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UNPROTECTED STRIKE ACTION IN SOUTH AFRICA

This dissertation is dedicated to my parents, Fey and Kobus van Heerden, and Leigh Davies for their unwavering support.

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1 *Introduction*

The right to strike is an inextricable component of the right to associate and bargain collectively. The right is unique in that it is a right which authorises employees to use measures that may be economically detrimental to the employer. So while the right is given protection in various forms it is not without limitation. It is important that various affected parties rights are adequately balanced.

It is the purpose of this dissertation to clearly articulate what constitutes unprotected strike action and thus the limits of protected strike action. Given the significant consequences of a strike being declared unprotected, it is important that all parties concerned, trade unions, employees and employers alike, are aware of the requirements that must be met in order to render a strike protected.

Chapter one of this dissertation provides a brief overview of the importance of the right to strike and how it is regulated internationally and nationally. Nationally the right to strike is primarily regulated by the Labour Relations Act 66 of 1995¹ which in turn is subordinate to the Constitution of the Republic of South Africa, 1996.² The particular provisions within the LRA, and from time to time the Constitution, are interpreted and clarified by way of judicial decisions.

¹ [Hereafter 'LRA']

² [Hereafter 'Constitution']

Chapter two addresses the kind of conduct which satisfies the definition of a 'strike' as contained within the LRA. This chapter concludes with a discussion of whether protected strike action can be rendered unprotected as a result of violence by, among others, reading limitations into the definition of 'strike.' In this regard, the Labour Relations Amendment Act³ and Code of Good Practice, Collective Bargaining, Industrial Action and Picketing⁴ are specifically considered.

Chapter three addresses both the substantive and procedural limitations imposed on the right to strike by the LRA. Importantly, if a strike meets the substantive requirements but fails to meet the procedural requirements it is unprotected and *vice versa*. In so far as some of these requirements are concerned the recent introduction of the Industrial Action Code has, in some instances, provided clarity and confirmed the current legal position as set out in jurisprudence. In other instances, the Industrial Action Code has introduced obligations not otherwise contained in legislation or judicial decisions. These provisions will be considered in this dissertation. The consequences arising out of unlawful strike action are also briefly addressed in this chapter.

A conclusion is provided at the end of the dissertation.

³ 8 of 2018. [Hereafter 'Amendment Act']. The Amendment Act became effective as of 1 January 2019.

⁴ [hereafter 'Industrial Action Code'].

2 *Chapter one: An introduction to the right to strike*

2.1 Introduction

It is useful when evaluating what constitutes 'strike action' and the requirements that must be met in to render such action protected that the context of the right to strike and its importance be taken into account. Often the context and purpose, together with international and national jurisprudence, informs the manner in which provisions in the LRA are interpreted by the courts. It is the purpose of this chapter to provide such context.

2.2 The right to strike and its importance

2.2.1 Recognition of the right to strike

'It is not hard to see how in both the labour market and the labour process there will arise a general class relation between capital and labour that will inevitably...involve the state and law as arbitrator...Nothing stops the labourers individually or collectively agitating and fighting for more...Both capital and labour are within their rights to struggle over these issues and, as Marx famously put it, "between equal rights, force decides."⁵

⁵ David Harvey *Seventeen Contradictions and the End of Capitalism* (2015) Penguin Books, Great Britain at 64.

The history of the right to strike has been described as one that 'begins with repression, progresses to toleration and thereafter to recognition.'⁶ Law has traditionally been hostile toward the recognition of the right to strike. This is due, in part, to the intrinsic nature of the right which is designed to cause 'economic harm.'⁷

Under the common law, an employee who engaged in strike action breached his / her contract of employment. As Halton Cheadle notes, the right to strike has a long history of 'legislative and judicial attempts to either suppress strikes or limit their exercise. The first raft of measures was penal. The second was tortious [delictual] and the third was contractual.'⁸ While the common law has been historically antagonistic towards strike action subsequent historical developments⁹ place strike action in an entirely different historical milieu.

The right is now constitutionally recognised. In recognising the right to strike as a constitutional right one becomes cognisant of the types of conduct which would render a strike unprotected as well as the need to balance such right against other constitutional rights.¹⁰

⁶ Halton Cheadle *et al Strikes and the Law* (2017) LexisNexis, South Africa at 1.

⁷ *Ibid* at 4. This is recognised in section 16(3) of the Industrial Action Code.

⁸ Halton Cheadle 'Constitutionalising the Right to Strike' in B Hepple, R Le Roux and S Silvana (eds) *Laws against Strikes: The South African Experience in an International and Comparative Perspective* (2016) Juta, Cape Town at 52.

⁹ *Ibid* at 53. For a useful summary on the history of the right to strike in South Africa see Anton Myburg '100 Years of Strike Law' (2004) 25 *ILJ* 962.

¹⁰ Section 16(5) of the Industrial Action Code records a number of other rights affected by the right to strike. Section 16(5) footnote 4 makes reference to ss 12(1), 16, 17, 18 and 25 of the Constitution.

In *National Unions of Metalworkers of SA v Bader Bop (Pty) Ltd*¹¹ the Court, in considering the importance of the right to strike, held as follows:

'In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system.'¹²

And later in the same judgment:

'The right to strike is essential to the process of collective bargaining. It is what makes collective bargaining work. It is to the process of collective bargaining what an engine is to a motor vehicle.'¹³

Despite its inherent nature and ability to result in economic harm many 'democratic countries regard the... "right to strike," as fundamental alongside freedom of association, the freedom to join and organise trade unions, freedom of assembly and freedom of speech.'¹⁴ In this regard, South Africa is no different in recognising the importance of the right to strike.

2.2.2 Justifications for recognising the right to strike

¹¹ (2003) 24 ILJ 305 (CC). [Hereafter '*Bader Bop*'].

¹² Ibid at para 13. See also Cheadle, Davis and Haysom *SA Constitutional Law: The Bill of Rights* (2013), LexisNexis, South Africa at para 18.7.

¹³ Ibid at para 67.

¹⁴ B Hepple 'The Freedom to Strike and its Rationale' in B, Hepple, R, Le Roux and Sciarra Silvana (eds) *Laws against Strikes: The South African Experience in an International and Comparative Perspective* (2016) Juta, Cape Town at 12.

Various theories have been put forward justifying the need to recognise and protect the right to strike. Kahn-Freund put forward the following four justifications:¹⁵

2.2.2.1 The need to counteract the inequality of bargaining power inherent in most employment relationships

Otto Kahn-Freund has argued that:

'the main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'¹⁶

This justification goes to the heart of the need for labour law in the first place. An employment relationship cannot simply be regarded as another standard commercial contractual relationship where the parties are exempt from the structural inequality that inheres between capital and labour. This inequality arises out of the inequality in access to resources.¹⁷ In the absence of legislative oversight¹⁸ and absent tools to effectively promote collective bargaining, employees could easily be compelled to enter into asymmetrical contractual arrangements.

¹⁵ Cheadle op cit (n6) 5 to 7.

¹⁶ Ibid at 5.

¹⁷ Ibid.

¹⁸ For example, the establishment of minimum terms and conditions of employment.

This is especially true of South Africa where the supply of unskilled labour vastly outweighs that of demand. In such circumstances, necessity becomes a form of coercion for employees who would have no other choice but to accept prejudicial terms of employment.

The right to strike then offers a means of countervailing the inequality of bargaining positions otherwise characteristic of the employment relationship. The law regulates the manner in which this is to be achieved. In this regard, 'labour law provides clear and defined channels by which conflict between employees and employers can be directed and as such the economic system can be preserved.'¹⁹

2.2.2.2 The need to facilitate the parties' autonomy to regulate the employment relationship.

The right to strike allows for a means for employees to temper the employer's election to change conditions of employment.

Kahn-Freund has argued that:

'the power to withdraw their labour is for workers what for management is the power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system that suppresses that freedom to strike puts workers at the mercy of their employers.'²⁰

¹⁹ DM Davis 'The functions of labour law' 8 *CILSA* (1980) 213 at 215. See also K Klare *Labour Law as Ideology: Towards a New Histiography of Collective Bargaining Law* 4 *Indus.Rel.L.J* (1981) 450.

²⁰ Cheadle *op cit* (n6) 6.

Cheadle argues that it is this consideration that provides the justification 'not only for the right to strike but also for the autonomy of labour law from the legal system as a whole.'²¹

An employer must have the flexibility to operate its business. This discretion typically covers areas of managerial decision making. However, there are certain areas where managerial decision making must be tempered. Collective bargaining, and its central component, the right to strike, offers employees a means to control management's authority where it oversteps or otherwise unduly impinges on employees' rights and interests. In this manner, a form of 'industrial self-government'²² is promoted. It also allows flexibility and satisfies the need to adjust to changing circumstances timeously.²³ In addition, the parties themselves are often best placed to come to agreements without the assistance of outside parties such as the judiciary.

2.2.2.3 The freedom to withhold labour

The freedom to work 'includes a freedom not to work (which would include engaging in strike action). As Kahn-Freud states "if people may not withdraw their

²¹ Ibid.

²² Ibid.

²³ Ibid.

labour, this may mean that the law compels them to work."²⁴ While an employee cannot be forced to work there are nonetheless limitations on how they withdraw their labour. Failure to adhere to these requirements may result in a breach of the employees' contracts of employment.²⁵ For this reason the provisions of the LRA must be adhered to before engaging in strike action.

2.2.2.4 The regulated release of social and economic pressure.²⁶

In South Africa, employees have rights to strike,²⁷ picket and engage in protest action. In this manner, the rights to assembly, demonstration, picket and petition is separately regulated under s 17 of the Constitution, s 77 of the LRA and the Regulation of Gatherings Act²⁸ respectively. This is because protest action is called for a different reason than strike action. It is to draw attention to socio-economic issues.²⁹ While political issues cannot be addressed by way of protest action it can be by way of the Gatherings Act. The right to strike, in particular, allows for a release of economic pressure.

²⁴ Ibid 4, footnote 27, and 6 to 7. See also the Forced Labour Convention, 1930 (no 29).

²⁵ Ibid 7. This would be the case in the instance of unprotected strike action.

²⁶ This can also be connected to the 'regulated release of physiological tension.' See Hepple op cit (n14) 25.

²⁷ Section 23 of the Constitution and s 64 of the LRA.

²⁸ 205 of 1993, as amended [hereafter 'Gatherings Act']. As per s 24(5) of the Industrial Action Code, this piece of legislation is excluded in circumstances where picketers meet the requirements of s 69 the LRA.

²⁹ Section 77 of the LRA. These rights are, however, recognised as important by the ILO. A Van Niekerk (ed), N Smith (ed), M A Christianson *et al Law@Work* 3ed (2015) LexisNexis, Durban at 432.

2.2.2.5 Human right?

Bob Hepple argues that to these four typical justifications can be added a fifth: human rights.³⁰ As Cheadle notes, 'the logical origins of the right to strike as a human right are probably the confluence of at least three rights: the right not to be forced to labour, freedom of association and the right to dignity, culminating in the right to strike itself.'³¹ The argument to treat the right to strike as a human right, however, is controversial and not without its detractors.³²

2.3 The hierarchy of laws

In South Africa, the field of labour law is regulated by various sources of law: the Constitution, legislation including, but not being limited to, the LRA, the Basic Conditions of Employment Act 75 of 1997,³³ the Employment Equity Act 55 of 1998 and the common law. The sources of labour law are ultimately subject to the Constitution.

2.3.1 The Constitution and the right to strike

³⁰ Cheadle op cit (n6) 6 to 7. See also Hepple op cit (n14) 40 to 43

³¹ Ibid.

³² Not least by the employers' group to the ILO who have difficulty in recognising a right to strike in the first place. See DF Frey 'Conflict over Conflict: The Rights to Strike in International Law' *Global Labour Journal* (2017) 8(1) 17 -31, JR Bellace 'The ILO and the Rights to Strike' 153 *Int'l Lab.rev* 29 (2014) 29 and L Swepston, 'Crisis in the ILO Supervisory System: Dispute over the Right to Strike' *International Journal of Comparative Labour Law and Industrial Relations* (2013) 29(2) 199-218.

³³ [Hereafter 'BCEA'].

Section 1(c) of the Constitution provides that 'the Republic of South Africa is one, sovereign democratic state founded on the following values; supremacy of the Constitution and the Rule of Law.' Section 2 of the Constitution furthermore provides that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

Section 23(2)(c) of the Constitution expressly provides that 'every worker has the right to strike.' Significantly, the constitutional enactment of the right contains no express mention of any limitations to the right to strike. In *South African Transport and Allied Workers Union (SATAWU) v Moloto NO*³⁴ the Court held that:

'the right to strike is protected as a fundamental right in the Constitution without express limitation. Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner less restrictive on the right if the text is reasonably capable of bearing that meaning.'³⁵

In *Certification of the Constitution of the Republic of South Africa, 1996*,³⁶ the Constitutional Court acknowledged the intricate relationship between the constitutional right to collective bargaining and the right to strike. This right entails, at a minimum, the freedom to bargain collectively and the right to utilise strike action in the interests of pursuing such bargaining.³⁷ In the absence of the right to strike,

³⁴ 2012 (11) BCLR 1177 (LC).

³⁵ Para 43.

³⁶ 1996 (10) BCLR 1253 (CC).

³⁷ Cheadle op cit (n12) para 18.7.1.

employees' ability to effectively bargain will be significantly curtailed. The Court held that:

'Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers, therefore, need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action.'³⁸

Section 23(5) of the Constitution provides for a right to collective bargaining and states that:³⁹

'Every trade union, employers' organisation and employer has the right to engage in collective bargaining. **National legislation may be enacted to regulate collective bargaining.** To the extent that the legislation may limit a right in this Chapter, **the limitation must comply with section 36(1).**⁴⁰

Importantly s 23(5) recognises that while the Constitution is supreme, its purpose is not to fully delineate and regulate generally stated rights, such as the right to strike action. Rather, this is to be achieved by the enactment of specific legislation, the purpose of which is to give content to such rights. Cheadle notes that 'a generally stated right contemplates that its primary function is to guarantee the right, leaving its content to be determined by regulation.'⁴¹ It is in terms of such legislation that the limits of the right are more fully detailed. The applicable legislation in the present instance is the LRA.

³⁸ Para 66.

³⁹ Andre Van Heerden 'Assignment 1: Collective Labour Law' University of Cape Town (1 September 2015).

⁴⁰ Emphasis added.

⁴¹ Cheadle op cit (n6) 14.

There are limits, however, to the manner in which legislation, including the LRA, can give content to a constitutional right. Legislation which fails to adhere to and comply with the provisions of the Constitution is liable to be struck down or otherwise interpreted in a manner which renders it consistent with such constitutional right. This is because any limitation introduced by the legislation must be in accordance with the provisions of s 36 of the Constitution. This too is expressly referred to in s 23(5) of the Constitution.

Section 36 of the Constitution broadly provides that a proportionality analysis must be undertaken when competing rights are at play. The section provides that:

(1) The rights in the Bill of Rights may be limited only in terms of laws of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (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.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

How s 23(5) of the Constitution has been given effect to by the LRA and, in certain instances, how such provisions have stood up to judicial scrutiny will be addressed in detail below.

2.3.2 The LRA and the right to strike

To promote a more flexible approach the LRA adopted a system of voluntarism⁴² where issues such as bargaining agents, bargaining subjects and bargaining levels are best left to be determined by the parties relying on their bargaining strength.⁴³ The LRA ensures this flexibility by forgoing a judicially⁴⁴ enforceable duty to bargain⁴⁵ and replacing it with two mechanisms designed to facilitate collective bargaining: the introduction of specified organisational rights,⁴⁶ as well as a legislatively recognised and protected right to strike.⁴⁷ The LRA

'seeks to secure only the means of collective bargaining, without prescribing, or empowering the courts to prescribe how these means should be exercised, or

⁴² For a useful discussion on voluntarism see D M Davis 'Voluntarism and South African Labour Law: Are the Queensbury Rules an Anachronism?' *Acta Juridica* (1990) 45 at 51 to 52.

⁴³ D Du Toit, D Bosch, D Woolfrey *et al Labour Relations Law: A Comprehensive Guide* 6ed (2015), LexisNexis, Durban at 279. See also Van Heerden *Op Cit* (n39).

⁴⁴ It is, arguably, enforceable by other means such as by way of agreement. See AA Landman 'The development of a common law duty to negotiate in good faith' (2018) 27(4) *Contemporary Labour Law* 41 and John Grogan *Workplace Law* 12ed (2017) Juta, Cape Town at 344.

