# Can the *ultima ratio* and proportionality principles possibly curb unprotected industrial action in South Africa?

Monray Marsellus Botha
*BLC LLB LLM BCom (Hons) MCom LLD, Advanced Diploma in Insolvency and Practice, Advanced Diploma in Corporate Law, Advanced Diploma in Alternative Dispute Resolution*
*Associate Professor and Head: Department of Mercantile Law, University of Pretoria*

**OPSOMMING**

**Kan die *ultima ratio*- en proporsionaliteitsbeginsel moontlik onbeskermde nywerheidsaksie in Suid Afrika verminder?**

Die *ultima ratio*- en proporsionaliteitsbeginsel behels nie net dat strenger vereistes neergelê moet word vir beskermde nywerheidsaksie nie maar ook dat die misbruik van die onderskeie arbeidswapens verhoed word. Hierdie beginsels word geëvalueer teen die agtergrond van sowel onbeskermde as gewelddadige stakings wat 'n algemene verskynsel en kenmerk van die onlangse geskiedenis in Suid-Afrika was.

## 1 INTRODUCTION

Marikana, "feesmustfall", "insourcingmustfall" and "zumamustfall" all have been recent realities in South Africa. Workers, students and members of society have all voiced their disapproval with organisational structures, inequality, access to free education, housing, better living conditions, decent work and fair wages. The right to strike has been a central feature in concerns regarding not only socio-economic conditions, but also improvement of working conditions and fairness in applying labour laws and other laws. Although the agendas of the various uprisings were different, the central theorem that flows from them is the utilisation of a basic and fundamental right: the exercise and use of industrial and protest action. Coupled with these events (but not limited to them) is the fact that industrial action has been plagued by unprotected and violent strike action. Before commencing the discussion regarding the possible solutions to the systemic problem associated with industrial action in recent years, one must first set the scene regarding the importance not only of the right to strike, but also the protections associated with it.

It is trite that the right to strike is recognised in South Africa not only by the Constitution[1] but also by other enactments, such as the Labour Relations Act.[2] Employers, on the other hand, may have recourse to a lock-out.[3] A strike is

1 S 23 of the Constitution of the Republic of South Africa, 1996.
2 66 of 1995 (the LRA).
3 S 64(1) of the LRA.

> "the partial or complete concerted refusal to work or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers for the purpose of remedying a grievance or resolving a dispute over any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory".[4]

The right to strike is evidently not only an essential component of the right to freedom of association,[5] but is also "inextricably linked to a process of collective bargaining".[6] The right to strike enjoys a "high degree of protection"[7] in South Africa. Thus, it can be said that the right to strike is

> "an essential means for the promotion of the social and economic interests of employees and trade unions, based ultimately on the proposition that trade unions should be free to organise their activities and formulate their programmes for the purposes of defending the interests of their members".[8]

Proponents who call for more limitations of the right to strike are of the view that due cognisance must be taken of employers' right to trade and property. In *BTR Dunlop Ltd v National Union of Metalworkers (2)*[9] the court stated that "the right to trade includes the right to manage that business, often referred to as the managerial prerogative".[10] The decision-making power of employers (and thus, corporations who are employers) is upheld in the free market economy by four notions:

(a) the right to property, which enables the owner to dispose of his property as he wishes in order to obtain benefit from it;

(b) freedom of commerce and industry, where every citizen obtains the freedom to engage in commerce, profession, craft or industry;

(c) freedom of association, which enables an individual to combine his resources in a trade or industry with that of others and form a corporation in order to share profits; and

(d) obtaining power over people, where a worker has the freedom to enter into an individual labour contract with an employer he selected and where the employer obtains the power to command the employee to obey.[11]

In terms of these notions, the power to manage the enterprise belongs to the employer. In this context, the managerial prerogative can be explained as follows:

> "The law gives the employer the right to manage the enterprise. He can tell the employees what they must and must not do, and he can say what will happen to them if they disobey. He must, of course, keep within the contract, the collective agreement and the legal rules that govern him . . . But, even given these constraints, he still has a wide managerial discretion. He can decide which production line the

4 S 213 of the LRA.
5 Manamela and Budeli "Employees' right to strike and violence in South Africa" 2013 *CILSA* 308.
6 Davis and Le Roux "Changing the role of the corporation: A journey away from adversarialism" 2012 *Acta Juridica* 306 319.
7 Du Toit and Ronnie "Necessary evolution of strike law" 2012 *Acta Juridica* 195 204.
8 Van Niekerk and Smit (eds) *Law@work* (2015) 399.
9 1989 (10) *ILJ* 701 (IC).
10 705C.
11 Blanpain "The influence of labour on management decision making: A comparative legal survey" 1974 *ILJ* 5 6.

> employees should work on; whether they should take their tea break at ten or ten fifteen; when they may go on leave; and countless other matters besides. He can also decide what will happen to the employees if they do not work properly, if they go to tea early and so on. In short, it is he who within the limits referred to, lays down the norms and standards of the enterprise. This – at least as far as the law is concerned – is what 'managerial prerogative' entails, no more and no less."[12]

It is clear from the above that both the interests of employees and employers are important in achieving some form of balancing act. It should therefore be noted that rights granted by the Constitution and other enactments are not absolute and can also be limited.[13]

In the context of the current industrial action landscape, it must be reiterated that the LRA sets out to promote not only "labour peace" but also "orderly collective bargaining" and "the effective resolution of labour disputes".[14] The "right and concomitant duty to bargain collectively is enshrined in the LRA"[15] and is "integral to a system that sets out to civilise the workplace, to provide for a fair distribution between wage and profits, keep the economy vibrant and contribute to the wider democratic order".[16] It is trite that the prevalence of unprotected strikes in certain sectors in recent years as well as violence associated with most strikes go against the very spirit of orderly collective bargaining, labour peace and the effective resolution of labour disputes.

It should be mentioned that fairness plays a central role when balancing the rights of workers and employers, whether they embark on industrial action or utilise the recourse to lock-out. The spirit of the law spells it out that unlawful and unprotected behaviour cannot and should not be allowed especially when it infringes on the legitimate exercise of the rights of others. In Japan, for example, the "faithfulness principle in union-management relations" is applied which entails that lawfulness is employed in collective action based on the principle of fair play.[17] The main aim of strikes in Japan is the promotion of collective bargaining and actions intended with the purpose of only harming the employer or any third party is regarded as unlawful.[18] Although it is not proposed that industrial action should be banned or limited to the extent that the fundamental right cannot be enforced, the economic, social and political realities and effects should also not be disregarded. What is suggested is that more regulation is required, especially when the purpose of a strike is not the promotion of a lawful or legitimate purpose, but reckless behaviour intended to destroy the employer.[19]

---

12 Brassey *et al The new labour law: Strikes, dismissals and the unfair labour practice in South African Law* (1987) 74.

13 S 36 of the Constitution.

14 S 1 of the LRA. My emphasis. One of the aims of the LRA is to provide "simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration". The CCMA was established for these purposes.

15 Davis and Le Roux 2012 *Acta Juridica* 317.

16 *Ibid* where they refer to Thompson "Bargaining over business imperatives: The music of spheres after *Fry's Metals*" 2006 *ILJ* 704 785.

17 Waas "The right to strike: A comparative view" in Waas (ed) *The right to strike: A comparative view*" (2014) 38.

18 *Idem* 39.

19 *Idem* 38.

