The Right to Strike under the *Labour Relations Act* 66 of 1995 (LRA) and Possible Factors for Consideration that Would Promote the Objectives of the LRA

DC Subramanien* and JL Joseph**

P·E·R

Pioneer in peer-reviewed, open access online law publications

Author

Darren C Subramanien

Judell L Joseph

Affiliation

University KwaZulu Natal
South Africa

Email

subramaniend@ukzn.ac.za

judellj02@gmail.com

Date Submission

6 February 2018

Date Revised

20 February 2019

Date Accepted

10 April 2019

Date published

23 April 2019

Editor Dr G Viljoen

How to cite this article

Subramanien DC and Joseph JL "The Right to Strike under the *Labour Relations Act* 66 of 1995 (LRA) and Possible Factors for Consideration that Would Promote the Objectives of the LRA" *PER / PELJ* 2019(22) - DOI http://dx.doi.org/10.17159/1727-3781/2019/v22i0a4400

DOI
http://dx.doi.org/10.17159/1727-3781/2019/v22i0a4400

Abstract

The *Labour Relations Act* 66 of 1995 (hereafter the LRA) was promulgated to redress the injustices and inequality within labour relations. It seeks to do so through four objectives which give effect to the LRA's purposes of transformation within the labour relations framework. One of these objectives is to promote orderly collective bargaining. It is envisaged that if parties engage in collective bargaining, then disputes should be resolved speedily and amicably without having employees resort to strikes and employers to lock-outs. This in turn would ensure that production within the workplace continues without interruption. Thus, the workdays lost would be decreased and productivity would be increased. One of the main features of the LRA is the endorsement and regulation of strike action. Employers have always possessed greater authority than employees due to their managerial prerogative, thus strike action is viewed as a necessary way of levelling the playing field between employers and employees in the collective bargaining framework. Strike action is regarded as forming part of the collective bargaining framework. It has been acknowledged that without the threat of strike action, collective bargaining would be futile. However, strike action in South Africa has been increasingly alarming over recent years. This is primarily due to the manner in which employees are asserting their demands. There has been an undeniable increase in the intensity of violence, intimidation, harassment, destruction to property and civil unrest evident in strikes. Even more disturbing is that these strikes have not been contained within the employment relationship; instead, the ramifications of disorderly strikers have caused severe consequences for innocent members of society and the country as a whole. This article highlights the violent context in which strikes take place and the necessity of limiting potential violence. In doing so, this article seeks to consider the viewpoints of two judgments, *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union* 2011 32 ILJ 2894 (SCA) and *SA Transport & Allied Workers Union v Moloto* 2012 33 ILJ 2549 (CC), which have addressed the issue of whether non-unionised members are required to provide separate notices of their intention to strike. It is argued that a strict interpretation of section 64(1)(b) of the LRA is required, in the light of the chaotic and violent strike action that has taken place over the years, as that would have the effect of creating greater certainty and predictability in the event of a strike. Thus, an expectation of order would be instilled which in turn would fulfil one of the objectives of the LRA, which is to promote orderly collective bargaining.

Keywords

Labour Relations Act 66 of 1995, collective bargaining, strike action, violence, intimidation, *Equity Aviation* case, *Moloto* case.

.....

1 Introduction

In 1994 the democratic government hastily instructed a drafting committee comprised of attorneys who were integral to the liberation movement, representatives of prominent employers, and international experts. The committee was tasked with the drafting of labour legislation which would instil much needed stability and reformation in an area that was characterised by uncertainty and inequality.[1] The culmination of protracted negotiations between government, employers and employees saw the formation of the most significant labour legislative framework, the *Labour Relations Act* 66 of 1995 (hereafter the LRA or the 1995 LRA), which is the foundation of current labour relations.[2]

There are four fundamental purposes which the LRA seeks to achieve, namely; to promote economic growth, instil justice in society, create harmony in the once turbulent labour market, and inculcate the concept of democracy in the workplace.[3] There are four primary objectives which assist in realising the purposes of the LRA. These objectives are enshrined in section 1 of the LRA and are: Firstly, to give effect to and regulate the rights endorsed by section 23 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*). Secondly, to give effect to the country's obligations to the International Labour Organisation. Thirdly, to provide a framework in which employers, employees and their respective unions and organisations can engage in collective bargaining and formulate industrial policy. Fourthly, to promote orderly collective bargaining, collective bargaining at sectoral level, decision making by employees within the workplace, and effective resolution of labour disputes.[4] This paper will focus primarily on the fourth objective of the LRA, which is to promote orderly collective bargaining and ensure the resolution of disputes.[5] The paper seeks to illustrate the significance of strike action as a means of dispute resolution. In doing so, it endeavours to suggest how case law could assist in the interpretation of section 64(1)(b) of the LRA in an effort to fulfil one of the objectives of the LRA, which is to promote

* Darren C Subramanien. LLB LLM (UKZN). Lecturer, Department of Socio-legal Studies, University of KwaZulu-Natal, South Africa. E-mail: subramaniend@ukzn.ac.za.

** Judell L Joseph. LLB LLM (UKZN). Lecturer, Durban University of Technology, South Africa. E-mail: judellj02@gmail.com.

1 Benjamin *Assessing South Africa's CCMA* 4.

2 Bhorat, Van der Westhuizen and Goga *Analysing Wage Formation* 9.

3 Benjamin, Bhorat and Cheadle 2010 *Int Labour Rev* 74.

4 Sections 1(a)-(d) of the *Labour Relations Act* 66 of 1995 (LRA).

5 Section 1(d) of the LRA.

orderly collective bargaining. In addition, this article makes tentative submissions that the judiciary could consider in its interpretation of legislation.

2 The role of the *Labour Relations Act* (LRA)

The promulgation of the LRA was a significant milestone in labour relations for two paramount reasons. Firstly, the LRA afforded almost all public servants who had once been excluded from previous amendments of the current LRA with bargaining power rights. It changed industrial councils into bargaining councils. Even though the LRA did not impose a duty on employers and employees to engage in bargaining, it did codify and fortify the rights of unions in the labour market.[6]

Secondly, the LRA entrenched the protection of strike action.[7] The right to strike is tantamount to the protection of lock-outs, which are an employer's prerogative in response to a strike. According to the LRA, strikes are afforded full protection if the act constitutes a strike under the definition of the LRA.[8] The protection of striking employees is vital as the old *Labour Relations Act* 28 of 1956 (hereafter the 1956 LRA) and its subsequent amendments did not protect employees against dismissal.[9] In terms of the common law, strike action amounted to breach of contract. Therefore, dismissal was regarded as the appropriate sanction against striking employees.[10] The 1956 LRA provided that if employees engaged in strike action, the Industrial Court would be required to determine whether their actions constituted unfair labour practice under the definition provided in the 1956 LRA.[11]

This meant in effect that even though employees were given a framework for how strike action should be implemented, it did not enunciate strike action as a right. Therefore, employers could still have held employees liable for breach of their employment contract.[12] This was a grave injustice, as not only did employers have the right to use lock-outs in response to strike action, but they also had control over the exercise of strike action. Hence, the 1995 LRA sought to redress this inequality by enshrining strike action as a right.[13]

6 Maree 2011 *SAJLR* 13.
7 Section 64 of the LRA; Godfrey *et al Collective Bargaining* 90.
8 Section 213 of the LRA.
9 Suchard 1982 *Africa Insight* 92.
10 Grogan *Dismissal* 118.
11 Section 12(1) of the *Labour Relations Act* 28 of 1956 (1956 LRA).
12 Tanner 1991 *Indicator SA* 89.
13 Section 64 of the LRA; Gall 1997 *Rev Afr Polit Econ* 208.

