JUST AND EQUITABLE COMPENSATION IN RESPECT OF UNPROTECTED STRIKES IN SOUTH AFRICA

by

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Submitted in partial fulfilment of the requirements for the degree

LLM in Labour Law

in the Faculty of Law

at the

UNIVERSITY OF PRETORIA

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Date of submission
31 October 2024

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ACKNOWLEDGEMENTS

I would like to express my heartfelt gratitude to God for His endless blessings and for providing me with the opportunity to pursue further studies in a topic that I have thoroughly enjoyed researching and writing about.

I am deeply thankful to my father for his unwavering prayers and encouragement throughout my pursuit of this degree. I would also like to extend my appreciation to my stepmother for her continuous support and motivation during this incredible journey.

To my friends, I am forever grateful for your encouragement and support, which have been invaluable during this time.

A special acknowledgment goes to my supervisor, Professor Stefan Van Eck. I sincerely appreciate your patience, guidance, and support throughout this process. It has truly been an honour and a privilege to work closely with such a distinguished professor in this field.

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SUMMARY

This study critically examines the intersection of the Labour Relations Act (LRA) and the South African Constitution concerning the right to strike and the conduct associated with strikes and picketing. It asserts that the existing legal framework inadequately addresses unlawful conduct linked to these activities, necessitating stricter limitations to align the right to strike with constitutional human rights.

While the 2018 amendment addressing advisory arbitration for violent picketing represents a minor step forward, issues of violent strikes continue to persist, with unions often disregarding court orders that prohibit such conduct. Additionally, the Labour Appeal Court's interpretation of section 68(1) introduces the concept of just and equitable compensation for unlawful actions during strikes, but this remedy is described as akin to a 'lucky draw' and heavily criticized for being ineffective and unreliable.

Furthermore, this study highlights South Africa's commitment as a founding member of the International Labour Organization (ILO) and its ratification of collective bargaining conventions. It notes that violent strikes are not protected under international labour law, as they contravene the principles of freedom of association. Although the ILO advocates for proportional penalties related to strikes, this study argues that the proportionality principle is often unrealistic in instances where union-sanctioned strikes lead to substantial financial losses and human rights violations.

The proposed amendment to the LRA, which sought to limit the authority of trade unions to authorize picketing only by their members, was rejected, leading to ongoing concerns about unions' responsibilities in managing picketing activities. The study posits that unions should be liable for negligence when they fail to regulate their members effectively during such activities, emphasizing the need for appointed marshals and convenors to ensure peaceful picketing.

A comparative analysis with Australia and Canada reveals that both countries have enacted laws allowing for the suspension and termination of harmful strikes, offering potential lessons for South Africa. The Australian Fair Work Act prioritizes economic stability and public safety over the right to strike, indicating that South Africa may benefit from re-evaluating its approach to balancing striking rights within the constitutional framework.

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Chapter 1

Introduction

1 Contextual background

'Strike violence has become the new normal in South Africa's Industrial Relations'[1]

The right of employees to engage in strike activities is a fundamental aspect of their freedom of association and serves as a powerful tool utilized by trade unions when negotiations for collective bargaining have reached an impasse. Strikes represent a prominent form of collective action taken during labour disputes and are generally considered the ultimate recourse for labour organizations in their efforts to address their grievances and pursue their objectives[2]. The fundamental philosophy of the Labour Relations Act[3] (LRA) is that collective bargaining is the preferred means of promoting good labour relations and resolving disputes and the strike weapon is an essential and integral part of collective bargaining[4]. Without a strike, collective bargaining becomes collective begging[5].

The Constitution of the Republic of South Africa[6], (Constitution) guarantees an employee with a constitutional right to join a trade union and to take part in trade union activities[7]. The LRA was enacted to give effect to this right[8]. Apart from the constitutional and legislative provisions governing collective bargaining, it must also be noted that freedom of association[9] and collective bargaining[10] are amongst the founding principles of the International Labour Organization[11] (ILO).

Violent and lengthy strikes in South Africa have been a prominent feature of the country's industrial relations for several decades now[12]. South Africa lacks adequate mechanisms[13] to control the nature of violent strikes, and the current measures[14] in place to attempt to curb the violent nature of strikes and pickets remain ineffective and unreliable. Lengthy and violent

[1] *Clover SA (Pty) Ltd v General Industries Workers Union of SA & Others* (2021) 42 *ILJ* 1111 (LC).
[2] Manamela XLVI *CILSA* (2013) 309.
[3] s 1 of the Labour Relations Act 66 of 1995.
[4] *National Union of Mine Workers v East Rand Gold & Uranium Co* Ltd 1992 (1) SA 700 (A); (1991) 12 *ILJ* 1221 (A).
[5] *NUMSA & others v Baderbob (Pty) Ltd & another* 2003 (2) *BCLR* 182 (CC).
[6] The Constitution of the Republic of South Africa Act 108 of 1996.
[7] s 23 of the Constitution.
[8] s 64(1) of the LRA.
[9] ILO Convention 87, (1948).
[10] ILO Convention 98, (1949).
[11] See Ch 2.
[12] Tenza (2020) *Obiter* 519.
[13] s 64 & 68 of the LRA.
[14] s 69(12) & 150A – 150D of the LRA.

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strikes have devastating effects on our economy[15], causing serious harm[16] or death[17] to non-striking employees and members of our society[18]. From January 2023 to December 2023, The Department of Labour[19] has recorded an upswing in strikes emanating from economic challenges that needed urgent consideration and negotiation by unions and employers. The South African labour market recorded 97 work stoppages involving more than 68 000 workers from January 2023 to December 2023. This is higher than the 87 strikes recorded in 2022[20].

In *Tsogo Sun Casinos (Pty) Ltd t/a Monte Casino v Future of SA Workers Union and others*[21] the court held that if a strike is marred by violence, one must question whether the strike continues to serve its purpose. The functionality principle was tested in our labour courts[22] and the courts held that there must be a certain degree of unacceptable violence present before the court will make a ruling whether the strike should be declared unprotected[23]. This serves only to create uncertainty about the extent of violence that an employer can seek urgent relief from the court. What level of violence must occur for the courts to intervene and issue an interdict?

The right to strike is currently limited by the legislative provisions of the LRA in that a strike must comply with procedural requirements[24] and the right to strike is further subjected to

[15] Tenza (2020) *Obiter* 519 – 521. Https://businesstech.co.za/news/business/98727/strikes-cost-south-africa-r6-1-billion/ (accessed 1 September 2024), in which Business Tech confirmed that labour stoppages since 2012 in the Platinum sector has cost the country approximately R18 billion lost in revenue. The five long month strike in early 2014 at Impala Platinum Mine amounted to a daily loss of about R400 million.

[16] In *SA Chemical Catering & Workers Union v Check One (Pty) Ltd* (2012) 33 *ILJ* 1922 (LC), striking employees were carrying various weapons ranging from sticks, pipes, bottles and planks to threaten non-striking employees to cut their throats. In *Sibanye Gold Ltd t/a Sibanye Stillwater v AMCU & others* (2019) 40 *ILJ* 898 (LC) more than 100 vehicles and homes were burnt down, roads were blockaded, passing vehicles were stoned, assaulting of a bus driver and police officer were recorded. See also, *FAWU & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2012) 33 *ILJ* 1779 (LAC) where non striking employees were harassed and threatened at their homes. One female employee was dragged from her home and assaulted with sjamboks and pangas. Houses were bombed and vehicles were set alight.

[17] Kubjana (2021) *Obiter* 40; Theron (2015) *ILJ* 849 confirmed that 34 employees were killed, and 70 employees were injured. This horrible incident today is characterised and known as the Marika Massacre. In *Security Services Employers Organisation v SA Transport & Allied Workers Union* (2012) 35 *ILJ* 1693 (CC), 20 employees were thrown of a moving train for not participating in strike action and as a result two employees died. In *Sibanye Gold Ltd t/a Sibanye Stillwater v AMCU & others* (2019) 40 *ILJ* 898 (LC), 10 people were killed.

[18] *Tsogo Sun Casinos (Pty) Ltd t/a Monte Casino v Future of SA Workers Union and* others (2012) 33 *ILJ* 998 (LC).

[19] Industrial Action Report (2023) RP 194/2024 Department of Labour 3.

[20] Industrial Action Report (2023) RP 194/2024 Department of Labour 3.

[21] In *Tsogo Sun Casinos (Pty) Ltd t/a Monte Casino v Future of SA Workers Union and others* (2012) 33 ILJ 998 (LC) the court stated that 'When the tyranny of the mob displaces the peaceful exercise of economic pressure to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose'. See also *Roberts Winery (Pty) Ltd v Commercial Stevedoring Agricultural & Allied Workers Union & others* (2017) 38 *ILJ* 1171 (LC).

[22] *Dis-Chem Pharmacies Ltd v Malema &* others 40 ILJ 855 (LC) 863. *Clover SA (Pty) Ltd v General Industries Workers Union of SA & others* (2021) 41 *ILJ* 1111 (LC).

[23] *National Union of Food Beverage Wine Spirits & Allied Workers Union & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers Union & others* (2016) 37 *ILJ* 476 (LC).

[24] s 64(1) of the LRA.

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substantive limitations[25]. In the spirit of the LRA[26] and the Constitution[27], strike violence is predominantly prohibited[28] and this study also aims is to illustrate a need for a stricter limitation[29] of the right to strike to align fairness within the constitutional framework[30] of human rights[31]. The Constitution of South Africa is the supreme law[32] of this country, and any conduct or law which is inconsistent with it is invalid[33]. When interpreting the provisions of Chapter 2[34] the courts must promote the values that underly an open democratic society based on human dignity, equality and freedom[35]. The right to life has been hold as the utmost important right[36] following by the right of dignity of a person[37]. It is evident that strike violence is a real phenomenon in the arena of collective bargaining, and it serves no purpose if such violent conduct is not consistent with the values of the Constitution.

South Africa was the 10th member state to ratify the ILO's Violence and Harassment Convention[38] on 29 November 2021. This was followed by South Africa's implementation on of the Code of Good Practice on the Prevention and Elimination of Victimisation and Harassment in the Workplace[39] on 18 March 2022. From the preamble of the latter convention, it states that the global community will not tolerate any form of violence or harassment in the world of work. It is evident that violence will not be tolerated on an international sphere of labour rights and thus warrants a proper intervention of the ILO to address violence during strike and picket action for stricter interpretation and a more suitable remedy for an employer.

This study argues that South Africa's current legislative framework for remedies available to an employer is ineffective and unreliable. An employer has the remedy to seek an interdict[40] or claim just and equitable compensation[41] against a trade union for any strike that involves unlawful conduct. The courts have criticized the unions and their members on several occasions for disobeying court orders[42] when a strike involving violence has been interdicted.

[25] s 65 of the LRA.
[26] s 1(d)(1) of the LRA it states that the purpose of the LRA is to advance labour peace through orderly collective bargaining.
[27] s 17 of the Constitution states that everyone has the right to picket, but it must be done peacefully.
[28] Explanatory Memorandum on the 1995 Labour Relations Amendment Bill, 2017 RS 71, 2019 AA2 – P202. Code of Good Practice in terms of Industrial Action, Collective Bargaining and Picketing Government Gazette GN R1396 GG42121, 19 December 2018.
[29] Tenza M (2018) *STELL LR* 471.
[30] s 36 & 39 of the Constitution.
[31] Ch 2 of the Constitution.
[32] Preamble of the Constitution.
[33] S 2 of the Constitution.
[34] Ch 2 of the Constitution.
[35] *Hotz & Others v University of Cape Town 2017* (2) SA 485 (SCA) para 62.
[36] *S v Makwanyane* 1995 (3) SA 391 (CC) 450.
[37] *S v Makwanyane* 1995 (3) SA 391 (CC) 451.
[38] ILO Violence and Harassment Convention 190 of 2019.
[39] Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace of the Employment Equity Act 55 of 1998.
[40] s 68(1)(a) of the LRA.
[41] s 68(1)(b) of the LRA.
[42] *Dis-Chem Pharmacies Ltd v Malema & others* (2019) 40 *ILJ* 855 (LC) 863.

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The courts have also taken a strong stance and penalized the unions and their members by imposing hefty fines.[43]

In *Rustenburg Platinum Mines v MPWU*[44], the company quantified their losses to R15 million rand due to an unprotected strike and the court reduced the claim to just and equitable compensation in the amount of R100.000.00. The court reasoned that the strike was not for a long duration, the union failed to comply with the provisions of the LRA and the company had not been intransigent in dealing with the issues with the strikers. Although the losses suffered by the company were severe, the court weighed up the Union's weak financial position as a factor to consider[45]and ordered the union to pay R100,000.00 in monthly instalments of R5000.00. In *Algoa Bus Company v SATAWU*[46] the company quantified their losses due to an unprotected strike to the amount of R500,000.00 and the court reduced the claim to a just and equitable amount of R100,000.00 repayable by each employee in monthly instalments of R50.00 due to the fact that the company overestimated the duration of the strike. However, Algoa[47] in a later strike, obtained an award of damages of about R10 million rand against three unions for participating in a later unprotected strike and in another later unprotected strike, Algoa was successful in claiming compensation in the amount of R1.6 million against one of the unions[48].

It is important to note that there were some minor improvements during the industrial arena with the 2018 Amendment Act[49] for advisory arbitration regarding violent picketing. While this may appear to benefit employers, violent pickets continue to be a common occurrence, with unions and their members still defying court orders prohibiting violent strikes and pickets. Another improvement was the Labour Appeal Court's[50] interpretation of section 68(1)[51], which allows for just and equitable compensation to be claimed for any conduct in support of an unlawful strike. By including the phrase 'any conduct', the legislature did not specify that just and equitable compensation can only be claimed for unprotected strikes.

In *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd*[52] the court held that the union would not always be held automatically liable for the actions of their members and as such, a claim under section 68(1)(b)[53] cannot always be successful even if the losses attributable to a strike are proven[54]. It is evident from

[43] *SA Municipal Workers Union & others v Thaba Chweu Local Municipality & another* (2017) 38 *ILJ* 1137 (LC); *KPMM Road & Earthworks (Pty) Ltd v Association of Mine Workers & Construction Union &* others (2018) 39 *ILJ* 609 (LC).
[44] *Rustenburg Platinum Mines v MPWU* [2001] 24 *ILJ* 405 (LC).
[45] s 68(1)(b)(iv) of the LRA.
[46] *Algoa Bus Company v SATAWU* [2010] 2 *BLLR* 149 (LC).
[47] *Algoa Bus Company v SATAWU* [2015] 36 *ILJ* 2148 (LC).
[48] *Algoa Bus Company v TARGWU* [2015] 36 *ILJ* 229 (LC).
[49] Labour Relations Amendment Act 8 of 2018; s150A – 150D of the LRA was included to provide for advisory arbitration.
[50] *SA Commercial Catering & Allied Workers Union v Massmart Holding Ltd & others* (2024) 45 *ILJ* 1610 (LAC).
[51] s 68(1) of the LRA.
[52] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported Case no: JS 172/2014 (2019) (LC) para 128.
[53] s 68(1)(b) of the LRA.
[54] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported Case no: JS 172/2014 (2019) (LC) para 130.

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this ruling that a remedy for just and equitable compensation is not effective nor reliable and the courts award compensation in a strict narrow sense[55].

2. Significance of Study

The Supreme Court in *Minister of Police and others v Umbhada Estates (Pty) Ltd and others*[56] the court found that that the South African Police Service (SAPS) wrongfully and negligently failed to prevent striking employees from causing damage to the company and injury of one of its employees and ordered that the employer can claim the full extent of their damages against the SAPS. In *Xstrata v AMCU*[57], the court held that the union has a duty to control their members and used the phrase 'to police' their members in order to ensure that their members do not commit any unlawful conduct during strike and picketing action.

The significance of this study will showcase that the remedy for just and equitable compensation is ineffective and unreliable. This motivates a more in-depth investigation into the common law to find more suitable remedies for an employer. This study will evaluate whether a trade union is capable of being held liable for negligence alternatively, liable under the common law doctrine of vicarious liability.

In a comparative analysis I will compare two countries to find solutions in foreign jurisdictions we can learn from.

Firstly, this study will compare South African labour law to Australian labour law to find solutions to end strike action immediately once it is marred with violence.

Secondly, this study will compare South African labour law to Canadian labour law to find solutions in extending vicarious liability to trade unions.

3. Research Questions

This study aims to address three questions

1. Is it possible for a strike to lose its protected status based on the functionality principle?
2. Is it possible to hold a union liable for negligence due to the breach of statutory duties in terms of the peace clauses?
3. Is it possible to extend the common law doctrine of vicarious liability to trade unions?

[55] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported Case no: JS 172/2014 (2019) (LC) para 130
[56] *Minister of Police and others v Umbhada Estates (Pty) Ltd and others* Case No 1281/2021 [2023] ZASCA 85 (1 June 2023).
[57] *Xstrata v AMCU* (2014) ZALCJHB No. J1239/13 (25 February 2015).

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4. Research Methodology

In my research I have made use of primary resources such as the Constitution, legislation, explanatory memorandums, reports, national and international jurisprudence. I have also made use articles, LLM Dissertations, LLD Dissertations and textbooks written by legal scholars. This study relies on a desktop methodology with elements of a comparative approach.

5. Structure

This dissertation will encompass six chapters. Chapter Two will present an in-depth analysis of the international right to strike, juxtaposing South African legislation with pertinent international conventions. It will seek to elucidate alternative remedies available to employers that may prove to be more effective than the existing statutory provisions.

In Chapter Three, attention will be directed towards the constitutional and legislative underpinnings of the right to strike, distinguishing between protected and unprotected strikes. This discussion will extend to the associated consequences, protections, and immunities afforded to these strikes, alongside an examination of recent developments in industrial relations, particularly regarding any potential limitations placed on the right to strike.

Chapter Four will critically evaluate the legislative remedies accessible to employers concerning just and equitable compensation, ultimately positing that these remedies are insufficient and unreliable. Additionally, this chapter will explore the possibility of holding trade unions liable for negligence in instances of breaching statutory obligations, particularly as they relate to peace clauses within the constitutional and legislative frameworks. A salient discussion will arise on whether the common law principle of vicarious liability could be applied within the trade union-member relationship.

In Chapter Five, this study will engage in a comparative analysis of strike actions across two jurisdictions Australia and Canada. The study will consider whether immediate termination of violent strike actions is warranted, the extent to which trade unions may be held liable for damages resulting from violent actions, and whether the common law principle of vicarious liability can be extended to encompass the dynamics between trade unions and their members.

Finally, Chapter Six will propose solutions aimed at a more stringent interpretation of the right to strike, or alternatively, a potential amendment to the LRA to address the efficacy and reliability of the current remedial measures available to employers. Such recommendations aim to enhance the framework governing the right to strike and its associated ramifications in the South African context.

