THE RIGHT TO STRIKE AND ITS LIMITATIONS

by

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Submitted in fulfilment of the requirements for the degree

MASTER LEGUM

in the

FACULTY OF LAW

UNIVERSITY OF PRETORIA

PROMOTOR: PROF BPS VAN ECK

OCTOBER 2015

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SUMMARY

In any employment relationship there is an unequal bargaining power between an employee and an employer. The employer is the "sole bearer of power" as s/he has financial power over an employee. The only means by which employees can counteract this power is if they act collectively. By acting collectively the employees are placed in a bargaining position with the employer and this also gives them an opportunity to enforce their employment rights. The International Labour Organisation (hereafter referred to as "ILO") Conventions 87 and 98 of 1948 also provides that employers and employees have the right to organize and to bargain collectively.

South Africa, because it is a member of the ILO, ratified the said Conventions and more specifically granted every worker with a constitutionally entrenched right to strike. This is set out in section 23 of the Constitution of South Africa No 108 of 1996 (hereafter referred to as the Constitution1996).

The Labour Relations Act (hereafter referred to as the "LRA") also gives effect to this right by providing a legislative framework within which this right to strike could be exercised. This protection can only be provided if the strike complies with the substantive and procedural requirements of Chapter IV of the LRA. This includes protection against dismissal, interdicts and civil liability for losses caused by a strike.

This dissertation seeks to determine what this right to strike entails and whether the current remedies are effective to curb unprotected strikes.

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CHAPTER ONE

INTRODUCTION

1. CONTEXTUAL BACKGROUND

Strikes coupled with violence continue to be a common occurrence in South Africa.[1] According to Freund the Congress of South Africa Trade Unions survey revealed that "just under half of the union members and one seventh of non-members reported that there had been a strike in their workplace in the past five years".[2] He further notes that according to this survey half of the members that had been surveyed confirmed that violence was used as a means to achieve an acceptable result.[3] The strikes were therefore affected intentionally without conforming to any substantive and procedural requirements of the LRA and were coupled with violence.[4]

Recent strikes in the mining industry were unusually prolonged and violent, more specifically the Marikana massacre. Makgetla notes that in the North West province, for example, 70 000 miners went on a strike which lasted for five months until July 2014.[5] During the said period the strike action was coupled with relatively high levels of violence, procedural action and union rivalry.[6] During the Marikana massacre 34 striking miners were tragically killed.[7]

[1] Freund (2012) 111.
[2] *Ibid.*
[3] Freund (2012) 111.
[4] *Ibid*.
[5] Makgetla (2015) 115.
[6] *Ibid.*
[7] Hepple (2015) 15.

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Hepple also confirms that during 2014 there were extreme and prolonged strikes in a few industries such as the platinum mines, engineering and metal working.[8] He notes that although 85% of these strikes were to demand higher wages, most critics agree that the core reason for the strike were due to a deep social crisis in the "new South Africa".[9] This is because strikes are frequently associated with community protests about the failure of the government to provide basic public services.[10] Despite the end of Apartheid, increasing poverty and inequality still exists.[11]

According to Makgetla, in South Africa inequalities remain an "outlier by global standards".[12] These inequalities place a massive burden on labour relations.[13] This is because earnings as well as economic standards are unequal.[14] He further notes that, because of this inequity, workers will measure their success in wage negotiations not by past increases or the standards of other industries, but rather against the: 'lifestyle of the employers and the economic and political upper classes in general'.[15] This will therefore result in wage negotiations being prolonged and being accompanied by violence in order to achieve the end result, for example as in the case of Marikana.

Hepple as well as Sethlatswe[16] notes that the facts of Marikana are as follows: during 2012 rock drill operators, who were the lowest paid workers, were in dispute with their employer regarding a salary increase.[17] They demanded that their salary be doubled. They were also in dispute with their union, namely NUM, because the union was of the opinion that the increase would not be to the rock driller workers' advantage. However, NUM agreed to an 18% salary increase for higher paid miners who were mostly first line supervisors of the mining workers team. The shop steward and union officials who were negotiating on behalf of the miners were themselves also highly paid earners. As a result thereof the rock drill operators terminated their union membership of NUM and

[8] *Ibid.*
[9] Hepple (2015) 15.
[10] *Ibid.*
[11] Hepple (2015) 16.
[12] Makgetla (2015) 119.
[13] *Ibid.*
[14] Makgetla (2015) 119.
[15] *Ibid.*
[16] Sethlatswe (2013) 451.
[17] Hepple (2015) 16; Sethlatswe (2013) 451.

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joined AMCU. Despite the fact that the majority union NUM was not agreeing to the strike, the workers still proceeded with an unprotected strike. Management agreed to increase the salary of the rock drill operators only after the tragic death of 3 miners at Implats mines and 34 miners at Marikana.

The main purpose of the right to strike is to attempt to restore the inequalities which have been created by social and economic factors;[18] such as the Marikana tragedy. The end result of the Marikana tragedy is that many lives were taken before collective bargaining occurred. It also highlights the importance of setting out the circumstances when the right to strike can be exercised and that the procedural requirements must be complied before a strike action can be allowed. Questions which also arise regarding the Marikana matter are whether the management "agreed" to the increase or were their "hands" being forced, and did it therefore amount to "economic duress"? According to Myburgh, should an employer sign an agreement under economic duress then the said agreement will not reflect "the force of supply and demand but rather the force of violence".[19]

This dissertation will not deal with the Marikana massacre, but rather what the right to strike entail and that unprotected strikes should be curbed before it escalates to violence or tragedy.

Section 23 of the Constitution grants every worker the right to strike. The main aim of granting these constitutional rights are to encourage collective bargaining.[20]

The LRA also gives effect to this right by providing a legislative framework within which this right to strike could be exercised. This includes protection against dismissal, interdicts and civil liability for losses caused by a strike. The LRA, however, restricts the right to strike to what it considers to be a protected strike. In terms of section 64 of the LRA a strike is only protected if firstly, the procedures as set out in the section have been complied with and secondly if the disputes are about the provisions as set out in

[18] Hepple (2015) 18.
[19] Myburgh (2013) 4.
[20] S23 (2) (c) of the Constitution, 1996.

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section 65 of the LRA. Thirdly if it falls within the definition of what is regarded as a strike.[21]

Do the procedures and the substantive requirements as contained in Chapter IV of the LRA have the effect of limiting the constitutional right to strike? It must be noted that South Africa's economy is "increasingly faced with competition from economies that benefit from lower wage costs and that linkages continue to be drawn between competiveness demands and labour market regulations".[22] If a strike does not assist in collective bargaining, can it be said that such a strike is protected?[23]

It must be noted as well, that section 36 of the Constitution also provides for the limitation of the Bill of Rights.[24] Section 68 also makes provision that the Labour Court has the discretion whether to interdict an unprotected strike and/or to grant compensation against a union in instances where there has been a breach of Chapter IV of the LRA.[25]

2. RESEARCH QUESTION

The question to be addressed is whether there should be a fundamental right to strike and whether the current remedies are effective to curb unprotected strikes? Would the granting of compensation be more effective means of reducing the number of unprotected strikes in South Africa?

3. SIGNIFICANCE OF THE STUDY

In an employment relationship there is unequal bargaining power between the employee and employer. The only manner in which employees would be able to counter this bargaining power is if they act collectively. The manner in which they could concert this bargaining power is the recourse of strike action. The main purpose of granting the constitutional right to strike is therefore to encourage collective bargaining. The right to strike can, however, not be concerted without limitation, otherwise it would tip the scale

[21] S213; S64; 65 of the LRA.
[22] Van Niekerk et al (2015) 16.
[23] Rycroft (2012) *Paper International Labour Law Conference, Barcelona* 9.
[24] S36 of the 1996 Constitution.
[25] S68(3)(b) of the LRA.

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in favour of employees and would therefore result in an imbalance in the collective bargaining.

4. RESEARCH METHODOLOGY

In answering the research question I will do a literature review and comparative analysis on whether there should be a fundamental right to strike. In addressing these issues an analysis will be made regarding the remedies which are available to an employer to curb trade unions from participating in an unprotected strike. An analysis will be made regarding international norms about strike action. A comparative study of England and Australia will be made regarding which remedy would be ideal for South Africa when dealing with unprotected strike.

5. STRUCTURE

In this dissertation I will in chapter two discuss the international norms regarding the recognition of the right or the freedom to strike. Special attention will be made regarding how the international instruments such as the ILO and the European Union (hereafter referred to as the "EU") have interpreted the aspect of strike action.

Thereafter in chapter three examines the right to strike and what the limitations are regarding the right. Specific reference will be made regarding the substantive and procedural limitation as set out in the LRA.

Chapter four explores the possible remedies which can be used in order to curb unprotected strike action more specifically whether compensation and/or a contempt of court interdict application could possibly curb unprotected strike action.

In chapter five comparative studies of England and Australia will be made, more specifically the procedures for protected industrial action and remedy for unprotected strike action.

The dissertation will then conclude by setting out recommendations regarding the right to strike and the remedies available to an employer when dealing with unprotected strikes.

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CHAPTER TWO

INTERNATIONAL NORMS

1. INTRODUCTION

According to Hepple, the general characteristics of strikes are that they must contain two essential elements: firstly there must be a "concerted action" and secondly there must be a "withdrawal of labour".[26] Strikes not only affect employers against whom the strike has been directed, but also affects workers and the national economy of countries.[27] Despite the harm which strikes can cause or possibly cause, all democratic countries regard the "freedom" or the "right" to strike as a fundamental right.[28] As pointed out by Cheadle, constitutions do not often describe the concept of "strike".[29] Yet most countries have either included the right to strike in their constitutions or have inferred that a right to strike flows from the constitutional right to freedom of association and collective bargaining.[30] According to Cheadle, ninety eight countries have included the right to strike in their respective constitutions.[31]

Despite this inclusion, the ambiguity of "the right to strike" is in its "very conception a right that contemplates restriction and limitation",[32] and which requires the law for its

[26] Hepple (2015) 28.
[27] Hepple (2015) 27.
[28] *Ibid.*
[29] Cheadle (2015) 75; Sciarra (2015) 216.
[30] Cheadle (2015) 67 and derived from Article 3 Convention 87.
[31] Cheadle (2015) 67.
[32] *Idem* 75.

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proper execution.[33] The international standards on the right to strike, such as the International Labour Organisation (hereafter referred to as ILO) and the European Union (hereafter referred to as EU), do not set out clear limitations and restrictions regarding the right to strike.[34] Under international law there are no parameters regarding the limitation of strikes and the general standards are difficult, if not impossible, to determine.[35]

Despite these shortcomings the right to strike is seen as an essential means of advancement of the social and economic concerns of employees and their trade unions.[36]

The purpose of this discussion is to establish the legitimacy of the concept of strike action, and the inferred right to strike or freedom to strike in international law, and its limitations. The focus is on the international norms set out by the ILO and the EU.

2. THE RIGHT TO STRIKE ACCORDING TO THE ILO

The supervisory bodies of the ILO contended that the right to strike can be derived from Convention 87 and 98.[37] The right to strike is an important component of collective bargaining as per Convention 98.[38] Industrial action can be used by workers as a weapon in order to maintain the equilibrium between labour and the power of capital.[39] During collective bargaining the parties should be free to enforce economic pressures in order to force the opposite party to make concessions; otherwise collective bargaining would amount to collective "begging".[40] The said Convention "aims at protecting workers and their representatives against victimisation by their employers on account of their trade union activities.[41] However, the ILO supervisory bodies do not generally link the

[33] Cheadle (2015) 75.
[34] Jacobs (2010) 664.
[35] *Ibid.*
[36] Van Niekerk et al (2015) 415; Digest (2006) 108 par 521.
[37] Van Niekerk et al (2015) 415.
[38] *Ibid*.
[39]Van Niekerk et al (2015) 415.
[40] Jacobs (2010) 659.
[41] Du Toit et al (2015) 77.

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protection of the right to strike with Article 4 of Convention 98.[42] The following articles of Convention 87 discussed below, address freedom of association.

Article 3 (1) of Convention 87 provides:

> Workers' and employers' organizations shall have the right to draw up their constitution rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs.

Article 8 (1) of Convention 87 provides:

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

Article 10 of Convention 87 provides:

> In these Conventions the term "organizations" means any organization of workers or of employers for furthering and defending the interests of workers or of employers.

Using the aforementioned articles the supervisory bodies have interpreted that there is a right to strike.[43] This is in spite of neither the ILO's Constitution, nor Conventions 87 and 98, containing an "explicit right to strike".[44]

3. CHALLENGES OF THE RIGHT TO STRIKE

Ambiguities in the interpretation of Convention 87 and its respective Articles 3, 8 and 10 must be seen in context. The reason for the omission of the explicit right to strike was due to "procedural difficulties, political differences, feeling that a specific elaboration was unnecessary and workers feared that specific right to strike would lead to restrictions".[45]

Subsequently, employers' organisations began to challenge the *status quo* of the ILO's supervisory body's interpretation of Convention 87. They were of the opinion that ILO supervisory bodies have exceeded their mandate by contending that the right to strike

[42] Creighton et al (2010) 331.
[43] Creighton et al (2010) 331.
[44] Birk (2001); Creighton et al (2010) 331; Van Niekerk et al (2015) 415.
[45] Deakin et al (2012) 1029.

