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Secret strike ballots in South Africa

by

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Philippians 4:13 – I Can Do All Things Through Christ Who Strengthens Me.

LIST OF ABBREVIATIONS

1956 LRA	Labour Relations Act 28 of 1956
2018 LRAA	Labour Relations Amendment Act 8 of 2018
AMCU	Association of Mineworkers and Construction Union
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CFA	Committee on Freedom of Association
DEMAWUSA	Democratic Municipal and Allied Workers Union of SA
FAWU	Food and Allied Workers' Union
FW Act	Fair Work Act 28 of 2009
FWC	Fair Work Commission
IC	Industrial Court
ICJ	International Court of Justice
ILC	International Labour Conference
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
NUMSA	National Union of Metal Workers of South Africa
PAJA	Promotion of Administrative Justice Act 3 of 2000
SACWU	South African Chemical Workers' Union
UN	United Nations

SUMMARY

Section 19 of the Labour Relations Amendment Act 8 of 2018 introduced the transitional provisions in an attempt to reduce violent strikes. These provisions served as a reintroduction of secret strike ballots, before embarking on protected strike action. These provisions entail that all registered trade unions must amend their constitutions to make provision for secret strike ballots. In the absence of such an amendment, strike action would not be permitted, unless a trade union conducts a secret strike ballot of its members.

A reading of the above provisions exhibits a level of intricacy. The provisions resulted in numerous recent judgments that served before the Labour and Labour Appeal Court. The transitional provisions led to constitutional challenges, administrative action challenges, deregistration challenges, legislative overlap challenges, and interpretation challenges. The key challenge being whether the transitional provisions present an unjustified limitation on the fundamental right to strike.

This dissertation will evaluate the above challenges from a historical, international, and constitutional perspective. A comparative study is also done with Australia, who like South Africa, is also a member of the ILO. Australia's strike laws require secret strike balloting, before protected strike action. Australia also focuses on individual plant-level bargaining, whereas South Africa strives towards centralised bargaining. These material differences are evaluated, where it is concluded that the Australian strike law regime is over procedural, complex and will not serve to be effective in South Africa.

This study furthermore argues that the transitional provisions present an unjustified limitation on the fundamental right to strike. Additionally, that the transitional provisions infringe on a trade union's fundamental right to regulate its own affairs.

This dissertation concludes that the transitional provisions will not limit violence during strikes. If enforced, it will have the opposite effect of leading to more violent and wildcat strikes. Recommendations are also made that the transitional provisions are to be repealed, and if not repealed, replaced with provisions that will provide clarity, certainty, and sound regulation.

Chapter 1
Introduction

1.1 Contextual background

The right to strike is a fundamental right as enshrined in the Constitution of the Republic of South Africa, 1996 ("The Constitution")[1] which is the supreme law of the Republic.[2] This right is integral to balancing the social and economic power differentials between employers and employees.[3]

The problem that South Africa faced before the coming of a new constitutional dispensation in 1994, in addition to a post-constitutional dispensation, is the violence that has become accustomed to strike action.[4] Workers in recent years have violently participated in strikes to emphasise their grievances by causing chaos and disharmony in the public.[5] This has been normalised to such an extent, that it has become a tradition.[6]

As a result, the South African government recently aimed to introduce a mechanism to improve inter-union governance, with the hope that it would reduce violent strikes. The Labour Relations Amendment Act 8 of 2018 ("2018 LRAA") provided for what the government had hoped to be, the required relief.

1 Section 23(2)(*c*) of the Constitution.
2 Section 2 of the Constitution.
3 *SA Transport and Allied Workers Union and others v Moloto NO and another* (2012) 33 *ILJ* 2549 (CC) 2551.
4 Botha *De Jure* (2015) 344.
5 Tenza *Obiter* (2020) 522.
6 Benjamin *ILJ* (2014) 10.

The 2018 LRAA introduced the transitional provisions[7] which requires that the Registrar had to, within 180 days from the date of the 2018 LRAA being promulgated, consult trade unions to find the most appropriate means to amend their constitutions, to make provisions for secret and recorded strike ballots. Furthermore, after the consultation process has been concluded, that the Registrar must issue a directive to that effect.[8]

Secondly, if a trade union does not make provision in its constitution for secret and recorded strike ballots, that such a trade union will not be able to embark on strike action, until such a trade union has conducted a secret strike ballot of its members.[9]

The Labour Court, in three reported judgments handed down shortly after the transitional provisions were promulgated, held that the transitional provisions were peremptory and that strike action may be interdicted, unless the provisions were complied with.[10]

The Registrar, due to the success that employer parties achieved in interdicting strikes whereas the transitional provisions were not complied with, went one step further and attempted, though failed, to cancel the registration of a trade union for its alleged failure to conduct a secret strike ballot.[11]

The initial position on the transitional provisions, as per the three judgments from the Labour Court mentioned above, was therefore that protected strikes could be interdicted if the transitional provisions were not complied with, but deregistration of a trade union would not be permitted.

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[7] The transitional provisions refer to trade unions and the right to strike, and employers organisations and the right to lockout. This dissertation will only focus on strikes and strike balloting. No references to lockouts will follow in this dissertation.
[8] Section 19(1) of the 2018 LRAA.
[9] Section 19(2) of the 2018 LRAA.
[10] *Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of SA & others; Foskor (Pty) Ltd v National Union of Metalworkers of SA & others* (2019) 40 *ILJ* 1814 (LC) 1817; see also *Air Chefs (SOC) Ltd v National Union of Metalworkers of SA & others* (2020) 41 *ILJ* 428 (LC) 442; see also *Johannesburg Metropolitan Bus Services (SOC) Ltd v Democratic Municipal and Allied Workers Union of South Africa and others* (2019) 12 BLLR 1335 (LC) 1337.
[11] *Democratic Municipal & Allied Workers Union of SA v Registrar of Labour Relations (*2020) 41 *ILJ* 1968 (LC).

The above position remained until the transitional provisions were pronounced on by the Labour Appeal Court in *NUMSA v Mahle Behr*[12] which overturned the position adopted by the Labour Court. The Labour Appeal Court held that the transitional provisions presented an unjustified limitation on the right to strike. Furthermore, that non-compliance with the transitional provisions cannot be grounds for interdicting the protected status of strike action.[13]

Complications arose as the first (and only) guidelines on balloting as issued by the Minister in terms of the Labour Relations Act 66 of 1995 ("LRA")[14] were scrutinised to the extent that it was called complex and ambiguous,[15] challenged,[16] and subsequently set aside, as the court held that it was *ultra vires*.[17]

Additional complications arose in that even though the Labour Appeal Court correctly found that the transitional provisions could not be grounds for interdicting the protective status of a strike, no guidance was provided by the court on what should be done once the Registrar started consulting trade unions, for the inclusion of secret strike ballots into their constitutions. No guidance has furthermore been provided on what should be done once a new directive, and guidelines, have been published.[18]

In addition, as argued by Du Toit *et al,* while the Labour Appeal Court provided some clarity on secret strike ballots, it does not address the incongruity between the transitional provisions, and section 67(7) of the LRA, which entails that the failure to conduct a strike ballot cannot result in litigation, challenging the protected status of a strike.[19]

To date, no clear answer on the application of the transitional provisions has been provided by our courts,[20] and the very guidelines that were supposed to guide trade

[12] (2020) 41 *ILJ* 2093 (LAC).
[13] (2020) 41 *ILJ* 2093 (LAC) 2099.
[14] GN1397 Gazette 42121, 19 December 2018.
[15] Fergus and Jacobs *ILJ* (2020) 765.
[16] *Association of Mineworkers & Construction Union v Minister of Employment & Labour* (2021) 42 *ILJ* 1538 (GP).
[17] (2021) 42 *ILJ* 1538 (GP) 1544.
[18] Van Eck *Litnet Akademies* (2020) 1038.
[19] Du Toit *et al* (2023) 409.
[20] Van Eck *Litnet Akademies* (2020) 1038.

unions on amending their constitutions for the inclusion of secret ballots, have been declared invalid and set aside.[21]

This dissertation will analyse the complex and confusing legal position surrounding secret strike balloting in South Africa. Arguments will be made on why the transitional provisions will not limit violent strikes. Furthermore, how secret strike ballots are only used as a tool by employers to interdict strikes. Additionally, how the transitional provisions unjustifiably limits the right to strike. And finally, why the transitional provisions should be repealed, or if not repealed, at the very least replaced with provisions that will provide for clarity, certainty, and sound regulation.

1.2 Research questions

In my analyses of secret strike ballots in South Africa, the following questions will be addressed to determine the transitional provisions' effectiveness, constitutionality, legality, and enforceability -

1. What lessons can be learned from the pre-1994 South African regime in relation to secret strike ballots?[22]

2. What is the view of the International Labour Organisation ("ILO") on strikes and secret strike ballots; and how does their view impact the position in South Africa?[23]

3. Do secret strike ballots present a limitation on the fundamental right to strike?[24]

4. Will secret strike balloting limit violence during strikes?[25]

5. What lessons can be learned from Australian strike law and its stance on mandatory secret strike balloting?[26]

[21] (2021) 42 *ILJ* 1538 (GP).
[22] See chapter 2 para 2.4 on page 12.
[23] See chapter 3 para 3.4 on page 22.
[24] See chapter 5 para 5.4.1 on page 41.
[25] See chapter 4 para 4.4 on page 28; see also para 5.5 on page 45.
[26] Australia was chosen as Australia is also a member of the ILO. Australian legislation furthermore prescribes mandatory strike ballots before embarking on strike action. See chapter 6 para 6.4 on page 59.

1.3 Motivation for the study

Violent strikes and the need for intervention remain one of the most controversial issues in South Africa. Myburgh argues that where levels of violence get out of control, it is the violence that places pressure on an employer to enter into settlement, not the pressure brought to bear by collective bargaining and strike action.[27]

One of the main purposes of the LRA is to promote orderly collective bargaining.[28] Obtaining settlement agreements by virtue of violence does not amount to orderly collective bargaining. It amounts to the exact opposite and demands intervention by our courts and legislatures.

Against this background, as submitted by Godfrey *et al,*[29] strike law was amended by the 2018 LRAA, to include numerous mechanisms to limit violence during strikes. These mechanisms include mandatory picketing rules before strike action,[30] making provision for advisory arbitration for actual or imminent violence during strikes,[31] and the reintroduction of secret strike ballots.[32]

These interventions merit an in-depth analysis. However, for the purposes of this dissertation, only secret strike balloting will be analysed.

1.4 Research methodology

Throughout this study, I will be conducting a desktop analysis which will consist of the evaluation and analysis of the appropriate primary sources of law which would include legislative framework and relevant jurisprudence. I will also be referring to secondary sources of law such as textbooks and journal articles. I will also conduct a comparative analysis between South Africa and Australia, and their respective approaches to strikes and secret strike balloting.

[27] Myburg *CLL* (2013) 5.
[28] Section 1(*d*)(*i*) of the LRA.
[29] Godfrey *et al ILJ* (2018) 2172.
[30] Section 4 of the LRAA; also see rule 13(1A) of the 2023 CCMA Rules.
[31] Section 17(3)(*b*) of the LRAA.
[32] Section 19 of the LRAA.

1.5 Structure

In chapter 2 an analysis of the historical position and effectiveness of strike balloting will be analysed. Specific reference will be made to the pre-1994 position, whereas the previous LRA[33] required strikes to be preceded by strike ballots for strikes to have been legal (notably, not protected).

Chapter 3 will focus on the International Labour Organisation ("ILO") and its stance on strikes and strike balloting. This chapter will discuss the relevant Conventions and Recommendations adopted in relation to strike law, and strike balloting. Further reference will be made to the recent dispute lodged with the International Court of Justice for a determination on whether ILO Convention 87 - Freedom of Association and Protection of the Right to Organise Convention, 1948 does confer the right to strike, from an international law perspective.

Chapter 4 will focus on the Constitution and the LRA. An analysis will be done on the confusing provisions of the LRA requiring the inclusion of strike ballots in trade union constitutions[34] yet further entailing that the failure to conduct ballots, would not provide employers with a weapon to interdict strike action.[35] Reference will also be made to the attempted amendment to the LRA in 2012, where mandatory strike balloting was almost reintroduced.

Chapter 5 will analyse the 2018 LRAA, the guidelines, and the recent conflicting judgments handed down by our courts in relation to secret strike balloting.

Chapter 6 will analyse the Australian legislative requirements in respect of strike balloting. The Australian Fair Work Act 28 of 2009 mandates secret strike balloting before embarking on strike action. A system that South Africa once embraced pre-1994,[36] did away with under the LRA,[37] and again tried to enforce through the 2018 LRAA.[38] A comparative analysis will be done between Australian and South African

[33] The Labour Relations Act 28 of 1956.
[34] Section 95(5)(*p*) of the LRA.
[35] Section 67(7) of the LRA.
[36] See chapter 2 para 2.1 page 8.
[37] See chapter 4 para 4.3 page 25.
[38] See chapter 5 para 5.2 page 31.

jurisdictions, and a conclusion will be reached on whether South Africa can gain any lessons from Australia on strikes and mandatory strike balloting.

In chapter 7, the conclusion of the dissertation is reached and explores recommendations as to why the transitional provisions should be repealed, and if not repealed, replaced with a new provision that will better serve the interests of all stakeholders. The conclusion is followed by a recommendation on what the replaced provisions should entail, if the provisions are not repealed.

Chapter 2

Pre-1994 position on strike action and secret strike balloting

2.1 Introduction and background

The Labour Relations Act 28 of 1956 ("1956 LRA") introduced the requirement of secret strike balloting.[39] Under the 1956 LRA, strikes were either legal or illegal. No reference was made to protected or unprotected strikes.[40]

In this chapter, the secret strike balloting requirements under the 1956 LRA will be fully analysed. Arguments will be made as to why the legal position under the 1956 LRA on strike balloting failed the interest of employees. These provisions were merely used to interdict procedurally incorrect strikes, which was sound for purposes of collective bargaining.

It will become evident from this chapter why the previous regime was labelled by Fergus and Jacobs as dubious[41] and why South Africa, correctly so, moved away from the secret strike balloting requirement with the coming of the LRA.

2.2 Secret strike ballots under 1956 LRA

2.2.1 Introduction

The rationale behind the introduction of secret strike ballots was confirmed by the Industrial Court in the matter of *CWIU v Bevaloid*[42] wherein it was held that secret

[39] Myburg *ILJ* (2004) 962.
[40] Van Eck *Litnet Akademies* (2020) 1029.
[41] Fergus and Jacobs *ILJ* (2020) 760.
[42] (1988) 9 *ILJ* 447 (IC).

strike ballots were a statutory requirement designed to ensure that the decision to strike, reflects the will of the majority of employees concerned.[43] Therefore, if the majority voted in favour of a strike, violent industrial action is less likely to occur.

Interdicts were handed down regularly under the 1956 LRA in instances where strike ballots were not conducted, or conducted, but not in accordance with legislative requirements.[44]

2.2.2 Legislative requirements

Section 65(2) of the 1956 LRA provides as follows in respect of strike ballots -

> No trade union and no office bearer, official or member of such union shall call or take part in any strike action, unless the majority of the union members in good standing, in the area and in the particular undertaking, industry, trade or occupation in which the strike is called, or the taking part in the strike takes place, have voted by ballot in favour of the strike action, after a report has been made to the Director General, or the period of 30 days has lapsed.[45]

Any contravention of the strike ballot requirements under the 1956 LRA amounted to an offence[46] which could have resulted in criminal prosecution. The 1956 LRA went further and entailed that any contravention to hold a secret ballot would likewise have constituted an offence.[47]

A reading of the strike ballot requirements under the 1956 LRA indicates that the statutory definition and requirements did not assist in setting out what was required when strike ballots were to be conducted. Especially since a failure to comply, could have resulted in interdicts, dismissals, and even criminal prosecution.

Against this background, Brassey correctly argues that strike law under the 1956 LRA was perplexing, as not even attorneys knew what was required in respect of the strike balloting requirement.[48] Parfitt furthermore argues that whilst balloting had become a regular feature of industrial relations in some factories, it was foreign to many. Often

[43] (1988) 9 *ILJ* 447 (IC) 450.
[44] Du Toit *et al* (2003) 241.
[45] Section 65(2) of the 1956 LRA.
[46] Section 65(3) of the 1956 LRA.
[47] Section 8(6)(*b*) of the 1956 LRA.
[48] Brassey *ILJ* (1990) 213.

the parties were not alive to the complexities involved, and voting procedures frequently did not bear scrutiny.[49]

Due to the legislature's failure to define the requirements related to strike ballots, our courts had to define and develop these requirements, as they were faced with a high number of interdict and dismissal disputes. A summary of the judicial developments will be discussed below.

