COMPENSATION AGAINST TRADE UNIONS IN RESPECT OF UNPROTECTED STRIKES IN SOUTH AFRICA

by

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DECLARATION OF ORIGINALITY

I, **NYAMBENI DAVHANA,** declare that this Dissertation, titled “Compensation Against Trade Unions in Respect of Unprotected Strikes in South Africa” is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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(Signature and date)

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ABSTRACT

The right to strike is one of the fundamental rights enshrined in the Constitution of the Republic of South Africa, 1996 ("the Constitution"). In this regard, section 23(2)(c) of the Constitution guarantees and protects this right. Additionally, the Constitution makes provision for the consideration of the International Labour Organisations ("ILO") obligations. The protection of the right to strike has been reinforced and cemented through the promulgation of the Labour Relations Act 66 of 1995 ("LRA"), which, in addition to the Constitution, also regulates the right to strike.

The LRA ensures that workers are able to exercise their collective power through participating in strike action. The right to strike is an indispensable appendage to the collective bargaining process. In fact, this right is primarily aimed at rectifying the fundamental inequality of bargaining power in the employment relationship, whereby the individual employer is considered as having an advantage over an individual employee.

In terms of the LRA, strikes can either be protected or unprotected. The Act also provides for various remedies for aggrieved parties where employees embark on an unprotected strike. Nevertheless, South Africa remains inundated with violent and unprotected strikes. In light of this, our courts have been grappling with the question of which remedy would be most appropriate where an unprotected strike results in damage to the employer. To this end, a hefty debate has ensued as to the efficacy of compensation claims pursuant to section 68(1)(b) of the LRA.

This dissertation examines the legal remedies available to aggrieved parties in cases of unprotected strikes, with particular attention given to claims for compensation against trade unions.

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1. Contextual Background

In South Africa, the procedural requirements of a strike are considered to be relatively simple.[1] However, more than twenty years since the promulgation of the LRA, South Africa continues to experience what commentators have argued, unacceptably high occurrences of unprotected strikes.[2] The Marikana tragedy, which occurred on 16 August 2012, marked a significant period in the history of industrial relations in South Africa.[3] So tragic were the events of the day that it has been described as:

> "A toxic cocktail of a brutal police force and governance – mobilized workers – combined with the co-ordination, failure and information asymmetry on both sides of that divide- resulted in the death of thirty four striking mineworkers".[4]

Cheadle highlighted the socio-economic background of the striking miners at Marikana.[5] Moreover, it is submitted that these circumstances contributed to the strike being

1 Cheadle (2017) 23.

2 Cheadle (2017) 23. The Department of Labour *Annual Industrial Action Report* (2017), VIII states that there was a reported 8% increase in strike incidences over the last two years.

3 Harvey (2013) Occasional paper delivered at the South African Institute of International Affairs, 5.

4 Ngcukaitobi (2013) *ILJ* 837. Harvey (2013) Occasional paper delivered at the South African Institute of International Affairs, 5. Some took this score even further by saying that it sparked memories of the Sharpeville Massacre.

5 Harvey (2013) Occasional paper delivered at the South African Institute of International Affairs, 5. Botha (2016) *THRHR* 369 underpins this score when he says "The right to strike has been a central feature in concerns regarding not only socio-economic conditions, but also improvement of working conditions and fairness in applying labour laws and other laws".

unprotected.[6] A pertinent question has since emerged amongst legal scholars, namely whether the legal niceties of strike procedures mean anything to workers living in impoverished conditions.[7]

Measured in terms of individual capacity and Gross Domestic Product ("GDP"), South Africa remains Africa's biggest economy.[8] In spite of this, the country is still struggling to do away with the apartheid scourges of high unemployment, poverty and inequality between the rich and the poor.[9] Apartheid laws are considered to have contributed to this plight.[10] To add to this, the unemployment rate continues to rise, and stood at 27,7% during the first quarter of 2017.[11] According to Stats South Africa, this was the highest unemployment rate recorded in fourteen years.[12]

In addition to the above figures, estimates from the World Bank show that South Africa is the most unequal society in terms of income distribution.[13] Income distribution is assessed according to the gini-index, a unit used to measure inequality.[14] In fact, the Department of Labour has reported the gini-coefficient as standing at 0.77 as of 2016.[15] As a result of this, it means that we also have one of the most unequal workforces in the world.[16] Reports further indicate that it will be difficult to eliminate this plague of inequality, not even in the next ten years.[17]

Having regard to the above, inequality is also prevalent in the employment relationship. There is significant inequality in the bargaining power between the employer and the

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6 *Ibid*.

7 *Ibid*.

8 Cheadle (2017) 31.

9 *Ibid*.

10 *Brink v Kitshoff* 1996 (4) SA 197 (CC), para 40-41.

11 Cheadle (2017) 31. https://tradingeconomics.com/south-africa/unemployment-rate shows that the rate dropped to 26,7% in the fourth quarter of 2017, remaining unchanged on the first quarter of 2018.

12 See www.statssa.gov.za/?p=11129.

13 The Department of Labour *Annual Industrial Action Report* (2017), IX.

14 https://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worlds-most-unequal-countries.

15 Cheadle (2017) 35. The gini-coefficient is a measure of inequality where 0 indicates total equality and 100 total inequality. By 2011 South Africa had become the most unequal society in the world, with a gini-index of 63,38.

16 The Department of Labour *Annual Industrial Action Report* (2017), IX.

17 See https://www.thesouthafrican.com/inequality-increase-apartheid-south-africa/.

individual employee.[18] However, employees can use their collective action to counterbalance the bargaining power of the employer.[19] To this end, the right to strike is considered to be one of the tools that employees can use.[20]

The right to strike is pivotal to the collective bargaining process and lies at the bedrock of the existence of every trade union.[21] In South Africa, this right enjoys constitutional protection.[22] Moreover, the LRA was enacted to, *inter alia*, give effect to this right.[23] In doing so, the LRA distinguishes between two types of strikes, namely; protected as well as unprotected strikes. Irrespective of the fact that a strike is protected or not, it will always incur certain legal consequences.[24] Employees who participate in protected strikes will enjoy immunity from civil as well as criminal liability, save in instances where they are guilty of misconduct.[25] On the contrary, employees who participate in an unprotected strike will not enjoy the same protection.[26] Strike violence has become a matter of great concern in South Africa,[27] regardless of the fact that a strike enjoys protection.[28]

Of particular significance are the remedies available in the case of an unprotected strike. In this regard, the following legal consequences remain available, namely, interdictory relief, claims for "just and equitable" compensation, as well as dismissal.[29] Imperative to this

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18 Davies and Freedland (1983) 18.

19 Myburgh (2004) *ILJ* 968. Gericke (2012) *THRHR* 566. *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another* [2012] 12 BLLR 1193 (CC), para 85.

20 Maduku (1997) *ILR* 513. *In Re: Certification of the Constitution of the Republic of South Africa,* (1996) 4 SA 744 (CC), para 66 (hereinafter the "*Certification* case"). Here, the Constitutional Court opined that workers depended on the exercise of collective power to ensure that they address the imbalance in bargaining power that remains pervasive amongst them *vis-à-vis* their employers, with this being done through strike action. More importantly, the significance of striking as a mechanism of countervailing the imbalance in bargaining power in the employment relationship has led to the right to strike being entrenched in Constitutions.

21 Manamela & Budeli (2013) *CILSA* 308. Davies (2009) 220 strikes play an important role in the collective bargaining process as they ensure that workers gain enough bargaining power in order to negotiate with their employer.

22 S 23(2)(c) of the Constitution. See also Van Niekerk *et al* (2017) 444.

23 Preamble, LRA.

24 Manamela & Budeli (2013) *CILSA* 322.

25 S 67(2) of the LRA.

26 S 68 of the LRA.

27 Rycroft (2013) "What Can Be Done About Strike-Related Violence?" Paper delivered at the Labour Law Research Network (LLRN), Barcelona, 3.

28 Manamela & Budeli (2013) *CILSA* 322.

29 Du Toit (2014) 488.

dissertation is the remedy found in section 68(1)(b) of the LRA,[30] in terms of which the Labour Court may order the payment of "just and equitable compensation" for any loss occasioned by an unprotected strike. This question was initially dealt with in *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*,[31] where the employer instituted a claim for compensation against the respondent union as a result of damage caused by its striking employees.[32] The Labour Court awarded the employer compensation of R100 000,00, payable in monthly instalment amounts of R5 000,00. The Court further held that it had the discretion to make an order of just and equitable compensation against the responsible party.[33]

In *Algoa Bus Co (Pty) Ltd v Transport Action Retail & General Workers Union & 0thers*,[34] employees of the applicant and members of the respondent trade union, embarked on an unprotected strike. This occurred despite the fact that an interdict prohibiting the strike had been issued.[35] Subsequent to this, the applicant company claimed compensation for economic loss in terms of section 68(1)(b) of the LRA.[36] The Labour Court held that both the union and its members were jointly and severally liable to compensate the applicant company an amount exceeding R1.4 million.[37] The above decisions notwithstanding, Le Roux argues that employers may still use common law principles in order to claim for damages suffered as a result of a strike.[38] He argues that this may be done as a remedy separate from the LRA.

The aim of this dissertation is to focus on unprotected strikes and the legal consequences that may ensue. In particular, the claim for compensation against trade unions in terms of section 68(1)(b) of the LRA will be analysed. The dissertation will consider how this provision has been applied by the Labour Court, the efficacy of the remedy, as well as

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30 S 68(1)(b) of the LRA gives the Labour Court exclusive jurisdiction to order just and equitable compensation for any loss attributable to an unprotected strike.

31 *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC) (hereafter "*Rustenburg Platinum Mines*").

32 *Rustenburg Platinum Mines*, para 85.

33 *Rustenburg Platinum Mines*, para 91.

34 *Algoa Bus Co (Pty) Ltd v Transport Action Retail & General Workers Union & 0thers* (2015) 36 *ILJ* 2292 (LC) (hereafter "*Algoa*").

35 *Ibid*.

36 *Ibid*.

37 *Idem* 2293.

38 Le Roux (2013) *CLL* 11.

possible ways in which the section may be improved. This dissertation will also consider the proposed amendments to the LRA and how they may address protracted and violent strikes.[39]

2. Research Questions

In *Algoa*, it was held that a union could not expect to remain immune from the financial consequences of reckless conduct by its members or office bearers.[40] It is against this backdrop that the following questions have been formulated and need to be answered:

a) To what extent can trade unions be held liable for unprotected strikes in terms of the common law or the LRA?
b) How effective are compensation claims in terms of the LRA?
c) What lessons can be gained from abroad?

3. Importance of Study

South Africa continues to experience a high number of violent and unprotected strikes.[41] As a result of this, employers continue to suffer damage and in extreme cases, lives are lost. The courts have consequently been called to deal with strikes of this nature, with particular focus on the various remedies as envisaged within the purview of section 68 of the LRA. In order to curb unprotected strikes, employers tend to apply for interdictory relief. However, this is not always beneficial, seeing that striking employees will at times disregard this interdict. Consequently, employers have now turned towards instituting claims for compensation against unions in terms of section 68(1)(b) of the LRA. Despite this, there is still uncertainty insofar as the extent to which trade unions can be held liable for unprotected strikes, where striking employees' conduct result in damage to the employer. Consequently, this dissertation seeks to provide clarity regarding the Labour Court's exclusive jurisdiction to grant an award of just and equitable compensation within the context of an unprotected strike.

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39 Le Roux (2017) *CLL* 26.

40 *Algoa* 2293.

41 Ngcukaitobi (2013) *ILJ* 846.

4. Research Methodology and Limitations

This study critically analyses constitutional provisions; available labour legislation; case law; books; journal articles and similar sources. The study undertakes a doctrinal analysis of possible claims against trade unions.[42] Consequently, reliance on empirical data will be kept to a minimum.[43] This study will also include a comparative analysis of foreign jurisdictions, which will be done to see how other countries have dealt with the question of compensation claims against trade unions where their employees embark on an unprotected strike. Moreover, this study will provide critique and suggestions for statutory reform.

There are two limitations to this study. The first limitation pertains to the nature of the methodology applied. Being a doctrinal study, this dissertation will not include matters that are deemed to be beyond the scope of the law.[44] The second limitation relates to time, as such, this study will not consider cases and research materials published after the 31st of October 2018.

5. Structure

This dissertation consists of six chapters. This introductory chapter is followed by a discussion into the international legal framework pertaining to freedom of association and the right to strike. Of particular significance will be how the ILO and its constituent bodies have dealt with strike violence and claims for compensation against the trade unions.

Chapter three will shift the focus to the South African context of strike law, where a detailed account of the right to strike will be conducted. This study will also include an overview of the legal remedies contained in the LRA, with a brief analysis of interdicts as a remedy.

In chapter four, focus will be turned towards different claims that may be instituted against trade unions, namely, common law claims for damages as well as statutory compensation in terms of the LRA. The main focus of the chapter will be compensation claims in terms of

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42 Sargent (1990) *HLR* 642. Doctrinal study entails the process of determining the internal structure and dynamics of a body of law, using the language of the law itself, without reference to external modes of analysis.

43 Wendel (2011) *CLR* 1039.

44 Sargent (1990) *HLR* 642. This includes moral, political and sociological matters.

section 68(1)(b) of the LRA and how this remedy has been applied by the courts. In order to shed light onto the dissertation topic, various cases will also be discussed.

In chapter five, foreign jurisdictions will be discussed, namely, the United Kingdom (UK) and Canada. This will be done in order to gain a broader understanding of how these two countries have addressed strike violence and the remedies that would ensue where the strike is unprotected. Moreover, a few lessons will be extracted from the two jurisdictions.

This dissertation will conclude in chapter six, where I will provide some recommendations which may well aid in improving the manner in which unprotected strikes are dealt with domestically.

CHAPTER 2

INTERNATIONAL NORMS: IS THERE A RIGHT TO STRIKE?