With the above in mind, the following reality should be emphasised:

> "The increase in strike action, as supported by COSATU, and the decline in productivity has created a degree of economic instability in South Africa and reduced government revenues due to production declines."[20]

It is thus proposed in the discussions below that protected strike action should be utilised only as a last resort where all other alternatives have been explored and where a legitimate purpose is pursued. It is proposed that the *ultima ratio* or proportionality principle should be explored as a means of not only curbing unprotected strikes, but also in attempt to limit the number of strikes that might have adverse effects on the economy and the livelihoods of both employees and employers. It can possibly enable workers as well as employers to deal effectively with strike action.

## 2 COLLECTIVE BARGAINING, INDUSTRIAL ACTION AND *ULTIMA RATIO* IN GERMANYAND THE EUROPEAN UNION

### 2 1 Origins of the *ultima ratio* and proportionality principles

The principle of *ultima ratio* has been of great importance in both the political and legal arena.[21] Although the complexity of its meaning has been invoked in a variety of cases concerning political, economic and social conflicts, wars as well as humanities and the natural sciences,[22] it is at the same time still problematic and difficult to grasp depending on its application.[23] The origins of the principle of *ulitma ratio* can be summarised as follows:

> "*Ultima ratio*, which comes from Latin '*ultimus*', meaning the last one, the far[th]est or most remote . . . and 'ratio', reasoning . . . is commonly understood as the last or final resort to achieve an aim pursued. Here, it is not to be understood as the chronologically last resort but as the most interfering last resort with the far[th]est-reaching effect. The term probably goes back to the famous French statesman Armand-Jean du Plessis, Duke of Richelieu, later on also a Cardinal of the Catholic Church. Towards the end of the Thirty Years' War, under the reign of Louis XIV of France, Richelieu let cast '*Ultima Ratio Regum*' on the royal French cannon which means 'the final argument of kings' . . . This, however, should not be understood as the last resort existing to achieve an aim pursued after having exhausted every other possibility but as the king's last word for deciding a political conflict. At the same time, the Spanish poet Pedro Calderón de la Barca wrote in his play 'In this life all is truth and all is falsehood' ['En Esta Vida Todo Es Verdad y Todo Mentira']: 'Ultima razón de reyes son la polvora y las balas', which means gunpowder and lead are the kings' last resort . . . In the German-speaking area the term appeared for the first time in Prussia. It is said that from 1742 onwards Frederick the Great's bronze cannons bore the inscription '*ultima ratio regis*'. So the cannonballs flew as his, the king's, last word, '*ultima ratio regum*' . . . Nowadays, the term is still used in the political debate: For example in the context of the on-going Euro debt crisis Horst Seehofer, the leader of the German Federal state of Bavaria, stated in the course of a political meeting that an expulsion of Greece from the Eurozone had to be '*ultima ratio*'. The original use in the military

20 Schutte and Lukhele "The real toll of South Africa's labour aggressiveness" 2013 *ACMM* 69 71.

21 Wendt "The principle of "*ultima ratio*" and/or the principle of proportionality" 2013 *Oňati Social-legal Series* 81 84.

22 *Ibid.*

23 *Ibid.*

> context suggests that certain means should only be used as '*ultima ratio*' because they are able to cause considerable damage. Therefore their use has to be carefully deliberated and can only be approved after having exhausted every other possibility."[24]

The principle of proportionality is directly linked to the *ultima ratio* principle, especially when it is considered in context of employment and labour law. The right to strike and participation in protest action does not come without limitations. Concepts such as *necessity* and *reasonableness* have been used by the courts to underwrite the concept of proportionality.[25] Against this backdrop (and what follows from the discussion below) the origins of the principle of proportionality can be summarised as follows:

> "The principle of proportionality is designed to limit abuse of power and infringement of human rights and freedoms by governments and other public officials to the minimum necessary in the circumstances. As a philosophical notion, proportionality may be traced back to the ancient Golden Rule of 'that which is hateful to you, do not do to your fellow.' As a legal principle, it originated in the nineteenth century in Prussian administrative law, in which it imposed constraints on police powers that infringed an individual's liberty or property. Throughout the years, the principle of proportionality expanded and migrated to other European countries, where it is now a central and binding public law principle, and to other jurisdictions, including Canada, New Zealand, Australia, South Africa, Hong Kong, India, and countries in South America. Furthermore, it has become part of many constitutional and international documents. It is also relevant in other contexts, such as international law (e.g., the doctrine of just war, the laws of self-defence, and international human rights law) and criminal law (e.g., punishment should be proportional to the offence)."[26]

## 2 2 The German and European positions

### *2 2 1 Germany*

The important role of trade unions in Germany (as well as South Africa and in the EU) cannot be downplayed: they have been "the typical vehicle" through which concerns are raised and articulated.[27] Trade unions provide a practical answer for workers through industrial action "to have an outlet to express their concerns", which is "particularly important in times of austerity".[28] In Germany, article 9(3) of the German *Grundgesetz* (Basic Law) provides that the right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Waas points out that although article 9(3) covers both individual and collective freedom of association, the right to bargain collectively is not expressly mentioned.[29] However, it is generally understood that the right to bargain collectively

---

24 *Idem* 84–85.

25 Italics in original. Cheadle "Constitutionalising the right to strike" in Hepple, Le Roux and Sciarra (eds) *Laws against strikes: The South African experience in an international and comparative perspective* (2015) 79.

26 Alon-Shenker and Davidov "Applying the principle of proportionality in employment and labour law contexts" 2013 *McGill LJ* 2013 375 377–378.

27 Barnard "A proportionate response to proportionality in the field of collective action" *E LR* 117 120.

28 *Ibid*; Waas "The right to strike" 236.

29 Waas "The right to strike" 236.

forms an essential element of the freedom of association.[30] In this context, Waas points out that

> "though the right to collective action is also not mentioned in Article 9(3), it is understood as being included in the freedom of association insofar as such a right is necessary to ensure an effective right in collective bargaining".[31]

Barnard emphasises that "the operation of collective bargaining would be undermined if trade unions did not have the power to put pressure on employers or employers' associations to enter into collective agreements on reasonable terms".[32] In this context, Barnard points out the following regarding the relationship between collective bargaining and strike action:

> "Collective action is the means of equalising the power of the employer and it is the most important and effective way that workers have to express their concerns. And so strike action is the corollary of collective bargaining, a link made express by both art. 6 of the European Social Charter 1961 (and 1996) and art. 28 of the EU Charter of Fundamental Rights. This link was recognised too by the German Federal Labour Court as early as 1955 when it made clear that 'industrial conflict must be exclusively understood as complementary to collective bargaining'. Article 9(3) of the German Constitution was amended in 1968 to include a provision that certain emergency measures could not be taken against industrial action, declared by associations on either side, to safeguard and improve working conditions. By implication, industrial action is now a constitutionally protected right in Germany."[33]

In Germany, there are virtually "no statutory provisions" that refer to industrial action, and it is exclusively regulated in detail by "judge-made law".[34] Judge-made law is of increasing importance and of particular relevance regarding labour law in the fields of individual and collective labour law,[35] but, particularly, collective labour law.[36] Because of the inactivity of the legislator, the labour courts have developed legal rules on industrial action or trade union rights as they dealt with cases on these topics.[37] Weiss points out that in other areas, such as collective bargaining where statutory rules exist, these rules are "vague and fragmentary", which means that crucial problems are left to the judiciary.[38] In areas such as workers' participation through works councils, the statute is detailed but has not prevented the courts from continuously trying to "re-balance the power relationship" between individual employers and works councils.[39] Of particular importance in this regard, is the following:

