 of the Constitution.

Even though strikes and actions in support of a strike may cause disruptions, the study submits that these collective actions cannot be totally prohibited as they remain a cornerstone of the collective bargaining system in South Africa. The right to strike, picket and protest are entrenched in the Constitution. These rights remain the legitimate means by which workers can express themselves on issues that affect them in the workplace.²⁹ A strike or conduct in contemplation or furtherance of a strike that is characterised by violence and unruly conduct are detrimental to the legal foundations upon which labour relations in the country are based. Such strikes are not functional to collective bargaining and should lose their protected status and should be dealt with as unprotected strikes.³⁰

In applying these proposed legal remedies, the study acknowledges that the rights of workers may be limited. It further submits that such limitation could be justified in terms of section 36(1) of the Constitution. The reason for this conclusion is that there are more advantages that may result from the limitation of these rights than having a

²⁸ *Xstrata South Africa v Association of Mineworkers and Construction Union and others* (Case No J1239/13).

²⁹ See *SATAWU v Garvas* (2012) 33 ILJ 1593 (CC) at 1610G.

³⁰ Chapter 4.

situation where workers are allowed to continue causing more damage to property and injury to people and only be proud that they are exercising their rights entrenched in the Bill of Rights. The limitation of these rights will pass the constitutional test in the limitation clause as it serves a legitimate purpose of preserving peace in the Republic. The victims will also have someone to hold liable for damage caused to him or her which is in line with the principles of fairness.

It is time for trade unions to accept responsibility for their actions or lack thereof.

"It is not only for what we do that we are held responsible, but also for what we do not do."³¹

³¹ Words of Jean-Baptiste Poquelin (known by his stage name Molière). Accessed at <https://en.wikipedia.org/wiki/Molière> on 17/07/2016.

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