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1. Introduction

This chapter explores the international legal framework pertaining to the right to strike as well as the legitimate means through which this right can be exercised. Emphasis will be placed on trade union participation in unlawful and violent strikes and sanctions that may follow as a result thereof. South African labour laws have, to a large extent, been influenced by the jurisprudence of the ILO,[45] with the interpretation of the right to strike not being an exception.[46] In fact, the Constitution recognizes international organisations, in particular, the ILO, as important sources of customary international law.[47]

South Africa is a founding member of the ILO,[48] and it has played a major role in the inception of the ILO's Constitution.[49] An exposition that highlights some of the fundamental principles of the ILO's Constitution and Conventions will prove to be most beneficial for the purpose of this study. The focus, therefore, will fall on the acceptance of unlawful and violent behavior of trade unions in particular.

45 Van Niekerk *et al* (2017) 23.

46 Novitz (2015) 46.

47 Van Niekerk *et al* (2017) 24.

48 *Ibid*. See also Manamela & Budeli (2013) *CILSA* 313. South Africa was temporarily requested to withdraw from the ILO due to its then apartheid policies and laws. However, the country rejoined the ILO after 1994.

49 Van Niekerk *et al* (2017) 24.

This inquiry will also evaluate the right to freedom of association. The aim of the chapter is to seek guidance from international norms regarding the weighing up of the right to strike and legal action against trade unions engaged in unlawful strike action. This chapter covers the following aspects, firstly, the formulation of the existence of the right to strike from an international law perspective. Secondly, the challenges facing the ILO's interpretation of the right to strike and lastly; whether trade unions may be held liable for their participation in unlawful and violent strikes.

2. The International Labour Community

2.1 Introduction

The Constitution enjoins the courts, tribunals and similar *fora*, to consider international law when interpreting the Bill of Rights.[50] In *S v Makwanyane*,[51] the Constitutional Court placed emphasis on the fact that the interpretation clause not only requires instruments that are binding upon the Republic to be used in the interpretation referred to above. In fact, this obligation extends to those legal instruments to which the State is not necessarily a party.[52] In addition to this, the Court stated that in certain instances reports of specialized agencies, such as the ILO, may assist in providing the correct interpretation of particular provisions in the Bill of Rights.[53]

The right to strike is guaranteed in the Constitution.[54] The LRA was also promulgated to give effect to this right. This is made clear from the preamble to the LRA, which states that the Act was promulgated to, *inter alia*, "regulate the right to strike".[55] This having been said, South Africa is also a state party to multiple international organisations, the ILO being one of them.[56] The expert committees of the ILO have developed jurisprudence on the right to strike, and have also deliberated on whether or not the Convention on the Right to Freedom

50 S 39(1)(b) of the Constitution; Van Niekerk *et al* (2017) 32.
51 *S v Makwanyane* 1995 (3) SA 391 (CC) (hereafter "*Makwanyane*").
52 *Makwanyane*, para 35.
53 *Ibid*.
54 S 23(2)(c) of the Constitution. Van Niekerk *et al* (2017) 33.
55 Hepple (2015) 15. Manamela & Budeli (2013) *CILSA* 314. Preamble to the LRA.
56 Hepple (2015) 15.

of Association and the Right to Organise ("Convention 87") gives rise to the right to strike.[57] This question will be dealt with hereunder.

2.2 The ILO and the Interpretation of a Right to Strike

In adopting the 1944 ILO Declaration on Fundamental Principles and Rights at Work (the "Declaration of Philadelphia"),[58] member states are obliged to uphold four fundamental rights. These rights include, amongst others, the right to freedom of association and collective bargaining.[59] It is as a result of this that the ILO confirmed the right to freedom of association as being one of the fundamental principles upon which it was established.[60] Another core reason that led to the formation of the ILO was the achievement of universal peace,[61] which could only be realized if grounded upon social justice and the promotion of labour rights.[62] More importantly, the achievement of social justice could be facilitated through the recognition of the right to freedom of association.[63]

An argument has been made that the ILO Constitution itself places significant emphasis on the importance of the right to freedom of association.[64] Accordingly, two core Conventions of the ILO become relevant, namely; the Convention 87, as well as the Convention on the Right to Organise and Collective Bargaining ("Convention 98"). Irrespective of the fact that there is no ILO Convention that explicitly guarantees the right to strike,[65] supervisory bodies of the ILO have proceeded to derive this right from the ILO Constitution and Conventions 87

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57 "The Right to Strike and the ILO: The Legal Foundations" brief presented at the International Trade Union Conference, March 2014, 4.

58 ILO Declaration of Philadelphia, 1944.

59 Davies (2009) 59. Van Niekerk *et al* (2017) 389.

60 Swepston (1998) *ILR* 169. A I(b) of ILO Declaration of Philadelphia, 1944.

61 Preamble to the ILO Constitution.

62 Davies (2009) 58.

63 "The Right to Strike and the ILO: The Legal Foundations" brief presented at the International Trade Union Conference, March 2014, 23. Budeli (2009) *De Jure* 138.

64 "The Right to Strike and the ILO: The Legal Foundations" brief presented at the International Trade Union Conference, March 2014, 23.

65 Manamela & Budeli (2013) *CILSA* 315.

and 98,[66] more particularly, from the broad provision of freedom of association and the right to organise.[67]

The following provisions of Convention 87 have been considered as encompassing the existence of a right to strike:

Article 3(1) provides:

> "Workers' and employers' organisations shall have the right to draw up their Constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes."

Article 8(1) provides:

> "In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land."

Article 10 provides:

> "In this Convention the term ***organisation*** means any organisation of workers or of employers for furthering and defending the interests of workers or of employers."

Wisskirchen mentions that although a reading of the above provisions' texts clearly indicate the absence of an explicit right to strike, the Committee of Experts has still gone as far as stating that the right to strike remains based on and derived from Article 3 of Convention 87. [68] In addition to this, the Committee on Freedom of Association ("CFA") has acknowledged that the right to freedom of association can indeed give rise to a right to strike, irrespective of the absence of an express link between the two.[69]

2.3 Concerns Regarding the ILO's Interpretation of the Right to Strike

The question of the interpretation of the right to strike has not been without its own issues at the ILO. One would be inclined to believe that the inclusion of an interpretation clause in

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66 *Ibid*. The ILO, through the Committee on Freedom of Association, has held that the right to strike is an essential element of freedom of association and consequently one important element of trade union rights.

67 Novitz (2003) 273.

68 Wisskirchen (2005) *ILR* 283.

69 Budeli (2009) *De Jure* 147.

Article 37(1) of the ILO Constitution would in itself resolve this impasse.[70] To put things into context, Art 37(1) of the ILO Constitution provides, *inter alia*, the following:[71]

Article 37(1):

> "Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice."

Article 37(2):

> "Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph"

From the provisions referred to above, two views emerge regarding the interpretation of both the ILO Constitution and Conventions. First, Article 37(1) considers the International Court of Justice ("ICJ") as the only organ with the explicit authority to interpret both the ILO Constitution and Conventions.[72] Secondly, Article 37(2) creates an additional mechanism for interpretation of a Convention, namely, by subjecting the question to a tribunal insofar as a dispute or question arises.[73]

What is worth noting is the fact that only five cases have ever been brought before the ICJ pursuant to Article 37(1). However, none of them related to either industrial action or the right to strike.[74] With regards to the tribunal being included as an alternative to the ICJ, there was a view that this would ensure flexibility as well as accessibility for parties seeking clarity on interpretation of the relevant instruments.[75] Nonetheless, the use of a tribunal has never been exercised, with the suggestion that this may be attributed to the possibility of

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70 La Hovary (2017) *CLLPJ* 337.
71 A 37 ILO Constitution.
72 La Hovary (2017) *CLLPJ* 337.
73 *Ibid*.
74 La Hovary (2017) *CLLPJ* 339.
75 *Idem* 341.

high costs associated with this.[76] It is submitted that the exercise of Article 37 has been ineffective insofar as it pertains to the ILO's interpretation of the right to strike.

Following from this, much dependence has been placed upon the interpretation of the ILO supervisory bodies, namely, the Committee of Experts on the Application of Conventions and Recommendations ("CEACR") as well as the CFA,[77] even though their interpretations are not binding.[78] This too, however, has not been without its own complexities, since there remains a view that the interpretation of Conventions does not fall within the ambit of the mandate of the CEACR as a supervisory body.[79] Some of these challenges will be dealt with briefly below.

2.4 Acceptance of a Right to Strike by the ILO

Supervisory bodies of the ILO have not been restrained from interpreting Convention 87 as being inclusive of a right to strike.[80] In fact, of the various schools of thought that have emerged, the commonly accepted one, advanced by Frey, entails the right to strike as being intertwined with the right to freedom of association.[81] So fundamental is this conception that the right to strike is considered an intrinsic corollary to the right to freedom of association as contemplated within Convention 87.[82] Although the above view has gained considerable support within the international labour community, it has not been spared being challenged by the International Organisation of Employer's ("IOE").

The challenge to the right to strike at the ILO reached its critical point in 2012, with the employer's group staging a walkout at the Conference Committee on the Application of Standards ("CCAS").[83] The IOE argued that the absence of an express mention of the right to strike in Convention 87 made it rather unacceptable that the entitlement would accrue by virtue of the Convention itself.[84] Moreover, they stated that the CEACR had exceeded their

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76 *Ibid*.

77 "The Right to Strike and the ILO: The Legal Foundations" brief presented at the International Trade Union Conference, March 2014, 18. Manamela & Budeli (2013) *CILSA* 315, where the authors state that the CFA has interpreted the existence of the right to strike from Conventions 87 and 98.

78 La Hovary (2017) *CLLPJ* 338. Wisskirchen (2005) *ILR* 273.

79 *Ibid*. Van Niekerk *et al* (2017) 27.

80 Zou (2012) *CLLPJ* 101.

81 Frey (2017) *GLJ* 19. Smit (2017) *CLLPJ* 400.

82 Zou (2012) *CLLPJ* 101. Gernigon, Odero and Guido (1998) *ILR* 137.

83 Novitz (2015) 55. La Hovary (2017) *CLLPJ* 338.

84 *Ibid*.

legitimate authority by interpreting the ILO Convention to require compliance with standards relating to the right to strike.[85]

In substantiating their challenge to the existence of the right to strike, the employer's group proffered three reasons. Firstly, the CEACR's mandate was limited to commentary on the application and not interpretation of Conventions.[86] Secondly, that the tripartite ILO Constitution (and not the CEACR) had the authority to decide on the meaning of ILO Conventions.[87] Lastly; since Convention 87 was silent on the right to strike, the CEACR could not comment nor express an opinion on the subject matter.[88]

What is interesting about this situation is the fact that the IOE had never sought such a challenge in more than forty years.[89] In fact, this had been the first time that such a challenge arose.[90] According to Novitz, the IOE's challenge to the existence of the right to strike may have been attributed to the fact that the CEACR's reports were finding expression in various ways, more importantly, that the reports were also influential in the conduct of member States.[91]

In addressing the arguments presented by the employer's groups, the findings of the CFA, it is submitted, would be of paramount importance. The CFA recognises the right to strike as being a fundamental right of the workers and their respective organisations, this being within the context that it be used as a means of defending their economic and social interests.[92] More importantly, the right to strike was reaffirmed as being an intrinsic corollary to the right to organise as entrenched in Convention 87.[93] Seemingly, in terms of the ILO, the right to strike flows directly from Convention 87. As such, without Convention 87 there

85 *Ibid*.

86 "The Right to Strike and the ILO: The Legal Foundations" brief presented at the International Trade Union Conference, March 2014, 6.

87 *Idem* 7.

88 *Ibid*.

89 Novitz (2015) 56; "The Right to Strike and the ILO: The Legal Foundations" brief presented at the International Trade Union Conference, March 2014, 8.

90 *Ibid*.

91 Novitz (2015) 56.

92 Digest (2006) 109 par 520. Manamela & Budeli (2013) *CILSA* 315. See also Novitz (2015) 48.

93 Digest (2006) 109 par 525. Zou (2012) *CLLPJ* 101.

would be no right to strike.[94] In essence, the right to strike is implicit in both the ILO Constitution as well as Conventions 87 and 98.[95]

Consensus was reached in 2015 when the workers, employers and governments all acknowledged the right to strike as being linked with the right to freedom of association.[96] Having accepted this as the position within the international labour law domain, the scope of this paper will then turn towards the trade union participation in violent or unlawful strikes and the consequences one finds in international labour law.

2.5 Unlawful and Violent Strikes in International Labour Law

It is now clear that the ILO does indeed recognise the right to strike.[97] This being so, the next issue that becomes relevant to this study is the question of the exercise of the right to strike as well as the consequences that flow as a result of the exercise thereof. The right to strike is a fundamental right to workers and their organisations and should be exercised in order to defend their economic as well as their social interests.[98] Generally, it is accepted that those who participate in industrial action should not be unduly penalized. This applies when the strike is legitimate. In other words, the aim of the strike must be the economic and social advancement of the striking workers.[99] Furthermore, authorities are not permitted to have recourse to imprisonment for the mere fact that a worker has organised or participated in a peaceful strike, as this could potentially place the right to strike in jeopardy.[100] Ultimately, any imposition of sanctions on unions for leading legitimate strikes, will amount to a gross violation of the principle of freedom of association.[101]

Unlawful strikes are not protected in international labour law and are not without negative consequences.[102] This is pivotal to the study, which is concerned with ascertaining whether or not trade unions may be subjected to compensation claims for their involvement in

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94 Digest (2006) 110 par 530. Budeli (2009) *De Jure* 149, where the author argues that the ILO sees the right to strike as an essential element of the right to freedom of association.