⁴⁵ See *Minister of Defence v SA National Defense Union* (2006) 27 ILJ 2276 (SCA) at para 25, *SA National Defence Union v Minister of Defence* [2007] 9 BLLR 785 (CC) at para's 53 to 56 and section 4(4) of the Industrial Action Code.

⁴⁶ Sections 12 to 16 of the LRA.

⁴⁷ S Godfrey, J Maree and D Du Toit *et al Collective Bargaining in South Africa: Past, Present & Future?* (2010) Juta, South Africa at 66 and Carl Mishke 'Getting a foot in the Door: Organisational Rights and Collective Bargaining in terms of the LRA' *Contemporary Labour Law* 13 (2004) 51 at 52.

how it should be concluded. In the final analysis then the right to strike...still determines the outcome of collective bargaining.¹⁴⁸

The explanatory memorandum to the LRA expressly records the 'need to entrench the constitutional right to strike subject to limitations which are reasonable and justifiable in an open and democratic society based on values of freedom and equality.'¹⁴⁹

2.3.3 The International Labour Organisation and the right to strike

Section 233 of the Constitution provides that 'when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.' Furthermore, ss 39(1)(b) and 39(1)(c) of the Constitution provide that 'when interpreting the Bill of Rights [the right to strike being contained therein], a court, tribunal or forum **must** consider international law and **may** consider foreign law.'¹⁵⁰ So when determining, among others, whether a limitation is reasonable and justifiable in an open and democratic society, consideration must also be had, with appropriate caution,⁵¹ to international jurisprudence. Consideration may also be given to foreign law.

⁴⁸Grogan op cit (n44) at 344 to 345.

⁴⁹'The Explanatory Memorandum to the Labour Relations Act' 1995 16 *ILJ* 279. See P Maserumule 'A perspective on developments in strike law' (2001) 22 *ILJ* 45 who critiques the idea that the right to strike should be limited. For a counter argument see Cheadle op cit (n8).

⁵⁰ Emphasis added.

⁵¹ Consideration must be given to local circumstances in any particular instance.

Section 1(b) of the LRA provides that one of its purposes is to 'give effect to obligations incurred by the Republic as a member state of the International Labour Organisation'⁵² while s 3(c) of the LRA provides that 'any person interpreting [the LRA] must interpret its provisions in compliance with the public international obligations of the Republic.'

Internationally, 'the framework in which collective bargaining [of which the right to strike is an essential component] must take place if it is to be viable is based on the principle of independence and autonomy of the parties and the free and voluntary nature of negotiations.'⁵³ As discussed, this emphasis on voluntarism has been replicated within the LRA which has as one of its objectives the facilitation of a framework within which parties can bargain.⁵⁴

South Africa has ratified a number of the ILO's Conventions including the ILO Convention on the Right to Organise and Bargain Collectively⁵⁵ and the Freedom of Association and the Right to Organise Convention.⁵⁶ While these conventions say nothing expressly about the right to strike, the ILO supervisory bodies have 'built up a body of principles which recognise that the right to strike is an intrinsic corollary to the right to organise, and a fundamental right of workers and of

⁵² [Hereafter 'ILO'].

⁵³ Bernard Gernigon, Alberto Otero, and Horacio Guido 'ILO Principles Concerning Collective Bargaining' (2000) 139(1) *International Law Review* 33 at 34.

⁵⁴ Section 1 of the LRA.

⁵⁵ The Right to Organise and Collective Bargaining Convention, 1948 (No 98) [hereafter 'Convention 98']. South Africa ratified this convention on 19 February 1996.

⁵⁶ The Freedom of Association and the Right to Organise Convention, 1948 (No 87) [hereafter 'Convention 87']. South Africa ratified this convention on 19 February 1996.

their organisations.⁵⁷ This has been achieved, in part, by reliance on the protection of the right to freedom of association as contained in Convention 87.

The ILO supervisory bodies, including both the Freedom of Association Committee and its Committee of Experts on the Application of Conventions and Recommendations, have interpreted Convention 87 in a manner which recognises the right to strike as 'one of the essential means available to workers to further and defend their occupational interests.'⁵⁸ Importantly, however, is the recognition by both bodies that 'there is no absolute or unlimited right to strike.' In fact, in recent years the employers' group at the ILO have sought to undermine the argument that there is an internationally recognised right to strike at all.⁵⁹

In addition to Conventions 87 and 98 the International Covenant on Economic, Social and Cultural Rights of 1996, which was ratified by South Africa with effect from 12 April 2015, provides that a party to the Covenant must undertake to ensure that the right to strike is provided for, provided that it is exercised in conformity with the laws of a particular country.⁶⁰ The provisions of the African

⁵⁷ J Servais 'ILO Law and the Right to Strike' 15 *Canadian Lab. & Emp. L.J.* 147 (2009 – 2010) 147 at 149. Freedom of Association: Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO (2016) at para's 522 to 523, General Survey of Freedom of Association (1994) 66 and Gernigon op cit (n53).

⁵⁸ Servais op cit (n57) 150. Freedom of Association: Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO (2016) at para 523, General Survey of Freedom of Association (1994) 66 and Gernigon op cit n53.

⁵⁹ Cheadle op cit (n6) 9. See Frey (n32), Bellace (n32) and Swepstron (n32).

⁶⁰ Art 8(1)(d).

Commission on Human Rights and Peoples Rights have similarly been interpreted to include the right to strike.⁶¹

Importantly, the ILO also recognises that 'national law sometimes imposes conditions that must be met in order to render a strike protected. Such conditions should be reasonable, and in any event not so complicated as to make a legal strike practically impossible.'⁶² To this end, 'one of the main lessons to be drawn from international experience is that no two countries are alike when it comes to regulating strikes.'⁶³ In this regard

'the international standards are flexible and open-ended and provide rich justifications for restrictions on the right to strike. The use that each country makes of these standards, and the restrictions it adopts, are the outcome of the particular political, social and economic struggles that have led to demands for a right to strike.'⁶⁴

In this regard, the LRA is no different in providing certain restrictions on the right to strike which have, in part, been formed by the political, social and economic factors of South Africa.

2.3.4 Common law

⁶¹ T Novitz 'The International and Regional Framework' in B Hepple, R Le Roux and Sciarra Silvana (eds) *Laws against Strikes: The South African Experience in an International and Comparative Perspective* (2016) Juta, Cape Town at 46.

⁶² Servais op cit (n57) 156.

⁶³ Hepple op cit (n14) 13.

⁶⁴ B Hepple 'The Right to Strike in an International Context' 15 *Canadian Lab. & Emp.L.J.* (2009-2010) 133 at 134 to 135.

In addition to the Constitution, the LRA and international law content is given to the right to strike by way of the common law in the form of judicial decisions which often clarify and guide the manner in which protected strike action is regulated in South Africa.

3 *Chapter two: Defining a strike*

3.1 Introduction

Before considering what constitutes an 'unprotected strike' it is necessary to look at what constitutes a 'strike' in the first instance. It is only once this issue is clarified that consideration can be given to whether a strike (as defined) is to be regarded as unprotected or not.

3.2 Defining 'strike' action

Section 213 of the LRA defines a 'strike' as being:

'the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory.'⁶⁵

The definition of a strike makes it clear that a number of conditions need to be met before conduct can constitute 'strike action.' Understanding these conditions are important for two reasons: Firstly, 'only strikes, as defined, are subject to the

⁶⁵ Emphasis added.

procedural and substantive requirements set out in the LRA.⁶⁶ Secondly, the internal requirements place limitations on what kind of conduct qualifies for the protections afforded by the right to strike.⁶⁷ The protections and immunities provided for by the LRA are briefly discussed in chapter three.

In *Transport and Allied Workers Union of SA obo Ngedle v Unitrans Fuel and Chemical (Pty) Ltd*,⁶⁸ the Court held that:

'there are four elements or components that make up a strike under the LRA. In everyday parlance, people call every collective stay-away from work or work stoppage a strike. Under the LRA a strike must have the four elements.'

These four elements are inherent qualifications⁶⁹ on what constitutes 'strike action.' They are, broadly, as follows:

- (a) Stoppage or disruption of work;
- (b) Committed by employees against an employer;
- (c) For the purposes of remedying a grievance or dispute;
- (d) in respect of a matter of mutual interest.

3.2.1 Stoppage or disruption of work

⁶⁶ Cheadle op cit (n6) 48.

⁶⁷ Certain conduct, such as protect action for instance, may nonetheless enjoy other forms of protection.

⁶⁸ 2016 (11) BCLR 1440 (LC). Cheadle op cit (n6) 49.

⁶⁹ For a discussion of the various inherent qualifications see John Grogan *Collective Labour Law* 2ed (2014) Juta, Cape Town at 195 to 214 and D Du Toit *et al* 'Labour Law through the Cases (2005) accessed at [http://lexisnexis/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://lexisnexis/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) on 20 June 2018.

The reference to a 'partial or complete concerted refusal to work, or the retardation or obstruction of work ensures that the 'right to strike is given the widest possible meaning.'⁷⁰ This is in contrast to some countries like France, for instance, where 'a go-slow or retardation of work is not a 'strike' and is not protected.'⁷¹

The statutory definition of 'strike' is wide enough to encompass not-only complete refusals to work but also so-called 'go-slows', 'work-to rule strike', 'grass-hopper strikes' industrial sabotage and sit-ins.⁷² Go-slows' refer to situations where employees continue to work but do so at a pace which has been deliberately slowed down. 'Work-to rule' strikes mean that employees comply only and exactly with their terms and conditions of employment but refuse to do anything further as a means of reducing efficiency. 'Grass-hopper strikes' are where employees engage in intermittent work stoppages' and 'sit-ins' are where employees sit in their workplace without performing work. To constitute 'strikes' all of the above acts must also meet the further requirements discussed below.

Generally speaking, a strike only pertains to an obstruction or refusal to perform work that employees are contractually obliged to perform, the exception being overtime. A refusal to work overtime, even if voluntary, may constitute a

⁷⁰ Hepple op cit (n14) 14. See also *CWIU v Plascon Decorative (Inland) (Pty) Ltd* [1998] 12 BLLR 1191 (LC).

⁷¹ Ibid.

⁷²Grogan op cit (n44) 407.

strike.⁷³ One further exception is noted by John Grogan. This is where 'off-duty employees' perform acts which result in the retardation or obstruction of work.⁷⁴

Furthermore, the work required to be performed must be lawful. There can be no strike action where employees fail to perform unlawful action. For instance, in *Simba (Pty) Ltd v FAWU*⁷⁵ 'where employees had refused to do work in terms of a collective agreement that in was in breach of the BCEA, it was held that the word 'work' did not include work that would be illegal to perform.'⁷⁶

Where employees refuse to work due to the failure by their employer to comply with agreed upon contractual obligations courts initially regarded such action as falling short of strike action; rather, employees were obliged to rely on the existing right that could be enforced.⁷⁷ This position, however, was altered in *NUM obo employees v CCMA*⁷⁸ where the Court found that 'a work stoppage in response to unlawful conduct by the employer fell within the definition of a "strike."⁷⁹

3.2.2 By employees (concerted action) against an employer

⁷³ Ibid. See also *Kgasago v Meat 'n More Spaza* [1998] 1 BLLR 69 (LC).

⁷⁴ Grogan op cit (n44) 406.

⁷⁵ (1997) 18 ILJ 558 (LC) at page 568.

⁷⁶ Cheadle op cit (n6) 50.

⁷⁷ *Nkutha v Fuel Gas Installations (Pty) Ltd* (2000) 2 BLLR 178 (LC). See also Du Toit op cit (n69).

⁷⁸ (2012) 1 BLLR 22 (LAC). See also Du Toit op cit (n69).

⁷⁹ Ibid.

The strike must be affected by employees against an employer. For instance, 'a dispute between two trade unions, or between a trade union and its members, or amongst employees, is not strikeable.'⁸⁰ The strike need not be against the employer of the employees concerned. The definition is therefore wide enough to cover strikes against another employer (so-called 'secondary strikes') as well.⁸¹ Primary and secondary strikes have separate requirements as set out in the LRA.⁸² While a primary strike is for the purpose of the employees remedying a grievance in which they have a vested interest, a secondary strike, or so-called sympathy strike, is to assist other employees to bring pressure to bear upon their employer.⁸³

In addition, in *Tiger Wheels Babelegi (Pty) v NUMSA*⁸⁴ the Court held that 'the definition of 'strike' in s 213 of the LRA was wide enough to protect an industry-wide strike against a challenge by an individual employer even though there was no issue in dispute between that employer and the employees concerned.'⁸⁵

⁸⁰ Cheadle op cit (n6) 56.

⁸¹ *CWIU v Plascon Decorative (Inland) (Pty) Ltd* [1998] 12 BLLR 1191 (LAC).

⁸² Section 64 of the LRA addresses 'primary strikes' whereas section 66 of the LRA addresses 'secondary strikes.'

⁸³ Section 66 of the LRA defines a secondary strike as 'a strike, or conduct, in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of the council, have a material interest in that demand.' A detailed discussion is beyond the scope of this dissertation.

⁸⁴ [1999] 1 BLLR 66 (LC) [hereafter '*Tiger Wheels*' case]. See Cheadle op cit (n6) 51.

⁸⁵ Du Toit op cit (n69).

It has been suggested by some commentators that as 'the Bill of Rights⁸⁶ vests the right to strike in "every worker", it is not obvious why individual workers should be precluded from exercising the right even if they possess the necessary bargaining power to exercise it, or whether their exclusion is constitutionally justified.⁸⁷

In contrast, other commentators have held that the Constitution recognises that the right to strike is an independent and individual⁸⁸ right but that the right must be exercised collectively.⁸⁹ One person is incapable of engaging in strike action.⁹⁰ The 'failure or refusal to work must [then] be concerted and must be engaged in by persons.'⁹¹

In *Schoeman v Samsung Electronics SA (Pty) Ltd*,⁹² the Court held that a single employee is incapable of striking.⁹³ Furthermore, in *Moloto*⁹⁴ the Constitutional Court made it clear that a single employee was incapable of engaging in strike action. There must, therefore, be concerted activity by more than one employee for the conduct to constitute strike action.

⁸⁶ Chapter two of the Constitution.

⁸⁷ Cheadle op cit (n6) 56.

⁸⁸ Hepple op cit (n14) 17.

⁸⁹ Cheadle op cit (n8) 55.

⁹⁰ *SATAWU v Moloto* [2012] 12 BLLR 1193 (CC) at para 34 [Hereafter '*Moloto*'].

⁹¹ Grogan op cit (n44) 407.

⁹² [1997] 10 BLLR 1364 (LC).

⁹³ However, in para 23 of *Co-Operative Worker Association v Petroleum Oil & Gas Co-Operative of SA* [2017] 1 BLLR 55 (LC) the opposite sentiment was expressed by way of an *obiter* remark. As a result it carries little weight.

⁹⁴ *Supra* (n90). See also Du Toit op cit (n69).

Importantly, in *Food and General Workers Union v Minister of Safety and Security*,⁹⁵ the Court recognised that employees who have been dismissed may not thereafter engage in strike action. However, to the extent that employees have been dismissed during on-going strike action, it would be lawful to persist with such strike action for the duration of the strike. For this purpose, their employment is thus extenuated. In other words, the definition of 'employees' is then extended to encompass former employees. The recognition that a strike will remain protected, even where all the employees have been dismissed by the employer, is an important one.⁹⁶

The Court noted that the 'effect of [the LRA] is to suspend the operation of the contract [of employment] for the duration of the protected strike to enable the parties to resolve the dispute by power play.'⁹⁷ The Court went on to explain that part of the power-play which may be used by an employer is the power to dismiss employees, provided such dismissal is not in contravention of s 67(5) of the LRA. Any dismissals in contravention of this section would be a nullity.⁹⁸

This makes sense: in the absence of such protection employers would simply dismiss strikers as a means of ending the strike. Thus in *Picardi Hotels Ltd v*

⁹⁵ (1999) 20 *ILJ* 1258 (LC).

⁹⁶ In *Afrox Ltd v SACWU; SACWU v Aprox Ltd* [1997] BLLR 382 (LC) it was held that the provision for former employees to engage in strike action does not extend to persons who are aggrieved by their dismissal itself. This is so, Landman J found, because strike action is impermissible if the issue in dispute is capable of being referred to arbitration or adjudication. Du Toit op cit (n69).

⁹⁷ *Supra* (n95) at para 19.

