Employees' right to strike and violence in South Africa

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Abstract

This paper deals with employees' right to strike and violence in South Africa. It first deals with the protection of employees' right to strike in international and regional human rights instruments. It then looks at the legislative framework governing the protection of the workers' right to strike in South Africa, before exploring the legal consequences of violence that takes place during protected and unprotected strikes. The article argues that although the right to strike is protected in international, regional, and domestic law, it is not absolute. Violent strikes are prohibited. It concludes that trade unions have a responsibility to ensure that when their members exercise their constitutional right to strike, they do not commit acts of violence as this may justify employees' dismissal, provided that all the requirements set by the Labour Relations Act have been met.

INTRODUCTION

Employees' right to strike is an essential component of their right to freedom of association,[1] and one of the weapons wielded by trade unions when collective bargaining fails. Strike action is the most visible form of collective action during labour disputes, and is often seen as the last resort of workers' organisations in pursuit of their demands.[2] Without the protection of the right to strike, employees cannot freely exercise the right to freedom of association. According to Olivier, if the right to bargain collectively and to strike were not well recognised, the right to freedom of association would remain ineffective.[3]

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1 Budeli 'Understanding the right to freedom of association at the workplace: its components and scope' (2010) vol 31/1 *Obiter* 16–33 at 27–28.

2 ILO General Survey, 'Freedom of association and collective bargaining' hereinafter referred to as the "ILO General survey' 1994 par 136.

3 Olivier 'Statutory employment relations in South Africa' in Slabbert *et al* (eds) *Managing employment relations in South Africa* (1991) 5–61.

In stressing the importance of the right to form and join a trade union, to bargain collectively and to strike as the main components of the right to freedom of association, Sachs opined as follows:

> The key, absolutely fundamental rights of workers are those rights that enable the working people to fight for and defend their rights. These rights comprise the first group of rights. This group of rights consist of three rights namely, the right to establish and join trade unions; the right to collective bargaining and the right to strike. These are the three pillars of the working people, of their capacity to defend all their other rights.[4]

Without the protection of the right to strike, trade unions become pathetic, powerless bodies and the rule of management becomes absolute.[5] As far as employees are concerned, the right to strike is integral to sound industrial relations[6] and the collective bargaining system.[7] Thus, without the right to strike, the right to bargain collectively is compromised. Similarly, without the right to strike, there cannot be genuine collective bargaining, and collective bargaining will be nothing other than collective begging.[8] Grunfeld remarked in 1967 as follows:

> If one set of human beings is placed in a position of unchecked industrial authority over another set, to expect the former to keep the interests of the latter constantly in mind and, for example to increase the latter's earnings as soon as the surplus income is available….is to place on human nature a strain it was never designed to bear.[9]

Human nature has not changed since 1967. Accordingly, strikes and other forms of industrial action are essential parts of the collective bargaining process. They represent the final stage when a negotiation agreement cannot be reached.[10] Ben-Israel stated the following regarding the freedom to strike:

> [t]he freedom to associate and to bargain collectively must be supplemented by an additional freedom, which is the freedom of strike. Hence, freedom to

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4 Sachs 'The Bill of Rights and worker rights: an ANC perspective' in Patel (ed) *Workers rights: from apartheid to democracy – what role for organised labour* (1994) 47. See also Budeli n 1 above at 22.

5 Patel n 4 above at 22.

6 Budeli n 1 above at 27.

7 Myburgh '100 years of strike law' (2004) 25 *ILJ* 962 at 966.

8 Blanpain *labour law, human rights and social justice* (2001) 190.

9 Grunfeld quoted by Pitt in *Employment law* (1992) 251.

10 Pitt n 9 above at 251.

> strike is a complementary freedom of the freedom of association since both are meant to help in achieving a common goal which is to place the employer-employee relationship on an equal basis.[11]

A view appears to have developed, that the right to strike is implicit when international instruments, constitutions, and laws guarantee the right to freedom of association and collective bargaining.[12]

Most of the strikes in South Africa are undertaken by trade unions during the collective bargaining process, when trade unions and employers fail to agree on some issues of mutual interest. Strikes may take different forms. They may be protected or unprotected, and they may be partial or complete. In 2012, South Africa was plagued by violent industrial action in all major sectors of the economy.[13]

Against this background, this article deals with employees' right to strike and violence in South Africa. It first explores the protection of employees' right to strike in international and regional human rights systems. It then examines the legislative framework governing the protection of workers' right to strike in South Africa, before exploring the legal consequences of violence during protected and unprotected strikes. The article argues that although the right to strike is protected in international, regional, and domestic law, it is not absolute.

EMPLOYEES' RIGHT TO STRIKE: A LEGISLATIVE FRAMEWORK

As pointed out above, the right to strike is an essential component of workers' right to freedom of association. The right to strike is protected via national constitutions, laws, international human rights instruments, international labour rights instruments, and regional human rights instruments. International and regional law is pivotal in shaping domestic laws.[14] Accordingly, in this part, we deal with the legal protection of workers' right to strike in international, regional, and South African labour law.

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11 Ben-Israel *International labour standards: the case of the freedom to strike* (1987) 93.
12 Budeli n 1 above at 28–29.
13 Such as the Transport, Mining and Agriculture sectors.
14 Section 39 of the Constitution of the Republic of South Africa.

The protection of employees' right to strike in international law

Workers' right to strike is generally protected by international human rights law embodied in conventions, rules, and principles aimed at protecting and promoting universal human rights. It is also protected in international labour law, a sub-species of international law, which is based on conventions, recommendations, and declarations adopted by the International Labour Organisation (ILO).

Protection under international human rights law

International human rights law is based on international conventions adopted within the framework of the United Nations (UN). Members of the United Nations are bound by the international instruments on the international plane, upon ratification. However, certain of the international instruments do not require ratification.[15]

Universal Declarations of Human Rights (UDHR)

The UDHR was adopted by the UN in 1948[16] as a 'common standard of achievement for all peoples and all nations' and it proclaims 'the inherent dignity and the equal and inalienable rights of all members of the human family and is the foundation of freedom, justice and peace of the world'.[17]

It is important to note that the UDHR is not a treaty, as such, and is therefore not legally binding on the UN member states. On its adoption, the UDHR was not intended to be binding, but to provide 'a guiding light to all those who endeavored to raise man's material standards of living…'.[18] However, with its constant reaffirmation in subsequent universal and regional instruments, as well as national constitutions, it is argued that some of its provisions have achieved the status of customary international law.[19] The

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15 For example, the Universal Declarations of Human Rights. It is not a treaty but a declaration. It has gained a status of customary international law.

16 Universal Declarations of Human Rights GA Res 217 (111) was adopted by the United Nations General Assembly on 10 December 1948.

17 Preamble to the UDHR.

18 United Nations Plenary meeting, Official Records of Third Session, Part I 1948 873, Netherlands Delegate. See also Budeli 'The protection of workers' right to freedom of association in international and regional human rights systems' (2009) 42/1 *De Jure* 136–165 at 141 .