> "Of course, in order to play the game correctly, the judges have to take recourse to a statutory provision, even if this provision does not say anything. In case of the

30 *Ibid.*
31 *Ibid.*
32 Barnard 2012 *E LR* 120.
33 *Idem* 121.
34 Kirchner *et al Key aspects of German employment* (2010) 200; Weiss and Schmidt *Labour law and industrial relations* (2008) 199; Weiss "Judge-made labour law in Germany" in Malherbe and Sloth-Nielsen (eds) *Labour law into the future: Essays in honour of D'Arcy du Toit* (2012) 122 126.
35 Weiss "Judge-made labour law" 122.
36 *Ibid.*
37 Weiss and Schmidt *Labour law and industrial relations* 199; Weiss "Judge-made labour law" 122 126.
38 Weiss "Judge-made labour law" 122.
39 *Ibid.*

> topics dealt with in this chapter the point of reference was and still is article 9 par. 3 of the German Constitution. This article deals with freedom of association and says nothing about the lawfulness of industrial action."[40]

The important feature is the term "industrial action", which was not included in article 9 paragraph 3 of the German Constitution.[41] Article 9 paragraph 3, however, was amended by the so-called Emergency Acts of 1968 (*Notstandsgesetz*), to include a provision "according to which certain emergency measures may not be directed against industrial action, declared by associations of either side, to safeguard and to improve working and economic conditions".[42] The amendment does not define the legal boundaries of industrial action, but it implies that "if industrial action is constitutionally protected against measures of emergency, industrial action must be lawful, at least to a certain extent".[43]

In 1955, the Federal Labour Court (*Bundesarbeidsgericht*, FLC) delivered a "basic and still leading" judgment,[44] which outlined the basic structure of strike and lock-out law. The FLC has since refined and modified this position in subsequent judgments.[45] Due to the fact that freedom of association impacts directly on collective bargaining, the relationship between collective bargaining and industrial action (according to case law/judge-made law) can be stated as follows:

> "Therefore, in the view of the FLC, industrial action has to be understood as being merely an annex to collective bargaining. Industrial action is only allowed in so far as its purpose is the achievement of a collective agreement, and the achievement of aims that can be regulated in a collective agreement. Any industrial action for other purposes, whatever they may be, is understood to be illegal from the very outset. A very important implication of this interrelationship between collective bargaining and industrial action is the following: industrial action may legally only be carried out by parties competent to conclude a collective agreement. For the employees' side, this means that a strike can only be called out by a trade union. The consequence of this understanding is that all strikes declared by a group of employees which are not backed by the union,[46] so-called wild-cat strikes,[47] are illegal, no

40 *Idem* 126.

41 Weiss and Schmidt *Labour law and industrial relations* 199; Weiss "Judge-made labour law" 126.

42 Weiss and Schmidt *ibid*; Weiss "Judge-made labour law" 126–127.

43 Weiss and Schmidt *Labour law and industrial relations* 199; Weiss "Judge-made labour law" 126–127.

44 Federal Labour Court (FLC) of 28 January 1955, *Arbeitsrechtliche Praxis*, No1 Art 9 GG Arbeitskampf.

45 Weiss and Schmidt *Labour law and industrial relations* 199; Weiss "Judge-made labour law" 127.

46 Waas "The right to strike" 237 acknowledges that consensus exists that only certain trade unions can "rightfully call a strike". He adds in this context: "Trade unions are empowered to call a strike itself if, and only if, they enjoy the so-called 'capacity to bargain collectively'. This capacity requires, among other things, an ability to enforce their objectives (so-called social power). Trade unions must be in a position to exert sufficient pressure to induce the counterpart to conclude a collective bargaining agreement. Because the right to bargain collectively is only constitutionally applicable to those groups which can make sensible contributions to the spheres not explicitly regulated by the state, trade unions must be in a position to exert sufficient pressure to push their counterpart to commence negotiations for a collective agreement. That the right to strike is conditional on the 'capacity to bargain collectively' seems plausible given the fact that German law guarantees the right to strike only insofar as that right is understood as being necessary to ensure proper collective bargaining" (237–238).

47 Waas also points out that, according to the courts, wildcat strikes may with retrospective effect be legitimised by trade unions taking over the strike. The reason for this is two-fold:

*continued on next page*

> matter what their goals may be and no matter how reasonable these goals are. Therefore, in Germany the right to strike is in fact a trade union right and not a right of the individual."[48]

The FLC has laid down other requirements for lawful strikes and some important developments are highlighted below. The FLC originally (in 1955) introduced the principle of "social adequacy"[49] in order to evaluate the legality of a strike.[50] However, it became obvious that this principle was not helpful in resolving the problem of legitimacy. Then the FLC in 1971 applied the principle of proportionality[51] as the governing criterion of strike law.[52] This principle tends to prevent the abuse of strikes as the strike itself is governed by this principle.[53] Proportionality implies that "the strike is only admissible after all other options for solution of the problems are exhausted, which in turn means that all negotiations must have failed (the so-called '*ultima ratio'* principle)".[54]

Based on the principle of proportionality, the FLC has derived the following specific prerequisites:[55]

(a) the strike must respect the peace obligation (the peace obliges the parties to the collective agreement to maintain industrial peace for the duration of the agreement in question);

(b) the strike must be fair; and

(c) the strike must be the last resort.

According to the FLC, "not only a strike as such would violate the peace obligation,[56] but any activity initiating and preparing a strike".[57] Consequently, "before the peace obligation has expired, no preparation for a strike may lawfully be carried

---

"First, trade unions would be put in a position of mere observers if 'wildcat strikes' could not be legitimised. Second, trade unions must be able to determine the point in time at which a strike should be initiated. Against this background, the courts also acknowledge a trade union's aim to surprise employers with sudden strike action (by taking over a strike that was initially initiated by a group of workers)" (238).

48 Weiss and Schmidt *Labour law and industrial relations* 199; Weiss "Judge-made labour law" 127. See also Kirchner *et al Key aspects of German employment* 200.

49 FLC of 28 January 1955 – GS 1/54, *Arbeitsrechtliche Praxis*, No 1 Art 9 GG Arbeitskampf.

50 Weiss "Judge-made labour law" 127.

51 FLC of 21 April 1971 – GS 1/68, *Arbeitsrechtliche Praxis*, No 43 Art 9 GG Arbeitskampf.

52 Weiss "Judge-made labour law" 128.

53 Weiss and Schmidt *Labour law and industrial relations* 203; Weiss "Judge-made labour law" 128. See also Kirchner *et al Key aspects of German employment* 201.

54 Kirchner *et al Key aspects of German employment* 201; Waas "The right to strike" 240–241.

55 Weiss and Schmidt *Labour law and industrial relations* 203; Weiss "Judge-made labour law" 128. See also Kirchner *et al Key aspects of German employment* 201 and Waas "The right to strike" 242–243.

56 The content of a peace obligation can be summarised as follows: "[A] peace obligation does not only entail that the parties bound to it must abstain from calling or otherwise supporting industrial action (passive side), but also implies that the parties must see to it that their members abstain from such action (active side). Such 'double-edged' peace obligation can be found, for instance, in *Finland*, *Japan*, *Greece* and *Germany*" (Waas "The right to strike" 34–35). In South Africa, peace obligations must be narrowly construed as a peace obligation "proscribing strike action in general would be unconstitutional" (*idem* 34).

