DOES THE LABOUR RELATIONS ACT UNJUSTIFIABLY LIMIT THE CONSTITUTIONAL RIGHT OF EMPLOYEES TO FREEDOM OF ASSEMBLY? EXAMINING THE CONSTITUTIONALITY OF THE PROHIBITION ON PURELY POLITICAL PROTEST ACTION AND GATHERINGS BY OFF-DUTY EMPLOYEES OVER DISPUTES OF MUTUAL INTEREST

BY GEOFFREY CHARLES ALLSOP

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SUPERVISOR

DR EMMA FERGUS: SENIOR LECTURER, FACULTY OF LAW, DEPARTMENT OF COMMERCIAL LAW, UNIVERSITY OF CAPE TOWN

CO-SUPERVISOR

ASSOCIATE PROFESSOR DEBBIE COLLIER, FACULTY OF LAW, DEPARTMENT OF COMMERCIAL LAW, UNIVERSITY OF CAPE TOWN.

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NAME GEOFFREY CHARLES ALLSOP

STUDENT NO ALLGEO007

PEOPLESOFT NO 1397269

DATE 15 July 2019

SIGNED Signed by candidate

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ABSTRACT

This thesis examines whether the Labour Relations Act 66 of 1995 ('LRA') justifiably limits the constitutional right to employees to freedom of assembly in accordance with s36(1) of the Constitution of the Republic of South Africa, 1996 ('the Constitution'). This question is considered in two broad parts.

The first part demonstrates two limitations. First, the inability of s77 of the LRA to provide legislative protection to employees who wish to embark on socio-economic protest action over a purely political issue. Second, the LRA's prohibition on off-duty employees utilising the Regulation of Gatherings Act 205 of 1993 ('RGA') to demonstrate against their employer over a dispute of mutual interest. While no court has yet considered if the LRA prohibits purely political protest action, the Labour Appeal Court in *ADT Security v NASUWU* 2015 (36) ILJ 152 (LAC) (*'ADT Security'*) held that is unlawful for off-duty employees to demonstrate over a dispute of mutual interest under the RGA. The first part begins by establishing how the LRA's statutory definition of protest action cannot, in its current form, protect purely political protest and how this limits the constitutional right of employees to free assembly. Similarly, it explains how *ADT Security* clearly establishes that the LRA limits the constitutional right of employees to freedom of assembly by infringing their constitutional right to assemble and demonstrate in compliance with the RGA.

The second part tests both limitations against s36(1) of the Constitution, the limitation clause, to assess if either infringement justifiably limits the constitutional right of employees to freedom of assembly, enshrined in s17 of the Bill of Rights. Considering the factors in s36(1)(a)-(e) of the Constitution, and other relevant factors, it examines if the purpose and reasons for either limitation are sufficiently compelling so as to be reasonable and justifiable. It concludes by arguing both limitations unjustifiably limit the constitutional right of employees to free assembly. Two recommendations are made. First, that the LRA be amended to expressly permit employees to demonstrate over disputes of mutual interest, in compliance with the RGA, in certain circumstances. Second, that the LRA be amended to expressly permit purely political protest action, provided the protest action is limited in scope and duration and subject to oversight by the Labour Court.

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LIST OF ABBREVIATIONS

AMCU	Association of Mineworkers and Construction Union
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CEAR	ILO Committee of Experts
CFA	ILO Committee on Freedom of Association
COSATU	Congress of South African Trade Unions
Digest	CFA Digest on Freedom of Association
FAWU	Food and Allied Workers Union
HC	High Court
IC	Industrial Court
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
NASUWU	National Security and Unqualified Workers Union
NEHAWU	National Health Education and Allied Workers Union
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
PAJA	Promotion of Administrative Justice Act 3 of 2000
RGA	Regulation of Gatherings Act 205 of 1993
SATAWU	South African Transport and Allied Workers Union
SCA	Supreme Court of Appeal

CHAPTER ONE

INTRODUCTION

1.1. BACKGROUND

Section 17 of the Constitution[1] protects the right of workers[2] to demonstrate, assemble and picket peacefully and unarmed.[3] One implication of enshrining freedom of assembly as a justiciable fundamental right, in a supreme Constitution,[4] is that any law which infringes ('or limits')[5] its exercise will be legally valid only if the infringement complies with the 'general limitation clause',[6] contained in s36(1) of the Constitution.[7]

Because constitutional rights are often framed in broad terms, their content is - for the most part and generally speaking - primarily given effect to through legislation enacted by the legislative branch of government.[8] The Regulation of Gatherings Act[9] ('RGA') is the principal statute that purports to give effect to s17 of the Bill of Rights in practice.[10] However, in the labour sphere, the Labour Relations Act[11] ('LRA'), which principally gives effect to the

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[1] Constitution of the Republic of South Africa, 1996. Hereafter, referred to as 'the Constitution'.

[2] The phrase 'worker' and 'employee' is used interchangeably throughout this thesis. On the meaning of 'worker', as used in s23 of the Constitution, see *SANDU v Minister of Defence* 1999 (4) SA 469 (CC) para 19-22.

[3] Hereafter referred to as 'freedom of assembly'.

[4] Section 2 of the Constitution. For an overview of constitutional supremacy and the Bill of Rights, see E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 and Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) 11:34.

[5] Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (2013) at 151 explain "limitation" is a synonym for "infringement". I use similar terminology throughout this thesis.

[6] Ibid at 152 further explain that s36(1) is a general limitation clause because it provides that 'all rights are limitable, and all are limitable according to the same set of criteria'.

[7] Section 36(1) provides that a right may only be limited if it takes place in terms of a law of general application and is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom after considering all relevant factors. For a high-level summary see *Brummer v Minister of Social Development* 2009 (6) SA 323 (CC) para 59.

[8] See Halton Cheadle 'Constitutionalising the Right to Strike' in Bob Hepple, Silvana Sciarra & Rochelle Le Roux (eds) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2016) 51-52.

[9] Act 205 of 1993. Referred to hereafter as 'the RGA' throughout the thesis.

[10] See *Mlungwana v S* 2019 (1) BCLR 88 (CC) para 7.

[11] Act 66 of 1995. Referred to hereafter as 'the LRA' throughout the thesis.

labour rights in s23 of the Constitution,[12] equally gives effect to freedom of assembly by providing for protected 'socio-economic protest action'[13] and 'picketing'.[14] No court has yet examined if the LRA permits employees to protest in terms of s77 of the LRA over a 'purely political' issue. Most academics however hold the view that the LRA does not permit purely political protest action, also referred to as 'purely political strike action'.[15] In *ADT Security v NASUWU* however, the Labour Appeal Court ('LAC') interdicted off-duty employees from gathering under the RGA, over a dispute of mutual interest with their employer, despite the fact they fully complied with the RGA.[16] In doing so, the LAC implicitly concluded that the LRA limits the constitutional right of employees to exercise their constitutional right to demonstrate and assemble in compliance with the RGA.[17] Equally, for reasons I later demonstrate, the statutory definition of protest action does not encompass purely political protests hence limiting the right of employees to free assembly.

1.2. RESEARCH QUESTION

Against this background, I consider two questions. First, how, and to what extent, does the LRA limit the constitutional right of employees to free assembly?[18] Second, can either limitation be justified as a permissible infringement of s17 of the Bill of Rights according to the criteria contained in the general limitation clause in s36(1) of the Constitution?

1.3. THESIS STRUCTURE AND OUTLINE

The body of the thesis comprises five chapters. Chapter two discusses the constitutional framework. First, I outline the two-stage limitation analysis in

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[12] Section 1(a) of the LRA states that one of it's fundamental objects is 'to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution'. See further *NEHAWU v UCT* 2003 (3) SA 1 (CC) para 15.

[13] Section 77.

[14] Section 69.

[15] See Rehana Cassim 'The Legal Status of Political Protest Acton under the Labour Relations Act 66 of 1995' (2008) 29 *ILJ* 2359.

[16] *ADT Security (Pty) Ltd v NASUWU* 2015 (36) ILJ 152 (LAC).

[17] Emma Fergus 'Pickets, socio-economic protest action, gatherings and demonstrations' in Darcy du Toit (ed) *Strikes and the Law* (2017) 151.

[18] A further limitation one could consider is the fact that both s69(1) and s77(1) of the LRA state that only 'registered trade unions' can initiate protected picketing or protest action. Both limitations however fall beyond the scope of the thesis.

terms of s36(1) of the Constitution. Second, I discuss several principles of constitutional and statutory interpretation one must apply to determine if legislation limits a constitutional right. Finally, I discuss the content of the constitutional right to freedom of assembly and provide a normative account of what the right should protect, both generally and in the labour law sphere.

Chapter three considers how the LRA and RGA respectively regulate the constitutional right to freedom of assembly in practice. First, I discuss the historical origins and context of protest action by workers in South Africa. Second, I outline the substantive and procedural requirements for protected socio-economic protest action in terms of s77 of the LRA. Here, I illustrate why the statutory definition of 'protest action' in s213 of the LRA cannot protect purely political protest action and how this limits the constitutional right of employees to demonstrate and assemble. Third, I explain how the RGA regulates public assemblies and demonstrations generally and discuss how it imposes drastic restrictions upon the exercise this constitutional right.[19]

Chapter four unpacks and critically discusses *ADT Security*. It aims to achieve three things. First, to juxtapose the conflicting approaches and reasoning of the Labour Court ('LC') and LAC. Second, to consider the cogency of three arguments for why the LAC decision was wrongly decided. Third, to explain, while the LAC ruling stands, how the LRA limits the constitutional right of employees to protest in compliance with the RGA.

Chapter five undertakes a limitation analysis to determine if either limitation justifiably limits the constitutional right of employees to freedom of assembly. After considering the factors expressly outlined in s36(1)(a)-(e), other relevant considerations, as well as arguments both for and against a finding of constitutional invalidity, I conclude that both limitations unjustifiably limit the constitutional right of employees to freedom of assembly.

Chapter six summarises my conclusions and recommendations. First, that s210 of the LRA be amended to expressly permit off-duty employees to assemble and demonstrate in compliance with the RGA over disputes of

[19] As above, I do not consider if the RGA is constitutional or unconstitutional in this respect given that this is similarly beyond the scope of this thesis.

mutual interest in certain circumstances. Second, that the statutory definition of protest action in s213 of the LRA be amended to expressly permit purely political protest action, provided it is limited in scope and duration and subject to LC oversight.

CHAPTER TWO

THE CONSTITUTIONAL FRAMEWORK: OUTLINE OF THE TWO STAGE LIMITATION ANALYSIS AND THE CONSTITUTIONAL RIGHT TO FREEDOM OF ASSEMBLY

2.1. INTRODUCTION

All Bill of Rights, in some form, provides a mechanism whereby their guarantees may, in certain circumstances, be legitimately infringed by the state.[1] At least two primary justifications exist for giving the state this power. First, to ensure the unrestricted exercise of constitutional rights do not impermissibly infringe upon corresponding rights held by others.[2] Second, to allow the state, within boundaries, to reconcile the inevitable conflict that arises between the exercise and enjoyment of constitutional rights and competing societal interests.[3]

Section 36(1) of the South African Constitution, the general limitation clause, contains specific criteria against which the constitutionality of any limitation must be assessed. It attracts a distinct two stage enquiry[4] - an inevitable feature of any "general limitation clause".[5] First, whether the constitutional right is in fact limited by the impugned law.[6] Second, if yes, whether the limitation complies with the requirements of s36(1).[7] Legislation

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[1] Halton Cheadle 'Limitations' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2018) 30:2 who explains that 'if no mechanism is [expressly] provided in the Bill of Rights for doing so, the courts develop such mechanisms'.

[2] See *SATAWU v Garvis* 2013 (1) SA 83 (CC) para 53, *Hotz v UCT* 2017 (2) SA 485 (SCA) para 62-3; *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para 28.

[3] Cheadle op cit (n1). See further Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (2013) 150 who mention competing societal concerns such as 'public order, safety, health and democratic values'. I consider competing societal concerns relevant to the present discussion in chapter five where the justifiability of both limitations is considered.

[4] *Minister of Safety and Security: In Re S v Walters* 2002 (4) SA 613 (CC) para 26-27.

[5] See *S v Zuma* 1995 (4) BCLR 401 (CC) at 414 and *S v Makwanyane* 1995 (3) SA 391 (CC) at para 100. See further Stuart Woolman & Henk Botha 'Limitations' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 3 ed (2013) 34:6 who discuss Art 1 of the Canadian Charter of Rights and Freedoms, the limitation clause which s36(1) of the South African Constitution is principally based upon.

[6] *Zuma* ibid. I use the phrase "impugned law" and "challenged law" interchangeably.

[7] Ibid.

which limits a constitutional right is therefore not *per se* unconstitutional.[8] Rather, it is unconstitutional only if it cannot be justified as a permissible infringement according to the justifying criteria in s36(1) of the Constitution.[9]

In this chapter, I outline the two-stage limitation analysis within which both limitations the LRA imposes upon the constitutional right of employees to freedom of assembly must be assessed. My present intention is *not* to demonstrate how the LRA limits this constitutional right nor determine the constitutionality of the limitations in terms s36(1). Both questions are addressed in subsequent chapters.[10] Rather, my immediate aim is to outline the framework and principles the following chapters utilise to demonstrate both limitations and subsequently assess their constitutionality. First, I provide a high-level outline of the two-stage limitation analysis. Second, I discuss several principles of constitutional and statutory interpretation one must apply at the first stage of the limitation analysis to determine both the content of a constitutional right and whether it is limited by the challenged law. Third, I discuss the content of the constitutional right to freedom of assembly by canvassing the spheres of activity the right protects - but also should protect - both generally and in the labour law sphere.

2.2. THE TWO-STAGE LIMITATION ANALYSIS IN A NUTSHELL

As noted, the limitation analysis consists of two distinct stages.[11] For convenience, I refer to the first stage as the "threshold stage" and the second as the "justifiability stage".[12]

The threshold stage requires the applicant to establish that the challenged law limits a constitutional right.[13] If no limitation is established, the

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[8] See *Dawood v Minister of Home Affairs* 2000 (3) SA 936 para 40.

[9] *S v Mamabolo* 2001 (3) SA 409 (CC) para 72. Section s36(2) however does provide for a limited instance where constitutional rights can legitimately be limited outside the ambit of the general limitation clause. See *AZAPO v President RSA* 1996 (4) SA 672 (CC) para 10.

[10] Chapters three and four demonstrate both limitations. Chapter five then considers whether either limitation complies with the justifying criteria contained in s36(1) of the Constitution. See further the outline provided at 1.3 of chapter one.

[11] See *Zuma* supra (n5) where Kentridge AJ summarised the two-stage approach as follows: 'First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause'. See also *Coetzee v Government RSA* 1995 (4) SA 631 (CC) para 9.

[12] See *Walters* supra (n4) where Kriegler J used similar terminology to describe each stage.

[13] Ibid.

constitutional challenge is dismissed there and then.[14] Where a limitation is established, the justifiability stage ensues to determine if the limitation is constitutional by testing it against the justifying criteria contained in s36(1) of the Constitution.[15] If the limitation complies with s36(1), it passes constitutional muster.[16] If not, it must be declared unconstitutional in terms of s172(1)(a) of the Constitution to the extent it unjustifiably infringes that constitutional right.[17]

(a) Threshold stage

Primarily, this is an exercise in constitutional and statutory interpretation.[18] It requires the applicant to establish two things: (a) that the content of a constitutional right; is (b) limited by the meaning and effect of the challenged law.[19] Whilst both enquires are interrelated, they should be considered separately as they are, technically speaking, conceptually distinct.[20] This is because the first enquiry is an exercise in constitutional interpretation, requiring an analysis of the right's meaning to determine the sphere and type of activity it protects.[21] By contrast, the second enquiry is an exercise in statutory interpretation. It requires interpreting the provisions of the challenged law to determine whether their meaning and effect limits the constitutional right in question.[22] Hereafter, I refer to the first sub-enquiry as the "scope and content enquiry" and the second as the "infringement" or "limitation" enquiry.

Determining the content of a constitutional right, by way of constitutional

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[14] Ibid.

[15] Ibid.

[16] *Makwanyane* supra (n5) at para 104. While *Makwanyane* considered the limitation clause under s33(1) of the Interim Constitution Act 200 of 1993 ('the Interim Constitution'), the *Makwanyane* statement applies equally to s36(1) of the Final Constitution. See *National Coalition for Gay and Lesbian Equality* 1998 (12) BCLR 1517 (CC) para 33-35.

[17] Section 172(1)(a) enjoins every court with jurisdiction to decide constitutional matters within its power to declare law or conduct inconsistent the Constitution to be invalid to 'the extent of its inconsistency'. See *Dawood* supra (n8) at para 59.

[18] *Moise v Germiston City Council* 2001 (4) SA 491 (CC) para 5-6.

[19] *Walters* supra (n4). See 2.3(b)(i) below where this is discussed further.

[20] While these two-sub-enquiries are not always expressly articulated by the courts, Kriegler J in *Walters* ibid arguably found that the threshold stage involves two sub-enquiries. This is supported by Woolman & Botha op cit (n5) 34:4 and Pierre De Vos 'The Limitation of Rights' in Pierre de Vos & Warren Freedman *South African Constitutional Law in Context* (2013) 355.

[21] *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 79.

[22] *Walters* supra (n4).

interpretation, is an inherently value laden and normative exercise.[23] Inevitably, it requires courts to make a moral value judgement about the type and sphere of activity a right protects or, to put it differently, what it *should* protect.[24] The general principle articulated by the Constitutional Court ('CC') is that constitutional rights should be interpreted generously and purposively.[25] In several decisions, the CC has held the two-stage approach will often require interpreting the right broadly at the threshold stage, only to qualify its content at the justifiability stage, where the constitutionality (or justifiability) of any limitation is assessed.[26] In this sense, the two-stage approach significantly influences the interpretation of constitutional rights.[27] This broad interpretation, as adopted by the CC, will therefore, generally speaking, make it easier to establish a limitation at the threshold stage.[28] In this instance, most of the analysis will turn on whether the limitation complies with s36(1) at the justifiability stage of the analysis - not whether the right is actually infringed by the challenged law at the threshold stage.[29]

Once the content of the right is determined, the second part of the threshold stage, the infringement sub-enquiry, takes place. This requires interpreting the impugned law to determine if it limits the right.[30] However, all

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[23] *Zuma* supra (n5) at para 17 endorsed by Kriegler J in *Makwanyane* supra (n5) at para 207. See also Lourens du Plessis 'Interpretation' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* (2013) 32:47

[24] See *Matiaso v Commanding Officer, Port Elizabeth Prison* 1994 (3) SA 592 (SE) 5971B-598B and *Ferreira v Levin NO* 1996 (1) SA 984 (CC) at para 37.

[25] See *Makwanyane* supra (n5) at para 100 and *Viking Pony Pumps (Pty) Ltd v t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) para 32. I discuss what this generous and purposive approach requires at 2.3(a)(i) below.

[26] See *Zuma* supra (n5) at para 21 endorsed *Ferreira* supra (n29#4) at para 58. For a practical illustration see *De Reuck v Director of Public Prosecutions (Witwatersrand Local division)* 2004 (1) SA 406 (CC) at para 48 *in casu*, criminalising possession of child pornography limits the constitutional right to freedom of expression but is a justifiable limitation in terms of s36(1).

[27] See Cheadle op cit (n1) at 30:4, De Vos op cit (n20) at 357 and Kevin Iles 'A Fresh Look at Limitations: Unpacking Section 36' (2007) 28 *SAJHR* 70-71.

[28] *Zuma* supra (n5) at para 21. However, this is subject to 'reading down' and the rebuttable presumption of constitutionality discussed below at 2.3(b)(i).

[29] See De Vos op cit (n20) at 357. Some CC decisions adopt a 'notional approach' by simply assuming, without properly applying the threshold stage, that the right is limited, and then proceeding directly to the justifiability stage. See, for example, *Beinash v Ernst & Young* 1999 (2) SA 91 (CC) and *Christian Education SA v Minister of Education* 1999 (2) SA 83 (CC). This is rightly criticised by Woolman & Botha op cit (n5) at 34:17-34:18.

[30] *Walters* supra (n4).

law is rebuttably presumed to be compatible with the Bill of Rights.[31] In this sense, the court must first attempt to interpret the challenged law in a manner which does not limit the right, provided such an interpretation is 'reasonably possible', before considering any alternative interpretation which limits it.[32] I explain what this entails when the indirect application of the Bill of Rights is discussed below.[33]

(b) Justifiability stage

If the applicant establishes a limitation, the justifiability stage ensues. This requires applying s36(1) of the Constitution to determine if the reasons for, and the purpose of, the limitation is sufficiently compelling to condone infringing a constitutional right.[34] The onus to establish justification rests on the party seeking to uphold the limitation.[35] In other words, once a limitation is established, the onus shifts to the respondent to establish its constitutionality.[36]

Two threshold requirements are necessary, but not sufficent, for justifiability to be established. First, the limitation must be sourced in a 'law of general application'.[37] Broadly, this means the limitation must take place in terms of something recognised as 'law'.[38] In most cases, this requirement is met.[39] However, by way of illustration, a mere executive policy[40] or

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[31] See George Devenish 'The Theory and Methodology for Constitutional Interpretation in South Africa' 69 (2006) *THRHR* 238. On a rebuttable presumption of constitutionality generally see *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1984 (2) SA 778 (ZS) at 783A-D.

[32] *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) para 11. See *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security* 2010 (2) SA 181 (CC) at para 23 where Mokgoro J held that any constitutionally compliant interpretation cannot be 'far-fetched'.

[33] At 2.3(b)(i) below.

[34] Cheadle op cit (n1) at 30:8.

[35] *Minister of Home Affairs v NICRO* 2004 (5) BCLR 445 (CC) para 34 referring to *Moise* supra (n18) at para 19.

[36] In *Phillips v Director v of Public Prosecutions* 2003 (3) SA 345 (CC) at para 20, Yacoob J held that even if no attempt is made to justify the limitation, the court still has an obligation to consider, *mero motu* if necessary, whether the limitation is justifiable.

[37] Section 36(1) states 'the rights in the Bill of Rights may be limited *only in terms* of a law of general application' (emphasis added).

[38] De Vos op cit (n20). The most comprehensive examination of this requirement appears in the minority judgment of Mokgoro J in *President RSA v Hugo* 1997 (4) SA 1 (CC) para 104.

[39] Woolman & Botha op cit (n5) at 34:47.

