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The roles of risk and of a perceived sense of injustice in union members' decision to participate in unprotected strikes

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447859

A research project submitted to the Gordon Institute of Business Science, University of Pretoria, in partial fulfillment of the requirements for the degree Master of Business Administration.

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ABSTRACT

Kelly's mobilization theory does not provide for the role of any cost/risk analysis as part of the process of deciding to embark upon collective action. On the other hand the theories advanced by the like of McAdam, Wiltfang and Simmons considering the incorporation of a cost/benefit analyses as part of the decision to embark upon collective action, do not have regard to the development of a sense of injustice. This study harmonizes the two approaches in seeking to answer the question why employees engage in unprotected strikes considering the significant risk involved. In doing so the study identifies the kind of triggers that would induce such a sense of injustice to trigger participation in unprotected strikes, whilst also investigating whether participants in unprotected strikes actually moderate their conduct to decrease the risks of such participation.

This study considered all 98 reported judgements of the Labour Court and the Labour Appeal Court that were reported by LexisNexis. The methodology used in this study was content analysis of a quantitative nature. Descriptive statistics were used to identify patterns, relationships and trends.

The analysis of the reported judgements shows that procedural disputes involving single issues at single employers, arising from time-sensitive unilateral changes to workplace practices, are likely to trigger unprotected strikes. The study further demonstrated that employees participating in unprotected strikes and their trade unions actually moderate their conduct to decrease the risk of dismissal. A close relationship between the profound sense of injustice that triggers unprotected strikes and the decisions to moderate the risks were established.

KEYWORDS

Unprotected strike
Injustice
Risk

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DECLARATION

I declare that this research project is my own work. It is submitted in partial fulfilment of the requirements for the degree of Master of Business Administration at the Gordon Institute of Business Science, University of Pretoria. It has not been submitted before for any other degree or examination in any other University. I further declare that I have obtained the necessary authorisation and consent to carry out this research.

Mien-Mariè Reyneke

14th January 2015

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1. CHAPTER 1: INTRODUCTION TO RESEARCH PROBLEM

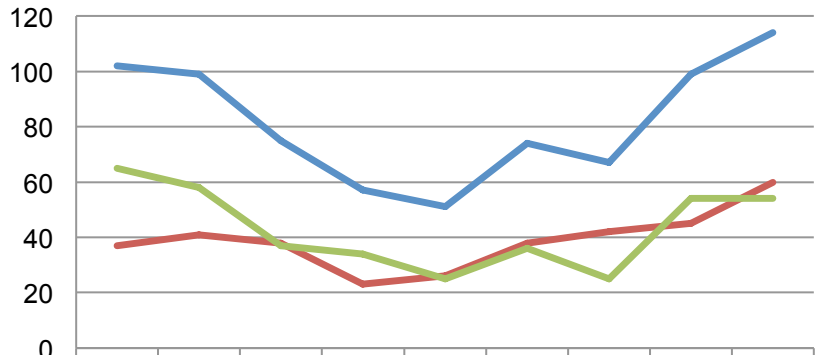
1.1. Research title

The roles of risk and a perceived sense of injustice in union members' decision to participate in unprotected strikes

1.2. Research problem

According to the Annual Industrial Action Report released by the Department of Labour, South Africa experienced 114 industrial action incidents during 2013, amounting to a loss of 1 847 006 working days and approximately R6.7 billion in wages. 52% of the strikes were unprotected, an increase of 6% from 2012 (Department of Labour, 2013). This increase in the number of unprotected strikes as well as the increase in comparison to the number of protected strikes confirms a trend that has manifested itself since 2008, as depicted in Figure 1 below, constructed from data obtained from the Department of Labour (2013) and Teke (2014).

Figure 1 - Protected and unprotected strikes in South Africa spanning the period 2005 – 2013



	2005	2006	2007	2008	2009	2010	2011	2012	2013
Total strikes	102	99	75	57	51	74	67	99	114
Unprotected strikes	37	41	38	23	26	38	42	45	60
Protected strikes	65	58	37	34	25	36	25	54	54

These statistics raise the question: why do employees engage in unprotected strike action when it involves considerable increased risks, whilst it is relatively easy to comply with the procedures to render the strike protected and thereby greatly diminish the risks of participation?

At its most elementary level, collective action consists of two or more individuals acting jointly in the pursuit of a common goal, often in the joint belief that their concerted action will enhance the prospects of successfully achieving their objective (Snow, Soule & Krieski, 2004).

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Strikes are a species of collective action and is defined in the Labour Relations Act (South Africa, 1995) as:

> … the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory. (p.120-121)

The mobilization theory (MT) as derived from the study of social movements (SM) and adopted by Kelly (1997, 1998) from Tilly's (1978) collective action theory is the generally accepted basis for explaining and understanding collective action in the context of industrial relations.

According to Tilly's (1978) collective action theory any collective action, whichever form it may take, reflects the participants' ability to act collectively as determined by the combination of interest definition, organization, mobilization and opportunity.

Kelly (1997, 1998) enhanced Tilly's mobilization model and specifically the element of interest definition, by dealing with the processes through which individuals become part of a collective with shared grievances, articulate the grievances as claims/demands, and establish the collective belief that the claims/demands can be enforced through collective action.

Kelly (1998) identified the central issues of industrial collective action as being:

> …first, how do individuals acquire a sense of a collective grievance, as opposed to individual grievance? Second, how, and under what conditions, do individuals organise collectively to pursue their collective grievances (or interests more broadly defined)? Third, how, and under what conditions, will such individuals take such collective action…? (p.24).

Kelly (1997, 1998) was emphatic in stating that a sense of injustice constituted the sine qua non for collective action. The research of Buttigieg *et al.* (2008) provided support for the use of MT as a theory to explain collective action and confirmed Kelly's (1998) argument regarding the centrality and importance of a sense of injustice for the

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mobilization of workers. The research by Johnson and Jarley (2004) also confirmed this.

Kelly (1997, 1998) relied on McAdam's (1988) model of collective action, according to which a sense of injustice comes into being when people are "cognitively liberated" from a previously held belief in the legitimacy of the status quo. Mere dissatisfaction with the status quo would not be sufficient for as long as the event/action/situation is perceived as fair or unavoidable. According to Kelly (1997, 1998) "cognitive liberation" will occur when a person becomes convinced that an event/action/situation is "unjust" or "illegitimate".

Several scholars have endeavoured to identify and describe the nature and kind of perceived injustices that would galvanize a group of people into collective action. The answer hereto is of even greater relevance in identifying the injustices that would mobilize workers to participate at considerable risk to them, to participate in unprotected strikes. Snow and Soule (2010) argue for "mobilizing grievances" as a particular kind of grievances, which are shared amongst individuals and considered sufficiently serious to justify not only a collective complaint but also "some kind of corrective, collective action" (p.24). Johnson and Jarley (2004) suggested in the context of industrial relations that collective action is in the final instance triggered by perceptions of workplace injustice, stemming from the conduct of management that lacks moral defensibility as opposed to mere dissatisfaction. Snow, Cress, Downey and Jones (as cited in Simmons, 2014) endeavour to be more specific by stating that "the disruption of the daily order of things" (p.529) rather than the "suddenness" of grievances that triggers collective action. None of these efforts at categorisation seek to identify workplace specific injustices that could be identified as mobilising grievances.

The mere existence of mobilising injustices does not offer a complete explanation of why individuals are willing to partake in strikes, whether protected or not. Tilly (1998) assumed that once individuals regard themselves as belonging to a group with collective interests, the ability to mobilize the group into embarking upon collective action would depend on definitions of interests, the degree of organization and the costs and benefits of taking action. McAdam's (1988) model of collective action also identified cost-benefit calculations as the key intervening variable between the perceived injustice and the collective action. This "rational choice" approach suggests that workers would, before deciding whether to participate in collective action, first weigh the costs and benefits of participation against the injustices that members intend to redress through participation (Johnson & Jarley, 2004).

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Kelly (1998) preferred Klandermans' value-expectancy theory, which suggests that members would participate in collective action if they place a high premium on the goal and believe that their participation in the collective action will contribute to its success. This accords with Kelly's (1998) suggestion that a workplace injustice would give rise to collective action when it is framed as being capable of rectification through collective action.

Kelly (1998) distinguished between three kinds of personal costs and benefits (goal, social and reward motives), which are considered by individuals in deciding whether to engage in collective action. The last of these categories (reward motives) refers to the personal consequences of participation weighed against the perceived benefits of successfully addressing the injustice. According to Kelly the individual's willingness to participate in collective action is said to be a weighted sum of these three motives.

In the context of the cost/benefit comparisons "cost refers to the expenditure of time, money, and energy that are required of a person engaged in any particular form of activism" whereas "risk refers to the anticipated dangers – whether legal, social, physical, financial and so forth – of engaging in a particular type of activity" (McAdam, 1986, p.67).

These approaches are all based on the premise that rational and deliberated decisions are made by the individuals as to whether they should participate in the collective action. In the context of deciding whether to participate in strike a rational and deliberated approach would entail minimizing the costs and risks of participation. One of the obvious and most significant ways to minimize the risk of participation would be to ensure that the strike is protected.

Engaging in an unprotected strike as opposed to a protected strike carries considerable risks. In terms of the Labour Relations Act workers who participate in protected strike action enjoy immunity from interdicts, civil claims or dismissal, provided they do not commit any unlawful acts and are allowed to picket peacefully, with the only significant costs being the loss of income that is suffered whilst on strike (South Africa, 1995). In contrast hereto, unprotected strikes may be interdicted, strikers may be dismissed and strikers as well as their trade unions may be held liable for the loss of income or other losses suffered by the employer caused by the unprotected strike (South Africa, 1995). Aside from the time that it takes there are no significant costs to complying with the procedural requirements to render a strike protected. On the face of the decision to embark upon an unprotected strike rather than comply with the

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procedural requirements to achieve the status of a protected strike would therefore appear irrational and reckless.

There are ostensibly three explanations for this seeming irrational decision:

- Notwithstanding what is contained in the LRA, the risk of dismissal is only notional and not real which can safely be ignored, due to the Labour Courts' approach;
- If a real risk, the strikers moderate their conduct to decrease the possible risks of participating in unprotected strikes;
- The sense of injustice triggering the unprotected strike is so profound that the risks are disregarded.

So as to determine why employees engage in unprotected strike action when it involves considerable increased risks, whilst it is relatively easy to comply with the procedures to render the strike protected and thereby greatly diminish the risks of participation, the following research questions are pursued herein:

- What kind of issues or conduct induces such a profound sense of injustice so as to induce participation in unprotected strikes?
- How are the legislated risks of participating in unprotected strikes, as contained in the LRA, applied in practice?
- What moderating role, if any, does risk play in unprotected strikes?

1.3. Research aim

Kelly (1997, 1998) made a significant contribution in developing a mobilization theory as derived from the study of social movements and (SM) and Tilly's (1978) collective action theory. It provides the generally accepted basis for explaining and understanding collective action in the context of industrial relations, and in particular the key role of perceived injustices.

McAdam and Klandermans approached the question of under what conditions individuals would engage in collective action from the perspective of risk, which element was not considered in the theory advanced by Kelly.

The aim of this research is to gain a deeper understanding of the reasons why workers engage in unprotected strike action with particular consideration of the role of risk and the sense of injustice in the decision to engage. This research is conducted against the background of an increase in unprotected strikes.

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An understanding of the triggers and reasons for unprotected strikes could assist employers and trade unions in developing strategies to anticipate and prevent unprotected strikes.

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2. CHAPTER 2: LITERATURE REVIEW

2.1. Introduction

Kelly (1998) identified the central issues of industrial problems as being, "…first, how do individuals acquire a sense of a collective grievance, as opposed to individual grievance? Second, how, and under what conditions, do individuals organise collectively to pursue their collective grievances (or interests more broadly defined)? Third, how, and under what conditions, will such individuals take such collective action…?" (p.24).

In the context of participation in unprotected strikes the third of these issues can be restated as follows: why do workers engage in unprotected strike action when it involves considerable increased risks, whilst it is relatively easy to comply with the procedures to render the strike protected and thereby diminish the risks of participation?

Two theories have attempted to advance answers to these questions. The first is the mobilization theory (MT) as derived from the study of social movements (SM) and adopted by Kelly (1997, 1998) for application in industrial relations from Tilly's (1978) collective action theory. MT, being a theory of the processes of how individual employees formulate their interests in collective terms and collectively act thereon, identifies sequential elements that come into play, culminating in the collective action.

The second school of thought seeks to explain the participation in any collective action with reference to the decision taken by individuals to do so and the matters and consideration that are taken into account by them in arriving at the decision. This approach is predicated on the assumption that decisions to participate are rational ones, entailing a cost-benefit analysis that, amongst others, considers the risks entailed in participating in the collective action.

The two approaches are not necessarily mutually exclusive or contradictory. They can be synthesised to compliment of each other. The first approach explores and explains the process of galvanizing individuals to partake in collective action whereas the later investigates the contents of the decision to so partake. Having regard to the research question the application of the both approaches are explored so as to explain collective action in the context of unprotected strikes with regard to the risks entailed in doing so.

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2.2. Social movements and mobilization theory

2.2.1. Mobilization theory

Tilly (1978) sought to obtain a clearer understanding of the conditions under which individuals formulate their interests in collective terms and collectively act thereon. His mobilization theory explored the main processes that would transform individuals into a collective, acting as a group.

2.2.2. Collective interests as the fulcrum for collective action

Tilly (1978) analysed collective action theory with reference to five elements, namely interest definition, organization, mobilization, opportunity and collective action itself. The elements of interests and mobilization were the focus of his work. According to his mobilization theory collective action, whichever form it may take, reflects the participants' ability to act together as determined by the combination of interests, organization, mobilization and opportunity.

In regard to interest definition the first issue that arises is the extent to which the members of any subordinate group believe their interests to be the same as or in opposition to those of the ruling group. Secondly, whether the members define their interests as restricted to them as individuals or collectively shared with others. If shared, with which group? Kelly (1998) described the interests and the process by which subordinate groups get to define those interests as the "fulcrum" (p.25) of Tilly's MT.

2.2.3. A sense of injustice as the *sine qua non* for collective action

Enhancing Tilly's mobilization model and specifically the element of interests, Kelly (1997, 1998) dealt with the processes through which individuals become part of a collective with shared grievances, which enables them to make claims/demands, as well as establish the collective belief that the claims/demands can be enforced through collective action.

