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An appraisal of the amendments to picketing rules: is this the key to curb violent strikes?

by

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ABSTRACT

This dissertation is aimed at evaluating and considering the amendments introduced by the *Labour Relations Amendment Act*, No. 08 of 2018 (hereafter *LRAA*, 2018) with a specific focus on the amendments to the picketing provisions contained in section 69 of the *Labour Relations Act*, No.66 of 1995 (hereafter *LRA*). The purpose of the evaluation is to assess the effect, if any, that the amendments may have in curbing violent and prolonged strikes. It is a common fact that South Africa is known for its violent and prolonged strike action. The question that remains is what should be done to address this problem. This study constitutes a theoretical research into the applicable pieces of legislation and legal instruments that govern the fundamental right to strike and the right to picket in support of a protected strike and whether such picketing rules enshrined in the *LRAA* 2018 will contribute to the measures implemented in an attempt to curb collective brutality in South Africa. The study further will carry out a comparative study into other countries' domestic laws with particular focus on the right to picket in order to find guidance on addressing the problem.

The study finds that the amendments to the picketing provisions introduced by the *LRAA* 2018 are not sufficient to curb violent and prolonged strikes. In fact, labour laws in isolation cannot address this problem. The broader socio-economic factors that frustrate workers eventually forcing them to embark on a strike and resort to violence have to be taken into account in order to address violent and prolonged strikes. Also, it is established that the legality of a strike is of no significance to a worker who is frustrated by socio-economic pressures. The South African government and social partners have to address the broader socio-economic factors.

This study further establishes that the Labour Court in effect can rely on section 213 of the LRA to interdict violent strikes. It was found further that given the failure by social partners at NEDLAC to reach an agreement on an amendment that expressly empowers the Labour Court to interdict protected strikes that are violent, the need for creative new laws and the Court's interventionist approach seem destined to continue. It remains to be seen where this situation will take our labour relations.

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CHAPTER 1

Introduction

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1. CONTEXTUAL BACKGROUND

The right to strike is constitutionally entrenched[1] and as is the case with any other right, the right to strike may be limited when it is reasonable and justifiable to do so.[2] The *Labour Relations Act*[3] (hereafter *LRA*) gives effect to the right to strike entrenched in the *Constitution*.[4] Internationally, the International Labour Organisation (hereafter ILO) has stated that although a right to strike is a basic right "it is not an end in itself".[5]

Rycroft correctly points out that recent newspaper reports and several judgments of the South African Labour Courts illustrate that violence during strikes as part of industrial action continues to be destructive and that the violence includes the murder of non-strikers, vandalising property and intimidation.[6] The instruments of control which employers mainly rely on are judicial in nature[7] because employers are allowed in law to bring an application to interdict violent conduct in strikes or restrict aspects of the strike.[8]

[1] Section 23(2) (c) of the *Constitution Act* 1966. See Grogan (2017) 405.
[2] Grogan (2017) 405 and Manamela and Budeli (2013) 320.
[3] Act No. 66 of 1995.
[4] Section 64 (1) and section 213 of the *LRA*.
[5] Van Niekerk *et al* (2018) 443.
[6] Rycroft (2012) 1. Evidence of this is that on 15 October 2018, there was a prolonged and violent strike within the Plastics Sector, which resulted in death of a security guard who was doused with petrol and set alight. The strike involved, among other things, destruction of property, vandalism and assaulting individuals and/or the employers.
[7] Rycroft (2012) 1.
[8] Rycroft (2012) 1.

South Africa is known for its repetition of a strike season, for violent strikes and a failure by strikers to obey interdicts issued by the Labour Court.[9] According to Myburgh interdicts issued by the Labour Courts are simply ignored.[10] He refers to two judgments in *Food & Allied Workers Union on behalf of Kapesi & others v Premier Foods Lts t/a Blue Ribbon Salt River*[11] (hereafter *Kapesi*) and *Tsogo Sun Casino (Pty) Ltd t/a Montecasino v Future of SA Workers Unions & others*[12] (hereafter *Tsogo Sun*) in an attempt to explain his contention.[13] In both cases employees engaged in violent conduct in furtherance of a strike and failed to adhere to the Labour Court's order interdicting such conduct.

In the *Tsogo Sun* case the striking employees were acting in breach of a picketing agreement by committing violent and criminal acts including, *inter alia,* assault, theft, malicious damage to property, blocking access to the employer's premises, burning tyres on the road, blocking the road with 20 litre bottles, and throwing bricks at members of the public.[14] In the *Kapesi* case strike action endured for a period of two months. The strike action was stained by extreme acts of violence. Non-strikers were intimidated and harassed, and a female non-striker was dragged from her home at night and assaulted with pangas and sjamboks. A vehicle of another non-striker was burned and the neighbour who was able to identify the perpetrators was shot and killed. Houses were petrol bombed.[15] In both cases the Labour Court's interdicts simply were ignored and the intervention of the South African Police Service was unsuccessful. As a result the violence continued, and the companies suffered the consequences.[16]

According to Freund a Congress of South African Trade Unions' survey illustrates that just under half of the members and one seventh of non-members reported that there had been a strike at their workplace in the past five years.[17] According to Freund the

[9] Myburgh (2013) 2.
[10] *Ibid*.
[11] [2010] 9 BLLR 903 (LC).
[12] (2012) 33 *ILJ* 998 (LC).
[13] Myburgh (2013) 2.
[14] (2012) 33 *ILJ* 998 (LC) para 4.
[15] [2010] 9 BLLR 903 (LC) 4.
[16] Myburgh (2013) 3, (2012) 33 *ILJ* 998 (LC), and [2010] 9 BLLR 903 (LC) 4.
[17] Freund (2012) 111.

survey revealed that half of the members who were surveyed indicated that violence had been used to achieve results in pursuit of their demands.[18] In supporting this view, Hepple reiterates that in 2014 a number of violent strikes occurred in industries such as engineering, metal working and on the platinum mines.[19] According to him although 85 % of these prolonged and violent strikes occur as a result of wage increase demands, most critics agree that at the core of this issue lies an underlying social crisis that South Africa faces.[20] It is believed that inequality in South Africa places pressure on and has a huge impact on labour relations.[21] O'Regan indicates that as a result of violent and prolonged strikes the use of interdicts to prohibit this type of conduct in strikes that occur in South Africa has increased significantly.[22]

In an attempt to address the nature of these violent and prolonged strikes, in 2012 the South African government proposed amendments to the *LRA* which culminated in the birth of the *Labour Relations Amendment Bill*.[23] The intention behind the proposed amendments was an effort to respond, among other things to the high level of unprotected strikes and unlawful acts in strikes including violence and intimidation.[24] The proposed amendments sought to introduce a strike ballot as a requirement for protected strikes or lock-outs as well as to strengthen the status of picketing by making picketing rules binding on third parties.[25] The amendments were opposed vehemently by the Congress of South African Trade Unions (hereafter COSATU) on the basis that they were the greatest threat to the right to strike since the end of apartheid policies.[26]

According to Ngcukaitobi the 2012 proposed amendments would have had little substantive value in reducing unprotected and violent strike action as employees and/ or workers take it upon themselves to respond to the failures in service delivery.[27] As a result of the protests the amendments were not adopted by parliament or signed into law by the president. South Africa continues to suffer from violent strikes, intimidation

[18] *ibid*.
[19] Hepple (2015) 15.
[20] *Ibid.*
[21] Makgetle (2015) 115.
[22] O'Regan (1988) 959.
[23] *Labour Relations Amendment Bill* B16-2012 GG 35212 of 5 April 2012.
[24] Ngcukaitobi (2013) 836.
[25] *LRAB* 2012.
[26]Ngcukaitobi (2013) 851.
[27] *Ibid.*

and prolonged strikes as workers have decided to heighten the impact of their strikes by violent conduct and by negatively impacting on the life and property of other people.[28]

However, this situation has changed in the years that followed. In 2017 the South African government introduced a Bill[29] seeking to amend the *LRA* and this Bill was signed into law in November 2018 and came into effect at the beginning of 2019.[30] There are three significant amendments introduced by the Labour Relations Amendment Act[31] (hereafter *LRAA*, 2018). First, the amended section 69 requires picketing rules to be in place prior to embarking on a picket in furtherance of a protected strike o lock-out.[32] Secondly, the amendments introduced a requirement that a secret ballot be held to establish if union members want to go on strike.[33] The third significant amendment is the introduction of advisory arbitration to deal with strikes that no longer are functional to collective bargaining or when there is an imminent threat to a constitutional right or if the strike causes an acute national crisis.[34]

This study focuses only on the amendments to section 69 of the *LRAA*, 2018, the *Code of Good Practice: Collective Bargaining, Industrial Action and Picketing* (hereafter the new *Code*), and the *Picketing Regulations* issued in terms of section 208 of the *LRA*. This study attempts to establish whether the amendments read together with the new *Code* and the new *Picketing Regulations* will be successful in curbing violent strikes. The other two mentioned amendments are not part of the scope of this dissertation and will not be discussed.

2. RESEARCH QUESTIONS

The amendments made to the picketing provisions were introduced as part of the measures to resolve violent strikes. The research questions underpinning this study are as follows:

[28] Tenza (2015) 211.
[29] Labour Relations Amendment Bill 2017.
[30] Labour Relations Amendment Act No.8 of 2018.
[31] Act No. 08 of 2018.
[32] Section 69 of the *LRAA*, 2018.
[33] Section 95 (9) of the *LRAA*, 2018.
[34] Section 150A to 150D of the *LRAA*, 2018.

2.1. What are the underlying reasons for violent strikes?

2.2. What are the most significant changes to the regulation of picketing in terms of the amendments?

2.3. What are the prospects that the amendments to the picketing rules will be successful in curbing violent strikes?

2.4. Are there any lessons that can be learnt from a comparative study?

3. MOTIVATION OF THE STUDY

South Africa in recent years has seen an increase in the incidence of prolonged and serious violence as well as damage to property during strike actions.[35] In reaction to such actions employers have approached the Labour Court to interdict violent strikes.[36] However, in many cases Court interdicts simply are ignored and not complied with.[37] In an effort to find a solution to prolonged and violent strikes, the *LRA* has been amended to address this problem.

The significance of this study is to evaluate aspects of these amendments, in particular the picketing rules provisions.[38] The study further determines whether the amended picketing rules indeed serve as a measure intended to limit violent and prolonged strikes.

4. RESEARCH METHODOLOGY

This study adopts a critical (theoretical) analysis and a comparative research methodology. The research is underpinned by a social justice perspective and the underlying reasons for violent strikes influence the findings in the rest of the study. Mill and van der Bunt identify that comparative research is a broad term that includes both the quantitative and qualitative comparison of circumstances in different societies.[39] Sasaki defines comparative study as research that seeks to compare and contrast nations, cultures, societies as well as institutions.[40] Pickvance argues that comparative analysis is conducted mainly to explain and gain a better understanding of the causal

[35] Manamela and Budeli (2013) 322 -323.
[36] *Ibid* 325.
[37] Myburgh (2013) 2.
[38] Section 69 of the *LRA*.
[39] Mill *et al* (2006) 621.
[40] Sasaki (2011).

processes involved in the creation of an event, feature or relationship usually by bringing together variations in the explanatory variable or variables.[41] Therefore, for this study to achieve its desired outcomes evidently a critical analysis and comparative research must be employed.

5. STRUCTURE

The main outcomes of the research questions will be presented in the format of a mini dissertation. The planned structure of the dissertation is explained and summarised below.

Chapter 1: Introduction

Chapter 1 provides an introduction and background to violent strikes in South Africa and why there is a need to address and/ or limit the consequences of violent strikes. This chapter further sets out the rationale for the study and the research questions that ultimately need to be answered. The research methodology is briefly summarised and finally the chapter provides an overview of the structure of the mini dissertation.

Chapter 2: Theoretical framework on the right to strike and its limitations

This chapter briefly considers the social context in South Africa and explores the underlying reasons for violent strikes. The chapter also identifies and defines the content of the right to strike and discusses its limitations.

Chapter 3: The amendment to section 69 of the *Labour Relations Act*, 1995

Chapter 3 gives a detailed discussion and analysis of the amendments to the *LRA*, with a particular focus on the amendments to the picketing rules provisions contained in section 69 of the *LRA*. This chapter further analyses the effect these amendments might have in curbing violent and prolonged strike actions.

[41] Pickvance (2001) 16.

Chapter 4: Comparative study

This chapter explores Britain's laws regarding strikes and compares their regulation to that of South Africa. A further comparison is made to strike laws in Namibia.

Chapter 5: Conclusion and recommendations

Chapter 5 brings the study to its conclusion. The chapter summarises the findings and conclusions from the other chapters, explains the contribution and limitations of the present study and makes recommendations.

CHAPTER 2

Theoretical framework on the right to strike and its limitations

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1. Introduction

The right to strike is recognised as fundamental in protecting workers' rights and interests by national laws of various countries and by international law.[42] The right to strike by definition is damaging to the economy, but South African law and international law view it as a fundamental right.[43] However, the International Labour Organisation (hereafter ILO) indicates although the right to strike is fundamental, it does not mean it does not have limitations.[44]

The right to strike in South Africa has its own procedural and substantive requirements which are set out in the *Labour Relations Act*[45] (hereafter *LRA*).[46] Strike action that is not compliant with the provisions of the *LRA* will not be protected and there are consequences for employees who take part in an unprotected strike.[47] This chapter looks into what the right to strike entails and whether this right can be limited and if so the extent of the limitation.

2. The right to strike

[42] Tenza (2015) 212.
[43] Van Niekerk *et al*. (2018) 443.
[44] Van Niekerk *et al.* (2018) 443.
[45] Act No. 66 of 1995.
[46] Chapter IV of the LRA; Du Toit *et al* (2015) 333; Van Niekerk *et al* (2015) 443; Grogan (2017) 412 – 428.
[47] Grogan (2017) 412 – 428.

