Investigating the Possibility of Suspending or Terminating a Strike on Account of Violent Conduct: Transplanting Lessons from Australia

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Abstract

South Africa has a history of violent industrial strikes, with authorities seemingly unable to exert control. The existing remedies in the form of an interdict and advisory arbitration awards do not appear to address violence during strikes. Violent and lengthy strikes affect members of the public and have long-term effects on the economy, resulting in loss of employment and poverty. Since South Africa does not have the legal mechanisms to deal with or curb violent strikes, this article submits that lessons could be drawn from foreign law on how to deal with these strikes. In this article, Australia is the foreign jurisdiction from which lessons are drawn. This article commences with a comparative analysis of industrial action between Australia and South Africa to answer the question of whether violent strike action is unique to South Africa. The article establishes that the Fair Works Commission (FWC): Australia's National Workplace Relations Tribunal can suspend or terminate industrial action that is characterised by violence. It then suggests that part of Australian labour law could be transplanted into South African labour law to combat strike-related violence. The article suggests that the Labour Relations Act 66 of 1995 (LRA) should be amended to include a provision that will empower the Labour Court to suspend or terminate industrial action once it turns violent, thus benefitting the economy and preventing job losses.

Keywords: strikes; violence; suspension; termination; lessons and foreign law

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Introduction

South Africa has had and continues to experience violent labour strike action.[1] It is acknowledged that the purpose of industrial action is to cause economic loss to the employer, and in the process, third parties suffer some collateral damage. Violent industrial action in South Africa is about to reach crisis levels because of its negative effects on the economy[2] and other sectors including job losses. This is most likely to happen if violent industrial action continues for an unreasonably long period of time.[3] The existing domestic laws in the Republic do not address the problem. This is corroborated by the number of interdicts issued by the Labour Court to stop violent strikes. However, such interdicts are sometimes ignored by trade unions and their members.[4] To find a solution to this problem, there is an increasing need to examine the laws of other countries for guidance on how to solve the problem of violence flowing from industrial action in South Africa.

Informed by the Constitution of South Africa, 1996 (Constitution),[5] the article investigates what practices other countries, especially Australia and its Fair Works Commission (FWC): Australia's National Workplace Relations Tribunal, which is empowered to terminate harmful industrial action. An examination of whether violent industrial action also occurs in Australia, or whether such conduct is unique to South Africa is undertaken in this article. It is proposed that some of Austrialia's industrial action legislation measures could be incorporated into South African labour relations law to deal with violent strikes.

1 *AMCU v Sibanye Gold Limited t/a Sibanye Stillwater and others* (2019) 40 ILJ 1607 (LC); *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 ILJ 476 (LC); *SA Chemical Catering & Allied Workers Union & others v Check one (Pty) Ltd* (2012) 33 ILJ 1922 (LC); *Security Services Employers Organisation & others v SA Transport & Allied Workers Union & others* (2012) 35 ILJ 1693 (CC); *Mahlangu v SATAWU, Passenger Rail Agency of SA & another, Third Parties* (2014) 35 ILJ 1193 (GSJ); *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 ILJ 998 (LC); Anton Mybugh, 'Interdicting Protected Strikes on Account of Violence' (2018) 38 ILJ 703.

2 As Van Niekerk put it in *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers & others* (2016) 37 ILJ 476 (LC) (UPN) para 37: '[I]t is regrettable that acts of wanton and gratuitous violence appear inevitably to accompany strike action, whether protected or unprotected … A week in the urgent court where employers seek interdicts against strike related misconduct on a daily basis bears testimony to this.'

3 *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue River Salt River* [2010] BLLR 903 (LC).

4 In *In2Food (Pty) Ltd v Food & Allied Workers Union & others* (2013) 34 ILJ 2589 (LC). See also, *Security Services Employers' Organisation & others v SATAWU & others* (2007) 28 ILJ 1134 (LC); and S*upreme Spring – A Division of Met Industrial v MEWUSA* (J2067/201).

5 Section 39(1)(c) of the Constitution of the Republic of South Africa, 1996.

Foreign Law in the Constitution

Foreign law is any law enacted and in force in a foreign state or country.[6] The principle of state sovereignty entails that states are independent and autonomous.[7] And therefore states are not bound to apply the rules of another country unless there are compelling reasons to do so. A country can borrow from the law of a foreign country if a certain area of law in the home country is still under-developed.[8] For example, South Africa borrowed much of Canadian constitutional law when this area of law was still in its infancy in South Africa after 1994.[9] The Constitution acknowledges the importance of foreign law and the role it can play in shaping or supplementing the law of South Africa. Section 39(1)(c) of the Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum may 'consider foreign law.' The interpretation of this section of the Constitution reveals that the consideration of foreign law is permissive, which means that the consideration of foreign law in South Africa is not binding. This was emphasised by the Constitutional Court in *S v Makwanyane*, where it stated that 'we can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.'[10]

In important respects, the Constitution is similar to the Canadian Constitution,[11] and early decisions of the Constitutional Court made frequent reference to Canadian cases and academic commentary.[12] Several reasons have been cited to justify the authorisation of South African courts to consider foreign law. One such reason is that South Africa's recent past as an apartheid state made it especially difficult to locate domestic jurisprudence to support the interpretation of the Constitution.[13] In *Shabalala v The Attorney-General of Tvl*,[14] the court stated:

> [The mandate to consider foreign law] should be exercised with circumspection, since the resort to case law of foreign jurisdictions by persons not fully acquainted with the practice in these jurisdictions or with the concepts and techniques of a foreign system entails a real risk that a foreign legal position would be misinterpreted. It is necessary to

6 John Dugard, *International Law: A South African Perspective* (3rd edn, Juta 2005) 56.

7 Sovereignty empowers a state to exercise the functions of a state within a particular territory to the exclusion of other states, *Island of Palmas* Case (*Netherlands v United States*) 2 RIAA 829 (1928) 838.

8 See Peter Wardell Hogg, 'Canadian Law in the Constitutional Court of South Africa' (1998) 13(1) SAPL 1.

9 ibid.

10 [1995] 6 BCLR 694 (CC).

11 The Constitution of Canada includes the Constitution Act of 1867 and the Constitution Act of 1982.

12 Hogg (n 8). In the opinion of the Constitutional Court, there are over 200 references to Canadian cases and over 80 references to Peter Wardell Hogg, *Constitutional Law of Canada* (4th edn, Carswell 1997); Arthur Chaskalson, Speech at the University of Toronto (22 October 1997).

13 Andrea Lollini, 'Legal Argumentation Based on Foreign Law: An Example from Case Law of the South African Constitutional Court*'* (2007) 3 Utrecht Law Review 60 65.

14 [1995] 12 BCLR 1593.

> take into account the accumulated experience of what does and does not work satisfactorily in the administration of justice in South Africa.