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can be deduced from Convention 87.[46] They argued that the said Convention does not explicitly refer to the right to strike.[47]

During 2012, the employers' group dramatically challenged the right to strike as interpreted by the ILO.[48] The employers' contentions were firstly the fact that Convention 87 does not mention the right to strike, which reflects a lack of consensus in 1948. They also argued that the supervisory bodies should not express an opinion on the issue and should not be "making policy" in this regard. [49] They contended that the mandate of the supervisory bodies is to comment on the application of Convention 87 and not to interpret a right to strike into the said Convention.[50] In essence the employers' organizations view is that the supervisory bodies cannot interpret a right to strike into a Convention which does not explicitly set out such a right.[51] They also pointed out that the ILO's Conventions are politically negotiated texts by various constituents and highlighted that the mandate of the supervisory committee had not changed since its inception in 1926.[52] In terms of Article 37.1 of the ILO Constitution only the International Court of Justice has the competency to interpret ILO Conventions.[53]

The 2012 challenge as mentioned above, has subsequently been partially subdued during the February 2015 tripartite meeting. The workers' and the employers' organizations issued a "joint statement" recognizing the mandate of the supervisory bodies as defined by the committee's 2015 report.[54] In the joint statement the "right to take industrial action by workers and employers in support of their legitimate industrial interest is recognised by the constituents of the ILO".[55]

[46] Novitz T (2015) 55.
[47] *Ibid*; Jacobs (2010) 659.
[48] La Hovary (2013) *ILJ* 338.
[49] *Ibid.*
[50] La Hovary (2013) *ILJ* 338.
[51] *Idem* 337.
[52] La Hovary (2013) *ILJ* 337.
[53] La Hovary (2013) *ILJ* 337; Article 37 (1) ILO Constitution.
[54] Novitz T (2015) 57.
[55] *Ibid* and reference is made to ILO Tripartite Meeting report TMF APROC/2015/2, Geneva, 23- 25 February 2015.

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4. THE EU'S INTERPRETATION REGARDING STRIKE LAW

The EU has two instruments through which it can exercise or influence labour standards, namely the European Convention on Human Rights 1950 (ECHR) and the European Social Charter 1961 (hereafter referred to as ESC).[56] Both instruments recognise the freedom of association, or the right to join and act as a member of a trade union.[57] However, only the ESC in Article 6(4) expressly recognizes the right to strike.[58] Under the ESC, this right was limited to the context of collective bargaining.[59]

Despite the EU's member states being obligated to implement both the ECHR and the ESC instruments, member applications of these instruments resulted in the ECHR taking preference over the ESC.[60] A key reason was the way socio-economic rights were defined by the ESC.[61] It did not place an obligation on member states to enforce the right to strike; it only "promoted" the right.[62] Furthermore, Article 20 of the ESC allows members of states an option to choose which obligations it wishes to execute.[63] Despite parties being bound to Article (6)4 of the ESC there is no obligation to implement the right to strike.[64]

The ECHR on the other hand was definitive and required the "immediate and complete guarantee of all rights as set out in the said instrument".[65] It must be noted however, that the ESC and ECHR are not courts and cannot provide binding judgments, unlike the European Court of Human Rights and the Court of Justice of the EU.[66] Similarly, their opinion on the limitation of the right to strike is non-mandatory on national legislation and the courts.[67]

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[56] Novitz (2003) 131.
[57] *Ibid;* Article 5 ESC 1961; Article 11 ECHR 1950.
[58] Novitz (2003) 131; Jacobs (2010) 661; Article (6) 4 of ESC 1961.
[59] Deakin et al (2012) 661.
[60] Novitz (2003) 131.
[61] *Idem* 132.
[62] Novitz (2003) 132.
[63] *Ibid;* Article 20 of ESC.
[64] Novitz (2003) 132.
[65] *Ibid*.
[66] Jacobs (2010) 664.
[67] *Idem* 665.

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The European Court of Human Rights initially did not interpret that Article 11 of the ECHR was ancillary to the right to collective bargaining or the right to strike.[68] The said courts merely drew inferences that these rights do exist (see the case of *Gustafsson v Sweden*).[69] In the matter the applicant employed less than 10 workers on a seasonal basis with the choice to be re-employed. The applicant was not part of an employers association, neither part of any collective labour organization. The association of restaurant employers barred the applicant from doing business as a result of the applicant's refusal to sign a substitute agreement. The applicant brought an application against the State of Sweden for not protecting him against the union's action, which infringed the applicant's right to freedom of association. The applicant further contended that this omission by the State was a violation of his rights, as entrenched in Article 11 of the ECHR. The court held that, to a degree, the applicant's right to freedom of association was affected by the union.

The European Court of Justice, in *The International Transport Workers Federation and Finnish Seaman's Union v Viking Line ABP and OU Viking Line Eesti*[70] (hereafter referred to as the *Viking* case) and *Laval un Partneri v Svenka Bygnadsarbetareforbundet*[71] (hereafter referred to as the *Laval* case) cases however opined that the right to strike is a fundamental right, but noted that economic freedom takes preference over this right.[72] The facts of the *Viking* case were that the employer (Viking) wanted to employ a crew from Estonia because the wages of said employees were lower than Finnish employees by reflagging one of its Finish ships. Under Finnish law and terms of the collective bargaining agreement, Viking is obliged to pay the crew wages at the same level as those in Finland. In order to prevent Viking from retrenching the Finish employees the Union announced their intention to embark in strike action. The employer then brought an application requesting that the union be ordered not to infringe on its right of establishment with regard to reflagging the ship in Estonia. The

[68] Novitz (2015) 60.
[69] *Ibid;* Collins et al. (2012) 661.
[70] *International Transport Workers Federation and Finish Seaman's Union v Viking Line ABP and OU Viking Line Eesti Viking* (2007) Case Number: C 438/05.
[71] *Laval un Partneri v Svenka Bygnadsarbetareforbundet* (2007) Case Number: 438/05.
[72] *Ibid ;* Hepple (2015) 42- Hepple has criticized the "proportionality approach" used by the Court of Justice of the European Union in this case.

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employer was of the opinion that by taking collective action, the union infringed on the employer's right of establishment for economic reasons.[73] The court held that according to an international instrument such as the ESC, the right to take collective action, including the right to strike, is a fundamental right.[74] The court further noted that although the right to take collective action, including the right to strike, is a fundamental right, the right must conform to community law and can therefore be limited in certain instances.[75] The court held that the right to strike can be limited if it infringes the freedom of establishment (economic freedom) of the company.[76] The court noted that the aim of collective action is to protect the jobs and conditions of employment of workers and if this is not under threat, then the right to collective action cannot be exercised.[77]

The facts of the *Laval*[78] case were that a Latvian company placed some of its workers in Sweden and tried to negotiate standard rates of pay for those employees with the Latvian building union. Simultaneously the employer attempted to sign a collective agreement with the Swedish union for Swedish employees with the same standard rates of pay. Swedish law did not provide for any minimum rates of pay, nor maximum working hours. The Swedish union embarked on collective action which prevented the Latvian employees from working at the Swedish building site. The employer took legal action which challenged the legitimacy of the collective action by the Swedish union. It also requested compensation for damages suffered. The court held that although the right to take collective action is regarded as a fundamental right which forms part of community, this right can be subject to certain restrictions.[79] The court was of the opinion that the right to collective action does not render community law irrelevant.[80] The court further noted that a member state can impose minimum rates of pay on

[73] Article 43 of the EC treaty prohibits restrictions of the freedom of establishment within the EU. This entails the freedom of businesses to relocate their business to another EU member state.
[74] *International Transport Workers Federation and Finnish Seaman's Union v Viking Line ABP and OU Viking Line Eesti* para 43.
[75] *Idem* para 44.
[76] *International Transport Workers Federation and Finnish Seaman's Union v Viking Line ABP and OU Viking Line Eesti* par 77.
[77] *Idem* para 81 – 84.
[78] *Laval un Partneri v Svenka Bygnadsarbetareforbundet.*(2007).
[79] *Laval un Partneri v Svenka Bygnadsarbetareforbundet* para 91.
[80] *Idem* para 94.

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placed workers either via legislation or collective agreement, but this must be done in accordance with the directive before it would be regarded as lawful, and to partake in collective action opposing it would fall outside the fundamental right to take collective action.[81]

It is my submission that the *Viking* and *Laval* cases are important because the courts have recognized that the trade union has the fundamental right to strike. However, the criticism regarding these cases is that the courts are of the opinion that economic freedom should take preference over this right. The main purpose of the right to strike is to provide economic freedom to workers.

In reviewing the ruling of the *Viking* case, Hepple also criticise the application of the "proportionality test" used by the European Court of Justice.[82] He states that "what is controversial" (with reference to the proportionality test) "is the application of this test in cases where no fundamental right of the employer is infringed (e.g. to peaceful enjoyment of its possessions) but only its commercial interests".[83] The *Viking* case is also in conflict with an earlier decision in the *Gustafsson v Sweden*[84] case, whereby the European Court of Human Rights held that the right to freedom of association cannot be evaluated against the right of the contractual interest of an employer.[85]

According to Sciarra, through rulings such as in the aforementioned case law, the European Court of Human Rights made its "own voice" heard.[86] The attempt to provide a less individualistic interpretation of Article 11 of the ECHR, compared with the court's previous case law, leaves some room for criticism.[87] Sciarra concludes that the clear disagreement between the *Viking* and *Laval* cases could be perceived as a struggle to

[81] *Laval un Partneri v Svenka Bygnadsarbetareforbundet* para 109.
[82] Hepple (2015) 42.
[83] *Ibid.*
[84] *Gustafsson v Sweden* (1996).
[85] Hepple (2015) 42.
[86] Sciarra (2015) 215.
[87] *Ibid.*

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achieve better individual guarantees, and a result of conflict arising from inflexible differences within the legal systems.[88]

Collins also notes that, since the *Viking* and *Laval* matter, the Supervisory Committee of the ILO has also repeated its concerns regarding the "effective limitations on actions for damages so that the union is not faced with threats of bankruptcy for carrying out their legitimate industrial action".[89]

In two other matters, *Demir and Bayakara v Turkey*[90] and *Enerji Yapi –Yol Sen v Turkey,*[91] the European Court of Human Rights ruled that Article 11 of the ECHR includes a right to collective bargaining and prohibits a blanket ban on the right to strike. In the *Demir and Byakara v Turkey* case Turkish law prohibited civil servants from belonging to a union. The *Demir* and *Bayakara* representing the union and its members contended that this Turkish law prohibited them from belonging to a union and infringed on their right to bargain collectively as contained in Article 11 of the ECHR. The Court contended that the right to bargain collectively has become one of the essential requirements in order to exercise the right to form and join trade union. The Court further contended that the laws had to be strictly interpreted and should not impair the very core of the right to organize. In addition, the court noted that any prohibitions imposed by the state on a specific right have to be shown to be legitimate.

Similarly, with reference to the *Enerji Yapi- Yol Sen v Turkey case* the courts followed the precedence set by the decision of the *Demir and Bayakara v Turkey* case*.* In said case the state prohibited public sector trade unions from participating in industrial action. Members of the Enerji –Yapi Yol Sen trade union ignored this prohibition and participated in industrial action. The trade union brought legal action against the state after members were then disciplined. The trade union alleged that the prohibition was an infringement on their rights to form and join unions, as entrenched in Article 11 of the

[88] Sciarra (2015) 215.
[89] Collins et al (2012) 731.
[90] *Demir and Bayakara v Turkey* (2008) case number 68959/01.
[91] *Enerji Yapi – Yol Sen v Turkey* (2009) case number 34503/97.

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ECHR. While the court held that the right to strike is not absolute, and is subject to certain conditions and limitations, an absolute bar on the right to strike is too extensive a restriction. As such, the court ruled that disciplinary action taken by the state against members for exercising their right to strike, in order to discourage trade unions from exercising their rights, is an infringement. In concluding the matter the court decided that the strike prohibition was not in response to a "pressing social need" and therefore the state failed to justify the need for the impugned restriction.

With reference to the above case law it is quite evident that the European Court of Human Rights has taken a robust approach in instances where member states have implemented legislation which prohibits the right to strike.[92] It is also clear that within the EU there is explicit recognition of the right to take collective action; however, this right can be limited in favour of free movement in the employer's commercial interests.[93] Furthermore, such action must be linked to both the protection of workers and probable outcomes.[94] It is promising to note that the European Committee of Social Rights has objected to the Swedish legislation within the aforementioned context. [95] In keeping with the European Court of Human Rights, the committee stated that there needs to be sufficient legislation to protect workers' ability to defend their economic and social interests through the right to strike, as stated in Article 6(4) of the European Social Charter.[96]

5. WHAT IS A STRIKE AND WHAT ARE ITS LIMITATIONS UNDER INTERNATIONAL LAW?

As noted earlier in the introduction, most countries either include the right to strike in their constitutions, or have inferred that a right to strike flows from the constitutional right to freedom of association and collective bargaining.[97] A constitutional right is regarded

[92] Collins et al (2012) 663.
[93] Novitz (2015) 59.
[94] *Ibid.*
[95] *Ibid* and Novitz made reference to *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden Complaint* No. 85/2012.
[96] *Ibid.*
[97] Cheadle (2015) 67 and derived from Article 3 Convention 87.

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as a higher norm against which ordinary laws are tested for compatibility.[98] However, provision is made for the determinants of compatibility to differ between legal systems.[99] Similarly, the international standards as set out by the ILO and the EU cannot claim universal validity and do not alter the fact that in many countries constitutional citation of the right to strike failed to occur.[100] Countries such as Britain, Austria, Denmark, Australia and Israel do not have an express right to strike in their constitutions.[101] Only a freedom to strike has been derived.[102] Van Niekerk notes that the ILO also cautions "that although strike action is a fundamental or basic right, it is not an end in itself".[103]

Jacobs, in his deliberations on several international standards, concludes that those which he reviewed were neither clear on the right to strike nor on the derogation and restriction on the right to strike.[104] Birk, in Jacobs, observes: "there are no succinct parameters to any permissible limitations of the right to strike under international law, and general standards are difficult if not impossible to determine".[105] If the right to strike is enshrined in a constitution it is normally stated in general terms.[106] The content of such a right is elaborated in subsidiary rules, be it in the form of legislation, common law rules or civil codes.[107] In South Africa for example, while a right is generally enshrined in the Bill of Rights it requires legislation or the common law for the right to be given effect.[108] According to the Labour Relations Act 66 of 1995 a right is defined as an individual right that is collectively exercised.[109] In determining the parameters of the constitutional right the courts have applied concepts (limitation clauses) such as necessity or reasonableness tests.[110] In both Canada and South Africa, the limitation

[98] Cheadle (2015) 67.
[99] *Ibid.*
[100] Jacobs (2010) 662.
[101] *Ibid.*
[102] Jacobs (2010) 662.
[103] Van Niekerk et al (2015) 415.
[104] *Idem* 664.
[105] Jacobs (2010) 664.
[106] Cheadle (2015) 68.
[107] *Ibid.*
[108] Cheadle (2015) 73.
[109] *Ibid.*
[110] Cheadle (2015) 78.

