

An evaluation of section 68(1)(b) of the Labour Relations Act 66 of 1995:

How effective is this remedy?

By

Thando Simelane

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Supervisor: Mrs S.B Gericke

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Chapter 1

Introduction to strike law in South Africa

1.1 Topic

An evaluation of section 68(1)(b) of the Labour Relations Act 66 of 1995: How effective is this remedy?

1.2 Research Problem

Collective bargaining is the expression in practice of freedom of association in the workplace.¹ It is important that all parties in the collective bargaining process exercise their rights within the ambit of the law for collective bargaining to be mutually beneficial. The success of the process of collective bargaining is hindered once any of the parties acts unlawfully and to the detriment of the other. In this respect the Labour Relations Act² (“the LRA”) is the main vehicle regulating a strike action which does not comply with the Act in the event of an infringement of the rights of any party by a trade union. Section 68(1)(b) affords compensation to any party who suffered damages as a result of any conduct which contributed to “any loss attributable to the strike.” This dissertation will seek to address the question of the effectiveness of the remedy provided by section 68(1)(b).

1.3 Assumptions

- (a) There is a high prevalence of strike violence in South Africa.³
- (b) Employers suffer different kinds of losses as a result of unprotected strikes.
- (c) Employers need a remedy to the loss they suffer as a result of unprotected strikes.
- (d) The remedy provided in section 68(1) (b) of the Labour Relations Act (the Act) has been used by employers.

¹Report 1(B) Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (2000) 9.

²Labour Relations Act 66 of 1995.

³See <http://www.csvr.org.za/index.php/publications/1826-crossing-the-picket-line-violence-in-industrial-conflict-the-case-of-the-afcol-strike.html> (accessed 31-09-2014).

1.4 Research Questions

(a) What is the purpose of section 68(1) (b)?

(b) Is the remedy found in section 68(1) (b) effective to compensate aggrieved persons who suffered losses as a consequence of strike violence?

(c) What alternative remedies are available for parties who suffer damage as a result of strike action?

1.5 Significance of the Study

Without industrial action, in particular strike action, meaningful collective bargaining that aims to balance the inequality between the bargaining power of labour and management, would not be achieved.⁴ The right to strike is a tool that is used by trade unions in pursuit of their member's demands.⁵ These range from wage demands to changes in employment status such as subcontracted workers seeking permanent employment, as well as unilateral change of employment terms and conditions.⁶ The existence of a legislative framework governing the right to strike aims to ensure that all parties can engage in a protected strike to the benefit of union members. However, in reality it often happens that the duty to abide by the requirements of a protected strike are ignored in the heat of the moment when strikers succumb to violent conduct. In the event that strike violence occurs it is imperative that the parties who suffer damage to their property or person can resort to a remedy for any financial loss incurred.

It is not sufficient that remedies are provided by the Act, they must be known to be applied in an effective manner with an effective outcome. An important factor to consider is whether the remedy acts as deterrence is one factor to consider in determining such effectiveness.

⁴Conradie and Holtzhausen *Labour Relations in South Africa* 3 (2009) 13.1.

⁵Manamela and Budeli *Comparative and International Law Journal of Southern Africa* 308.

⁶*Early Bird Farm (Pty) Ltd v FAWU* [2004] 7 BLLR 628 (LAC) 629; *SA Post Office Ltd v TAS Appointment and Management Services CC* [2012] 6 BLLR 621 (LC) 622; *Transnet SOC v NUMSA* J1540/14 at 7.

1.6 Research Methodology

The methodology will involve a quantitative method. More specifically it involves a comparative analysis of the remedies available to an employer in the legal framework as well as to determine the effectiveness of the compensation remedy in the Labour Relations Act.

1.7 Proposed Structure

This paper will delve into the purpose and outcome of the remedy provided by section the compensation remedy found in section 68 of the Labour Relations Act in order to identify what its function entails and whether it is achieved by the remedy. This will be done within the framework of the right to strike and the international and supra-national standards available in the context of the right to strike.

Chapter 1: Introduction to strike law in South Africa

This chapter comprises a brief overview of the paper.

Chapter 2: International Labour Standards and Constitution

This chapter will discuss the right to strike in light of its standing in the Constitution and International Labour Law. Additionally the chapter will include how regional instruments in Africa and Europe have addressed the right to strike under the right to freedom association.

Chapter 3: The Right to Strike: South African Regulatory Framework

The introduction to strike law in South Africa will provide a foundation for the remedy of compensation in the context of the right to strike. The discussion pertaining to the right to strike will comprise of a brief history and description as well as its legal limitations.

Chapter 4: Section 68(1) (b) of the Labour Relations Act

This chapter will provide what section 68(1) (b) of the Labour Relations Act entails. Then it explores the application of the section in case law.

Chapter 5: A Comparative perspective of the remedies to loss suffered during unprotected strikes

The other remedies which employers or third parties could consider as an alternative to section 68(1)(b) or in conjunction with the remedy are discussed. Followed by a

brief discussion of comparable remedies in UK labour law. Thereafter a comparative perspective of the remedies follows.

Chapter 6: Conclusion

This chapter will contain observations, concluding remarks and recommendations in the context of the effectiveness of the remedy afforded by section 68(1) (b) of the Act.

Chapter 2

International Law Standards and the Constitution

2.1 Introduction

The South African Constitution, in sections 231 to 233⁷, highlights the importance of international law and its impact on South African labour law. These sections encompass international law agreements, customary international law and the application of international law through regional and national law. The importance of the Constitution and the impact of the rule of law is linked to the purpose, interpretation and the application of the LRA.⁸ One of the principle aims of the LRA is to give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation.⁹ These obligations with respect to the right to strike will be further discussed below. In conclusion, consideration will be given to the approaches other countries have taken towards the right to strike.

2.2 International Labour Law and the Right to Strike

2.2.1 Introduction

The principal purpose of the ILO is to provide international regulation of labour standards.¹⁰ This is done with the view of ensuring peace, social justice and eliminating unfair competition on the basis of exploitative and inhumane labour conditions.¹¹ South Africa became one of the founding members of the ILO in 1919 but left in 1966 due to the ILO's position concerning the government's apartheid policy.¹² Thereafter in 1990, informal contact between labour groups in South Africa and ILO representatives began.¹³ Subsequently in 1994, South Africa was readmitted as a full member.¹⁴ In South African law merely ratifying an international

⁷S231-s233 of the Final Constitution of South Africa 1996.

⁸See s 1 of the LRA.

⁹Grogan *Workplace Law* 309; See s 1(b) of the LRA.

¹⁰Du Toit *Labour Relations Law a comprehensive guide* 5(2006) 67.

¹¹*Ibid.*

¹²Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2012) 1-19.

¹³*Ibid.*

¹⁴*Idem*1-20.

convention does not have the effect that it has an impact on the national law.¹⁵ Rather, it is required that the provisions be incorporated in an Act in Parliament.¹⁶ Therefore the LRA serves as a vehicle that incorporates South Africa's public international law obligations in the context of labour relations and the fundamental right to fair labour practices.¹⁷

2.2.2 The International Labour Organisation (ILO) and the Right to Strike

International law and South African law recognise the right to strike as a fundamental right.¹⁸ The ILO does not expressly mention the right to strike in conventions, such as the Right to Organize and Collective Bargaining Convention 98 of 1949. However, it recognises the right as an intrinsic corollary to article 3(1) of Convention 87 (Freedom of Association and Protection of the Right to Organise).¹⁹ The ILO has used article 4 of Convention 87 to establish minimum standards for the right to strike.²⁰ Article 4 states that:²¹

Measures that are appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary between employers or employers' organizations and workers' organizations with a view to the regulation of terms and conditions of employment by means of collective agreements.

The Convention provides workers with protection against acts of anti-union discrimination such as requiring workers not to join a union, or relinquish trade union membership for employment, or dismissing workers due to their union membership,

¹⁵ *Idem*68.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Chicktay "Defining the Right to Strike: a comparative analysis international labour standards and South African Law" (2012) *Obiter* 1.

¹⁹ Conradie and Holtzhausen *Labour Law Relations in South Africa* 3 (2009) 13.1; 1994 Report of the ILO Committee of Experts on Freedom of Association and Collective Bargaining 66 at 149-151.

²⁰ Chicktay *Obiter* (2012)1.