The case of *S v Makwanyane* was one of the first cases adjudicated by the newly established Constitutional Court where it had to engage in comparative interpretation. At issue was the constitutionality of capital punishment—on whether it was a cruel and degrading treatment. The Court, in deliberating on this matter, consulted a wide range of foreign laws, including the laws of Canada, Germany, Hungary, India, Tanzania, the United Kingdom, the United States and Zimbabwe. The Court attempted to define the limited role that foreign laws could play and the caution with which comparative interpretation should be approached. It stated that:

> Comparative bill of rights jurisprudence, will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of law on which to draw. Although we are told by s 35(1) that we 'may' have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of chap 3 of our Constitution.[15]

Following the above discussion, which serves as background and demonstrates the authority for the application of foreign law, it is argued that much can be learnt from Austrialia's labour relations law while certain aspects could be incorporated into the labour relations law of South Africa—particularly with regard to violent strikes. Australia and South Africa share certain similarities, for example, both countries have decentralised systems consisting of national, provincial and local spheres of government.[16] The three tiers in Australia consist of the federal government, the states and the local government.

Australia has certain provisions in its statutes or labour codes in place that that can prevent or resolve disputes before they degenerate into disruptions and turning violent.[17] In Australia, each sphere of government is responsible for specific matters assigned to it by the Commonwealth of Australia Constitution Act, 1900.[18] Labour relations matters are the responsibility of both the federal government and the states.[19] The most important legislation with regard to labour matters in Australia is the Fair Work Act (Cth)[20] (FW Act). Should there be a conflict between the federal law and the law of the state, for example, the federal law prevails.[21] It is this aspect of the law of Australia (method of resolving disputes) that is of significance to South Africa, because of the

15 *S v Makwanyane* (n 10) para 37.
16 Section 40 of the Constitution.
17 Section 423 of the FW Act.
18 The Commonwealth of Australia Constitution Act, 1900.
19 Constitution of Australia s 51(35).
20 Act 28 2009.
21 Constitution of Australia s 109.

violent nature of strikes and its negative consequences. In Australia, if industrial action degenerates into violence, the FWC has the power to suspend or terminate such action. The article argues that such lessons should be transplanted into the labour law of South Africa to allow the Labour Court or CCMA to suspend or terminate such industrial action.

In South Africa, the main statutes regulating terms and conditions of employment and matters of mutual interest including the resolution of disputes, are the Labour Relations Act[22] (LRA) and the Basic Conditions of Employment Act[23] (BCEA) which draw their powers from the labour relations clause in the Constitution.[24] The Constitution states that 'national legislation may be enacted to regulate collective bargaining.' It is through this provision that these pieces of legislation were enacted.

It is acknowledged that both countries make provision for workers to form or join unions of their choice and to participate in the activities of their unions.[25] There are, however, differences in the way labour disputes are resolved in the two countries. Australian labour law differs from South African labour law with regard to industrial action—and especially on the two following aspects. In the first place, the courts or similar structures are empowered to intervene in industrial disputes that appears to or have the potential to cause significant harm to lives and property.[26] The power to terminate an industrial action that has the potential to cause harm is entrusted to the FWC.[27] It exercises its power by engaging with a bargaining party, or the Minister, or by acting on its own initiative.[28] The power to terminate industrial action is distinct from the power that the FWC may exercise to terminate an enterprise agreement after its nominal expiry date, in order to break an impasse during the resolution of a dispute.[29] In South Africa, the Labour Court can intervene in industrial disputes only if one of the parties, usually the employer, applies for an interdict to stop the action.[30] This is not a general remedy available to the employer as he or she can approach the Labout Court for an interdict only if the strike is not protected—unless the conduct constitutes a crime.[31]

22 Act 66 1995.
23 Act 75 1997.
24 The Constitution s 23.
25 In Australia this is regulated by s 19 of the FW Act of 2009, as amended by the Fair Works Act of 2012. In South Africa these are regulated by ss 4(1), 64(1), 65(1) and 69(1) of the LRA.
26 FW Act s 423e.
27 ibid.
28 FW Act s 423(7).
29 Shae McCrystal, 'Termination of Enterprise Agreements under the Fair Work Act 2009 (Cth) and Final Arbitrations' (2018) 31(2) Australian Journal of Labour Law 131–156
30 LRA s 68(1).
31 LRA ss 68(1)(a)(i); 157(1) and 158(1)(ii).

Strikes in Australia

Australia has ratified international conventions and it is therefore bound to provide employees with the right to strike.[32] For example, the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESR) binds Australia to comply with international law on the implementation of the right to strike by employees in its jurisdiction.[33] In addition, Australia is a signatory to the Right to Organise and Collective Bargaining Convention[34] and the Freedom of Association and Protection of the Right to Organise Convention.[35] Article 3 of the *Freedom of Association and Protection of the Right to Organise Convention* states that:

> workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmers. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4 of the Right to Organise and Collective Bargaining Convention[36] further states that:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

In February 2015 at an International Labour Organisation (ILO) tripartite meeting, the Workers' and Employers' Groups issued a joint statement: 'Right to take industrial action by workers and employees in support of their legitimate industrial interests is recognised by the constituents of the ILO.'[37]

The right to strike is a component of the principles of freedom of association protected by the Constitution of the ILO[38] as an obligation to respect the right of workers to

32 Anthony Forsyth and Andrew Stewart, 'Of "Kamikazes" and Mad Men": The Fallout from the Qantas Industrial Dispute' (2013) 36(3) Melbourne University Law Review 4.

33 Article 8(1)(d) of the ICESR.

34 Convention No 98 of 1948 requires ratifying states to encourage and promote the full development of voluntary collective bargaining between employers, their associations and workers' associations.

35 No 87 of 1948.

36 No 98 of 1951.

37 ILO 2015 <https://goo.gl/ksw9Pg> accessed 20 July 2021

38 ILO 1994 [146].

organise to protect their economic and social interests.[39] Thus, the protection of the right to strike in Convention 87 is enhanced in practice by the protections in Convention 98.

Despite the absence of a general right to strike in Australia, the Fair Work Act[40] (FW Act) in section 19(1) defines industrial action as 'a temporary stoppage of work by a group of employees in order to express a grievance or enforce a demand.' This definition includes various forms of industrial action such as work bans, work to rule, boycotts and go slows—but excludes picketing.[41] This was also emphasised in *Davids Distribution Pty Ltd v National Union of Workers*. It was observed that the definition of industrial action in section 19(1) of the FW Act encompasses a broad range of conduct, including total work stoppage (strikes), refusal to accept work, partial work bans, go slow campaigns, work to rule and overtime bans—with the exception of picketing.[42] A literal interpretation of this definition entails that it is broad enough to include strikes.

In situations where employees intend to embark on an industrial action, a distinction is drawn between protected and unprotected industrial action in Australia. The FW Act lays down some foundations that employees must comply with before they can attempt to embark on industrial action. For example, the FW Act does not permit a strike taken in support of an unlawful demand or terms.[43] Unlawful demands may include discriminatory terms, claims for bargaining services' fees, or attempts to give employees access to unfair dismissal protection outside of the protections already provided in the Act.[44] In terms of the FW Act, lawful strike action by employees may only be taken against an employer in support of claims to be included in a single-enterprise agreement.[45] Collective enterprise agreements allow employees in a single enterprise to gain improvements in their remuneration and terms and in their conditions of employment.[46]

McCrystal argues that employees and their representatives cannot use industrial action to pursue social or economic objectives that do not qualify as claims in an enterprise agreement.[47] Access to protected industrial action under the FW Act is restricted to

39 ILO Freedom of Association and Protection of the Right to Organise Convention 87 1948, art 3.

40 FW Act 28 2009.

41 Forsyth and Stewart (n 32) 5.

42 See *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463; (1999) FCA 1108; *Metal Trades Industry Association of Australia v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* (1997) 77 IR 87; A*ge Co Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia Print PR* 946290; (2004) 133 IR 197.