Before the 1980s the right to strike was governed by common law under the principle of breach of contract.[48] At common law an employer was entitled to dismiss an employee for taking part in a strike action if that participation materially breached the employee's contract of employment.[49] A strike could amount to a delict which entitled an employer to compensation.[50] In *S v Smith*[51] the Court held that when regard is had to common law an employer has a right to dismiss an employee who refuses to adhere to his contractual obligations regarding his work.[52] Should an employee participate in strike action which then breaches his employment contract an employee would be liable to be dismissed by the employer.[53] I submit that this situation created an imbalance in an employer-employee relationship in that it gave greater bargaining power to the employer than to an employee.

In light of the above, legislation was enacted to address the injustices of the past.[54] Currently, the right to strike is entrenched in the *Constitution* which explicitly provides that "every worker has the right to strike".[55] This right can be utilised as a means to an end by workers as it protects the workers' mutual interests, however, it is a right that can be utilised only collectively.[56] This right is viewed as an essential means to promote the interests of workers as well as their trade unions' social and economic goals.[57] It is further identified to be fundamental to collective bargaining.[58]

In *NUMSA v Bader Bop*[59] (hereafter *Bader Bop*) the Constitutional Court held that the *Constitution* recognises the importance of fair labour practices and that the right to strike is an important factor in collective bargaining.[60] The Court further indicated that the right to strike is important for two main reasons, first, it protects the dignity of workers and, second, it gives the workers power in the bargaining process.[61]

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[48] *Ibid* 405.
[49] *Ibid* 405.
[50] *Ibid.*
[51] (1955) 1 SA 239 (K).
[52] *Ibid* 241 par G-H.
[53] (1955) 1 SA 239 (K) 244 para A – B.
[54] The LRA, No. 66 of 1995.
[55] Section 23 (2) of the *Constitution*.
[56] Hepple (2015) 41.
[57] Van Niekerk *et al*. (2018) 443.
[58] Du Toit *et al* (2015) 333; Myburgh (2004) 966; Van Niekerk *et al.* (2015) 443.
[59] 2003 *ILJ* (CC) 316.
[60] *Ibid* par I – J.
[61] *Ibid* 317 para A – B.

According to Hepple the right to strike does not derive from the right to freedom of association or the right to collective bargaining, it is an independent and individual right.[62] He relies for support on the *Bader Bop* case[63] where the Constitutional Court granted a minority union the right to strike in circumstances where it was not entitled to participate in collective bargaining as their representation requirements were not met.[64] He is of the opinion that the right to strike is an important factor in collective bargaining.[65]

Rycroft supports the notion that strikes must be "functional" to collective bargaining and that violent industrial action causes otherwise legitimate strikes to lose their protected status.[66] She further expresses the view that strikes must be orderly and comply with the procedures for them to constitute the right to strike.[67] It means that if the procedures outlined in the *LRA* in respect of strikes have not been complied with the strike is an unprotected strike and the workers and the trade union participating in the strike lose the protection offered by the *LRA*.[68] The workers and the trade union participating in the strike then are liable to pay compensation as a result of the damage suffered by the employer.[69]

To argue against Rycroft's contention, Fergus asks whether placing reliance on the "functionality requirement" is the most appropriate way to contain the violence or to justify judicial intervention.[70] Fergus submits that the desire to limit strikes which have become dysfunctional due to violence is understandable and reasonable.[71] Fergus critiques Rycroft in so far as she finds a different historical foundation for the functionality test and condemns her for promoting the functionality principle as a legal justification to contain violent conduct in strikes.[72]

To illustrate Fergus's point, the Court dismissed the validity of the functionality requirement in favour of an explanation of the relationship between strikes and

[62] Hepple (2015) 32.
[63] (2003) *ILJ* 316 (CC).
[64] Hepple (2015) 32.
[65] Hepple (2015) 42.
[66] Rycroft (2014) 203-206.
[67] *Ibid*.
[68] Rycroft (2012) *Paper International Labour Law Conference, Barcelona* 7.
[69] *Ibid*.
[70] Fergus (2016) 1538.
[71] *Ibid* 1539.
[72] *Ibid* 1538 – 1549.

collective bargaining in the *Black Allied Workers Union & Others v Prestige Hotel CC t/a Blue Waters Hotel* (hereafter *BAWU*).[73] Fergus argues that regrettably the Labour Court recently has relied on and has engaged with the functionality requirement in a manner which presents difficulties.[74]

Fergus reiterates that interdicting a strike seems to be quite different from interdicting conduct during the strike.[75] She contends that she does not suggest that the need to limit the levels of violence in strikes in South Africa is unimportant,[76] on the contrary it is an urgent need and very significant.[77] However, she questions whether it is appropriate for the judiciary to find that a strike loses its protection or at least may be suspended when the legislature explicitly elected not to include such a provision in the law.[78] In Fergus' opinion to maintain the principle of separation of powers is more appropriate, and therefore a principled justification which opposes the functionality test for judicial intervention in the legislative process surely is necessary.[79] Fergus suggests an alternative approach as opposed to the "functionality requirement", which is that the victims of strike violence may rely on their constitutional right to freedom of security of person which encompasses the right to be free from all forms of violence.[80]

3. The socio-economic dimension of strikes

At the time the *LRA* was enacted most South Africans envisaged a better life,[81] under the impression that the new democratic dispensation would change their vulnerable socio-economic circumstances.[82] The Marikana strike is used as an example to demonstrate the socio-economic dimension in strikes.

[73] (1993) 14 *ILJ* 963 (LAC).
[74] *Ibid* 1543
[75] Fergus (2016) 1548
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid* 1548 – 1549.
[80] *Ibid* 1549. Fergus states that the mere fact that the *LRA* does not provide for adequate protection to those who suffer at the hands of violent strikers might suggest that the *LRA* is unconstitutional. However, this view is far-fetched.
[81] Cheadle *et al* (2018) 23.
[82] *Ibid*.

The Marikana strike, often identified with the Marikana massacre, in 2012, left 34 miners dead after they were shot by the police. In Marikana the socio-economic pressures and poor living conditions found in mining communities were experienced by migrant workers.[83] It is argued that the socio-economic circumstances of workers at Marikana contributed to the unprotected and violent strike action.[84] According to Jacobs labour laws are not the only solution to all the understandable needs of workers, and the reality is that workers often target their employers directing their frustrations at them in demanding a better life.[85] By way of an example, he points to accommodation, transport, and healthcare, which ordinarily are the province of government, as services demanded of employers.[86] These services are provided by government in countries with well-developed social security systems, such as Germany.[87]

It can be argued that high levels of unemployment and poverty are a large contributory factor in the number of violent, prolonged and unprotected strikes that occur in South Africa. The relationship between poverty and labour unrest go beyond the issue of human rights and immensely impact the workers' life experiences.[88] Most strikes in South Africa are caused by workers negotiating an increase to their wages, and the only way they know how to put pressure on the employer is by way of strike action.[89]

Labour legislation has a primary aim of regulating labour relations, as well as promoting social justice and, at least, should be mindful of the broader socio-economic and political reality that South Africa faces.[90] Workers face challenges such as providing for their extended families and, poor living conditions, and these should be borne in mind by organised labour and business when engaging in collective bargaining.[91] Hartford believes that collective agreements that are designed to benefit majority unions and prevent minority unions from entering the bargaining arena are

[83] Cheadle *et al* (2018) 29.
[84] *Ibid* 30.
[85] *Ibid*.
[86] *Ibid* 30-31.
[87] Deithier (2007) 1-2.
[88] Cheadle et al (2018) 33.
[89] *Ibid*.
[90] *Ibid* 34.
[91] *Ibid*.

problematic.[92] He further points out that should this circumstance continue and workers are excluded from the benefits of collective bargaining, they cannot be expected to honour collective agreements concluded without their input.[93] The *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others*[94] (hereafter *AMCU*), illustrates the bias towards the principle of majoritarianism in this current collective bargaining model. The *LRA* favours the principle of majoritarianism in which majority unions conclude collective agreements with employers that bind minority unions. This aspect of labour regulation falls outside the scope of this study and will not be covered in the rest of the dissertation.

Ngcukaitobi, on the other hand, mentions that socio-economic challenges and/ or factors are the reason structural violence occurs, and, in turn, deprives people of the opportunity to meet their basic needs.[95] According to him, the legality of a strike is insignificant to a striking worker who has socio-economic challenges.[96] His view is that these socio-economic challenges largely are due to past injustice, and/ or, put differently, are the legacy of apartheid policies which created an imbalance in the power of the employer and workers.[97]

4. Limitation of the right to strike

The ILO cautions that the right to strike is not an end in itself.[98] Most importantly, the right to strike in section 23 of the *Constitution* is not internally restricted,[99] but as in the case of any other right in the *Constitution* is subject to the limitation clause in section 36 of the *Constitution*.[100] This right can be limited in terms of section 36 of the

[92] Theron *et al* (2015) 849.
[93] Cheadle *et al* (2018) 34. Kruger and Tshoose (2013) 288*,* confirm that section 18 of the LRA promotes a system of collective bargaining where the position of a majority union is enhanced and minority unions are marginalised. The *LRA* promotes the principle of majoritarianism.
[94] 2017 (6) BCLR 700 (CC).
[95] Ngcukaitobi (2013) 840.
[96] *Ibid* 843.
[97] *Ibid* 847.
[98] Van Niekerk *et al* (2018) 443.
[99] Myburgh (2004) 962.
[100] Gericke (2012) *THRHR* 567; Van Niekerk *et al* (2018) 443.

Constitution which allows rights in the *Constitution* to be limited in terms of the law of general application.[101]

The legislation that gives effect to the constitutional right to strike is the *LRA*.[102] The *LRA* prescribes substantive and procedural limitations to the right to strike.[103] As a result the right to strike can be exercised only if certain procedural and substantive rights are complied with.[104]

4.1 Procedural limitation to the right to strike

In order for strikers to acquire protection under the *LRA* they must follow the prescribed statutory procedural requirements, unless there is a collective agreement which prescribes a different approach.[105] The first step is to refer the issue in dispute for conciliation to the Commission for Conciliation Mediation and Arbitration (hereafter *CCMA*) or a bargaining council having jurisdiction.[106] The workers may not strike until the CCMA has certified that the parties have been unable to resolve the dispute or unless a period of 30 days has lapsed since the matter has been referred, whichever occurs first.[107] In the case of disputes of refusal to bargain an advisory arbitration award must first be issued before a strike action or a lock-out are engaged in.[108]

The employer must be provided with at least 48 hours written notice before the commencement of the strike.[109] In *SA Transport & Allied Workers Union v Moloto*,[110] (hereafter *Moloto*) the trade union referred the dispute for conciliation in terms of section 64(1)(a) of the *LRA*. The required 30 days' notice lapsed and the union provided the employer with a notice of a commencement of a strike.[111] The notice merely provided: "We intend to embark on a strike action on 18 December 2003 at

[101] Section 36 of the *Constitution*; Cheadle (2015) 78.
[102] Freund (2012) 115.
[103] Section 64 of the *LRA*.
[104] Du Toit *et al* (2015) 334.
[105] Grogan (2017) 412.
[106] *Ibid*.
[107] *Ibid.*
[108] *Ibid.*
[109] Section 64 (1) (b) of the *LRA*.
[110] 2012 *BLLR* 1193 (CC).
[111] *Ibid.*

08h00".[112] The employer held the view that non-union members were not covered by this notice and it was entitled to dismiss non-union members who took part in the strike.[113] The Court rejected the employer's contention and held that the requirement of section 64(1)(b) merely is a single notice that informs the employer of the commencement date of the strike.[114] The Court held further that the notice provided by the trade union was sufficient to cover the non-union members and the strike action thus was protected.[115]

In light of the above, it is submitted that procedural requirements have to be complied with for a strike to be protected. According to Grogan the *LRA* does not impose criminal sanctions on strikers who have not complied with its provisions.[116] However, it protects strikers against dismissal and civil action if they comply with the requirements of the statute and denies them protection from disciplinary action or dismissal in the case of non-compliance. [117] Grogan further states that strike action that is protected is beyond the jurisdiction of the Court and the reason is to leave untouched the economic muscle of the parties.[118] Myburgh reiterates that Courts should refrain from interfering in protected strikes.[119]

In the 1956 *LRA* a secret ballot had to be held prior to a strike action taking place.[120] This requirement was removed by the 1995 *LRA*.[121] The *LRA* recently has been amended (the 2018 amendments) to include the requirement of a secret ballot prior to embarking on a strike action.[122] The question is whether the failure to hold a secret ballot as contemplated in section 95 (9) of the *LRAA*, 2018 before embarking on a strike action affects the legality of a strike. Answering this question is beyond the scope of this dissertation and therefore is not discussed.

[112] *Ibid* par 3.
[113] *Ibid.*
[114] *Ibid* par 4
[115] *ibid* par 112 – 114.
[116] Grogan (2017) 412.
[117] *Ibid*.
[118] *Ibid.*
[119] Myburgh (2004) ILJ 969.
[120] Du Toit *et al* (2015) 348.
[121] Du Toit *et al* (2015) 348 and section 67 (7) of the *LRA*.
[122] Section 95 (9) of the *LRA*.

4.2 Substantive limitation to the right to strike

It is trite law that only strikes that are defined and protected in terms of the *LRA* enjoy the protection afforded by the *LRA*.[123] The *LRA* defines a strike as follows:[124]

> 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 different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between the employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.