²¹ *Ibid.*

or participation in union activities.²² Workers' and employers' organisations are also protected from interfering in one another's organizations.²³ This is crucial in achieving the full independence and freedom trade unions and employers' organisations need to function.²⁴ This is also in line with the constitutionally enshrined right of employers and employees to organise.²⁵ The ILO supervisory bodies have also witnessed a surge in complaints involving acts of union discrimination and interference.²⁶ The allegations included dismissals and demotions by employers against trade unions and their members for establishing or joining a trade union or for their participation in trade union activities.²⁷ These complaints are said to illustrate the need for remedies and penalties that will sufficiently dissuade these acts.²⁸ Supervisory bodies are said to also provide protection to the right to strike in two key roles they play.²⁹ One of the roles entails applying express provision guaranteeing the right to strike in a multilateral instrument, for instance the operation of the control mechanisms established by the European Social Charter 1961.³⁰ The other role involves interpreting the provision made for freedom of association to encompass the right to strike.³¹ ILO supervisory bodies do this by "considering the scope of the constitutional entitlement to 'freedom of association' and the appropriate construction of ILO Conventions 87 and 98".³²

Another important convention in this regard is the European Convention of Human Rights protects the right to form and join trade unions in article 11.³³ However, its

²²ILO Declaration on Fundamental Principles and Rights at Work (<http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/lang--en/index.htm>).

²³Article 2 Convention 87; ILO Declaration on Fundamental Principles and Rights at Work (<http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/lang--en/index.htm>).

²⁴Freedom of association in practice: Lessons learned Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 11.

²⁵Van Jaarsveld *et al* (2010) 8-13.

²⁶*Ibid.*

²⁷*Ibid.*

²⁸*Ibid.*

²⁹Novitz *International and European Protection of the Right to Strike* (2003) 1; European Social Charter 1961 <http://conventions.coe.int/Treaty/en/Treaties/html/035.htm> (accessed 30-10-2014) .

³⁰*Ibid.*

³¹*Ibid.*

³²*Ibid.*

³³Article 11 European Convention on Human Rights .

capacity to protect collective rights of workers remains doubtful.³⁴ The European Court of Human Rights views industrial action as a possible aspect of freedom of association.³⁵ However, the court it has made the conclusion that a right to strike is unnecessary for industrial action to be exercised effectively.³⁶

The right to collective bargaining is enshrined in the Convention in the prerequisite for collective bargaining.³⁷ It may be interesting to note that the ILO supports the view that collective bargaining derives its importance from being a powerful tool in the resolution of economic and social concerns amongst employers and employees.³⁸ These concerns include gender and non-discrimination matters.³⁹ The ILO views collective bargaining as a way for workers and employers to reach agreements relating to issues of the work place.⁴⁰ It also forms part of the right to freedom of association which is enshrined in section 18 of the South African Constitution.⁴¹ Collective agreements are said to create an atmosphere of mutual trust resulting in social peace being established.⁴² In the South African context this could imply that collective agreements play a role in providing a framework for collective bargaining and promoting orderly collective bargaining, in line with the LRA's purpose.⁴³

As mentioned above, one of the important conventions relevant to the right to strike is a core convention on freedom of association, namely Convention 87 which South

³⁴Novitz 182.

³⁵*Ibid.*

³⁶*Ibid.*

³⁷ILO Declaration on Fundamental Principles and Rights at Work (<http://www.ilo.org/declaration/principles/freedomofassociation/lang--en/index.htm>.) (accessed 01-10-2014).

³⁸ ILO Declaration on Fundamental Principles and Rights at Work (<http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/lang--en/index.htm>) (accessed 01-10-2014).

³⁹ Freedom of association in practice: Lessons learned Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 23.

⁴⁰ ILO Declaration on Fundamental Principles and Rights at Work (<http://www.ilo.org/declaration/principles/freedomofassociation/lang--en/index.htm>.) (accessed 01-10-2014).

⁴¹ *Ibid*; Convention 87; section 18 Constitution of the Republic of South Africa 1996.

⁴² Freedom of association in practice: Lessons learned Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 23.

⁴³ Labour Relations Act 66 Of 1995.

Africa ratified in 1996.⁴⁴ The right for workers and employers to establish and join organizations of their own choice without prior authorization are set out in this fundamental convention.⁴⁵ The Convention also stipulates that workers' and employers' organizations shall organize freely and not be liable to be dissolved or suspended by administrative authority, as well as that they shall have the right to establish and join federations and confederations.⁴⁶ They may also in turn affiliate with international organizations of workers and employers.⁴⁷

South Africa's obligations are not only found in international conventions and treaties but also in customary international law.⁴⁸ Section 231(4) of the Constitution confirms this. It provides that customary international law rules are binding on South Africa unless the rules are inconsistent with the Constitution or an Act of Parliament.⁴⁹ Creating a customary rule under international law entails two requirements.⁵⁰ Namely, that the rule is a settled practice as well as an acceptance of an obligation to be bound.⁵¹

2.3 Regional Instruments

In addition to the South African legal position regulating the right to strike consideration will be given to the African and European regional instruments in the context of the right to strike.

2.3.1 European Regional Instruments

Strike law developments in European countries and South Africa have close parallels.⁵² There are three stages or phases where European countries' developments and South African developments are paralleled⁵³, namely the repression of industrial action, the tolerance of industrial action and the extension of

⁴⁴ Du Toit 68.

⁴⁵ Article 2 Convention 87 Freedom of Association and Protection of the Right to Organise.

⁴⁶ *Idem* Article 5.

⁴⁷ *Ibid.*

⁴⁸ Du Toit 71.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Conradie and Holtzhausen 13.9.

⁵³ *Ibid.*

the right to strike.⁵⁴ Article 6 of European Social Charter was the first treaty to guarantee the freedom or right to strike.⁵⁵ This guarantee applied specifically to conflicts of interests under collective agreements.⁵⁶ The charter considers the right to strike within certain parameters.⁵⁷ It is considered as a worker's right only within collective bargaining and limited to conflicts of interest not conflicts of right.⁵⁸ National legislatures are then given the liberty to decide how the right will be exercised in their respective countries.⁵⁹ Some western European countries regard the right as a constitutional right like South Africa while others have not included the right in their law. Though Germany does not expressly contain a constitutional right to strike, it does safeguard the right to freedom of association.⁶⁰ Another important convention in this regard is the European Convention of Human Rights protects the right to form and join trade unions in article 11.⁶¹

2.3.2 African Regional Instruments

Africa's regional instrument comes in the form of African Human and People's Rights Charter. The African Human and People's Rights Charter does include the protection of the general right to freedom of association in the following provisions. Firstly, "every individual shall have the right to free association provided that he abides by the law". Secondly, "subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association".⁶²

The Southern African Development Community (SADC) also has high regard for international law.⁶³ Some countries in the SADC region as well as the SADC member states have a clear sensitivity towards the role international law plays in

⁵⁴ *Ibid.*

⁵⁵ Mthombeni (1990) 342.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Article 11 European Convention on Human Rights.

⁶² Manamela and Budeli 320; Art 10 African Charter on Human and People's Rights.

⁶³ Olivier *LAWSA* (ed Joubert) 13(2) (2012) par 152.

labour law.⁶⁴ This sensitivity is illustrated in a number of ways. One of them being the specific references made to the role of international law in regional instruments, conventions and statutory frameworks.⁶⁵ Others include the SADC's reliance on international law in court judgements relating to labour issues and the extent of ratifications of the labour law international instruments.⁶⁶ Namibia serves as an example in that it is "subject to the ILO's regular machinery for supervision of compliance with ratified conventions",⁶⁷ such as Convention 87.⁶⁸ Lesotho also provides in the Lesotho Labour Code that interpretation of the Code's provisions and ambiguous cases, the court should take ILO Conventions into consideration, irrespective of whether or not Lesotho has ratified them.⁶⁹ The regional instruments at SADC level promote the adoption of international standards and the instruments were in fact developed with the international standards framework in mind.⁷⁰ The SADC's commitment went as far as the adoption of the Charter of Fundamental Social Rights compelling member states to implement measures which were consistent with ILO conventions.⁷¹ These conventions included ILO conventions on freedom of association, the right to organise, collective bargaining and those that give effect to fundamental labour rights. The Charter of Fundamental Social Rights in the SADC ("Social Charter") also promotes freedom of association and collective bargaining in article 4.⁷² It urges member states to create an enabling environment which is consistent with the ILO Conventions on freedom of association, right to organise and collective bargaining.⁷³

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Fenwick "Labour Law in Namibia: Towards an indigenous solution" *SALJ* 674.

⁶⁸ Parker "Administrative Labour Law in Namibia, its current state, challenges, and proposals for reform" 243.

⁶⁹ Olivier *LAWSA* 13(2) par 152.

⁷⁰ *Ibid.*

⁷¹ Van Jaarsveld *et al* 1-20.

⁷² Art4 The Charter of Fundamental Social Rights
www.sadc.int/documentspublications/show/837(accessed 31-10-2014).

⁷³ *Ibid.*

2.4 Concluding Remarks

Although international law may not expressly protect the right to strike it is enclosed in the right to freedom of association. The role which international standards play in shaping countries' laws, especially in the context of the history of South Africa, is a fundamental one. Freedom of association is one of very foundations of every constitutional and democratic order. Without freedom of association no society can be democratic or free.⁷⁴ It also advances and promotes economic, social and substantive equality.⁷⁵ The importance of the right to strike can be said to be increasing as regional instruments also grow in establishing the right within their regions.⁷⁶ In conclusion it is submitted that the role of international labour standards play in South African labour law is indispensable in the promotion of the right to strike and collective bargaining as a whole.