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clauses are set out in their respective constitutions and require the limitation of the rights to be "reasonable".[111]

For countries who do not have the express right to strike set out in their constitutions, the courts will derive such rights from international standards as set out by the ILO or the EU, for example. Some courts have derived the right to strike from the constitutional right to freedom of association.[112]

The classic definition of a strike has two essential elements, namely "concerted action" and "withdrawal of labour".[113] Interestingly, in countries such as France and Italy the right to strike can be exercised even if the "concerted action" is unrelated to labour relations,[114] whereas in countries such as Britain, Germany and the USA, the freedom or the right to strike can only be exercised as an economic freedom.[115]

"Withdrawal of labour", in some countries, is dependent on a complete withdrawal. In other countries such as France a "go slow" or retardation of work would not be regarded as a "strike" and therefore would not be protected.[116] This action would amount to a breach of contract.[117] In South Africa, on the other hand, the Labour Relations Act 66 of 1995 defines a strike as a "partial or complete concerted refusal to work, or the retardation or obstruction of work".[118]

Unlike other human rights the right to strike is regarded as an individual right that can only be exercised collectively.[119] This implies that the individual right of the worker is merely a right to participate in the decision of whether to strike or not.[120] The individual right, is however, dependent on whether the "collective action" is lawful.[121] The

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[111] *Ibid*.
[112] Cheadle (2015) 71; Hepple (2015) 27; Birk (2001) 96.
[113] Hepple (2015) 28.
[114] *Idem* 30.
[115] Hepple (2015) 30.
[116] *Idem* 29.
[117] Hepple (2015) 29.
[118] S213 of the LRA.
[119] Cheadle (2015) 7; Hepple (2015) 31 and Novitz (2003) 276 noted that "in 1977 Khan Freund stated that the right to strike must be considered as being conferred on an individual and not as a member of a trade union."
[120] Cheadle (2015) 71; Hepple (2015) 31.
[121] *Ibid.*

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"lawfulness" of the collective action is dependent on whether it is constitutionally or legislatively permitted.[122] The collective action does not necessarily have to be exercised by the trade union only; any group of workers can participate in collective action.[123] In Italy, the right to participate in a strike may be exercised by any group of workers whether they are part of a union or not.[124] However, in Germany and the Nordic countries, the right to strike can only be exercised by the trade union, it is not an individual right.[125]

6. CONCLUSION

The right to strike has been included in the constitutions of most countries. If it's not entrenched in a constitution then it would be derived from right to freedom of association and collective bargaining.[126] Most countries have recognized the right to strike or the freedom to strike because it is protected under international law.

The supervisory body of the ILO and the EU are examples of international bodies that recognise the right to strike or freedom to strike. The ILO Supervisory body advises that the right to strike can be derived from Convention 87 and 98.[127] As demonstrated in the discussions, while said Conventions do not make the right to strike explicit, many countries still recognise that the right to strike exists and is inferred from the Conventions.[128]

The EU instruments, namely the ECHR and the ESC, recognise the right to strike. The ESCHR infers this right from the Conventions, freedom of association or the right to join and act as a member of a trade union,[129] while the ESC makes specific reference to the right to strike.[130] Contention on the interpretation and application of the right to strike by the European Courts vis-a-vis *Laval* and *Viking* cases demonstrates that there is explicit

[122] Cheadle (2015) 72.
[123] *Ibid.*
[124] Cheadle (2015) 72.
[125] Hepple (2015) 31.
[126] Cheadle (2015) 67.
[127] Van Niekerk et al (2015) 415.
[128] *Ibid.*
[129] Novitz (2003) 131; Article 5 ESC 1961; Article 11 ECHR 1950.
[130] Novitz (2003) 131; Jacobs (2010) 661; Article (6) 4 of ESC 1961.

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recognition of the right to take collective action within the EU; however, this right can be limited in favour of free movement in the employer's commercial interests.[131] Authors such as Hepple and Sciarra criticises the ruling of the EU courts on these matters. Hepple, for example, notes that the application of the proportionality test applied by the court in said matters is controversial, particularly in cases where no fundamental "right" of the employer is infringed upon, but only its commercial interests.[132]

The European Court of Human Rights had initially not recognized the right to strike, but have subsequently accepted that this right exists indirectly.[133] This is most evident in matters where the State has implemented legislation which placed a blanket prohibition on the right to strike.[134]

It is significant to note that limitations or restrictions pertaining to the right or freedom to strike have not been set out by the ILO or the EU,[135] while the content of such a right or freedom is elaborated in subsidiary rules whether in the form of legislation, common law rules or civil codes.[136]

[131] Novitz (2015) 59.
[132] *Ibid.*
[133] Novitz (2015) 60.
[134] *Gustaffson v Sweden; Demir* and *Bayakara v Turkey*; *Enerji Yapi – Yol Sen v Turkey*.
[135] Jacobs (2010) 664.
[136] Cheadle (2015) 68.

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CHAPTER THREE

CONSTITUTIONAL RIGHT TO STRIKE AND ITS LIMITATION

1. INTRODUCTION

By definition a strike is destructive in economic terms, but by both international terms and in terms of South African law it is viewed as a fundamental right.[137] Although the right to strike is recognized as a fundamental right in South Africa, this right can only be exercised if it complies with certain prescribed requirements as set out in the LRA.[138] A strike that does not comply with the LRA will not be protected and employers are free to institute disciplinary action against such strikers and/or sue strikers or their union for compensation.[139] The question that arises is what this right entails and to what extent this right can be exercised or limited.

2. CONSTITUTIONAL RIGHT TO STRIKE

Initially strike action was governed by common law under breach of contract.[140] With regard to common law an employer would be able to dismiss an employee who participates in strike action if s/he materially breached his/her contract of employment.[141] With reference to the matter *S v Smith*,[142] the court held that, with

[137] Van Niekerk et al. (2015) 415; Hepple (2015) 27.
[138] Chapter IV of the LRA; Van Jaarsveld et al. (2012) Par 906 – 908; Van Niekerk et al. (2015) 415; Grogan (2015) 429; Du Toit et al. (2015) 333.
[139] Grogan (2015) 429; Du Toit et al (2015) 333.
[140] Grogan (2015) 429.
[141] Myburgh (2004) 966.

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regard to common law an employer clearly has a right to dismiss an employee who refuses to carry out his contractual obligation regarding his work.[143] According to the court, if an employee participates in a strike then he breaches his contract of employment and such an employee can therefore be dismissed for this action.[144] This however, created an imbalance in the employment relationship in that the employer had a greater bargaining power than employees. This also resulted in numerous strike actions by employees. There was also no explicit protection for strikers against dismissals in the LRA, 1956.[145]

Legislation such as strike law was therefore introduced largely to respond to past events.[146] The right to strike was entrenched in the constitution, namely section 23 which provides that every worker has the right to strike.[147] The right to strike is one of the fundamental labour rights that employees are entitled to.[148] A constitutional right to strike is regarded as a higher standard against which ordinary legislation is tested for its compatibility.[149]

The right to strike is unlike other human rights: firstly, even though it is seen not as an end in itself, it can be regarded as a "means to an end" in that it is an important way to protect the interest of workers.[150] Secondly, it is the right of an individual worker which can only be exercised collectively.[151] These rights address the needs of employees and their union's social and economic needs.[152] The right to strike flows from collective bargaining and is regarded as an integral part of collective bargaining.[153] It creates an imbalance in the employment relationship and it also provides a safeguard over the

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[142] *S v Smith* (1955)1 SA 239 (K).
[143] Idem 241 par G – H.
[144] *S v Smith* 244 Par A – B.
[145] Myburgh (2004) 966.
[146] Myburgh (2004) 962; Du Toit et al. (2015) 333.
[147] S23 of the Constitution, 1996.
[148] Van Jaarsveld et al. (2012) Par 906 – 90; Van Niekerk et al. (2015) 415 noted that the ILO has cautioned: 'that although strike action is a fundamental or basic right, it is not an end in itself'.
[149] Cheadle (2015) 67.
[150] Hepple (2015) 41.
[151] Hepple (2015) 41; Cheadle (2015) 71.
[152] Van Niekerk et al. (2015) 415; Cheadle (2015) 73.
[153] Myburgh (2004) 966; Van Niekerk et al. (2015) 415; Du Toit et al. (2015) 333; Grogan (2015) 429; Cheadle (2015) 73.

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employer's power over capital.[154] It is a tool which the union can use to demand their needs during a bargaining process.[155]

The constitutional court in the matter *Ex Parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa 1996*[156] explained the basis for these rights:

"Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of *strike action*" (my emphasis).[157]

In the *NUMSA v Bader Bop*[158] the court held further that, "the constitution recognises the importance of ensuring fair labour relations".[159] The right to strike is an important factor for an effective collective bargaining process.[160] The court held further that this right is important for two reasons: firstly, it is important for the dignity of workers, in that the workers may not be treated as "coerced employees". Secondly, it will ensure that workers are able to reclaim bargaining power during the collective bargaining process.[161]

According to Rycroft there is a link between collective bargaining and the right to strike.[162] If a strike or gathering does not encourage functional collective bargaining then that strike would be regarded as unprotected.[163] A strike must be orderly and certain

[154] Van Niekerk et al. (2015) 415.
[155] *Ibid.*
[156] *Ex Parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa* (1996) 17 *ILJ* 821.
[157] *Idem* 841 par A-B.
[158] (2003) *ILJ* 316.
[159] *Ibid* par I-J.
[160] *Idem 317* par A-B.
[161] *NUMSA v Bader Bop (PTY) LTD & Another 317* para A-B.
[162] Rycroft (2012) *Paper International Labour Law Conference, Barcelona* 3.
[163] *Ibid.*

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procedures must be followed before the employees or union would be entitled to rely on the constitutional right to strike.[164]

What this entails is that, if the procedures as set out in the LRA regarding strike have not been complied with, the strike would be regarded as an unprotected strike.[165] The union or employees who participate in unprotected strikes can possibly lose all immunities which are entrenched in the LRA.[166] This could therefore expose such a union or employees to be liable for the compensation suffered by the employer.[167]

If the court has to deal with a dilemma of an unprotected strike compensation claim, the court must determine whether the misconduct which has taken place, promoted "functional collective bargaining".[168] If the strike does not promote "functional bargaining", then it should not be protected.[169] In order to determine this, the court must take into account the levels of violence and what the union had done in order to prevent the violence.[170]

If it is established that the strike is associated with violence and nothing was done to curb it, then the strike should be regarded as unprotected. The union who participates in such unprotected strike might be held liable for any loss which the employer has suffered.[171]

Hepple also advises however: "the right to strike is an *independent* right and an *individual right*".[172] It is not derived from the right to freedom of association or the right to collective bargaining.[173] According to him the result of this method can be seen in *NUMSA v Bader Bop matter*, where the constitutional court granted the minority union the right to strike despite them not being entitled to participate in collective bargaining

[164] Rycroft (2012) *Paper International Labour Law Conference, Barcelona* 3.
[165] *Idem* 7.
[166] Rycroft (2012) *Paper International Labour Law Conference, Barcelona* 7.
[167] *Ibid.*
[168] Rycroft (2012) *Paper International Labour Law Conference, Barcelona* 9.
[169] *Ibid.*
[170] Rycroft (2012) *Paper International Labour Law Conference, Barcelona* 9.
[171] *Idem* 7.
[172] Hepple (2015) 32.
[173] Hepple (2015) 32.

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as their constituency requirements were not met.[174] However, he confirms that the right to strike is an important element in the principle of collective bargaining.[175]

According to Sciarra, in South Africa there are "underlying socio–economic" problems, which may have contributed to the rise of "adversarial labour relations".[176] Ngcukaitobi notes as well that the legality of a strike is insignificant to a worker who has to deal with socio–economic challenges.[177] The socio-economic challenges are largely due to the "legacy of apartheid" and this created an imbalance of power between the worker and the employer.[178] According to Ngcukaitobi social or economic factors/challenges are the reason why structural violence occurs and this prevents people from meeting their basic needs.[179] The inequality in socio-economic factors must therefore be taken into account when dealing with the limitations of the right to strike. I am however of the opinion that there should be conformity to legislation as this could curb violent strikes.

3. LIMITATIONS TO THE RIGHT TO STRIKE

The right to strike has its roots in Convention 87 and 98 of the ILO.[180] However, the ILO advises that, although strike action is a fundamental or basic right, this right is not an end in itself.[181] In section 23 of the Constitution the right to strike is unrestricted.[182] Although the constitutional right to strike is unrestricted it must be borne in mind that, like any right as set out in the constitution, it is not an absolute right.[183] Cheadle also notes that the concept of the right to strike envisages restrictions and limitations.[184]

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[174] *Ibid.*
[175] Hepple (2015) 42.
[176] Sciarra (2015) 212.
[177] Ngcukaitobi (2013) 843.
[178] *Idem* 847 and 849; Brassey (2013) 834.
[179] Ngcukaitobi (2013) 840.
[180] Gericke (2012) *THRHR* 573; Van Niekerk et el. (2015) 415; Du Toit et al. (2015) 333.
[181] Van Niekerk et al. (2015) 415.
[182] Myburgh (2004) 962.
[183] Gericke (2012) *THRHR* 567; Van Niekerk et al. (2015) 415; Hepple (2015) 415 advised that: 'the right to strike may not be seen as an end in itself but as a means to an end', in the sense that strike action can be used as a tool to protect the interest of workers.
[184] Cheadle (2015) 75.

