

The promotion of orderly collective bargaining and effective dispute resolution, the dynamic labour market and the powers of the Labour Court (1)

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OPSOMMING

Die bevordering van ordelike kollektiewe bedinging en effektiewe beslegting van geskille, die dinamiese arbeidsmark en die magte van die Arbeidshof

Die tekort aan vertroue tussen bedingspartye, konflik tussen vakbonde asook onbeskermdede, gewelddadige en langdurige stakings is 'n algemene verskynsel en kenmerk van die onlangse geskiedenis in die arbeidsmark in Suid-Afrika. Die optrede van vakbonde tydens kollektiewe bedinging, die meerderheidsbeginsel en inter-vakbond konflik is veral onder die vergrootglas. Die huidige stand van sake in die arbeidsmark het dit dus genoodsaak om 'n ondersoek te loods ten aansien van hoe die Arbeidshof genader kan word in gevalle waar partye hulself op maniere gedra wat buite die reguleringsraamwerk van kollektiewe bedinging gaan. Beginsels soos funksionaliteit en proporsionaliteit asook verskeie remedies en uitbreiding van magte van die Arbeidshof word in die lig hiervan ook heroorweeg.

1 SETTING THE SCENE: BRIEF OVERVIEW OF THE COLLECTIVE BARGAINING FRAMEWORK

“Non-strikers were harassed and intimidated. Employees were visited at their homes by persons who threatened them with physical harm and death. Relatives of non-strikers were also visited in this manner and informed of what would be done to the family members working at the bakery. One female non-striker was dragged from her home at night and assaulted with pangas and sjamboks. The vehicle of a non-striker was set alight and destroyed. Shots were fired on this occasion. A neighbour of the non-striker was able to identify the perpetrators. He was subsequently shot and killed near his home. Houses were petrol bombed. Threats to kill senior management were made. Some employees and the senior management group were provided with security guards. A shot was fired through the security guard's vehicle parked outside the home of Lavery, the regional manager. Delivery vans were held up and the daily takings were robbed as were personal possessions

and money of the drivers and staff. A state of lawlessness prevailed. The cost of increased private security escalated and non-strikers went about their business knowing that they, their families, property and possessions were in a state of danger. Criminal charges were laid with the police. The police were unable to be of much assistance and the crimes went unpunished. An interdict was sought and obtained in the Labour Court. Statements were obtained from non-strikers as well as from the family members who had experienced these crimes. Various communications were addressed to the union. A commencement was made with an application for contempt of court. But it was not finalized. The strike was eventually settled about two months later on 9 May 2007.”¹

In context of strike action and collective bargaining, the issues raised in the quote above, including intimidation, violence and a total disregard for the rule of law, are relevant in evaluating the current state of labour relations and industrial action in South Africa. Collective bargaining is widely accepted as the primary means of determining terms and conditions of employment in South Africa. Due to South Africa’s particular history, collective bargaining has been “underlined by the legacy of deep adversarialism” between employers and organised labour.² Various types of behaviour in the selection of collective representatives, the conduct of collective bargaining and the enforcement of collective agreements are prescribed and proscribed by labour laws.³ The greatest net benefit from collective bargaining can be obtained when a system is in place that promotes good faith bargaining and efficient enforcement of collective agreements.⁴ One of the purposes of the LRA is to promote collective bargaining⁵ and to provide a framework within which employers, employers’ organisations, trade unions and

1 *Food & Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* 2010 31 *ILJ* 1654 (LC) paras 10–14 (hereafter *Blue Ribbon*). Although not as violent as the *Blue Ribbon* strike, the facts in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 *ILJ* 998 (LC) (hereafter *Tsogo Sun*) are also reflective of a general state of lawlessness. The Labour Court (per Van Niekerk J) described them as follows: “Regrettably, the picketing that occurred was anything but peaceful. In the founding papers, the applicant averred that the individual respondents were acting in breach of the picketing agreement by engaging in a variety of criminal acts, including assault, theft, malicious damage to property, and blocking access to and egress from the applicant’s premises. The conduct described in the founding and supplementary affidavits includes the emptying of rubbish bins onto the road outside Montecasino, burning tyres on the road, blocking the road with 20 litre water bottles, throwing packets of broken glass onto the road, throwing bricks at members of the SAPS, damaging vehicles, dragging passengers from vehicles and assaulting them, rolling concrete dustbins into Montecasino Boulevard, damaging patrons’ vehicles, and assaulting persons in the vicinity of Montecasino. The applicant’s attempts to resolve the issue of strike related violence by agreement with the first respondent failed – an undertaking given by the first respondent at the applicant’s request proved to be worthless. Ultimately, intervention by the SAPS was necessary, but even this did not deter the individual respondents” (para 4). In both the *Blue Ribbon* and *Tsogo Sun* cases, the Labour Court’s interdicts were ignored, and it is clear that the intervention of the SAPS was ineffective. The violence persisted, the companies were made to suffer the consequences and the rule of law was totally undermined.

2 Du Toit “Collective bargaining and worker participation” 2000 *ILJ* 1544.

3 Dau-Schmidt, Harris and Lobel *Labour and employment law* (2009) 96.

4 *Ibid.*

5 Preamble to and s 1 of the LRA. Ch III of the Labour Relations Act 66 of 1995 (hereafter LRA) regulates collective bargaining in ss 11–63 of the Act.

employees can bargain collectively to determine conditions of employment, formulate industrial policy and provide for other matters of mutual interest.⁶

Collective bargaining⁷ is one of the means by which employees can participate in decision-making in management of organisations, influencing, at least, pay and the terms of conditions of employment.⁸ It is an adversarial process, which involves negotiation between parties with conflicting interests “seeking to achieve mutually acceptable compromises”.⁹ For workers it is primarily a means of maintaining “certain standards of distribution of work, of rewards and of stability of employment”, whereas employers view it as a means of maintaining

6 The constitutional framework supports the provisions of the LRA. The LRA and its provisions are formed by s 23 of the Constitution (Du Toit “What is the future of collective bargaining (and labour law) in South Africa” 2007 *ILJ* 1424). The Constitution guarantees the universal right to fair labour practices as well as the right of workers to engage in collective bargaining and to strike. S 23(5) of the Constitution provides that every trade union, employers’ organisation and employer has the right to engage in collective bargaining. It is a widely controversial issue as to whether s 23 of the South African Constitution imposes a duty to bargain. See Cheadle, Davis and Haysom (eds) *Constitutional law* (2006) 18–25 where Cheadle develops three arguments against interpreting the right to engage in collective bargaining so as to include a positive right to bargain. S 27(4) of the Interim Constitution, 1993 was worded differently as it afforded workers and employers the “right to organise and bargain collectively”. See also *SA National Defence Union v Minister of Defence* 2007 9 BLLR 785 (CC) where O’Regan J, in an *obiter dictum*, noted the following: “[I]t should be noted that were section 23(5) to establish a justiciable duty to bargain, enforceable by either employers or unions outside of a legislative framework to regulate that duty, courts may be drawn into a range of controversial industrial relations issues. These issues would include questions relating to the level at which bargaining should take place (ie the level of the workplace, at the level of an enterprise, or at industrial level); the level of union membership required to give rise to that duty; the topics of bargaining and the manner of bargaining. These are difficult issues, which have been regulated in different ways in the recent past in South Africa” (para 55). See also Van Niekerk and Smit (eds) 366 regarding a discussion of *SA National Defence Union v Minister of Defence* 2007 9 BLLR 785 (CC).