⁷⁴Budeli "The protection of worker's right to freedom of association in international and regional human rights system" (2009) *De Jure* 16.

⁷⁵*Idem* 25.

⁷⁶Van Jaarsveld *et al* 1-20.

Chapter 3

The Right to Strike: The South African Regulatory Framework

3.1 Introduction

The right to strike is entrenched in South Africa's supreme law, the Constitution.⁷⁷ Additionally, "the right is also essential to the process of collective bargaining."⁷⁸ It is what makes collective bargaining work.⁷⁹ It is to the process of collective bargaining what an engine is to a motor vehicle."⁸⁰ In recent years, strikes in South Africa have been the norm instead of the exception to the extent that the term "strike season" is widely used.⁸¹ These strikes have not only been more frequent but I would argue that they have become more violent.⁸² According to figures compiled by the SA Institute of Race Relations (SAIRR) 181 people have been killed in strike violence in the past 13 years.⁸³ Strike violence has also resulted in damage to the employer's property as well as that of the general public.⁸⁴ Instances include the destruction of street vendors' stalls and lost stock as a result of a SATAWU protest march.⁸⁵ In 2012 a non-striking truck driver lost his life when he was fatally wounded by one of the bricks thrown at his truck during a protected strike.⁸⁶ On paper the statute seeks to remedy this situation by awarding compensation to those who fall victim to this damage and suffer loss. In this chapter I will discuss what the right to strike entails, its limitations and then introduce the remedy the Labour Act provides for damage caused by strikes which will be discussed in more detail in the following chapter.

⁷⁷S 23(2)(c) Constitution of the Republic of South Africa 1996.

⁷⁸*NUMSA v Bader Bop (Pty) Ltd* (2003) 24 ILJ 305 at 367; JF Myburgh SC "100 Years of Strike Law" ILJ 968.

⁷⁹*Ibid.*

⁸⁰*Ibid.*

⁸¹A Myburgh SC "The failure to obey interdicts prohibiting strikes and violence" CLL 2.

⁸²*Metsimaholo Local Municipality v SAMWU* J1561/2014 at par 7.

⁸³<http://www.news24.com/SouthAfrica/News/181-strike-deaths-over-last-13-years-20130121> (accessed 22-06-2014).

⁸⁴*Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others* J 2510/11 (LC) at par 4.

⁸⁵*South African Transport & Allied Workers Union v Garvis* [2011] ZASCA 152.

⁸⁶*Transnet SOC Ltd v SATAWU* [2012] JOL 29498 (LC) 2.

3.2 Legislative Framework: The Labour Relations Act 66 of 1995

3.2.1 Introduction

Prior to the Constitution's entrenchment of the right to strike and its implementation in the Labour Relations Act 66 of 1995 ("the LRA"), there was no explicit protection for strikers in its predecessor the LRA 1956.⁸⁷ The Railway Regulation Act 1908 ("the Railway Regulation Act") prohibited white people in South Africa from striking and the penalty was criminal prosecution.⁸⁸ The Transvaal Industrial Disputes Bill introduced changes in the working conditions that employers and employees proposed, by requiring that they be preceded by one month's notice.⁸⁹ Where a deadlock occurred the Bill stipulated that a strike could not happen until the government appointed a conciliation board investigated the dispute and a month lapsed since the publication of its report.⁹⁰ The bill passed into law and the industrial worker's most effective weapon, the strike, was severely restrained.⁹¹ According to Jeff Lever's study, between the end of the Anglo-Boer in 1902 and the creation of the Union of South Africa in 1910, the Railway Regulation Act and Transvaal Industrial Disputes Bill had a defining impact on the collective bargaining and the right to strike in South Africa for the next 70 (seventy) years.⁹² Thereafter the Industrial Conciliation Bill was passed in 1924. It made provision for the registration of trade unions but had shortcomings, as it excluded a number of people from the definition of an employee.⁹³ The excluded persons "included civil servants, agricultural and domestic workers, contract Africans and indentured Indians".⁹⁴ Furthermore, the Industrial Conciliation Act 1956 (ICA) completely excluded black people from collective bargaining.⁹⁵ The slow evolution of South African labour law on strikes occurred between 1980 and 2000.⁹⁶ This evolution occurred through the interpretation of the Labour Relations Act ("LRA 1956") by the courts⁹⁷. Post 1994

⁸⁷ JF Myburgh SC 962.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Idem* 963.

⁹² *Idem* 962.

⁹³ *Idem* 964.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Idem* 965.

⁹⁷ *Ibid.*

the criminalization of strikes in the LRA 1956 was replaced with the concept of protected strikes and unprotected strikes.⁹⁸ The legislature abolished the wide unfair labour practice jurisdiction the Industrial Court had enjoyed.⁹⁹ The legislature also drew a clear line between the consequences of participating in protected and unprotected strikes.¹⁰⁰

3.2.2 The definition of the strike

The current LRA has given rise to the inception of the right to strike and accompanied with it the formation of the protected strike. The right to strike has the benefit of explicit protection in section 23(2)(c) of the Final Constitution.¹⁰¹ The right is further enforced in section 64 of the LRA 1995. The definition in section 213 of the LRA 1995 is quite comprehensive and defines a strike as including the following;

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 purposes 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 compulsory¹⁰².

The three main elements comprising a strike being an interruption of work, caused by employees or ex-employees acting in concert and lastly there must be an employment related purpose.¹⁰³ However, it is crucial to remember that this right has limitations.¹⁰⁴ Firstly the definition inherently limits the exercising of the strike.¹⁰⁵ Secondly, there are procedural conditions applicable before a strike can commence and for the strike to qualify as protected.¹⁰⁶ Thirdly, though the right to strike is entrenched in South African law and gives the labour force power in collective bargaining, this right does not extend the exercising of this right to include infringing

⁹⁸ *Idem* 968.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Constitution of the Republic of South Africa 1996.

¹⁰² Grogan 368.

¹⁰³ *South African Labour Law* (1) Benjamin and Thompson AA 1-305.

¹⁰⁴ S67 Labour Relations Act 1995.

¹⁰⁵ *Ibid.*

¹⁰⁶ *SATAWU V Moloto* [2012] 12 BLLR 1193 (CC) 1199.

the rights of the employer or third parties by damaging their property.¹⁰⁷ Chicktay, a senior lecturer at the University of Witwatersrand, highlights the importance of defining the right to strike correctly.¹⁰⁸ Defining it too widely would have the result of covering situations where employees may not have intended to strike.¹⁰⁹ Subsequently it would thus subject the employees to consequences of an unprotected strike.¹¹⁰ Alternatively a very narrow definition could result in a restrictive definition prohibiting employees from participating in a strike at all.¹¹¹

Strikes in South Africa also take the form of protests whereby the aim of the protest includes highlighting the lack of service delivery for instance. Therefore they are not limited to issues that are likely to be resolved through neither collective bargaining nor employment issues.¹¹² “Workers may also strike over economic and social policy issues of direct concern”.¹¹³ The term “socio-economic interests” is not defined in the LRA but was dealt with in the *Government of Western Cape Province v Congress of COSATU*¹¹⁴ One of the questions before the court was whether protests against the poor state of education fell within the definition of “socio economic interest” in the definition of a protest action.¹¹⁵ Such protest action is not only protected in South Africa through legislation but also highly regarded internationally.¹¹⁶ Though South African law currently complies with international law standards, before 1994 protest actions such as the ones that took place against the apartheid regime resulted in many people being dismissed for their participation.¹¹⁷ The ILO’s Fact Finding and Conciliation Committee probed parts of the LRA 1956 in 1992 and requested that “workers be given the right to strike in order to promote and defend their socio-

¹⁰⁷ *Ibid.*

¹⁰⁸ *Idem* 262.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Idem* 263.

¹¹³ *Ibid.*

¹¹⁴ *Idem* 265.

¹¹⁵ *Idem* 264.

¹¹⁶ *Idem* 265.

¹¹⁷ *Idem* 264.

economic interests”.¹¹⁸ In an upcoming chapter one of the South African legislations regarding the regulating of gatherings will be discussed further.