Central to these processes are the questions how and why individuals acquire an individual sense of injustice and how and why they develop a sense that the injustice is a collective one shared by others. Kelly (1997, 1998) relied on McAdam's (1988) model of collective action, which stated that a sense of injustice comes into being when people are "cognitively liberated" from a previously held belief in the legitimacy of the status quo. Mere dissatisfaction with the status quo would not be sufficient for as long as the event/action/situation is perceived as fair or unavoidable. According to Kelly

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(1997, 1998) “cognitive liberation” will occur when a person becomes convinced that an event/action/situation is “unjust” or “illegitimate”.

Kelly discussed how Folger and Cropanzano argued that a “wrong” should be morally indefensible to induce a sense of injustice. Moral indefensibility is determined by the magnitude of the offending conduct as well as the perceived ability and moral imperative of the offender to pursue less offensive alternatives.

Johnson and Jarley (2004) suggested that collective action is in the final instance triggered by perceptions of workplace injustice, as opposed to mere dissatisfaction. Such an injustice would stem directly from the conduct of management. Management conduct would lack moral defensibility if alternative courses of action were available that were less injurious, more defensible and similarly effective. In the context of mobilizing workers to embark upon the high-risk behaviour of participating in an unprotected strike, it is to be expected that the sense of injustice would be significantly more profound than the sense of injustice that would serve to mobilize workers to embark upon a protected strike.

Kelly (1997, 1998) was emphatic in stating that a sense of injustice constituted the *sine qua non* for collective action. The research of Buttigieg *et al.* (2008) provided support for the use of MT as a theory to explain collective action and confirmed Kelly’s (1998) argument regarding the centrality and importance of a sense of injustice for the mobilization of workers. The research by Johnson and Jarley (2004) also confirmed this.

2.2.4. From dissatisfaction to injustice

Mobilizing grievances are not regarded as naturally occurring or as automatically generated but rather as the result of collective interpretation of circumstances or events (Snow & Soule, 2010).

Kelly (1997, 1998) stated that the process towards collective action commences with the framing of grievances as the source of the sense of injustice, which in turn serves as the basis for the cognitive liberation that would enable mobilization.

Employers seek to legitimize an event/action/situation by claiming that their conduct conform to established laws, rules, agreements or precedent, and/or by referring to values or beliefs that are shared with the employees or their trade union and/or by relying on the express or inferred consent by the employees or their trade union (Kelly, 1998).

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From this it follows that perceived grievances could therefore arise when management's conduct is perceived as illegitimate, example being in breach of established rules and so forth, or in violation of shared beliefs or values or what was consented to. Perceived illegitimacy arising from substantive or procedural breaches or violations can be distinguished from grievances arising from perceived distributive injustices. Such distributive injustices arise from perceptions of relative unfairness in pay and benefits or an unfair process of establishing the remuneration (Buttigieg *et al.*, 2008).

Perceived illegitimate or unfair conduct would in itself not give rise to a sense of injustice and neither would it suffice for employees to feel so aggrieved as to partake in collective action. For that to happen a worker needs to be cognitively liberated. According to McAdam (1988) two additional elements need to be present before cognitive liberation can be said to have taken place: employees need to feel entitled to their demands and be convinced that there is some chance of their demands be met as a result of some collective action.

2.2.5. From injustice to collective interest

A group of individuals' sense of injustice or illegitimacy does not of necessity transform them into a group with a collective interest. The transformation to such a collective requires three processes: attribution, social identification and leadership (Fantasia, 1989).

Firstly, it is necessary for the group to attribute their shared sense of injustice to an agency (i.e. the employer or government) instead of blaming it on uncontrollable circumstances. An attribution explains the reasons for and causes of an action or event as being attributable to the agency, without it necessarily being accurate or true. The consequence of an attribution is to make the agency the target of their collective action. In the context of the workplace the sense of injustice would usually be attributed to the employer or group of employers within a single industry. Government through its policies or legislation can however also be the target of collective action.

Secondly, social identification is the process whereby the individuals develop a sense as being a distinct group with different, opposing collective interests and values to that of the target. This establishes an "us and them" perception of the relationship. The process lends itself to stereotyping the own group as well as the target, which in turn will enhance the attribution process and predispose the members of the group to explain their own group as well as the target and groups associated with it in

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characteristic ways. In instances where workers are members of a trade union, this social identification already started with the joining as member of the trade union.

Thirdly, the role of leadership is crucial in framing the issues so as to promote a sense of injustice about what had happened as well as in both the processes of attribution and social identification. Leadership is pivotal to establish and embed the narrative that creates and sustains the collective (Kelly 1998). Fantasia's (1989) case studies showed that leaders play at least three critical roles in mobilizing workers for collective action once they have imbued them with a sense of injustice. Firstly they promote and solidify the cohesion of the group and its identity by concentrating their thoughts on their collective interests. Secondly, leaders embark upon a process of persuading workers to take collective action notwithstanding the costs and consequences of such action. Finally, leaders have to counter and defend the collective action against arguments and actions that it is illegitimate. This is especially so in instances of unprotected strikes which is by definition illegitimate in the eyes of the law. In addition hereto the leaders may, if the risk of participating in an unprotected strike is deemed too high, play a pacifying role.

2.3. The role of framing

2.3.1. The concept of framing

In the context of social movements "frames" fulfil the function of rendering "events or occurrences meaningful and thereby function to organize experience and guide action'' (Benford & Snow, 2000, p.614) whereas, according to Snow and Benford (as cited in Snow, 2004) "framing" denotes the process by which leaders in social movements "frame, or assign meaning to and interpret relevant events and conditions in ways that are intended to mobilize potential adherents and constituents, to garner bystander support, and to demobilize antagonists'' (p.384).

In fulfilling this framing function, social movements do not invent new ideas. Its interpretive function is fulfilled by contextualising events or circumstances with regard to existing ideological heritage and the themes and values of the broader society within which it functions (Klandermans, 2004).

In addition to providing a cognitive interpretation of events or circumstances, social movements also act as conduit for emotions, that "affective component of ideology" (Klandermans, 2004, p.369). "After all, people are angry, morally outraged, and movement organizations provide the opportunity to express and communicate those feelings" (Klandermans, 2004, p.369).

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2.3.2. Collective action frames

The products of the framing process within social movements are referred to as "collective action frames'' (Snow, 2004).

Gahan and Pakarek (2013) sought to extend and enrich union theory by using the "collective action frame" (CAF) concept. Framing as a concept is used to understand the way in which groups of employers or trade unions mobilize individuals to participate in collective action as a collective. Frame theory is based on the premise that individuals would be more likely to participate in collective action if their views strongly resonate with the group's interpretive interpretation.

The processes of achieving cognitive liberation as well as attribution, social identification and leadership can be better understood if framing is accepted as an inherent part thereof (Frege & Kelly, 2003). Frames provide individuals, groups and organizations with a condensed interpretation of the "world out there" through the selective encoding of situations, events and conduct in the past or present (Snow & Benford, 1992).

For individuals, frames constitute the mechanism for achieving cognitive liberation, i.e. transforming what could be perceived as an unfortunate event which was beyond the control of the individual, into an injustice that could be attributed to the employer and acted upon (McAdam, 1988).

For a trade union its interpretive orientation appears from the CAFs it presents to its members when mobilizing them. A CAF reflects the union's interpretation of a circumstance or event and is used to mobilize members, garner support from bystanders and neutralize opponents (Snow & Benford, 1988). Through the process of framing, trade unions create and develop CAF's. Snow *et al.* (1986) stated that because unions are to a certain extent in control of the process of creating and developing CAF's, they could determine the contents thereof.

Since it is in the interests of trade unions to enforce their role as the bargaining agents for employees it is to be expected that any conduct by an employer that could perceived to undermine that role of the trade union, such unilateral changes to workplace practices without negotiated consent of the trade union or disciplinary steps against shop stewards, would be regarded as grave injustices. As postulated hereunder, such unilateral conduct by employers are likely to be triggers for unprotected strikes.

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2.3.3. Functions of collective action framing

Frames exist at various levels and fulfil a variety of functions. It can serve as "master frames", providing an overarching interpretation that can serve as a template for contextually specific CAF's (Snow & Benford, 1992). Frames are used for diagnostic purposes i.e. to identify the originator of any injustice and the cause thereof. Prognostic framing is used to suggest a resolution of the perceived injustice, and the strategies to achieve it. The purpose of motivational (or action) framing is to suggest the rationale and justification for participation in the collective action and to convince the members of the probable success of the collective action (Snow & Benford, 1988; Benford & Snow, 2000).

According to Klandermans (2004), collective action frames are described with reference to an identified injustice (i.e. some description of a wrong), identity (i.e. the identification of those responsible for the injustice and those who are affected thereby) and agency (i.e. the expression of the possibilities to change). Put differently Snow and Benford (as cited in Morris & Staggengorg, 2004) have argued that "collective action frames punctuate the seriousness, injustice, and immorality of social conditions while attributing blame to concrete actors and specifying the collective action needed to generate social change" (p.183).

"Collective action frames, like picture frames, focus attention by punctuating or specifying what in our sensual field is relevant and what is irrelevant, what is ''in frame'' and what is ''out of frame,'' in relation to the object of orientation" (Snow, 2004, p.384). More importantly frames also act as the mechanisms for the articulation of a single set of meanings, which de facto defines the narrative. Furthermore frames may also perform the role of transformative agent by changing and reconfiguring prevalent meanings such as transforming grievances into injustices and mobilizing grievances into collective action (Snow, 2004).

2.3.4. Framing processes

For Snow *et al.* (1986), the extent to which resonance is achieved between a trade union's interpretation of a situation and that of its existing or potential members would depend on the substance and appeal of its CAF. Frames that "resonate" strongly would enhance a SMO's efforts at achieving its mobilization goals, and vice versa (Snow & Benford, 1988).

Cress and Snow (as cited in Ament & Caren, 2004) argue that to be effective in mobilizing for collective action it is necessary to employ both resonant ''diagnostic'' and ''prognostic'' frames. Frames aimed at mobilizing collective action need to identify the

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targets of the collective action i.e. the injustice and those responsible and present a credible solution to resolve the injustice that resonates with would-be participants (Amenta & Caren, 2004).

Diagnostic framing involves two distinct activities: the first is the identification and description of an event or circumstance as constituting an injustice; the second is the attribution of blame or responsibility for the injustice (Snow & Soule, 2010). As a matter of logic a contextually specific CAF, which involves a specific injustice attributable to the employer at a specific workplace would be easier to create and would more readily resonate with the experiences of the would-be participants in unprotected strikes. As postulated hereunder such contextual specific CAF's unilateral conduct by employers are more likely to trigger unprotected strikes.

2.3.5. Leadership, networking and participation

For collective action framing to be effective, a SMO has to engage in frame alignment processes so as to create frames that resonate with the culture and experiences of the would-be participants or other relevant actors (Morris & Staggenborg, 2004).

To the extent that framing identifies the injustices that need to be changed and suggests the strategies to achieve redress and seeks to achieve maximum resonance amongst would-be participants, the credibility and legitimacy of the leaders will play a defining role (Morris & Staggenborg, 2004).

Snow and Soule (2010) contend, "the vast empirical literature prompts the contention that the presence of a network tie to someone already engaged in a movement is one of the strongest predictors of individual participation in that movement" (p.120). In the context of industrial relations, Snow and Soule (2010) contend that "workplace networks" function as "critical conduits for grievance sharing and identity formation", which would be critical to influence individual decision making" (p.120-121).

Networks not only affect participation in collective action but participation in collective action creates new networks and shapes and enhances existing ones. Being part of a social network would increase the likelihood of that individual participating in the collective action (Della Porta & Diani, 2006). Being embedded in a social network not only serves a motivational function but also serves to discourage non-participation or withdrawal from the network (Della Porta & Diani, 2006). Being employed at a single workplace of necessity implies a more intimate and close-knit network of employees than employees who work with an industry but at multiple employers.

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2.3.6. Injustice/Grievance

Kelly's (1997, 1998) view that a sense of injustice constitutes the *sine qua non* for collective action is now generally accepted as valid. It raises the question as to what category of injustice or grievance would be so profound as to trigger participation in an unprotected strike rather than addressing the injustice/grievance by way of the prescribed procedures culminating, if necessary in a protected strike. In this regard the attempts at describing and categorising categories of injustices that would serve to mobilize collective action is instructive.

Simmons (2014) uses the term "grievances" to denote the central claims which underlie all social movements being those trends, practices or policies which the members of social movements seek to change or preserve. He contends that grievances should not only be understood with reference to its ordinary grammatical meaning but also by recognizing that grievances are meaning-laden. By considering grievances through the lens of meaning the reason why some grievances and not others cause groups to act collectively may become apparent (Simmons, 2014). In the context of collective action in labour, the "meaning" of the demand/injustice should be investigated in addition to what was articulated.

This approach is grounded in establishing the context of grievances/injustice with appreciation thereof that meaning is informed by time, place and history. Snow and Soule (2010) postulate that context is key. A contextual investigation of ostensibly distinct and differently formulated grievances/injustices may reveal that they are contextually similar or aimed at addressing the same grievance/injustice (Simmons, 2014).

Snow and Soule (2010) argue for "mobilizing grievances" as a particular kind of grievances, which are shared amongst individuals and considered sufficiently serious to justify not only a collective complaint but also "some kind of corrective, collective action" (p.24). In the context of an unprotected strike the grievance would have to be considered sufficiently serious to justify collective action outside of the dictates of the legislation.

The basic argument is that understanding the "idea" contained in a grievance is critical to understanding what the grievance is and detecting patterns of mobilization (Simmons, 2014).

Snow, Cress, Downey and Jones (as cited in Simmons, 2014) contend that it is not the "suddenness" of grievances that triggers collective action, but "rather the disruption of the daily order of things" (p.529). According to them the "dramatic alterations in

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subsistence routines" (p.529) would trigger social mobilization because of the inability or unwillingness of people to accept disruptions to that which they have grown accustomed to (Simmons, 2014).

Simmons suggests that an analysis of the context of a social movement's claims or demands can lead to a better understanding of which frames are likely to resonate when and in which context (Simmons, 2014). An injustice is therefore not only to be considered with regard to what was articulated but also with reference to the context within which it is framed having regard to time, place and history.

Relevant contextual considerations would seem to be firstly, whether the mobilizing injustice triggering the unprotected strike arose from a distributive demand or a procedural issue. Buttigieg *et al.'s*, (2008) distinguishes between injustices arising from substantive or procedural breaches or violations on the one hand, and grievances arising from perceived distributive injustices on the other. Distributive injustices are usually resolved by way of structured and scheduled wage negotiations. In contrast hereto substantive or procedural breaches and violations by their nature implies change and disruption of the status quo.