95 Mthombeni (1990) *CILSA* 340.

96 Servais (2017) *CLLPJ* 383.

97 See https://www.ituc-csi.org/right-to-strike-re-affirmed-at-ilo?lang=en (visited on 10 June 2018).

98 Digest (2006) 110.

99 Novitz (2003) 317. Digest (2006) 133.

100 Swepston (1998) *ILR* 190. Novitz (2003) 321.

101 Digest (2006) 133.

102 Manamela & Budeli (2013) *CILSA* 316.

violent and unlawful strikes. There are certain jurisdictions where injunctive or interdictory relief is available as a remedy during instances of illegal strikes.[103] However, in certain jurisdictions, claims for damages have been found to be justified.[104] As such, a few examples are worth briefly mentioning, namely; Turkey and the United Kingdom. In Turkey, the law itself expressly provides that any damage sustained by the employer as a result of an unlawful strike, must be compensated by the labour union which called for the strike in question.[105] In the United Kingdom however, the focus is more on the delictual aspect as seen through "economic torts",[106] where certain amounts of money may be claimed from the union responsible.[107] These two examples demonstrate how certain countries have dealt with the issue of damage occurring as a result of unlawful strikes.

An inquiry into unlawful or violent strikes would be incomplete without a consideration of the case concerning the Indonesian government brought before the CFA.[108] In the Indonesian case,[109] a complaint was laid against the government of Indonesia by the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association ("IUF").[110] The allegations entailed, *inter alia*, the arrest and detention of striking trade unionists as well as the large scale dismissal of unionists pursuant to their participation in a strike.[111] In a prior recommendation of the CFA, it was held that the arrest and detention of trade union leaders for the exercise of legitimate trade union activities would amount to a violation of the principles of freedom of association.[112]

In casu, the workers protest caused damage to the hotel (employer), although the union contended that they had not caused the physical damage to the hotel.[113] However, the domestic court had ordered that seven members of the union pay two million US dollars in compensation to the employer for allegedly causing losses in connection with the strike.[114]

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103 Waas (2014) 66.
104 *Ibid*.
105 *Ibid*.
106 See discussion in Chapter 5, 2.1.
107 *Ibid*.
108 Novitz (2003) 321.
109 *Case No.2116 (Indonesia),* 328th Report CFA (2002), 325.
110 *Ibid*.
111 *Ibid*.
112 *Case No.2116 (Indonesia),* 328th Report CFA (2002), 325, at para 329.
113 *Case No.2116 (Indonesia),* 328th Report CFA (2002), 325, at para 330.
114 *Case No.2116 (Indonesia)*, 328th Report CFA (2002), 325, at para 333.

The union, however, argued that ordering it to pay such an exorbitant amount of money would effectively deprive it of its member's exercise of their right to freedom of association as well as their collective bargaining rights.

In dealing with this matter, the CFA held that measures that deprive trade unions of their freedom on the grounds of trade union activity, constituted an obstacle to the exercise of trade union rights.[115] In addition to this, the CFA itself has always recognised the right to strike by workers and their organisations as a legitimate means of defending their economic and social interests.[116]

Finally, the CFA concluded that the imposition of the penalty for economic loss that might be linked to the strike action amounted to a restriction of the right to strike.[117] In light of the above, it is submitted that the CFA is itself reluctant to grant orders of compensation against trade unions as this would impede on their exercise of the right to freedom of association, which would impede their right to strike.

3. Conclusion

The following findings are made. Firstly, the right to strike is not explicitly mentioned in either the ILO Constitution or Conventions 87 and 98.[118] Instead, what is found is the reference to the right to freedom of association. In the absence of an explicit reference to the right to strike, a lot of dependence has been placed upon the ILO supervisory bodies, which have since proceeded to interpret the right to strike from the reference to the right to freedom of association in Conventions 87 and 98.[119]

Secondly, irrespective of the above, it has been accepted that the ILO does indeed recognize the existence of the right to strike. This recognition, however, was not without contention at the International Labour Conference, with this recognition only being publicly embraced in 2015. It is now settled law that there is a right to strike in international law.

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115 *Case No.2116 (Indonesia),* 328th Report CFA (2002), 325, at para 367.

116 *Case No.2120 (Nepal)*, 328th Report CFA (2002), 530, at para 540.

117 *Case No.2116 (Indonesia),* 328th Report CFA (2002), 325, at para 368.

118 Zou (2012) *Trinity C.L. Rev* 104.

119 See discussion in Chapter 2, 2.4. This caused a huge debate at the ILO Conference.

Lastly, the international labour community does not take strike violence lightly.[120] In fact, it goes without saying that some strikes will turn violent. Strike violence therefore, is an area of strike law that the ILO has also had to deal with.[121] While the ILO considers the exercise of the right to strike as being intricately linked to the right to freedom of association, it places considerable emphasis on legitimate strikes.[122] This entails that strikes not only seek to protect, but also promote, workers and trade unions economic and social interests.[123] As a result of this, the ILO is reluctant to award claims for compensation against striking workers and the unions in particular, as this would inadvertently curtail the right to strike.[124]

120 See discussion in Chapter 2, 2.5.

121 Novitz (2003) 321.

122 Digest (2006) 133.

123 *Case No.2120 (Nepal)*, 328th Report CFA (2002), 530, at para 540.

124 Waas (2014) 66.

CHAPTER 3

THE SOUTH AFRICAN RIGHT TO STRIKE

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1. Introduction

Up until now, the focus of this study has been the interpretation of the definition of the right to strike within the context of international labour law. In particular, as derived from Conventions 87 and 98 of the ILO. Having accepted the existence of a right to strike in international law, this chapter will focus on the right to strike in South Africa. This chapter commences with the formulation of the constitutional right to strike. This will then be followed by a brief analysis of the LRA as legislation giving effect to this right. An analysis of the LRA will be inclusive of the legal requirements as well as consequences that flow from participation in protected and unprotected strikes. Of particular importance will be the situation where striking employees and unions resort to violence. In light of this, the legal remedies available during unprotected strikes will be discussed, namely; interdicts, orders of just and equitable compensation, as well as dismissal of striking employees. Ultimately, a discussion on granting of orders of just and equitable compensation will be the most important.

2. Constitutional Recognition of the Right to Strike

A constitutional right has been described as a norm against which ordinary laws are tested for compatibility.[125] One of the things that a court may do is declare legislation or conduct

[125] Hepple (2015) 67.

that is found to be incompatible with a constitutional right, as being invalid.[126] Most crucial to the existence of a constitutional right is the fact that it is given effect through, *inter alia*, legislation.[127] Some states have an express right to strike included in their constitutional texts, whereas others do not, meaning that there would not be an explicit right to strike where no provision is included in the constitutional text.[128] More often than not, the latter instance would entail the right to strike being derived from a constitutional right to freedom of association, with the two rights being co-dependent on each other.[129]

Initially, strikes were prohibited,[130] with participation in strikes considered to be punishable either through delictual or contractual claims.[131] Prior to the enactment of the LRA in 1995, South Africa had regressive labour laws.[132] This can be seen through the enactment of South Africa's first piece of comprehensive labour legislation,[133] the Industrial Conciliation Acts of 1924 and 1956.[134] According to Du Toit, the turning point, however, came in 1979, after the appointment of the Wiehahn Commission.[135] This resulted in the creation of the Industrial Court and inclusion of black workers and trade unions in labour legislation.[136] However, the most significant change occurred during the transition from the former apartheid rule to the new constitutional dispensation with a Constitution entrenching the right to strike.[137]

As a result of this change, we now have in South Africa, a right to strike that is explicitly stated in the Constitution, with every worker being entitled to this right.[138] In *National Union*

126 *Ibid*.

127 *Ibid*.

128 Hepple (2015) 71.

129 *Ibid*.

130 Cheadle (2017) 1.

131 *Idem* 2 made observation that common-law jurisdictions eventually created statutory immunities against criminal prosecutions for workers who collectively decided to strike.

132 Cheadle (2017) 3.

133 Du Toit *et al* (2015) 6.

134 Cheadle (2017) 3. Myburgh (2004) *ILJ* 964 argues that the Acts were exclusionary to the extent that they did not include, *inter alia*, contract Africans and Indians, within their definition of "employee".

135 DuToit *et al* (2015) 10.

136 Myburgh (2004) *ILJ* 964.

137 *Idem* 968 criminalization of strikes was abolished and replaced by notion of protected and unprotected strikes.

138 Rautenbach-Malherbe (2012) 394. S 23(2)(c) of the Constitution, which provides that "every worker has the right to form a trade union, to participate in the activities and programmes of a trade union; and to strike".

of Metalworkers of SA and Others V Bader Bop (Pty) Ltd and Another,[139] the Court held that the right to strike was constitutionally entrenched through section 23(2)(c) of the Constitution.[140] In justifying the constitutional guarantee of the right to strike, Cheadle highlights a number of factors, the most crucial being the inequality in bargaining power.[141] According to him, there exists structural inequality of bargaining power between the individual worker and employer.[142] This view reinforces the expression in the *Certification* case, where the Constitutional Court held that generally, employers enjoyed more social and economic power than their individual workers.[143] As a result, employees can use their collective action to counterbalance the effect of the inequality in bargaining power.[144] Ultimately, the constitutionally entrenched right to strike is of unique nature insofar as it encompasses a right to inflict economic harm.[145] Maya AJ encapsulated this in *SA Transport and Allied Workers Union and Others v Moloto NO & Another*,[146] when she held that the right to strike should be seen within the context of redress of inequality in social and economic power within the employer and employee relations.[147]

Although constitutionally entrenched, it is worth noting that this right is unrestricted in the Constitution.[148] However, this is not the case when the LRA is concerned.[149] Notwithstanding its unrestricted nature in the Constitution, all rights in the Bill of Rights are not absolute.[150] In fact, most modern Bills of Rights expressly provide for the limitation of rights.[151] This is done through the aid of a general limitations clause, which provides that rights in the Bill of Rights may be limited. However, this limitation should be reasonable and justifiable in an open and democratic society based on, *inter alia*, human dignity, equality

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139 *National Union of Metalworkers of SA and Others V Bader Bop (Pty) Ltd and Another* (2003) 24 *ILJ* 305 (hereafter "*Bader Bop*").

140 Myburgh (2004) *ILJ* 968.

141 Cheadle (2017) 5.

142 *Ibid*. The employer represents a collectivity of resources, whereas the individual worker has one resource, their labour.

143 *Certification* case, at para 85.

144 Myburgh (2004) *ILJ* 968. Gericke (2012) *THRHR* 566.

145 Cheadle (2017) 4.

146 *SA Transport and Allied Workers Union and Others v Moloto NO & Another* (2012) 33 *ILJ* 2549 (CC) (hereafter "*Moloto*").

147 *Idem* 2551.

148 *Moloto* 2550.

149 Gericke (2012) *THRHR* 566 the LRA imposes certain limitations.

150 Hepple (2015) 76.

151 Rautenbach-Malherbe (2012) 302.

and freedom.[152] This is an exercise in proportionality, whereby interests of the society are balanced against the interests of the affected individuals or groups.[153] In addition to using the general limitations clause that exists in the Constitution, there are other ways in which the right to strike may be limited. In addition to the Constitution, the LRA also regulates the right to strike.[154] The limitation on the right to strike by the LRA affects the substantive as well as the procedural aspects of strike law.[155] This will be dealt with when looking at the right to strike within the context of the LRA below.

3. The LRA and the Right to Strike

3.1 Introduction

The LRA makes it clear that it is meant not only to give effect to section 23(2)(c) of the Constitution, but to also ensure the regulation of the right to strike.[156] The preamble to the LRA puts this into context when it details the purpose of the Act being, amongst other things:

> "to give effect to section 23 of the Constitution;
> to regulate the organisational rights of trade unions;
> to promote and facilitate collective bargaining at the workplace and at sectoral level;
> to regulate the right to strike and the recourse to lock-out in conformity with the Constitution."[157]

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152 S 36(1) of the Constitution provides thus:
"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(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.".

153 Cheadle (2015) 78.

154 Myburgh (2004) *ILJ* 964. Cheadle (2015) 88. Maduku (1997) *ILR* 513; *Certification* case, para 66. Here, the Constitutional Court opined that workers depended on the exercise of collective power to ensure that they address the imbalance in bargaining power that remains pervasive amongst them *vis-à-vis* their employers, with this being done through strike action. More importantly, the significance of striking as a mechanism of countervailing the imbalance in bargaining power in the employment relationship has led to the right to strike being entrenched in Constitutions.

155 Du Toit *et al* (2015) 344.

156 LRA, Preamble.

157 *Ibid*.

From the above, one can then truly appreciate the significance of the right to strike from both a constitutional as well as legislative perspective. With this being so, it is necessary to understand the legislative meaning of a "strike". The LRA defines a "strike" thus:

> "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."[158]

The definition of a strike is multi-faceted. In sum, it entails a refusal to work, which is exercised collectively, the purpose of which should be the remedying of a grievance or the resolution of a dispute in respect of a matter of mutual interest.[159]

3.2 Legal Consequences of Protected Strikes

It should be borne in mind that the focus of this study is not so much what happens when a strike enjoys protected status. Rather, the main area of concern relates to the consequences of unprotected strikes. However, a brief consideration of the requirements pertaining to a protected strike will assist in analyzing unprotected strikes and the consequences that follow as a result thereof.

Prior to the enactment of the LRA, and according to the common law, a strike amounted to a breach of contract, in terms of which an aggrieved party would be entitled to recover damages from the guilty party, or alternatively, seek to uphold the contract against the other party.[160] Furthermore, strikes were classified as criminal offences.[161] However, since the enactment of the LRA, strikes may be considered lawful. Consequently, strikes can now be classified as either being protected or unprotected.[162]

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158 S 213 of the LRA. Du Toit (2014) 477 mentions a number of things pertaining to the definition, *inter alia*; that an individual employee cannot exercise the right to strike, and that the mere refusal to work by an employee will not constitute a strike provided that there is no specific demand to remedy a grievance or to resolve a dispute.