3.3 Damage as a consequence of violent strike action

The right is limited to exercising it within the parameters of the South African labour law. Presently the right has been abused in numerous forms, namely ranging from the infringement of picketing rules agreed with the trade unions, to several strikes being characterized by violence. According to the City Press, 99 strikes were recorded in 2012 compared to 67 in the previous year.¹¹⁹ The industrial action report also recorded that 3.3 million working days were lost in 2012 and resulted in R6.6 billion of striking workers’ lost wages.¹²⁰ The report further recorded 44% of the strikes as unprotected strikes.¹²¹ The report’s records support the notion that numerous strikes around the country have been characterized by violence more especially in the mining and transport sectors.¹²² At the tabling of the 2012 industrial action report, the Director General of the Department of Labour suggested that the reason for violence was found in the “exercise of leadership”.¹²³ Stating the manner in which the parties of the dispute had to conduct themselves “hinged largely on the exercise of leadership”. Many considered the Lonmin mineworkers strike as the biggest strike of 2012.¹²⁴ To the extent that the strike was even termed a “massacre” in the media.¹²⁵ The strike action saw eight Lonmin workers and two policemen killed on 10 August 2012.¹²⁶ It then culminated in the death of at least (30) thirty people.¹²⁷ It was reported that the Marikana’s Lonmin mine reported that it lost six days or 15000 ounces of platinum and that it was unlikely that they would reach its full year

¹¹⁸*Idem* 263.

¹¹⁹<http://www.citypress.co.za/news/strikes-sa-hit-five-year-high/> (accessed 04-11-2013).

¹²⁰2012 Annual Industrial Report 20.

¹²¹2012 Annual Industrial Report 9.

¹²²<http://www.labour.gov.za/DOL/media-desk/media-statements/2013/industrial-action-report-2012> (accessed 04-11-2013).

¹²³*Ibid*; 2012 Annual Industrial Report 2.

¹²⁴<http://www.sahistory.org.za/article/timeline-marikana-massacre-2012-2013> (accessed 04-11-2013).

¹²⁵*Ibid*.

¹²⁶<http://www.iol.co.za/news/south-africa/lonmin-massacre-a-timeline-1.1364646>(accessed 04-11-2013).

¹²⁷*Ibid*.

production target of 75000 ounces.¹²⁸ In other instances strikes have been characterised by various destructive behaviour. This behaviour may include the emptying of rubbish bins onto the road outside employers' premises, burning tyres on the road, blocking the road, throwing packets of broken glass onto the road, throwing bricks at members of the SAPS, damaging vehicles, dragging passengers from vehicles and assaulting them, rolling concrete dustbins into employers' premises, damaging patron's vehicles, and assaulting persons in the vicinity of employers' premises.¹²⁹

The Minister of Labour has also condemned violence in any industrial action. Stating that violence has no place in our society whose foundation as democracy is based on intensive social dialogue.¹³⁰ She further highlighted the fact that "nothing yet has proven to work better than the ability to negotiate and reach consensus..."¹³¹

The limitations to the right to strike are found in section 65 of the LRA.¹³² It stipulates that certain persons may not take part in a strike.¹³³ Namely a person bound to a collective agreement prohibiting a strike in respect of the issue in dispute.¹³⁴ Additionally the person is bound to refer the issue in dispute to arbitration or to the Labour Court.¹³⁵ Finally those who are engaged in essential services or maintenance services may not engage in strike action.¹³⁶ However, despite such legislation employers and society at large continue to fall victim to destructive conduct related to strike action.

3.4 Concluding Remarks

The right to strike has strengthened through the years in South African law and has been an integral part of collective bargaining in the workplace. However, in recent years strike action has increasingly been marred by violence resulting in different

¹²⁸ *Ibid.*

¹²⁹ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 ILJ 998 (LC) 1001.

¹³⁰ <http://www.labour.gov.za/DOL/media-desk/media-statements/2013/industrial-action-report-2012>(accessed 04-11-2013).

¹³¹ *Ibid.*

¹³² S 65 of the Labour Relations Act 1995.

¹³³ *Ibid.*

¹³⁴ S 65(1)(a) of the Labour Relations Act 1995.

¹³⁵ S 65(1)(b) of the Labour Relations Act 1995.

¹³⁶ S 65(1)(c) of the Labour Relations Act 1995.

kinds of damage. It can range from employers' suffering financial loss and damage to property to innocent bystanders being assaulted. Such instances occur despite violence in strike action being condemned by government and existing statutory limitations. The next chapter will explore how employers can be compensated in such instances and how this statutory has been applied in case law.

Chapter 4

Section 68(1)(b) of the Labour Relations Act

4.1 Introduction

In the past 10 (ten) years there have been a few land mark cases which have reflected the manner in which the courts have attempted to address damage arising from strikes and protests through the awarding of compensation. These include *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*, *Mangaung Local Municipality v SAMWU* and *Algoa Bus Company v SATAWU*. These cases and their influence will be discussed in this chapter.

4.2 Overview of Section 68(1)(b)

Before proceeding to the case law discussion an overview of section 68(1)(b).

The provision which is set out as follows in the Labour Relations Act:¹³⁷

To order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, having regard to—

(i) whether—

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

(bb) the strike or lockout was premeditated;

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

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

(ii) the interests of orderly collective bargaining;

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

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

4.3 *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*

One of the first cases that addressed the remedy of compensation in terms of section 68(1)(b) of the LRA is *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*. The respondent union was one of the applicant employer's recognised trade unions.¹³⁸ Approximately a month after the employer obtained an interdict prohibiting the union's members from instigating or participating in an unprotected strike, a

¹³⁷ Labour Relations Act 66 of 1995.

¹³⁸ *Rustenburg Platinum Mines v Mouthpiece Workers Union* [2002] 1 BLLR (LC) 86.

report was received by the employer indicating that the union intended on striking.¹³⁹ The union members commenced with unprotected strike action the next day and the union's executive committee was videotaped pressuring employees not to return to work.¹⁴⁰ The employees only returned to work after being threatened with disciplinary action.¹⁴¹ Though the employer quantified its loss as a result of the strike as at least R15 million the claim was later reduced to R100 000.¹⁴²

The Court held that in order to obtain the compensation award the applicant had to satisfy three requirements.¹⁴³ These three requirements entail that the strike constitute an unprotected strike, "that the applicant suffered loss and that the party against whom the relief is sought must have participated in the strike or committed acts in furtherance thereof"¹⁴⁴. These requirements were not complied with by the trade union.

As regards to the first requirement, it was common cause that the strike was unprotected.¹⁴⁵ Preceding the applicant employer's application for compensation, the employer and trade union concluded a written recognition and procedural agreement in February 1998.¹⁴⁶ However, a year later the trade union partook in industrial action which then resulted in the employer seeking and obtaining a temporary interdictory relief.¹⁴⁷ The relief which the employer received entailed the trade union's members being interdicted from promoting, inciting, instigating and/or participating in an unprotected strike.¹⁴⁸ Even though the order was then made final in March 1999, a month later the employer received a report to the effect that the workforce intended to embark on a strike the next morning.¹⁴⁹ Subsequent to receiving the report the

¹³⁹ *Ibid.*

¹⁴⁰ *Idem* 84.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Idem* 89.

¹⁴⁶ *Idem* 86.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Idem* 90.

employer sought clarity on the veracity of the report and attempted to convene an urgent meeting with trade union representatives, to no avail.¹⁵⁰

The second requirement was also common cause.¹⁵¹ As a result of the strike the employer initially quantified its losses, as a result of the strike, to be R15 million.¹⁵² This involved lost production and hence profits.¹⁵³ Later on the employer reduced its claim to R100 000.¹⁵⁴ In order to ameliorate the effect of a compensation award the Court held that the union would pay the award in monthly instalments of R5000.¹⁵⁵ Counsel referred to the provision which permitted the Court to direct that the payment method of the compensation is made in terms of section 158(1)(j) of the LRA.¹⁵⁶ In its judgement the Court also highlighted the fact that a fair compensation must be awarded. Additionally it held that the compensation “was designed to compensate an aggrieved party for loss actually suffered.”¹⁵⁷ The writer is of the opinion that the judge weakens the compensation by acknowledging its purpose but thereafter nullifying the very design of compensation by the inclusion of the statement.

The third requirement on the other hand was the main issue in dispute. However, due to the trade union’s failure to challenge the accusation; it had to be construed as an admission.¹⁵⁸ On the two occasions that the employer made it evident that it considered the respondent as the instigator of the strike, the employees’ representatives did not raise any objections.¹⁵⁹ The respondent employee’s justification to the Court for its conduct was that it would have been “impolitic and imprudent for it to side with management against the striking workforce”.¹⁶⁰ The Court had difficulty grasping this explanation.¹⁶¹ In the court’s view an explanation

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Idem* 94;S158(1)(j)The Labour Court may deal with all matters necessary or incidental to performing its functions in terms of this Act

¹⁵⁷ *Idem* 85.