⁹⁸ *Ibid.*

*FGWU*⁹⁹ the Court held that 'employees could strike beyond the point of dismissal. To hold otherwise, the Court reasoned, would mean that an employer could avoid a strike simply by dismissing the employees before the commencement of the strike.'¹⁰⁰ An employer's ability to simply dismiss employees is also significantly constrained by the unlawful dismissal provisions in the LRA.¹⁰¹

However, and importantly for present purposes, this does not apply to dismissals effected for engaging in unprotected strike action. The Court held, having regard to s 68 of the LRA, that protected strikes are treated on a separate basis to unprotected strikes. So too are dismissals effected following unprotected strikes. Dismissals so effected bring the employment relationship to an immediate end.¹⁰²

3.2.3 Remedying a grievance or resolving a dispute

In order to qualify as a 'strike,' the action must be undertaken for the purposes of remedying a grievance or resolving a dispute in respect of a matter of mutual interest between an employer and employees.¹⁰³ As such, protest action would not qualify as a strike (although it is protected by other means). This is because protest

⁹⁹ [1999] 6 BLLR 601 (LC). See also Cheadle *op cit* (n6) 51.

¹⁰⁰ Cheadle *op cit* (n6) 51.

¹⁰¹ See, in particular, ss 186, 187, 193 and 194 of the LRA. Section 187(1)(a) expressly states that 'a dismissal is automatically unfair...if the reason for the dismissal is that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV' of the LRA.

¹⁰² *Supra* (n95) para's 20 and 21.

¹⁰³ Section 213 of the LRA.

action is focused on socio-economic issues, the target of which is often the State and not the employer.¹⁰⁴

Ultimately, it is not enough for a group of employees to simply refuse to work; such refusal must be for a purpose. In *TSI Holdings (Pty) Ltd v NUMSA*,¹⁰⁵ the Court recognised that:

'the issue in dispute underlying a strike may still be identified by the strikers' demand, because the term "issue in dispute" is in turn defined as "the demand, grievance or the dispute that forms the subject-matter of the strike."¹⁰⁶

It is essential that employees' refusal to work be for the purpose of remedying a grievance or resolving a dispute. If not, their actions fall short of a strike and will not be protected.¹⁰⁷ For instance, in *Simba (Pty) Ltd v FAWU*,¹⁰⁸ employees simply refused to work a shift system when instructed to do so. The Court held that this merely amounted to a 'concerted refusal to work. The employees have raised no complaint; they have articulated no demands.'¹⁰⁹ In dismissing the employees' complaint the Court stated:

¹⁰⁴ See ss 77 and 213 of the LRA. Section 213 of the LRA defines 'protest action' as 'the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of **promoting or defending the socio-economic interests** of workers, but **not for a purpose referred to in the definition of strike**' (emphasis added).

¹⁰⁵ (2006) 27 ILJ 1483 (LAC) [hereafter '*TSI Holdings*'].

¹⁰⁶ Grogan op cit (n69) 196.

¹⁰⁷ See *SASTWU v Karras t/a Floraline* [1999] 10 BLLR 1097 (LC).

¹⁰⁸ Supra (n75). Grogan op cit (n44) 409.

¹⁰⁹ Ibid para 17.

'I have examined the papers carefully to determine whether or not there is a demand, a grievance or a dispute which the second to further respondents require to be resolved. I regret that I am unable to find any evidence of anything other than a concerted refusal to work. The employees have raised no complaint; they have articulated no demand.'¹¹⁰

In such cases, the employees' conduct may constitute a form of misconduct (such as insubordination or failure to perform their duties and functions), rendering them subject to appropriate disciplinary action.

Furthermore, in *FAWU v Rainbow Chicken Farms*¹¹¹ the employees had refused to work on a religious holiday. It was held that the employees 'had not sought to remedy a grievance or resolve a dispute.'¹¹² As will become apparent below, it is important that employees clearly articulate their demands to an employer. While it is arguable, in terms of *FAWU*, that there was an implicit demand that religious employees should not have to work on religious holidays a potential alternative course of action (as opposed to engaging in unprotected strike action) would have been lodging an unfair discrimination dispute.¹¹³

Conversely, there can generally be no strike where the demand of the employees is itself unlawful. In *TSI Holdings*,¹¹⁴ the Court held that it would be

¹¹⁰ Ibid para 18.

¹¹¹ [2000] 1 BLLR 70 (LC) [hereafter '*FAWU*'].

¹¹² *Grogan op cit* (n44) 409.

¹¹³ See *TDF Network Africa (Pty) Ltd v Faris* (CA 4/17) [2018] ZALAC 30 (5 November 2018). Note para's 42 and 43 where the Court expressly distinguished its facts from that of the *FAWU* case.

¹¹⁴ (2006) 27 *ILJ* 1483 (LAC). *Grogan op cit* (n44) 409. See also *National Union of Public Service and Allied Workers v National Lotteries Board* 2014 (6) BCLR 663 (LC) and *Cheadle op cit* (n6) 22.

unlawful for employees to demand a supervisor be fired without due process having been followed. However, a demand that a supervisor be lawfully disciplined in a manner which may lead to dismissal¹¹⁵ is acceptable.

What is required, however, is a careful and critical assessment of what constitutes an 'unlawful demand.' For example, in *Bidvest Food Services (Pty) Ltd and NUMSA, Gallant & 158 others*¹¹⁶ the National Union of Metalworkers¹¹⁷ engaged in strike action in an effort to obtain organisational rights in the workplace of the employer, Bidvest. NUMSA and Bidvest operated in different industries, NUMSA in the metal industry and Bidvest in the food industry. The dispute arose because Bidvest refused to grant NUMSA organisational rights, arguing that NUMSA was barred by its own constitution from organising in the industry to which Bidvest belongs.

As a result of Bidvest's refusal to grant it organisational rights, NUMSA referred the matter to the Commission for Conciliation, Mediation and Arbitration¹¹⁸ for conciliation. Bidvest raised a point *in limine* at the CCMA. It argued that the CCMA lacked jurisdiction to entertain the dispute because the CCMA was unable to

¹¹⁵ *City of Johannesburg Metropolitan Municipality v SAMWU* [2011] 7 BLLR 663 (LC) and *Metro Bus (Pty) Ltd v SAMWU obo Members* [2009] 9 BLLR 905 (LC). For a critique of this latter case see Grogan op cit (n69) 211 to 212.

¹¹⁶ [2014] ZALCCT 58. See J Van Wyk and A van Heerden 'Striking in support of a demand for Organisational rights in a workplace outside the scope of a trade union's constitution' accessed at <http://www.polity.org.za/article/striking-in-support-of-a-demand-for-organisational-rights-in-a-workplace-outside-the-scope-of-a-trade-unions-constitution-2015-01-06> on 28 January 2019 which offers a useful summary of the case and the legal principles applicable thereto.

¹¹⁷ [Hereafter 'NUMSA'].

¹¹⁸ [Hereafter 'CCMA'].

grant NUMSA the rights it sought. The CCMA disagreed and a certificate of outcome was issued certifying the dispute as unresolved.

Normally, NUMSA would have an election to either refer the matter to arbitration in an effort to obtain organisational rights or engage in strike action. However, NUMSA would have difficulty in referring the matter to arbitration, as the following cases show.¹¹⁹

In *SATAWU v Telekleen / Compukleen*¹²⁰ the union, SATAWU, sought organisational rights from an employer. The employer objected, arguing, by way of a preliminary point, that the members the union sought to recruit fell outside the scope of the union's constitution. The CCMA agreed, holding that the application for organisational rights was defective. The preliminary point was thus upheld. Similarly, in *CEPPWAWU / Pop Snacks*¹²¹ the CCMA held that a union may only operate in sectors in which it is allowed to in terms of its constitution to which it is bound. In other words, the union had no *right* to demand organisational rights in a workplace falling outside the scope of their constitution.

NUMSA then issued a strike notice indicating it wished to engage in strike action in order to compel Bidvest to provide it with organisational rights. In response, Bidvest approached the Labour Court on an urgent basis in an effort to

¹¹⁹ Section 65(2) of the LRA.

¹²⁰ (2010) 7 BALR 768 (CCMA).

¹²¹ (2009) 11 BALR 1156 (CCMA).

have the strike declared unprotected. Bidvest argued that the strike was unprotected because the nature of NUMSA's demand, to organise in an industry outside the scope of its own constitution, was unlawful.

The Court held that 'the legality of a strike is not dependent on the probable success or legal merits of the demand, whether the trade union organising the strike is registered, whether the participating workers are members of that trade union or whether the trade union operates within the industry in which the employer's workplace falls.'¹²²

The Court reasoned that the right to strike was a right possessed by every employee. There can be no bar on such employees going on strike in:

'an effort to obtain rights and strike an agreement through collective bargaining and power play. That is a right that every worker has. The demand of the workers in this case is that NUMSA must be allowed to represent them and to exercise the organisational rights set out in section 21 of the LRA. That is a demand in respect of a matter of mutual interest. It is not unlawful.'¹²³

The Court thus held that:

'Section 23(2)(c) of the Constitution guarantees, for every worker, the right to strike. That right is limited only by the provisions of section 64 of the LRA. In the case before me, the workers cited as respondents have complied with those provisions. They have acquired the right to strike. That right should not be further limited by reading into the provisions of ss 64 and 65(2) a

¹²² Van Wyk op cit (n116).

¹²³ Supra (n116) para's 18 and 19.

provision that workers may not strike in pursuit of a demand for organisational rights for a union that is restricted in its scope by its own constitution.¹²⁴

In other words, while NUMSA did not have a right to demand organisational rights, it nonetheless could demand organisational rights as a matter of mutual interest. Engaging in strike action was a means of compelling Bidvest to nonetheless enter into a collective agreement with NUMSA outside of the confines of s 21 of the LRA (ie in terms of s 20 of the LRA). This demand was not of the same nature as a demand to perform an unlawful act because the outcome could, within the confines of the LRA, be lawfully achieved, just not through the mechanism of arbitration.

Grogan states that the grievance or dispute must exist at the time of the dispute. If the grievance or dispute does not exist at the time of the work stoppage, then clearly there can be no strike.¹²⁵

Once a dispute or grievance has been resolved, the strike ends. Any strike action committed after such time may be regarded as unprotected.¹²⁶ In *Afrox Ltd v SA Chemical Worker's union (2)*¹²⁷ the Court held that:

'once the dispute giving rise to the strike is resolved, the strike must end and the right to strike must fall away. The Court explained that the strike can

¹²⁴ Supra (n116) para 23.

¹²⁵ Grogan op cit (n69) 204.

¹²⁶ *Ceramic Industries Limited v NCBAWU* [1997] 5 BLLR 546 (LC) and *Pikitup (Soc) Ltd v SAMWU* (2) 2013 11 BLLR 1118 (LC). See also Du Toit op cit (n69).

¹²⁷ (1997) 18 *ILJ* 406 (LC).

terminate in various ways: First, the strikers can abandon the strike and unconditionally return to work. Second, the 'substratum'...has disappeared. This can happen where the employer concedes to the demands of the strikers or removes the grievance or resolves the dispute.¹²⁸

In *Transport and Allied Workers Union of SA obo Ngedle v Unitrans Fuel and Chemical (Pty) Ltd*,¹²⁹ the Court held that 'a protected strike can only become unprotected if it continues beyond the point where the employer fully and unconditionally complies with the demand or the strikers alter their demand.'¹³⁰ The latter reference to a change of demand is important in that a union may only strike on those issues which have been the subject matter of conciliation as more fully discussed below.

3.2.4 Matters of mutual interest

In order to constitute a strike, the demand must be in respect of a matter of 'mutual interest' between employees and an employer, a phrase which, as Grogan notes, is open to extremely wide interpretation.¹³¹

The courts have, in fact, shown a willingness to give a wide meaning to what constitutes matters of mutual interest.' In *Vanachem Vanadium Products (Pty) Ltd v*

¹²⁸ A J Rycroft 'Can a protected strike lose its status?' (2012) 33 *ILJ* 821 at 824.

¹²⁹ 2016 (11) BCLR 1440 (CC).

¹³⁰ Cheadle op cit (n6) 54.

¹³¹ Grogan op cit (n69) 205.

*National Union of Metalworkers of South Africa*¹³² the Court indicated that the phrase 'matters of mutual interest' must be given a wide meaning to include all matters of concern to the employment relationship and must not be confined to be matters concerning the wellbeing of the enterprise.¹³³

In *City of Johannesburg Metropolitan Municipality v SAMWU*,¹³⁴ the Court also held that a 'matter of mutual interest...is any matter concerning employment.'¹³⁵ The 'sweeping phrase seemingly encompasses issues of employment in general, and is not limited strictly to matters pertaining to wages and conditions of service.'¹³⁶ For instance, in *Pikitup (SOC) Ltd v SAMWU obo Members*,¹³⁷ a dispute over health and safety, with particular regard to the proposal to introduce breathalysers in the workplace, was found to constitute a 'matter of mutual interest.' In making its ruling the Court, while noting the wide definition of the term 'matter of mutual interest,' held as follows:

'The phrase mutual interest seeks to limit the issues that may form the subject matter of a strike. It can therefore not be without boundary. The matter should not be too far removed from the employment relationship so that it can properly be said that it does not concern the employment relationship.'

¹³² [2014] 9 BLLR 923 (LC). This is a departure from *Rand Tyres and Accessories (Pty), Ltd. and Appel v Industrial Council for The Motor Industry (Transvaal), Minister for Labour, and Minister for Justice* 1941 TPD 108. See M E Manamela 'Matters of Mutual Interest for Purposes of a Strike' *Obiter* (2015) 791 and Grogan op cit (n44) 387 to 388.

¹³³ Para 17.

¹³⁴ (2011) 7 BLLR 663 (LC).

¹³⁵ See also Du Toit op cit (n69).

¹³⁶ Grogan op cit (n69) 205.

¹³⁷ [2014] 3 BLLR 217 (LAC). See J Van Wyk 'Employees Rights to Strike over issues of health and safety' accessed at <http://www.hrpulse.co.za/news/230618-employees-rights-to-strike-over-issues-of-health-and-safety> on 19 May 2017.

Matters that are purely socio-economic or political would generally not be matters of mutual interest.¹³⁸

Caution should be exercised when distinguishing between disputes of right and disputes of mutual interest as the courts have held the distinction is not watertight.¹³⁹ The courts have held that 'the categorisation of [a] dispute as either one of right or interest, [is] strictly speaking, not determinative...the legislature has provided for an election to either engage in strike action or approach the appropriate forum to enforce the right.'¹⁴⁰

Nevertheless, the Industrial Action Code¹⁴¹ expressly distinguishes between disputes of right¹⁴², disputes of mutual interest¹⁴³ and socio-economic disputes.¹⁴⁴ When making a determination a court is required to look at the true nature of the

¹³⁸ *Supra* (n137). See John Grogan 'Of Mutual Interest: When are strikes permissible' *Employment Law Journal* August (2014).

¹³⁹ *MITUSA v Transnet Ltd* [2002] 11 BLLR 1023 (LAC).

¹⁴⁰ *Mawethu Civils (Pty) Limited v National Union of Mineworkers* [2016] JOL 36070 (LAC).

¹⁴¹ For a discussion regarding the draft version of the Industrial Action Code (which remain largely unchanged from the final version) see PAK Le Roux 'The Code of Good Practice: Collective Bargaining and Picketing (Part Two)' (2017) 26(12) *Contemporary Labour Law* 130.

¹⁴² Defined in the Code, at s 17(1)(a), as 'a dispute that the Act or other employment laws require to be settled by arbitration or adjudication. An example of a dispute of right is a dispute arising from a contravention of a collective agreement or an employment law such as unfair dismissal, unfair discrimination, and underpayment of wages. It can be described as a dispute concerning existing rights.'

¹⁴³ Defined in the Code, at s 17(1)(b), as 'a dispute concerning employment or labour relations that cannot be resolved through enforcing existing rights. It can be described as a dispute to create new rights. A dispute of mutual interest is the legitimate scope of a collective bargaining agreement and the matters which may legitimately form the subject of a protected strike or lockout.'