57 *Idem* 242.

out".[58] The *ultima ratio* principle is of great importance in cases where employees, for example, stop work for two to three hours during negotiations to put pressure on the employer.[59] The proportionality principle is applied in Germany with considerable caution:[60]

> "Though an *ultima ratio* principle is known in the German law on strikes and lock-outs, it is very reluctantly applied by the courts because, among other things, it is regarded as the very aim of a strike to make the employers suffer. As a consequence a strike might only be regarded as 'out of proportion' if it aims at destroying the employer economically."[61]

Short and spontaneous "warning strikes" lasting not more than a few hours during the negotiation stage as a means of exerting pressure have remained marginal and more or less isolated incidents during the bargaining stage.[62] The FLC found that these strikes during negotiations were not lawful as they were not utilised as a last resort when negotiations failed.[63] In this context, the developments and views regarding the position of the FLC on whether a strike is a "warning strike" or "normal strike" can be summarised as follows:[64]

---

58 FLC of 31 October 1958 – 1 AZR 632/57, *Arbeitsrechtliche Praxis*, No 2 § 1 TVG Friedenspflicht. See also Weiss "Judge-made labour law" 128. Waas, with reference to the peace obligation, points, out: "The peace obligation, as acknowledged by the courts, is 'double-edged' in the sense that it not only entails that the parties bound to it must abstain from calling or otherwise supporting industrial action (passive side), but also that the parties must see to it that their members abstain from such action (active side) . . . The peace obligation means that industrial action is illegal during the validity period of the collective agreement if it is directed against the collective agreement as a whole or against part of it. An employer can rely on a peace obligation that is part of a collective agreement concluded by an employers' association to which he or she belongs. This peace obligation also protects him or her from a strike that a trade union calls in order to get him or her to conclude a 'company collective agreement' on subjects already covered by the other collective agreement. As a result, employers whose employees enjoy working conditions that are fixed by a collective agreement can, in principle, rely on not being targets of industrial action. In Germany, collective agreements continue to have some effect following their termination. During that period, there is no 'statutory' peace obligation, though the parties may agree on a continuing peace obligation to gain time for negotiations that are not threatened by a strike" ("The right to strike"242–243).

59 Kirchner *et al Key aspects of German employment* 201. See also Weiss "Judge-made labour law" 129 regarding the so-called warning strikes.

60 Barnard 2012 *E LR* 123 where Barnard refers to private correspondence with Waas.

61 See also Weiss and Schmidt *Labour law and industrial relations* 204 in this regard.

62 Weiss and Schmidt *Labour law and industrial relations* 204; Weiss "Judge-made labour law" 129.

63 *Ibid.*

64 Weiss further sums up the reaction of the trade unions regarding this development as follows: "Faced with this situation some trade unions developed the strategy of so-called 'new mobility'. This strategy consisted in 'warning strikes' rotating within the area to be covered by a collective agreement and conducted during negotiations. The question was whether or not these local short strikes, based on a highly developed union strategy, fell under the category 'normal strike' or under the category 'warning strike'. In the first case they would have been unlawful since the above mentioned prerequisites for a lawful strike were not met, whereas they would have been lawful in the second case. For the unions, the strategy of 'new mobility' has a great advantage when compared to a 'normal strike'. Due to the obligation to pay strike benefits granted by the unions' standing rules, a normal strike has become very expensive for German trade unions. By contrast, a strike along the lines of 'new mobility' is very cheap, the union does not pay any benefits at all. Thus, for the unions it was crucial whether 'new mobility' was lawful. In 1984, the FLC confirmed the

*continued on next page*

> "This traditional view changed when, in 1976, the FLC had to decide on the lawfulness of a short strike of a few hours in one establishment which remained the single action of this kind during all following bargaining rounds within the respective industry and region.[65] The Court evidently wanted to legalize warning strikes for the very simple reason that in the past it had quite often turned out that those small 'warning strikes' led to a quicker compromise, thereby eliminating the necessity for a big strike. Thus, with regard to the principle of last resort [*ultima ratio*], the Court stated: 'the principle is only meant for a strike of a longer duration or a strike of an indefinite period . . . If the only intention of a strike is to promote negotiations by demonstrating to the employers' side the employees' readiness to go on strike, then this mild pressure, by way of a short warning strike, may be exerted before means of negotiation are exhausted.' In other words, the criterion of last resort only applies to a normal strike, but not to warning strikes. Since 1976 consequently the question has become controversial of where to draw the demarcation line between 'normal strike' and 'warning strike', the latter being characterized by mild pressure and short duration."[66]

However, this position of the FLC has changed dramatically as it no longer differentiates between normal and warning strikes with regard to the *ultima ratio* principle (principle of last resort).[67] At the same time, the FLC has significantly lowered the conditions to be met in order to abide by the requirements of *ultima ratio*. The implication is that it is now much easier to go on strike, even at an early stage of negotiations.[68] According to the FLC, the principle of *ultima ratio*

> "does not require a formal declaration that collective bargaining has broken down as a prerequisite for initiating industrial action of any kind. That initiation rather reflects the free declaration of the party concerned, a declaration which is not open to review and, hence, solely determining, that it considers the possibilities of reaching an understanding without recourse to pressure to be exhausted. This means that there is no later determining point of time as from which industrial action other than warning strikes . . . becomes lawful. There is a uniform point as from which a warning strike, like any other form of industrial action, is not excluded, even though collective bargaining continues".[69]

The implication of this new approach is that the principle of *ultima ratio* "has more or less become meaningless".[70]

---

legality of the strikes conducted in the framework of 'new mobility' by categorising them as being warning strikes. This decision provoked strong opposition from the employers' side. Employers and employers' associations were questioning the constitutionality of this judgment. They argued that the system of free collective bargaining, as guaranteed by the Constitution, would be endangered by the fact that, due to the lawfulness of the strategy of 'new mobility', the employees' side would become too powerful, thereby destroying the balanced negotiation procedure" ("Judge-made labour law" 129).

65 FLC of 17 December 1976 – 1 AZR 605/75, 1977 *NJW* 1079.

66 Weiss and Schmidt *Labour law and industrial relations* 204–205; Weiss "Judge-made l abour law" 129.

67 FLC of 21 June 1988 – 1 AZR 651/86, *Arbeitsrechtliche Praxis*, No 108 Art 9 GG Arbeitskampf. See also Weiss and Schmidt *Labour law and industrial relations* 204–205; Weiss "Judge-made labour law" 130.