43 FW Act, s 409(3).

44 See FW Act, Part 3-2 for the provisions dealing with unfair dismissal protection.

45 FW Act, s 409(3).

46 *CFMEU v Woodside Burrup (Pty) Ltd & Another* (2010) FWAFB 6021 para 25.

47 Shae McCrystal, 'Why is it so Hard to Take Lawful Strike Action in Australia' (2019) 61(1) Journal of Industrial Relations 133.

industrial action undertaken to support negotiations for a single enterprise agreement—with employees engaging in employee claim action or employee response action.[48] Employee claim action is undertaken by a bargaining representative and the employees represented to support their claims in negotiations for a single enterprise agreement.[49] An employee response action is an industrial action undertaken in response to an industrial action undertaken by an employer.[50] Bargaining for a new enterprise agreement must have commenced because the employer has agreed to bargain or because the employer has been required to bargain by an order of the FWC, following a bargaining representatives' successful application for a majority support determination.[51]

Prior to 2015, protected industrial action could be taken by employees and their representatives in support of a proposed agreement where bargaining had not commenced.[52] However, this was amended in 2015 by the Fair Work Amendment Act (Cth), so that employees and their representatives can no longer seek to influence the commencement of bargaining through industrial action. In order to force the employer to the bargaining table, unions must now obtain a majority support determination, proving that they have the support of a majority of employees who will be covered by the agreement.[53]This has further restricted the circumstances in which employees can lawfully take industrial action.[54] In order to fall within the scope of a protected industrial action, any action taken must be 'industrial action' in terms of section 19(1) of the FW Act.[55] The definition in section 19(1) of the FW Act requires the relevant action to have the effect of restricting, limiting or delaying the performance of work.[56]

For an industrial action to enjoy protection, it needs to comply with certain requirements specified in the FW Act. These are:

48 FW Act, s 408.
49 ibid s 409(1).
50 ibid s 411.
51 ibid s 172.
52 *JJ Richards & Sons Pty Ltd v FAIR Work Australia, discussed in Howard* (201) FCAFC 53.
53 FW Act, s 237.
54 Breen Creighton, Getting to the Bargaining Table: Coercive, Facilitated and Pre-commitment Bargainingin McCrystal Shae, Creighton Breen and Forsyth Anthony (eds), *Collective Bargaining under the Fair Work Act* (Federation Press 2018).
55 The scope of s19(1) is broad—to include total work stoppages, work bans and the performance of work in a manner different from that in which it is normally performed, but excludes picketing, *David's Distribution v NUW* (1999) FCA 1108.
56 Breen Creighton and Shae McCrystal, 'Esso Australia Pty Ltd v The Australian Workers' Union: Breaches of Orders, Coercion and Protected Industrial Action under Fair Work Act 2009 (Cth)' (2017) 39(2) Sydney Law Review 233–244.

- The industrial action can only be taken in support of enterprise-level bargaining by unions or groups of workers,[57] but must prohibit a protected industrial action involving pattern bargaining;[58]

- The matter must concern the relationship between an employee and employer and matters that relate to the relationship between a union and an employer;[59]

- All employees (union or non-union) must be balloted before taking industrial action;[60]

- Where industrial action threatens life, safety or an important part of the Australian economy; where parties request a cooling off period; or where a significant harm is inflicted on a third party, the action may be terminated or suspended by the FWC;[61]

- The FWC may suspend or terminate protected industrial action which is causing significant economic harm.

With these requirements, it is clear that protected industrial action in Australia can only be taken in support of those acceptable claim(s) with genuine occupational connection, which are not otherwise deemed to be prohibited or unlawful.[62] The party that intends to take on industrial action must genuinely try to reach agreement with the other negotiating party and if negotiations fail to bring about the required solution, then they can attempt to launch the process of embarking on a strike. During negotiations, the parties must comply with the good faith bargaining requirements as set out in the FW Act.[63] The decision to enter negotiations is voluntary, although there are provisions which trigger an obligation on employers to agree to participate in a bargaining process.[64]

A further requirement for a protected industrial action is that it must be preceded by a ballot of all employees—unionised or non-unionised.[65] Ballots enable employers to delay the taking of industrial action in some instances. In terms of the FW Act, permission to hold a pre-strike ballot must first be obtained from the FWC.[66] It is believed that the rationale for the introduction of a ballot requirement was to make unions more accountable and responsive to their members, to facilitate freedom of

57 FW Act, ss 409(1) and 210(1).
58 Pattern bargaining is defined in s 412 of the FW Act. See, also, the case of *NTEU v University of Queensland* 920090 FWA 90.
59 FW Act, s 172(1).
60 ibid s 409(2).
61 ibid s 224–246.
62 Shae McCrystal 'Protected Industrial Action and Voluntary Collective Bargaining under the Fair Work Act 2009' (2010) 21(1) The Economic and Labour Relations Review 37 at 45.
63 FW Act, s 228.
64 ibid ss 237 and 238.
65 ibid FW Act, part 3-3, division 8.
66 ibid.

choice for union members, and to ensure that employees and not outsiders, had initiated industrial action. The aim is to determine whether the proposed industrial action has the support of the majority of employees. Section 436 of the FW Act states that the purpose of the ballot provision is to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in a particular protected industrial action for a proposed agreement.

Ballots are handled by the Australian Elections Commission[67] (AEC), unless the applicant has nominated an alternative agent and the FWC has approved it.[68] The ballot should be authorised by the FWC. The FWC must refuse to order a ballot if the applicant party has not been genuinely trying to reach an agreement. The FWC can only grant a protected ballot order to employees once it is satisfied that enterprise bargaining has commenced.[69] A pre-strike ballot under the FW Act is limited to the individual enterprises (workplace) at which negotiations for an agreement are taking place.[70] If unions are negotiating with different employers in one industry, for example different universities or government agencies, a separate ballot needs to take place at each enterprise or government agency.[71] Creighton argues that the approach taken under the FW Act means that the results of all ballots are publicly available. This provides an invaluable dataset for exploring the impact of voter turnout requirements on ballot outcomes.[72]

Once the above requirements have been complied with, the FW Act provides that employees must serve their employer with a notice to commence the action, in accordance with section 414.[73] The notice must be in writing and must state the reasons for wanting to embark on a strike.[74] The period of notice must at least be three days, unless the protected industrial action ballot specifies a longer period.[75] The notice must also specify the nature of the action and the day on which it will start.[76] In *Telstra Corporation Ltd v Community and Public Sector Union,*[77] the respondent and other

67 The AEC is an independent statutory body which has responsibility for the conduct of ballots in a range of contexts, including federal elections, by-elections and referenda, Breen Creighton, Catrina Denvir, Richard Johnstone, Shae McCrystal and Alice Orchiston, 'Pre-strike Ballots and Collective Bargaining: The Impact of Quorum and Ballot Mode Requirements on Access to Lawful Industrial Action'(2019) 48(3) Industrial Law Journal 343 at 354.