Secondly whether the strike was triggered by a single injustice arising at the workplace of a single employer or by multiple issues involving multiple workplaces and/or multiple employers. According to Tilly's (1978) mobilization theory collective action, whichever form it may take, reflects the participants' ability to act together as determined by the combination of interests, organization, mobilization and opportunity. As a matter of logic it should be easier to share a collective sense of injustice, organize and mobilize if the sense of injustice arises from a single issue at the single workplace of a single employer. Such a sense of injustice would have an intimacy to it in the sense that such it is more likely to relate to an issue at the workplace itself where the effects thereof is directly experienced by the employees directly involved. Injustices that manifest themselves with multiple employers are more likely to generate less of a sense of immediacy It should also in terms of the process be easier to mobilize employees to engage in an unprotected strike if restricted to a group who share the same workspace.

Thirdly whether the perceived injustice are linked to a sudden or disruptive change. In this context the comment by Snow, Cress, Downey and Jones (as cited in Simmons, 2014) that the "suddenness" of grievances is less likely to trigger collective action, requires consideration in the context of unprotected strikes. The "cost" of complying with the LRA to render a strike protected is the time it requires to comply with the procedures. Time sensitive injustices would render it particularly unattractive to wait for

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the prescribed processes to play themselves out. This is particularly so where the employer unilaterally imposes changes to workplace practises or threatens to effect such changes. In such an event the costs of complying with the changes whilst the processes are followed could be significant and difficult to reverse. Time could also become of the essence in instances where demands to redress injustices need to be address urgently or even where injustices that are not time sensitive, become time sensitive due to procrastination by the employer in addressing them. This leads to:

Hypothesis 1: Unprotected strikes are more likely to be triggered in the context of:

H1.1: Procedural injustices, rather than distributive injustices.

H1.2: Single injustices arising at single employers, rather than multiple injustices involving multiple employers.

H1.3: Sudden unilateral changes or imminent threats of changes to workplace practices by employers and perceived time-sensitive injustices.

2.4. Mobilization and rational choice

Tilly (1998) assumed that once individuals regard themselves as belonging to a group with collective interests, the ability to mobilize the group into embarking upon collective action would depend on definitions of interests, the degree of organization and the costs and benefits of taking action. McAdam's (1988) model of collective action also identified cost-benefit calculations as the key intervening variable between the perceived injustice and the collective action. This rational choice approach suggests that workers would, before deciding whether to participate in collective action, first weigh the costs and benefits of participation against the injustices that members intend to redress through participation (Johnson & Jarley, 2004). Assuming a rational choice, this approach would amongst entail a consideration of the not only the costs and benefits but also the risks of participation.

Kelly (1998) regarded Klandermans' value-expectancy theory as the most sophisticated theory of individual calculations about collective action. This theory suggests that members would participate in collective action if they place a high premium on the goal and believe that their participation in the collective action will contribute to its success. This accords with Kelly's (1998) suggestion that a workplace injustice would give rise to collective action when it is framed as being capable of rectification through collective action.

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Kelly (1998) distinguished between three kinds of personal costs and benefits (goal, social and reward motives), which are considered by individuals in deciding whether to engage in collective action.

Goal motives comprise beliefs about the number of people expected to participate, based on the assumption that high levels of participation are necessary for success and that the proposed collective action will actually make a difference.

Social motives refer to the perceived reactions of significant others (family, friends, fellow workers) and the value placed on those reactions. Workers may be mobilized on the basis of compliance with social pressure (Fantasia, 1989).

Reward motives refer to the personal consequences of participation, such as loss of pay or dismissal, and the value placed on those consequences, weighed against the perceived benefits of successfully addressing the injustice. The individual's willingness to participate in action is said to be a weighted sum of these three motives. As with McAdams' cost/benefit approach, the consideration and weighing assumes amongst others a rational consideration of the risks of participation.

2.5. Cost and risk

In the context of the cost/benefit comparisons "cost" refers to the expenditure of time, money, and energy that are required of a person engaged in any particular form of activism whereas risk refers to the anticipated dangers – whether legal, social, physical, financial and so forth – of engaging in a particular type of activity (McAdam, 1986). Anything forfeited, abandoned, spent or lost as well as things that are "negatively" experienced such as pain or hunger by participants in collective action, will be regarded as costs. In the context of strikes the most significant cost would be the loss of income.

Risk, on the other hand, refers to as contingent costs or negative experiences that may or may not materialise as a result of their movement participation such as being arrested, paying a fine, being beaten or dismissed. Costs are under the individual participant's control whilst risks, as uncertain future consequences, depend not only on the participant's own actions, but on responses of others (Wiltfang & McAdam, 1991).

In his study of the recruitment process, McAdam (1986) distinguished between low-risk/cost and high-risk/cost forms of activism. Snow & Soule (2010) converted this into a matrix as follows:

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Table 2.1 - Types of cost and risk associated with collective action participation - adapted from Snow and Soule (2010)

Type of risk/cost	**Low risk**	**High risk**
Low cost	Low risk, low cost participation	High risk, low cost participation
High cost	Low risk, high cost participation	High risk, high cost participation

This matrix can be adapted to participation in strikes as follows:

Table 2.2 - Types of cost and risk associated with strike participation

Type of risk/cost	Low risk	High risk
Low cost	Protected strike of limited duration or extent (i.e. an overtime ban or retardation of work)	Unprotected strike of limited duration or extent (i.e. a brief work stoppage, an overtime ban or retardation of work)
High cost	Protracted protected strike manifested as a complete refusal to work	Unprotected strike manifested as a complete refusal to work

In the context of strikes, whether protected or not, the costs would primarily be determined by whether it entails a complete refusal to work or not as well as the duration of the strike and the commensurate loss of income. Whilst workers cannot control the duration of the strike, except for abandoning it, it can be assumed that an industry strike or strike involving multiple employers would as a rule be resolved quicker than a strike involving a single employer.

The risks of participating in a strike are in the first instance determined by the question whether it is a protected strike or not. Having regard to the protection afforded to protected strikes the risks are low, whilst participating in unprotected strikes the risks are high. These issues are dealt with hereunder in the context of the applicable legislation.

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2.6. The right to strike and unprotected strikes

The risks of participating in unprotected strikes are determined by the legislative environment and the extent to which the right to strike is regulated in the Labour Relations Act (South Africa, 1995). The supervisory bodies of the International Labour Organization (ILO) consider the right to strike a fundamental right that workers as well as their organizations may utilize in order to promote or defend their interests (Gernigon, Odero & Guido, 2000). In South Africa, this fundamental right is embodied in Section 27 of the South African Constitution as well as in the Labour Relations Act (LRA) (Manamela & Budeli, 2013). The right to strike is however not an absolute one. Neither the right to freedom of association nor the right to strike should unjustifiably infringe upon the rights of others (Manamela & Budeli, 2013). The ILO stresses that strike action should be peaceful and should not involve acts of criminal conduct (Gernigon, Odero & Guido, 2000).

In the LRA, the right to strike is curtailed by Section 65. The implication hereof is that strikes in breach of Section 65 can never be protected.

Furthermore, for strikes to qualify as protected, the following procedural requirements are necessary (Manamela & Budeli, 2013):

- Mandatory referral of "the issue in dispute" to the Commission for Conciliation Mediation and Arbitration (CCMA), resulting in a conciliation meeting between the parties in order to attempt to settle the dispute.
- Issue of a certificate by the CCMA stating that the issue in dispute remains unresolved.
- Written notice to the employer regarding the intended strike action, at least 48 hours prior to the commencement of the strike.

Any conduct that aids the lawful and legitimate aims of protected strike action will be protected. According to Manamela and Budeli (2013), workers who participate in protected strike action are:

- Allowed to picket peacefully.
- Have immunity from interdicts, civil claims or dismissal, provided they do not commit any unlawful acts.

In practice the only real cost of participating in a protected strike is the loss of income on the basis of the application of the “no work, no pay” rule that is invariably applied when workers go out on strike. The legal risks of participating in a protected strike are

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low in that a dismissal for participation in a protected strike would constitute an automatic unfair dismissal.

A strike is considered to be unprotected when the strike is prohibited under Section 65 of the LRA and/or if the procedural requirements are not complied with. An unprotected strike is in itself considered to be an act of misconduct (Manamela & Budeli, 2013). According to Manamela and Budeli (2013), unprotected strikes carry the following risks:

- Participants may be interdicted from participating in unprotected strikes together with a order to pay the legal costs of the court application, which, if not complied with, may result in contempt of court proceedings.
- Participants in unprotected strikes could be held liable to compensate the employer for losses in income caused by the unprotected strike.
- Employee may be dismissed for taking part in an unprotected strike

Section 68(5) of the LRA (South Africa, 1995) states:

> Participation in a strike that does not comply with the provisions of this Chapter [IV], or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account. (p.47)

Item 6 of Schedule 8 of the Code of Good Practice in the LRA (South Africa, 1995) states:

> (1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including –
>
> (a) the seriousness of the contravention of the Act;
>
> (b) attempts made to comply with the Act; and
>
> (c) whether or not the strike was in response to unjustified conduct by the employer.

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(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them. (p.151)

The research question is premised on the assumption that participation in unprotected strikes carries a significantly higher risk than participation in a protected strike. As was shown above, participation in an unprotected strike will not automatically justify dismissal. A judicial discretion is conferred upon the Labour Court in Item 6 of Schedule 8 to assess a dismissal for participation in an unprotected strike based on considerations of substantive and/or procedural fairness. This discretion, if predominantly exercised in favour of employees could establish a set of precedents that could potentially reduce the actual risk of dismissal significantly. If the risks of participation in unprotected strikes were to have been significantly reduced by the Labour Court, any deterrence against embarking upon unprotected strikes would diminish. The same would apply to any motivation to moderate conduct whilst participating in unprotected strikes.

A mere consideration of the dictates of the LRA is therefore incomplete in assessing the legal risks of participation in unprotected strikes. An analysis of the approach of the Labour Court to Item 6 of Schedule 8 of the Code of Good Practice in the LRA (South Africa, 1995) is therefore imperative, which leads to:

Hypothesis 2: Participation in unprotected strikes constitutes a significantly higher risk than participation in protected strikes.

2.7. Moderating the risks of participating in unprotected strikes

Both McAdams' cost/benefit approach and Klanderman's value expectancy theory would in the first instance, imply a decision by a would-be participant in in unprotected strike whether he/she participate in an unprotected strike at all. Once a decision has

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been made to participate, a more nuanced decision regarding ways to moderate the risks of participation is made with the purpose of minimizing the risks.

It is only the conduct that determine the substantive fairness of dismissals for participating in unprotected strikes that are within the control of the participants in unprotected strikes, i.e. whether the intended unprotected strike is in response to unjust conduct by the employer, the seriousness of the contravention of the LRA and attempts to comply with the LRA as set out in Item 6(1) of Schedule 8. The considerations of procedural fairness as contained in Item 6(2) are determined by the conduct of the employer, the outcome of which cannot be determined by the employees. An analysis of the conduct of participants before and during unprotected strikes would be indicative whether the participants moderate their conduct to lessen the risks of participation.

Unprotected strikes are by definition either strikes on non-strikeable issues or because the processes and procedures were not fully complied with. Item 6(1)(a) and (b) require of striking employees to restrict their non-compliance with the LRA as far as possible. Endeavours by employees or their trade union to engage with an employer, which may range from merely giving notice of the strike, to engaging in meetings and/or correspondence, to referrals of the dispute would be indicative of at least as attempts to comply with the LRA as required by item 6(1)(b). A complete disregard of the interests of the employer and intimidation, violence and obstruction of access to the workplace would be regarded as serious contraventions of the LRA.

To be able to characterize the unprotected strike as being in response to the unjust conduct of the employer as contemplated in Item 6(1)(c) of necessity implies that the strike needs to be in response to conduct of the employer and not conduct of the employees themselves. An indication that employees in fact moderated the risks of participating in unprotected strikes would be to consider whether the strike was in fact triggered by the conduct of employers. This implies that employees' conduct would be moderated by their choice of the issue on which they chose to embark on the unprotected strike.

The choice of mobilizing grievance would require them being of the conviction that the conduct by the employer would be regarded by the Labour Court as a strike in response to unjustified conduct by the employer. If an unprotected strike is aimed at addressing a single procedural injustice and is triggered by sudden unilateral changes or imminent threats of changes to a workplace practices by a single employer (as postulated in Hypothesis 1) the Labour Court is more likely to regard the strike in

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reaction to the unjustified conduct of the employer. This would especially be so if the unprotected strike were aimed at addressing procedural injustices, rather than distributive injustices. This results in:

Hypothesis 3: Employees moderate the risk of participating in unprotected strikes.

2.8. Conclusion

The literature review has demonstrated how, with reference to Kelly's (1998) mobilization theory, individuals acquire such a collective sense of injustice that they would, notwithstanding the costs attached thereto, embark upon collective action to redress the injustice. The review also demonstrated the pivotal role played by the existence of a sense of injustice in persuading workers to engage in collective action. Johnson and Jarley (2004) concluded that if the efficacy of collective action is regarded as constant in a rational choice framework, then the motivation to engage in collective action would increase if and to the extend that the severity of the injustice increases. The decision to participate in an unprotected strike implies a profound sense of injustice to the extent that the protection afforded to protected strikes is abandoned. Assuming that the decision to partake in an unprotected strike is made in the knowledge of the risks, a rational person would be assumed to moderate the risks of his conduct to the extent possible.

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3. CHAPTER 3: RESEARCH HYPOTHESES

3.1. Hypothesis 1

Unprotected strikes are more likely to be triggered in the context of:

H1.1: Procedural injustices, rather than distributive injustices.

H1.2: Single injustices arising at single employers, rather than multiple injustices involving multiple employers.

H1.3: Sudden unilateral changes or imminent threats of changes to workplace practices by employers and perceived time-sensitive injustices.

3.2. Hypothesis 2

Participation in unprotected strikes constitutes a significantly higher risk than participation in protected strikes.

3.3. Hypothesis 3

Employees moderate the risk of participating in unprotected strikes.

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4. CHAPTER 4: RESEARCH METHODOLOGY

4.1. Research design

The methodology used for this research was content analysis of a quantitative nature of reported judgments of the South African Labour Court and Labour Appeal Court in court cases regarding unprotected strikes. Content analysis is a method where text (or other communications) is analysed in a methodical manner in order to identify the answers to the research hypotheses (Cooper & Schindler, 2014) (Zikmund, Babin, Carr & Griffin, 2010). In this instance, the contents of the judgements were systematically analysed and described in a quantitative manner. The answers to the research hypotheses as obtained from the content analysis were categorized in order to identify consistent patterns and relationships between variables or themes (Julien, 2008). The use of content analysis for this research provided a practical solution, since the data was readily accessible.