68 Weiss and Schmidt *Labour law and industrial relations* 205; Weiss "Judge-made labour law" 130.

69 Weiss and Schmidt *Labour law and industrial relations* 205–206; Weiss "Judge-made labour law" 130.

70 Weiss and Schmidt *Labour law and industrial relations* 206; Weiss "Judge-made labour law" 130.

*2 2 2 The European Union*

Collective bargaining (starting in the late nineteenth century) has been an important instrument within European countries to equalise the balance of power between workers and management.[71] The traditional model of industrial relations, limited to the borders of the respective states in Europe, appears to have become increasingly problematic due to the opening and merging of markets through the European integration process.[72] The application of the Treaty on the Functioning of the European Union (TFEU), especially with regard to the freedom of establishment, the free movement of commodities, services and capital and the freedom of movement of workers, in which these freedoms "have essentially contributed to build up an Internal market on European scale" and thus the mobility of companies, has "considerably increased" due to the merging of the different national markets of the Member States.[73]

In context of the above, close attention is given to the balancing of economic and social rights in the EU, especially with reference to the provisions of TFEU regarding the free movement of goods, persons, services and capital. These issues were put under the spotlight when the European Court of Justice (ECJ)[74] was required to deliver judgment in *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line*[75] and *Laval v Svenska Byggnadsarbetareförbundet.*[76] These cases put collective action (which includes strike action as well as other forms of industrial action, like work-to-rule or overtime bans) in national, EU and international context.[77] In these cases, the ECJ held the Treaty provisions have "horizontal direct effect" against trade unions that organise industrial action and that industrial action infringes an employer's free movement rights regarding freedom of establishment and freedom to provide services.[78]

However, difficulty arises when "the limitation of the right to strike is justified on the basis of 'balancing' another right".[79] The ECJ recognised that the right to strike is a fundamental right within the EU and that trade unions may protest against these claims by asserting the right to strike. However, it is not an unconditional right and applies "only where they are acting proportionately in the exercise of that right".[80] In Finland and Sweden, the right to strike is recognised as

71 Seifert "Transnational collective bargaining: The case of the European Union" in Malherbe and Sloth-Nielsen (eds) 77.

72 *Ibid.*

73 *Idem* 77–78.

74 Now called the Court of Justice of the European Union.

75 C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* (Judgment 11 December 2007).

76 Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* (Judgment 18 December 2007).

77 See, for a detailed discussion of these cases, Barnard 2012 *E LR* 117–135; Davies "One step forward, two steps back? The *Viking* and *Laval* cases in the ECJ" 2008 *ILJ* 126–148; Malmberg and Sigeman "Industrial actions and EU economic freedoms: The autonomous collective bargaining model curtailed by the European court of justice" 2008 *Common Market LR* 1115–1146 and Dawson "Three waves of new governance in the European Union" 2011 *E LR* 208–225.

78 Arts. 43 and 49 EC. See Barnard 2012 *E LR* 121; Davies 2008 *ILJ* 126 and 2011 *E LR* 221.

79 Cheadle "Constitutionalising the right to strike" 80.

80 See Barnard 2012 *E LR* 121; Davies 2008 *ILJ* 126 and 2011 *E LR* 221.

a fundamental right; in other cases the right to strike is only implied.[81] It is clear that the Constitution of the ILO or any of its conventions does not explicitly include the right to strike. However, the right has been affirmed through case law developed by the ILO's Freedom of Association Committee when interpreting Convention No 87.[82]

Barnard points out that an express right to strike is contained in the 1961 European Social Charter (and the revised version of 1996).[83] The latter provision has now been read into article 11 of the European Court of Human Rights (ECHR), as a result of the significant and important rulings by the Court of Human Rights in *Demir and Baykara v Turkey*[84] and *Enerji-Yapi Yol*.[85] In this context, article 28 of the EU Charter of Fundamental Rights expressly recognises the right to strike (subject to the limitations laid down by national and EU law).[86]

Many thought that the right to strike fell outside the European Union's "constellation of interest" because article 153(5) TFEU excludes the competence, at least under article 153(1) TFEU, of the European Union to enact any legislation in respect of industrial action.[87] Barnard states:

> "Yet it was the references in *Viking* – and its sister case *Laval* – that brought collective action to the attention of the European Union. And it was the Court of Justice that declared the right to strike to be a fundamental right of EU law."[88]

In both *Viking* and *Laval*, collective action was taken by trade unions against Finnish and Swedish employers respectively to force them to accept the Finnish instead of a cheaper Estonian agreement and a Swedish agreement instead of a Latvian agreement.[89] Both *Viking* and *Laval* were based on an infringement of the fundamental freedom of movement provisions in the EU Treaty.[90] The ECJ in *Viking* held that "the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the [treaties]" and that "the protection of workers is one of the overriding reasons of public interest recognised by the Court".[91] The ECJ dealt with the question of proportionality and indicated that the strike action was "suitable"[92] because "collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members".[93] The ECJ said that strike action "might not be *necessary*"[94] since it is

81 Barnard 2012 *E LR* 119.
82 *Ibid*.
83 *Idem* 120.
84 *Demir and Baykara v Turkey*, Application No 34503/97 (12 November 2008).
85 *Enerji Yapi-Yol* Application No 68959/01.
86 Barnard 2012 *E LR* 120.
87 *Ibid*.
88 *Ibid*; Malmberg and Sigeman 2008 *Common Market LR* 1129.
89 See, for a detailed discussion of these cases, Barnard 2012 *E LR* 117–135; Davies 2008 *ILJ* 126–148; Malmberg and Sigeman 2008 *Common Market LR* 1115–1146; Dawson 2011 *E LR* 208–225 and Jasper "The future of collective labour agreements" in Malherbe and Sloth-Nielsen (eds) 97.
90 Arts. 49 and 56 TFEU; Barnard 2012 *E LR* 121; Davies 2008 *ILJ* 126–148 and Dawson 2011 *E LR* 208–225. See also Jasper "The future of collective labour agreements" 97.
91 *Viking* para 77. See also Barnard 2012 *E LR* 121 for a discussion of *Viking*.
92 Barnard 2012 *E LR* 122.
93 *Viking* para 81. See also Barnard 2012 *E LR* 122 for a discussion of *Viking*.
94 Barnard 2012 *E LR* 122.

for the national court to examine whether the "FSU [Finnish Seaman's Union] did not have other means at its disposal which were less restrictive of freedom of establishment"[95] to bring to a successful conclusion the collective negotiations entered into with *Viking*, and, "whether that trade union had exhausted those means before initiating such action".[96]

Barnard puts forward four criticisms of the *Viking* judgment:[97]

> "First, despite the express recognition of the right to strike in *Viking*, the Court has actually made strike action more difficult in the context of transnational disputes than before the judgment. This is because trade unions must now satisfy not only national rules on strike action (e.g. balloting and notice requirements), as they had to prior to the judgment, but also the requirements laid down in *Viking* (collective action can only be taken when jobs or terms and conditions of employment are under serious threat and that action must be the last resort (the *ultima ratio* principle).
>
> Secondly, despite the talk of balancing, the Court adopted an essentially one-sided or asymmetrical approach: it says that the economic right has been infringed by the exercise of the social right with the result that the onus is on the trade union to justify this breach *and* show that it is proportionate. This explains the accusation, made largely by trade unions, that the Court is in fact favouring economic interests of employers over the social interests of workers. A caveat does, however, need to be made. The precedence of the economic over the social is not necessarily a bad thing for developing a social dimension of the European Union in the general sense, since opening up the markets will benefit the Estonian workers, improving their prosperity and thus giving effect to the aspiration originally expressed in art.117 EEC. Kukovec puts this succinctly, 'like Wittgenstein's duck-rabbit picture, what appears as economic is social and what social is economic, depending on the angle from which we see the dilemma. The debate could just as well be framed in terms of social rights of [Estonian] workers against the [Finnish] interpretation of the freedom of movement provisions which ignores their realisation.'
>
> While this argument has much merit, it distracts from the general thesis of this article, namely that in terms of preserving the integrity of national social systems, the Viking judgment is severely damaging to rules developed by the states in the social field – the very area over which the initial Treaty of Rome settlement deliberately gave autonomy to the states – because fundamental (EU) economic rights take precedence in principle over fundamental (national) social rights.
>
> Thirdly, the Court adopted a restrictive approach to the proportionality principle: trade unions have to carry on negotiating longer than before, especially when a well-advised employer holds out the prospect that there might be a settlement just round the corner. How will a trade union know if it has "exhausted" other means at its disposal before initiating industrial action? These uncertainties, the case-by-case nature of the review process and the potential of an uncapped damages award mean that *Viking* (and *Laval*) have had a significant chilling effect on collective action.
>
> Fourthly, and most fundamentally, industrial action and the proportionality principle are unhappy and probably incompatible bedfellows. The more successful a strike from a trade union's point of view (e.g. a complete closing down of the employer's business), the less likely it is to be proportionate. For this reason some Member States, such as the United Kingdom, do not subject strike action to a (substantive) proportionality review at all."[98]