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Chapter 2

International Norms

1. Introduction

In terms of international labour standards, the right of freedom of association, including the right to form and join unions, enjoys a universal status as a fundamental labour and human right. However, the right to strike holds a more ambiguous status and the debate over what constitutes its legitimate exercise gives rise to much controversy.

The right to strike is notably absent in the text of the International Labour Organization (ILO) conventions and recommendations and this has given ILO supervisory bodies leeway in developing more detailed principles on the right to strike. The right to strike has been recognised as an 'intrinsic corollary of freedom of association'[58] and a 'fundamental right of workers and their organisations'[59].

South African labour laws have largely been influenced by the jurisprudence of the ILO[60]. South Africa is a founding member of the ILO and played a significant role in the inception of the ILO's Constitution.[61]

This Chapter will briefly highlight the historic foundations of the ILO and the structures of its supervisory bodies within in the ILO. This chapter will further evaluate the right to freedom of association within the context of interpretation under the umbrella of Article 37 of the ILO. The aim of this chapter is to seek guidance from international norms regarding the right to strike in the context of liability for a claim of damages towards trade unions in the event of unlawful and violent strike action.

2. History, Structure and Influence of the ILO

2.1 Introduction

The Constitution of the Republic of South Africa bestows a legal duty on courts tribunals, and similar *fora* to consider international law when interpreting the Bill of Rights and other legislation[62]. The Constitutional Court in *S v Makwanyane*[63] has set the tone for proper interpretation and put emphasis on the fact that the interpretation clause does not only require to interpret legal instruments that is binding upon the Republic of South Africa but also extends to those legal instruments which the state is not necessarily a party[64]. The right

[58] International Labour Organization, 311th Report of the Committee of Freedom of Association (1998), Case No 1954 at 405; Zou (2012) *Trinity C.L Rev* 101.
[59] Gernigon (1998) *ILR* 442.
[60] Van Niekerk (2019) 23.
[61] Manamela (2013) *CILSA* 313.
[62] s 39(1)(b) & 233 of the Constitution; Van Niekerk (2019) 32; Kujinga (2018) *PER/PELJ* 5.
[63] *S v Makwanyane* 1995 (3) SA 391 (CC).
[64] In *S v Makwanyane* 1995 (3) SA 391 (CC) para 35, the court stated that 'international agreements and customary international law provide a framework within which … the Bill of Rights can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialized agencies such as the Internal Labour Organization may provide guidance as to the correct interpretation of particular provisions'.

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to strike is guaranteed in the Constitution[65] and the LRA was enacted to give effect to this right and it is clearly stated in the preamble of the LRA[66]. The South African history of labour relations and workers' rights are long and complicated. Without freedom of association, workers are at risk of being isolated and powerless. Accordingly, South African labour relations need to be considered within the context of the industrial revolution, economic history and traditional attitudes to work[67]. Workers' rights to freedom of association cannot be promoted and enforced at domestic level without reference to its protection under international instruments[68].

2.2 Historic Overview of the ILO

The ILO was established by the Treaty of Versailles, signed in 1919 and South Africa was a signatory to the treaty which also established the League of Nations[69]. All members of the League of Nations became founding members of the ILO[70]. After the Second World War, the United Nations (UN) replaced the League of Nations, and the ILO became one of the UN's first specialised agency[71]. As a founding member of the UN, South Africa continued to be a member of the ILO up until 1959 when apartheid became a focal point of debate in the ILO. In 1961 the International Labour Conference adopted a resolution calling for the withdrawal from the ILO due to South Africa's apartheid policy of its government[72]. The South African government gave notice of their withdrawal from the ILO in 1964[73]. South Africa has rejoined the ILO on 26 May 1994 and has subsequently ratified all of the ILO's core conventions and plays a significant role in the ILO affairs[74].

2.3 The structure of the ILO & Supervisory mechanisms

The main focus of this chapter is to review international labour standards in the context of liability for trade unions in the event of unlawful and violent strikes and therefore a short and brief overview of the structure and supervisory bodies of the ILO will be discussed.

The ILO is unique for its tripartite structure[75] and compromises of three main bodies[76]:

(1) The International Labour Conference serves as the paramount policy-making institution of the ILO. Convening annually in Geneva, this conference is characterized by the participation of national delegations representing member states. A principal function of the Conference is the formulation and adoption of new international labour standards, thereby playing a critical

[65] s (23)(2)(c) of the Constitution.
[66] The preamble of the LRA makes it clear that the act is enacted to 'regulate the right to strike'.
[67] Budeli (2009) *Fundamina* 57.
[68] Budeli (2009) *De Jure* 139.
[69] Manamela (2013) *CILSA* 313; Van Niekerk (2019) 23.
[70] Van Niekerk (2019) 23.
[71] Van Niekerk (2019) 23.
[72] Van Niekerk (2019) 24.
[73] Manamela (2013) *CILSA* 313; Van Niekerk (2019) 24.
[74] Manamela (2013) *CILSA* 314; Van Niekerk (2019) 24.
[75] Frey (2017) *GLJ* 18.
[76] Van Niekerk (2019) 24 - 25.

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role in the advancement of labour rights and the promotion of equitable working conditions globally.

(2) The Governing Body constitutes the executive arm of the ILO and plays a pivotal role in determining the agenda of the International Labour Conference. In addition to its agenda-setting responsibilities, the Governing Body oversees the organization's budget and is tasked with making critical decisions on various policy matters. This governance structure ensures that the ILO effectively fulfils its mandate to promote social justice and develop policies that enhance labour standards worldwide.

(3) The International Labour Office serves as the administrative body of the ILO, tasked with executing the day-to-day operations necessary to fulfil the organization's mandate. This body is instrumental in implementing the ILO's policies and programs, ensuring that its objectives related to labour rights and standards are effectively operationalized in practice. Through its various functions, the International Labour Office plays a critical role in advancing the ILO's mission on a global scale.

The Following supervisory bodies and mechanisms of the ILO are also important to note[77]:

(1) The Committee of Experts on the Application of Conventions and Recommendations is mandated to examine reports made by members states in accordance with Article 22 of the ILO's Constitution.

(2) The Conference Committee on the Application of Standards meets annually each year to discuss non-compliance with ratified conventions included in the report of the Committee of Experts.

(3) Article 24 complaints procedure are available for employers' or workers' organisations to make representations to the International Office to the effect that a member state has failed to secure in any respect the effective observance within its jurisdiction of any convention that it has ratified.

(4) Article 26 complaints procedure is legally enforceable where any member of the ILO has the right to file a complaint with the International Labour Office if it is not satisfied that any other member is securing effective observance of any convention that both member states have ratified.

(5) The Committee on Freedom of Association (CFA) is established in 1951 to examine allegations of breaches of freedom of association submitted by an ILO member state, an employer's organisation or workers organisation.

3 The Right to strike in terms of the ILO

Member states of the ILO are obliged to uphold the fundamental principles of the 1944 ILO Declaration of Philadelphia[78]. These rights amongst others include the right to freedom of

[77] Van Niekerk (2019) 27 – 30.
[78] ILO Declaration of Philadelphia, 10 May 1944. ILO Declaration on the fundamental principles and rights at work 88th session Geneva, 18 June 1998.

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association and collective bargaining[79]. In the preamble, the ILO Constitution 1919 recognised freedom of association as one of its core founding principles[80].

Two core conventions of the ILO become relevant as a starting point to determine where the right to strike has derived from, namely Convention 87 and Convention 98. Despite the absence of a specific Convention that explicitly guarantees the right to strike, the supervisory bodies of the ILO have interpreted this right as being derived from the ILO Constitution and Conventions 87 and 98. More specifically, it is linked to the broader principles of freedom of association and the right to organize, which has generated considerable legal controversy regarding its interpretation.[81]

In terms of Convention 87, the following provisions have been considered in the arguments to interpret the right to strike:

Article 3(1) states that '[w]orkers and employers' organizations shall have the right to draw up their Constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes'.

Article 8(1) states that 'In exercising the rights provided for in this Constitution, workers and employers and their respective organisations, like other persons or organised collectivises, shall respect the law of the land.'

Article 10 states that 'In this Convention the term organisation means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.'

Wisskirchen[82] and Zou[83] opines that although there is a textual absence of the right to strike in the ILO Constitution and its conventions, the Committee of Experts has still gone as far to interpret that the right to strike has derived from Article 3 of Convention 87 which was subsequently acknowledged by the Committee of Freedom of Association[84] regardless of an express link between the right to freedom of association and the right to strike. However, there remains no ILO Convention that explicitly require member states to take particular steps to ensure protection of the right to strike[85].

4. The challenge to the right to strike within the ambit of Article 37

In 2012, the interpretation of the right to strike reached a critical point with the employer's group at the Conference Committee on the Application of Standards[86]. It was clear that the

[79] Article 1(b) & 3(e), ILO Declaration of Philadelphia, 10 May 1944; Article 2(a) ILO Declaration on the Fundamental Principles and Rights at Work, 88th session Geneva, 18 June 1998.
[80] Endorsed in 1949 in the Declaration of Philadelphia which reaffirmed that freedom of association was one of the fundamental principles on which the ILO was based. Cheadle (2017) 8.
[81] Cheadle (2017) 11; Swepston (1998) ILR 170; Gernigon (1998) *ILR* 443; Zou (2012) *Trinity C.L Rev* 103; Manamela (2013) *CILSA* 315; La Hovary (2017) *Comparative Labor Law & Policy Journal* 338 -339; La Hovary (2013) *ILJ* 340; Frey (2017) *GLB* 23; Hepple (2009) *Canadian Labor & Employment Journal* 137.
[82] Wisskirchen (2005) *ILR* 283.
[83] Zou (2012) *Trinity C.L Rev* 103.
[84] Budeli (2009) *De Jure* 147.
[85] Novitz (2003) 110.
[86] La Hovary (2017) *CLLPJ* 338.

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provisions of Article 37[87] would have provided clarity and certainty regarding the interpretation of the ILO's Constitution and its provisions, however it left the Employer's Group in huge discontent.

In short, Article 37(1)[88] provides that any question or dispute relating to the interpretation of the ILO's Constitution or any of its subsequent Conventions concluded by members in pursuance of the provisions of the ILO's Constitution shall be referred for decision to the International Court of Justice (ICJ). Subsequent to Article 37(1)[89], Article 37(2)[90] creates an additional mechanism for interpretation of a convention by subjecting the question to a tribunal insofar as a dispute arises or question arises.

The Employers Group has continuously upheld their arguments that the two conventions[91] does not link a worker's right to strike to freedom of association[92]. Accordingly, the Committee of Freedom of Association has on numerous occasions held that the right to strike is an essential element of the right to freedom of association and one of the essential elements of trade union rights.[93] The Committee of Experts considers the right to strike as an essential element available to all workers and their organisations for the promotion and protection of their economic and social interests[94]. More importantly, the right to strike was reaffirmed as being intrinsic corollary to the right to organize[95]. Therefore, without Convention 87, there would be no right to strike[96].

During the 101st Session of the International Labour Conference, the Employers Group raised significant concerns within the Committee of Application of Standards regarding the interpretation of the right to strike as an inherent aspect of Convention No. 87, as articulated by the Committee of Experts. They contended that the authority to interpret conventions rests solely with the Committee of Application of Standards, asserting that it is this committee's prerogative to undertake such interpretations. Furthermore, the Employers Group argued that the Committee of Experts lacks the mandate to express opinions or formulate policy related to this matter, thereby suggesting that the Committee of Experts had exceeded its designated authority[97].

The dissatisfied Employers Group refused to cooperate with the yearly Committee on Application of Standards and staged a walkout, which ironically the employers' concerted activity amounted to a *de facto* strike that prevented the ILO supervisory mechanisms from working as intended under the ILO Constitution[98]. A subsequent compromise was reached

[87] Article 37 of the ILO Constitution.
[88] Article 37(1) of the ILO Constitution.
[89] Article 37(1) of the ILO Constitution.
[90] Article 37(2) of the ILO Constitution.
[91] Convention 87 of the ILO, 1948 & Convention 98 of the ILO, 1949.
[92] Manamela (2013) *CILSA* 315.
[93] Committee on Freedom of Association, Second Report (1952), Case No 28 (Jamaica), in Sixth Report of the International Labour Organisation to the United Nations (Geneva), para 27.
[94] Manamela (2013) *CILSA* 315. Digest (2006) 109 para 520.
[95] Digest (2006) 109 par 525; Zou (2012) *Trinity C.L Rev* 101.
[96] Digest (2006) 110 par 530; Budeli (2009) *De Jure* 419.
[97] La Hovary (2012) *ILJ* 341 – 342.
[98] Frey (2017) GLJ 19; La Hovary (2017) *Comparative Labor Law & Policy Journal* 337.

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under which the employers agreed to cooperate if they don't deal with the issues relating to the right to strike[99].

On 12 July 2023, the worker vice-chairperson of the Governing Body formally addressed a letter to the Director-General of the International Labour Office (Office) soliciting that the protracted dispute concerning the interpretation of convention 87[100] particularly in relation to the right to strike, be immediately referred to the International Court of Justice (ICJ) for adjudication[101] as stipulated by Article 37(1)[102]. In pursuit of this objective, the worker vice-chairperson implored the Office to undertake all necessary measures to include an item on the agenda of the 349th session of the Governing Body scheduled for October–November 2023[103]. The agenda item aims to prompt discussion and decision making regarding the request for an advisory opinion from the ICJ to determine primarily (a) whether the right to strike is protected under convention 87[104] and (b) whether the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the ILO competent to determine that the right to strike stems from convention 87[105].

On 10 November 2023, during the 349th *ter* Session, the Governing Body approved, by a majority of 33 votes in favour, 21 against, and 2 abstentions, a resolution mandating the request to the ICJ for an expedited advisory opinion concerning whether the right to strike of workers and their organizations falls under the protection of convention 87[106]. Subsequently, on 11 November 2023, in the context of the 349th *ter* Session, the Governing Body resolved against the inclusion of a standard-setting item on the right to strike in the agenda for the 112th Session (2024) of the International Labour Conference, establishing that appropriate follow-up measures would be considered after receipt of the ICJ advisory opinion.

The Resolution noted that, despite extensive efforts, no consensus had been attained through tripartite dialogues[107]. It underscored that pursuant to Article 37(1)[108], any referral to the ICJ pertains solely to the question or dispute presented, and expressed the aspiration that, given the ILO's distinct tripartite structure, both the governments of ILO member states and the international employers' and workers' organizations with general consultative status in the

[99] Frey (2017) GLJ 19; La Hovary (2013) *ILJ* 342.
[100] Convention 87 & 98 of the ILO.
[101] Director General ILO, Request for Advisory Opinion, in terms of the right to strike under convention 87, 13 November 2023.
[102] Article 37(1) of the ILO Constitution.
[103] Director General ILO, Request for Advisory Opinion, in terms of the right to strike under convention 87, 13 November 2023.
[104] Convention 87 of the ILO.
[105] Convention 87 of the ILO; Director General ILO, Request for Advisory Opinion, in terms of the right to strike under convention 87, 13 November 2023.
[106] Convention 87 of the ILO. Director General ILO, Request for Advisory Opinion, in terms of the right to strike under convention 87, 13 November 2023.
[107] Director General ILO, Request for Advisory Opinion, in terms of the right to strike under convention 87, 13 November 2023.
[108] Article 37(1) of the Constitution of the ILO.

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ILO would be invited to participate directly and equitably in both written and oral proceedings before the Court[109].

Certified true copies of the resolution, in both English and French, were transmitted to the Court by the Director-General in a letter dated 13 November 2023 addressed to the President of the court. In that same correspondence, the Director-General notified the President that, the Office was in the process of preparing a dossier comprising all pertinent documents, which would be submitted to the Court at the earliest opportunity[110]. This dispute is currently pending.

5. Compensatory claims against trade unions

The right to strike is a fundamental right to workers and their organisations and should be exercised in order to defend their economic and social interests[111]. According to Novitz, it is inappropriate to impose civil liability on trade unions or workers when the strike is a lawful strike[112]. Furthermore, authorities are not permitted and should refrain from recourse to imprisonment for the participation of workers in a peaceful strike as this would severely jeopardise the right to strike and in the event that the strike does not meet the criteria of legitimacy, criminal penalties must be proportionate[113]. A peaceful protest does not warrant a violent response[114].

Unlawful and violent strikes are not protected in international labour law[115] and the principles of freedom of association do not protect the abuse of the right to strike which involved criminal activity[116], and disturbing the public order[117]. The ILO endorsed the principle when a strike is marred with violence is ceases to be peaceful and therefore contrary to the principles of freedom of association and the right to strike. The use of violence to coerce non-strikers to employees are also not condoned in the international plethora of human rights[118].

According to Rycroft[119], the principles of freedom of association do not shelter criminal acts committed during strikes. However, penal sanctions should be imposed only for the violation of strike prohibitions which are themselves in conformity with the prerequisites of freedom of association. All penalties linked to strikes must be proportionate to the offence[120] as this

[109] Director General ILO, Request for Advisory Opinion, in terms of the right to strike under convention 87, 13 November 2023; ICJ Press Release No 2023/71, 27 November 2024; Order ICJ, Request for Advisory Opinion in terms of the right to strike under Convention 87, 16 November 2023.
[110] Director General ILO, Request for Advisory Opinion, in terms of the right to strike under convention 87, 13 November 2023.
[111] Digest (2006) 110; Manamela (2013) *CILSA* 315. Digest (2006) 109 para 520.
[112] Novitz (2003) 321. Swepston (1998) *ILR* 190.
[113] Novitz (2003) 317. Digest (2006) 133.
[114] Novitz (2003) 317.
[115] Zou (2012) Trinity *C. L Rev* 107; Manamela (2013) 316.
[116] Digest (2006) par 667.
[117] Digest (2006) par 650.
[118] Digest (2006) par 651.
[119] Rycroft (2013) 34 *ILJ* 2499.
[120] Digest (2006) par 670.

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might hinder a trade union's functions to operate in the event that penal sanctions have the effect to cripple a trade union's financial affairs and as a result cease to operate.

6. The Right to strike versus Human Rights

The right to life is a fundamental prerequisite for the exercise of the rights contained in Convention 87 and human rights must be respected. The Government has a duty to defend the social climate where respect for the law reigns and for that, it is the only way of guaranteeing the protection of individual rights[121]. The right to freedom of association can only be exercised when the rights to human life and safety of individuals are respected. The ILO bestows a duty on member states to prevent any violations of human rights[122].