The definition clearly has three elements namely, refusal to work; collective action and the purpose of the strike.[125]

In *Schoeman and Another v Samsung Electronics (Pty) Ltd*[126] (hereafter *Samsung Electronic*) the Court held, among others, that an individual employee cannot strike,[127] however an individual employer can effect a lock-out against a single employee.[128] When regard is paid to the definition the right to strike is an individual right that can be exercised only collectively.[129] The right to strike has both an individual and a collective element.[130] The individual element gives a worker the right to elect to participate in a decision to strike while the collective element gives the worker the right collectively to take part in the strike action.[131]

In *NUM v CCMA*[132] (hereafter *NUM v CCMA*) the Labour Appeal Court held strike action in response to an unlawful deduction from a worker's salary can be regarded as a strike for the purposes of remedying a grievance or resolving a dispute.[133] In *TSI Holdings (Pty) Ltd & others v NUMSA & others*[134] (hereafter *TSI Holdings*) a strike was called to demand that the supervisor be dismissed. The Labour Appeal Court held that

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[123] Du Toit *et al* (2015) 334.
[124] S213 of the *LRA*.
[125] Van Niekerk *et al* (2018) 444- 449.
[126] (1997) 10 BLLR 1364 (LC).
[127] *ibid* 1367 par I-J.
[128] *Ibid*.
[129] Cheadle (2015) 73.
[130] *Ibid.*
[131] Cheadle (2015) 71.
[132] (2012) 1 BLLR 22 (LAC).
[133] *Ibid*.
[134] [2006] 7 BLLR 631 (LAC).

the demand fell outside the category of demands that can be supported by a strike as defined in section 213 of the *LRA* and reiterated that a trade union may not embark on a strike in support of a demand that is unlawful.[135]

The *LRA* clearly specifies the circumstances under which a right to strike may not be exercised namely, where there is a collective agreement that prohibits employees from embarking on a strike; where the individual is bound by an agreement that requires the dispute to be referred to arbitration; where the dispute requires one of the parties to refer to the Labour Court in terms of the *LRA* and where the employee is engaged in essential services or maintenance services.[136]

Employees in essential or maintenance services, as a general rule, are prohibited from embarking on a strike.[137] They have an option of referring the dispute to compulsory arbitration as provided in the *LRA*.[138] Essential services, among others, are the South African Police Service, Parliamentary Service, and any service of which the interruption endangers the life, personal safety or health of the whole or any part of the population.[139] The prohibition, however, does not include personnel who are rendering support services.[140]

5. Conclusion

The chapter reveals that although the right to strike has been seen in some circumstances as destructive, it is trite law that the right to strike has been identified internationally and in South Africa as a fundamental right. This right is entrenched in the South African *Constitution* and given effect by the *LRA*. The right to strike has been described by Rycroft to be functional to collective bargaining.[141] Hepple, on the other hand, believes this right is an independent and individual right which is essential to proper or successful collective bargaining.[142] The chapter shows that the right to strike attempts to balance power in the relationship between the employer and employees.

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[135] *Ibid* par 48.
[136] S65 (1) of the *LRA*.
[137] Grogan (2017) 424.
[138] S74 of the *LRA*.
[139] Grogan (2017) 424.
[140] *Ibid*.
[141] *Bader Bop* 317 par A-B.
[142] Hepple (2015) 32.

I agree with Ngcukaitobi that the legality of a strike is not of any significance to a worker facing socio-economic challenges. In this regard, socio-economic factors should be taken into account when dealing with the limitation of the right to strike. More specifically, the socio-economic challenges should be taken into consideration in the amendment of the *LRA* in order to curb violent strikes.

The question that remains to be answered in this study is whether due to the number of long and violent strikes in South Africa the amendments to the *LRA*, particularly the amendment to picketing rules, the new *Code* and new *Picketing Regulations* are sufficient to address and / or curb violent strikes. This question is discussed in detail in the following chapter.

CHAPTER 3

The amendments to section 69 by *Labour Relations Amendment Act*, 2018

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1. Introduction

The failure by strikers to comply with Court orders prohibiting violence in strikes and its perpetuation in protected strikes turns collective bargaining into a form of economic coercion.[143] In turn, it forces an employer to conclude an agreement that is outside economic reality.[144] In *Food & Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River*[145] (hereafter *Kapesi*) the Labour Court held that violent and unruly strikes are extremely detrimental to the legal foundation upon which South African labour relations are founded.[146] The Court held further that strikes normally are aimed at persuading employers to accede to employees' demands in a peaceful and orderly manner through the stoppage of their labour.[147]

In a more recent judgment in the case of *National Union of Food Beverage Wine Spirits and Allied Workers (NUFBWSAW) and others v Universal Product Network (Pty) Ltd*[148] (hereafter *Universal Product Network*) delivered by van Niekerk J, the union had failed to reach an agreement with the employer over a list of demands in relation to the terms

[143] Botha *et al* (2017) 531; and Myburgh (2013) 14.
[144] *Ibid*.
[145] (2010) 31 *ILJ* 1654 (LC).
[146] *Ibid* par 6.
[147] *Ibid*.
[148] (2016) 37 *ILJ* 476 (LC).

of their members' employment.[149] The union commenced a protected strike,[150] the employer lodged an urgent application alleging that the striking employees had failed to comply with picketing rules agreed upon between the union and employer and had committed various acts of misconduct.[151] The employer sought an order to interdict the employees' violent conduct and the interdict was granted.[152] The union stated that they were not involved in violence or political interference and contended that the strike remained protected.[153] It was further stated that the Labour Court on various occasions, has suggested that violent conduct is the opposite of the aim of a strike which is to convince an employer through the peaceful means of stopping work to agree to the union's demands.[154] The Court referred to *Tsogo Sun Casino (Pty) Ltd t/a Montecasino v Future of SA Workers Unions & others* [155] (hereafter *Tsogo Sun*) where the Court held that:

> [13] 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.

The Court further referred to *Edelweiss Glass & Aluminium(Pty) Ltd v Union of Metal Workers of SA*[156] (hereafter *Edelweiss Glass & Aluminium*) where it was held that a transmutation of a protected strike to that of an unprotected strike occurs only if it is proved that employees had used the protected strike as leverage to achieve objectives other than those it could legitimately achieve.[157]

The Honourable van Niekerk J stated that he agreed with Rycroft's approach that the Courts should question whether "misconduct has taken place to an extent that the strike no longer promotes functional collective-bargaining and is therefore no longer deserving of its protected status". In answering this question the degree of violence should be weighed and the efforts of the unions in preventing the violence should be

[149] *Ibid* par 15
[150] *Ibid* par 17.
[151] *Ibid.*
[152] *Ibid* par 18.
[153] *Ibid.*
[154] *Ibid* par 30.
[155] (2012) 33 *ILJ* 998 (LC).
[156] (2001) 32 *ILJ* 2939 (LAC).
[157] (2016) 37 *ILJ* 476 (LC) par 31.

assessed.[158] In this case the Court found that the violence did not warrant the Court to alter the status of an otherwise protected strike to that of an unprotected strike.[159]

It is argued that it was disappointing of the Court to have considered the possibility of altering the status of a protected strike to that of an unprotected strike despite the presence of alternative remedies available to the employer.[160] An interdict is one of the remedies; other remedies are a delictual claim, breach of contract, claims for equitable compensation and criminal proceedings.[161] Alteration of the status of a strike would tip the scale in favour of the employer.[162] Van Eck and Kujinga are of the considered view that the Court rather should emphasise existing alternative remedies,[163] they indicate that picketing rules had been agreed upon and the employer had valid arguments to advance in the event there was a real threat of violent strike action.[164] It is trite law that employees who commit unlawful violent conduct which results in the employer suffering a loss are held liable.[165] The protection of employees during a strike does not extend to cover employees who commit unlawful violent conduct during a strike;[166] in consequence employees incur civil liability.[167] The employer may proceed to obtain an interdict or the employees committing violent acts may be dismissed, however a dismissal must be procedurally and substantively fair.[168] Although the *Universal Product Network* case perhaps is open to a measure of criticism in its reliance on the functionality principle, there are other plausible ways to reach the same results as arrived at by the Court; these include the interpretation that violent strikes do not qualify as a 'strike' as defined in section 213 of the *Labour Relations Act*[169] (hereafter *LRA*).[170]

[158] *Ibid* par 32.
[159] *Ibid* par 39.
[160] Van Eck and Kujinga (2017) 14.
[161] *Ibid* 15 – 16.
[162] *Ibid* 14
[163] *Ibid*.
[164] *Ibid*.
[165] Manamela and Budeli (2013) 325.
[166] *Ibid.*
[167] *Ibid.*
[168] *Ibid* 325 – 326.
[169] Act No. 66 of 1995.
[170] Myburgh (2018) 724.

In *KPMM Road and Earthworks (Pty) Ltd v Association of Mineworkers and Construction Union and Others*[171] (hereafter *KPMM Road*) the Court held that:

> it has once again been necessary for me to return to what has become a common side effect of protected strike action by trade unions and employees, being that of unlawful behaviour, violence and intimidation. I am quite sure it was never envisaged or contemplated that the right to strike as enshrined in the Constitution, would have components of unlawful conduct, violence and intimidation as such a significant part of it. This kind of behaviour deserves no Constitutional protection and should be completely rooted out of the employment environment.

Against the background of South Africa's violent strikes this study considers the amendments to the *LRA* introduced by the *Labour Relations Amendment Act*[172] (hereafter *LRAA, 2018*) and assesses the extent to which they serve the purpose for which they were enacted. This chapter specifically concentrates on the amended provisions dealing with picketing rules as embodied in section 69 of the *LRA*. The chapter looks into the position prior to the amendment of picketing rules and the position thereafter as well as into the effect the amendments to picketing rules possibly will have in curbing violent conduct during strikes.

In furtherance of the above assessment the study looks into the relevant *Code of Good Practice: Collective Bargaining, Industrial Action and Picketing*[173] (hereafter new *Code*) applicable to pickets and the new *Picketing Regulations*[174] issued in terms of section 208 of the *LRA.*

2. Picketing in terms of section 69 of the LRA

Picketing may be defined as conduct that is aimed at gaining support and publicity for the workers' cause.[175] The right to picket is constitutionally entrenched.[176] Section 69 of the *LRA* gives effect to the provisions of section 17 of the *Constitution*.[177] In South Africa picketing usually is limited to conduct initiated by strikers or their unions in

[171] (2018) 39 *ILJ* 609 (LC) at para 1.
[172] Act No. 08 of 2018, which was published in Government Gazette No. 42061.
[173] Government Gazette No. 42121.
[174] *Ibid*.
[175] Cheadle *et al* (2018) 158.
[176] Section 17 of the *Constitution of the Republic of South Africa* states that "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."
[177] Item 24 (2) of the new *Code*.

support of a protected strike.[178] The purpose of pickets is described as a means to persuade other workers to join a strike and to influence replacement workers filling the positions of striking workers.[179] The *LRA* governs the right to picket and provides the requirements that need to be complied with for a picket to be protected.[180] The *LRA* clearly stipulates that only a registered trade union may authorise a picket by its members for demonstrating peacefully in support of a protected strike or in opposition to a lock-out.[181] It further provides that such a picket may be held outside the employer's premises where the public has access or on the employer's premises provided the employer gives permission to this effect.[182]

On 27 November 2019 the *LRAA*, 2018 came into effect. It amended section 69 of the *LRA* by the substitution of subsections (4), (5) (6) and (12) respectively. In the following paragraphs this study concentrates on the provisions of section 69 of the *LRA* prior to the amendments and the position subsequent to the amendments as mentioned above.

2.1 The position prior to the amendments

Before the amendment section 69 of the *LRA* provided as follows:

> (4) If requested to do so by the registered trade union or the employer, the Commission must attempt to secure an agreement between the parties to the dispute on the rules that should apply to any picket in relation to that strike or lock-out. [183]

In *Lomati Mill Barberton v PPWAWU and others*[184] (hereafter *Lomati Mill*) the Court held that the *LRA* inspires unions and employers voluntarily to agree to the applicable picketing rules at a workplace.[185] Picketing rules can be decided by the employer and unions without the Commission for Conciliation Mediation and Arbitration (hereafter CCMA) intervening or the CCMA can facilitate the process of establishing picketing

[178] *Ibid*.
[179] *Ibid*.
[180] Section 69 (1) & (2) of the *LRA*.
[181] Section 69 (1) (a) and (b) of the *LRA* and Cheadle *et al* (2018) 161.
[182] Section 69 (2) of the *LRA* and Cheadle *et al* (2018) 161.
[183] Section 69 (4) of the *LRA*.
[184] (1997) 4 BLLR 415 (LC).
[185] *Ibid* 417 and see Cheadle *et al* (2018) 166.

rules at the request of the employer or the unions.[186] This position is in line with the provision of section 69(4) as quoted above.

The *LRA* provided that in the absence of an agreement on picketing rules it required the CCMA to establish picketing rules, and in so doing it should take into account the circumstances of the workplace or the premises where the picket is intended to take place.[187] The *LRA* further required the CCMA in establishing picketing rules to take into account any relevant *Code of Good Practice*.[188] The effect of these provisions is that picketing rules had to be in place, be it by agreement between the parties or as established by the CCMA in line with section 69 (5) (a) and (b) as indicated above.[189] Another thing to note is that the CCMA could interfere and attempt to secure an agreement on picketing rules between the parties in dispute only if requested to do so either by the employer or the union.[190] In the event that the CCMA's attempt to secure an agreement between the parties to the dispute on rules that should apply to a picket in relation to a strike fail the CCMA had to establish the picketing rules.[191]

The picketing rules established by the CCMA or by agreement between the parties must make provision for workers to picket in a place owned or controlled by a person who is not the employer provided that person is afforded an opportunity to make representations before the rules are established.[192] This provision is aimed at securing the right to picket in circumstances where a standard employer-employee relationship does not exist or where the employer's premises are not owned by the employer.[193] The picketing provisions further provide that a picket should be held at the employer's premises if permission has been granted by the employer.[194] However, the employer

[186] Cheadle *et al* (2018) 166, and section 69 (4) of the *LRA*.
[187] Section 69 (5) (a) of the *LRA.*
[188] Section 69 (5) (b) and Cheadle *et al* (2018) 166*.*
[189] Cheadle *et al* (2018) 166*.*
[190] Section 69 (4) of the *LRA*.
[191] Ibid and section 69 (5) (a) and (b) of the *LRA*.
[192] Section 69 (6) (a) of the *LRA* and Cheadle *et al* (2018) 163.
[193] Cheadle *et al* (2018) 163 and see *Growthpoint Properties Ltd v South Africa Commercial Catering and Allied Workers Union (SACCAWU) and Others* 2011 (1) BCLR 81 (KZD) para 55 – 62, where the Court held that prohibiting civil legal proceedings to interdict conduct such as picketing in support of strike cannot be absolute, otherwise it would mean that all other constitutional rights would surrender to the right to strike and picket. This means that a picket can be carried out in a place owned or controlled by a person who is not an employer. However, the right of the owner to institute civil legal proceedings to interdict a picket in support also is allowed.
[194] Section 69 (6) (b) of the *LRA*.

may not unreasonably withhold its permission for the union and its members to picket at its premises.[195]

The *LRA* further affords any party with an opportunity to refer a dispute to the CCMA, among others, for an alleged material breach of a picketing agreement concluded between the parties or established by the CCMA.[196] In the event that conciliation fails the dispute has to be referred to the Labour Court for adjudication.[197] The Labour Court, in the required circumstances, is allowed to grant urgent relief which is just and equitable.[198] In the following section the study discusses the amendment to section 69 and the effect it may have in curbing violent strike.