¹⁴⁴ While this may be the case, in practice there still remains a lack of clarity regarding what constitutes disputes of right and disputes of interest. This is compounded by the various uses of the term in the LRA. See Cheadle *op cit* (n6) 110 and *Department of Home Affairs v Public Servants Association* (2017) 38 *ILJ* 1555 (LC).

dispute in order to determine whether it is a matter over which strike action may permissibly be taken.¹⁴⁵

There are two exceptions to the general principle that only matters of mutual interest, and not disputes of right, may form the subject matter of strike action. Certain disputes provide for an election to either judicially enforce a right or, alternatively, engage in strike action in an effort to obtain such right.¹⁴⁶ They are disputes in terms of s 189A of the LRA and organisational rights disputes.¹⁴⁷ Section 189A of the LRA regulates so-called large scale retrenchments. Section 189A (7)(a) of the LRA provides for employees to have an election to refer the dispute either to the Labour Court or to strike over the dispute.¹⁴⁸ Organisational rights disputes are discussed in more detail below.

3.3 Peace / Functional to collective bargaining

3.3.1 Introduction

¹⁴⁵ *Coin Security Group (Pty) Ltd v Adams* [2000] 4 BLLR 371 (LAC).

¹⁴⁶ *Cheadle op cit* (n6) 109. The Industrial Action Code also provides, at s 17(4), that 'apart from the two exceptions relating to organisational rights and retrenchment in certain circumstances, the dispute must be one of mutual interest. Accordingly, rights disputes (other than the two exceptions) do not constitute matters that can form the subject matter of a protected strike or lockout.'

¹⁴⁷ See ss 65(2)(a) and 64(2) of the LRA and s 17(3) of the Industrial Action Code.

¹⁴⁸ Given the periods which must elapse within section 189A of the LRA before this right accrues it was held in *NUMSA v Bell Equipment Co SA (Pty) Ltd* (2011) 32 ILJ 382 (LC) that there was no need to approach the CCMA and obtain a certificate of outcome.

A protected strike may lose its protected status in certain circumstances: for instance, where the underlying dispute or grievance has been satisfactorily resolved. However, in recent years, two court cases have suggested another possible, more controversial, basis upon which strike action may be declared unprotected, and interdicted. The suggestion is that certain conduct perpetrated during the currency of the strike, and in particular, violent conduct,¹⁴⁹ may render the strike dysfunctional to collective bargaining.

Uniquely, the cases in question deal with the possibility of rendering an otherwise protected strike unprotected even where the demand or grievance still persists. Due to its controversy as well as practical difficulties¹⁵⁰ that may arise in its implementation alternative means of achieving the same result have been suggested including possibly reading limitations into the definition of 'strike' action itself.¹⁵¹ These issues are addressed below.

3.3.2 Dysfunctional to collective bargaining

In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union*,¹⁵² the Court held, by way of an *obiter* comment, as follows:

¹⁴⁹ For a discussion on violent strike action and, in particular, the Marikana massacre see T Ngcukaitobi, 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 *ILJ* 836 and J Theron, S Godfrey, E and Fergus 'Organisational Rights and Collective Bargaining Rights through the Lens of Marikana' (2015) 36 *ILJ* 849.

¹⁵⁰ Rycroft *op cit* (n128) 821.

¹⁵¹ A Myburg 'Interdicting Protected Strikes on Account of Violence' (2018) 39 *ILJ* 703.

¹⁵² (2012) 33 *ILJ* 998 (LC). [Hereafter '*Tsogo Sun*'].

'This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. **When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.**¹⁵³

In *Tsogo Sun*, a protected strike had resulted in violence and chaos. In its ruling, the Court noted that the 'fact that the individual respondents are workers earning a relatively low income is of no consequence. They have not denied participating in the unlawful conduct alleged by the applicant, and they must bear the consequences of their actions.'¹⁵⁴

Tsogo Sun has since been endorsed, once again by way of an *obiter* comment, in *National Union of Food Beverage Wine Spirits and Allied Workers (NUFBWSAW) v Universal Product Network (Pty) Ltd In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits and Allied Workers*.¹⁵⁵ In reaching its decision the Court relied on two sources that a strike may lose its protection in appropriate circumstances.¹⁵⁶

¹⁵³ *Ibid* para's 13 and 14. Emphasis added.

¹⁵⁴ *Ibid* para 11.

¹⁵⁵ [2016] 4 BLLR 408 (LC) [Hereafter '*UPN*']. For a summary of the case see J Van Wyk and A van Heerden 'Can a strike be rendered unlawful as a result of unlawful acts including acts of violence?' accessed at http://www.werksmans.com/virt_e_bulletins/can-a-strike-be-rendered-unlawful-as-a-result-of-unlawful-acts-including-acts-of-violence/ on 20 May 2017.

¹⁵⁶ E, Fergus 'Reflections on the (Dys)functionality of strikes to collective bargaining: Recent Developments (2016) 37 *ILJ* 1537 at 1547.

First, the Court quoted *Edelweiss Glass & Aluminium (Pty) Ltd v National Union of Metalworkers of SA*¹⁵⁷ as authority for the proposition that a protected strike may only be transmuted into an unprotected strike where 'the employees had used the protected strike as leverage to achieve objectives other than those in respect of which strike action could legitimately be taken.'¹⁵⁸The Court seemed to suggest that the use of violence may meet this test.¹⁵⁹

Second, the Court considered the notion that violence may be non-functional to collective bargaining. The Court held:

'The proper approach, it would seem to me, is that proposed by Prof Rycroft¹⁶⁰...who **acknowledges the practical difficulties that clearly arise, not least the determination of how much violence will misconduct would have to have occurred (sic) before the court intervenes.** He suggests that the court ask the following question '**Has misconduct taken place to an extent that the strike no longer promotes functional collective-bargaining, and is therefore no longer deserving of its protected status**'? In answering this question, Prof Rycroft proposes that the court weigh the levels of violence and efforts by the union concerned to curb it. He explains that this is not an anti-union proposal; rather, he imagines a balancing counter-measure allowing unions to launch a similar court application for an order granting protected status to an otherwise unlawful strike if it is in response to unjustified conduct by the employer... In my view, this is an eminently sensible approach to adopt.'¹⁶¹

¹⁵⁷(2001) 32 *ILJ* 2939 (LAC).

¹⁵⁸ See, however, Fergus op cit (n156) 537 who critiques the relevance of *Edelweiss* in finding that an otherwise lawful strike should lose its protection due to strike action. For a counter-argument see Myburg op cit (n151) 716.

¹⁵⁹Supra (n155) para 31.

¹⁶⁰ Rycroft op cit (n128) 821.

¹⁶¹ Supra (n155) para 32. For an alternative formulation for an appropriate threshold for intervention see Myburg op cit (n151) 721.

Prof Alan Rycroft argues that, aside from the express requirements of ss 64 and 65 of the LRA, there are a number of implicit restrictions on the right to strike.¹⁶² He notes however that asserting that acts of misconduct or violence committed during a strike are unprotected differs from suggesting that such acts open up a means to delegitimise the strike.¹⁶³ Ordinarily, an employer would resort to an interdict to prevent unlawful strike action, contempt of court proceedings where employees fail to comply and dismissal proceedings as a means of maintaining control during a violent strike. However, these mechanisms would have no effect on the protected nature of the strike. It is in this respect that the *Tsogo Sun* and *UPN* cases are novel and controversial in light of the entrenched constitutional right to strike.

Rycroft argues that while there is no express provision allowing for a strike to be rendered unprotected in such circumstances, the courts may have an implicit power to declare a strike unprotected.¹⁶⁴ Relying on *Tsogo Sun* Rycroft argues that violent action may be a legitimate reason to render an otherwise protected strike unprotected.

The rationale is that 'the potential interdicting of strikes on account of violence is not simply about violence *per se*. Instead, it is about the dynamic that strike violence produces, and the impact it has on the collective bargaining

¹⁶² Rycroft op cit (n128) 822 to 823.

¹⁶³ Ibid at 823.

¹⁶⁴ Ibid at 826.

process.¹⁶⁵ While the very purpose of a strike is to bring pressure to bear on the other party, sometimes, in the form of 'hard bargaining,¹⁶⁶ there may be limits to such conduct. Where violence is used as a means of coercion Anton Myburgh argues that 'the strike is not a battle of attrition whose outcome is determined by the forces of demand and supply, as it is designed to be.'¹⁶⁷ Simply put, the law does not recognise unlawful acts as a legitimate means of obtaining redress. As alluded to in *UPN*, however, rendering an otherwise protected strike unprotected due to violence does presents its own difficulties.

3.3.3 Violence and the definition of a strike

Dr Emma Fergus clarifies the practical difficulties inherent¹⁶⁸ in the approach endorsed by Rycroft and the *Tsogo Sun* and *UPN* cases. She argues that there is no legislative or judicial authority to support the notion that functionality is a requirement for collective bargaining 'least of all in the sense that they must accord with the court's view of what is functional at any given time and in any given industry.'¹⁶⁹ Rather, 'strikes-provided they are concerned with matters relevant to the relationship between employers and employees – are by definition functional to collective bargaining.'¹⁷⁰

¹⁶⁵ Myburgh op cit (n151) 705.

¹⁶⁶ That hard bargaining is not equivalent to duress see *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA) and Myburgh op cit (n151) 708.

¹⁶⁷ Myburgh op cit (n151) 707.

¹⁶⁸ As fully set out in Fergus op cit (n156).

¹⁶⁹ Ibid 1544.

¹⁷⁰ Ibid 1539.

While it is debatable to what extent the resort to violence as a *method*¹⁷¹ of securing legitimate demands is functional to collective bargaining, it is nonetheless clear that, according to Fergus, there are clear practical and legal difficulties with an approach focused on the functionality of collective bargaining.¹⁷² Practical difficulties would include determining what threshold of violence is sufficient to warrant intervention. Legal difficulties would include the possibility of striking employees being prejudiced by the conduct of a minority. These difficulties may be exploited by 'manipulation by unduly interventionist courts.'¹⁷³

She goes on to say that 'the need to constrain the wanton levels of violence which are sometimes associated with strikes in South Africa cannot be disputed,¹⁷⁴ proposing tentatively that the right to strike be read as a right 'which may only be exercised peacefully.'¹⁷⁵ For Myburgh, this requires the reading in of additional requirements into s 67 of the LRA or, rather, the reading of a limitation into the definition of what constitutes a 'strike.'¹⁷⁶

¹⁷¹ As Myburgh notes the issue is the nature of the employees' conduct not the content of their demand. See Myburg op cit (n151) 714. See also 719 to 720 for a persuasive discussion on the extent to which violence cannot be divorced from the strike itself.

¹⁷² Fergus op cit (n156) 1546.

¹⁷³ Ibid 1550.

¹⁷⁴ Ibid 1545. For a discussion on recent strike statics, containing statistics on unprotected and violent strike action, see Cheadle op cit (n6) 31.

¹⁷⁵ Fergus op cit (n156) 1548.

¹⁷⁶ Myburg op cit (n151) 712.

Prof Peter Le Roux similarly suggests an amendment to the definition of 'strike' focusing on the 'act' element of the definition:

'Here an issue of terminology arises. The violence does not lead to a "strike" being unprotected. It is submitted that it will, in most cases at least, be preferable to argue that the violence leads to the employees' action no longer being regarded as a strike, and therefore no longer being capable of enjoying the protection granted to strikes by section 67 of the [LRA]. **This is because the form that the actions undertaken by or on behalf of the employees take is no longer a refusal to work or another action that falls within the definition of strike.**¹⁷⁷

For Myburgh, there are three potential means by which a limitation into the right to strike can be read. The first is by focusing on the notion of 'unlawful conduct.' So, for instance, if the 'means used by the workers to obstruct work...is unlawful violence, then the conduct will not qualify as a strike, and will thus not be protected.¹⁷⁸ The second is by focusing on the argument put forward by Le Roux that 'once violence replaces the refusal to work as the focal point of the strike, then it no longer qualifies as a strike as defined, because violence is not part of the act element of the definition¹⁷⁹ of a strike. The third is to read in the term 'peaceful' into the definition of 'strike'. To the extent that the reading in of 'peaceful' constitutes a limitation on the right to strike Myburgh argues it would be justifiable in terms of s 36 of the Constitution.¹⁸⁰

¹⁷⁷ Ibid. Emphasis added.

¹⁷⁸ Ibid 716.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid 717 to 719.

However, Fergus also emphasises the necessary interplay between the constitutional right to strike and other constitutional rights. She argues that 'absent protection from harm, the constitutional rights of those who fall victim to strike violence to freedom and security of the person...are evidently infringed'¹⁸¹ during violent strike action. Where there is a balancing of rights the principle allowing the right to strike to trump other rights is often untenable.¹⁸² The constitutional rights of non-participants are also expressly recognised by the Industrial Action Code.¹⁸³

3.3.3.4 The Amendment Act and Industrial Action Code

Legislative amendments have recently been enacted to address the violent nature of strikes in South Africa in the form of the Amendment Act¹⁸⁴ and the Industrial Action Code.

The Amendment Act 'provides for a deadlock-breaking mechanism for protracted and violent strikes, in the form of compulsory advisory arbitration undertaken by a statutory advisory panel.'¹⁸⁵ A director of the CCMA **may**¹⁸⁶ appoint an advisory arbitration panel in the public interest to make an advisory arbitration award (a) in order to facilitate a dispute on his / her own accord or in consultation

¹⁸¹ Fergus op cit (n156) 1549.

¹⁸² Ibid 1549.

¹⁸³ Op Cit (n4).

¹⁸⁴For a useful summary of the Amendment Act in its 'bill format' see PAK Le Roux 'The labour law amendment bills' (2017) 27(3) *Contemporary Labour Law* 26.

¹⁸⁵ Myburg op cit (n151) 722.

¹⁸⁶ Emphasis added.

with the parties, (b) after consultation in the prescribed manner with the parties to the dispute and (c) in the prescribed manner setting out the panel's terms of reference as provided for.¹⁸⁷ A director must appoint an advisory arbitration panel if:

- (a) Subject to the below-mentioned requirements, he is directed to do so by the Minister or on application by a party to the dispute;
- (b) If ordered to do so by the Labour Court in the circumstances prescribed by law;
- (c) By agreement of the parties.

The aforementioned requirements are that the director has reasonable grounds to believe that any one or more of the following circumstances exist:¹⁸⁸

- (a) That the strike or lock-out is no longer functional to collective bargaining because it has continued for a protracted period of time and no resolution of the dispute appears to be imminent;
- (b) There is a minimum threat that constitutional rights may be, or are being, violated by persons participating in or supporting the strike or lock-out through the threat or use of violence or the threat of, or damage to, property;

¹⁸⁷ Section 150A (1) of the Amendment Act.

¹⁸⁸ Section 150A(3) of the Amendment Act.

- (c) That the strike or lock-out causes, or has the imminent potential to cause or exacerbate, an acute national or local crisis affecting the conditions for the normal social and economic functioning of the community or society.¹⁸⁹

The above-mentioned grounds mirror the grounds discussed by Fergus and Myburgh above. However, the Amendment Act does not allow for a strike to be interrupted during an advisory arbitration. The strike cannot be interdicted. Furthermore, a party is not bound by the arbitration award unless either the trade union party to the dispute or the employer organisation party to the dispute have accepted, or have been deemed to have accepted, the recommendation made in terms of the arbitration award.¹⁹⁰ The Amendment Act thus stops well short of the *obiter* remarks in *Tsogo Sun* and *UPN* which suggest protected strike action may be rendered unprotected.

The provisions of the Amendment Act should be read in conjunction with the provisions of the Industrial Action Code. The Industrial Action Code has been passed in terms of s 203(1) of the LRA. Section 203(3) of the LRA expressly provides that 'any person interpreting or applying [the LRA] must take into account any relevant code of practice', which includes the Industrial Action Code. While the Industrial Action Code does not propose that strike action be suspended as a result of violent conduct, it does throughout the collective bargaining process and right up until the

¹⁸⁹ Sections 150A (3)(a) to (c) of the Amendment Act.

¹⁹⁰ Section 150D, read with section 150C (5)(b), of the Amendment Act.

stage of industrial action place emphasis on mechanisms designed to avoid violence and acrimony between the parties.¹⁹¹ The Industrial Action Code emphasises that strike action be peaceful.¹⁹² This is coupled with an obligation to engage in good faith bargaining.¹⁹³

It is unclear whether the emphasis on a strike being 'peaceful' creates any substantive amendment to the law as existing prior to the enactment of the Industrial Action Code. It has always been the case that acts of violence fall outside the purview of protection,¹⁹⁴ and there is no suggestion in the Industrial Action Code that violent strike action will render an otherwise protected strike unprotected. There is no suggestion, then, that the word 'peaceful' has been read into the definition of a strike.