¹⁵⁸ *Idem* 90.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

would have “placed the workforce in a more favourable light”.¹⁶² The evidence lead by the respondent employees contained discrepancies and the Court was not satisfied that its impact and cogency disturbed the reliability of the admission made at the meeting.¹⁶³ In fact the judge found the explanation to be dishonest.¹⁶⁴ Subsequently it found the respondent did instigate the strike that occurred on 21 April 1999.¹⁶⁵ The basis being that failure to explain that it did not instigate the strike constituted an admission.¹⁶⁶

Farber AJ’s judgement also elaborated on the broad discretion that the legislature has conferred on the Labour Court.¹⁶⁷ He said the only restriction imposed on the discretion was that the result must be “just and equitable”.¹⁶⁸ In exercising his discretion the judge considered a number of factors. The factors were whether or not the strike was premeditated, unjustified conduct by the other party, interdict proceedings, the interests of orderly collect bargaining, the duration of the strike and the financial position of both the applicant and the respondent. The judge found that the strike was indeed premeditated.¹⁶⁹ No evidence was presented to the judge suggesting the employer had been uncompromising, nor suggesting that it was unwilling to compromise.¹⁷⁰ As to the interdicts, two interdicts were said to not deter the employees from striking.¹⁷¹ The respondent’s conduct was highly irresponsible and very erosive.¹⁷² The strike fortunately did not last that long to the respondent’s credit. The judge noted that while the applicant’s financial position was strong, on the other hand the respondent was barely solvent.¹⁷³

This case illustrated how the Court confirmed what the legislation has stipulated with regard to the remedy of compensation in the event of a strike and the application thereof. The Labour Court’s judgement in this instance also displayed its firm hand

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Idem* 91.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Idem* 85.

¹⁷⁰ *Ibid.*

¹⁷¹ *Idem* 93.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

towards the vehement disregard that strikers showed by disregarding two court interdicts.¹⁷⁴ It is submitted that the judgement also illustrates how the Court took a firm stance against such unprotected strikes, reflecting its disapproval towards strikers who infringe law. Furthermore, the manner in which the judge considered the factors which were an important aspect of his discretion resulted in a proper application of discretion.

The proper exercising of the court's discretion was reflected in the fact that though the compensation award was penal, it did not result in the crippling of the union. Therefore future collective bargaining between the union and the employer could still occur.

4.4 Mangaung Local Municipality v SAMWU

Certain employees employed in the applicant employer's electricity department and were members of the respondent union embarked on an unprotected strike which lasted 7 days.¹⁷⁵ During the strike they blockaded the department's entrance and exits as well as prevented other employees from rendering services to consumers.¹⁷⁶ The unprotected strike and striker's conduct resulted in the employer suffering a loss amounting to R275 000.¹⁷⁷ It is important to note that the employer's claim arose and the losses were allegedly suffered before the Labour Relations Amendment Act 12 of 2002 ("the Amendment Act").¹⁷⁸ Therefore the employer's claim was restricted to section 68(1)(b) prior to the Amendment Act. Subsequently the claim will thus be limited to loss suffered due to the strike and not include conduct in furtherance of the strike.¹⁷⁹ The losses consisted of income lost due to the strike and income loss due to non-striking workers being unable to work.¹⁸⁰ The Court in this matter held that "the LRA advocated a "robust" approach to the quantification of the amount for which unprotected strikers or their union should be held liable."¹⁸¹ It was further emphasised that though compensation was "designed to send a clear message that

¹⁷⁴ *Ibid.*

¹⁷⁵ *Mangaung Local Municipality v SAMWU* [2003] BLLR 268 (LC) 269-270.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Idem*271.

¹⁷⁸ *Idem*272.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Idem*269.

unprotected strikes will not be tolerated”, the possibility that compensation may have to be paid by a trade union with funds contributed by members who did not participate in the strike must be taken into consideration.¹⁸²

4.5 *Algoa Bus Company v SATAWU*

Subsequent to the *Rustenburg Platinum Mines Ltd*, the case of *Algoa Bus Company v SATAWU* arose in 2009. In this matter the employer’s operations came to a standstill due to an unprotected strike.¹⁸³ It also resulted in a reduction of normal passengers amounting to 60 000 passengers less than usual over the two days of striking and a financial loss amounting to R465 001,34 excluding goodwill.¹⁸⁴ The applicant employer sought an order declaring the employees (third and fourth respondents) to be indebted to it for the above amount plus interest for damages arising from an unlawful strike and directing the employees to pay that amount.¹⁸⁵ Though the employer decided to sue the Transport, Action, Retail & General Workers Union (TARGWU) and the employees, it only cited the first respondent SATAWU.¹⁸⁶ TARGWU and its members did not oppose the employer’s application. When the Court considered the merits of the applicant’s case it found that the manner in which the losses were quantified was inaccurate.¹⁸⁷ The reason being that the calculation involved the duration of strike being two days instead of one day and for seven hours the next day.¹⁸⁸ The applicant’s submission that the calculation was not affected by duration of the strike was rejected.¹⁸⁹ Similar to *Rustenburg Platinum Mines v Mouthpiece Workers Union* the Court also confirmed the meaning of “just and equitable” compensation in terms of section 68(1)(b) of the LRA to refer to fairness.¹⁹⁰ Due to the employees not providing an explanation the Court

¹⁸² *Idem* 269.

¹⁸³ *Idem* 150.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Algoa Bus Company v SATAWU* [2010] 2 BLLR 149 (LC) 157.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Idem* 150.

subsequently ruled the strike to be premeditated and unprocedural.¹⁹¹ The Court held that the strike caused the employer's financial loss and inconvenience to the public.¹⁹²

As with the *Rustenburg* case, one observes that the Court looked at the same factors when exercising its discretion to order the compensation. However, the Court also considered the fact that the principle of "no work no pay" was applied by the applicant employer. It is the writer's opinion that on a closer look at the factors it is difficult to see how this principle is actually an important consideration in the court's discretion. Looking at the other factors it was clear to the Court that "neither the employees nor the unions made any attempts to comply with the LRA provisions and their conduct was not in the interests of orderly collective bargaining".¹⁹³ The strike was also found to not be as a result of unjustifiable conduct on the applicant's part.¹⁹⁴ Secondly the strike was unprocedural and constituted an unprotected strike as contemplated in the LRA.¹⁹⁵ Thirdly it was found that the strike resulted in financial loss and public inconvenience even though it was for a short duration.¹⁹⁶

On comparing these two cases one sees that the Courts applied the same approach looking at the law and used the same factors in applying their discretion. The employers in both cases reduced their claim for compensation though the reasons are not stated.

4.6 Challenges encountered in the application of section 68(1)(b)

Upon applying section 68(1)(b) the employer may encounter a few challenges. These may include having to quantify the exact financial loss of the damages caused by the unprotected strike. An estimation may not be accurate due to a number of factors, for instance the actual calculations of damages may be time consuming or not possible. Certain financial losses such as loss of future income may also be difficult to quantify.

¹⁹¹ *Idem* 157.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

Another challenge that may arise is the difficulty of identifying the perpetrators of the loss suffered in cases where the property is vandalised.¹⁹⁷ Unless the employer has access to video footage investigations may also prove to be fruitless in proving misconduct of striking employees. Video footage can also prove to be helpful in interdicting unprotected strike action.¹⁹⁸ An applicant would need to place “extensive evidence before the Court, including video footage of employees who have been identified as members of the striking union engaging in various acts of misconduct including blocking the entrances to the company’s premises”.¹⁹⁹ Such evidence could also be used in disciplinary action against employees who were specifically identified.²⁰⁰ The requirement of obtaining witnesses who are willing to testify is another obstacle encountered by employers in identifying and prosecuting those responsible for damage.²⁰¹

4.7 Other applications of section 68(1)(b) in case law

Though lockouts are not the focus of this paper it must not be forgotten that section 68(1)(b) is applicable in such instances. The Labour Appeal Court held in *Stuttafords v SACTWU* that “the Labour Court does not have jurisdiction to award compensation to locked-out employees in the context of a protected lock-out by reason of the unlawful use of replacement labour by the employer”.²⁰² Zondo JP held that section 68(1)(b) is in fact limited to loss arising from an unprotected strike or lock-out.²⁰³ The Court also noted that, in contrast to section 68(1)(a), section 68(1)(b) does not apply to loss attributable to “conduct in contemplation or in furtherance of strikes and lock-outs”.²⁰⁴ Consequently employers did not have section 68(1)(b) at their disposal in cases where they suffered loss as a result of damage caused by acts committed outside of the unprotected strike. However, in August 2002 the Amendment Act

¹⁹⁷Mischke *Strike Violence and Dismissals* 2012 CLL 12.

¹⁹⁸*Alpha Pharm Western Cape (Pty) Ltd v NEHAWU* C1008/2012 4 at 12.

¹⁹⁹*Ibid.*

²⁰⁰*Ibid.*

²⁰¹Mischke 2012 CLL 13.

²⁰²*Stuttafords v SACTWU* [2001] 1 BLLR (LAC) 56 at 39.

²⁰³*Idem* 55 at 31.