2.2 Amendment to section 69 of the *LRA*

The Memorandum of Objects that accompanied the *Labour Relations Amendment Bill* 2017 indicates that the reasons for amending the right to picket in the *LRA* are:

> the levels of picket line violence that has [sic] come to characterise strikes in the last few years require [sic] more stringent regulation to ensure the orderly conduct of pickets in strikes.[199]

The amended section 69 (4) provides that:

> Unless there is a *collective agreement* binding on the *trade union* that regulates picketing, the commissioner conciliating the *dispute* must attempt to secure an agreement between the parties to the *dispute* on rules that should apply to any picket in relation to that *strike* or *lock-out* before the expiry of the period contemplated in section 64 (1) (a) (ii).

In essence the amended section 69(4) states that in the absence of a collective agreement on picketing rules the Commissioner conciliating a dispute is compelled to secure a picketing agreement between the parties before expiry of the conciliating time limit in section 64(1)(a).[200] In the event that the conciliating Commissioner fails to

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[195] Section 69 (3) and Cheadle *et al* (2018) 166.
[196] Section 69 (8) (c) and (d) of the *LRA* and Cheadle *et al* (2018) 169.
[197] Cheadle *et al* (2018) 169, and section 69 (11) of the *LRA*.
[198] *Ibid*.
[199] Godfrey *et al* (2018) 2170.
[200] Section 69 (4) of the *LRAA*, 2018. *Ibid* 2170 – 2171, and The *Labour Relations Amendments Act*, 2018 *Picketing Regulations* (*Picketing Regulations*) came into effect from 01 January 2019. Regulation 2 emphasises that in the event a dispute is not resolved at conciliation, a trade union may commence picketing only if there is a collective agreement which regulates picketing or the employer and trade union reach an agreement at conciliation on picketing rules or the Commissioner determining picketing rules in terms of section 69 (5) of the *LRAA*.

secure an agreement between the parties in dispute the conciliating Commissioner must determine picketing rules based on default picketing rules that are prescribed in terms of section 208 and in the published new *Code*.[201] The amendment goes further and enjoins the conciliating Commissioner to take into account any representations made by the parties to the dispute attending the conciliation meeting.[202] The picketing rules must be issued together with the certificate of non-resolution of the dispute before the conciliating Commissioner.[203]

It is worth noting that in terms of the wording of the old section 69 (4) of the *LRA* the CCMA had no power to intervene at its own initiative in securing an agreement on picketing rules between an employer and unions. Only the employer or a union could invite the CCMA to assist with securing an agreement on picketing rules.[204] Secondly, the old section 69(4) did not refer to any collective agreement regulating picketing rules. The amended section 69 (4) makes provision for employer and unions to conclude a collective agreement that regulates picketing rules.[205] Picketing rules ought to relate to a strike or lock-out to which the picket will apply.[206] Fergus argues that on the strict reading of the wording of the old section 69 of the *LRA*, general picketing rules at a workplace could not be established by this process.[207] However, a reading of the provisions of the old section 69 indicates nothing prevented parties from agreeing on picketing rules on their own terms.[208]

The amendment to section 69(4) confers a duty on the Commissioner conciliating a dispute to attempt to secure an agreement between the parties to a dispute on picketing rules in the absence of a collective agreement which regulates picketing and binds the parties.[209] In the new section 69 the Commissioner need not wait to be requested by either of the parties to the dispute to secure an agreement on picketing rules.[210] The *LRAA*, 2018 specifically makes provision for picketing rules to be

[201] Section 69 (5) (a) –(c) of the *LRAA*, 2018.
[202] Section 69 (5) (c) of the *LRAA*, 2018.
[203] Section 69 (6A) of the *LRAA*, 2018.
[204] Cheadle *et al* (2018) 167.
[205] Section 69 (4) of the *LRAA*, 2018.
[206] Cheadle *et al* (2018) 167.
[207] *Ibid.*
[208] Cheadle *et al* (2018) 167.
[209] Section 69 (4) of the *LRAA*, 2018.
[210] This is introduced by amendments to section 69 (4) by the *LRAA*, 2018.

determined prior to a picket taking place.[211] The *LRAA*, 2018 further makes provision that should the conciliating Commissioner fail to secure an agreement the picketing rules should be determined in accordance with the default picketing rules issued under section 208 or rules published in the *Code of Good Practice* which is the new *Code*.[212].

Section 69(6) provides a guideline on the requirements of the picketing rules. The amendment to section 69 by the *LRAA*, 2018 introduces a further inclusion of subsections 6A to 6C.[213] When regard is had to these provisions it is clear that a Commissioner conciliating a dispute must determine picketing rules at the same time as issuing a certificate which is contemplated in section 64(1)(a).[214] A Commissioner conciliating a dispute may determine picketing rules on an urgent basis.[215] There cannot be a picket in support of a protected strike or in opposition to a lock-out unless picketing rules have been agreed to in a binding collective agreement or in an agreement between the parties or as determined by the conciliating Commissioner.[216]

When picketing rules have been established unions are liable to ensure that their members and officials are familiar with the rules and that the rules are complied with.[217] The Labour Court may enforce picketing rules in circumstances where attempts to conciliate the matter are unsuccessful.[218]

The picketing rules then must be submitted by the trade union to a responsible officer who is appointed in terms of section 2(4) of the *Regulation of Gatherings Act*[219] (hereafter *Gatherings Act*) and to a member of the South African Police Services (hereafter SAPS) as contemplated in section 2(2) of that Act.[220] In circumstances

[211] Section 6 (6C) of the *LRAA,* 2018, Cheadle *et al* (2018) 166, and Godfrey *et al* (2018) 2170.
[212] Cheadle *et al* (2018) 166.
[213] See section 69 (6A) to (6C) of the *LRAA,* 2018.
[214] Section 69 (6A) of the *LRAA*, 2018, and see Regulation 2 (3) of the *Picketing Regulations* issued in terms of section 2018 of the *LRA*, which provides that in circumstances where there is no collective agreement, a commissioner prior to issuing a certificate of non-resolution, ought to secure an agreement on picketing rules using the default picketing rules as a basis.
[215] Section 69 (6B) of the *LRA*.
[216] Section 69 (6C) (a) (i) to (ii) and (b) of the *LRA*.
[217] Cheadle *et al* (2018) 168.
[218] *Ibid*.
[219] Act No. 205 of 1993.
[220] Regulation 5 (1) (a) and (b) of the Picketing Regulations, 2018 issued in terms of section 208 of the *LRA* (hereafter new *Picketing Regulations*, 2018).

where the Commissioner determined the picketing rules they have to be distributed to the parties in the dispute.[221] The employer then must distribute them to its appointed representatives or to the manager on duty during the strike or to its security personnel or place a copy of the picketing rules on notice boards.[222] The union is required to provide its marshals with a copy of the picketing rules and also to take the necessary measures to ensure that its marshals and convenors understand the rules.[223] The new *Picketing Regulations* issued in terms of section 208 of the *LRA* further prescribe default picketing rules that will be enforced when a Commissioner has to determine the rules.[224]

The *LRAA*, 2018 further amends section 69(12) which section now empowers the Labour Court to suspend pickets if it is just and equitable to do so.[225] Godfrey *et al* indicate this is the only stringent provision introduced by the *LRAA*, 2018, which is the power of the Labour Court to suspend pickets when it is just and equitable to do so.[226] This provision empowers the Labour Court to order a suspension of a picket (but not of the strike itself) in the event of a breach of the right to picket or the picketing rules.[227] However, the amendments do not indicate under which circumstances a picket will be suspended, but it is assumed that strong submissions and facts have to exist that would justify a limitation to a constitutional right.[228] An example of such a situation would be in circumstances where a trade union fails to control a picket in line with the picketing rules put in place and as a result unlawful conduct of a serious nature takes place unchecked.[229]

In *Dis-Chem Pharmacies Ltd v Malema and others*[230] (hereafter *Dis-Chem*) a picketing rules dispute was referred to the CCMA.[231] The trade union refused to participate in the process of establishing picketing rules; as a result the Commissioner concerned

[221] Regulation 5 (2) of the new *Picketing Regulations*.
[222] Regulation 5 (3) (a) to (c) of the new *Picketing Regulations*.
[223] Regulation 5 (4) of the new *Picketing Regulations*.
[224] Picket Regulations, 2018 at 9.
[225] Section 69 (12) (c) of the *LRAA*, 2018.
[226] Godfrey *et al* (2018) 2171.
[227] Myburgh (2018) 723.
[228] Godfrey *et al* (2018) 2171.
[229] *Ibid*.
[230] (2019) 40 *ILJ* 855 (LC).
[231] *Dis Chem* at par 9.

issued picketing rules.[232] The strike action ultimately commenced and there were various material breaches to the picketing rules and unlawful conduct by the striking employees.[233] The employer on the same afternoon obtained urgent interim relief which ordered the trade union and its members to comply with the picketing rules. The order further interdicted them from continuing to commit acts of violence and intimidation.[234] Despite the order granted by Van Niekerk J, the trade union and its members continued with violent conduct and intimidation. As a result, the employer again brought an application before Snyman AJ seeking an urgent interim relief. Snyman AJ expressed a view that the only effective way to deal with the violent conduct and intimidation was to impose sanctions.[235] He stated that the most suitable sanction in this regard would be for the striking employees and trade unions to forfeit their rights under the *LRA* in circumstances where they conduct themselves in an unlawful manner.[236]

The Court further referred to the judgment of *Verulam Sawmills (Pty) Ltd v Association of Mineworkers and Construction Union and Others*[237] (hereafter *Verulam Sawmills*) where the Labour Court held:

> [15] Not only are picketing rules there to attempt to ensure the safety and security of persons and the employer's workplace, but if they are not obeyed and violence ensues resulting in non-strikers also withholding their labour, the strikers gain an illegitimate advantage in the power play of industrial action, placing illegitimate pressure on employers to settle.

Snyman AJ further held that in his view, subsequent to the amendments, the *LRA* in effect contemplates that picketing that is not peaceful and which as a result contravenes picketing rules can result in the forfeiture or the suspension of the right to picket.[238] The Court interdicted the trade union and its members from continuing to picket. The picketing rules were suspended and were of no force or effect for the duration of the dispute.[239]

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[232] *Ibid* par 10.
[233] *Ibid* par 11.
[234] *Ibid*.
[235] *Ibid* par 20.
[236] *Ibid* par 20.
[237] (2016) 37 *ILJ* 246 (LC) par 15.
[238] (2019) 40 *ILJ* 855 (LC) par 27.
[239] *Ibid* par 3.

In *Sibanye Gold Limited t/a Sibanye Stillwater v Association of Mineworkers and Construction Union and others*[240] (hereafter *Sibanye Gold Limited*) the applicant sought an order that varied the picketing rules in order to interdict incidences of unlawful conduct by striking employees.[241] The respondents contended that the relief sought by the applicant would unduly infringe on their fundamental right to picket in support of a protected strike.[242] The Court referred to the case of *SA Airways v SA Transport and Allied Workers Union and Others*[243] (hereafter *SA Airways*) where the Court stated that the purpose of section 69 as read with the *Picketing Code* is to regulate protest action and demonstration during protected strikes and to ensure that it is lawful and peaceful.[244] The section further is intended to protect employees who conduct picketing in terms of section 69 from discipline and interdicts.[245]

The applicant requested the Court to limit the number of employees participating in the picket. However, the Court was of the view that this limitation would cause an imbalance in terms of the right to picket and the establishment of picketing rules that do not unduly limit the right to picket peacefully, in an orderly fashion and lawfully.[246] The applicant further proposed a single picketing area.[247] The Court held that a single picketing area minimises the difficulties associated with striking employees moving from area to area.[248] The Court held that this variation would be just and equitable and would bring about a peaceful demonstration as contemplated in section 69(1).[249] The Court further held that the picketing rules were inadequate, and as a result its intervention was needed to rectify matters.[250]

[240] (2019) 40 *ILJ* 898 (LC).
[241] *Ibid* 4.
[242] *Ibid*.
[243] (2013) 34 *ILJ* 2064 (LC).
[244] *Sibanye Gold* at par 7.
[245] *Ibid*.
[246] *Ibid* par 34 and 35.
[247] *Ibid par* 39.
[248] *Ibid*.
[249] *Ibid*.
[250] *Ibid* para 45.

In addition, there is a view that these amendments present a challenge; Ruciman holds that picketing rules stating when and where a picket will take place pose a problem for a number of reasons namely:[251]

- Issuing of a non-resolution certificate by a commissioner will be dependent on picketing rules that expressly state where and when the picket will take place and unlike now once a certificate is issued trade unions will be compelled to go on strike;[252]
- Picketing rules specifying where and when the picket will take place favour the employer. The employer will have sufficient time to make provisions for alternative labour and to make plans to undermine the collective power;[253]
- The default picketing rules further provide a Commissioner with power to decide what workers can or cannot do during the picket, for example, the songs that can be sung and whether workers can hold placards. It is stated that this rule could undermine the rights to strike and to freedom of expression;[254]
- Pickets in support of strike action will be limited to a number of workers. Pickets are limited to workers and trade union members only because the number of picketers may be limited;[255]
- If picketing rules are contravened, the trade union will be required to suspend the strike until such time that the Commissioner is satisfied that it can control the picket; and[256]
- The new *Code* requires trade unions to police strikes, which means union officials may be involved in investigations against their own members in circumstances where there are allegations of unlawful conducted allegedly committed during picketing.[257]

There is another view that the *LRA*, after 24 years of its existence, still is woefully inadequate to deal with strike violence.[258] It is indicated that the attempts made to

[251] Runciman (2018) 1-2.
[252] *Ibid.*
[253] *Ibid*.
[254] *Ibid*.
[255] *Ibid*.
[256] *Ibid*.
[257] *Ibid*.
[258] Coetzee (2019) 35.

address strike violence are soft interventions and are not sufficient.[259] The amendments to picketing rules in terms of the *LRAA*, 2018 are commendable however they are not a tangible comfort to an employer and to other employees affected by violent strikes.[260] It is suggested that the amendments are not strict or stringent enough to deal with strike violence.