4.2. Population

According to Zikmund *et al.* (2010), a population or universe consists of an entire group that shares a mutual set of characteristics. The population in this research consisted of all reported judgements by LexusNexus of the South African Labour Court or the Labour Appeal Court in instances where orders were sought to interdict unprotected strikes, claims for compensation by employers for losses caused by unprotected strikes as well claims by employees for reinstatement and/or compensation arising from their dismissal for participating in unprotected strikes. The judgements cover the period from the inception of the Labour Relations Act of South Africa in 1995 to date hereof. The population consists of the Labour Court and Labour Appeal Court's reported interpretation and application of the principles of employment law in general and the LRA in particular as applied to unprotected strikes.

4.3. Unit of analysis

The unit of analysis is the entity being measured or observed (Wegner, 2012). Thus, the unit of analysis in this research was case in which judgments were delivered on unprotected strikes in respect of which interdicts were sought to stop or prevent such strikes, claims instituted for compensation by employers for losses caused by such strikes as well claims by employees for reinstatement and/or compensation arising from their dismissal for participating in such strikes.

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4.4. Sampling

A sample is a portion or subset of a larger population (Zikmund *et al.*, 2010). Sampling involves any process that analyses this subset in order to draw conclusions regarding the population (Cooper & Schinder, 2014).

According to Cooper and Schindler (2014), a sample must be selected in such a way that it is representative of the population. This will allow the researcher to make inferences about the larger population based on the sample.

A census is a study "of all the individual elements that make up the population" (Zikmund *et al.*, 2010, p.387). The size of the population in this study was small enough that census (saturation) sampling could be used. This allowed the researcher to study every element of the population. Accuracy is likely to be greater because "the population is small, accessible and highly variable" (Cooper & Schinder, 2014, p.339). Census sampling also eliminated any sampling error.

According to Zikmund *et al.* (2010), a larger sample is more precise than a smaller one, all other things being equal. In total, 98 reported judgements seeking interdicts against unprotected strikes and spanning the period since 1995 were utilized.

The sample used are all judgments reported by LexusNexus in respect of interdicts sought to stop or prevent unprotected strikes, claims instituted for compensation by employers for losses caused by unprotected strikes as well claims by employees for reinstatement and/or compensation arising from their dismissal for participating in unprotected strikes.

4.5. Data collection

The researcher collected data by utilizing the LexusNexus electronic database of reported judgments of the Labour Court and Labour Appeal Court. LexusNexus provides as a commercial database amongst others of all judgments of the Labour Court and Labour Appeal Court to subscribing judges, legal and labour law practitioners as well as institutions and researchers. A parallel, competing database is provided by Jutas. NexusLexus and Jutas rely on the same source for the judgments reported by them, being the Labour Court and the Labour Appeal Court, and therefore tend to report the same judgments.

The LexusNexus database includes significantly more judgments than those reported by Jutas. The editorial decision whether a judgment should be reported is made on consideration of whether a particular judgment is informative of the Labour Court and Labour Appeal Court's interpretation and application of the principles of employment

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law in general and the LRA in particular. In all instances the entire judgment is reported and not redacted in any way. Reported judgments are of great significance since judgments by these courts set precedents that are binding on and followed by the Labour Court and Labour Appeal Court in subsequent cases.

The body of reported judgments constitutes a representative sample of all cases in which the principles of employment law in general and the provisions of the LRA in particular relating to unprotected strikes were considered and applied. The conspectus of cases that are considered by the Labour Court and the Labour Appeal Court in considering the law relating to unprotected strikes entail interdicts sought to stop or prevent unprotected strikes, claims instituted for compensation by employers for losses caused by unprotected strikes as well claims by employees for reinstatement and/or compensation arising from their dismissal for participating in unprotected strikes. By their nature the judgments were likely to deal with the facts from which the answers to the research hypotheses were inferred.

Using the NexusLexus database, the researcher performed an electronic search for all reported judgements of the Labour Court and Labour Appeal Court that contained the phrase “unprotected strike”. The result was a total of 249 reported judgements. The researcher read through each reported judgement in order to identify the relevant ones.

The researcher then filtered the judgments and excluded the following from the total obtained:

- Duplicate cases – if appeals were included, the results would be skewed
- Reported judgements on cases that related to protected strikes, but that contained the phase “unprotected strike”

Validity refers to the extent to which an instrument accurately measures what the researcher intends to measure (Cooper & Schinder, 2014). The researcher achieved validity by consulting a legal expert in order to seek agreement on the content identified.

Reliability refers to the degree to which data collection and analysis are accurate, precise and consistent (Cooper & Schinder, 2014). The researcher achieved reliability by ensuring that coding was performed more than once, thereby ensuring consistency.

No pre-testing was performed.

Riffe, Lacy and Fico (2005) argue that a census allows for the most valid examination of a population because it includes every element. According to Zikmund *et al.* (2010), a sample may be more accurate in certain instances as a result of coding errors,

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especially in cases where the volume of content to be analysed is very large or when coding is done by a large group of people. The potential for increased inaccuracy was eliminated by the fact that the number of reported judgements was 98 in total and by the fact that the researcher performed all the coding herself.

4.6. Data analysis

The data analysis involves the examination of gathered data. In an effort to understand the data, a variety of analytical techniques may be applied, including applying statistical methods in order to determine patterns that provide meaning (Zikmund *et al.*, 2010). The researcher examined the content of reported court judgements in detail and categorized it in order to determine possible patterns regarding the perceived causes of unprotected strikes.

The coding process involved designing a coding sheet by systematically assigning the data to relevant categories. Coding was restricted to manifest content. Relationships within and between the categories were then analysed using descriptive statistical methods (Riffe *et al.*, 2005). The descriptive statistic results were used to describe patterns and test theory-driven hypotheses. Once this interpretive stage was reached, latent meaning analysis also formed part of the process.

Typically all judgements follow the same format:

- a statement of the nature of the case (whether it is an application to stop or prevent unprotected strikes, a claim for compensation by employers for losses caused by unprotected strikes or a claim by employees for reinstatement and/or compensation arising from their dismissal for participating in unprotected strikes);
- a summary of the relevant factual versions advanced by the opposing parties;
- a consideration of the evidence and a finding as to which facts the court accepts as having been proved;
- a summary of the applicable provisions of the LRA and legal principles with reference previous judgments;
- an application of the legal principles to the facts of the case;
- a conclusion and order.

All the data relied upon in this study could be identified in the judgments and were incorporated into the code sheet.

The process was aided by the use of descriptive statistics. Descriptive statistics were used in order to describe the sample's characteristics (Cooper & Schinder, 2014). The

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researcher was then able to use summary descriptive measures to identify patterns, relationships and trends within the data (Wegner, 2012). In particular, focus was places on frequency analysis and results depicted through percentages frequency tables, cross-tabulation tables, percentage cross-tabulation pages, bar charts and pie charts.

4.7. Research limitations

The researcher identified the following limitations:

- Legal proceedings arising from unprotected strikes are only instituted in a limited number of instances.
- The researcher relied on reported judgements only, which does not purport to be all judgements involving unprotected strikes.
- The facts in these reported judgements are by definition a judge's summary of what he regards as relevant proven facts and therefore not a full record of the court papers or evidence that was lead.

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5. CHAPTER 5: RESULTS

5.1. Introduction

The purpose of this chapter is to provide the results obtained through the statistical analysis of the data. Descriptive statistics were applied and the results for each hypothesis are presented in turn.

5.2. Hypothesis 1

Unprotected strikes are more likely to be triggered in the context of:

H1.1: Procedural injustices, rather than distributive injustices.

H1.2: Single injustices arising at single employers, rather than multiple injustices involving multiple employers.

H1.3: Sudden unilateral changes or imminent threats of changes to workplace practices by employers and perceived time-sensitive injustices.

5.2.1. Category of unprotected strikes

The judgements were categorised according to the nature of the dispute that led to the unprotected strike. The disputes included the following: 54 disputes regarding changes to workplace practises/procedures, 14 wage disputes, 12 disputes regarding restructuring, retrenchments, outsourcing and job security, nine distributive and bargaining disputes, eight disputes regarding organizational rights and one intra-union dispute.

Figures 5.1 and 5.2 respectively show the distribution and incidence of the disputes. It is clear that the majority of unprotected strikes involved disputes that dealt with changes to workplace practices/procedures and disputes regarding restructuring, retrenchments, outsourcing and job security. Disputes relating to distributive issues and bargaining disputes reflect a small minority.

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Figure 5.1 - Distribution of disputes that lead to unprotected strikes

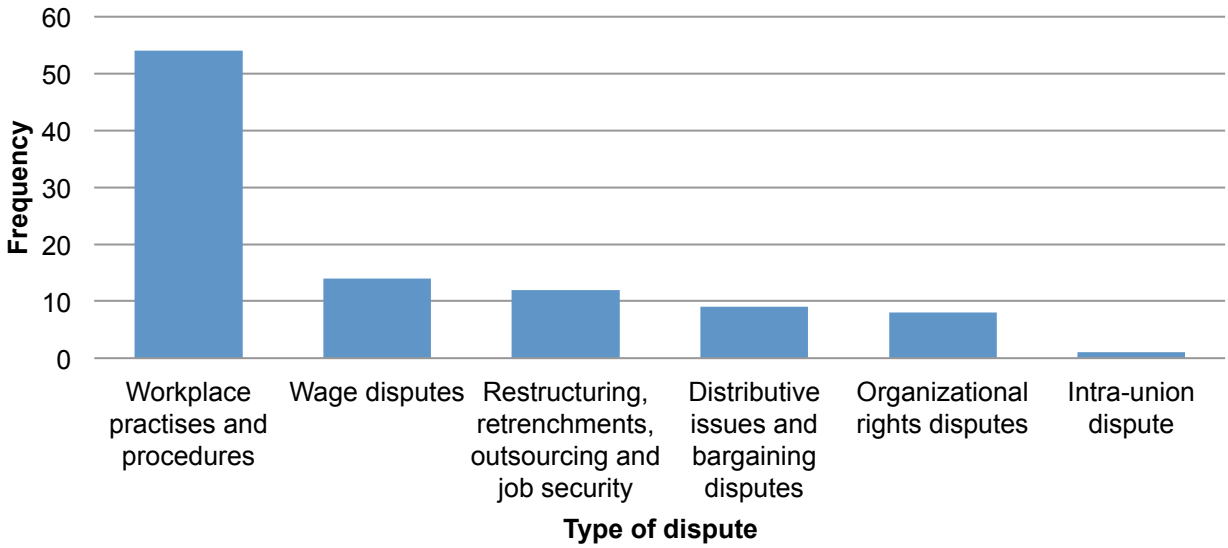
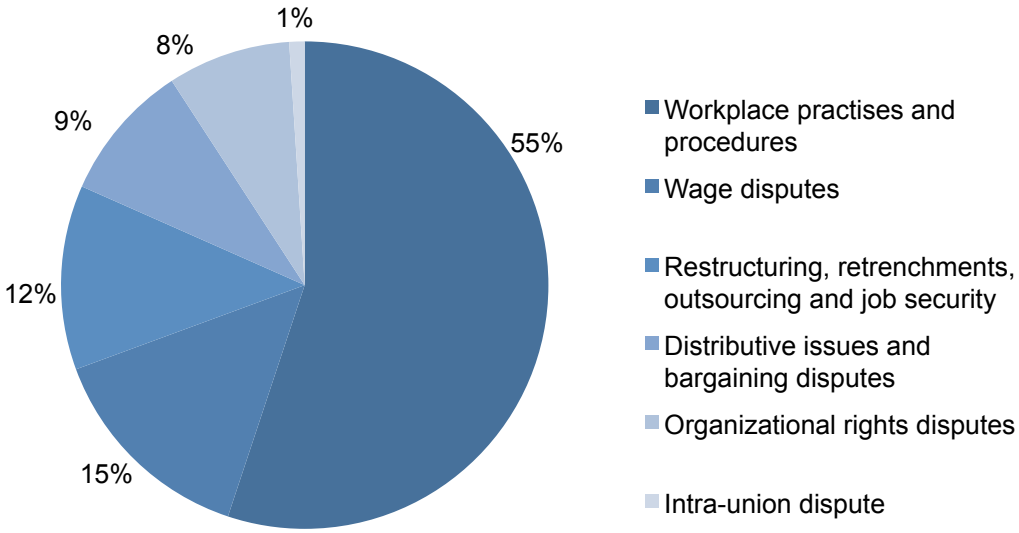


Figure 5.2 - Incidence of disputes that lead to unprotected strikes



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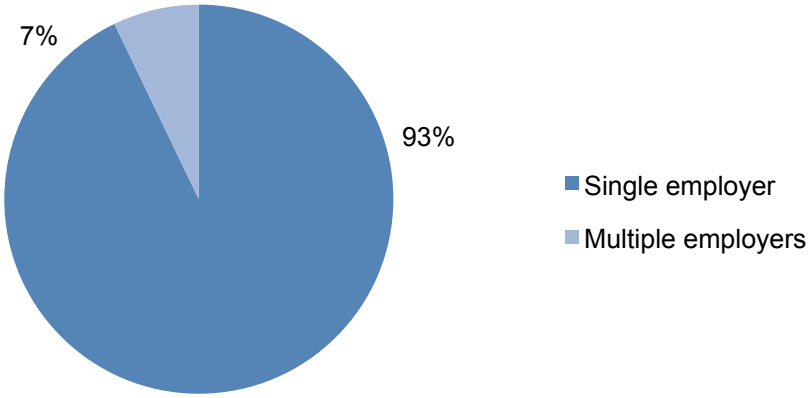
5.2.2. Single employer versus multiple employers

91 cases dealt with a single employer while only seven cases dealt with multiple employers. Figure 5.3 shows the incidence of single versus multiple employers.