7 Collective bargaining is defined as “a method of determining the terms and conditions of employment and regulating the employment relationship, which utilizes the process of negotiation between representatives of management and employees and results in an agreement which may be applied uniformly across a group of employees” (Salamon *Industrial Relations* (2000) 323) or collective bargaining can be defined as follows: “[A] process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial. In the process, different interests are reconciled. For workers joining together allows them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers, free association enables firms to ensure that competition is constructive, fair and based on a collaborative effort to raise productivity and conditions of work (International Labour Organization (ILO) “Organizing for social justice – Global report under the follow-up to the ILO declaration on fundamental principles and rights at work” (2004).

8 Gold and Weiss *Employment and industrial relations in Europe* (1999) 35. See also *Rand Tyre and Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Transvaal)*, *Minister for Labour & Minister for Justice* 1941 TPD 108 with regard to matters of mutual interest.

9 Godfrey *et al Collective bargaining* (2010) 1.

“industrial peace”.¹⁰ This discussion first looks at the development of collective bargaining. Godfrey *et al* aptly describe the development process as follows:

“Historically, it took shape in many countries – including South Africa – with the emergence of unions formed by skilled minorities of workers (also known as ‘craft unions’, or ‘trade’ unions in the strict sense of the word). It was, however, the emergence of unions of less skilled workers – typically, industrial or general unions – that has given collective bargaining much of its dynamism and social importance. Since these workers did not command monopolies of skills, their unions could not rely simply on wage bargaining to improve their members’ living standards. Political and social reform – the extension of the franchise, the provision of public health systems, free education and the like – was necessary to give them access to a better quality of life. As a consequence, unionisation of the majority of workers tended to be accompanied not only by the extension of collective bargaining but also by the formation of mass-based political movements pressing for social reform. ‘Social democracy’ and ‘social welfare’ as political values and principles of governance have their roots in this development.”¹¹

These developments in the practice of collective bargaining, as well as the role of trade unions in the introduction of broader socio-economic policies, have led to the incorporation of a flexibility principle in the relationship between capital and labour. The concept of “regulated flexibility” plays a role in the workplace and in collective bargaining as a means of negotiating changes to employment, wages and work processes. Paul Benjamin introduced the concept of “regulated flexibility” to South Africa based on the approach outlined in the *ILO country review*.¹² The approach includes both the employers’ interest in flexibility and the employees’ interest in security and it formed part of the recommendations of the Labour Market Commission and the Minister of Labour’s approach to labour law reform. Three kinds of flexibility (as noted by the *ILO country review* and the Labour Market Commission) exist:

- (a) employment flexibility which includes “the freedom to change employment levels quickly and cheaply”;
- (b) wage flexibility which refers to “the freedom to determine wage levels without restraint”; and
- (c) functional flexibility which entails “the freedom to alter work processes, terms and conditions of employment, etc quickly and cheaply”.¹³

Security on the other hand includes the following:

- (a) labour market security which includes opportunities for employment;

10 Du Toit “What is the future of collective bargaining (and labour law) in South Africa?” 2007 *ILJ* 1405 points out that the “qualifier ‘primarily’ is important: power built up in the bargaining arena enables trade unions also to engage with broader issues and exert political pressure”; Davies and Freedland *Kahn-Freund* (1983) 69 as well as Godfrey *et al* *Collective bargaining* 1 and Du Toit 2007 *ILJ* 1405.

11 Godfrey *et al* *Collective bargaining* 1.

12 Cheadle “Regulated flexibility: Revisiting the LRA and the BCEA” 2006 *ILJ* 668.

13 Standing, Sender and Weeks *Restructuring the labour market: The South African challenge: An ILO country review* ch 1. “A perspective on labour market flexibility for South Africa” 1996 International Labour Office Geneva 5–9. See also Cheadle 2006 *ILJ* 668.

- (b) employment security which includes protection against arbitrary loss of employment;
- (c) job security which includes “the protection against arbitrary loss of or alteration to the job”;
- (d) work security which include health and safety in the workplace;
- (e) skills reproduction security which include access to the means of skill acquisition and training “to ensure that their skills do not become obsolescent or inadequate.”
- (f) income security which is more complex and involves protection against arbitrary reduction in income and a sense of economic equity; and
- (g) representation security which deals with representation in the workplace.¹⁴

The concept of regulated flexibility “is not simply a balance between the two sets of interests but a framework within which an appropriate balance is struck”.¹⁵ The recognition that the labour market is both diverse and dynamic is central to the concept of regulated flexibility: it is referred to as “a one shoe that does not fit all as well as a shoe that fits all time”.¹⁶ It requires the creation of a space within which employers and workers may adapt standards over time to suit their needs subject to the particular sector, sub-sector or workplace.¹⁷ One mechanism that characterises regulated flexibility and this conception of space within which choice may be exercised is what Guy Standing calls “voice regulation”,¹⁸ which includes social dialogue at national or regional level, collective bargaining at sectoral or workplace level, workers’ participation at the level of the enterprise and employee consultation at the level of the workplace.¹⁹ The balance, accordingly, is “struck by accommodating the interests that each party brings to bear in these dialogues”.²⁰

Achieving the balance is central – not only in order to find common ground between employers and trade unions but also to reach agreement on some issues that are central in negotiating improvements to the working conditions of employees. Consultation²¹ and the disclosure of information are central to the dialogue between employers and trade unions, especially with regard to decisions that affect not only the organisation/company but also the workplace at which employees render their services. A bone of contention might be the fact

¹⁴ Cheadle 2006 *ILJ* 668.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Standing *et al Restructuring the labour market* 10. See also Cheadle 2006 *ILJ* 668.

¹⁹ Cheadle 2006 *ILJ* 668.