Coetzee proposes that a number of measures ought to be implemented in an attempt to deal with violent strikes.[261] One of the measures is that the *LRA* should be amended to make provision for an immediate suspension of the right to strike when violence occurs during strikes.[262] It is noted that the right to strike is fundamental, however it should not be forgotten the right is not absolute, as such it should not trump other constitutional rights to life, freedom and security of a person.[263] Coetzee further suggests that hefty fines should be introduced levied on unions and their officials, and there is a duty on unions to take all reasonable steps to prevent violence, damage to property and acts of misconduct during strikes.[264]

A further measure that has been proposed is the need to revisit the rule and practice established by the Courts that unions should not be required to pay the legal costs of employers as a result of the ongoing relationship.[265] Since cost orders create a sense of justice and fairness in a system, cost orders can be imposed in circumstances where an employer approaches the Labour Court on an urgent basis to interdict violent conduct in strikes. The Courts should not be hesitant to grant a cost order against such a union.[266]

I agree with Myburgh's contention to the effect that it is hard to say what the Labour Court will take from the amendments to section 69 and the new *Code* when it is next

[259] *Ibid*.
[260] *Ibid* 35 – 36.
[261] *Ibid* 36.
[262] *Ibid*.
[263] *Ibid.*
[264] Cohen *et al* (2009) 81. In *South African Transport and Allied Workers Union and Another v Garvas* and Others [2012] 10 BLLR 959 (CC) at para 41, the Court held that the union should be responsible for any reasonably foreseeable damage that arose from the protest march which constituted a gathering in terms of the *Regulations of Gatherings Act*.
[265] Coetzee (2019) 36.
[266] *Ibid*.

requested to interdict a strike on account of strike violence.[267] The position clearly is that the Labour Court has not been empowered specifically to interdict a protected strike on account of violence, but merely to suspend a picket. However, this position was of no concern to van Niekerk J in the *Universal Product Network* case,[268] and It further poses no concern in so far as a violent strike no longer qualifies as a strike given the definition of a strike in section 213 of the *LRA*. The Court has the power to interdict even in the absence of an amendment to the *LRA*.[269] It is viewed further that the judges of the Labour Court may take it that the amendments brought by the *LRAA,* 2018 as well as the new *Code* pave the way for an interventionist approach as taken in the *Universal Product Network* case to continue.[270]

What action should the Court take if requested to interdicting a strike on account of violence? I agree with Myburgh that the most that the Labour Court can do is to suspend the strike pending the union establishing that the strike will resume on a peaceful basis.[271] A cooling off period will assist the employer to restore bargaining powers and may afford the parties an opportunity to settle the dispute.[272]

3. The *Code of Good Practice: Collective Bargaining*

The *Code of Good Practice: Picketing*[273] (hereafter the old *Picketing Code*) was repealed on 1 March 2019 and was replaced by the *Code of Good Practice: Collective Bargaining, Industrial Action and Picketing*[274] (hereafter the new *Code*) published on 19 December 2018. The new *Code* was issued with the aim of providing practical guidance on pickets which are in support of protected strikes or in opposition to a lock-out.[275] The intention behind the new *Code* among others is to provide guidance to those taking part in a picket in support of a protected strike, as well as to an employer and employees or the members of the general public who are affected by the picket.[276]

[267] Myburgh (2018) 723.
[268] *Ibid*.
[269] *Ibid*.
[270] *Ibid*.
[271] Ibid.
[272] *Ibid*.
[273] Government Gazette 18887 of 15 May 1998.
[274] Government Gazette 42121 of 19 December 2018.
[275] Item 24 (1) of the new *Code*.
[276] *Ibid*.

The new *Code* further states that violence during strikes and lock-outs requires measures to prevent it and to induce a behaviour change in the manner in which employees, employers, police and private security members engage with each other during a strike or lockout.[277] Conduct that is acceptable as well as that which is unlawful during a picket is outlined in the new *Code*.[278] The new *Code* further makes provision that the function of the police is not to take a view on the merits of a particular strike or picket, but to uphold the law and keep the peace. [279] It is further clear that if an employee's conduct during a picket constitutes misconduct the employer may take disciplinary action in accordance with the *LRA*. The new *Code* applies only to pickets that are held in terms of section 69 of the *LRA*.[280] The new *Code* goes further and provides default picketing rules, guidelines on agreed picketing rules and advises on conduct during the picket.[281] In light of the fact that the new *Code* is not binding it is viewed as insufficient to address violent strikes.[282]

4. The *Picketing Regulations*

On 19 December 2018 the Minister of Labour under section 208 of the *LRA* published the *Labour Relations Amendment Act*, 2018 *Picketing Regulations* (hereafter the new *Picketing Regulations*) which took effect on 01 January 2019.[283] The new *Picketing Regulations* in support of the amended section 69(4) provide that a union may not engage in a picket unless there is a collective agreement that regulates picketing, an agreement reached between the parties in the conciliation proceedings or picketing rules determined by the CCMA in line with section 69(5) of the *LRAA*, 2018.[284]

The new *Picketing Regulations* further compel the CCMA to request the trade union to submit a copy of any collective agreement regulating picketing to the conciliating

[277] Item 2 (1) of the new *Code*.
[278] Item 32 of the new *Code*. The Code emphasises that picketers must conduct themselves in a peaceful, unarmed and lawful manner. They may carry placards, chant slogans, sing and dance. A union is required to appoint convenors and marshals to monitor the picket in line with the picketing rules. Unions must ensure that these marshals and convenors understand the picketing rules put in place.
[279] Item 33 of the new *Code*.
[280] Item 24 (4) of the new *Code*.
[281] Items 27, 28, and 30 of the new *Code*.
[282] Coetzee (2019) 35.
[283] Government Gazette No. 42121.
[284] Regulations 2 (1) (a) – (c) of the new *Picketing Regulations*.

Commissioner.[285] Only in the event that the conciliating Commissioner is satisfied that there is no collective agreement regulating picketing that he then attempts to secure an agreement on picketing rules between the parties utilising the default picketing rules as a basis.[286] The difference between the new *Picketing Regulations* and the amended provisions of section 69(4) and (5) is that the new *Picketing Regulations* require the conciliating Commissioner in the absence of a collective agreement regulating picketing to secure an agreement between the parties on picketing rules using the default picketing rules as a basis.[287] The amended section 69 merely states that in the absence of a collective agreement the commissioner must secure an agreement between the parties on picketing rules. It does not go further and prescribe that in securing the agreement of picketing rules the commissioner must do so using the default picketing rules as a basis.[288]

5. Conclusion

In this chapter I discuss the amendments to picketing rules brought about by the *LRAA, 2018*. What is clear from the above overview is that the amendments are meant to address the difficulty of the ongoing violent and prolonged strikes which South Africa faces. The chapter concentrates on the amendments to picketing provisions in the *LRA*. It is clear from the above discussion that the significant change brought about by the amendments is that picketing rules have to be in place prior to a picket taking place in support of a protected strike or a lock-out;[289] picketing rules are a prerequisite to embarking on a picket in support of a strike and/or lock-out.[290] The new *Code* and new *Picketing Regulations* give guidance on pickets in support of a protected strike. In the assessment above, it is established that the amended section 69 now provides that employers and unions may conclude a collective agreement that contains picketing rules.[291] The *LRAA*, 2018 further provides that in the absence of a collective agreement or the Commissioner securing an agreement on picketing rules between

[285] Regulation 2 (2) of the new *Picketing Regulations*.
[286] Regulation 2 (3) of the new *Picketing Regulations*.
[287] Regulation 2 (3) of the new *Picketing Regulations*.
[288] Section 69 (4) and (5) of the *LRAA*, 2018 and Regulation 2 (3) of the new *Picketing Regulations*.
[289] Section 6 (6C) of the *LRAA*, 2018, Cheadle *et al* (2018) 166, and Godfrey *et al* (2018) 2170.
[290] *Ibid*.
[291] Section 69 (4) of the *LRAA*, 2018.

the parties the Commissioner determines picketing rules in line with the default picketing rules introduced by section 208 of the *LRA* or the new *Code*.[292]

A new *Code* has been enacted as a guideline for pickets; further there is a new *Picketing Regulation* that has been enacted to regulate pickets. The question that remains to be answered is whether these amendments address the long-standing problem of prolonged and violent strikes that South Africa experiences. It is my view that as yet the result is unclear; I am of the considered view that picketing rules lead to a more formalised and organised action in support of a strike. Union members in a strike need to familiarise themselves with the rules and this practice would lead to organised picketing in support of a strike.

I agree with Ngcukaitobi,[293] to the effect that socio-economic challenges are the root course of the problem of prolonged and violent strikes, and that these socio-economic challenges to a large extent are the result of the legacy of apartheid policies and past injustice, and that these created an imbalance in the relationship between the employer and employee.[294] Whether the amendments address violent conduct in strikes remains to be seen.

There is a further view that the amendments are insufficient[295] It is suggested that more stringent measures to deal with violent strikes should be put in place. Myburgh suggests that despite the LRA not providing specifically for the suspension of a violent strike the Labour Court still can interdict or suspend a violent strike relying on the argument that a violent strike is not a "strike" as defined in section 213 of the *LRA*.[296] It is proposed that the *LRA* should be amended to empower the Courts to suspend a violent strike. A further suggestion is that hefty fines should be imposed, and a cost order be given against unions.

[292] Section 69 (5) of the *LRAA,* 2018.
[293] Ngukaitobi (2013) 847.
[294] *Ibid*.
[295] Coetzee (2019) 35.
[296] Myburgh (2018) 724.

CHAPTER 4

Comparative study

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1. Introduction

The preamble to the *Labour Relations Act*[297] (hereafter *LRA*) together with section 1(b) provide that the purpose of the Act, among others, is to give effect to the country's international obligations as a member state of the International Labour Organisation (hereafter ILO).[298] The *LRA* further emphasises this point by providing in section 3(a) that the Act should be interpreted in alignment with South Africa's international obligations.[299] In this regard the provisions of the *LRA* to a great extent are influenced by international labour standards formulated and adopted at the International Labour Conference (hereafter ILC).[300]

A fundamental international labour standard is the employee's right to freedom of association contained in the *Freedom of Association and Protection of the Right to Organise Convention and Right to Organise and Collective Bargaining Convention* (fundamental Conventions).[301] The right to strike, inter alia, is inferred from these fundamental Conventions.[302]

[297] No. 66 of 1995.
[298] Preamble to the *LRA* and section 1 (b) of the *LRA*.
[299] Section 3 (a) of the *LRA*.
[300] Manamela and Budeli (2013) 314.
[301] ILO Conventions 87 and 93 of 1948.
[302] *Ibid*.

This chapter is a comparative study between South Africa, United Kingdom and Namibia in relation to the effect that picketing rules have on a strike and in curbing violent and prolonged conduct in strikes and considers as well the South African position in respect of the effect of picketing rules on violent and prolonged strikes. The chapter further provides an analysis of the labour laws in United Kingdom and Namibia with a particular focus on picketing rules and the effect they have on curbing violent and prolonged strikes. The chapter also explores aspects of the labour laws in United Kingdom and Namibia in relation to picketing rules that may be considered for adoption by the South African government to find out if existing picketing rules or the laws governing picketing in these countries indeed address the difficult issue of violence in strike actions. The chapter finally attempts to draw on the lessons, if any, to be learned from these countries which could assist South Africa to address violence during strikes or industrial action.

2. Picketing in the United Kingdom

Section 220(1) of the *Trade Union and Labour Relations (Consolidation) Act* 1992 (*TULR (c) A* 1992) provides for the possibility of a person in contemplation or furtherance of a trade dispute to attend at or near his workplace or if it is a union official at or near the members workplace to peacefully obtain or communicate information or peacefully persuade any person to work or abstain from working;[303] thus this provision allows picketing when it is in furtherance of a trade dispute. It is further worth noting that when the *TULR (c) A* 1992 was enacted picketing was not defined.[304] However, section 10 of the *Trade Union Act* 2016 (*TUR* 2016) introduced section 220A into the *TULR (c) A* 1992 which defined picketing as:

> as an attendance at or near a place of work, in contemplation or furtherance of a trade dispute for purpose of obtaining or communicating information; or persuading any person to work or abstain from working.[305]

[303] Section 220 (1) of the *TULR (c) A* 1992.
[304] Greaves *et al* (2017) 5.
[305] Section 220A (9) of the *TULR (c) A* 1992; Greaves *et al* (2017) at 1 -further defined as form of a demonstration which is commonly associated with strike action, where workers, representatives of the respective trade unions assemble at or near the employer's premises. See also in Barrow *et al* (2018) 463.