The introduction of a judicially enforceable obligation to bargain in 'good faith' is a novel addition to the law.¹⁹⁵ Some of the examples of conduct conducive to good faith bargaining, as contained in the Industrial Action Code, create obligations

¹⁹¹ See for instance ss 2(1), 2(3), 2(4), 3(1)(d), 3(1)(e), 5(1)(e), 5(1)(f), 5(1)(g), 5(1)(h), 16(4) and 23(1) of the Industrial Action Code.

¹⁹² See for instance ss 3(1)(d), 5(1), 22(2) and 23(1) of the Industrial Action Code.

¹⁹³ See for instance ss 5(1)(e), 7, 18(3), Annexure A of the Industrial Action Code and s 8.3 of the Accord on Collective Bargaining and Industrial Action.

¹⁹⁴ This will be discussed in more detail in chapter three below.

¹⁹⁵ For a useful discussion on whether good faith bargaining should be introduced in South Africa see F Leppan *et al* 'Bargaining in Bad Faith in South African Labour Law: An Antidote?' *Obiter* (2016) 474. There is nothing unusual about agreeing to good faith bargaining in a collective agreement. In fact, this is contemplated by the Industrial Action Code in that parties are advised to sign the model declaration in sched A to the Industrial Action Code wherein which the parties agree to bargain in good faith. *Op cit* (n44).

in addition to that imposed by the LRA.¹⁹⁶ Section 7 of the Industrial Action Code has a number of commendable provisions aimed at facilitating healthy collective bargaining, thereby avoiding situations that degenerate into industrial action; often of a violent nature. However, to the extent that the Industrial Action Code offers the courts the opportunity to judicially determine the merits of a dispute, which will be the case where they have to determine whether parties are bargaining in good faith, it has the potential to further inflame existing tensions between the parties.¹⁹⁷ There is a danger of 'negotiations descending into allegations and disputes as to whether either or both parties are negotiating in bad faith.'¹⁹⁸

While the Amendment Act does not expressly allow for a strike to be interdicted for being violent Myburgh notes that:

'judges of the Labour Court may very well take the view that the thrust of the amendments to the LRA, the terms of the accord and the Draft Picketing Code, pave the way for a continuation of the interventionist approach adopted in *UPN*' case. Certainly, there can now be no debate about the fact that it is universally accepted by all concerned that strike violence is deplorable and must be brought under control.'¹⁹⁹

Whether the courts will be inclined to do so cannot be determined as yet. The extent to which the Amendment Act or Industrial Action Code will have a practical effect on violent strike action is unclear. Many commentators have commented on

¹⁹⁶ For instance, s 7(2), read with s 13(3), of the Industrial Action Code is an express departure from the provisions of s 16 of the LRA.

¹⁹⁷ See s 7(8) of the Industrial Action Code for instance and *Van Heerden Op Cit* (n39).

¹⁹⁸ PAK Le Roux 'The Code of Good Practice: Collective Bargaining and Picketing' (2017) 26(11) *Contemporary Labour Law* 119 at 126.

¹⁹⁹ Myburg op cit (n151) 723.

the socio-economic considerations²⁰⁰ (such as extreme poverty and discrepancy of wealth) which may have an adverse effect on any legal attempt to curtail such action. Inequality and poverty can result in systems of structural violence where 'some social structure purportedly harms people by preventing them from meeting their basic needs.'²⁰¹ Issues that are normally political and economic in nature, such as vast inequality coupled with lack of service delivery, then impacts upon labour issues resulting in a general lack of trust in the underlying social order.²⁰² Until these issues are rectified it may be the case that violent strikes persist despite the best legal efforts to curtail such conduct.

²⁰⁰Cheadle op cit (n6) chapter three.

²⁰¹ Ngcukaitobi op cit (n149).

²⁰² Ibid.

4 *Chapter three: The requirements of protected strike action*

4.1 Introduction

Broadly stated strike action is protected when it complies with the procedural and substantive requirements of the LRA, as set out in ss 64 and 65 thereof. In

*Ceramics Industries Ltd t/a Bettaware v NCBAWU*²⁰³ the Court held that:

'broadly speaking...the [LRA] seeks to give effect to the fundamental right to strike by insulating participation in a protected strike from the legal consequences that might otherwise have followed in its wake. On the other hand, it regulates that right both procedurally and substantively. Procedurally it does so by requiring that certain formal requirements have to be met before protection follows. Substantively, it imposes limitations, one of which is to limit protected strikes to issues that are not arbitral or justiciable in terms of the [LRA].'²⁰⁴

4.2 Protected and unprotected strike action distinguished

Before detailing the requisite procedural and substantive requirements of protected strike action it is necessary to elaborate on the importance on the distinction between protected and unprotected strike action in the first place.²⁰⁵ Why it is crucial is because of the certain types of protection afforded to employees participating in protected strike action and not unprotected strike action which are:

²⁰³ 1997 6 BLLR 697 (LAC) [hereafter '*Ceramics*']. Du Toit op cit (n69).

²⁰⁴ Supra (n203) page 700.

²⁰⁵For a comprehensive discussion of the consequences see T Cohen and R Le Roux 'Liability, Sanctions and other Consequences of Strike Action' in B Hepple *et al Laws against Strikes: The South African Experience in an International and Comparative Perspective* (2016) JUTA at 126 to 139.

4.2.1 Preventing the strike being interdicted²⁰⁶

Where an unprotected strike commences, it is often the case that an employer's initial reaction is to bring the strike action to an end via an urgent interdict.²⁰⁷

Section 68(1) of the LRA allows an employer, in such circumstances, to approach the courts with a request to 'grant an interdict or order to restrain...any person from participating in a strike or in contemplation or furtherance of a strike.'²⁰⁸ An interdict can be obtained to prevent employees from engaging in continued unprotected strike action.²⁰⁹ This course of action is not available where the strike is protected.

Where any person fails to adhere to the terms of a court order they may be held in contempt of court under certain circumstances.²¹⁰ The interdict is enforceable against any employees engaged in unprotected strike action, as well as their union(s).

²⁰⁶ For a useful article on strike interdicts, especially in the context of strike violence, see PAK Le Roux 'Strike Interdicts: Dealing with violence and unlawful demands' (2015) 25(5) *Contemporary Labour Law* 52 and Cheadle op cit (n6) 111.

²⁰⁷ As per s 158 of the LRA.

²⁰⁸ See for instance *PRASA t/a Metrorail v SATAWU* (case no 190/2016) 12 May 2016 [hereafter '*PRASA*'].

²⁰⁹ It can also be used to prevent employees from engaging in acts of misconduct.

²¹⁰ *Ibid.* For a useful article on contempt of court procedures see PAK Le Roux 'Contempt of Court in the context of strike violence' (2014) 23(12) *Contemporary Labour Law* 109 and Cheadle op cit (n6) 113 to 117.

4.2.2 Protection against disciplinary action ²¹¹

As discussed earlier, the common law was initially repressive of strike action. By engaging in strike action, employees were considered to have breached their contract of employment and committed misconduct. Any employee engaging in strike action would thus face disciplinary action including dismissal. This stringent approach was relaxed, in part, under the auspices of the Industrial Court, which regarded it as 'unfair to dismiss illegally striking workers if the object of the strike was considered to be legitimate.'²¹²

Section 67(2) of the LRA provides that 'a person does not commit a...breach of contract by taking part in a (a) protected strike...or (b) any conduct in contemplation or furtherance of a protected strike.' This would include a breach of a contract of employment; as well as any duties and obligations, whether written or implied, contained therein or arising by virtue of the employment relationship. Section 67(4) expressly provides that 'an employer may not dismiss an employee for participating in protected strike action or for any conduct in contemplation of or in furtherance of a protected strike.' This does not, however, extend to separate acts of misconduct committed during the course of a protected strike.²¹³

²¹¹ This issue is dealt with briefly herein. For a comprehensive discussion see Cheadle *op cit* (n6) 193 to 217.

²¹² *Ibid* at 209.

²¹³ Section 67(5) of the LRA.

Section 68(5) of the LRA provides that 'participation in a strike that does not comply with the provisions [of the LRA]...**may constitute a fair reason for dismissal.**'²¹⁴ In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Sched 8 must be taken into account.²¹⁵

Employees engaging in unprotected strike action thus face the risk of disciplinary action, including dismissal. Nevertheless, it is important to note that the 'unprotected nature of the strike 'is not a magic wand' that renders the dismissal of the strikers automatically unfair, and the onus remains on the employer to establish substantive and procedural fairness.'²¹⁶

4.2.3 Compensation²¹⁷

Section 67(6) of the LRA provides that 'civil legal proceedings may not be instituted against any person for (a) participating in a protected strike...or (b) any conduct in contemplation or in furtherance of a protected strike.' Section 67(8) of the LRA makes it clear that this protection does not extend to any acts that constitute an offence.

²¹⁴ Emphasis added.

²¹⁵ Section 68(5) of the LRA. In other words, the dismissal must be substantively and procedurally fair in terms of the LRA.

²¹⁶ Cheadle op cit (n6) 209.

²¹⁷For a useful article on contempt proceedings see PAK Le Roux 'Claims for compensation arising from strike and lockouts' (2013) 23(2) *Contemporary Labour Law* 11 and PRASA supra (n208).

In terms of s 68(1)(b) of the LRA, a court may order the payment of just and equitable compensation to an employer for any loss attributable to unprotected strike action.²¹⁸ There is no guarantee of such an order being granted but compensation awards have been made where the circumstances so justify.²¹⁹ Employees who engage in unprotected strike action run the risk of having to pay compensation.

4.2.4 Delictual damages

In addition to compensation, a court may order delictual damages against a trade union or its members where the strike is unprotected. A 'delict is broadly defined as "wrongful and blameworthy conduct which causes harm to a person."²²⁰

Section 67(2) of the LRA provides that 'a person does not commit a...delict by taking part in a (a) protected strike...or (b) any conduct in contemplation or

²¹⁸ Section 68(b) of the LRA set out the factors a court will have regard to when awarding just and equitable compensation. The court will consider::

- (a) Whether –
 - (i) Attempts were made to comply with the provisions of Chapter IV of the LRA and the extent of those attempts;
 - (ii) The strike or conduct was premeditated;
 - (iii) The strike was in response to unjustified conduct by another party to the dispute;
 - (iv) There was compliance with an order granted to interdict the unprotected strike
- (b) The interests of orderly collective bargaining;
- (c) The duration of the strike or conduct;
- (d) The financial position of the employer, trade union or employees respectively.

²¹⁹ See *Algoa Bus Company (Pty) Ltd v Transport Action Retail and General Workers Union (Thor Targwu)* [2015] 9 BLLR 952 (LC) and Cheadle op cit (n6) 118. It is important that parties set out sufficient detail to substantiate the damages sought.

²²⁰ Cheadle op cit (n6) 119.

furtherance of a protected strike.' Section 67(8) of the LRA makes it clear that this protection does not extend to any acts that constitute an offence.

4.3 Procedural requirements

Section 64 of the LRA provides that in order for a strike to be protected, the following conditions must be met:

- (a) The issue in dispute must have been referred to the CCMA and either the CCMA has issued a certificate of outcome declaring the dispute unresolved or a period of 30 days has elapsed since the referral of the dispute was received by the CCMA;²²¹ and
- (b) No less than 48 hours' notice of the strike must be given by the employees/trade union to the employer (or bargaining council or employers' organisation as the case may be)²²² or seven days' notice in the case of the state.²²³

²²¹ Sections 64(1(a)(i) and (ii) of the LRA.

²²² Section 64(b) of the LRA.

²²³ Section 64(d) of the LRA.

If the issue pertains to a refusal to bargain then it is also mandatory that an advisory award is obtained.²²⁴ The above requirements need not be compiled with where:

- (a) The parties are members of a bargaining council and the bargaining council's procedures have been adhered to;
- (b) The strike conforms with the procedures set out in a collective agreement; or
- (c) The strike is in response to an unlawful lock-out initiated by the employer.²²⁵

While the procedural requirements appear, at first glance, relatively straightforward there has been, over the course of a number of years, significant litigation over the various procedural requirements and what, exactly, they require in order to be met. As a result, significant content and clarification has been provided setting out the various procedural requirements that must be adhered to. The Industrial Action Code has also sought to clarify aspects of these requirements. The requirements are as follows:

4.3.1 Referral / certificate of outcome or expiration of 30 day period

²²⁴ Section 64(2), read in conjunction with section 135(3)(c), of the LRA.

²²⁵ Sections 64(3)(a) to (c) of the LRA.

The initial requirement is that the issue in dispute must have been referred to the CCMA, or an appropriate bargaining council certified to resolve disputes, for conciliation and either a certificate of outcome has been issued recording that the dispute remains unresolved or a period of 30 days has elapsed since the referral.²²⁶

Section 213 of the LRA defines 'issue in dispute' as 'the demand, the grievance or the dispute that forms the subject matter of the strike.' Thus there must be a dispute present before a referral can be made. A dispute suggests that the employer is aware of the dispute and has failed to agree to the demand forming the subject matter of the dispute.²²⁷

The dispute concerned may be referred to the CCMA by either the employer or employee.²²⁸ Section 64(1)(a) of the LRA does not require that a particular party refer the dispute in order to commence strike action. Where the employer refers a dispute to the CCMA and it remains unresolved, then the union may strike over the issue(s) in dispute.²²⁹ It is insufficient to simply notify a council there is a dispute and then seek no assistance from them. This would not constitute a legitimate referral.²³⁰ It is required that the nature of the dispute be set out in the referral.

²²⁶ Section 64(1)(a) of the LRA.

²²⁷ *City of Johannesburg Metropolitan Municipality v SAMWU* (2008) 29 ILJ 650 (LC).

²²⁸ Cheadle op cit (n6) 58.

²²⁹ Ibid.

²³⁰ *Columbus Joint Venture v NUMSA* [1997] 10 BLLR 1292 (LC). Du Toit op cit (n69).

However, a 'lack of detail in the referral and / or certificate of outcome is also acceptable, as long as the substance of the dispute is addressed at conciliation.'²³¹

The purpose of conciliation is to assist the parties to the dispute to reach a mutually acceptable solution without the need to resort to industrial action which is always regarded as a means of last resort. Any attempt to resolve a dispute at conciliation must be genuine. In the case of *Betafence v South Africa (Pty) Ltd v NUMSA*²³² the Court held:

'the conciliation process within the context of mutual interest disputes should not be seen as a mere obligatory charade and a licence to industrial action. The CCMA or Bargaining Councils were not meant to be mere vending machines expected to dispense of certificates of outcome on demand. The parties prior to embarking on any form of industrial action, must have through the assistance of conciliators/mediators, embarked on a genuine process of conciliation, or at the very least, made some concerted effort in that regard'²³³

This has been confirmed by the Industrial Action Code which states that "the parties must in good faith endeavour to settle the dispute."²³⁴

A union or employees cannot commence with industrial action and then raise new demands²³⁵ that have not been subjected to conciliation. The courts will look at

²³¹ Cheadle op cit (n6) 57. See also *Defy Appliances (Pty) Ltd v NUMSA* [2001] 12 BLLR 1328 (LC).

²³² [2016] ZALCCT 33 (15 September 2016).

²³³ Ibid para 19.

²³⁴ Section 18(3) of the Industrial Action Code.

²³⁵ See *FGWU and Others v Minister of Safety and Security* [1999] 4 BLLR 332 (LC) [hereafter 'FGWU' case], Halton op cit (n6) 57 and Grogan op cit (n44) 413. See also s 7(4) of the Industrial Action Code which records one of the principles of good faith bargaining as a restriction on parties

the true nature of the dispute where there is a question about the real reason for the strike.²³⁶ The Industrial Action Code states that the secondary object of conciliation is to record the parties' demands.²³⁷ Should the dispute remain unresolved, then this requirement proves useful in practice. It limits the potential for a debate as to whether new demands have been introduced or not and it makes eminent sense, given the purpose served by the conciliation phase, that a union is barred from engaging in strike action until the certificate is actually issued²³⁸ or the 30 day period²³⁹ has expired whichever occurs first.²⁴⁰

In *Lesedi Local Municipality v SAMWU*²⁴¹ the Court held that a bargaining council,²⁴² is not authorised to make a determination as to whether a strike is protected or not. Rather, the appropriate forum to determine whether a strike is protected or not is the Labour Court.²⁴³ One exception to this principle is the requirement that an advisory arbitration award is obtained in terms of s 64(2), read with s 135(3)(c), of the LRA before a strike can commence

introducing new demands during negotiations unless it's to settle the matter and even then only with the agreement of the other party.