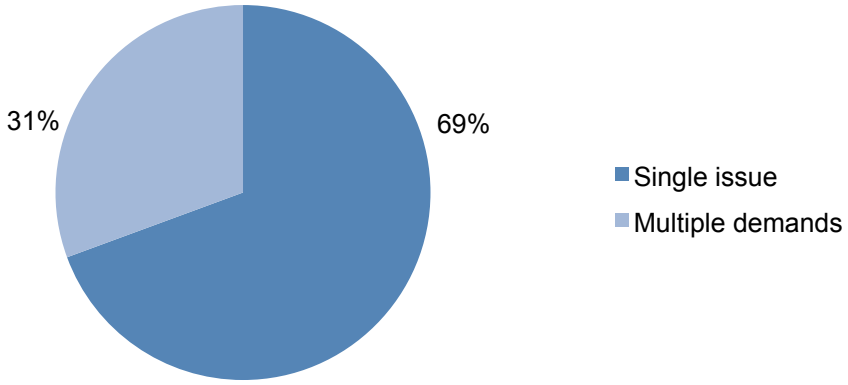
Figure 5.3 - Incidence of single versus multiple employers



5.2.3. Single versus multiple demands

Of the seven unprotected strikes that took place at multiple employers, four dealt with a single issue and three dealt with multiple demands. Of the 91 unprotected strikes that took place at a single employer, 64 dealt with a single issue and 27 dealt with multiple demands. In total, 68 unprotected strikes dealt with single issues and 30 unprotected strikes dealt with multiple demands. Figure 5.4 shows the incidence of single issues versus multiple demands.

Figure 5.4 - Incidence of single issues versus multiple demands



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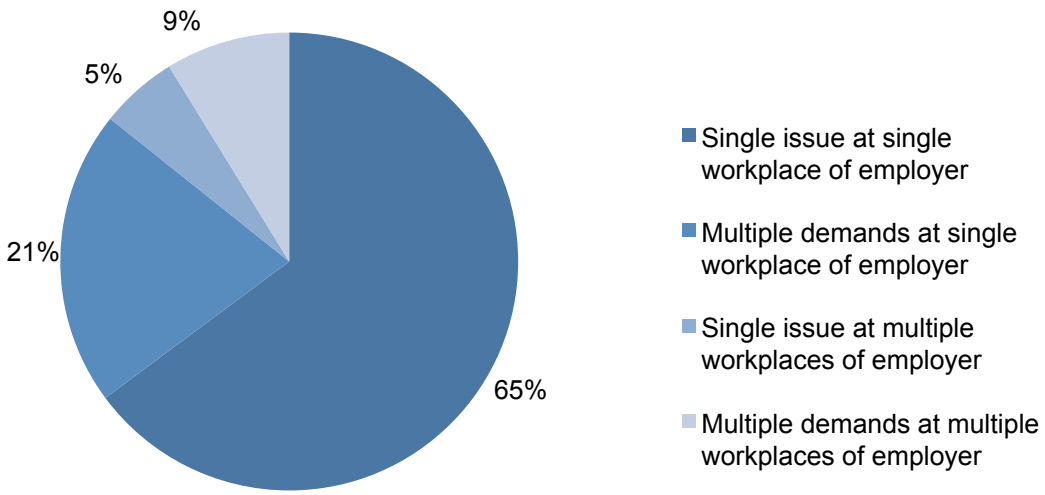
A further analysis was done that considered the occurrence of a single issue versus multiple demands at a single employer. Of the 64 single issues, 59 unprotected strikes occurred at a single workplace of a single employer, while only five unprotected strikes occurred at multiple workplaces of a single employer. Of the 27 multiple demands, 19 unprotected strikes occurred at a single workplace of a single employer, while only eight unprotected strikes occurred at multiple workplaces of a single employer.

Table 5.1 below gives a breakdown of the number of demands according to the number of workplaces of a single employer. Figure 5.5 shows the incidence of the number of demands according to the number of workplaces of a single employer.

Table 5.1 - Number of demands according to number of workplaces of a single employer

	Single workplace of single employer	Multiple workplaces of single employer	Total
Single issue	59 (64,84%)	5 (5,49%)	64 (70,33%)
Multiple demands	19 (20,88%)	8 (8,79%)	27 (29,67%)
Total	78 (85,71%)	13 (14,29%)	91 (100%)

Figure 5.5 - Incidence of the number of demands according to the number of workplaces of a single employer



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5.2.4. Perceived triggers of unprotected strikes

The judgements were categorised according to the perceived trigger of the unprotected strike. 23 strikes were perceived to have been caused by a deadlock in negotiations between the employer and employees. 24 strikes were perceived to have been caused by unresolved demands made by or grievances experienced by employees, outstanding for an extended period of time. 50 strikes were perceived to have been caused by unilateral conduct by the employer and not agreed to by employees. One judgement regarding an intra-union dispute was omitted because it was not considered a dispute between the employer and employees.

Figures 5.6 and 5.7 respectively show the distribution and incidence of the perceived triggers of the unprotected strikes. It is evident that the majority of unprotected strikes were triggered by perceived unilateral conduct by the employer that was not agreed to by the employees.

Figure 5.6 - Distribution of the perceived triggers of unprotected strikes

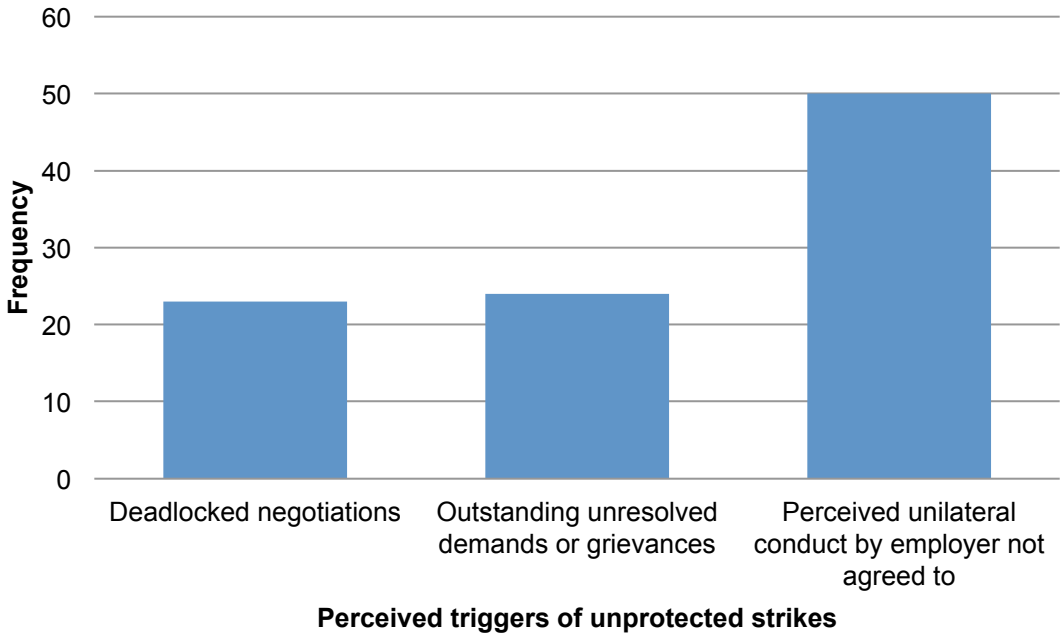

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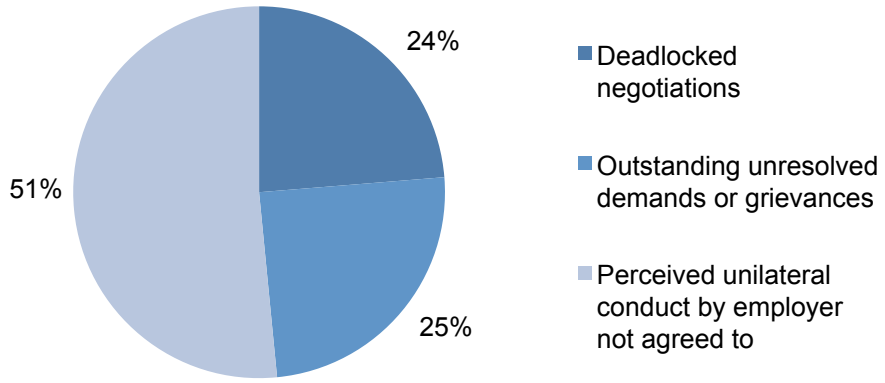
Figure 5.7 - Incidence of the perceived triggers of unprotected strikes

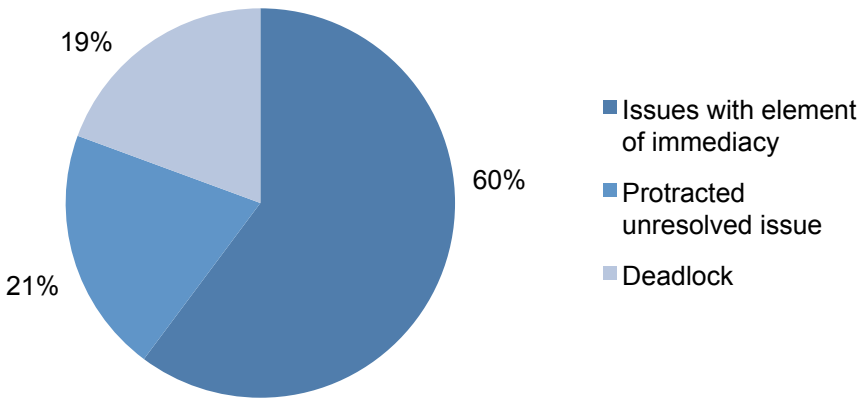


5.2.5. Time-sensitive issues

The judgements were categorised according to whether they were dealing with immediate issues, protracted unresolved issues or deadlocked. 59 cases contained an element of immediacy and as such are considered to be time-sensitive in nature. They consisted of the following: 37 cases dealt with unilateral change on the part of the employer, eight cases dealt with immediate demands from employees and 14 cases dealt with immediate threats from the employer. 20 cases dealt with protracted unresolved issues. The fact that they are so protracted causes employees to become impatient and frustrated. For this reason they are also considered to be time-sensitive. 19 cases dealt with issues that were deadlocked. These are not considered to be time-sensitive.

Figure 5.8 shows the incidence of time-sensitive issues. It is evident that the majority (81%) of unprotected strikes were time-sensitive in that they either had an element of immediacy or a protracted unresolved issue. If protracted unresolved issues are excluded a clear majority of the issues (61%) had elements of immediacy.

Figure 5.8 - Incidence of time-sensitive issues



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5.3. Hypothesis 2

Participation in unprotected strikes constitutes a significantly higher risk than participation in protected strikes.

5.3.1. Nature of the relief sought

The judgements were categorised according to the nature of the relief sought. The 98 judgements consisted of 25 applications by employers to prevent an unprotected strike, 13 applications by employers to stop an unprotected strike, two applications by employees to have strikes declared protected, two compensation claims by employers arising from an unprotected strikes and 56 unfair dismissal claims by employees arsing from unprotected strikes.

Figures 5.9 and 5.10 respectively show the distribution and incidence of the nature of the relief sought. It is evident that the majority of judgements dealt with unfair dismissal claims by employees arising from participation in unprotected strike.

Figure 5.9 - Distribution of unprotected strikes according to nature of relief sought

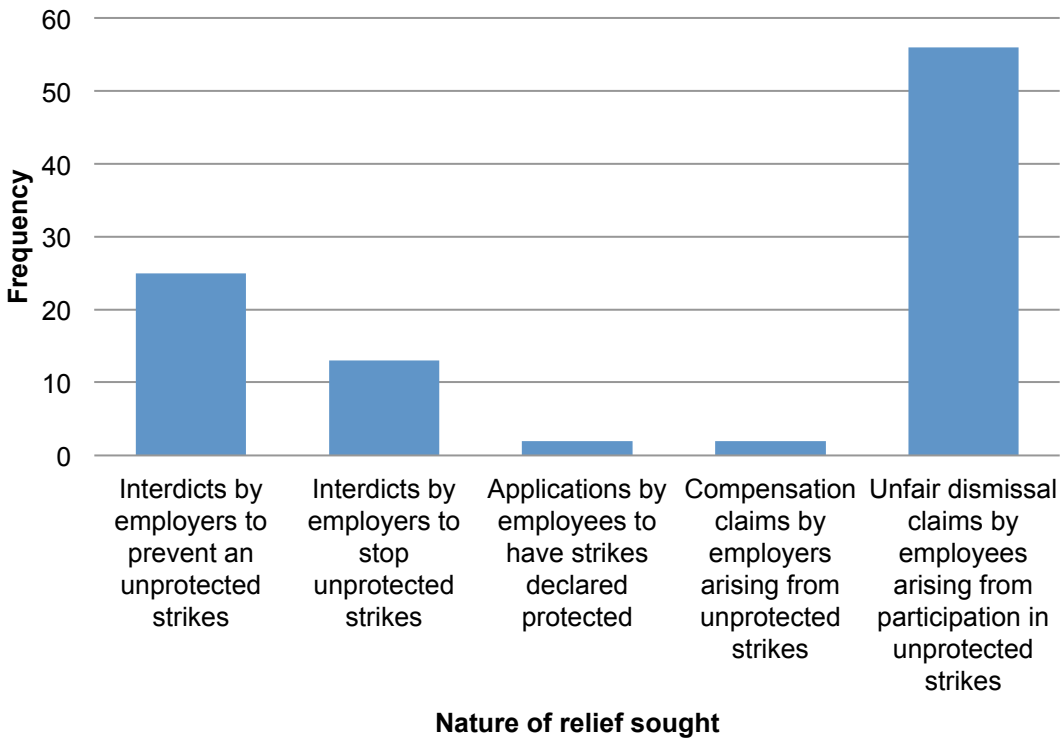

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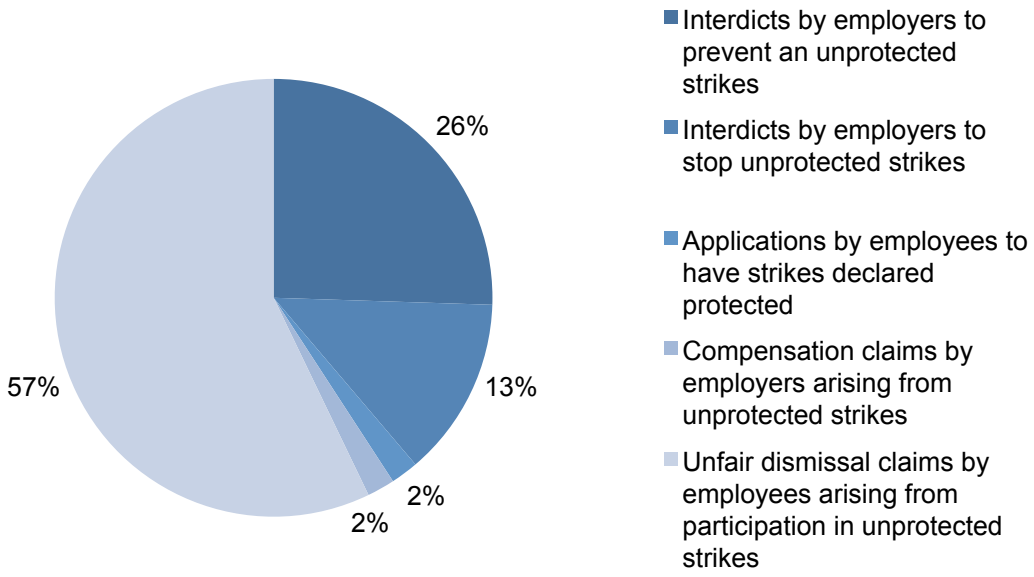
Figure 5.10 - Incidence of unprotected strikes according to nature of relief sought



5.3.2. Outcome of the matters

The judgements were categorised according to the nature of the relief sought and the outcome of the matters. 59 judgements were in favour of the employer and 37 were in favour of the employees. Two judgements were omitted: one application by employees to have a strike declared protected and one unfair dismissal claim by employees arsing from an unprotected strike. The reason being that the judgements examined stated that they had not been resolved. Table 5.2 below gives a breakdown of the outcome of the matters by the nature of relief sought and Figure 5.11 shows the incidence of the outcome for unfair dismissal claims by employees arising from the participation in unprotected strikes.