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Section 36 of the Constitution allows the right to strike to be limited in terms of the law of general application.[185] However, this section requires that when applying the limitation of this right, it should be "reasonable".[186] What this limitation entails is to balance the interest of society with the interest of the person(s) who will be affected thereby.[187]

The constitutional right to strike has been generally stated and therefore requires the right to be given effect to by legislation.[188] Section 23 (5) and (6) also provides that national legislation must be enacted in order to give effect to this right.[189] The national legislation which gives effect to this right to strike and primarily regulates it is the LRA, more specifically Chapter IV of the LRA.[190] Although the LRA gives effect to this right it also sets out its limitations.[191] It mostly imposes substantive and procedural limitations.[192] This right can therefore only be exercised if certain procedural and substantive requirements as set out in Chapter IV of the LRA have been complied with.[193]

3.1 Substantive limitations to the right to strike

The substantive limitations prohibit strikes in certain circumstances.[194] Only strikes which are defined by the LRA would therefore enjoy the immunities and protection as afforded by the LRA.[195] Section 213 of the LRA regards the action as a strike only if the following elements/ requirements have been complied with:[196]

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[185] S36 of the Constitution, 1996; Gericke (2012) *THRHR* 567; Cheadle (2015) 78.
[186] S36 Constitution; Cheadle (2015) 78.
[187] *Ibid.*
[188] S23 of the Constitution, 1996; Cheadle (2015) 73.
[189] S23 (5) and (6) of the Constitution, 1996; Grogan (2015) 5.
[190] Corazza (2015) 88; Freund (2012) 115.
[191] Freund (2012) 115; Grogan (2015) 429; Du Toit et al (2015) 333; Van Niekerk et al (2015) 415.
[192] Van Niekerk et al (2015) 415.
[193] Grogan (2015) 429; Van Niekerk et al (2015) 415; Du Toit et al (2015) 334. Corozza et al (2015) 88 notes that 'the LRA is founded on voluntarism, however it is far more regulated in nature than the Italian system. Both substantive and procedural limits are placed on the right to strike by statute'.
[194] DuToit et al (2015) 341; Van Niekerk et al (2015) 421.
[195] Du Toit et al (2015) 334.
[196] Section 213 of the LRA; Gericke (2012) 569; Grogan (2015) 430 - 435; Du Toit et al (2015) 334 - 340; Van Niekerk et al(2015) 416 – 418. See also matter of *NUM v CCMA and Others* (2011) JOL 25257 (LAC): employees worked shift system including public holidays. Employer threatened that if they do not work shifts immediately before Easter, then they would not be paid for the full weekend that they worked. Employees opted not to work and contended that they did not participate in strike action. Court rejected contention and confirmed that their

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a) There must be a refusal to work;
b) It must be a collective action; more than one person must therefore be involved in the refusal to work;
c) There must be a purpose for the strike;
d) The strike must be directed at a specific purpose, namely "remedying a grievance, resolving a dispute or complying with or acceding to demands of employees; regarding any matter of mutual interest between employer and employee".[197]

The elements mentioned above originated from the employees' right to associate and organize in trade unions and to engage in collective bargaining.[198]

In the matter of *Schoeman and Another v Samsung Electronics (PTY) LTD*[199] the court held that an individual employee cannot strike even though an individual employer can affect a lock-out against a single employee.[200] According to the definition, the right to strike is an individual right that can only be exercised collectively.[201] The right to strike has both individual and collective aspects.[202] With regard to the individual aspect the worker has the right to participate in the decision to strike or to end it, and with the collective aspect s/he has the right to participate collectively in the strike action.[203]

In the matter of *CWIU v Plascon Decorative (Inland) (PTY) Ltd*[204] the court held that the definition of a strike in the LRA is extensive and comprises of certain elements, namely the non-performance of work by employees and for the purpose stated.[205] The court held that once a union had complied with the pre-strike procedures then all members of that union who are employed by the employer are entitled to strike. The definition as set

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action of not working during the weekend preceding the Easter amounted to strike action, as it complied with all three elements of a strike, as set out in Section 213 of the LRA.

[197] Van Jaarsveld et al. (2012) Par 910A; Van Niekerk et al. (2015) 421 notes that the act does not define what the concepts of mutual interest are.

[198] Gericke (2012) 569.

[199] *Schoeman and Another v Samsung Electronics (PTY) LTD* (1997) 10 BLLR 1364 (LC).

[200] *Ibid* and *Schoeman and Another v Samsung Electronics (PTY) LTD 1367* para I-J.

[201] Cheadle (2015) 73.

[202] *Idem* 71.

[203] Cheadle (2015) 71.

[204] *CWIU v Plascon Decorative (Inland) (PTY) LTD* (1998) 12 BLLR 1191 (LAC).

[205] *CWIU v Plascon Decorative (Inland) (PTY) LTD* Par G – H.

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out in section 213, does not limit the right to strike to only those members who are within the bargaining unit, as it is "broad enough to cover a strike involving employees of the same employer who are not directly affected by the strike dispute".[206]

In the matter of *NUM v CCMA* the court held that strike action in reaction to the unlawful deduction from workers salary can be regarded as a strike for the "purpose of remedying a grievance or resolving a dispute".[207]

Section 65 of the LRA on the other hand, sets out the circumstances under which this right may not be exercised.[208] It provides that no person may take part in a strike if:[209]

a) the person is bound by a collective agreement which prohibits a strike;[210]
b) the person is bound by an agreement which requires the dispute to be referred for arbitration;
c) the issue in dispute relates to a disagreement which one of the parties must refer to the Labour Court in terms of the Act; or
d) the employee is engaged in an essential service or a maintenance service.

Essential services relate to those services which provide protection for life or personal safety.[211] The constitutional court in the matter of *South African Police Services v Police and Prisons Civil Rights Union*[212] held that, not all persons engaged in the South African Police Service (hereafter referred to as SAPS) would be regarded as essential service

[206] *Idem* Page 1197 Par I-J.
[207] NUM v CCMA (2012) 1 BLLR 22 (LAC).
[208] Gericke (2012) 567.
[209] Section 65 (1) of the LRA and Gericke (2012) 567; Van Niekerk et al. (2015) 421 – 425; Grogan (2015) 442 – 452; Du Toit et al (2015) 348 - 349.
[210] *South African National Security Employers Association v TGWU* (1998) 4 BLLR 364(LAC): the employer applied for an interdict to prohibit employees from embarking in a strike action in support of a wage demand. The employer wanted to implement a demand after the expiry of a current agreement. The court contended that Section 65 (3)(a)(i) of the LRA provides that the parties are only bound by the collective agreement during the time frame for which it is effective.
[211] Van Niekerk et al. (2015) 424.
[212] *South African Police Services v Police Prisons Civil Rights Union and another* (2011) (9) BCLR 992 (CC).

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members who are involved in an essential service.[213] Therefore, all SAPS employees who are not involved in essential services may exercise their right to strike.[214]

Strikes in compliance with the LRA are referred to as protected strikes and not as "legal strikes".[215]

3.2 Procedural limitations to the right to strike

The procedural requirements stipulate the processes which must be followed prior to a protected strike.[216] The procedural requirements have been set out in section 64 of the LRA: [217]

1) The issue in dispute must be referred to either the bargaining council or the CCMA.
2) A certificate stating that the dispute remains unresolved must be issued or alternatively a period of 30 days must have lapsed from the date of the referral of the dispute.
3) The employer must be given at least 48 hours written notice of the commencement of the strike.

The courts have on numerous occasions been requested to provide guidance regarding the validity of a strike notice. In the matter of *Ceramic Industries Ltd v NCBAWU*[218] it was held that the purpose of the strike notice is to "warn the employer of collective action in the form of strike, and when it is going to happen, so that the employer may deal with the situation".[219] The court noted further that the purpose of the warning of the strike is twofold, namely that the employer may decide to prevent the intended "power play" by giving in to the demand of the employees, or that the employer may take the

[213] *South African Police Services v Police and Prisons Civil Rights Union* 1004 para 34.
[214] *Idem* 1005 para 39.
[215] Van Jaarsveld et el. (2012) par 913 – 915.
[216] Du Toit et al. (2015) 341.
[217] S 64(1) to (5) of the LRA; Du Toit et al. (2015) 341 – 346; Grogan (2015) 436 – 439; Van Niekerk et al. (2015) 426 – 429.
[218] *Ceramic Industries Ltd v NCBAWU* (1997) 6 BLLR (LC).
[219] *Ceramic Industries Ltd v NCBAWU* 701 para H-I.

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necessary steps to protect its business when the strike commences.[220] The courts have also recognized that although strike action is a fundamental part of collective bargaining, the strikers can only be protected from dismissal if certain requirements have been met.[221]

See also the matter of *SA Transport & Allied Workers Union v Moloto*.[222] Before the union called a strike it referred the dispute for conciliation in terms of section 64(1) (a) of the LRA. The required notice, as set out in the LRA, had lapsed and the union gave the employer notice in writing of its intended strike action. The written notice read as follows: "We intend to embark on a strike action on 18 December 2003 at 08h00". The central issue in dispute was whether the notice of the union entitled non-union members also from participating in the strike action. The employer contended that the non–union members were not protected by said notice and that the employer was therefore entitled to dismiss the non-union members who participated in the strike action. The court rejected the employer's contention and held that, what is required by section 64(1) (b) is a single notice stating when the strike will start. The court noted further that requiring more than that would lead to uncertainty and place a further hindrance on workers' right to strike. The court contended that the notice submitted by the union sufficed and that the participation of the non-union members in the strike action was protected. The court concluded that the dismissals of the non-union members were therefore automatically unfair.[223]

As noted above the right to strike is only protected if the procedural requirement has been met. Section 64 of the LRA provides that every employee has the right to strike, but this right is conditional to compliance with certain preliminary procedures.[224]

Employees who participate in a protected strike will be secure in the sense that no civil or criminal liability can arise from their strike action and neither may they be dismissed

[220] *Idem* 702 para B-C.
[221] Van Jaarsveld et al. (2012) par 906 – 908.
[222] *SA Transport & Allied Workers Union v Moloto* (2012) *ZACC* (CC) 19.
[223] *SA Transport & Allied Workers Union v Moloto* par 112 – 114.
[224] Grogan (2015) 436.

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for misconduct for taking part in the strike.[225] A protected strike is beyond the jurisdiction of the court and the intention of doing this is to leave it to the economic muscle of the parties.[226] The courts must therefore refrain from interfering in a "protected strike" and from inducing the "power play" which is inherent in the strike.[227]

However, this was the opposite view which the court held in the *SACWU v Afrox*[228] case. In this matter the employees were dismissed despite taking part in a protected strike.[229] The union challenged the dismissal and contended that the dismissal was automatically unfair in terms of section 187(1) (c) as no procedural requirement was met by the employer before embarking in dismissal. The employer on the other hand, contended that the dismissal was fair because it was a dismissal due to operational requirements as required by section 189 of the LRA. The court held that there are two instances in which an employee may be dismissed even if s/he participates in a protected strike: firstly if violence is used during a strike[230] and secondly, if the strike needs to be stopped due to "economic foundations of the employment relationship".[231] In other words, the employer would not be able to financially sustain the company if the strike is prolonged. It was due to the second exception that the court concluded that the dismissal was fair and that the employer could dispense with procedural requirements, because the dismissal was due to an operational reason.[232]

I am however in disagreement with the court decision in this matter, as the basis for the courts' decision is similarly to the *Laval* and *Viking* matters as discussed previously; the court took preference over economic freedom without considering the economic freedom of workers.

Under the LRA 1956 a secret ballot had to be held before a strike could be affected, but this requirement has now been dispensed with. Section 67 (7) makes provision that the

[225] *Ibid* and S67 of the LRA.
[226] Myburgh (2004) *ILJ* 969.
[227] *Ibid.*
[228] *SACWU v Afrox LTD* (1998) 19 *ILJ* (LC); Myburgh (2004) 970.
[229] *SACWU v Afrox LTD* 63.
[230] *Idem* 65 para I-J.
[231] *SACWU v Afrox LTD* 66 para A-B.
[232] *Idem* 75 para C-D.

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validity of a protected strike would not be affected, even if the constitution of a registered union requires that a secret ballot be held before a strike can be embarked on.[233] Therefore, the "failure to hold a ballot no longer affects the legality of a strike".[234]

The requirement for a secret ballot has, however, still been viewed as relevant to the relationship between the trade union and their members.[235] If no ballot has been held, the members of that union may opt not to participate in the strike action, or the members may approach the Labour Court for an order interdicting such a strike or compelling compliance with the ballot requirement.[236] The rationale behind the strike ballot is to check whether the majority of the trade union members approve of a strike.[237] However, strike ballots as a prerequisite can be "abused and manipulated".[238] In some cases the ballot requirement was used by the employer in order to stall a strike and they did this by referring the matter for further litigation.[239] This was the situation before the 1995 amendment was implemented to the LRA.[240]

4. CONCLUSION

Although a strike action is perceived to be destructive to the economy, it has been accepted internationally and in South Africa as a fundamental right.[241] It is for this reason that provision was made for it in section 23 of the Constitution of South Africa.