²³⁶ *Platinum Mile Investments (Pty) Ltd t/a Transition Transport v SATAWU* (2010) 31 ILJ 2037 (LAC). See Cheadle op cit (n6) 57.

²³⁷ Section 18(4) of the Industrial Action Code.

²³⁸ *SATAWU v Natro Freight (Pty) Ltd* [2006] 8 BLLR 749 (LC).

²³⁹ Or such longer period as may be agreed between the parties.

²⁴⁰ *Supra* (n227). *Eskom v NUMSA* [2002] 12 BLLR 1153 (LAC).

²⁴¹ [2007] 1 BLLR 55 (LC). Du Toit op cit (n74).

²⁴² By inference the CCMA as well.

²⁴³ *Cape Gate (Pty) Ltd v NUMSA* [1997] 6 BLLR 767 (LC). Du Toit op cit (n69).

4.3.2 Notice of intention to engage in strike action

4.3.2.1 Required notice period

Once a certificate of outcome has been obtained or the 30 day period has expired, notice of the strike must be given by the employees to the employer. Ordinarily, 48 hours' notice is required.²⁴⁴ However, where notice must be provided to the state, seven days' notice is stipulated.²⁴⁵ Who constitutes the 'State' was the subject matter of *City of Matlosana v SALGBC*.²⁴⁶ The Court held that 'the "State" was not limited to national and provincial government but that the term covered the State in all its manifestations, including bodies such as the regional service council and transitional metropolitan councils.'²⁴⁷ The Court held that:

'Another consideration for the seven-day notice is its rationale. One of the reasons for giving notice is that the State provides essential and necessary services to the public..., such services are rendered at national, provincial and local levels. No alternative provider of many components of such services is readily available, especially to poor communities. There is, therefore, a rational basis for requiring seven days' notice for strikes in all three tiers of government.'²⁴⁸

²⁴⁴ Section 64(1)(b) of the LRA.

²⁴⁵ Section 64(1)(d) of the LRA.

²⁴⁶ [2009] JOL 23154 (LC) [hereafter '*City of Matlosana*'].

²⁴⁷ PAK Le Roux 'Strikes – procedural issues' (2009) 19(4) *Contemporary Labour Law* at 32. In so holding the Court was relying on the judgment of *Greater Johannesburg Transitional Metropolitan Council v Eskom* 2000 (1) SA 866 (SCA).

²⁴⁸ Para 7.

The requirement to provide notice is not, however, without debate as to its practical requirements. A number of judgments have clarified the standards that must be met when providing such notice.

In *Moloto* the Constitutional Court²⁴⁹ held that there is no requirement for employees to provide any further information than the time of the commencement of the strike such as who, exactly, will engage in strike action.²⁵⁰ The Court further held that:

'To require more information than the time of its commencement in the strike notice from employees, in order to strengthen the position of the employer, would run counter to the underlying purpose of the right to strike in our Constitution – to level the playing fields of economic and social power already generally tilted in favour of employers.'²⁵¹

The Court in *Ceramics*,²⁵² held that the union should provide an exact time when the strike would commence, relying on a purposive approach to s 64(b) of the LRA. The Court held that:

'The provisions of section 64(1)(b) need to be interpreted and applied in a manner which gives best effect to the primary objects of the Act and its own specific purpose... One of the primary objects of the Act is to promote orderly collective bargaining... The section's specific purpose is to give an employer advance warning of the proposed strike so that an employer may prepare for the power play that will follow. That specific purpose is defeated if the employer is

²⁴⁹ Supra (n90). See Cheadle op cit (n6) 59 and Du Toit op cit (n69).

²⁵⁰ The Industrial Action Code makes it clear in s 20(4) that a strike notice need not provide which employees are to go on strike.

²⁵¹ Para 86.

²⁵² Supra (n203).

not informed in the written notice in exact terms when the proposed strike will commence.²⁵³

The Court accordingly held that the failure to provide a specific date upon which the strike would commence would defeat this objective.²⁵⁴ The purposive approach adopted in the *Ceramics* case is consistent with that of the *City of Matlosana* case.

The Industrial Action Code states that a strike notice must contain the date and time when the strike is to commence as well as the demands which the other party is being required to meet.²⁵⁵

In addition, the Industrial Action Code recommends that 'parties should agree to a notice period, notwithstanding the minimum periods set out in the [LRA], that is of sufficient duration to allow the employer to shut down its plant or services without damage to property and to allow the employees to make the necessary arrangements to face a period of no income.'²⁵⁶ This provision goes further than the LRA and prior

²⁵³ Page 702. See also *Fidelity Guards Holdings v Professional Transport Workers Union* (1998) 19 ILJ 260 (LC). See PAK Le Roux 'Giving employers notice of strike action' (2012) 21(7) Contemporary Labour Law 62.

²⁵⁴ This is not to say that some judgments have not sought to soften the approach adopted in the *Ceramics* case supra n203. In *Western Platinum Ltd v National Union of Mineworkers* (2000) 21 ILJ 2502 (LC) the union said the strike would commence on or before 15h00. This was found to be acceptable. In *Country Fair Foods (a division of Astral Operations Ltd) v Hotel Liquor Catering Commercial & Allied Workers Union* [2006] 5 BLLR 478 (LC) the Court held that it was only necessary to give the day on which the strike would commence and not the hour. In this instance, the strike notice was provided 13 days in advance. To require a specific time in some circumstances would be overly formulistic. Rather, the fundamental determination was whether the employer and had been given adequate warning of the strike and had sufficient time to mitigate the risks incumbent upon its business as a result of the strike action. Du Toit op cit (n69).

²⁵⁵ Section 20(3) of the Industrial Action Code.

²⁵⁶ Section 20 of the Industrial Act Code.

judicial decisions. There is presently no obligation for parties to agree to a longer period. It remains to be seen how courts will interpret this provision. The extent to which the inclusion of the peremptory statement that parties 'should' agree to extended periods may prove fertile ground for litigation.

In circumstances where a strike is suspended and then recommences, there is no need to issue a new strike notice.²⁵⁷ The courts have also held that providing notice to an employer outside of working hours may be problematic. In the case of *SA Airways (Pty) Ltd v SATAWU*²⁵⁸ the Court held, by way of an *obiter* remark, that:

'It seems to me that the giving of notice may well be improper, and the strike notice accordingly deficient, where the person giving notice is aware that the intended recipient is unlikely to receive it within a reasonable time.'²⁵⁹

4.3.2.2. Commencement of the strike

It has been held, in *Tiger Wheels*²⁶⁰ that a strike need not commence on the day provided for in the notice. Where a strike commenced three days after the date specified in the notice, the employees could not be said to have waived their right to commence strike action. The Court held that 'though the notice is intended to give the employer an opportunity to prepare for the approaching power-play, this did not mean that the non-commencement of the strike on the specified day would

²⁵⁷ *Transportation Motor Spares v NUMSA* [1999] 1 BLLR 78 (LC). There are, however, limits to this principle as further discussed below in *PRASA* supra (n208).

²⁵⁸ (2010) 31 *ILJ* 1219 (LC). Du Toit op cit (n69).

²⁵⁹ Para 24.

²⁶⁰ See Cheadle op cit (n6) 59.

necessarily defeat the purpose of the notice.²⁶¹ Whether or not the employees intended to waive their right to strike must be determined based on the particular facts.

Bradley Conradie notes that 'this decision must be seen in light of the relatively short period that elapsed between the date specified in the notice and the day when the strike commenced. An unreasonable delay, Zondo J suggested in a minority judgment, might well result in the loss of the right to strike.'²⁶²

The Industrial Action Code now provides that

'if a strike or lockout does not commence on the date stated in the notice, the trade union or employers' organisation should issue a further notice stating the date and time of commencement if it intends to strike or lockout unless there is an agreement, that should not be unreasonably withheld, to extend or shorten the notice to allow for further negotiations.'²⁶³

The Industrial Action Code states that a failure to issue a new notice may give rise to an inference that the strike has been waived or abandoned.²⁶⁴ The mention of this inference has the potential to result in significant litigation in that an employer may view any delay as a waiver of the right to strike by the employees or the trade union concerned and seek to interdict the strike on this basis. It is likely,

²⁶¹ Cheadle op cit (n6) 59 footnote 105. For a critique of this position see Le Roux op cit (n253).

²⁶² Ibid. The reference to 'Zondo J' is a reference to the honourable Judges judgment in the *Tiger Wheels* case supra (n84).

²⁶³ Section 20(5) of the Industrial Action Code.

²⁶⁴ Section 20(6) of the Industrial Action Code provides that 'the failure to issue a further notice, or strike or lockout after a notice is issued in terms of 19(5) herein, may lead to an inference that the trade union or employers' organisation has waived or abandoned its right to strike or lockout.'

based on existing jurisprudence, that the courts would be reluctant to readily find a waiver to have taken place especially in the instance of a short delay and in light of the fact that the discretion of whether to find whether a waiver has occurred ultimately remains, by virtue of the inclusion of 'may' as opposed to 'must' in the Industrial Action Code, with the courts.

The question arises as to whether strike action may be rendered unprotected where there is a substantial delay between the issuing of the certificate of outcome and the strike notice. In *PRASA*,²⁶⁵ the Court had to consider whether strike action embarked upon by SATAWU, one of the unions active at the employer, PRASA's, workplace was protected or not.

SATAWU had referred a dispute regarding a number of issues to the CCMA. A certificate of outcome confirming that the matter was unresolved was subsequently issued, after which the union elected to engage in further discussions with PRASA. These discussions took place on a regional and national level.

Although discussions regarding the subject matter of the certificate continued at national level, the union's Western Cape regional office elected to issue a notice of intention to engage in strike action some 18 months after the certificate of outcome

²⁶⁵ *Supra* (n208). See J Van Wyk, J and A van Heerden 'Striking in support of a demand for organisational rights in a workplace outside the scope of a trade union's constitution' accessed at <http://www.polity.org.za/article/striking-in-support-of-a-demand-fororganisational-rights-in-a-workplace-outside-the-scope-of-a-trade-unions-constitution-2015-01-06> on 17 May 2017 which contains a useful summary of the case and the legal principles applicable thereto.

was obtained. PRASA then approached the Labour Court arguing that the strike was unprotected.

An interim order was issued with a finding that the strike was unprotected. On the return date, the Court had to consider whether SATAWU could be said to have waived, estopped or abandoned their right to strike in issuing the notice 18 months after the certificate of outcome. In reaching its ruling the Court gave consideration to the ruling of *Public Servants Association of SA v Minister of Justice and Constitutional Development*²⁶⁶ which, in turn, made reference to *Western Platinum Ltd v National Union of Mineworkers*²⁶⁷ which held that:

'Taking all of the above into consideration I am not satisfied that the notice given by the respondents in terms of s 64(1)(b) [of the LRA] was given within a reasonable time and as such the certificate upon which the notice was based has become stale by effluxion of time.'²⁶⁸

In the *Public Servants' case*, Judge Landman held that 'if [the Court] meant to [hold] that it was permissible to rely merely on the effluxion of time then I would respectfully disagree with him.'²⁶⁹ In so finding, the Court endorsed the view that there must be a waiver, abandonment or estoppel present in order to render the strike

²⁶⁶ (2001) 22 *ILJ* 2303 (LC) [hereafter '*Public Servants'*].

²⁶⁷ (2000) 21 *ILJ* 2502 (LC). Which, in turn, endorses *Free State Consolidated Gold Mines 1988* (2) SA 425 (O).

²⁶⁸ *PRASA supra* (n208) para's 52 and 53.

²⁶⁹ *Supra* (n266) para 55.

unprotected. It was this ruling that the Court in *PRASA*²⁷⁰ disagreed and departed from.

Rather, the Court in *PRASA* held that:

'The inquiry should not centre on a waiver of the right to strike. Rather, it is a failure to rely on a specific certificate of outcome that is discernible in a case such as that before [the Court]...the right to strike is retained, but after an unreasonable delay in acting on the issuing of a certificate, a union is required to go through the procedural steps set out in section 64 of the LRA once more. This approach accords with the speedy resolution of disputes on which the LRA is premised. It is also imminently sensible: over a period of 18 months there are likely to have been changes in the collective bargaining relationship. The procedural requirements clothing strike action with protection, which includes the opportunity for parties to reach a settlement agreement through the conciliation process, may produce a different outcome, given the effluxion of time.'²⁷¹

It is argued that this ruling is consistent with the purposive approach adopted by the *Ceramics* case and is correct. It will have to be determined on the facts whether an unreasonable delay has been occasioned in any particular instance.

4.3.2.3 To whom must notice be provided and by whom

Normally, notice must be provided to the employer. However where the dispute pertains to agreements concluded in a bargaining council, then notice need only be provided to such council, provided the employer is a member of the

²⁷⁰ *PRASA supra* (n208).

²⁷¹ *Ibid* Para 8.

council.²⁷² The purpose of this requirement is practical. An employers' duly authorised representative is dealt with to avoid having to provide notice to all the employers who fall within the scope of the bargaining council.²⁷³ The notice must be provided by an authorised member of the union calling the strike.²⁷⁴

Similarly, if the 'employer is a member of an employers' organisation that is a party to a dispute, notice of the strike must be given to the employers' organisation and...need not be given to the employer.²⁷⁵

4.3.2.4 To whom does the notice apply

In *Afrox Ltd v SACCAWU*,²⁷⁶ the Court found that the strike notice applies to all of the unions' members and not just the members of the union who were part of the referral to the CCMA. In addition, once a dispute is conciliated, other employees who do not have an interest in the matter may also strike in support of their colleagues. For example, where a particular bargaining unit is in dispute with the employer, non-bargaining members can also participate in the strike without the need

²⁷² Cheadle op cit (n6) 58, *Tiger Wheels case supra* (n84) and *Plastics Converters Association of SA v Association of Electric Cable Manufacturers of* [2011] 11 BLLR 1095 (LC). Where the employer is a not a member of the council then the notice will be insufficient in so far as such employer is concerned. See *SA Airways (Pty) Ltd v SATAWU* (2006) 27 ILJ 1034 (LC).

²⁷³ Cheadle op cit (n6) 58.

²⁷⁴ Grogan op cit (44) 414.

²⁷⁵ Cheadle op cit (n6) 59.

²⁷⁶ *Supra* (n127).

for a separate strike notice to be obtained and provided to the employer concerned.²⁷⁷ In *Moloto*,²⁷⁸ the Court extended this approach by finding that non-unionised employees need not provide separate notices.²⁷⁹ In *Plastics Converters Association of SA v Association of Electric Cable Manufacturers of SA*,²⁸⁰ the Court found that where a dispute had been referred by a party to a bargaining council, then the employees falling within the registered scope of the council need not obtain separate notices even if they are not members of the bargaining council.

4.3.2.5 The content of the notice

It is a requirement that a notice clearly articulate all of the union's demands. In *SA Airways (Pty) Ltd v SATAWU*,²⁸¹ the Court held that:

'The same purposive approach adopted by the Labour Appeal Court requires that a strike notice should sufficiently clearly articulate the union's demands so as to place the employee in a position where it can take an informed decision to resist or exceed to those demands. In other words, the employer must be in a position to know with some degree of precision which demands a union and its members intend pursuing through strike action, and what is required of it to meet those demands... Any employer faced with a strike notice issued in such imprecise terms would be hard pressed to know which element of what grievance and petition it was being asked to resist or concede.'²⁸²

²⁷⁷ *Supra* (n90) and *Cheadle op cit* (n6) 60. In reaching its ruling the Court relied on the reasoning set out in *Ceramics supra* (n203). See in this regard para's 26 to 28 of the Court's judgment. The Industrial Action Code provides that the notice does not have to include the division of the employer's workplace in which the strike is going to occur.

²⁷⁸ *Supra* (n90). For a comprehensive discussion of this case see Brenda Grant *et al* 'Who needs to notify the employer of impending strike action? A discussion of SA Transport & Allied Workers Union v Moloto and Another 2012 (6) SA 249 (CC)' *ILJ* 37(1) 62.

²⁷⁹ Section 21(1) of the Industrial Action Code confirms this. *Van Niekerk op cit* (n29) 428.

²⁸⁰ *Supra* (n272).

²⁸¹ [2010] 3 BLLR 321 (LC). *Cheadle op cit* (n6) 61.

²⁸² Para 27. See also *supra* (n90) para 91.

It has been held that where the employer shows by its conduct that it is aware of the union's demand then the notice is sufficient.²⁸³ Section 20(3) of the Industrial Action code reiterates the point that the strike notice must contain the demands the other party is to meet.