68 Sections 464–465 of the FW Act.

69 Section 443.

70 It is not possible to take protected industrial action in relation to an agreement applying to all or part of an industry, or a specific geographical area, see Creighton and others (n 67) 343 at 355.

71 FW Act, s 228.

72 Creighton and others (n 67) 356.

73 See Esso Australia Pty Ltd v AWU (2016) FCAFC 72.

74 FW Act, s 414(1) of the.

75 Ibid FW Act, s 414(2)(b).

76 ibid s 414(6).

77 [2001] 107 FCR 93.

unions were involved in negotiations for a collective agreement to replace the one that would soon expire. The unions purported to serve Telstra with notice to strike. According to Telstra, the notice served by the union was defective and proper compliance with the law was questionable. The employees proceeded with their proposed industrial action, as indicated in the notice. The Court held that the industrial action was not protected on two grounds: first, the correct notice period had not been given, and second the notice was void because of lack of specificity.

Where parties have complied with the provisions in the FW Act and the FWC, the participants in industrial action are protected from the common law or statutory liability.[78] In short, the concept 'protected' industrial action grants immunity from legal action for the party taking (or threatening) industrial action.[79] In *Esso Australia v The Australia Workers Union,*[80] the High Court referred to the immunity from civil suit provided by the FW Act as a privilege.[81] If the industrial action is protected, it may continue indefinitely until an agreement is reached. However, before an agreement is reached, the FWC may suspend or terminate industrial action should it cause significant economic harm to the Australian economy, the population, or the bargaining parties.[82] In *NTEU v Monash University*,[83] a full bench suspended a protected industrial action by employees at Monash University after finding that the general welfare of students, subject to a results ban, was endangered because of heightened anxiety levels and the potential threat to their mental health and welfare. The court insisted that section 424(1) of the FW Act only requires that a threat that endangers life, health, safety or welfare, and not a threat that could identified as significant.

Failure to comply with the requirements for a protected industrial action, will render the action unprotected. There could be two reasons for employees not complying with the statutory requirements for a protected strike. The first is that they deliberately or unintentionally failed to comply with the requirements. The second is that the action was taken without reference to the statutory requirements. Regardless of whether the non-compliance was deliberate or negligent, the strike will not enjoy immunity and the employees will be liable for breach of contract or any other sanction or remedy that may be available to the employer in terms of the law.

An unprotected industrial action may attract civil remedies in the form of sanctions that may include termination of employment, a common law breach of contract, injunction and claim for damages for loss suffered or other forms of adverse action.[84] The FWC

78 FW Act, Section 415.
79 ibid s 415 and part 3-1.
80 Esso Australia (n 73).
81 At 423.
82 FW Act, s 424.
83 (2013) FWCFB 5982.
84 FW Act, s 342 and 346.

may make an order that the unprotected industrial action should stop, not occur, or not be organised.[85] In *Esso* it was held that where a bargaining representative intends to take protected industrial action but fails to comply with the prerequisites, the action will be unprotected.[86] In other words, if parties try to take lawful industrial action and get it wrong, the otherwise entirely lawful intention of the bargaining representative to coerce the employer to agree to their claims in bargaining translates into an unlawful intention to coerce the employer in breach of the FW Act.[87]

In *Ambulance Victoria v United Voice*[88] a ballot question sought consent for ambulance personnel to take industrial action in the form of releasing details of ambulance response times to the media. When challenged by the employer, the Federal Court determined that this action did not constitute industrial action in the relevant sense. The Court held that not only would such conduct be unprotected, but it could also be found to constitute unlawful coercion within the meaning of section 343 of the FW Act.[89]

The action by a group of employees is regarded as a legitimate suspension of the operation of their contracts of employment until certain demands or grievances are met or a particular agreement is reached between the employees and the employer or employers' organisation. As is the case with South Africa,[90] the principle of 'no work no pay' applies in Australia if employees embark on industrial action—unless it is a partial ban.[91] The FW Act provides that 'if an employee engaged, or engages in protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to the total duration of the industrial action on that day.'[92] In South Africa, the employer may not, however, stop paying other employee entitlements to employees on strike.[93]

However, Australia differs from South Africa, since its definition of industrial action does not include picketing, which is an act in support of a strike.[94] In South Africa, a picket is one of the recognised forms of industrial action. Another form of industrial action recognised in South Africa is protest action—which is regulated in terms of section 77 of the LRA.

85 ibid s 418.
86 Esso Australia (n 73).
87 Section 343. See also McCrystal (n 47) 138.
88 FCA 1119 (2014).
89 ibid para 60.
90 LRA, s 67(3). See, also, *Coin Security (Cape) v Vukani Guards & Allied Workers Union* (1998) 10 ILJ 239 at 244J–245A.
91 FW Act, ss 470(1) and (2). See, also, *Construction Forestry Mining & Energy Union v Mammoet Australia* (Pty) Ltd (2013) HCA 36.
92 FW Act, s 470(1).
93 LRA, s 67(3)(a).
94 A picket is an act in contemplation or in furtherance of a protected strike, section 69(1) of the LRA.

Suspension or Termination of a Protected Industrial Action

Under the FW Act, once industrial action has commenced, it may continue indefinitely unless the FWC suspends or terminates it on application by one of the bargaining parties. The suspension or an application for suspension may take place during a cooling-off period if the suspension will help resolve the dispute.[95] The FWC may also suspend the protected industrial action if it is causing significant harm to a third party, for example, by disrupting the supply of goods or services to their business.[96] Other grounds for suspending industrial action may include the position where the industrial action adversely affects the employer or employee(s) who are parties to the dispute, and whether the suspension will be contrary to public interest.

The suspension of industrial action may not be contrary to international law standards, as the ILO permits temporary restrictions on access to the right to strike in order to enable parties to exhaust negotiations, conciliation or voluntary arbitration procedures, on grounds that are reasonable.[97] On application by a bargaining representative for the agreement or a person prescribed by the Fair Work Regulations, the FWC can make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in, if the Commission is satisfied that the suspension is appropriate—taking into account the following matters:[98]

- Whether the suspension would be beneficial to the bargaining representatives for the agreement, because it would help resolve the matters at issue;
- The duration of the protected industrial action;
- Whether the suspension would be contrary to the public interest or inconsistent with the objects of the Fair Work Act; and
- Any other matters that the Commission considers relevant.[99]

It is assumed that the suspension will give the parties sufficient time to revisit and revise their offers and, where necessary, take a fresh mandate from their members. A 'cooling off period' must be ordered by the FWC on application by a bargaining representative to the proposed agreement, if the FWC considers one to be appropriate.[100] This is having

95 FW Act, s 425(1)(a).
96 ibid s 426.
97 International Labour Conference, Committee of Experts on the Application of Convention and Recommendations (81st Session 1994), Report III (Part 4B), Geneva, (General Survey).
98 FW Act, s 425.
99 *Nystar Port Pirie PTY Ltd v Construction, Forestry, Mining and Energy Union and Others* (2009) FWA 1144.
100 FW Act s 425(1).

regard to whether suspension of protected industrial action would help resolve the dispute.