[40] See *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) and *August v Electoral Commission* 1999 (3) SA 1 (CC) at para 23.

employment practice[41] which limits a constitutional right, cannot, for example, ever be justifiable as neither constitute a 'law of general application'.[42] Second, the limitation must strive to achieve a legitimate government purpose,[43] and a rational connection must exist between the limitation and any purpose it seeks to achieve.[44] Similar to the law of general application requirement, rationality is generally met in most, but not necessarily all, cases.[45] This is because rationality is a low threshold[46] and is met provided there is a rational connection between the limitation and any legitimate purpose it strives to achieve.[47]

If both threshold requirements are established, one can determine if the reasons for, and purpose of, the limitation is sufficiently compelling so as to be justifiable. Section 36(1) states that this is established when, after considering all relevant factors, the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[48]

Section 36(1)(a)-(e) mentions several relevant factors such as: the nature of the right; the purpose of the limitation; the relationship between the limitation and its purpose; the nature and extent of the limitation and whether less restrictive means exist to achieve it. These factors do not constitute a closed list.[49] Neither should they be applied mechanically.[50] Rather, all relevant factors must be weighed to determine whether a proportional balance is struck overall between: (a) the importance and purpose of the limitation; versus (b) the nature of the infringement, its severity and whether less restrictive means exist to achieve its purpose.[51] No universal standard exists

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[41] *Hoffmann v South African Airways* 2001 (1) SA I (CC) para 41.
[42] For a comprehensive discussion, see Woolman & Botha op cit (n5) at 34:47-34:67.
[43] *Magajane v North West Gambling Board* 2006 (5) SA 250 (CC) para 65.
[44] See *Holomisa v Holomisa* 2019 (2) BCLR 247 (CC) para 25 and *S v Jordan* 2002 (6) SA 642 (CC) para 15. On rationality generally, see *DA v President RSA* 2013 (1) SA 248 (CC) para 27.
[45] De Vos op cit (n20) at 371. See *Holomisa* ibid and *Print Media South Africa and Another v Minister of Home Affairs* 2012 (6) SA 443 (CC) para 81.
[46] See *DA v President RSA* supra (n44) at para 42.
[47] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49.
[48] *Makwanyane* supra (n5) at para 100.
[49] *Law Society of South Africa v Minister of Transport* 2011 (2) BCLR 150 (CC) para 37.
[50] See *S v Manamela* 2000 (3) SA 1 (CC) at para 32 endorsed in *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of SA* 2011 (3) SA 1 (CC) para 54.
[51] *S v Bhulwana* 1996 (1) SA 388 (CC) para 18. I discuss the concept of "proportionality" and the various factors mentioned in s36(1)(a)-(e) of the Constitution at 5.2 and 5.3 of chapter five.

to determine justifiability as each case necessarily depends upon on its own facts and circumstances.[52]

2.3. THRESHOLD STAGE: INTERPRETING THE CONSTITUTIONAL RIGHT AND THE CHALLENGED LAW

(a) Scope and content enquiry: protected ambit of the right

Section 39(1) of the Constitution provides three express instructions as to how the Bill of Rights must be interpreted. It reads:

> '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'

Section 39(1) however is not an exhaustive account of how to interpret the Bill of Rights.[53] Other relevant factors include: (a) the text of the right;[54] (b) its purpose;[55] (c) its history;[56] (d) its context;[57] and (e) its connection to other constitutional rights.[58] I explain, and apply, several of these factors at the end of this chapter where the content of the constitutional right to freedom of assembly is discussed.[59] First, I outline the general approach (or theory) of rights interpretation articulated by the CC in terms of s39(1)(a). Second, I consider the injunction to consider international law and the discretion to consider foreign law in terms of s39(1)(b) and (c) respectively.

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[52] *Makwanyane* supra (n5) at para 104. See however 5.2 of chapter five where I discuss various factors which may heighten the standard of justification on the respondent.

[53] Du Plessis op cit (n23) at 32:125. See also Currie & de Waal op cit (n3) at 135 who note that '…the instructions contained in s39, important as they may be, are themselves sufficiently abstract as to require a great deal of interpretation'.

[54] *Makwanyane* supra (n5) at para 9, *Daniels v Campbell NO* 2004 (5) SA 331 (CC).

[55] *Shabalala v Attorney General of the Traansvaal* 1996 (1) SA 725 (CC) para 26.

[56] *SAPS v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 29-34; *Garvis* supra (n2) at para 62-3.

[57] *Ferreira* supra (n24) at para 82.

[58] See *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC) para 27 and *SANDU v Minister of Defence* 1999 (4) SA 469 (CC) para 8.

[59] At 2.4(a) below. I also consider the relevance of some of these factors when applying s36(1) at the justifiability stage of the limitation analysis at 5.3 of chapter five.

(i) *General approach towards Bill of Rights interpretation*

Early CC decisions, partly relying upon s39(1)(a) and partly upon comparative constitutional law jurisprudence,[60] articulated the general principle that all constitutional rights should be interpreted both generously and purposively, within the framework of the values of the Constitution as a whole.[61]

This factor has two interconnected components. First, a generous interpretation requires courts to construe constitutional rights in a manner that seeks to maximise their enjoyment and minimise interference with them.[62] One logical consequence is that constitutional rights should not be interpreted narrowly by reading implicit limitations into them.[63] Furthermore, where legislation limits a right, that limitation should be narrowly construed to ensure it limits the right no more than is necessary to achieve its purpose.[64] Second, a purposive and value based interpretation requires identifying the underlying purpose of the right, and then interpreting it in a manner which gives effect both to its purpose and constitutional values.[65] This must be objectively determined within the context of the Constitution as a whole, ultimately entailing a value judgment as to what the right should (or should not) protect.[66]

(ii) *The role of international and foreign law*

The injunction in s39(1)(b) to 'consider international law' reflects the significant influence international human rights law had upon the Bill of Rights drafters.[67] The CC has interpreted this to considering both binding and non-binding

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[60] See the Privy Council decision of Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) 328-329 endorsed in both *Zuma* supra (n5) at para 14 and *S v Mhlungu* 1995 (3) SA 391 (CC) para 8. See also the significant reliance by the CC upon the Canadian Supreme Court decision in *R v Big M Drug Mart* 1985 18 DLR (4th) 321 at 395-396 cited in, amongst others, *Zuma* ibid; *Makwanyane* supra (n5) and *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 51.

[61] See JR de Ville *Constitutional and Statutory Interpretation* (2000) at 250-254.

[62] Curie & de Waal op cit (n3) at 138, Cheadle op cit (n1) at 34:14.

[63] *SATAWU v Moloto NO* 2012 (6) SA 249 (CC) para 72. See the discussion of *Business SA v COSATU* 1997 (5) BLLR 511 (LAC) at 3.1(b)(i) where the LAC arguably failed to adhere to this principle when interpreting the constitutional right to strike in s23(2)(c) of the Constitution.

[64] *TAWUSA obo Ngedle v Unitrans Fuel (Pty) Ltd* 2016 (37) ILJ 2485 (CC) para 52-53. See 2.3(b) below where "reading down" is considered.

[65] Currie & de Waal op cit (n3) at 137.

[66] *Makwanyane* supra (n5) at para 88. See also *Ex Parte Attorney General, Namibia: in re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC) 91D-F per Mahomed CJ.

[67] See John Dugard 'International Law and the Final Constitution' (1995) 11 *SAJHR* 241-2.

sources of relevant international law when interpreting the Bill of Rights.[68]

The CC has interpreted the phrase 'international law' broadly for the purposes of s39(1)(b) by holding that it includes not only customary international law,[69] as well as conventions and treaties,[70] but also: commentaries, recommendations and opinions by specialised bodies and tribunals such as the European Court of Human Rights[71] ('ECHR'), special rapporteurs of the United Nations[72] ('UN') as well as International Labour Organisation ('ILO') supervisory bodies such as the Committee on Freedom of Association[73] ('CFA') and Committee of Experts on the Application on Conventions and Recommendations[74] ('ILO Committee of Experts').[75] However, binding international law does enjoy greater weight as 'the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms international law.'[76]

The relative weight afforded to international law will differ on a case by case basis, as courts should be mindful of textual, and other differences, between the Bill of Rights and international law.[77] Furthermore, courts are only obliged to 'consider' international law which does not equate to an inflexible duty to interpret constitutional rights consistently with international law in every instance.[78] Thus, it is submitted that interpreting the Bill of Rights differently

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[68] See *Makwanyane* supra (n5) at para 35.
[69] Ibid.
[70] Ibid. See *Mlungwana v S* 2019 (1) SACR 429 (CC) para 58 where Petse AJ relied upon the International Covenant on Civil and Political Rights when interpreting the constitutional right to demonstrate and assemble. *Mlungwana* is discussed further at 3.2(c)(i) of chapter three.
[71] *Zuma* supra (n5) at para 32.
[72] See *Garvis* supra (n2) at para 64 where Moegeng CJ referred to a report by the UN Special Rapporteur on Extra-judicial, Summary and Arbitrary Executions when interpreting the right to freedom of assembly. See 3.2(c)(ii) of chapter three where *Garvis* is discussed further.
[73] *Moloto NO* supra (n63) at para 58-9.
[74] *NUMSA v Bader Bop* 2003 (3) SA 513 (CC) para 29, *AMCU v Chamber of Mines* 2017 (3) SA 242 (CC) para 52.
[75] This list however is not exhaustive. See further John Dugard *International Law: A South African Perspective* 4 ed (2011).
[76] *AZAPO* supra (n9) at para 26. See further *Glenister v President RSA* 2011 (3) SA 347 (CC) para 179-193.
[77] *Government RSA v Grootboom* 2001 (1) SA 46 (CC) para 26.
[78] See *Coetzee v Government RSA* 1995 (4) SA 631 (CC) at para 57.

or, even inconsistently, with international law will not necessarily give rise to constitutional difficulty provided relevant sources of international law are properly considered when the court interprets the right in question.[79]

The above principles apply equally to the consideration of foreign law in terms of s39(1)(c).[80] The only real distinction between the two provisions is that the courts are peremptorily obliged to consider international law, but enjoy a discretion to consider foreign law when interpreting the Bill of Rights.[81]

(b) Limitation enquiry: meaning and effect of the impugned law

Section 39(2) similarly contains express instructions as to how the courts must interpret the impugned law. It states:

> 'When interpreting any legislation…every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'

Section 39(2) is equally not an exhaustive account of how to interpret the challenged law. First, I discuss constitutional avoidance and two concomitant principles: (a) "reading down"; and (b) the presumption of constitutionality. Second, I explain the principle of constitutional subsidiarity applicable to legislation which is enacted to give effect to a constitutional right.

(i) Statutory interpretation: the indirect application of the Bill of Rights, reading down and subsidiarity

The interpretation of the challenged law is governed by the indirect application of the Bill of Rights. The Bill of Rights indirectly influences the interpretation of the challenged law due to the 'principle of avoidance'.[82] Constitutional avoidance means wherever it is possible to decide a dispute without *directly* deciding a constitutional issue, i.e applying the Bill of Rights directly, that route

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[79] *Grootboom* supra (n77).

[79] See 3.1(c) of chapter three where I discuss the position of the ILO CFA which states that purely political protest action does not enjoy protection under international law principles of freedom of association. See *ILO Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* 5 ed (2006) para 526.

[80] See *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 62 and *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 90 and 106.

[81] See *S v Williams* 1995 (3) SA 632 (CC) at paras 26 and 57.

[82] Currie & de Waal op cit (n3) at 57.

should be preferred.[83] In this sense, whenever legislation is alleged to infringe a constitutional right, constitutional avoidance requires the court to first attempt to decide the dispute without ruling upon the constitutionality of that law.[84]

However, this does not mean no consideration should be given to constitutional principles or the underlying right. This is for two reasons. First, where two interpretations of a law exist - neither of which limit a fundamental right - the court must prefer the interpretation which better 'promotes the spirit, purport and object of the Bill of Rights'.[85] Second, where legislation is shown, *prima facie*, to limit a fundamental right, the indirect application of the Bill of Rights requires the court to first attempt to interpret the challenged legislation consistently with the Bill of Rights.[86] This principle is known as 'reading down'.[87] Broadly, it means where two interpretations of the impugned law exist: (a) one which limits a constitutional right; and (b) one which does not, the second interpretation must be preferred provided the text of the statute is 'reasonably capable' of bearing the second interpretation.[88] Reading down however is not unfettered.[89] Where the text cannot 'reasonably bear' a constitutionally compliant meaning, the court must proceed to the justifiability stage to determine whether the limitation passes constitutional muster.[90]

Practically, the duty to apply, and exhaust, reading down before directly applying the Bill of Rights to the challenged law means all legislation is

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[83] *Zantsi v Council of State Ciskei* 1995 (4) SA 615 (CC) para 8.
[84] *S v Dlamini* 1999 (4) SA 623 (CC) para 27.
[85] See *Wary Holdings (Pty) Ltd v Stalwo* 2009 (1) SA 33 (CC) para 46 and 84 and *Moloto NO* supra (n63) at para 71-72.
[86] *Investigating Directorate: Serious Economic Offence v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors v Smit NO* 2001 (1) SA 545 (CC) at para 22.
[87] Currie & de Waal op cit (n3) at 68-69.
[88] *SAPS v POPCRU* 2011 (6) SA 1 (CC) para 29.
[89] See Jason Brickhill & Michael Bishop 'In the beginning was the word: the role of text in the interpretation of statutes' (4) 129 *SALJ* 681 who argue the CC has, failed on several occasions, to recognise that 'reading down' is constrained by what the text is 'reasonably capable' of meaning.
[90] *Hyundai* supra (n86) at para 24. See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 23-24 where the CC held the word 'spouse' could not be read down to include 'same sex partner' as this would be unduly strained.

rebuttably presumed to be compatible with the Bill of Rights.[91] Therefore, when legislation is challenged on the basis it limits a constitutional right, the first question, once the content of the right has been established, is whether the challenged law is reasonably capable of an interpretation which does not limit that fundamental right.[92] Only in circumstances where the legislation cannot bear such an interpretation, does one apply the Bill of Rights directly to ascertain if it complies with the justifying criteria in s36(1) of the Constitution.[93]

One final principle related to constitutional avoidance is the principle of subsidiarity.[94] This principle states that whenever legislation is enacted to give effect to a constitutional right, such as the RGA[95] and LRA[96] respectively, litigants cannot directly rely on the constitutional right to vindicate it.[97] Rather, they must instead utilise the statutory remedies and procedures provided for any legislation which "gives effect" to the practical exercise of that right in practice.[98] However, direct reliance on the underlying constitutional right is permissible if the constitutionality of the legislation itself is challenged.[99]

2.4. FREEDOM OF ASSEMBLY: CONTENT OF THE RIGHT

Section 17 of the Bill of Rights reads as follows:

> "Everyone has the right, peacefully and unarmed, to assemble, to

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[91] See Dennis Davis 'Interpretation of the Bill of Rights' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2018) 33:4 and *Laugh it off Promotions CC v South African Breweries International* 2006 (1) SA 144 (CC) para 48.

[92] *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) para 89. This applies even where a litigant does not rely upon s39(2). See *Phumelela Gaming and Leisure Ltd v Grundlingh* 2007 (6) SA 350 (CC) para 26-27. At 3.1(c) of chapter three and 4.4(a) of chapter four, I consider if either limitation is avoidable by utilising reading down.

[93] See *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC) para 62-63 and 70-71.

[94] On its various meanings see the minority judgment of Cameron J in *My Vote Counts NPC v Speaker of the National Assembly* 2015 (12) BCLR 1407 (CC) para 44-66.

[95] Which gives effect to s17 of the Bill of Rights. See *ADT Security v NASUWU* 2012 (33) ILJ 575 (LC) para 11.

[96] Which gives effect to s23 of the Bill of Rights. See *NAPTOSA v Minister of Education* 2001 (2) SA 112 (C) endorsed in *SANDU v Minister of Defence* 2007 (5) SA 400 (CC) para 51.

[97] *SANDU* ibid para 52.

[98] Ibid.

[99] Ibid. I return to this principle at 3.2 of chapter three where distinctions between the LRA and RGA are discussed and at 4.3(b)(ii) of chapter four where the LAC's reliance on it in *ADT Security* is critiqued.

demonstrate, to picket and to present petitions'[100]

First, I discuss the right to assemble and demonstrate. Second, I consider the right to picket. Third, I briefly explain the 'peaceful and unarmed' internal modifiers.[101]

(a) 'Assemble and demonstrate'

Section 17 guarantees the right of 'everyone'[102] to assemble peacefully and unarmed for the purpose of manifesting opposition, or support, for any lawful demand or cause both against the state and private persons or institutions.[103] Simply put, this means any law which impedes or restricts the ability of any group or person to exercise the right in this manner will limit it.[104]

Three particular factors are worth emphasising when determining the content of the right to freedom of assembly: (a) its history; (b) its purpose; and (c) its role in faciliting the exercise of other constitutional rights.[105]

First, the history of the right is particularly significant.[106] This is because, during the Apartheid era, the state progressively enacted several pieces of security legislation[107] designed to systemically erode and deny the common law right to assemble and demonstrate.[108] Fortifying this, is the fact that one central purpose of the Bill of Rights is to prevent similar abuses of fundamental

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[100] I do not consider petitions which is beyond the scope of this work and unnecessary for present purposes. For a general discussion see Stuart Woolman 'Freedom of Assembly' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 43:25-43:26.

[101] 'Internal modifies' are defined by De Vos op cit (n20) at 358 as words or phrases in the text of the right which 'explicitly exclude certain practices from protection or condition its application more subtly'. See Cheadle op cit (n1) at 30:7-30:8 who criticises the use of this concept.

[102] 'Everyone' in the Bill of Rights must be literally construed. This means, workers clearly benefit from the right See *Mlungwana* supra (n70) at para 62 and *Kylie v CCMA* 2010 (4) SA 383 (LAC) para 17-22.

[103] Dennis Davis 'Assembly' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2018) 12:2.

[104] *Mlungwana* supra (n70) at para 43, *Garvis* supra (n2) at para 57 and 61. Section 7(2) of the Constitution also requires the state to ensure the law 'respects, protects, promotes and fulfils' its exercise.

[105] See 2.3(a) above.

[106] See *Garvis* supra (n2) at para 62-63 where the CC placed similar emphasis on this factor.

[107] For instance, the Riotous Assemblies Act 17 of 1956 and Suppression of Communism Act 44 of 1950. For an analysis of these laws, see Michael Kidd 'Meetings and Emergency Regulations' (1989) 5 *SAJHR* 471 and *Tsoaeli v S* 2018 (1) SACR 42 (FB) para 18-24.

[108] See *S v Turrell* 1973 (1) SA 248 (C) and Elilson Kahn 'Freedom of Assembly' (1973) 90 *SALJ* 18 together with the comments of Moegeng CJ in *Garvis* supra (n2) at para 63.

rights by the state.[109] Therefore, given this history, it would be necessary to establish particularly persuasive reasons to justify restricting its exercise.[110]

Second, the purpose of the right to free assembly, broadly speaking, is to enable groups which lack political or economic power, such as blue-collar workers for instance, to express opposition, or support, for or against causes of importance to them outside the confines of official political institutions.[111] Its underlying and fundamental value therefore lies in its ability to force public institutions, or private individuals, to seriously consider the demands of politically weak or marginalised groups.[112] Therefore, without it, the ability of these groups to meaningfully participate in, and influence, the course of democratic politics is significantly undermined.[113] In this sense, freedom of assembly is an indispensable component of participatory democracy.[114]

Third, and particularly significant, is the fact freedom of assembly is intrinsically connected to, and underpinned by, several other constitutional rights such as: expression, association and dignity.[115] This is because assemblies constitute forms of expressive conduct which means the ability of vulnerable groups – such as workers – to effectively assemble and protest is rendered illusory if there exists no corresponding right to free expression.[116] Similarly, the right to freedom of association necessarily incorporates a right of the members of an association to pursue the objectives of the association to

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[109] See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 40.

[110] *Garvis* supra (n2) at para 52. See similar comments expressed by the Lesotho Supreme Court in *Seeiso v Minister of Home Affairs* 1998 (6) BCLR 765 (LesCA).

[111] See *Garvis* Ibid para 61 and Woolman op cit (n100).

[112] See Woolman op cit note 100 at 43:21 – 43:22 who identifies eight further purposes which underlie the constitutional right to freedom of assembly.

[113] Woolman ibid.

[114] See Henk Botha 'Fundamental Rights and Democratic Contestation: Reflections on Freedom of Assembly in an Unequal Society' (2017) 21 *LDD* 1221 and the German Constitutional Court decision in *Brokdorf* 69 Bverf GE 315 345 (1985) discussed in Woolman ibid at 43:22 and Davis op cit (n103) 12:1. On participatory democracy generally, see *Doctors for Life v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 112-16. I expand on the connection between participatory democracy and freedom of assembly in specific relation to the rights and interests of workers at 3.2(a) of chapter three and 5.3 of chapter five.

[115] See *S v Mamabolo* supra (n9) at para 50, *Hotz* supra (n2) at para 62 and *SANDU* supra (n58) at para 8. On the interconnection between constitutional rights generally see *Grootboom* supra (n77) at para 23.

[116] Woolman op cit (n100) at 43:1. Section 16 of the Bill of Rights guarantees free expression.

which they belong, such as workers belonging to a trade union, through mechanisms such as mass assemblies or demonstrations.[117] Finally, dignity underpins all three rights as prohibiting (or restricting) individuals or groups from publicly pursuing objectives or causes of importance to them undermines their sense of agency and moral worth.[118] In this sense, legislation which limits freedom of assembly will - almost invariably - correspondingly infringe constitutional rights to expression, association and also arguably dignity.[119]

(b) 'Picket'

Pickets are usually conducted by workers during workplace disputes.[120] One explanation for including it in s17, and not s23 of the Bill of Rights,[121] was to extend the right to picket 'beyond the sphere of employer-employee relations' alone.[122] On this basis, picketing under the RGA in support of an assembly or demonstration concerning a non-labour dispute would be protected as part of the general constitutional right to freedom of assembly[123]

Picketing, in the labour context, describes 'any conduct designed to gain publicity and support for the workers cause'[124] which is widely regarded as a 'necessary corollary' of the constitutional right to strike.[125] Its purpose includes: persuading non-strikers to join the industrial action, informing the

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[117] See *SANDU* supra (n58) at para 8, *Pilane v Pilane* 2013 (4) BCLR 431 (CC) para 69-70 and Nicholas Haysom 'Freedom of Association' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2018) at 13:4 who refers to *NAACP v Alabama* (1958) 357 US 449 where the United States Supreme Court recognised freedom of association is a 'necessary implication…of the freedoms to expression and assembly'.