3 The entrenchment of the right to strike

The significance of the entrenchment in the *Constitution* of the right to strike was emphasised in *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA.*[14] The Constitutional Court was called upon to consider whether the proposed amendments to the new constitution complied with the constitutional principles enshrined in the *Constitution of the Republic of South Africa* 200 of 1993.[15] There were essentially two main objections. The first objection was that the inclusion of the right to strike in the new Constitution and the exclusion of an employer's right to lock-out was in violation of the constitutional principles II and XXVIII.[16] The second objection raised was that the proposed provision failed to identify and protect an employer's right to participate in collective bargaining in terms of the constitutional principle XXVIII.[17]

In terms of the first objection, it was argued that effective collective bargaining necessitates that parties utilise economic power to counter each other. This economic power usually takes the form of lock outs and strikes. Therefore, the right to lock out should be recognised in exactly the same way that the right to strike is recognised and protected.[18] This argument is based on the standard of equality that the right to strike is the equivalent to the right to lockout. Thus, both the right to strike and the right to lock out should be included in the *Constitution*, 1996.[19] In response to the first objection, Chaskalson J held that this objection cannot be accepted. The Constitutional Court arrived at this decision by considering that collective bargaining is founded upon the acknowledgment that employers have always possessed superior social and economic power over their workers.[20]

---

14 *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA* 1996 4 SA 744 (CC) (hereafter *Chairperson of the Constitutional Assembly*); *R v Smit* 1995 1 SA 239 (K); *Raad van Mynvakbondde v Die Kamer van Mynwese* 1984 5 ILJ 344 (IC).

15 *Chairperson of the Constitutional Assembly* 822A.

16 Constitutional Principle II states that "Everyone shall enjoy all universally accepted Fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution"; Constitutional Principle XXVII states that "Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organizations and trade unions and to engage in collective bargaining shall be recognized and protected. Provision shall be made that every person shall have the right to fair labour practices".

17 *Chairperson of the Constitutional Assembly* 839H-840A.

18 *Chairperson of the Constitutional Assembly* 840C-D.

19 *Chairperson of the Constitutional Assembly* 840G-841A.

20 *Chairperson of the Constitutional Assembly* 841A.

Collective bargaining is enforced to counteract the unequal power that has existed between employer and employee.[21] The unequal power apportioned to employers and employees was highlighted in *National Union of Mineworkers v Bader Bop*,[22] where O'Regan J emphasised that the right to strike is a critical mechanism that allows employees to declare their bargaining power within the employment relationship.[23] Furthermore, the right to strike is essential in furthering the dignity of employees as it allows workers to assert their demands and not to be intimidated into unilateral conditions of employment that are laid down by the employer.[24] Workers are compelled to work together in order to exert their power in the form of a strike, which is an employee's only weapon against the employer. However, employers implement their power through an array of weapons such as dismissal, the replacement of current labour with other labour, and the unilateral introduction of new working conditions and terms as well as the right to lock out.[25] The significance of the right to strike as a fundamental right for employees has therefore resulted in the right being more commonly enshrined in the constitutions of various countries than the right to lock out. Thus, Chaskalson J concluded that the right to strike and the right to lock out are not always equivalent in importance.[26]

The second objection was that the explicit inclusion of the right to strike without the explicit inclusion of the right to lock out diminishes an employer's right to collective bargaining and affords less significance to the rights of employers than to the rights of employees.[27] In the light of the second argument, Chaskalson P enquired into the requirements of constitutional principle XXVIII. The Constitutional Court stated that in terms of this principle there was no request that the proposed text include an express reference to the economic power available to either workers or employers.[28] The court further elaborated that when the right to collective bargaining is recognised there is an implication of the right to utilise economic power against the parties involved in collective bargaining.[29] Furthermore, the inclusion of the right to engage in strikes does not weaken an employer's right to participate

21 *FAWU v Spekenham Supreme* 1988 9 ILJ 628 (IC); Committee of Experts "Freedom of Association and Collective Bargaining" para 200.
22 *National Union of Mineworkers v Bader Bop* 2003 24 ILJ 305 (CC) (hereafter *Bader Bop*).
23 Section 64 of the LRA; *Bader Bop* 307B.
24 *Bader Bop* 307C.
25 *Chairperson of the Constitutional Assembly* 841A-C.
26 *Chairperson of the Constitutional Assembly* 841C.
27 *Chairperson of the Constitutional Assembly* 840C-D.
28 *Chairperson of the Constitutional Assembly* 840C-D.
29 *Chairperson of the Constitutional Assembly* 840D-E.

in collective bargaining, nor does it diminish an employer's right to effect lock out against employees.[30]

The third objection was in relation to the second objection. It was argued that including the right to strike in the *Constitution* infers that legislation such as the LRA which protects lock outs would be unconstitutional and would consequently be in violation of constitutional principle XXVIII.[31] Chaskalson J held that this objection was unfounded as the entrenchment of the right to lock out in the LRA merely ensured that the right to lock out was regulated in accordance with constitutional principles.[32] Furthermore, the Constitutional Court stated that the development of the LRA take place arise through the expertise of the labour courts and labour legislation. The LRA and its provisions would always be under constitutional inspection so that the rights of both employers and employees were always upheld.[33] Furthermore, in the light of the third objection, it was argued that the failure to expressly endorse the right to lock out in the *Constitution*, 1996 was not in accordance with constitutional principle II, which requires that the *Constitution*, 1996 entrenches and protects "all universally accepted fundamental rights, freedoms and civil liberties".[34] Chaskalson J responded to this objection by stating that the right to lock out had not been accepted as a universally accepted fundamental right as none of the main international conventions entrenches the right to lock out. Only a few countries have acknowledged the right to lock out in their constitutions.[35] Thus, the Constitutional Court concluded that the exclusion of the right to lock out was not in violation of constitutional principle II.[36]

4 Substantive requirements for the protection of the right to strike

There are certain characteristics that can be extracted from the definition of a strike, and if such characteristics are not present then such a strike would not be afforded protection. Consequently, the definition of a strike seeks to

30 *Chairperson of the Constitutional Assembly* 840F.
31 *Chairperson of the Constitutional Assembly* 841E.
32 *Chairperson of the Constitutional Assembly* 841E-F.
33 *Chairperson of the Constitutional Assembly* 841G.
34 *Chairperson of the Constitutional Assembly* 841H.
35 *Chairperson of the Constitutional Assembly* 841H-842A. Sweden explicitly entrenches the right to lock out in its Constitution. Germany and Spain imply the right to lock out in their Constitution. (Blenk *European Labour Courts* 10).
36 *Chairperson of the Constitutional Assembly* 841H-842A.

emphasise that there is a difference between lawful and unlawful strikes.[37] There are three essential elements which constitute a strike, as stated in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd.*[38] In *Plascon Decorative*, the court stated that the first requirement is that there must be a refusal to perform work;[39] secondly, the refusal must be undertaken by employees;[40] and lastly, such a refusal of work must be purposed to resolve a matter of mutual interest as stated by the LRA.[41] In regard to the first element, the refusal to perform work can be carried out partially or completely.[42]

In *Steel Mining & Commercial Workers Union v Brano Industries (Pty) Ltd*,[43] the court held that the employees' refusal to work amounted to a strike. This decision was held even though the employees alleged that they had not engaged in a strike but rather a meeting over the dismissal of the shop steward, where they demanded that disciplinary proceedings be suspended.[44] The court stated that the partial refusal to work, even though not for a lengthy period, can amount to a strike. Furthermore, the LRA provides that an act can constitute a strike even if there is only a retardation or obstruction of work.[45]

In *SA Breweries Ltd v Food & Allied Workers Union*[46] the court held that the term "work" had to be given a narrow interpretation pertaining only to those actions which an employee is obliged to perform in terms of an employment contract.[47] The court mentioned three significant constituents of a protected strike. Firstly, there must be a failure, retardation or obstruction of work. Secondly, the action must be undertaken as a collective.[48] And thirdly, the

37 Section 213 of the LRA; *SA Chemical Workers Union v Sentrachem Ltd* 1998 9 ILJ 410 (IC).

38 *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* 1999 20 ILJ 321 (LAC) (hereafter *Plascon Decorative*).