The right to strike is also an important factor as it encourages effective collective bargaining processes.[242] Some academics, such as Hepple, note however that the right to strike is an *"independent"* right and an *"individual"* right" but is an important

[233] S67(7) of the LRA; *Ibid.*
[234] Du Toit et al. (2015) 348.
[235] *Ibid.*
[236] Du Toit et al. (2015) 348.
[237] *Idem* 6.
[238] Rycroft (2015) 7.
[239] *Ibid.*
[240] Rycroft (2015) 7; See for example the matters *National Union of Metalworkers of SA & others v Jumbo Products CC* (1991) and *Kwazulu Natal Furniture Manufacturers Associations v National Union of Furniture & Allied Workers of South Africa* (1996) 8 BLLR 964 (N).
[241] Van Niekerk et al (2015) 415; Hepple (2015) 27.
[242] *NUMSA v Bader Bop (PTY) LTD & Another* 317 par A-B; Myburgh (2004) 966; Van Niekerk et al. (2015) 415; Du Toit et al. (2015) 333; Grogan (2015) 429; Cheadle (2015) 73.

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requirement for effective collective bargaining.[243] The LRA has also given effect to the this right and specifically provides that the right can only be protected/exercised if the substantive and procedural requirement as set out in Chapter IV of the LRA has been complied with.[244]

[243] Hepple (2015) 32.
[244] Grogan (2015) 429; Van Niekerk et al. (2015) 415; Du Toit et al. (2015) 334.

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CHAPTER FOUR

REMEDIES AGAINST UNPROTECTED STRIKES

1. INTRODUCTION

The LRA offers protection to all employees who participate in a protected strike.[245] As noted in Chapter 3, this protection can only be offered if the substantial and procedural requirements as set out in Chapter IV of the LRA have been complied with. The protection or immunity guaranteed by the LRA is that no civil proceedings may be instituted against the union; neither can a union member be dismissed.[246] However, this protection does not mean that the strikers are protected from all legal sanctions and that the employers are therefore left without recourse when confronted with a strike action.[247] This is especially true in instances where the strike action is unprotected or when the strike action becomes violent, in other words where misconduct took place. In South Africa strike action has often been accompanied by intimidation and violence. It is for this reason that the LRA was enacted and amended in order to curb unprotected strikes and strikes which have been accompanied by misconduct. What can an employer do in order to curb unprotected strike action or to curb misconduct from occurring without it being regarded as an infringement of the union's right to strike?

[245] S64 of the LRA; Van Niekerk et al. (2015) 433; Grogan (2015) 452; Du Toit et al. (2015) 354.
[246] S67 of the LRA. Gericke (2012) *THRHR* 572.
[247] S68 of the LRA; Cohen et al (2015) 145.

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2. REMEDIES AGAINST UNPROTECTED STRIKE

If a strike does not comply with the substantive and procedural requirements of the LRA then the strike would be regarded as unprotected.[248] An unprotected strike must also be distinguished from the instance where misconduct has taken place during a protected strike; this in itself amounts to misconduct.[249] An unprotected strike does not draw criminal or administrative sanctions.[250] Civil litigation is therefore the only means whereby one could litigate against an unprotected striker.[251] Common law remedies can be used in order to curb the unprotected strikes, but in practice most employers depend on the provision of the LRA to provide relief.[252] Regarding unprotected strike action or if misconduct has taken place, an employer could do one of the following:

a) obtain an interdict in order to prevent the strike action from taking place;[253]
b) claim damages and compensation;[254] or
c) contend that the strike action amounted to misconduct and therefore possibly dismiss strikers.[255]

This chapter will however only concentrate on aspect (a) and (b) as the said options provide relative quick relief. Claiming compensation must also be used in the instance that the employer suffers a loss as result of an unprotected strike. Cohen advises as well that when dealing with an unprotected strike; to dismiss an employee it is of "little value". This is especially the case when dealing with large number of employees which are involved in the unprotected strike and when dealing with a strike which has complex socio economic reasons.[256] She propose that when dealing with unprotected strikes in such circumstances, employers should rely on other forms of sanctions more

[248] Le Roux (2004) *CLL* 91; S68 of the LRA.
[249] Cohen et al. (2015) 147. Rycroft (2014) 2689 referred to the matter of *Food & Allied Workers Union v Harvestime Corporation* in which the industrial court held that, even if the employee who acts in his/her capacity as a shop steward would be on same footing as the employer, it does not grant said shop steward a "license to rudeness, disrespectfulness or insolence".
[250] Cohen et al (2015) 152; Grogan (2015) 460.
[251] *Ibid* and Du Toit et al (2015) 358.
[252] Cohen et el. (2015) 153.
[253] S68(1)(a) of the LRA; Le Roux (2004) *CLL* 91; Du Toit et al. (2015) 358; Grogan (2015) 460.
[254] S68(1)(b) of the LRA; Le Roux (2004) 91; Du Toit et al. (2015) 358; Grogan (2015) 460.
[255] S68(5) of the LRA read in conjunction with item 6 (1) of the Code of Good Conduct: Dismissals.
[256] Cohen et al. (2015) 158.

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specifically to claim compensation or use contempt of court proceedings to ensure that the employer do not suffer a loss.[257]

2.1 Interdict

Interdicts are intended to protect applicants from suffering irreparable damage which can be caused by wrongful activities.[258] Section 68 (1) of the LRA grants the labour court with exclusive jurisdiction to grant an interdict to prohibit a person from participating in an unprotected strike or any conduct in contemplation or in furtherance of such an unprotected strike.[259] Except in the case of essential and maintenance services, the interdict can only relate to the strike regarding a certain issue and cannot be framed in such a manner that it deprives employees of their right to strike.[260] This would amount to an unreasonable limitation of the employees' constitutional right to strike.[261] When determining whether to grant an interdict the employer has to establish a *prima facie* right to relief sought, that there are reason(s) to believe that irreparable harm will be done or is to be done to the employer/applicant if the relief will not be granted; that the "balance of convenience favours the grant of the relief and that no other reasonable remedies are available to the applicant".[262]

However, an interdict can only be an effective means if the court order is respected by the union and/or its members. A contempt of court application can be applied for, in the instance that the interdict has not been complied with.[263] The test for a contempt of court application is to establish whether the breach was committed deliberately and *mala fide*.[264] It is not apparent from the wording of the LRA whether the union or their members should be held liable when participating in an unprotected strike.[265] This

[257] *Ibid.*
[258] Rycroft (2013) 2499.
[259] S68(1)(a) of the LRA, Grogan (2015) 461; Gericke (2012) 576.
[260] Grogan (2015) 461.
[261] *Ibid.*
[262] Cohen et al. (2015) 154; Grogan (2015) 461; *Automobile Manufacturers Employers Organisation v NUMSA* (1998) 11 BLLR 1116 (LC): the court held that the deliberate and bad faith non-compliance with an interdict will amount to contempt of court which could potentially result in the imposition of criminal liability.
[263] Cohen et al (2015) 153 notes that in Britain a contempt of court application can also be applied for in order to reinforce the interdict order.
[264] *Fakie NO v CCII Systems (PTY) LTD* 2006 (4) SA 326 (SCA); Rycroft (2015) 2501.
[265] Cohen et al (2015) 154.

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aspect has been clarified by the matter *Xstrata South Africa (PTY) LTD v Association of Mineworkers and Construction Union*.[266] The court held that there are three grounds on which the union is obliged to take responsibility for the action of their members during unprotected strikes, firstly section 17 of the Constitution dictates that everyone has the right to *peacefully* (my emphasis) and unarmed, assemble, demonstrate and present petition and this place an obligation on the union to ensure that their members act accordingly.[267] The court noted that Section 17 does not only provide a right but also imposes an obligation.[268] Secondly that due to the guardian relationship between the union and its members, the union is obligated to lead and guide its members. It must also ensure that the members are acting lawfully.[269] Thirdly collective bargaining relationship between the employer and the union requires the union must safeguard that its members are complies with the provision of the LRA, or with any lawful court order.[270] The court therefore concluded that the union is responsible for its members throughout the bargaining process and it must therefore take full responsibility and "fully associate itself with the conduct of its members throughout the illegal strike".[271]

I am in agreement with the courts' decision as the union cannot stand back when it is called upon to take account for its members' actions. They have to take responsibility for their members' action.

Myburgh advises that interdicts granted by the labour courts are, however, ignored even if criminal charges are brought against the person.[272] It is for this reason that employers frequently opt to apply for contempt of court applications against unions in order to reinforce the interim interdict orders.[273]

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[266] *Xtrata South Africa (PTY) LTD v Association of Mineworkers and Construction Union* (2014) ZALCJHB 58.
[267] *Xtrata South Africa (PTY) LTD v Association of Mineworkers and Construction Union and SA transport* para 36.
[268] *Ibid*.
[269] *Ibid.*
[270] *Xtrata South Africa (PTY) LTD v Association of Mineworkers and Construction Union and SA transport* para 38.
[271] *Xtrata South Africa (PTY) LTD v Association of Mineworkers and Construction Union* (2014) par 37 - 38.
[272] Myburgh (2013) *CLL* 2; Cohen et al (2015) 155.
[273] Cohen et el. (2015) 155; Rycroft (2015) 2505 raised the question: what happens if the contempt of court application is also disobeyed? Does this mean that the court's authority is weakened or does it mean that the court will grant orders for imprisonment of union officials?

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He adds that contempt of a Labour Court interdict has the implications: firstly, the rule of law is undermined by the employees or unions.[274] See for example in the *Modise v Spar Blackheath*[275] case where the strikers disobeyed an interdict prohibiting the strike. The court noted that "obedience to a court order is foundational to a state based on the rule of law.[276] The courts should apply a strict approach to ensure that it remains that way".[277] If a court order is not obeyed there would be a society of "chaos and lawlessness will be the order of the day".[278]

Secondly, the failure to comply with the court order will lead to the credibility and standing of the Labour Court as an institution, being undermined.[279] Thirdly, if violent strikes are not prohibited or allowed to be perpetuated, it would lead to collective bargaining power being distorted and that would lead to a form of "economic duress".[280]

Should a strike therefore be allowed to become violent, it would defeat the main purpose of collective bargaining. The economic power would therefore be to the advantage of the trade union only. This would then lead to "economic duress" and collective agreements will be signed by an employer under duress and will not collectively bargain with the union.[281]

Myburgh notes that "economic duress" occurs when an employer signs a wage agreement of which the wage level does not reflect the forces of supply and demand, but rather because of the force of violence.[282] This would then create an imbalance in the employment relationship. He advises further that when applying for an interdict to prevent unprotected strikes it is no longer an effective measuring tool.[283] It is for this reason the more likely approach used by the Labour Court is to allow employers use

[274] Myburgh (2013) *CLL* 4.
[275] *Modise v Steve's Spar Blackheath* (2000) 5 BLLR 496 (LAC).
[276] Idem 535 para H-I.
[277] *Modise v Steve's Spar Blackheath* 535 para H – I.
[278] *Ibid.*
[279] Myburgh (2013) *CLL* 4.
[280] *Ibid.*
[281] Myburgh (2013) *CLL* 6.
[282] *Idem* 4.
[283] Myburgh (2013) *CLL* 6.

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hearsay evidence in the instance where witnesses refuse to testify.[284] If an employee is found guilty of strike violence or disobey a court interdict, the court will deal with the perpetrator without remorse.[285] The labour court will also possibly "mulct unions" with all the costs if the union was the cause of the strike violence.[286]

Therefore if an unprotected strike action occurred despite a court order prohibiting it, then the court will adopt a strict approach.

See for example the *Modise v Steve Spar Blackheath* case, the court supported this view. In this matter the court held that if a court order was disobeyed, then a strict approach must be applied by the court in dealing with appropriate sanction.[287] According to the court a party who committed an offence should be penalized for its non-compliance.[288]

See also the matter of *In2Food (PTY) LTD v FAWU and others*[289] where the parties participated in an unprotected strike for two weeks. On the first day of the strike the LC granted an interim interdict restraining the union and its members from continuing with the unprotected strike and from harassing, threatening, assaulting or intimidating the non–striking workers. The union did not challenge the interim interdict and continued with the unprotected strike action. The strike action then escalated to violence and damage to property ensued. The employer brought an application of contempt of court and submitted evidence in support of the application. The court noted that the evidence which was submitted clearly proved that the union and its members were in contempt of the court's order.[290] The court held that the right to strike is protected by the constitution; however, this right is not without limitation. It must firstly comply with the provision of Section 64 of the LRA and secondly, it must be in line with the constitutional right to picket and/or assemble peacefully and unarmed.[291] The court held that the union should

[284] *Ibid.*
[285] Myburgh (2013) *CLL* 6.
[286] *Ibid and Tsogo Sun Casinos (PTY) LTD t/a Monte Casino v Future of SA Workers Union and Others.*
[287] *Modise v Steve's Spar Blackheath* 535 para H - I.
[288] *Idem* 535 para I – J.
[289] (2013) 34 ILJ 2589 (LC).
[290] *In2Food (PTY) LTD v FAWU* 2590 para A.
[291] *Idem* 2591 para H-I.