2.2.3 Judicial developments

In *FAWU v Clover Dairies*[50] it was held that secret strike ballots may be conducted at the employer's premises.[51] This was done to ensure that the majority of employees could participate in ballots that would determine whether employees were to strike or not.[52]

In *SACWU v Sentrachem*[53] the court held that a strike ballot form must be drawn up in a simple, unambiguous manner which would not leave room for any doubt regarding its purport. Potential strikers had to understand what the ballot form, and vote, entailed.[54]

In *SA Nylon Spinners (Pty) v SA Chemical Workers Union*[55] the court held that ballots should only have to be conducted by employees in respect of the class or group of employees that intends to participate in strike action.[56]

In *White v Neill Tools*[57] the court went into detail in respect of the secrecy requirement related to strike ballots. The court held that a strike ballot provides an individual with an opportunity to cast his or her vote in secret and to consider the consequences of

[49] Parfitt *ILJ* (1992) 294.
[50] (1986) 7 *ILJ* 697 (IC).
[51] (1986) 7 *ILJ* 697 (IC) 699.
[52] (1986) 7 *ILJ* 697 (IC) 701.
[53] (1988) 9 *ILJ* 410 (IC).
[54] (1988) 9 *ILJ* 410 (IC) 436.
[55] (1992) 13 *ILJ* 1014 (IC).
[56] (1992) 13 *ILJ* 1014 (IC) 1016.
[57] (1991) 12 *ILJ* 368 (IC).

the contemplated action privately and without being unduly influenced, pressurised or intimidated by having to make his choice in the open.[58]

In *NUMSA v Jumbo Products CC*[59] the court provided a list of requirements of what would constitute a lawful ballot.[60] It is noted, with rebuke, that a detailed list of requirements related to secret ballots only followed in a 1991 court judgment, despite the 1956 LRA being legislated almost 35 years prior. It is clear from the above jurisprudence that our courts went into great depth to set out and define the requirements that applied to secret strike balloting. It is however established law that it is not the work of a court to develop legislative requirements, it is the job of the legislature.[61]

The cases discussed above did not have to serve to define and develop the requirements related to secret strike ballots, that are legislatively prescriptive, to avoid being interdicted, dismissed, or prosecuted. This failure by the legislature led to unnecessary litigation and frustrated workers' right to strike.

2.3 Evaluation

The main question under the 1956 LRA comes down to whether the requirements of secret balloting assisted in reflecting the will of the majority of employees concerned, and in turn, reduced violence during strikes. Unfortunately, it did not.

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[58] (1991) 12 *ILJ* 368 (IC) 372.
[59] (1991) 12 *ILJ* 1048 (IC).
[60] (1991) 12 *ILJ* 1048 (IC) 1054 – 1055 whereas the requirements can be summarised as –
a) The union or a shop stewards' committee should appoint a ballot officer whose first duty will be to make all the necessary arrangements for the holding of the ballot.
b) The ballot officer should give the employer concerned reasonable written notice of the date, time, and place of the ballot and the employer should be invited to send an observer to witness the balloting.
c) The issue upon which the ballot is to be taken must be the same issue which formed the subject of the dispute between the parties.
d) The ballot officer should control the issue of ballot papers to ensure that non-members do not cast a vote, and that bona fide members in good standing will cast only a single vote each.
e) The ballot officer should commence to count the votes immediately after the voting has been completed.
f) The ballot officer's original certificate together with the attendance register and all the ballot papers should be placed in one or more envelopes, which should then be sealed and be kept in safe custody.
g) The onus to demonstrate that a strike ballot was properly conducted and that no irregularities occurred during the balloting would fall on the union especially where the legality of the strike is put in issue.
[61] Gardbaum *CCR* (2019) 3.

Parfitt argues that there was a measure of tedium associated with ballots, especially when large numbers of voters were illiterate and unfamiliar with voting procedures.[62] Parfit was correct in making this submission, especially under the previous political regime in South Africa whereas most persons in South Africa were illiterate due to the consequences of apartheid. Employees were not, and neither could have been, in a position to follow and study case law to be able to know how to conduct strike ballots. As Brassey submits, not even attorneys had certainty on the processes related thereto.[63]

It follows that Du Toit was correct in arguing that secret strike ballots under the 1956 LRA served to increase the incidence of illegal strikes, heightening tension between adversaries and ultimately bedevilled the resolution of disputes.[64] There exists no evidence to prove that strike ballots under the 1956 LRA reduced violent strikes. On the contrary, one of the largest and most violent strikes in South Africa occurred when more than 100,000 employees embarked on strike action in Natal in 1973.[65]

Fortunately, as pointed out by Van Eck, employers for the most part did not pursue criminal prosecution in respect of failures to comply with secret strike ballots. This would have been an injustice.

I am therefore in agreement with the 1995 LRA explanatory note which entails that secret strike ballot requirements under the 1956 regime merely served to provide fertile soil for employers to interdict strikes, and to justify the dismissal of strikers in strikes that were technically irregular, but otherwise functional to collective bargaining.[66]

2.4 Conclusion

I submit that there were no benefits to secret strike ballots under the 1956 LRA. Secret strike ballot requirements were for the most part not properly defined and therefore only resulted in litigation, unrest and more violence. Poor, uneducated, and vulnerable

[62] Parfitt *ILJ* (1992) 303.
[63] See para 2.2.2 on page 9.
[64] Du Toit *et al* (2003) 241.
[65] Webster *GLJ* (2017) 142.
[66] Explanatory Memorandum *ILJ* (1995) 303.

employees were interdicted and dismissed when attempting to strike, yet they were never able to know what was expected of them during strike balloting. These actions removed the powerplay between employers and employees, which is the entire reason why strike action is effective in the first place.[67]

It is submitted it was extremely unjust that employees were subjected to interdicts, and dismissals, in the absence of clearly defined balloting guidelines and requirements. These guidelines and requirements had to be, and were not, understandable and accessible to all employees. As a result, legal balloting became untenable for many anticipated strikes.

In the following chapter, the ILO's view on strikes and secret strike balloting will be fully analysed. Arguments will be made on how South Africa fails to adhere to the ILO Committee of Experts Recommendations in respect of secret strike balloting. Furthermore, as to why secret strike balloting, brought about by the transitional provisions, does not constitute sound regulation from an international law perspective.

[67] *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC) 317.

Chapter 3

The ILO on strikes and strike balloting

3.1 Introduction and background

The basis of international labour law is International Labour Conventions adopted by the ILO. The ILO was established in 1919 after World War 1 as a UN-specialised agency to deal with workers' rights in general.[68]

The primary achievement of the ILO since its inception has been the establishment of a body of international labour standards aimed at promoting opportunities for employees, to obtain decent and productive work in conditions of freedom, equity, security, and dignity.[69] The preamble of the ILO Constitution emphasises its goal to create universal and lasting peace using social justice.[70]

South Africa, upon rejoining the ILO in 1994, embarked on a program of ratification of core ILO Conventions which created international labour obligations. The ratification processes required adjustment to domestic legislation to give full effect to these obligations.[71]

This is evident from the Constitution enjoining all courts to have regard to international and foreign law,[72] the LRA detailing one of its main purposes as giving effect to the obligations that South Africa incurred being a member of the ILO[73] and our courts often

[68] Manamela and Budeli *CILSA* (2013) 312.
[69] Van Eck *et al* (2020) 4.
[70] Preamble of the ILO Constitution.
[71] Van Niekerk *et al* (2023) 24.
[72] Section 39(1)(*b-c*) of the Constitution read with section 233 of the Constitution.
[73] Section 1(*b*) of the LRA.

drawing on the pronouncements of international and foreign courts when faced with novel points.[74]

In this chapter, the ILO Conventions and Recommendations on the right to strike and strike balloting will be fully analysed. Reference will be made to the developments in international labour law whereas the International Court of Justice ("ICJ") for the first time in the ILO's history, will have to make a long-awaited determination as to whether ILO Convention 87 does confer the right to strike.[75]

This dissertation would have been submitted before judgment had been handed down by the ICJ. It will therefore be argued, with reference to relevant ILO jurisprudence and insightful arguments from our scholars, why the ICJ should render a judgment that Convention 87 does confer the right to strike.

Reference will also be made to ILO's Governing Body's view on secret strike ballots, the ILO's Committee of Experts' Recommendations on secret strike ballots, and why secret strike ballots in South Africa fails to align with these views and recommendations.

3.2 The ILO and the right to strike

In *NUMSA v Bader Bop*[76] the Constitutional Court affirmed that there are two ILO Conventions relevant to the right to strike in South Africa. These Conventions are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention 87), and the Right to Organise and Collective Bargaining Convention, 1949 (Convention 98).[77] South Africa ratified both Conventions on 19 February 1996.[78]

Although both Conventions are relevant to the right to strike, neither of the Conventions provides for the outright recognition of the right to strike. It is for this

[74] Grogan (2020) 9.
[75] https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_901633/lang--en/index.htm (date of use - 19 March 2024 at 09h14).
[76] (2003) 24 *ILJ* 305 (CC).
[77] (2003) 24 *ILJ* 305 (CC) 322.
[78] Van Niekerk *et al* (2023) 24.

reason that Seifert correctly submits that the right to strike in the legal order of the ILO remains one of the most controversial questions in international labour law.[79]

To understand the Conventions, reference is first to be made to the two pillars of the ILO supervisory system.[80] The first pillar is the Committee on the Application of Standards that receives reports from the Committee of Experts on the Application of Conventions and Recommendations ("CEACR").[81] The second pillar is the ILO Governing Body, that receives reports from the Committee on Freedom of Association ("CFA").[82]

The CEACR is composed of twenty recognised experts in the field of labour law who are independent of their governments.[83] The CFA is tripartite and is composed of an independent chairperson and three representatives of government, three employer representatives and three employee representatives.[84]

Both the CEACR and the CFA engaged with their supervision have asserted that the right to strike is essential to collective bargaining.[85] Therefore, that the right to strike can be derived from Conventions 87 and 98.

Reference is made to the finding of the CFA in 1952 in which the CFA found that Convention 87 guarantees the right to strike as an essential element of trade union rights, enabling workers to collectively defend their economic and social interests.[86]

Seven years after the finding of the CFA, the CEACR in 1959, also found that the right to strike is a core element of freedom of association under Article 3 of Convention 87.[87]

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[79] Seifert *CLLPJ* (2018) 1.
[80] International Labour Conference, 99th Sess, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) at 2.
[81] Regenbogen *CLELJ* (2011) 401 – 402.
[82] Regenbogen *CLELJ* (2011) 405.
[83] (2003) 24 *ILJ* 305 (CC) 323.
[84] Van Niekerk *et al* (2023) 30.
[85] Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations (ILO, Geneva 1983) 473-6.
[86] Committee of Freedom of Association [CFA], (United Kingdom), July 1, 1951, Case No. 28 Rep. No. 2 (1952).
[87] International Labour Conference. [ILC], 43rd Session, 1959, CEACR, General Survey – Freedom of Association and Collective Bargaining (1959)-43.

Over and above the findings of the CFA and CEACR, the International Labour Conference ("ILC") furthermore established, in two resolutions adopted, one in 1957[88] and another in 1970[89] that it considers the right to strike as an essential element of freedom of association.[90] In other words, it is essential to Convention 87.

It is against this background that Van Eck argues that a liberal interpretation of Conventions 87 and 98 entails that the right to strike can be drawn from these Conventions.[91] The legal problem however persists that in the preparatory work of Convention 87 and 98, the parties to the ILO could not agree to the proposal to include an express right to strike.[92]

Moreover, in 2012, whilst the employer parties to the ILO agreed that there is a general right to take industrial action, it held the view that the CFA and CEACR had no mandate to determine the legal ambit of that right. Furthermore, that the observations by the Committee of Experts under the ILO are not binding.[93] The employer parties therefore outright challenged the authoritative nature of the Recommendations of the Committee of Experts.

These observations by the employer parties have rightly been called dangerous.[94] Smit argues that the general principles that have been drafted and formulated by the Committee of Experts, have been done clearly and concisely, which has had a great impact, and their influence is recognised both nationally and internationally.[95] Smit, argues that the observations by the Committee of Experts should remain binding for as long as they are not contradicted by the ICJ.[96]

[88] Resolution of June 26, 1957 concerning the Abolition of Anti-Trade Union Legislation in the States Members of the ILO [ILC, 40th Session, 1957, Record of Proceedings of the 40th session (1957) 783.
[89] Resolution of June 25 1970 concerning Trade Union Rights and their Relation to Civil Liberties [ILC, 54th Session, 1970 733-6.
[90] Seifert *CLLPJ* (2018) 1.
[91] Van Eck *et al* (2020) 113.
[92] Cheadle *et al* (2017) 11.
[93] ILO (Geneva) 2012, General Survey 4748 para 118 - 123.
[94] Smit *CLLPJ* (2017) 412.
[95] Smit *CLLPJ* (2017) 413.
[96] Smit *CLLPJ* (2017) 413.

Regenbogen holds a different view and argues that neither the CFA nor the CEACR are constituted as an adjudicative or judicial body, and neither has the authority to issue binding interpretations of ILO Conventions.[97] Regenbogen further submits that the only body responsible for doing so is the Committee on the Application of Standards ("CAS").[98] Regenbogen argues that the CAS has on numerous occasions confirmed that no consensus exists on whether Convention 87 does provide for an international right to strike.[99]

The above therefore results in two different opposing views. Some scholars argue that the findings of the Committee of Experts should not be binding, whereas others argue that it should.

Fortunately, and to finally obtain a definitive answer on whether the ILO Conventions and specifically whether Convention 87 does confer the right to strike, a dispute relating to the interpretation of the Convention has been referred to the ICJ on 10 November 2023.[100] This dispute was filed in accordance with article 37(1) of the ILO Constitution which entails that –

> Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

It is anticipated that a liberal interpretation as suggested by Van Eck will be adopted and that the ICJ will conclude that Convention 87 does confer an international right to strike.[101] As argued by Smit, the supervisory committees' work holds legal and wider significance, and this should be strengthened rather than undermined. Especially if the founding principle of social justice is still an object of the ILO.[102]

It has furthermore been argued by Frey that there are 154 ILO member states that have ratified Convention 87. [103] Out of the 154 ILO members that ratified Convention

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[97] Regenbogen *CLELJ* (2011) 405.
[98] Regenbogen *CLELJ* (2011) 413.
[99] International Labour Conference, 99th Sess, 2010, Report of the Committee on the Application of Standards, Part One, at 18 para 57.
[100] https://www.ituc-csi.org/ILO-Landmark-decision-on-right-to-strike (date of use - 06 February 2024 at 06h20).
[101] Van Eck *et al* (2020) 113.
[102] Smit *CLLPJ* (2017) 413.
[103] Frey *GLJ* (2017) 25.

87, 139 of these member states (90.8 per cent) have ratified the International Covenant on Economic, Social and Cultural Rights treaty ("ICESCR") which entails under article 8(1)(d) that –

> 1. The States Parties to the present Covenant undertake to ensure -
> (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

It is submitted that 90.8% of countries that ratified Convention 87, would not agree to bind themselves to another treaty outright making provision for the right to strike, if these countries did not want to bind themselves to the right to strike as conferred by the ILO. As Frey suggests, such an approach would be disingenuous.[104]

The importance of the Committee of Experts' observations has in any event been referenced in numerous jurisdictions, including South Africa, when developing strike laws. Two jurisdictions whose highest courts have referenced their views are discussed below.