19 See Waldock 'Human rights in contemporary international law and the significance of the European convention' quoted by Umozurike *The African Charter on Human and Peoples' Rights* (1997) 11; Dugard *International law: a South African Perspective* (2000) 34, 241. See also Budeli *Freedom of association and trade unionism in South Africa: from apartheid to the democratic constitutional order* (unpublished LLD thesis,

UDHR makes no reference to the right to strike. However, the UDHR protects the general right to freedom of association, and the right to peaceful assembly.[20] Undoubtedly, the UDHR protects the right to associate and to assemble in so far as these rights are exercised peacefully. Thus, any violent activities during the exercise of these rights will contravene the provisions of article 20 of the UDHR.

In an attempt to transpose the UDHR into a binding and enforceable instrument, the UN General Assembly adopted two covenants on human rights. The first covenant is the International Covenant on Civil and Political Rights (ICCPR),[21] which protects civil and political rights; and the other, the International Covenant on Economic, Social and Cultural Rights (ICESCR),[22] which protects economic, social and cultural rights.[23] Together, the UDHR, ICCPR, and ICESCR constitute the International Bill of Rights, and are essential international human rights instruments.

The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR was adopted in 1966 and is binding on member states who ratify it. It protects civil and political rights. Like the UDHR, the ICCPR does not refer to the right to strike, but protects related rights such as the freedom of peaceful assembly,[24] and freedom of association.[25] Accordingly, any violent action while exercising these rights, will be in violation of articles 21 and 22 of the ICCPR. South Africa ratified the ICCPR in December 1998, and is therefore bound by its provisions.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR was adopted shortly after the ICCPR to protect economic, social and cultural rights. Article 8 of the ICESCR protects labour rights. In terms of article 8(1)(d) 'the States Parties to the present Covenant undertake to ensure "the right to strike, provided that it is exercised in conformity with

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University of Cape Town 2007) 196.

20 Article 20 of the UDHR

21 International Covenant on Civil and Political Rights 1966 999 UNTS 171; 6 ILM 368 (1967). Hereafter ICCPR.

22 International Covenant on Economic, Social and Cultural Rights UNTS 3 (1967) 6 ILM 360 (1960). Hereafter ICESCR.

23 See Budeli n 19 above at 196.

24 ICCPR art 21.

25 *Id* at art 22.

the laws of particular country"'. Article 8 contains an internal limitation, in that the right to strike should be exercised in conformity with national laws. National laws prohibit violence during strike action. Thus, exercising the right to strike outside the ambit of national laws, is a violation of the provisions of article 8 of the ICESCR. The ICESCR also recognises the imposition of lawful restrictions on the exercise of the right to strike by members of the armed forces, the police, or of the administration of the state.[26] Like the ICCPR, the ICESCR is binding on member states which have ratified it. However, South Africa has signed, but not ratified the ICESCR. Accordingly the Covenant is not binding on South Africa since the country has not ratified it. See sections 231 and 39 of the Constitution.[27]

Protection of employees' right to strike under international labour law

The basis of international labour law is International Labour Conventions adopted by the ILO. The ILO was established in 1919 after World War I, as a UN Specialised Agency to deal with workers' rights in general.[28] Thus, one of the primary functions of the ILO is to develop and enforce international labour standards. Accordingly, since its establishment, the ILO has adopted numerous conventions and recommendations regulating workers' rights.[29]

South Africa joined the ILO on its inception in 1919, and played an important role in the adoption of the ILO Constitution. However, due to its apartheid policy, South Africa withdrew from the ILO in 1966 and re-joined only in 1994, shortly after the collapse of the apartheid regime.[30]

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26 ICESR art 8(2).

27 See: http://www.google.co.za/search?hl=en-ZA&source=hp&q=South+Africa+expressed+its+intention+to+ratify+the+ICESCR&gbv=2&oq=South+Africa+expressed+its+intention+to+ratify+the+ICESCR&gs_l=heirloom-hp.12...4250.4250.0.5656.1.1.0.0.0.0.281.281.2-1.1.0...0.0...1ac.2.12.heirloom-hp.oOcVaBncI7s (last accessed 17/05/2013).

28 See Budeli n 19 above at 200.

29 Some of the Conventions adopted by the ILO are the Convention and Recommendation Concerning Discrimination in Respect of Employment and Occupation No 111 (adopted on 25 June 1958 and entered into force on 15 June 1960); the Convention Concerning Equal Remuneration For Men and Women for Work of Equal Value No 100 (adopted on 29 June 1951 and entered into force on 23 May 1953); the Convention and Recommendation Concerning Equal Opportunities and Equal Treatment for Men and Women Workers and Workers with Family Responsibilities No 165 (adopted on 23 June 1981 and entered into force on 1 August 1981); the Convention Concerning Social Policy (Basic Aims and Standards) No 117 (adopted on 22 June 1962 and entered into force on 23 April 1964); and the Convention Concerning Employment Policy No 122 (adopted on 9 July 1964 and entered into force on 15 July 1966).

30 See Budeli n 19 above at 256.

Accordingly, international labour law has played a crucial role in the transformation of South African labour law.[31] The South African Labour Relations Act (LRA) was enacted to, amongst other things, give effect to the obligations incurred by South Africa as a member of the ILO.[32] South Africa ratified the two core ILO conventions (87 of 1948 and 98 of 1949)[33] on trade unions' rights.[34]

ILO Convention 87 of 1948

ILO Convention 87, guarantees all employers and workers, including supervisors, the right freely to establish and join organisations of their own choice subject only to the rules of the organisation.[35] Under article 3, workers' and employers' organisations are also entitled to draw up their constitutions and rules to elect their representatives in full freedom; to organise their administration and activities; and to formulate their programmes without any interference from public authorities.[36] Article 3 provides that public authorities shall refrain from any interference that would restrict such organisations or impede their lawful exercise of their rights. Article 8 of this Convention, further provides that in exercising the rights provided for in the Convention, workers, employers and their respective organisations, must respect the law of the land. The law of the land, however, should not be such as to impair, and shall not be applied so as to impair, the guarantees provided for in the Convention.[37] In the Convention, the term 'organisation' means any organisation of workers and employers responsible for furthering and defending the interests of workers or employers.[38]

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31 *Id* at 256.

32 LRA 66 of 1995 s 1(b).

33 South Africa signed and ratified the two ILO Convention on Freedom of Association on 19 February 1996. South Africa ratified these conventions in 1996, immediately after its readmission and these conventions constitute binding obligation in international law.

34 ILO Convention 87 of 1948 'Freedom of Association and the Right to Organise Convention' and Convention 98 of 1949 'The Right to Organise and Collective Bargaining Convention'. The provisions of the Constitution and LRA dealing with freedom of association are more or less the same with the provisions of these two Conventions.

35 Convention No 87 of 1948 art 2.

36 *Id* at art 3, which deals with collective rights of the organisations themselves.

37 *Id* at art 8(1) and (2).

38 *Id* at art 10.