²⁰ *Ibid.*

²¹ The contract of employment situates employees at a distance from decision-making because the employer controls employees. The social component of an employment relationship is largely neglected because the individual and collective interests of employees are not fully recognised. Consultation, at least as an initial step, can assist employers and employees in achieving a true democratisation of the workplace (Smit *Labour law implications* (2001) 55) and as a form of participation, should not be underestimated.

that disclosure of information, consultation and issues regarding joint decision-making (in the absence of workplace forums)²² are reserved for majority trade unions. In context of the current discourse (and any discussion on labour law in South Africa) the purpose of the LRA should be noted, namely, “to advance economic development, social justice, labour peace and the democratisation of the workplace”. Some of the primary objects of the LRA is to promote employee participation in decision-making in the workplace²³ and the effective resolution of labour disputes.²⁴

In context of this discussion, Kahn-Freund’s observations should be noted again, namely, “the principal interest of management in collective bargaining has always been the maintenance of industrial peace over a given area and period”²⁵ and “the principal interest of labour has always been the creation and the maintenance of certain standards over a given area and period, standards of distribution of work, or rewards, and of stability of employment”.²⁶ It is submitted that this position remains valid. The differing interests present in collective bargaining inevitably result in conflict between labour and management, although the degree of opposition varies.

Four different models of participatory structures can be identified in terms of their relationship to collective bargaining:²⁷

- (a) an alternative to collective bargaining;
- (b) marginal to collective bargaining;
- (c) competing with collective bargaining; and
- (d) an adjunct to collective bargaining.

The third model above refers to centralised bargaining forums in which employee participation is an extension of collective bargaining.²⁸ This is an approach which the unions already understand. It is argued that this approach

22 Workplace forums and co-determination goes beyond the scope of this article and will not be discussed. It is crucial when evaluating workplace forums and co-determination to understand collective bargaining. The “existence of legislated centralised bargaining facilitates the separation of the relationship between workers and management into a collective bargaining channel and a co-determination channel” (Patel 1998 “Democratising the public service co-determination, workplace democratisation and transformation” *LDD* 118). Adversarial bargaining at centralised level has a number of consequences for the initiation and development of workplace forums.

23 S 1(d)(iii) of the LRA. The explanatory memorandum on the original draft of the LRA explained the inclusion of this principle as follows: “South Africa’s re-entry into international markets and the imperatives of a more open international economy demand that we produce value-added products and improve productivity levels. To achieve this, a major restructuring process is required. Studies of how other countries have responded to restructuring warn that our system of adversarial industrial relations, designed in the 1920s, is not suited to this massive task . . . If we are to have any hope of successfully restructuring our industries and economy, then management and labour must find new ways of dealing with each other” (Du Toit *et al Labour relations law* (2015) 389).

24 S 1(d)(iv) of the LRA.

25 Davies and Freedland *Kahn-Freund* 69.

26 *Ibid.*

27 Marchington as referred to by Klerck “Adversarial participation and antagonistic cooperation?: Workplace forums, employee participation and lean production” 1999 *Transformation* 19.

28 Klerck 1999 *Transformation* 19.

“does not depend for its success on receiving cooperation from management, the union structure remains independent of managerial structures in the workplace, and the union retains control over the shopfloor component of the programme”.²⁹

The fourth model is the one proposed by the LRA.³⁰ In terms of this model, collective bargaining and participatory structures are kept separate: the latter handles issues not covered by the former. These activities, however, are viewed as complementary. The logic of this approach is that

“strong workplace organisation will prevent consultative bodies from undermining negotiating bodies, the central role of shop stewards is protected through involvement in both channels, and management is committed to and perceives real benefits from involvement in participatory arrangements”.³¹

From a workers’ point of view there are compelling reasons for collective action. In advanced industrial societies, employers have greater economic and social power than any individual worker, though a worker occasionally may find him- or herself in a stronger bargaining position if he or she possesses experience or skills that are high in demand.³² In general, however, workers can influence power in their employment relationship only by collectively furthering their demands and only then stand a chance of counterbalancing the power of the employer.³³

South African labour legislation is superimposed on a rigid adversarial system based upon a liberal market system.³⁴ The predominant system of employee participation in South Africa is collective bargaining. Labour and capital are represented by trade unions and employers’ organisations, which is evident from section 23(5) of the Constitution, which recognises the right to engage in collective bargaining. Nevertheless, “[n]otwithstanding the right [to] bargain collectively, the law generally limits collective bargaining and its impact upon the so-called ‘core areas’ of the managerial prerogative, ie determining the direction, plans and policies of the business”.³⁵

The managerial prerogative of the employer entitles it to make strategic and operational decisions. Collective bargaining does not empower trade unions and employees with greater power regarding decision-making with regard to the direction, plans and policies of the business. For this reason, co-determination or joint decision-making over key decisions relating to the running of the business is not covered by collective bargaining but is left entirely to management³⁶ or to consultation/joint decision-making.

Within the statutory regulatory framework created by the LRA, collective bargaining is grounded on a form of voluntarism:

“The law does not interfere with power relations. It is the balance of forces that ultimately determines the outcome. Expressed differently, as argued by Kahn-Freund . . . labour law operates within the framework of a collective *laissez-faire*.

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 Deakin and Morris *Labour law* (2012) 771.

33 *Idem* 772.

34 See Davis and Le Roux “Changing the role of the corporation: A journey away from adversarialism” 2012 *Acta Juridica* 316.

35 *Ibid.*

36 *Ibid.*

This concept relates to the power by which the free play of the collective forces of labour and capital shape industrial society. Inside this framework, the law intervenes only where the disparity of these powers is great enough to prevent the successful operation of an autonomous process of negotiation and settlement.”³⁷

Central to the collective bargaining framework is the recognition of the right to strike,³⁸ as well as granting representative trade unions certain organisational rights.³⁹ The process of collective bargaining and the provisions of a collective agreement remain subject to scrutiny, for example, if the provisions unfairly discriminate against a particular group it will constitute an infringement of the constitutional right to equality.⁴⁰ Commentators suggest that labour law in South Africa (and in Southern Africa) should take the region’s particular socio-economic profile into account and develop an indigenous paradigm.⁴¹

The lack of trust between various bargaining parties, prolonged, unprotected and violent strike action and inter-union rivalry are all characteristics of the labour relations landscape in South Africa. The fact that the LRA favours majoritarianism⁴² is another factor that plays a role in the current state of South African labour relations. In context of the above, the purpose of this article is to address the state of collective bargaining in South Africa, and particularly issues regarding the behaviour of trade unions during collective bargaining, majoritarianism and inter-union rivalry. This is followed by a consideration of possible ways in which the Labour Court may facilitate orderly (functional) collective bargaining and effective dispute resolution within the regulatory framework provided for in the LRA. Avenues through which the Labour Court may be approached in situations where parties to collective bargaining conduct themselves in a manner that goes beyond the regulatory collective bargaining framework provided for, are also considered.

2 PROTECTED STRIKE ACTION

Chapter IV of the LRA provides for the statutory requirements that must be complied with in order for a strike to be protected. Employees taking part in such a protected strike will have immunity against both delictual claims and claims for breach of contract. Section 65 of the LRA provides that no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a

37 Godfrey *et al* *Collective bargaining* 20 as well as Davis and Le Roux 2012 *Acta Juridica* 316.

38 In *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BLLR 103 (C) para 35 the right to strike was described as a “component of a successful collective bargaining system”. See also *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co Ltd v Association of Mineworkers & Construction Union* (2014) 35 *ILJ* 3111 (LC) and *Platinum Mile Investments (Pty) Ltd t/a Transition Transport v SATAWU* (2010) 31 *ILJ* 2037 (LAC) in this regard. Note that the International Labour Organisation (ILO) conventions 87 and 98 do not expressly recognise the right to strike.