The definition introduced by section 10 of the *TUA* 2016 is similar to how picketing was understood before the introduction of section 220A (9) to the *TULR (c) A* 1992.[306] Pickets may attempt to blockade or stop suppliers from entering the workplace by persuading drivers to refuse to deliver which may result in a breach of contract and potentially in inducing a breach of commercial agreements.[307] It is recognised that it is legal to picket;[308] the law merely imposes limitations on how, where and for what purpose the picket is undertaken.[309]

Section 220A provides that the provisions of section 220 do not make lawful any picketing that a union organises or encourages its members to take part in unless the requirements in section 220A(2) to (8) are complied with.[310] Pickets have to comply with the provisions and requirements prescribed in section 220A of the *TULR (c) A* 1992 to be protected by law.[311] The requirements prescribed by the *TULR (c) A* 1992, *inter alia*, are that the picket must be in contemplation and or furtherance of a trade dispute, the picket must be peaceful and should occur solely at or near the workplace.[312]

A picket will be protected from liability only if it complies with the provisions of section 220 and 220A of the *TULR (c) A* 1992.[313] Violent and secondary pickets[314] result in the immunity being uplifted.[315] Section 220A of the *TULR (c) A* 1992 introduced several new provisions for unions to comply with before immunity could apply.[316] Unions are required to appoint a picket supervisor whose responsibility is to manage

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[306] Greaves *et al* (2017) 5. *News Group Newspapers Ltd v Society of Graphical and Allied Trades* (SOGAT) 1982 [1987] I.C.R. 181 at 213G-214B per Stuart Smith J.
[307] *Ibid*.
[308] Handmand and Leopold (1979) 158.
[309] Item 2 of the revised *Picketing Code*.
[310] Section 220A (1) of the *TULR (c) A*, 1992.
[311] Section 219 (3) of the *TULR (c) A*1992.
[312] Section 219 (3) and section 220 (1) (a) and (b), see also Barrow *et al* (2018) 463; and In *RMT v United Kingdom* [2014] IRLR 467 at para 19, the Court held that "the statutory protection against liability in tort regarding acts done in contemplation or furtherance of a trade dispute (section 219 of the 1992 Act) is confined, by section 244 of the same Act, to a dispute between workers and their employer*".*
[313] *Ibid,* and see item 4 of the revised *Picketing Code*. Please note that criminal law applies to pickets in the same manner it applies to everyone else. There is no exemption from criminal law provisions.
[314] Secondary picketing is picketing anywhere other than at an employee's own place of work. Secondary picketing is unlawful.
[315] Barrow *et al* (2018) 463.
[316] Section 10 of the *TUA* 2016. See also Barrow *et al* (2018) 463.

the picket line.[317] The functions of the picket supervisor are provided for in detail in the revised *Code of Practice (Picketing)*, *(*hereafter revised *Picketing Code*) which has been issued by the Secretary of State under section 2013 (2) of the *TULR (c) A*, 1992.[318] The union further is required to take reasonable steps to ensure that the police are aware and have been informed of the picket supervisor's full names, contact details as well as the location of the picket line.[319]

The picket supervisor is required by law to be present on the picket line or alternatively be contactable by the police or unions to attend the picket at short notice.[320] A picket supervisor further has to be in possession of a letter indicating that the picket is approved by the union.[321] He further is obligated to show the letter to the employer or agent on request as soon as it may be practically possible.[322] The supervisor further is required to wear a badge or armband so as to be easily identifiable.[323] Non-compliance with the provisions of section 220A of the *TULR (c) A*, 1992 results in the lifting of a statutory immunity on liability that applies in civil law proceedings.[324] It is a civil wrong which is actionable in civil Courts to persuade an employee to breach his employment contract or to be in breach of a commercial contract, however the law exempts those who picket in furtherance of a trade dispute from civil liability by way of special statutory immunities.[325]

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[317] Barrow *et al* (2018) 463 and item 13 of the revised *Picketing Code*.
[318] The *Code of Practice (Picketing)* Order 2017 No. 237; The Department for Business Energy and Industrial Strategy, Code of Practice, 2017 and Barrow *et al* (2018) 463.
[319] Section 220A (4) of the *TULR (c) A* 1992 and item 14 of the Picketing Code. This is important in circumstances where an issue arises which does not require the attention of the police but could benefit from the advice of the picket supervisor.
[320] Item 13 and 14 of the revised Picketing Code.
[321] Barrow et al (2018) 463, section 220A (5) and (7) of the *TULR (c) A*, 1992. Read with item 13 of the revised *Picketing Code*.
[322] Section 220A (6) of *TULR (c) A*, 1992.
[323] Section 220A (8) of *TULR (c) A*, 1992 and see also Barrow *et al* (2018) 463 ft 185 "Originally the Government proposed to legislate in order to limit general protests associated with strike action. The consultation document (Department for Business Innovation and Skills: Consultation on Tracking intimidation of Non-Striking Workers, July 2015), contained proposals to require trade unions to publish a plan of intended action in advance of any protest, to limit their use of social media, to inform the Certification officer of the picketing and protest activity and the creation of new criminal offence of intimidation. After widespread criticism this attempt at even tighter statutory control was abandoned."
[324] Section 220A (1) of the *TULR (c) A*, 1992.
[325] Item 3 of the revised *Picketing Code*.

The United Kingdom further has a *Picketing Code* in place which addresses the role of a picket supervisor in detail.[326] The next section discusses the provisions contained in the *Picketing Code* of the United Kingdom.[327]

2.1 The *Code of Practice (Picketing)*[328]

The United Kingdom previously had a *Code of Practice (Picketing)*[329] (the old *Picketing Code*) which was promulgated by the Secretary of the State in terms of section 3 of the *Employment Act* of 1980 and came into effect on 01 May 1992. This *Picketing Code* replaced the whole *Code of Practice on Picketing* issued under the same section in 1980.[330] In March 2017 a revised *Code of Practice on Picketing* (the revised *Picketing Code*) took effect. The *Picketing Code* was changed to include a new provision dealing with the appointment of a picket supervisor as a result of section 220A of the *TULR (c) A* 1992 which was included by section 10 of the *TUA* 2016.[331] The purpose of the revised *Picketing Code* is to provide practical guidance on picketing in relation to a trade dispute.[332] It does not impose any legal obligation and failure to observe it of itself does not render any party liable to proceedings,[333] however the provisions of the revised *Picketing Code* are admissible as evidence in Court.[334]

Statutory immunities provided in the *TULR (c) A* 1992 give trade union officials the power to organise pickets without the fear of being sued by employers for taking part in a picket.[335] However the protection applies only to acts of inducing a breach, interference with performance of a contract or a threat to do either of these things.[336] There are no exemptions for criminal conduct committed during a picket.[337] The enforcement of criminal law is the responsibility of the police and public authorities.[338]

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[326] *Code of Practice (Picketing)* 1992 as revised in March 2017 as a result of the inclusion of section 220A of the *TULR (c) A*, 1992, which was inserted by section 10 of the *TUA*, 2016.
[327] *Ibid.*
[328] *Code of Practice (Picketing)* 1992 as revised in March 2017.
[329] *Employment Code of Good (Practice)* Order 1992 S1 1992/476
[330] Explanatory note for Oder 1992 S1 1992/476.
[331] The *Code of Practice (Picketing)* Order 2017 No. 237.
[332] Item 1 of the revised *Picketing Code*.
[333] Item 8 of the revised *Picketing Code*.
[334] Item 8 of the Picketing Code.
[335] Greaves *et al* (2017) 2.
[336] Item 4 of the revised *Picketing Code*.
[337] Item 6 of the revised *Picketing Code* and see Greaves *et al* (2017) 2.
[338] Item 50 of the revised *Picketing Code*.

In *Thomas v NUM (South Wales Area)*[339] (hereafter *Thomas*) it was held that an employer and other private parties affected by picketing cannot in law rely on criminal wrongdoing in legal proceedings that they intended to bring against the trade union and its members.[340]

The revised *Picketing Code* deals with the appointment of a picket supervisor.[341] The appointed picket supervisor is either an official or a member of a trade union embarking on a strike.[342] The supervisor is expected to be fully aware and be cognisant of the provisions governing a picket, in order for him to advise on what constitutes a peaceful picket.[343] In terms of the revised *Picketing Code* the picket should be confined to a location or locations as near as practicable to the employer's premises.[344] The revised *Picketing Code* makes it clear that it provides protection only for peaceful communication and persuasion.[345] The law does not protect picketers whose conduct is unlawful, such as unlawful threats, assault (violence), harassment and trespassing on private property.[346]

2.2 Unlawful conduct during pickets

In *News Group Newspapers Ltd v Society of Graphical and Allied Trades (SOGAT)*[347] (hereafter *News Group Newspaper*) it was held that picketing *per se* is not unlawful, however certain actions of pickets may except those which are excused by law (immunities), involve the commission of one or more torts, or in more extreme circumstances criminal conduct.[348]

Picketing is unlawful in circumstances where there is a commission of torts which is not protected in terms of statutory immunities under the *TULR(c) A 1992*.[349] It is further unlawful to engage in conduct that induces a breach of contract which does not comply

[339] [1985] I.C.R. 886 at 906G per Scott J.
[340] *Ibid* at 906G.
[341] Item 9 of the revised *Picketing Code*.
[342] Item 12 of the revised *Picketing Code*.
[343] *Ibid.*
[344] Item 22 of the revised *Picketing Code*.
[345] Item 32 of the revised *Picketing Code*.
[346] *Ibid*. See also Greaves *et al* (2017) 2.
[347] 1982 [1987] I.C.R. 181.
[348] 1982 [1987] I.C.R. at 201C – E. See also Greaves *et al* (2017) 1.
[349] Greaves *et al* (2017) 1.

with the requirements for statutory immunity to apply.[350] The law protects only peaceful communication and persuasion for a person to work or not to work.[351] The law does not protect picketers from civil proceedings being brought against them for conduct that occurred during picketing which amounts to a civil wrong such as an unlawful threat or assault, harassment, obstruction of paths and road, the entrances and exit to premises and trespassing on private property.[352] The employer or any private party affected by such unlawful conduct is at liberty to institute legal proceedings against individual pickets and the trade union responsible for the picket line.[353]

Employers commonly seek the relief of an injunction to prevent or restrict unlawful picketing.[354] However, employers or private parties affected by the unlawful picket are at liberty to claim for damages caused by such an unlawful picket.[355] The Court is then faced with the challenge of considering the following key questions and issues in proceedings to obtain an injunction to restrain unlawful picketing:[356]

- What wrongdoings are being committed or likely to be committed during the picketing?
- If the wrongdoings only are inducing a breach of contract, is it in compliance with the *TULR (c) A*1992?
- If the picket contains wrongful conduct and it is not protected by statutory immunities, then who is responsible in law for the wrongful and unlawful conduct and in particular can a trade union be held responsible?
- Should an injunction be granted and what are the terms?

In *Gate Gourmet London Ltd v Transport and General Workers Union*[357] (hereafter *Gate Gourmet*) the Court stated that in consideration of the above questions the

[350] *Ibid* and Barrow *et al* (2018) 463.
[351] Item 32 of the revised *Picketing Code*.
[352] *Ibid.*
[353] Greaves *et al* (2017) 1 and Barrow *et al* (2018) 463.
[354] Greaves *et al* (2017) 2 and see Emir (2012) 643, where it refers to the *Newspaper Group Ltd* case where it was held that if there is an unlawful act committed by a trade union during a picket, an injured party may apply for an injunction in order to restrain the commission of the unlawful conduct and also claim damages for loss suffered. A trade union's defence could be only the statutory protections.
[355] *Ibid*.
[356] *Ibid* 5.
[357] [2005] EWHC 1889 (QB); [2005] I.R.L.R 881.

Courts have an obligation not to act in a way that may be incompatible with the right to picket under Article 10 and 11 of the *European Convention of Human Rights* (ECHR) and the need for limitations of the rights to be prescribed by law and which is necessary in a democratic society for one of the purposes specified in Article 10 (2) and 11 (2).[358] Wrongdoings in the course of picketing could be inducing a breach of contract,[359] a public nuisance (i.e., picketing on the highway),[360] a private nuisance,[361] intimidation,[362] harassment[363] etcetera.

The Courts further have an obligation to determine who will be held responsible for the conduct under tort in law,[364] if particular individuals are identified to have committed the acts, they will be held liable for their actions which may be restrained by an injunction (interdict) or order for damages or both.[365] However, it is indicated that it would be more beneficial and effective to the employer to establish that a trade union is responsible in law for the conduct during picketing,[366] because an injunction can be obtained against the trade union and the union will assist in enforcing the restrictions contained in the injunction and also it is beneficial in terms of a damages claim as opposed to a claim against individuals.[367] In *Kent Free Press v National Geographical Association*[368] (hereafter *Kent Free Press*), the Court held that the failure of a person to comply with an injunction amounts to contempt of court and a fine or imprisonment, or sequestration of property should be ordered.[369]

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[358] *Ibid* at par 22 and 26. Article 10 provides that everyone has the right to freedom of expression. Article 11 provides that everyone has the right to freedom of peaceful assembly and freedom of association with others. Articles 10 (2) and 11 (2) in essence provides that since the exercise of these freedoms carries with it duties and responsibilities, it may be subject to formalities, restrictions, conditions and penalties as prescribed by law and necessary in a democratic society, and among others for the protection of the rights and freedoms of others,

[359] In *OBG Ltd v Allan* [2008] 1A.C. 1 para 39 – 44 per Lord Hoffman, the Court held that picketing usually will involve the act of inducing breach of contract. See also Greaves *et al* (2019) 3.

[360] Obstruction of a highway which unreasonably affects the reasonable convenience of the public is a public nuisance. However not every highway obstruction will constitute a nuisance. See Greaves et al (2019) 3.

[361] In Greaves *et al* (2019) 3, a private nuisance is described as a situation where a landowner who has access to the highway from any part of his property is prevented from its use and interference with such a right is actionable as a private nuisance. It is interference with the enjoyment and use of one's property.

[362] In *News Group Ltd* at 204D, F-G per Stuart-Smith J, the Court found that there must be a serious threat which is taken seriously. Threats of violence inadvertently amount to tortuous intimidation.

[363] Greaves *et al* (2019) 3 stated that the conduct has to be oppressive and unacceptable.

[364] *Ibid* 5.

[365] *Ibid*.

[366] *Ibid*.

[367] *Ibid*.

[368] [1987] IRLR 267.

[369] Emir (2012) 659.