ILO Convention 98 of 1949

ILO Convention 98, supplemented the ILO Convention 87 of 1948. It deals, in particular, with the right to organise and to bargain collectively. It also provides adequate protection for workers, employers, trade unions, or workers' organisations from acts of interference by other parties. Although the Convention also refers to the rights of employers, it set out to protect trade unionists and their organisations against possible threats from employers or their organisations. This Convention protects workers against acts of discrimination and victimisation by their employers on the basis of their trade union membership or activity.[39] These include acts of dismissal, and any other act designed to cause prejudice to workers by reason of union membership, or because of their participation in union activities outside of working hours, or, with the consent of the employer, within working hours.[40]

ILO Conventions 87 of 1948 and 98 of 1949 and employees'right to strike

As indicated above, the right to strike is essential to the exercise of the right to freedom of association and collective bargaining in the workplace. However, the two core ILO Conventions on trade unions' rights and collective bargaining, make no explicit reference to the right to strike. Similarly, the two Conventions do not expressly link workers' right to strike with the right to freedom of association. Nonetheless, the creation of the ILO Committee on Freedom of Association (CFA), has led to the recognition of such a connection. Accordingly, the CFA has on numerous occasions, indicated that the right of employees to strike is an essential element of the right to freedom of association, and one of the essential elements of trade union rights.[41] The Committee of Experts considers the right to strike as one of the essential means, available to all workers and their organisations, for the promotion and protection of their economic and social interests.[42] The CFA has interpreted the two Conventions on freedom of association as implying the right to strike.[43] According to the CFA, the provisions of Convention 87 which provide a legal basis to the right to strike, are articles 3, 8, and 10.

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39 *Id* at art 1.1.

40 ILO Convention No 98 art 1.2.

41 Committee on Freedom of Association, Second Report (1952), Case No 28 (Jamaica), in Sixth Report of the International Labour Organisation to the United Nations (Geneva), Appendix 5, 181, par 27.

42 1983 Report of the Committee of experts, par 2000.

43 ILO General survey, 1994 par 179.

The ILO also adopted two resolutions in 1957 and 1970 respectively, that emphasised the right to strike in member states.[44]

According to the Committee of Experts, a general prohibition of the right to strike constitutes a considerable restriction of the opportunities open to trade unions to further and defend the interests of their members,[45] and of the right of members to organise[46] their activities.[47] It is also considered to be inconsistent with the obligation to accord proper respect to the principles of freedom of association resulting from their membership of the ILO Constitution.

The ILO has maintained that the right to strike is an essential element of the right to freedom of association, but recognises that strikes may be restricted by law where public safety is concerned, provided that adequate alternatives – such as mediation, conciliation, and arbitration – offer a solution to workers who are affected.[48]

Similarly, the right to strike, which is held to be fundamental by the ILO supervisory bodies, is not absolute, and should be exercised in line with other fundamental rights of other citizens and employers.[49] Therefore, exercising the right to strike in a way which violates other peoples' rights, is contrary to the principle of freedom of association. According to the Committee of Experts, engaging in an unlawful strike may be considered an unfair labour practice and entail civil liability and disciplinary sanctions.[50]

On the other hand, any member state's domestic law which prohibits in general, or restricts in particular, the right to strike, must comply with the two ILO Conventions on freedom of association.[51] The supervisory body has accepted that governments may legitimately impose certain preconditions on

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44 ILO Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the ILO, adopted by the International Labour Conference at its 40th session in 1957 and the Resolution concerning Trade Union Rights and their relations to Civil liberties, adopted by the International Labour Conference at its 54th session in 1970.

45 1983 Report of the Committee of experts, par 205.

46 Provided in art 3 of Convention 87 of 1948.

47 ILO General Survey, 1973, par 107.

48 ILO General Survey, n 2 above at, par 164.

49 See Gernigon, Odero , and Guido *ILO principles concerning the right to strike* ILO, Geneva (2000) 42.

50 ILO General survey, n 2 above at par 176.

51 Birk 'Derogations and Restrictions on the Right to Strike Under International Law' in Blanpain (ed) *Labour law, human rights and social justice* (2001) 99.

the right to strike.[52] However, all preconditions must be reasonable, and must not substantially limit the means of action open to trade union organisations.[53] The CFA also considers that restrictions on the right to strike should be limited to cases where the action ceases to be peaceful.[54] According to the CFA, the principle of freedom of association does not protect abuses consisting of criminal acts performed while exercising the right to strike. Thus, violent activities during strikes, fall outside the ambit of the protection.[55]

The ILO accepts that although it is difficult to draw a clear distinction between political strikes and trade union related strikes, strikes are regarded as acceptable only if they are embarked upon with the aim of furthering the economic, social, and occupational interests of workers. This is because according to the ILO, the right to strike does not extend to purely political strikes.[56]

The ILO has also accepted that the right to strike may be limited in respect of certain groups or categories of worker, such as certain public officials and workers in essential services. According to the Committee of Experts, the prohibition should be limited to officials exercising authority in the name of the state. Essential services are 'those the interruption of which would endanger the life, personal safety or health of the whole or part of the population'.[57]

The Committee of Experts also recognises sympathy strikes and a general prohibition on sympathy strikes, could lead to abuse. Workers should be able to participate in sympathy strikes provided that the initial strike they are supporting is itself lawful.[58]

When dealing with the issue of replacement labour during strike action, the Committee considers this practice to seriously impair the right to strike, and affect the free exercise of trade union rights.[59] Finally, the Committee

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52 These may include the giving of strike notice, the holding of ballots, the recourse to compulsory conciliation and arbitration.
53 ILO General survey n 2 above at pars 170–172.
54 ILO General survey 1994 at pars 173–174.
55 *ILO Digest of Decisions and Principles of the CFA* (5ed 2006) par 667.
56 *Id* at par 529. See also ILO General survey n 2 above at par 165.
57 ILO General survey n 2 above at pars 158–159.
58 *Id* par 168.
59 *Id* at par 175.

indicates that sanctions for strike action should be possible only where the prohibitions in question are in conformity with the principles of freedom of association.[60]

PROTECTION OF EMPLOYEES' RIGHT TO STRIKE UNDER REGIONAL HUMAN RIGHTS SYSTEMS

Regional human rights systems play an important role in shaping the national laws of different countries. Accordingly, in this section the protection of workers' rights to strike in the European, American, and African human rights systems is addressed.

The European human rights system

In Europe, human rights are mainly protected through three human rights instruments, the first two are the European Convention for the Protection of Human Rights and Fundamental Freedoms,[61] and the European Social Charter.[62] The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950 as a regional instrument for the protection of human rights. The Convention essentially deals with civil and political rights. Although the right to strike is not expressly protected by the European Convention, article 11 of this Convention protects the right to freedom of association and assembly. The European Social Charter, a regional instrument protecting social and economic rights, was adopted as an adjunct to the European Convention on Human Rights.[63] Article 6 of this Convention expressly protects the right to strike for collective bargaining purposes. It provides that, with a view to ensuring the effective exercise of the right to bargain collectively, the contracting parties undertake to protect:

> the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.[64]

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60 *Id* 1994 par 177.

61 The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention) was adopted in 1950 in Rome and it came into force in 1953.