39 See discussion below.

40 See Slabbert *et al* *Managing employment relations* (2005) 5–69 as well as *Executive Council for Education (North-West Province) and the Minister of Education* 1997 12 BCLR 1655 (CC) and *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1997 11 BLLR 1438 (LC).

41 Du Toit “What is the future of collective bargaining (and labour law) in South Africa” 2007 *ILJ* 1425.

42 See discussion below.

strike or lock-out if (a) there is a collective agreement in place that binds such persons and prohibits them from taking part in a strike or lock-out in respect of an issue in dispute;⁴³ (b) that person is bound by an agreement that requires such a dispute to be referred to arbitration; (c) the issue in dispute is one that a party has the right to refer to the Labour Court or arbitration in terms of the LRA or any other employment law;⁴⁴ or (d) that person is engaged in an essential service or maintenance service. The substantive limitations go beyond the discussion, as the focus of this article is on the procedural constraints, non-compliance with the procedural requirements and conduct during protected strike action.

2.1 Procedural requirements

Section 64 of the LRA establishes a number of procedural constraints on the exercise of the right to strike.⁴⁵ Section⁴⁶ 64(1) provides *inter alia* as follows:

“Every employee has the right to strike and every employer has recourse to lock-out if – . . .

- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and
 - (i) a certificate stating that the dispute remains unresolved has been issued; or

43 See, in this regard, the *Chamber of Mines* case paras 47–54 where the court reconfirmed the limitations as set out by s 65(1)(a) of the LRA. See also, in this regard, Smit “Commentary: Extension of collective agreements at workplace level and limitation of the right to strike in *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co Ltd v Association of Mineworkers & Construction Union* (2014) 35 ILJ 3111 (LC) 2015 *International Labor Rights Case Law* 184–193.

44 Exceptions in this instance would be in the case of a s 189A dispute about substantive fairness and where the issue in dispute deals with a trade union’s access to the workplace, deduction of trade union fees, representatives of a trade union or leave for trade union activities. In these instances, the limitations would not apply and strike action may be embarked upon. See ss 65(2) and 12–15 of the LRA as well as *NUMSA v Bader Bop (Pty) Ltd* 2003 3 BLLR 103 (CC) in this regard.

45 The right to strike as provided for by s 23(2)(c) of the Constitution is limited by substantive and procedural limitations of the LRA, which “generally accord with those recognised as legitimate by the ILO’s supervisory bodies” (see, in this regard, Van Niekerk and Smit (eds) 415).

46 See *SA Airways (Pty) Ltd v SA Transport & Allied Workers Union* (2010) 31 ILJ 1219 (LC) para 27 where the court with regard to the minimum content of a strike notice held as follows: “The same purposive approach adopted by the Labour Court requires that a strike notice should sufficiently clearly articulate the 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. In other words, the employer must be in a position to know with some degree of precision which demands a union and its members intend pursuing through strike action, and what is required of it to meet those demands. Some of the issues giving rise to the intended strike, as they are articulated in the strike notice, are clear. The issue of disciplinary action demanded in respect of Venter, as well as the demand in relation to retention bonuses, are relatively clearly expressed, and to require more would be to adopt an unnecessarily and unjustifiably technical approach. The same cannot be said however in respect of the reference to ‘demands for which certificate of non-resolution was issued on 21 September 2009’. This is particularly so in a case as the present, where the referral to conciliation was made, it would seem, in respect of unspecified and various grievances and petitions lodged over a period of months preceding the notice. Any employer faced with a strike notice issued in such imprecise terms would be hard pressed to know which element of what grievance and petition it was being asked to resist or concede.”

- (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that -
- (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer."

It is evident from recent case law that our courts (including the Constitutional Court) are starting to put more emphasis on the section 64 procedural requirements, in particular that of conciliation as a means to achieve orderly collective bargaining and the effective resolution of labour disputes. In a recent case of *Betafence South Africa (Pty) Ltd v NUMSA*⁴⁷ an order, in terms of which the strike was suspended with immediate effect, was issued *by agreement* between the parties.⁴⁸ The employees, despite this order, did not suspend the strike, compelling the employer, two days after the first order, to approach the court for a second (interim) order declaring the strike unprotected and the employees in contempt of court. The court in determining whether there was compliance with section 64 requirements, with criticism, referred to previous judgments illustrating little regard for conciliation as a means to resolve disputes.⁴⁹

After the Constitutional Court's finding in *Transport and Allied Workers Union of South Africa v PUTCO Limited*⁵⁰ it seems clear that a different approach should now be followed:⁵¹

"The dictates of section 64(1)(a) are clear. No industrial action can be undertaken until there has been an attempt at conciliation.⁵² . . . Referral to conciliation is not merely a perfunctory procedural step that has to be complied with in order to obtain a licence to lock out or to embark on a strike. The object of section 64(1)(a) is to bring together the parties to the negotiations, and encourage them to seek solutions to issues of mutual concern, thereby *reinforcing a collective bargaining culture*."⁵³

The right to collective bargaining between employer and employees has been recognised by the Constitutional Court as a key factor to a fair industrial relations environment.⁵⁴

What seems to be clear from the Constitutional Court's finding in *Betafence* is that the LRA sanctions the use of economic power by employers and employees (as a last resort)⁵⁵ once the issue in dispute has been referred for conciliation and

47 C194/2016 (15 September 2016).

48 Para 1.

49 *City of Johannesburg Metropolitan Municipality v SAMWU* [2011] 1 BLLR 663 LC para 15: "Since a conciliation meeting is not a precondition for a strike to be protected (because it is sufficient that 30 days have elapsed after the date of referral), the commissioner's ruling is not a relevant factor."

50 *Transport and Allied Workers Union of South Africa v PUTCO Limited* [2016] ZACC 7 (hereafter *PUTCO*).

51 *PUTCO* para 45.

52 See *Kgasago v Meat Plus CC* (1999) 20 ILJ 572 (LAC); [1999] 5 BLLR 424 (LAC); *NASECGWU v Donco Investments (Pty) Ltd* [2009] ZALC 114; (2010) 31 ILJ 977 (LC).

53 Own emphasis. *PUTCO* para 7.

54 Para 46. See also *NUMSA v Bader Bop (Pty) Ltd* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) (hereafter *Bader Bop*) para 13. See also s 23(1) of the Constitution which guarantees the right to fair labour practices and s 23(5) which guarantees the right to engage in collective bargaining.