²⁰⁴*Idem* 50 at 13.

changed this position and section 68(1)(b) was not limited to strikes but extended to loss caused by conduct in furtherance of a strike.²⁰⁵

4.8 Concluding Remarks

Though case law pertaining to the compensation remedy is at hand and gives guidance as to how the section is applied by the courts. Through case law the courts have also demonstrated their disapproval and response to unprotected strikes.²⁰⁶ The writer submits that the case law also reveals the shortcomings of the section as it stands. One of the biggest shortcomings of this remedy may be that in the employer's eyes the remedy does not deter unprotected strikes in the future. Furthermore, in attempting to exercise fairness, the courts order the unions to pay over compensation that they can afford and over a period of time. However, this results in the employers' losses only being partly recovered. The interpretation of just and equitable compensation has resulted in employer's receiving considerably less compensation than that which was claimed. Subsequently, section 68(1)(b) does not seem to achieve the legislature's aim to deter the violence which results in damage, but appears to be an insignificant slap on the wrist of the liable parties .

²⁰⁵ *Mangaung Local Municipality v SAMWU* 272.

²⁰⁶ See footnote 32 above.

Chapter 5

A Comparative perspective of the remedies to loss suffered on account of unprotected strikes

5.1 Introduction

Employers have other remedies at their disposal besides section 68(1)(b)'s compensation remedy. These remedies come in the form of interdicts, common law claims for damages, dismissals, as well as a similar remedy in section 11 of the Regulation of Gatherings Act ("The Act")²⁰⁷ The focus of this chapter is on a comparative analysis between relevant common and statutory law remedies and section 68(1)(b) of the Labour Relations Act.

5.2 Interdicts

The Labour Court has exclusive jurisdiction to grant an interdict order to restrain any person from participating in an unprotected strike or any conduct in contemplation or in furtherance of a strike.²⁰⁸ The interdict can either be effected in full or partially.²⁰⁹ Therefore interdicts can be restricted to an aspect of the strike such as a category of employees, or be a complete interdict.²¹⁰ The employer can seek to interdict certain employees from participating in a strike such as those that constitute essential workers.²¹¹ Alternatively an employer can seek to apply for an interdict against all union members like ABSA did against all SACTWU members.²¹² Employers also have the choice of only applying for an interim order or seek a final interdict on the return date. In *Rainbow Chicken Farms v FAWU* the employer launched an urgent application for a rule nisi with an interim interdict against the trade union which was about to embark on strike action as well as the respective employees seeking to strike.²¹³ In the employer decided not to pursue a final interdict

²⁰⁷ Le Roux "Defining the right to strike" 2004 CLL 91; Regulation of Gatherings Act 205 of 1993.

²⁰⁸ S68(1)(a) of the Labour Relations Act 66 of 1995.

²⁰⁹ Grogan 393.

²¹⁰ *Ibid*; *Oasis Group Holdings (Pty) Ltd v Bardien*.

²¹¹ *Ekurhuleni Metropolitan Municipality v SAMWU* [2011] JOL 26853 (LC) 3.

²¹² *ABSA Bank Limited v South African Clothing & Textile Workers Union* [2014] JOL 31586 (KZD) 5-6.

²¹³ *Rainbow Chicken Farms (Pty) Ltd v FAWU* [1997] 8 BLLR 1081 (LC) 1082.

on the return date but instead sought a declaratory order that “any strike action as contemplated in the correspondence to the applicant by the first respondent dated 11 June 1997 is in contravention of section 65(1)(a) and (c) of the LRA and a costs order respectively”.²¹⁴ Alternatively the employer could also proceed to apply for a final interdict.²¹⁵ The decision to grant an interdict is based upon, the court considering the principles pertaining to granting an urgent relief into consideration.²¹⁶ The following requirements must be met in order to succeed in obtaining an interim interdict: whether the employer has established a *prima facie* right to the relief it seeks.²¹⁷ Secondly, that a well-grounded apprehension of irreparable harm exists towards the applicant if the relief is not granted.²¹⁸ To establish this requirement an objective test is used where “the question is whether a reasonable person, confronted by the facts, would apprehend the probability of harm; actual harm need not be established upon a balance of probabilities”.²¹⁹ Lastly, that the balance of convenience favours the granting of the relief and that no other satisfactory remedy exists for the applicant.²²⁰ It is also important that an employer makes sufficient attempts to serve notice of application on each striker or identify the strikers in papers.²²¹ Case law has also found that the fact that an interim interdict is a discretionary remedy was another important consideration, resulting in the court possessing a wide discretion.²²²

The requirements for a final Interdicts on the other hand entail that the applicant is establishes a clear right, an injury actually committed or reasonably apprehended; and similar to an interim interdict the absence of similar protection by any other ordinary remedy.²²³

²¹⁴ *Ibid.*

²¹⁵ *Knox D’Arcy Ltd v Jamieson* [1996] 3 All SA 669 (A) 669.

²¹⁶ Grogan 393; *Oasis Group Holdings (Pty) Ltd v Bardien* C 968 / 2010 7 at 13.

²¹⁷ Grogan 393; *Aranda Textile Mills (Pty) Ltd v Hurn* 2000 2 All SA 530 (E) 530-531; *Oasis Group Holdings (Pty) Ltd v Bardien supra.*

²¹⁸ Grogan 393; *Braham v Wood* [1956] 1 All SA 300 (D) 305; *Oasis Group Holdings (Pty) Ltd v Bardien supra.*

²¹⁹ Harms LAWSA (ed Joubert) 11 (2008) par 405.

²²⁰ Grogan 393; *Oasis Group Holdings (Pty) Ltd v Bardien supra.*

²²¹ Grogan 394.

²²² Harms LAWSA 11 par 403; *Hix Networking Technologies CC v System Publishers (Pty) Ltd* [1996] 4 All SA 675 (A) 681.

²²³ Harms LAWSA 11 par 396.

5.2.1 Common law requirements for an interdict

In the case of *SA Post Office Limited v TAS Appointment and Management Services CC and others* the strikers were not employees of the Post Office but were employees of various subcontractors.²²⁴ Their primary demand was to be made permanent employees of the Post Office instead of subcontracted workers.²²⁵ The court also noted that section 68(1) does not explicitly grant relief to any party but instead held that the Labour Court has exclusive jurisdiction in these matters.²²⁶ The class of applicants that could potentially seek an order to interdict an unprotected strike, or any unlawful conduct in furtherance of a strike, is in fact not described.²²⁷ The LRA does not expressly restrict potential applicants but requires that certain prerequisites be met. It is important that the party applying for an interdict demonstrates convinces the court that there is an unprotected strike and that this unlawful act has infringed on one or more of that party's legal rights.²²⁸ The Court held that the common law regulating interdicts are still applicable to parties in this respect, when a party sought to interdict a strike it did not rely on section 68(1)(a) per se but relied on the strikers infringing another right instead such as a breach of contract or delict.²²⁹ In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others* an interim interdict was granted to prevent employees from continuing with violent and unlawful conduct including obstructing vehicles and persons from entering or leaving the premises, assault, theft and malicious damage to property.²³⁰ On the return date the strike had ended and the employer did not pursue a final interdict.²³¹ However, costs were sought from both the union and the employees.²³² In making its decision the court exercised its discretion in accordance with "the requirements of the law and fairness".²³³ Having regard to law and fairness

²²⁴ *SA Post Office Limited v TAS Appointment and Management Services CC* (2012) 33 ILJ 1958 (LC) 622.

²²⁵ *Ibid.*

²²⁶ Freund Current Labour Law 2012 (2012) 119.

²²⁷ *Ibid.*

²²⁸ *SA Post Office Limited v TAS Appointment and Management Services CC* 624.

²²⁹ Freund 120.

²³⁰ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* 1000.

²³¹ *Idem* 999.

²³² *Ibid.*

²³³ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* 1002.

the judge found no basis why the respondents should not be liable for the applicant's (employer's) costs.²³⁴

5.2.2 Statutory requirements for an interdict

Section 68(2) and section 68(3) on the other hand stipulates the procedural requirements that govern interdicts.²³⁵ Before an interdict is granted section 68(2) states that 48 hours notice must be served on the respondent.²³⁶ The Act does however permit shorter periods under specific conditions. The considerations which the court addresses are as follows:

The applicant has given the respondent written notification of his or her intention to apply for an interdict; the respondent has been availed of reasonable and sufficient opportunity to be heard before a decision is taken on the application, and the applicant has shown good cause why a period shorter than 48 hours should be permitted.

Section 68(3) stipulates that:

Despite subsection (2), if written notice of the commencement of the proposed strike...was given to the applicant at least ten days before the commencement of the proposed strike..., the applicant must give at least five days' notice to the respondent of an application for an order in terms of subsection (1) (a).