62 The European Social Charter was adopted in 1961.

63 Budeli n 18 above at 159.

64 Article 6(4) of the European Social Charter.

Like its predecessor, the Social Charter also protects workers' rights to organise, and their freedom of association.[65]

The third European instrument protecting human rights is the Charter of Fundamental Rights of the European Union.[66] The EU Charter enshrines certain political, social, and economic rights for European Union countries. Article 28 of this Charter specifically protects workers' right to strike. It provides that

> [w]orkers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Accordingly, workers' right to strike is adequately recognised under the European human rights system. EU member states which have ratified these instruments, are legally bound to protect and promote the rights they enshrine.

The American human rights system

In 1969, the Organisation of American States (OAS)[67] adopted the American Convention of Human Rights as an instrument for protecting human rights in American states.[68] This Convention is largely concerned with political and civil rights. The American Convention does not refer to workers' right to strike. However, like the European Convention, the American Convention contains particular provisions concerning freedom of association in its article 16.

An additional protocol to the American Convention on Human Rights[69] to protect economic, social and cultural rights was signed in 1988. The Protocol contains specific provisions concerning trade unions' rights.[70]

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65 Article 5 of the Social Charter.

66 It came into force on 1 December 2009. It is hereinafter referred to as the EU Charter.

67 The International conference of American states approved the establishment of the International Union of American Republics in 1889–1890. The Charter of the OAS was signed in Bogota in 1948 and entered into force in 1951.

68 This Convention entered into force on July 1978 and it is the principal instrument for both North and Latin America.

69 Protocol of San Jose 1988 hereinafter referred to as the Protocol.

70 *Id* at art 8.

Article 8(b) of this Protocol specifically provides that 'states parties shall ensure the right to strike'. Thus states who are party to this protocol are required to protect and promote the right to strike.

African human rights system

The Organisation of African Unity (OAU), now the African Union (AU),[71] was established in 1963 in Addis Ababa, Ethiopia. Its founding Charter did not explicitly include human rights as part of its mandate. The OAU member states were only required to have 'due regard' for the human rights set out in the UDHR.[72] Accordingly, the African Charter on Human and Peoples' Rights (ACHPR), was adopted in 1981[73] and is the major regional human rights instrument on the African continent.[74] It draws from other human rights instruments, and recognises basic civil, political, economic, and social rights. Unfortunately, although the ACHPR recognises the general right to freedom of association, it makes no reference to the right to strike. Thus, the Charter does not protect workers' right to strike. On the African continent, there is no other instrument which protects the right to strike at the workplace. In this light, one must wonder how important the African continent regards workers' right to strike? Is it not essential for the exercise of labour rights, yet it is left to individual African countries to decide whether they recognise the right or not. Some African countries have recognised the right to strike as a fundamental right by entrenching it in their Constitutions.[75]

THE PROTECTION OF EMPLOYEES' RIGHT TO STRIKE IN SOUTH AFRICAN LAW

The Constitution

The right to strike is a fundamental social right. It is one of the labour rights protected under section 23 of the South African Constitution.[76] In terms of

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71 The OAU is composed of fifty-three Independent African states and is the largest regional organisation. Recently, African states created the African Union (hereinafter the AU) to replace the OAU. The Constitutive Act of the AU was adopted by the OAU Assembly of Heads of States and Governments in Lomé in 2000 and it came into force 2001.

72 OAU Charter art 2(1).

73 The African Charter on Human and Peoples' Rights (21 ILM 58 (1082), hereinafter 'the African Charter') was adopted on 17 June 1981 in Banjul.

74 It came into force in 1986.

75 For example the Constitution of the Republic of South Africa, s 23.

76 *Ibid*.

this section 'every worker has the right to strike'.[77] Unlike South Africa's Interim Constitution of 1993 which protected strikes for collective bargaining purposes only, the 1996 Constitution extends its protection beyond collective bargaining, to include the right to strike over social and economic issues that have an impact on workers' interests. Similarly, the 1996 Constitution does not balance the right to strike with the employer's recourse to lock-out for the purpose of collective bargaining.[78]

It is important to note that during strike action it is not only the employees' right to collective action that is relevant, but also that of the economy of the country and public interests. The Constitutional Court of South Africa has also held that members of the National Defence Force have the right to exercise the rights provided for in section 23 of the Constitution and, therefore, like any other employees, are also entitled to strike.[79] It is important to note that during strike action, involves not only the employees' right to collective action, but also the economy of the country and public interest. Thus, the right to strike is not absolute and is subject to limitation under section 36 of the Constitution.[80]

The current Labour Relations Act

In giving effect to the right to strike protected in section 27, as superseded by section 23 of the Constitution, the South African Labour Relations Act[81] recognises the right to strike. The LRA provides that 'every employee has the right to strike and every employer has the recourse to lock-out'.[82] Unlike the Constitution which does not protect the employer's recourse to lock-out, the LRA balances the employee's right to strike with the employer's recourse to lock-out.

A strike is defined in the LRA 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

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77 *Ibid*.

78 Section 27 of the Interim Constitution balanced the right to strike with the Employer's recourse to lock-out.

79 *SANDU v Minister of Defence and Others* (1999) 20 *ILJ* 2265 (CC) (SANDU).

80 The 'limitation clause'.

81 Act 66 of 1995 hereafter referred to as the LRA.

82 *Id* at s 64(1).

> grievance or resolving a dispute over any matter of mutual interest between employer and employee …[83]

For any conduct to qualify for protection under the LRA, it must meet the elements of a strike as set out in the definition. The conduct must, therefore, be concerted; must involve collective action by people who are employed or have been employed; and the purpose must be to remedy a grievance or resolve a dispute, relating to any matter of mutual interest. Independent contractors and employees excluded from the application of the LRA,[84] cannot exercise the right to strike under the LRA.[85] Similarly, political strikes by workers are not protected under the LRA.

Section 64 of the LRA lays down the procedures to be followed before employees can participate in a strike action.[86] The issue in dispute must be referred to a council or the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation; if conciliation fails or thirty days have passed after the referral of the dispute, at least forty-eight hours written notice of the commencement of the strike must be given. There are also limitations in terms of section 65 of the LRA with which the parties must comply. Employees' failure to comply with the required procedure and limitations, will render the strike unprotected. Both section 23 of the Constitution, and section 64 of the LRA, protect the right to strike for employment-related disputes.

STRIKES AND VIOLENCE IN SOUTH AFRICA

Whether protected or not, a strike will incur certain legal consequences. Although the right to strike is protected, and employees are free to engage in a strike once the prescribed requirements have been met, employees should not make themselves guilty of misconduct during their strike action. Violence during both protected and unprotected strikes, has become a serious concern in South Africa. In 2006, during the strike by security industry employees who were members of SATAWU, some fifty people allegedly lost their lives, and damage to property was estimated at R1,5

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83 *I*d at s 213.

84 Section 2 excludes from the application of the LRA members of the National Defence Force, National Intelligence Agency, the South African Secret service and the South African National Academy of Intelligence.