159 Van Niekerk *et al* (2017) 449.

160 Du Toit *et al* (2015) 354.

161 *Ibid*.

162 Myburgh (2004) *ILJ* 968.

A strike will be considered protected provided it complies with the statutory requirements set out in Chapter IV of the LRA.[163] In the event of protected strikes, the employees participating in such a strike will be granted immunity from delictual claims for breach of contract as well as from dismissal by the employer.[164] Although an employee participating in a protected strike may be granted immunity against dismissal, said immunity does not extend to dismissal for misconduct during the strike or for reasons related to the employer's operational requirements.[165] Sections 64 as well as 65 of the LRA are relevant here. Section 64(1) of the LRA outlines the procedural requirements of a strike and provides that:[166]

> "(1) Every employee has the right to strike and every employer has recourse to lock out if-
>
> (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-
>
> (i) a certificate stating that the dispute remains unresolved has been issued; or
>
> (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-
>
> (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer."

Section 65 of the LRA refers to the substantive limitations of the right.[167]

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163 Van Niekerk *et al* (2017) 450.

164 Van Niekerk *et al* (2017) 450. Myburgh (2004) *ILJ* 968.

165 Du Toit (2014) 487.

166 S 64(1) of the LRA, provides, *inter alia*, that:

"(1) Every employee has the right to strike and every employer has recourse to lock out if-

(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-

(i) a certificate stating that the dispute remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-

(b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer,".

167 Cheadle (2017) 105. S 65(1) of the LRA provides, *inter alia*, that:

"(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if-

(a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;

(b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;

(d) that person is engaged in-

Protected status will only be afforded to striking employees once all the preliminary requirements have been complied with.[168] All the associated immunities, such as contractual and delictual liability, will flow as a normal consequence of strikes that adhere to the requirements set out in sections 64 and 65 of the LRA.[169]

Therefore, employees embarking on a protected strike will not be held either delictually or contractually liable for their conduct.[170] Moreover, the employer will not be obliged to remunerate the striking employees for the duration of the strike,[171] nor will they be allowed to dismiss them.[172] Lastly, the employer will not be allowed to institute any civil proceedings against the employees for their participation in a protected strike.

3.3 Legal Consequences of Unprotected Strikes

Thus far, this chapter has had a brief look at strikes from a Constitutional perspective as well as where strikes comply with the provisions of the LRA. This has not been a contentious issue, seeing that protection will be afforded to strikes of this nature. Having done this, the question of the legal consequences of unprotected strikes becomes relevant, and this is what will form part of the focus of this theme.

Contrary to employees engaged in protected strikes, strikers who flout the provisions of the LRA will not enjoy the protection afforded by this Act.[173] Instead, they will be considered to be participating in an unprotected strike and will, by virtue thereof, be exposed to negative consequences.[174] Cohen and Le Roux advise that employers should not be legally paralyzed when confronted with strike action.[175] In fact, according to section 68(1) of the

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(i) an essential service; or
(ii) a maintenance service."

168 DuToit *et al* (2015) 344.

169 Cheadle (2017) 105.

170 S 67(2) of the LRA.

171 S 67(3) of the LRA.

172 S 67(4) of the LRA. It should be noted that s67(5) the Act does not prohibit the employer from lawfully dismissing the striking employees for reasons related to either misconduct on their part or for operational requirements of the job.

173 Du Toit (2014) 488.

174 Du Toit *et al* (2015) 358.

175 Cohen and Le Roux (2015) 145.

LRA,[176] the following two consequences may ensue, namely; the Labour Court may interdict the strike or may order the payment of just and equitable compensation for any loss attributable to the strike.[177] In extreme cases, the striking employees may be dismissed.[178] Compensation claims against trade unions will be dealt with in the following chapter. However, for purposes of this discussion, a brief analysis of interdicts is to follow.

4. Interdicts

At the core of this study is the question of awards of compensation against trade unions. However, before getting to that, a brief overview of injunctive relief will be discussed. Generally, interdicts are common-law remedies, the main aim of which is to protect the applicant from suffering irreparable damage cause by the respondent.[179] The 1956 LRA provided for injunctive relief, a remedy that is also found in the 1995 LRA.[180] The granting of interdicts falls within the exclusive jurisdiction of the Labour Court.[181] The main objective of granting an interdict is to restrain workers from participating in an unprotected strike.[182] In practice, interdicts are granted on an urgent basis, with the employer required to give the trade union at least 48 hours' notice.[183] One of main problems encountered by employers is the flouting of interdicts by striking employees,[184] which is usually accompanied by violence and destruction to property.[185]

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176 S 68(1) of the LRA provides, *inter alia*, that:
"(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-
(a) to grant an interdict or order to restrain-
(i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or
(ii) any person from participating in a lock-out or any conduct in contemplation or in furtherance of a lock-out;
(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct,"

177 Du Toit *et al* (2015) 358. S 67(5) of the LRA.

178 Cohen and Le Roux (2015) 146 submit that this should be the exception seeing that "the dismissal of striking workers is regarded as a serious discrimination in employment on the grounds of legitimate trade union activities".

179 O'Regan (1988) *ILJ* 959 author also argues that, within the context of a strike, employers will refer to the damage they suffer as a result of the cessation of production as a result of a strike.

180 O'Regan (1988) *ILJ* 965.

181 Cheadle (2017) 111. S 68(1) of the LRA.

182 *Ibid*.

183 *Ibid*.

184 Cheadle (2017) 112.

185 Myburgh (2013) *CLL* 2.

Where an application for an interdict has been lodged, it is submitted that the Labour Court has leaned towards granting them speedily.[186] In arriving at a decision as to whether or not to grant such an award, the Court is guided by a few factors.[187]

Although interdicts are generally granted as a result of participation in an unprotected strike, this remedy is not of fundamental importance to this study. Consequently, this remedy will not be discussed in much detail. Worth noting, however, is the ongoing debate pertaining to whether a protected strike can become unprotected.[188] In light of this, scholars have impressed upon the courts to consider whether a strike should lose its protected status when it is no longer functional to collective bargaining.[189] Cheadle poses a pertinent question when he ponders:

> "Given South Africa's troubled labour relations climate, can a strike that is characterised by serious violence still be regarded as a 'concerted refusal to work' within the meaning of section 213 of the LRA or section 23 of the Constitution?"[190]

Van Eck and Kujinga approach this issue from a different perspective.[191] According to them, the relevant question is whether the Labour Court has the authority to alter the legal status of a protected strike.[192] The authors then attempt to answer this question through a critical analysis of the case of the *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd*.[193] *In casu*, the union and employer failed to reach consensus over a list of demands in relation to terms and conditions of

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186 Cohen and Le Roux (2015) 155.

187 Cohen and Le Roux (2015) 155 the court will take into account the following factors:
(a) whether the employer has established a *prima facie* right to the relief sought;
(b) whether there will be irreparable harm to the applicant employer should the relief not be granted;
(c) whether the balance of convenience favours the grant of the relief sought; and
(d) whether the applicant employer has no other satisfactory remedy available to them.

188 This is important where the strike involves violence.

189 Cheadle (2017) 120.

190 *Idem* 121.

191 Van Eck and Kujinga (2017) *PER* 1.

192 Van Eck and Kujinga (2017) *PER* 2 authors submit that at the heart of the issue is the question of whether the labour court has the authority to declare a protected strike to be unprotected, this being on the basis of violent industrial action, or if this would negatively affect the process of orderly collective bargaining pursuant to the LRA.

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

employment.[194] Subsequent to this, the union issued a strike notice to the employer pursuant to the LRA. A protected strike later commenced.[195] The employer, however, successfully lodged an urgent interdict in relation to violent acts of the strike related to misconduct and political interference. The union, in its defence, denied any involvement in the purported violence or political interference, maintaining that the strike remained protected.[196] The question before the Court was whether it had the authority to declare a protected strike to be unprotected on the grounds of strike related violence. The Court held that it had the power to alter the protected status of a strike on the grounds of violence.[197]

In analysing the above decision, Van Eck and Kujinga refer to the divergent views of Rycroft and Fergus. The former is of the view that violence may warrant a strike losing its protected status,[198] whereas the latter is believes that granting the courts such authority would fly in the face of the constitutional right to strike and disturb the collective bargaining equilibrium.[199] Ultimately, Van Eck and Kujinga submit that the LRA, in its current form, does not empower the Labour Court to make such a finding.[200] Consequently, it is submitted that the remedies as they appear in the LRA should suffice.[201] It is the considered view of the author that legal certainty should remain a priority and that the courts should not exercise powers that are not conferred by legislation. Therefore, it is submitted that Fergus in correct in her analysis of the powers of the Labour Court.

5. Conclusion

194 Van Eck and Kujinga (2017) *PER* 7.

195 *Ibid*.

196 *Ibid*.

197 Van Eck and Kujinga (2017) *PER* 2 are doubtful as to whether this decision was legally sound.

198 Rycroft (2013) "What Can Be Done About Strike-Related Violence?" Paper delivered at the Labour Law Research Network (LLRN), Barcelona, 3-4 argues that functionality approach be used to determine whether or not a protected strike may lose it protected status. According to Rycroft, this test entails asking the question whether the misconduct was to the extent that the strike no longer promoted functional collective bargaining, and therefore not deserving of protection.

199 Van Eck and Kujinga (2017) *PER* 2. Fergus (2016) *ILJ* 1546, argues that the LRA does not expressly require strikes to be functional to collective bargaining. Moreover, the test proposed by Rycroft would amount to a limitation on the right to strike.

200 Van Eck and Kujinga (2017) *PER* 18.

201 *Ibid*. Cheadle (2017) 122 noted that the Labour Relations Amendment Bill, 2017 contained a proposal for the creation of a procedure prohibiting strikes which are dysfunctional.

The following conclusions can be drawn from this chapter. Firstly, the Constitution guarantees the right to strike, which is unrestricted.[202] Secondly, pursuant to the abovementioned recognition, the LRA was enacted to give effect to this right. Therefore, the LRA provides for procedural and substantive limitations to the right.[203] Fulfilling both requirements affords the strike protected status, thereby insulating the striking employees from any disciplinary action by the employer. However, this will persist insofar as the employees comply with the LRA.

The third finding that can be made here pertains to situations where a strike does not comply with the LRA, specifically, remedies the employer may invoke. These remedies include interdicts as well as claims for compensation. The courts may grant interdicts against the striking employees. Interlocutory relief, however, has not been without its complexities, with the courts granting this remedy in order to curb violent strikes. Be that as it may, it is clear that striking employees continue to disregard this order.[204] To this end, there have been arguments in favour of altering the protected status of strikes where violence occurs. It is submitted that this would not be in line with the LRA, as no empowering provision currently exists.

202 See discussion in Chapter 3, 3.1.
203 See discussion in Chapter 3, 3.2.
204 See discussion in Chapter 3, 4.

CHAPTER 4

CLAIMS AGAINST TRADE UNIONS

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1. Introduction

South Africa is known for its "perpetual strike season",[205] with strike violence also considered a South African pandemic.[206] In order to curb this, an employer may institute a claim against a trade union involved in an unprotected strike. In this regards, two liability regimes are available, one in terms of section 68(1)(b) of the LRA and another in terms of the common law. It should be noted, however, that these remedies will only be available where the strike does not enjoy the protection of the LRA. In terms of the common law, a civil claim remains one of the remedies that an employer may exercise against employees participating in an unprotected strike. To exercise this remedy, the employer must have suffered harm as a result of strike related violence.[207]

205 Myburgh (2013) *CLL* 2.
206 Myburgh (2018) *ILJ* 705.
207 *Ibid*.

It is common cause that the LRA, in addition granting interdicts,[208] provides for the awarding of just and equitable compensation for any loss attributable to the strike.[209] This remedy is not equivalent to common law claims for damages and the two should not be confused. This chapter will commence with an overall analysis of the common law remedy of delictual damages that may be exercised by the employer in the case of unprotected strikes. This will then be followed by the remedy of just and equitable compensation in terms of the LRA. Finally, this chapter will then briefly consider third party claims against unions as a result of violent riots and picketing in particular. This will include an analysis on vicarious liability within the context of strike law.

2. Common Law Damages

Striking workers and unions who participate in unprotected strikes are stripped of the immunity against delictual claims they are afforded by section 67(2) and (6) of the LRA.[210] The LRA does not condone harmful conduct of employees or unions during industrial action.[211] This may be dealt with in terms of the law of delict as well as criminal law.[212] This discussion will focus only on the delictual aspect. According to the law of delict, an employer who suffers loss as a result of an unprotected strike would have a common law claim against their striking employees or the union involved.[213]

Where damage arises from a delict, the wrongdoer is legally obliged to compensate the aggrieved party.[214] However, this can only succeed should the claimant prove all five requirements of a delict as they appear from the definition.[215] The five factors are conduct, wrongfulness, fault,[216] causation and harm or damage.[217] The law of delict distinguishes between delicts that result in patrimonial damage and those which cause injury to the

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208 As discussed in Chapter 3, 3.3 above.

209 S 68(1)(b) of the LRA.

210 Cheadle (2017) 119.

211 Tom (2014) *LLM Dissertation* 28.

212 *Ibid*.

213 *Ibid*.

214 Neethling and Potgieter (2014) 3.

215 No delictual liability will flow unless all five requirements are proved.

216 Cheadle (2017) 119 argues that the employer has to prove that the wrongdoer caused the loss intentionally, which should include the extent of the loss.

217 Neethling and Potgieter (2014) 4.

personality.[218] It is submitted that the relevant regime here would be that pertaining to patrimony, as it pertains directly to assets.