In *Edelweiss Glass and Aluminum (Pty) Ltd v NUMSA*,²⁸⁴ the Court held that the parties are entitled to raise new issues during the course of the strike as a means of resolving the dispute. The Court held that:

'Critical to the dispute resolution structure of the [LRA] is the encouragement of the resolution of disputes by agreement. It would be completely unrealistic in the context of a strike, to insist that in any engagement that is aimed at resolving the strike the parties are limited to pressing only those demands that have specifically been formulated in the run-up to the strike. The parties are entitled to adopt a much broader problem-solving approach to resolving a collective bargaining dispute. This may include introducing proposals or issues that have not even been thought of, let alone presented at the bargaining table, if this might leave to breaking the deadlock that exists...this of course does not mean that a trade union may seek to use a protected strike as leverage to achieve other objectives in respect of which no strike action could be taken.'²⁸⁵

As Le Roux notes, the purpose of this approach is to facilitate the resolution of disputes. The idea is that the demand is raised in the interests of resolving the matter, not to compel the acceptance of a new demand.²⁸⁶ So while a notice must still be clearly articulated, it does not mean that new demands cannot subsequently be

²⁸³ *UPN Supra* (n155).

²⁸⁴ [2012] 1 BLLR 10 (LAC).

²⁸⁵ Para's 71 to 73.

²⁸⁶ *Le Roux op cit* (n247) 64.

added subject to the caveat expressed above. The Industrial Action Code confirms that a notice must contain demands that are no different than those demands upon which the parties deadlocked. However, the Industrial Action Code also provides that new demands can be raised during negotiations where this forms part of an effort to resolve matters.²⁸⁷ There is no reason to think this approach is limited once industrial action is already underway and this is consistent with the jurisprudence discussed above.

4.3.2.6 Time limit

In *Public Association SA v Minister of Justice and Constitutional Development*,²⁸⁸ the Court held that it is not a requirement that a time limit be placed on the strike.²⁸⁹ The Court held that:

'The LRA does not compel strikers to put a limit on the duration of their strike, or if they should do so, it does not compel them to disclose this information. It is inherent in the nature of a strike that it is a power play where new economic forces determine which party will yield, either by capitulating or making an acceptable offer. It is this uncertainty about the duration of the strike which adds to the effectiveness of the strike and the goal of collective bargaining.'²⁹⁰

4.3.3 Advisory arbitration award

²⁸⁷ Section 7(4).

²⁸⁸ [2001] 11 BLLR 1250 (LC).

²⁸⁹ Cheadle op cit (n6) 59.

²⁹⁰ Para 71.

Section 64(2) of the LRA provides that 'if the issue in dispute concerns a refusal to bargain an advisory award, must have been made in terms of s 135(1)(c) of the LRA before notice of intention to engage in strike action may be given.' Section 64(2)(c) of the LRA lists the following issues which would constitute a refusal to bargain.²⁹¹

- (a) A refusal to recognise a trade union as a collective bargaining agent or to agree to establish a bargaining council;²⁹²
- (b) A withdrawal of recognition of a collective bargaining agent;²⁹³
- (c) A resignation of a party from a bargaining council;
- (d) A dispute about appropriate bargaining units, appropriate bargaining levels or bargaining subjects.²⁹⁴

Section 135(1)(c) of the LRA provides that 'the [CCMA] must determine a process to attempt to resolve a dispute, which may include making a recommendation to the parties, which may be in the form of an advisory arbitration award.' Read in the context of s 64(2) of the LRA, the discretionary 'may' must be read as 'must' when dealing with refusal to bargain issues.²⁹⁵

²⁹¹ See W A Joubert *et al* 'The Law of South Africa' 3ed (2018) vol 24(1) LexisNexis, Durban at 346.

²⁹² See *Natal Sharks Board v SACCAWU* [1997] 8 BLLR 1032 (LC).

²⁹³ See *County Fair Foods v Hotel Liquor Catering Commercial & Allied Workers Union* [2006] 5 BLLR 478 (LC).

²⁹⁴ *NUMSA v Transnet SOC* 2016 ILJ 638 (LAC).

²⁹⁵ Cheadle *op cit* (n6) 61.

While the parties need not adhere to the terms of the advisory arbitration award, which is non-binding, in order to engage in strike action they are, nonetheless, obliged to first receive the award and serve it on the other party²⁹⁶ before engaging in such action.²⁹⁷ In *FGWU*,²⁹⁸ the Court held that just because:

'the commissioner in this case delayed issuing the advisory award until prompted to do so by the fifth respondent [it] did not relieve the applicants of their obligation to comply with the peremptory provisions of section 64(2) [of the LRA]. Nor does the fact that the advisory award happened to be issued after the applicants served their notice on the fifth respondent, but before they commenced the strike, serve to condone their non-compliance with section 64(2). The purpose of section 64(2) is clearly to compel the parties seriously to consider the advisory award before deciding whether to strike. This purpose would be frustrated if employees could give notice of their intention to strike before receiving an advisory award.'²⁹⁹

Even where a commissioner refuses to issue an advisory award, it has been found that the union or employees are barred from engaging in industrial action. Rather, their recourse is to approach another commissioner to obtain an award.³⁰⁰

4.4 Exceptions to procedural requirements

4.4.1 Conformity with the procedure contained in a collective agreement³⁰¹

²⁹⁶Supra (n236) and Du Toit op cit (n69).

²⁹⁷ Ibid. *FGWU* supra (n235). *CEPPWAWU v CPT Ltd* [2013] 4 BLLR 378 (LC). For a discussion on the 'potential' of obtaining advisory arbitration awards see Neil Coetzer 'The Road Less Travelled: Unlocking the Potential of Advisory Arbitration Awards' (2014) 35 *ILJ* 880.

²⁹⁸ Supra (n235). Du Toit op cit (n69).

²⁹⁹ Para 31.

³⁰⁰ *NEWU v MIBCO* [2002] 1 BLLR 62 (LC).

³⁰¹ Section 64(3)(b) of the LRA.

The LRA, in accordance with the purpose of self-governance and voluntarism in the regulation of industrial policy,³⁰² allows parties, by way of a collective agreement, to regulate which procedure must be adhered to when embarking upon protected strike action.

It has been held that a party who complies with the mutually agreed upon procedures contained in a collective agreement, need not also adhere to the provisions contained within the LRA.³⁰³ However, a party may elect to forego the procedures contained in the collective agreement, provided they comply with the procedure provided for in the LRA.³⁰⁴ In *County Fair Foods (Pty) Ltd v FAWU*,³⁰⁵ the Court held that:

'What the legislature has sought to achieve is to give parties a choice of either following a pre-strike dispute procedure contained in a collective agreement or following the statutory procedure in section 64(1). Compliance with either procedure suffices to confer on employees the right to strike and the resultant strike acquires the status of a protected strike with all the benefits and consequences which flow from such status.'³⁰⁶

³⁰² See section 1(c) of the LRA and Cheadle op cit (n6) 62.

³⁰³ *North East Cape Forests v SAAPAWU (2)* [1997] 6 BLLR (LAC) and Cheadle op cit (n6) 62.

³⁰⁴ *Columbus Joint Venture v NUMSA* [1997] 10 BLLR 1292 (LC) and *BMW South Africa (Pty) Ltd v NUMSA obo Members* [2012] 3 BLLR 274 (LAC). In the latter case Waglay DJP voices his disagreement with this approach when stating, at para 9 of the judgment, that 'the respondent on the other hand argues that it is not obliged to comply with the procedure set out in clause 8.3 because its demand is one of mutual interest and it is entitled to embark on a strike in support of its demand as long as it does so in compliance with the provisions of the Labour Relations Act no 66 of 1995 (as amended) (the Act). I disagree. Where parties have concluded an agreement which does not deny any of the parties to the agreement the rights and obligations provided in the Act, I see no reason why that agreement cannot be enforced.'

³⁰⁵ [2001] 5 BLLR 494 (LAC) [hereafter '*Country Fair Foods*']. Du Toit op cit (n69).

³⁰⁶ Para 20.

4.4.2 Disputes dealt with by a bargaining council in accordance with its constitution³⁰⁷

Similarly, bargaining councils are also provided with latitude to regulate their own procedures. Where a bargaining council deals with a strike, between two parties who are members of such council, in accordance with the procedures prescribed in its constitution the strike will be protected.

4.4.3 As a counter to an unprotected lock out³⁰⁸

Where an employer elects to lock-out employees and fails to adhere to the procedures prescribed in the LRA,³⁰⁹ then the employees need not comply with the aforementioned procedural requirements. They may, in response to the lock-out, engage in strike action which will be protected.

Significantly, the strike must be in response to the lock-out. Demands that are not the subject matter of the lock-out cannot, therefore, be raised in the absence of the union or employees complying with the ordinary procedural pre-conditions insofar as those extra demands are concerned.³¹⁰ If there has, in fact, been no lock-

³⁰⁷ Section 64(a) of the LRA. See also *South African Clothing and Textile Workers Union v Yartex (Pty) Ltd t/a Bertrand Group* (2013) 34 ILJ 1931 (LAC) and *Plastic Convertors Association SA v AECMSA* 2011 ILJ 3007 (LC).

³⁰⁸ Section 64(3)(c) of the LRA.

³⁰⁹ Where the lock-out is not, in fact, unprotected then this exception is no longer applicable. See *Cheadle op cit* (n6) 62 and *Kgasago v Meat Plus CC* [1999] 5 BLLR 424 (LAC).

³¹⁰ *Cheadle op cit* (n6) 62. See also *NUMSA v NEASA* [2015] 3 BLLR (LC) where a lock-out was held to be unprotected because it sought to add new demands.

out, then likewise, any subsequent strike action in response to the purported lock-out would be unprotected.³¹¹

4.4.4 Unilateral change to terms and conditions of employment³¹²

Section 64(4) of the LRA provides that any employee or trade union that refers a dispute about a unilateral change to terms and conditions of employment to the CCMA, or appropriate bargaining council, may require³¹³ that the employer refrain from implementing such change for a period of 30 days, or until such time as the dispute has been conciliated,³¹⁴ or where the change has so been implemented restore the terms and conditions of employment for the aforementioned periods. In accordance with s 64(5) of the LRA, the employer has 48 hours within which to do so.

Sections 64(4) and 64(5) of the LRA must be read in conjunction with s 64(3)(e) of the LRA which, in turn, provides that strike action may be undertaken, without the need to adhere to the procedural prescripts of the LRA where the employer fails to adhere to the obligation to refrain from imposing or restoring terms and conditions of employment which have unilaterally been amended.

³¹¹ See for instance *MTO Forestry (Pty) Ltd v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union* [2018] 10 BLLR 950 (LC).

³¹² See Cheadle op cit (n6) 62 and Grogan op cit (n44) 416.

³¹³ This requires an active act on the part of the union / employees. See Cheadle op cit (n6) 63 and *Mukwevho v ECCAWUSA* [1999] 4 BLLR 358 (LC).

³¹⁴ *Eskom v NUMSA* [2002] 12 BLLR 1153 (LAC).

The aforementioned sections indicate that the changes must have been made unilaterally³¹⁵ and must have pertained to the employees' terms and conditions of employment. This is in contrast to, for instance, workplace policies and procedures which may be amended at the discretion of the employer.³¹⁶ Where, however, the unilateral change 'may otherwise be referred to arbitration or adjudication in terms of the LRA or any other employment law,³¹⁷ then this mode of recourse is not available.

4.5 Substantive requirements

Besides the procedural requirements, a party seeking to avoid engaging in unprotected strike action must also comply with a number of substantive requirements as set out below.

4.5.1 Collective agreements

4.5.1.1 Section 65(1)(a) of the LRA

Section 65(1)(a) of the LRA provides that 'no person may take part in a strike...or in any conduct in contemplation or furtherance of a strike...if that person

³¹⁵ See *Staff Association for the Motor and Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Ltd* [1998] 6 BLLR 616 (LC). The employees must not have subsequently consented to the change to the terms and conditions of their employment.

³¹⁶ See for instance *Apollo Tyres South Africa v NUMSA* [2012] 6 BLLR 544 (LC). This may not apply where the policies and procedures have been incorporated by reference in, for instance, an employment contract as terms and conditions of employment.

³¹⁷ *Cheadle op cit* (n6) 63.

is bound by a **collective agreement that prohibits a strike...in respect of the issue in dispute.**³¹⁸ Provisions regulating strike action regarding a particular dispute are colloquially referred to as 'peace-clauses.'

Section 213 of the LRA defines a 'collective agreement' as a 'written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and, on the other hand, one or more employers, one or more registered employer's organisations or one or more employers and one or more registered employer's organisations.'

The purpose of this provision is consistent with the LRA's emphasis on industrial self-governance. A union is free to 'contract [its] members out of the right to strike.'³¹⁹ Where the substantive nature of the dispute is regulated in the collective agreement any subsequent strike action over such an issue would be unprotected. This will be the case even where the CCMA has issued a certificate of outcome.³²⁰ In *County Fair Foods (Pty) Ltd v FAWU*,³²¹ the Court had to consider the extent of the prohibition and whether it also applied to particular dispute resolution procedures? The Court held that the prohibition did not extend to pre-strike procedures.

³¹⁸ Emphasis added.

³¹⁹ Grogan op cit (n44) 418.

³²⁰ *Vodacom (Pty) Ltd v CWU* [2010] 8 BLLR 836 (LAC). See also *Glencore Operations South Africa (Pty) Ltd v National Union of Metalworkers of South Africa* [2018] 10 BLLR 1022 (LC).

³²¹ [2001] 5 BLLR 494 (LAC). See also *BMW South Africa (Pty) Ltd v NUMSA obo Members* [2012] 3 BLLR 274 (LAC) and Cheadle op cit (n6) 109.

Any party bound by a collective agreement remains bound to that agreement for its duration even if they are no longer members of the union concerned.³²² This is not to say that a party cannot engage in strike action regarding future agreements, notwithstanding the fact that the current agreement has yet to expire.³²³

The question arises as to who can be bound by a collective agreement to which they are not a party. In terms of s 23(1)(d) of the LRA, a collective agreement can be extended to employees who are not members of the registered trade union provided certain conditions are met. In *South African Airway (Soc) Ltd v South African Cabin Crew Association*,³²⁴ the Court had cause to consider whether a collective agreement had been extended to non-parties in terms of s 23(1)(d) of the LRA. The Court held that s 23(1)(d) of the LRA allows for a collective agreement to be extended to a minority union if:³²⁵

- (a) The employees are identified in the agreement;³²⁶
- (b) The agreement expressly binds the employees; and
- (c) That trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

³²² Cheadle op cit (n6) 109. See *Vista University v Botha* [1997] 5 BLLR 614 (LC).

³²³ *South African National Security Employers Association v TGWU* [1998] 4 BLLR 364 (LAC) [hereafter 'TGWU']. Van Niekerk op cit (29) 422.

³²⁴ (J949/17) 2017 ZALCJHB (10 May 2017) [hereafter '*Cabin Crew Association*'].

³²⁵ See *NUMSA obo Members v Transnet SOC Ltd* 2018] 5 BLLR 488 (LAC).

³²⁶ This is a strict requirement. See for instance, *Sasol Mining (Pty) Ltd v Association of Mineworkers and Construction Union* 2017) 38 ILJ 969 (LC).

The Court held that these conditions had been met thereby confirming the principle that a party need not be a signatory to the collective agreement to be bound by the terms thereof in appropriate circumstances. In this regard:

'If a collective agreement has been extended to non-parties, it binds those parties. No person would be allowed to strike if bound by a collective agreement that prohibits a strike or that regulates the issues in dispute. The extension of collective agreements to non-party employees effectively denies them the right to strike in respect of the issues regulated by the collective agreement.'³²⁷

However, there is an exception to the principle that minority unions may not strike where a collective agreement has been extended to them and their members in terms of section 21(3)(d) of the LRA: where collective agreements impose bargaining thresholds for organisational rights. This issue is discussed more fully below.

Section 28(1)(i) of the LRA provides that 'the powers and functions of a bargaining council in relation to its registered scope include the following...to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike...at the workplace.' Agreements made in a bargaining council may also be extended to non-parties provided the procedures set out in s 32 of the LRA are adhered to.³²⁸

³²⁷ *TGWU supra* (n323) para 40. This principle survived constitutional challenge in *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* [2017] 7 BLLR 641 (CC).