5.3 Common law claim of damages

South African employers also have the option to claim damages in terms of the common law. In terms of Roman Dutch law the owner of a thing which was "intentionally or negligently damaged by another is entitled to restitution to his or her *status quo ante*".²³⁷ The owner can also recover damages for loss of future income.²³⁸ Section 67 (6) of the LRA states that civil legal proceedings may not be instituted against a person participating in a protected strike [,] or [in terms of] any conduct in furtherance of a protected strike.²³⁹ However, any conduct which is found to be a criminal offence is unprotected and amendable to the jurisdiction of a civil

²³⁴ *Ibid.*

²³⁵ Conradie and Holtzhausen 523.

²³⁶ *Ibid.*

²³⁷ Harms LAWSA par 63.

²³⁸ *Ibid.*

²³⁹ Labour Relations Act 66 of 1995.

court.²⁴⁰ Furthermore, in *Mondi Kraft Division v CEPPWAWU & others* it was held that the Labour Court has jurisdiction to not only hear delictual claims arising from unprotected strikes but delictual claims in protected strikes as well.²⁴¹

The court in *SA Post Office Limited v TAS Appointment and Management Services CC and others* is of the view that “the mere fact that a business may suffer directly or indirectly as a consequence of an unprotected strike, does not necessarily give rise to a valid delictual claim”.²⁴² Therefore businesses who may have suffered damages due to unprotected strikes do not automatically have a valid delictual claim.²⁴³ The court also found that the typical applicant in such matters was most commonly the strikers’ own employer, “and it will simply be assumed – usually without it having to be stated – that the strikers are in breach of their obligation to render their services, and because the strike is unprotected their conduct amounts to an actionable breach of the employment contract”.²⁴⁴

Grogan is of the view that the LRA mirrors the requirements of the common law in cases involving pure economic loss”.²⁴⁵ Pure economic loss is a form of patrimonial loss in terms of the South African law of delict.²⁴⁶

5.4 Statutory remedy in terms of dismissal law

In addition to the remedies discussed, employers may seek to dismiss employees who participated in an unprotected strike. Though the remedy of dismissing employees engaged in unprotected strike action does not result in compensation like the section 68(1)(b) remedy, the employer can at least ensure that no further damage is caused. In order to avoid unfair dismissal disputes the employers are required to follow the guidelines found in Schedule 8 of the Code of Good Practice:

²⁴⁰ *Lomati Mill Barberton v Paper Printing Wood and Allied Workers Union* (1997) 18 ILJ 178 (LC) 184 as quoted in *Mondi Kraft Division v CEPPWAWU* [2005] JOL 14827 (LC) 12.

²⁴¹ *Mondi Kraft Division v CEPPWAWU* 17.

²⁴² *SA Post Office Limited v TAS Appointment and Management Services CC* [2012] 6 BLLR 621(LC) 624.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ Grogan 394.

²⁴⁶ Potgieter and Visser *Law of Delict* (2010) 220.

Dismissal.²⁴⁷ In such instances participating in an unprotected strike is seen as misconduct.²⁴⁸ Additional conduct that might be unlawful and considered as misconduct includes intimidating non-striking employees, maliciously damaging the employer's property and interfering in the employer's business operations.²⁴⁹ Though an unprotected strike constitutes misconduct it does not automatically justify dismissal.²⁵⁰ In order for a dismissal to be substantively fair the employer must refer to facts and surrounding circumstances.²⁵¹ Other criteria which is considered is the seriousness of the contravention of the LRA, whether attempts were made to comply with the LRA and whether or not the strike was in response to unjustified conduct by the employer.²⁵² It is also important for the employer to ensure a fair procedure is followed. The guidelines in terms of Schedule 8 as follows:²⁵³

prior to the dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt; the employees should be allowed sufficient time to reflect on the ultimatum and respond to it; and if the employer cannot reasonably be expected to take these steps, it may dispense with them.

In the case of *SA Commercial Catering and Allied Workers Union v Check One Pty (Ltd)* the employer dismissed 9 (nine) of the 38 (thirty eight) employees who participated in an unprotected strike. The nine employees were identified and subsequently dismissed on account of "their violent, threatening and intimidating behaviour during the strike".²⁵⁴ The rest of the perpetrators received final written warnings for participating in the strike.²⁵⁵ The nine dismissed employees brought a complaint that they were unfairly dismissed. In return the employees alleged that the employer failed to apply disciplinary measures in a consistent manner. The Court

²⁴⁷ S68(5) of Labour Relations Act 66 of 1995; Conradie and Holtzhausen 523.

²⁴⁸ *Ibid.*

²⁴⁹ Van Jaarsveld *et al* 5-29.

²⁵⁰ Du Toit 463.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*; item 6(2) Schedule 8 Code of Good Practice: Dismissal.

²⁵⁴ Freund *Current Labour Law Review* 2012 125; *SA Commercial Catering and Allied Workers Union v Check One Pty (Ltd)* (2012) ILJ 1922 (LC) 38.

²⁵⁵ *Ibid.*; *SA Commercial Catering and Allied Workers Union v Check One Pty (Ltd)*.

found that the allegation of misconduct was proved and dismissed the claim that the employer applied selective discipline.²⁵⁶

5.5 Regulation of the Gatherings Act

The purpose of the Act is to” regulate peaceful “public gatherings and demonstrations at certain places and provides for matters connected therewith”.²⁵⁷

However, the preamble limits the exercising of this right by confining the gatherings in two ways. The first example being that every person has the right to peacefully assemble with other persons and to express his views on any matter freely in public peaceful ones.²⁵⁸ Secondly, the right must be exercised having regard to others.²⁵⁹

The question of liability or consequences is found in section 11 of the Act.²⁶⁰ Section 11 expressly stipulates that liability from damage arises from participation in gatherings and demonstrations.²⁶¹ In section 11(1)(a) specifies that “every organization on behalf of, or under the auspices of which that gathering was held, or, if not so held, the convener” would be jointly and severally liable for riot damage.²⁶²

Section 11(1)(b) similarly specifies that every person participating in a demonstration would be jointly and severally liable for riot damage.²⁶³ Section 11(2) constitutes a defence against liability in section 11(1). The organisation or person must prove the following factors:

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

²⁵⁶ *Ibid.*

²⁵⁷ Regulation of Gatherings Act 205 of 1993.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*

One of the most significant cases which applied section 11 of the Regulation of Gatherings Act is *Garvis and others v SATAWU*. In this case a claim for damages arose after the gathering organised by SATAWU in May 2003 “escalated into a full-scale riot leading to destruction, damage and the plaintiffs’ loss of property”.²⁶⁴ The plaintiffs’ claim was brought in terms of section 11(1) of the Gatherings Act and alternatively under the common law.²⁶⁵ However, the defendant pleaded as follows in its alternative defence:²⁶⁶

That if the trial court finds that the defendant is liable to the plaintiffs in terms of section 11(1) of the Act and that the defendant is not entitled to succeed with its defence in terms of section 11(2), the words “and was not reasonably foreseeable” in section 11(2)(b) of the Act are inconsistent with the Constitution of the Republic of South Africa.

The constitutional challenge of section 11(2) brought the issue of trade union liability into the spotlight and confirmed the constitutionality section 11(2)(b).²⁶⁷ SATAWU argued that section 11(2)(b) was unconstitutional because the provision offended its members’ right to gather and demonstrate.²⁶⁸ The union argued that being required to prove that the act or omission was not reasonably foreseeable placed too great of a burden on trade unions seeking to protest publicly, therefore infringing on their constitutional right as entrenched in section 17. The court held that there was no significant distinctions between section 11(2)(b) and the common law requirements for the test of negligence.²⁶⁹

Unlike section 68(1)(b), section 11(2)(b) expressly provides a defence for march organisers whereby they primarily need to prove that they did not “permit or connive at the act or omission which caused the damage in question foreseeable”. Lastly the organiser must establish that they took all reasonable steps within their power to prevent the act or omission”.

²⁶⁴ *Garvis and others v SATAWU* [2010] 31 ILJ 2521(WCC) 2523.

²⁶⁵ *Ibid.*

²⁶⁶ *Idem* 2524.

²⁶⁷ *Idem* 2521.

²⁶⁸ *South African Transport and Allied Workers Union v Garvis* [2011] 12 BLLR 1151 (SCA) 1151.

²⁶⁹ *Idem* 1160.