In summary, the grounds for suspension of an industrial action are: firstly, the FWC may suspend industrial action where one of the parties requests a cooling-off period[101] or where industrial action is causing significant harm to a third party who has been affected by the action, for example, by disruption to the supply of goods or services to their business.[102] The FWC may also suspend or terminate industrial action (with termination leading to arbitration of the dispute) where significant harm is being caused to the bargaining parties themselves[103] or where the industrial action threatens or would threaten to endanger life, personal safety or health or the welfare of the population or part of it, or cause significant economic damage to the Australian economy or an important part of it.[104] Orders to suspend industrial action have certain disadvantages, such as neutralisation of the effectiveness of industrial action, reduced workers' bargaining power, and, over time, will reduce staff willingness to support industrial action because of its ineffectiveness.[105]

In a *Qantas* dispute, the employer engineered a lockout of employees to trigger termination of their own industrial action under section 424.[106] The effect of this was to end the right of the employees concerned to take protected industrial action, because suspension or termination of any industrial action during bargaining removes the right of other bargaining parties to access protected industrial action.[107] In the *Qantas*[108] example, the unions concerned had taken great care with their own industrial action to avoid triggering a suspension or termination under section 424. However, they could not stop the employer from responding with its own industrial action which deliberately had this effect.[109]

The duration of the industrial action should also be a signifant factor, as the shorter the duration of industrial action, the less likelihood there is of significant economic harm or

101 ibid s 425.
102 ibid s 426.
103 ibid s 423.
104 ibid s 424. See, also, *NTEU v Monash University* (2013) FWCFB 5982; *Sydney Trains; NSW Trains; The Hon Dominic Perrottet, Minister for Industrial Relations* (New South Wales) (2018) FWC 632.
105 Martyn Lyons, 'Assessing Suspension of Protected Industrial Action in Australian Higher Education Workplaces' (2013) 13(2) Employment Relations Record 17.
106 *Australian and International Pilots Association v Qantas Airways Ltd* (2011) 211 IR 220. See, also, Joellen Riley, 'A safe Touch-down for Qantas?' (2012) 25 Australian Journal of Labour Law 76; Forsyth and Stewart (n 32) 785; Alex Bukarica and Andrew Dallas, *Good Faith Bargaining under the Fair Work Act 2009: Lessons from the Collective Bargaining Experience in Canada and New Zealand* (Federation Press 2012) 131–50.
107 FW Act, s 413(7)(a).
108 *Australian and International Pilots Association v Qantas Airways Ltd* (2014) FCA 32.
109 Forsyth and Stewart (n 32) 132.

threats to safety or welfare of the population.[110] In South Africa, if a strike continues for an unreasonably long period, which would annoy the striking workers causing them to attack workers not on strike.[111]

When a decision is made to terminate bargaining completely, the FWC may make a workplace determination to resolve outstanding matters in dispute, so the termination of protected industrial action (but not unprotected industrial action) can lead to compulsory arbitration of the dispute.[112] The onus is on the applicant to satisfy the FWC that the order to stop or terminate the industrial action had to be made—except where the matter commenced on the Commission's own motion.[113] The applicant should be able to point to some objective evidence that indicates a likelihood that the industrial action would cause harm.[114] The termination or suspension of an industrial action is available, regardless of whether the action is protected. The aim of section 424 is to provide effective legal remedies to those who suffer harm because of industrial action. The FWC will intervene in terms of section 424, if it is satisfied that the strike action threatens life, personal safety or the health and welfare of the population. This section gives the FWC a discretion to stop an industrial action on account of a threat to the community, and concerns regarding health and safety issues and the welfare of the population.

The application to suspend or terminate industrial action can be made by the minister responsible for workplace relations or an employer who is affected by the industrial action or any person prescribed by the regulations.[115] In *Australia and International Pilots Association v Fair Work Australia*,[116] the Commonwealth Minister applied to the FWC for an order to suspend or terminate an industrial action by the Australia Licensed Aircraft Engineers' Association (ALAEA), the Transport Workers union (TWU), and the Australian and International Pilots Association (AIPA). The Minister's application was endorsed by the fact that after the unions had commenced with their industrial action, Qantas responded by grounding its flights—an act which the Minister considered detrimental to the tourism industry. Fair Work Australia (FWA),[117] as it then was, observed that there was no likelihood that the protected industrial action taken by the three unions (ALAEA, TWU and AIPA) could cause significant damage to the tourism

110 Martyn Lyons, 'Assessing Suspension of Protected Industrial Action in Australian Higher Education workplaces' Employment Relations Record (n 116) 24.

111 Mlungisi Tenza, 'The Effects of Violent Strikes on the Economy of a Developing country: The Case of South Africa' (2020) 41(3) Obiter 521.

112 Section 266 of the FW Act.

113 *Coal & Allied Operations (Pty) Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (1997) 73 IR 311 at 321.

114 *Pryor v Coal & Allied Operations (Pty) Ltd* (1997) 78 IR 300.

115 *Australia and International Pilots Association v Fair Works Australia* (2012) FCAFC 65.

116 ibid.

117 FWA (now FWC) is a labour tribunal; see ss 575 and 577(a)–(d) of the FW Act.

and air transport industries.[118] The FWA, nonetheless, terminated the industrial action by unions, as well as the action by Qantas, and all other activities associated with the industrial action.

The question that arises then is: what constitutes 'significant harm'? The answer cannot be found in the FW Act as it does not provide a clear definition of this concept or phrase except that the FWC must be satisfied that the protected industrial action is having adverse effects on employees, employers or third parties.[119] In *CFMEU v Woodside Burrup (Pty) Ltd*,[120] the Court interpreted 'significant harm' as 'harm that is exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context and, as such, an order will only be available under such ground in very rare areas'. Harm is significant if it is more serious than merely a loss, inconvenience or delay. It is, therefore expected that the FWC will suspend industrial action on the grounds of the latter interpretation. Where industrial action is suspended or terminated, any further action taken in support of such action will not enjoy protection.[121] In *CFME v Woodside Burrup (Pty) Ltd and another*,[122] the FWA (now the FWC) held that the meaning of 'threatening to cause harm' in the context of section 426 of the FW Act, is that the protected industrial action is likely to injure or to be a source of danger to a third party.[123]

It is not a requirement that the action by employees must cause harm, but the mere probability that it might cause harm will be sufficient for the FWC to make an order for the termination or suspension of the industrial action. Once it has been established that the action threatens to cause 'significant harm', the question is what form of redress would be available to the victims. The first is an injunction which is a court order prohibiting or preventing the commencement or continuation of the industrial action threatening to cause significant harm.[124] This court order, usually in the form of an interdict, seems to work only if the person who suffers loss is the employer. The court in *National Workforce (Pty) Ltd v AMWU*[125] found that loss and damage had been caused to the appellants by strikers and that the rights of the appellants had been infringed. The court found no evidence to justify the infringement, and considered that the loss of profit, unfulfilled contracts and the loss of clients all justified the granting of an order to prevent workers from going ahead with their action. This decision hints at

118 Paragraph 10.
119 FW Act, s 426(4).
120 FWAFB 2010, 6021.
121 FW Act, s 413(7).
122 *CFMEU v Woodside Burrup (Pty) Ltd and another* (2010) FWAFB 6021.
123 ibid para 69.
124 'The aim of an injunction is to prevent industrial action from continuing once it has been established that it is destructive.' See *Shell Refining (Australia) (Pty) Ltd v Australian Workers' Union* (1999) VSC 297 (Unreported, Beach J, 13 August 1999).
125 VR 1998 3, 265, 272.