Damage is a fundamental aspect of delictual claims.[219] In fact, the compensatory nature of the law of delict suggests that there must be damage or loss for which the law would make compensation available.[220] The compensatory nature of the law of delict may take on various forms. However, what remains important is the compensation for damage, which is essentially the monetary equivalent of damage awarded to a person. The object, therefore, is to eliminate as fully as possible, the past as well as a future patrimonial damage.[221] Consequently, money is then intended as the equivalent of damage.[222] In general, the plaintiff is required to prove, on a balance of probabilities, that he suffered damage as well as the extent of the damage suffered.[223]

According to Le Roux, when looking at a delictual claim of this nature from a strike law perspective, it is evident that this would relate to the conduct of the striking employees.[224] He further advises that a claim for common law damages in terms of delict would not be extended to unions, as it is more suitable to hold individual employees liable instead.[225] However, the afore mentioned remedy against an individual striking employee will be complex as it is impossible for an individual employee to bear the costs for the damage caused by a group of striking employees.[226] Apart from this, the author submits that this remedy remains available for the aggrieved employer against the union.[227]

Tenza advises, however, that this remedy should be exercised pursuant to the principles governing vicarious liability.[228] He mentions that:

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218 *Ibid*.
219 Neethling and Potgieter (2014) 221.
220 *Ibid*.
221 *Ibid*.
222 *Ibid*.
223 *Idem* 250.
224 Le Roux (2013) *CLL* 12.
225 Le Roux (2013) *CLL* 12.
226 *Ibid*.
227 *Ibid*.
228 Tenza (2016) *LLD Thesis* 236.

> "If the conduct was committed by members of the union and the source of such conduct is a strike or picket, the union should be held liable as a result of the risk of harm the union creates when it calls a strike. If it is also proved that there is a close connection between what the members did and what they were supposed to do, the union could be held liable."[229]

In doing this, the interests of justice will be served. This is due to the fact that victims will be able to hold someone liable and be compensated.[230] The author underpins this score by reference to *Mondi Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union*,[231] where the Court held that it would be complex to attribute liability to the trade union. This being so, an aggrieved party would still need to prove vicarious liability of the trade union.[232] According to Tom, for the employer to be successful with such a claim, it must prove either that:

> "(i) the trade union members committed a delict against the employer for which it was vicariously liable, or
> (ii) the trade union itself committed a delict against the employer."[233]

It submitted that a common law claim for damages against the union will be successful if the employer can prove that a delict has been committed by the striking employees. This can be done by proving all five elements of a delict. In this regard, it is submitted that this type of claim may be burdensome, since a strike is a collective act.[234] Consequently, it is submitted that this may not be the best possible course of action. Tenza advises, however, that the doctrine of vicarious liability be expanded in order to cover unprotected strikes.[235] I am inclined to agree with this submission,[236] as it would give employers a more viable alternative, should they wish to claim for common law damages as opposed to compensation pursuant to the LRA.

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229 *Idem* 235.
230 Tenza (2016) *LLD Thesis* 236.
231 *Mondi Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union* (2005) 26 *ILJ* 1458 (LC).
232 Tenza (2016) *LLD Thesis* 236.
233 Tom (2014) *LLM Dissertation* 27.
234 Tenza (2016) *LLD Thesis* 236.
235 *Ibid*.
236 See discussion in Chapter 5,3.5.

3. Compensation in Terms of the LRA

3.1 Introduction

Before proceeding to claims based on section 68(1)(b) of the LRA, it should once again be noted that there remains a clear distinction between a claim for compensation as well as a claim for damages, and the two should not be confused, nor should they be used interchangeably.[237] The former is based upon the LRA whereas the latter on the common law principles of the law of delict.[238]

The Labour Court has exclusive jurisdiction to order just and equitable compensation for loss suffered as a result of an unprotected strike.[239] This remedy is not limited to any category of persons.[240] Labour Court has heard quite a few cases in this regard, as will be seen below.[241] An important aspect of compensation claims is that the amount granted by the Court must be just and equitable.[242]

3.2 Factors that the Court Must Consider

The LRA lists several factors that the court must consider when deciding on compensation claims.[243] These factors include:

a) whether attempts were made to comply with the provisions of the LRA;
b) whether the strike was premeditated;
c) whether the strike was in response to unjustified conduct by another party to the dispute;
d) whether there was compliance with an order of the LC interdicting the employees from striking;

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237 Le Roux (2013) *CLL* 13.

238 Le Roux (2013) *CLL* 13 submits that there have been a few critical questions that have been asked regarding the two remedies, and of these, two are most pertinent. Turning to the first question, there is concern as to whether the two remedies amount to the same thing. Lastly, there is a concern as to whether, the LRA has, by implication, done away with a claim for damages. To this end, different cases tend to arrive at different conclusions. However, in answering this, he submits that the two remedies are not mutually exclusive.

239 Cheadle (2017) 118.

240 *Ibid*. Rycroft (2015) 112 submits that this remedy may be extended to the union, its members or even both.

241 Le Roux (2013) *CLL* 11.

242 Cheadle (2017) 118.

243 S 68(1)(b)(i)-(iv) of the LRA.

e) the interests of orderly collective bargaining;
f) the duration of the strike; and
g) the financial position of the employer, trade union or employees respectively.[244]

According to the ILO, awarding compensation claims may threaten the viability of the union.[245] This being so, the increasing rate of unprotected strikes and the additional ineffectiveness of interim orders may incline employers to exercise the remedy in this provision.[246]

Rustenburg Platinum Mines was one of the first cases in which the Labour Court had to apply this remedy.[247] In this case the employer instituted a claim for compensation against the union. This claim was valued at R15 million, which was later reduced to R100 000.[248] The respondent trade union had embarked on industrial action, with the employer subsequently obtaining an interdict against the employees who had been on strike.[249]

The Court confirmed that there were a number of factors that had to be complied with before an award for compensation could be awarded,[250] this being inclusive of the amount to be awarded.[251] However, the following three factors are worth noting. Firstly, it must be shown that the strike does not comply with provisions of the LRA. Secondly, the applicant seeking compensation must show that they suffered loss as a result of the strike. Lastly; it must be shown that the respondent against whom compensation is sought, actually participated in the strike or committed acts in contemplation or in furtherance thereof.[252] The Court was satisfied that all the above requirements had been met.[253]

The Court opined that the legislature had given it a very wide discretion, this being subject to only one proviso, that the result achieved must be "just and equitable".[254] In essence, the

244 *Ibid*.
245 *Ibid*.
246 Cohen and Le Roux (2015) 155.
247 Le Roux (2013) *CLL* 11.
248 *Rustenburg Platinum Mines*, at para 85.
249 *Rustenburg Platinum Mines*, at para 86.
250 See factors listed in Chapter 4, 2.1, (a)-(g) above.
251 *Rustenburg Platinum Mines*, at para 89.
252 *Ibid*.
253 *Rustenburg Platinum Mines*, at para 91.
254 *Ibid*.

aim of this remedy is to compensate employers for loss that they have actually suffered and should not be misconstrued as a way of penalising the party against whom the remedy is sought.[255] Ultimately, the Court found that a claim for compensation should succeed and awarded the applicant employer an amount of R100 000.[256] This amount, however, was to be paid in monthly instalments of R5 000.[257]

In *Mangaung Local Municipality v SA Municipal Workers Union*,[258] members of the respondent union, whom had been employed in the applicant's electricity department, embarked on an unprotected strike. In doing so, they blocked the department's entrance, thereby preventing employees from rendering services to customers.[259] Resultantly, the applicant employer claimed compensation in terms of section 68(1)(b) of the LRA, this to the tune of R272 000. The claim was for losses that it averred resulted from the strike as well as the conduct of the striking employees.[260]

The Court, upon interpreting section 68(1)(b) of the LRA, held that its powers to award compensation were limited to situations where the loss was attributable to an unprotected strike. Furthermore, the Court's powers did not extend to losses attributable to other things, such as the conduct of the strikers.[261] The Court did not, however, follow the reasoning adopted in the *Rustenburg Platinum Mines* case above.[262] In trying to establish who would be held liable for the compensation claim, the Court held that the LRA did not specify against whom such claim may be instituted, however; a reading of the text would suggest an interpretation in favour of holding either a trade union or its members, or even both liable.[263]

The pertinent question before the Court was whether a trade union could be held liable not because it had called for or instigated the strike, but because it had failed to take any steps

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255 *Ibid*.

256 *Rustenburg Platinum Mines*, at para 94.

257 *Ibid*.

258 *Mangaung Local Municipality v SA Municipal Workers Union (SAMWU)* [2003] 3 BLLR 268 (LC) (hereafter "*Mangaung Local Municipality*").

259 *Mangaung Local Municipality*.

260 *Ibid*. Le Roux (2013) *CLL* 16. The court was only prepared to consider compensation for loss as a result of the strike itself and not for loss as a consequence of blocking the entrance.

261 *Mangaung Local Municipality*, at para 26.

262 *Mangaung Local Municipality*, at para 31.

263 *Mangaung Local Municipality*, at para 43. See discussion in Chapter 4, 3.1.

to bring the strike to an end.[264] What was clear to the Court was that the union had received information of the strike, yet did nothing to prevent it from occurring.[265] As a result of this, the Court found that where members of a union embark on an unprotected strike and the union becomes aware of this fact and is requested to intervene, but fails to do so without just cause, then the union is liable to compensate an employer who suffers loss as a result of such strike.[266] Accordingly, the respondent union was held liable to compensate the applicant for losses suffered, which amounted to R25 000.[267]

The above illustrates that the Labour Court will award compensation against unions for unprotected strikes where the union did not call the strike, but did not take positive steps to stop the strike or conduct in furtherance thereof.[268] It is submitted that the Court came to a correct finding in this regard, since this ensures that employees participating in an unprotected strike do not escape the negative consequences associated with this. More importantly, this guarantees and strengthens the right of recourse envisioned by the legislature.

In the recent case of *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & Others*, [269] members of the respondent union embarked on a protected strike against their employer, but the strike turned violent. Subsequent to this, the Labour Court granted the employer an order interdicting the unlawful and violent conduct by the respondent union members at the employer's premises. The Court, per Snyman AJ, held that the employees had violated the Court order, and were held in contempt.[270] The Court further held that the union had not complied with its obligations in terms of the order, seeing that it had merely informed the striking employees of the order and did nothing further. Ultimately, the Court found that both the union and the striking employees had acted wilfully and in bad faith in breach of the interdict. A fine of R1 million was imposed on

264 *Ibid*.

265 *Mangaung Local Municipality*, at para 45.

266 *Mangaung Local Municipality*, at para 47. Le Roux (2013) *CLL* 16.

267 Rycroft (2015) 113 emphasised the fact that the courts do not tolerate unprotected strikes.

268 Tenza (2016) *LLD Thesis* 118.

269 *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & Others* (2018) 39 *ILJ* 609 (LC).

270 *Ibid*.

the union, however, this was suspended for three years, and a fine of R1 000 was imposed on each employee to be deducted directly from his or her wages.[271]

This finding is similar to the *Algoa* decision insofar as it entails that both the union and striking employees were liable for a certain amount. This is meant to deter unions and their members from embarking on unprotected strikes as well as to curb them from disobeying court orders. It is submitted that such an order can help improve collective bargaining amongst the parties, instead of the employees flouting provisions of the LRA when turning to strike.

3.3 *Quantum* to be Awarded

One of the main factors that the Labour Court has had to grapple with is that of the size of the award. This entails the amount that is to be awarded against the trade union. To this end, the Court has had to take cognisance of the financial position of the trade union.[272]

In *Algoa*, members of the respondent union went on strike in order to protest the disciplinary measures against other members of the union.[273] The strike was interdicted by the employer on the basis that it was unprotected.[274] Despite being informed of this, the employees continued striking. Subsequently, the employer instituted a claim for compensation for R1,4 million,[275] which represented the full amount lost by the employer after the strike was interdicted.[276] Consequently, the union and the strikers were held jointly and severally liable on the compensation amount.[277] However, the union and employees had to pay this amount in monthly instalments of R5 280 and R214.50, respectively.[278] In arriving at his decision, Lagrange J made the following observation:

> "In my mind, an important question that has to be considered is whether the effect of a particular award of compensation against a union is likely to seriously compromise its ability to function, bearing in mind that it will usually have responsibilities to members in other workplaces, whose right to effective representation by**,** and

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271 *Ibid*.
272 S 68(1)(b)(iv) of the LRA.
273 *Algoa*, at para 1.
274 *Ibid*.
275 *Algoa*, at para 1.
276 Cheadle (2017) 118.
277 *Algoa*, at para 1.
278 *Idem* 2294.

participation in the affairs of, a functioning union ought not to be seriously compromised by the unlawful conduct of a section of the membership or of a local organiser."[279]

Despite posing this question, Lagrange J added that unions should not expect to be exempted from compensation claims as a result of unlawful behaviour of its members.[280] This view resonates with the author as it appears to be a balancing act that the Court should follow. More than this, it ensures that the interests of both parties are equally protected.

In *Professional Transport & Allied Workers Union on behalf of Khoza v New Kleinfontein Gold Mine (Pty) Ltd*,[281] the Court had to consider a counterclaim for just and equitable compensation against the union brought in terms of section 68(1)(b) of the LRA.[282] Although the claim for compensation did not succeed, the Court made an important observation with regards to determining the compensation amount to be awarded. The Court noted the importance of the financial position of the union.[283]

In this regard, the Court opined that unions could not escape financial liability simply because it would be financially onerous.[284] Ultimately, although a trade unions financial position is a factor that is to be considered by the Court. This will not be used in a manner that would relieve a union from its liability.[285]

Le Roux is of the view that one of the areas in which the Labour Court may take a more activist approach is in the sphere of unprotected strikes. More particularly, when considering claims for compensation in terms of section 68(1)(b) of the LRA.[286] In this regard, Myburgh argues that the Court should award significant amounts.[287] I am in support of this proposition by the two scholars. This is said bearing in mind the high rate of

279 *Algoa*, at para 10.
280 *Ibid*.
281 *Professional Transport & Allied Workers Union on behalf of Khoza v New Kleinfontein Gold Mine (Pty) Ltd* (2016) 37 *ILJ* 1728 (LC) (hereafter "*Kleinfontein Gold Mine*").
282 *Kleinfontein Gold Mine*, at para 1.
283 *Kleinfontein Gold Mine*, at para 79.
284 *Kleinfontein Gold Mine*, at para 79.
285 *Ibid*.
286 Le Roux (2013) *CLL* 11.
287 Le Roux (2013) *CLL* 11. Myburgh (2013) *CLL* 2.

unprotected strikes. More than this, unions, together with their striking employees, continue to disregard interdicts against unprotected strikes.[288] It is therefore within this context that an argument in favour of increased compensation awards is made. While the discussion is mainly focused around compensation claims in terms of section 68(1)(b) of the LRA, it would be prudent to put the LRA aside for a moment and briefly analyse the right to picket and riot damage, as well as how the courts have dealt with some of these cases.