85 However, every worker can claim this right under the Constitution.

86 LRA s 64.

million.[87] Due to violent conduct, the strike in Marikana during August 2012 resulted in deaths of both mineworkers and police officers, others were injured and property was damaged. Consequently, the Farlam Commission has been appointed to investigate the tragic incidents which took place during the strike.[88] The truck driver's strike in October 2012 also turned violent; trucks were set on fire, and drivers who did not take part in the strike were assaulted.[89] In the same year, farm workers went on strike in the Western Cape demanding more than double their current pay, and property worth millions of rands was destroyed during the strike.[90] The LRA offers protection for strikers taking part in a protected strike. However, it does not promote violent conduct during a strike.

The balance of power in industrial relations favours employers over employees. Industrial action – and strike action in particular – is a tool employees use to bring some balance. In *BAWU v Prestige Hotels CC t/a Blue Waters Hotel,*[91] the following was stated with regard to the functionality of a strike:

> a lawful strike is by definition functional to collective bargaining. The collective negotiations between the parties are taken seriously by each other because of the awful risk they face if a settlement is not reached. Either of them may exercise its right to inflict economic harm upon the other. In that sense the threat of a strike or lock-out is conducive and functional to collective bargaining.

It is submitted that a violent strike is not functional to collective bargaining. It is not conducive to bargaining in good faith. The Constitution accords everyone the right to assemble, demonstrate, picket, and present petitions. However these activities must be peaceful, and participants must be unarmed.[92]

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87 See *SATAWU v Garvis and others Case* CCT 112/11 [2012] ZACC 13 at 5–6.

88 Terms of reference: Farlam Commission of Inquiry: *Government Gazette* 35680/ Proclamation 50 (2012).

89 See Wendy, Hans & Sapa 'Truck driver's strike turns ugly' available at: www.iol.co.za (last accessed 25 April 2013).

90 See Western Cape 2012 Farm Workers' Strike available at: http://en.wikipedia.org/wiki/Western_Cape_2012_Farm_Workers_Strike (last accessed 25 April 2013).

91 (1993) *ILJ* 963 (LAC) at 971J–972A.

92 See s 17 of the Constitution. See also *SATAWU v Garvis & others* (2011) 6 SA 382 (SCA) at 394.

The right to strike does not offer striking employees a licence to engage in unruly or criminal conduct.[93] Violence during strike, is actually an abuse of the right to strike.[94] In addition to the right to strike, the LRA permits employees on strike to picket peacefully in support of a protected strike. It was held in *Picardi Hotels Ltd v Food & General Workers Union & others,*[95] that employees on strike can hold, display, and wave placards, but what is written on the placards may not constitute a criminal offence. Such employees may also not wave sjamboks[96] or brandish firearms during the picket.[97] Holding members of management hostage, is also not permitted during a strike or picket.[98] Employees who commit acts of misconduct during a strike should be held accountable for their actions.

LEGAL CONSEQUENCES OF VIOLENCE DURING PROTECTED AND UNPROTECTED STRIKES

In dealing with protected strikes, the discussion that follows is restricted to the legal consequences of misconduct during such action. However, as an unprotected strike in itself constitutes misconduct, all its legal consequences will be addressed.

Protected strikes and violent conduct

Civil liability

Under common law, a person who organises or takes part in a strike can be held liable for breach of contract, and for losses suffered by the employer during the strike, provided the requirements for delictual liability are met.[99] However, section 67 of the LRA provides for the protection of employees who take part in a protected strike. Sub-section 67(2) provides as follows:

> a person does not commit a delict or breach of contract by taking part in –
> a protected strike … or
> any conduct in contemplation or furtherance of a protected strike …

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93 See *Transport & General Worker Union of South Africa v Ullman Brothers (Pty) Ltd* (1989) 10 *ILJ* 1154 (IC); *Food & Alled Workers Union v National Co-operative Dairies Ltd* (2) (1989) 10 *ILJ* 490 (IC).

94 See *National Union of Metal Workers of SA v G M Vincent Metal Sections (Pty) Ltd* (1993) 14 *ILJ* 1318 (IC).

95 (1999) 20 *ILJ* 1915 (LC) at [25].

96 See *Prestige Hotel t/a Blue Waters v SACCAWU & others* [1997] 8 BLLR 1078 (LC).

97 See *CEPPWAWU & others/Tugela Mill (a division of SAPPI Kraft (Pty) Ltd)* [2002] 12 BALR 1249 (CCMA).

98 See *Mabinana & others v Baldwins Steel* [1999] 5 BLLR 453 (LAC).

99 See *Atlas Organic Fertilizers v Pikkewyn Ghwano* (1981) 2 SA 173 (T) at 202G.

Therefore, under the LRA, a person who takes part in a protected strike, or any conduct in contemplation or furtherance of a protected strike, does not commit an unlawful act or breach of contract. In *Coin Security Group (Pty) Ltd v SANUSO,*[100] the court interpreted the phrase 'conduct in contemplation or in furtherance of such a strike' to include 'any conduct that was engaged in during the course of a strike, was pursuant thereto and served to advance it'. No civil action may be instituted against any person on the basis of his or her participation in a protected strike.[101] Immunity is guaranteed against civil claims. Employees who engage in unlawful violent conduct which result in the employer suffering loss, will, however, be held liable. The immunity does not cover unlawful acts by strikers, nor does it entitle striking employees to remuneration during the protected strike.[102]

Interdict

The employer may also not interdict anyone taking part in a protected strike[103] on the basis of the immunity these individuals enjoy from delictual claims by the employer. However, as employees are not immune in respect of any unlawful conduct.[104] the employer may be granted an interdict against employees who engage in unlawful conduct during a protected strike. The employer may apply to the Labour Court or High Court for an order restraining any person from committing violent acts of misconduct. A mandatory order may also be issued to direct the union to intervene and take all reasonable steps to stop unlawful acts.

Dismissal

Dismissal for misconduct or acts of violence during a protected strike

In terms of section 67(4) of the LRA, an employer may not dismiss employees engaged in a protected strike. If such employees are dismissed, the dismissal will automatically be unfair.[105] Employees engaged in a protected strike cannot be dismissed for the mere fact of taking part in a

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100 (1998) 19 *ILJ* 43 (C).
101 See s 67(6) of the LRA. See also *White v Neil Tools (Pty) Ltd* (1991) *ILJ* 368 (IC).
102 See s 67(3) and (5) of the LRA.
103 See also *Coin Security Group (Pty) Ltd v SANUSO* (1998) 19 *ILJ* 43 (C).
104 See *Mondi Ltd-Mondi Kraft Division v CEPPWAWU & others* (2005) 26 *ILJ* 1458 (LC).
105 Section 187(1)(a) of the LRA. See also *Adams v Coin Security Group (Pty) Ltd* (1999) 1192 (LC).

strike as in itself, their act does not constitute misconduct.[106] However, section 67(5) provides as follows:

> sub section (4) does not preclude the employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee's conduct during strike. Or for a reason based on the employer's operational requirements.