2.7 Conclusion

In conclusion, the examination of the right to strike within the framework of the International Labour Organization (ILO) reveals a complex interplay between recognized conventions, historical interpretations, and ongoing disputes. While both Conventions No. 87 and No. 98 lay the groundwork for understanding the right to freedom of association and collective bargaining, the absence of explicit provisions guaranteeing the right to strike has led to significant legal ambiguities. The supervisory bodies, notably the Committee of Experts, have interpreted this right as intrinsically linked to the principles of freedom of association, thus acknowledging its essential role in safeguarding workers' interests. Nevertheless, the challenges posed by the Employers Group, particularly during the 101st Session of the International Labour Conference, highlight the divisions that persist surrounding the interpretation of these rights and the authority of the various committees involved. The recent initiative to refer the contentious interpretation of Convention No. 87 to the International Court of Justice reflects a crucial development in this ongoing discourse, which may pave the way for greater clarity and consensus in international labour law. Furthermore, the interplay between the right to strike and human rights emphasizes the necessity of balancing the protection of workers' rights with the safeguarding of public order and individual liberties. As the current dispute awaits resolution, it is evident that the right to strike remains a pivotal, albeit contested, element of the broader framework of labour rights and international human rights obligations, demanding continued scrutiny and constructive dialogue among all stakeholders involved.

[121] Digest (2006) para 34.
[122] Digest (2006) para 47.

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Chapter 3

The Legislative Framework for Strikes in South Africa

1. Introduction

In the course of scrutinizing the right to strike within the South African legal framework, it is imperative to delineate, from the outset, that this chapter will concentrate on the constitutional ramifications of this right in relation to human rights. It is apparent that strikes manifesting acts of violence fail to receive protection under the tenets of freedom of association. Furthermore, the ILO imposes an obligation on each member state to preclude such violence and to hold liable those individuals who contravene the law. This circumstance engenders pivotal inquiries regarding the apparent imbalance and disproportionate nature of the right to strike in juxtaposition to the duty to uphold human rights. The right to life has been adjudicated to possess greater weight than the right to strike. Notwithstanding this, there persists a troubling prevalence and severity of violence associated with strikes, inadequately addressed by existing legal and regulatory frameworks. Such violence considerably jeopardizes the economic stability of the nation and erodes the rule of law. Consequently, there is an escalating demand within South African society for the imposition of more stringent restrictions upon the right to strike.

2. The Constitutional Framework and its limitations

The adoption of the Interim Constitution[123], followed by the final Constitution of the Republic of South Africa[124], marked a significant shift in the development of South African law[125]. The Constitution itself is defined as the 'supreme law'[126] and includes a 'Bill of Rights' that outlines fundamental constitutional rights[127]. The Constitution has brought about significant changes in the arena of labour law, leading to the enactment of various legislation[128] aimed at realizing the constitutional goals of creating a democratic society founded on human dignity and equality[129]. It is emphasized that the exercise of one's rights should not infringe upon the rights of others. As such, the rights articulated in the Bill of Rights are not absolute and the Constitution sets out a framework for restricting rights when such limitations are justifiable and necessary to promote a fair society grounded in human dignity, equality, and freedom[130].

Section 23(2) of the Constitution[131] provides *inter alia* that every worker has the right to strike. The Constitutional Court has recognised both the component of the right to strike which seeks to protect the dignity of employees and that, which enables employees to assert their

[123] Interim Constitution.
[124] Constitution.
[125] Du Toit (2023) 74. Van Niekerk (2019) 12.
[126] Preamble of the Constitution.
[127] Chapter 2 of the Constitution.
[128] LRA; Basic Conditions of Employment Act 73 of 1997; Employment Equity Act 55 of 1998.
[129] Explanatory Memorandum of the Labour Relations Act (1995) 16 ILJ 278; *Ex Parte Chairperson of the Constitutional Assembly: In Re-Certification of the Constitution of the Republic of South Africa*, 1996 (1996) 17 *ILJ* 821 (CC).
[130] s 36 of the Constitution.
[131] s 23(2) of the Constitution.

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bargaining power in the workplace[132]. The legal position was however different in our predecessor Labour Relations Act (LRA)[133]. Section 65(3) in terms of the 1956 LRA determined that strikes were regarded as crimes against the state[134] and, consequently, there was no freedom to strike. In terms of Section 65 of the 1956 LRA, strikes were prohibited unless the matter giving rise to the strike had been considered in the Industrial Court. In terms of the current LRA, strikes must comply with certain procedural requirements[135], subjected to substantive limitations[136] to be protected and to enjoy immunity against claims for breach of contract, delictual and civil liability[137].

3. The Right to Strike in terms of the LRA

3.1 Introduction

To give effect to the constitutional right to strike[138], the Constitution mandated the legislature to enact legislation that will regulate collective bargaining and other labour matters[139]. Strikes and lockouts are protected if it complies with the legislative provisions of Chapter IV of the LRA[140]. Chapter IV of the LRA imposes certain procedural requirements[141] and substantive limitations to the right to strike[142]. The central aspect of this study will focus on the consequences of unprotected strikes, and I will briefly address the definition of a strike, the procedural requirements and the substantive limitations.

3.2 Definition

The LRA defines a strike as -

'the partial or complete 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'.[143]

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[132] *NUMSA & others v Baderbob (Pty) Ltd & another* 2003 (2) *BCLR* 182 (CC).
[133] Labour Relations Act 28 of 1956.
[134] s 65(3) of the Labour Relations Act 28 of 1956 provides that any person who contravenes subjection (1) shall be guilty of an offence. s 20 of the Internal Security Act 28 of 1982 empowered the Minister of Law and Order to prohibit any person who in the opinion of the Minister engage in activities calculated to endanger the security of the State or from participating in any gathering or class of gatherings.
[135] s 64(1) of the Labour Relations Act 66 of 1995.
[136] s 65 of the LRA.
[137] s 67(2) & (6) in terms of the LRA.
[138] s 23 of the Constitution.
[139] s 23(5) of the Constitution; Explanatory Memorandum of the Labour Relations Act (1995) 16 ILJ 278; *Ex Parte Chairperson of the Constitutional Assembly: In Re-Certification of the Constitution of the Republic of South Africa,* 1996 (1996) 17 *ILJ* 821 (CC).
[140] s 67(1) of the LRA.
[141] s 64(1) of the LRA.
[142] s 65(1) of the LRA.
[143] s 213 of the LRA. In order to define a strike within the relevant legal and operational context, several requisite elements must be present: (1) there must exist a cessation of work activities, (2) participation must be by more

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3.3 Procedural Requirements for a Protected Strike

To enjoy protection in terms of the LRA, strikes and lockouts must comply with the procedure prescribed in section 64[144]. Firstly, the issue in dispute must be referred to the Commission of Conciliation, Mediation and Arbitration (CCMA) or relevant bargaining council for conciliation[145]. Secondly, if the dispute is not successfully conciliated in the CCMA, the presiding Commissioner must issue a certificate that the dispute remains unresolved[146], alternatively a period of 30 days must elapse since the date of the referral of the dispute[147]. Lastly, the parties to the dispute must issue a written notice of their intention to strike or lock-out at least 48 hours prior to the commencement of the strike or lockout[148].

3.4 Substantive limitations to the right to strike

In terms of the section 65[149] it states that no person may take part in a strike or lockout if that strike or lockout is prohibited in terms of a collective agreement[150], parties are bound by an agreement that the matter must be arbitrated[151], the issue in dispute involves a right dispute in which a party may refer the matter to arbitration or the Labour Court[152] and lastly, the person is engaged in an essential or maintenance service[153].

4. Immunities and protection

In the event that the strike or lockout is protected in accordance with section 64[154], the union and its members will enjoy protection and immunity in terms of section 67[155]. In short, section 67[156] states that if the strike is protected, a person does not commit a delict or breach of

than one employee acting collectively, (3) the action must be undertaken for the purpose of addressing a grievance or resolving a dispute, and (4) the subject matter in dispute must pertain to an issue of mutual interest between the employer and the employees. *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 *ILJ* 321 (LAC); Grogan (2020) 383 – 389; Van Niekerk (2019) 451 – 456; Du Toit (2023) 334 – 340.

[144] s 64 of the LRA.
[145] s 64(1)(a) of the LRA.
[146] s 64(1)(a)(i) of the LRA.
[147] s 64(1)(a)(ii) of the LRA; See also *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union & others* (2011) 32 *ILJ* 1909 (LC) para 15, the court determined that pursuant to section 64(1)(a) of the LRA, it is adequate that a period of 30 days has elapsed following the referral of the dispute. This interpretation affirms that the mere passage of time, without the necessity for further conditions, fulfils the statutory requirement for the initiation of industrial action.
[148] s 64 (1)(b) & (c) of the LRA.
[149] S 65 of the LRA.
[150] s 65(1)(a) of the LRA; *Vodacom (Pty) Ltd v Communications Workers Union* (2010) 31 *ILJ* 2060 (LAC).
[151] s 65(1)(b) of the LRA.
[152] s 65(1)(c) of the LRA.
[153] s 65(1)(d)(i) & (ii) of the LRA.
[154] s 64 of the LRA.
[155] s 67 of the LRA.
[156] s 67 of the LRA.

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contract[157] by taking part in the strike or conduct in furtherance of a protected strike[158]. An employer may not dismiss an employee for taking part in a protected strike or any conduct in furtherance of a protected strike[159]. An employer must exercise utmost caution when dismissing an employee for participation in a protected strike as such actions may expose the employer to a substantial risk of claims for automatic unfair dismissal[160]. The potential for such claims underscores the necessity for employers to adhere meticulously to legal standards and procedures, to mitigate liability arising from dismissals that may contravene established protections afforded to employees engaged in lawful strike action. An employer is also not entitled to instigate civil proceedings against the union or its members for participating in a protected strike[161] or any conduct in furtherance of a protected strike[162]. An employer is not obliged to remunerate an employee for the duration of participating in the strike action[163]. Although employees enjoy immunity and protection for participating in a protected strike or conduct in the furtherance of a protected strike, section 67[164] further states that an employer has the right to dismiss an employee for any misconduct committed during the strike or for reasons based on an employer's operational requirements[165]. If any act or conduct of employees in contemplation of furtherance a protected strike constitutes an offence, the immunity falls away and an employer can institute claims for breach of contract, delict and civil claims[166].

5. Legal consequences in terms of unprotected strikes

Strike action which is not in compliance with the LRA[167] attract civil remedies available to an employer. Firstly, the Labour Court may grant an interdict or an order restraining a strike or lockout or any act in contemplation or furtherance of the strike or lockout that does not comply with the provisions of Chapter IV of the LRA[168]. In the arena of granting interdicts, the Labour Court has the power to grant relief, or urgent interim relief, which is just and equitable in the circumstances which may include directing a party to comply with a picketing agreement, varying the terms of a picketing agreement or suspend a picket[169]. Secondly, the Labour Court has the power to grant an order for payment for just and equitable compensation for any loss attributable to an unprotected strike[170]. Lastly, participation in an unprotected strike is a fair ground for dismissal[171]. Just and equitable compensation as a remedy for an employer is central to this study and will be discussed in more detail in Chapter 4. Dismissal for unprotected strike action is not clear cut and warrants a brief and thorough

[157] s 67(2)(a) of the LRA.
[158] s 67(2)(b) of the LRA.
[159] s 67(3) of the LRA.
[160] s 187(1(a) of the LRA.
[161] s 67(6)(a) of the LRA.
[162] s 67(6)(b) of the LRA.
[163] s 67(3) of the LRA.
[164] s 67 of the LRA.
[165] s 67(5) of the LRA.
[166] s 67(7) of the LRA.
[167] s 64(1), 65(1). See also the strike definition in terms of s 213 of the LRA.
[168] s 68(1)(a) of the LRA.
[169] s 69(12) of the LRA.
[170] s 68(1)(b) of the LRA.
[171] s 68 of the LRA.

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discussion on this remedy available to an employer. For the purposes of this chapter, it is essential to highlight the recent developments and ongoing discourse regarding the functionality principle that the Labour Courts have applied to ascertain when a strike ceases to be functional to the process of collective bargaining. It is particularly pertinent to examine the circumstances under which a protected strike loses its protective status and transitions into an unprotected strike, thereby rendering it susceptible to civil remedies. This examination is critical for understanding the evolving legal landscape surrounding strike action and the implications for both employers and employees.

6. Dismissal

An employer is entitled to terminate the employment of employees who partake in an unprotected strike. However, several factors must also be duly considered in this regard. These factors may include the circumstances surrounding the strike, the reasons for the employees' actions, and the adherence to procedural requirements prior to dismissal. Such considerations are crucial to ensure compliance with relevant legal standards and to mitigate potential liabilities that may arise from the dismissal process[172]. In *National Union of Metalworkers of SA & others v CBI Electric African Cables*, the court held that the dismissals of the striking employees were substantively fair, however procedurally unfair as it was expected from the company to issue ultimatums and to contact the union and request the union's intervention to persuade their members to stop the strike[173]. An unprotected strike is not a license to dismiss employees without considering all the surrounding circumstances[174] and the guidelines set out in Item 6(1) of the Code of Good Practice[175].

[172] Item 6 of Schedule 8 of the LRA.

[173] In *National Union of Metalworkers of SA & others v CBI Electric African Cables* (2014) 35 *ILJ* 642 (LAC), the court reiterated the importance of considering Schedule 6 & 7 of the Code of Good Practice of the LRA before embarking upon a decision to dismiss. In *Roberts Brothers Construction (Pty) Ltd & another v National Union of Mineworkers & others* (2020) 41 *ILJ* 2107 (LAC), the LAC confirmed that the employer has a duty to contact the trade union to advice and inform the union that its members embarked upon an illegal strike and requires intervention from the union to persuade the strikers to stop the unprotected strike. In *Modise & others v Steve's Spar Blackheath* (2000) 21 *ILJ* 519 (LAC) para 38, the court upheld the obligation of an employer to observe the *'audi alterem partem'* rule with regards to all dismissals, irrespective of the reason. However, the minority held that it is not a requirement of our law that strikers be given a fair hearing before being dismissed. The four appellants had taken part in an illegal and dysfunctional strike. They were given a fair ultimatum to which they did not respond and were fairly and properly dismissed. Article 7 of the ILO Convention on Termination of Employment 158 of 1982 states that 'the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably expect to provide this opportunity'. Myburgh (2004) *ILJ* 970; Van Eck (2016) *PER/ PELJ* 15.

[174] *National Union of Mineworkers and others v Commission for Conciliation, Mediation and Arbitration and others*. Appeal Case Number CA: 11/2007 (LAC).

[175] Item 6(1) of the Code of Good Practice of the LRA states that '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 this Act.
(b) attempts made to comply with this act.
(c) whether or not the strike was in response to unjustified conduct by the employer'.

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7. Functionality Principle

One of the primary objects of the LRA[176] *inter alia* is to promote orderly collective bargaining and further provides for the peaceful demonstrations of pickets during a strike[177]. The purpose of section 69[178] read together the Code of Good Practice relating to Picketing Rules[179], is to regulate protest action and demonstrations during a protected strike action to ensure that it is lawful and peaceful.

The Labour Relations Bill of 2012 had suggested that the word 'supporters' in subjection 69(1) in the current LRA be removed so that registered trade unions will be able to authorise picketing by its members only. This proposed provision has since been rejected and was not included in the final legislation[180]. According to Tenza[181] and Rycroft[182], such rejection was motivated due to the influential position of the Congress of Trade Unions in South Africa (COSATU) at the National Economic Development and Labour Council of South Africa (NEDLAC). CASATU was dismayed with such proposal due to belief that it may interfere or take away employees' right to participate in Industrial action[183]. Had this provision been enacted without any objections, it would have been praised as a smart move by the legislature. Unions have traditionally placed the responsibility for damages resulting from industrial action on non-union members (supporters), asserting that their own members did not cause the damages and used this as a defence against liability and to distance themselves and its members from violent strikes.

In response to the violent nature and prolonged duration of strikes, the need for measures to address this issue resulted in the amendment of the LRA, leading to the enactment of the Labour Relations Amendment Act[184]. The amendment introduced advisory arbitration by a statutory arbitration panel to break deadlocks in protracted and violent strikes. This section outlines the grounds on which such action can be initiated[185]. The amendment also grants the Director of the Commission for Conciliation, Mediation and Arbitration (CCMA) the authority to facilitate mediation between parties to resolve their dispute and return them to the negotiating table[186]. While this amendment has been praised as a positive step by the legislature, Myburgh[187] and Tenza[188] argue that it does not go far enough in providing adequate protection to prevent violent strikes from occurring. It is evident that violent strikes are far from over since the remedies that the LRA put in place seem to fail in addressing it.

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[176] s 1(d)(i) of the LRA.
[177] s 69(1) of the LRA.
[178] s 69 of the LRA.
[179] Picketing Regulations and Default Picketing Rules GN R1393, GG 42121, 19 December 2018.
[180] Labour Relations Amendment Act of 2014.
[181] Tenza *LLD Dissertation* 46.
[182] Rycroft (2015) *ILJ* 1.
[183] Rycroft (2015) *ILJ* 7.
[184] Labour Relations Amendment Act 2018; s 150A – 150D of the LRA.
[185] s 150A - D of the LRA.
[186] s 150A - D of the LRA; Van Niekerk (2023) 489; Du Toit (2023) 400 – 401.
[187] Myburgh, 4 – 5 October (2019) Conference, University of Pretoria. Myburgh argues that advisory arbitration is a clever middle road, however, the advisory arbitration award amounts to a soft intrusion on a right to strike and for our voluntarisms system of collective bargaining as unions can be called out to account.
[188] Tenza (2021) *SA MERC LJ* 20.

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Interdicts issued by the Labour Courts are in some cases undermined and disrespected by unions and their members[189] and this leave uncertainty how violence will be curbed[190].