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be held accountable for the actions of its members.[292] The court cautioned that unions have far too long washed their hands of the violent actions of their members.[293] Taking all the facts into account the court found the union in contempt of the court order of the LC and ordered that it pays a fine of R500 000 as well as costs on attorney and client scale.[294]

When the court successfully grants contempt court application, it can grant costs order against the union or order compensation to the employer for loss suffered.[295]

2.2 Compensation

Section 68(1) (b) of the LRA allows the Labour Court jurisdiction to grant an order of payment of "just and equitable compensation" for any loss suffered as a result of an unprotected strike.[296] If the employee has contravened the provisions of Chapter IV of the LRA, then the right to strike can be limited. The drafters of the LRA were careful when they drafted the limitation on the right to strike.[297] It was done to balance the interest of the employer and employee by taking into account public interest.[298]

The definition of a strike also contains a limitation to the right to strike.[299] The courts and tribunals have jurisdiction to adjudicate disputes between a union and its members.[300] The courts and tribunals can therefore hold the union liable to pay compensation if a loss were sustained by the members, more specifically, in the instance where the union fails to comply with its statutory duties to act in the best interest of its members as their representative.[301] Gericke has also noted that, "a lack of accountability in the decisions

[292] *In2Food (PTY) LTD v FAWU* 2591 para H-I
[293] *Ibid.*
[294] *In2Food (PTY) LTD v FAWU* 2592 para D-E.
[295] *Garvis v SA Transport and Allied Workers Union* (2010) 2537.
[296] S (68)(1)(b) LRA; Grogan (2015) 462; Du Toit et el (2015) 359; Van Niekerk et el. (2015) 435. Cohen et el (2015) 156 note that the ILO has frowned upon the practice of granting damages against the union.
[297] Le Roux (2004) *CLL* 91.
[298] *Ibid.*
[299] Le Roux (2004) *CLL* 97.
[300] Gericke (2012) *THRHR* 585.
[301] *Ibid.*

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and actions taken by trade unions may end in financial loss and unemployment for members".[302]

The South African courts struggle with the concept whether the members can hold the union liable or accountable for their actions.[303] In respect hereof see the matter of *SA Municipal Workers Union v Jada*[304] whereby the magistrate's court granted delictual damages to members of a union who were dismissed because they participated in an unprotected strike. The union members contended that they embarked in the unprotected strike on instruction of one of the officials of the union. They therefore contended that the union breached their duty of care and due to this breach they suffered damages, because the constitution of the union required that the union must ensure that their members are not dismissed. On appeal, however, the claim of the union members were dismissed as the court was of the opinion that the members could not prove that the union owed them a duty of care.[305]

Before granting an interdict the labour court must first be establish whether:[306]

1) Attempts were made in order to comply with the provisions of the LRA i.e. Chapter IV.
2) The strike was premeditated.
3) The strike was in response to unjustified conduct by another party to the dispute (i.e. employer in this instance).
4) There was compliance with a previous interdict granted by the Labour Court restraining the strike.
5) The strike was in the interest of encouraging collective bargaining.
6) The duration of the strike.
7) The financial position of the employer. What were the consequences, more specifically, the financial consequences which the employer had to endure due to the unprotected strike?

[302] Gericke (2012) *THRHR* 585.
[303] Le Roux (2004) *CLL* 113.
[304] (2003) 24 *ILJ* (W) 1344.
[305] *SA Municipal Workers Union v Jada* 1344 para G-H.
[306] S68(b) of the LRA; Rycroft (2015) 112; Van Niekerk et al. (2015) 435 – 436.

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If a union fails to intervene in an unprotected strike or it fails to delegate this responsibility to a shop steward who in turns fails to discharge this obligation, the union can be held liable for the losses suffered.[307]

In the matter of *Rustenburg Platinum Mines Ltd v Mouth Piece Workers Union*[308] the court held that, when exercising this discretion, the court must firstly establish whether the strike was indeed unprotected[309] and secondly, whether the employees or trade union participated in the incident.[310] Thirdly, the court must establish whether the employees have participated in the unprotected strike and lastly whether the employer suffered a loss as a result of the strike.[311] The court held further that the employer would only be entitled to compensation which is just and equitable.[312] What is regarded as just and equitable is calculated by weighing up the loss suffered against the nature of the conduct and the blameworthiness of the person(s) responsible for the loss.[313]

This was the court's opinion in the *Algoa Bus Company v Satawu* [314] matter. The facts of the matter were a claim was instituted against the trade union because the employees participated in an unprotected strike. The court held that an employer would be entitled to compensation if it is proven that the provisions in the LRA regarding a strike have not been complied with.[315] The court noted further that if it was proven that the strike caused loss to the employer and that it was an inconvenience to the public then the employer would be entitled to be compensated for said loss.[316] In this matter the employer company could however not prove that the strike took place for the full period as alleged and was therefore not entitled to the full compensation as claimed.[317]

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[307] Cohen et al (2015) 155.
[308] *Rustenburg Platinum Mines Ltd v Mouth Piece Workers Union* (2002) 1 BLLR 84 (LC); Van Niekerk et al. (2015) 436; Du Toit et al. (2015) 360; Grogan (2015) 463.
[309] *Rustenberg Platinum Mines Ltd v Mouth Piece Workers Union* 89 para G-H.
[310] *Ibid.*
[311] *Rustenburg Platinum Mines Ltd v Mouth Piece Workers Union* 89 para G-H.
[312] *Idem 91.*
[313] *Rustenburg Platinum Mines Ltd v Mouth Piece Workers Union* 89 para H-I.
[314] *Algoa Bus Company v Satawu* (2010) 2 BLLR 149(LC).
[315] Paragraph C –D Page 158 *ibid.*
[316] *Algoa Bus Company v Satawu* 158 para A – B.
[317] *Idem* 158 para D-E.

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The court concluded that, when interpreting section 68 of the LRA, the compensation which is awarded must be fair.[318]

See also the matter of *Mangaung Local Municipality v SA Municipal Workers Union.*[319] In this case the court had to determine whether the union could be held liable for failure to take the necessary steps to end the strike. The court held that, if a trade union is in a bargaining relationship with the employer it has a duty to ensure that its members comply with the provisions of the LRA when embarking in a strike.[320] The court opined that the union was responsible for the loss which the employer incurred because the strike was unprotected. The court advised that it had to send a strong message to the union and its members that unprotected strikes would not be tolerated.[321] For this reason the court ordered the union to pay compensation to the employer in the sum of R 25 000.00 despite the employer suffering a loss of R 272 541.84.

The courts in the *Tsogo Sun Casinos (PTY) Ltd t/a Montecasino v Future of SA Workers Union*[322] matter went a step further by granting a cost order against the union. In this matter the court granted an interim interdict restraining the employees from continuing with certain violent and unlawful conduct. After the interim interdict was granted, the union abandoned the unprotected strike. On the return date the employer still proceeded to request a final interdict as well as a cost order against the union and its employees. The employees contended that the court could not grant a cost order against them, as they were low income earners. They further contended that it might affect the bargaining relationship between the employer and employees. The court rejected this argument and granted a cost order against them.[323] The court was of the opinion that the employees and the union should bear the consequences of their actions.[324] The court held further that a cost order granted against them, would not

[318] *Algoa Bus Company v Satawu* 158 para C- D .
[319] (2003) 24 *ILJ* 405 (LC).
[320] *Mangaung Local Municipality v SA Municipal Workers Union* para 47.
[321] *Mangaung Local Municipality v SA Municipal Workers Union* para 51.
[322] *Tsogo Sun Casinos (PTY) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 *ILJ* 998 LC.
[323] *Idem* 1002 para I-J.
[324] *Tsogo Sun Casinos (PTY) Ltd t/a Montecasino v Future of SA Workers Union* 1003 para E-F.

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unduly strain the collective bargaining relationship between the parties.[325] The court noted further that, "when the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of labour dispute, one must question whether a strike continues to serve its purpose and thus continues to enjoy protected statuses."[326] The court concluded that the court must take all necessary steps in order to prevent misconduct, or take all reasonable steps to prevent its occurrence.[327]

Cohen et al notes that with reference to the above case law, the compensation granted is not penal, but is granted in order to compensate the employer for loss suffered.[328] This will depend on the facts of each case, the seriousness of the breach and the respective liability of the parties.[329] As noted in chapter two; Collins et el advises that the ILO's Supervisory Committee has cautioned that when granting compensation against a union that it should not have the effect of bankrupting the union when they exercise industrial action.[330] I am however in agreement with the courts' decision, if the union participates in an unprotected strike and this cause's economic loss to the employer then the union should be held liable for the loss suffered but it should however not bankrupt the union. The courts has to an extend also complied with the ILO's Supervisory' s recommendation, in that the compensation ordered was not for the total loss suffered but rather as a means to prevent the unions from embarking in future unprotected strike action.

The limitation regarding the right to strike can be implemented only if the employer has not committed an act unlawfully.[331] If the union embarks on a strike and if it was requested to commit an unlawful act by an employer, then the unions' failure to comply

[325] *Idem* 1003 para C-D.
[326] *Tsogo Sun Casinos (PTY) Ltd t/a Montecasino v Future of SA Workers Union* 1004 para A.
[327] *Idem* 1004 para B-C.
[328] Cohen et el (2015) 156.
[329] Cohen et al (2015) 156; Du Toit et al (2015) 360; Van Niekerk et al (2015) 436; Grogan (2015) 463.
[330] Cohen et al (2015) 156.
[331] Le Roux (2004) *CLL* 99.

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with the provisions of Chapter VI of the LRA, would not be regarded as a strike, for purposes of section 67 of the LRA.[332]

In the matter of *National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board*[333] the court also confirmed that lawful activities exclude illegal activities or activities that constitute a contravention of the law.[334] The court noted furthermore that it also excludes conduct which amounts to criminal offences and, more specifically, if it causes physical harm to any person or damage to property.[335]

Although the LRA empowers the employer to claim compensation from the union who participates in unprotected strikes, there are very few matters which proceeded to litigation.[336] One of the reasons, presumably, is that the employer is in a bargaining relationship with the union and should they proceed with the litigation, it will only delay the dispute even after the strike has run its course.[337]

3. CONCLUSION

The LRA makes provision for the right to strike.[338] This right to strike can only be exercised if the substantive and procedural requirements of Chapter IV have been complied with. If the strike action is not in compliance with said chapter, it would be regarded as unprotected.

If the action is unprotected, then according to section 68 of the LRA, the employer can apply for a court order interdicting employees from participating in the unprotected act, claim from the union compensation that is just and equitable and/or dismiss the employee.[339] Cohen advises that when dealing with a large number of employees which

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[332] *Ibid.*
[333] *National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board* (CCT 75/13) (2014) ZACC (CC) 10.
[334] *Idem* 74 para 153.
[335] *National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board* page 95 paragraph 194.
[336] Rycroft (2015) 112.
[337] *Ibid.* Rycroft (2015) 112 said that, although the South African courts have not referred to the aspect, it must be borne in mind that the ILO does not approve of the granting of compensation orders against the Union as it can "threaten the viability of the union".
[338] S64 of the LRA.
[339] S68 of the LRA; Le Roux (2004) *CLL* 91; Du Toit et al. (2015) 358; Grogan (2015) 460.

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participates in an unprotected strike and if the core reason for the unprotected strike is due to socio economic or political reasons the dismissals would not be an effective deterrent.[340]

An interdict can only be effective if the union and its members comply with the court order. If not, the court would be entitled to grant a contempt of court application against the union and/or its member(s).

If a strike does not encourage functional collective bargaining, then the strike would be unprotected and the union could be liable for damages suffered by an employer.[341] It was previously noted that the instance in which the court would grant compensation, is when the strike was associated with violence, was not peaceful, or when it was not used as an effective tool to bargain collectively. Regarding compensation the court can only grant an amount payable which is equivalent to the proven loss suffered by the employer.[342]

If a strike has been accompanied by violence, then it will lead to an imbalance in the economic power between employee and employer, as an employer would sign a wage agreement under duress, therefore defeating the purpose of collective bargaining.[343]

Granting compensation against an employee or union, who participate in an unprotected strike, is seen as an effective deterrent.[344] Employers should therefore be encouraged to claim compensation from union in instances that strikes are unprotected especially when it is accompanied by strike violence.

[340] Cohen et al (2015) 158.
[341] *Ibid.*
[342] *Algoa Bus Company v Satawu* Paragraph C –D Page 158.
[343] Rycroft (2012) *Paper International Labour Law Conference, Barcelona* 7.
[344] *Ibid*.

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CHAPTER FIVE

COMPARATIVE STUDY: ENGLAND AND AUSTRALIA

A. ENGLAND

1. INTRODUCTION

The Constitution of South Africa makes provision for the right to strike.[345] A strike must be orderly and certain procedures, as set out in the LRA, must be followed before the trade union would be entitled to rely on the constitutional right to strike.[346] English law, on the other hand, does not grant an express right to strike.[347] Those who participate in strike action would be regarded as committing a tort (offense).[348] English law "starts with

[345] S23 of the 1996 Constitution.
[346] Rycroft (2012) *Paper International Labour Law Conference, Barcelona* 3.
[347] Davies (2009) 228; Bell (2006) 204. In the *Unison v UK* (2002) IRLR 497 the court held the traditional position namely that restriction can be made on the right to strike, but a blanket ban preventing public sector employees from taking part in a one day national strike in support of the right to collective bargaining, violated Article 11.
[348] Davies (2009) 229 and S219 of TULRCA 1992.

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the presumption that a strike is unlawful as a breach of contract by the employee".[349] Although there is no express right to strike in English law, there are statutes which offer trade union and strike organisers a possibility of immunity against the liability of tort, if certain conditions have been complied with.[350] This is similar to the LRA of South Africa, which gives effect to the constitutional right to strike. The immunity granted by English law has been set out in the Trade Union Labour Relations (Consolidation) Act (hereafter referred to as TULRCA).[351] However, this immunity only applies if the industrial action was done in "contemplation or furtherance of a trade dispute".[352]

2. PROTECTED INDUSTRIAL ACTION

Like the LRA of South Africa, the TULRCA also provides for substantial and procedural requirements which must be met before a union can participate in a "protected" industrial action, or be granted immunity from certain tort liabilities. According to section 219 of the TULRCA, the substantial requirements regarding immunity are that the strike action by the union can only be "in contemplation or furtherance of a trade dispute".[353] This immunity granted by said section does not apply to all forms of unlawful action, but only those referred to in section 219, namely, if it induces another person to break a contract or interferes or induces another person to interfere with its performance. [354] Or if it threatens 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.[355]

Collins advises that section 219 TULRCA has not taken into account evolving common law.[356] He notes further that this is "one of the weaknesses of the immunity as a basis of protection, for the freedom of to strike, immunity can be provided only to those torts

[349] Collins et al. (2012) 664.
[350] *Ibid.*
[351] TULRCA 1992.
[352] S219 TULRCA 1992.
[353] S219 TULRCA 1992; Bell (2006) 209; Deakin et al (2012) 1060.
[354] Collins et al (2012) 668; Section 219 TULRCA.
[355] *Ibid.*
[356] Collins et al (2012) 668.