95 *Viking* para 87. See also Barnard 2012 *E LR* 122 for a discussion of *Viking*.
96 *Ibid.*
97 Barnard 2012 *E LR* 122–123.
98 *Ibid.*

It has been said that the decisions in *Viking* and *Laval* have become "symbols for the trade union movement of how the European Union is failing workers", which is also evident from the European Union's response to the economic crisis where it "has exacerbated these concerns, especially in respect of those countries in receipt of a bailout where severe cuts to the minimum wage and reform to other employment rights have become a condition for further EU/IMF support".[99]

## 3 CONCLUDING REMARKS: LESSONS FOR SOUTH AFRICA

The right to strike is regarded as "a potential weapon that serves to maintain the equilibrium between labour and the concentrated power of capital".[100] But, it is evident from the provisions of the LRA that labour peace and orderly collective bargaining should be promoted. Strike action should be peaceful. It is clear from the provisions of the Act that strike action (and the recourse to a lock-out) should meet certain requirements for it to be protected.

The judgment in *BAWU v Prestige Hotels CC t/a Blue Waters Hotel*[101] (a pre-1995 case) illustrates that the right to strike and the institution of the lock-out is central to collective bargaining:

> "[A] law[ful] strike is by definition functional in collective bargaining. The collective negotiations between the parties are taken seriously by each other because of the awful risk they face if a settlement is not reached. Either of them may exercise its right to inflict economic harm upon the other. In that sense the threat of a strike or lock-out is conducive and functional to collective bargaining."

It is important to note that due to the prevalence of unprotected industrial action which is in most cases associated with violence, stricter measures or sanctions should be investigated. It is therefore possible to incorporate elements of the *ultima ratio* and proportionality principles. With regard to industrial action, labour peace and dispute resolution, it is suggested that the objectives of the LRA should be enforced more strictly, especially labour peace and dispute resolution.

For purposes of this discussion, it is important to reflect on the consequences of strike action in recent years:[102]

| | **2008** | **2009** | **2010** | **2011** | **2012** | **2013** | **2014** |
|---|---|---|---|---|---|---|---|
| **Number of work stoppages** | 57 | 51 | 4 | 67 | 99 | 114 | 88 |
| **Working days lost** | 497,436 | 1,526,796 | 20,674,737 | 2,806,656 | 3,309,884 | 1,847,006 | 10,264,775 |
| **Loss of wages (ZAR 000m)** | ZAR 48,000m | ZAR 235,458m | ZAR 407,082m | ZAR 1,073,109m | ZAR 6,666,109m | ZAR 6,732,108m | ZAR 10,264,775m |

99 *Idem* 134.

100 Van Niekerk and Smit (eds) *Law@work* 399.

101 *BAWU v Prestige Hotels CC t/a Blue Waters Hotel* 1993 *ILJ* 963 (LAC) 971J–972A.

102 Source: Department of Labour *Annual industrial action report* (2012) Figures 1, 2 and 5; Figures 1 and 2 (2013); Executive summary (2014); Department of Labour 2012 http://www.labour.gov.za; Department of Labour 2013 http://www.labour.gov.za; Department of Labour 2014 http://www.labour.gov.za.

The above table shows that strikes clearly are not only disruptive, but have huge economic impact. The frequency and high level of strike activity, coupled with accompanying violence, have led to the call for the reintroduction of strike ballots,[103] the use of compulsory/interest arbitration and a wider use of peace obligations/clauses.

The reintroduction of strike ballots (in South Africa)[104] could resolve some of the issues raised in the workplace as to whether workers want to strike or in instances when the trade unions' interests conflict with those of their members. In Germany, for example, most trade unions have established some guidelines when it comes to strike balloting by calling for a vote by their members before they embark on a strike and such vote must be supported by 75% of the trade union's members.[105] The opportunity to address the prevalence of unprotected strikes (in South Africa) which negatively impact on employer-employee cooperation has been missed.[106] Strike balloting would also support the introduction of the "*ultima ratio*" and the proportionality principle found in German and EU labour law, into the domain of South African labour relations. It is submitted that its introduction would increase the legitimacy of the process of calling strikes and force trade unions to listen to the wishes of their members. In other words, if a strike is called without complying with the ballot requirement, it will be unprotected

103 See Rycroft 2015 *ILJ* 18–19.

104 The Labour Relations Act 28 of 1956 (the 1956-LRA) contained balloting requirements, but these requirements were not enacted in the 1995-LRA. A principal reason for the exclusion was that the balloting requirements gave rise to "technical disputes over compliance and there was extensive litigation over the issue" (Memorandum of objects of the Labour Relations Amendment Bill, 2012). The proposed amendment of s 64 of the LRA and the reintroduction of strike ballots, however, did not make it into the final version of the Labour Relations Amendment Act 6 of 2014. It should also be noted that current legislation does not require trade unions to conduct strike ballots before notice is given of protected strike action. See also s 95(5)(o), (p) and (q) of the LRA regarding the provision in the constitution of trade unions to provide for the circumstance and manner in which a ballot must be conducted. See also *KwaZulu Natal Furniture Manufacturers' Association v National Union of Furniture & Allied Workers of South Africa* 1996 8 BLLR 964 (N) and *National Union of Metal Workers of SA v Jumbo Products CC* 1991 12 *ILJ* 1048 (IC) with reference to strike ballots and the guidelines required for strikes. See also Benjamin "Beyond dispute resolution: The evolving role of the commission for conciliation, mediation & arbitration" 2014 *ILJ* 1 who points out that many trade unions "do retain balloting requirements in their constitutions but a failure to comply with these is not a basis for interdicting strike action". S 67(7) of the LRA provides in this regard that "The failure by a registered trade union or a registered employers' organisation to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of who it intended to call a strike or lock-out may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the strike or lock-out."

105 Waas "The right to strike" 26.

106 In this regard, Botha "Responsible unionism during collective bargaining and industrial action: Are we ready yet?" 2015 *De Jure* 328 345 points out that: "The amendment to section 64 of the LRA and the reintroduction of a ballot, before a protected strike or lock-out may commence, has not been included in the final version of Labour Relations Amendment Act 6 of 2014. The introduction of strike balloting was intended to prevent industrial action if it enjoys only minority support due to the fact that violence or intimidation are more likely to occur under these circumstances. The change was proposed in response to the high levels of unprotected strike action as well as the unlawful acts of intimidation and violence that accompanied the strikes in recent years in South Africa."

because a procedural requirement was not adhered to by the trade union. It has been suggested that the period for the commencement of a strike should be increased and that a secret strike ballot be introduced. The increase in the notice period could result in the resolution of the dispute by means of conciliation and can possibly be viewed as a "cooling-off" period.[107] For example, an extension of a 14-day notice period could bring about changes in how conciliation, as a process, is utilised in the South African labour framework. It is proposed that the manner in which conciliation is viewed as a dispute resolution process utilised as a mere box-ticking exercise should change and that parties to a dispute should show a serious intention and commitment to resolve the dispute rather than merely comply with an initial stage in the process in order to obtain a required result (the dispute remains unresolved).