In terms of this sub-section, the employer may fairly dismiss employees who engage in unlawful violent conduct[107] during a protected strike. The employer can even lay criminal charges against such employees.[108] The purpose of section 67 is to protect parties from civil liability resulting from legitimate industrial action, and not liability for illegitimate and unlawful acts. The immunity in terms of section 67 of the LRA relates to the action of employees, which is for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutal interest between employer and employee.[109] Conduct that will be protected, is that which advances the lawful and legitimate objects of a protected strike.[110] Improper behaviour and unlawful conduct – such as assault, intimidation, and damage to property (vandalism) – will attract both civil and criminal liability.[111] Misconduct is one of the three grounds which justify the dismissal of employees under the LRA.[112]

Fairness in the dismissal of employees based on misconduct during a protected strike

The employer who dismisses employees engaged in a protected strike, on the basis of misconduct, must ensure that the dismissal is fair, and is in line with the requirements for a fair dismissal based on misconduct.[113] As with any other misconduct, the dismissal must be both substantively and procedurally

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106 See *National Union of Metalworkers of SA v Boart MSA (Pty) Ltd* (1995) 16 *ILJ* 1469 (LAC).

107 See *FGWU v The Minister of Safety & Security Group (Pty) Ltd* (1999) *ILJ* 1258 (LC); *NCBAWU v Betta Sanitaryware* (1999) 1617 (CCMA).

108 See Basson *et al Essential Labour Law* (5 ed 2009) at 327. See also *Perskor v MWASA* (1991) *ILJ* 86 (LAC).

109 See Manamela 'A dispute in respect of a matter of mutual interest in relation to a strike: *City of Johannesburg Metropolitan Municipality v SAMWU*' (2012) 24 SA *Merc LJ* 107–114.

110 See s 67(6) of the LRA.

111 See Du Toit *et al Labour relations law: a comprehensive guide* (5ed 2006) at 311.

112 See s 188 of the LRA.

113 The Code contains guidelines in this regard.

fair as provided for in the Code of Good Practice: Dismissal (the Code). What is important is that the dismissal must be fair and be based on a fair reason related to the employee's conduct, and the procedure followed in the dismissal must also be fair. A discussion of all the relevant requirements is beyond the scope of this article.

Misconduct during strike action generally involves a number of employees. If the misconduct is made up by different acts committed at different times and places, separate hearings should be conducted; where the misconduct is collective, a group hearing can be conducted.[114] Where employers cannot identify the perpetrators of misconduct, they may be tempted to dismiss all strikers based on the criminal law doctrine of 'common purpose' – as happened in the Marikana debacle.[115] However, this doctrine will only apply if it can be proved that each of the strikers actively associated himself or herself with the actual perpetrators. The limits to the application of the doctrine of common purpose, emerged in *NSCAWU & others v Coin Security Group t/a Coin Security*,[116] where the court found that some seventy-four of the workers who had been dismissed, could not possibly have committed the acts, and that the employer had failed to demonstrate which, if any, of the other strikers had actively associated himself or herself with the perpetrators.

Item 7(a) of the Code requires that the employer must prove, on a balance of probabilities, that the employee to be dismissed was guilty of misconduct. This will include, amongst others considerations, proving that there was a rule and the employee broke that rule. Whether the rule exists, may be determined either from the employee's contract, or a collective agreement or disciplinary code. However, there are certain types of conduct which, even though are not written, are deemed to destroy the employment relationship. Some rules of conduct may be so well established and known, that it is unnecessary for the employer to communicate them to employees.[117] Anderman[118] says the following regarding employers' power to discipline:

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114 Grogan *Collective labour law* (1ed 2010) 229.

115 Grant 'Marikana: Common purpose not outdated or defunct': http://mg.co.za/article/2012-08-31-marikana-common-purpose-notoutdated-or-defunct (last accessed 24 April 2013).

116 [1997] 1 BLLR 85 (IC).

117 See Item 3(1) of the Code.

118 Anderman *Labour law: management decisions and wokers' rights* (1992) 62.

> employers' disciplinary powers … are well developed in the terms implied in employment contracts. Even if nothing is put into express terms of employment contracts, the employer's disciplinary control is carefully preserved in the employee's duty to obey as an implied fundamental term of the contract.

There is no need for the employer to prove beyond reasonable doubt, as in a criminal court, that the employee committed the offence. In *Moahlodi v East Rand Gold & Uranium Co Ltd,*[119] the court formulated the test as follows:

> an employer need not be satisfied beyond reasonable doubt that an employee has committed an offence. The test to be applied is whether the employer had reasonable grounds for believing that the employee has committed the offence. It is sufficient if, after making his own investigations, he arrives at a decision on a balance of probabilities, that the offence was committed [by the employee] provided that he affords the employee a fair opportunity of stating his story in refutation of the charge.

Furthermore, in *Potgietersrus Platinum Ltd v Commission for Conciliation, Mediation and Arbitration & others,*[120] an award by a CCMA Commissioner was set aside because he adopted the criminal 'beyond reasonable doubt' standard of proof. Where a number of employees are involved, it must be shown on a balance of probabilities, that each of them was actually involved in the act. The commission of an act of misconduct must be linked to individuals. If the employer wishes to discipline a number of employees for collective misconduct,[121] similar cases must receive similar treatment.[122] It would constitute unfair treatment, were the employer to single out one or two employees; he or she may, however, identify the most serious transgressions,[123] but cannot dismiss all employees in a section where the guilty employees cannot be determined.

Dismissal for operational reasons during a protected strike

Employees taking part in a protected strike may also be dismissed based on the employer's operational requirements. In such a case, the procedure set

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[119] (1988) 9 *ILJ* 597 (IC) at 601I–J.
[120] (1999) 20 *ILJ* 2679 (LC)
[121] See *SACTWU v Novel Spinners (Pty) Ltd* [1999] 11 BLLR 1157 (LC); *Minister of Correctional Services v Ngubo* (2000) *ILJ* 313 (N).
[122] See *FAWU v Amalgamated Beverage Industries Ltd* (1994) *ILJ* 1057 (LAC).
[123] See *Reckitt & Collman (SA) (Pty) Ltd v CWIU* (1991) *ILJ* 806 (LAC).

in section 189 must be followed.[124] In this regard, the court must establish whether the real reason for the dismissal was indeed the employer's operational requirements.[125] A dismissal based on operational considerations, is valid irrespective of whether the operational problems arose as a consequence of the strike.[126]

Unprotected strikes

An unprotected strike is not a criminal offence punishable by law as was the case under the previous dispensation. However, it is in itself an act of misconduct.[127] If the strike does not comply with the procedural requirements, or there are limitations in terms of section 65, the strike will not enjoy protection. The immunity that applies in the case of protected strikes, does not apply to unprotected strike. The following legal consequences will ensue in the case of unprotected strikes.

An interdict

In terms of section 68, the employer may apply to the Labour Court for an interdict against anyone who is engaged in an unprotected strike or for any conduct in contemplation or in furtherance of such a strike.[128] The special procedural requirements for strike interdicts are provided for in section 68(2) of the LRA. Section 68, however, does not apply where the employer suffers as a result of unlawful conduct emanating from a protected strike; it applies only to unprotected strikes.