4. Strikes and Violent Pickets

The right to picket is intricately linked to the right to strike and vests in the striking employees as well as the union members and supporters of the union.[289] Therefore, this right may be exercised by members of a trade union in support of a protected strike.[290] This right is regulated by section 69 of the LRA,[291] and is constitutionally protected by the right to freedom of expression,[292] as well as the right to freedom of assembly.[293] In addition to the above, a Picketing Code has been formulated to ensure regulation of the right.[294] The Code gives guidance to employers, employees and members of the public on acceptable picketing behaviour.[295]

Picketers are required to conduct themselves in a peaceful, lawful and unarmed manner.[296] Some acceptable picketing behaviour includes employees standing outside the employer's gates in a public area and holding, displaying or waving placards to communicate with the employer and the public.[297] However, these communications should not amount to a criminal offence.[298] Workers found to be picketing unlawfully can be dismissed for misconduct.[299] Furthermore, these workers may be held civilly liable for the damages incurred by a third party in specific circumstances.[300] The Code of Good Practice on

288 Myburgh (2013) *CLL* 2.

289 Cohen and Le Roux (2015) 148 there are a few principles from picketing that continue to affect the Labour Court's decision in the application of s68(1)(b) of the LRA.

290 Van Niekerk *et al* (2017) 465.

291 *Ibid*.

292 S 17 of the Constitution.

293 S 18 of the Constitution. See also Van Niekerk *et al* (2017) 465.

294 Cohen and Le Roux (2015) 148. See also s1 of GN 765 in GG 18887, dated 15 May 1998.

295 Van Niekerk *et al* (2017) 465.

296 Cohen and Le Roux (2015) 149.

297 Van Niekerk *et al* (2017) 466.

298 *Ibid*.

299 Cohen and Le Roux (2015) 149.

300 Cohen and Le Roux (2015) 149 the preference however, is to hold the union liable.

Picketing envisages that this be done in a peaceful manner and free from violence. However, there have been instances where picketing has turned violent, thereby requiring the intervention of the courts.

The above exposition refers to pickets that are convened and regulated by the LRA. It is worth mentioning that protected pickets are immune from the application of the ordinary laws regulating the right of assembly.[301] This includes, *inter alia*, the common law and the Regulation of Gatherings Act (RGA).[302] However, pickets that do not comply with the LRA may be subject to the RGA, provided that they fall within the ambit of the Act. This being so, it must borne in mind that the RGA was enacted to regulate gatherings and demonstrations in public places.[303] Where a gathering or demonstration falling within the prescripts of the RGA results in damage, the convenor, as well as the participants, may be held jointly and severally liable for the riot damage.[304] It is submitted that the RGA would apply to the exclusion of the LRA.

What is important here is how the courts have dealt with cases of this nature, namely; violent pickets according to the LRA, as well as violent demonstrations in terms of the RGA. Below will be a discussion of the two liability regimes as determined by the courts.

4.1 Picketing According to the Courts

The courts have had to deal with violent pickets. In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others*,[305] the respondent union was engaged in a protected strike called in support of a wage dispute between the applicant and respondent union.[306] The parties entered into a picketing agreement detailing how the individual respondents would exercise the right to picket in support of the strike.[307] The picket was not peaceful and the individual respondents breached the picketing agreement through committing various criminal acts. These acts included, amongst other things,

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

302 *Ibid*. Act 205 of 1993 (RGA).

303 Preamble to the RGA.

304 S 11(1)(a)-(b) of the RGA.

305 *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others* (2012) 33 *ILJ* 998 (LC) (hereafter "*Tsogo Sun*").

306 *Tsogo Sun*, at para 4.

307 *Ibid*.

burning tyres and emptying rubbish bins onto the road; throwing bricks at police officers; damaging vehicles; as well as dragging passengers from vehicles and assaulting them.[308]

The applicant employer tried to resolve the matter by referring it to the CCMA. This was done in an attempt to get the individual respondents to comply with the picketing agreement.[309] However, the CCMA was unable to resolve the dispute.[310] The Court held that the right to collective bargaining was not authorization to engage in collective brutality.[311] Furthermore, the Court had the following to say regarding the violent conduct of the individual respondents:

> "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."[312]

Ultimately, the Labour Court confirmed that it would always intervene to protect the right to strike and to peaceful picketing, as this was a mandate conferred by the Constitution and the LRA.[313] This finding supports the argument previously advanced, namely; that the courts must adopt a stricter approach when addressing violent strikes. It is submitted that this is one of the lessons that can be extracted and used to strengthen claims for compensation in terms of the LRA.

In *SA Transport & Allied Workers Union (SATAWU) & another v Garvas & Others*,[314] the applicant union organised a protest march in Cape Town, which amounted to a gathering pursuant to the RGA.[315] The protest was chaotic and caused extensive damage to vehicles and shops along the route, with 50 people allegedly losing their lives.[316] As a result of this,

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308 *Ibid*.
309 *Tsogo Sun*, at para 5.
310 *Ibid*.
311 *Tsogo Sun*, at para 11.
312 *Tsogo Sun*, at para 13.
313 *Tsogo Sun*, at para 13.
314 *SA Transport & Allied Workers Union (SATAWU) & another v Garvas & Others* (2012) 33 *ILJ* 1593 (CC) (hereafter "*Garvas*").
315 *Ibid*.
316 *Garvas*, at para 10.

the victims instituted a claim for damages in the High Court against the union in terms of section 11 of the RGA, alternatively relying on the common claim for damages.[317] In light of this, the High Court was called upon to interpret the constitutionality of "and was reasonably foreseeable".[318] What was imperative here were provisions of sections 11(1) and (2) of the RGA. In terms of these provisions, every organisation under whose auspices a gathering was held, would be jointly and severally liable for damage caused by the riot, save for instances where certain elements were proven by the organisation.[319]

In the Court *a quo*, the union argued that that section 11(2) was internally self-obstructive and incoherent, thereby also being inconsistent with section 17 of the Constitution.[320] These arguments were rejected by the Court. This caused the union to appeal the decision to the Supreme Court of Appeal (SCA).[321] The SCA rejected the union's arguments, holding that the challenged section was meant to ensure proper attribution of liability.[322] Moreover, the Court held that the entire scheme of the RGA was to ensure that persons or organisations that organised assemblies that degenerated into riots, would bear liability thereof.[323]

Ultimately, the union appealed the decision of the SCA to the Constitutional Court, arguing that section 11(2) of the RGA was contradictory and irrational.[324] In addition to this, the union argued that this provision limited the right to freedom of assembly as contemplated within section 17 of the Constitution, with this limitation being unjustifiable.[325] The Court, however, held that this provision was capable of rational interpretation. Furthermore, the Court opined that the legislature had intended that organisations should bear the effects of negative consequences incurred as a result of their decision to organise the gathering.[326] However, an organisation will be exempt from liability only if the conduct that caused

317 *Garvas*, at para 14. See also Wallis (2012) *ILJ* 2257.
318 *Garvas*, at para 19.
319 *Ibid*. The organisation would need to prove all 3 elements in S 11(2) to be exempt from liability.
320 *Garvas*, at para 20.
321 *Ibid*.
322 *Garvas*, at para 21.
323 *Garvas*, at para 22.
324 *Garvas*, at para 24.
325 *Ibid*.
326 *Garvas*, at para 39.

damage was not reasonably foreseeable,[327] and if it took steps within its powers to prevent the conduct.[328]

Turning to the argument of limitation of section 17 of the Constitution, the Court held that indeed this limitation existed.[329] This notwithstanding, the Court found that the purpose of this limitation was important as it sought to protect members of society. This score was underpinned when the Court observed, per Mogoeng CJ, that:

> "When a gathering imperils the physical integrity, the lives and the sources of livelihood of the vulnerable, liability for damages arising therefrom must be borne by the organisations that are responsible for setting in motion the events which gave rise to the suffered loss. And that is what this important limitation is designed to achieve."[330]

Consequently, it was found that the effect of section 11 was to impute liability to organisers as they ought to be the first in line of fire when riot damage occurs.[331] As a result of this, the Court held that an innocent victim or third party may hold the organisers liable for compensation as a result of damage suffered during the riot.[332] Strict liability is used to attribute conduct.[333] The effect of this judgment is that a trade union can be held liable for losses and damages caused by its members during a march or a public gathering. This, however, must be pursuant to incidents occurring within the purview of formal marches or gatherings organised in terms of the RGA.[334]

In sum, the RGA presents a different liability regime for holding wrongdoers accountable for damage causing conduct. This is done by using the principles applicable to strict liability, a remedy not provided for in the LRA. It is the view of the author that the legislature should

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327 *Garvas*, at para 41 court held that the organisation must be aware of the possibility of damage and cater for it from as early as the planning and during the gathering.

328 *Garvas*, at para 41.

329 *Garvas*, at para 67.

330 *Ibid*.

331 *Garvas*, at para 84.

332 *Ibid*.

333 Landman (2011) *ILJ* 838 says this is strict because all that is required for the claimant to succeed with the claim is them proving all the elements in S 11 of the RGA.

334 *Garvas*, at para 84.

consider extracting some of the legal remedies contained in the RGA to try and curb violent and unprotected strikes.

4.2 A Response from Government and Parliament

In November 2014 the National Economic Development and Labour Council (NEDLAC) convened a labour indaba. One of the main objectives of the indaba was to ensure that the social partners deliberated on, *inter alia*, violent and protracted strikes.[335] Having recognized that the right to strike was constitutionally entrenched, the social partners agreed that violent strikes affected labour stability and economic growth.[336] In light of the afore mentioned, the different constituencies resolved that they would, amongst other things; uphold the constitutional right of workers to strike, explore all other possible options before embarking on strike action and find ways of ensuring that industrial action was free from violence.[337]

In addition to the Ekurhuleni declaration, parliament has since proposed a number of amendments to the LRA.[338] These amendments are aimed at preventing lengthy and violent strikes.[339] In this regard, the parties agreed to the inclusion of advisory arbitration.[340] However, of particular relevance here are the amendments pertaining to picketing rules as well as strike balloting. With regards to the former, it is submitted that picketing rules are currently established by collective agreements, which are binding in respect of a particular strike.[341] The proposed amendments envisage that picketing occur through a collective agreement with general application or through determination in terms of picketing rules that have been prescribed.[342] This would effectively mean that the rules would apply to all potential future strikes.[343] Moreover, the amendments provide that no picketing may take

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335 Ekurhuleni Declaration "Promoting Employment and Strengthening Social Dialogue: Towards Transformation of the South African Labour Relations Environment" November 2014, 1.

336 Ekurhuleni Declaration "Promoting Employment and Strengthening Social Dialogue: Towards Transformation of the South African Labour Relations Environment" November 2014, 2.

337 *Idem*, *3*.

338 Labour Relations Amendment Bill, 2017.

339 Le Roux (2017) *CLL* 27.

340 *Idem* 28.

341 Le Roux (2017) *CLL* 31.

342 S 69(6A), Labour Relations Amendment Bill, 2017

343 Le Roux (2017) *CLL* 31 the picketing rules are to be formulated during the conciliation process in terms of section 64 of the LRA. Should this not be reached, the conciliator may, on their own accord, decide on prescribing the picketing rules.

place unless there has been consensus on the rules in terms of a collective agreement or as determined by a conciliator.[344]

It is submitted that these proposed amendments are aimed at curbing lengthy and violent strikes. One of the ways in which this is sought to be achieved is by the introduction of the remedies in section 68 of the LRA. Therefore, where the picketing rules have been breached, the remedies in section 68 will be applicable. How effective this will be remains to be seen. Nonetheless, this is a positive proposal as it ensures that picketing rules are established at an early stage of dispute resolution.

5. Conclusion

The courts continue to play a crucial role in the interpretation of the LRA. Central to this study has been the question of claims for compensation against trade unions during violent strikes as well as damages claims pursuant to the common law. The following findings are made.

Firstly, it is submitted that the Labour Court will award compensation claims against the trade unions where their employees embark on unprotected strikes to the detriment of the employer, as well as where the employee trade union does nothing to curb an unprotected strike where there has been just cause for intervention.[345] In underscoring this, the courts have demonstrated that this remedy is not exercised as a punitive measure, but rather as a means of ensuring that the employer recovers their economic loss incurred as occasioned by the unprotected strike itself. Le Roux and Myburgh argue that the Labour Court should consider ordering the payment of more substantial sums of compensation, this being done to deter employees from embarking on unprotected strikes.[346] I would support this view,[347] seeing that we already have mechanisms in place to ensure the effective exercise of the right to strike. Consequently, I am of the view that this will not curtail the employee's ability to exercise the right to strike.

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344 *Ibid*. As a result of this, remedies in section 68 of the LRA may be exercised where a picketing agreement has been breached.

345 See discussion in Chapter 4, 3.2.

346 Le Roux (2013) *CLL* 18.

347 Although I remain mindful of the ILO's view that unions should not be subjected to exorbitant orders of compensation.