The Labour Court exercises exclusive jurisdiction over all matters pertaining to labour disputes and possesses the powers set in section 158 of the LRA[191]. Among the orders that the Labour Court is empowered to issue are those for urgent interim relief, interdicts, declaratory orders, compensation, and compliance with the provisions of the LRA. Tenza advocates for amending the LRA to grant the Labour Court the authority to terminate or suspend industrial action that is disproportionately damaging in terms of property and personal harm, as well as detrimental to the economy and employment[192]. Rycroft contends that a strike characterized by violence should forfeit its legal protections when participants act unreasonably[193]. Rycroft[194] further suggests that a strike tainted by misconduct should lose its protected status, leading to the potential for employees to face dismissal and financial liabilities. Despite these arguments, the Labour Court has also explored the functionality principle of strikes, specifying that a certain degree of violence must be present for the court to intervene. The court's position on this matter remains somewhat ambiguous, as demonstrated in the *Product Network* case, where the court assessed the degree of violence instigated by striking employees in relation to the union's efforts to prevent or mitigate such violence. Rycroft further emphasizes the court's duty to investigate the extent of violence during a strike to evaluate whether the strike promotes effective collective bargaining and thus warrants continued protected status[195]. The functionality principle was confirmed and debated in numerous cases in the Labour Court[196]. The functionality principle was previously applied where the court suspended the picketing rules and interdicted employees from participating in any further picket, gathering, assembly or protest action[197]. Botha argues that violence during protected and unprotected strikes does

[189] Botha (2015) *Obiter* 194.
[190] Furgus (2016) ILJ 537.
[191] Section 158 of the LRA.
[192] Tenza (2021). Furgus (2016) ILJ 5327
[193] Rycroft 'what can be done strike related violence?'.
[194] Rycroft 'what can be done strike related violence?'.
[195] Rycroft 'what can be done strike related violence?'.
[196] In *Shoprite Checkers (Pty) Ltd v CCMA* (2006) 27 *ILJ* 2681 (LC), the court held that if the picket exceeds the bounds of peaceful persuasion or incitement to support the strike, to become coercive and disruptive of the business or third parties, this picket ceases to be reasonable and lawful. In *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union & other*s (2010) 31 *ILJ* 2539, it was held that members of the public affected by the noisy picketing can interdict the picket. In *Ram Transport (Pty) Ltd v SA Transport Allied Workers Union & others* (2011) 32 *ILJ* 1722 (LC), the court stated that the Labour Court is always open to those who seek protection of the right to strike. The court further stated that 'but those who commit acts of criminal and other misconduct during the course of strike action in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose'. It can be argued that there is a difference between disciplinary action taken for strike misconduct and loss of the strike's protected status for that misconduct. In *Tsogo Sun Casino Ltd t/a Monte Casino v Future of SA Workers Union & others* (2012) 33 *ILJ* 998 (LC), the court held that the right to engage in collective bargaining is not a licence to engage in collective brutality. The court further held that it will always intervene to protect the right to strike and right to peaceful picketing however when that right is exercised in acts of gratuitous violence to achieve their ends one must question whether a strike continuous to serve its purpose and whether it enjoy protected status.
[197] In *Dis-Chem Pharmacies Ltd v Malema & others* (2019) 40 *ILJ* 855 (LC), the court held that the conduct of the striking employees was unacceptable, showed clear contempt of the LRA and orders of the court, and it was irreconcilable with the fundamental obligation, attached to the right to picket, of peaceful protest. Nowhere was assault and intimidation, blockading of roads and premises, damage to property and wielding of weapons seen as a peaceful protest. The court ordered that the picketing rules be suspended and interdicted the employees

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not contribute to collective bargaining and should be discouraged in terms of international and national labour laws[198]. This study supports Botha's views. Furgus argued that on certain occasions, a functional strike has been construed as a requirement for a lawful strike. She further opines that the functionality of a strike may involve matters of mutual interests, in that a strike must concern legitimate subjects for collective bargaining or promote the wellbeing of the enterprise, relying on the ILO's historical acknowledgement of the right to strike as an integral part of collective bargaining and that the functionality principle is no longer part of South African Law[199]. It must be noted that the ILO recognises and authorises the limitation of the right to strike in circumstances where public safety is concerned, provided that other instruments are available to striking employees to offer alternatives such as mediation, conciliation and arbitration[200].

8. Conclusion

Employees have a constitutional right to strike[201], subject to the procedural requirements[202] and substantive limitations[203] set forth in the LRA to enjoy immunity against dismissals and civil liability[204]. The ongoing occurrence of violent strikes is not new to the South African industrial relations regardless of the protected status of the strike. Collective bargaining does not provide a free pass for collective brutality. It has been extensively debated that a strike that devolves into violence can lose its protected status, rendering it ineffective for collective bargaining. Under the recent amendments to the LRA, a strike that is no longer functional for the purposes of collective bargaining may be referred to the CCMA for advisory arbitration[205]. This is done with the intention of enabling the union to rectify the situation, offer guidance to its members on the consequences of their unlawful actions. However, the feasibility of this amendment is questionable, as unions do not always have a strong hand to control members, who may continue with violent actions during a protected strike. The courts have frequently criticized unions for failing to control their members during strikes.

The implementation of advisory arbitration is inadequately robust, as an advisory arbitration award lacks binding authority, permitting a party to reject the award at their discretion. This legislative effort to mitigate the disruptive impact of strikes raises significant concerns, as it fails to offer a meaningful remedy or relief for parties adversely affected by the actions of unions and strikers. The right to strike is not absolute and is subject to limitations, which can be justified under the Constitution's limitation clause[206]. The limitation clause allows for the restriction of any right in term of 'law of general application'[207]. It is evidently stated in in the

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from participating in any further picket, gathering, assembly or protest action. In *Clover SA (Pty) Ltd v General Industries Workers Union of SA & others* (2021) 42 *ILJ* 1111 (LC), the court confirmed that where the rule of the mob and unlawful conduct replace peaceful demonstration/ picketing and the provisions of agreed picketing rules are flagrantly ignored, section 69(12) enjoins the court to intervene and grant urgent relief as in the *Dis-Chem* case where a suspension of the rules was ordered.

[198] Botha (2017) *THRHR* 531.

[199] Furgus (2016) *ILJ* 546 -551.

[200] Digest (2006).

[201] s 23 of the Constitution.

[202] s 64(1) of the LRA.

[203] s 65 of the LRA.

[204] s 67 of the LRA.

[205] s 150A -D of the LRA.

[206] s 36 Constitution.

[207] Tenza (2018) *STELL LR* 480.

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ILO's Constitution, South Africa's Constitution[208], the LRA[209], and the Code of Good Practice on Collective Bargaining[210] and Picketing Rules[211], that a strike marred with pickets must be peaceful. Till date, the realities of violent strikes and pickets have not yet been adequately addressed. The above Code emphasizes that prolonged and violent strikes have severe repercussions on the strikers, their families, small businesses in the community that serve the strikers, employers, the economy, and society as a whole.

[208] s 23 of the Constitution.
[209] s 1 & 69 of the LRA.
[210] Picketing Rules of the LRA.
[211] Picketing Rules of the LRA.

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Chapter 4

Remedies available to an Employer

1. Introduction

In South Africa, strikes marred with violence is most common and considered as the new normal in South African industrial relations[212]. As articulated in Chapter 3, this study endorses the functionality principle as strikes characterized by violence no longer fulfil any functional purpose in the realm of collective bargaining. It is posited that an employer who enters into a wage agreement amidst a violent strike may be perceived as having done so under duress due to the detrimental impact of violence which plays a pivotal role in the integrity of negotiations and the legitimacy of agreements reached during such tumultuous circumstances.

It is noteworthy to also illustrate that there were some minor improvements in the industrial era in terms of the 2018 Labour Relations Amendment Act for advisory arbitration. Although this might seem to be a win for employers, violent pickets remain prominent, and unions and members still disobey court orders interdicting violent strikes and pickets. A further improvement was the Labour Appeal Court's interpretation of section 68(1) in that just and equitable compensation can be claimed for 'any conduct' in furtherance of a strike which is unlawful. By adding the words 'any conduct', the legislature did not provide for a distinction as to whether just and equitable compensation can only be claimed in terms of a protected or unprotected strike.

Central to this study lies the issue of the remedies accessible to employers seeking just and equitable compensation from trade unions for damages incurred during violent strikes. This study aims to illuminate a pressing concern of the apparent reluctance of courts to award damages that are fair and appropriate against trade unions in such contexts

This study will investigate whether it may be possible for an employer to claim the full extent of their damages against a trade union under common law remedies and whether the doctrine of vicarious liability can be extended to the trade union-member relationship.

2. Remedies in terms of the LRA

2.1 Introduction

In the event that a strike is not in compliance with section 68, the court may grant an interdict against any person from participating in the strike or award just and equitable compensation. In order to address the current legal position regarding the interpretation of section 68(1), this study will briefly discuss the wording of section 68 and the Labour Appeal Court's interpretation in terms of section 68(1)(b) in *SA Commercial Catering and Allied Workers Union v Massmart Holding Ltd and others (Massmart)*[213].

[212] *Clover SA (Pty) Ltd v General Industries Workers Union of SA & Others* (2021) 42 *ILJ* 1111 (LC).
[213] *SA Commercial Catering & Allied Workers Union v Massmart Holding Ltd & others* (2024) 45 *ILJ* 1610 (LAC).

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2.2 Provisions of Section 68

Section 68(1)(b)[214] grants the Labour Court exclusive authority to award just and equitable compensation for losses resulting from non-compliant strikes or lockouts. In determining this compensation, the court considers several factors: the efforts made to adhere to the legal provisions, whether the strike or lockout was predetermined, if the actions were a reaction to unjust behaviour by another party, and compliance with any prior court orders in section 68(1)(a)[215]. Additionally, the court considers the importance of maintaining orderly collective bargaining, the duration of the strike or lock-out, and the financial circumstances of both the employer and the trade union or employees involved

2.3 The *Massmart* Case

In the *Massmart* case[216], the members of the appellant union, SACCAWU, initiated a protected strike at the respondents' stores within the Massmart group of companies. Massmart brought a claim against the union in the Labour Court seeking a payment of over R9 million as just and equitable compensation in terms of section 68(1)(b)[217] for losses incurred due to unlawful actions and offenses committed by the union's members during the protected strike. The union objected to Massmart's claim on the basis that was the Labour Court did not have the jurisdiction to order the payment of just and equitable compensation for losses related to a strike, lockout, or any conduct in support or in anticipation of a strike or lockout in cases where the strike was protected.

The court determined that a simple interpretation of the language used in section 68(1)(b)[218], as amended, supports the understanding that the reference to 'or any conduct in contemplation or in furtherance of a strike or lockout, that does not comply with the provisions of this Chapter' is not limited to conduct occurring within the context of a strike or lockout that fails to comply with the stated provisions of the chapter.

Considering the normal rules of grammar and syntax, it is evident that the reference in section 68(1)[219] to 'any strike or lockout, or any conduct in contemplation or furtherance of a strike or lockout, that does not comply with the provisions of this Chapter' is intended to encompass both any strike or lockout, as well as any conduct, that does not comply with Chapter IV[220]. The mention of 'any conduct' within the context of 'a' strike or lockout indicates that such conduct may be related to any strike or lockout, not exclusively one that violates the provisions of Chapter IV[221]. An interpretation that limits the availability of remedies solely to unlawful conduct during an unprotected strike would be unreasonable and would create an arbitrary distinction in the remedies available based on whether a strike or lockout was protected. The court concluded that the LRAA[222] expanded the scope of section 68(1)(b)[223] by including the

[214] s 68(1)(b) of the LRA.
[215] s 68(1)(a) of the LRA.
[216] *SA Commercial Catering & Allied Workers Union v Massmart Holding Ltd & others* (2024) 45 *ILJ* 1610 (LAC).
217; s 68(1)(b) of the LRA.
[218] s 68(1)(b) of the LRA.
[219] s 68 of the LRA.
[220] Ch IV of the LRA.
[221] Ch IV of the LRA.
[222] s 17 of the LRA Amendment Act 12 of 2002.
[223] s 68(1)(b) of the LRA.

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words 'or any conduct'. Accordingly, the Labour Court has exclusive jurisdiction to order the payment of just and equitable compensation for any unlawful conduct in support of a strike, regardless of whether the strike is protected or not.

The court rejected SACCAWU's argument that the Labour Court drew its authority to interdict unlawful conduct during a protected strike from section 158(1)[224] rather than section 68(1)[225]. The court relied on a plain reading of section 68(1)[226] in context to assert that the Labour Court is expressly empowered to interdict unlawful actions, including unlawful conduct during either a protected or unprotected strike or lockout. Since unlawful conduct during a protected strike is not shielded by the immunity provided in section 67(6)[227], it would be illogical and contrary to the provision to allow an employer or union to pursue compensation claims under section 68 for losses resulting from conduct breaching Chapter IV, but not for losses linked to conduct during a protected strike. In conclusion, the court found no error with the Labour Court's[228] interpretation and accordingly found that the appeal must fail. This study supports the ruling of the Labour Appeal Court.

2.4 Interdicts

Section 68(1)(a) of the LRA[229] permits an employer or any interested person to apply for an interdict. An interdict can take the form as an urgent court order whereby applicants approach the court *ex parte* to obtain a temporary order restraining the defendant from continuing with the unlawful activities[230]. The aim of this court order is mainly aimed at protecting applicants from suffering irreparable damage caused by the wrongful activities of the defendants.[231] The remedy of an interdict is available where a person with an interest in the matter foresees or realises that the other party acts or intents to act contrary to the law or infringe his or her rights[232]. This means that the actual conduct need not to exist as a mere reasonable expectation that the conduct will take place is sufficient for any innocent party to apply for this remedy[233]. The courts have taken a firm stance on multiple occasions in expressing their opinions about the violent nature of strikes and the wilful disregard of court interdicts by unions and its members[234].

2.5 Just and Equitable Compensation

When a violent strike is interdicted, the Labour Court also has jurisdiction to order the payment of just and equitable compensation for any loss attributable to the strike or conduct.

[224] s 158(1) of the LRA.
[225] s 68(1)(b) of the LRA.
[226] s 68(1)(b) of the LRA.
[227] s 68(1)(b) of the LRA.
[228] *Massmart Holdings Ltd & others v SA Commercial Catering & Allied Workers Union* (2022) 43 *ILJ* 2051 (LC).
[229] s 68(1)(a) of the Labour Relations Act 66 of 1995.
[230] Tenza *LLD Dissertation* 108; Grogan (2020) 413.
[231] Tenza *LLD Dissertation* 108.
[232] Tenza *LLD Dissertation* 108.
[233] Rycroft *'What Can Be Done About Strike Related Violence?'.*
[234] *Betafence South Africa (Pty) Ltd v NUMSA* [2016] ZALCCT 33 (15 September 2016) paras 54 – 55; *GRI Wind Steel South Africa v AMCU* [2018] 3 BLLR 273 (LC); *Plastic Convertors Association of South Africa obo Members v NUMSA* [2020] 7 BLLR 690 (LC).

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Du Toit[235] opines that section 68(1(b)[236] creates a *sui generis* remedy in that an employer is not entitled to claim the full extent of their damages comparing to the common law remedies, but only just and equitable compensation which the Labour Court deem as fair. Van Eck[237] asserts that the remedy in question does not align with traditional common law damages, but rather denotes a sum moderated by principles of equity. In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*[238], the Court identified three elements which must be proven by an employer claiming just and equitable compensation. Firstly, the employer must prove that the strike does not comply with the provisions of the LRA. Secondly, the employer must establish that a loss was suffered as a result of the strike. Thirdly, the party to whom the claim is directed at participated in the strike or committed an act in furtherance of thereof[239].

2.6 Pitfalls to Just and Equitable Compensation

In *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd*[240] the court confirmed that the purpose of section 68(1)(b)[241] is not punitive, but it is meant to compensate the employer for losses actually suffered, which place the onus on the employer to prove the extent of the loss attributable to the unprotected strike or conduct in furtherance of the strike[242]. The court concluded that the strike was unprotected, and attempts were made to comply with the provisions of the LRA. It was accepted that the strike was premeditated, and it was not as a result of the unlawful conduct of the employer[243]. The court accepted that the union genuinely believed that the strike was protected[244]. The strike took place over one and half day and it was further accepted by the court that the employer suffered a financial loss[245]. The court held that the union would not always be automatically held liable for the actions of their members and as such, a claim under section 68(1)(b) of the LRA cannot always be successful even if the losses attributable to a strike are proven[246]. In claiming damages, the court further held that the employer should have at least mitigated their losses by applying for interdict at the time when the interdict commenced or immediately thereafter[247]. It is evident from this ruling that a remedy for just

[235] Du Toit (2023) 360.
[236] s 68(1)(b) of the LRA.
[237] Van Eck (2017) ILJ 15; Le Roux (2013) 11.
[238] *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 *BLLR 84* (LC)
[239] *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 *BLLR* 84 (LC) para 89.
[240] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported (JS 172/2014) [2019] (LC) 24 April 2019 para 128.
[241] s 68(1)(b) of the LRA.
[242] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported (JS 172/2014) [2019] (LC) 24 April 2019.
[243] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported (JS 172/2014) [2019] (LC) 24 April 2019 para 129.
[244] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported (JS 172/2014) [2019] (LC) 24 April 2019 para 129.
[245] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported (JS 172/2014) [2019] (LC) 24 April 2019 para 129.
[246] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported (JS 172/2014) [2019] (LC) 24 April 2019 para 130.
[247] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported (JS 172/2014) [2019] (LC) 24 April 2019) para 133.

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and equitable compensation is not effective or reliable and the courts award compensation in strict narrow sense[248].

In *Rustenburg Platinum Mines v MPWU*[249], the company quantified their losses to R15 million rand due to an unprotected strike and the court reduced the claim to just and equitable compensation in the amount of R100,000.00. The court found that the strike was not for a long duration, the union failed to comply with the provisions of the LRA and the company had not been intransigent in dealing with the issues with the strikers. Although the losses suffered by the company were severe, the court weighed up the union's weak financial position as a factor to consider[250] and ordered the union to pay R100,000.00 in monthly instalments of R5000.00. This ruling clearly indicates that employers may be hesitant to pursue claims for damages, as the outcome remains uncertain. Additionally, companies must carefully assess the legal costs associated with such actions. The inherent unfairness and ineffectiveness of this ruling necessitate judicial intervention to critically examine the remedial options available to employers for their consideration[251].

In *Algoa Bus Company v SATAWU*[252], the company quantified their losses due to an unprotected strike to the amount of R500,000.00 and the court reduced the claim to a just and equitable amount of R100,000.00 repayable by each employee in monthly instalments of R50.00 because the Company overestimated the duration of the strike. However, *Algoa*[253] in a later strike, obtained an award of damages of about R10 million rand against three unions for participating in a later unprotected strike and in another later unprotected strike, *Algoa* was successful in claiming compensation in the amount of R1.6 million against one of the Unions[254]. According to Du Toit[255], the LRA does not expressly take away the right of an employer to claim damages in terms of the common law.

3. Liability in terms of Common Law

3.1 Introduction

The remedy available to an employer to claim just and equitable compensation has been proven unreliable and ineffective. According to Du Toit, the LRA does not expressly limit an employer's right to claim damages in terms of the common law. An employer may elect to pursue a claim for just and equitable compensation in terms of section 68[256] or a claim for

[248] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported (JS 172/2014) [2019] (LC) 24 April 2019 para 130.
[249] *Rustenburg Platinum Mines v MPWU* [2001] 24 *ILJ* 405 (LC).
[250] s 68(1)(b)(iv) of the LRA.
[251] *Rustenburg Platinum Mines v MPWU* [2001] 24 *ILJ* 405 (LC) 15 – 18 where the court examined the factors to be taken into account in terms of s 68(1)(b). The court stated that s 68 is not penal on nature and just and equitable compensation means nothing more than to be fair. The union referred to the court to s 158 of the LRA and requested the court to make a ruling that the compensation awarded to be paid off in monthly instalments, which the court found in favour of due to the fact that the court does not want to impose a financial penalty on the union to cripple its financial structure.
[252] *Algoa Bus Company v SATAWU* [2010] 2 *BLLR* 149 (LC).
[253] *Algoa Bus Company v SATAWU* [2015] 36 *ILJ* 2148 (LC).
[254] *Algoa Bus Company v TARGWU* [2015] 36 *ILJ* 229 (LC).
[255] Du Toit (2023) 360.
[256] s 68(1)(b) of the LRA.