55 See the discussion of last resort and proportionality below.

only if that process fails.⁵⁶ According to the Constitutional Court, it is no longer sufficient for parties to mutual interest disputes to simply refer the matter to conciliation, demand a certificate or wait for thirty days to expire after the referral as a “mere obligatory charade” with the view of obtaining “a licence to industrial action”.⁵⁷ “The CCMA or Bargaining Councils were not meant to be mere vending machines expected to dispense of certificates.”⁵⁸

According to the Constitutional Court’s interpretation, a premium is placed on the conciliation process or at least an attempt at conciliating the dispute with the assistance of a conciliator as a means to have it resolved.⁵⁹ It was held, to the extent that section 64(1) does not specifically state that an attempt at conciliation *must* be made before embarking on industrial action or before a certificate may be issued, that such an interpretation ought to be accorded to this section in accordance with section 3 and in line with the primary objects and overall purpose of the LRA.⁶⁰

It was on the ground of non-compliance with section 64(1)(b) alone, that the strike in *Betafence* was found to be unprotected.⁶¹

It is evident from the increase of unprotected, violent and protracted strikes in South Africa that issues such as strike notice, the lawfulness of strike action as well as using strike action as a last resort mechanism has been placed under the spotlight. Rycroft points out that “[t]here is a general assumption that a strike is a last resort, preceded by good faith bargaining⁶² and willingness to compromise during conciliation”.⁶³ Although this assumption is not reflected in (earlier case) law and practice in South Africa, it seems clear from the latest developments in case law, including that of the Constitutional Court, that more emphasis ought to be put on the section 64 procedural requirements, as a means to achieve orderly collective bargaining and the effective resolution of labour disputes. The requirement of referral serves two purposes, that is, firstly to ensure that employees do not resort to strike action impulsively and in an uncalculated manner. It further serves the purpose of compelling the parties to subject themselves to conciliation

56 *PUTCO* para 45.

57 *PUTCO* para 19.

58 *Ibid.*

59 *Idem* 18.

60 *Idem* paras 18 19. “To the extent that the other party to the dispute may show scant regard to that process by either frustrating it or refusing to participate in it at all, the provisions of section 64 (1) (a) (ii) would then take effect.” And para 21: “As I understand the principle, the issuing of the certificate does not confer a right to strike beyond the observance of other requirements within the meaning of section 64 (1) of the LRA.”

61 Para 27.

62 Rycroft “The role of trade unions in strikes” in Hepple *et al Laws against strikes* (2015) 110 points out that good faith bargaining is not a legal requirement in South Africa and that the law has flirted with the idea of good faith bargaining in the 1980s but it never found its way into legislation. He adds that this duty has been described as having two principle functions: “First, the duty reinforces the obligation of an employer to recognise the bargaining agent and, secondly, the duty fosters rational, informed discussion, thereby minimising the potential for unnecessary industrial conflict. But it has also been noted that the duty is not designed to redress an imbalance of bargaining power: Thus a party whose bargaining strength allows it virtually to dictate the terms of the agreement does not bargain in bad faith.”

63 *Ibid.*

with the assistance of an independent third party. Given the potentially destructive nature of strikes the LRA seeks to *regulate* strike action in a manner as to ensure that it is not resorted to prematurely. This is why the LRA seeks to ensure that parties *make an effort* to conciliate under the guidance of a bargaining council with jurisdiction or the CCMA. This conciliating commissioner's statutory mandate extends only to assisting the parties in their attempt to reach agreement.

Moreover, although parties cannot be forced to reach consensus, the legislature promotes consensus-seeking by prescribing time periods during which industrial action may not be resorted to, creating the opportunity to resolve the dispute before considering industrial action.⁶⁴ The reason therefor is in line with the generally applied principle that industrial action should not be resorted to if there are less destructive and more peaceful ways of reaching consensus.⁶⁵ With the destructive power of strikes in mind, one should act with caution not to "encourage" strike action where less adverse ways of dispute resolution, explicitly provided for in legislation, has not yet been resorted to.⁶⁶ This approach also seems logical if viewed against the backdrop of great hardship (financial and otherwise) suffered by strikers especially in the context of prolonged strike action. It is a well-known fact that the legislature prescribes conciliation as a prerequisite for a protected strike.⁶⁷ These procedural requirements (limitations) should not be underestimated; they might serve a great deal in achieving effective (functional) collective bargaining and an optimal opportunity for reaching consensus.⁶⁸

Non-compliance with statutory procedures should not blindly be assumed to result in mere procedural unfairness/irregularities as this might result in the deprivation of the other party's opportunity to reflect and/or to make provision for the consequences of industrial action.⁶⁹ The opportunity to reach consensus, specifically provided for by the legislature, should not be taken lightly or merely ignored. This is due to the fact that non-compliance with a prescribed time period, which may on the face of it appear as a mere procedural flaw, may very well result in gross substantive unfairness if a party is deprived of its opportunity to engage in collective bargaining in an attempt to avoid industrial action.⁷⁰ To disregard the possibility of such injustice would be to disregard the constitutional right not to be subjected to unfair labour practices.⁷¹

64 Germishuys "An analysis of *Edcon v Steenkamp* with reference to its effect on the 'De Beers' principle" 2016 *THRHR* 49.

65 *Idem* 48.

66 *Ibid.*

67 The only way in which it might be said that conciliation before strike action is waived, is on the assumption that conciliation – as a prerequisite – was dealt with under s 189A. This was *not* the case in *Edcon*. See also Germishuys 2016 *THRHR* 48.

68 It should be noted, firstly, that non-compliance with prescribed time periods cannot be generally assumed to be procedural flaws – it will depend on the facts of each case (it may, eg, severely impact on substantive rights of the other party). See also Germishuys 2016 *THRHR* 46.

69 *Idem* 49.

70 *Ibid* 49.

71 *Idem* 50.

2.2 Protection afforded to lawful strike action

Section 67 of the LRA protects strikers from civil liability when they participate in conduct that advances the lawful and legitimate objects of a protected strike.⁷² This immunity is not extended to employees engaged in unlawful conduct such as assault, intimidation and wilful damage to property. Such conduct (not participation in the strike),⁷³ may be interdicted and will attract criminal as well as civil liability and may result in fair dismissal.⁷⁴ The concern, however, are the numerous cases where the interdicts granted have proven to be worth less than the paper they were written on.⁷⁵ This illustrates the availability of the necessary regulatory means; it is the practical implementation and enforcement of such that seems to be the problem.

Employees engaged in a protected strike are further guaranteed protection against dismissal by section 187(1)(a) of the LRA in that, should they be dismissed as a result of their participation in a protected strike, such a dismissal will be automatically unfair.