The question is relevant to the recent situation where strikes have lasted for long periods of time: when a strike is no longer functional and is simply continuing for an unspecified period, the CCMA or Labour Court should intervene by suspending the strike and subjecting the parties to the dispute to compulsory arbitration during which workers return to work to render their services.

However, there is no provision in the LRA regarding interest arbitration. In light of the five-month-long platinum mine strike in 2014, calls have been made for the introduction of compulsory or interest arbitration when a strike is unresolved and has lasted for a prolonged period of time. However, compulsory arbitration has its opponents and is regarded "as superficially attractive but fraught with difficulties".[108] In context of this discussion, it is also important to consider section 150(5) of the LRA which provides as follows:

> "Unless the parties to the *dispute* agree otherwise, the appointment of a commissioner in terms of this section does not affect any entitlement, of an *employee* to *strike* or an employer to *lock-out*, that the party to the dispute may have acquired in terms of Chapter IV."[109]

Rycroft's view of this provision is worth quoting in full:

> "The section required 'parties to agree' not to suspend the strike, leaving open the question if only one party agreed. One viable interpretation is that if the employer party insisted on the suspension of the strike, but the union party did not, there

107 Brand, for example, proposes that the notice period for a strike should be increased to 14 days, creating a longer period for conciliation and the introduction of a right to a secret strike ballot within the 14 days' notice period (Rycroft "Strikes and the amendments to the LRA" 2015 *ILJ* 18–19). "Adherence to this requirement can be rewarded with strike protection under the following circumstances: if (*a*) the ballot is called by any one of the social partners in a workplace; (*b*) the ballot is conducted by the CCMA or a suitably accredited independent body; (*c*) the ballot is conducted among the categories of workers who wish to participate in a strike in a workplace; (*d*) the quorum for the ballot is 50% plus one of those workers who wish to participate in the strike; (*e*) 50% plus one of those workers who vote, vote in favour of the strike; and (*f*) the ballot is conducted within the 14-day notice period before a strike, then the ballot will be deemed to be valid for the purposes of any urgent interim court relief sought by any party. A further ballot may be called after 30 days from the date of a previous ballot" (*idem* 18–19). Cooling-off periods are also commonly used in other jurisdictions such as Hungary where the cooling-off period is 7 days and Poland where the cooling-off period is 14 days (Waas "The right to strike" 31).

108 Rycroft 2015 *ILJ* 15.

109 See s 24 of Labour Relations Amendment Act 6 of 2014.

> would have been no agreement. In such circumstances the CCMA's decision to suspend the strike would prevail.
>
> This controversial 'forced cease-fire' was changed in the 2013 Bill to give the assurance that unless the parties agreed otherwise, the appointment of a commissioner in terms of this section did not affect any entitlement of an employee to strike or an employer to lock out where the party might have acquired rights to do so in terms of chapter IV of the LRA. This change – clearer and preferable to the 2010 version – made possible a mutually agreed suspension of the strike for the duration of conciliation.
>
> A similar proposed change was made to s 69. The 2012 amendments anticipated the suspension of a strike or lock out in a different context. Amendments provided that in picket-related disputes the Labour Court (LC) could 'grant relief, including urgent interim relief, which is just and equitable in the circumstances and which may include . . . (*c*) in the case of a trade union, suspending the picket or strike; or (*d*) in the case of an employer, suspending the engagement of replacement labour even in circumstances in which this is not otherwise precluded by section 76 or suspending the lock-out'.
>
> This innovative provision was seen to have offered 'a significant impact on strike violence'. But once again the portfolio committee deleted these provisions and the 2014 Amendment Act offers no fresh possibilities for institutionalised mechanisms for dealing with illegal or unprocedural industrial action by either employers or employees. Perhaps a more onerous role will now fall to the LC to do what it has threatened: to remove the protected status of a strike where violence renders the strike dysfunctional."[110]

To reiterate, this was a lost opportunity to curb the consequences regarding unprotected and prolonged strikes and to shed some light on the appropriate conduct of parties during collective bargaining, including how and when they utilise their respective industrial weapons.

The challenges experienced in the past relating to technical non-compliance, may, arguably, be addressed through careful regulation. The constitutional framework now ensures that the right to strike is entrenched. Regulation also ensures that trade unions adhere to notice periods when calling a strike action and guarantees that the use of strike action is a last resort. Stricter enforcement by the CCMA and the labour courts is required, especially in cases of a strike which has lost its purpose and has continued for a long period without achieving anything. It is suggested, in such an instance, that the Labour Court should intervene and force the parties to resolve their dispute by means of compulsory arbitration. Compulsory arbitration would be necessary if a strike is no longer functional, is violent or relates to issues in terms of section 84 of the LRA that are not "strikeable" in terms of section 65 of the LRA, and would be considered a "rights dispute".

The disruptive effect of strike action should be re-examined, especially the long-term and adverse effects it has on the well-being of the workers and the corporation. The right to strike should not be abolished or unjustifiably limited, but the parties to the bargaining table should find alternative ways of addressing issues other than the use of industrial action (especially in instances which industrial action was utilised in the previous negotiation cycle). Currently, the conclusion of long-term agreements prevails only in certain industries. It is recommended

110 Rycroft 2015 *ILJ* 5–6.

that the Minister of Labour be granted the power to intervene in certain industries in which strike action is prevalent and compel the bargaining parties to conclude long-term agreements spanning two or three years – collective agreements that are binding on both the employer and the workers. If workers then have problems with the agreement, they should resort to other means of dispute resolution: strike action would be barred in these instances.

Unfortunately, the system has failed: 52% of all strikes embarked on in 2013 were unprotected strikes whereas 48% of strikes were protected.[111] In 2014, the numbers were the opposite: 48% were unprotected strikes and 52% were protected.[112] Although the 2014 statistics were different, more work days were lost in 2014 compared to that in 2013.[113] It was mentioned that stricter measures should be implemented to curb the regular occurrence of unprotected strikes and their effects. Such measures should place a moratorium on strikes in the case of a trade union embarking on unprotected strike action, or of protected strike action becoming violent, or of strike action being dysfunctional. Stricter liability for trade unions by which they can be held civilly liable or even criminal sanctions may be implemented: the court in *SA Transport and Allied Workers Union v Garvis*[114] held that a trade union could escape liability only if the act or omission that caused the damage "was not reasonably foreseeable", and if it took reasonable steps within its power to prevent that act or omission.[115] In this regard, the following can be articulated:

> "Trade unions have to deal with the reality of liability. Bad faith negotiations, union rivalry, disorderly and violent conduct during strikes as well as the promotion of, and participation in, wildcat and unprotected strikes are against the spirit of the LRA which aims to promote orderly collective bargaining and labour peace . . . Trade unions and their representatives (as indicated above) are responsible for how they conduct themselves during the collective bargaining process and should be responsible in the manner in which they promote the interests of their members and should take responsibility for their members during strike action. A more proactive measure, rather than the reactive and punitive mechanisms that are being utilised, should be sought."[116]