In light of the above it is clear that the law protects pickets which are in furtherance of a trade dispute, which are peaceful and for purpose of communicating or persuading a person not to work or to work and lastly to which a picket supervisor has been appointed.[370] On the other hand, conduct which is not protected by statutory immunities and which is committed during a picket is unlawful.[371] As a result the individual or trade union responsible for committing unlawful acts will be held liable either by being interdicted or by way of an order for damages or both. Failure to observe an injunction imposed has a consequence of a fine or imprisonment or sequestration.[372]

3. Picketing in Namibia

Namibia previously had a history of colonialism, racism and apartheid.[373] Namibia was under the control and administration of Germany between 1904 and 1919.[374] On 17 December 1920 South Africa was given the mandate governing the former German colony and assumed the administration of what had been German South West Africa.[375]

As in the case of South Africa, Namibia functions under the supremacy of the *Constitution*.[376] A fundamental labour related right evinced in Chapter 3 is the right against forced labour.[377] Other labour-related rights are stated as fundamental freedoms under Article 21 which sets out that all persons shall have the right to:

a) freedom of speech and expression, which shall include freedom of the press and other media;[378]

[370] Section 220 and 220A of the *TULR (c) A* 1992.
[371] Item 32 of the revised *Picketing Code*.
[372] *Ibid.*
[373] See Preamble of The *Constitution of the Republic of Namibia*, 1990.
[374] Ruppel, Oliver C. and Katharina Ruppel-Schlichting, "Legal and Judicial Pluralism in Namibia and Beyond: A Modern Approach to African Legal Architecture?" (2011) nrs 64 *Journal of Legal Pluralism* 33-63.
[375] *Ibid*.
[376] Sub-Article 1 (6) in The *Constitution of the Republic of Namibia*, 1990 provides that: This Constitution is the Supreme Law of Namibia.
[377] Article 9 in The *Constitution of the Republic of Namibia*, 1990.
[378] Sub-Article 21 (1) (a) in The *Constitution of the Republic of Namibia*, 1990.

b) assemble peaceably and without arms;[379] and
c) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties.[380]

These fundamental freedoms are not without limitation as they must be exercised subject to the laws operative in Namibia.[381] The law imposes reasonable restrictions on the exercise of the fundamental freedoms and the fundamental freedoms must be exercised subject to the applicable restrictions.[382]

The right to strike and the right to picket, although each is set out in different terms, clearly serve as fundamental rights and freedoms in Namibia.[383] In addition, these fundamental rights are constitutionally guaranteed to all persons in Namibia.[384] The Namibian *Constitution* prohibits the promulgation of any law that has the effect of infringing the above fundamental rights and freedoms.[385]

Labour and employment-related matters are contained in the *Labour Act* (2007 Act).[386] The purpose or objectives of the 2007 Act are as follows:

a) to entrench fundamental labour rights and protections;
b) to consolidate and amend the labour law;
c) to regulate basic terms and conditions of employment;
d) to regulate the registration of trade unions and employers' organisations; and
e) to regulate collective labour relations.[387]

The 2007 Act applies to all employers and employees, except those in protective services.[388] The 2007 Act re-affirms the employees' right to freedom of association under section 6 by providing that an employee may not be prejudiced for being a member of a trade union or for participating in the lawful activities of the relevant trade

[379] Sub-Article 21 (1) (d) in The *Constitution of the Republic of Namibia*, 1990.
[380] Sub-Article 21 (1) (e) in The *Constitution of the Republic of Namibia*, 1990.
[381] Sub-Article 21 (2) in The *Constitution of the Republic of Namibia*, 1990.
[382] *Ibid.*
[383] *Ibid.*
[384] *Ibid.*
[385] Sub-Article 25 (1) in the *Constitution of the Republic of Namibia*, 1990.
[386] *Labour Act* 11 of 2007.
[387] See Preamble of the *Labour Act*.
[388] Sub-section 2 (1) – (2) in the *Labour Act* 11 of 2007.

union.[389] The employees' right to strike and employers' right to a lock-out as well as the right to picket in furtherance of strike and the prescribed procedures are contained in Chapter 7 of the 2007 Act.

The 2007 Act does not define a picket,[390] it merely provides that an employee or members or officials of a union may hold a picket in furtherance of a strike for purposes of communicating information as well as persuading any individual not to work.[391] This picket may be held at or near the place of employment.[392] A picket must meet certain requirements.[393] It has to be peaceful;[394] a violent and intimidating picket is not in compliance with the 2007 Act.[395] A picket has to advance the course of the strike and be to persuade individuals not to attend work.[396]

In *Navachab Joint Venture t/a Navachab Gold Mine v Mineworkers Union of Namibia & others*[397] (hereafter *Navachab Joint Venture*) Strydom JP stated that those who embark on a picket must be able to and be in a position to give effect to the stated objects. He further reiterated that a picket's major justification is furthering the right to freedom of speech and peaceful protest.[398]

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[389] Section 6 in the *Labour Act* 11 of 2007 provides as follows:

"***6 Freedom of association***

(1) A person must not prejudice an employee or an individual seeking employment because of past, present or anticipated-

(a) exercise of any right conferred by this Act, any other law, contract of employment or collective agreement;

(b) disclosure of information that the employee or individual seeking employment is entitled or required to give in terms of this Act or any other law;

(c) failure or refusal to do something that an employer must not lawfully permit or require an employee to do;

(d) membership of a trade union; or

(e) participation in the lawful activities of a trade union-

(i) outside of ordinary working hours; or

(ii) with the consent of the employer, during working hours."

[390] Parker (2012) 237.

[391] Sub-section 76 (2) in the *Labour Act* 11 of 2007, Parker (2012) 237.

[392] *ibid*.

[393] Parker (2012) 237.

[394] *Ibid*.

[395] *Ibid* 237- 238.

[396] *Ibid* 238.

[397] 1995 NR 225 (LC).

[398] *Ibid* at 229 G – H.

Picketing on a highway, railway, runway and any other transport facility would constitute a trespass.[399] A picket on public transport facilities is likely to interfere with the flow of transport facilities and their proper functioning.[400] A picket must be conducted in such a way that it does not contravene the rights that are guaranteed in the *Constitution.*[401] Violence in picketing equally is unlawful and is in contravention of the right to picket.[402]

In *Navachab Joint Venture*[403] the applicant and respondent had a dispute and as a result the respondents called a strike. The applicant sought an order to interdict and restrain the respondents from being inside the fenced in operational area to the mine during the strike and restricting the designated area of picketing to be outside the entrance and exit of a fenced area. The Labour Court referred to three English cases[404] in an attempt to interpret the phrase 'at or near' the employer's premises. One of the three cases it referred to is *British Airports Authority v Ashton and others*[405] (hereafter *British Airports Authority*) where the Court considered the phrase and stated that it does not confer a right to picket on land against the will of the owner;[406] it would be absurd if the legislature had intended that such a right be implied.[407] Strydom JP concluded that in view of the cases referred to above and the comments given by writers on the interpretation of the phrase, pickets took place and were understood to have taken place outside the employer's premises.[408] Therefore, the introduction of the phrase in legislation does not change that pickets take place outside the employer's premises.[409] The phrase, in his opinion, emphasises and strengthens the

[399] Parker (2012) 238.
[400] *Ibid.*
[401] *Ibid*.
[402] *Ibid.*
[403] *Navachab Joint Venture t/a Navachab Gold Mine v Mineworkers Union of Namibia & others* 1995 NR 225 (LC).
[404] *Broome v DPP* (1974) 1 All ER 314 (CA); *LARKIN v Belfast Harbour Commissioners* (1908) IR 214; *British Airports Authority v Ashton and others* [1983] 3 All ER 6 (QB). These cases dealt with the interpretation of the word 'at or near'. It was found that the words do not confer a right on picketers to attend on land against the will of an owner.
[405] [1983] 3 All ER 6 (QB).
[406] *Ibid* at par 13 – 1 and Parker (2012) 238.
[407] *Ibid*.
[408] *Navachab Joint Venture* at 231 B-C, and Parker (2012) 238.
[409] *Ibid.*

meaning given to picketing, because the general grammatical meaning of the phrase does not mean 'on the premises' or 'within' the employer's premises.[410]

It is submitted that the requirement of how, where and when pickets take place constitutes a measure to ensure that pickets are peaceful and is an attempt to avoid violence in strikes. It is further submitted that if strike rules are adhered to violence is less likely to occur.

3.2 The *Code of Good Practice on Picketing*[411]

The purpose of the *Code of Good Practice on Picketing* (the *Code*) is to provide practical guidance on a picket in support of a protected strike or in opposition to any lock-out.[412] The *Code* recognises that Article 21 of the *Constitution* makes provision for the right to peaceful assembly, to demonstrate, to picket and to present petitions.[413] It emphasises that the right has to be exercised peacefully and when one is unarmed.[414] The 2007 Act seeks to give effect to this constitutionally- entrenched right to picket in support of a protected strike or lock-out.[415]

The *Code* imposes no legal obligations and as a result a failure to adhere to the provisions does not render anyone liable to proceedings.[416] The 2007 Act states that when interpreting and/ or applying the Act one must take into account the *Code* when establishing picketing rules.[417] It further is noted that the *Code* applies only to pickets held in terms of section 76 (2) of the 2007 Act.[418]

The *Code* places an emphasis on the basis that the picket ought to be a peaceful demonstration in support of a protected strike or lock-out.[419] It further stipulates that a picket may be held in a public place or on the premises of the employer if the

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[410] *Ibid*.
[411] Government Gazette of the Republic of Namibia No. 4361. It is issued in terms of section 137 of the *Labour Act No*. 11 of 2017.
[412] Item 1 (a) of the *Code*.
[413] Item 1 (b) of the *Code*.
[414] *Ibid*.
[415] *Ibid*.
[416] Item 1 (c) of the *Code*.
[417] Section 137 (3) of the *Labour Act*, and Item 1 (c) of the *Code*.
[418] Item 1 (d) of the *Code*.
[419] *Ibid*.

permission of the employer has been obtained.[420] The *Code* further states that a registered trade union and employer should seek to conclude a collective agreement to regulate a picket during strikes or lockouts.[421] The *Code* also outlines the issues that ought to be addressed in the agreed picketing rules.[422] This position is similar to the position in South African law.

A trade union is required to appoint an official to oversee the picket and has to inform the employer accordingly.[423] The appointed official in terms of sections 74 to 75 of the 2007 Act has to be in possession of a copy of the collective agreement and of the set of rules that regulate such a picket.[424] The employer, on the other hand, is required to appoint a person who will represent them in any dealings or issues arising from being picketed.[425] Also, the union is required to appoint a representative to monitor the picket.[426]

Picketers are not allowed to physically prevent members of the public, fellow employees, service providers and customers from gaining access to the employer's premises.[427] The picketers are prohibited from committing any conduct that is unlawful or which may be perceived to be violent.[428] It is clear from the *Code* that the role of the police is not to enforce the 2007 Act, save for section 79 (2) or 117 (2) (b).[429] The duty of the police is to uphold the law and not to get involved or assess the merits of what gave rise to the strike or lockout.[430] The police will enforce criminal law.[431]

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[420] *Ibid*.
[421] Item 3 (a) of the *Code*. This is similar to the position in South Africa. The *LRA* encourages the employer and unions to conclude a collective agreement that agrees on picketing rules and/ or in the absence of an agreement on picketing rules for the conciliating commissioner to impose default picketing rules contained in the Code and the Picketing Regulations.
[422] The issues among others are the authorisation of the picket by a trade union, notice of commencement of the picket, the place, time and the extent of the picket, the nature of the conduct in the picket, the number of picketers and their location, modes of communication between the employees' representatives and the employer, provisions of the Code and access to the employer's premises to make use of the toilets.
[423] Item 4 (a) of the *Code*.
[424] *Ibid*.
[425] Item 4 (b) of the *Code*.
[426] Item 4 (c) of the *Code*.
[427] Item 4 (f) of the *Code*.
[428] *Ibid*.
[429] Item 5 (c) of the *Code*.
[430] Item 5 (b) of the *Code*.
[431] Item 5 (d) of the *Code*.

3.3 Unlawful conduct during pickets

A Labour Court may be approached by any party for an urgent interdict against a strike, picket or lock-out that is not compliant with the provisions of the 2007 Act.[432] However, the applicant seeking such an urgent interdict must give notice in writing to the respondent of the intention to obtain an interdict together with the documents relevant to the matter.[433] Thereafter the applicant must serve a copy of the interdict application on the Labour Commissioner and the respondent.[434] The respondent must be provided with a reasonable opportunity to be heard prior to any order being made.[435] No urgent interdictory order may be granted in the absence of compliance with the above provisions.[436]

In terms of subsection 117 (2) (b) of the 2007 Act the Labour Court has the power to request the inspector general of the police to give a situation report on any danger to life, health or safety of persons arising from any strike or lockout. Before making an interdictory order the Labour Court may request that a police report be furnished in respect of any danger ensuing during a strike or lock-out.[437]

In *Prime Minister & Others v Namibia National Teachers Union & Others*[438] (hereafter *Prime Minister & Others*) the applicant filed an urgent application to interdict the trade union members from engaging in industrial action and to have a decision that was taken by the conciliator in relation to the strike rules and the distance within which picketing in support of the industrial action was scheduled set aside.[439] The Court held that section 76 (2) of the 2007 Act requires picketing to take place at or near the employer's premises in order to communicate information and to persuade other employees not to attend work.[440] The distance that was prescribed by the conciliator was 500 meters from the employer's premises. The Court held that the applicant in this regard failed to tender evidence to show cause that the decision of the conciliator

[432] Sub-section 79 (1) in the *Labour Act* 11 of 2007.
[433] *Ibid.*
[434] *Ibid.*
[435] *Ibid.*
[436] *Ibid.*
[437] *Ibid.*
[438] (LC 151/2015) [2016] NAHCMD 41 (21 October 2016).
[439] *Prime Minister & Others* par 5 and 6.
[440] *Ibid* 70 to 74.

in relation to the prescribed distance was unreasonable and irrational. As a result the Court ordered the decision of the conciliator should stand.[441]

In conclusion, the Court held that section 117 (2) (b) of the *Labour Act* has invested powers in the Labour Court to elect whether to request the Inspector General to give a situation report on any danger to life, health or safety of persons arising from a strike or lock-out.[442] This request has to be based on facts or information suggesting that such an action is necessary and required.[443] The Court emphasized that the Act is clear that only the Court has the right to call for such a report and not any other party.[444] The Court reaffirmed that the function of the police is to facilitate and not to enter into questions regarding the merits of the strike.[445] The application was dismissed.[446]

In Namibia pickets must be peaceful and in furtherance of a protected strike to be protected by law. Pickets must communicate information or be to persuade any individual not to work and may be held at or near the place of work. It is clear that a violent picket is not in compliance with the 2007 Act. The *Code* provides a practical guideline on pickets which are in support of a strike or opposing any lock-out. It is noted above that the *Code* imposes no legal obligations. The *Code* promotes that the employer and union conclude a collective agreement regulating a picket and the issues that must be agreed to in picketing rules. An official of a trade union must be appointed to oversee the picket and an employer must appoint a representative. Unlawful conduct during picketing is prohibited by law; violent conduct during picketing which is in furtherance of a strike is prohibited. The guidelines in the *Code* and requirements as contained in the 2007 Act are an attempt to address and to curb violent conduct during strikes and / or pickets which are in furtherance of a strike. The Labour Court has the power to elect whether to request the Inspector General to give a situation report on a danger to life, health and security of a person.[447] In short, the law prohibits violent conduct during picketing.