Secondly, it is accepted that a trade union may be held vicariously liable for harmful actions of its employees who embark on an unprotected strike.[348] However, this is a separate remedy and is exercised pursuant to the law of delict, and not the LRA, as has be observed from the *Garvas* case. In sum, should an employer decide to exercise this remedy, they would be excluded from claiming compensation in terms of the section 68(1)(b) of the LRA.

This chapter considered the domestic legal framework of strikes in general, and compensation claims against trade unions in particular, this being pursuant to both the LRA as well as RGA. The next chapter will consider the legal regime applicable in foreign jurisdictions and some of the lessons that we may import into our domestic legislative framework.

[348] See discussion in Chapter 4, 4.1.

CHAPTER 5

COMPARATIVE ANALYSIS

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1. Introduction

It is common course that the Constitution grants the courts the discretion for the consideration of comparable foreign law.[349] This is derived from section 39(1), which provides that:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law."[350]

[349] Neethling and Potgieter (2014) 17.

[350] S 39(1) of the Constitution.

Davenish advises, however, that foreign law must be interpreted and applied with due regard for the South African context and the values enshrined in the Constitution.[351] It is further understood that foreign law has been extensively researched as well as applied by the courts since the post-apartheid constitutional democracy.[352] In light of this, it is therefore vital for this study to consider comparable foreign law, in particular, the right to strike in foreign jurisdictions. The two jurisdictions that will be considered here are the United Kingdom (UK) and Canada.

This will entail looking at the overarching legislative framework in general and the right to strike in particular. Particular attention will be drawn to the trade union liability in these two jurisdictions and how they compare to the domestic legal regime. This chapter will then conclude by extracting certain lessons that may be learnt from the two countries.

2. The United Kingdom (UK)

2.1 Introduction

English law does not contain an express right to strike. Instead, it provides for trade union immunities against claims based on one or more of the economic torts, provided certain requirements are met.[353] Consequently, a trade union will only escape liability where it complies with certain statutory requirements, as will be seen below. South African legislation does, however, provide for an express right to strike. In addition to this, no delictual claim may arise from a protected strike. It is submitted that this position resembles, to a certain extent; the immunities that can be extended to the unions pursuant to English law. In this regard, a study of the right to strike in the UK is justified.

2.2 Historical Background

Industrial relations form an important and controversial area of English labour law.[354] Although a strike can be described as being detrimental to an employer's business and having significant effects on other firms and the public, it continues to play a pivotal role in the collective bargaining process. According to Davies, two different views emerge here,

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351 Davenish (2006) *THRHR* 239.

352 *Idem* 244.

353 Deakin (2012) 1089.

354 Davies and Freedland (1983) 12 posit that the evolution of an orderly and well-functioning system of labour relations remains one of the great achievements of British civilization.

the one seeing industrial action as a fundamental human right,[355] whereas the other considers it to be a significant labour right.[356]

The traditional position in English labour law is that there exists no express right to strike.[357] As a result of this, there is no specific legal regime dedicated to legal rules of employment *per se*.[358] As such, much dependence has been placed on the common law as developed by the courts. This usually relates to the law of torts (delict) and a system of injunctions (interdicts).[359] However, more elaborate legislation, in the form of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA),[360] was enacted to regulate industrial action.[361] Achmat compares and contrasts this to the situation within the South African domestic law, where there is an express right to strike in the Constitution, which is given effect through the LRA.[362]

The absence of an express constitutional right to strike has not gone without qualification, with Davies advancing two reasons for this. First, there is some recognition of the right to strike within the context of European labour law,[363] in particular, the European Convention on Human Rights, where Article 11 provides for the interpretation of the protection of the freedom to strike.[364] Second, the European Court of Justice (ECJ) has recognized the existence of a right to strike, albeit in Community Law. In fact, in the *Viking* case,[365] the Court confirmed this position when it held that a union had the right to strike.[366] However,

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355 Davies (2009) 219 the right to strike is then linked to civil and political rights.

356 *Idem* 220 here the right to strike is viewed as an essential component of collective bargaining.

357 Davies (2009) 228.

358 Prassl (2014) 552.

359 *Ibid*.

360 Trade Union and Labour Relations (Consolidation) Act 1992, (TULRCA).

361 Prassl (2014) 553.

362 Achmat (2015) *LLM Dissertation* 46 this right must comply with the provisions of the LRA in order to be constitutionally exercised.

363 Davies (2009) 228.

364 *Ibid*.

365 *International Transport Workers Federation v Viking Line ABP* (2007) C-438/05 (hereinafter referred to as the "*Viking*" Case).

366 *Viking*, at para 43, Court observed: "In that regard, it must be recalled that the right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the

the caveat was that the right should constitute a proportional limitation of the employer's right to free movement.[367]

The above notwithstanding, English law still does not provide for an explicit right to strike.[368] It is submitted that those who organise and participate in a strike will be found guilty of having committed one or more of the economic torts. This may be as a consequence of persuading an employee to participate in a strike, which would result in the organiser committing a tort of inducing breach of contract, and, in addition to this, the tort of interfering with business or trade by unlawful means.[369] Accordingly, it is illegal to organise a strike. All the same, strikes can still take place, and will be "legal",[370] provided they comply with substantive and procedural requirements.[371]

2.3 Substantive Requirements

Section 219 of the TULRCA provides, *inter alia*, that:

> "(1) An act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only—
>
> (a) that it induces another person to break a contract or interferes or induces another person to interfere with its performance, or
>
> (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance."[372]

Bearing reference to the above, immunities will only be extended to acts that are "done in contemplation or furtherance of a trade dispute."[373] A question that arises from the aforementioned pertains to the definition of a trade dispute. According to section 244 of the

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Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1)."

367 Davies (2009) 228.

368 Davies (2009) 228.

369 *Idem* 229 employees will be considered to be in breach of contract if they strike.

370 Davies (2009) 229 statutory law offers trade unions and strike organisers possible immunity against liability in tort if certain conditions are fulfilled.

371 Davies (2009) 234.

372 S 219(1)(a)-(b) of the TULRCA, 1992.

373 *Idem* 230. Prassl (2014) 559 the aim of this qualification is to outlaw industrial action with political objective.

TULRCA a “trade dispute” means a dispute between workers and their employer which relates wholly or mainly to one or more of the following:[374]

(a) Terms and conditions of employment, or the physical conditions in which any workers are required to work;
(b) Engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
(c) Allocation of work or the duties of employment between workers or groups of workers;
(d) Matters of discipline;
(e) A worker’s membership or non-membership of a trade union;
(f) Facilities for officials of trade unions; and
(g) Machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers’ associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

Consequently, the above factors represent areas that are most likely to form the subject of disagreement or contestation between the unions and their employer.[375] What is imperative is that this forms part of the substantive requirements that have to be complied with.

2.4 Procedural Requirements

Having complied with substantive requirements alone will not be sufficient for a union to be granted immunity from tortious claims. An additional requirement lies in the fulfilment of the procedural aspects. Prassl advises that unions will enjoy immunity against certain tortious liability only if certain factors are met.[376] In fact, a trade union must have complied with a series of formal requirements in respect of balloting as well as certain notices.[377] For purposes of this discussion, the main focus will be strike balloting.

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374 Davies (2009) 230. S 244(1) the of the TULRCA 1992. Achmat (2015) *LLM Dissertation* 48.

375 Davies (2009) 230 protection of the right to strike will be on the basis that it contributes to the process of collective bargaining.

376 Prassl (2014) 557.

377 *Ibid*.

Section 233 of the TULRCA provides that a strike can only be convened by a trade union after a full strike ballot has been conducted.[378] The ballot must be conducted by a "specified person" under "specified conditions."[379] Furthermore, a majority of members must be in support of the proposed strike.[380] Consequently, all potential participants of a strike must have been balloted by the trade union.[381]

2.5 Legal Consequences of Unprotected Strikes

Notwithstanding the lack of the existence of a right to strike, a strike may be considered as being "lawful."[382] Deakin and Morris submit that "those who organise industrial action are highly likely to commit at least one of the economic torts."[383] Liability of the trade union will flow from section 20(1) of the TULRCA, in terms of which proceedings are instituted on the grounds that an act "induces another person to break a contract or interferes or induces another person to interfere with its performance."[384] As an alternative to the above, it must be shown that an act "consists in threatening that a contract (whether one to which the union is a party or not) will be broken or its performance interfered with or that the union will induce another person to break a contract or interfere with its performance."[385]

Once the above have been proven, the two primary remedies a party aggrieved by the unlawful industrial action may seek from the courts are; an injunction or a claim for

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378 Prassl (2014) 555.

379 S 233 of the TULRCA, 1992 states the following regarding balloting:
"(1) Industrial action shall not be regarded as having the support of a ballot unless it is called by a specified person and the conditions specified below are satisfied.
(2) A "specified person" means a person specified or of a description specified in the voting paper for the ballot in accordance with S 229(3).
(3) The conditions are that—
(a) there must have been no call by the trade union to take part or continue to take part in industrial action to which the ballot relates, or any authorisation or endorsement by the union of any such industrial action, before the date of the ballot;
(b) there must be a call for industrial action by a specified person, and industrial action to which it relates must begin, before the ballot ceases to be effective in accordance with S 234.
(4) For the purposes of this S a call shall be taken to have been made by a trade union if it was authorised or endorsed by the union; and the provisions of S 20(2) to (4) apply for the purpose of determining whether a call, or industrial action, is to be taken to have been so authorised or endorsed."

380 Prassl (2014) 555.

381 Prassl (2014) 555.

382 Prassl (2014) 560.

383 *Ibid*.

384 Prassl (2014) 561. S 20(1) of the TULRCA, 1992.

385 S 20(1) of the TULRCA, 1992.

damages.[386] The two remedies are similar to the South African position, where an aggrieved party may approach the courts for an interdict in terms of the LRA, or alternatively claim damages in terms of the common law.[387] With regards to damages, this will be awarded according to the law of torts (delict).[388] According to English law, the main aim of the award of damages is to place the claimant in the position they would have been in had the tort not been committed.[389] Should the claim succeed, the amount awarded will be capped according to the size of the union.[390]

Turning to the injunction, it is submitted that this is the most sought after remedy.[391] The main aim of this remedy is to prevent industrial action from starting or continuing.[392] It remains a remedy issued under the discretionary power of the High Court and entails ordering the defendant to desist from specific conduct.[393] This remedy was enumerated in the *American Cyanamid* case. Here, the Court held that this remedy hinged on two critical issues.[394] First, it is imperative to consider whether there is a serious triable issue at stake in the proceedings. Lastly, there is a need to establish where the balance of convenience lies.[395]

3. Canada

3.1 Introduction

The comparison between Canada and South Africa is warranted, seeing that there exists certain similarities between their respective constitutions, with the domestic courts having depended on Canadian jurisprudence in the process of the formulation the current constitutional dispensation.[396] As is the case domestically, Canada has three spheres of

386 Deakin (2012) 1089.
387 Achmat (2015*) LLM Dissertation* 50.
388 Deakin (2012) 1090.
389 *Ibid*.
390 *Ibid*. Criticism against this remedy is that it remains a powerful weapon for the employer, and that the hearing may take place long after the dispute has been settled.
391 Deakin (2012) 1090.
392 *Ibid*.
393 *Ibid*.
394 Prassl (2014) 562.
395 *Ibid*. The question to be asked is whether damages would represent the most appropriate remedy for the claimant's loss.
396 Tenza (2016) *LLD Thesis* 140.

government, namely, the national (federal), provincial and local government.[397] Employment that is not regulated by the federal government is governed by the provincial sphere.[398] As such, several institutions exist in order to regulate labour relations, with one such institution being the Labour Relations Board, which exists at both federal as well as provincial level.[399] The mandate of the Labour Relations Board is the adjudication of labour matters. This is different to South Africa, where labour disputes are heard and decided by the Labour Court.

Similar to South Africa, Canada has ratified both the Convention on the Right to Organise and Collective Bargaining, as well as the Convention on Freedom of Association and the Right to Organise.[400] In fact, there are similarities in the bargaining systems of the two countries, save for two exceptions, namely; the need for strike ballots and interest arbitration in the Canadian Code.[401] More importantly, the South African Bill of Rights, in most respects, resembles the Canadian Charter of Rights and Freedoms (Canadian Charter).[402]

3.2 Historical Background

There is no express constitutional right to strike in Canadian law.[403] This notwithstanding, England had argued, from as early as 1988, for the constitutional entrenchment of the right to strike.[404] He advised that this would enhance the collective bargaining process.[405] However, the right to strike is still not constitutionally entrenched. Although not explicitly provided for in the Canadian Constitution, this right remains legally recognised.[406] This is done through the guarantee of the right to freedom of association,[407] which is expressly mentioned in the Canadian Charter,[408] this being pursuant to international standards.[409]

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397 Tenza (2016) *LLD Thesis* 149.
398 Tenza (2016) *LLD Thesis* 149.
399 Tenza (2016) *LLD Thesis* 149.
400 Tenza (2016) *LLD Thesis* 150.
401 Tenza (2016) *LLD Thesis* 142.
402 *Ibid*. South African Employment Equity Act is based on the Canadian Employment Equity Act of 1985.
403 Hepple (2009) *CLELJ* 136.
404 England (1988) *QLJ* 168.
405 *Idem* 169.
406 Fudge and Tucker (2009) 333 argue that the right to strike is a social practice deeply embedded in Canadian history.
407 Tenza (2016) *LLD Thesis* 150.
408 Hepple (2009) *CLELJ* 136.
409 Tenza (2016) *LLD Thesis* 150.