In Canada, in the majority judgement of *Saskatchewan Federation of Labour v Saskatchewan*[105] the Canadian Supreme Court relied on the observations by the Body of Experts and held that -

> Although Convention 87 does not explicitly refer to the right to strike, the ILO supervisory bodies have recognised the right to strike as an indispensable corollary to the right of trade union association that is protected in the Convention. Striking, according to the Committee of Experts is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests.[106]

In South Africa in the matter of *NUMSA & others v Bader Bop*[107] the Constitutional Court referred to the observations of the Body of Experts and held that -

> The Committee comprises three representatives each of governments, employers and workers, with an independent chairperson. Its decisions are therefore an authoritative development of the principles of freedom of association contained in the ILO Conventions. The jurisprudence of these Committees too will be an important resource in developing the labour rights contained in our Constitution.[108]

[104] Frey *GLJ* (2017) 26.
[105] (2015) 1 *SCR* 245 (SCC).
[106] (2015) 1 *SCR* 245 (SCC) para 67.
[107] (2003) 24 *ILJ* 305 (CC).
[108] (2003) 24 *ILJ* 305 (CC) 323.

I submit that the observations by the Committee of Experts were correct and derived from Convention 87 and that this should be reflected by the judgment from the ICJ. Naturally, such a judgment will prove that the fundamental right to strike under our Constitution[109] and the LRA[110] is consistent with international labour laws.

3.3 The ILO and strike ballots

As argued above, the authority of the Committee of Experts holds significant weight. The Committee's view on secret and recorded strike ballots is therefore crucial to the arguments presented in this dissertation.

The Committees of Experts accept that limitations on the right to strike, and the establishment of procedures to be followed before embarking on strike action, do not constitute an infringement of the right to freedom of association.[111]

The Committee of Experts goes further and confirms that strike ballots will be in accordance with the principles of freedom of association when they do not render the right to embark on strike very difficult, or even impossible in practice.[112] According to the Committee, regard should be had to the context in which ballots apply, taking into account the level of bargaining, the nature of the affected workplace and the like.[113]

In 1998 during the 86th ILC, the ILO adopted the Declaration on Fundamental Principles and Rights at Work. Guidelines were published following this Declaration, in accordance with the ILO Constitution, which under Article 10 paragraph 2 calls upon the ILO to –

> Accord to governments at their request all appropriate assistance within its power in connection with the framing of laws and regulations on the basis of the decisions of the Conference.

Chapter 5 of the guidelines entails that the strike ballot requirement is intended to ensure that labour relations, including industrial action, are carried out in an orderly fashion to reduce the likelihood of wildcat strikes, and to ensure democratic control

[109] Section 23(2)(*c*) of the Constitution.
[110] Section 64(1) of the LRA.
[111] Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations (ILO, Geneva 1983) 219-21.
[112] Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations (ILO, Geneva 1983) 170.
[113] Fergus and Jacobs *ILJ* (2020) 766.

over an important decision for the workers concerned.[114] The guidelines furthermore provide an example of how secret strike balloting can be legislated by referring to the ILO's own proposal of secret strike ballots, in addition to referencing several jurisdictions where strike ballots are compulsory such as Ireland, Swaziland, Dominican Republic, Zambia and El Salvador.[115]

The draft provision entails, amongst others, that before strikes, a ballot shall be taken by the employees contemplating such strike action after the completion of any procedural aspects as may be contained in such member's legislation. Additionally, if a strike were to be adopted by less than the absolute majority of employees, the trade union and the employees taking part in the strike must respect the free will to work of those who do not adhere to the strike.[116]

The guidelines also provide draft requirements for a ballot to be legally compliant. The requirements entail that for a ballot to be successful, it must fulfil the requirements of the rules of the trade union concerned. It must also be supported by the majority of votes cast, and by no less than the majority of members of the trade union who are present and balloting. Additionally, the result must be certified by the scrutineers taking the ballot, or by the Commission, depending on who oversees such a ballot.[117]

Unfortunately, in South Africa, the transitional provisions introduced by the 2018 LRAA failed to consider the requirement that secret strike ballots must conform to the rules of the trade union concerned (a trade union's constitution). The transitional provisions, and accompanying guidelines (before being set aside), failed to give a trade union the freedom to conduct its own procedures when balloting in terms of its constitution, it prescribed the exact opposite, by imposing mandatory processes.[118]

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[114] https://www.ilo.org/static/english/dialogue/ifpdial/llg/noframes/ch5.htm#11 (date of use - 05 February 2024 at 14h02).
[115] https://webapps.ilo.org/static/english/dialogue/ifpdial/llg/noframes/ch5.htm#11 (date of use - 27 May 2024 at 09h27).
[116] https://www.ilo.org/static/english/dialogue/ifpdial/llg/ch5/ex8.htm (date of use - 05 February 2024 at 16h00).
[117] https://www.ilo.org/static/english/dialogue/ifpdial/llg/ch5/ex8.htm (date of use - 05 February 2024 at 16h20).
[118] Paragraph 9.4 of the guidelines in GN1397 Gazette 42121, 19 December 2018; See chapter 5 para 5.4.3 on page 44.

The guidelines which accompanied the transitional provisions furthermore failed to give effect to the level of bargaining when having to conduct secret strike ballots. Neither does it consider the nature of the affected workplace. It merely proposes a blanket approach to all registered trade unions on what must be done when balloting.[119] It is submitted that a secret strike ballot cannot be the same for a trade union in an individual workplace, which attempts to strike for a plant-level demand, which would affect hundreds of employees; as opposed to a trade union that is a party to a bargaining council, that wants to embark on an industry strike, which would have an impact on thousands of employees.

It is furthermore submitted the transitional provisions, and accompanying guidelines, did indeed render the right to strike extremely difficult in practice, contrary to the Recommendations of the Committee of Experts. This is evident from the three reported judgments that interdicted strike action when the 2018 LRAA was promulgated, for the failure of the trade union parties to hold held secret strike ballots.[120]

3.4 Conclusion

This study welcomes the decision on the referral of the interpretation dispute that was lodged with the ICJ, to finally obtain a definitive answer as to whether Convention 87 provides for the right to strike. As submitted above, in my view the ICJ should render a judgment confirming that Convention 87 does confer the right to strike. If not, the ICJ will rule against the founding principles of social justice, placed on the ILO in terms of its Constitution. Furthermore, it will effectively discard decades' worth of observations and developments by the Committee of Experts, not only in relation to strike law, but also in relation to strike balloting.

Arguments presented in this chapter show how the Committee of Experts have concluded that strike ballots should not render the right to strike difficult, or even

[119] Paragraph 9.4 of the guidelines in GN1397 Gazette 42121, 19 December 2018; See chapter 5 para 5.4.3 on page 45.
[120] *Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of SA & others; Foskor (Pty) Ltd v National Union of Metalworkers of SA & others* (2019) 40 *ILJ* 1814 (LC) 1817; see also *Air Chefs (SOC) Ltd v National Union of Metalworkers of SA & others* (2020) 41 *ILJ* 428 (LC) 442; see also *Johannesburg Metropolitan Bus Services (SOC) Ltd v Democratic Municipal and Allied Workers Union of South Africa and others* (2019) 12 BLLR 1335 (LC) 1337.

impossible. This is exactly what transpired under the 1956 LRA, as discussed in chapter 2 of this dissertation.[121]

This was also once again the initial position under the 2018 LRAA, before partial clarification of the Labour Appeal Court in *NUMSA v Mahle Behr,*[122] as will be fully discussed in chapter 5 of this dissertation.[123]

It is submitted that the transitional provisions and accompanying guidelines are in contravention of the observations of the Committee of Experts and the guidelines published in terms of the Declaration on Fundamental Principles and Rights at Work. Not only did the transitional provisions and accompanying guidelines fail to provide a trade union with the right to conduct its own procedures when balloting in terms of its constitution; it also failed to give effect to the level of bargaining when having to conduct a secret strike ballot.

This is one of the reasons why this dissertation argues that section 19 of the 2018 LRAA should be repealed, or if not repealed, replaced with a provision that will better serve all parties' interests. South African labour laws place significant weight on the Recommendations from ILO, and requires that all legislative provisions, including the transitional provisions, should adhere to the standards set by the ILO. The transitional provisions in its current form does not adhere to the standards set by the ILO, as it renders strike action extremely difficult in practice.

In the following chapter, the position of the Constitution and the LRA (prior to the 2018 LRAA) on secret strike balloting will be analysed. These pieces of legislation, both heavily influenced by the ILO, are the main sources governing industrial relations in South Africa.

[121] See chapter 2 para 2.4 on page 12.
[122] (2020) 41 *ILJ* 2093 (LAC).
[123] See chapter 5 para 5.4.3 on page 44.

Chapter 4

Influence of the Constitution and the LRA on strikes and secret strike balloting in South Africa

4.1 Introduction

The South African political and labour regime changed, rightly so, to a democratic system in 1994 with the fall of the apartheid regime. The primary sources of labour legislation that were changed under the new labour dispensation were the Constitution which was declared as the supreme law of the Republic of South Africa[124] and the LRA whose main purpose is to regulate fundamental rights (such as the right to strike) in conformity with the Constitution.[125] Du Toit and Ronnie correctly submit that the right to strike and to engage in collective bargaining is guaranteed by the Constitution, and is regulated by the LRA.[126]

4.2 The Constitution and the right to strike

At common law, the right to strike would constitute a breach of an employment contract and would therefore entitle employers to summarily terminate strikers' contract of employment.[127]

The common law position was abolished by the Constitution, which entails that the right to strike is fundamental and that every worker has the right to strike.[128] In the matter of *NUMSA & others v Bader Bop*[129] the Constitution Court pronounced on the significance of the right to strike and held that -

[124] Section 4 of the Constitution.
[125] Section 1(*a*) of the LRA.
[126] Du Toit and Ronnie *Acta Juridica* (2012) 197.
[127] Grogan (2020) 383.
[128] Section 23(2)(*c*) of the Constitution.
[129] (2003) 24 *ILJ* 305 (CC).

> The right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations.[130]

Grogan correctly submits that like all rights, the right to strike may be reasonably limited for the sake of other values and interests.[131] The right to strike is therefore not absolute. The LRA regulates the procedural[132] and substantive[133] limitations on the right to strike and provides for the relevant remedies if the procedural or substantive limitations are not complied with.[134]

4.3 The LRA on the right to strike and strike ballots

The LRA defines a strike as -

> The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory.[135]

Although the predecessor of the LRA, the 1956 LRA, made secret strike ballots compulsory before striking as discussed in chapter 2 of this dissertation,[136] the same mandatory obligation did not follow under the LRA. Fines and criminal prosecution were also not reenacted under the LRA.[137]

The LRA under section 64 specifically lists the procedural limitations that must be adopted before employees may embark on strike action. The LRA under section 65 goes further and specifically lists the substantive limitations on the right to strike.

Notably, missing from the procedural and substantive limitations is the requirement to conduct a pre-strike ballot. Confusion however arises in that the LRA sets out what must be contained in a registered trade union's constitution before embarking on strike action. The LRA provides that –

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[130] (2003) 24 *ILJ* 305 (CC) 316 - 317.
[131] Grogan (2020) 383; see also section 36 of the Constitution.
[132] Section 64 of the LRA.
[133] Section 65 of the LRA.
[134] Section 68 of the LRA.
[135] Section 213 of the LRA.
[136] See chapter 2 para 2.1 on page 8.
[137] Van Eck *Litnet Akademies* (2020) 1030.

> A constitution of a trade union must provide that before a trade union calls a strike, such union must conduct a ballot.[138]

A reading of the above legislative prescript would give the impression that secret ballots are mandatory before a union can embark on strike action, despite not being explicitly required by section 64, or prohibited by section 65 of the LRA. The LRA however goes further and provides that the failure to conduct a ballot, could not be the basis for any litigation challenging the legality or protected status of a strike.[139]

Rycroft correctly identified that there are no reported judgments prior to the 2018 LRAA, whereas employers attempted to interdict strikes when there was non-compliance with strike balloting procedures, or failures, to follow the procedures of strike balloting as set out in a trade union's constitution.[140]

One is then to question why the LRA in its first form placed an obligation on registered trade unions, to include in their constitutions the obligation that ballots had to proceed with strike action, if a failure to adhere thereto had no legal consequence.

This position is best explained in the explanatory memorandum of the LRA. The memorandum entails that the inclusion of strike ballots would serve to ensure democratic practices for members of a trade union, by providing employees with the requisite democratic guarantees that the majority rules, without allowing for abuse by third parties such as employers interdicting strikes, in the absence of ballots.[141]

Additionally, if a trade union resorts to strike action without a ballot, or holds a ballot but fails to secure a majority of votes in support of industrial action, employees may refuse to participate in the strike and may not be disciplined for doing so.[142] Employees may also approach the Labour Court for an order interdicting such a strike or compelling compliance with the ballot requirement.[143] As Cheadle *et al* however

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[138] Section 95(5)(*p*) of the LRA.
[139] Section 67(7) of the LRA.
[140] Rycroft *ILJ* (2015) 20.
[141] Explanatory Memorandum *ILJ* (1995) 303.
[142] Section 95(5)(*o*), (*p*) and (*q*) of the LRA.
[143] S 95(5)(*q*) read with s 158(1)(*a*)(i), (iii) and (*e*) of the LRA.

correctly submit, the likelihood of trade union members interdicting their own union is not great, except in instances of inter-union division.[144] Over and above, should an employee challenge his or her union, such an employee is most likely to suffer intimidation and exclusion by the remaining trade union members.[145]

The above confirms that the secret ballot requirements were included to improve governance between trade unions and their members. It was never the intention of the legislatures that employers could use the failure to hold a ballot as a ground to interdict a strike.

4.4 Attempted reintroduction of strike ballots in 2012

The position regarding strike balloting under the LRA was almost changed in 2012 to reintroduce strike ballots. The Labour Relations Amendment Bill 6 of 2012 ("2012 Bill") attempted, though failed, to amend section 64 of the LRA to make provision for the following additional preconditions before strike action would be protected -

> (iii) the trade union or the employers' organisation, as the case may be, has to conduct a ballot of its members in good standing who are entitled to strike or lock-out in terms of this section in respect of the issue in dispute; and
> (iv) a majority of the members of the trade union or employers' organisation who voted in that election have voted in favour of the strike or lock-out.[146]

The explanatory memorandum went into great depth to motivate why the above amendments were attempted. According to the Bill, the amendment of section 64 was to prevent industrial action from being staged if it enjoys only minority support, as violence or intimidation are more likely to occur under these circumstances.[147]

The explanatory memorandum went further and recognised that the 1956 LRA strike balloting requirement gave rise to technical compliance disputes and extensive litigation. According to the Bill, the issue would have been dealt with in that a certificate of compliance would have been issued by the CCMA, a bargaining council or an accredited private agency which would have served to prove that a ballot was staged in compliance with the attempted amendments to section 64 of the LRA.[148]

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[144] Cheadle *et al* (2017) 73.
[145] Van Eck *Litnet Akademies* (2020) 1032.
[146] Clause 6(a) of the 2012 Bill.
[147] Memorandum on the Objects of the Labour Relations Amendment Bill 6 of 2012 page 4.
[148] Memorandum on the Objects of the Labour Relations Amendment Bill 6 of 2012 page 5.

This study must respectfully disagree. History, particularly under the pre-1994 regime, proves that mandatory strike ballots at the threat of interdicts merely led to further frustration, unrest, and violence. Additionally, although the CCMA does provide for the overseeing of a balloting process, it is done at an exponential cost. Currently, the CCMA charges an amount of R3 213,50 – R7 301.73 plus all direct variable costs to oversee a ballot.[149]

It is highly unlikely, if not outright impossible, that trade unions would incur these costs for each anticipated strike. This would result in additional expenses and time, which in turn would have an impact on the effectiveness of the anticipated strike.

As Benjamin correctly submits, there is no evidence to correlate the level of strike-related violence, with the level of worker support for a demand.[150] Additionally, as Fergus and Jacobs suggest, the opposite effect of mandatory strike ballots would have been that frustrated employees seeking to exert their power over employers, whether sanctioned by ballot or not, would have resorted to wildcat strikes.[151]

Cheadle *et al* furthermore identified that the unintended consequences of secret strike ballots may be that strike leaders inflate their demands to promote a majority outcome in a ballot. Furthermore, that such demands may exacerbate violence and lengthy strikes, as employers would not be able to meet the unrealistic demands. Additionally, that violence and intimidation may be used to persuade employees to vote in favour of a strike, before voting in a ballot, even if such a ballot is done in secret.[152]

It has been established in *S v Makwanyane*[153] that in balancing whether a fundamental right should be limited, regard must be given as to whether the desired ends by such limitation could be reached through other means less damaging to the right in question.[154]

[149] https://www.ccma.org.za/wp-content/uploads/2023/02/CCMA-Fees-and-Costs-Info-Sheet-2022-01.pdf (date of use - 24 March 2024 at 09h27).
[150] Benjamin *ILJ* (2014) 11.
[151] Fergus and Jacobs *ILJ* (2020 766.
[152] Cheadle *et al* (2017) 72.
[153] 1995 (3) SA 391 (CC).
[154] 1995 (3) SA 391 (CC) para 104.