“But we are dealing here, it seems to me, with a different phenomenon, one that displays contempt for the law and its institutions. The value and effectiveness of legal institutions is dependent entirely on an acknowledgement and commitment to the *rule of law*. When citizens or a group of citizens decide that their interests are better advanced by flouting the law, then there is very little to say about the role and perspective of courts. The basic foundation of law assumes that as good citizens, while we recognise the inevitability of conflict, we share substantive moral conceptions of the good, and that we are concerned to maintain the integrity of the legal system. When this is not present, and when citizens reject the law as a means of settling normative conflict, then the social good of the law, which includes its capacity to provide a framework of co-operation despite disagreement, disintegrates.”⁷⁶

72 See s 67(6) of the LRA. See also Manamela “A dispute in respect of a matter of mutual interest in relation to a strike: *City of Johannesburg Metropolitan Municipality v SAMWU*” 2012 *SA Merc LJ* 107–114 and Botha “Revisiting an old friend: What constitutes ‘a matter of mutual interest’ in relation to a strike? A tale of two recent cases” 2015 *Obiter* 194–209 discussing two recent cases, *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members* (2014) 35 *ILJ* 983 (LAC) and *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA* (2014) 35 *ILJ* 3241 (LC) in respect of remedying a grievance or resolving a dispute relating to a matter of mutual interest between employer and employee.

73 Employers may not interdict workers participating in a protected strike. See also *Coin Security Group (Pty) Ltd v SANUSO* (1998) 19 *ILJ* 43 (C).

74 See s 67(6) of the LRA. See Du Toit *et al Labour relations law: A comprehensive guide* (2006) 311. See also *White v Neil Tools (Pty) Ltd* (1991) *ILJ* 368 (IC). See *Mondi Ltd-Mondi Kraft Division v CEPPWAWU* (2005) 26 *ILJ* 1458 (LC). S 67(5) provides as follows: “[S]ubsection (4) does not preclude the employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee’s conduct during strike or for a reason based on the employer’s operational requirements.” See *FGWU v The Minister of Safety & Security Group (Pty) Ltd* (1999) *ILJ* 1258 (LC); *NCBAWU v Betta Sanitaryware* (1999) 1617 (CCMA). See Basson *et al Essential Labour Law* (2009) 327. See also *Perskor v MWASA* (1991) *ILJ* 86 (LAC).

75 Myburgh “The failure to obey interdicts prohibiting strikes and violence (the implications for labour law and the rule of law)” 2013 *CLL* 5. “The typical statement in an application for an interdict to the effect that, short of dismissal, the employer has no alternative remedy other than to seek an urgent interdict, no longer holds true insofar as interdicts are now often not worth the paper they are written on.”

76 Own emphasis. Van Niekerk J said this in his SASLAW keynote address “Marikana: The perspective of the Labour Court” 2012 SASLAW National Conference 27 November 2012.

The failure to obey interdicts prohibiting unprotected strikes and strike violence are reflective of serious socio-economic and political problems. In an attempt to improve the current state of labour relations business, government and labour will have to cooperate with one another.⁷⁷

2.3 Labour Court's approach to misconduct during protected strikes

The Labour Court expressed its displeasure in the "strongest possible terms" against misconduct committed during strike action and against unions that refuse or fail to take all reasonable steps to prevent such misconduct from occurring.⁷⁸

It has been confirmed on numerous occasions that the courts will not hesitate to intervene, as per its mandate conferred by the Constitution and the LRA, to protect both the right to strike and the right to peaceful picketing.⁷⁹ This, however, will not hold true where the right to strike is tarnished and ultimately eclipsed where strikers purporting to exercise their right to strike engage in acts of gratuitous violence as a means to achieve their ends.⁸⁰ In situations where the "tyranny of the mob" displaces the peaceful exercise of economic pressure to resolve a labour dispute, it becomes doubtful whether such a strike continues to serve its purpose and one must question whether it continues to enjoy protected status.⁸¹ This opens the door to an argument that a strike marred by misconduct and violence loses its protected status.⁸² This is based on the constitutional understanding that a strike is for the purpose of effective peaceful and orderly collective bargaining.⁸³ "If behaviour during the strike is destructive of that purpose then the protected status has been jeopardised."⁸⁴

2.3.1 Amendment to section 69

The powers of the Labour Court would have been extended by (*inter alia*) the proposed amendment to section 69 of the LRA.⁸⁵ The proposed amendment arose from the common problem that more often than not employers are simply unable to identify the perpetrators of strike violence and as a result thereof they are made to suffer the effects of the concerted unlawful behaviour that threatens

77 Organised labour (except for one union and one labour federation), business and government in the mining sector have entered into a "framework agreement for a sustainable mining industry" in which all parties jointly commit themselves to respect the rule of law (the ultimate foundation upon which our system of labour law is built). As noted by Myburgh 2013 *CLL* 10, it was necessary to reflect on the extent of the problems and the work that needs to be done in our labour relations system.

78 *Tsogo Sun* para 14. In his judgment, Van Niekerk J confirmed that he would not have hesitated to grant an order for costs as between attorney and own client, had it not been that the relief sought was specifically confined to an order for costs on the ordinary scale.

79 *Tsogo Sun* para 13 where reference was made to Navsa JA in *SA Transport & Allied Workers Union v Garvas* (2011) 32 *ILJ* 2426 (SCA) para 50.

80 *Tsogo Sun* para 13.

81 *Ibid.* This was emphasised by and corresponds with the dynamics of economic duress as explained by Myburgh 2013 *CLL* 7.

82 Rycroft "Can a protected strike lose its status? *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 *ILJ* 998 (LC)" (2013) 34 *ILJ* 821 826.

83 *Idem* 827.

84 *Ibid.*

85 Myburgh 2013 *CLL* 6.

the fabric of civilized society and undermines the rule of law.⁸⁶ “In the past the majority of the population was subjected to the tyranny of the state. We cannot now be subjected to the tyranny of the mob.”⁸⁷

The amendment to section 69 would have had the effect of enabling the Labour Court to suspend a strike on account of the violence committed during the picket. This would have been the case, even if the individual perpetrators could not be identified.⁸⁸ This is a means designed to avoid employers being subjected to economic duress.⁸⁹ More importantly, the measureless right to life⁹⁰ and freedom and security of the person⁹¹ of workers and citizens come to mind. It is submitted that if a life is endangered, this alone should be considered as a justifiable reason for seriously considering and implementing limitations on the right to strike.

A result of such amendment, feared by COSATU, is that a collective right will be rendered vulnerable to problematic action of individuals.⁹² COSATU referred to the current position where the relief that can be sought is limited to interdicting unlawful behaviour. Such relief has on numerous occasions proved to be rather ineffective. But while there may well be merit in this, the fact is that desperate times call for desperate measures.

3 STATE OF LABOUR RELATIONS IN SOUTH AFRICA

3.1 Majoritarianism and representivity

The state of labour relations is a big concern. The Marikana disaster is but one example of the deterioration of labour relations in South Africa where a host of socio-economic, political and legal factors contributed to the deterioration and decline of bargaining and negotiation structures.⁹³ Representativeness plays an important role in the collective bargaining landscape in South Africa. Section 23(2) of the Constitution grants workers not only the right to form and join trade unions but also to take part in the activities and programmes of trade unions. Section 23(4) grants trade unions the right to organise⁹⁴ and section 23(2) grants

⁸⁶ Navsa JA in *SA Transport & Allied Workers Union v Garvas* (2011) 32 ILJ 2426 (SCA) para 50.