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[441] *Ibid.*
[442] *Ibid* par 92, and section 117 (2) (b) of the *Labour Act*.
[443] *Prime Minister & Others* par 92.
[444] *Ibid.*
[445] *Ibid* para 92 to 94.
[446] *Ibid* para 95 and 96.
[447] *Prime Minister & Others* at par 92.

3.4 Conclusion

Picketing is recognised as a lawful action both in United Kingdom and in Namibia. In the United Kingdom sections 220 and 220A of the *TULR (c) A* 1992 govern pickets. It is clear from legislation that pickets must be in furtherance of a trade dispute and be at or near the employees' place of work. A picket will be lawful only if it complies with the requirements set out in section 220A (2) to (8). A picket supervisor must be appointed to supervise the picket. The functions of the picket supervisor are detailed in the revised *Picketing Code*. This is an important measure to guard against unlawful conduct occurring during pickets which are to further a trade dispute. In circumstances where unlawful conduct is committed, the Courts are amenable to order an injunction to restrain such unlawful conduct and enforce compliance with injunctions obtained to restrain or interdict violence or unlawful conduct during a picket in furtherance of a trade dispute.[448] The *Kent Free Press* case is very clear on this aspect; it was held that failure to comply with an injunction amounts to contempt of Court and a fine or imprisonment or the sequestration of property should be ordered.

The Namibian *Constitution*, the *Labour Act* 2007 and the *Code* to an extent are similar in their provisions to the *LRA* and the *Code of Good Practice: Collective Bargaining, Industrial Action and Picketing*[449] (hereafter the new *Code*) governing picketing in South Africa. In Namibia as in South Africa the picket must be a peaceful demonstration; in effect the law prohibits violence during picketing. Section 11 (7) of the *Labour Act* 2007 empowers the Namibian Labour Courts to request the Inspector General to provide a situation report on any danger to life, health and safety of person, the power to request a situation report vests only in the Courts.

The *TULR (c) A 1992* and revised *Picketing Code* in Britain emphasises the role of a picket supervisor or monitor and the responsibilities of such an official. It is submitted that this measure needs to be incorporated into the South African *LRA* and the new *Code* providing a guideline on pickets.

[448] Emir (2012) 659 and *Kent Free Press* at para 23.85.
[449] Government Gazette 42121 of 19 December 2018.

In South Africa interdicts often are obtained against violent conduct in strikes and to order compliance with the picketing rules agreed upon. The issue that is of concern is that such orders simply are ignored.[450] The obtaining of interdicts has not had the effect of reducing strike violence. I submit that the Labour Courts in South Africa should not be hesitant in issuing contempt of Court orders in circumstances where there is non-compliance with an interdict of violent conduct during picketing in furtherance of a strike. Fines, imprisonment and sequestration of property should be ordered, as in the *Kent Free Press* case mentioned above.

The *Labour Relations Amendment Act*[451] (hereafter *LRAA,* 2018) was enacted to address the issue of violent and prolonged strikes. The question is whether the amendments made to the picketing rules have an effect in curbing violent strikes; any effect remains to be seen.

[450] Myburgh (2013) 2.
[451] Act No. 08 of 2018.

CHAPTER 5

Conclusion and recommendations

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1. Conclusion

As indicated in this study, the right to strike is constitutionally entrenched and as with any other right it may be limited if it is reasonable and justifiable to do so.[452] The *Labour Relations Act*[453] (hereafter *LRA*) gives effect to the right that is entrenched in the Constitution and is recognised to be a fundamental right by the International Labour Organisation (hereafter ILO).[454] The ILO Conventions 87 and 98 do not have a specific provision on the right to strike;[455] the right is simply inferred from these Conventions. In addition to the right to strike in the *Constitution* and the *LRA*, section 17 of the *Constitution* grants everyone the right to assemble, demonstrate, picket and present petitions.[456] The *Constitution* limits these rights by providing that these actions take place peacefully, with those taking part being unarmed. Despite our progressive legislation and the *Constitution* making it abundantly clear that violent conduct is unlawful during a strike and during a picket in support of a strike, South Africa suffers from violent strikes.

The purpose of this study was to examine the amendments to the *LRA* brought about by the *Labour Relations Amendment Act*[457] (hereafter *LRAA* 2018) with a focus on the amendments to picketing rules and the effect they have on violent strike actions. The significant part of this dissertation is to evaluate the amendments to section 69 of the *LRA,* the *Code of Practice: Collective Bargaining, Industrial Action and Picketing* (hereafter new *Code*), and the new *Picketing Regulations* issued in terms of section 208 of the *LRA*. This evaluation was carried out with a view ultimately to answering

[452] Section 23 (2) (c) of the *Constitution of the Republic of South Africa* and Grogan (2017) 405.
[453] Act No. 66 of 1995.
[454] Section 64 (1) and section 213 of the *LRA*.
[455] ILO Conventions 87 and 98 of 1948.
[456] Sections 17 and 23 of the *Constitution of the Republic of South Africa* and section 64 (1) of the *LRA*
[457] Act No. 08 of 2018.

the questions set out in chapter 1 of this dissertation, the main question being whether these amendments will contribute to or will curb violent conduct in strikes.

In demonstration of the underlying reasons for violent strikes, the study looked into the Marikana massacre that occurred in 2012. It established that several of the workers active in the strike experienced socio-economic pressures common among migrant workers as well as the poor living conditions in mining communities.[458] The high levels of unemployment and poverty are a contributory factor in the violent and prolonged strike actions that occur in South Africa.[459] In most instances the strikes that occur relate to wage increase negotiations.

Jacob is of the view that our labour legislation should take into account the broader socio-economic and political reality that South Africa faces.[460] Ngcukaitobi too is of the view that socio-economic challenges are the underlying reason behind violent and prolonged strikes.[461]

I agree with Ngcukaitobi in this regard, as well as the opinion that the legality of a strike is insignificant to a striking employee. The study found that the underlying reasons for violent strike action to an extent are the high levels of unemployment and of poverty and other socio-economic pressures. According to Jacob, labour law cannot provide the solution to the understandable needs of workers and in reality workers often direct their frustrations and their demands of a better life at the employer.[462] I agree with Jacob that labour law is not the only solution to fulfilling the demands of workers. It is submitted that labour legislation should take into account the broader socio-economic situation and the political reality that faces South Africa.[463]

Rycroft is of the view that the Labour Court has the power to declare a protected strike to be unprotected as a consequence of violence occurring during a strike and in doing so the Court may rely on the functionality test. To the contrary, Fergus is of the view

[458] See Chapter 2 para 3 above.
[459] Cheadle *et al* (2018) 33.
[460] *Ibid* and see Chapter 2 par 3 above.
[461] See Chapter 2 par 3 above.
[462] See Chapter 2 par 3.
[463] *Ibid*.

that the Courts should not rely on the functionality requirement as it is problematic. She is of the view that changing the status of the strike amounts to a limitation of the right to strike and is undesirable. I agree with Rycroft and Fergus to the extent they indicate there is a need to address violent conduct during strikes in South Africa. However, with Fergus I hold the view that in relying on the functionality test the Labour Court faces practical difficulties. What extent or degree of violence will persuade the Courts to alter a protected strike to having an unprotected status? I am of the view that the action of altering the protected status of a strike is a limitation of the Constitutional right to strike, which has to be justified in terms of section 36 of the *Constitution*. The other consideration is how to balance the right to strike and the right to freedom and the security of a person. Myburgh's article[464] indicates that the *Constitution* does not have a hierarchy of rights and he therefore questions the right to strike being allowed to trump the right to the security of a person is critiqued.

In view of the above, I agree with the view that the Labour Court should consider an alternative solutions as opposed to relying on the functionality test to alter the status of a protected strike. An alternative the Court may consider is suggested by Van Eck and Kujinga. They are of the considered view that the Court should emphasise existing alternative remedies.[465] They indicate that if picketing rules had been agreed upon the employer would have valid arguments to advance in the event there is a threat of violent strike action.[466] Another option the Court may consider is advanced by Myburgh to the effect that a violent strike does not fulfil the definition of a strike stipulated in section 213 of the *LRA*.[467]

In assessing the amendments to section 69, the dissertation found that the most significant change introduced by the *LRAA*, 2018 is that picketing rules ought to be in place prior embarking on a picket in support of a protected strike.[468] In the absence of an agreement on picketing rules the conciliating Commissioner ought to impose default picketing rules outlined in the new *Code* and the new *Picketing Regulation*.[469] Prior to the amendments the Commission for Conciliation Mediation and Arbitration

[464] Myburgh (2018) 723 -724.
[465] Van Eck and Kujinga (2017) 14.
[466] *Ibid*.
[467] Myburgh (2018) 724.
[468] See Chapter 3 par 2.2 above.
[469] *Ibid* par 2.2 to 3 above.

(hereafter the CCMA) could facilitate the process of securing an agreement between the parties to the dispute on picketing rules only when requested to do so by the employer or the unions.[470] In the absence of a collective agreement or an agreement on the picketing rules secured by the conciliating Commissioner, the amended section 69 requires the conciliating Commissioner to establish picketing rules in terms of default picketing rules contained in the new *Picketing Regulations* issued in terms of section 208 of the *LRA* or the new *Code*.[471] The amended section 69 further provides the Courts with the power to suspend pickets at one or more of the locations designated in the collective agreement or agreed rules or rules determined by the CCMA if it is justifiable to do so.[472] This is a stringent measure and may put pressure on a union and its members not to engage in violent conduct on pickets in furtherance of a strike. This possibility was demonstrated in the *Dis-Chem* case discussed in detail in chapter 3 in this study.

The new *Code* is a practical guideline to picketing. The new *Code* in no uncertain terms sets out the type of conduct that is allowed during picketing. The new *Picketing Regulations* further assist unions and the employer as to what is expected of them during pickets. It serves as a legal instrument to regulate pickets and to guide the conciliating Commissioner on the issue of determining picketing rules.

Lastly, the study looked into whether there are lessons to be learnt from other countries with a particular focus on pickets and the effect they have on strikes and on limiting violent and prolonged strikes. The study looked into whether there are provisions which govern pickets in other countries that South Africa could incorporate in the *LRA* and the new *Code* that would curb violent strikes. It is clear from the consideration of United Kingdom and Namibian legislation and case law that unlawful conduct in picketing is prohibited.[473] In both countries the law affords an employer an opportunity to approach the Courts for an urgent relief interdicting unlawful conduct committed during a picket and which is not protected by statutory immunities provided in law.[474] It is clear from the law in the United Kingdom that failure to observe an interdict by

[470] *Ibid* par 2.1 above.
[471] See chapter 3 par 2.2 above.
[472] Section 69 (12) of the LRAA, 2018, and see chapter 3 above at par …
[473] See chapter 4 par 2 and 3 above.
[474] See chapter 4 par 2.2 and 3.3 above.

picketers can result in a contempt of Court order being granted. A fine imprisonment or sequestration of property may be ordered, as was demonstrated in the *Kent Free Press case*[475]

In Namibia section 117 (2) of the *Labour Act*, 2007 empowers the Courts to request an Inspector General of the police to give a situation report on the danger to life, health and safety of persons arising from strike or lock-out. The Courts have a discretion to call for this report; it is not up to the parties in the dispute to call for the situation report.[476]

It is my considered view that the amendments to section 69 will have little effect in curbing violent strikes. The amendments to the *LRA* cannot be the only solution adopted to curb violent strikes. I submit that the amendments were introduced in an attempt to keep pickets in support of a strike action peaceful and free of violence however the effect is yet to be seen. The amendment to section 69 (12) will have little effect on curbing violent strikes. The provision affords the Court the power to suspend a picket at one or more locations as agreed to in a collective agreement, or picketing rules.[477]

2. Recommendations

I recommend that the *LRA* and the new *Code* should incorporate a provision such as in section 220A of the *TULR (c) A* 1992 which requires the unions embarking on a picket in furtherance of a strike to appoint a picket supervisor who is familiar with the provisions of the *Picketing Code;* the name of the picket supervisor, the location of the picket, and how to the contact the supervisor should be provided to the police.[478] Our new *Code* should be amended to introduce a provision that a picket supervisor should be provided with a letter stating that the picket is approved by the union.[479]

[475] See chapter 4 par 2.2 above.
[476] See chapter 4 par 3.3 above.
[477] See chapter 3 at par 2.2 above.
[478] Section 220A (4) (a) – (c) of *TULR (c) A* 1992.
[479] Section 220A (5) of *TULR (c) A* 1992.

South Africa should incorporate into the *LRA* the provision in the Namibian *Labour Act* which empowers the Labour Courts to request a situation report on any danger to life, health and safety of persons during a picket.

The failure by trade unions to comply with Court interdicts should have severe consequences; the Labour Court should not hesitate to issue contempt of Court orders in circumstances where a union and its members disobey a court order interdicting violent conduct and should order imprisonment or the sequestration of property as in the United Kingdom. [480]

Faced with a dispute whether to interdict violent conduct during a strike, instead of altering the protected status of the strike, the Labour Courts should look into alternatives already available in law. I recommend the Court to consider the alternatives suggested by Van Eck and Kujinga; if picketing rules have been agreed on, an employer has valid arguments to advance in the event there is a threat of violent strike action.[481] I recommend that the Court should consider the argument that a violent strike does not comply with the definition stipulated in section 213 of the *LRA* and as a result interdict the violent strike.

I recommend that in the future the social partners at NEDLAC should reconsider amending the *LRA* specifically to empower the Labour Court to interdict a strike on account of violence. The amendment should incorporate a provision that the strike be suspended until such time that the union establishes its resumption will be peaceful.

I further recommend that the South African government and social partners collectively engage in addressing the broader socio-economic challenges that are the underlying reason for violent strikes.

[480] *Kent Free Press* case.
[481] Van Eck and Kujinga (2017) 14.

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