The fundamental right to strike will indeed be damaged and limited by compulsory secret strike balloting, without secret strike balloting being able to achieve its desired end, of reducing violence during strikes, through improved inter-union governance. No evidence exists to prove that strike ballots will improve inter-union governance. Likewise, no evidence exists to prove that strike ballots will reduce violence due to improved inter-union governance.

4.5 Conclusion

This study argues that the pre-2018 position on balloting never enjoyed any attention since no legal consequence followed from a failure to hold a pre-strike ballot. Strike ballots only became relevant in 2012, when the 2012 Bill proposed the reintroduction of mandatory strike ballots.

It is submitted that the initial proposed amendments to strike balloting in the 2012 Bill were, rightly so, abandoned. The proposed amendments to reintroduce mandatory pre-strike balloting, would not have been able to withstand a constitutional challenge. It is submitted that the proposed wording of section 64 would have unjustifiability limited the fundamental right to strike. These attempted amendments would have most likely ended up before the Constitutional Court, whereas it is argued that they would have been declared unconstitutional.

It is concluded that strike balloting under the LRA, before the 2018 LRAA, provided for sound regulation to a limited extent. No strikes were interdicted at the hands of employers and pre-strike ballots. Yet, the inclusion of mandatory provisions for strike ballots in a union's constitution would have seemed as if it created certain statutory obligations, whereas it did not.[155] This entails that a layman, employee, employer, or other stakeholder could become confused about whether strike ballots were indeed mandatory. Unclear legislative provisions do not provide for sound regulation and can merely result in unnecessary litigation.

The following chapter will analyse the 2018 LRAA transitional provisions, and the contradictory and confusing judgments handed down following its promulgation.

[155] Van Eck *Litnet Akademies* (2020) 1038.

Chapter 5

2018 LRAA amendments, case law and the current position on secret strike balloting

5.1 Introduction

The Minister of Employment and Labour introduced the Labour Relations Amendment Bill 32 of 2017 ("2017 Bill") on 24 November 2017. The memorandum of the 2017 Bill[156] explains that the transitional provisions (secret strike balloting) were introduced due to trade unions being registered in the past, without their constitutions making provision for strike ballots, and therefore in breach of LRA.[157]

The memorandum furthermore explained that the amendments to section 95(9) of the LRA, in which the definition of the word "balloting" was extended to mean any system of voting by members that is recorded and secret, was to promote good governance and secrecy.[158] South African authors argue that the amendments to the LRA by means of the 2018 LRAA were to promote inter-union governance, and not to provide employers with grounds to interdict the protected status of strikes.[159]

[156] Clause 18 of the Memorandum on the Objects of the Labour Relations Amendment Bill, 2017.
[157] Section 95(5)(*p*) and 95(9) of the LRA.
[158] Clause 2.7.2 of the Memorandum on the Objects of the Labour Relations Amendment Bill, 2017.
[159] Van Eck *Litnet Akademies* (2020) 1032; see also Fergus and Jacobs *ILJ* (2020) 758.

5.2 The 2018 LRAA amendments

The 2017 Bill cumulated into the 2018 LRAA which provides as follows in respect of the transitional provisions –

> 19. (1) The Registrar must, within 180 days of the commencement of this Act, in respect of registered trade unions and employers' organisations that do not provide for a recorded and secret ballot in their constitutions—
>
> (a) consult with the national office bearers of those unions or employers' organisations on the most appropriate means to amend the constitution to comply with section 95; and
>
> (b) issue a directive to those unions and employers' organisations as to the period within which the amendment to their constitution is to be effected, in compliance with the procedures set out in the amended constitution.
>
> (2) Until a registered trade union or employers' organisation complies with the directive made in terms of subsection (1)(*b*) and the requirements of section 95(5)(*p*) and (*q*) of the Act, the trade union or employer organisation, before engaging in a strike or lockout, must conduct a secret ballot of members.[160]

The Department of Employment and Labour, in justifying the transitional provisions, mainly argued two grounds. Firstly, that the inclusion of the requirements of compulsory secret strike ballots into trade union constitutions, would give individual workers the final say, in contributing to a decision that has major implications for them, i.e. whether to embark on strike action or not. Secondly, that such an inclusion would amount to good democratic practice and serve to limit violence during strikes.[161]

The WITS Centre of Applied Legal Studies ("CALS") argued that the transitional provisions represented an incursion into the organisational autonomy of trade unions. Furthermore, that it undermined the open, deliberative, and collective nature of decision-making in the trade union movement. Lastly, that it provided an additional legal ground for employers to deny the protected status of strikes, using interdicts.[162]

The CALS was correct. This is exactly what transpired once the 2018 LRAA was promulgated. Trade unions, whose constitutions did not make provision for secret strike balloting, were interdicted for the first time since the LRA's enactment in 1996, for their failure to conduct secret strike ballots.

[160] Section 19 of the 2018 LRAA.
[161] https://pmg.org.za/committee-meeting/26189/ (date of use – 10 October 2023 at 11h23).
[162] https://pmg.org.za/committee-meeting/26189/ (date of use – 25 March 2024 at 12h49).

The Minister furthermore published guidelines[163] that were issued in accordance with the LRA[164] to allegedly guide trade unions on the processes to be followed during secret strike balloting, before embarking on strike action. It will become evident in this chapter that these guidelines proved to be an incursion into the organisational autonomy of trade unions. The guidelines that were published, were not merely guidelines or a directive. The guidelines amounted to mandatory processes which had to be adopted by trade unions during secret strike ballots, prior to embarking on industrial action.

The transitional provisions and the guidelines have been the subject of numerous legal challenges that will be discussed throughout this chapter. An evaluation will also be done on where our courts, with respect, errored in their interpretation of the transitional provisions. A further evaluation will also be done as to why our courts, correctly so, set aside the guidelines that were published by the Minister. A conclusion will then be reached on the status of the transitional provisions and the guidelines in its current form.

5.3 Judicial developments

The transitional provisions were first pronounced on by the Labour Court. The Labour Court granted interdicts on numerous instances where trade unions failed to hold secret strike ballots, whereas their constitutions did not make provision for secret strike balloting.

5.3.1 The Labour Court on the transitional provisions

The first matter which addressed the transitional provisions was the matter of *Mahle Behr SA (Pty) Ltd v NUMSA.*[165] In this judgment, NUMSA did not hold a secret strike ballot before embarking on industrial action. NUMSA's constitution furthermore did not make provision for a secret strike balloting process.[166]

[163] GN1397 Gazette 42121, 19 December 2018.
[164] Section 95(9) of the LRA.
[165] (2019) 40 *ILJ* 1814.
[166] (2019) 40 *ILJ* 1815.

NUMSA raised the provisions of section 67(7) of the LRA and argued that their failure to hold a ballot cannot result in any legal challenge, challenging the legality of a strike.[167] The Labour Court disagreed and held that protection under section 67(7) of the LRA would only apply to trade unions that make provisions in their constitutions for secret and recorded strike ballots.[168] NUMSA additionally argued that the Registrar has not provided a directive on how their constitution had to be amended as of the date when the matter was argued. Therefore, because no directive existed, they did not have to ballot. The court disagreed.[169] This was a crucial error that was rectified by the Labour Appeal Court, as will be discussed later in this chapter.[170]

NUMSA furthermore argued that the transitional provisions amounted to an infringement on NUMSA's constitutional right to strike.[171] The Labour Court disagreed and held that the transitional provisions did not amount to an infringement of the constitutional right to strike. The Labour Court held that all that NUMSA had to do was to amend their constitution, to include a provision for secret strike ballots, and then NUMSA would be allowed to strike.[172]

The Labour Court furthermore noted that the requirement to include a provision for secret strike ballots[173] was present in the LRA since its inception, and it was inconceivable that NUMSA has not adhered to this requirement.[174]

The court held that in interpreting the transitional provisions, that the provisions were clear and unambiguous and therefore the court was obliged to give effect thereto, therefore a literal interpretation.[175] The court ultimately upheld the interdict and held in the absence of a secret strike ballot, whereas a union's constitution does not make provision for secret strike ballots, that a union is not entitled to strike.[176]

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[167] (2019) 40 *ILJ* 1816.
[168] (2019) 40 *ILJ* 1816.
[169] (2019) 40 *ILJ* 1817.
[170] See chapter 5 para 5.3.4 on page 39.
[171] (2019) 40 *ILJ* 1816.
[172] (2019) 40 *ILJ* 1816.
[173] Section 95(5)(*p*) of the LRA.
[174] (2019) 40 *ILJ* 1816.
[175] (2019) 40 *ILJ* 1817.
[176] (2019) 40 *ILJ* 1817.

Van Eck has correctly argued that the right to strike was limited by the literal interpretation as applied by the court.[177] The right to strike is a fundamental right and requires a purposive interpretation as is compulsory under the Constitution.[178] The court therefore clearly errored in its findings and interpretation. This judgment was blatantly wrong and set the tone for the judgments that followed in interdict applications that served before the Labour Court.

The second matter in which the transitional provisions were considered was the matter of *Air Chefs (SOC) Ltd v NUMSA*.[179] The Labour Court held that the reason behind the transitional provisions was to ensure a democratic process and that the limitation on the right to strike was purely procedural. The court held that the transitional provisions merely suspend the right to strike until NUMSA either amends its constitution, or NUMSA holds a secret strike ballot before embarking on strike action.[180]

Van Eck argues, correctly so, that the court came to an illogical conclusion.[181] Firstly, the 2018 LRAA never mentioned a democratic process and its purpose was rather to create modern processes in respect of balloting between a union and its members. The mentioning of a democratic process was merely submissions made by the Minister when justifying the 2018 LRAA amendments.[182] These submissions do not constitute binding law. Secondly, the Constitution does not differentiate between procedural and substantive limitations.[183] A limitation remains just that, whether the limitation is procedural, or substantive. The Constitutional Court in *SATAWU v Moloto*[184] affirmed that the right to strike is limited by the LRA's procedural, substantive and definitional requirements.[185]

[177] Van Eck *Litnet Akademies* (2020) 1034.
[178] Section 39(2) of the Constitution. A purposive interpretation entails that when interpreting a right contained in the Bill of Rights, that a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.
[179] (2020) 41 *ILJ* 428 (LC) 428.
[180] (2020) 41 *ILJ* 428 (LC) 441.
[181] Van Eck *Litnet Akademies* (2020) 1034.
[182] See chapter 5 para 5.2 on page 31.
[183] Van Eck *Litnet Akademies* (2020) 1034.
[184] (2012) 33 *ILJ* 2549 (CC)
[185] (2012) 33 *ILJ* 2549 (CC) 2567.

The third matter in which the transitional provisions were considered was the matter of *Johannesburg Metropolitan Bus Services (SOC) Ltd v DEMAWUSA*.[186] Similarly, DEMAWUSA's constitution did not provide for secret strike ballots and DEMAWUSA furthermore did not conduct a secret strike ballot before its anticipated strike action. The Labour Court held that there was a difference between an order declaring a strike unprotected, and an order prohibiting a union from engaging in the planned strike until it conducted a secret ballot.[187]

Interestingly, the court held that section 19 of the 2018 LRAA was not part of Chapter IV (the Chapter governing trade unions) of the LRA. Thus, on a literal reading of the transitional provisions of section 19 of the 2018 LRAA, read with section 67(7) of the LRA, the failure of a union to conduct a secret ballot of members when that is required in terms of section 19 of the 2018 LRAA, would not render a subsequent strike unprotected. The reasoning for this was that such a failure would not constitute non-compliance with a provision of Chapter IV of the LRA.[188] The court held that the failure to hold a ballot, may still however lead to an interdict, as it was in breach of section 19 of the 2018 LRAA.[189]

The application of the LRA by the court in this judgment created a conflict between legislative provisions.[190] One provision entails that a failure to hold a ballot cannot result in any legal challenges, challenging the legality of a strike.[191] The other making secret strike ballots mandatory in the form that a union "must" ballot, if a union's constitution does not make provision for secret strike ballots.[192] What is noteworthy from this judgment is that the court interdicted the strike as a result of non-compliance with section 19 of the 2018 LRAA, even though the court found that the transitional provisions did not form part of chapter IV of the LRA. Put differently, the strike was interdicted, even though it was found that the strike could not be declared unprotected.

[186] (2019) 12 BLLR 1335 (LC) 1337.
[187] (2019) 12 BLLR 1335 (LC) 1335.
[188] (2019) 12 BLLR 1335 (LC) 1337.
[189] Section 158(1)(*b*) of the LRA.
[190] Van Eck *Litnet Akademies* (2020) 1035.
[191] Section 67(7) of the LRA.
[192] Section 19(2) of the 2018 LRAA.

The court established the legal position that non-compliance with section 19 of the 2018 LRAA will result in interdicts. This is a legal challenge, that as of the date of this dissertation, has not been addressed by any other court. This blatantly wrong judgment will be revisited later in this chapter in my evaluation.[193]

5.3.2 The Labour Court on deregistration for non-compliance with the transitional provisions

As Grogan correctly identified,[194] with the coming of the 2018 LRAA,[195] came a new obligation on all registered trade unions, to annually submit all ballot records to the Registrar.[196] This is in addition to all other records that must be provided to the Registrar on an annual basis.[197]

The 2018 LRAA furthermore empowered the Registrar to deregister a trade union where the Registrar requests evidence of a ballot, and such ballot is not recorded in some written form, and the record regarding the ballot is not submitted upon request.[198] As correctly set out by Greenhalgh, these provisions now provided a proactive Registrar with the power to involve himself in the internal balloting affairs of a union.[199]

Against this background, the saga of DEMAWUSA and secret strike balloting took another turn. In the matter of *Democratic Municipal & Allied Workers Union of SA v Registrar of Labour Relations,*[200] after DEMAWUSA was interdicted, as explained above, DEMAWUSA held a secret ballot and proceeded with strike action.[201] The strike led to the Registrar inquiring about the legitimacy of the strike ballot.[202]

After the inquiry, and upon receiving no response, the Registrar sent written correspondence to the general secretary of DEMAWUSA, informing DEMAWUSA that

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[193] See chapter 5 para 5.4.1 on page 40 - 41.
[194] Grogan *ELJ* (2020) 1.
[195] Section 10 of the 2018 LRAA.
[196] Section 100(*f*) of the LRA.
[197] Section 100 of the LRA.
[198] Section 106(2A)(*b*) of the LRA.
[199] Greenhalgh *JJS* (2023) 143.
[200] (2020) 41 *ILJ* 1968 (LC).
[201] (2020) 41 *ILJ* 1968 (LC) 1970.
[202] (2020) 41 *ILJ* 1968 (LC) 1971.

the Registrar intended to cancel their registration as a trade union.[203] The reasons as to why the Registrar attempted the cancellation were due to DEMAWUSA allegedly failing to operate as a union in that it failed to keep[204] and provide[205] records to the Registrar as required by the LRA. Additionally, that DEMAWUSA failed to comply with the guidelines on balloting of its members when conducting a secret strike ballot, before embarking on strike action.[206]

The Labour Court held that the deregistration of DEMAWUSA on account of an alleged failure to comply with balloting provisions on one occasion, and not providing information connected therewith despite express requests from the Registrar, seemed a somewhat drastic step.[207]

The Labour Court furthermore confirmed the principle that secret strike balloting was a matter between a trade union and its members, when the court held that no members complained of ballot rigging, or that it would not be in the best interest for DEMAWUSA, to continue to operate as a trade union.[208]

The Labour Court, for the first time, also referred to the guidelines as were published and held that it was arguable that the guidelines on balloting were not intended to be binding prerequisites for the acceptable conduct of a secret strike ballot.[209] The Labour Court ultimately set aside the cancellation of DEMAWUSA, pending its appeal.

5.3.3 The Labour Court on the guidelines

After reference was first made to the guidelines not being binding as set out above, further litigation was imminent. The guidelines were pronounced on in the matter of *AMCU v Minister of Employment & Labour*[210] where the guidelines were set aside.