⁸⁷ *Ibid.*

⁸⁸ Myburgh 2013 CLL 7.

⁸⁹ *Ibid.* The Constitutional right to property in s 25 of the Constitution is also relevant in this regard.

⁹⁰ S 11 of the Constitution.

⁹¹ S 12 of the Constitution. S 12(1)(c): “Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.”

⁹² Ngcukaitobi “Strike law, structural violence and inequality in the platinum hills of Marikana” (2013) 34 ILJ 836 858 records COSATU’s objection to the amendment (the collective right will be rendered vulnerable to individual right to life).

⁹³ *Idem* 836. See discussion of these factors below.

⁹⁴ In *National Union of Public Service & Allied Workers on behalf of Mani v National Lotteries Board* (2014) 35 ILJ 1929 (CC) para 153 the Constitutional Court, eg, noted regarding the phrase “lawful activities” in ss 4(2)(a) and 5(2)(c)(iii) as follows: “[T]he phrase must exclude illegal activities or activities that constitute activities that constitute contraventions of the law. It definitely excludes conduct that constitutes criminal offences.

The provisions include participation by union members in union activities that form part of

workers the right to strike.⁹⁵ Chapter III of the LRA establishes various organisational rights⁹⁶ that may be enforced by sufficiently representative⁹⁷ and majority representative trade unions. These rights include trade union access to the workplace, deduction of trade union subscriptions, election of trade union representatives, leave for union office bearers for time off from work for union-related purposes as well the disclosure of information. In *NUMSA v Bader Bop (Pty) Ltd*⁹⁸ the court expressly noted that although employers are not compelled to recognise minority unions, and even though minority trade unions do not meet the statutory thresholds that entitle them to organisational rights, they may still embark on industrial action in order to secure their rights.⁹⁹

the core functions of a trade union. These include taking up its members' complaints or grievances with their employer, representing them in grievance and disciplinary proceedings, collective bargaining, attending statutory tribunals to represent their members' interests and communicating with its members' employer about workplace issues. In this regard, s 200 of the LRA is important. It provides that a trade union may act in any or more of three capacities 'in any dispute to which any of its members is a party', namely, in its own interest, or on behalf of any of its members, or in the interest of any of its members".

95 See, eg, *South African Police Service v Police and Prisons Civil Rights Union* 2011 6 SA 1 (CC) para 30 where the court reiterated the importance of the right to strike as well as the fact that that an important purpose of the LRA is to give effect to the right to strike. The court also stated that the process of interpretation should give effect to that purpose "so as to avoid impermissibly limiting the right to strike". See also *Eskom Holdings Ltd v NUMSA* 2012 2 SA 197 (SCA) para 28 with regard to the interpretation of the Bill of Rights to give effect to its fundamental values as well as the fact that s 1 of the LRA "expresses the LRA's primary objects amongst others as 'to give effect to and regulate the fundamental rights' conferred by s 23 of the Constitution" (para (a)); and to promote "orderly collective bargaining" (para (d)(i)).

96 Ss 12–16 of the LRA.

97 See, eg, *SACTWU v Sheraton Textiles (Pty) Ltd* 1997 7 SALLR 48 (CCMA) as to when a trade union will be regarded as being "sufficiently representative".

98 *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BLLR 103 (CC).

99 The court also noted that employers are, however, not compelled to recognise minority trade unions. Van Niekerk and Smit (eds) 377 note in this regard that "[t]he finding means nothing more than that the recognition of shop stewards is a legitimate subject for collective bargaining and industrial action". See also, with regard to minority trade unions, *South African Post Office v Commissioner Nowosenetz* 2013 2 BBLR 216 (LC). Minority trade unions may be granted rights in ss 14 and 16 of the LRA in specified circumstances. Strike action is in terms of s 65(2)(a) of the LRA also permitted regarding organisational rights, excluding the right to information. Minority trade unions, however, are granted access (by the Labour Relations Amendment Act 6 of 2014) to acquiring organisational rights which would have ordinarily been reserved for majority unions. An arbitrator is empowered to grant a registered trade union the rights to elect trade union representatives and the disclosure of information if the applicant union meets the following criteria: (i) the applicant trade union meets the "sufficiently representativity" threshold; and (ii) if there is no other union in the workplace that has been granted those rights (s 21(8A) of the 2014 Amendment Act). S 21(8C) of the 2014 Amendment Act provides that a commissioner in an arbitration may grant organisational rights (in s 12, 13 or 15) to a registered trade union or two or more registered trade unions who act jointly if such a trade union does not meet the thresholds of representativity established by a collective agreement to which the employer and other unions are party. These rights will be granted if all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings and if the union represents a significant interest or substantial number of employees in the workplace. See also *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC); *Transnet SOC Ltd v National Transport Movement* 2014 1 BLLR 98 (LC); and *UASA & AMCU v*

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Representativeness is one of the factors that played a role in the Marikana disaster.¹⁰⁰ In the context of representativeness the following should be articulated:

“A question intrinsically related to representativeness is whether the bargaining agents of workers are legitimate. Where they are not, workers’ rights and particularly the right to strike may be infringed.

Laws may be structured to reflect representativeness of unions, or they may lack this effectiveness. Where they lack effectiveness, the legitimacy of unions as bargaining agents is undermined. A lack of legitimacy, in addition to scuppering the right to strike, may ultimately exacerbate – rather than reduce – workplace conflict.”¹⁰¹

At face value, it appears that the LRA promotes pluralism when it grants organisational rights to “sufficiently representative” trade unions, even though they are not majority trade unions.¹⁰² “Sufficiently representative” is not defined by the LRA: they are “those unions that do not have as their members the majority of employees employed by an employer at the workplace”.¹⁰³ A “representative trade union” is defined by section 11 of the LRA as “a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees by an employer in a workplace”. The term “pluralist” was defined under the 1956 Act to describe “a model of collective bargaining that, in contrast to the ‘majoritarian’ model grants recognition to more than one trade union provided they are sufficiently representative of a defined bargaining unit”.¹⁰⁴ The rights to appoint trade union representatives¹⁰⁵ and disclosure of information¹⁰⁶ are enjoyed only by majority trade unions: the other three organisational rights mentioned earlier are afforded to both sufficiently and majority representative trade unions.¹⁰⁷

Regardless of provisions seemingly favouring a pluralist model, it is clear that the LRA favours majoritarianism.¹⁰⁸ The LRA’s commitment to majoritarianism

BHP Billiton Energy Cool South Africa JS345/13 regarding granting organisational rights to minority trade unions which do not meet the required thresholds.