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known to exist at the time the offence is committed.[357] If a new form of liability has been created by the court, the union would not be able to rely on section 219 as a form of protection.[358] For this reason the protection from liability based on the right to strike has an obvious advantage.[359]

The "golden formula" for immunity to be granted is that the action must be "in contemplation or furtherance of a trade dispute".[360] According to section 244 a "trade dispute" means a "dispute between workers and their employers".[361] Section 244 of the TULRCA makes provision for 7 categories which are regarded as a "trade dispute"[362]:

a) Terms and conditions of employment or physical conditions in which any workers are required to work.
b) Engagement, non–engagement, termination, suspension of employment or duties of employment of one or more workers.
c) Allocation of work or duties of employment as between workers or groups of workers.
d) Matters of discipline.
e) Workers' membership or non-membership of a trade union.
f) Facilities for officials of trade unions.
g) Machinery for negotiations or consultations and other procedures relating to any of the above.

Section 244 requires that the dispute should relate "wholly or mainly" to one of the seven categories mentioned above. Strike action, which is used as a front to further a "political", "government policy", or as an avenue of political action, or any "non-industrial issues", will not have any immunity.[363] This creates problems for workers in the public sector. They must ensure that their dispute is related to their terms and conditions of

[357] Collins et el (2012) 668.
[358] *Ibid.*
[359] Collins et el (2012) 668.
[360] Bell (2006) 209.
[361] S244 TULRCA 1992.
[362] S244 TULRCA 1992; Deakin et al (2012)1063; Collins et al (2012) 670.
[363] S244 of TULRCA; Davies (2009) 230; Deakin et el (2012) 1065; Collins et al (2012) 671.

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employment, even though it may be regarded as closely linked to government policy.[364] If the dispute is about government policy or privatization rather than genuine concern about job cuts, then there would be no immunity against such action.[365]

In South Africa, on the other hand, to be eligible to "strike", the aim of the action must be to remedy a grievance or to resolve a dispute of "*any matter of mutual interest*" between the employer and employee.[366] In South Africa, if the strike action is aimed at the government for the sole purpose of promoting or defending socio-economic interest, then the workers participating in the said strike action could still be protected by the LRA.[367] English Law prohibits "secondary strikes", no immunity is therefore granted if the trade union participates in secondary strike action.[368] However, the LRA of South Africa permits secondary strikes, but only if certain conditions have been complied with.[369]

Once it has been established that the dispute amounts to a "trade dispute" and if the strike action is called by a trade union (if the "action is official"), before immunity can be granted to participate in a strike action, certain procedural requirements must also be met.[370] These procedural requirements are set out in section 226 to section 234 A of the TULRCA.[371] These sections set out extensive procedural requirements concerning the organization of a compulsory ballot.[372] Similarly the LRA of South Africa also sets out procedural requirements which should be met before a strike action would be protected.[373] The LRA 1995 has, however, removed the compulsory requirement of a

[364] Davies (2009) 230.
[365] Hepple (2015) 30 ; Davies (2009) 230.
[366] *Ibid* and S213 LRA.
[367] Hepple (2015) 30.
[368] S224 TULRCA; Davies (2009) 231; According to Davies the English law ban on secondary strikes was condemned by the International Labour Organization; Bell (2006) 211.
[369] S66 LRA; Van Niekerk et al (2015) 429- 432.
[370] Collins et al (2012) 690.
[371] S222 – S234 A TULRCA; Bell (2006) 210; Deakin et al (2012) 1069; Collins et al (2012) 679.
[372] *Ibid.* Collins et al. (2012) 690 – Collins et el is of the opinion that the notice obligation as set out in Section 222–234 A is a serious impediment to a trade union's freedom. He notes further that "legislation is to protect union members; why does an employer have the right to sue to enforce an obligation where members are content that substantial compliance is enough?".
[373] S64 of the LRA.

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ballot to be held preceding a strike.[374] To hold a ballot in South Africa is therefore "irrelevant to the legality of and the statutory protection conferred upon a strike".[375] However, ballots remain relevant to the relationship between trade unions or employers' organizations and their members.[376]

If the condition for obtaining the immunity as set out above has not been met and a strike action goes ahead, the union or the strike organizer will be exposed to liability in tort which is a civil law remedy.[377]

3. REMEDIES

There are two primary remedies which are available to those who are affected by unlawful industrial action, namely a request to the court to grant an injunction (interdict) or damages.[378] This remedy is similar to the LRA of South Africa, namely section 68.

In the UK, if damages are awarded, it would be based on the "general principle applicable to law of tort, namely to place the claimant in the position s/he was, had the tort not been committed".[379] In terms of section 22 of the TURLCA there are limitations to the damages that the trade union may be required to pay.[380] These limitations are based on the size of the union.[381] With regard to the option to sue for damages, Deakin et el advises that it is a "powerful weapon" for employers. However, it carries the disadvantage in that the hearing is likely "to be heard long after the dispute has been settled and these proceedings are unlikely to promote good industrial relations".[382] Davies advises in practice, most employers choose to stop the strike, in order to prevent

[374] Du Toit et al. (2015) 348; Rycroft (2004) *CLL* 1.
[375] Du Toit et al. (2015) 348;
[376] Du Toit et al. (2015) 348; Collins et al. (2012) 679 has advised that the "ILO Supervisory bodies have taken the view that mandatory ballots imposed by the State do not breach Convention 87, provided the law does not impose unduly onerous obligations".
[377] Davies (2009) 233.
[378] Deakin et al (2012) 1089, Collins et al. (2012) 713.
[379] Deakin et al (2012) 1089.
[380] S22 TULRCA 1992; Davies (2009) 233; Deakin et al (2012) 1089; Collins et al (2012) 729.
[381] *Ibid.*
[382] Deakin et al (2012) 1090; Collins et el (2012) 731 - With reference to granting of damages awards the ILO has "noted concerns and called for effective limitations on actions for damages so that unions are not faced with threats of bankruptcy for carrying out legitimate industrial action. The committee has requested the UK to review the TULRCA and to consider appropriate measures for the protection of workers engaged in industrial action".

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suffering damages and to seek compensation afterwards.[383] The manner in which this is done is by bringing an application for injunction, therefore preventing the strike from escalating until there is a trial to determine the legality of the strike action.[384]

The purpose of an injunction, which is similar to South Africa's interdicts, it is a court order to prevent a person from committing a specified conduct such as restraining a union from breaching of contract.[385] In terms of section 236 of the TULRCA, no court may however, "compel any employee to work or attend at any place for doing of any work".[386]

The test to be applied to establish whether the court should grant an injunction was set out in the matter of *American Cyanamid v Ethicon*.[387] The test to apply is to determine whether or not to grant an injunction according to "balance of convenience".[388] This test entails that the court must consider whether the damages would be sufficient "remedy for either side if its position were vindicated at the trial, if so, an injunction should be refused".[389] If an interim injunction was granted and there has been a breach of the said injunction, then this would amount to a contempt of court.[390] In terms of section 20 of the TULRCA, if a union member has breached the court order, then the union would be held vicariously liable for the members' actions.[391]

There are three major differences between the UK and South Africa regarding strikes. Firstly, the UK makes no provision for the right to strike, but refers to the freedom to strike. Secondly, if the strike action is not in furtherance of a "trade dispute" then there is no immunity; however, in South Africa you can participate in strike action if the matter

[383] Davies (2009) 233.
[384] Davies (2009) 233; Deakin et al (2012) 1090.
[385] Deakin et al (2012) 1090.
[386] S236 TULRCA; Deakin et al (2012) 1090. This is similar to S187 of the LRA whereby it would be regarded as automatic unfair dismissal if the employee is forced to do the work normally done by an employee who was taking part in a strike.
[387] *American Cyanamid v Ethicon* (1975).
[388] Deakin et al (2012) 1091; Collins et al. (2012) 714.
[389] Davies (2009) 233; Deakin et al (2012) 1091; Collins et al. (2012) 714.
[390] Deakin et el (2012) 1096.
[391] S20 TULRCA 1992; Deakin et al (2012); S20 of TULRCA has origins from the *Taff Vale v Railway Co Ltd v ASR* (1901) matter whereby the courts held that trade unions could be held liable for torts of their servants and agents, which meant they could be restrained by injunction and sued for damages.

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does not relate to a "trade dispute" i.e. socio-economic problems. Thirdly, secondary strike action is prohibited in the UK whilst in South Africa it is allowed, but only in certain circumstances.

B. AUSTRALIA

1. INTRODUCTION

Australia's legislation is similar to the UK unlike South Africa's, in that it does not make reference to an express right to strike, but refers to a freedom to strike.[392] Instead of formal recognition of the right to strike, Australia has in both federal and state systems adopted several legislative prohibitory industrial actions.[393] It has, however, like the United Kingdom, implemented certain legislation which provides for the protection or immunity against liability if the person participates in industrial action. This has been set out in the Fair Work Act 2009 (hereafter referred to as FW Act). However, unlike the United Kingdom, Australia has little history of legislative protection against common law liability for industrial action.[394] This is because of the long standing uncertainty as to whether continued recourse to industrial action could be reconciled with the rationality of "compulsory" conciliation and arbitration.[395] Little legislative pressure was applied to strike action because of the proviso of compulsory conciliation and arbitration.[396] This has resulted in a real threat to the capacity of unions and their members when they intend to take industrial action, as they would be exposed to liability in tort.[397] This has been formally recognized by the High Court in the matter of *Victoria v Commonwealth*.[398]

2. PROTECTED INDUSTRIAL ACTION

Section 415 of the FW Act provides that:

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[392] Owens et al. (2011) 527.
[393] Creighton et al (2010) 763.
[394] Creighton et al (2010) 814.
[395] *Ibid* 814.
[396] Creighton et al (2010) 814.
[397] *Ibid*
[398] *Victoria v Commonwealth* (1996) 187 CLR 416; Creighton (2010) 814 - According to Creighton et el it is evident that the "current state of law sit most uneasily with Australia's obligation under international law."

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> No action lies under any law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial action unless the industrial action has involved or is likely to involve personal injury, wilful or reckless destruction of or damage to property or unlawful taking or keeping or use of property.[399]

This section therefore provides that, if a worker or employee participates in a protected strike s/he will not be exposed to the various tort and statutory liabilities.[400]

Like the provisos of the LRA of South Africa and TULRCA of UK, the FW Act of Australia also requires that substantive and procedural requirements must be met before parties could resort to protected industrial action.[401]

Section 408 of the FW Act allows for only three forms of protected action, namely a) an employee claim action for the agreement, b) an employee response action for the agreement, and c) an employers' response action for the agreement.[402]

An industrial action will not be protected in the following instances:[403]

a) if it takes place while an existing enterprise agreement is in existence;[404]
b) if the proposed agreement is a multi-enterprise or Greenfields agreement[405];[406]
c) if the person organizing the industrial action has "genuinely" tried to reach an agreement;[407]
d) if the action has not been protected by a protected action ballot;[408]

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[399] S415 FW Act 1992; Creighton (2010) 828.
[400] Creighton et al. (2010) 828.
[401] Owens et al. (2011) 588.
[402] S 408 FW Act (2009); Creighton et al. (2010) 828; Owens et al. (2011) 591.
[403] Creighton et al. (2010) 828; Owens et al. (2011) 592.
[404] S417 FW Act; Creighton et al. (2010) 820; Owens et al. (2011) 592.
[405] S172 (2) (b); (3) (b); (4); Creighton et. al. (2010) 304 advise that a Greenfields agreement is an "agreement relating to a genuine new enterprise that the employer(s) are establishing or proposing to establish, where the employer has not yet employed any employees, who will be necessary for the normal conduct of the enterprise and will be covered by the agreement". He note further that this agreement the employer can only enter with the union which represent the majority of the employees which will be covered by the said agreement.
[406] S413 (2) FW Act (2009); Creighton et al. (2010) 819; Owens et al. (2011) 592.
[407] S413 (3) FW Act (2009); Creighton et al. (2010) 819; Owens et al. (2011) 592.
[408] S409 (2) FW Act (2009); Creighton et al. (2010) 818; Owens et al. (2011) 592. This is similar to the TULRCA act which requires a compulsory ballot to be held before strike action can be participated in. According to Creighton (2010) page 820 this complex process regarding the ballot can be a breach of the right to strike, as it

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e) if the notice requirement has not been met;[409]
f) if the bargaining representatives or the employees are in breach of any FWA[410] bargaining orders;[411]
g) if the FWA or the minister has suspended or terminated the industrial action under any provision under Division 6 of Part 3-3;[412]
h) if the bargaining representative is engaged in pattern bargaining within the meaning of section 412;[413]
i) if the industrial action relates to demarcation dispute or contravenes an FWA order relating thereto;[414]
j) if the industrial action relates to an unlawful term in the agreement;[415]

An employee's response action has been defined in section 410(1) of the FW Act as an industrial action that is organised or engaged in as a response to the industrial action by an employer.[416] The industrial action referred to here is "lock-out" implemented by the employer.[417] This is similar to section 68(1) (b) of the LRA which requires that, when granting an order of compensation, the court should take cognisance of the fact that the strike is not a strike in response to unjustified conduct by the employer.[418] In Australia there is also no protection for employer initiated lock outs unless it is in response to employee industrial action.[419]

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can be viewed as a substantial limitation of the union right to strike. See also footnotes 30 and 32 regarding South African view of the compulsory ballot requirement.