³²⁸ See *Free Market Foundation v Minister of Labour* [2016] ZAGPPHC 266 where the constitutionality of s 32 of the LRA was upheld. In *AMCU v Minister of Labour* (case number JR46/16) the Court held that where a party wishes to challenge an extension of an agreement in

4.5.1.2 Section 65(3)(a) of the LRA

Section 65(3)(a) of the LRA states that 'subject to a collective agreement, no person may take part a strike...or in any conduct in contemplation or furtherance of a strike...if that person is bound by any collective agreement that **regulates the issue in dispute.**'³²⁹ Note the difference in wording between s 65(1)(a) of the LRA and s 65(3)(a) of the LRA. Whereas the latter section merely requires the collective agreement to 'regulate' the issue in dispute the former requires it to be prohibited.

So, in *Cape Gate (Pty) Ltd*³³⁰ the Court held that where a bargaining council main agreement regulated the issue in dispute (wages for the period), any strike action regarding this issue, such as agitating for higher wages, would be unprotected. The Court held that:

'The objective underlying the clause is to ensure that negotiation of such matters takes place only at the level of the bargaining council and in no other forum, such as at plant level. It is also to preclude any strike action over such matters while they continue to be regulated by the main agreement. The clause would make little sense if it had the effect now contended for on behalf of NUMSA, namely that where wage increases are determined in the main agreement, employees and their unions are free to agitate for further increases by way of plant level negotiation and ultimately strike action. This would be subversive of the objective of promoting collective bargaining at the level of bargaining councils and the effectiveness of their agreements.'³³¹

terms of s 32 they must claim that the election to extend the agreement was *mala fide*, capricious or arbitrary.

³²⁹ Emphasis added.

³³⁰ [2007] 5 BLLR 446 (LC), Du Toit op cit (n69).

³³¹ Para 38.

Employees may strike where the agreement merely requires negotiation on an issue and the negotiations have been unsuccessful.³³² It has also been held that an agreement that removes the possibility of plant-level bargaining in favour of centralised bargaining is enforceable,³³³ subject to the caveat that it is made clear that plant level bargaining is excluded.³³⁴

Interestingly the reference to 'regulates' includes not only substantive issues but also procedural issues. In *Cabin Crew Association*,³³⁵ the Court gave consideration to what is meant by the issue in dispute being regulated by a collective agreement. The Court held that 'in the end, it is thus contemplated by the provisions of s 65(3)(a)(i) [of the LRA] that the issue in dispute forming the subject matter of the strike can be regulated by collective agreement not only by way of determining the substance of the issue in dispute itself, but in prescribing a process or structure in terms of which the issue in dispute must be bargained and determined.'³³⁶ It is submitted that this approach, as opposed to that contained in *County Fair*,³³⁷ is the correct one. It is not clear why, in the interests of voluntarism and self-regulation, a

³³² Grogan op cit (n44) at 419. See *Air Chefs (Pty) Ltd v SATAWU & Others* (2013) 34 ILJ 119 (LC).

³³³ *Yarntex* op cit (n307).

³³⁴ Grogan op cit (n44) 419 and 423. See *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v CCMA* (2013) 34 ILJ 2217 (LC) and *CSS Tactical (Pty) Ltd v Security Officers Civil Rights & Allied Workers Union* (2015) 36 ILJ 2764 (LAC).

³³⁵ *Supra* (n324).

³³⁶ Para 53. See also *Fidelity Guards v PTWU* [1997] 11 BLLR 1424 (LC).

³³⁷ *Supra* (n305).

party cannot regulate both substantive and procedural issues within a collective agreement.³³⁸

4.5.2 Employee bound by an agreement to refer a dispute to arbitration

Section 65(1)(b) of the LRA provides that 'no person may take part in a strike...or in any conduct in contemplation or furtherance of a strike...if that person is bound by an agreement that requires the issue in dispute to be referred to arbitration.' Note that the reference to 'agreement' is wider than a reference to 'collective agreement.'

4.5.3 Issues in dispute referred to arbitration / Labour Court

4.5.3.1 General legal position

Section 65(1)(c) of the LRA provides that 'no person may take part in a strike...or in any conduct in contemplation or furtherance of a strike...if the issue in dispute is on that a party has the **right to refer to arbitration or the to the Labour Court** in terms of [the LRA] or **any other employment law**.'³³⁹ The reference to 'any other employment law' was introduced by way of amendment with effect of 1 January 2015 and significantly expands the ambit of this provision.³⁴⁰

³³⁸ To this end the dictum by Waglay DJP Supra (n304) above is apposite.

³³⁹ Emphasis added. The amendment was effected in terms of the Labour Relations Amendment Act 8 of Act 6 of 2014.

³⁴⁰ Effectively overturning the ruling in *TSI Holdings (Pty) Ltd v NUMSA* [2004] 6 BLLR 600 (LC).

This section distinguishes between justiciable disputes (traditionally referred to as disputes of right) and disputes of mutual interest. Judge Steenkamp also highlights a further exception present in *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*³⁴¹ where employees may strike over benefits provided the fairness of conduct regarding the benefits is not challenged.³⁴²

4.5.3.2 Exception: organisational rights³⁴³

Section 65(2)(a) of the LRA provides that

'Despite section 65 (1)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15 [of the LRA].'

Organisational rights, which are dealt with in ss 12 to 16 of the LRA, are divided among those that 'can only be obtained, as a matter or right, by majority unions and those that can be obtained by 'sufficiently representative unions.'³⁴⁴ If an employer refuses to grant such rights the union may approach the CCMA, in terms of s 21 of the LRA, for the acquisition of such rights. Section 21 of the LRA provides

³⁴¹ [2013] 5 BLLR 434 (LAC).

³⁴² Cheadle op cit (n6) 110. See also *Mawethu Civils (Pty) Limited and v National Union of Mineworkers* [2016] JOL 36070 (LAC) where a dispute regarding a benefit was regarded as unprotected.

³⁴³ See A Van Heerden 'Assignment 2: Collective Labour Law' University of Cape Town (6 October 2015), s 17(3) of the Industrial Action Code and PAK Le Roux, 'Organisational rights: an update' (2018) 27(6) *Contemporary Labour Law* 67.

³⁴⁴ Van Heerden op cit (n343).

for a procedure by which a union may obtain organisational rights in specified circumstances. After the matter is conciliated the union has an election, provided it meets the necessary representation thresholds, to either to arbitrate the dispute or strike in support of any of the organisational rights contained in ss 12 to 15 of the LRA.³⁴⁵

In *Bader Bop*³⁴⁶ the Court 'expressly recognised a union's right to embark upon strike action for the purposes of concluding an agreement providing it organisational rights³⁴⁷ even in instances where the union did not have the necessary representation. This is because the Court 'eschewed a narrow reading of s 20 of the LRA, holding instead that:³⁴⁸

'a better reading is to see section 20 [of the LRA] as an express confirmation of the internationally recognised rights of minority unions to seek to gain access to the workplace, the recognition of their shopstewards as well as other organisational facilities through the techniques of collective bargaining.'³⁴⁹

Section 65(2)(b) of the LRA provides that where a representative trade union makes an election to strike for organisational rights and issues a strike notice instead of referring the matter to arbitration it is barred from adopting the arbitration route for a period of 12 months from the date of such strike notice.

³⁴⁵ Van Heerden op cit (n343). Section 65(2)(a) of the LRA provides that a union may not strike in support of rights in terms of s 16 of the LRA.

³⁴⁶ *Supra* (n11).

³⁴⁷ Section 20 of the LRA.

³⁴⁸ Van Heerden op cit (n343).

³⁴⁹ Para 41.

While the LRA sets 'the standard thresholds'³⁵⁰required for the acquisition of organisational rights, parties to a collective bargaining relationship may also establish their own thresholds for the acquisition of such rights.³⁵¹ As discussed above the threshold agreement may be extended to non-parties in terms of either ss 23(1)(d) or 32 of the LRA.

Where a threshold agreement has been concluded in terms of s 18 of the LRA³⁵² and extended in terms of s 23(1)(d) of the LRA the question remains whether a minority union and employer may nonetheless enter into an agreement in terms of s 20 of the LRA³⁵³ or engage in strike action in so far as compelling an employer to grant such rights.

In *South African Correctional Services Workers Union (SACOSWU) v Police and Prisons Civil Rights Union (POPCRU)*,³⁵⁴ the Court held that a threshold agreement concluded in terms of s 18 of the LRA merely provided what threshold a union must meet to become a sufficiently representative union by way of right. Nothing however precluded such a union from striking in support of organisational rights. The Court held that:

³⁵⁰ Note that these thresholds have been amended in order to provide greater opportunity for minority unions to obtain rights in the workplace. See ss 21 (8A) to (8D) of the LRA.

³⁵¹ Van Heerden op cit (n343).

³⁵² Ibid. Section 18 allows a majority union to establish an agreement regulating the thresholds for Organisational rights in terms of ss 12, 13 and 15 of the LRA. This threshold can then be extended by virtue of s 21(3)(d) of the LRA.

³⁵³ Section 20 of the LRA provides that 'nothing in this Part [of the LRA] precludes the conclusion of a collective agreement that regulates Organisational rights.'

³⁵⁴ [2017] 9 BLLR 905 (LAC). This ruling was confirmed by way of an *obiter* comment by the Constitutional Court in *POPCRU v SACOSWU* (CCT 152/17) (23 August 2018).

'While s 23(1) provides that a collective agreement is binding on the parties to it, a threshold agreed by an employer obliges the employer to confer ss12, 13 and s15 rights upon a union which had achieved the threshold agreed in the s18(1) agreement. It does not bar the employer from bargaining collectively with a minority union which seeks to have any organisational rights conferred on it, nor does the existence of a s18(1) agreement oblige the employer to deprive a minority union of any such organisational rights.'³⁵⁵

The Court overturned the ruling of the Court a quo's,³⁵⁶ which held that a threshold agreement extended to minority unions could bind them in terms of s 64(3)(a) of the LRA.

4.5.4 Employees bound by arbitration awards and ministerial determinations or determinations made in terms of chapter eight of the BCEA

Section 65(3)(a)(i) of the LRA provides that 'subject to a collective agreement, no person may take part in a strike...or in any conduct in contemplation or furtherance of a strike...if that person is bound by an arbitration award...that regulates the issue in dispute.' As Grogan notes there are:

'two related reasons for denying protection to workers who strike over issues that have been determined by an arbitration award; first, the dispute has been finally determined; secondly, the issue is no longer in dispute.'³⁵⁷

³⁵⁵ Para 36.

³⁵⁶ *POPCRU v Ledwaba NO 11 BLLR 1137 (LC)*.

³⁵⁷ Grogan op cit (n44) 423.

Section 65(3)(a)(ii) provides that 'subject to a collective agreement, no person may take part in a strike...or in any conduct in contemplation or furtherance of a strike...if that person is bound by any determination made in terms of s 44 that regulates the issue in dispute.'

Section 65(3)(b) provides that 'subject to a collective agreement, no person may take part in a strike...or in any conduct in contemplation or furtherance of a strike [regarding] any determination made in terms of Chapter Eight of the BCEA and that regulates the issue in dispute, during the first year of that determination.'

4.5.5 Essential and maintenance services³⁵⁸

Section 65(1)(d) of the LRA provides that 'no person may take part in a strike...or in any conduct in contemplation or furtherance of a strike...if that person is engaged in an essential service or a maintenance service.' An 'essential service' is defined as 'a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population, the Parliamentary service [and/or] the South African Police Force.'³⁵⁹ A 'maintenance service' is a service where 'the interruption of that service has the effect of material physical destruction to any working area, plant or machinery.'

³⁵⁸ For a useful summary of essential and maintenance services see T Cohen and R Le Roux 'Limitations on the Right to Strike in the Public Sector and Essential Services' in B Hepple, R Le Roux, and Silvana Sciarra (eds) *Laws against Strikes: The South African Experience in an International and Comparative Perspective* (2016) Juta, Cape Town at 108 to 125.

³⁵⁹ Section 213 of the LRA [hereafter 'ESC']. However, see *SA Police Service v POPCRU* (2011) 32 *ILJ* 1603 (CC) where it was held that limitation on SAPS only applied to police officers and not support staff.

Essential and maintenance service fall under the auspices of the Essential Services Committee.³⁶⁰ Essential service employees are prohibited from engaging in strike action. All disputes which would, if not for the fact they were part of an essential service, be strikeable matters are referred to arbitration.³⁶¹

Section 71 of the LRA states that the ESC may investigate whether to declare a service essential. Section 70B of the LRA provides further that 'the powers and functions of the ESC are to...decide, on its own initiative or at the reasonable request of any interested party, whether to institute investigations as to whether or not the whole or part of any service is an essential service.' If they so elect to declare a service essential it is published in the government gazette. Any party may refer a dispute to the ESC to determine whether a particular service is an essential service.

Maintenance services are established either by way of collective agreement, by way of a panel appointed by the ESC or by way of application to the ESC. Those employees who are engaged in maintenance services are likewise precluded from engaging in strike action. Rather they are entitled to arbitrate any dispute which they would ordinarily be able to strike on. Section 76(1)(a) of the LRA provides that 'an employer may not take into employment any person to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service.' The trade-off for an employer in having

³⁶⁰ See ss 70 to 75 of the LRA for the regulation of the essential services committee, essential services and maintenance services.

³⁶¹ Section 74 of the LRA.

a maintenance service established is the prohibition on the use of replacement labour.³⁶²

Where some of the employees are engaged in an essential service and others are not, the employees that are not engaged in an essential service may engage in strike action. This does not deprive the essential workers from arbitrating the same dispute.³⁶³

³⁶²Section 76(1)(a) of the LRA.

³⁶³ *City of Cape Town v SALGBC* (2011) 32 *ILJ* 1318 (LC). Grogan op cit (n44) 425.

5 Conclusion

The nature of 'unprotected' strike action, in South African law, is inextricably intertwined with what constitutes 'protected' strike action. Where collective action meets the definition of a strike, then such strike action will be protected provided it complies with the substantive and procedural requirements contained in the LRA.

Conversely, any conduct fitting the definition of 'strike action' that fails to comply with the procedural and/or substantive requirements of the LRA will be unprotected. It is important then to understand the specific hurdles that must be overcome for each procedural and substantive requirement in order to avoid a strike being rendered unprotected. It is also important that regard be had to nuanced areas of strike law so that pitfalls may be avoided by employers, employees and employee representatives/trade unions alike.

The process of providing clarity in this regard has been assisted, in part, by the recent introduction of the Industrial Action Code. The Industrial Action Code has provided a useful summation of what is required for specified procedural and substantive requirements to be met. The Industrial Action Code is not without its problematic additions; additions which may muddy the waters and facilitate litigation instead of providing clarity and certainty.

While in most instances the elucidation provided for in the Industrial Action Code is a distillation of relevant case authority there are instances where the Industrial Action

Code goes further than established law (by trying to introduce the notion of good faith bargaining and having parties agree to a notice period that may be excess in the minimum period provided for by the LRA). The manner in which the courts apply these particular provisions will be given substance to in due course. This much is clear by virtue of the fact that courts are obliged to consider the terms of the Industrial Action Code as per s 203 of the LRA.

The purpose of the LRA is to facilitate peaceful and healthy collective bargaining. Crucial to the framework of the LRA's collective bargaining regime is the ability of workers to mobilise in a peaceful manner in an attempt to secure their demands against their employer.

The LRA is clear in providing that strike action must be peaceful. It is not a licence to engage in acts of violence. While protected strike action provides immunity from dismissal, delictual liability and civil liability, such immunity extends only to employee engaging in protected strike action. It does not extend to unprotected strike action or unlawful conduct (regardless of whether the strike is protected or not).

Where employees fail to comply with the procedural and substantive requirements of the LRA and/or engage in acts of criminality no such protection is afforded to them.

The recent amendments to the LRA as well as the Industrial Action Code make specific mention of the violent nature of unprotected strikes within South Africa and the importance of curbing same. Both seek to introduce mechanisms aimed at avoiding such action in the future although they stop short of suggesting an otherwise protected strike can be rendered unprotected by violent conduct. The extent to which

unprotected strike action, and particularly violent strike action, persists notwithstanding such mechanisms remains an open question. As some commentators have noted the main driving force behind the level of violent strike action in South Africa may be driven largely by socio-economic factors as opposed to legislative provisions having been found to be wanting. In such instances, the solution falls outside the realm of pure legal consideration. Such a debate is beyond the scope of this dissertation. It is nevertheless the hope that when parties have clarity on what falls foul of protected strike action they can more easily conduct themselves in a manner consistent with the law.

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