[203] (2020) 41 *ILJ* 1968 (LC) 1971.
[204] Section 99 of the LRA.
[205] Section 100 of the LRA.
[206] (2020) 41 *ILJ* 1968 (LC) 1971.
[207] (2020) 41 *ILJ* 1968 (LC) 1975.
[208] (2020) 41 *ILJ* 1968 (LC) 1976.
[209] (2020) 41 *ILJ* 1968 (LC) 1975.
[210] (2021) 42 *ILJ* 1538 (GP).

AMCU argued that the guidelines were to be set aside in accordance with the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and alternatively that it did not comply with the principle of legality as enshrined by the Constitution.[211]

To have relied on PAJA, the act of the Minister had to fall within the definition of an administrative action. The relevant provision of PAJA entails –

> any decision taken . . . by —
> (a) an organ of state, when — . . .
> (ii) exercising a public power or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect.[212]

The Minister argued that the guidelines did not have an adverse effect either on AMCU, or any other trade union, and therefore did not amount to an administrative action.[213]

The court disagreed and held that the guidelines were indeed peremptory. The court held that the guidelines prescribed how ballots should be conducted before the calling of a strike. As a result, the guidelines did indeed have an adverse effect on AMCU and impacted AMCU's right to regulate its own affairs.[214]

The court importantly held that the major problem with the guidelines was found under paragraph 9.[215] The court noted that guidelines indicated what procedures "should" or "must" be followed when conducting a secret ballot and referred to numerous paragraphs that were indeed mandatory.[216]

The court held that the Minister issued the guidelines in accordance with section 95(9) of the LRA and the Minister was not entitled to do so. The Minister had to issue the guidelines in accordance with section 95(8) of the LRA and therefore the Minister acted *ultra vires.*[217] The guidelines were ultimately set aside. This decision was correct and will be revisited later in this chapter in my evaluation.[218]

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[211] Section 1(*c*) of the Constitution.
[212] Section 1(*c*) of PAJA.
[213] (2021) 42 *ILJ* 1538 (GP) 1542.
[214] (2021) 42 *ILJ* 1538 (GP) 1542.
[215] Paragraph 9 of the guidelines.
[216] (2021) 42 *ILJ* 1538 (GP) 1544.
[217] (2021) 42 *ILJ* 1538 (GP) 1544.
[218] See chapter 5 para 5.4.3 on page 44 - 45.

5.3.4 The Labour Appeal Court on the transitional provisions

A full bench from the Labour Appeal Court in the matter of *NUMSA v Mahle Behr SA*[219] overturned the judgment from the court *a quo* and held that the Registrar did not issue a directive as was required by the transitional provisions, and in the absence of a directive, NUMSA did not have to comply with the secret strike ballot requirement before embarking on strike action.[220]

The court importantly found that the court *a quo* applied an incorrect interpretation of the transitional provisions, and as a result, unjustifiably limited NUMSA's right to strike.[221] The court found that when any right implicates a fundamental right contained in the Constitution (the right to strike), a purposive interpretation had to be applied, and if the transitional provisions can be interpreted in a way that better promotes the right to strike, such an interpretation ought to be preferred.[222]

This judgment was correct in its approach and was even labelled by Greenhalgh as an inescapable outcome.[223] The court however failed to address critical legal questions in relation to secret strike balloting as identified by Van Eck.[224] These questions will be evaluated below.

5.4 Evaluation

There are three critical points of discussion regarding the above judgments. The first is an evaluation of the secret strike balloting requirement. The second is whether the Registrar should be able to deregister a trade union for its failure to conduct a ballot, or to provide the Registrar with processes incidental thereto. The third is what the future of secret strike balloting and the guidelines are in South Africa, after our courts have left numerous questions open for interpretation and development.

[219] (2020) 41 *ILJ* 2093 (LAC).
[220] (2020) 41 *ILJ* 2093 (LAC) 2099.
[221] (2020) 41 *ILJ* 2093 (LAC) 2099.
[222] (2020) 41 *ILJ* 2093 (LAC) 2097.
[223] Greenhalgh *JJS* (2023) 138.
[224] Van Eck *Litnet Akademies* (2020) 1037.

5.4.1 Evaluation of the transitional provisions

Even though the Labour Appeal Court in *NUMSA v Mahle Behr*[225] correctly rectified the interpretation of the transitional provisions, from a literal interpretation to a purposive interpretation, numerous crucial questions remained unanswered.

Firstly, what happens in an instance where the Registrar did consult trade unions, issued a directive on how to amend constitutions, and a union failed to comply with the directive? May this still result in a strike being interdicted based on section 19 of the 2018 LRAA as per the finding of *Johannesburg Metropolitan Bus Services (SOC) Ltd v DEMAWUSA.*[226]

In addressing this question, reference is made to the 1995 explanatory memorandum of the LRA which entailed that compulsory secret strike ballots provided fertile soil to interdict strikes, and therefore not introduced into the LRA.[227] Further reference is made to the attempted reintroduction of secret strike ballots under the 2012 Bill.[228] Clearly, if the legislature intended that secret strike ballots were once again to be made mandatory, similar wording to the 2012 Bill would have followed. Unless SAFTU was correct in arguing that the transitional provisions were a way of smuggling into law, ways to limit protected strike action[229] or as Fergus and Jacobs suspect, that it was the government's unstated purpose.[230]

Irrespectively, for as long as a purposive interpretation is adopted by our courts, as was done by the Labour Appeal Court in *NUMSA v Mahle Behr*[231], even if a directive by the Registrar has been issued, the right to strike will not be limited by the transitional provisions.

Fergus and Jacobs are correct when they argue that the court came to the incorrect conclusion in *Johannesburg Metropolitan Bus Services (SOC) Ltd v DEMAWUSA.*[232]

[225] (2020) 41 *ILJ* 2093 (LAC).
[226] (2019) 12 BLLR 1335 (LC) 1337.
[227] Explanatory Memorandum *ILJ* (1995) 303.
[228] Clause 6(*a*) of the Labour Relations Amendment Bill of 2012.
[229] Godfrey *et al ILJ* (2018) 2172.
[230] Fergus and Jacobs *ILJ* (2020) 770.
[231] (2020) 41 *ILJ* 2093 (LAC).
[232] (2019) 12 BLLR 1335 (LC) 1337.

Firstly, employees who strike, in non-compliance with section 19 of the 2018 LRAA, will technically be on a protected strike. Therefore, an interdict would have to follow for a failure to conduct a secret strike ballot in terms of section 158(1)(*b*) of the LRA. Notably, not an interdict for being on an unprotected strike in terms of section 68(1)(*a*) of the LRA.

Thus, an employee can be interdicted, despite being on a protected strike. Thus, no discipline or civil action can be taken against the employee, as the employee is on a protected strike.[233] But if an interdict is handed down, and an employee does not comply with the interdict (even though the employee is on a protected strike) an application may be lodged that such an employee be declared in contempt of court. Thus, a criminal sanction and a reintroduction to criminal proceedings as per the 1956 LRA.[234] Clearly, this system does not make any sense and was never the intention of the legislature.

The second crucial point to consider is whether it would be justifiable to limit the fundamental right to strike, to force trade unions to amend their constitutions to make provision for secret and recorded strike ballots.

This study argues that it would not be a justifiable limitation. The transitional provisions were legislated to improve inter-union governance. It is for this reason that once a constitution is indeed amended, no requirement of secret strike ballots in terms of section 19 of the 2018 LRAA is applicable.[235]

It is submitted that it was never the intention of the legislature to punish trade unions with interdicts at the hands of employers, to force them to change their constitutions, to make provision for secret and recorded strike ballots. Further, even if it was the legislature's unstated purpose, interdicts should not be enforceable.

[233] Section 67(4) of the LRA.
[234] Chapter 2 para 2.2.2 on page 9.
[235] Greenhalgh *JJS* (2023) 148.

Secret strike balloting is a matter between a trade union and its members. Reference is made to the matter of *MacDonald's Transport Upington (Pty) Ltd v AMCU*[236] in which the Labour Appeal Court held -

> Bluntly, what business is it of an employer, in such circumstances, to concern itself with whether membership dues are up to date or any other aspect of the relationship between individual employees and their union? In my view, there is no basis at all.[237]

Attempting to improve inter-union governance cannot be a ground for limiting the fundamental right to strike. Employers have no interest in relation to inter-union affairs. It is submitted that no irreparable harm, a requirement for an interdict,[238] can be suffered by an employer whereas a trade union and its members did not ballot. I therefore concur with Van Eck when he argues that such a limitation would not be justifiable.[239]

Tenza shares a different view and argues that balloting members prior to strike action would help to establish their willingness to embark on a strike. If the majority vote in favour of a strike, it would send a signal to the employer that workers are serious and that it must consider their concerns or demands in a serious light.[240] Whilst this might be true, and whilst it is a convincing argument, persuasion cannot be used as a justifiable reason to limit the fundamental right to strike.

The third crucial point for discussion is that the fundamental right to strike is afforded to employees in respect of the Constitution[241] and not to trade unions. How then can the failure of a trade union to hold a secret ballot, impact the right to strike that is entrusted to an individual by the Constitution?[242]

It is with regret that no party argued, before the Labour Court, or before the Labour Appeal Court, that the right to strike extends to individuals and not to trade unions. I strongly believe that if this point had been argued, the Labour Court would have come

[236] (2016) 37 *ILJ* 2593 (LAC).
[237] (2016) 37 *ILJ* 2593 (LAC) 2608.
[238] Grogan (2020) 414.
[239] Van Eck *Litnet Akademies* (2020) 1037.
[240] Tenza *Obiter* (2019) 280.
[241] Section 23(1)(*c*) of the Constitution.
[242] Van Eck *Litnet Akademies* (2020) 1037.

to a different conclusion. Alternatively, that the Labour Appeal Court would have at least elaborated on this point.

As Van Eck submits, it would not make any sense to place more procedural obligations on an individual who wants to strike, merely because such an individual belongs to a registered trade union.[243] It could never have been the intention of the legislature that persons who belong to registered trade unions, can have their fundamental right to strike limited by secret strike ballots, whereas persons who do not belong to registered trade unions, do not have to adhere to the same procedural requirements. Such an approach is discriminatory and will not withstand any judicial challenge. Placing more procedural obligations on an employee who belongs to a trade union, as opposed to a non-unionised employee, would amount to discrimination and would prejudice such an employee. Such conduct is prohibited by the LRA.[244]

5.4.2 Deregistration for non-compliance with the transitional provisions

Greenhalgh argues that the Registrar is best suited to fulfil the function of overseeing accountability of trade unions, to their members, in so far as it relates to decision making to embark on industrial action.[245] Furthermore, the matter of *DEMAWUSA v Registrar of Labour Relations*[246] as discussed above, was a "test case" to assess the Registrar's powers.[247]

I respectfully disagree with this submission in so far as it relates to the Registrar being best suited. Firstly, if the Registrar was best suited, why would the legislature have waited some 25 years to enforce the requirement of strike balloting in trade union constitutions by means of the Registrar[248] if the requirement was part of the LRA since its promulgation in 1996. Secondly, if the Registrar was best suited, why has nothing happened on new guidelines or a directive after the judgment of *NUMSA v Mahle Behr*[249] which was handed down 4 years ago.

[243] Van Eck *Litnet Akademies* (2020) 1030.
[244] Section 5(2)(*c*)(ii) of the LRA.
[245] Greenhalgh *JJS* (2023) 138.
[246] (2020) 41 *ILJ* 1968 (LC).
[247] Greenhalgh *JJS* (2023) 152.
[248] Section 95(5)(*p*) of the LRA.
[249] (2020) 41 *ILJ* 2093 (LAC).

It has been established that the court will balance the interests of the Registrar against the interests of the trade union and its members before deregistering a trade union.

I cannot foresee any instance in which the failure to provide the Registrar, even on multiple instances, with balloting process could lead to deregistration. Section 106(2A)(*b*) of the LRA will have to be purposively interpreted as the Constitution specifically provides for the fundamental right that a trade union may determine its own administration, activities, and programmes.[250] The failure to provide the Registrar with balloting process would not lead to the prejudice of the Registrar, or any other stakeholder. There is therefore no reason to intervene or limit a trade union's fundamental right to regulate its own affairs by means of balloting, at the threat of deregistration.

Even if, unlikely so, an employee is aggrieved by any process related to secret strike balloting, less damaging legislative remedies are available to such an employee. An employee can interdict a trade union for its failure to conduct a secret strike ballot in accordance with its constitution.[251] Such an approach will result in much less harm as opposed to a trade union being deregistered. I therefore recommend that the provisions compelling a trade union to provide the Registrar with balloting process[252] as introduced by the 2018 LRAA[253] be repealed as it serves no purpose.

5.4.3 The need for new guidelines

The court was correct in *AMCU v Minister of Employment & Labour*[254] when it held that numerous provisions under the guidelines were mandatory. Examples are that the guidelines entail that reasonable notice "must" be given to members of a ballot.[255] Further such notice "must" specify the time and place of the ballot.[256] Additionally the subject of the ballot "must" be clearly phrased and "must" be consistent with the terms of the dispute referral.[257] Also, ballot papers "must" be prepared in accordance with

[250] Section 23(4)(*a*) of the Constitution.
[251] Section 158(1)(*e*) of the LRA.
[252] Section 100(f) of the LRA.
[253] Section 10 of the 2018 LRAA.
[254] (2021) 42 *ILJ* 1538 (GP).
[255] Paragraph 9.1 of the guidelines.
[256] Paragraph 9.2 of the guidelines.
[257] Paragraph 9.3 of the guidelines.

any applicable union constitutional provisions.[258] Lastly, that ballots "must" not contain any information that would make it possible to identify voters.[259]

Clearly, none of the above requirements were guidelines. They were mandatory and prescriptive. It is submitted that the court was therefore correct in setting aside the guidelines, as they did not amount to just administrative action. In addition, it is extremely worrisome that the Minister did not use the correct legislative provisions when the guidelines were published.

As suggested, the guidelines were an overarching framework that wanted to see trade unions incorporate recorded and secret strike ballots into their internal processes.[260] Fergus and Jacobs correctly labelled these guidelines as complex and ambiguous and if they were not set aside, they would have most definitely led to litigation, even if real attempts at compliance were made.[261]

If a new directive and guidelines are ever implemented, which this study argues they should not, the Minister will have to be cautious to not impose mandatory obligations on trade unions on what must be done during balloting. If not, such a directive or guideline will merely once again be set aside based on the provisions of PAJA.

5.5 Conclusion

It is high time that employers and the Registrar, stop with their attempts at interdicting, and even in the case of the Registrar, deregistration, of trade unions based on the omission of trade unions to conduct secret strike ballots. The intention of the legislature has been clear from the outset of the LRA, that strike ballots were to improve inter-union governance.[262] Not for third parties to attempt interdicts and deregistration.

There is no evidence available to suggest that the transitional provisions have limited violence during strikes. In fact, the only evidence available is an abundance of case

[258] Paragraph 9.4 of the guidelines.
[259] Paragraph 9.5 of the guidelines.
[260] Greenhalgh *JJS* (2023) 146.
[261] Fergus and Jacobs *ILJ* (2020) 765.
[262] Explanatory Memorandum *ILJ* (1995) 303; see also chapter 4 para 4.3 on page 26.

law in which strikes were once again interdicted at the hands of employers, based on procedural technicalities brought about by the transitional provisions. A position similar to the position of the 1956 LRA. Interestingly, the only party that can interdict trade unions for their failure to hold ballots before strikes, are employees.[263] Despite this remedy, there is not one reported judgment related thereto. Clearly, the persons most affected by improved inter-union governance, i.e. trade union members, are not concerned with secret strike balloting, or keeping their trade unions bound thereto.

Fortunately, the Labour Appeal Court in *NUMSA v Mahle Behr*[264] put an end to the debate as to whether strikes can be declared unprotected for a trade union's failure to conduct a secret strike ballot. No further reported judgments followed the judgment from the Labour Appeal Court.

This is not to say that further litigation would not ensue based on non-compliance with the transitional provisions as per *Johannesburg Metropolitan Bus Services (SOC) Ltd v DEMAWUSA*[265] or once new guidelines, or a directive, is enacted. It is submitted that if interdicts are ever pursued, in the unlikely event of new guidelines or a new directive being promulgated, that such litigation must be dismissed and met with the appropriate cost orders. These applications have no place in the South African labour regime and must be discouraged at every available instance.