39 *Plascon Decorative* paras 20-22.

40 *Khosa v Minister of Social Development* 1999 6 BCLR 615 (CC).

41 Section 213 of the LRA; *Plascon Decorative* 22.

42 *Floraline v SASTAWU* 1997 9 BLLR 1223 (LC).

43 *Steel Mining & Commercial Workers Union v Brano Industries (Pty) Ltd* 2000 21 ILJ 666 (LC) (hereafter *Steel Mining & Commercial Workers Union*).

44 *Steel Mining & Commercial Workers Union* 668B-D.

45 Section 213 of the LRA; *Simba (Pty) Ltd v Food & Allied Workers Union* 1998 19 ILJ 1593 (LC) (hereafter *Simba*).

46 *SA Breweries Ltd v Food & Allied Workers Union* 1989 10 ILJ 844 (A) (hereafter *SA Breweries*).

47 *SA Breweries* 844J.

48 *Schoeman v Samsung Electronics (Pty) Ltd* 1997 10 BLLR 1364 (LC); *NUM v CCMA* 2011 32 ILJ 2104 (LAC).

action must be initiated to compel the employer to submit to the demands of the employees.[49]

The third requirement is that the strike must be initiated to resolve a dispute concerning a matter of mutual interest.[50] The first aspect of this requirement pertains to the dispute over which the strike is initiated. The Labour Court and the Labour Appeal Court have on numerous occasions verified that there has to be an actual dispute over which the employees are engaged in strike action.[51] The judiciary is required to investigate the true nature of the dispute and not merely the way in which the dispute is presented.[52] In *SA Scooter & Transport Allied Workers Union v Karras t/a Floraline*[53] the court held that the employees had engaged in an illegal strike as there was no actual dispute causing the employees to leave the employers' business premises and to continue to stay away from work, other than an alleged threat by the employer.[54] Thus, the mere stoppage of work without a "purpose" does not render the employees' actions a strike.[55] In addition to the employees' collective refusal to continue work, they are also required to assert a demand and it must be made known that the refusal to continue work will persist until that demand is met by the employer.[56] The cessation of work must be to induce the employer to accede to the demands of the employees.[57] In regard to the term "dispute" there has been further clarity pertaining to strikes. In *TSI Holdings (Pty) Ltd v National Union of Metalworkers of SA*[58] the court mentioned that there are three categories of strikes, namely strikes where the

---

49 *SA Breweries* 846B-G; s 213 of the LRA.

50 *National Union of Metalworkers of SA v Hendor Mining Supplies* 2007 28 ILJ 1278 (LC).

51 *FAWU v Rainbow Chicken Farms* 2000 1 BLLR 70 (LC); *SATAWU v Coin Reaction* 2005 26 ILJ 150 (LC).

52 *Coin Security Group (Pty) Ltd v Adams* 2000 4 BLLR 371 (LAC).

53 *SA Scooter & Transport Allied Workers Union v Karras t/a Floraline* 1999 20 ILJ 2437 (LC) (hereafter *SA Scooter& Transport Allied Workers Union*); see also *Samancor Ltd v National Union of Metalworkers of SA* 1999 20 ILJ 2941 (LC); *Pick n Pay (Pty) Ltd v SA Commercial Catering & Allied Workers Union* 1998 19 ILJ 1546 (LC).

54 *SA Scooter & Transport Allied Workers Union* 2448E-F; *Rand Tyres & Accessories v Industrial Council for the Motor Industry* 1941 TPD 108; *East London (Pty) Ltd v National Union of Metalworkers of SA* 2007 28 ILJ 642 (LC).

55 *De Beer v Walker* 1948 1 SA 340 (T).

56 *Media Workers Association of SA v The Argus Printing & Publishing Co Ltd* 1984 5 ILJ 16 (IC); *Paper Wood & Allied Workers Union v Uniply (Pty) Ltd* 1985 6 ILJ 255 (IC); *Media Workers Association of SA v Facts Investors Guide (Pty) Ltd* 1986 7 ILJ 313 (IC); *R v Mtiyana* 1952 4 SA 103 (N); *NUM v CCMA* 2011 32 ILJ 2104 (LAC).

57 *Ngewu, Masondo v Union Cooperative Bark and Sugar Co Ltd* 1982 4 SA 390 (N); *R v Canqan* 1956 3 SA 366 (E).

58 *TSI Holdings (Pty) Ltd v National Union of Metalworkers of SA* (2006) 27 ILJ 1483 (LAC) (hereafter *TSI Holdings*).

employees have a demand, strikes where there is a grievance rather than a demand, and strikes which arise from a dispute.[59]

The mere collective refusal to work without asserting an actual demand cannot constitute a strike. In *Simba* the issue centred on a change in staggered tea-breaks. The applicants alleged that this change should not have been implemented without properly consulting the employees. The employees then engaged in a strike.[60] In arriving at its decision the court considered the definition of a strike under the LRA. It was noted that even though the actual definition in section 213 of the LRA does not mention "issue in dispute", this term can be read into the definition by referring to section 64(1) of the LRA.[61]

The court highlighted that this was necessary to prevent any confusion and problems such as those which had been encountered under the old *Labour Relations Act*, where employees as a collective would engage in a refusal to work without actually asserting the demand that initiated such a refusal.[62] It was for this reason that "issue in dispute" should refer to a demand, grievance or a dispute that would establish the basis for a protected strike.[63] The court held that the employees *in casu* failed to use their refusal to work as a method of compilation. The employees were merely exercising their collective right not to work. The situation would have been different if the employees had refused to work the staggered breaks until a grievance was resolved.[64]

There was no actual demand, grievance or dispute which the employees were striking over. The employees' refusal to work was held to be a consequence of the implementation of the staggered breaks, which was not regarded as the initiator of the refusal to work.[65] It can be concluded from this case that the court was interested specifically in whether or not there was an articulated demand, grievance or dispute that initiated the strike. It was quite evident from the facts of the case whether this was indeed present, as if this had been so then the employees *in casu* would have resumed work once the dispute over the staggered breaks had been resolved.

59 *TSI Holdings* 1492E-F; *NUM v CCMA* 2011 32 ILJ 2104 (LAC).
60 *Simba* 1595A-G.
61 *Simba* 1596D.
62 *Simba* 1596F-I.
63 *Simba* 1596G-H.
64 *Simba* 1597F-G.
65 *Simba* 1597H-J.