Compensation

The Labour Court may also order the payment of 'just and equitable compensation' for any loss resulting from an unprotected strike.[129] Such compensation will, however, not be granted unless the employer can prove that it suffered loss, and that the loss resulted from the unprotected strike. In deciding whether to grant an order for payment of compensation, the Labour Court must have regard to whether attempts were made to comply with the provisions of sections 64 and 65 of the LRA, the extent to those attempts,

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[124] Operational requirements include requirements based on the economic, technological, structural and similar needs of the employer (s 213 of the LRA). See also *SACWU v Afrox Ltd* (1998) *ILJ* 62 (LC).

[125] See *SACWU & others v Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC).

[126] See Cohen *et al Trade Unions and the Law in South Africa* (2009) at 71.

[127] See s 68(5) of the LRA.

[128] *Id* at s 68(1)(a).

[129] *Id* at s 68(1)(b).

and whether the strike was premeditated.[130] It must also be considered whether the strike was in response to unjustified conduct by the other party to the dispute, and whether there was compliance with an order or interdict granted in terms of section 68(1)(a) of the LRA. The interests of orderly collective bargaining, the duration of the strike, and the financial position of the employer, trade union, or employees, must also be taken into account.[131] A trade union, its members, or both, can be held liable for losses resulting from an unprotected strike. In *Manguang Local Municipality v SAMWU,*[132] the Labour Court held that where the trade union has a collective bargaining relationship with the employer, and its members embark on an unprotected strike – of which the union is aware but in which it has, without just cause, failed to intervene – the union will, in terms of section 68(1)(b), be held liable to compensate the employer for any loss incurred as a result of the strike.[133] In *Algoa Bus Company v SATAWU & others,*[134] the company sued the union and employees for a financial loss of R465 000 it incurred during an unlawful strike. The court held that while employers are entitled to claim compensation for losses actually suffered during an unlawful strike, the amount awarded need not necessarily be full compensation for such loss. The court then ordered the union and employees to pay the company only R100 000 in monthly instalments of R50. This finding illustrates how ineffective this remedy has been in the hands of the courts.

Dismissal

Participation in an unprotected strike as an act of misconduct

Section 68(5) of the LRA provides that participation in an unprotected strike or certain forms of conduct in contemplation or furtherance of an unprotected strike, may be a fair reason for dismissal. It is an act of misconduct. However, as in the case of any other act of misconduct, participation in an unprotected strike does not necessarily justify dismissal.[135] A dismissal will only be fair if it is both substantively and procedurally fair.[136] There must be valid or fair reasons for the dismissal, before it will be recognised as fair.

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130 See s 68(1)(b)(i)(aa) of the LRA.
131 See *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (2001) 22 *ILJ* 2035 (LC).
132 [2003] 3 BLLR 268 (LC)
133 See Cohen *et al* n 126 above at 84.
134 [2010] 2 BLLR 149 (LC).
135 See also Maserumule 'A perspective on developments in strike law' (2001) 22 *ILJ* 45.
136 See item 6 of the Code.

The fairness of a dismissal based on participation in an unprotected strike

The substantive fairness of a dismissal of strikers who have participated in an unprotected strike, must be evaluated in the light of the facts of the case – including the seriousness of the failure to comply with the provisions of the LRA;[137] any attempts made to comply;[138] and whether the strike was in response unjustified conduct by the employer.[139] The dismissal of strikers engaged in an unprotected strike must also be procedurally fair. The employer must contact a trade union official at the earliest possible opportunity to discuss the course of action it proposes to take. The employer must give striking employees or their trade unions an ultimatum[140] that he intends to dismiss them, so affording them a proper opportunity of obtaining advice and taking a rational decision as to what course to follow.

Unprotected strikes and acts of misconduct

During an unprotected strike, the employer may apply to the Labour Court or High Court for an order restraining any act of misconduct. A mandatory order may also be acquired to direct the union to intervene and take steps to stop or prevent violent action. The employer may also dismiss employees for violent acts of misconduct. When employees are dismissed for acts of misconduct during an unprotected strike, they are dismissed for a disciplinary offence, and the substantive and procedural requirements in section 188 and items 4(1) and 7 of the Code must be met. Aspects relating to the dismissal of employees who commit acts of misconduct during a protected strike, as discussed above, will, therefore, apply even to the dismissal of employees for acts of misconduct during an unprotected strike.[141] Courts generally examine the behaviour of strikers when deciding the fairness of their dismissal.[142] An employer can institute disciplinary action at any time during a protected or unprotected strike, against employees committing acts of misconduct.[143] Employers may also dismiss

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137 *Id* at item 6(1)(a).

138 *Id* at 6(1)(b).

139 *Id* at item 6(1)(c). See also *Liberty Box & Bag Manufacturing Co (Pty) Ltd v Paper Wood & Allied Workers Union* (1990) 11 *ILJ* 427 (ARB).

140 See item 6(2) of the Code. See also *SA Clothing & Textile Workers Union & others v Yarntex (Pty) Ltd t/a Bertrand Group* (2010) 31 *ILJ* 2986 (LC).

141 See **Dismissal for misconduct or acts of violence during a protected strike** above.

142 See *Transport & General Workers Union of SA v Ullman Brothers (Pty) Ltd* (1989) *10 ILJ* 1154(IC); *Food & Allied Workers Union v National Co-operative Dairies Ltd* (2) (1989) 10 *ILJ* 490 (IC).

143 See *CEPPAWU and others v Metrofile* (2004) 25 *ILJ* 231 (LC)

unprotected strikers for operational reasons. In doing so, they must comply with the provisions of section 189 of the LRA.[144]

SPECIFIC ACTS OF MISCONDUCT

Damage to property

In order to justify dismissal, the damage to property must be wilful and serious. The employees' actions must be consciously directed towards the destruction of property. In terms of item 3(4) of the Code, wilful damage to property of the employer constitutes serious misconduct.

Assault

Assault is an unlawful and intentional application of force to a person, or a threat that such force will be applied. Force need not necessarily involve the actual application of physical force. Threats of violence may be sufficient.[145] Assault includes various personal interactions, ranging from fisticuffs to pushing and shoving.[146] In terms of item 3(4) of the Code, physical assault on the employer, a fellow employee, a client, or a customer, is a serious act of misconduct.

Intimidation

Intimidation which entails threats uttered seriously, is a ground for dismissal.[147] In *Adcock Ingram Critical Care v CCMA & others,*[148] it was stated that to constitute 'intimidation' words need not be directed at particular persons. It was further held that words are intimidatory if they are calculated to 'terrify', 'overawe', or 'cow'.[149]

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144 See Grogan n 114 above at 263.

145 See *Ntshangase v Alusaf (Pty) Ltd* (1984) 5 *ILJ* 336 (IC).

146 See Mischke 'Assault in the workplace: rhe role of provocation as a defence' (2010) 20/2 *CLL* 11.

147 See *Metal & Allied Workers Union & others v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd* (1988) 9 *ILJ* 129 (IC); *Food & Allied Workers Union & another v BB Bread (Pty) Ltd* (1987) 8 *ILJ* 704 (IC).