[118] On dignity and the interpretation of constitutional rights see Laurie Ackerman *Human Dignity: Lodestar for Equality in South Africa* (2015) and *Dawood* supra (n8) at para 34-35.

[119] I expand further on this theme at 3.1(c)(ii) of chapter three and 5.2 of chapter five. See 4.4(c) of chapter four where I also examine potential connections between free assembly and the constitutional right to engage in collective bargaining in s23(5) of the Constitution.

[120] Woolman op cit (n100) 43:24.

[121] Which, as above, guarantees various rights regarding 'labour relations'.

[122] Woolman op cit (n100) at 43:24.

[123] Emma Fergus 'Pickets, socio-economic protest action, gatherings and demonstrations' in Darcy du Toit (ed) *Strikes and the Law* (2017) 158. However, see the discussion of *ADT Security* v *NASUWU* 2015 (36) ILJ 152 (LAC) in chapter four where I explain why it is less clear if the LRA permits employees to picket under the RGA where a labour dispute is involved.

[124] Ibid.

[125] Section 23(2)(c) of the Bill of Rights. Just as the constitutional right to strike is similarly regarded as a 'necessary corollary of the constitutional right to engage in collective bargaining'. On both points see Halton Cheadle 'Labour Relations' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2018) 18:24-18:26.

public about the reasons for the strike, to canvass support and pressurise suppliers and the public to boycott the workers' employer.[126] As above, picketing could equally be used for this same purpose outside a labour dispute. For instance: to raise awareness, or canvass support for, a protest regarding austerity measures or lack of housing or encourage the public to boycott a company involved in environmental pollution or for example.

Section 69 of the LRA and the 'Code of Good Practice: Picketing' regulate pickets in the labour law sphere.[127] Section 69(1) states a picket is protected when called by a registered trade union for the purpose of 'peacefully demonstrating' in support of any protected strike or in opposition to any lockout.[128] Participation in a protected picket attracts the same protections as protected strike action.[129] Unprotected pickets, and unlawful picketing conduct, can however be interdicted by the LC.[130]

(c) Internal modifiers: 'peaceful and unarmed'

Assemblies, demonstrations and pickets receive constitutional protection only when exercised both: (a) 'peacefully' and (b) 'unarmed'.[131] The practical effect of both internal modifiers is that violent or armed assemblies, demonstrations or pickets can be restricted (or prohibited) by the state without the need for justification under s36(1) of the Constitution, because such restrictions will not restrict (or limit) conduct protected by the content s17 of the Bill of Rights.[132]

The qualification that assemblies and demonstrations be exercised

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[126] Dennis Davis & Norman Arendse 'Picketing' (1988) 26 *Industrial Law Journal* 26.

[127] Fergus op cit (n123). On what constitutes acceptable picketing conduct, see *Picardi Hotels Ltd v FGWU* 1999 (6) BLLR 601 (LC) para 25.

[128] See Fergus ibid at 160-171 on the requirements and consequences of protected versus unprotected picketing. Section 69(2)(a) provides that the picket can be held at any place to which the public has access and outside the premises of the employer. See 3.2(c)(ii) of chapter three where I discuss the connection between public pickets and the possibility of joint and several liability for riot damage under s11(1) of the RGA.

[129] Under s69(7) as read with s67 of the LRA. See 3.1(b) of chapter three where these protections are discussed.

[130] See Fergus op cit (n124) at 168-169. It also possible for parties affected by the picket, who are not employers, to interdict unprotected pickets or unlawful picketing conduct in the High Court per *Growthpoint Properties Ltd v SACCAWU* 2011 (1) BCLR 81 (KZD) para 15.

[131] *Garvis* supra (n2) at para 53.

[132] Ibid. See *Islamic Unity Convention* supra (n2) at para 31 where the same principle regarding the internal modifiers in s16(2) of the Bill of Rights - the exclusion of hate speech and incitement to cause harm in respect of freedom of expression - is discussed.

peacefully and without arms, in order to receive constitutional protection, accords with similar restrictions that exist in international law instruments[133] and foreign jurisdictions that enshrine free assembly as a justiciable constitutional right.[134] However, individual protesters do not lose constitutional protection simply because other protesters are armed or have committed acts of violence.[135]

2.5. CONCLUSION

This chapter sought to provide a high level, yet thorough, account of the two-stage limitation analysis and the constitutional right to freedom of assembly, both for workers and marginalised members of society generally. I apply this framework in the remainder of this thesis in two parts. First, by establishing two limitations the LRA imposes upon the constitutional right of workers to freedom of assembly. Second, at the justifiability stage, by examining if either pass constitutional muster. The first limitation, the LRA's prohibition on purely political protest action, I now turn to establish in the following chapter.

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[133] See Art 11 of the African Charter on Human and People's Rights and Art 21 of the ICCPR, both cited in Davis op cit (n103). A similar pre-condition is stipulated by the ILO CFA regarding strikes. See Bernard Gernignon, Alberto Odero & Guido Alberto Horacio 'ILO Principles Concerning the Right to Strike' (1998) 137 *International Labour Law Review* 444.

[134] Davis ibid at 12:2 cites Art 1 of the United States Constitution and s2(c) of the Canadian Charter, both of which require assemblies to be peaceful to enjoy constitutional protection.

[135] *Garvis* supra (n2) at para 53. However, whether the provisions of the RGA providing for joint and several liability for riot damage are consistent with this principle is debatable. See 3.2(b)(ii) of chapter three.

CHAPTER THREE

THE LEGISLATIVE FRAMEWORK: PROTEST ACTION AND GATHERINGS UNDER THE LRA AND RGA

3.1. THE LRA AND SOCIO-ECONOMIC PROTEST ACTION

(a) Background

Historically, socio-economic protest action is derived from 'stayaway' protest action.[1] In the late 1980's to early 1990's, stayaways were mass work stoppages organised by disenfranchised workers in protest against Apartheid policy, labour and tax legislation, local political issues and to commemorate events of importance to workers.[2]

Section 65(1A) of the previous LRA[3] rendered stayaways unlawful as they amounted to concerted refusals to work for purposes unrelated to workplace demands.[4] This opened employees up to disciplinary action, and often dismissal, because participation amounted to common law misconduct in the form of absenteeism.[5] While sympathetic employers implemented a policy of "no work, no pay, discipline",[6] others disciplined and dismissed stayaway participants.[7] Despite several opportunities, the courts 'resolutely

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[1]John Grogan *Collective Labour Law* 2 ed (2014) 290. Martin Brassey *Commentary on the Labour Relations Act* (2006) A4:91 defines a stayaway as, 'a mass refusal to work in order to resist some political initiative or secure some political gain'.

[2] See Darcy du Toit, Shane Godfrey & Carole Cooper et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 380, PAK Le Roux & Andre van Niekerk 'Protest Action in Support of Socio-economic Demands – The First Encounter' (1997) *CLL* 81, Paul Benjamin & Clive Thompson *South African Labour Law* (2018) 355 and Jeremy Gauntlett & DF Smuts 'Boycotts: The Limits of Lawfulness' (1990) 11 *ILJ* 940.

[3]Labour Relations Act 28 of 1956. On this requirement see Paul Benjamin 'Political Stayaways: The dismissal of participants' (1990) 11 *ILJ* 944-945 and Edwin Cameron, Halton Cheadle & Clive Thompson *The New Labour Relations Act* (1989) 78-80 and 85.

[4] *Mbiyane v Cembad (Pty) Ltd t/a T A Art Centre* 1989 (10) *ILJ* 468 (IC) at 470A-471E.

[5] Rehana Cassim 'The Legal Status of Political Protest under the Labour Relations Act 66 of 1995' (2008) 29 *ILJ* 2350.

[6] Du Toit et al op cit (n2) referring to *BEEWU v MD Electrical* 1990 (11) *ILJ* 87 (IC) 94D-E.

[7] See *NUM v Amcoal Collieries & Industrial Operations Ltd* 1992 (13) *ILJ* 1449 (LAC) at 1451G-1452H and the discussion of this decision in Belinda Grant 'Political Stay Aways in the Labour Appeal Court' (1992) 4 *South African Mercantile Law Journal* 88.

declined' to afford stayaways with legal protection.[8] As a result, dismissed employees were only reinstated where it was established their employer selectively dismissed participants or failed to follow a fair procedure.[9]

The inability of the previous LRA to provide any express protection to stayaways attracted significant criticism from the ILO Fact Finding Commission in the early 1990s.[10] This was because the previous LRA's absolute prohibition on strike action, concerning workers social and economic interests, violated various international labour law principles of freedom of association.[11] Primarily, because the ILO Committee of Experts and Committee on Freedom of Association ('CFA')[12] have interpreted the ILO Convention on Freedom of Association and Protection of the Right to Organise[13] as recognising and protecting strike action over both industrial and socio-economic demands as legitimate under international law freedom of association principles.[14] However, the CFA do view 'purely political strikes' – or 'purely political protest action' - as unprotected by these same international law principles in terms of ILO Conventions.[15] The ILO CFA view is considered further below.[16]

To ensure the current LRA complied with the Republic's obligations as

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[8] Brassey op cit (n1) at A4:91. This is best exemplified by *ACTWUSA v African Hide Trading* 1989 (10) *ILJ* 475 (IC) cited in Du Toit op cit (n2) where the Industrial Court remarked that stayaways 'serve no purpose, apart from disrupting the country's economy and causing employers irreparable financial losses'.

[9] See *NUM v Free State Consolidated Gold Mines (Operations) Ltd – President Steyn Mine, Brand Mine, Freddie's Mine* 1995 (16) *ILJ* 1371 (A). However, in certain circumstances, the Industrial Court found dismissals to be unfair where dismissed employees could not attend work due to intimidation or a lack of transport related to the stayaway. See *Gana v Building Materials Manufacturers Ltd tia Doorcor (*1990) 11 *ILJ* 564 (IC) at 568F-G.

[10] See Shamina Saley & Paul Benjamin 'The Context of the ILO Fact Finding and Conciliation Report on South Africa' (1992) 13 *ILJ* 757 and The Explanatory Memorandum to the Labour Relations Act (1995) 16 *ILJ* 300.

[11] LRA Explanatory Memorandum ibid.

[12] *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (2006) para 521.

[13] Freedom of Association and Protection of the Right to Organise, Convention 1948 (No.87).

[14] See Bernard Gernigon, Alberto Odero & Horacio Guido 'ILO Principles Concerning the Right to Strike' (1998) 137 *International Labour Law Review* 443-444 and *NUM v Amcoal Collieries & Industrial Operations Ltd* 1990 (11) *ILJ* 1295 (IC) at 130E-J.

[15] See Jane Hodges Aeberhard, & Alberto Odero De Dios, Alberto 'Principles of the Committee on Freedom of Association concerning Strikes' (1987) 126 *International Labour Law Review* 543 and Cassim op cit (n5) at 2351.

[16] At 3(c)(ii) below. On the influence of international law generally see 2.3(a)(ii) of chapter two.

an ILO member state,[17] s77 acknowledged a new form of industrial action: to 'promote or defend the socio-economic interests of workers'.[18]

(b) Legal framework: protected versus unprotected protest action

Chapter IV of the LRA regulates both strikes and protest action.[19] Understanding how the LRA regulates protest action requires understanding how Chapter IV regulates strikes.[20] While not identical, the LRA regulates both forms of industrial action analogously.[21] Both must comply with procedural and substantive requirements[22] for employees to receive protection against dismissal[23] and civil immunity from contractual or delictual claims arising from participation in a strike or protest action respectively.[24] Similar to strikes,[25] the LRA therefore distinguishes between protest action that (a) complies with the substantive and procedural requirements ('protected protest action') versus (b) protest action which does not ('unprotected protest action').[26]

For protesting employees, this distinction is of fundamental importance. Participation in unprotected protest action constitutes misconduct and attracts

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[17] Section 1(b) of the LRA states one of its fundamental objects is to 'give effect to obligations incurred by the Republic as a member state of the International Labour Organisation'. Section 3(c) similarly states the LRA must be interpreted 'in compliance with the public international law obligations of the Republic'. See 3(c)(ii) below.

[18] Emma Fergus 'Pickets, socio-economic protest action, gatherings and demonstrations' in Darcy du Toit (ed) *Strikes and the Law* (2017) 172.

[19] Including picketing, discussed at 2.4(b) of chapter two. For an overview of chapter IV, see *CWIU v Plascon Decorative (Inland) (Pty) Ltd* 1998 (12) BLLR 1191 (LAC) para 17 and 21.

[20] Grogan op cit (n1) at 291.

[21] Fergus op cit (n18) at 174.

[22] Section 77(1)(a)-(d) considered at 3(b) below. See Bradley Conradie 'Protected Strikes' in Darcy du Toit (ed) *Strikes and the Law* (2017) 49-62 on the requirements for protected strikes.

[23] Section 187(a) states the dismissal of an employee because of their participation in protected protest action is automatically unfair.

[24]Section 67(4) and (6). Section 67(8) however expressly excludes immunity for criminal offences. Section 67(5) further permits an employer to dismiss employees because of misconduct committed during the course of a protected protest or due to operational requirements. On how to determine whether the dismissal was because of participation in protest action, hence automatically unfair, see the two-part causation test in *Kroukam v SA Airlink (Pty) Ltd* 2005 (12) BLLR 1172 (LAC) para 103.

[25] Fergus op cit (n18) at 174.

[26] Ibid. Section 77(3) further states that any employee who participates in protected protest action in compliance with the substantive and procedural requirements in s77(1) enjoys the same protections provided for in s67 of the LRA.

no automatic protection against dismissal[27] nor immunity from civil legal proceedings.[28] The LC enjoys exclusive jurisdiction to interdict unprotected protest action and failure to comply with an interdict restraining unprotected protest action constitutes civil contempt of court.[29]

However, even when protected, s77(2)(b) provides the LC with exclusive jurisdiction to grant a declatory order prescribing the duration of protection after considering: (a) the nature and duration of the protest; (b) steps taken by the union or federation to minimise harm caused by the protest; and (c) protester conduct.[30] Section 77(2)(b) thus empowers the LC, in certain circumstances, to render protected protest action unprotected.[31] When considering such a declaratory order, the LC must conduct a proportionality assessment, not dissimilar to the proportionality enquiry applicable to s36(1) of the Constitution.[32] Proportionality requires the LC, when exercising this discretion, to consider, and weigh, all relevant factors including: the importance of the matter giving rise to the protest and all other relevant factors, including, but not limited to, those referred to in s77(2)(b)(i)-(iii).[33]

The statutory preconditions for protected protest action, most significantly the substantive requirements, are considered immediately below.

(i) *Substantive requirements*

The primary substantive requirement is that the protest comply with the

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[27] However, any dismissal for participation in unprotected protest action must still be both procedurally and substantively fair under s188(1) of the LRA. The Schedule 8 Code of Good Practice: Dismissal must equally be considered in terms of s188(2).

[28] Grogan op cit (n1) at 290. See 3.2(c)(ii) below where I discuss the possibility of unions and employees incurring joint and several liability for 'riot damage' arising from participation in protest action in terms of s11 of the RGA.

[29] Section 77(4)(a). On civil contempt and contempt of court generally see *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 6-10 and 42.

[30] Section 77(2)(b)(i)-(iii). Section 77(4) similarly provides a failure to comply with such a declaratory order not only constitutes contempt but, in addition, results in protesters losing automatic protection against dismissal under s67(4) as read with s187(1)(a).

[31] *Government of the Western Cape v COSATU* 1998 (2) BLLR 1286 (LC). Significantly, no similar power is afforded to the LC, at least not expressly, in respect of a protected strike. See *NUFBWSAW v Universal Product Network* 2016 (37) ILJ 476 (LC) para 28 and 31-32.

[32] *Government of the Western Cape* ibid at para 32 referring to *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para 140. See 2.2 of chapter two and 5.2(b)(ii) of chapter five where I explain what proportionality entails in practice.

[33] Ibid.

statutory definition in s213 of the LRA.[34] Section 213 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 workers, but not for a purpose referred to in the definition of a strike*.'[35]

The LRA's definition of 'protest action' is substantially similar to its definition of a 'strike'.[36] The only, yet fundamental, distinction relates to its purpose.[37] Specifically, the purpose of protest action must be to 'promote or defend the socio-economic interests of workers' and not, according to the statutory definition of a strike, to 'remedy or resolve a dispute of mutual interest between employer and employee'.[38]

Before explaining the meaning of purely political protest action – and considering whether the LRA protects it[39] - it is necessary to further unpack two elements of the statutory definition. First, how the LRA defines strike, as protest action must take place for a purpose not referred to 'in the definition of a strike'.[40] Second, the meaning of the phrase 'to promote or defend the socio-economic interests of workers'.[41]

(aa) 'Not for a purpose referred to in the definition of a strike'

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 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*

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[34] Benjamin & Thompson op cit (n2) at 356. Section 77(1) further states employees engaged in an 'essential or maintenance service' cannot participate in protected protest action. Whether this restriction complies with s17 of the Constitution is beyond the scope of this thesis.

[35] Emphasis added.

[36] Cassim op cit (n5) at 2350.

[37] Andre van Niekerk 'Strikes and Lock-outs' in Andre van Niekerk & Nicola Smit (eds) *Law@Work* 4 ed (2017) 461.

[38] *Government of the Western Cape* supra (n31) at para 32. The purpose of a strike and the phrase to 'promote or defend the socio-economic interests of workers' is discussed at 3.1(i)(aa) and (bb) below.

[39] Specifically, whether purely political protest action falls within the statutory definition of protest action in s213 of the LRA. This is considered at 3.1(c)(ii) below.

[40] Per the statutory definition above.

[41] Ibid.

employer and employee'.[42]

This definition has four elements: (a) 'the partial or complete concerted refusal to work or retardation or obstruction of work'; (b) 'by persons who have been employed by the same or different employers'; (c) 'for the purpose of resolving a grievance or resolving a dispute'; (d) 'in respect of a matter of mutual interest between employer and employee'.[43]

Element (a) is replicated, word for word, in the statutory definition of protest action.[44] Protest action therefore takes the form of a strike – the concerted refusal to work – but for a different purpose: 'to promote or defend the socio-economic interests of workers'.[45] However, and despite clear connections between both forms of industrial action,[46] the LAC in *Business SA v COSATU* concluded the right to protest under s77 does not derive from the constitutional right to strike, as it is not undertaken for the purposes of collective bargaining.[47] The majority therefore held protest action rather derives from the constitutional rights to freedom of assembly and expression.[48]

Leaving aside the constitutional basis for protest action,[49] elements (c) and (d) encapsulate the statutory purpose of a strike: 'to remedy or resolve a grievance or dispute in respect of a matter of mutual interest between employer

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[42] Emphasis added.

[43] *TAWUSA obo Ngedle v Unitrans Fuel and Chemical (Pty) Ltd* 2016 (11) BCLR 1440 (CC) para 105 cited in Conradie op cit (n22) at 49. A further requirement, which does not expressly appear in the statutory definition, is that the demand forming the subject matter of the strike must be lawful. See *TSI Holdings (Pty) Ltd v NUMSA* 2006 (7) BLLR 631 (LAC) para 48.

[44] Benjamin & Thompson op cit (n2) at 357.

[45] Van Niekerk op cit (n37).

[46] Fergus op cit (n18) at 172.

[47] *Business SA v COSATU* 1997 (5) BLLR 511 (LAC) 517

[48] Ibid. Contrast with the minority judgment reported separately as *Business South Africa v COSATU* 1997 (6) BLLR 681 (LAC) at 683. Nicholson JA held protest action *does* derive from the constitutional right to strike. He reasoned - correctly it is submitted - that the constitutional right to strike is not limited to concerted refusals to work for the purposes of collective bargaining alone, because s23(2)(c) of the Final Constitution, unlike 27(4) of the Interim Constitution, does *not* require strikes be undertaken solely for the 'purposes of collective bargaining'. See Carole Cooper 'Labour Relations' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) 53:48. Refer to 2.3(a)(i) of chapter two where I outline the principle that constitutional rights should not have implicit limitations read into them.

[49] For a detailed criticism of *Business SA* see Cooper ibid at 53:46-53:48. A further criticism is constitutional rights, especially in the labour context, often overlap and therefore protest action can arguably give effect to *both* the right to strike and freedom of assembly and expression. See *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC) para 52-53.

and employee'.[50] It therefore follows that protest action undertaken *for this purpose* cannot receive statutory protection under s77 of the LRA.[51]

The LRA does not define 'dispute of mutual interest.[52] The courts have interpreted it in the 'widest possible sense'[53] as a narrow construction would, effectively, circumscribe the disputes over which workers could legitimately strike.[54] The courts have therefore interpreted 'dispute of mutual interest' as any dispute involving the creation of 'new' rights in the employment relationship[55] or any matter affecting terms and conditions of employment between employer and employee.[56] The dispute however must be between 'employer and employee'. This means, for instance, that an internal trade union dispute cannot form the subject of a protected strike.[57] Similarly, a dispute between workers and the state, public institutions or representatives involving socio-economic issues would not be between 'employer and employee' and therefore cannot form the basis of a protected strike.

(bb) 'Promote or defend the socio-economic interests of workers'

The primary distinction between 'strikes' and 'protest action' concerns both the target and purpose of the industrial action.[58] Strikes target employers to secure benefits or advantages for employees regarding their immediate working conditions: matters employers can influence or improve.[59] Protest action targets state or public institutions to secure advantages for workers of a 'social or economic nature': matters employers may not necessarily be in a position

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[50] On the other elements see Conradie op cit (n22).

[51] For the simple reason that the statutory definition of protest action, as above, provides that protest action cannot take place for '*a purpose referred to in the definition of a strike'*. See *Government Western Cape* supra (n31) at para 17.

[52] *De Beers Consolidated Mines Ltd v CCMA* 2000 (5) BLLR 578 (LC) para 16.

[53] Du Toit et al op cit (n2) 388 referring to the oft cited decision of *Rand Tyres & Accessories v Industrial Council for the Motor Industry Traansvaal* 1941 TPD 108.

[54] See Alan Rycroft & Barney Jordaan *A Guide to South African Labour Law* 2 ed (1992) at 169 endorsed in *HOSPERSA v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC) para 11.

[55] See *Vanachem Vanadium Products (Pty) Ltd v NUMSA* (2014) 35 ILJ 3241 (LC) para 13.