[409] S413 (4) FW Act (2009); Creighton et al. (2010) 820; Owens et al. (2011) 592.
[410] FWA is like the CCMA of South Africa.
[411] S413 (6) FW Act (2009); Creighton et al. (2010) 820; Owens et al. (2011) 592.
[412] S413 (7) FW Act (2009); Creighton et al. (2010) 820; Owens et al. (2011) 592.
[413] S409 (4) FW Act; Creighton et al. (2010) 820; Owens et al. (2011) 592. According to Section 412 of the FW Act (2009) pattern bargaining will occur where a person is a bargaining representative for two or more agreements, and said person is seeking common terms to be included in two or more agreements and the conduct must relate to two or more employers.
[414] S409 (5) FW Act (2009); Creighton et al. (2010) 820; Owens et al. (2011)592.
[415] S409(3) of the FW Act (2009); Creighton et al. (2010) 820; Owens et al. (2011)592.This is similar to S65 (3) (a) (i) of the LRA of South Africa.
[416] S410 (1) FW Act; Creighton et al. (2010) 818.
[417] Creighton et al. (2010) 818.
[418] S68 of the LRA.
[419] Owens et al. (2011) 591.

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With regard to the procedural requirements, section 414(1) of the FW Act requires that written notice must be given to the employer before embarking on strike action.[420] This notice must be given at least 3 working days before the strike commences or such longer period as may be specified in a protected ballot order.[421] Like the LRA, the FW Act is also silent as to what form the notice should entail.[422] It is for this reason that the section 414 notice has been subject to litigation.[423] In the matter of *David's Distribution PTY LTD v NUW*[424] the court held that the main aim of the notice is that the party that will be affected by the strike action must be informed about the intention to strike. This would place the said party in a position to take the necessary defensive action in order to curb the loss to be suffered.[425]

Immunity does not, however, extend to the situation whereby the person was involved or is likely to be involved in "personal injury, wilful or reckless property damage or misappropriation of property or defamation".[426]

3. REMEDIES

The principles of the UK case *Taff Vale Railway Co v Amalgamated Society of Railway Servants*[427] were presumed to be part of Australian common law.[428] The court opined "that a trade union can be held liable in their own name for tortious acts committed in the course of industrial action sanctioned by the union".[429] With regard to unprotected industrial tort action, there are essentially two options: firstly, to apply for an injunction restraining the union from commencing or continuing to participate in the industrial action, and secondly, to claim damages in order to compensate the plaintiff for any loss

[420] S414 (1) FW Act, S64 of the LRA; This notice requirement is similar to Section 64 of the LRA. For further reading see Van Niekerk et al. (2015) 427.
[421] S414 (2) FW Act; Creighton et al. (2010) 820.
[422] Van Niekerk et al. (2015) 427.
[423] Creighton et al. (2010) 820; Van Niekerk et al. (2015) 427.
[424] *David's Distribution PTY LTD v NUW* (1999) 91 FCR 463.
[425] Creighton et al. (2010) 820; The South African Labour court in the matter of *SAA (PTY) LTD v SATAWU* (2010) (2010) 3 BLLR 321 (LC) at para 27, also made a similar decision as the *David's Distribution PTY LTD v NUW* (1999), and held that the strike notice should sufficiently clearly articulate a union's demands so as to place the employer in a position where it can take an informed decision to resist or accede to those demands".
[426] S415 FW Act; Creighton et al. (2010) 828; Owens et al. (2011) 590.
[427] *Taff Vale Railway Co v Amalgamated Society of Railway Servants* (1901) AC 426.
[428] Creighton et al. (2010) 795.
[429] *Ibid*.

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suffered as a result of the union's conduct (common law claim for damages).[430] A protected industrial action can also be suspended, but only if significant harm could be caused to the economy.[431] Neither the LRA nor the TULRCA has such a provision. The only instance, in which a protected strike can be suspended according to the LRA and the TULRCA, is when the protected strike action becomes unprotected.

3.1 Remedy for unprotected strikes

If a strike is unprotected, the parties that are participating in the action would be exposed to legal sanctions.[432] The legal sanctions include statutory injunctions and also common law action which can be brought against the participants or the instigators of the unprotected strikes.[433]

Regarding the claim for common law damages, unions who organize unprotected strikes may commit three types of tort, namely inducing a breach of contract, conspiracy to injure the employer's trade or business, and intimidation.[434]

Like the UK, in Australia most parties prefer to use the quicker route to prevent the unprotected action from escalating by applying for an injunction, instead of the longer route of claiming damages.[435] In Australia, if an injunction has been applied for and is successful, it normally brings an end to the matter.[436] The unprotected strikers must obey the court order otherwise they would be saddled with a fine, imprisonment and/or sequestration of their assets if their action was found to be in contempt of a court order.[437] If a successful interim injunction has been granted, then the strike action will inevitably lose momentum, as a civil action can take up to two to three years to complete.

[430] S418 – 419 FW Act 2009; Creighton et al. (2010) 804; Owens et al. (2011) 594.
[431] S423 and S431 FW Act 2009; Creighton et al. (2010) 828.
[432] Creighton et al. (2010) 804; Owens et al. (2011) 594.
[433] *Ibid.*
[434] Owens et al. (2011) 595.
[435] Creighton et al. (2010) 804; Owens et al. (2011) 600.
[436] Creighton et al. (2010) 804.
[437] *Ibid.*

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Section 418 and 419 of the FW Act provides that an injunction may be applied for when a party wishes to prevent an unprotected strike from proceeding. As noted above, this is similar to Section 68 of the LRA of South Africa and similar to the UK's manner of dealing with unprotected strikes. The TULRCA does not, however, have a specific provision which governs injunction orders, but the parties rely on normal civil procedure provisions.[438] The elements for granting interim injunction in Australia are that it must be proven that a) "an industrial action was happening; b) it was industrial action taken by employees of a constitutional corporation; and c) the industrial action was not protected".[439]

3.2 Remedy for protected strikes

As noted above, neither the LRA of South Africa nor the TULRCA of the UK have a provision which suspends or terminates a protected action. The LRA and the TULRCA only have provisions if the protected industrial action becomes an unprotected strike or if misconduct has been committed. However, section 423 of the FW Act of Australia provides that, if a protected industrial action causes "significant economic harm", the FWA can grant an order to suspend or terminate the protected industrial action.[440] The "significant economic harm" complained of can be directed to either the employer and/or any employee.[441]

The economic harm must be eminent and if the protected action is on-going, the FWA must be satisfied that the strike action has continued for a prolonged period of time and that the dispute will not be resolved "in the reasonably foreseeable future".[442]

The main reason for "suspension or the termination" of the protected industrial action is to allow the parties to "cool off" and to try to resolve the matters in dispute by agreement.[443] Creighton et al notes that this "cooling off" could, however, lead to a

[438] Collins et al. (2012) 713. S221 of TULRCA only deals with the restrictions on the granting of injunctions and interdicts.
[439] *TNT Australia Pty Ltd Riteway Transport Pty Ltd t/as Riteway Express and Transport Workers Union of Australia* (2006) as referred to by Owens et al. (2011) 601.
[440] S423 FW Act; Creighton et al. (2010) 832.
[441] *Ibid.*
[442] S423 (5) and 6 FW Act, Creighton et al. (2010) 832.
[443] Creighton et al. (2010) 834.

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"heating up" rather than cooling down period, especially in the instance where the employees think that the industrial action should not have been suspended.[444] Employees may feel that the employer might have made important concessions when the suspension took place and the suspension caused the industrial action to lose momentum.[445] Section 431 of the FW Act also provides that the minister may make a written declaration terminating a protected industrial action if s/he is satisfied that essential services are involved in the industrial action, or if the industrial action caused economic harm.[446]

4. CONCLUSION

South Africa's Constitution provides for the right to strike and the LRA gives effect to this right and also sets out the limitations regarding this right.[447] In both the UK and Australia there is no fundamental right to strike, but a freedom to strike. In these countries there is a presumption that by participating in strike action, a tort has been committed.[448] The said countries have, however, not placed a blanket ban on strike action. They made provision in their legislation, namely the TULRCA and the FW Act, regarding strike action. The said legislation grants immunity against tort liability, but only if certain substantial and procedural requirements have been met. This is similar to the provisions of the LRA, except that no ballot requirement is needed in South Africa. A striking similarity between Australia and the UK is that, if a strike is found to be unprotected, then the employer can apply for an injunction (interdict) restraining the unprotected strike and can claim for damages to compensate the employer for loss suffered. This is also similar to legislation of South Africa. In Australia and the UK, however, in practice most employers choose to stop the strike action by applying for an injunction,[449] as they see this as an alternative to suffering damage and having the difficulty of claiming for compensation afterwards. Claiming for compensation afterwards has its disadvantage in that the matter would be heard long after the dispute has been

[444] *Ibid.*
[445] Creighton et al. (2010) 834.
[446] S431 FW Act; Creighton et al. (2010) 835.
[447] S23 1996 Constitution, Chapter IV LRA.
[448] S219 TULRCA; Davies (2009) 229; S415 FW Act; Owens et al. (2011) 527.
[449] Davies (2009) 233; Deakin et al. (2012) 1090; Creighton et al. (2010) 804; Owens et al. (2011) 600.

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settled. Seeking an injunction is therefore a quicker manner to prevent an unprotected strike action from escalating.[450] The ILO has also "noted concerns and called for effective limitations on actions for damages so that unions are not faced with threats of bankruptcy for carrying out legitimate industrial action".[451]

From the comparative studies done between UK and Australia and bearing in mind the ILO warning regarding damages claims, although it might appear to be lucrative to claim for damages against unions for participating in unprotected strike action, the quicker route to prevent a strike action in South Africa, is to apply for an interdict. It must be noted however as Myburgh warns, in South Africa, even court interdicts are ignored by unions.[452]

[450] Creighton et al. (2010) 804; Owens et al. (2011) 600.
[451] Collins et al. (2012) 731.
[452] Myburgh (2013) *CLL* 4.

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CHAPTER 6

CONCLUSION AND RECOMMENDATION

As demonstrated in this study, although the Conventions of the ILO do not make express reference to the right to strike, it has been inferred from the Conventions. Most countries have therefore implemented national law to give effect to this right or freedom to strike. With reference to the EU, the European Court of Justice in the *Viking* and *Laval* matters has recognised that the right to strike is a fundamental right. The courts have cautioned that this right can be limited especially in instances whereby the free movement of the employers' commercial interest is at stake. Authors such as Hepple and Sciarra criticises the court's application of the *Viking* and *Laval* matter regarding the limitation applied. For example, Hepple notes that no fundamental right of the employer has been infringed, only the employers' "commercial interest" with which opinion I agree.

The right to strike has also been regarded as a fundamental right in that it plays an important role in collective bargaining. It is a means whereby employees are able to enjoy social and economic freedom in the sense that, when the employees act collectively they are able to bargain collectively with the employer. South Africa cannot, like England and Australia, have a freedom to strike, as there are several socio-economic inequalities which were created by the "legacy of apartheid". Ngcukaitobi notes that the socio-economic inequalities are one of the reasons why South Africa has been inundated with unprotected and violent strikes.

It is my submission that unprotected or violent strikes should, however, not be allowed to be the order of the day as it could affect the economic structure of South Africa. There should be compliance with the substantive and procedural requirements of the LRA before embarking on strike action and violent strikes should be curbed. Critics such as Myburgh and Rycroft also caution that, should a strike be destructive, for example if violence is used, then it will not encourage collective bargaining and therefore defeats the purpose. Myburgh notes as well that unprotected or violent strikes would lead to

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"economic duress", which would tip the scale in favour of the union only and therefore create an imbalance in the employment relationship.

The South African courts made it clear that unions should be held accountable for their actions, especially in the instance where economic loss was suffered, which decisions I agree with. Examples of this were demonstrated by the court in the cases of *Algoa Bus Company v Satawu* and the *Mangaung Local Municipality v SA Municipal Workers Union.* In the *Tsogo Sun Casinos t/a Montecasinos v Future of SA Workers Union* case the court went a step further by granting a punitive cost order against the union. It must be noted, however, that compensation should not be used as a punishment but rather be granted in order to compensate the employer for economic loss suffered. The ILO's supervisory committee contends as well that when granting compensation it should not be done in order to bankrupt the union especially in the instance when they participate in industrial action. The right to strike is also an important factor in collective bargaining and if the union's said right are threatened they may opt not to participate in collective bargaining.

The South African courts are adamant that unions should be held responsible where they deliberately fail to comply with the provision of the LRA by engaging in unprotected strikes, especially in the instance where the strike is coupled with violence. In addition, if the union's action results in financial loss to the employer and if the union also fails to discharge the responsibility to intervene in such unprotected strike.

Although there are relatively few matters in which the court granted compensation against a union, Cohen has cautions that dismissing employees serves "little value" when dealing with a large number of employees who are participating in an unprotected strike action. This is especially true when the strike is fuelled by either socio-economic or political factors.

In practice has been demonstrated that Australia and England have opted in practice to use injunction (interdict) in order to stop unprotected strikes. Davies confirms that the injunction is used as an alternative to suffering damages as it is difficult to claim compensation afterwards. Creighton et al. also notes that claiming compensation

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afterwards has a disadvantage in that the matter would be heard long after the dispute has been settled. Myburgh, however, cautions in South Africa even interdicts are ignored by the unions. This was demonstrated in the *Modise v Spar Blackheath* and the *In2Food (PTY) LTD v FAWU* matters.

It is therefore my submission that the right to strike should be protected, but only in the instance that the action does not conform to the substantive and procedural requirements of the LRA, in other words, a protected strike. It is my further submission that if the strike is unprotected, is violent in nature or a misconduct committed, then employers or the person who suffers the financial loss should be encouraged to claim compensation from the union. This is especially true in the instance where the union fails to prevent the unprotected strike or fails to prevent violent strike action. It is therefore my recommendation that the courts decisions such as the *Algoa Bus Company v Satawu*, *Mangaung Local Municipality v SA Municipal Workers Union, Tsogo Sun Casinos t/a Montecasinos v Future of SA Workers Union* should be followed.

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