In *Pikitup (SOC) Ltd v SA Municipal Workers' Union on behalf of Members*[66] the court considered the requirement that a demand has to be a matter of mutual interest. The case centred on the proposed implementation of a breathalyser testing procedure for all Pikitup drivers. This introduction of the test was a response to the fact that approximately 250 drivers had reported to work drunk. The union opposed the implementation of the test.[67] The matter remained unresolved after conciliation and consequently the employees engaged in a strike. The company applied to interdict the strike and declare it unlawful. The court held that this was not a matter of mutual interest, but rather that it pertained to the operational management of the company and was excluded from being an issue which could be collectively bargained. The strike was thus interdicted.[68] Upon the return date of the case, the court found that the strike was a matter of mutual interest and as such was lawful. The reason for the court's decision was that the implementation of Breathalyzer testing was to ensure a safe working environment for workers. Consequently, the method of ensuring a safe working environment through Breathalyzer testing was viewed by the court to constitute a matter of mutual interest as the employees were deemed to have an interest in the environment in which they conducted their work. Secondly, the court took into account that if the result of the Breathalyzer test was positive and if an employee disputed the result he or she could request a further test. If the result was still positive, the employee could request that a blood test be administered. The court further considered that the fact that the employer intended administering a blood test irrespective of whether or not the employee requested the test was of serious concern and would be of interest to the employee. As a result, this would be a matter of mutual interest between the employer and employees, and would render the strike lawful.[69] The matter was then taken on appeal to determine firstly whether the breathalyser test was unlawful and secondly, whether health and safety issues were matters of mutual interest.[70] However, for the purpose of drawing attention to the term "matter of mutual interest", this discussion will focus on the second issue brought on appeal only.

Musi AJA first analysed the significance of construing the term "matter of mutual interest" widely, as to hold otherwise would have severe ramifications for the right to engage in collective bargaining. The court considered that the

66 *Pikitup (SOC) Ltd v SA Municipal Workers' Union obo Members* 2014 35 ILJ 983 (LAC) (hereafter *Pikitup*).
67 *Pikitup* 984D-E.
68 *Pikitup* 984F.
69 *Pikitup* 1003A-B.
70 *Pikitup* 984G-H.

term was extremely wide and could encompass a number of issues. It was agreed that the term should include any issue that directly or indirectly affects the employees within an employment relationship.[71] It is submitted that this is the intention of the legislature, because if it wanted to restrict this term to specific issues it would have done so. By its failure to qualify the term, the legislature tacitly acknowledged that there is an unspecified number of issues which would have a bearing on a particular trade that would affect an employee and his employer.[72] This was also the position of the legislature prior to the promulgation of the LRA.[73] Therefore, the term must be construed in a literal sense to include any issue within the employment relationship.[74] However, Musi AJA stated that even though the Labour Appeal Court should broadly interpret the term "matter of mutual interest", the Labour Court and the Labour Appeal Court must be careful not to afford an overly extensive interpretation of the term that would include any issue as a proper subject matter of a strike. The court stated that where the issue is of a socio-economic or political nature, then such a dispute cannot be regarded as the subject matter for a strike, as the employer would be confronted with uncertainty and the issue would be completely out of his control.[75] This is a correct reflection of the intention of the legislature, as the LRA has provided an extensive regulation of the right to strike to ensure that the right can be adequately controlled and its potential destruction minimalised.[76]

The Labour Appeal Court turned to the *Occupational Health and Safety Act* 85 of 1993 (hereafter the OHSA) to determine that a wide interpretation of the term "matter of mutual interest" is essential to give effect to the right to engage in collective bargaining. Musi AJA noted that the OHSA requires both the employer and the employee to work together to provide a safe and healthy workplace. The Labour Appeal Court held that the purpose of the OHSA is in line with the intention of collective bargaining, which is to ensure that employers and employees engage in cohesive interaction to resolve disputes.[77] It was further held that the decision handed down by Snyman J in the Labour Court was too narrow as it limited collective bargaining only to issues which pertained to terms and conditions of employment. Furthermore, Musi AJA stated that the Labour Court's decision did not take into account

71 *Pikitup* 1000F-G.
72 *Minister for Labour & Minister for Justice* 1941 TPD 108 para 115.
73 *Rand Tyres & Accessories v Industrial Council for the Motor Industry* 1941 TPD 108.
74 *De Beers Consolidated Mines Ltd v CCMA* 2000 5 BLLR 578 (LC) 581C.
75 *Pikitup* 1000H-I.
76 *Durban City Council v Minister of Labour* 1948 1 SA 220 (N).
77 *Pikitup* 1003A-D.

that there is an implied condition within an employment contract that employees are entitled to work in a healthy and safe environment.[78]

It was thus argued that due to the power that management possesses, it is capable of implementing health and safety procedures that ostensibly appear to be in the employees' best interest. However, the employees may hold that such procedures are contrary to their interests. If health and safety issues were exempt from collective bargaining, then employees would be prevented from deliberating on issues that could potentially be obtrusive to their rights.[79] It is submitted that this ruling is in accordance with the primary objective of the LRA, which is to ensure that employees engage in collective bargaining so that their rights are not in any way infringed by the dictates of the employer. It was on this basis that the court concluded that health and safety issues are matters of mutual interest.[80]

This point was further elucidated in *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & General Workers Union*,[81] where the court held that a demand over equity shareholding of 20% amounted to a dispute of mutual interest and was therefore a matter over which employees may engage in industrial action.[82] The court arrived at its decision based on the fact that the right to strike can be used as an instrument to obtain fair conditions of employment as well as to acquire new rights. The employment environment is one that has constantly to adapt and reform according to new developments in society. Therefore, the nature of issues proper to bargaining has to be flexible to accommodate these changes.[83] It follows from this case that the court is not willing to apply a stringent test in determining whether a dispute is one that amounts to a matter of mutual interest. The most pertinent notion which can be derived from precedent is that the dispute must affect both the employer and employee.

The fact that an act constitutes a strike does not in itself render the strike lawful.

5 Procedural requirements for protected strikes

78 *Pikitup* 1003A-C.
79 *Pikitup* 1001A-C.
80 *Pikitup* 1001A-C.
81 *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & General Workers Union* 2009 30 ILJ 1099 (LC) (hereafter *Itumele Bus Lines*).
82 *Itumele Bus Lines* 1121E-H.
83 *Itumele Bus Lines* 1120F-I.

The LRA has entrenched a clear procedure which must be followed for a strike to be protected,[84] and if these specific procedures are not followed, then employees forfeit the protection attributed to the right to strike.[85] The LRA provides for two procedural requirements to be followed to ensure the protection of a strike.[86] The first requirement is that employees and employers are compelled to engage in conciliation before any further action takes place. If conciliation is unsuccessful or if the matter has been referred to the CCMA for 30 days without resolution, then a certificate will be issued indicating that the dispute remains unresolved.[87] The second requirement is that the union must furnish the employer with 48 hours' notice of its intention to strike.[88]

5.1 The framework for the resolution of interest disputes

The dispute resolution framework is essential to the right to strike as it is this framework which seeks to remedy conflict before employees engage in strike action. The LRA has established avenues for dispute resolution that are speedy and easily available in keeping with its primary objective to resolve conflict.[89] However, more significantly, employees are compelled to engage in a conciliatory phase which is a precondition for a protected strike as enshrined in section 64(1) of the LRA.[90] In the light of the topic of this paper, the mechanisms for dispute resolution will be analysed only in terms of interest disputes.