the possibility that the victims of industrial action could also bring an action for damages against the union. In this regard, the plaintiff has several grounds available if he or she wants to claim damages for the loss sustained because of the industrial action. These include actions for interference with contractual relations, intimidation, conspiracy and unlawful interference with trade or business.[126]

Strikes in South Africa

The right to strike in South Africa is entrenched in the Constitution of South Africa, 1996[127] (Constitution) and given more effect in the[128] Labour Relations Act (LRA), which makes provision for protected and unprotected strikes.[129] A strike is protected if the union or convenor has complied with sections 64(1) and 65(1) of the LRA. The former section lays down the procedure that must be followed before embarking on a strike. For example, the matter must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the strike can only go ahead if the CCMA has issued a certificate confirming that the dispute is unresolved. Section 65(1) prohibits employees from initiating a strike when certain limitations exist. For example, section 65(1)(d) prohibits essential services workers from taking part in a strike. If there is compliance with the requirements in both sections 64(1) and 65(1) of the LRA, the strike will be protected and participating employees will enjoy immunity from civil proceedings that may flow from non-performance of contractual duties resulting from the strike.[130] However, this immunity is not available should employees be guilty of misconduct or commit criminal offences.[131]

If the union or employees embark on a strike without complying with sections 64(1) and 65(1), the strike will be unprotected and will attract civil remedies in terms of section 68 of the LRA. These remedies include an interdict,[132] an order for just and equitable compensation[133] and dismissal for misconduct, provided it is substantively and procedurally fair.[134]

Despite regulation, strikes in recent years have become violent, with striking workers attacking non-striking workers—causing injury to innocent members of the public and damage to property. The following are examples from case law where strikers have committed violence, damaged property and injured people. In *Security Services*

126 ibid 273.
127 Constitution of the Republic of South Africa 1996, s 23.
128 Act 66 of 1995.
129 LRA, ss 64(1) and 65(1.
130 ibid LRA s 67(2).
131 ibid s 67(8).
132 ibid s 68(1).
133 ibid s 68(1)(b).
134 ibid s 68(6).

Employers Organisation & Others v SA Transport & Allied Workers Union & Others (SATAWU),[135] some twenty people were reported to have been thrown out of moving trains in Gauteng Province. Most of them were security guards who were not on strike and who were believed to be targeted by their striking colleagues. Two were killed, while others sustained serious injuries.[136] In *SA Chemical Catering & Allied Workers Union & others v Check one (Pty) Ltd*,[137] striking employees were carrying various weapons, including sticks, pipes, planks and bottles. One of the strikers, one Mr Nqoko, was alleged to have threatened to cut the throats of those employees who had been brought from other branches of the employer's business to help in the branch where employees were on strike. Such conduct was held not to be in line with good conduct of striking.[138] In *Tsogo Sun Casino (Pty) Ltd t/a Montecasino v Future of South Africa Workers Union and Others*,[139] the employees who were on strike obstructed vehicles and persons from entering or leaving the applicant's premises, protested or were present in Montecasino Boulevard, interfered with traffic or persons entering or leaving Montecasino Boulevard, picketed within 500 metres of the premises, intimidated or assaulted persons or damaged property at or near the premises. Such conduct raises the question of the remedy available to victims of violent strikes—as most of them take place while protected.

As stated above, the LRA makes provision for an interdict to prohibit harmful strikes. However, the remedy of interdict does not appear to be effective in addressing a violent strike as and tends to be ignored by striking workers and their union as was illustrated in the case of *Xstrata South Africa v Association of Mineworkers and Construction Union and Others.*[140] The employer launched contempt proceedings against the union and the dismissed employees. It was held that the union should not wash its hands of the conduct of members, but must take steps to prevent its members from behaving in an unlawful manner.[141]

In *In2Food (Pty) Ltd v Food & Allied Workers Union & Others*,[142] the workers also embarked on an unprotected strike that turned violent. Although the employer was granted an interdict, a violent strike continued. In *Kapesi & others v Premier Foods Ltd*

135 (2012) 35 ILJ 1693 (CC) 5.
136 *SABC News* 25 May 2006 at 16:00.
137 (2012) 33 ILJ 1922 (LC).
138 ibid 1933A.
139 (2012) 33 ILJ 998 (LC).
140 (2014) ZALCJHB 58 (LC) <http://www.saflii.org/za/ZALCJHB/2014/58.htm> accessed l September 2020.
141 ibid 17.
142 *In2Food (Pty) Ltd v Food & Allied Workers Union & Others* (note 24 ch 5). See, also, *Security Services Employers' Organisation & others v SATAWU & Others* (2007) 28 ILJ 1134 (LC); and *Supreme Spring – A Division of Met Industrial v MEWUSA* (J2067/2010).

t/a Blue Ribbon Salt River,[143] several incidents of violence were committed during a strike. Non-strikers were harassed and intimidated, vehicles were damaged, and one female non-striker was dragged from her home at night and assaulted with pangas and sjamboks. An interdict was obtained at the Labour Court. However, this interdict was ignored, violence persisted, and the company consequently suffered damages.

Advisory arbitration award in the LRA

The need for measures to address 'the violent nature and duration of the strikes' led to the LRA being amended, resulting in the Labour Relations Amendment Act[144] (LRAA). The five-month strike in the platinum sector in 2014 was devastating—impacting the Rustenburg area as well as South Africa's broader economy.[145] The LRAA introduced section 150A into the LRA. This section makes provision for deadlock-breaking mechanisms for protracted and violent strikes, through compulsory arbitration by a statutory advisory arbitration panel.[146] In terms of this section, there are three grounds on which such action can be initiated:

- if the strike is no longer functional to collective bargaining because it has continued for a protracted period of time and no resolution appears to be imminent;

- there is an imminent threat that constitutional rights that may be or are being violated by strikers or their supporters through the threat of use of violence or the threat of or damage to property; or

- if the strike causes or has the imminent potential to cause or exacerbate an acute national or local crisis affecting the conditions for the normal social and economic functioning of the community or society.

The above provisions in the LRAA empower the Director of the Commission for Conciliation, Mediation and Arbitration (CCMA) to steer the parties back to the negotiating table and to mediate their dispute. This amendment is lauded as a useful gesture by the legislature to attempt to end long strikes in the Republic, but it is still short of being interest arbitration as seen in Canada and Australia. If a strike continues

143 (2012) 33 ILJ 1779 (LAC).

144 Act 8 2018.

145 South Africa's economy shrank by 0,6 per cent in the first quarter. According the South African Reserve Bank's *Full Quarterly Bulletin* no 272 (June 2014), the negative growth in the first quarter of 2014 was mainly brought about by a marked decrease in the real value added by the mining sector, reflecting the impact of a prolonged strike in the platinum mining sector <http://www.resbank.co.za/Lists/News%20Publications/6140/01Full%20Quarterly%20%Bulletin%E2%80%93%20March%202014.pdf> accessed 19 September 2020.