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damages under the common law provisions in the Labour Court or civil courts[257], which includes claims for delict and breach of contract[258]. This chapter will focus on alternative remedies available to the employer outside the scope of the LRA and examine whether a trade union can be held liable for negligence due to a failure to comply with a statutory duty in terms of the constitutional and legislative peace regulations. This study will further illustrate whether the common law doctrine of various liability can be extended to trade unions to hold them liable for the unlawful of their members.

In cases where strikers and unions engage in violent strikes, strikers lose their immunity against civil and delictual claims. In accordance with the law of delict, an employer who suffers losses as a result of a strike may have a legal claim against the striking employees. Le Roux[259] explains that if an employer incurs losses due to a strike, it may seek compensation from the employees or the union. A delict refers to an intentional or negligent act or omission by a person that causes harm to another. Le Roux[260] suggests that pursuing a delictual claim against employees for losses may be more feasible than holding a trade union responsible for the actions of its members. However, the challenge remains that employees may not always have the financial means to provide compensation for damages and thus warrants an investigation whether an employer can hold the union vicariously liable for the unlawful acts of their members during industrial action[261].

In *Blinkwater Mills (Pty) Ltd and another v Food and Allied Workers Union and others*[262], members of the union engaged in a protected strike causing the company to suffer losses. The company initiated a claim for damages against the union and its members in the Mpumalanga High Court. The union argued that the Labour Court had exclusive jurisdiction to order compensation for losses during strikes in terms of section 68(1)(b)[263] The High Court ruled that section 68(1)(b)[264] applied only to protected and unprotected strikes and that the Labour Court did not have jurisdiction over common law delictual damages. The court confirmed that employers could pursue delictual claims for losses incurred during protected strikes, even if statutory immunity from civil liability applied. The employer must prove quantifiable losses resulting from an intentional or negligent wrongful act to seek restitution. The court emphasized that employers could choose to claim compensation under the LRA or pursue damages under the common law principles. The courts have previously found that it is possible to hold the union liable for delictual damages[265].

The Supreme Court in *Minister of Police and others v Umbhada Estates (Pty) Ltd and others*[266] found that that SAPS wrongfully and negligently failed to prevent striking employees from causing damage to the company and injury of one its employees. In this matter, a prolonged strike turned extremely violent, and the strike was characterised by various acts of

[257] S 77(3) of the BCEA.
[258] *Mondi Paper v CEPPWAWU (2005)* 26 *ILJ* 1458.
[259] Le Roux (2013) *Contemporary Labour Law* 11.
[260] Le Roux (2013) *Contemporary Labour Law* 12.
[261] Le Roux (2013) *Contemporary Labour Law* 12 – 13.
[262] *Blinkwater Mills (Pty) Ltd & another v Food & Allied Workers Union & others* (2020) 41 *ILJ* 873 (ML).
[263] s 68(1)(b) of the LRA.
[264] s 68(1)(b) of the LRA.
[265] *Jumbo Products v NUMSA* (1996) ILJ 859 (W); Eskom Ltd v NUM (2001) 22 *ILJ* 618 (W); Gericke (2012) *THRHR* 17; Rycroft ' What Can Be Done About Strike Related Violence'? 199.
[266] *Minister of Police and others v Umbhada Estates (Pty) Ltd and others* (Case No 1281/2021) [2023] ZASCA 85 (1 June 2023).

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intimidation, assault, malicious damage to property, vandalism, theft, petrol bombing, looting and blockading of the farm entrance[267]. There were several interdicts[268] ordered from the Labour Court to interdict the strike and further orders from the Labour Court to compel the SAPS intervene in this violent strike and the SAPS failed to adequately adhere to the court's orders. The SAPS has a constitutional and legislative duty to maintain public order[269]. This case is a watermark case to hold the SAPS liable for the full extent of damages suffered in the event that the SAPS has failed to comply with their constitutional[270] and legislative duty[271] to protect and prevent harm or damage.

The courts have on numerous occasions held that unions are responsible for controlling their members in violent strike action and to dissuade them from engaging in any unlawful activities[272]. Part of this chapter is to investigate if a trade union has a similar duty to ensure that the peace clauses[273] are complied with.

3.2 Law of Delict

The test for negligence is based on two key elements[274], namely the reasonable foreseeability and reasonable preventability of harm or damage[275]. It is crucial to emphasize that what is necessary is the ability to foresee potential harm and the reasonable likelihood of harm actually occurring. Simply foreseeing the possibility of harm is insufficient[276]. The determination of what is or is not reasonably foreseeable in any given case is a matter that depends on the specific facts at hand and requires consideration of all circumstances involved[277]. While the exact manner in which harm may manifest need not be predictable, the general occurrence of harm must be reasonably foreseeable[278]. In order to constitute a delict, one person must have caused damage or harm to another person by means of an act or

[267] *Minister of Police and others v Umbhada Estates (Pty) Ltd and others* (Case No 1281/2021) [2023] ZASCA 85 (1 June 2023) para 5.
[268] *Minister of Police and others v Umbhada Estates (Pty) Ltd and others* (Case No 1281/2021) [2023] ZASCA 85 (1 June 2023) para 13.
[269] s 205(3) of the Constitution states that 'the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure inhabitants of the Republic and their property, and to uphold and enforce the law'. s 13 of the South African Police Service Act 66 of 1995 (PSA) assigns specific duties to members of the police and provides that - '(1) subsequent to the Constitution and with due regard to the fundamental rights of every person. Members may exercise such powers and shall perform such duties and functions as are by the law conferred on or assigned to a police official'. It is clear from these provisions that public policy and the Constitution place a legal duty on the SAPS to prevent crime and maintain public order.
[270] s 205(3) of the Constitution.
[271] s 13 of the PSA.
[272] *Xstrata v AMCU* ZALCJHB (Case No. J1239/13) [2014] (LC) (25 February 2015) par 35 – 38.
[273] s 17 of the Constitution. s 1(d)(i) of the LRA. Rule 24(4)(c) in terms of the Code of Good Practice Collective Bargaining Industrial Action and Picketing of the LRA.
[274] *Kruger v Coetzee* 1966 (2) SA 428 (A) 430.
[275] *Jacobs v Transnet Ltd t/a Metrorail* [2014] ZASCA 143.
[276] *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) para 8.
[277] *Pitzer v Eskom 2012* JDR 0507 (SCA).
[278] *Sea Harvest Corporation (Pty) Ltd & another v Duncan Dock Cold Storage (Pty) Ltd &* another [2001] 1 *ALL SA* 128 (A) para 22.

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conduct[279]. Conduct may be described as a general prerequisite for delictual liability. Damage must be caused by something, and in the event of delict, it is caused by conduct[280].

Neetling explains that the law is hesitant to find that there was a legal duty on someone to act positively and to prevent damage to another and sometimes difficult to draw a distinction between conduct of a positive nature and conduct by way of omission, or more likely the negligent exercise of control[281]. An act causing harm to another must be wrongful in a legally reprehensible way[282]. If a person was aware of a dangerous situation, this may be factor in determining whether that person had to exercise control over the danger and whether a legal duty rested on that person to take the necessary steps to prevent the loss or harm[283]. A statutory provision on its own is not always sufficient to ensure the existence of a legal duty and it usually considered in the ambit of other factors in order to determine the wrongfulness[284]. A legal duty may also flow from a contract between parties where one party had a duty to prevent damage or harm[285]. The Supreme Court of Appeal confirmed the doctrine of abuse of right whether statutory or otherwise in principle should be regarded as wrongful and therefore actionable because the doctrine enjoys general application of the law of delict[286]. Whether a person is 'vulnerable to the risk or damage' is a further policy consideration that can be taking into account determining the presence of a legal duty[287].

Section 69 of the LRA[288], states that the union 'may authorise a picket' by its members and supporters. The Explanatory Memorandum on the Labour Relations Amendment Bill, 2017[289] explains that the purpose of these amendments is to require trade unions to take responsibility for pickets and to ensure that the constitutional rights of others to freedom and security of person, freedom of association, fair labour practices and property, are not infringed[290]. When interpreting the LRA, the Code of Good Practice[291] must be taken into account[292]. The Code of Good Practice[293] illustrates consistently that strikes marred with violence, intimidation and infringement of constitutional rights will not be condoned in the

[279] Neetling (2020) 27.
[280] Neetling (2020) 27.
[281] Neetling (2020) 32 – 33.
[282] Neetling (2020) 35; *Lillicrap Wassenaar & Partners v Pilkington Brothers SA (Pty) Ltd* 1985 1 SA 475 (A) 498 – 499; *Stedall v Aspeling* 2018 2 SA 75 (SCA) para 11.
[283] Neetling (2020) 73.
[284] *Home Talk DevelopmentS (Pty) Ltd & others v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA) para 19.
[285] *Van Der Bijl v Featherbrooke Estate Home Owners Association* (NPC) 2019 1 SA 642. In this case the plaintiff's resided in an up marketed secured estate. One evening robbers gained entrance to the estate and the plaintiff's home where they were assaulted and sustained injuries. The court took into account all relevant facts and policy considerations and found that the association had a duty to protect those residing in the estate or that the law requires so.
[286] *Koukoudis v Abrina 1772 (Pty) Ltd* 2016 5 SA 352 (SCA) para 52.
[287] Neetling (2020) 84.
[288] s 69(1) of the LRA.
[289] Explanatory Memorandum on the 1995 Labour Relations Amendment Bill, 2017 RS 71, 2019 AA2 – P202.
[290] Clause 4, Explanatory Memorandum on the 1995 Labour Relations Amendment Bill, 2017 RS 71, 2019 AA2 – P206 – 205.
[291] Code of Good Practice in terms of Industrial Action, Collective Bargaining and Picketing Government Gazette GN R1396 GG42121, 19 December 2018.
[292] s 203 of the LRA.
[293] Code of Good Practice in terms of Industrial Action, Collective Bargaining and Picketing Government Gazette GN R1396 GG42121, 19 December 2018.

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strongest terms[294]. The Picketing rules only applies to picketing in terms of section 69[295], which consists of four elements[296], *inter alia* one of the elements require the picket to be peaceful in support of a protected strike[297]. A picket in terms of the picketing rules 'must' be authorised by a registered trade union[298] in accordance with their constitution in terms of a resolution authorising the picket or resolution permitting a trade union official to authorise a picket in terms of section 69(1)[299] in a formal setting and adduced in writing[300]. This authorisation only applies to members and supporters of the trade union[301]. The contracting parties to the picketing rules are between an employer, union or employer's organisation[302] and parties should seek to conclude a collective agreement to regulate pickets, failure the CCMA can facilitate such an agreement[303]. The trade union has a legal duty to appoint convenors and marshals[304] to monitor and control the picket in terms of the picketing rules[305], provide the latter with a copy of the picketing rules in order to ensure that the convenors, marshals and picketers understand these rules[306]. It is also important to note that no picket in support of a protected strike may take place unless picketing rules have been established between the parties or determined by the CCMA[307]. A clear reading from the LRA and Code of Good Practice in terms of picketing, it states that a trade union must authorise a picket and must appoint convenors and marshals to control and monitor the picket. The picketing rules

[294] Code of Good Practice in terms of Industrial Action, Collective Bargaining and Picketing Government Gazette GN R1396 GG42121, 19 December 2018, Part A Introduction, it states that the purpose of the code inter alia is to promote a peaceful strike or lockout free of violence and intimation. Regulations 5 of the introduction refers that one of the fundamental commitment between parties is to promote maximum participation and accountability in the preparation for, the conduct and the conclusion of negotiations in that inter alia, violence intimidation, damage to property and the use of dangerous weapons in the pursuit of collective bargaining, industrial action or protest action is condemned in the strongest terms and should not be tolerated in workplace, on picket lines or in any conduct related or incidental to such industrial or protest action. It further states that parties must commit to prioritise dealing with violence related conduct in industrial and protest action in an expeditious manner.

[295] s 69 of the LRA.

[296] Code of Good Practice in terms of Industrial Action, Collective Bargaining and Picketing Government Gazette GN R1396 GG42121, 19 December 2018. Rule 24(4) of the Picketing Rules refers to pickets in terms of s 69 of the LRA which comprise of four elements: (a) the picket must be authorised by the representative union, (b) only members and supporters of the trade union may participate, (c) the purpose of the picket must be peacefully demonstrated in support of a protected strike and (e) the picket may be held outside the premises of the employer, or with consent inside the premises of the employer.

[297] Rule 24(4)(c) of the Picketing Rules; Rule 24(5) of the picketing Rules requires compliance with all four elements for immunity. It states that 'If the picket complies with these four elements, then the ordinary laws regulating the right of assembly do not apply. These laws include the common law, municipal by-laws and the Regulation of Gatherings Act 205 of 1993'. This in simple terms can be interpreted that 'if' the picket does not comply with any of the four elements, then the ordinary laws regulating the right of assembly including the common law, municipal by-laws and the Regulations of the Gatherings Act (RGA)[297] will find application and that the protected immunity in terms of s 67 of the LRA will not find application either.

[298] Rule 25(1) of the Picketing Rules.

[299] s 69(1) of the LRA.

[300] Rule 25(2) of the Picketing Rules.

[301] Rule 25(4) of the Picketing Rules

[302] Rule 28(1) of the Picketing Rules.

[303] Section 69(4) of the LRA.

[304] Rule 32(2)(a) of the Code of Good Practice.

[305] Rule 32(2)(b) of the Code of Good Practice.

[306] Rule 32(2)(c) of the code of good practice.

[307] s 65(9) of the LRA; Rule 27 of the Code of Good Practice.

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in the Code of Good Practice are ambiguous in terms of liability in the event when members and union contravene the picketing rules[308].

This study argues that a union can be held liable for negligence if it fails to adhere to a legal or contractual obligation. When a union authorizes a picket, it should also be accountable for the actions of its members who benefit from this authorization. The union has a responsibility to appoint marshals and convenors to oversee and regulate the picket. It is evident that both marshals and convenors operate under the union's authority, and the union holds the power to ensure that these individuals fulfil their duties effectively to maintain peaceful picketing in accordance with constitutional and legislative guidelines. Furthermore, if picketing rules are concluded in a collective agreement and from the collective agreement the union is responsible for peaceful picketing, then the union failed to comply with its contractual obligations. In this event the union must prove what measures they have implemented to prevent the harm or damage[309]. This study further contends that the doctrine of 'abuse of right' might also find application as the right to strike and the right to picket are continuously abused to reach ulterior motives.

In terms of causation, the factual and legal causation must be established to identify a nexus in the factual and legal causation. If the union fails to intervene in a violent strike or fail to monitor and control the violent strike and an employer has subsequently suffered damages or non-striking employees sustained injuries due to assault, the union must provide evidence what measures have they implemented to prevent the harms or damages caused[310]. The question of legal causation arises when determining which consequences caused by the wrongdoer's wrongful, culpable act he should be liable for, in other words which consequences should be imputed to him[311].

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[308] It can only be interpreted that if there is non-compliance with the four elements, then the laws regulating assembly including the common law, municipal by-laws and RGA will find application and extent to trade union liability. This is so because the Code of Good Practice further states that a person who takes part in a protected picket does not commit a delict or breach of contract and that an employer cannot sue a person or the union for damages caused by the picket. It seems that if the picket is not protected, the employer is then entitled to sue the union and employees for any damages caused by the employees.

[309] In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC), the court held that 'Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty bearer. The closer they are, the greater the obligation on the duty bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty bearer. Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of state in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decisionmakers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decisionmaker's authority to determine what are reasonable and appropriate measures in the overall context of their activities'. See also *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) 528.

[310] Neetling (2020) 216.

[311] Neetling (2020) 230.

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3.3 Vicarious liability

This study argues theoretically that a trade union is capable of being held liable for vicarious liability. The general principle of vicarious liability may be described as the common law strict liability of one person for the delict of another. The former is thus indirectly or vicariously liable for the damages caused by the latter[312]. According to Tenza, the theory of vicarious liability in South African labour law has not yet been developed and recognised to extent vicarious liability to trade unions[313]. Where an employee acting within the scope of his employment and commits a delict, his employer is fully liable for the damages[314]. The identification doctrine relates to a corporate body may be identified with key individuals who acts on its behalf[315]. Fault is not required to on the part of the employer. Three key requirements are needed to prove vicarious liability namely (a) there must be an employer at the time when a delict was committed, (b) the employee must commit the delict, (c) the employee must act within the scope of his/her employment when the delict was committed[316]. Extending vicarious liability to union – member relationship has similarities to the employer – employee relationship. Both relationships have an employee party. Unions also operate in the work environment. An employee has a right to join a trade union and participate in trade union activities[317]. The employer issues instructions to an employee. A trade union authorising a picket[318] and subsequently provide instructions to its members. The members of the trade union picket under the control of the trade union. Strikes and picket action is conducted under the trade union's guidance and supervision. In theory, an employer can hold a union liable in applying the close connection factor and the employer must prove that there is a causal connection between the conduct of an employee and what the employee was instructed to do by the union, shopstewards or union officials[319]. In order for an employer to be successful to attribute vicarious liability to the trade union, the employer must prove first that (a) the trade union members committed a delict against the employer for which it was vicariously liable and (b) the trade union itself committed a delict against the employer[320].

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[312] Neetling (2020) 444.
[313] Tenza *LLD Dissertation* 210.
[314] Botha *De Jure* (2012) 225.
[315] Botha (2012) De Jure 229.
[316] Neetling (2020) 446 – 447; Tenza *LLD Dissertation* 216. See also *Minister of Police v Rabie* 1986 (1) SA 117 (A) which the court stated that act done by a servant, there he subjectively intended to act solely for his own purposes, may fall outside the scope of his employment. However, if there is a sufficiently close link between the servant's acts for his own interests and the business of his mater, the master may be still held liable. The close connection test was developed in the court to protect women and children in *K v Minister of Safety and Security* [2005] 6 *SA* 419 (CC).
[317] S 4(1) of the LRA.
[318] S 69(1) LRA.
[319] In *Xstrata v AMCU* ZALCJHB (Case No. J1239/13) [2014] (25 February 2014) para 35 – 38, the court confirmed that the union has a duty to control ('police') its members during strike action. The court further held at para 42 'It cannot be doubted that AMCU has fully associated itself with the conduct of its members throughout the illegal strike, even after the dismissal of the strikers. AMCU cannot therefore, when it is required to account for the actions of its members, wash its hand of them in the mould of the proverbial *Pontius Pilate*. AMCU has conceded that it is in a position to take reasonable steps in order to attempt to ensure that its members comply with the court order. This concession implies that it does appreciate its obligation to indeed police its members'
[320] *Mondi Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union* (2005) 26 ILJ 1458 (LC); Nyambeni (2018) *LLM Dissertation* 33; Tom (2014) *LLM Dissertation* 27.

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6. Conclusion

In examining the remedies established under section 68 of the LRA, it is evident that the legal framework strives to balance the interests of employers and trade unions amidst the complexities of strikes and lockouts. The Labour Court's authority to award just and equitable compensation for losses resulting from protected or unprotected strikes, as interpreted in the landmark *Massmart* case, underscores the expansion of union liability beyond the confines of protected strikes. The court's interpretation affirms that unions must be held accountable for the conduct of their members, thereby reinforcing a system of checks that promotes lawful and peaceful collective action.