The 1956 LRA did not expressly provide clarity on the distinction between disputes of right and disputes of interest, which resulted in many inconsistencies on whether the matter had to be referred for negotiation or whether the matter had to be decided by a court. The 1995 LRA, which regulates present-day dispute resolution, expressly states which disputes may not be resolved through industrial action.[91] Disputes of interest essentially pertain to the enactment or alteration of a new set of rules,[92]

84 Section 64 of the LRA.
85 *SA Chemical Workers Union v Sentrachem Ltd* 1998 9 ILJ 410 (IC).
86 Sections 64(1)(a)-(b) of the LRA; Muller, Bezuidenhout and Jooste *Healthcare Service Management* 398.
87 Section 64(1)(a) of the LRA; Keith *Understanding the CCMA Rules and Procedures* 22.
88 Section 64(1)(b) of the LRA; Le Roux 2012 *CLL* 41.
89 Vettori 2013 *SA Merc LJ* 245.
90 Section 64(1) of the LRA; Van Heerden 2011 *Without Prejudice* 66.
91 Section 65(1) of the LRA.
92 *HOSPERSA v Northern Cape Provincial Administration* 2000 21 ILJ 1066 (LAC).

whereas disputes of rights pertain to the way in which existing rules and norms are interpreted and applied.[93]

The classification of whether a dispute is an interest or rights dispute is highly pertinent, as employees may lawfully strike only over disputes of interest.[94] This was further endorsed in *MITUSA v Transnet (Pty) Ltd*,[95] where the court stated that the dispute resolution system distinguishes between rights which are resolved through arbitration and those which must be resolved through a display of power.[96] The distinction of disputes is pertinent as there are different mechanisms for resolving rights and interest disputes.[97] The LRA prescribes two categories of disputes which may be referred to the CCMA for arbitration, namely: disputes which relate to the terms of the LRA, such as those pertaining to the actual provisions of the LRA, which are referred to as rights disputes,[98] and disputes which relate to matters of mutual interest, which are referred to as interest disputes.[99] If employees merely want to approach the CCMA for a demand on an increase in wages, they will be instructed that the correct procedure would be to engage in collective bargaining and industrial action.[100] Similarly, if a dispute pertains to a rights dispute, such a dispute has to be referred to the CCMA for arbitration to be resolved.[101] It is therefore imperative that a distinction be made between rights and interest disputes as it determines which resolution technique to adopt.[102] In all disputes, regardless of their nature, parties are required to engage in conciliation before the matter can be referred for arbitration or the process of adjudication.[103] It must be noted that section 65(1) of the LRA does not impose a mandatory duty to bargain.[104] Therefore, in such cases conciliation would be the first point of dispute resolution for interest disputes.[105] Such a referral is made to the bargaining council within that

93 Hanami and Blanpain *Industrial Conflict Resolution* 8.
94 Spielmans 1939 *AER* 301.
95 *MITUSA v Transnet (Pty) Ltd* 2009 23 ILJ 2213 (LAC) (hereafter *MITUSA*).
96 *MITUSA* 2215D-E.
97 Okene and Emejuru 2015 *JLPG* 136.
98 Section 133(1)(b) of the LRA; *Sithole v Nogwaza* 1999 20 ILJ 2710 (LC); *Gauteng Provinisale Administrasie v Scheepers* 2000 21 ILJ 1304 (LAC); *SA Democratic Teachers Union v Minister of Education* 2001 22 ILJ 2325 (LC).
99 Section 133(1)(a) of the LRA.
100 Grogan *Dismissal, Discrimination and Unfair Labour Practices* 12.
101 *BHT Water Treatment (A Division of Afchem) (Pty) Ltd Incorporating PWTSA v CCMA* 2002 2 BLLR 173 (LC); *University of the Witswatersrand Johannesburg v Commissioner Hutchinson* 2001 22 ILJ 2496 (LC).
102 *Sapeko Tea Estates (Pty) Ltd v Maake* 2002 10 BLLR 1004 (LC).
103 Bhorat, Pauw and Mncube *Understanding the Efficiency and Effectiveness of the Dispute Resolution System* 4.
104 Section 65 (1) of the LRA; Anstey, Grogan and Nycukaitobi *Collective Bargaining* 51.
105 Gibson *South African Mercantile and Company Law* 664.

sector, or if one does not exist, the dispute is referred to the CCMA.[106] If a matter is categorised as a dispute of interest and is not resolved within the 30-day time frame stipulated by the LRA, then the parties are entitled to engage in industrial action or lock-out.[107]

5.2 The requirement of 48 hours' notice

The primary element that makes way for a protected strike is that the parties must provide 48 hours' notice to the employer of the intended strike.[108] The Supreme Court of Appeal was called upon to adjudicate on the requirement of 48 hours' notice in the landmark case of *Equity Aviation v South African Transport and Allied Workers Union* (SATAWU).[109] In *Equity Aviation,* SATAWU represented 725 of the 1157 Equity Aviation's employees. As a result of failed negotiations, SATAWU supplied the employer with the required 48 hours' notice of its intention to strike. The strike persisted for four weeks, involving both represented employees and unrepresented employees. The strike was deemed lawful for the represented employees who had complied with the LRA; however the unrepresented employees' participation was not regarded as lawful as they had failed to give a separate notice of their intention to strike.[110] Consequently, the unrepresented employees were dismissed for prolonged unauthorised absenteeism. The dismissed employees referred the matter as an automatically unfair dismissal. The Labour Court found that the employees formed part of the union's membership at the time of the strike; but regardless of this ruling the employees' membership was not a prerequisite for their lawful participation in the strike.[111]

On appeal this decision was set aside by the Labour Appeal Court. The majority decision, in which Khampepe ADJP and Davis JA concurred, reasoned that to necessitate a separate strike notice by non-represented employees would also necessitate a separate referral of the dispute for conciliation. The majority court considered this premise in the light of the purpose of section 64(1)(a) of the LRA, which is to ensure orderly collective bargaining. The purpose of section 64(1) of the LRA was merely to ensure that there was a referral in order to ensure a lawful strike, it did not intend to require the indication of the identity of the parties. Once the union had

106 Van der Merwe and Du Plessis *Introduction to the Law of South Africa* 427.
107 Section 6(1)(a) of the LRA; Steenkamp and Bosch 2012 *Acta Juridica* 122.
108 Landis and Grosset *Employment and the Law* 294.
109 *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union* 2011 32 ILJ 2894 (SCA) 2898E (hereafter *Equity Aviation Services*).
110 *Equity Aviation Services* 2896H-I.
111 *Equity Aviation Services* 2896D-J.

referred the matter for conciliation then another referral of the same dispute by non-represented employees would be futile.[112] The reason for this decision was that the issue in dispute affected both the represented employees and the non-represented employees. When the matter was referred for conciliation, the union represented the interests of both represented and non-represented employees. Therefore, once the majority union had referred the dispute and was unsuccessful, the non-represented employees were entitled to strike along with the represented employees.[113] The majority decision of the court was that there was no reason to draw a distinction between categories of workers. If the legislature intended to draw a distinction between categories of workers, then it would have done so. The employer is entitled to receive a notice of intention to strike but not to be notified of the identity of the individuals.[114]

The crucial question in *Equity Aviation Services* which the Supreme Court of Appeal had to decide on was whether the unrepresented employees were required to submit a separate notice of their intention to strike or whether the notice submitted by the union was sufficient to include the unrepresented employees that would ultimately render their participation in the strike as being lawful.[115] In the Supreme Court of Appeal, Lewis JA considered the two chief arguments made by the respondents in the Labour Appeal Court. The first argument by the respondents was that section 64(1)(b) of the LRA did not require more than one notice. In the majority decision, Khampepe ADJP agreed with this argument and held that to confer any further requirements into section 64(1)(b) of the LRA that the legislature has not expressly included would contradict labour law jurisprudence. Furthermore, it would be overly formal, which would negate the simplistic framework of dispute resolution. This would be contrary to the objectives of the LRA.[116]

Davis JA proffered another line of reasoning when he concurred with Khampepe ADJP in his judgment by stating that if "a significant group of workers" provides notice of its intention to strike, then it would ensure satisfactory compliance with the implementation of organised industrial relations.[117] Zondo JP in the dissenting judgment held that this decision was entirely incorrect and would lead to immense uncertainty within the law.