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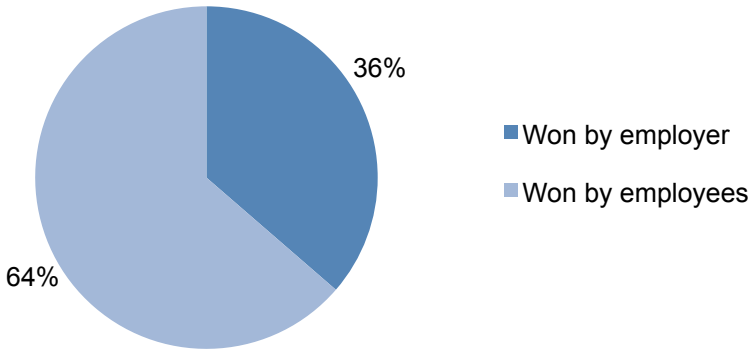
Table 5.2 - Outcomes by nature of relief sought

Nature of relief sought	Won by employer	Won by employees	Total
Interdicts by employers to prevent an unprotected strikes	25 (26,04%)	0 (0%)	25 (26,04%)
Interdicts by employers to stop unprotected strikes	11 (11,46%)	2 (2,08%)	13 (13,54%)
Applications by employees to have strikes declared protected	1 (1,04%)	0 (0%)	1 (1,04%)
Compensation claims by employers arising from unprotected strikes	2 (2,08%)	0 (0%)	2 (2,08%)
Unfair dismissal claims by employees arising from participation in unprotected strikes	20 (20,83%)	35 (36,46%)	55 (57,29%)
Total	59 (61,46%)	37 (38,54%)	96 (100%)

Figure 5.11 - Unfair dismissal claims by employees arising from participating in unprotected strikes



5.3.3. Basis of judgement for outcomes

The judgements were categorised according to the basis of the outcome. Two judgements were omitted because they had not been resolved.

60 judgements were in favour of the employers: 13 of the judgements were based on the unacceptable conduct of the strikers having regard to item 6(1)(a). 17 of the judgements were based on the fact that the issues were not strikeable ones and 30 judgements were based on a failure by the employees to follow the procedures of the Act as contemplated in Item 6(1)(b). Figure 5.12 shows the incidence of judgements in favour of the employers.

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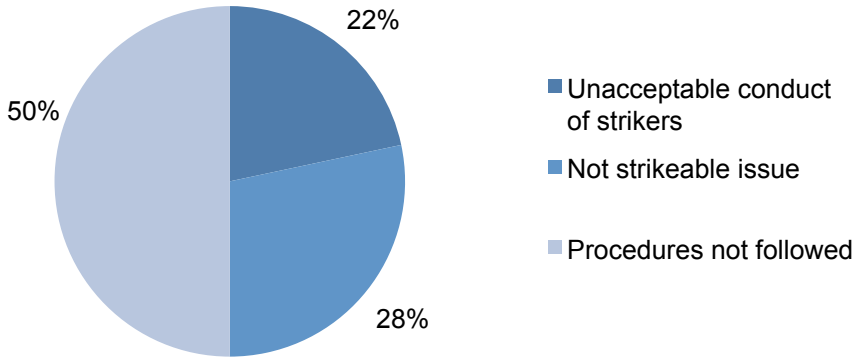
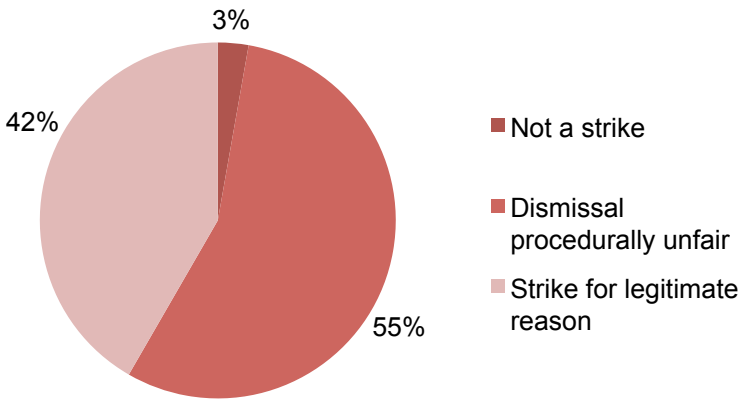
Figure 5.12 - Incidence of judgements in favour of employers



36 judgements were in favour of the employees: one judgement was based on the fact that the work stoppage could not be classified as a strike, 20 judgements were based on procedurally unfair dismissals for want of compliance with Item 6(2) and 15 of the judgements were based on a finding that the strike was in response to the unjust conduct of the employer as contemplated in Item 6(1)(c). Figure 5.13 shows the incidence of judgements in favour of the employers.

Figure 5.13 - Incidence of judgements in favour of employees



The 15 judgements in which the rulings were in favour of the employees based on the legitimacy of the strike were analysed further. All 15 cases involved unfair dismissal claims arising from participation in unprotected strikes, occurred at a single workplace of a single employer and had no violent incidents.

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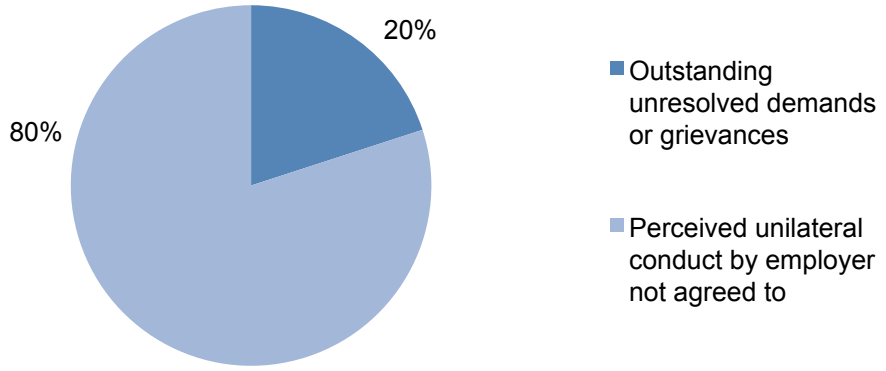
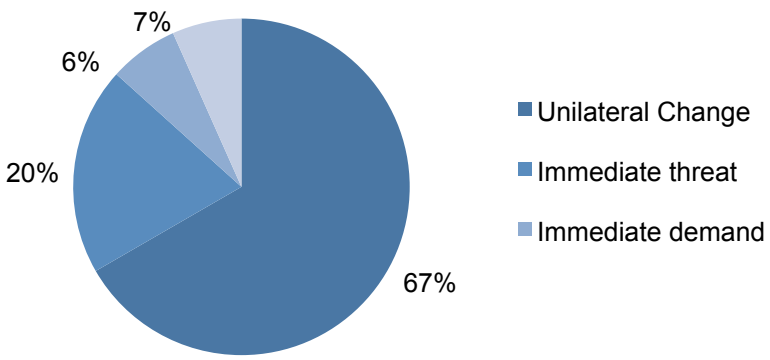
The first part of the analysis looked at the perceived triggers for these cases. The perceived trigger for 12 of the cases was unilateral conduct by employers not agreed to by employees, while the perceived trigger for the other three cases was outstanding unresolved demands or grievances experienced by employees. Fig 5.14 shows the incidence of the perceived triggers of the unprotected strikes where the court decided that the unprotected strikes happened for legitimate reasons.

Figure 5.14 – Incidence of perceived triggers of the unprotected strikes in cases where the court decided that the unprotected strikes happened for legitimate reasons



The second part of the analysis focuses on the time-sensitiveness of the issues. 14 of the 15 cases contained an element of immediacy and as such were considered to be time-sensitive in nature. They consisted of the following: ten cases dealt with unilateral change on the part of the employer, three cases dealt with immediate threats from the employer and one case dealt with immediate demands from employees. One case dealt with protracted unresolved issues, most probably resulting in impatience and frustration for the employees and thus were considered to time-sensitive.

Figure 5.15 - Incidence of time-sensitive issues in cases where the court decided that the unprotected strikes happened for legitimate reasons



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5.3.4. Outcome by type of dispute

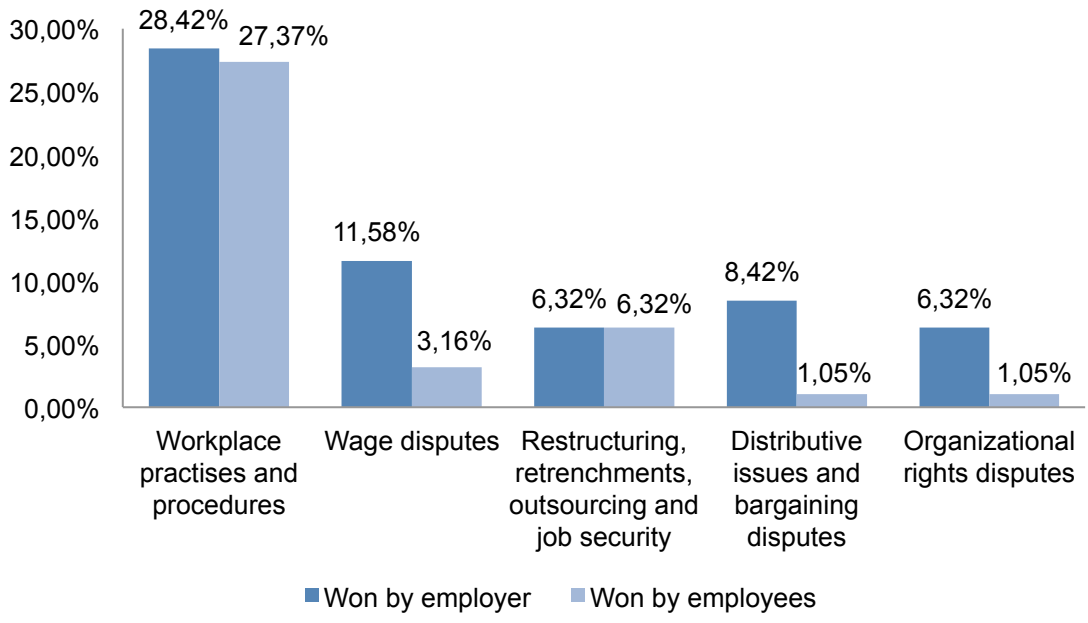
The judgements were categorised according to the nature of the dispute and the outcome of the matter. 58 judgements were in favour of the employer and 37 were in favour of the employees. Three judgements were omitted: one dispute regarding changes to workplace practises/procedures, one dispute regarding organizational rights and one intra-union dispute. The first two judgements were omitted because they had not been resolved. The third judgement was omitted because it was not considered a dispute between the employer and employees.

Table 5.3 below gives a breakdown of the outcome of the matter by the nature of the dispute and Figure 5.14 shows the distribution of the outcome of the matter according to the nature of the dispute.

Table 5.3 - Outcomes by nature of dispute

Nature of dispute	Won by employer	Won by employees	Total
Workplace practises and procedures	27	26	53
Wage disputes	11	3	14
Restructuring, retrenchments, outsourcing and job security	6	6	12
Distributive issues and bargaining disputes	8	1	9
Organizational rights issues	6	1	7
Total	58	37	95

Figure 5.16 - Distribution of the outcomes according to nature of dispute



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5.4. Hypothesis 3

Employees moderate the risk of participating in unprotected strikes.

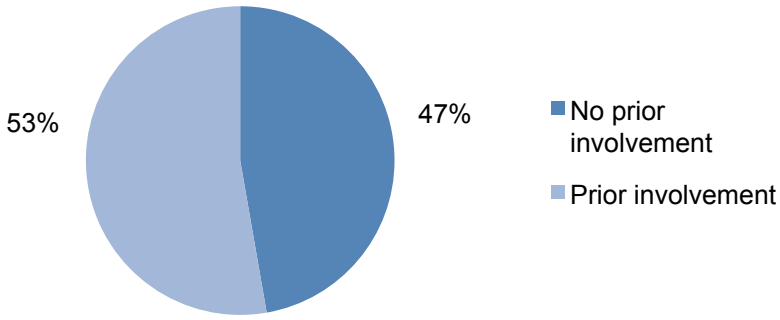
5.4.1. Procedures and union involvement

The judgements were categorised according to union involvement prior to the unprotected strikes, dispute referral to the CCMA or bargaining council, communication with the employer prior to the strike and the union's role in terminating the strike. The seven cases where multiple employers were involved were omitted because the conduct was not considered to be relevant by the court.

5.4.1.1. Union involvement prior to unprotected strikes

48 cases showed union involvement prior to the strike and 43 cases showed no union involvement prior to the strike. Figure 5.15 shows the incidence of union involvement prior to unprotected strikes.

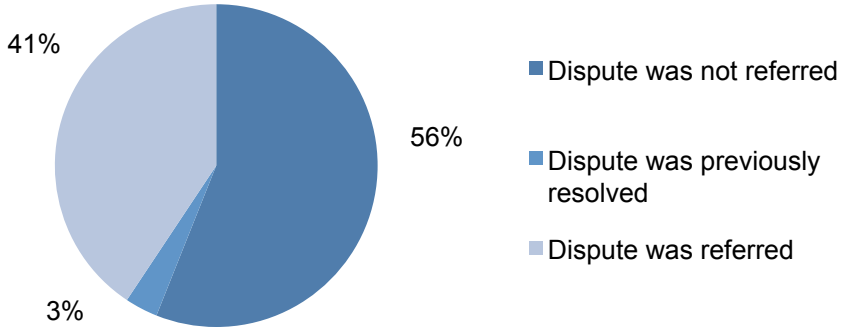
Figure 5.17 - Incidence of union involvement prior to unprotected strikes



5.4.1.2. Dispute referrals to CCMA or bargaining council

In 37 cases the dispute was referred to the CCMA or bargaining council. In 51 cases the dispute was not referred to the CCMA or bargaining council. In three cases the dispute had been previously resolved, but the disputes were resuscitated. Figure 5.16 shows the incidence of dispute referrals to the CCMA or the bargaining council.