Moreover, the remedies available including interdicts and the awarding of just and equitable compensation offer a means through which employers can seek recourse for damages suffered. However, the discretion exercised by the courts in determining compensation amounts reveals a significant challenge for employers seeking remedies. The requirement for employers to demonstrate both the absence of compliance with the LRA and the extent of their losses, combined with the courts' tendency to moderate compensation awards, indicates a stringent approach that may dissuade employers from pursuing claims altogether.

The judicial reluctance to impose heavy financial burdens on unions, particularly in light of their financial standing, further complicates the landscape of remedying damages in the context of strikes. While the legislative framework aims to prevent the exploitation of unions through punitive damages, it simultaneously creates a precarious situation for employers grappling with the implications of unprotected strikes.

This study highlights the importance of reassessing and potentially reforming the current legal provisions to enhance the efficacy and equity of the remedies available under Section 68 of the LRA. There remains a compelling need for judicial intervention and legislative clarity to ensure that employers can protect their interests without disproportionately hindering the operational capacity of trade unions. Such reforms could ultimately contribute to a more balanced framework within which collective bargaining can flourish alongside broader economic stability

This study has illuminated the intricate dynamics of liability as it pertains to trade unions under the common law, particularly in instances of industrial action. The ability of employers to pursue claims for damages outside the scope of the LRA reflects the continuing evolution of legal understanding regarding the responsibilities of trade unions. It is clear that, while the remedies available under section 68 of the LRA are intended to provide redress, they often fall short in effectiveness and reliability, prompting employers to explore alternative common law remedies.

The discussion surrounding the liability of trade unions for the actions of their members hinges significantly on the interpretation of negligence and the law of delict. This study

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contends that unions can bear responsibility not only for the unlawful actions of their members but also for failing to fulfil their statutory and contractual obligations related to maintaining peace during strikes. This obligation extends to the appointment of adequate marshals and convenors to oversee picketing activities, thereby reinforcing the union's role in ensuring compliance with legal standards.

Furthermore, the exploration of vicarious liability introduces a crucial perspective on how unions may be held accountable for members' actions during industrial actions. The theory, though still developing in South African law, allows for the possibility that trade unions could bear vicarious liability for damages caused by their members' delictual actions, thereby emphasizing the need for unions to actively manage and control the conduct of their members during strikes.

Ultimately, the judicial acknowledgment of a union's dual role both as a representative of its members and as an entity responsible for upholding the peace provisions of the LRA suggests a forthcoming shift in legal interpretation. Courts appear increasingly willing to impose liability on unions to protect the rights and interests of employers and third parties. As the legal landscape continues to evolve, the principles articulated in this study will most likely play a pivotal role in delineating the boundaries of union liability, thereby shaping the future of collective action and the associated legal responsibilities of trade unions in South Africa.

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Chapter 5

Comparative Analysis

1 Introduction

Comparative law is essential for a thorough comprehension of contemporary legal frameworks. To ascertain the practicality of a legal system's structures and functions, it is imperative to compare the existing legal regime with international jurisdictions that undertake similar or identical roles. Engaging in comparative legal analysis facilitates the identification of deficiencies and challenges within a legal framework, thereby enhancing its overall effectiveness.[321]

This chapter investigates the labour laws of two countries, Australia and Canada to establish whether and to what extent they hold a trade union liable for unlawful conduct committed during industrial action in their respective jurisdictions. The purpose is to draw some lessons from the ways in which these countries deal with violent industrial actions in their jurisdictions.

Section 39(1) of the Constitution[322] states that 'when interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law'.

2. The Countries Chosen for Comparative Study

2.1 Introduction

This chapter will conduct a comparative analysis of liability against trade unions based on violent industrial action within the legal frameworks of Australia and Canada, both of which share notable similarities with South Africa. Firstly, a significant point of conjunction among these three constitutional states lies in their governance structure, as each Country derives authority from its constitution[323]. Additionally, all three countries feature decentralized governmental systems encompassing national, provincial, and local levels. Moreover, both Australia and Canada have specific provisions within their statutes or labour codes designed to mitigate or resolve disputes, thereby preventing them from escalading into disruptions or acts of violence.

2.2 South Africa and Australia

Australia operates as a federal state[324], with governance distributed across three distinct levels or spheres namely federal, state, and local. Each level is endowed with specific responsibilities delineated by the Constitution. In the realm of labour relations, both the federal government

[321] Weiss (2003) *CLL/PJ* 177.
[322] s 39 Constitution of South Africa
[323] The Constitution of Australia 1900 and the Constitution of Canada 1982.
[324] The National Government in Australia is called the Federal State.

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and state governments have jurisdiction[325]. However, in instances where a conflict arises between federal law and state law, the federal law takes precedence[326], ensuring uniformity across the nation. In Australia, the Fair Works Act[327] (FWA) regulates employee relations and in South Africa, the Labour Relations Act[328] (LRA). Both South Africa and Australia's labour legislation makes provision for employees to form and join unions and also to participate in union activities[329].

2.3 South Africa and Canada

Canada and South Africa exhibit notable constitutional parallels. During the formative years of our constitutional democracy, South African courts frequently drew upon Canadian legal sources to align their rulings on constitutional perspectives. Hogg[330] confirmed that this is evidenced by the presence of over 200 citations of Canadian case law and more than 80 references to Canadian legal sources in judgments delivered by the South African Constitutional Court. Additionally, the South African Bill of Rights bears resemblance to the Canadian Charter[331] of Rights and Freedoms[332]. According to Tenza[333], South Africa has also adopted elements of Canadian labour law, illustrated by the Employment Equity Act[334], which is influenced by Canadian legislation[335]. In the Canadian context, the Canadian Labour Code[336] serves as the foundational legal framework for labour law, with most labour statutes deriving their authority from this Code.

3. Australia

3.1 Introduction

The Australian Constitution does not explicitly recognize the right to freedom of association and the right to strike. Australia ratified various international instruments such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[337], and ILO

[325] s 51(35) of the Constitution of Australia.
[326] s 109 of the Constitution of Australia.
[327] Fair Works Act 28 of 2009 as amended by the Fair Works Act 120 of 2023.
[328] Labour Relations Act 66 of 1995.
[329] s 19 of the FWA and s 4(1), 64(1), 65(1), 69(1) of the LRA.
[330] Hogg (1998) *13 SAPR/PL* 2.
[331] Part 1 of the Constitution of Canada.
[332] Hogg (1998) *SAPR/PL* 3.
[333] Tenza (2016) *LLD Dissertation* 141.
[334] Employment Equity Act 55 of 1998.
[335] Canadian Employment Equity Act of 1985.
[336] Canadian Labour Code R.S.C 1985.
[337] Australia ratified the convention on 10 December 1975. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN. Accessed 12 September 2024.

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Convention 87 and 98[338], which reinforces these rights[339]. Although freedom of association is not explicitly enshrined in the Constitution, the FWA protects an employee's right to freedom of association and the right to participate in industrial action[340].

3.2 Definition of the Right to Strike

Section 19(1)[341] of the FWA defines 'industrial action' as various forms of employee conduct that disrupt work, including (a) employees performing their tasks differently than usual, leading to delays or limitations in work, (b) employees imposing restrictions on their work performance or refusing to accept or offer work, (c) employees failing to attend work or refusing to perform their duties, and (d) employers locking out employees from their workplaces.

Section 19(2)[342] provides exclusions from this definition, specifying that certain actions do not constitute industrial action, such as (a) actions authorized or agreed upon by the employer; (b) actions taken by the employer that are authorized by or agreed to by employees; (c) actions by employees driven by a reasonable concern for their health or safety, provided they did not unreasonably disregard an employer's directive to perform safe and suitable work elsewhere.

3.3 Procedural Requirements and Substantive Limitations

The FWA makes provision for protected strike action[343] following certain prerequisite procedural requirements[344] for parties to a collective bargaining dispute to comply with. Failure to comply with these requirements will render the strike unprotected and employees will not enjoy immunity against dismissals or civil claims[345]. The FWA further illustrates that any conduct during protected strike action relating to personal injury[346], wilful or reckless destruction of, or damage to property[347], the unlawful taking and keeping use of property,[348]

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[338] ILO Convention 87. Australia is one of the founding members of the ILO. Australia ratified Convention 87 on the 28th of February 1973. https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232:NO Accessed 12 September 2024. On the latter date, Australia also ratified Convention 98. https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312243:NO Accessed 12 September 2024.

[339] Art 8(d) of the ICESCR of 1966 provides that an employee has a right to strike in accordance with the laws of that country. Convention 87 and 98 of the ILO provides an employee the right to freedom of association and collective bargaining. See chapter 2. In *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) HCA 20, the court reiterated that international instruments ratified by the country should be taken into account in judicial proceedings.

[340] Part 3 of the FWA.

[341] s 19(1) of the FWA.

[342] s 19(2) of the FWA.

[343] s 415 FWA.

[344] s 408 – 416A of the FWA.

[345] s 415 of the FWA.

[346] s 415(1)(a) of the FWA.

[347] s 415(1)(b) of the FWA.

[348] s 415(1)(c) of the FWA.

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or defamation[349] will not be protected and employees will not enjoy any immunity for such conduct.

Section 408 of the FWA identifies three forms of protected industrial action namely, (a)[350] employee claim action, (b)[351] employee response action and (c)[352] employer response action, for the agreement. To enjoy protection all action must be for a proposed enterprise agreement[353] in compliance with the common requirements for industrial action[354].

The common requirements for protected industrial action include:

- The industrial action must not relate to a proposed enterprise agreement that is a greenfields[355] agreement or cooperative workplace agreement[356].
- Parties must genuinely attempt to reach an agreement[357].
- Adhering to notice requirements[358].
- An employee and or the bargaining representative must not contravene any orders[359].
- No industrial action is allowed before the nominal expiry of an enterprise agreement[360].
- No suspension and termination order or ministerial declaration is in operation[361].

Before the trade union can issue notice[362] of industrial action, the trade union must conduct a ballot of its members. This is different from South African labour law as the LRA does not impose a legal duty on a trade union[363] to ballot its members prior issuing a notice of intention to strike. The trade union must apply to the Fair Works Commission (FWC) for a protected action ballot order to be conducted to determine whether employees wish to engage in the particular action for the agreement[364]. Should the FWC be satisfied that the union complies with the prerequisite requirements for the application of a protected ballot, the FWC can make an order for a protected ballot[365] and decide on an independent entity or agency who

[349] s 415(2) of the FWA.
[350] s 408(a) of the FWA.
[351] s 408(b) of the FWA.
[352] s 408(c) of the FWA.
[353] s 409, 410 & 411 of the FWA.
[354] The common requirements are outlined in subdivision B, s 413 of the FWA.
[355] In Australia, the Fair Work Commission (FWC) explains that a greenfields agreement relates to a type of enterprise agreement for a business which is newly established without any staff members. https://www.fwc.gov.au/page/about-greenfields-agreements#:~:text=Introduction,activity%2C%20project%20or%20undertaking%20AND Accessed 12 September 2024.
[356] s 413(2) of the FWA.
[357] s 413(3) of the FWA.
[358] s 413(4) of the FWA. Notice requirements must comply with s 414 of the FWA.
[359] s 413(5) of the FWA.
[360] s 413(6) of the FWA.
[361] s 413(7) of the FWA.
[362] s 414 of the FWA.
[363] LRRA 6 of 2014.
[364] s 437 of the FWA. In terms of s 440 of the FWA, the union must within 24 hours after application for protected ballot, serve the application on the employer. In terms of s 441 of the FWA, the application must be determined by the FWC within 2 days after the application has been made.
[365] s 443 of the FWA. In terms of s 443(3A) of the FWA, the FWC must determine a date for protected ballot as expeditiously as possible.

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will oversee this ballot[366]. After the ballot, the union must issue a notice of intention to strike within 3 days[367] and the notice must specify the nature of the action and the day on which it will start[368]. Tenza[369] referred to *National Workforce (Pty) Ltd v Australian Manufacturing*[370] where the court confirmed that the serving of a notice is a precondition for the commencement protected industrial action and the union were subsequently held liable for civil action due to their failure. The no work no pay principle in South Africa is similar to Australia. If employees embark upon industrial action, the employer must not make any payment to the employees[371]. A further similarity to South African labour[372] is the substantive limitations imposed on employees and trade unions[373]. Industrial action must be in support or advancing of lawful terms[374]. Industrial action must not be part of pattern bargaining[375] or relate to a demarcation dispute[376], or the negotiation of agreements which is not enterprise agreements[377] or if industrial action is prohibited by a collective agreement.[378]

3.4 Unprotected Industrial Action

The FWA establishes a framework for protected industrial action[379], contingent upon two primary criteria. Firstly, the industrial action must adhere to the prescribed statutory procedures and common requirements for protected industrial action[380]. Secondly, the action in question must not engage in any conduct that pertains to personal injury, the destruction or damage of property, unauthorized possession of property[381], or the act of defamation[382]. Furthermore, the FWA empowers FWC to suspend or terminate either protected[383] or unprotected industrial action[384]. This intervention can be initiated by the FWC's own

[366] s 444 of the FWA. Normally the Australian Electoral Commission will oversee ballots.
[367] s 414(2)(a)(i) of the FWA.
[368] s 414(6) of the FWA.
[369] Tenza (2016) *LLD Dissertation* 158.
[370] *National Workforce (Pty) Ltd v Australian Manufacturing Workers Union* (1997) VSC 44. In *Telstra Corporation Ltd v Community and Public Sector Union* (2000) 107 *FCR* 93, the court held that a notice is a precondition for a protected strike and it also defective which lacks substance subsequently rendering the strike unprotected.
[371] s 416 of the FWA. See also s 524 of the FWA in terms of stand down of employees. Creighton (2017) 45 *Federal Law* Review 383 at 393 where Creighton explains that s 524(1)(a) of the FWA address the possibility by enabling employers to stand down their employees in circumstances where industrial action is not organised by the employer or relates to the employer but other employers which the employer is not part of. This will allow the employer to stand down their employees and is also not required to pay its employees for the duration of the industrial action. This is however different from the South African labour law.
[372] s 65 of the LRA.
[373] s 409 of the FWA.
[374] s 409(3) of the FWA.
[375] s 409(4) of the FWA. Pattern Bargaining is explained in s 412 of the FWA where a person is a bargaining representative for 2 or more proposed enterprise agreements, the course of conduct involves seeking common terms included for 2 or more of the agreements, or the course of conduct relates to 2 or more employees.
[376] s 409(5) of the FWA.
[377] s 172 of the FWA.
[378] s 409(1)(c) & 413 of the FWA.
[379] s 415 of the FWA.
[380] s 409 & 413 of the FWA.
[381] s 415(1)(a) – (c) of the FWA.
[382] s 415(2) of the FWA.
[383] s 423 of the FWA.
[384] s 418 of the FWA.

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initiative[385], a bargaining representative or person affected by the industrial action[386], Minister[387] or court[388], particularly if the industrial action in question poses significant harm[389] to the economy[390], jeopardizes lives, compromises the personal safety and welfare of the population[391], or inflicts significant harm upon a third party[392].

It is therefore imperative to underscore the legal duty bestowed upon the FWC to make an order suspending or terminating a protected industrial action that is being engaged in or is threatened[393], impending or probable if the FWC is satisfied that the action has threatened, is threatening[394] or would threaten to endanger life, personal health[395] and safety or the welfare[396] of the population or part of it, or causing significant damage to the Australian economy or a part of it. The appropriate test is not whether the protected industrial action 'would' endanger, but rather whether it would 'threaten' to endanger[397]. The simple existence of a threat to safety or health, or welfare, is not sufficient and the danger must be probable, rather than simply a possible eventuality.[398] Conduct that jeopardizes an individual's physical or mental well-being, or significantly obstructs potential improvements in their health, can be deemed as endangering personal health or safety. Such conduct need not be life-threatening, rather it may still represent a considerable risk to personal safety or health. Importantly, the effects of this conduct must extend beyond mere inconvenience as they must actively expose individuals to danger[399].

In *Ausgrid and Others v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Service Union of Australia and others*[400] the applicants sought the termination or the suspension of protected industrial action. The unions issued notices of intention to take industrial action comprising a four-hour stoppage of work. Ausgrid's electricity network covers about 22,275 square kilometres, supplying electricity to 1.64 million

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385 s 418(2)(a), 419(2)(a), 423(7), 424(2)(a), 425 & 426(1) of the FWA.
386 s 417(2), 418(2) & 419(2)(b) of the FWA.
387 s 423(7)(b)(ii), 424(2)(b)(i) & 426(6)(b) of the FWA.
388 s 421 & 422 of the FWA.
389 *CFMEU v Woodside Burrup (Pty) Ltd,* (2010) FWAFB 6021, the FWC interpreted 'significant harm' as 'harm that is exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context and as such, an order will only be available under such ground in very rare areas'.
390 s 423 of the FWA deals with protected industrial action which pose a threat to the economy of Australia.
391 s 424 of the FWA determines that industrial that poses a threat to life, safety, health and wealth must be suspended or terminated.
392 s 426 of the FWA.
393 *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union [2009] FWA 44* para 29; University of South Australia v National Tertiary Education Industry Union [2009] FWA 1535 para 32. In both cases it was held that the term 'threatened' means 'constitute a threat to be likely to injure, be a source of harm or danger'.
394 *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44 para 30, it was held that the term 'threat' means 'a declaration of an intention to inflict pain, injury or other punishment'.
395 *University of South Australia v National Tertiary Education Industry Union* [2009] FWA 1535 para 35 where 'health' was defined as 'the general condition of the body or mind with reference to soundness or vigour'.
396 *State of Victoria – Department of Health and Community Services v Health Services Union of Australia Print* L9810 (AIRCFB) 1995 para15 where 'wealth' was defined as the 'state of faring well, well-being'.
397 *Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union* [2009] FWA 44 para 29.
398 *State of Victoria – Department of Human Services v Health Services Union* [2012] FWA 8376 para 80.
399 *Victorian Hospitals' Industrial Association v Australian Nursing Federation* [2011] FWAFB 8165 para 51.
400 *Ausgrid and Others v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Service Union of Australia and others* [2015] FWC 1600.

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customers which include residential, large and small businesses, as well as major industries including mining, shipping, tourism, manufacturing and agriculture. The Commission was satisfied that it was probable that an emergency event or events, such as vehicle impacts, storms, and disconnection and reconnection of customers would occur during the period of the protected industrial action. The Commission found that the notified action would likely delay the restoration of power in the event of a power interruption. Delays in the restoration of power are such as to threaten to endanger the safety, health and welfare of persons impacted by the power interruptions. The Commission held that section 424(1)(c)[401] is concerned with action that threatens to endanger persons in the manner described and the section does not require a finding that it will endanger such persons in respect of their welfare, health or safety. The FWC suspended the protected industrial action.