[56] *Greater Johannesburg Metropolitan Council v IMATU* 2001 (9) BLLR 1063 (LC) para 32.

[57] *Mzeuku v Volkswagen (Pty) Ltd* 2001 (8) BLLR 857 (LAC) para 16-17.

[58] Giovanni Orlandi 'Political Strikes' in Bob Hepple, Rochelle Le Roux & Silvana Sciarra (eds) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2016)144-145.

[59] Grogan op cit (n1) at 292, Brassey op cit (n1) at A4:92.

to influence.[60] However, drawing the line between concerted refusals to work over demands concerning 'matters of mutual interest' (strikes) versus 'socio-economic interests of workers' (protest action) is easier said than done.[61]

Similar to 'mutual interest', the LRA does not define 'socio-economic interests of workers'.[62] It is capable of either a wide or narrow interpretation.[63] The LAC in *Business SA* appeared to favour the narrow construction.[64] The majority concluded that because LRA protest action does not derive from the constitutional right to strike, s77 does not necessarily require an 'expansive or liberal interpretation…in the sense the exercise of the right to protest must be restricted as little as possible'.[65] However, it is submitted that this finding turned upon the interpretation of the procedural requirements in s77(1)(a)-(d) of the LRA, not necessarily the definition of 'protest action' in s213.[66] It is therefore arguably *obiter*. Thus, whilst persuasive, it does not necessarily constitute binding precedent that the substantive requirement contained in the phrase 'socio-economic interests of workers' must also be narrowly construed.[67]

Subsequent to *Business* SA, the LC considered the phrase 'to promote or defend the socio-economic interests of workers' in *Government of the Western Cape v COSATU.*[68] The immediate substantive question was whether protest action to address disparities in public school funding in the Western Cape was undertaken to 'promote or defend the socio-economic interests of workers'.[69] The court declined to provide an 'all-encompassing definition'.[70]

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[60] Cassim op cit (n5) at 2353.

[61] See *Greater Transitional Metro Council* supra (n56) at para 26 where Revelas J held that disputes of mutual interest and socio-economic interests of workers are not mutually exclusive.

[62]See *Government Western Cape* supra (n31) at para 15 and *Iscor Refractories v NACBAWU* 1999 (3) BALR 276 (IMSSA) at 283.

[63] Le Roux & van Niekerk op cit (n2) at 85.

[64] Supra (n47) at 518.

[65] Ibid. For a further criticism of this finding see Halton Cheadle 'Labour Relations' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2018) at 13:34.

[66] See Brassey op cit (n1) at A4:91-A4:92. I discuss the procedural requirements below.

[67] This is supported by *Government Western Cape* supra (n31) at para 20. Contrast however with the view expressed by John Grogan 'Legitimate Protest: the Limits of Protection' (1999) 8 *Employment Law Journal* 13.

[68] Ibid.

[69] Ibid para 9.

[70] Cassim op cit (n5) at 2353.

Given the 'elasticity of the phrase,'[71] each case must depend on its own facts.[72] However, unlike *Business SA*, the LC relied upon the LRA's stated purpose in adopting a 'liberal interpretation'.[73] Mlambo J, finding the protest fell within the statutory definition, held protest action will usually satisfy the substantive requirements for protection if workers 'place the demand giving rise to the protest action within the ambit of the social status and economic position of workers in general'.[74] This appears to require establishing a causal link between the protest action and 'promoting or defending the socio-economic interests of workers' for the protest to comply with the statutory definition.[75]

(ii) *Procedural requirements*

It is noteworthy s77(1)(a) provides that only a 'registered trade union' or 'trade union federation' can initiate protected protest action.[76] This applies despite the fact s77(1) provides that every '***employee'*** has the right to protest over socio-economic interests affecting workers.[77] The apparent purpose is to ensure a discernible body can be held accountable for unprotected protest action or protected protest action which breaches an LC declatory order circumscribing its duration under s77(2)(b).[78]

Section 77(1)(a)-(d) stipulates four procedural requirements.[79] First, as noted, the protest must be initiated by a registered trade union or federation.[80] Second, the union or federation must serve notice on the National Economic

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[71] Grogan op cit (n1) at 293

[72] *Government Western Cape* supra (n38) at para 30.

[73] Cassim op cit (n5) at 2353. Section 1 of the LRA states its purpose 'is to advance economic development, *social justice*, *labour peace* and the *democratisation of the workplace*' (emphasis added). I expand on this provision further at 5.3 of chapter five.

[74] *Government Western Cape* supra (n38) at para 17.

[75] Cassim op cit (n5) at 2355. Establishing this link would most likely occur in terms of the s77(1)(b) notice served on NEDLAC. Section 77(1)(b) is discussed immediately below.

[76]Section 69(1) contains a similar restriction for protected pickets. See the discussion on picketing at 2.4(b) of chapter two.

[77] Section 77(1). Emphasis added. Contrast with the procedural requirements for protected strike action under s64 which does not require the involvement of a registered trade union.

[78] Fergus op cit (n18) at 175 argues this requirement, given declining trade union membership in South Africa, is constitutionally suspect. However, once protected protest action has been initiated members of the authorising union and supporters may join it. This principle applies equally to protected strikes. See *SATAWU v Moloto NO* 2012 (6) SA 249 (CC) para 92.

[79] *Government Western Cape* supra (n38) at para 23.

[80] Section 77(1)(a).

Development and Labour Advisory Council ('NEDLAC') stating the reasons for, and nature of, the intended protest.[81] Third, the issue giving rise to the protest must be considered by NEDLAC or 'any other appropriate forum'[82] in which the parties can participate to resolve the underlying dispute.[83] Fourth, the union or federation must serve notice on NEDLAC at least 14 days before commencing with the protest.[84]

The procedural steps must be taken sequentially: the order in which they appear in s77(1)(b)-(d) of the LRA.[85] The s77(1)(b) notice stating the reasons for, and duration of the protest, is intended to afford the negotiating parties a proper opportunity to resolve the matter giving rise to the protest.[86] Substantial compliance is sufficent for this requirement to be met.[87] Therefore, it is not necessary to identify every employee, or group of employees, who will protest.[88] Section 77(1)(c) however does not stipulate the time period within which NEDLAC must consider the matter giving rise to the protest, but it has been suggested the time period must be 'reasonable'.[89] Furthermore, it is not necessary for negotiations to deadlock before 14 days' notice to protest under s77(d) can be given, but NEDLAC or 'any other appropriate forum' must still properly consider the underlying dispute.[90] A 'cosmetic consideration' is therefore insufficient.[91] The notice to commence protesting should also only be given once it is clear the other negotiating party sees 'no scope for resolving

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[81] Section 77(1)(b)(i)-(ii).

[82] Brassey op cit (n1) at A4:95 argues however that this provision creates more problems than it solves, given the s77(1)(d) notice must be served on NEDLAC to commence with a protected protest, not the 'other appropriate forum'. Practically, NEDLAC must therefore play a role regardless of whether another forum is involved or not.

[83] Section 77(1)(c).

[84] Section 77(1)(d).

[85] *Business SA* supra (n47) at 523.

[86] Ibid at 524.

[87] Ibid. On substantial compliance see *ACDP v IEC* 2006 (5) BCLR 579 (CC) para 24-25.

[88] Fergus op cit (n18) at 175 citing *Moloto NO* supra (n79) at para 88-92.

[89] Ibid. Brassey op cit (n1) at A4:93 conversely argues implicitly reading in a 'reasonable time' requirement is nonsensical because s77(1)(c) provides it is a procedural pre-requisite for the dispute to properly 'considered' before protected protest action can take place.

[90] *Government Western Cape* supra (n38) at para 26.

[91] Fergus op cit (n18) at 175 citing *Government Western Cape* supra (n31) at para 28.

the dispute'.[92] Finally, the 14 day advance notice to commence protesting should be given to NEDLAC in terms of LRA form 4.5.[93] However, failure to give notice in terms of LRA form 4.5 is not fatal, provided the alternative notice substantially complies with the requirements of s77(1)(d).[94]

(c) Purely political protest action

(i) *What is purely political protest action?*

There exists no universally accepted legal definition of 'purely political' protest action.[95] Kahn Freund argues it is neither possible, nor desirable, to attempt a precise definition.[96] This is because the term 'political' is itself a contested concept.[97] It has 'no universally accepted definition' and is therefore incapable 'of a precise definition prescribed by law.'[98]

Nevertheless, working definitions of 'purely political' protest action - or 'purely political strike action' - have been attempted. In *Sheard v AEUW*, an English Appeal Court decision, the court cautioned against a precise definition, but nevertheless held a purely political strike is one undertaken to 'pursue a policy in opposition to the government in power'.[99] Cassim, drawing on *Sherard*, defines purely political protest action as one, 'directed against the government or any other public authority'.[100] Fikentscher, adopts a similar definition, arguing that political strikes involve, 'the exertion of pressure against officials…the representatives of the power vested in the state and its authorities'.[101] Nadasen further proposes that a defining characteristic of

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[92] *Business SA* supra (n47) at 528. Brassey op cit (n1) at A4:95 likens the requirement to 'consider the dispute' as requiring NEDLAC, or the other appropriate forum, to properly apply its mind to the dispute.

[93] Fergus op cit (n18) at 176.

[94] *Business SA* supra (n47) at 525.

[95] Cassim op cit (n5) at 2354. The ILO refers uses the phrase 'political strike action' as opposed to 'political protest action'. I utilise both phrases synonymously.

[96] Paul Davis & Mark Freedland *Khan Freund's Labour and the Law* 3 ed (1983) 315.

[97] Ibid. See also Andrew Heywood *Politics* 3 ed (2007) 4-19 who explains how political scientists themselves cannot agree on a universally accepted definition of the term 'political'.

[98] Davis & Freedland ibid at 316.

[99] *Sheard v Amalgamated Union of Engineering Workers* [1973] ICR 421 at 429-428 cited in Cassim op cit (n5) at 2356.

[100] Ibid.

[101] Wolfgang Fikentscher 'Political Strikes under German Law' (1953) 5 *The American Journal of Comparative Law* 72

purely political strike action is where strikers 'act not only in [their] capacity as workers, but equally in [their] role as citizens'.[102]

In this sense, and similar to socio-economic protest action, the demand is directed at public institutions or government, not the workers' employer who is not necessarily in a position to accede to the demand giving rise to the protest.[103] Similarly, as Novitz identifies, political strikes encompass a wide range of objectives from: aiming to depose the government; reducing its credibility and attempting to influence (or 'dictate') broader policy decisions.[104] Historical examples include strikes (or protests) to: oppose a declaration of war, support a presidential candidate[105] and technicians refusing to transmit a football match to South Africa in opposition towards Apartheid policy.[106]

However, just as strikes over disputes of mutual interest often 'intertwine with socio-economic demands', protest action over a 'purely political' issue may equally intertwine with socio-economic demands as well as demands concerning disputes of mutual interest.[107] Thus, it is necessary to examine if the LRA protects protest action involving: (a) purely political issues unrelated to workers socio-economic interests;[108] (b) socio-economic and industrial demands; and (c) political and socio-economic demands.[109] I consider this immediately below.

(ii) *Does the LRA protect purely political protest action?*

No binding authority exists regarding whether the LRA permits purely political protest action. Equally, for the same reason, no binding authority exists regarding whether the failure to protect purely political protest action would limit the constitutional right of employees to freedom of assembly, let alone if

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[102] Sagie Nadasen '"Strike for the purpose of collective bargaining…" – The Place of the Political Strike in a Democracy' (1997) 11 *TSAR* 122.
[103] Cassim op cit (n5) at 2356. See also *NUMSA v The Benicon Group* 1997 (18) ILJ 123 (LAC) at 124F-G.
[104] Tania Novitz *International and European Protection of the Right to Strike* (2003) 295.
[105] Cassim op cit (n5) at 2356.
[106] See *British Broadcasting Corporation v Hearn* [1977] 1 WLR 1004 discussed in Cassim ibid at 2357.
[107] Cassim ibid at 2356-2357.
[108] This can be defined as *purely political protest action proper.*
[109] Cassim op cit (n5) at 2358.

this would be justifiable in terms of s36(1) of the Constitution.

The academic position, overwhelmingly, holds the statutory definition does not encompass protest action concerning purely political issues.[110] The common premise rests on the fact that while the CFA regards socio-economic strikes as protected by international principles of freedom of association,[111] strikes of a 'purely political nature' are not protected by these same principles.[112] Novitz contends the primary basis upon which the CFA takes this position, is because it views 'purely political' strikes as 'disruptive of the democratic process'.[113] However, the CFA has acknowledged practical difficulties in distinguishing between 'purely political' protests' (or strikes) versus 'socio-economic' strikes,[114] as both 'notions overlap'.[115] However, where protest action involves both 'political' and 'socio-economic' demands, the CFA holds the strike should be protected, provided it is not used as a pretext to pursue political objectives 'unconnected with defending or furthering workers interests'.[116]

The academic position has merit for at least two interconnected reasons. First, s233 of the Constitution requires courts to prefer any 'reasonable interpretation' of legislation which is inconsistent with international law over any alternative inconsistent interpretation.[117] Second, s3(c) of the LRA requires interpreting it consistently 'with the Republic's public international law obligations'.[118] For both reasons, both CFA and ILO Committee of Experts opinions significantly influence how our courts interpret both the LRA[119] and

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[110] See Grogan op cit (n1) at 412, Brassey op cit (n1) at A4:91 and van Niekerk op cit (n37).
[111] *Freedom of Association Digest* op cit (n12) at para 481. For a summary of the academic position see Cassim op cit (n5) at 2359.
[112] *Digest* ibid para 327. See further Aeberhard & De Dios op cit (n15) at 548-549.
[113] Novitz op cit (n105) at 56. I consider an opposing view at 5.3 of chapter five.
[114] *Digest* op cit (n12) at para 527. See also Gernigon, Odero & Guido op cit (n14) at 445-446.
[115] *Digest* ibid at para 359.
[116] Ibid at para 357 and 412 discussed in Aeberhard & de Dios op cit (n15) at 549.
[117] See *Kaunda v President RSA* 2005 (4) SA 235 (CC) para 33.
[118] Section 1(b) similarly states a fundamental LRA object is to 'give effect to obligations incurred by the Republic as a member state of the International Labour Organisation'.
[119]See for instance *POPCRU v SACOSWU* 2019 (1) SA 73 (CC) para 89-97, *Discovery Health v CCMA* (2008) 29 ILJ 1480 (LC) para 41-47 and *NEHAWU v UCT* 2003 (3) SA 1 (CC) para 34 and 41.

the fundamental labour rights in s23 of the Constitution.[120] Whilst not legally binding,[121] the views of both ILO supervisory bodies do bear significant weight.[122] The CFA view, that purely political strikes are unprotected, would therefore bear significant pull were a court called upon to determine whether the LRA prohibits purely political protest action.

The CFA, however, as above, views protest action involving *both* political and socio-economic demands as protected by the principle of freedom of association.[123] On this basis, one can make two arguments, both, it is submitted, are compatible with the CFA and ILO Committee of Experts position. First, LRA protest action involving both political and socio-economic demands should be encompassed by the statutory definition, when not used as a pretext to pursue purely political demands unrelated to workers socio-economic interests.[124] Second, and for the same reason, strikes (not protest action), which involves both socio-economic demands and demands of mutual interest should be capable of protection.[125] However, the more immediate issue is whether *purely political* protest action - involving neither socio-economic or industrial demands – can fall within the statutory definition?

The academic position, and despite the above, is flawed to the extent it proposes simply because the CFA views purely political protest action as unprotected it equally, and necessarily, follows that LRA purely political protest action is prohibited. As noted, ILO supervisory body opinions, whilst persuasive, are not binding.[126] Similar to the duty to 'consider' international law when interpreting the Bill of Rights, courts are not inflexibly bound to interpret

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[120] See *NUMSA v Bader Bop* 2003 (3) SA 513 (CC) para 25-36, *SANDU v Minister of Defence* 2007 (5) SA 400 (CC) para 84.

[121] *Volkswagen SA (Pty) Ltd v Brand NO* 2001 (22) ILJ 933 (LC) para 67.

[122] See Halton Cheadle 'Reception of International Labour Standards in common-law legal systems' (2012) 14 *Acta Juridica* 348, Andre van Niekerk 'International Labour Standards' in Andre van Niekerk & Nicola Smit (eds) *Law@Work* 4 ed (2017) 31-34 and *FAWU v Pets Products (Pty) Ltd* 2000 (7) BLLR 781 (LC) para 14.

[123] *Digest* op cit (n12) at para 357 and 412.

[124] Cassim op cit (n5) at 2364.

[125] Ibid referring to *Greater Johannesburg Transitional Metro Council* supra (n56) at para 24-32 where Revelas J found a strike to be protected which involved both socio-economic demands and demands in respect of a dispute of mutual interest.

[126] *Volkswagen SA* supra (n121).

the LRA consistently with opinions held by ILO supervisory bodies in every instance.[127] Thus, an express departure, it is submitted, would be justified were it necessary to avoid an interpretation of the LRA that would limit a constitutional right.[128] Furthermore, ILO supervisory body opinions are, by their nature, abstract and general and therefore cannot necessarily take account of particular circumstances in specific jurisdictions.[129] Whether the LRA protects (or should protect) purely political protest action should also be considered within the South African context and the framework of the Bill of Rights.[130]

To this extent, whether purely political protest action is permitted, depends on how broadly or narrowly one interprets 'to defend or promote the socio-economic interests of workers'.[131] It is difficult to determine in the abstract whether purely political protest is permitted, as each case is fact specific.[132] However, a narrow (or literal) interpretation would not, it is submitted, support the conclusion that purely political protest is permitted. The phrase 'socio-economic interests of workers' must be assumed to have been used intentionally, in part, to exclude workers from utilising s77 of the LRA to protest over matters not affecting their 'socio-economic interests'.[133] A broad interpretation could result in the conclusion, per above, that protest action involving *both* political and socio-economic matters is protected. However, even broadly interpreted, a purely political matter, for instance, a decision to appoint a corrupt politician to the cabinet or host a foreign diplomat accused of genocide, would arguably not affect the 'socio-economic interests' of workers. Pursuant to 'reading down', interpreting the definition to include such matters would prevent a finding that the statutory definition limits the right of employees to freedom of assembly.[134] The fundamental problem is 'socio-economic

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[127] See the discussion on s39(1)(b) of the Constitution at 2.3(a)(ii) of chapter two.
[128] See the discussion on reading down at 2.3(b)(i) of chapter two.
[129] See Benjamin & Saley op cit (n10) at 751
[130] Ibid.
[131] Cassim op cit (n5) at 2364.
[132] *Government Western Cape* supra (n31) at para 30.
[133] See Grogan op cit (n1) at 202 who argues 'the words "socio-economic" seems to have been intended to *exclude* stayaways with a purely party-political objective" (emphasis added). Similar reasoning underpins the words 'dispute of mutual interest' in the statutory definition of a strike. See *Vanachem Vanadium Products* supra (n55) at para 17.
[134] See the discussion on reading down at 2.3(b)(i) of chapter two.

interests of workers' is not reasonably capable of an interpretation which would necessarily include political matters within its ambit.[135] Such an interpretation would thus go beyond the restraints imposed upon the reading down principle.

On this basis, a literal interpretation would not protect purely political protest action. A generous (or liberal) interpretation may protect protests involving both socio-economic and political matters but interpreting 'socio-economic interests' to necessarily include "purely political" matters (or demands) would stretch the concept too far and be unduly strained. The statutory definition therefore cannot protect purely political protest action. This, in turn, limits the right of employees to freedom of assembly as it prevents them from manifesting opposition, or support, for causes of importance to them which do not necessarily affect their socio-economic interests.[136] Furthermore, it therefore follows, it is submitted, that this prohibition also infringes their rights to freedom of expression, association and dignity, all of which are intricately linked to the right to free assembly.[137] Whether this limitation can be justified in terms of s36 of the Constitution, is considered in chapter five.

3.2. THE RGA AND GATHERINGS

(a) Background

Historically, as demonstrated, South African workers have not confined themselves to pursuing industrial demands alone.[138] Under the constitutional dispensation, workers continue to protest and demonstrate as a means to pursue broader socio-economic (and political) demands both within their

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[135] See *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security* 2010 (2) SA 181 (CC) at para 23 where Mokgoro J held the constitutionally compliant interpretation cannot be 'far-fetched'.
[136] See 2.4(a) of chapter two where this aspect of the content of the right is discussed.
[137] See *S v Mamabolo* 2001 (3) SA 409 (CC) para 50, *SANDU* supra (n120) at para 7-8, *Hotz v UCT* (2016) 4 SA 723 (SCA) para 62 as well as 2.4(a) of chapter two where the intrinsic interconnection between freedom of assembly and these other rights is explained. See further *Business SA* supra (n47) at 489:J-489A where the LAC recognised that protest action is underpinned by the constitutional rights to freedom of assembly *and* expression and Cassim op cit (n5) at 2365-2366. I further expand on this theme at 5.3 of chapter five.
[138] Fergus op cit (n18) at 151.

communities and society generally.[139]

Aside from LRA socio-economic protest action workers can utilise the RGA, the principal statute which gives effect to the right to freedom of assembly outside the labour sphere,[140] as a mechanism to express opposition towards (or support for) a particular cause.[141] In this sense, LRA socio-economic protest action and RGA demonstrations and assemblies often pursue indistinguishable objectives.[142] The distinction drawn between LRA socio-economic protest action and RGA demonstrations is therefore a 'purely legal' one.[143] While both regulate freedom of assembly, albeit in different ways, they do prescribe different requirements to lawfully protest or assemble respectively.[144] However, one important distinction is the RGA does not circumscribe the matters over which workers can assemble and demonstrate - unlike s77 of the LRA.[145] Therefore, nothing prevents workers from pursuing socio-economic demands or purely political demands under the RGA to the exclusion of the LRA. Whether workers elect to rely upon s77 of the LRA to pursue socio-economic demands, or the RGA, is therefore a tactical choice to made in the circumstances of each case.[146] However, whether workers can use the RGA, to the exclusion of the LRA, to assemble over a dispute of mutual interest is less certain, something I consider in the following chapter.[147]

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[139] See Tembeka Ngcukaitobi, 'Strike law, structural violence and inequality in the platinum hills of Marikana' (2013) 34 *ILJ* 840 and Mario Jacobs 'The socio-economic dimension of strikes' in Darcy du Toit (ed) *Strikes and the Law* (2017) 42-44.