146 In *Gri Wind Steel South Africa v AMCU & Others* (C561/17) (2017) ZALCCT 60 (23 November 2018) para 18, Steenkamp J commented that this proposed amendment was motivated by the fact that violence and contempt for the rule of law have reached alarming levels.

for longer than expected with no solution forthcoming in Canada, Canadian law provides certain mechanisms for ending a dispute.[147] In Australia, the FW Act operating through the FWC is empowered to issue an order that will suspend or prevent industrial action 'that causes significant harm, has a negative effect on the economy, the population and on the employer and employees.'[148] It is argued in this article, that the advisory arbitration award, as introduced in terms of section 150 of the LRAA, fails to address the issue of violent strikes in the Republic. Myburgh submits that the advisory arbitration is a clever middle road.[149] He further argues that the advisory arbitration award amounts to a soft intrusion on the right to strike (and for our voluntarism system of collective bargaining)—as unions can be called to account.[150]

It would appear that the issue of violent strikes in South Africa is far from over, since the remedies that the LRA put in place seem to fail in addressing it. Since interdicts are not respected, it must be asked how violence is to be addressed during strikes. It has been argued above that the FWC in Australia can terminate an industrial action that is causing harm to the employer, employees, the economy and/or the population.[151] The article submits that there are lessons to be learned from Australia on how to deal with strike-related misconduct in the form of violence.

Transplanting Australian Law into South Africa

In Australian law disruptive industrial conduct is dealt with by the FWC. The FWC, which is an industrial relations tribunal, does not allow industrial action to escalate into a situation where it causes harm to the population or the economy of Australia. It seems, in terms of the Australian labour law, that only in rare instances does industrial action by employees result in violence or unlawful acts, since the mere possibility of harm or damage to other people and/or their property is sufficient to allow the FWC to terminate or suspend the industrial action. This means that the employees' right to strike is taken away for that period of industrial action. Any person who continues with such industrial action after the FWC has suspended or terminated an industrial action, will be committing an offence for which the Federal Court may impose remedies.[152] The Court may order an injunction on such terms as it considers appropriate.[153] The Court can also make an order for civil penalties.[154] The FW Act provides that a person commits an

147 The Canadian Labour Code and the Labour Relations Codes or Acts of various provinces and territories require collective agreements to make provision for the settlement of disagreements such as grievances and disputes.

148 FW Act s 423.

149 Anton Myburgh, 'Long and Violent Strikes: Critique on Advisory Arbitration' (100 ILO celebration conference, University of Pretoria, 4–5 October 2019).

150 ibid.

151 See s 424 of the FW Act.

152 FW Act s 421.

153 ibid s 420(3).

154 ibid s 539.

offence if he or she intentionally[155] engages in conduct in contravention of an FWC order.[156] The punishment for this is imprisonment for a maximum of twelve months.[157]

In South Africa, the Labour Court has exclusive jurisdiction on all matters affecting labour[158] and has powers mentioned in section 158 of the LRA. Some of the orders the Labour Court may make include an order for an urgent interim relief, an interdict, a declaratory order, compensation and compliance with the provisions of the Act.[159] The article argues that the LRA should be amended to give the Labour Court powers to terminate or suspend industrial action that is out of proportion and has caused damage to property and injury to people—including a negative impact on the economy and employment. Cheadle supports this view when he states that this would be possible where the action is 'accompanied by egregious conduct.'[160] Rycroft argues that a strike marred by violence should lose protection if participants behave unreasonably.[161] He further states that a strike marred by misconduct loses its protected status, with the result that the protection of employees from dismissal falls away and the strikers could be sued for financial loss.[162] However, the question of the degree or extent of violence required to convince the court to make such an order, is unclear. In *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v NUFBWSAW,*[163] the Court held that the degree of violence committed by the striking workers should be weighed against the attempts of the union (if any) to prevent or reduce the violence.[164] Rycroft argues that the following questions must be asked:

> Has misconduct taken place to the extent that the strike no longer promotes functional collective bargaining, and is therefore no longer deserving of its protected status? In answering this question the court would have to weigh the levels of violence and efforts by the union concerned to curb it.165

155 The requirement of intent is imported into this section by the Criminal Code (Cth), s 56(1).
156 LRA s 157.
157 Crimes Act 1900, s 4D determines that where an offence is created in a Commonwealth Act and a penalty is specified, the offence is punishable on conviction by a penalty 'not exceeding the penalty so set out in the Act'.
158 LRA s 157(1).
159 ibid s 158(1).
160 Healton Cheadle, Clive Thompson and PAK Le Roux, 'Reform of Labour Legislation Needed Urgently' *Business Day* (Johannesburg, 15 November 2011).
161 Alan Rycroft, 'What Can be Done About Strike Related Violence' <https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_Rycroft.pdf/eda46151-176d-4091-a689-f1042e03e338> accessed 8 May 2021.
162 ibid.
163 (2016) 37 ILJ 476 (LC).
164 At 488–489.
165 Rycroft (n 161) 827.

The question of whether a strike characterised by violence should lose protection was also answered in *Shoprite Checkers (Pty) Ltd v CCMA*,[166] in relation to a picket. The Court held that 'if a picket exceeds the bounds of peaceful persuasion or incitement to support the strike, to become coercive and disruptive of the business of third parties, the picket ceases to be reasonable and lawful.' It is believed that an affirmative answer to the question of whether a violent strike should lose protection, will pave the way for civil remedies which may not have been available had the strike remained protected. The question then would be how this process will unfold.

The courts have been faced with challenges in instances where trade unions no longer pursue the settlements of legitimate demands relating to matters of mutual interest—but rather pursue political agendas that often lead to violence.[167] Botha argues that violence during protected and unprotected strikes is unacceptable, does not contribute to collective bargaining, and should be discouraged in terms of international and national labour laws.[168] A strike can only be functional in the context of collective bargaining if it is concerned with matters relevant to the employer/employee relationship.[169] On certain occasions, a functional strike has been construed as a requirement for a lawful strike.[170] The functionality of a strike may involve matters of mutual interest, in that a strike must concern legitimate subjects for collective bargaining or promote the well-being of the enterprise.[171] Therefore, if a strike becomes violent and no longer pursues legitimate demands, the court should intervene that: 'violent and unruly conduct is the antithesis of the aim of a strike, which is to persuade the employer through the peaceful withholding of work to agree to a union's demands.'[172] The result would be a court order declaring the strike as unprotected.

It is proposed that an affected party may make an urgent application to the Labour Court in terms of section 158(1)(a)(iv) to declare the industrial action unprotected due to excessive violence resulting in damage to property, intimidation, injury to people, chaos and anarchy. Most importantly, the duty of the court will be to determine if the strike is still functional to collective bargaining. Based on evidence before the court, including

166 (2006) 27 ILJ 2681 (LC) 2689J.

167 Monray Maesellus Botha and Wilhelmina Germishuys, 'The Promotion of Orderly Collective Bargaining and Effective Dispute Resolution, the Dynamic Labour Market and the Powers of the Labour Court (2)' (2017) 80 THRHR 531 at 540.

168 ibid.

169 *SA Federation of Civil Engineering Contractors* n 10 above para 21; see, also, *SA Transport & Allied Workers Union & Others v Moloto NO & Another* (2012) 33 ILJ 2549 (CC) para 61.

170 Emma Fergus, 'Reflections on the (Dys)functionality of Strikes to Collective Bargaining: Recent Developments' (2016) 37 ILJ 1537 at 1540.