In *Monash University v National Tertiary Education Industry Union*[402], the union had sent a notice of intention to participate in protected industrial action to Monash University. The notice lacked a termination date of the industrial action. One of the forms of industrial action was 'a ban on recording, or transmission to the employer, of assessment results, with the exception of results for which an exemption has been granted by the NTEU Exemptions Committee' (the results ban). The Full Bench was satisfied that the results ban threatened to endanger student health and welfare by heightening student stress and anxiety. The full bench found that the indefinite nature of the results ban would aggravate its potential and actual effects on students. The full bench issued an order suspending protected industrial action in the form of the results ban for a period of two weeks.

In *Re Svitzer Australia (Pty) Ltd*[403], the employer Svitzer has been with the maritime unions for more than three years, including after the expiry of the enterprise agreement in 2019. Despite Svitzer's best efforts to reach a reasonable agreement, the parties remained apart on key threshold issues. Svitzer seek to remove restrictive work practices from its enterprise agreement which are critical to the future sustainability and competitiveness of its Australian business. On 14 November 2022, Svitzer gave notice to the bargaining representatives in terms of section 414(5)[404] of employer response action in the form of an indefinite lockout of all harbour towage employees covered by the 2016 enterprise agreement. This was also announced in a press release which caused the FWC to intervene and consider making an order on its own initiative in terms of section 424[405] to suspend or terminate the strike. It must also be noted that the employees and the unions also intended to partake in industrial action. The FCW considered a suspension of the proposed protected industrial action. The Minister

[401] s 424(1)(c) of the FWA.
[402] *Monash University v National Tertiary Education Industry Union* [2013] FWCFB 5982. On the contrary, in *KDR Victoria Pty Ltd T/A Yarra Trams* [2015] FWC 6282, Yarra Trams applied for an order to terminate protected industrial action for a 4-hour work stoppage. Yarra Trams submitted that the industrial action was threatening to endanger the personal safety or health or the welfare of a part of the population of Melbourne who rely on public transport generally and tram services in particular. The FWC held that while the industrial action would undoubtedly have an effect on the travelling public, it was not satisfied that the protected industrial action by the ARTBIU had threatened, was threatening or would threaten to endanger the personal safety or health or the welfare of the population or part of it. The application was dismissed.
[403] *Re Svitzer Australia (Pty) Ltd* [2022] FWCFB 123.
[404] s 414(5) of the FWA.
[405] s 424 of the FWA.

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however submitted[406] that the proposed lock out must be terminated permanently rather than suspended[407] as it would have critical implications for the Australian economy, and it would endanger the safety and welfare of the population or part of it[408]. The FWC suspended the protected industrial action.

3.5 Trade Union Liability

In Australia, it is not uncommon for individuals engaging in industrial action, including strikers, to inadvertently cause damage to the property of others and engage in unlawful activities. For instance, picketers or strikers may obstruct the movement of vehicles to and from the employer's premises. Such actions by picketers can potentially be deemed unlawful[409].

The court in *National Workforce (Pty) Ltd v AMWU[410],* found that loss and damage had been caused to the appellants by strikers, and that the rights of the appellants had been infringed. The court found no evidence to justify the infringement, and considered that the loss of profit, unfulfilled contracts, and the loss of clients all justified the granting of an order to prevent them from going ahead with their action. According to Tenza[411], the decision in *National Workforce (Pty) Ltd v AMWU[412]* decision implies that it might be possible for an employer to bring a claim against a trade union. The plaintiff has several grounds available if he or she wants to claim damages for the loss sustained as a result of the industrial action.[413]

The FWC may also make an order for civil penalties.[414] The FW Act provides that a person commits an offence if he or she intentionally engages in conduct in contravention of an FWC order.[415] The punishment for this is imprisonment of a maximum of 12 months.[416]

4. Canada

4.1 Introduction

In Canada, there are multiple institutions[417] sharing the responsibility of regulating labour relations, including the Federal Labour Relations Board and the provincial Labour Relations Boards, all established under the Labour Relations Code[418]. These boards are tasked with

[406] *Re Svitzer Australia (Pty) Ltd* [2022] FWCFB 123, Outline of Submissions for the Minister for Employment and Workplace Relations para 25 – 27.
[407] *Re Svitzer Australia (Pty) Ltd* [2022] FWCFB 123 para 22
[408] *Re Svitzer Australia (Pty)* Ltd [2022] FWCFB 123 para 37. Approximately one-billion-dollar worth of goods passing through 17 ports each day. Australia's ports are a critical infrastructure facilitating exports to a global market and imports key components for production and retail in Australia.
[409] *ACI Operations (Pty) Ltd v AMWU* (2000) 96 IR 228.
[410] *National Workforce (Pty) Ltd v AMWU* (1998) 3 VR 272.
[411] Tenza (2016) *LLD Dissertation* 182 – 183.
[412] *National Workforce (Pty) Ltd v AMWU* 272.
[413] *National Workforce (Pty) Ltd v AMWU* 273.
[414] s 539 of the FWA.
[415] s 675(1) of the FWA.
[416] s 4D of the Crimes Act 1900.
[417] s 91 & 92 of the Canadian Constitution provides for three spheres of government in Canada namely, the national (federal), provincial and local government.
[418] Tenza (2016) *LLD Dissertation 149*.

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adjudicating various labour-related issues. Among these, the Labour Board of British Columbia possesses the most extensive powers compared to its counterparts in other provinces and territories, covering areas such as conciliation, strikes, picketing, and grievance arbitration[419].

The Canadian Constitution explicitly safeguards the right to freedom of association[420]. As articulated in the Charter of Rights and Freedoms[421], 'everyone has the right to freedom of association'. This provision is consistent with the international standards pertaining to the bargaining collective conventions[422] which Canada ratified in March 1972.

4.2 Constitutional Limitation

The rights enshrined in the Charter, including the right to freedom of association, are subject to limitations imposed by law. Section 1 of the Canadian Constitution states that 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'[423]

Limiting a right involves a balancing exercise in which competing rights are assessed against one another to determine which carries greater weight. The principle of proportionality is essential in this context as it necessitates a rational connection between the law's intended purpose and the means employed by the legislature to achieve that end[424]. This process calls for a fair equilibrium among conflicting interests[425]. In considering restrictions on the rights protected by the Charter, Canadian courts have adopted a two-stage approach[426]. Notably, the South African Bill of Rights shares similarities with the Canadian Charter of Rights and Freedoms in this regard.

4.3 Procedural Requirements and Substantive Limitations

If an employee or a union believes that their right to freedom of association has been violated, they have the option to seek redress from the appropriate Labour Board[427]. In the context of Canadian labour law, the right to freedom of association encompasses the protection against dismissal for exercising this right. Moreover, in Canada, the right to strike is considered an integral aspect of freedom of association[428], available to workers as part of their industrial citizenship[429]. In Canada a strike is defined as the 'cessation of work, a refusal to work or continue to work by employees in combination or in concert or in accordance with a common

[419] Tenza (2016) *LLD Dissertation* 149 – 150.
[420] s 2(d) of the Canadian Constitution.
[421] Part 1 of the Canadian Constitution.
[422] Convention 87 & 98 of the ILO.
[423] s 1 of the Canadian Constitution.
[424] Grimm (2007) *University of Toronto Law Journal* 386.
[425] Hogg (1998) *SAPR/PL* 5.
[426] Hogg (1998) *SAPR/PL* 5.
[427] s 19(1) of the Canadian Labour Code.
[428] This protection provided in the Canadian Labour Code and the Canadian Constitution is similar to the South African legal framework in terms of s 18 of the Constitution, & s 4(1) & 187(1)(a) of the LRA.
[429] Tenza (2016) *LLD Dissertation* 165.

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understanding, or a slowdown or other concerted activity on the part of employees that is designed to restrict or limit production or output'.[430]

Similar to the situation in South Africa[431], the right to strike in Canada is subject to certain limitations[432]. One significant limitation is that unions are prohibited from engaging in industrial action if the employer's service has been designated as an essential service[433]. Additionally, workers cannot participate in industrial action if the dispute in question is governed by a collective agreement that is still in effect[434] and such disputes must then be resolved through arbitration. In South African labour law, a strike may commence in the absence of an existing collective bargaining agreement addressing the issue at hand[435].

Canadian labour law makes provision for protected strikes, provided that the appropriate procedures are adhered to. Employees can only participate in strike action while collective bargaining occurs or after the expiry of a collective agreement[436]. Most jurisdictions in Canada recognize the pivotal role that conciliation serves in resolving labour disputes[437], a sentiment mirrored in South Africa[438]. Should conciliation prove unsuccessful, the union mandated by their members must conduct a ballot of its members to vote in favour of the strike[439]. McQuarrie[440] explains that a majority vote in favour of the strike does not always guarantee that the strike will commence as unions rely on the majority vote as a bargaining tactic for

negotiations. This position is different in South Africa as unions are not required to ballot its members as a prerequisite for a protected strike.

The legal frameworks governing strike action across the Canadian provinces exhibit variations in their requirements for providing notice prior to the commence of a strike. Some provinces mandate that notice be given directly to the employer, while other provinces require that notification must be made to the Minister of Labour[441]. In general, the union must issue a 72 hours' notice before the commencement of a strike.[442] During a protected strike, the strike may 'freeze' for further negotiations. However, should parties fail to reach an agreement, the union is required to issue a new notice of intention to strike.[443]

In *Candu Energy Inc v Society of Professional Engineers and Associates*,[444] the union, following a majority vote of employees expressed support for the strike, provided the employer with a

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[430] s 3(1) of the Canadian Labour Code; McQuarrie (2015) 240.
[431] s 65 of the LRA.
[432] Charlotte (2009) *University of New Brunswick LJ* 131; McQuarrie (2015) 246.
[433] Charlotte (2009) *University of New Brunswick LJ* 131.
[434] s 88.1 of the Canadian Labour Code.
[435] s 65(1)(a) of the LRA only determines that a strike is prohibited if a collective agreement prohibits such action.
[436] McQuarrie (2015) 246.
[437] McQuarrie (2015) 250. McQuarrie explains that the philosophy requiring third party intervention through conciliation is that a strike following by lockout may have damaging effects on employees, employers and the economy, and parties should attempt to resolve the dispute through conciliation which an independent conciliator is appointed who will subsequently attempt to resolve the issue and report to the Minister.
[438] s 115 of the LRA.
[439] s 87 of the Canadian Labour Code.
[440] McQuarrie (2015) 250.
[441] McQuarrie (2015) 248.
[442] s 87(1) of the Canadian Labour Code.
[443] *British Columbia Maritime Employers Association v International Longshore and Warehouse Union* (2023) *(CanLII)* CIRB 1088.
[444] *Candu Energy Inc v Society of Professional Engineers and Associates*, (2012) *(CanLII)* 650 (CIRB).

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72-hour notice prior to the strike's commencement[445]. The employer challenged the validity of this notice, arguing that it was issued more than 60 days after the union had conducted its strike vote, and claimed that this rendered the strike notice unlawful in violation of sections 87.2(1) and 87.3(1)[446]. These sections stipulate that notice must be given to the employer within 60 days of the ballot, and that a 72-hour notice must precede the start of the strike. The court determined that the 72-hour notice requirement serves the purpose of enabling the opposing party to make necessary preparations. Ultimately, the court concluded that the union had adhered to legislative requirements and fulfilled the intent of strike notice, which is to allow the employer adequate time to prepare for a work stoppage.

A strike that does not adhere to the established pre-strike requirements is considered illegal, along with any activities related to that strike[447] Should a strike fail to comply with these mandatory procedures, the employer has the right to terminate the employees participating in the illegal strike which is similar to the South Africa[448].

In South Africa, a union is obligated to provide the employer with a notice 48 hours prior to the commencement of a strike[449]. The requirement for serving notice is instrumental in fostering orderly collective bargaining, as failure to adhere to this notice period can disrupt the integrity of the bargaining process[450].

4.4 Consequences of Unprotected Strikes

Strike action is declared unlawful if the procedural requirements mentioned above are not fulfilled, or if the industrial action is conducted without union representation[451]. Both unions and employers are prohibited from initiating a strike or lockout until they have adhered to the prescribed dispute resolution processes[452]. Any collective action or coordinated work stoppages undertaken by employees stemming from workplace disputes are deemed unlawful if they take place before the right to strike or lockout has been established[453].

Carrobrothers[454] explained that picketing consists of three elements, (a) a physical presence of persons called pickets, (b) communication of information and (c) intention to persuade those to whom the information conveyed to conduct themselves as to favour the cause of those responsible for the picketing. In 1951, the Supreme Court of Canada held that this action

[445] The notice was serviced within the ambit of s 87.2 of the Canadian Labour Code.
[446] s 87.2 & 87.3 of the Canadian Labour Code.
[447] *Thomson v Saskatoon School Division* (1995) 13 *(CanLII)* 618 (SK QB); *Canada Steamship Lines Inc* (2002) *(CanLII)* 201 (CIRB); *Natural Glacial Waters Inc v Brewery, Winery and Distillery Workers Union, Local 300,* (2000) *(CanLII)* 27838 (BC LRB); *Canadian National Railway Company v United Transportation Union General Chairpersons Messrs. Rex Beatty, Bryan Boechler, Raymond LeBel and Ms. Sylvia LeBlanc & others* (2007) *(CanLII)* 379 (CIRB).
[448] s 67 of the LRA.
[449] s 64(1) of the LRA.
[450] *Ceramic Industries Ltd t/a Beta Sanitary Ware v National Construction, Building and Allied Workers Union* (2) (1997) 18 *ILJ* 671 (LAC) at 701H.
[451] s 91 of the Canadian Labour Code.
[452] s 88 & 91 of the Canadian Labour Code.
[453] *British Columbia Maritime Employers Association v International Longshore and Warehouse Union* (2023) *(CanLII)* CIRB 1088.
[454] Carrobrothers (1957) *The Canadian Bar Review* 16.

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may be lawful.[455] Picketing was held to be unlawful in several historical judicial decisions where the courts held that pickets must not threaten anyone or commit bodily harm[456], not enter the property of another without consent[457], utter defamatory statements[458] or injure a man in its trade causing damages to him[459].

In South Africa, picketing serves as an action that supports or furthering a strike[460]. Since picketing is contingent upon the existence of a lawful strike, it becomes unlawful when the conduct of picketers is illegal or constitute a hindrance to the operations of the business[461].

The prevailing principle in South Africa[462], Australia[463] and Canada[464], is that picketing should be conducted peacefully. The Supreme Court of Canada has clarified that peaceful picketing is generally protected under the Charter's provision for freedom of expression found in section 2(b)[465]. However, if a picket involves violence or the threat of violence, it may be categorized as assault[466]. Individuals engaged in such unlawful conduct could face criminal charges, penalties and imprisonment[467].

In situations where a strike persists beyond the anticipated duration without resolution, Canadian labour law offers specific mechanisms to resolve the dispute[468]. The Canadian Labour Code grants certain authorities the power to intervene when a significant public interest is at stake.[469]

4.5 Vicarious Liability

The question that this study seeks to address is whether an employer may hold a trade union vicariously liable for the unlawful actions of its employees, particularly in the context of an unprotected strike.

Hall[470] referred to a ruling from the Supreme Court of California in *Mary M v City of Los Angeles*[471] where the court outlined three policy considerations underlying the doctrine of vicarious liability namely (a) to prevent recurrence of the tortious conduct, (b) to give greater

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[455] *Aristocratic Restaurants Ltd Williams* [1951] D.L.R (S.C.Can) 769.
[456] *R v Reners* [1926] 3 (D.L.R) 669 (S.C.Can).
[457] *Schulberg v L.I.A.T.S.E* [1926] 3 D.L.R 166 (B.C.C.A).
[458] *Schulberg v L.I.A.T.S.E* [1926] 3 D.L.R 166 (B.C.C.A).
[459] *Sorell v Smith* [1925] A.C 700 (H.L).
[460] s 64(1) & (69)(1) of the LRA.
[461] McQuarrie (2015) 253 – 256.
[462] s 17 of the Constitution, s 1 & 69 of the LRA, Code of Good Practice on Picketing Rules of the LRA.
[463] s 415 of the FWA.
[464] McQuarrie (2015) 235 – 236.
[465] *Sobey v UFCW Local* 175 (2013) *(CanLII)* 1207 (ONSC).
[466] s 264.1 of the Canadian Criminal Code R.S.C (1958) C-46 states that 'every one commits an offence who in any manner, knowingly utters, conveys or causes any person to receive a threat (a) to cause death or bodily harm to any person; (b) to burn, destroy or damage real or personal property; or (c) to kill, poison or injure an animal or bird that is the property of any person'.
[467] s 264.1(2) & (3) of the Canadian Criminal Code.
[468] Tenza (2021) *SA MERC LJ* 188.
[469] s 107 of the Canadian Labour Code.
[470] Hall (2000) *Journal of Social Welfare and Family Law* 166.
[471] *Mary M v City of Los Angeles* (814 P. 2d 1341) (Cal.1991).

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assurance of compensation for the victim and (c) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury.

To underpin liability, the remedies against trade unions were under considerable debate in the late 1800s and early 1900s as trade unions were not recognised for liability as legislation only applied liability to registered corporations[472]. In 1903, Galt[473] stated in the Canadian law review that 'as a matter of plain justice, it cannot be denied that if a man suffered injury at the hands of any organised body of men, call it what you will, a trade union, a voluntary combination or otherwise, he ought to have redress against the organization just as against any individual who caused him similar injury'.

The principle of vicarious liability extending to trade unions mirrors that of employers concerning the actions of employees[474]. The Salmond test[475] was originally developed to assign liability to employers for their employees' conduct[476]. According to Tenza[477], Canada adopted the Salmond test to extend vicarious liability to trade unions due to progressive labour laws as industrialisation developed.

Typically, for this form of liability to apply, at least one of two criteria must be met, corresponding to the branches of the Salmond test. For such a claim to succeed, two conditions must be met. Firstly, the union can be held accountable for actions that it has explicitly authorized. Secondly, the union may also be liable for unauthorized actions that are linked to those authorized actions, provided that these acts are considered as methods of committing an unlawful act. Therefore, a claim against the union for vicarious liability will fail unless one of these conditions is fulfilled. The principle of vicarious liability is recognized within Canadian law[478].