[140] See *Tsoaeli v S 2018* (1) SACR 42 (FB) para 11 and *SATAWU v Garvis SATAWU* 2013 (1) SA 83 (CC) para 55. See 2.3(b)(i) of chapter two.

[141] See Dennis Davis 'Assembly' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2018) 12:2.

[142]Fergus op cit (n18) at 179. For instance: an RGA assembly over poor service delivery, lack of housing or poor schooling would equally implicate the 'socio-economic interests of workers' thereby providing grounds for socio-economic protest action under s77 of the LRA.

[143] Ibid at 155.

[144] Ibid.

[145] However, workers who engage in RGA assemblies, and not LRA socio-economic protest action, will not benefit from the protections in terms of s77(3) as read with s67 of the LRA. Furthermore, as a result, workers who absent themselves from work without valid cause to participate in an RGA demonstration commit misconduct (absenteeism) and can be disciplined or potentially dismissed. Nothing of course would prevent them from engaging in RGA demonstrations and gatherings outside working hours.

[146] Fergus op cit (n18) at 155.

[147] Where *ADT Security v NASUWU* 2015 (36) ILJ 152 (LAC) is discussed.

Before considering overlaps between both statutes in the labour context, and how the RGA limits workers' rights to assemble, I discuss how the RGA distinguishes between 'demonstrations' and 'gatherings'.

(b) 'Demonstrations' versus 'gatherings'

The RGA regulates two forms of assembly: 'demonstrations' and 'gatherings'. The primary distinction solely turns on the number of participants.[148] 'Demonstration' is defined as: 'any demonstration by one or more persons, *but not more than 15 persons*, for or against any person, cause, action or failure to take action.'[149] 'Gathering' is defined: 'as any assembly, concourse or procession of *more than 15 persons*…on any public road defined in the Road Traffic Act…or any other place or premises wholly or partly open to the air'.[150]

It is not immediately clear why '15 persons' was decided as the basis on which to distinguish between 'gatherings' versus 'demonstrations'.[151] Regardless, the distinction is not semantic. The RGA imposes more stringent regulations, and limitations, upon gatherings than it does demonstrations. Two such limitations are considered immediately below: the s3 'notice requirement' and the s11 provisions providing for joint and several liability for 'riot damage'.

(c) RGA restrictions on freedom of assembly

(i) *The notice requirement*

A detailed discussion of the notice requirement is unnecessary for present purposes.[152] However, a brief discussion is required to set the background for the discussion of *ADT Security v NASUWU* in the following chapter.[153]

Section 3(1) requires the gathering convenor to give seven days

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[148]Stuart Woolman 'Freedom of Assembly' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) 43:22.

[149]Emphasis added.

[150]Emphasis added. This is an abbreviated definition from *Tsoaeli* supra (n141) at para 12.

[151]See Pierre de Vos 'Political and Process Rights' in Pierre De Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2013) 553 who argues distinguishing between gatherings purely on the basis of size is arbitrary and therefore raises questions about the constitutionality of this provision. The arbitrariness of the distinction was considered, but not decided, by the High Court in *Mlungwana v S* 2018 (2) All SA 183 (WCC) para 94.

[152] For a detailed discussion see *Mlungwana v S* 2019 (1) BCLR 88 (CC) para 7-23.

[153] Supra (n147).

advance notice to the RGA responsible officer. No similar notice requirement is required for demonstrations.[154] If seven days advance notice cannot be provided, at least 48 hours' notice must be provided.[155] However, where only 48 hours' notice is provided, the responsible officer can prohibit the gathering on notice.[156] Once the notice is received, the officer can conduct negotiations to determine how the gathering will take place.[157] Section 12(1)(a) however provides it is an offence to convene a gathering where no notice is provided or where insufficient notice is provided. The only defence appears in s12(2): where the convenor can establish the gathering 'took place spontaneously'.

Criminalising failure to give notice, or inadequate notice, clearly discourages people from exercising the right to assembly thereby imposing drastic limitations upon its exercise. In *S v Mlungwana*, the CC thus, and unsurprisingly, struck down s12(1)(a) as an unjustifiable limitation on freedom of assembly.[158] Worker protests under the RGA, which qualify as gatherings, therefore no longer face the possibility of criminal sanctions if no advance notice is given to the local authorities. However, per *Mlungwana*, they may still face the possibility of administrative fines if no advance notice is provided.[159]

(ii) *Joint and several liability for riot damage*

Section 11 is perhaps the RGA's most controversial provision.[160] Section 11(1) states that the convenor, participants or any organisation which holds a gathering are jointly and severally liable for any 'riot damage' it causes.[161] Section 1 defines 'riot damage' as:

> 'any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and

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[154] *Mlungwana* supra (n153) at para 10.
[155] Section 3(2).
[156] Section 3(2).
[157] Section 4(1).
[158] *Mlungwana* supra (n153) at para 2. See further Davis op cit (n141) at 12:8.
[159] Ibid at para 99-101. Technically, this issue was left open by the CC but appears to have been endorsed by the High Court in the same matter, *Mlungwana* supra (n152).
[160]See De Vos op cit (n151) at 556-558. Similar to the discussion on the notice requirement, only a brief discussion is necessary for present purposes.
[161] Section 11(4) however provides that s11(1) does not abolish the right of those who suffer harm during a gathering to institute common law delictual claims.

immediately before, during or after, the holding of a gathering'.

Section 11(1)(a) creates a form of strict statutory vicarious liability.[162] This is because the convenor, participants or organisation – which could a union[163] - are jointly and severally liable if the s11(1)(a) elements are established.[164] Section 11(2) provides a defence where the convenor or organisation establishes: (a) they did not permit any act or omission causing riot damage; (b) the act or omission did not 'fall within the scope of the objectives of the gathering' and was 'not reasonably foreseeable'; and (c) all 'reasonable steps' were taken to prevent any act or omission causing riot damage.[165]

Section 11(1) significantly increases the potential costs of organising gatherings which may discourage workers from exercising the right to assemble under the RGA.[166] Furthermore, establishing the s11(2) defence, to avoid the imposition of strict liability, is difficult in practice, as organisations must continuously take 'all reasonable steps' to prevent any riot damage which is 'reasonably foreseeable' and which is 'caused directly or indirectly' both 'before, during [and] after the gathering'.[167] It is therefore unsurprising, s11(2) was similarly subjected to constitutional challenge in *SATAWU v Garvis*.[168]

In *Garvis,* the South African Transport and Allied Workers Union ('SATAWU'), during the course of a protected strike,[169] organised a gathering in the City of Cape Town that turned violent resulting in millions of rands worth

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[162]Adolph 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)' (2011) 31 *ILJ* 838. On vicarious liability generally, see Johan Neethling & Johan Potgieter *Visser: Law of Delict* 7 ed (2015) 389-399.

[163] See Malcom Wallis 'Now you Foresee It, Now You Don't – SATAWU v Garvis & Others' (2012) 33 *ILJ* 2259 who notes the RGA only applies to public assemblies. However, strikes, and more specifically pickets, can take place in a public space potentially opening up unions to liability. See 2.4(b) of chapter two.

[164] Landman op cit (n162) at 846 notes the fact that because s11(1) provides for strict liability, it does incentivise reliance upon s11(1), because it abrogates the need to establish fault, an essential element for delictual liability. See Neethling & Potgieter op cit (n163) at 129.

[165] Section 11(2)(a)-(c).

[166] Wallis op cit (n163) at 2250.

[167] See Stuart Woolman 'You Break it, You Own It: South African Assembly Jurisprudence After Garvis' (2015) 9 *Vienna Journal of International Constitutional Law* 557-560.

[168] *SATAWU v Garvis* 2013 (1) SA 83 (CC).

[169] Ibid para 10. See 4.4(b)(ii) of chapter four where the relevance of this fact is discussed.

of riot damage.[170] When faced with s11(1) liability, SATAWU mounted a constitutional challenge against the s11(2) defence contending it was irrational on the basis there was no realistic way for an organisation to establish its three elements which, in turn, meant s11(1) liability would in essence almost always be a foregone conclusion.[171] However, unlike *Mlungwana*,[172] the CC upheld s11(2) as rational and constitutional.[173] While Moegeng CJ held s11(2) limited the right to free assembly, he found the limitation to be both rational and justifiable under s36(1) of the Constitution.[174] Needless to say, *Garvis* has been subjected to varying degrees of criticism[175] and a detailed analysis is beyond the scope of this thesis. For present purposes, it is important to keep in mind that unions, and their members, must always be alive to the possibility of joint and several s11(1) liability for 'riot damage' when organising gatherings,[176] or even LRA protest action, which may turn awry.[177]

3.3. CONCLUSION

This chapter had two objectives. First, to demonstrate how s77 as read with the definition of 'protest action' in s213 of the LRA cannot protect purely political protests which, in turn, limits the constitutional right of workers to free assembly. Second, to outline how the RGA regulates, and limits, the right of workers to assemble and demonstrate - both generally and in the context of socio-economic protest action and picketing. The next chapter establishes the second limitation. How the LRA limits the constitutional right of employees to assemble in compliance with the RGA, by prohibiting gatherings over disputes of mutual interest, a limitation that flows from the LAC decision in *ADT Security v NASUWU*.[178]

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[170] Ibid para 12.
[171] Ibid para 16-17.
[172] Supra (n153) at para 2.
[173] Supra (n169) at para 40 and 84.
[174] Ibid para 84.
[175] See Woolman op cit (n167), Davis op cit (n141) and Wallis op cit (n163) at 2262.
[176] Landman op cit (n162) at 846.
[177] Orlandi op cit (n58) at 145-146. However, it is important to note unions are only obligated to take 'reasonable steps' within their power to prevent to riot damage. See *Garvis* supra (n168) at para 45 and *KPMM Road and Earthworks v AMCU* (2018) 39 ILJ 609 (LC) para 54.
[178] Supra (n147).

CHAPTER FOUR:

ADT SECURITY V NASUWU: A CRITICAL ANALYSIS OF HOW THE LRA LIMITS THE CONSTITUTIONAL RIGHT OF EMPLOYEES TO ASSEMBLE UNDER THE RGA

4.1. INTRODUCTION

The LC[1] and LAC[2] in *ADT Security v NASUWU* (‘*ADT Security*’) had to determine the following (implicit) question: does the LRA limit the constitutional right of off-duty employees to assemble under the RGA over disputes over mutual interest?[3] The LC held the LRA does not limit this right, as the workers in question expressly disavowed all reliance on their LRA rights and remedies and fully complied with the RGA requirements.[4] On appeal, the LAC unanimously held otherwise.[5] While the LAC did not directly address whether the LRA limits the constitutional right of employees to assemble under the RGA - or whether this is justifiable[6] - it held it would be contrary to public policy, and therefore unlawful, to allow employees to use the RGA to protest over workplace disputes to the exclusion of the LRA.[7]

While the LAC did not directly address the issue, the result is the same. The LRA limits the constitutional right of employees to assemble and picket in compliance with the RGA over workplace disputes without first utilising the LRA.[8] However, as I argue below, this holding does not prevent workers from using RGA assemblies in *conjunction with* LRA protected strike action to

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[1] *ADT Security (Pty) Ltd v NASUWU* 2012 (33) ILJ 575 (LC)

[2] *ADT Security (Pty) Ltd v NASUWU* 2015 (36) ILJ 152 (LAC)

[3] Ibid para 12. I explain why this question was implicit at 4.2(b) below. For a useful summary, see John Grogan ‘Labour Law’ *Annual Survey of South African Law* (2014) 731-732. On the meaning of the phrase ‘dispute of mutual interest’ see 3.1(b)(i) of chapter three.

[4] *ADT Security* supra (n1) at para 10-12. See 3.2(c)(i) of chapter three on what the RGA requirements for demonstrations and gatherings respectively entail.

[5] *ADT Security* Supra (n2) at para 32.

[6] Ibid para 30. I consider this question in the following chapter.

[7] Ibid para 15 and 30.

[8] See Darcy du Toit ‘The right to equality versus employer ‘control’ and employee ‘insubordination’: Are some more equal than others?’ (2016) 37 *ILJ* 21-23. On picketing outside the ambit of s69 of the LRA see 2.4(b) of chapter two and Halton Cheadle ‘Labour Relations’ in MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (2018) 18:23-18:25.

influence the outcome of workplace disputes.[9] First, I outline the background facts and legal issues. Second, I contrast the LC and LAC reasoning. Here, I illustrate, while the LAC judgment stands, it is undeniable that the LRA limits the constitutional right of employees to assemble under the RGA.[10] Finally, I consider three separate criticisms of the LAC's decision: (a) whether it was possible to apply 'reading down' to avoid the limitation;[11] (b) whether it conflicts with the CC's decision in *SATAWU v Garvis*;[12] and (c) whether it conflicts with the constitutional right of trade unions to engage in collective bargaining.[13]

4.2. BACKGROUND

(a) Facts

The National Security and Unqualified Workers Union ('NASUWU' or 'the union') was a minority union in the workplace[14] of ADT Security (Pty) Ltd ('ADT').[15] NASUWU asked ADT to extend it organisational rights under Chapter III of the LRA.[16] ADT refused as NASUWU lacked sufficent levels of representativeness to validate the rights it wished to exercise.[17] NASUWU could have referred a dispute to the CCMA for conciliation under s22 of the LRA and embarked on protected strike action under Chapter IV of the LRA[18]

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[9] See the discussion of *SATAWU v Garvis* 2013 (1) SA 83 (CC) at 4.4(b) below.

[10] Du Toit op cit (n8), Emma Fergus 'Pickets, socio-economic protest action, gatherings and demonstrations' in Darcy du Toit (ed) *Strikes and the Law* (2017) 182-183.

[11] I briefly recap what 'reading down' entails below at 4.4(a). See 2.3(b)(i) of chapter two for a more in-depth discussion.

[12] 2013 (1) SA 83 (CC). See Fergus op cit (n10).

[13] Section 23(5) of the Bill of Rights states 'every trade union, employer and employer's organisation has the right to engage in collective bargaining'. I consider its three contours at 4.4(c) below. See Cheadle ibid for an overview. Du Toit op cit (n8) raises the further argument, if the LAC decision is correct, that the LRA also limits the constitutional right to equality in s9(3) of the Constitution. This criticism, unfortunately, is beyond the scope of this thesis.

[14] On the statutory definition of 'workplace' in s213 of the LRA, see *AMCU v Chamber of Mines* 2017 (3) SA 242 (CC) para 24-32.

[15] *ADT Security* supra (n2) at para 7.

[16] Ibid. On organisational rights generally see Darcy du Toit, Shane Godfrey & Carole Cooper et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2014) 250-266.

[17] *ADT Security* supra (n2) at para 7. Namely, rights only majority unions are statutorily entitled to which appear in s14-16 of the LRA.

[18] On the procedural and substantive requirements for protected strike action see Du Toit et al ibid at 334-354. See 3.1(b) of chapter three on the protections it attracts.

to compel ADT to grant it organisational rights.[19] NASUWU did neither of these things.[20]

Instead, it expressly disavowed all reliance on its LRA rights and successfully applied to the City of Cape Town ('the City') in terms of s3 of the RGA to hold a gathering and picket outside ADT's head office in support of its demand for organisational rights under the LRA.[21] An agreement under s4(4) of the RGA was concluded between NASUWU and the RGA responsible officer which provided that: local police and traffic services would monitor the gathering, participants would remain unarmed and unmasked for its duration and NASUWU would appoint marshals to monitor it.[22] During the picket, NASUWU would hand a memorandum of their demands to ADT management which were 'not limited to LRA issues alone'.[23] When ADT became aware of the proposed gathering it applied to the LC, on an urgent basis, for a final interdict restraining NASUWU from proceeding with the gathering and picket.[24]

(b) Legal issues

Both courts considered two issues. First, does the LC have jurisdiction to interdict a gathering?[25] Second, if yes, were the three requirements for a final interdict established?[26]

Because NASUWU fully complied with the RGA, ADT could not interdict the gathering for lack of compliance with that statute.[27] ADT therefore argued two alternative grounds. First, the LRA prohibits employees from utilising the RGA as an alternative mechanism to influence the outcome of collective

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[19] Grogan op cit (n3) at 732. On the right of minority unions to strike over organisational rights to which they are not statutorily entitled, in terms of s20 of the LRA, see *NUMSA v Bader Bop* 2003 (3) SA 513 (CC) para 41-45.
[20] *ADT Security* supra (n2) at para 8.
[21] Ibid. See 3.2(c)(i) of chapter three on the s3 RGA notice requirement.
[22] Ibid.
[23] *ADT Security* supra (n1) at para 15. I expand further on the significance of this fact in particular at 4.3(b)(i) below.
[24] Ibid para 7.
[25] *ADT Security* supra (n2) at para 11.1.
[26] Ibid para 11.2. Namely: (a) a clear right; (b) a reasonable apprehension of harm; and (c) absence of an alternative remedy. I discuss how ADT sought to establish these three elements below. See generally *Hotz v UCT* 2017 (2) SA 485 (SCA) para 29 and 35-36.
[27] Du Toit op cit (n8) at 21-22.

bargaining, as this would unlawfully circumvent the LRA and because the RGA conflicts with the LRA insofar as disputes of mutual interest are concerned.[28] Second, alternatively, employee participation would breach the implied contractual duty of good faith, constituting common law misconduct, as it would directly and adversely affect ADT's reputation and goodwill.[29] Implicit in the first argument, was whether the LRA limits the constitutional right of employees to assemble in compliance with the RGA.[30] If correct, the LRA would limit this right by preventing off-duty employees from protesting under the RGA over a workplace dispute, despite fully complying with the RGA's requirements.[31]

4.3. CONTRASTING THE REASONING

(a) Does the Labour Court have jurisdiction?

(i) *Labour Court*

Steenkamp J concluded that despite the fact neither the LRA or RGA expressly give the LC jurisdiction to interdict a RGA gathering, the LC had jurisdiction to entertain ADT's application.[32]

Whilst not expressly articulated, the LC appeared to source jurisdiction in s157(2)(a) of the LRA.[33] Three decisions were cited to find jurisdiction:[34] *Makhanya v University of Zululand,*[35] *Gcaba v Minister of Safety and Security*[36] and *South African Maritime Authority v McKenzie*.[37] All three, it is submitted,

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[28] *ADT Security* supra (n2) at para 11.2 and para 14-16. ADT primarily relied upon s210 and s22 of the LRA in support of this contention. I expand on both provisions at 4.3(b)(ii) below.

[29] Ibid para 31. I discuss the contractual duty of good faith below at 4.3(c). For an overview see Craig Bosch 'The Implied Term of Trust and Confidence in South African Labour Law' (2006) 27 *ILJ* 28 and *CSIR v Fijien* 1996 (2) SA 1 (SCA) para 18. On the distinction between 'tacit' versus 'implied' contractual terms see *Alfred McAlpine & Son (Pty) Ltd v Traansvaal Provincial Administration* 1974 (SA) 506 (A) at 531.

[30] See Grogan op cit (n3) at 732.

[31] See the discussion of *Mlungwana v S* 2019 (1) BCLR 88 (CC) at 2.4(a) of chapter two where Petse AJ held at para 43 that any law which 'would prevent unarmed persons from assembling peacefully would the right in section 17 [of the Bill of Rights]'.

[32] *ADT Security* supra (n1) at para 6.

[33] Section 157(2)(a) provides that the LC has concurrent jurisdiction with the HC to determine any alleged or threatened violation of a constitutional right 'arising from employment and labour relations'.

[34] *ADT Security* supra (n1) at para 2-5.

[35] 2009 (30) ILJ 1539 (SCA).

[36] 2010 (1) SA 238 (CC).

[37] 2010 (3) SA 601 (SCA).

largely articulate the same two principles. First, the LRA does not fully encapsulate all the rights employees enjoy.[38] Second, depending on the claim, a single forum may have exclusive jurisdiction, or multiple forums concurrent jurisdiction, to enforce claims arising from the employment relationship.[39]

Broadly, three claims may 'potentially' arise.[40] First, claims arising from the 'LRA rights'.[41] Second, claims arising from 'general law' such as damages or specific performance arising from an unlawful termination of an employment contract.[42] Third, constitutional claims, arising from, for instance, the right to just administrative action as given effect to by the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').[43] The LC and CCMA have exclusive jurisdiction to enforce 'LRA rights'. The LC and High Court ('HC') concurrent jurisdiction to enforce contractual claims: the HC under its inherent common law jurisdiction[44] and the LC in terms of s77(3) of the Basic Conditions of Employment Act 75 of 1997 ('BCEA').[45] Finally, the LC and HC enjoy concurrent jurisdiction to enforce constitutional rights: the HC in terms of s169(1)(a) of the Constitution and LC in terms of s157(2)(a) of the LRA.[46] It is therefore, not 'unusual' for an employee to assert one more claims arising from the same facts, which depending on the nature of the claim, may be enforceable in multiple forums.[47]

Applying these principles, Steenkamp J appeared to reason as follows. Because the RGA gives effect to s17 of the Constitution, and because the

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[38] This principle was first articulated in *Fedlife Assurance Ltd v Wolfaardt* 2002 (2) SA 295 (SCA) para 11-12 and 21-22, later reiterated in *Makhanya* supra (n35) at para 8 and 11, *Gcaba* supra (n36) at para 73 and subsequently *McKenzie* supra (n37) at para 7.

[39] *Makhanya* ibid para 11-15, *Gcaba* ibid para 42 and 52. See also *Fredericks v MEC for Education Eastern Cape* 2002 (2) SA 693 (CC) para 38 citing *Wolfaardt* ibid at para 25. It is important to note the CC decision in *Chirwa v Transnet* 2008 (4) SA 367 (CC) had been interpreted to have 'implicitly' overruled both *Fredericks* and *Wolfaardt*, but Nugent AJA in *Makhanya* ibid at para 14 and 90-93 distinguished *Chirwa* finding it had not overruled either *Fredericks* or *Wolfaardt* and similar reasoning was adopted in *Gcaba* para 53-54. See generally Darcy du Toit 'A common-law hydra emerges from the forum shopping swamp' (2010) 31 *ILJ* 21.

[40] *Makhanya* supra (n35) at para 12.

[41] Ibid para 11.

[42] Ibid.

[43] Ibid.

[44] Section 173 of the Constitution.

[45] *Makhanya* supra (n35) at para 2 and 11.

[46] Ibid para 11.