171 ibid 1539.

172 *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 ILJ 476 (LC) para 30. See, also, *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 ILJ 998 para 13.

the degree of violence, the court may exercise its discretion to declare, or not declare, the strike unprotected.

It is, however, acknowledged that the Labour Court is the only court recognised to deal with labour-related matters in South Africa.[173] Currently, the Labour Court will only act once it is approached by an affected person.[174] Generally, courts in South Africa do not have the inherent right to adjudicate or stop industrial action or to interfere in any other manner.

Given the number of violent strikes in South Africa, it might be a positive development for labour relations if the Labour Court were given more powers to enable it to deal directly with strike-related violence. These should include the power to declare industrial action unprotected, and to suspend or terminate an industrial action that threatens the lives of the people or causes public violence. Other authors support this view. Cheadle, Le Roux and Thompson have argued that:

> Violence in private sector labour relations has reached new post-1994 heights. Here too there is a need to introduce procedural obligations that go beyond pro-formal picketing rules. And a case can be made for the right to industrial action to be open to suspension by the Labour Court if that action is accompanied by egregious conduct.[175]

If South Africa adopts preventative measures, as in Australia, the LRA will need to be amended to include a provision that empowers the Labour Court to take proactive steps to suspend or terminate industrial action that, in the eyes of the court, threatens the lives of people or has the potential to damage property.[176] The criteria that the court could use to determine whether to suspend or terminate industrial action, should include the degree of violence and intimidation, the extent of the damage to property, and the seriousness of the threats to the lives of people that occurs during the action. For a court to intervene, Rycroft argues that the following question needs to be asked: 'has the misconduct taken place to an extent that the strike no longer promotes functional collective bargaining, and is therefore no longer deserving of its protected status.'[177] The Labour Court in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd*,[178] adopted Rycroft's functionality test, which means that the Labour Court could assume the power to alter the status of a strike from protected to unprotected, on the basis of violence.[179] This entails the weighing up of the

173 LRA, s 157(1).
174 ibid s 69(12).
175 Healton Cheadle, 'Revisit Labour Laws' *Business Day* (Johannesburg, 15 November 2011).
176 The court hinted that this might happen in *Tsogo Sun Casino (Pty) Ltd t/a Montecasino v Future of South Africa Workers Union and Others* (n 172) 1004A.
177 Rycroft (n 161).
178 (2016) 37 ILJ 476 (LC).
179 ibid para 32.

level of violence against the efforts of the trade union to curb it, in order for a court to determine whether a strike's protected status is still functional to collective bargaining.[180]

Rycroft further argues that there is an inseparable link between strikes and functional collective bargaining and justifies this on three grounds. Firstly, the Constitution provided that 'workers have the right to strike for the purposes of collective bargaining.'[181] Secondly, strikes must be orderly, and lastly, the strike must not involve misconduct. This he infers from the fact that employees engaged in misconduct can be dismissed, irrespective of whether the strike is protected.[182] Informed by the decision of *Afrox Ltd v SACWU 2*,[183] Rycroft argues that a strike can lose its protection if it is no longer functional to collective bargaining, and is bound to lose protection.Those who participate in such action will face dismissal or an action for damages. This would be the case where industrial action is no longer functional to collective bargaining.[184]

If the Labour Court is given the power to suspend or terminate industrial action, such conduct should not be seen as 'anti-union', but as a means to address violent strikes. It is believed that unions would be given a chance to counter-argue a move to suspend or terminate their action and to convince the court why their action should not be suspended or terminated.

The legislature has, however, attempted to respond to violent strikes in South Africa through the enactment of the LRAA.[185] Section 69(12)(c) of the LRA, as amended by the LRAA, provides that:

> in addition to any relief contemplated in section 68(1) of the LRA, the Labour Court may grant relief, including urgent interim relief, which is just and equitable in the circumstances and which may include an order suspending a picket at one or more of the locations designated in the collective agreement, agreed rules contemplated in sub-section (4) or rules determined by the Commission.

The LRAA refers to a picket; however, a purposive interpretation would include strikes since pickets refer to conduct with intent to further a strike. Pickets serve to support a

180 Stephen Van Eck and Benjamin Kujinga, 'The Role of the Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 ILJ 476 (LC)' (2017) 20 PELJ 17.

181 Interim Constitution of South Africa, Act 200 1993, s 27. This was, however, not retained in the Final Constitution of 1996.

182 Rycroft (n 161) 202. See, also, s 67 of the LRA.

183 *Afrox Ltd v SACWU 2* (1997) 18 ILJ 406 (LC).

184 See *National Union of Mineworkers & others v Free State Consolidated Gold Mines (Operations) Ltd – President Steyn Mine; President Brand Mine; Freddies Mine* (1996) 1 SA 422 (A) 438B.

185 Act 8 2018.

protected strike or oppose a lock-out. Therefore, the likelihood is that the lawmakers had both strikes and conduct in furtherance or in contemplation of a strike in mind when it enacted the LRAA. This means that an affected person, usually the employer, is allowed to remedy the continued damage caused by violent industrial action by approaching the Labour Court to suspend the strike. In terms of the new amendments, the strike is not called off, but rather suspended. The intention is to allow the union to remedy the situation and to offer advice to its members about the effects of their unlawful behaviour, and take action against those responsible for wrongdoing.

In this article it is argued that suspension alone is not sufficient, but that action should be terminated if it negatively affects members of the public and the economy. Although this will amount to the limitation of a right guaranteed in the Constitution,[186] this move can be justified in terms of the limitation clause, which states that any right (including the right to strike) may be limited in terms of the law of general application.[187] In addition, the Code of Good Practice: Collective Bargaining,[188] states that the right to engage in collective bargaining (including the recourse by employers to exercise economic power) and the right to strike may be limited by legislation—provided that the limitation is reasonable and justifiable.[189] It further states that prolonged and violent strikes have a seriously detrimental effect on the strikers, the families of the strikers, small community businesses that provide services to strikers, the employer, the economy, and the community.[190] So, workers exercising the right to strike must therefore recognise the constitutional rights of others.[191]

Conclusion

The effects of violent strikes in South Africa are well documented. They have had devastating effects on the economy, and often result in injury and death. The existing remedies seem incapable of dealing with violent industrial action, hence the need to seek assistance from foreign law. The use of foreign law in South Africa is informed by section 39(2) of the Constitution and its employment is not new in South Africa, since the country has used the constitutional law of Canada during the early stages of constitutional law after 1994.[192]

Australia was chosen as a country to draw lessons from when it comes to dealing with violent strikes in South Africa. It was learnt that the labour tribunal in Australia (FWC) is given powers to suspend or terminate industrial action that has the potential to cause

186 The Constitution, s 23(1)(c).
187 ibid s 36.
188 GG No 42121 (7 December 2018).
189 ibid item 16(2).
190 ibid item 16(4)
191 ibid item 16(5)
192 Around 1994.

significant harm to the health and welfare of the population and the economy. The article argues that the Labour Court in South Africa should be given similar powers in order to avoid loss of jobs and resultant poverty that flow from long strikes and the death of people following violence. To achieve this, the LRA should be amended to include a provision that empowers the Labour Court to be equal to this task.

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