112 *Equity Aviation Services* 2898E.

113 *Equity Aviation Services* 2898F; *Chemical Energy Paper Printing Wood & Allied Workers Union v CTP Ltd* 2013 34 ILJ 1966 (LC).

114 *Equity Aviation Services* 2898I.

115 *Equity Aviation Services* 2895C.

116 *Equity Aviation Services* 2898G-I.

117 *Equity Aviation Services* 2900D-I.

Zondo JP reasoned that this could not suffice as a sound justification, because the term "significant group" would mean that if an insignificant group of employees provided the notice first then a further notice would be required by a significant group of employees.[118] Consequently, if a significant group of employees provided notice then it would not necessitate those who formed part of an insignificant group of employees to provide separate notices.[119] The Supreme Court of Appeal agreed with the decision of Zondo JP in this regard, as Lewis JP held that this was an illogical rationalisation of what section 64(1)(b) of the LRA requires.[120] Furthermore, it is submitted that the conclusion reached by Davis JA is invalidated by the first argument of Khampepe ADJP, which states that labour law jurisprudence would be undermined if you include further requirements which the legislature had not expressly included.[121] In section 64(1)(b) the LRA does not make mention of any term regarding a "significant group of people". Therefore, to infer such a term would be contrary to labour law jurisprudence.[122]

The second argument raised by the respondents in the Labour Appeal Court was that requiring non-represented employees to furnish separate notices would be a limitation without justification of the right to strike.[123] The decision held by Khampepe ADJP in regard to the respondents' argument pertained to a strict interpretation of the right to strike in accordance with leading cases, which compelled the interpretation of the right to strike to be construed without importing implicit limitations that were not expressly conferred by legislature.[124] The Supreme Court of Appeal disagreed with this decision and held that this requirement does not affect the enforcement of the right, but rather how the right is exercised. It was merely a procedural requirement that is required to render the strike lawful.[125]

The Supreme Court of Appeal considered the argument raised by the employer in the Labour Appeal Court. Equity Aviation averred that the majority decision did not appreciate the difference between section 64(1)(a) of the LRA, which necessitated negotiations between the parties to allow for a period of cooling off, and section 64(1)(b) of the LRA, which allows for the employer to prepare for the strike.[126] If this requirement were undermined,

118 *Equity Aviation Services* 2900D-I.
119 *Equity Aviation Services* 2900D-I.
120 *Equity Aviation Services* 2900D-I.
121 *Equity Aviation Services* 2898G-I.
122 *Equity Aviation Services* 2898E.
123 *Equity Aviation Services* 2902C.
124 *S v Zuma* 1995 2 SA 642 (CC).
125 *Equity Aviation Services* 2898G-I
126 *Equity Aviation Services* 2900F-G.

then the employer would not be able to determine the magnitude, intensity and the actual focus of the strike. This would defeat the entire purpose of a strike, as the employer would not be able to make an informed decision to accede to the employees' demands.[127] Furthermore, an employer would not have knowledge of whether it should take adequate steps to protect the business or to make pre-strike regulatory decisions as well as to take the necessary health and safety precautions that may arise during the strike.[128] The union argued that due to the context in which collective bargaining takes place, Equity Aviation would have been aware of the magnitude of the strike and would have been able to prepare for it.[129] However, this had not been the case, as Equity Aviation had made inquiries regarding the participants in the strike and it had been informed that the strike would involve union members only. Thus, it had made preparations based on this knowledge.[130] The court had to determine whether the purpose of section 64 had been frustrated, as in *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union (1)*,[131] in which the court on appeal dealt with non-compliance with section 64(1)(b) of the LRA. The court had pointed out that there was no argument that the non-compliance in any way had frustrated the purposes of the LRA. Therefore, reliance on the non-compliance failed on appeal.[132]

Zondo JP took the factors which were presented by Equity Aviation into account when he handed down the dissenting judgment that separate notices were required from non-represented employees. The Supreme Court of Appeal agreed with the dissenting judgment[133] and added a fifth purpose, that providing a separate notice would protect the non-represented employees. Lewis JA was of the opinion that if all employees complied with the procedural requirements of the LRA then their conduct would be protected under the LRA. Therefore, it was in the best interests of all employees that an employer receive a notice of intention to strike by all its employees who intended to strike.[134] The Supreme Court Appeal further approved Zondo JP's interpretation of section 64(1)(b) of the LRA, where he relied on labour law authors who claim that as soon as the procedural requirements for a valid strike have been fulfilled, namely that the matter has been referred for conciliation and the union has provided the employer with

127 *Equity Aviation Services* 2900H.
128 *Equity Aviation Services* 2901A.
129 *Equity Aviation Services* 2901E-G.
130 *Equity Aviation Services* 2901E-G.
131 *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union (1)* 1998 20 ILJ 260 (LAC) (hereafter *Fidelity Guards Holdings*).
132 *Fidelity Guards Holdings* 269D-F.
133 *Equity Aviation Services* 2901A.
134 *Equity Aviation Services* 2899E-F.

the notice of its intention to strike, then the union is at liberty to call out all its members to engage in strike action. Non-represented employees may also join in the strike provided that they furnish separate notice of their intention to strike.[135] The Supreme Court of Appeal and Zondo JA were of the opinion that not to do so would result in disorderly collective bargaining. The Supreme Court of Appeal accordingly set the decision of the Labour Appeal Court aside.[136]

However, in *SA Transport & Allied Workers Union v Moloto*[137] the Constitutional Court ruled against the decision in *Equity Aviation Services*, thus establishing a new line of precedent. As a result of failed negotiations pertaining to wages, the union obtained a certificate that the dispute remained unresolved.[138] The union, which represented the majority of Equity's workforce, issued a notice to the employer indicating their intention to embark on a strike. Similarly to *Equity Aviation Services*, non-members of the trade union also engaged in the strike. These employees were then dismissed because of their participation in an unprotected strike.[139]

The Constitutional Court was called upon to adjudicate on two arguments. The argument presented by the applicants pertained to the language expressed by the legislature, which provided for a strict interpretation of the provision of section 64(1)(b) of the LRA in the light of the *Constitution* and the purpose of the LRA.[140] The applicants claimed that to allow any further reading into the provision would entail that the employer be given an unfair advantage over the employees, who were already placed in an inferior position in the employment field.[141] The argument presented by the respondents pertained to a purposive interpretation of section 64(1)(b) of the LRA, which claimed that in order for the provision to contain any purpose at all, notices of the intended strike had to be given by all employees who intended to strike.[142]

The majority, in which Yacoob ADCJ, Froneman J, Nkabinde J, Cameron J and Van der Westhuizen J concurred, held in favour of the applicants. The majority considered two primary aspects that followed from the factual