[47] Ibid para 37, *Gcaba* supra (n36) at para 52.

reason for the interdict, '[concerned] the relationship between employer and employee' the LC had jurisdiction to interdict it under s157(2)(a).[48] On this basis, the court concluded that the LC 'most likely' has concurrent jurisdiction with the HC to interdict a gathering.[49] This discussion on jurisdiction, albeit lengthy, is necessary because the LC relied upon them 'both in relation to jurisdiction and the merits.'[50] I return to them below where the substantive question - whether the LRA limits the constitutional right of employees to assemble in compliance with the RGA - is discussed.[51]

(ii) *Labour Appeal Court*

The LAC similarly held that the LC had jurisdiction but adopted different reasoning.[52] Relying on s158(1)(a)(iii)[53] of the LRA Hlophe AJA reasoned where a minority union does not follow the arbitration and conciliation procedures s22 prescribes regarding organisational rights disputes, the LC 'by implication of s157(1) read with s158' has jurisdiction to interdict a gathering.[54]

(b) Does the LRA limit the constitutional right of employees to assemble and demonstrate under the RGA?

(i) *Labour Court*

Whether the LRA limits the right of employees to assemble under the RGA was considered under the head of whether ADT established a clear right to a final interdict.[55] ADT asserted a clear right on the basis the gathering was unlawful.[56] This rested on two propositions. First, NASUWU lacked sufficent levels of representativeness to validate the organisational rights it wished to exercise.[57] Second, utilising the RGA as an alternative mechanism to secure

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[48] *ADT Security* supra (n1) at para 5.
[49] Ibid para 6. This is consistent with *Growthpoint Properties Ltd v SACCAWU* 2011 (1) SA 81 (KZD) para 15 regarding the interdicting of unprotected (or unlawful) picketing conduct in terms of s69 of the LRA where the rights of non-employers is concerned. See 2.4(b) of chapter two.
[50] Ibid.
[51] At 4.3(b) below.
[52] *ADT Security* supra (n2) at para 13.
[53] Section 158(1)(a)(iii) provides the LC can grant 'an order directing the performance of any act, when implemented, will remedy a wrong and give effect to the primary objects of the Act'
[54] *ADT Security* supra (n2) at para 13.
[55] *ADT Security* supra (n1) at para 9.
[56] Ibid.
[57] Ibid para 10-11.

organisational rights, would unlawfully circumvent s22 of the LRA.[58]

As to both grounds, Steenkamp J held the starting point to determine the lawfulness of the gathering was s17 of the Bill of Rights which is a constitutional right employees also enjoy as given effect to by the RGA.[59] The right asserted by the union was not a 'LRA right' but a 'constitutional right'.[60] Therefore, whether NASUWU had sufficent levels of representativeness to validate organisational rights was irrelevant to determining the lawfulness of the gathering itself.[61] This was because NASUWU's levels of representativeness was a factual question to be determined under s21 of the LRA.[62] As to the second ground, the LC, in two broad parts, expanded upon why the LRA should not be interpreted to limit the right of NASUWU and its members to conduct the gathering in compliance with the RGA.

First, the present matter was distinguishable from *ADT Security v SATAWU*.[63] In *SATAWU* Cele AJ, relying upon *TSI Holdings v NUMSA*,[64] interdicted a gathering by off-duty employees because their demands solely concerned disputes of mutual interest.[65] *SATAWU* was distinguishable for two reasons. First, unlike *SATAWU*, NASUWU expressly disavowed all reliance on the LRA.[66] Second, as noted, NASUWU and its members made it clear their demands were 'not limited to LRA issues alone'.[67] Regardless it is submitted, even if *SATAWU* were applicable, Cele AJ's reliance upon *TSI Holdings* was misplaced. *TSI Holdings* did not establish utilising the RGA to make demands over disputes of mutual interest is unlawful. Rather, *TSI Holdings* simply establishes unlawful demands cannot form the subject of a protected strike, because it would be contrary to the rule of law to protect industrial action which

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[58] Ibid para 12.
[59] Ibid para 9-10.
[60] Ibid para 11. Adopting similar reasoning per *Makhanya* supra (n35) para 11 and *Gcaba* supra (n36) para 52 which articulated the first principle: the LRA is not exhaustive of employee rights. See 4.3(a)(i) above.
[61] Ibid para 10.
[62] Ibid para 10-11.
[63] (J1099/08) [2008] ZALC 215 (13 June 2008)
[64] 2006 (7) BLLR 631 (LAC) para 48.
[65] *SATAWU* supra (n64) at para 7-8.
[66] *ADT Security* supra (n1) at para 14-15.
[67] Ibid para 15. See 3.1(bb) of chapter two where I discuss a similar principle regarding strikes and demands over mutual interest per the LC decision in

has, as its objective, an unlawful demand.[68]

Second, and without expressly stating so, Steenkamp J utilised reading down to conclude that the LRA and RGA were both capable of an interpretation which would both: (a) not result in the LRA limiting the constitutional right of off-duty employees assemble under the RGA over workplace disputes; and (b) which would not further limit the constitutional right to free assembly than those which the RGA already imposes.[69] This was for three reasons.

First, whereas the gathering was arguably 'contrary to the spirit of the LRA insofar as [NASUWU] could have embarked on a protected strike' that in itself did 'not make it unlawful'.[70] As NASUWU expressly disavowed all reliance on its right to embark on a protected strike, and fully complied with the RGA, the gathering itself was lawful.[71] Second, the RGA already limits the right to free assembly by requiring convenors to give advance notice of gatherings to the authorities in terms of s3(1) and because s11(1) imposes joint and several liability for riot damage.[72] Both provisions limit the right to free assembly no more than is necessary to achieve their purpose.[73] Therefore, it would be undesirable to limit it further by prohibiting off-duty employees from gathering over workplace disputes, to the exclusion of the LRA, in circumstances where they expressly disavow all reliance on the LRA.[74] Third, ADT had an alternative remedy, because s11(1) would allow it to claim damages from NASUWU if any riot damage resulted from the gathering and picket.[75]

Finally, Steenkamp J similarly rejected the contention the gathering should be interdicted because it would breach the implied duty of good faith.[76] The employees would be off-duty during the gathering and participation would

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[68] *TSI Holdings* supra (n64) *in casu* a demand to unfairly dismiss a racist manager in contravention of s188 of the LRA. See Halton Cheadle 'Constitutional and international law' in Darcy du Toit (ed) *Strikes and the Law* (2017) 22-23.
[69] See 2.3(b)(i) where both components of reading down is discussed.
[70] *ADT Security* supra (n1) at para 15.
[71] Ibid.
[72] Ibid para 15-16. Refer to 3.2(c) of chapter three where both RGA limitations are discussed.
[73] Ibid.
[74] Ibid.
[75] Ibid para 17.
[76] Ibid para 18.

therefore not amount to unprotected strike action or a breach of contract.[77] If on-duty employees participated, they could be disciplined by ADT because they would not enjoy the s67 LRA protections applicable to protected strike action.[78] The right of ADT to discipline such employees therefore provided a further alternative remedy.[79] An additional alternative remedy was ADT could have judicially reviewed the City's authorisation in terms s6 of PAJA: an alternative remedy it failed to pursue.[80] ADT's interdict application was therefore dismissed and the gathering took place as scheduled.[81]

(ii) *Labour Appeal Court*

The LAC emphasised three propositions in finding the gathering was unlawful to conclude - by implication - that the LRA limits the constitutional right of employees to assemble under the RGA.

First, the LAC emphasised that the LRA was negotiated between government, organised labour and business in the National Economic Development and Labour Advisory Council ('NEDLAC').[82] Conversely, the RGA is not a product of NEDLAC negotiation. Therefore the 'inference is that the Legislature could not have intended for the LRA to apply in matters…comprehensively dealt with in specialised [labour] legislation'.[83]

Second, the LAC emphasised various conflicts between the provisions of the RGA and LRA. For instance: that s64(1)(a) as read with s65(1)(c) of the LRA requires that disputes of mutual interest first be referred to the CCMA or LC for conciliation or adjudication before protected industrial action can take place.[84] By contrast, the RGA has no similar requirement of adjudication or mandatory conciliation and therefore the RGA, to this extent, conflicts with the

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[77] Ibid para 15.
[78] Ibid para 18.
[79] Ibid.
[80] Ibid. See Fergus op cit (n10) at 183 and Dennis Davis 'Assembly' in MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (2018) 12:5 who both argue decisions to grant, or refuse, authorisation for a gathering in terms of the RGA constitutes administrative action under s1 of PAJA.
[81] Ibid para 19.
[82] *ADT Security* supra (n2) at para 17 discussed in Fergus op cit (n10) at 183.
[83] *ADT Security* ibid relying on *Sidumo v Rustenburg Mines* 2008 (2) SA 24 (CC) para 94.
[84] *ADT Security* ibid para 14.

LRA.[85] Section 210 of the LRA therefore requires its provisions supersede the RGA insofar as a conflict arises between the two statutes.[86]

Third, and connected to the preceding two propositions, the LAC relied upon several decisions such as *Gcaba*,[87] *Sidumo v Rustenburg Mines*,[88] *SANDU v Minister of Defence*[89] and *SATAWU*[90] in emphasising the LRA's central object of creating specialised forums and procedures to regulate employment related disputes.[91] By utilising the RGA, and not the LRA, the LAC reasoned that permitting the gathering in the circumstances would undermine the principle of subsidiarity because it would create parallel systems of jurisprudence under different statutes.[92] Thus, it would be contrary to public policy to permit unions to 'bypass' the LRA's dispute resolution mechanisms by using the RGA in the present circumstances.[93] However, and despite this, the LAC gave, unlike the LC, relatively little consideration to the fact NASUWU expressly disavowed all reliance on its rights under the LRA and relied solely on its constitutional right to assemble in accordance with the RGA.[94]

The LAC declined to decide whether employee participation would breach the implied contractual duty of good faith. However, it did appear inclined towards such a finding by remarking, 'there can be no doubt that picketing at an employers head office during their lunch break would impact on the employer's goodwill and reputation'.[95]

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[85] Ibid para 14-16. Section 210 of the LRA states insofar as a conflict arises between the provisions of the LRA and any Act expressly amending the LRA or the Constitution, the LRA must prevail.
[86] Ibid.
[87] *Gcaba* supra (n36) at para 56.
[88] *Sidumo* supra (n83)
[89] 2007 (5) SA 400 (CC) para 51.
[90] Supra (n63).
[91] *ADT Security* supra (n2) at para 17-21 and para 30.
[92] Ibid para 30 referring to *Gcaba* supra (n36) at para 56. However, the LAC failed to take cognisance of para 54 of *Gcaba* where the CC also held, 'legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights'. See Fergus op cit (n10) at 183 for a further criticism on why the LAC's reliance on *Gcaba* was misplaced.
[93] *ADT* Security Ibid para 32.
[94] *ADT Security* supra (n1) at para 12 and 14.
[95] *ADT Security* supra (n2) at para 31.

4.4. THREE CRITICISIMS OF *ADT SECURITY*

(a) First criticism: failure to consider 'reading down'

As discussed elsewhere,[96] 'reading down' has two interconnected principles courts must always apply even where litigants do not expressly invoke it.[97] First, legislation must always be interpreted in a manner which does not limit a fundamental right where it is 'reasonably possible' to do so.[98] Second, where legislation does limit a fundamental right, it must be narrowly construed to ensure it limits the right no more than is necessary to achieve its purpose.[99]

While the LC applied reading down in both senses, the LAC appears to have completely disregarded it. However, unlike the LAC, the LC gave no consideration to s210 of the LRA. Section 210, among other propositions,[100] significantly influenced the LAC's conclusion that the gathering would be unlawful - given that the LRA provides for mandatory dispute resolution over mutual interest disputes, prior to the exercise of economic pressure, while the RGA does not.[101] Thus, the issue is whether s210 is reasonably capable of an interpretation that would permit off-duty employees to utilise the RGA as an alternative to the LRA where they expressly disavow all reliance on the LRA?

It is submitted two possibilities exist. First, similar to protest action under s77, where employees disavow reliance on the LRA, the gathering should be permitted if it involves both workplace demands, and other demands not regulated by the LRA.[102] This was the case in *ADT Security*, where NASUWU made it clear their demands were 'not limited to LRA issues alone'.[103] Second, where off-duty employees expressly disavow all reliance on the LRA, s210 is not applicable as the employees in question would have disavowed all reliance upon it.[104] However, whether s210 is 'reasonably capable' of either

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[96] See 2.3(b)(i) of chapter two.
[97] See *Phumelela Gaming and Leisure Ltd v Grundlingh* 2007 (6) SA 350 (CC) para 26-27.
[98] *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) para 89.
[99] *TAWUSA obo Ngedle v Unitrans Fuel (Pty) Ltd* 2016 (37) ILJ 2485 (CC) para 52-53.
[100] See the other two propositions the LAC relied upon at 4.3(b)(ii) above.
[101]See Fergus op cit (n10) at 183-184.
[102] See the discussion at 3.1(c) of chapter three.
[103] *ADT Security* supra (n1) at para 15. What the 'other issues' entailed however is not made clear in either judgment.
[104] This appeared to be the reasoning of the LC ibid at para 14-15.

interpretation is less certain, given the courts have consistently asserted the primacy of the LRA over other legislation under s210.[105] It is undeniable, insofar as employment disputes are concerned, that the RGA conflicts with the LRA to the extent the former does not require referrals to conciliation before a RGA protest over a workplace dispute can take place. It is therefore doubtful, despite what the LC found, that s210 is reasonably capable of an interpretation which would not limit the right to utilise the RGA, without first relying upon the LRA, as a mechanism to influence the outcome of an employment dispute.

(b) Second criticism: *ADT Security* conflicts with *SATAWU v Garvis*

Fergus[106] contends *ADT Security* conflicts with the CC's judgment in *SATAWU v Garvis*.[107] As discussed, *Garvis* involved a gathering in the City of Cape Town, undertaken in conjunction with a protected strike, which resulted in millions rands worth of riot damage.[108] In *Garvis*, the CC did not directly address if the gathering itself was unlawful, as the Court was confined to determining the constitutionality of s11(2) of the RGA.[109] However, the CC did not find the gathering unlawfully circumvented the LRA.[110] Therefore, on this basis, Fergus contends the CC 'implicitly accepted' its legality, hence raising the possibility that *ADT Security* conflicts with the CC's decision in *Garvis*.[111]

However, *Garvis* is distinguishable from *ADT Security*. In *Garvis*, it was common cause the union had *already* utilised the LRA's dispute resolution procedures as the strike was protected.[112] *Garvis* however, does arguably establish that unions can utilise RGA gatherings *in conjunction* with protected strike action to influence the outcome of workplace disputes of mutual interest. Where a gathering is undertaken in conjunction with a protected strike, the basis on which the LAC in *ADT Security* held the gathering to be unlawful would fall away. Specifically, a gathering in these circumstances would only occur once the dispute of mutual interest had been conciliated, given

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[105] See *Sidumo* supra (n83) at para 99 and *Chirwa* supra (n39) at para 49.
[106] Fergus op cit (n10) at 184.
[107] Supra (n12).
[108] See 3.2(c)(ii) of chapter three.
[109] *Garvis* supra (n12) at para 4.
[110] Fergus op cit (n10) at 184.
[111] Ibid.
[112] *Garvis* supra (n12) at para 10.

conciliation is, generally speaking, a pre-requisite for protected strike action.[113] Furthermore, as Du Toit notes, nothing prevents supporters or family members of a union from utilising the RGA to stage demonstrations, gatherings or pickets in support of that union's workplace demands.[114]

(c) Third criticism: *ADT Security* is incompatible the constitutional right of trade unions to engage in collective bargaining

Cheadle contends *ADT Security* is incompatible with the constitutional right of trade unions to engage in collective bargaining.[115] This right has three components.[116] First, the negative aspect of the right entails a 'freedom to collectively bargain' which means any law that prohibits or restricts the ability to collectively bargain will limit it.[117] Second, there is an 'implicit right' to exercise economic power, for example, through strike action.[118] Third, and most controversially, a positive duty to bargain.[119]

For present purposes, only the second component, the implicit right to exercise economic power, is relevant. In *In re: Certification of the Constitution of the Constitution of the Republic of South Africa, 1996*, the CC in affirming this second component, held the 'primary mechanism' through which workers exercise economic power is through strike action.[120] Employers exercise economic power through a 'range of weapons' such as, 'the employment of alternative or replacement labour, the unilateral imposition of new terms and conditions of employment' and 'lock-outs'.[121] On this basis, the CC appears to have accepted the right to exercise economic power is not confined to strike action but could also hypothetically include other mechanisms, such as, for

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[113] See Bradley Conradie 'Protected Strikes' in Darcy du Toit (ed) *Strikes and the Law* (2017) 64.

[114] Du Toit op cit (n8) at 22.

[115] Cheadle op cit (n8). A similar argument is made by Malcom Wallis 'Now You Foresee It, Now You Don't – SATAWU v Garvis & Others' (2012) 33 *ILJ* 2261-2262.

[116] Ibid.

[117] Ibid 24:1.

[118] Ibid 24:2.

[119] Ibid. However, this part of the right only exists in principle as the CC in *SANDU* supra (n89) at para 48 declined to decide whether the right has a positive duty to bargain thereby leaving the SCA decision in *SANDU v Minister of Defence* 2007 (1) SA 402 (SCA) para 25, that there is no constitutional duty to bargain, intact.

[120] 1996 (10) BCLR 1253 (CC) para 66

[121] Ibid.

instance, RGA protests.[122] Thus, on this basis, an argument exists that unions have a constitutional right, pursuant to the implicit right to exercise economic power during collective bargaining, to utilise the RGA, without relying upon the LRA, as a mechanism to influence workplace disputes, hence raising further doubts about the correctness of the LAC's conclusion in *ADT Security*.[123]

4.5. CONCLUSION

Despite criticisms, the LAC in *ADT Security* clearly established that the LRA limits the constitutional right of employees to assemble under the RGA over a dispute of mutual interest. Whether this limitation passes constitutional muster, in terms of s36 of the Constitution, is considered in the next chapter.

[122] Cheadle op cit (n8) at 18:24. However, as Brassey *Commentary on the Labour Relations Act* (2006) C3:55-C3:56 appears to suggest, if this holds then it could equally follow, and despite the fact the right to lock-out is not expressly protected in s23, that employers have a corresponding right to a lock-out as part of the implicit right to exercise economic power.

[123] Cheadle Ibid referring to *NUPSAW obo Mani v National Lotteries Board* 2014 (35) ILJ 1885 (CC) para 35-36 where the CC appeared to accept that a media campaign, pursuant to a dispute of mutual interest, was legitimate and not prohibited by the LRA.

CHAPTER FIVE

THE LIMITATION ANALYSIS: CAN EITHER LIMITATION BE JUSTIFIED UNDER THE LIMITATION CLAUSE?

5.1. INTRODUCTION

The preceding two chapters established two restrictions the LRA imposes on the constitutional right of employees to free assembly. First, how its definition of protest action prohibits - or least cannot protect - purely political protest action by workers under s77 of the LRA which correspondingly limits their constitutional right to assemble and demonstrate. Second, how s210 prohibits off-duty employees from exercising the constitutional right to protest in compliance with the RGA to influence the outcome of collective bargaining without first utilising the LRA. In three parts, this chapter considers if either limitation is justifiable according to the criteria in s36(1) of the Constitution.

First, I explain proportionality and the role it plays in determining the justifiability of a limitation, together with the variable standard of justification it attracts. Second, I explain the various factors s36(1)(a)-(e) requires one to consider when determining the justifiability of a limitation. Additional factors, not expressly mentioned in s36(1)(a)-(e), are also considered given, as noted elsewhere, the s36(1)(a)-(e) factors do not constitute a closed list.[1] Third, I apply s36(1) to both limitations and contend, in conclusion, that neither are justifiable and thus stand to be declared unconstitutional in terms of s172(1)(a) of the Constitution.[2] Two recommendations to address the unconstitutionality of the LRA on this score are set out in the following chapter.

5.2. 'REASONABLE AND JUSTIFIABLE': PROPORTIONALITY AND THE VARIABLE STANDARD OF JUSTIFICATION

Section 36(1) of the Constitution states:

> 'The rights in the Bill of Rights may only be limited in terms of a law of general

[1] See 2.2(b) of chapter two and *Law Society v Minister of Transport* 2011 (1) SA 400 (CC) para 37.

[2] See *Dawood v Minister of Home Affairs* 2000 (3) SA 936 para 59 on what s172(1)(a) requires where an unjustifiable limitation is established, discussed at 2.2 of chapter two.

application to the extent that the limitation is *reasonable and justifiable* in an open and democratic society based on human dignity, equality and freedom, taking into account *all relevant factors* including –

(a) the nature of the right,
(b) the importance of the purpose of the limitation,
(c) the nature and extent of the limitation,
(d) the relation between the limitation and its purpose, and
(e) less restrictive means to achieve the purpose.'[3]

Neither s36(1), or its predecessor in s33 of the interim Constitution,[4] require, at least not expressly, that a limitation be 'proportional' in order to be 'reasonable and justifiable'.[5] However, since the CC's first decision,[6] it has interpreted 'reasonable and justifiable' to require that a limitation be proportional (sometimes referred to as 'balanced')[7] to be constitutional.[8] Section 36(1) therefore cannot be meaningfully applied without properly understanding how the proportionality requirement influences its practical application.[9] Proportionality, it is submitted, has two broad elements. First, a threshold requirement, requires that the limitation occur for reasons which a

[3] Emphasis added. See 2.2(b) of chapter two where I discuss the threshold requirements of (a) law of general application; and (b) rationality. The CC has consistently accepted the LRA is a 'law of general application' and therefore, it is unnecessary to consider it further. Rationality is considered in more detail below at 5.3(d).

[4] Constitution of the Republic of South Africa Act 200 of 1993.

[5] Pierre de Vos 'The Limitation of Rights' in Pierre De Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2013) 363

[6] See *S v Makwanyane* 1995 (3) SA 391 (CC) para 104 where Chaskalson P held 'the limitation of rights for a purpose that is reasonable and necessary in an open and democratic society involves the weighing up of competing values, and ultimately *an assessment based on proportionality*' (emphasis added). Whilst the *Makwanyane* account on proportionality was decided under s33 of the interim Constitution, it equally holds for s36 of the Final Constitution. See *National Coalition for Gay and Lesbian Equality* 1998 (12) BCLR 1517 (CC) para 33-35.

[7] See Iain Currie 'Balancing and the Limitation of Rights in the South African Constitution' in Stuart Woolman & David Blitchitz (eds) *Is this Seat Taken? Conversations at the Bar, Bench and Academy about the South African Constitution* (2012) 251.