148 (2001) 22 *ILJ* 1799 (LAC).

149 See also *Transport and General Workers Union & another v Durban Transport Management Board* (1991) 12 *ILJ* 1113 (IC); *National Union of Mineworkers & others v Deelkraal Gold Mining Co Ltd* (2) (1994) 15 *ILJ* 1327 (IC).

LIABILITY OF TRADE UNIONS FOR VIOLENT ACTS OF MISCONDUCT DURING STRIKES

There is a duty upon unions to take all reasonable steps to stop and prevent violence, damage to property and other acts of misconduct during a strike.[150] A union can be held vicariously liable for the acts of its members if the employer can establish that there was a wrongful act committed by the union members and that it was liable for its members' actions. In *Mondi Ltd v CEPPAWU and others*,[151] during a protected strike employees who were on strike switched off the employer's machinery and the employer incurred damages of R673 000. The employer subsequently claimed these damages from the union. The court held that in order for the union to be held vicariously liable for its members' actions, it must be proved that they acted with common purpose by authorising the employees' behaviour. It found that there was insufficient evidence to identify the employees responsible for switching off the machine, and therefore that the union could not be held vicariously liable. In *Eskom Ltd v National Union of Mineworkers,*[152] Eskom sued the union for more than R6 million in damages caused by union members who were part of a union-organised demonstration, during which they ran amok and vandalised the premises. Eskom claimed that the union was vicariously liable for the damages.

Although section 17 of the Constitution grants everyone the right to assemble, demonstrate, picket, and present petitions, all these rights must be exercised peacefully. These rights are further limited by section 11(1) of the Regulation of Gatherings Act,[153] which provides that if any riot damage occurs as a result of a gathering or demonstration, the organisation or convener responsible for such gathering or demonstration, shall be jointly and severally liable together with any person who unlawfully caused or contributed to the damage. Section 11(2) of the Regulation of Gatherings Act, however, provides that such organisation or person may defend such a claim by, amongst others, proving that they did not authorise the act that caused the damage, that the act did not fall within the scope of the objectives of the gathering or demonstration, and that reasonable steps were taken to prevent the act in question.

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150 See Cohen *et al* n 126 above at 81.
151 See Cohen et al.
152 (2001) 22 *ILJ* 618 (W).
153 Act 205 of 1993.

In *SATAWU v Garvis and others*, SATAWU organised a protest march, which constituted a gathering in terms of the Regulation of Gatherings Act, as part of its national strike. This resulted in people being killed and property damaged. The respondents claimed damages in the High Court from the union in terms of section 11 of the Act. SATAWU denied liability and challenged the constitutionality of provisions of section 11(2)(b) on the ground that it was inconsistent with the constitutional right to assemble, demonstrate, and picket. The court found against SATAWU which then appealed to the Supreme Court of Appeal (SCA). The SCA dismissed the appeal and SATAWU appealed to the Constitutional Court which found that section 11 was not irrational, and that the constitutional right to assemble and demonstrate is constitutionally protected and guaranteed as long as it is exercised peacefully. The Constitutional Court further held that as the decision to assemble resides with the organisation, the organisation should be responsible for any reasonably foreseeable damage arising from such assembly, as the purpose of section 11(2) is to protect the safety and property of the public from foreseeable possibility of damage. SATAWU's appeal was therefore dismissed.

CONCLUSION

The right to strike is an important part of collective bargaining. It is an effective and powerful bargaining tool for employees. This right is protected at international, regional, and national level.[154] Under South African law, the right to strike is protected in terms of section 23(2)(c) of the Constitution and section 64(1) of the LRA. However, like any other right in the Bill of Rights, the right to strike is not absolute. It is limited in terms of section 36 of the Constitution which is a general limitation clause for all rights in the Bill of Rights.[155] It is also limited in terms sections 64 and 65 of the LRA. A strike which complies with the procedure set out in section 64 of the LRA, will be protected and employees who engage in such a strike will not be held liable for breach of contract, and cannot be dismissed for participation in such a strike. However, employees can be dismissed for violent acts of misconduct – such as assault, intimidation, and damage to property – committed during a protected strike.[156]

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[154] See pars 1 and 3.

[155] See Chapter 2 of the Constitution.

[156] In terms of s 67(5) of the LRA employees can also be dismissed for operational requirements during a protected strike.

Failure to comply with the procedure set out in section 64(1) of the LRA, will render a strike unprotected and participation in such action constitutes misconduct. An employer may apply for an interdict against employees taking part in such action, and may also claim compensation for any loss suffered as a result of such conduct. Furthermore, participation in an unprotected strike constitutes a fair reason for dismissal. Therefore, an employer would be justified in dismissing employees engaged in such action, provided that all the substantive and procedural requirements are followed. In addition, employees who commit violent acts of misconduct (such as assault, intimidation and damage to property) during an unprotected strike, may be dismissed on the basis of such conduct in terms of provisions of section 188 of the LRA, and items 4(1) and 7 of the Code of Good Practice.

In addition to section 23 of the Constitution and section 64(1) of the LRA which grant every worker the right to strike, section 17 of the Constitution grants everyone the right to assemble, demonstrate, picket, and present petitions. However, it limits these rights by providing that all these actions must take place peacefully and that those taking part must be unarmed. In terms of section 11(1) of the Regulation of Gatherings Act,[157] an organisation responsible for a gathering or demonstration which has resulted in damage, shall be jointly and severally liable together with any other person who unlawfully caused or contributed to the damage. Trade unions can, therefore, be held liable for violent conduct which takes place during strike action.[158]

South Africa has recently been confronted with a high level of violent strikes. This negatively impacts on the image of the country internationally, and also affects its economy as investors may be hesitant to do business in the country.[159] Violence during both protected and unprotected strike action is, therefore, unacceptable, is not functional to collective bargaining, and is discouraged in terms of both international and national labour laws.[160] South

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157 Act 205 of 1993.

158 *SATAWU v Garvis and Others* n 87 above.

159 See 'Warning on the effect of violent strikes to the economy' available at: ERLINK"http://www.algoafm.co.za/article"http://www.algoafm.co.za/article (last accessed 3 June 2013). See also 'The economic impact of Marikana' available at: http://mg.co.za/article/2012-11-02-the-economic-impact-of-marikana (last accessed 3 June 2013) and 'Worsen South Africa's economic situation-Aveng CEO': http://www.ventures-africa.com (last accessed 3 June 2013).

160 See pars 1 and 3 above.

Africa has one of the most progressive labour legislation regimes in the world which makes dispute resolution processes available to parties.[161] Workers and their trade unions must use these processes instead of resorting to violence. Lawlessness should not be allowed to infiltrate and pollute the right to strike. The right to strike is an important tool for employees during collective bargaining, but it should not be abused and misused by workers through acts of violence. Accordingly, it is up to trade unions to ensure that their members conduct themselves properly during strikes, whether protected or not.

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[161] See 'Regulating labour relations' available at http://www.southafrica.info/business/economy/policies/labourbodies.htm (last accessed 3 June 2013).