Section 2(d) of the Charter provides that everyone has the fundamental right to freedom of association.[410] Tenza argues that the right to freedom of association, as espoused within the Charter, includes the recognition and protection of the right to strike.[411]

Consequently, it is submitted that the Charter further recognises protected strikes and requires that certain provisions be complied with prior to exercising this right.[412] However, from a labour law perspective, the Canadian Labour Code (Code) is the overarching legislation from which all other labour legislation flows.[413] Of particular relevance is section 8(1) of the Code, which provides that "every employee is free to join the trade union of their choice and to participate in its lawful activities."[414]

3.3 Substantive Requirements

Section 3(1) of the Code defines a strike as being inclusive of:

> "a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output."[415]

Employee conduct will only be classified as a strike once it has complied with the abovementioned definition. It should be noted, however, that strikes are prohibited during the subsistence of a collective agreement.[416] According to section 88(1)(a) and (b) of the Code, this is subject to two exceptions, namely, where:

> "(a) a notice to bargain collectively has been given pursuant to a provision of this Part, other than subsection 49(1); and

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410 S 2(d) Canadian Charter provides that:
"Everyone has the following fundamental freedoms:
(*a*) freedom of conscience and religion;
(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(*c*) freedom of peaceful assembly; and
(*d*) freedom of association."

411 Tenza (2016) *LLD Thesis* 152.

412 *Idem* 166.

413 Tenza (2016) *LLD Thesis* 144.

414 S 8(1) Canadian Labour Code, 1985.

415 S 3(1) of the Canadian Labour Code, 1985.

416 S 88(1) of the Canadian Labour Code, 1985.

(b) the requirements of subsection 89(1) have been met."[417]

In light of the above, it is submitted that the right to strike is not absolute. In effect, this right can be limited pursuant to section 1 of the Constitution, which provides that:

> "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[418]

As a consequence of this, where a union or employees believe that this right has been infringed upon, they may approach the relevant labour board for redress.[419] Complying with the above requirements is insufficient. In addition to the above, a union that intends on embarking on a protected strike will need to comply with a few formal requirements.

3.4 Procedural Requirements

Having satisfied the substantive requirements, a union will also need to comply with the prescribed procedural requirements. In this regard, two requirements are peremptory, namely; conciliation and pre-strike balloting. The parties are first required to undergo a process of conciliation,[420] which is an opportunity for them to resolve the dispute and delay the commencement of the strike.[421] This duty is derived from section 50(a) of the Code, which obliges the employer, after having received notice from the union, to meet with a bargaining agent for purposes of bargaining collectively.[422] This is underscored by section 89(1) of the Code, which states that:

> "No employer shall declare or cause a lockout and no trade union shall declare or authorize a strike unless

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417 *Ibid*.

418 S 1 of the Canadian Charter, 1982.

419 Tenza (2016) *LLD Thesis* 166.

420 Fudge and Tucker (2009) *CLELJ* 349 opine that a strike will be considered unlawful should this not be complied with.

421 Tenza (2016) *LLD Thesis* 166.

422 S 50(a) of the Canadian Labour Code, 1985, which provides:
"Where notice to bargain collectively has been given under this Part,
(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall
(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and
(ii) make every reasonable effort to enter into a collective agreement."

(a) the employer or trade union has given notice to bargain collectively under this Part;
(b) the employer and the trade union
(i) have failed to bargain collectively within the period specified in paragraph 50(a), or
(ii) have bargained collectively in accordance with section 50 but have failed to enter into or revise a collective agreement."[423]

Should the parties fail to conclude a collective agreement, the Minister of Labour must be informed of said outcome.[424] Subsequent to this, twenty-one days must have elapsed after the date on which the Minister notified the parties, *inter alia*; of the intention not to appoint a conciliation officer, or establish a conciliation board.[425]

Should the conciliation process fail, members of the union are required to conduct a strike ballot prior to embarking on the intended industrial action.[426] Consequently, a strike will only be allowed to proceed if the majority of the employees vote in favour thereof.[427] In addition to this, the vote must be done in secret.[428] Failure to comply with these requirements will render the strike unprotected.[429]

3.5 Legal Consequences of Unprotected Strikes

In the event that a strike does not comply with the Code, an employer is entitled to apply for a declaration stating that the strike is unlawful.[430] This application must be made to the Labour Board.[431] Once this has been done, the Board may use its discretion to grant the declaration. However, this decision can only be made after the trade union or employees against whom such order is sought, have been afforded an opportunity to make representations.[432] Should the declaration be made, the employer may also request the Board to make an order:

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423 S 89(1)(a)-(b) of the Canadian Labour Code, 1985.
424 S 89(1)(c) of the Canadian Labour Code, 1985.
425 S 89(1)(d) of the Canadian Labour Code, 1985.
426 Tenza (2016) *LLD Thesis* 166.
427 *Idem* 168.
428 *Ibid*.
429 Fudge and Tucker (2009) *CLELJ* 349.
430 S 91(1) of the Canadian Labour Code, 1985:
"Where an employer alleges that a trade union has declared or authorized a strike, or that employees have participated, are participating or are likely to participate in a strike, the effect of which was, is or would be to involve the participation of an employee in a strike in contravention of this Part, the employer may apply to the Board for a declaration that the strike was, is or would be unlawful."
431 *Ibid*.
432 S 91(2) of the Canadian Labour Code, 1985.

> "(a) requiring the trade union to revoke the declaration or authorization to strike and to give notice of such revocation forthwith to the employees to whom it was directed;
>
> (b) enjoining any employee from participating in the strike;
>
> (c) requiring any employee who is participating in the strike to perform the duties of their employment; and
>
> (d) requiring any trade union, of which any employee with respect to whom an order is made under paragraph (b) or (c) is a member, and any officer or representative of that union, forthwith to give notice of any order made under paragraph (b) or (c) to any employee to whom it applies."[433]

As a consequence of the above, any trade union that authorizes a strike contrary to the Code shall be guilty of an offence and liable "to a fine not exceeding one thousand dollars for each day that the strike continues."[434]

In addition to the above statutory remedy, a trade union may be held vicariously liable by the employer for the unlawful conduct of its employees, this being within the context of an unprotected strike.[435] Two requirements must be satisfied for this claim to succeed. Firstly, the union can only be held liable for acts authorised by it.[436] Secondly, and in the alternative, the union can be held liable for unauthorised acts connected with the authorised acts.[437] However, this applies only to acts that may be regarded as modes of committing an unlawful act.[438] Consequently, a claim against the union based on vicarious liability will not succeed unless one of the abovementioned requirements have been complied with.

4. Comparison

According to English law, a trade union will be immune from a claim in the law of torts only if the strike is aimed at the furtherance of a trade dispute. Within the South African context, however, a lawful strike must be aimed at remedying a grievance or resolve a dispute of "any matter of mutual interest" between the employer and employee.[439] In Canada, a strike must be aimed at restricting or limiting output. Consequently, it is submitted that, from a

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433 *Ibid*.

434 S 100(3) of the Canadian Labour Code, 1985.

435 Tenza (2016) *LLD Thesis* 186.

436 Tenza (2016) *LLD Thesis* 187. The union officials must have the supported or authorised the action by the members.

437 *Ibid*. Trade union members must have committed illegal acts while advancing the call to action by the union.

438 *Ibid*.

439 Achmat (2015) *LLM Dissertation* 49; See discussion in Chapter 3, 3.1.

statutory perspective, the English and domestic law definition of a strike bear similarities. The right to strike is not absolute in Canada and can be limited in terms of section 1 of the Canadian Constitution. This is similar to the South African position, in particular, the limitations clause found in section 36 of the Constitution. Pre-strike ballots are compulsory both in the UK and Canada. However, this is not a requirement in South Africa in terms of the LRA. As such, strikes can take place in the absence thereof.[440] These are some of the similarities and differences between the three countries that are worth noting.

5. Conclusion

The main aim of this chapter was to analyse the right to strike from a foreign perspective. This was done by looking at strike law through the lens of English and Canadian law. In this regard, the following observations are made, specifically with regards to the regulation in the UK.

First, English law does not constitutionally recognize the right to strike,[441] whereas the South African legal framework recognizes and entrenches this right. Second, despite the lack of an express right to strike as mentioned above, there does exist some remedies where industrial action is not "protected".[442] The first remedy is the claim for damages pursuant to the law of torts, whereas the second pertains to the injunction. It is submitted that these two are similar to the South African position. Consequently, much can be compared between the two remedies. Third, the English law makes it compulsory for unions to conduct pre-strike ballots, whereas no such requirement exists in terms of the LRA.[443]

Turning to the Canadian position, the following findings can be made. Firstly, no explicit right to strike exists, whereas South Africa explicitly recognises said right.[444] However, the right has been enumerated through the use of ILO instruments as a tool of interpretation. [445] Secondly, pre-strike balloting is peremptory in terms of the Canadian Code, whereas the LRA contains no such requirement.[446] Thirdly, Canada applies vicarious

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440 Achmat (2015) *LLM Dissertation* 51.
441 See discussion in Chapter 5, 2.1.
442 See discussion in Chapter 5, 2.3.
443 See discussion in Chapter 5, 3.1.
444 *Ibid*.
445 See discussion in Chapter 5, 3.1.
446 See discussion in Chapter 5, 3.2.

liability in cases of unprotected strikes, whereas this remedy is only applied in terms of the common law of damages in South Africa.

From a general observation perspective, it is worth noting that both the UK and Canada make it compulsory for the unions to hold pre-strike ballots prior to lawfully exercising the right to strike.[447] This is not the position in South Africa, as unions are under no obligation to conduct pre-strike ballots. In sum, it is submitted that South Africa may be in a position to consider extracting the principle of strike ballots, as is done in both these jurisdictions.

447 *Ibid*.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

This dissertation has shown that the conversation regarding compensation claims against trade unions is occurring on a global stage.[448] In giving credence to this, the ILO has confirmed that trade unions may be held liable for unprotected strikes. One of the ways in which this may be done is by granting compensation claims against the responsible union. However, caution must be had to the amount that is granted. In fact, the view expressed by the ILO is that compensation claims must not be exorbitant, as this would lead to the right to strike being unnecessarily curtailed.[449]

The first research question was based on the ability to hold a union liable for an unprotected strike in terms of either the common law or LRA.[450] This study confirmed that it is possible to hold a trade union liable in terms of the common law. Doing so would require adherence to the principles governing the law of delict, and would be a liability regime separate from the LRA and exercised through the ordinary courts.[451] Consequently, a claimant will most likely succeed with their claim if it is based on strict liability. However, compensation claims in terms of section 68(1)(b) of the LRA lie at the bedrock of this study.[452] This statutory provision grants the Labour Court exclusive jurisdiction to, amongst other remedies, award a claim for just and equitable compensation in favour of an aggrieved party who has been negatively affected by an unprotected strike. This dissertation analyzed this remedy as is it is applied by the employer against the union.

This remedy was first applied in the *Rustenburg Platinum Mines* case, where the Court found that the union, in embarking on industrial action, had not complied with provisions of the LRA.[453] Subsequent to this, the *Algoa* case reaffirmed the position that unions will be

448 See discussion in Chapter 2, 2.5.

449 *Ibid*.

450 See Chapter 1, 2.

451 See discussion in Chapter 4, 2.

452 Chapter 4, 2; It is still accepted that an aggrieved person may claim for common law damages, as this remedy still exists.

453 See discussion in Chapter 4, 3.

susceptible to compensation claims where their unlawful strikes cause damage to the employer.[454] Most recently, the Labour Court, in *KPMM & Road & Earthworks (Pty) Ltd v AMCU*, awarded a significant compensation claim. This reinforces the score that the Labour Court will grant compensation claims against unions where the strike is unprotected. Moreover, the above analysis and incidents speak to the question pertaining to the extent that unions may be held liable in terms of both the common law and the LRA. It is submitted that trade unions will in fact be capable of being held liable on one of both of the above remedies. However, the two remedies are mutually exclusive. As such, the employer has to elect with remedy would be most appropriate to pursue.

Having established this, the next question then turned towards the efficacy of the remedy of just and equitable compensation.[455] To this end, the following observation is made, namely, that there has not been specific statutory guidelines. This is said with the view that the LRA itself does not comprehensively provide guidelines. Consequently, the Labour Court has been afforded "discretion" in terms of this remedy. As a result, different judges will always come to different conclusions when it comes to the size of the award.[456] The Labour Court continues to grapple with the blight of cases pertaining to unprotected and violent strikes. This, it is submitted, indicates that the unions are not deterred by the compensation claims awarded against them. To this end, it is submitted that this remedy is not as effective as some would expect. In this regard, Le Roux advises that perhaps the Labour Court should consider awarding significant compensation claims.[457] It is submitted that this view is one the author supports, insofar as it does not result in the unnecessary limitation of the right to strike.

The last question posed related to the lessons that South Africa could learn from abroad in general, and the UK and Canada in particular. Turning to the UK, it is worth noting that this jurisdiction does not contain an explicit right to strike. Instead, this is regulated in terms of the law of torts. According to this liability regime, should a union be liable for damages in terms of torts, the amount awarded against the union will be capped, this being done in

454 See discussion in Chapter 4, 2.
455 See discussion in Chapter 1, 2.
456 See discussion in Chapter 4, 3.
457 *Ibid*.

accordance with the size of the union.[458] In Canada there is no such provision. However, the union is held liable pursuant to vicarious liability.[459] Apart from the two modes of accountability, what is most striking about these two jurisdictions is that it is compulsory for the unions to hold pre-striking ballots.[460] This is a preliminary requirement that the unions are supposed to comply with in both. Failing which, the intended industrial action cannot be permitted. However, should the industrial action proceed, it will be considered unlawful. This would then trigger the different forms of liability.

Tenza argues that the most important lesson that South Africa may learn here is that pre-strike ballots may assist in dealing with violent and unprotected strikes in. I am in agreement with Tenza, who argues for the re-introduction of strike ballots as a procedural requirement in our domestic strike law. This was a missed opportunity when parliament was considering the amendments to the LRA. Unfortunately, the proposed strike-balloting proposal was later removed from the initially proposed text of the amendments. It is submitted that this would have been an opportune moment for the legislature to attempt to curb violent strikes.

458 See discussion in Chapter 5, 2.5.

459 See discussion in Chapter 5, 3.5.

460 See discussions in Chapter 5, 2.4 and 3.4.

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