Figure 5.18 - Incidence of dispute referrals to CCMA or bargaining council



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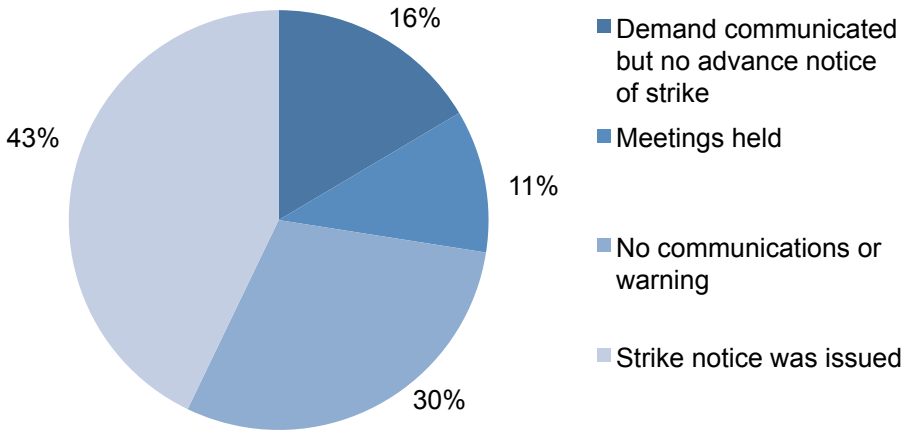
5.4.1.3. Communication with employers prior to unprotected strikes

39 cases showed that a strike notice was issued. Ten cases showed that meetings were held with the employer. 15 cases showed that demands were communicated with the employer but that no advance notice of the strike was communicated. 27 cases showed that there were no communication or warning of a strike. Figure 5.17 shows the incidence of communication with employers prior to unprotected strikes.

Figure 5.19 – Incidence of communication with employers prior to unprotected strikes



5.4.1.4. Union's involvement in termination unprotected strikes

Four cases showed that a union was requested to intervene by the employer, did so and persuaded the strikes to return to work. Four cases showed that a union was requested to intervene by the employer but failed to do so. One case showed that a union was requested to intervene by the employer but was then not given the opportunity to do so by the employer. Seven cases showed that a union was requested by the employer to intervene, did so but failed to persuade the strikers to return to work. 49 cases showed that union officials were involved. 26 cases showed that a union was not requested to intervene by the employer and was not involved otherwise. Figure 5.18 shows the union's role in terminating unprotected strikes.

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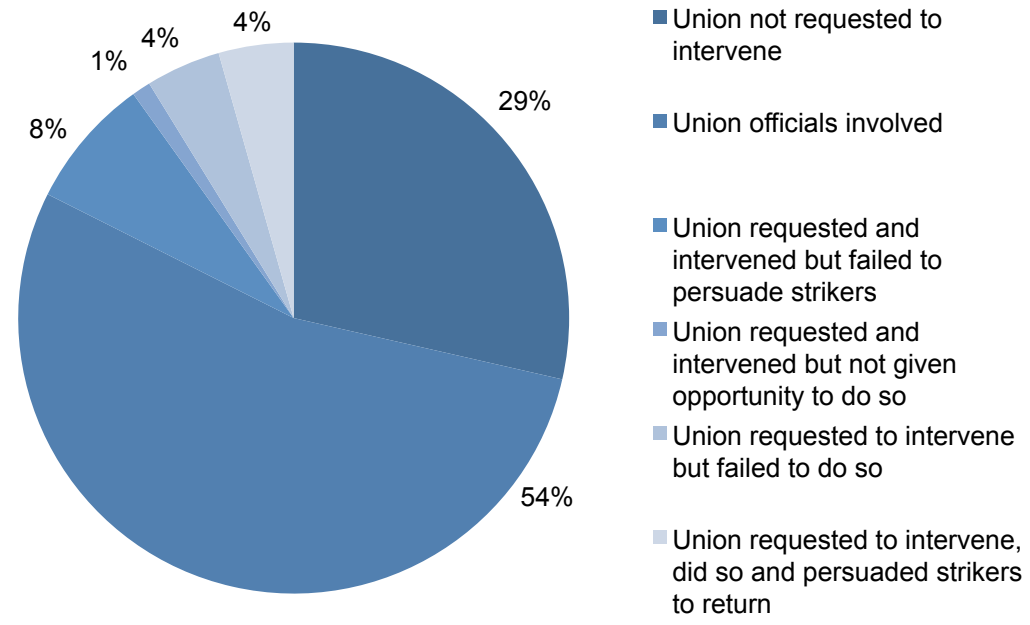
Figure 5.20 - Union's involvement in terminating unprotected strikes

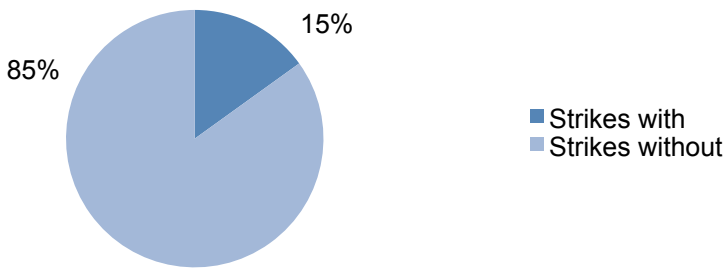


5.4.2. Violence

The judgements were categorised according to whether violence occurred. Violence in this instance includes intimidation or obstruction of access to the workplace. 25 applications for interdicts to prevent an unprotected strike from happening were not included since the strike had not yet taken place. This left 73 cases of which 62 had no allegations of violence, intimidation or obstruction In only 11 cases were allegations made of violence, intimidation or obstruction. Figure 5.19 shows the incidence of violence in unprotected strikes.

The judgements were categorised according to whether violence occurred. Violence in this instance includes physical acts of violence, intimidation or obstruction. 25 applications for interdicts to prevent an unprotected strike from happening were not included since the strike had not taken place yet. This left 73 cases of which 62 had no violence and only 11 did. Figure 5.19 shows the incidence of violence in unprotected strikes.

Figure 5.21 - Incidence of violence in unprotected strikes



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6. CHAPTER 6: DISCUSSION OF RESULTS

6.1. Hypothesis 1: Unprotected strikes are more likely to be triggered in the context of:

H1.1: Procedural injustices, rather than distributive injustices.

H1.2: Single injustices arising at single employers, rather than multiple injustices involving multiple employers.

H1.3: Sudden unilateral changes or imminent threats of changes to workplace practices by employers and perceived time-sensitive injustices.

As suggested by Simmons (2014), Hypothesis 1 postulates a possible contextual framework so as to gain an understanding of the context within which the decisions to embark upon the analysed unprotected strikes were made rather than following the prescribed procedures to gain protected status for their intended collective action.

6.1.1. Hypothesis 1.1

Based on the distinction of Buttigieg *et al.* (2008) between distributive injustices and substantive/procedural injustices, Hypothesis 1.1 seeks to establish whether such distributive or substantive/procedural injustices can be used to provide context for the mobilizing injustices leading to the unprotected strikes. The answer hereto will, without even having regard to the other contextual considerations be informative of the broad category of injustices that are likely to trigger unprotected strikes.

Whilst many categories could conceivably be identified the distinction between distributive and substantive/procedural is a fundamental one because of the distinctive injustices that underpin each. Distributive injustices, according to Buttigieg *et al.* (2008), arise from perceptions of relative unfairness in pay and benefits of an unfair process of establishing such unfairness. In contradistinction hereto substantive/procedural injustices stem from the employer's conduct that is perceived to lack legitimacy because of a breach of established practices or shared beliefs or values. The former injustice in essence seeks to change the existing unfair remuneration regimes whilst the latter seeks the maintaining of the status quo.

Distributive injustices are usually addressed by way of structured and scheduled wage negotiations. In the South African context this would more often than not be conducted at industry or sectorial level under the auspices of bargaining councils between multiple employers or their representative bodies on the one hand and representative trade

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unions representing employees employed by a multitude of employers on the other hand. In contrast hereto, substantive or procedural breaches and violations by their nature implies change and disruption of the status quo, which are more likely to arise on an ad hoc basis. Substantive/procedural injustices would typically include changes to working practices and hours, changes to shift patterns and restructuring, out sourcing and retrenchments.

The distinction between distributive and substantive/procedural injustices as causes for all strikes in South Africa is significant. During 2013, 85% of working days lost in South Africa due to strikes (both protected and unprotected) arose from distributive disputes (Department of Labour, 2013). The 2013 statistic is the second lowest of the past five years, with distributive disputes being the trigger for 82,5% of working days lost to strikes in 2012; 97,8% in 2011; 98,8% in 2010 and 91,2% in 2009 (Department of Labour, 2013, 2011, 2009). On the face of it substantive/procedural disputes gave rise to an insignificant number of strikes during the past five years.

If the nature of disputes play no contextual role in the decisions to engage in unprotected strikes one would assume that the trigger for unprotected strikes would also be distributive disputes, with a fairly insignificant number of unprotected strikes being caused by substantive/procedural issues.

Figures 5.1 and 5.2 showed the distribution and incidence of the disputes that lead to unprotected strikes. They clearly show that the majority (67%) of unprotected strikes involved disputes that dealt with changes to workplace practices/procedures. According to Figure 5.2, wage disputes and distributive issues and bargaining disputes accounted for only 24% of disputes resulting in unprotected strikes (all of these qualify as distributive injustices). Figure 5.2 shows that procedural injustices, which include workplace practices and procedures, restructuring, retrenchments, outsourcing and job security and organizational disputes, account for 67% of the types of disputes that lead employees to embark upon unprotected strikes.

This indicates that the triggers for unprotected strikes constitute a complete reversal of the trigger for protected strikes. This not only confirms Hypothesis 1.1 as being true, it also for all intents and purposes eliminates distributive injustices as a likely cause for unprotected strikes. It also justifies the inference that distributive injustices are not experienced as so profound as to give rise to the perceived necessity to embark upon an unprotected strike.

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Hypothesis 1.1 also supports Snow, Cress, Downey and Jones (as cited in Simmons, 2014) when they contend that disturbing the status quo is likely to trigger collective action.

Hypothesis 1.1 is therefore found to be true.

6.1.2. Hypothesis 1.2

The result of Hypothesis 1.1 that substantive/procedural injustices are the likely causes of unprotected strikes by necessary implication introduces an investigation of the kind of substantive/procedural injustices that are likely to trigger unprotected strikes. Based on Simmons' (2014) suggestion that grievances should be examined through the lens of meaning as informed by amongst others time, place and history, the locality of the origin of grievances would be relevant. This so because the ability to embark upon collective action is, according to Tilly (1978) a reflection of the participants' ability to act together as determined by the combination of interests, organization, mobilization and opportunity.

With regards to place as it relates to context, the analysis of the judgements indicated that 91 cases involved a single employer, while only seven cases involved multiple employers. Of the seven cases that involved multiple employers, four dealt with a single issue while three dealt with multiple demands. This is not significant. What is significant is that of the 91 cases that involved a single employer, an overwhelming majority of 69% dealt with a single issue, as is evident from Figure 5.4.

In a more in-depth analysis of the 91 single employer cases, it was found that in an astounding 86% of cases, the unprotected strikes occurred at a single workplace, while only 14% of cases involved unprotected strikes at multiple workplaces of a single employer. Referring to Figure 5.5, 5% of cases involved a single issue at multiple workplaces, 9% of cases involved multiple demands at multiple workplaces, 21% of cases involved multiple demands at a single workplace and a significant majority of cases (65%) involved a single issue at a single workplace.

These statistics justify the inference that the ability to embark upon collective action is enhanced if the sense of injustice arises from a single issue at the single workplace of a single employer where it would be easier to organize and mobilize. A single locality as the origin of the sense of injustice would provide an intimacy on the side of the employees to the issue because it affects them directly at their place of work. This intimacy would greatly simplify the framing process. This is so because employees at a single workplace are part of a social network which increase the likelihood of them participating in the collective action (Della Porta & Diani, 2006). Injustices that manifest

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themselves with multiple employers are more likely to generate less of a sense of intimacy. It should also in terms of the process be easier to mobilize employees to engage in an unprotected strike if restricted to a group who share the same workspace.

Therefore Hypothesis 1.2 is found to be true.

6.1.3. Hypothesis 1.3

In the discussion of Hypothesis 1.1, substantive/procedural injustices in essence seek to maintain the status quo. This characteristic by necessary implication gives content to the kind of injustices that are likely to trigger unprotected strikes. Changes or intended changes to the status quo would not of necessity induce a sense of injustice. According to Johnson and Jarley (2004) collective action is in the final instance triggered by perceptions of workplace injustice that stem directly from the conduct of management. The conduct of management would lack moral defensibility and legitimacy if alternative courses of action were available or the maintaining of the status quo was to be less injurious, more defensible and similarly effective.

In addition to the nature and content of the change or intended change, the way in which it is implemented gives context to the sense of injustice induced by it. It speaks for itself that a change, unilaterally imposed on employees, is more likely to induce a sense of injustice. Similarly, a change unilaterally upon employees without the benefit of time to communicate and negotiate with the employer is more likely to do so as opposed to a change that was timeously communicated and discussed, even if it is not agreed to.

Hypothesis 1.3 is postulated to consider these apparent truisms by seeking to further define the mobilizing injustices that trigger unprotected strikes with regard to content and context of time. This is also done, to test the comment by Snow, Cress, Downey and Jones (as cited in Simmons, 2014) that the “suddenness” of grievances is less likely to trigger collective action.

With regard to context, Figures 5.6 and 5.7 show that 51% of the causes of the unprotected strikes related to unilateral conduct by employers that were either implemented, or threatened to be implemented. Whilst not showing an overwhelming preponderance to strike in response to unilateral changes it nevertheless comprises approximately half of the 97 cases considered.