[8] See Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (2013) 162-163 and De Vos op cit (n5). The CC's endorsement of proportionality is perhaps unsurprising given its use in Canadian constitutional law as the limitation clause is largely modelled on a comparable provision in the Canadian Charter of Rights and Freedoms. See Hugh Corder & Lourens Du Plessis Understanding *South Africa's Transitional Bill of Rights* (1994) 127-128 and *R v Oakes* (1986) 26 DLR (4th) 200 at 277.

[9] See IM Rautenbach 'Proportionality and the Limitation Clauses of the South African Bill of Rights' (2014) 17 *PELJ* 2250 for a comprehensive discussion on proportionality.

reasonable person, committed to a society based on 'human dignity, equality and freedom', would regard as sufficiently persuasive to justify the limitation of a fundamental right.[10] Second, a balance must be struck between any harm the limitation causes ('infringement of a fundamental right') and any corresponding benefits it seeks to achieve ('the purpose of the limitation').[11]

In this sense, all relevant factors, including those expressly mentioned in s36(1)(a)-(e) must be considered to determine whether a limitation satisfies these twin elements of proportionality.[12] As noted, no single factor should be elevated above another.[13] Neither should they be applied 'mechanically' as a 'checklist of requirements'.[14] Furthermore, no universal standard exists to determine proportionality, as each limitation must be scrutinised according to the facts and circumstances of each case.[15] However, what is clear, is the standard of justification proportionality attracts is subject to a sliding scale.[16] In other words, the persuasiveness of the reasons required to satisfy proportionality can be heightened depending on factors such as: (a) whether the limitation infringes multiple constitutional rights;[17] (b) the extent of the infringement;[18] (c) its relative importance;[19] (d) whether less restrictive means to achieve the purpose of the limitation exist;[20] and (e) which right is infringed.[21]

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[10] Denise Meyerson *Rights Limited* (1997) 36-43 cited in Currie & De Waal op cit (n8) at 151. This essentially constitutes the threshold requirement of rationality, considered at 5.3(b) and (d) below. See 2.2(b) of chapter 2 where I explain what rationality entails.

[11] Currie & De Waal ibid at 162-163. See a similar summary of this second element in *S v Bhulwana* 1996 (1) SA 388 (CC) para 18 and *Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC) para 27.

[12] See Currie & De Waal bid at 164 and *Walters* ibid at para 26-27.

[13] See *S v Manamela* 2000 (3) SA 1 (CC) para 32 and 2.2(b) of chapter two.

[14] Ibid.

[15] *Makwanyane* supra (n6).

[16] See Halton Cheadle 'Limitations' in MH Cheadle, DM Davis & NRL Haysom South African Constitutional Law: The Bill of Rights (2018) 30:10-30-11 and Rautenbach op cit (n9).

[17] See *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 46 and 82.

[18] See *Bhulwana* supra (n11) where the CC remarked that '…the more substantial the inroad into fundamental rights, the more persuasive the ground of justification must be'. See also *S v Jordan* 2002 (6) SA 642 (CC) para 86.

[19] *Magajane v Chairperson North West Gambling Board* 2006 (5) SA 250 (CC) para 65.

[20] See *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC) para 49 and the minority judgment in *Prince v President Cape Law Society* 2001 (2) SA 388 (CC) para 83.

[21] The question of a 'hierarchy of rights' is controversial, as noted by De Vos op cit (n5) at 374. In *Johncom Media Investments Limited v M* 2009 (4) SA 7 (CC) para 19 the CC held there exists no hierarchy. However, in other decisions such as *Makwanyane* supra (n6) at para 34

Factors (b), (c) and (d) also constitute factors s36(1) requires one to consider to determine the justifiability of a limitation.[22] In this sense, it is submitted these factors operate on two levels. First, they are relevant to determine if a limitation is 'reasonable and justifiable'. Second, they influence the level of scrutiny (or standard of justification) which a limitation will be subjected to determine its justifiability.[23] I explain this interaction below, where I also simultaneously apply s36(1) to both limitations in illustrating how both unjustifiably limit the constitutional right of workers to freedom of assembly.

5.3. THE LIMITATION ANALYSIS

(a) Nature (and importance) of the right

This requires considering two things. First, whether the limitation is compatible with the essential content of the right.[24] Second, the relative importance of the right to an 'open and democratic society based on human dignity, equality and freedom'.[25] Generally, the more important the right to an open and democratic society, the more persuasive the standard of justification will be.[26]

The CC has consistently underscored the importance of freedom of assembly to an open and democratic society in several decisions.[27] The Court has also drawn express connections between free assembly and constitutional

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it held 'the rights to life and dignity are the most important of all human rights' and similar comments were expressed about equality in *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC) para 71. See Cheadle op cit (n16) who argues proportionality necessarily requires that there exist a hierarchy of constitutional rights.

[22] The above factors do not constitute a closed list and other considerations may heighten (or potentially decrease) the standard of justification. See De Vos ibid at 373-378.

[23] See Stuart Woolman & Henk Botha 'Limitations' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) 34:67-34:70, Cheadle op cit (n16) and Kevin Iles 'A Fresh Look at Limitations: Unpacking Section 36' (2007) 28 *SAJHR* 80-84.

[24] There is some controversy whether this is necessarily a factor which must be considered. While it expressly appeared in s33(1)(b) of the interim Constitution, it does not expressly appear in s36(1) of the Final Constitution. Contrast Cheadle op cit (n16) at 30:1 with Stuart Woolman & Henk Botha ibid 34:71-34:72 regarding different views on this factor.

[25] While the 'importance of the right' does not appear in s36(1), it was referred to in *Makwanyane* supra (n6) under the interim constitution. In *National Coalition* supra (n6) at para 34, under the final Constitution, Ackermann J held the importance of the right is a factor 'which must necessarily be taken into account'. See *SATAWU v Garvis* 2013 (1) SA 83 (CC) para 61 where the importance of the right to free assembly was considered under this factor.

[26] Woolman & Botha op cit (n23) at 34:71.

[27] *Garvis* supra (n25), *Mlungwana v S* 2019 (1) BCLR 88 (CC) para 73.

rights to free expression, association, political rights and dignity.[28] In doing so, it has also expressly affirmed links between free assembly and participatory democracy.[29] For economically vulnerable groups, such as workers, freedom of assembly is an indispensable mechanism for them to articulate their views and canvass support for causes of importance to them.[30] Additionally relevant is that the courts have also consistently emphasised the suppression of free assembly in the past in underlining its importance in democratic South Africa.[31]

Taking these factors into account, two things become clear. First, freedom of assembly is regarded as an indispensable component of participatory democracy in a society based on human dignity, equality and freedom.[32] Second, any limitation of the right to free assembly will, almost invariably, also indirectly infringe other constitutional rights.[33] Therefore, given its importance, and its intrinsic connection to other constitutional rights, a high standard of justification would have to be met to justify limiting its exercise.[34]

(b) Importance and purpose of the limitations

This factor has two elements.[35] First, identifying the limitations purpose.[36] Second, examining the relative importance of that purpose in an open and democratic society.[37] This overlaps with the rationality threshold requirement, because any limitation which serves no legitimate constitutional purpose, or bears no rational connection to a legitimate purpose, cannot ever be

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[28] See *SANDU v Minister of Defence* 1999 (4) SA 469 (CC) para 8, *S v Mamabolo* 2001 3) SA 409 (CC) para 50. See also *Business SA v COSATU* 1997 (5) BLLR 511 (LAC) a 499D-E discussed in Rehana Cassim 'The Legal Status of Political Protest Action' (2008) 29 *ILJ* 2371.
[29] *Mlungwana* supra (n27) at para 69 referring to *Doctors for Life International v Speaker of the National Assembly* 2006 (6) A 416 (CC) para 115.
[30] See Henk Botha 'Fundamental Rights and Democratic Contestation: Reflections on Freedom of Assembly in an Unequal Society' (2017) 21 *LDD* 1221
[31] See *Garvis* supra (n25) and *Mlungwana* ibid para 66 referring to *Sachs v Minister of Justice* 1934 AD 11.
[32] *Mlungwana* supra ibid at para 69.
[33] Ibid at para 71. Namely, rights to free expression, association and inherent human dignity.
[34] *Garvis* op cit (n25) at para 66, *Business SA* supra (n28). See also Cassim op cit (n28) at 2372 and 5.2 above.
[35] Woolman & Botha op cit (n23) at 34:73.
[36] Ibid.
[37] Ibid, Cheadle op cit (n16) at 30:15-30:16.

justifiable.[38] One obvious problem is that the purpose of a limitation is not always immediately apparent.[39] Therefore, one must interpret the limiting law to ascertain its purpose, and then determine if that purpose is both legitimate and sufficiently compelling to justify the limitation of that fundamental right.[40]

The LRA does not state the purpose of either limitation. However, it is submitted, their respective purposes are as follows. The prohibition on purely political protest action arguably has two purposes. First, to prevent the economic harm wide scale protest action over a purely political matter would cause because it would necessarily entail substantial numbers of employees not reporting for work.[41] Second, as noted previously,[42] because purely political protest action is viewed as 'disruptive of the democratic process'.[43] Similarly, prohibiting off-duty employees from gathering over disputes of mutual interest, without utilising the LRA, also has a similar two-fold purpose. First, to strive, as far as possible, that workplace disputes can be resolved through conciliation or arbitration without a resort to industrial action.[44] Second, to ensure the LRA's purpose, as the central statute giving effect to the labour rights in s23 of the Constitution, is not undermined.[45]

Both limitations strive to achieve legitimate purposes and a rational connection exists between the limitations and the purposes they respectively seek to achieve. However, there are several counterarguments that these

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[38] See Currie & De Waal op cit (n8) at 166, Cheadle op cit (n16) at 30:10-30:13 and Illes op cit (n23) at 82-83. De Vos op cit (n21) at 371 therefore regards this factor is a threshold requirement, not a balancing factor in terms of proportionality.

[39] Woolman & Botha ibid at 34:73.

[40] Cheadle op cit (n16) referring to *National Coalition* supra (n6) at para 37-38. See also *Makwanyane* supra (n6) at para 185.

[41] Cassim op cit (n28) referring to the majority decision in *Business SA* supra (n28) at 481E-F and the IC decision in *ACTWUSA v African Hide Trading* 1989 (10) ILJ 475 (IC) at 478J-479A.

[42] See 3.1(c)(ii) of chapter three where the ILO CFA position on purely political protest action is discussed.

[43] Tania Novitz *International and European Protection of the Right to Strike* (2003) 295.

[44] See Explanatory Memorandum to the Labour Relations Act (1995) 16 *ILJ* 284 and Darcy du Toit, Shane Godfrey & Carole Cooper et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2014) 333.

[45] Section 1(a) of the LRA provides its fundamental purpose is 'to advance economic development, social justice, labour peace and the democratisation of the workplace [by] giving effect to the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996'.

purposes, whilst rational and legitimate, are not sufficiently compelling to justify infringing the constitutional right of workers to freedom of assembly.

Two counterarguments exist regarding the prohibition on purely political protest action. First, it is undisputable purely political protests cause economic harm. However, strike action *equally* causes economic harm.[46] In essence, the right to strike is a 'right to cause to economic harm'.[47] Second, and while economic harm remains a relevant consideration,[48] prohibiting workers from protesting over political issues undermines fundamental values of participatory democracy and the ability of workers - as vulnerable members of society - to meaningfully influence the democratic process.[49] Purely political protests can therefore serve to *enhance* the democracy process, not disrupt it.[50]

Three counterarguments similarly exist regarding the prohibition on RGA gatherings. First, it is undeniable that permitting off-duty employees to utilise the RGA as an alternative mechanism to influence collective bargaining would undermine the LRA's dispute resolution mechanisms. However, as argued in the previous chapter, RGA gatherings can equally be considered as a facet of the constitutional right to engage in collective bargaining.[51] Second, only off-duty employees would be permitted to use the RGA in these circumstances, in turn minimising economic harm as such workers would not be on duty. Third, it is debatable whether permitting such gatherings would result in a parallel stream of jurisprudence under the RGA. Workers would receive none of the civil immunities against civil legal proceedings applicable to protected strikes and would continuously face the possibility of joint and several liability for riot damage if the gathering turned awry. It is thus unlikely unions would elect to follow this route on a widespread basis in practice.

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[46] See the minority judgment of Nicholson JA in *Business SA* supra (n28) at 496A and the IC decision in *Gana v Building Materials Manufacturers t/a Doorcor* (1990) 11 ILJ 564 (IC) at 574D both discussed in Cassim op cit (n28) at 2373-2374.

[47] See Bob Hepple 'The Freedom to Strike and its Rationale' in Bob Hepple, Rochelle Le Roux & Silvana Sciarra (eds) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2016) 12.

[48] Cassim op cit (n28) at 2374.

[49] See Botha op cit (n30), *Mlungwana* supra (n27).

[50] Novitz op cit (n43) at 260.

[51] See 4.4(c) of chapter four.

(c) Nature and extent of the limitations

This requires considering the degree of the infringement.[52] Limitations which substantially impact on fundamental rights,[53] or affect the dignity of vulnerable groups in particular, attract a greater standard of justification.[54]

The prohibition on purely political protest action severely impacts upon the ability of workers, as a vulnerable group, to exercise fundamental rights to freedom of assembly, expression and association. Similarly, it impacts upon their ability to influence the outcome of the democratic process. Taken together, it impacts their fundamental dignity as a vulnerable group and would therefore attract a high standard of justification. Conversely however, it must be accepted workers would still be able to organise protests over purely political matters in terms of the RGA. However, on the opposite side of the coin, such protest action could only occur outside of working hours which could fundamentally impact upon its efficacy.

Equally, the prohibition on RGA gatherings also affects the ability of workers to demonstrate and assemble where the underlying dispute is one of mutual interest regulated by the LRA. However, one consideration pulls in the opposite direction. Specifically, because workers would be able to utilise RGA gatherings in conjunction with protected strike action.[55] This consideration would weigh in favour of a finding of proportionality and justifiability, because the impact upon the right is minimised, provided workers first follow the LRA's dispute resolution procedures that regulate disputes of mutual interest.

(d) Relation between the limitations and their purpose

This factor requires considering two things. First, the extent to which the limitation is capable of achieving its purpose.[56] Second, whether a proportional

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[52] Currie & de Waal op cit (n8) at 168, Cheadle op cit (n16) at 30:16.
[53] *Manamela* supra (n13).
[54] *Mlungwana* supra (n27) at para 82 referring to *Jaftha v Schoeman* 2005 (2) SA 140 (CC) para 39 and 43 and *Sarrahwitz v Maritz NO* 2015 (4) SA 491 (CC) para 46 and 63.
[55] See 4.4(b) of chapter four.
[56] Woolman & Botha op cit (n23) at 34:83, Cheadle op cit (n16) at 30:16. However, as De Vos op cit (n5) at 371 notes, this factor overlaps with the rationality requirement as, even where a limitation serves a legitimate purpose, it cannot be justifiable if there exists no possibility that it will achieve its purpose. See for instance *Bhulwana* supra (n11) at para 20-23.

balance is struck between the means chosen to achieve the purpose of the limitation and any corresponding impact on the constitutional right.[57] If the means chosen only marginally contribute towards its achievement, it is less likely to be reasonable and justifiable.[58]

It is submitted exist clear arguments exist both for, and against, the proposition both limitations are capable of achieving their purpose. First, there does exist a reasonable possibility that prohibiting purely political protests will prevent economic harm. However, as above, this argument is substantially weakened when one considers that strike action equally causes economic harm. It is weakened further when one also considers the corresponding indirect impact the prohibition has on other constitutional rights such as dignity, association and free expression. Second, prohibiting off-duty employees from using the RGA as an alternative mechanism outside the LRA to engage in collective bargaining, also has a reasonable possibility of preventing unnecessary industrial action and parallel streams of jurisprudence. However, this argument is similarly weakened when one considers that unions and workers are unlikely to use RGA protests in this manner on a widespread basis, given that gatherings, unlike protected strikes, attract no immunity against civil legal proceedings or dismissal and will always face the possibility of strict joint and several liability for riot damage under s11(1)(a) of the RGA.

(e) Less restrictive means to achieve each purpose

This requires examining if the purpose of the limitation can be achieved by means that are less restrictive of the right.[59] Where less restrictive means exist to achieve the purpose of a limitation, it is less likely to be justifiable.[60] While all relevant factors must be considered, this is the factor on 'which most limitations will stand or fall'.[61] However, a degree of judicial deference is necessary because it is always possible for the courts to identify hypothetically less restrictive means to achieve the purpose of a given limitation.[62]

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[57] Currie & De Waal op cit (n7) at 169.
[58] Ibid, Cheadle op cit (n16) at 30:16.
[59] Cheadle ibid at 30:15-30:16.
[60] Currie & de Waal op cit (n7) at 170.
[61] Ibid at 171.
[62] See *Makwanyane* supra (n6) at para 107 and *Manamela* supra (n13) at para 94.

Considering appropriate deference, it is submitted there exist means to achieve the purpose of each limitation which are not only less restrictive of the right to freedom of assembly, but which will also give effect to their purposes.

First, regarding purely political protests, there is no reason why purely such protest action could not be permitted, but subjected to stricter scrutiny than protest action not concerning purely political matters. This is the approach followed in other 'open and democratic societies'[63] such as Italy and Denmark which permit purely political protest provided they are of short duration.[64] Not only would this be less restrictive of the right but would equally prevent the indirect infringement of other rights such as expression, association and dignity. Furthermore, it would also promote participatory democracy by allowing workers to meaningfully influence the outcome of political decisions.

Second, regarding the prohibition on RGA gatherings, a less restrictive measure would be to only permit gatherings were workers expressly disavow reliance on the LRA. Furthermore, a relevant consideration, is on-duty workers who engage in gatherings could be disciplined by their employer and that their employer could judicially review authorisations for gatherings under s6 of the Promotion of Administrative Justice Act.[65] If riot damage occurs, as the LC in *ADT Security* found, the employer would have another additional remedy by holding the union jointly and severally liable under s11(1) of the RGA.[66]

5.4. CONCLUSION

It is submitted two conclusions flow from the above. First, given both limitations limit rights which are fundamental to an open democratic society, affect the dignity of vulnerable groups and infringe multiple constitutional rights, they would be subjected to a strict or high standard of justification. Second, neither limitation meets the requirements of 'reasonableness and justifiability'

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[63] Examining the position of other 'open and democratic societies' is a relevant factor not expressly mentioned in s36(1) to determine the justifiability of a limitation. See for instance *National Coalition* supra (n6) where Ackermann J examined the position of other open and democratic societies in determining whether the criminalisation of sodomy unjustifiably limited the right of homosexuals to equality.

[64] See Cassim op cit (n28) at 2360 and the discussion of the Italian Constitutional Court decision in *Public Prosecutor v Antenaci* vol 1 *ILLR* 51.

[65] Act 3 of 2000. See the discussion at 4.3(b)(i) of chapter four.

[66] *ADT Security (Pty) Ltd v NASUWU* 2012 (33) ILJ 575 (LC) para 10.

prescribed by s36(1) of the Constitution as: the connections between the limitations and their purposes are weak; means less restrictive of the right to freedom of assembly, which will equally achieve the purposes of both limitations exist; and because the purposes they seek to achieve, whilst legitimate, are not sufficiently persuasive to justify the severe infringements they impose on the right of workers to free assembly. I now turn to consider two amendments to the LRA which could potentially remedy its unjustifiable violation of s17 of the Bill of Rights.

CHAPTER SIX

CONCLUSION AND RECOMMENDATION

Modern labour law, at least in capitalist societies,[1] is underpinned by the proposition that there exists an 'inherent inequality of bargaining power between employer and employee'.[2] This proposition in mind, I have sought to advance two central claims. First, the constitutional right to freedom of assembly has the potential to provide workers with an additional mechanism to counteract this inequality, in addition to the fundamental right to strike. Second, workers do not exist solely as employees, but equally as citizens. The right to free assembly provides them, as vulnerable members of society, with an indispensable mechanism to meaningfully participate (and influence) the outcome of the democratic process. In turn, this not only gives effect to other fundamental constitutional rights such as association, expression and dignity, but equally enhances the value of participatory democracy.

Advancing both claims, I have attempted to establish how the LRA unjustifiably limits the constitutional right of workers to free assembly in both senses. First, how s210 unjustifiably limits their constitutional right to assemble in terms the RGA by prohibiting them from utilising it as an alternative mechanism, outside the LRA, to influence the outcome of workplace disputes of mutual interest. Second, how the statutory definition of protest action, in s213 of the LRA, prohibits them from embarking on protected protest action under s77 of the LRA over purely political matters which do not necessarily affect their socio-economic interests. Comprehensive recommendations to address the unconstitutionality of the LRA on this score is beyond the scope of this work. Two recommendations, albeit briefly articulated, would however, it is submitted, address both unjustifiable (and unconstitutional) infringements.

First, the definition of protest action in s213 of the LRA should be amended by deleting the reference to 'socio-economic interests of workers'.

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[1] Halton Cheadle 'Constitutional and international law' in Darcy du Toit (ed) *Strikes and the Law* (2017) 5.

[2] Paul Davis & Mark Freedland *Khan Freund's Labour and the Law* 3 ed (1983) 6 endorsed in *Sidumo v Rustenburg Platinum Mines* 2008 (2) SA 24 (CC) para 72.

This would provide sufficent scope for workers to embark on protected protest action under s77 of the LRA over a purely political issue. However, purely political protest action should not be unlimited, either in scope or duration. A similar amendment to s77 of the LRA should be considered which would give the LC the power, which it already has, to grant a declaratory order expressly limiting the scope and duration of purely political protest action. A proportionality enquiry should conducted, similar to the one it already conducts, to determine the length and duration of a purely political protest and all relevant factors should be considered in determining the duration of the protest action, including those already referred to in s77(2)(b) as well as the importance of the matter giving rise to the political protest action.

Second, s210 of the LRA should be amended to expressly permit workers to assemble, in compliance with the RGA, over a workplace dispute the LRA regulates. However, this should be confined solely to permitting off-duty workers to protest under the RGA over a dispute of mutual interest without relying upon the LRA. Additionally, workers should only be permitted to utilise this route where they expressly disavow all reliance on the LRA. In this sense, once workers elect to utilise the RGA, and disavow reliance on the LRA, they should not be permitted to subsequently refer a dispute of mutual interest and embark on protected strike action over it. This is not to suggest, as is the current position, that workers should not be able to use RGA demonstrations and gatherings in conjunction with protected strike action in terms of chapter IV of the LRA. Rather, if workers elect to pursue an RGA assembly, to the exclusion of the LRA, they should be bound by that decision and not be entitled to subsequently to engage in forum shopping should the RGA demonstration not be successful in compelling their employer to accede their demand. This suggestion, it is submitted, would not only allow workers to utilise the RGA as an alternative mechanism to engage in collective bargaining, but would also equally prevent the development of parallel and potentially conflicting streams of labour law jurisprudence under both the LRA and RGA.