135 *Equity Aviation Services* 2902E-F.
136 *Equity Aviation Services* 2902G-H.
137 *SA Transport & Allied Workers Union v Moloto* 2012 33 ILJ 2549 (CC) (hereafter *Moloto*).
138 *Moloto* 2250[2]-[4].
139 *Moloto* 2250[2]-[4].
140 *Moloto* 2558D.
141 *Moloto* 2558E-F.
142 *Moloto* 2558G-H.

context of the case as well as the principle of the constitutional jurisprudence of statutes. The majority took cognisance of the recognition agreement that had been concluded by the union and Equity Aviation, which recognised the union as a bargaining agent which represented all the employees employed by Equity Aviation. Furthermore, there was also an agency agreement in place which permitted the union to engage in negotiations regarding wages on behalf of both non-union employees and members of the union.[143] The Constitutional Court stated that it was in this context that the notice to strike should be interpreted, as from the beginning of negotiations both members of the union as well as non-union members were represented by the union regarding this wage dispute.[144] Equity Aviation could not reasonably have believed that the strike notice did not include non-union employees, from the facts of the case.[145]

The majority further considered that the right to strike was a constitutional right with significant value. Consequently, there should not be any implicit requirement read into the right without proper justification.[146] The majority held that there was no proper justification to read an implicit requirement into the right, as the LRA only envisaged one strike in respect of one dispute; thus, there was no rationale or language from statute to assume that there should be two notices given for one strike.[147] In *Moloto* the court held that the LRA in section 64 has explicitly stated the procedural requirements that have to be met for the protection of a strike, and that once these requirements have been satisfied there does not have to be any further procedure conferred upon it.[148] Therefore, it could be deduced that the court in *Moloto* had effectively illustrated that the court was unwilling without adequate justification to read limitations into fundamental rights enshrined by the *Constitution*.[149] The majority court further reasoned that in terms of the principle of constitutional jurisprudence, if there was more than one interpretation of the statutory provision, such interpretation must conform to the spirit, purport and objective of the Bill of Rights.[150]

6 Analysis of the interpretation of section 64(1)(b) of the LRA in the light of *Equity Aviation Services and Moloto*

143 *Moloto* 2550H-I.
144 *Moloto* 2550J.
145 *Moloto* 2551A.
146 *Moloto* 2550F-G.
147 *Moloto* 2551C.
148 *Plascon Decorative* 328A-B.
149 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 5 BLLR 433 (CC).
150 *Moloto* 2551C-D.

The court in *Equity Aviation Services* concluded that orderly collective bargaining would be achieved if there was an implicit reading into the notice to strike. The reasoning of the Supreme Court Appeal was more in line with how the employer would perceive the strike notice in order to prepare for the power play that was to commence.[151] In *Moloto* the majority's reasoning was in line with the effect that the reading in of implicit requirements would have on the employees. It is acknowledged that workers suffer from an inherent imbalance of power in the workplace as a result of the employer's superior position of enforcing wages and employment conditions, and workers have no option but to accept these conditions if they are in need of jobs.[152] Therefore, by not interpreting further implicit limitations employees would be able to level this imbalance of power that employers have possessed through strike action which would bring pressure upon the dominant elite and compel employers to accede to the demands of employees.[153] Furthermore, non-unionised employees would feel the impact of an additional strike notice much more severely than employees who are represented by a union, as this would be an additional requirement only non-unionised employees had to comply with.[154]

The Constitutional Court in *Moloto* considered that two consequences would arise if the court interpreted section 64(1)(b) of the LRA to give effect to the words expressly enshrined by legislature.[155] Firstly, a less intrusive interpretation would ensure greater certainty in enforcing the right to strike, as reading in an implicit requirement would require more information in the notice and would lead to further implicit requirements being read into the provision.[156] If this occurred there would be great uncertainty in enforcing strikes, as employees would not be able to follow a clear guideline on protected strikes. This would negate the purpose of the LRA, which endorses orderly collective bargaining.[157] It is imperative to note that the majority's reasoning regarding this first point on promoting orderly collective bargaining differs from the approach taken by the Supreme Court of Appeal in *Equity Aviation Services.*[158] In *Equity Aviation Services* the Supreme Court of Appeal rationalised that the enforcement of orderly dispute resolution would ensure that employers are not caught off guard and that a strike does not

151 *Moloto* 2558H-I.
152 Kaufman 1989 *J Labor Res* 286.
153 Singh and Kumar *Employee Relations Management* 89.
154 Chicktay "Employment, the Economy and Growth" 17.
155 *Moloto* 2551C-D.
156 *Moloto* 2551E.
157 *Moloto* 2551F.
158 Smit and Fourie 2012 *De Jure* 430.

proceed to an extent that is uncontrollable, as this would be contrary to the intention of the LRA.[159]

Secondly, a less intrusive interpretation of the right to strike would accord with the underlying rationale for industrial action, which is to balance the social and economic power in the workplace.[160] If more information was required other than that which legislature provided for, the position of the employer would be further strengthened, and the *Constitution*'s purpose of levelling the playing field that is already been tilted in favour of the employer would be frustrated.[161] In this regard, the majority were of the view that reading further requirements into the legislation would make the enforcement of strikes indeterminate, as the employer would claim that yet further requirements be read into the legislation.[162] This would also erode the attempt to balance the unequal power relation between the employer and the employee.[163]

7 Possible factors for consideration in the interpretation of section 64(1)(b) of the LRA that would promote the objectives of the LRA

The Supreme Court of Appeal in *Equity Aviation Services* and the dissenting decision of Zondo JP in the Labour Appeal Court fall in line with the conclusion reached by Froneman DJP in *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction and Allied Workers Union.*[164] The Labour Appeal Court held that section 64(1)(b) of the LRA has to be interpreted to advance the objectives of the LRA, one of which is to ensure orderly collective bargaining.[165] This point is further illustrated in *Macsteel (Pty) Ltd v National Union of Metalworkers of South Africa* (NUMSA),[166] where the court stated that:

> [t]he LRA creates machinery which makes collective bargaining not only possible but compulsory. Its aim is to avoid if possible industrial strife and to maintain peace. Its operation is such that, if parties negotiate genuinely and in

159 Du Toit and Ronnie 2012 *Acta Juridica* 195.
160 *Moloto* 2551E-F.
161 *Moloto* 2551G.
162 *Poswa v Member of the Executive Council Responsible for Economic Affairs, Environment & Tourism, Eastern Cape* 2001 3 SA 582 (SCA).
163 Molusi 2010 *Obiter* 156.
164 *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction and Allied Workers Union* 1997 6 BLLR 687 (LAC).
165 *Ceramic Industries* 701-702.
166 *Macsteel (Pty) Ltd v NUMSA* 1990 11 ILJ 995 (LAC) (hereafter *Macsteel*).

> good faith, and their demands and offers are reasonable, settlement will be reached before disruption takes place.[167]

Therefore, it is submitted that the function of collective bargaining is to ensure that parties come to an understanding about the issue and that the dispute will not necessitate engagement in industrial action or lock-outs to reach a resolution. This would benefit both the employer and the employee in that the employer would save on production time lost and the employee would not forfeit the right to be paid.