However, both remedies seek to be a deterrence of unlawful violent behaviour that infringes on others' rights and ensures that persons or organisations who organise

The courts position with regard to the scope of the responsibility and liability of organisers is mentioned in the following case before South African Human Rights Commission. In *Freedom Front v South African Human Rights Commission and Another 2003 (11) BCLR 1283 (SAHRC)* the court confirmed the responsibility and liability of organisers with respect to hate speech uttered by marchers at rallies.²⁷⁰ It was highlighted that organisers may be held liable similarly to organisers of marchers being held responsible for damage caused by marchers.²⁷¹

5.6 Evaluation of remedies in the United Kingdom

5.6.1 Picketing Code of Practice

English Law, like South African law, has remedies which the employer can utilise when it has suffered loss as a result of strike action. In the Picketing Code of Practice ("the Code") employers who are party to a contract that is interfered with or could possibly be interfered with by unlawful picketing have a civil remedy.²⁷² An employer, worker or any other person party to a contract may apply for a court order preventing or stopping the unlawful picketing.²⁷³ In England and Wales the court order is referred to as an injunction while in Scotland it is called an interdict.²⁷⁴ Employers can also claim damages in the event that they suffer loss caused by the activities of the unlawful picketing.

The Code holds a trade union liable for unlawful acts during a picket if the following persons or bodies have endorsed or authorised the unlawful act. These persons or bodies include "the union's principle executive committee, president or general secretary, any person with powers under the union's own rules to do so ,any other

²⁷⁰ *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) 1300.

²⁷¹ *Idem* 1299.

²⁷² Item 31 of Picketing Code of Practice PL 928.

²⁷³ *Ibid.*

²⁷⁴ Footnote 5 of Item 31 of Picketing Code of Practice PL 928.

committee of the union or any official of the union including those who are employed by the union and those...who are not” such as shop stewards.²⁷⁵

5.6.2 Economic torts

In *OBN Ltd v Allan* the House of Lords attempted to bring clarity around English common law remedy economic torts.²⁷⁶ The Lords with the leading opinions distinguished between two torts, namely “inducing breach of contract” and “causing loss by unlawful means”.²⁷⁷ The elements of a tort (delict) of causing loss were said to include causing loss by unlawful means.²⁷⁸ The second element refers to the wrongful interference with the acts of a third party, in which the claimant had an economic interest.²⁷⁹ Thirdly, the use of unlawful means: “acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against the third party and which is intended to cause loss to the claimant”.²⁸⁰

When the above remedies are compared with remedies found in South African law it is clear that they are quite similar. However, unlike English law a breach of contract is regarded as a different form of wrongful conduct in private law.²⁸¹ Nevertheless the similarity between a delict and a breach of contract is conceded.²⁸² The remedies are similar in that both involve “an act by one person (contracting party) which in a wrongful and culpable way causes damage to another (contracting party)”.²⁸³

²⁷⁵ Item 37 of Picketing Code of Practice PL 928.

²⁷⁶ Simpson Economic Tort Liability in Labour Disputes: The potential impact of the House of Lord’s decision in *OBG Ltd v Allan* 479.

²⁷⁷ Simpson 470.

²⁷⁸ *Idem* 472.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ Neethling *et al* 6.

²⁸² *Ibid.*

²⁸³ *Ibid.*

5.7 Concluding Remarks

Case law indicates that one of the first remedies employers utilise in the case of unprotected strike action is to apply for an interdict. The urgent nature of an interdict is one of the factors that distinguishes this remedy from the section 68(1)(b) remedy. It could also be argued that the few prerequisites considered in an application for an interdict assists in expediting the application. An interdict application is also in essence a preventative measure which seeks to prevent the unprotected strike from commencing or if it has already started the aim is to stop it in its tracks. Section 68(1)(b) is only sought by employers once the strike damage or its impact on the employers' business is calculated to some degree. The considerations of the compensation remedy in section 68(1)(b) are also more extensive.

The most distinguishable factor of the common law remedy is that it extends to protected strikes and not only the damage caused by an unprotected strike. The compensation remedy on the other hand is only available in the event of an unprotected strike. In as far as similarities both remedies provide a monetary remedy.

The dismissal of employees is also a remedy similar to interdicts in that it is preventative preventing more damage by the employees responsible for the strike damage. Unfortunately this remedy requires that employers ensure that the procedure, as laid out in Schedule 8 of the LRA, is followed which could be problematic issues. For example identification of the perpetrators may prove to be difficult in some instances.²⁸⁴

The writer is of the view that section 11 of the Regulation of Gatherings Act provides a useful guideline which should be used to ensure that trade unions become more responsible for the actions of their members in the event of strike action.

Though the alternative remedies above have features which may make them more appealing than the compensation remedy, none can completely replace it.

²⁸⁴ See footnote 198-200.

Chapter 6

Conclusion

6.1 Concluding Remarks

How effective is the statutory remedy provided in section 68(1)(b) of the LRA? To answer this question one has to evaluate section 68(1)(b) in the context of strike law in South Africa, more especially the right to strike. As discussed the right to strike is an integral part of collective bargaining in South African law. Its importance is reflected in the protection which the Constitution provides it as well as its status as a fundamental right. The importance of the right to strike is reiterated in international labour law as well. Though the ILO may not expressly protect the right like the South African Constitution, fundamental ILO Conventions appear to promote it by protecting the right to organise and freedom of association. Regional instruments also demonstrate their support for the right to strike by expressly guaranteeing it or encouraging freedom of association and the right to organise. There are alternative remedies which employers can utilise besides section 68(1)(b), however none prove to be able to completely replace it. Foreign law such as English law also provide similar remedies to those found in South African Law.

Despite the statutory and common law remedies at the employers' disposal unprotected strike action and strike violence still persists in South Africa. Courts have shown their disapproval for unruly behaviour and disregard for the rule of law.²⁸⁵ Unfortunately the court orders do not have the deterring effect one would desire. Employers are also not sufficiently compensated which could result in the dismissal of employees for operational reasons (retrenchments).²⁸⁶

6.2 Recommendations

In as much as the right to strike exists and is protected domestically and internationally. The limitation of this right cannot be ignored by trade unions and their members when exercising it. I submit that though trade unions are held responsible

²⁸⁵*In2FOOD (Pty) Ltd v FAWU* J350/13 (accessed 29-10-2014); *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 ILJ 998 (LC) 1004.

²⁸⁶*Food and Allied Workers Union obo Kapesi v Premier Foods Ltd t/a Nlue Ribbon Salt River* (CA7/2010); Mischke 2012 CLL 13.

for the actions of their members during a strike the implementation of the penalty simply amounts to a “slap on the wrist” and is not effective in preventing such conduct in the future. Employers are left with little restitution when it comes to the financial loss and damages faced with as a result of a strike. The compensation paid to them as ordered by the courts to date only amounts to a drop in the ocean of actual loss suffered. Such a situation neither benefits the employer nor the employees. The reigns of collective bargaining require tightening in as far as the conduct of strikers is concerned. Trade unions should not resort to violence and such behaviour must be strongly discouraged through our legislation.

However, society should not view legislation as the primary solution to strike violence and the losses suffered as a result. Strike violence should be approached with a multifaceted approach involving all role players of the collective bargaining process. Trade unions leadership should embark on transforming the culture and conduct associated with strike action. This would involve removing the perception or belief that union members need to resort to violence to obtain the employer’s attention. The nature of strikes in South Africa is such that a certain degree of disruptiveness is expected.²⁸⁷ However, forcing employers to accede to employees’ demands, through violent and criminal conduct, is unacceptable.²⁸⁸ It is generally accepted that South African courts strongly disapprove of such gross infringements of others’ rights. Furthermore, strikes that are marred with violence and unruly conduct are extremely detrimental to the legal foundations upon which the country rests. The aim of a strike is to persuade the employer through the peaceful withholding of work to agree to their demands.

Furthermore, an approach seeking to instil a different mentality, one that encourages the rule of law, should be pursued. Unions should also seek to pursue all the preventative measures that are reasonably possible to prevent strike violence.²⁸⁹ This includes them adopting a more aggressive approach in managing

²⁸⁷A Myburgh 2013 CLL 4; *Food & Allied Workers Union on behalf of Kapesi & Others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC) at para 6.

²⁸⁸*Ibid.*

²⁸⁹*South African Transport and Allied Workers Union v Garvis* [2011] 12 BLLR 1151 (SCA) .

their members conduct, strong preparation for all foreseeable risks and providing contingency plans. “The time has come in our labour relations history that trade unions should be held accountable for the actions of their members.” “For too long trade unions have glibly washed their hands of the violent actions of their hands of the violent actions of their members. .²⁹⁰” It is not beneficial for trade unions or their members to exercise their right to strike in a manner which will ultimately lead to loss of jobs, threat to others rights through intimidation as well as possible loss of life and be detrimental to the economy.

The remedy provided by section 68(1)(b) does not effectively provide the compensation that employers require when they suffer losses caused by unprotected strikes. Unfortunately the remedy is ineffective in its current form. However, as mentioned above there is no simple solution. All parties need to reflect on the current state of collective bargaining and be willing to be a part of the necessary transformation.

²⁹⁰*In2FOOD (Pty) Ltd v FAWU* J350/1 <http://www.worklaw.co.za/SearchDirectory/CaseLaw/I16-fj.asp> (accessed 29-10-2014).

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