BIBLIOGRAPHY

PRIMARY SOURCES

Statutes

Basic Conditions of Employment Act 75 of 1997

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996

Labour Relations Act 28 of 1956

Labour Relations Act 66 of 1995

Promotion of Administrative Justice Act 3 of 2000

Regulation of Gatherings Act 205 of 1993

Riotous Assemblies Act 17 of 1956

Suppression of Communism Act 44 of 1950

International Instruments

African Charter on Human and Peoples Rights 1987, African Union

Freedom of Association and Protection of the Right to Organise, Convention 1948 (No.87)

International Covenant on Civil and Political Rights 16 December 1996, United Nations General Assembly

Right to Organise and Collective Bargaining Convention ILO Convention, 1949 (No. 98)

Case law

ACDP v IEC 2006 (5) BCLR 579 (CC)

ACTWUSA v African Hide Trading 1989 (10) ILJ 475 (IC)

ADT Security (Pty) Ltd v National Security & Unqualified Workers Union 2015 (36) ILJ 152 (LAC)

ADT Security (Pty) Ltd v National Security & Unqualified Workers Union 2012 (33) ILJ 575 (LC)

ADT Security v SATAWU (J1099/08) [2008] ZALC 215 (13 June 2008)

Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC)

Alfred McAlpine & Son (Pty) Ltd v Traansvaal Provincial Administration 1974 (SA) 506 (A)

AMCU v Chamber of Mines 2017 (3) SA 242 (CC)

August v Electoral Commission 1999 (3) SA 1 (CC)

AZAPO v President RSA 1996 (4) SA 672 (CC).

BEEWU v MD Electrical 1990 (11) ILJ 87 (IC)

Beinash v Ernst & Young 1999 (2) 91 (CC)

Bernstein v Bester NO 1996 (2) SA 751 (CC)

Bertie van Zyl (Pty) Ltd v Minister for Safety and Security 2010 (2) SA 181 (CC)

Bhe v Magistrate Khayelitsha 2005 (1) SA 580 (CC)

Brummer v Minister for Social Development 2009 (6) SA 323 (CC)

Business SA v COSATU 1997 (5) BLLR 511 (LAC)

Case v Minister of Safety and Security 1996 (3) SA 617 (CC)

Chirwa v Transnet 2008 (4) SA 367 (CC)

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)

Coetzee v Government of the Republic of South Africa 1995 (4) SA 631 (CC)

CSIR v Fijien 1996 (2) SA 1 (SCA)

Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC)

Democratic Alliance v African National Congress 2015 (2) SA 232 (CC)

Democratic Alliance v President RSA 2013 (1) SA 248 (CC)

Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (CC)

Discovery Health v CCMA (2008) 29 ILJ 1480 (LC)

Ex Parte Minister of Safety and Security: in re S v Walters 2002 (4) SA 613 (CC)

Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA).

FAWU v in2Food 2014 (35) ILJ 2726 (LAC)

FAWU v Pets Products (Pty) Ltd 2000 (7) BLLR 781 (LC)

Fedlife Assurance Ltd v Wolfaardt 2002 (2) SA 295 (SCA)

Ferreira v Levin NO 1996 (1) SA 984 (CC)

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

Fourways (Pty) Ltd v South African Commercial Catering 1999 (3) SA 752 (W)

Gana v Building Materials Manufacturers Ltd tia Doorcor (1990) 11 ILJ 564 (IC)

Garvis v SATAWU 2010 (6) SA 280 (WCC)

Gcaba v Minister of Safety and Security 2010 (1) SA 238 (CC)

Glenister v President RSA 2011 (3) SA 347 (CC)

Govender v Minister of Safety and Security 2001 (4) SA 273 (SCA)

Government of the Western Cape v COSATU 1998 (2) BLLR 1286 (LC)

Government RSA v Grootboom 2001 (1) SA 46 (CC)

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

Growthpoint Properties (Pty) Ltd v SACCAWU 2011 (1) BCLR 81 (KZD)

Hoffmann v South African Airways 2001 (1) SA 1 (CC)

Holomisa v Holomisa 2019 (2) BCLR 247 (CC)

HOSPERSA v Northern Cape Provincial Administration (2000) 21 ILJ 1066 (LAC)

Hotz v University of Cape Town 2017 (2) SA 485 (SCA)

In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC)

Iscor Refractories v NACBAWU 1999 (3) BALR 276 (IMSSA)

Jaftha v Schoeman 2005 (2) SA 140 (CC)

Johncom Media Investments Ltd v M 2009 (4) SA 7 (CC)

Kaunda v President RSA 2005 (4) SA 235 (CC)

Khosa v Minister of Social Development 2004 (6) SA 505 (CC)

KPMM Road and Earthworks (Pty) Ltd v AMCU (2018) 39 ILJ 609 (LC)

Kroukam v SA Airlink (Pty) Ltd 2005 (12) BLLR 1172 (LAC)

Kylie v CCMA 2010 (4) SA 383 (LAC)

Laugh it off Promotions CC v South African Breweries 2006 (1) SA 144 (CC)

Law Society of South Africa v Minister of Transport 2011 (2) BCLR 150 (CC)

Magajane v Chairperson North West Gambling Board 2006 (5) SA 250 (CC)

Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC)

Makhanya v University of Zululand 2010 (1) SA 62 (SCA)

Mbiyane v Cembad (Pty) Ltd t/a T A Art Centre 1989 (10) ILJ 468 (IC)

Minister of Health v New Clicks 2006 (2) SA 311 (CC)

Minister of Home Affairs v NICRO 2005 (3) SA 280 (CC)

Mlungwana v S 2018 (2) All SA 183 (WCC)

Mlungwana v S 2019 (1) BCLR 88 (CC)

Moise v Greater Germiston Transitional Local Council 2001 (4) SA 491 (CC)

My Vote Counts NPC v Speaker of the National Assembly 2015 (12) BCLR 1407 (CC)

Mzeuku v Volkswagen (Pty) Ltd 2001 (8) BLLR 857 (LAC)

NAPTOSA v Minister of Education 2001 (2) SA 112 (C)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)

NEHAWU obo Cornelius v High Rustenburg Hydro 2004 (9) BALR 1152 (CCMA)

NEHAWU v UCT 2003 (3) SA 1 (CC)

NUFBWSAW v Universal Product Network 2016 *ILJ* 476 (LC)

NUM v Amcoal Collieries & Industrial Operations Ltd 1990 (11) ILJ 1295 (IC)

NUM v Amcoal Collieries & Industrial Operations Ltd 1992 (13) ILJ 1449 (LAC)

NUM v Free State Consolidated Gold Mines (Operations) Ltd – President Steyn Mine, Brand Mine, Freddie's Mine 1995 (16) *ILJ* 1371 (A)

NUMSA v Bader Bop 2003 (3) SA 513 (CC)

NUMSA v The Benicon Group 1997 (18) ILJ 123 (LAC)

NUPSAW obo Mani v National Lotteries Board 2014 (3) SA 544 (CC)

Phillips v Director of Public Prosecutions, Witwatersrand Local Division 2003 (3) SA 345 (CC)

Phumelela Gaming and Leisure Ltd v Grundlingh 2007 (6) SA 350 (CC)

Picardi Hotels Ltd v FGWU 1999 (6) BLLR 601 (LC)

Pilane v Pilane 2013 (4) BCLR 431 (CC)

Pillay v MEC for Education: KZN 2008 (1) SA 474 (CC)

POPCRU v SACOSWU 2019 (1) SA 73 (CC)

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)

Prince v Cape Law Society 2002 (2) SA 794 (CC)

Ramakatsa v Magashule 2013 (2) BCLR 202 (CC)

Rand Tyres & Accessories v Industrial Council for the Motor Industry Traansvaal 1941 TPD 108.

Rhodes University v SRC Rhodes University 2017 (1) SA 617 (ECG)

Richter v Minister of Home Affairs 2009 (3) SA 615 (CC)

S v Bhulwana 1996 (1) SA 388 (CC)

S v Dlamini 1999 (4) SA 623 (CC)

S v Jordan 2002 (6) SA 642 (CC)

S v Makwanyane 1995 (3) SA 391 (CC)

S v Manamela 2000 (3) SA 1 (CC)

S v Turrell 1973 (1) SA 248 (C)

S v Williams 1995 (3) SA 632 (CC)

Sachs v Minister of Justice 1934 AD 11.

SANDU v Minister of Defence 1999 (4) SA 469 (CC)

SANDU v Minister of Defence 2007 (1) SA 402 (SCA)

SANDU v Minister of Defence 2007 (5) SA 400 (CC)

Sarrahwitz v Maritz NO 2015 (4) SA 491 (CC

SATAWU v Garvis 2011 (4) SA 475 (SCA)

SATAWU v Garvis 2013 (1) SA 83 (CC)

SATAWU v Moloto NO 2012 (6) SA 249 (CC)

Shabalala v Attorney-General (Transvaal) 1996 (1) SA 725 (CC)

Sidumo v Rustenburg Platinum Mines 2008 (2) SA 24 (CC)

South African Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA)

South African Police Service v POPCRU 2011 (6) SA 1 (CC)

South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC)

TAWUSA obo Ngedle v Unitrans Fuel (Pty) Ltd 2016 (37) ILJ 2485 (CC)

Tsoaeli v S 2018 (1) SACR 42 (FB)

Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development of Bank of SA 2011 (3) SA 1 (CC)

Van der Merwe v Road Accident Fund 2006 (4) SA 230 (CC)

Volkswagen SA (Pty) Ltd v Brand NO 2001 (22) ILJ 933 (LC)

Wary Holdings (Pty) Ltd v Stalwo 2009 (1) SA 33 (CC)

Zantsi v Council of State Ciskei 1995 (4) SA 615 (CC)

Foreign case law

British Broadcasting Corporation v Hearn [1977] 1 WLR 1004

Brokdorf decision 69 BVerf GE 315 (1985)

Ex Parte Attorney General, Namibia: in re Corporal Punishment by Organs of State 1991 (3) SA 76 (NmSC)

Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC)

NAACP v Alabama (1958) 357 US 449

Public Prosecutor v Antenaci vol 1 ILLR 51

R v Big M Drug Mart 1985 18 DLR (4th) 321

R v Oakes [1986] 1 SCR 103

Seeiso v Minister of Home Affairs 1998 (6) BCLR (LesCA).

Sheard v Amalgamated Union of Engineering Workers [1973] ICR 421

Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1984 (2) SA 778 (ZS)

SECONDARY SOURCES

Literature

Ackerman, Laurie *Human Dignity: Lodestar for Equality in South Africa* (2015) Juta, Cape Town

Benjamin, Paul & Thompson, Clive *South African Labour Law* (2018) Juta, Cape Town

Blitchitz, David 'Does balancing adequately capture the nature of rights?' in Woolman, Stuart & Blitchitz, David (eds) *Is this Seat Taken? Conversations at the Bar, Bench and Academy about the South African Constitution* (2012) Pretoria University Law Press, Pretoria

Brassey, Martin *Commentary on the Labour Relations Act* (2006) Juta, Cape Town

Cameron, Edwin; Cheadle, Halton & Thompson, Clive *The New Labour Relations Act: The Law After the 1988 Amendments* (1989) Juta, Johannesburg

Cheadle, Halton 'Constitutional and international law' in Darcy du Toit (ed) *Strikes and the Law* (2017) LexisNexus, Cape Town

Cheadle, Halton ‘Labour Relations’ in Halton Cheadle, Dennis Davis & Nicholas Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2018) Juta, Cape Town

Cheadle, Halton ‘Limitations’ in Halton Cheadle, Dennis Davis & Nicholas Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2018) LexisNexus, Cape Town

Cohen, Tamara & Le Roux, Rochelle ‘Liability, Sanctions and other Consequences of Strike Action’ in Bob Hepple, Rochelle Le Roux & Silvana Sciarra (eds) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2016) Juta, Cape Town

Conradie, Bradley ‘Protected Strikes’ in Darcy du Toit (ed) *Strikes and the Law* (2017) LexisNexus, Cape Town

Cooper, Carole ‘Labour Relations’ in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) Juta, Cape Town

Corder, Hugh & Du Plessis, Lourens *Understanding South Africa’s Transitional Bill of Rights* (1994) Juta, Cape Town

Currie, Iain & De Waal, Johan *The Bill of Rights Handbook* 6 ed (2013) Juta, Cape Town

Currie, Iain ‘Balancing and the Limitation of Rights in the South African Constitution’ in Woolman, Stuart & Blitchitz, David (eds) *Is this Seat Taken? Conversations at the Bar, Bench and Academy about the South African Constitution* (2012) Pretoria University Law Press, Pretoria

Davis, Dennis ‘Assembly’ in Cheadle, Halton; Davis, Dennis & Haysom, Nicholas (eds) *South African Constitutional Law: The Bill of Rights* (2018) LexisNexus, Cape Town

Davis, Dennis ‘Interpretation of rights’ in Cheadle, Halton; Davis, Dennis & Haysom, Nicholas (eds) *South African Constitutional law: The Bill of Rights* (2018) LexisNexus, Cape Town

Davis, Paul & Freedland, Mark *Khan Freund’s Labour and the Law* 3 ed (1983) Stevens & Sons, London

De Ville, JR *Constitutional & Statutory Interpretation* (2000) Interdoc, Cape Town

De Vos, Pierre ‘Political and Process Rights’ in Pierre De Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2013) Oxford University Press, Cape Town

De Vos, Pierre ‘The Limitation of Rights’ in Pierre de Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2013) Oxford University Press, Cape Town

Du Plessis, Lourens ‘Interpretation’ in Stuart Woolman & Michael Bishop (eds) *South African Constitutional Law* 2 ed (2013) Juta, Cape Town

Du Toit, Darcy ‘Labour Relations’ in *The Bill of Rights Compendium* (2016) Lexis Nexus, Cape Town

Du Toit, Darcy; Cohen, Tamara; Everett, Winnie; Giles Graham; Steenkamp, Anton; Conradie, Bradly *Labour Law through the Cases* (2018) LexisNexus, Cape Town

Du Toit, Darcy; Godfrey Shane; Cooper, Carole; Giles, Graham; Cohen, Tamara; Conradie, Bradley & Steenkamp, Anton *Labour Relations Law: A Comprehensive Guide* 6 ed (2014) LexisNexus, Cape Town

Dugard, John *International Law: A South African Perspective* 4 ed (2011) Juta, Cape Town

Duncan, Jane *Protest Nation: The Right to Protest in South Africa* (2016) University of Kwa-Zulu Natal Press, Pietermaritzburg

Fergus, Emma 'Pickets, socio-economic protest action, gatherings and demonstrations' in Darcy du Toit (ed) *Strikes and the Law* (2017) Lexis Nexus, Cape Town

Gernignon, Bernard; Odero, Alberto & Guido, Horacio *ILO Principles Concerning the Right to Strike* (2000) International Labour Organisation, Geneva

Grogan, John *Collective Labour Law* 2 ed (2014) Juta, Cape Town

Grogan, John *Workplace Law* 12 ed (2017) Juta, Cape Town

Haysom, Nicholas 'Freedom of Association' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2018) LexisNexus, Cape Town

Hepple, Bob 'The Freedom to Strike and its Rationale' in Bob Hepple, Rochelle Le Roux & Silvana Sciarra (eds) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2016) Juta, Cape Town

Heywood, Andrew *Politics* 3 ed (2007) Palgrave MacMillan, London

Hoexter, Cora *Administrative Law in South Africa* 2 ed (2012) Juta, Cape Town

Jacobs, Mario 'The socio-economic dimension of strikes' in Darcy du Toit (ed) *Strikes and the Law* (2017) LexisNexus, Cape Town

Meyerson, Denise *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997) Juta, Johannesburg

Michelman, Frank 'The Rule of Law, Legality and the Supremacy of the Constitution' in Stuart Woolman & Michael (eds) *Constitutional Law of South Africa* 2 ed (2013) Juta, Cape Town 11:1

Neethling, Johan & Potgieter, Johan *Visser: Law of Delict* 7 ed (2015) LexisNexus, Durban

Noritz, Tania *International and European Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union* (2003) Oxford University Press, Oxford

Orlandi, Giovanni 'Political Strikes' in Bob Hepple, Rochelle Le Roux & Silvana Sciarra (eds) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2016) Juta, Cape Town

Rycroft, Alan & Jordaan, Barney *A Guide to South African Labour Law* 2 ed (1992) Juta, Cape Town

Van Niekerk, Andre 'International Labour Standards' in van Niekerk, Andre & Smit, Nicola (eds) *Law@Work* 4 ed (2017) LexisNexus, Cape Town

Van Niekerk, Andre 'Strikes and Lock-outs' in Andre van Niekerk & Nicola Smit (eds) *Law@Work* 4 ed (2017) LexisNexus, Cape Town

Woolman, Stuart & Botha, Henk ‘Limitations’ in Stuart Woolman & Michael Bishop (eds) *South African Constitutional Law* 2 ed (2013) Juta, Cape Town

Woolman, Stuart ‘Freedom of Assembly’ in Stuart Woolman & Michael Bishop (eds) *South African Constitutional Law* 2 ed (2013) Juta, Cape Town

Journal articles

Benjamin, Paul ‘Political Stay-Aways: The Dismissal of Participants’ (1990) 11 *Industrial Law Journal* 944

Botha, Henk ‘Fundamental Rights and Democratic Contestation: Reflections on Freedom of Assembly in an Unequal Society’ (2017) 21 *Law Democracy and Development* 1221

Brickhill, Jason & Bishop, Michael ‘In the beginning was the word: the role of the text in the interpretation of statutes’ (2011) 4 *South African Law Journal* 681

Cassim, Rehana ‘The Legal Status of Political Protest Action under the Labour Relations Act 66 of 1995’ (2008) 29 *Industrial Law Journal* 2349

Chamberlain, Lisa ‘Assessing Enabling Rights: Striking Similarities in Troubling Implementation of the rights to Protest and Access to Information in South Africa’ (2016) 16 *African Human Rights Journal* 365

Cheadle, Halton ‘Reception of International Labour Standards in common-law legal systems’ (2012) 14 *Acta Juridica* 348

Davis, Dennis & Arendse, Norman ‘Picketing’ (1988) 26 *Industrial Law Journal* 26

Devenish, George ‘The Theory and Methodology for Constitutional Interpretation in South Africa’ (2006) 69 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 238

Du Toit, Darcy ‘The right to Equality versus employer ‘control’ and employer ‘insubordination’: Are some more equal than others?’ (2016) 37 *Industrial Law Journal* 1

Du Toit, Darcy ‘What is the future of collective bargaining (and labour law) in South Africa?’ (2007) 28 *Industrial Law Journal* 1405

Du Toit, Darcy 'A common-law hydra emerges from the forum shopping swamp' (2010) 31 *Industrial Law Journal* 21

Dugard, John ‘International Law and the Final Constitution’ (1995) 11 *South African Journal of Human Rights* 241

Fikentscher, Wolfgang ‘Political Strikes under German Law’ (1953) 5 *The American Journal of Comparative Law* 72

Gauntlett ,Jeremy & Smuts, DF ‘Boycotts: The Limits of Lawfulness’ (1990) 11 *Industrial Law Journal* 937.

Gernignon, Bernard; Odero, Alberto & Guido, Horacio ‘ILO Principles Concerning the Right to Strike’ (1998) 137 *International Labour Law Review* 441

Grant, Belinda ‘Political Stay-Aways and the Labour Appeal Court’ (1992) 4 *South African Mercantile Law Journal* 88

Grogan, John ‘Labour Law’ *Annual Survey of South African Law* (2014) 645

Grogan, John ‘Legitimate Protest: the Limits of Protection’ (1999) 8 *Employment Law Journal* 11

Hodges Aeberhard, Jane & Odero De Dios, Alberto ‘Principles of the Committee on Freedom of Association concerning Strikes’ (1987) 126 *International Labour Law Review* 543

Hoexter, Cora ‘Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court’ (2008) 1 *Constitutional Court Review* 209

Iles, Kevin ‘A Fresh Look at Limitations: Unpacking Section 36’ (2007) 28 *South African Journal on Human Rights* 70

Kahn, Elilson ‘Freedom of Assembly’ (1973) 90 *South African Law Journal* 18

Kidd, Michael ‘Meetings and Emergency Regulations’ (1989) 5 *South African Journal on Human Rights* 471.

Landman, Adolph ‘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)*’ (2011) 31 *Industrial Law Journal* 834

Le Roux, Peter & van Niekerk, Andre ‘Protest Action in Support of Socio-economic Demands – The First Encounter’ (1997) 6 *Contemporary Labour Law* 81.

Mureinik, Etienne ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31

Nadasen, Sagie '"Strike for the purpose of collective bargaining…" – The Place of the Political Strike in a Democracy' (1997) 11 *Tydskrif vir die Suid-Afrikaanse Reg* 117

Ngcukaitobi, Tembeka 'Strike law, structural violence and inequality in the platinum hills of Marikana' (2013) 34 *Industrial Law Journal* 836

Rautenbach, IM 'Proportionality and the Limitation Clauses of the South African Bill of Rights' (2014) 17 *Potchefstroom Electronic Law Journal* 2228.

Saley, Shamina & Benjamin, Paul 'The Context of the ILO Fact Finding and Conciliation Report on South Africa' (1992) 13 Industrial Law Journal 731

Steenkamp, Anton; Stelzner, Susan & Badenhorst, Nadene 'The Right to Bargain Collectively' (2004) 25 *Industrial Law Journal* 943

Wallis, Malcolm 'Now You Foresee it, Now You Don't – SATAWU v Garvis & Others' (2012) 33 *Industrial Law Journal* 2257.

Woolman, Stuart 'My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in Garvis v. SATAWU' (2011) 27 *South African Journal on Human Rights* 346

Woolman, Stuart 'You Break it, You Own It: South African Assembly Jurisprudence After Garvis' (2015) 9 *Vienna Journal of International Constitutional Law* 548

Reports and Explanatory memoranda

Explanatory Memorandum to the Labour Relations Act (1995) 16 *ILJ* 278

Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (2006) International Labour Office, Geneva

ILO Prelude to Change: Industrial Relations Reform in South Africa: Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa LXXV, Series B (1992)