The first branch stipulates that the union can be held liable for actions that it has authorized. The second branch allows for liability to be attributed to unauthorized acts that are linked to the authorized actions, provided those acts can be seen as improper methods of carrying out an authorized act. The first criterion involves factual inquiries about whether union officials condoned or sanctioned the actions of their members[479]. The second criterion examines whether members committed assaults or other illegal activities while pursuing their objectives, ensuring that such actions were not independent but rather connected to the authorized activities. The second branch of the Salmond test emphasizes the degree of connection between the authorized actions and the harmful acts. If the methods employed by the union are closely related to the harmful conduct, indicating that the union's strategy facilitated or encouraged such unlawful activities, then the union may be held vicariously liable for the actions of its members.[480]

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[472] *Williams v United Mine Workers of America* (1919) *(CanLII)* 372 (AB CA); Pearce (1932) *The Canadian Bar Review* 349 – 350; Arthurs (1960) *The Canadian Bar Review* 347.
[473] Galt (1903) *Canadian Law Review* 627.
[474] *Bazley v Curry* (1999) 2 S.R.C 534 (SCC).
[475] Campbell (1940) *Cambridge Law Journal* 2026.
[476] *Bazley v Curry* (1999) 2 S.R.C 534 (SCC).
[477] Tenza (2016) LLD Dissertation 186.
[478] *Bazley v Curry* (1999) 2 S.R.C 534 (SCC).
[479] *Bazley v Curry* (1999) 2 S.R.C 534 (SCC) para 39 – 44.
[480] *Bazley v Curry* (1999) 2 S.R.C 534 (SCC) para 39 – 44.

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Historical rulings have established that unions can be held vicariously liable for the actions of their members during industrial actions. This principle was illustrated in the case of *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council*.[481] In 1994, TNL Construction Ltd received contracts to undertake construction at MacMillan Bloedel in Port Alberni. The Building Trade Unions (BTU) opposed the hiring of TNL Construction and protested against the presence of its employees on the site. Some protesters even blockaded the construction site's entrance to prevent TNL employees from accessing the premises.

In response, TNL sought an order from the Labour Relations Board to declare the picketing unlawful. The Labour Relations Board granted the order, but the protesters disregarded it. Subsequently, numerous incidents involving violence, intimidation, harassment, and verbal abuse directed were at TNL employees occurred. The plaintiffs, including TNL and its employees, contended that BTU was vicariously liable for the harm caused by its members. While the BTU accepted responsibility for civil disobedience, they claimed that they had not authorized any actions beyond peaceful protest and thus should not be held vicariously liable for the more aggressive conduct. The defendants asserted that any acts of violence or property damage were perpetrated by individuals who were not their members and were not acting within the scope of their authority. However, in determining BTU's vicarious liability for its members' actions, the Labour Relations Board analysed the two branches of the Salmond test. It rejected the defendants' argument that they had not sanctioned the unlawful behaviour of their members and had taken reasonable steps to prevent it. Based on the evidence, the Board found that TNL employees faced threats, intimidation, and persistent harassment from BTU members. Furthermore, BTU representatives who were aware of their members' conduct, either participated in these activities or failed to intervene. The defendants' primary objective appeared to be to subject the plaintiffs to ongoing distress and psychological pressure. Consequently, vicarious liability was imposed on the defendants under the first branch of the Salmond test, resulting in an order for damages against the unions[482].

In the case of *Canadian Forest Products Ltd v Hospital Employees Union*[483], members protested against healthcare employers regarding the provisions of a new collective agreement. The court held that unions can be found vicariously liable for its members' violations of the Code, even if the illegal picketing was not explicitly authorized by the union. This liability arose from the union's failure to take steps to prevent the continuation of the unlawful picketing. Furthermore, the determination of liability was unaffected by whether the picket was authorized by the union. The Board referenced *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council*[484], stating, 'where the strategy employed by unions engaging in protest is so closely connected to the tortious conduct that it can be said that their strategy fostered and promoted the unlawful activity, unions may attract vicarious liability for the actions of their members.' It emphasized that unions have a duty to take all reasonable measures available to prevent violent industrial action.

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[481] *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council*. (1999) *(CanLII)* 15170 (BCSC).
[482] *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council*. (1999) *(CanLII)* 15170 (BCSC) para 148, the court awarded damages for loss of wages, general damages, aggravated damages and punitive damages.
[483] *Canadian Forest Products Ltd v Hospital Employees Union* (2007) *(CanLII)* 56719 (BC LRB).
[484] *Matusiak v British Columbia and Yukon Tertiary Building and Construction Trades Council*. (1999) *(CanLII)* 15170 (BCSC) para 90.

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In *Mainland Sawmills Ltd v USW Union Local*[485], the plaintiff sought to hold the union liable for the actions of its members during a picketing incident that involved assault. The court considered the Salmond test for vicarious liability and concluded that union officials, including Mr. Ghag, who led the group, were complicit in the violence and property damage at Mainland. The court found that the union's leadership was aware of, and tacitly endorsed, the tortious conduct, leading to the imposition of vicarious liability under the second branch of the Salmond test. The court reasoned that the strikers' assaults were not entirely independent but related to the union-sanctioned strike, justifying liability attribution to the union[486]. Consequently, both the union and its members were held jointly liable for damages based on their involvement in the unlawful actions.

5. Conclusion

This chapter illustrated some similarities between Australia, Canada and South Africa. Firstly, all three countries in their governance structure derives authority from its constitution[487] and feature decentralized governmental systems encompassing national, provincial, and local levels. Secondly, all three countries ratified the collective bargaining conventions of the ILO[488] and further recognise the right to freedom of association and the right to strike which was domesticated into legislation[489]. Thirdly, all three countries make provision for procedural requirements and substantive limitations for a protected strike in order for employees and trade unions to enjoy immunity against dismissals and civil claims.

However, it is notable that in Australia and Canada, conducting a ballot is a procedural requirement for a strike to enjoy protected status. This requirement is not similar to South Africa. The Labour Relations Amendment Act[490] deleted the ballot requirement from the Labour Relations Bill of 2012. Tenza[491] argued that the removal of the ballot requirement from the Amendment Act, the legislature lost an opportunity refashion strike law considering the contemporary social and economic realities.

It is further notable that in both Australia and Canada, the respective legislative frameworks governing collective bargaining makes provision for the suspension and termination of strikes. The FWA in Australia empowers the FWC and the Minister to suspend or terminate a strike which causes any harm to the economy, property or people. This position is similar in the Canadian context.

In Canada it is further notable that the courts have developed the common law doctrine of vicarious liability to extend liability to trade unions for the unlawful conduct of their members during strike action.

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[485] Mainland Sawmills Ltd v USW Union Local (2007) (CanLII) 1433 (BCSC).
[486] *Mainland Sawmills Ltd v USW Union Local* (2007) (CanLII) 1433 (BCSC) 46.
[487] The Constitution of Australia 1900 and the Constitution of Canada 1982.
[488] Convention 87 & 98 of the ILO.
[489] In Australia the FWA regulates collective bargaining and in Canada, the Canadian Code regulates collective bargaining.
[490] LRAA 2014.
[491] Tenza (2016) *LLD Dissertation* 194.

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Chapter 6

Conclusions and Recommendations

This study aimed at addressing three critical questions[492] in the South African industrial relations regarding the functionality of a strike marred with violence and accountability due to the union's failure to comply with the statutory peace clauses and the extension of vicarious liability. This study critically addressed the following three questions:

1. Is it possible for a strike to lose its protected status based on the functionality principle?
2. Is it possible to hold a union liable for negligence due to the breach of statutory duties in terms of the peace clauses?
3. Is it possible to extend the common law doctrine of vicarious liability to trade unions?

Firstly, this study argued that a strike marred with violence is no longer functional for the purposes of collective bargaining. This study illustrated that the LRA[493] and the Constitution[494] does not condone any unlawful conduct associated with strikes and pickets[495] and as such demands for a stricter limitation[496] to align the right to strike within the constitutional framework[497]of human rights[498]. The Constitution of South Africa is the supreme law[499] of this country, and any conduct or law which is inconsistent with it is invalid[500]. When interpreting the provisions of Chapter 2[501] the courts must promote the values that underly an open democratic society based on human dignity, equality and freedom. The right to life has been hold as the utmost important right[502]

This study illustrated that there were some minor improvements to curb violent strikes with the 2018 amendment act[503] for advisory arbitration regarding violent picketing. While this may appear to benefit employers, violent pickets continue to be a common occurrence, with unions and their members still defying court orders prohibiting violent strikes and pickets.

[492] See Ch 1.
[493] s 1(d)(1) of the LRA it states that the purpose of the LRA is to advance labour peace through orderly collective bargaining.
[494] s 17 of the Constitution states that everyone has the right to picket, but it must be done peacefully.
[495] Explanatory memorandum on the 1995 Labour Relations Amendment Bill, 2017 RS 71, 2019 AA2 – P202. Code of Good Practice in terms of Industrial Action, Collective Bargaining and Picketing Government Gazette GN R1396 GG42121, 19 December 2018.
[496] Tenza (2018) *STELL LR* 471.
[497] s 36 & 39 of the Constitution.
[498] Ch 2 of the Constitution.
[499] Preamble of the Constitution.
[500] S 2 of the Constitution.
[501] Ch 2 of the Constitution.
[502] *S v Makwanyane* 1995 (3) SA 391 (CC) 450.
[503] Labour Relations Amendment Act 8 of 2018. s150A – 150D of the LRA was included to provide for interest arbitration.

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Another improvement was the Labour Appeal Court's[504] interpretation of section 68(1)[505], which allows for just and equitable compensation to be claimed for any unlawful conduct in support of a strike regardless of whether the strike was protected or unprotected. This study argued that the functionality principle does find application as strikes marred with violence no longer serves any purpose for collective bargaining, and as such it is possible that a strike may lose its protected status.

The remedy of just and equitable compensation available to an employer is nothing more than a 'lucky draw'. This remedy is ineffective and unreliable and its seems that this remedy is put in place more to frustrate and discourage employers to claim compensation against trade unions than to serve actual justice for an employer who has suffered real damages due to violent strikes. This was evident in *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd*[506] where the court held that the union would not always be automatically held liable for the actions of their members and as such, a claim under section 68(1)(b) of the LRA cannot always be successful even if the losses attributable to a strike are proven[507]. In the event that an employer may be successful to claim just and equitable compensation against trade unions, the outcome of such claims is not realistic to the damages actually suffered and as this study has illustrated, this was evident in *Rustenburg Platinum Mines v MPWU*[508], where the Company quantified their losses to R15 million rand due to an unprotected strike and the court reduced the claim to just and equitable compensation in the amount of R100,000.00.

This study further illustrated that South Africa is a founding member of the ILO and ratified both collective bargaining conventions[509]. Unlawful and violent strikes are not protected in international labour law[510] and the principles of freedom of association do not protect the abuse of the right to strike which involves criminal activity[511], and disturbance of the public order[512]. The ILO endorsed the principle when a strike is marred with violence it ceases to be peaceful and therefore contrary to the principles of freedom of association and the right to strike. However, the ILO determined that all penalties linked to strikes must be proportionate to the offence[513] as this might hinder a trade union's functions to operate in collective bargaining sphere and penal sanctions will have the effect to cripple a trade union's financial affairs and as a result cease to operate. This study has illustrated through the lens of the South African industrial relations, that the proportionality principle is unrealistic when a strike sanctioned by a trade union erodes into financial losses and trump human rights violations. This study found that the principles of the international right to strike and the associated penal sanctions for compensation against trade unions warrants a stricter interpretation and limitation.

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[504] *SA Commercial Catering & Allied Workers Union v Massmart Holding Ltd & others* (2024) 45 ILJ 1610 (LAC).
[505] s 68(1) of the LRA.
[506] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported Case no: JS 172/2014 (2019) (LC) par 128.
[507] *Chemical, Energy, Paper, Printing Wood and Allied Workers Union and other v Polyoak Packaging (Pty) Ltd* Unreported Case no: JS 172/2014 (2019) (LC) par 130.
[508] *Rustenburg Platinum Mines v MPWU* [2001] 24 ILJ 405 (LC).
[509] Convention 87 & 98 of the ILO.
[510] Zou (2012) *Trinity C. L Rev* 107. Manamela & Budeli (2013) 316.
[511] Digest (2006) par 667.
[512] Digest (2006) par 650.
[513] Digest (2006) par 670.

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The Labour Relations Bill of 2012 had suggested that the word "supporters" in subjection 69(1) in the current LRA be removed so that registered trade unions will be able to authorise picketing by its members only. This proposed provision has since been rejected and was not included in the final legislation[514] Section 69[515], states that the union 'may authorise a picket' by its members and supporters. The explanatory memorandum on the Labour Relations Amendment Bill, 2017[516] explains that the purpose of these amendments is to require trade unions to take responsibility for pickets and to ensure that the constitutional rights of others to freedom and security of person, freedom of association, fair labour practices and property, are not infringed[517]. When interpreting the LRA, the Code of Good Practice[518] must be taken into account[519].

Secondly, this study argues that a union is capable of being held liable for negligence due to the failure to comply with a legal or contractual duty. The union authorise pickets and must be held liable when pickets spiral out of control.

This study has elucidated the complexities surrounding the liability of employers and trade unions within the realm of common law, particularly in the context of labour disputes and violent strikes. Notably, the inadequacy of envisioned remedies under the LRA has been evidenced, presenting employers with the precarious task of seeking just compensation through common law avenues. The persisting question of the extent to which trade unions may bear liability for actions of their members, particularly during unlawful activities, has been critically examined.

The jurisprudential analysis, anchored in case law such as *Blinkwater Mills (Pty) Ltd v Food and Allied Workers Union*[520], serves to confirm that common law claims for delictual damages are justiciable, even amid statutory protections afforded to striking employees. Furthermore, the judicial precedent set by *Minister of Police v Umbhada Estates (Pty) Ltd*[521] affirms the principle that statutory bodies, such as the SAPS, may also be held accountable for negligence in ensuring public order during industrial actions.

Consequently, it is posited that trade unions, when exercising their authority in authorising pickets, inherently assume a legal duty to ensure compliance with statutory and contractual obligations. The inapplicability of vicarious liability in scenarios marked by violent conduct underscores the accountability these entities must accept to deter unlawful acts committed by their members. This discourse ultimately highlights the necessity for unions to establish enforceable measures that would mitigate the risk of legal repercussions stemming from non-compliance with established picketing rules. The implications of this analysis advocate for a

[514] LRAA 2014.
[515] s 69(1) of the LRA.
[516] Explanatory memorandum on the 1995 Labour Relations Amendment Bill, 2017 RS 71, 2019 AA2 – P202.
[517] Clause 4, Explanatory memorandum on the 1995 Labour Relations Amendment Bill, 2017 RS 71, 2019 AA2 – P206 – 205.
[518] Code of Good Practice in terms of Industrial Action, Collective Bargaining and Picketing Government Gazette GN R1396 GG42121, 19 December 2018.
[519] s 203 of the LRA.
[520] *Blinkwater Mills (Pty) Ltd & another v Food & Allied Workers Union & others* (2020) 41 *ILJ* 873 (ML).
[521] *Minister of Police and others v Umbhada Estates (Pty) Ltd and others* (Case No 1281/2021) [2023] ZASCA 85 (1 June 2023).

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re-evaluation of the existing frameworks governing trade union responsibilities and encourage a more robust approach to safeguarding the rights of all parties involved in industrial action

Thirdly, this study posits a theoretical framework for the liability of trade unions under the doctrine of vicarious liability. In the context of South African labour law, as highlighted by Tenza[522], the application of this principle to trade unions remains underdeveloped and requires substantial legal recognition.

Fundamentally, the principle outlines that employers are fully accountable for delicts committed by employees within the scope of their employment, regardless of fault. The identification doctrine further establishes that a corporate entity may represent its key individuals acting on its behalf. To substantiate a claim of vicarious liability, three essential criteria must be met: (a) the existence of an employer at the time the delict occurred, (b) the commission of a delict by the employee, and (c) the employee's actions being within the ambit of their employment when the delict happened.

In drawing parallels between the trade union-member relationship and the employer-employee dynamic, both relationships inherently involve an employee party. Trade unions operate within the employment environment, and employees retain the right to engage in union activities, affirming the union's role in directing its members, particularly during strikes and picketing. The union's authorization of such actions implies a duty of care and supervision over its members' conduct.

To establish vicarious liability of a trade union, the employer must demonstrate a close causal connection between the wrongful actions of the union's members and the instructions or guidance provided by the union, shop stewards, or union officials. Consequently, for an employer to successfully claim against a trade union under this doctrine, it must validate that (a) the union members committed a delict for which the union is vicariously liable and (b) the union itself engaged in wrongful conduct in relation to the employer. This theoretical exploration emphasizes the potential for extending vicarious liability to trade unions, thereby reinforcing accountability in labour relations.

This study further conducted a comparative analysis of two counties, Australia and Canada. Both counties ratified the bargaining conventions[523] of the ILO and subsequently domesticated the right to strike into legislation[524]. In a comparative analysis, both countries' respective legislative provisions provide for suspension and termination of a strike in the event when the strike is harmful to the economy, property, employees or citizens.

In Australia, the FWA[525] prioritise the country's economic structure, development, safety of citizens and property over and above the right to strike. In the Constitutional framework of South Africa's Bill of Rights, South Africa can learn this lesson from Australia to prioritise human rights and the advancement of developing the economy[526]. In South Africa it seems that the right to strike is placed on a pedestal in isolation too worthy for limitation. While the right to strike remains firmly intact on its pedestal, the rights of other citizens are severely

[522] Tenza *LLD Dissertation* 210.
[523] Convention 87 & 98 of the ILO.
[524] The FWA in Australia and the Canadian Labour Code in Canada.
[525] s 415 of the FWA.
[526] s 1 of the LRA provides that the purpose of the act is to advance inter alia economic development and labour peace.

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affected and thus warrants legislative and judicial interventions to address this critical issue. South Africa can draw lessons from the Australian principles to prioritise the economy and the safety of its citizens and property.

South Africa's Constitution makes provision for the development of the common law.[527] In Canada, the courts have developed the common law doctrine of vicarious liability and extended vicarious liability to trade unions for the unlawful conduct of its members during strike action. This study argued theoretically that a trade union is capable of being held liable for vicarious liability for the unlawful conduct of its members.

Tenza[528] recommended the introduction of a compulsory interest arbitration in the labour relations framework of South Africa which will allow the Minister of Labour to intervene and force parties to end their dispute. This study is in agreement with Tenza's arguments. In Australia, the FWA authorise the FWC to suspend or terminate a strike. This study recommends that the LRA should be amended to include a provision that empowers the Labour Court suspend or terminate a strike which is no longer functional to collective bargaining.

[527] s 39(2) of the Constitution.
[528] Tenza (2021) *MERC LJ* 199.

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LEGISLATION	**MODE OF CITATION**
South Africa	
Basic Conditions of Employment Act 73 of 1997	**BCEA**
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Labour Relations Act 28 of 1956.	LRA 1956
Labour Relations Act 66 of 1995	LRA
Labour Relations Amendment Act 6 of 2014	LRA (2014)
Labour Relations Amendment Act 8 of 2018	LRAA (2018)
Regulations of the Gatherings Act 205 of 1993	RGA
Internal Security Act 28 of 1982	Internal Security Act
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International Jurisdictions	
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Canadian Criminal Code R.S.C (1958) C-46	Canadian Criminal Code
Canadian Employment Equity Act of 1985.	Canadian EEA
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Constitution of Australia 1900	Constitution of Australia
Constitution of Canada 1982	Constitution of Canada

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