It is clear from this chapter that the transitional provisions have not served any purpose from the date of promulgation, save for interdicts at the hands of employers. There are no benefits to the transitional provisions in their current state, and therefore the need for the provisions to be repealed, or replaced with new provisions, as fully set out in this dissertation's recommendations in chapter 7.[266]

The following chapter will discuss Australia's position on strikes and mandatory strike balloting and will outline why such a system is too complex, and why it will not serve to be effective in South Africa.

[263] S 95(5)(*q*) read with s 158(1)(*a*)(i), (iii) and (*e*) of the LRA.
[264] (2020) 41 *ILJ* 2093 (LAC).
[265] (2019) 12 BLLR 1335 (LC) 1337.
[266] Chapter 7 para 7.3 on page 67 - 68.

Chapter 6

Strikes and strike ballots in Australia

6.1 Introduction

The strike and strike balloting requirements differ substantially in Australia, when compared with the South African legal position. These differences will be discussed throughout this chapter. This dissertation focuses on Australia in its comparative analysis as Australia is also a member of the ILO. Like South Africa, Australia has also adopted ILO Conventions 87 and 98.[267]

It is imperative for this study to compare the Australian strike and strike balloting requirements with South Africa, as Australian strike and strike balloting requirements has been criticised by several Australian authors, in which numerous recent arguments have been made for a total reform. These criticisms and arguments will be evaluated in this chapter.

In September 2022, the newly elected Australian federal Labour Government convened the "Jobs + Skills Summit" which amongst others, highlighted the pressing need for a reform of Australian strike laws. It was during this summit that Australian Government acknowledged the need to work with business and unions to revitalise good faith negotiation, to obtain genuine agreements in Australian workplaces in relation to wages and other terms and conditions of employment.[268]

[267]https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102544 (date of use - 31 May 2024 at 11h05)
[268] Forster and McCrystal *UNSWLJ* (2023) 1107.

It is submitted that one of the genuine ways to obtain agreements, is by virtue of strike action. This is however problematic due to the stringent Australian strike and strike balloting requirements, before being able to participate in industrial action.

Forster and McCrystal argue that there is a need for reform to develop employees' right to strike.[269] Peetz argues that the Australian legal system is highly restrictive concerning the circumstances in which it is possible to take lawful industrial action.[270] McCrystal even went as far as to publish a recent article titled "Why is it so hard to take lawful strike action in Australia."[271]

This chapter will illustrate the difficulties faced when attempts are made to engage in industrial action in Australia. It will also emphasise how strike balloting in its current form in Australia, merely adds to a long list of irrational requirements.

This chapter will also consider the current legislative framework governing strikes and strike balloting in Australia, whether this framework provides for sound regulation, the view of the ILO on Australian strike law, and why the position regarding strikes and strike balloting in Australia will not serve to be effective in South Africa.

6.2 Legislative framework

6.2.1 Introduction

McCrystal argues that it is very hard for Australian employees to take industrial action. Additionally, that the circumstances that may give rise to lawful strike action are very narrow, and how it is easier in Australia to identify unlawful strikes, as opposed to regulating lawful strike action.[272]

Strike action is unlawful under Australian common law. An employee will repudiate their contract of employment under Australian common law, should such an employee fail to obey a lawful and reasonable command, in support of an industrially motivated

[269] Forster and McCrystal *UNSWLJ* (2023) 1132.
[270] Peets *AJLL* (2016) 143.
[271] McCrystal *JIR* (2019) 129 - 144.
[272] McCrystal *JIR* (2019) 130.

agenda.[273] A position similar to the South African common law position, as discussed in chapter 4.[274]

The Fair Work Act 28 of 2009 ("FW Act") governs industrial relations in Australia and has codified the right to embark on industrial action. The FW Act is a voluminous piece of legislation consisting of 800 sections, as opposed to the LRA in South Africa consisting of 214 sections.

One of the main objectives of the FW Act is to provide workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations.[275]

The FW Act does not provide for the definition of a strike, which differs from South African legislation.[276] The FW Act however provides for the definition of industrial action. Industrial action under the FW Act is defined as the following actions –

> (a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
> (b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
> (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
> (d) the lockout of employees from their employment by the employer of the employees.[277]

The FW Act recognises three instances where industrial action would be protected, subject to complying with legislative requirements. Firstly, where employees claim action for an agreement[278] (similar to strikes in South Africa).[279] Secondly is where employees respond to action for an agreement[280] (similar to defensive strikes by

[273] McCrystal *JIR* (2019) 131.
[274] Chapter 4 para 4.2 on page 24.
[275] Section 3(*a*) of the FW Act.
[276] Chapter 4 para 4.3 on page 25.
[277] Section 19(1)(*a*-*d*) of the FW Act.
[278] Section 408(*a*) of the FW Act.
[279] Section 64(1)(*b*) of the LRA.
[280] Section 408(*b*) of the FW Act.

employees in South Africa).[281] Thirdly where employers respond to action for the conclusion of an agreement[282] (similar to defensive lockouts in South Africa).[283]

For purposes of this dissertation, only the requirements for industrial action where employees claim for an agreement (strikes in South Africa) will be analysed. A point of commencement would be the powers of the Australian Fair Work Commission ("the FWC"). In terms of the FW Act, the FWC has a long list of functions that the FWC must perform.[284] The only function of the FWC that will be discussed in this chapter is that of industrial action.[285]

The FWC has the power under the FW Act to authorise industrial action.[286] Similar to the position in South Africa, where the LRA empowers the CCMA to issue a strike certificate.[287] The requirements to embark on protected industrial action in Australia are vastly different as opposed to South Africa. These requirements are discussed below.

6.2.2 The requirements for protected industrial action under the FW Act

The requirements that must be adhered to before strike action would be protected under the FW Act are as follows.

Firstly, is that the bargaining representative must attempt good faith bargaining with the employer.[288] In the matter of *Australian Postal Corporation v CEPU*[289] the FWC held that this requirement may lead to the non-issuing of a strike ballot order, if it can be shown that good faith bargaining did not take place.[290]

What amounts to good faith bargaining, remains unanswered by the FW Act. Creighton *et al* however argue what will amount to good faith bargaining is a question

[281] Section 64(1)(*c*) of the LRA.
[282] Section 408(*c*) of the FW Act.
[283] Section 64 of the LRA.
[284] Section 516(1)(*a* - *r*) of the FW Act.
[285] Section 516(*j*) of the FW Act.
[286] Section 459(1)(*a*) of the FW Act.
[287] Section 64(1)(*a*)(i) of the LRA.
[288] Section 228 of the FW Act.
[289] (2009) 189 *IR* 262.
[290] (2009) 189 *IR* 262 para 29.

of fact to be determined having regard to all of the facts and circumstances of a particular case. It requires an assessment of the subjective intention of the applicant. At issue is whether he or she is trying to reach an agreement at that enterprise, or whether their conduct is motivated by other considerations.[291]

The second requirement is that once good faith bargaining fails, the bargaining representative must apply to the FWC, demonstrating that the bargaining has failed, and seek an order to conduct a ballot to vote on the proposed industrial action.[292] Employers have a right to oppose such an application and frequently do.

As pointed out by McCrystal, this often leads to considerable delays in obtaining a ballot order.[293] A study conducted by Orchiston *et al* identified three strategies by employers in respect of opposing ballot order applications. These are forestalling industrial action, undermining momentum to frustrate a union's ability to use protected industrial action, and creating fatigue to reduce employees' appetite to strike.[294] Most objections made have been found to be without substance.[295] Such strategies should not be permissible, especially since one of the objectives of the FW Act is to provide laws that are fair to Australian employees.

The third requirement is that if the application to hold a ballot is successful, a secret ballot referendum must be held for all members covered by the agreement, that is the subject of proposed industrial action. The ballot must outline the exact form of the proposed industrial action and must then be approved by the members taking the ballot.[296] Creighton *et al* argue that the simple idea that unions should ballot before taking industrial action has resulted in a complex, formalistic, and highly technical legal regime. Furthermore, that these requirements have the effect of making strike action more difficult in practice.[297]

[291] Creighton *et al AUJL* (2016) 163.
[292] Section 437 of the FW Act.
[293] McCrystal *JIR* (2019) 135.
[294] Orchiston *et al MULR* (2019) 621.
[295] Orchiston *et al MULR* (2019) 629.
[296] Section 459(1)(*a*) of the FW Act.
[297] Creighton *et al ILJ* (2019) 358.

Orchiston *et al* however highlight that one of the unexpected positive consequences of mandatory strike ballots is that they present an opportunity for unions to exert pressure in bargaining, as it can increase leverage and threat of industrial action, without embarking on actual industrial action.[298] An argument similar to the argument of Tenza in support of secret strike ballots in South Africa, as discussed in chapter 5.[299]

Orchiston *et al* do, however, recognise that an unsuccessful ballot can damage a union's credibility and undermine its bargaining position.[300] Orchiston *et al* furthermore recognise that the ballot requirements impose a significant barrier to unions and their members exercising their right to take lawful industrial action. Additionally, that the real reason for ballots is to constrain access to protected industrial action, by making it harder for trade unions to strike.[301]

The fourth requirement is that a majority of members balloting, must return their votes.[302] A majority of those returned ballot papers must be in favour of the proposed strike action.[303] A study conducted by Creighton *et al* submits that whilst employees do not generally vote against industrial action, they fail to vote. As a result, a quorum is the most common reason as to why protected industrial action is not approved.[304] This presents a shortcoming in the Australian ballot system. A quorum not being reached should not be the reason why industrial action cannot proceed.

A viable alternative as suggested by Orchiston *et al* would be a system where trade unions are allowed to conduct their own balloting processes within an appropriate regulatory framework, without first having to have to apply to the FWC.[305] This will allow trade unions to formulate strategies to have the majority of employees participate in ballots, in a manner most practical for a trade union and its members. This will naturally result in higher balloting participation.

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[298] Orchiston *et al MULR* (2019) 608.
[299] See chapter 5 para 5.4.1 page 42.
[300] Orchiston *et al MULR* (2019) 611.
[301] Orchiston *et al MULR* (2019) 630.
[302] Section 459(1)(b) of the FW Act.
[303] Section 459(1)(c) of the FW Act.
[304] Creighton *et al ILJ* (2019) 359.
[305] Orchiston *et al MULR* (2019) 631.

The fifth requirement is that the bargaining representative only has 30 days to initiate the industrial action, from the date at which the ballot results are declared.[306] If the 30 days lapse, then the action becomes illegal and may be subject to penalties as well as suspension and/or termination orders.[307] As submitted by Bornstein, this is problematic in that only 30 days are provided, despite the balloting process often taking weeks to complete.[308] It is submitted that the process to get to this stage is already a strenuous one, met with a large number of procedural requirements that must be adhered to. The balloting process should at least be amended to provide for 60 days, alternatively, the requirement should be that a ballot must be held for as long as the dispute remains live.

The last requirement entails that the bargaining representative must provide a detailed notice, and disclosure, of the nature of the industrial action, including the timing of the action. This must be done at least three days before the anticipated industrial action.[309]

The above requirement was recently pronounced on by the Australian High Court in *Esso Australia v AWU*[310] where the trade union AWU's industrial action was declared unprotected.[311] In this matter AWU in their notice of industrial action, informed Esso that the nature of their industrial action would be the "deisolation of equipment". AWU believed that this would include all the steps necessary to embark on a strike, including said deisolation. It turned out that the deisolation of equipment had a very technical meaning attached to it, namely "to turn the equipment back on". The High Court accepted the employer's interpretation and held that the strike action was unprotected.[312]

It is submitted that this judgment represents a position where employees act in a *bona fide* manner to ensure that all the stringent procedural steps were adhered to before

[306] Section 459(1)(d) of the FW Act.
[307] Section 418 of the FW Act.
[308] Bornstein "Requirements for the Right to Strike" (2018) 5 - accessed at - https://www.monash.edu/__data/assets/pdf_file/0008/1441196/Josh-Bornstein-paper.pdf 5. (date of use – 02 May 2024 at 09h42).
[309] Section 414 of the FW Act.
[310] [2017] HCA 54.
[311] [2017] HCA 54 para 64.
[312] McCrystal *JIR* (2019) 137.

Striking, merely for strike action to be declared unprotected, based on a technical meaning such as “deisolation of equipment”. Put differently, strike action may be declared unprotected, merely because of a technical term on how the strike would take place. Whilst it is submitted that a strike notice must clearly indicate how strike action would occur, it should not be overly technical to allow for abuse due to technical definitions. Trade unions or parties wanting to embark on industrial action, should rather not use such technical terms in their strike notices, and keep it confined to a simple explanation of how the industrial action would take place.

McCrystal argues that where a statute appears to override common law rights, the court will not presume that this is the intended effect unless this intention is clearly expressed. This presumption of interpretation has been used by the courts to construe provisions of the FW Act in a manner that protects common law rights and remedies over an approach that would protect the right of workers to take lawful industrial action.[313]

It is clear from the above requirements that several complexities exist that create a position where protected strike action is almost untannable. It is against this background that McCrystal argues that strike action has become extremely difficult in Australia, even for the most seasoned industrial relations practitioners.[314] Bornstein likewise submits that the technical requirements to embark on strike action are a lawyer's picnic, when arguing for relief against employees’ wanting to embark on strike action, thus enabling employers to frustrate and delay strike action.[315] Creighton *et al* argue that historically Australia never had any issue of coercion or intimidation to motivate strikes, and in the absence of such evidence, the ballot system is attempting to solve a system, that never existed to begin with.[316]

[313] McCrystal *JIR* (2019) 131-132.
[314] McCrystal *JIR* (2019) 129.
[315] Bornstein “Requirements for the Right to Strike” (2018) 5 - accessed at - https://www.monash.edu/__data/assets/pdf_file/0008/1441196/Josh-Bornstein-paper.pdf 5. (date of use – 02 May 2024 at 09h42).
[316] Creighton *et al AUJL* (2016) 169.

6.2.3 Limitations on the right to strike and orders suspending or terminating strikes

McCrystal argues that strikes in Australia are made even more difficult, due to how easily protected industrial action can be stopped.[317] A discussion of instances giving rise to when industrial action may be taken, and strike suspension and termination orders, follows below.

Employees in Australia can only strike during the window after the expiry of the term of an enterprise agreement, with an employer, only where employees seek a further agreement with that employer.[318] Employees cannot bargain for industry-wide outcomes and can merely relate their demands to a single workplace.[319]

The above instances are materially different in Australia, as opposed to South Africa. In South Africa, employees may strike over matters of mutual interest,[320] a term that has been found to mean "any issue concerning employment."[321] Furthermore, South Africa encourages sectoral bargaining, and it is one of the main purposes of the LRA.[322]

The FW Act provides for instances where industrial action may or must be suspended or terminated as will be discussed below. In South Africa, these powers are specifically reserved for the Labour Court,[323] and not the CCMA. The instances where the Labour Court would intervene in protected strike action in South Africa, are also much less, as opposed to the grounds in Australia as discussed below.