Parties show their good faith and commitment to the resolution of wage disputes in a particular negotiation cycle by agreeing that in the following cycle an embargo would be placed on industrial action and that disputes would be resolved, for example, by means of arbitration if negotiation fails. The reason that unprotected strikes and unnecessary protracted or violent strikes must be better

111 Department of Labour 2013 http://www.labour.gov.za.
112 Department of Labour 2014 http://www.labour.gov.za.
113 *Ibid*.
114 2012 *ILJ* 1593 (CC).
115 Para 42.
116 Botha 2015 *De Jure* 347. Botha also proposes that principles of corporate governance should equally be applied to trade unions and that trade unions should act in a responsible manner. He suggests the following in this regard: "It is thus argued, with regard to responsible unionism, that elements of responsible corporate citizenship should be applied to trade unions in evaluating whether or not they act in a responsible manner. Trade unions are equipped with huge amounts of social, economic and political power and need to be responsible when negotiating with employers, and other important role players and social partners, about the livelihoods of the most vulnerable workers. They are entrusted with a huge responsibility to care about the terms and conditions of employment but also to bargain from a sustainability perspective." (341).

addressed is that the consequences spill over into the cooperative relationship between employers and workers and negatively influence worker voice in decision-making.

In Germany, the right to strike is conditional on the "capacity to bargain collectively": the right to strike is guaranteed only insofar as that right is understood as being necessary to ensure proper collective bargaining. It is suggested, when a deadlock is reached and the matter is referred to compulsory arbitration, that a limitation should be placed on embarking on strike action and that workers should return to work.

The prevalence of strike action in South Africa reveals that, in most instances, strikes are used not to remedy a grievance but to force the employer to concede to the demands of trade unions. Sometimes these demands do not relate to the negotiations or fall outside wage issues. It was proposed that a greater commitment should be attached to conciliation as a dispute resolution process before strike action can be embarked on.

It is also possible to amend the sections on strikes by specifically excluding inter-union disputes:[117] they are not intended to remedy a grievance or dispute between employers and employees. Although the spirit of section 64 indicates that strike action may be exercised only as a last resort and should support lawful demands, stricter application of the "*ultima ratio*" and proportionality principles is called for.[118] In this regard, as pointed out earlier, the Labour Court should intervene when it appears that the strike is no longer functional or that the trade union has no interest in trying to resolve the dispute and reach an agreement. When workers and their trade unions embark on industrial action, the strike should meet the following criteria in context of whether the strike action is proportional: (1) the strike action should be suitable to the demands being made (the employer must be able to meet the demands); (2) the strike must be necessary and used as measure of last resort where all other measures have failed; and (3) the strike must be reasonable[119] taking into account the rights and interests directly

---

117 In Australia, eg, industrial action must not relate to a significant extent to a demarcation dispute whereas in Colombia strikes may not be aimed at settling disputes between unions (Waas "The right to strike" 21).

118 The use of *ultima ratio* appears to have become meaningless in Germany (see para 2 2 2 1 above) but this does not mean that it cannot work in South Africa. The collective bargaining landscape in Germany is quite different from that of South Africa. In Germany, for example, collective bargaining can encompass two types of agreements: (i) works agreements between the employer and the works council; and (ii) agreements with a trade union (trade union agreements). Works agreements are excluded in cases of already existing collective agreements in order to prevent the works council from competing with trade unions. S 77(3) *BetrVG* makes it clear that no rivalry (with reference to collective bargaining) should exist between trade unions and works councils. Such rivalry is regarded as "a threat to the collective bargaining system", because, if there is a breakdown in the system of collective agreements, the result would be "no adequate substitute at plant level where works agreements cannot be enforced by the works council" (Weiss and Schmidt *Labour law and industrial relations* 199). Collective bargaining in South Africa is quite adversarial and the prevalance of violent and unprotected strike action calls for much stricter measures and, therefore, the application of *ultima ratio* and proportionality can be useful to address these problems and concerns.

119 See, eg, *Sealy of SA (Pty) Ltd v Paper Printing Wood & Allied Workers Union* 1997 18 *IJL* 392 (LC) where the court stated that the "reasonableness" introduced proportionality into the test regarding whether the nature and extent of secondary strikes are reasonable to

*continued on next page*

and indirectly affected by the strike action (*proportionality strictu sensu*).[120] It is proposed that section 64 of the LRA be amended to incorporate an onus of proof where the trade union or employer (depending on the format of industrial action) would justify that the action taken is a last resort and that it is proportionate. It should be mentioned that what constitutes a last resort will depend on the circumstances and facts of each case: for example, if the demands are unrealistic and the trade union negotiates in bad faith and knows that the employer can never meet its demands in order to use strike action as a weapon it cannot really be said that it is then used as a last resort. In context of the South African industrial action landscape, last resort can entail that the parties may prove that they were willing to explore, for example, advisory arbitration when an impasse was reached, or indicate that they explored other alternatives like removing certain items from the wish list of demands. If they still cannot reach agreement, the trade union will be able to prove that strike action is utilised as a last resort. It is thus suggested that strike action should not only be suitable, legitimate and reasonable but should also be used as a means of resolving a dispute and, thus, necessary to achieve the imbalance in the equilibrium that exists between employers and workers. It should be used as a measure of last resort and not as a means to impose failure of an employer's operations. The infringement on economic rights should therefore be proportional to the social rights sought to be enhanced.

It is suggested that more drastic measures and sanctions should be imposed to curb the prevalence of unprotected strike action and violence during protected and unprotected strike action. It is possible, for example, to extend the limitations of the right to strike as provided for by section 65(1) of the LRA[121] and extend the scope of peace obligations/clauses where strike action is limited by subjecting a dispute during the duration of a collective agreement to a particular dispute resolution procedure (for example, arbitration) or where an embargo or moratorium is placed on trade unions not to take part in strike action if they, for example, did not follow the procedures to comply with protected strike action, or if they did embark on protected strike action and were guilty of misconduct or the strike action became violent. When principles such as "only as a last resort" or "not at the expense of the public good" are applied more strictly it might curb

---

the possible direct or indirect effect that the secondary strike will have on the business of the primary employer (s 66(2)(c) of the LRA). In *Optimum Coal Mine (Pty) Ltd v National Union of Mineworkers* 2014 ZALCJHB 454 (LC) para 15 the court stated that proportionality is "the yardstick in determining reasonableness as contemplated in section 66(2)(c) of the LRA".

120 Cheadle "Constitutionalising the right to strike" 79.

121 S 65(1) of the provides as follows: "No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if – (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration; (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law; (d) that person is engaged in – (i) an essential service; or (ii) a maintenance service." S 65(3) further provides that when employees are bound by an arbitration award, collective agreement, or a ministerial determination in terms of the Basic Conditions of Employment Act of 75 of 1997 regulating the disputed issue they are prohibited from striking.

the prevalence of embarking on unprotected strikes when stricter liabilities are imposed and prevent workers from turning violent during a protected strike.[122]

This would not only support the call for trade unions to act more responsibly when they participate in collective bargaining and embark on strike action but would also incorporate the principles of *ultima ratio* and proportionality that are much needed in an adversarial bargaining process tainted by violence, disruptions, disorderly behaviour and unrest.

In closing, the following sentiment of the Labour Court should be kept in mind:

> "This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status."[123]

122 See, in this regard, *Technikon South Africa v NUTESA* 2001 1 BLLR 58 (LAC) para 43.

123 *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers' Union* 2012 (22) *ILJ* 998 (LC) para 13.