When the context of the injustice is linked to the time element a more compelling picture emerges. With regards to time as it relates to context, the analysis of the judgements indicated that 19% of cases dealt with issues that were deadlocked. These were therefore not considered to be time-sensitive. 21% of cases dealt with protracted

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unresolved issues where the employer was perceived to procrastinate, resulting in frustration and rendering time as of the essence. These cases could therefore be regarded as time-sensitive. 60% of cases, a large majority, contained an element of immediacy and were therefore considered to be time-sensitive. Of these, 63% dealt with unilateral change on the part of the employer, 14% dealt with immediate demands from employees and 24% dealt with immediate threats from the employer. The point to stress is that an overwhelming 81% of unprotected strikes were time-sensitive in that they either had an element of immediacy or a protracted unresolved issue rendering their resolution urgent.

The reason why time sensitive injustices coupled with unilateral changes or threatened changes constitute the overwhelming triggering cause for unprotected strikes is directly related to the "cost" of time. Based on the theories contending for cost/benefit analyses an employee, in deciding whether to embark upon an unprotected strike, would weigh the time, cost and reduced risk of complying with the procedures imposed by the LRA, which includes the cost of in the interim accepting and living with the changes or the procrastination of the employer, against the costs and risks of embarking on an unprotected strike in any effort to bring the matter to a head. The costs of living with the changes whilst waiting for the processes to take their course may be significant. Changes to the hours of work or shift systems, the introduction of short time, loss of work due to retrenchments or out sourcing are the kind of cases that were analysed, all of which entailing a significant costs with the added risk that once implement, the changes would be irreversible.

Therefore Hypothesis 1.2 is found to be true.

The statistics disprove the contentions by Snow, Cress, Downey and Jones (as cited in Simmons, 2014) that it is not the "suddenness" of grievances that trigger collective action. It however confirms their contention that disturbing the status quo acts as trigger for collective action.

6.2. Hypothesis 2: Participation in unprotected strikes constitutes a significantly higher risk than participation in protected strikes.

The risks of participating in unprotected strikes include the following:

- Participants may be interdicted from participating in unprotected strikes together with a order to pay the legal costs of the court application, which, if not complied with, may result in contempt of court proceedings.
- Participants in unprotected strikes could be held liable to compensate the employer for losses in income caused by the unprotected strike.

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- Participation in an unprotected strike may in terms of Section 68(5) of the LRA constitute a fair reason for dismissal.

Section 68(5) of the LRA (South Africa, 1995) however requires that in determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.

Item 6 of Schedule 8 of the Code of Good Practice in the LRA (South Africa, 1995) requires to be restated:

> (1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including –
>
> (a) the seriousness of the contravention of the Act;
>
> (b) attempts made to comply with the Act; and
>
> (c) whether or not the strike was in response to unjustified conduct by the employer.
>
> (2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them. (p.151)

By requiring the court to consider the fairness or not of a dismissal with reference to Item 6 of Schedule 8, a judicial discretion is conferred upon it. In exercising this discretion the Labour Court is required to have regard to the facts of each case, taking cognisance of the prescribes of Item 6. This would amongst others entail interpreting

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Item 6 in the context of the LRA and employment law in general and previous judgments of the Labour Court and the Labour Appeal Court. Whilst each case is decided on its own facts, the court's interpretation of Item 6 and its application thereof on the facts of the matter will be instructive of the approach of the court.

In terms of South African common law all courts are bound by the judgments of courts of a higher status. This would amongst others compel the Labour Court to follow and apply the judgments of the Labour Appeal Court whereas Labour Appeal Court would be bound to the judgments of the Constitutional Court. Courts are also bound to previous judgements of that court unless it is decided that the previous judgments are clearly wrong. The only way in which any court can avoid being bound to previous decision is to find the matter before it distinguishable from such previous judgements. This system of precedents results in a body of law that ensures consistency in the application of the law. It is usual for courts to therefore quote and apply the principles and approaches adopted in previous judgments that are applicable. This system of precedents results in a body of law that ensures consistency in the application of the law. To that extent the courts fulfil a "legislative" function by contextualising the LRA and interpreting it.

In the context of this research the way in which the court has interpreted Item 6 and applied its discretion is as informative and binding as the provisions of the LRA itself. The real risk of dismissal for participation in unprotected strike can only be fully considered by analysing the judgments of the Labour Court to detect trends.

In dealing with Hypothesis 2, the researcher looked at how the court used its discretion. Was it used in favour of employers or employees? Figures 5.9 shows the distribution of unprotected strikes according to the nature of the relief sought. Most of the judgements dealt with unfair dismissal claims by employees arising from participation in unprotected strikes. According to Figure 5.10, 57% of cases were cases where dismissals occurred. It is therefore clear that employers do dismiss employees participating in unprotected strikes, making the risk to embark on an unprotected strike not only a legal risk, but also a reality.

In analysing the outcome of the matter by the nature of relief sought, Table 5.2 clearly indicates that interdicts are winnable as a rule. Therefore if a strike is unprotected and the employer applied to the court for an interdict, he is assured of being granted such relief. According to Table 5.2, 25 out of 25 (100%) interdicts by employers to prevent unprotected strikes were awarded. The court was merely applying the law, which states that an unprotected strike may be interdicted. For this reason, an employer

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should always ask for an interdict, because in most cases they will get it. 11 out of 13 (85%) interdicts by employers to stop unprotected strikes were awarded. In only two instances were the interdicts not awarded due to technical procedural mistakes.

Figure 5.11 shows the incidence of unfair dismissal claims by employees arising from participating in unprotected strikes. In this case the numbers ostensibly are in favour of the employees. Figures 5.12 and 5.13 are however important because it is a strict application of the Act. Examining the incidence of judgements in favour of employers (Figure 5.12), 22% of cases were won due to unacceptable conduct of strikers, while 50% of cases were won due to procedures not followed by employees.

Examining the incidence of judgements in favour of employees (Figure 5.13), 55% of cases were won due to unfair dismissal procedures by employers, while 42% of cases were won because it was ruled that employees went on strike for a legitimate reason.

Figure 5.13 is also very instructive for a different reason. 55% of judgements in favour of employees found that the dismissal was procedurally unfair. This does not mean that there was not a fair reason for dismissal. It just means that the employer made a mistake by not following the correct procedures for dismissal. Employers can avoid this entire risk. In this instance, the employers need not have lost 55% of those cases. Assuming that they had followed the prescribed procedures, that outcome would be very different. Instead of only winning 36% of unfair dismissal claims by employees, employers would have won 73%. Furthermore, both claims by employers for compensation for losses suffered as a result of unprotected strikes were granted against the trade unions involved. There is no indication that the Labour Court has adopted a biased approach in favour of employees.

The conclusion is therefore that the Labour Court has confirmed the real risk to employees and their trade unions of participating in unprotected strikes.

Therefore Hypothesis 2 is found to be true.

6.3. Hypothesis 3: Employees moderate the risk of participating in unprotected strikes.

This hypothesis is based on the assumption that employees and their trade unions make conscious decisions to moderate the risks of participating in unprotected strikes. The fact that a decision was made to embark upon an unprotected strike then of necessity implies that the decision was made with a full appreciation of the risks and an assumption of the risks. It also implies that in assuming the risks the participants considered ways of moderating such risks.

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Whether this occurred, can in the absence of direct evidence, only be inferred from what was stated regarding the conduct of the participants. Only the conduct referred to in Item 6(1) is relevant as being within the control of the participants. Item 6(2) deals in its entirety with the conduct that is expected of the employer. The court will examine the conduct of employees. This is where the court's discretion comes into play because, according to Item 6(1), participation in an unprotected strike does not always warrant dismissal. The substantive fairness of dismissal referred to in Item 6(1) must be determined with regards to the facts of the case (i.e. the general issue at hand).

For the purposes of the analysis the conduct referred to in Items 6(1)(a) and 6(1)(b) are considered together and thereafter the conduct referred to in Item 6(1)(c). Having analysed the judgments, conduct that may justify the inference that the employees and their trade unions tried to moderate their risks of participation were identified by complying with Items 6(1)(a) and 6(1)(b). This conduct consisted of all endeavours by employees or their trade union to engage with an employer, which may range from merely giving notice of the strike, communicating the demands, engaging in meetings and/or correspondence and referrals of the dispute. On the other hand a complete disregard of the effects of the strike on the interests of the employer, intimidation, violence and obstruction of access to the workplace, a refusal to engage with the employer and a refusal to comply with interdicts would be regarded as serious contraventions of the LRA.

An analysis of the judgments as evidenced in Figures 5.17 to 5.21 indicate significant efforts to engage both prior to and during the strike. The results on union involvement prior to unprotected strikes (53%), dispute referrals to the CCMA or bargaining council (41%), communications with unions or employers prior to unprotected strikes, including issuing a strike notice (70%) and the union's involvement in terminating unprotected strikes (71%) support the inference that in most instances, employers at least attempted to comply with Items 6(1)(a) and 6(1)(b). Contrary to public perceptions only 15% of unprotected strikes involved violence, intimidation or obstructing of access to the workplace. None of the incidents were serious.

Item 6(1)(c) differs from Items 6(1)(a) and 6(1)(b) in that although it deals with unjustified conduct by the employer, it is also under the control of the employees. This is because employees can mitigate the risk of Item 6(1)(c) by being careful when it comes to the choice of the cause of the strike. To be able to characterize the unprotected strike as being in response to the unjust conduct of the employer as contemplated in item 6(1)(c), of necessity implies that the strike needs to be in response to conduct of the employer and not conduct of the employees themselves. An

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indication that employees in fact moderated the risks of participating in unprotected strikes would be to consider firstly whether the strike was in fact triggered by the conduct of employers. This implies that employees' conduct would be moderated by their choice of the issue on which they chose to embark on the unprotected strike.

The choice of mobilizing grievance would require them being of the conviction that the conduct by the employer would be regarded by the Labour Court as a strike in response to unjustified conduct by the employer. By its very nature this judgment call is fraught with uncertainty. If an unprotected strike is aimed at addressing a single procedural injustice and is triggered by sudden unilateral changes or imminent threats of changes to a workplace practice by a single employer (as postulated in Hypothesis 1) an analysis of the judgments will show that the Labour Court is more likely to regard the strike in reaction to the unjustified conduct of the employer. This would especially be so if the unprotected strike were aimed at addressing procedural injustices, rather than distributive injustices.

Referring back to Figure 5.13 (incidence of judgements in favour of employees), the court ruled that 42% of unprotected strikes were for legitimate reasons. The researcher did a further analysis of the 15 judgements in which the rulings were in favour of the employees based on the legitimacy of the strike. All 15 cases involved unfair dismissal claims arising from participation in unprotected strikes, all occurred at a single workplace of a single employer and none of the cases had any incidents of violence. Looking at Figure 5.14, the perceived trigger for 12 (80%) of the cases was unilateral conduct by employers not agreed to by employees. Looking at Figure 5.15, 87% of the cases consisted of unilateral changes or immediate threats of changes by employers.

These results justify the inference that employees are deliberate and careful in the choices they make. They seem to have selected the instances where they chose to embark on unprotected strikes, so that's there is a better chance that the court will agree that the unprotected strike is in response to unjustified unilateral conduct and rule in their favour.

The fact of the matter is that sometimes the risk of not going on an unprotected strike may simply be too high. Imagine an employer suddenly extending working hours. Taking the time to have a strike declared in such a case could mean that it would become too difficult to overturn the decision. That is why in such an instance, the best course of action may be to do a cost/risk analysis and embark upon an unprotected strike. The results from this research project therefore make an overwhelming case to say that employees make careful decisions to limit the risk. This would also justify the

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inference that the unions know the law and that the employees get good advice from the unions.

Therefore Hypothesis 3 is found to be true.

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7. CHAPTER 7: CONCLUSION

7.1. Recommendations to employers and trade unions

Results of the research shows that there is clarity as to which injustices would probably trigger unprotected strikes and under what circumstances. This is of importance to employers in that they can avoid the kinds of disputes and the circumstances that are likely to result in unprotected strikes.

By way of example, employers should avoid imposing unilateral changes to working conditions, workplace practices and procedures without giving sufficient advance notice to employees and their trade unions.

Employers should engage with the employees and the trade unions, convince them of the need for the changes and explore alternatives. Employers should be sensitive to the time-sensitivity of its conduct and should avoid rendering issues time-sensitive and should not procrastinate in resolving issues with employees and their trade unions.

When confronted with an unprotected strike, employers should in the first instance conduct introspection and access whether the strike was not in response to its own unjust conduct. If its own conduct is fairly assessed as being unjust, it should concede the unjustness of its conduct and remedy it.

If an employer judges its own conduct not to be unfair, it should meticulously follow the procedures imposed in Item 6(2) before dismissing the striking employees. The analysed judgements are replete with instances where employers acted in haste when dismissing striking employees rather than engaging them constructively.

When confronted with an unprotected strike, employers should without fail, apply for interdicts to prevent or stop such strikes. It is assured that the relief sought by it will be granted. In doing so, it avoids the potential costs and risks of having to face a claim for unfair dismissal.

Trade unions should in principle discourage unprotected strikes because of the high risk to its members of participation. There are adequate alternatives available to pursue, including the launching of urgent proceedings in the Labour Court.

When confronted with an unprotected strike by its members, trade unions should actively intervene, discourage the members from continuing with the strike and actively pursue alternatives to resolve the disputes.

When confronted with an unprotected strike by its members, trade unions should be conscious of the fact that it can reduce the risk of dismissal and it should do so.

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7.2. Limitations of the research

If the Department of Labour did more detailed reporting in their Annual Industrial Action Report, a more comprehensive distinction could be made between protected and unprotected strikes.

In the absence of interviews with trade unions and participating employees who have participated in unprotected strikes, it is impossible to ascertain their motives and strategies in deciding not to follow the procedures of the Act.

Similarly, in the absence of interviews with employers who have experienced unprotected strikes, their motives and strategies in dealing with the strikes cannot be ascertained.

7.3. Recommendations for future research

The researcher has identified a number of possibilities for future research, many of which a qualitative approach would work well:

Investigate ways of reducing unprotected strikes and promote compliance with the procedures of the Labour Relations Act.

Investigate whether amendments to the Labour Relations Act to strengthen the right of employees to interdict unilateral conduct by the employer should be introduced and whether it would decrease the incidence of unprotected strikes.

Whether more claims against trade unions and employees for losses incurred from participation in strike action are likely to further moderate their conduct. Judgements for both such cases in this research report were in favour of the employer.

Investigate why employers do not resort to the Labour Court more often to apply for interdicts to prevent or stop unprotected strikes. The results from this research report indicated that employers were very successful in obtaining interdicts to prevent or stop unprotected strikes.

Follow a case study approach to investigate the context of selected recent reported judgements in order to investigate the context of the unprotected strikes in order to gain deeper insight into the motivation and strategic decisions of the different role players, being employees, employers and trade union officials.

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