100 Corazza and Fergus “Representativeness and the legitimacy of bargaining agents” in Hepple *et al* *Laws against strikes: The South African experience in an international and comparative perspective* (2015) 87.

101 *Ibid.*

102 S 11 of the LRA; Du Toit *et al* *Labour relations law* (2006) 246. Majority unions “are those registered unions that on their own, or in combination with any one or more unions, have as their members the majority of the employees employed by an employer in a workplace. This requires that at least 50 percent plus one of the employees employed in the workplace must be members of the union(s)”: Van Niekerk and Smit (eds) 359.

103 Van Niekerk and Smit (eds) 359. See also *OCGAWU v Volkswagen SA (Pty Ltd)* (2002) 23 *ILJ* 220 (CCMA).

104 Du Toit *et al* *Labour relations law* (2006) 246. See also Baskin and Satgar *South Africa’s new Labour Relations Act* (1995) 12 in this regard.

105 S 14 of the LRA.

106 S 16 of the LRA.

107 See, in this regard, ss 21(8A) and 21(8C) of the LRA discussed above.

108 Du Toit *et al* *Labour relations law* (2006) 246. See also *Kem-Lin Fashions CC v Brunton* 2001 22 *ILJ* 109 (LAC) regarding the majoritarian principle. See also the *Chamber of Mines* case para 56 where the court stated the following regarding the principle of majoritarianism: “[M]ajoritarianism serves to underpin a number of other provisions of the LRA, some of which have been the subject of constitutional challenge. The purpose of the limitation is rooted in a policy choice made by the legislature to adopt a specific

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is specifically stated with regard to resolving disputes as the question is posed whether a trade union is “sufficiently representative”, in which case the commissioner “must seek to minimise the proliferation of trade union representation in a single workplace, and where possible encourage a system of a representative trade union in a workplace” and “minimise the financial and administrative burden requiring an employer to grant organisational rights to more than one registered trade union”.¹⁰⁹

The platinum-mine upheavals during 2013 brought some underlying problems associated with representativeness to the forefront.¹¹⁰ The National Union of Mineworkers (NUM) had entered into agreements with most of the platinum mines and set the threshold for basic trade union rights for any newcomer union at 50% of all the employees working at that workplace.¹¹¹ The Amalgamated Mining and Construction Union (AMCU) wanted to acquire basic trade union rights at a time when many employees believed that their interests were no longer properly served by NUM. AMCU became highly represented especially with rock drill operators and miners but were prevented from gaining access to the mine to take part in the collective bargaining process, grievance and

model of collective bargaining at the level of the workplace, a choice that is consistent with the scheme of the LRA as a whole.”

109 See s 21(8)(a)(i) and (ii) of the LRA as well as Du Toit *et al Labour Relations Law* (2006) 246 and Van Niekerk and Smit (eds) 359. This “winner takes all” majoritarian approach to collective bargaining protects the interests of well-established and larger unions as their strength lies in the number of workers that are members of such trade unions. See Ngcukaitobi 2013 *ILJ* 854 in this regard. The following can also be added with regard to the “winner takes all” approach: “The point being made is that working outside of established bargaining structures can mean workers are subjected to decreased access to information, thereby increasing frustration and insecurity. More broadly, the effect of this approach has meant that neither employers nor employees derive the intended value from its framework. It has become increasingly difficult for employers to maintain industrial peace while workers struggle to maintain certain standards of rewards and of stability in their employment. While employers are increasingly perceived as unrelenting, workers lose faith in the negotiation process and are forced to find unconventional ways to air their concerns” (see *ibid*). Other incentives for majoritarianism include the right to enter into a collective agreement setting thresholds of representivity for the granting of access to the workplace, the deduction of trade union subscription fees or levies and leave for trade union activities (see respectively ss 18 12 13 15 of the LRA). As well, they may conclude agency shop and closed shop agreements, conclude collective agreements that will bind employees who are not members of trade union or unions party to the agreement, apply for establishing workplace forums and may choose the members of the workplace forum from among its elected representatives if it is recognised in terms of a collective agreement as the sole bargaining agent for all employees in the workplace (see s 25 26 23(1)(d)(iii) 80 81 of the LRA as well as Du Toit *et al Labour relations law* (2006) 246 in this regard). Ngcukaitobi 2013 *ILJ* 854 points out that the majoritarian approach is out of tune with the realities of today’s labour relations: “This winner-takes-all approach was developed and adopted when there was a fair degree of union stability, a growing consolidation within the trade union movement, and a strong commitment to social dialogue and inclusive solutions within the government, labour, business and civil society. But much has changed since then.”

110 Brand “Organisational rights and trade union rivalry in South Africa” 2014 *The Dispute Resolution Digest* 55.

111 *Ibid*.

disciplinary proceedings as well as serving the interests of these employees at meetings.¹¹² NUM subsequently entered into an agreement regarding wages for miners and rock drill operators which was not supported by an overwhelming majority of employees. This led these employees to bypass NUM as the recognised trade union and collective bargaining agent and to embark on an unprotected (wildcat) strike despite being bound by the agreement entered into by NUM.¹¹³ Conflict then arose between members of AMCU and NUM which resulted in the police killing 34 striking miners.¹¹⁴

It is evident from the above that well-established social pacts¹¹⁵ are also under attack. The Congress of South African Trade Unions (COSATU) faced its own problems with internal feuds between member trade unions, the suspension (and subsequent expulsion) of its General Secretary Zwelinzima Vavi and the expulsion of the National Union of Metalworkers of South Africa (NUMSA) from COSATU.¹¹⁶ Both these incidents (Marikana and COSATU) illustrate that the labour relations system in South Africa is broken as pacts at social, economic and political levels are falling apart. The following important questions (regarding the state of labour relations in South Africa in general) arise:

“Why have strikes on the platinum mines been non-procedural, and why have they turned violent? Does Marikana have wider implications than simply the need to ‘sort out labour relations’ in the platinum sector? And then what explains the surge in industrial action at national level? Does it suggest that the first democratic pact has run its course? What has to be fixe(d), at what levels, and how?”¹¹⁷

(to be continued)

112 *Ibid.*

113 *Ibid.* See also Anstey “Marikana – And the push for a new South African Pact” 2013 *SA J of Labour Relations* 138.

114 Hepple *et al* “Introduction” in Hepple *et al* *Laws against strikes: The South African experience in an international and comparative perspective* (2015) 15.

115 Pacts “reflect decisions by key social actors not to use the full extent of the power available to them for adversarial purposes, but to leverage mutual accommodation. Such decisions are motivated less by altruism than by self-interest – they are premised on a shared perception that the benefits of cooperation may be better than those of coercion”. See Anstey 2013 *SA J of Labour Relations* 133 in this regard).

116 Friedman “We have met the enemy and he is us: COSATU’s war against itself in 2013” 2014 *The Dispute Resolution Digest* 50–53.

117 Anstey 2013 *SA J of Labour Relations* 137.