The FWC may on its own accord,[324] or on application,[325] suspend protected industrial action in instances where said action is causing, or likely to cause employers/employees significant economic harm.[326] Also in instances where harm is

[317] McCrystal *JIR* (2019) 137.
[318] Section 409 of the FW Act.
[319] Section 413(2) of the FW Act.
[320] Section 134(1) of the LRA.
[321] *De Beers Consolidated Mines v CCMA & Others* [2000] BLLR 578 (LC) 580.
[322] Section 1(*d*)(ii) of the LRA.
[323] Section 68 of the LRA.
[324] Section 423(7)(*a*) of the FW Act.
[325] Section 423(7)(*b*) of the FW Act.
[326] Section 423(2 - 4) of the FW Act.

imminent.[327] Additionally in instances where the industrial action has engaged for a protracted period and the dispute will not be resolved in the likely future.[328]

The FWC must on its own accord,[329] or on application,[330] suspend or terminate industrial action in instances where protected industrial action has threatened, is threatening, or would threaten to endanger the life, the personal safety or health, or the welfare of the population or part of it.[331] Additionally whereas protected industrial action has threatened, is threatening, or would threaten to cause significant damage to the Australian economy or a part of it.[332]

There are also two instances where the FWC must on its own accord, or on application, suspend protected industrial action (notably not terminate as discussed above). The first instance is that of "cooling off"[333] where the FWC is satisfied that suspension is appropriate after taking into account that suspension would be beneficial to the bargaining representatives.[334] Furthermore, when the FWC finds suspension appropriate due to the duration of industrial action.[335] Lastly, and very flexibly, allowing for possible abuse, is any other matter that the FWC considers relevant.[336]

The second instance where the FWC must suspend protected industrial action is where the protected industrial action presents significant harm to a third party. Instances where suspension would occur are where there is damage to the ongoing viability of an enterprise carried on by the third party.[337] Where the industrial action disrupts the supply of goods or services to an enterprise carried on by the third party.[338] Additionally where the industrial action reduces the third party's capacity to fulfil a

[327] Section 423(5) of the FW Act.
[328] Section 423(6) of the FW Act.
[329] Section 424(2)(*a*) of the FW Act.
[330] Section 424(2)(*b*) of the FW Act.
[331] Section 424(1)(*c*) of the FW Act.
[332] Section 424(1)(*d*) of the FW Act.
[333] Section 425 of the FW Act.
[334] Section 425(1)(*a*) of the FW Act.
[335] Section 425(1)(*b*) of the FW Act.
[336] Section 425(1)(*d*) of the FW Act.
[337] Section 426(4)(*a*) of the FW Act.
[338] Section 426(4)(*b*) of the FW Act.

contractual obligation.[339] Lastly, where the industrial action causes other economic losses to the third party.[340]

McCrystal argues that the above suspension and termination grounds have not caused significant concern, apart from section 424 of the FW Act, which entails that strikes must be suspended if it threatens to endanger the welfare of the population or part of it. McCrystal correctly identifies that almost all successful industrial actions, in any services sector, has an impact on third parties. Therefore, that this ground of suspension has the potential to bring to an end a whole range of lawful industrial action, particularly when that action does as planned and intended, and causes disruption.[341]

6.3 Evaluation

A reading of the above requirements before embarking on strike action, read together the instances where strikes may be suspended or terminated, clearly shows why Australian authors argue that strikes in Australia will suffer an "imminent death".[342]

This is further highlighted by the findings of the ILO. In 1999 the ILO criticised Australia for limiting the right to strike to a single business, by finding that such limitation inhibits the right of workers and their organisations to promote and protect economic and social interests.[343]

In 2012 the ILO Committee of Experts requested that the Australian government take steps to ensure that the right to strike is not restricted by unduly challenging and complicated strike ballot procedures.[344]

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[339] Section 426(4)(*c*) of the FW Act.
[340] Section 426(4)(*d*) of the FW Act.
[341] McCrystal *JIR* (2019) 131-132.
[342]Bornstein "Requirements for the Right to Strike" (2018) 5 - accessed at - https://www.monash.edu/__data/assets/pdf_file/0008/1441196/Josh-Bornstein-paper.pdf 5. (date of use – 02 May 2024 at 09h42).
[343] Committee of Experts' Report of the Committee of Experts on the Applications of Conventions and Recommendations' (International Labour Conference, 87th Session, 1999) 205
[344] Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILC, 101st Session, March 2012, at 60; Case No 2698 (Australia), 357th Report of the CFA, 2010, [209].

In addition to the ILO, the United Nations Committee of Economic Social and Cultural Rights ("CESCR") in 2009 also expressed concern over the quorum requirement related to strike ballots. The CESCR recommended that Australia should remove in law and practice, obstacles and restrictions to the right to strike, and to remove the secret ballot requirements for workers who wish to take industrial action.[345]

It is for this reason that Peetz argues that the toughness and tightening of strike laws in Australia is internationally unusual and widely seen as restricting the right to strike.[346] Additionally that strike laws are used by the state to attempt to control unions, reduce militancy, shift the balance of power, and reduce over-conflict.[347]

McCrystal argues that if Australia is to maintain a system of voluntary collective bargaining in which the interests of workers are respected and protected, the legislation must permit robust bargaining supported by timely and straightforward access to industrial action for employees. Therefore, an overhaul of the strike and strike balloting requirements.[348]

6.4 Conclusion

I concur with every Australian author that has been referenced in this chapter to state that it is extremely difficult to take strike action in Australia. One of the major problems in Australian strike law, is the strike balloting requirement. This goes against the very principles of the ILO that entails that that strike ballots will be in accordance with the principles of freedom of association, when they do not render the right to embark on strike very difficult, or even impossible in practice.[349]

It is therefore unsurprising that the CESCR has recommended that Australia remove their strike ballot requirements. Additionally, why the ILO has also held that the right to strike in Australia should not be unduly restricted by complicated balloting procedures.

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[345] CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Australia, 22/5/2009, UN doc No E/C.12/AUS/CO/4, at [19].
[346] Peets *AJLL* (2016) 152.
[347] Peets *AJLL* (2016) 153.
[348] McCrystal *JIR* (2019) 141.
[349] See chapter 3 para 3.3 on page 20.

When strikes in Australia do not proceed, it is mostly because of the quorum requirement during balloting.[350] The main problem as to why quorums are not reached, is due to the manner in which the Australian system overregulates this requirement.

This chapter has discussed how the balloting requirement should change from a system where it is overregulated by legislation, to a system which is robust, timely, straightforward and done in accordance with the rules of a trade union concerned.[351] This will be the only way in which Australia would be able to comply with two of the requirements as set out in the FW Act, namely to provide laws that are fair for Australian employees, and to comply with the obligations placed on Australia by international labour law.[352]

It is clear that South Africa cannot learn any lessons from Australian strike law in its current state.

South African trade unions will never comply with the Australian requirements. The process of first having to apply to the CCMA, then having to prove good faith bargaining before the CCMA, is not a process any trade union would follow. Additionally having to conduct ballots, then have to obtain a majority quorum, and then from that quorum achieve a majority vote, too then only issue a notice on when strike would occur, is likewise a process that no trade union would follow. Trade unions will furthermore not condone the suspension of strikes when they are successful, and causes disruption, as intended.

This system is unjust and will be found to be unconstitutional in South Africa as our Constitution not only provides for the right to strike,[353] but also for the right that everyone enjoys fair labour practices.[354] These requirements will merely result in

[350] Creighton *et al ILJ* (2019) 359.
[351] McCrystal *JIR* (2019) 141.
[352] Section 3(*a*) of the FW Act.
[353] Section 23(2)(*c*) of the Constitution.
[354] Section 23(1) of the Constitution.

wildcat, violent and unprotected strikes, as was the position in South Africa when strike balloting was mandatory, as was discussed in chapter 2.[355]

South Africa furthermore strives towards a system of sectoral bargaining, whereas the Australia bargaining regime focuses on individual employers. Most of the sectors in South Africa are regulated by bargaining councils (Steel, Road Freight, Motor, Civil Engineering, Restaurants, Building, etc). It will be impossible to implement an Australian system in South Africa, as this will impact millions of employees who is regulated by their respective bargaining councils. If collective bargaining is now to occur for plant level disputes, at every employer in South Africa, it would merely result in an influx of strikes in South Africa, which will not be to the benefit of employers or employees. This requirement, read with the strike balloting requirement, will also never work in South Africa, as trade unions will never conduct secret strike ballots for every plant level dispute.

In the following chapter, my conclusion, and recommendations on secret strike balloting in South Africa will be reached. It will be argued how the transitional provisions, and by virtue the guidelines, have not assisted any party since the date of enactment. Furthermore, on why the transitional provisions should be repealed. A further recommendation is made that if the transitional provisions are not repealed, how it should be replaced by new transitional provisions, to provide clarity and certainty.

[355] See chapter 2 para 2.3 page 12.

Chapter 7

Conclusion and recommendation

7.1 Introduction

The purpose of this study was to provide guidance on the 2018 LRAA transitional provisions, which reintroduced secret strike ballots.[356] Secret strike ballots impact employees, employers, trade unions, employer organisations, and several other stakeholders. It was therefore imperative for this study to determine whether the transitional provisions provide for sound regulation. This evaluation was carried out with a view of answering the questions set out in chapter 1 of this dissertation.[357]

7.2 Conclusion on legal questions raised by this dissertation

There were 5 questions posed which aimed to determine whether secret strike ballots would serve to be effective under the current South African strike law regime. It will become clear from these questions, and their findings as discussed below, that secret strike ballots in its current state does not provide for sound regulation.

[356] Section 19 of the 2018 LRAA.
[357] Chapter 1 para 1.2 on page 4.

7.2.1 What lessons can be learned from the pre-1994 South African regime in relation to secret strike ballots?

The 1956 LRA was the first legislation that introduced secret strike ballots in South Africa.[358] The intention behind its enactment, that it would reduce violence during strikes, due to reflecting the majority of employees wills concerned,[359] never came to fruition. One of the largest strikes in South Africa occurred under this regime when more than 100,000 employees engaged in a violent strike in Kwa-Zulu Natal in 1973.[360] Secret strike ballots were overly complicated, and never properly defined by the 1956 LRA.

Only *in NUMSA v Jumbo Products CC*[361] a judgment handed down 35 years after the enactment of the 1956 LRA, were the requirements for lawful (notably not protected) balloting finally set out by means of a court judgment.

No employee could be expected to study court judgments to know how to ballot. Due to the lack of properly defined requirements, employees were interdicted, dismissed and could even be prosecuted.[362] This study therefore aligns with the arguments of Du Toit *et al* that strike balloting under the 1956 LRA served to increase the incidence of illegal strikes, heightening tension between adversaries and ultimately bedevilled the resolution of disputes.[363] It is for this very reason that compulsory secret strike balloting was not reenacted into the LRA, as confirmed by the LRA's explanatory note.[364]

It is therefore clear that the only lessons that could have been gained by the 1956 LRA, was that secret strike ballots did not reduce violence, made strikes extremely difficult without justification, and should not be compulsory in South Africa.

[358] Myburg *ILJ* (2004) 962.
[359] *CWIU v Bevaloid* (1988) 9 *ILJ* 447 (IC).
[360] Webster *GLJ* (2017) 142.
[361] (1991) 12 *ILJ* 368 (IC) 372.
[362] Section 65 of the 1956 LRA.
[363] Du Toit *et al* (2003) 241.
[364] Explanatory Memorandum *ILJ* (1995) 303.

7.2.2 What is the view of the ILO on strikes and secret strike ballots; and how does their view impact the position in South Africa?

The ILO Committee of Experts are of the view that secret strike ballots will not be in contravention of Convention 87 (Freedom of Association and Protection of the Right to Organise) for as long as it does not render strike balloting extremely difficult, or even impossible in practice.[365] Despite a challenge to their authority with regards to strike law, said challenge which is currently serving before ICJ,[366] their views still remain extremely important and has been referenced in numerous jurisdictions, including South Africa in *NUMSA & others v Bader Bop.*[367]

The position under the 1956 LRA, and once again the initial position under the 2018 LRAA, prior to partial clarification by the Labour Appeal Court in *NUMSA v Mahle Behr*[368] was that secret strike ballots renders the right to strike extremely difficult. Not only because of the poor wording, and requirements related to strike ballots under both pieces of legislation, but due to its practicality in the South African labour market.

It is therefore argued that secret strike balloting, under the transitional provisions, does not comply with the Recommendations of the ILO Committee of Experts. The impact being that it should be repealed, or replaced with new provisions, as one of the main purposes of the LRA is to give effect to the obligations that South Africa incurred being a member of the ILO.[369]

7.2.3 Do secret strike ballots present a limitation on the fundamental right to strike?

The right to strike is a fundamental right that is constitutionally entrenched.[370] The LRA was enacted to give effect to the fundamental right to strike.[371] The LRA furthermore provides for the substantive,[372] procedural,[373] and definitional[374]

[365] Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations (ILO, Geneva 1983) 170.
[366] See chapter 3 para 3.2 on page 18.
[367] (2003) 24 *ILJ* 305 (CC) 323 - 324.
[368] (2020) 41 *ILJ* 2093 (LAC).
[369] Section 1(*b*) of the LRA.
[370] Section 23(1)(*c*) of the Constitution.
[371] Section 1(*a*) of the LRA.
[372] Section 64 of the LRA.
[373] Section 65 of the LRA.
[374] Section 213 of the LRA.

limitations on the right to strike as confirmed in the matter of *SATAWU v Moloto.*[375] Strike balloting has not, and will not, serve as a justified limitation.

The first interpretation applied to the transitional provisions was that of a literal interpretation, which was clearly wrong. Had the Labour Court applied a purposive approach when considering the first interdict application in *Mahle Behr v NUMSA*[376] it would not have granted an interdict, for the failure to comply with the transitional provisions.

Due to the error made in *Mahle Behr v NUMSA*[377] the court came to the same conclusion in *Air Chefs v NUMSA.*[378] To exacerbate matters, came the judgment of *Johannesburg Metropolitan Bus Services v DEMAWUSA*[379] in which it was found that an interdict for the failure to comply with the transitional provisions could follow under section 19 of the 2018 LRAA, even though an employee would be on a protected strike.

Arguments presented throughout this study show that such a conclusion is wrong. An employee cannot be disciplined, and neither can civil action be instituted, yet an employee can be held in contempt of court. This had never been the intention of the legislature. It remains worrisome that this position remains unsettled law. It is however submitted that similar judgments should not follow, as the Labour Appeal Court at least provide some guidance on how the transitional provisions are to be interpreted.

In *NUMSA v Mahle Behr*[380] the Labour Appeal Court held that the transitional provisions did present a limitation on the fundamental right to strike, and therefore had to be purposively interpreted.

Unfortunately, the court failed to address numerous other legal questions that were addressed in this dissertation. It is argued that the transitional provisions should never

[375] (2012) 33 *ILJ* 2549 (CC).
[376] (2019) 40 *ILJ* 1814 (LC).
[377] (2019) 40 *ILJ* 1814 (LC).
[378] (2020) 41 *ILJ* 428 (LC).
[379] (2019) 12 BLLR 1335 (LC).
[380] (2020) 41 *ILJ* 2093 (LAC).

give rise to interdicts at the hands of employers, irrespective of whether such an interdict follows in terms of section 19 of the 2018 LRAA or section 68(1)(*a*)(i) of the LRA. It is submitted that the protection afforded under the LRA that a failure to ballot, cannot give rise to legal challenges, affecting the legal status of a strike,[381] must be interpreted to extend to the transitional provisions.

It is furthermore argued that the only time in which an interdict can follow against a trade union for omissions in respect of strike balloting, should be at the hands of an employee, to improve inter-union governance.[382]

Finally, that the fundamental right to strike as enshrined in the Constitution is afforded to employees, not to trade unions. A trade union's failure to conduct a secret and recorded strike ballot is a matter between the trade union and its members. Employers have no right to interfere with trade union matters as confirmed by *MacDonald's Transport Upington (Pty) Ltd v AMCU.*[383] It is concluded that a trade union's failure to ballot, cannot result in a limitation on an employee's fundamental right to strike. To interdict registered trade unions for their failure to ballot, whereas unregistered and non-union employees do not have to adhere to the same requirement, is nothing less than discriminatory.

7.2.4 Will secret strike balloting limit violence during strikes?

This dissertation concludes that the transitional provisions, and the guidelines, which accompanied the transitional provisions did not limit any violence during strike action. It also did not serve to the benefit of any stakeholder, except for employers attempting interdicts. I concur with Fergus and Jacobs when they submit that mandatory strike ballots will have the opposite effect of reducing violence during strikes, as they only serve to frustrate employees, which can lead to more violent and wildcat strikes.[384]

As Benjamin correctly submits, no evidence exists that proves that strikes would be less violent, due to a secret strike ballot.[385] On the contrary, the only evidence

[381] Section 67(7) of the LRA.
[382] Section 95(5)(*q*) read with s 158(1)(*a*)(i), (iii) and (*e*) of the LRA.
[383] (2016) 37 *ILJ* 2593 (LAC).
[384] Fergus and Jacobs *ILJ* (2020) 766.
[385] Benjamin *ILJ* (2014) 11.

available suggests that strike ballots resulted in an influx of violent strikes under the 1956 LRA.

Whilst it is recognised that violence in the South African strike regime needs to be contained and minimised, it is concluded that secret strike ballots will not serve this purpose. Numerous other provisions were promulgated with the 2018 LRAA,[386] and it is suggested that another study may serve to determine whether these measures may serve to reduce violent strikes.

7.2.5 What lessons can be learned from Australian strike law and its stance on mandatory secret strike balloting?

This study concludes that it is extremely difficult to take strike action in Australia. One of the major problems in Australian strike law, is the strike balloting requirement. This goes against the very principles of the ILO that entails that that strike ballots will be in accordance with the principles of freedom of association, when they do not render the right to embark on strike very difficult, or even impossible in practice.[387]

The CESCR and the ILO were therefore correct to recommend that Australia do away with mandatory strike balloting requirements.[388]

The Australian system is overregulated, has been labelled as extremely difficult, on life support, and how it is easier to identify unlawful strikes, as opposed to regulating lawful strike action.[389] This is a system that would not work in South Africa. There are therefore no lessons that South Africa can learn from Australia in relation to strikes and strike balloting.

This study's recommendation on secret strike balloting in South Africa follows hereunder.

[386] See chapter 1 para 1.3 on page 5.
[387] Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations (ILO, Geneva 1983) 170.
[388] Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILC, 101st Session, March 2012, at 60; Case No 2698 (Australia), 357th Report of the CFA, 2010, [209].
[389] See chapter 6 para 6.1 on page 48.

7.3 Recommendation

Van Eck argues that the transitional provisions should be repealed.[390] I entirely support this view. Strike balloting has become a non-issue for the Registrar and the legislature. This is evident from the fact that no new guidelines, or a directive, has been gazetted 4 years after the judgment of *NUMSA v Mahle Behr.*[391]

It furthermore has, and continues to, fail its alleged goal of reducing violent strikes. The transitional provisions, in their current form, merely amount to legislation that serves no valid purpose.[392]

If the transitional provisions are not repealed, they should at least be replaced with new provisions. The new provisions should shift the onus from the Registrar to consult trade unions, to rather placing the onus on trade unions, to consult the Registrar. Doing so will uphold the fundamental right of trade unions to regulate their own affairs.[393]

It is furthermore recommended that the provision compelling trade unions to provide the Registrar with secret strike balloting process,[394] be repealed. As argued in this dissertation, this provision provides the Registrar with legislative powers which should not withstand any judicial challenge.

It is recommended that if the transitional provisions are not repealed, that the transitional provisions be replaced with new provisions. Fergus and Jacobs have provided valid proposals on how the transitional provisions are to be amended.[395] I have used these recommendations, in addition to my arguments presented throughout this dissertation, to formulate my draft proposal for a new section 19 of the 2018 LRAA. This recommendation entails that section 19 of the 2018 LRAA provide as follows -

[390] Van Eck *Litnet Akademies* (2020) 1039.
[391] (2020) 41 *ILJ* 2093 (LAC).
[392] Van Eck *Litnet Akademies* (2020) 1039.
[393] Section 23(4)(*a*) of the Constitution.
[394] Section 100(*f*) of the LRA.
[395] Fergus and Jacobs *ILJ* (2020) 775.

19.(1) The national office bearers of a registered trade union must, within 180 days of the commencement of this Act, in so far as such a trade union does not provide for recorded and secret strike ballots in their constitutions –

(a) consult the Registrar to reach an agreement on the most appropriate means to amend their constitutions to provide for secret and recorded strike ballots;

(b) To amend their constitutions in accordance with the agreement reached; or

(c) If no agreement is reached –

(i) Await a directive of the Registrar which would provide guidance on how to amend such a trade union's constitution for the inclusion of secret and recorded strike ballots, with the applicable time frames involved;

(ii) Amend the constitution in accordance with the directive received, subject to subsection 2

(2) The directive as issued by the Registrar in terms of subsection 1(*c*) shall –

(a) Not contain any mandatory processes that trade unions are to adhere to when conducting secret strike balloting;

(b) Consist merely of guidelines on how secret strike ballots may be conducted without imposing any substantive or procedural obligations.

(3) Non-compliance with any provision under this section shall not result in any litigation, challenging the protected status of strike action.

The above amendment will remove any interdict attempts by employers for a failure to comply with the transitional provisions. Instead, trade unions can be forced by means of interdicts to amend their constitutions, without affecting the protected status of strikes.

A trade union will furthermore have the power to amend its constitution in the way it deems fit, while being guided by the Registrar on how such an amendment is to be affected. This will uphold a trade union's fundamental right to regulate its own affairs.

This dissertation concludes that definitive and immediate changes are required to the transitional provisions. Until such a date in which the provisions have not been repealed, or replaced, the provisions will continue to serve no purpose, remain obsolete, and ultimately serve as legislation that has no legal consequence.

BIBLIOGRAPHY

1. Primary Sources of Law

Case Law
Air Chefs (SOC) Ltd v National Union of Metalworkers of SA & others (2020) 41 *ILJ* 428 (LC)
Association of Mineworkers & Construction Union v Minister of Employment & Labour (2021) 42 *ILJ* 1538 (GP)
Australian Postal Corporation v CEPU (2009) 189 *IR* 262
CWIU v Bevaloid (1988) 9 *ILJ* 447 (IC)
De Beers Consolidated Mines v CCMA & Others [2000] BLLR 578 (LC)
Democratic Municipal & Allied Workers Union of SA v Registrar of Labour Relations (2020) 41 *ILJ* 1968 (LC)
Edgars Stores Ltd v SA Commercial Catering & Allied Workers Union & others (1992) 13 *ILJ* 177 (IC)
Esso Australia v AWU [2017] HCA *54*
FAWU v Clover Dairies (1986) 7 *ILJ* 697 (IC)
Johannesburg Metropolitan Bus Services (SOC) Ltd v Democratic Municipal and Allied Workers Union of South Africa and others (2019) 12 BLLR 1335 (LC)
MacDonald's Transport Upington (Pty) Ltd v AMCU and others (2016) 37 *ILJ* 2593 (LAC)
Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of SA & others; Foskor (Pty) Ltd v National Union of Metalworkers of SA & others (2019) 40 *ILJ* 1814 (LC)
Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) *SA* 593 (SCA)
National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd (2003) 24 *ILJ* 305 (CC)
National Union of Metalworkers of SA & others v Jumbo Products CC (1991) 12 *ILJ* 1048 (IC)

National Union of Metalworkers of SA & others v Mahle Behr SA (Pty) Ltd (Association of Mineworkers & Construction Union as Amicus Curiae) National Union of Metalworkers of SA & others v Foskor (Pty) Ltd (Association of Mineworkers & Construction Union as Amicus Curiae) (2020) 41 *ILJ* 2093 (LAC)
S v Makwanyane 1995 (3) SA 391 (CC)
SA Nylon Spinners (Pty) Ltd v SA Chemical Workers Union (1992) *13 ILJ* 1014 (IC)
SA Transport and Allied Workers Union and others v Moloto NO and another (2012) 33 *ILJ* 2549 (CC)
SACWU v Sentrachem (1988) 9 *ILJ* 410 (IC)
Saskatchewan Federation of Labour v Saskatchewan (2015) 1 *SCR* 245 (SCC)
Sasol Industries (Pty) Ltd & another v SA Chemical Workers Union (1990) 11 *ILJ* 1010 (LAC)
White v Neill Tools (1991) 12 *ILJ* 368 (IC)

International Law
CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Australia, 22/5/2009, UN doc No E/C.12/AUS/CO/4
Committee of experts' Report of the Committee of Experts on the Applications of Conventions and Recommendations' (International Labour Conference, 87th Session, 1999)
Committee of Freedom of Association [CFA], (United Kingdom), July 1, 1951, Case No. 28 Rep. No. 2 (1952)
Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations (ILO, Geneva 1983)
Freedom of Association and Protection of the Right to Organise, ILO Convention 87 of 1948
Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO 4th (revised) ed (ILO, Geneva 1996)
ILO 2012 (Geneva) 2012, *General Survey* 4748

International Covenant on Economic, Social and Cultural Rights Treaty
International Labour Conference, 99th Sess, 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A)
International Labour Conference, 99th Sess, 2010, Report of the Committee on the Application of Standards, Part One
International Labour Conference. [ILC], 43rd Session, 1959, CEACR, General Survey – Freedom of Association and Collective Bargaining
International Labour Conference. [ILC], 43rd Session, 1959, CEACR, General Survey – Freedom of Association and Collective Bargaining (1959)
Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILC, 101st Session, March 2012, at 60; Case No 2698 (Australia), 357th Report of the CFA, 2010
Resolution of June 25 1970 Concerning Trade Union Rights and their Relation to Civil Liberties [ILC, 54th Session, 1970
Resolution of June 26, 1957 Concerning the Abolition of Anti-Trade Union Legislation in the States Members of the ILO [ILC, 40th Session, 1957, Record of Proceedings of the 40th session (1957)
Right to Organise and Collective Bargaining Convention 98 of 1949

Legislation	**Mode of citation**
Constitution of the Republic of South Africa, 1996	The Constitution
Fair Work Act 28 of 2009	FW Act
Guidelines on balloting for strikes or lockouts issued in terms of section 95(9) of the LRA Government Gazette GN R1397 Government Gazette 2018:93(42121), 19 December 2018	The Guidelines
Labour Relations Act 28 of 1956	1956 LRA
Labour Relations Act 66 of 1995	LRA
Labour Relations Amendment Act 8 of 2018	2018 LRAA

Labour Relations Amendment Bill 32 of 2017	2017 Bill
Labour Relations Amendment Bill 6 of 2012	2012 Bill
Memorandum on the Objects of the Labour Relations Amendment Bill, 2012	Memorandum on the Objects of the Labour Relations Amendment Bill, 2012
Memorandum on the Objects of the Labour Relations Amendment Bill, 2017	Memorandum on the Objects of the Labour Relations Amendment Bill, 2017
Promotion of Administrative Justice Act 3 of 2000	PAJA

2. Secondary Sources of Law

Books	**Mode of citation**
Brassey *et al The New Labour Law* (1987) Juta 2nd edition	Brassey *et al* (1987)
Cheadle *et al Law Against Strikes* (2017) Lexis Nexis 1st edition	Cheadle *et al* (2017)
Du Toit *et al Labour Relations Law* (2003) Butterworths 4th edition	Du Toit *et al* (2003)
Du Toit *et al Labour Relations Law: A Compressive Guide* (2023) Lexis Nexis 7th edition	Du Toit *et al* (2023)
Grogan J *Collective Labour Law* (1993) Juta 1st edition	Grogan (1993)
Grogan J *Workplace law* (2020) Juta 13th edition	Grogan (2020)
Van Eck *et al Celebrating the ILO 100 Years on* (2020) Juta 1st edition	Van Eck *et al* (2020)
Van Niekerk *et al Law@work* (2023) Lexis Nexis 6th edition	Van Niekerk *et al* (2023)

Internet Sources
https://greens.org.au/about (date of use - 28 May 2024 at 09h40)

https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102544 (date of use - 31 May 2024 at 11h05)
https://pmg.org.za/committee-meeting/26189/ (date of use - 10 October 2023 at 11h23)
https://webapps.ilo.org/static/english/dialogue/ifpdial/llg/noframes/ch5.htm#11 (date of use - 27 May 2024 at 09h27)
https://www.ccma.org.za/wp-content/uploads/2023/02/CCMA-Fees-and-Costs-Info-Sheet-2022-01.pdf (date of use - 24 March 2024 at 09h27)
https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_901633/lang--en/index.htm (date of use - 19 March 2024 at 09h14)
https://www.ilo.org/static/english/dialogue/ifpdial/llg/ch5/ex8.htm (date of use - 05 February 2024 at 16h20)
https://www.ituc-csi.org/ILO-Landmark-decision-on-right-to-strike (date of use - 06 February 2024 at 06h20)
https://www.monash.edu/__data/assets/pdf_file/0008/1441196/Josh-Bornstein-paper.pdf 5. (date of use - 02 May 2024 at 09h42)

Journal Articles	**Mode of citation**
Benjamin "Beyond Dispute Resolution: The Evolving Role of the Commission for Conciliation, Mediation and Arbitration" (2014) *ILJ* 4	Benjamin *ILJ* (2014)
Botha "Responsible Unionism During Collective Bargaining and Industrial Action: Are We Ready Yet?" (2015) *De Jure* 328	Botha *De Jure* (2015)
Calitz "Violent, Frequent and Lengthy Strikes in South Africa: Is the Use of Replacement Labour Part of the Problem" (2016) *SA MERC LJ* 436	Calitz *SA MERC LJ* (2016)
Creighton *et al* "Pre-Strike Ballots and Collective Bargaining: The Impact of Quorum and Ballot Mode Requirements on Access to Lawful Industrial Action" (2019) *ILJ* 343 action	Creighton *et al ILJ* (2019)

Creighton *et al* "Strike Ballots and the Law in Australia" (2016) *AUJL* 154	Creighton *et al AUJL* (2016)
Du Toit and Ronnie "The Necessary Evolution of Strike Law" (2012) *Acta Juridica* 195	Du Toit and Ronnie *Acta Juridica* (2012)
Fergus and Jacobs "The Contested Terrain of Secret Ballots" (2020) *ILJ* 757	Fergus and Jacobs *ILJ* (2020)
Forster and McCrystal "Reforming Australian Bargaining and Strike Laws to Maximise Worker Power" (2023) *UNSWLJ* 1105	Forster and McCrystal *UNSWLJ* (2023)
Frey "Conflict over Conflict: The Right to Strike in International Law" (2017) *GLJ* 17	Frey *GLJ* (2017)
Gardbaum "Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa" (2019) *CCR* 1	Gardbaum *CCR* (2019)
Godfrey et al "The New Labour Bills: An Overview and Analysis" (2018) *ILJ* 2161	Godfrey *et al ILJ* (2018)
Greenhalgh "Strike Ballots in Present-day South Africa: Examining the Intersection Between Non-Compliant Trade Unions, De-registration, and the Registrar" (2023) *JJS* 135	Greenhalgh *JJS* (2023)
Grogan "Secret Pre-Strike Ballots: Not Just a Token" (2020) *ELJ* 1	Grogan *ELJ* (2020)
LRA Explanatory Memorandum (1995) 16 *ILJ* 278	Explanatory Memorandum *ILJ* (1995)

Manamela and Budeli "Employees Right to Strike and Violence in South Africa" (2013) *CILSA* 308	Manamela and Budeli *CILSA* (2013)
McCrystal "Why Is It So Hard to Take Lawful Strike Action in Australia?" (2019) *JIR* 129	McCrystal *JIR* (2019)
Myburgh "100 Years of Stike Law" (2004) 25 *ILJ* 962	Myburg *ILJ* (2004)
Myburgh "The Failure to Obey Interdicts Prohibiting Strikes and Violence" (2013) *CLL* 1	Myburg *CLL* (2013)
Orchiston *et al* "Pre-Strike Ballots and Entreprise Bargaining Dynanics: An Empirical Analysis" (2019) *MULR 593*	Orchiston *et al MULR* (2019)
Parfitt "Work-Place Ballots: Rules and Procedures" (1992) 13 *ILJ* 294	Parfitt *ILJ* (1992)
Peets "Industrial Action, the Right to Strike, Ballots and the Fair Work Act in International Context" (2016) *AJLL* 133	Peets *AJLL* (2016)
Regenbogen "The International Labour Organization and Freedom of Association: Does Freedom of Association Include the Right to Strike?" (2011) *CLELJ* 385	Regenbogen *CLELJ* (2011)
Rycroft "Strike and Amendments to the LRA" (2015) *ILJ* 1	Rycroft *ILJ* (2015)
Seifert "The Protection of the Right to Strike in the ILO: Some Introductory Remarks" (2018) *CLLPJ* 1	Seifert *CLLPJ* (2018)
Smit "International Developments Regarding the Implementation of the Right to Strike" (2017) *CLLPJ* 395	Smit *CLLPJ* (2017)

Tenza "Investigating the Need to Reintroduce a Ballot Requirement for a Protected Strike in South Africa" (2019) *Obiter* 263	Tenza *Obiter* (2019)
Van Eck "Vonnisbespreking: Stakingstemmings: Oplossing en raaisels deur die Arbeidsappèlhof *National Union of Metalworkers of South Africa v Mahle Behr SA (Pty) Ltd (Association of Mineworkers & Construction Union as Amicus Curiae)* 2020 41 *ILJ* 2093 (AAH)" (2020) *LitNet Akademies* 1027	Van Eck *Litnet Akademies* (2020)
Webster "Marikana and Beyond: New Dynamics in Strikes in South Africa" (2017) *GLJ* 139	Webster *GLJ* (2017)