The first factor that the courts should consider is that section 64(1)(b) of the LRA gives effect to the objective of the LRA, which is to promote orderly collective bargaining. The objective of the LRA and the purpose of section 64(1)(b) of the LRA would be weakened and made ineffective if employers were not informed of the extent of the strike.[168] There are two ways in which orderly collective bargaining would be damaged by not informing the employer of the exact extent of the strike.[169] Firstly, the employer requires this information, as the magnitude of the strike is a factor that the employer considers when deciding whether it is more reasonable to accede to the employees demand than to allow the strike to commence and cause an excessive disruption to production. The underlying purpose of a strike in orderly collective bargaining is to utilise the threat of economic harm to the employer's business to allow the employer the opportunity to consent to the employees' demands.[170] A strict interpretation of section 64(1)(b) of the LRA therefore promotes orderly collective bargaining as it allows the employer to be furnished with sufficient information that has the potential to bring the dispute to a resolution rather than having the situation escalate to strike action. It is submitted that the purpose of collective bargaining would be eroded if the employer were not given adequate information and were unaware of the real factors pertaining to the negotiation process.

The second factor that the courts should consider in their interpretation of section 64(1)(b) of the LRA is that requiring separate notices from non-represented employees would enable an employer to protect the interests of the business when the actual strike commenced, as prior knowledge regarding how many employees would be participating in the strike would indicate the extent of the strike and thus allow the employer to plan ahead on the basis of that knowledge.[171] Furthermore, if the employer is not provided

167 *Macsteel* 1006B-E.
168 *Ceramic Industries* 702.
169 *Ceramic Industries* 701-702.
170 *Stuttafords v SACTWU* 2001 1 BLLR 47 (LAC).
171 Smit and Fourie 2012 *De Jure* 432.

with information regarding the number of employees who would be striking, the employer would be blind-sided, and should a large number of non-unionised employees strike along with the employees who are represented by unions, there would be no measures taken by the employer to prepare for this disruption.[172] One can only implement measures to prevent harmful and dangerous occurrences if they can be foreseen.[173] An employer cannot be expected to safeguard against severe financial loss or potential danger if it is unaware of the severity that the strike would inflict.[174] This is a grave concern as if insufficient measures are taken against potential harm then the damage to the business and society at large could be great.[175] In addition, if employers are blind-sided as to the extent of the strike, this could cause the scales of power to tilt in favour of the employees. It is thus argued that this would vitiate the purpose of orderly collective bargaining, which is to ensure that employers and employees are put in an equal position and that the scales of power are balanced during collective bargaining.[176] As a result, the main objective of the LRA, which is to promote orderly collective bargaining for the purpose of dispute resolution, would be impaired, as collective bargaining is dependent on cooperation, trust, mutual aspirations and a willingness to compromise within the employer-employee relationship.[177]

A third factor that the judiciary should consider is that the interpretation of section 64(1)(b) of the LRA should not focus entirely on the ramifications that the right to strike has on employees or the employment relationship, as strikes extend far beyond the borders of the employment relationship, and innocent bystanders and the general public are often affected by the actions of striking workers.[178] The consequences of violent strikes exceed the ordinary boundaries of the employment relationship.[179] These violent strikes have created an atmosphere of fear and chaos, as strikers set tyres and vehicles alight, vandalise shops, destroy buildings, barricade roads, attack non-strikers and innocent civilians and violently confront law enforcement.[180] This behaviour during strikes is indicative that a tradition of violence, fear, harassment and damage to property has become inculcated in strike

172 Gosai 2012 *Without Prejudice* 28.
173 *SATAWU v Garvas* 2013 1 SA 83 (LC).
174 *Algoa Bus Company v SATAWU* 2010 2 BLLR 149 (LC).
175 Seedat *Effects of Strikes in the South African Gold Mining Industry* 3.
176 Romeyn Date unknown https://apo.org.au/node/1844.
177 Bolton *et al* 2007 *SAJIP* 74.
178 Thompson 1992 *ILJ* 500.
179 Bekker and Van der Walt 2010 https://duepublico.uni-duisburg-essen.de/servlets/DerivateServlet/Derivate-25689/09_Walt_Bekker_Strikes.pdf.
180 Alexander 2010 *Rev Afr Polit Econ* 26.

activity.[181] It is argued in this paper that a possible contributor to such violence could be the liberal interpretation of the procedural requirements of the right to strike in section 64(1)(b) of the LRA, which may lead to an acrimonious and unpredictable environment during strike action.[182] Consequently, it is argued that a liberal interpretation of section 64(1)(b) of the LRA employers may lead to employers' not being given sufficient information of the extent of the potential strike, which would lead to uncertainty. When there is uncertainty it leads to instability, which is the breeding ground for anarchy and violence. A strike that is initiated in the context of instability and unpredictability has a greater possibility of resulting in violence and chaos.[183] Thus, in its interpretation of the LRA the judiciary should not focus exclusively on the implications that the right to strike has on employees. Instead it should broaden its ambit of interpretation to take into consideration the external effect a particular interpretation would have on the public and the innocent lives of civilians.[184] This submission is based on the perception that strikes extend beyond the confines of the employment relationship between employers and employees, and their ramifications have an impact on all members of society.[185] A stricter interpretation of section 64(1)(b) of the LRA may possibly assist in decreasing strike violence. Even though it may be argued that an employer should not be considering the strike rate of the country during collective bargaining but instead should be focussing on the interests of the business and the employment relationship, it is submitted that a strict interpretation of section 64(1)(b) of the LRA is required in the light of the increase in strike violence in South Africa.[186]

A fourth factor that the judiciary should consider in the interpretation of section 64(1)(b) of the LRA is that even though industrial action is protected by both the *Constitution*[187] and the LRA, this protection is afforded within restrictions, as the right to strike is not an absolute right.[188] Essentially this means that the right to strike may be limited in terms of section 36 of the *Constitution*, which allows for the limitation of rights when there are competing interests of rights. This requires a balancing of rights to determine whether the limitation of one right against another right is justifiable in the light of democratic values which are based on equality, dignity and

181 Benjamin *Assessing South Africa's CCMA* 35.
182 *SA Transport & Allied Workers Union v Moloto* 2012 33 ILJ 2549 (CC).
183 Chicktay "Employment, the Economy and Growth" 17.
184 Thompson 1992 *ILJ* 500.
185 Mottier and Bond Date unknown http://ccs.ukzn.ac.za/default.asp?2.27.3.1858.
186 *Tiger Food Brands Ltd t/a Albany Bakeries v Levy* 2007 28 ILJ 1827 (LC).
187 Section 23 of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).
188 DLA Cliffe Dekker Hofmeyr *From Recognition to Strike* 8.

freedom.[189] The endorsement and limitations of industrial action which are specified by the LRA[190] are enforced to give effect to the spirit of the *Constitution*.[191] The *Constitution* enshrines basic human rights which are the cornerstone of our democracy.[192] However, the ramifications of strike activity over the years have violated these basic human rights that the *Constitution* seeks to uphold. This assertion is supported by a consideration of the strike action that has taken place over the years.[193] In recent years South Africa has experienced an increase in strikes and protests that have been engulfed by violent behaviour and civil unrest.[194] These strikes are usually unprotected and have instilled an aura of fear and catastrophic destruction which have damaging implications for employers, the economy and the public.[195] Even though such strikes cause disruption and chaos, they continue over lengthy periods and often end in unsatisfactory compromises that usually lead to further strike action.[196] The violence during strikes has compelled businesses to delay the services they offer to protect the lives of innocent citizens and the destruction of property.[197] There have been accounts of strikers directing their attacks at non-strikers and members of the public, which has led to the assault, the intimidation and even the death of innocent people.[198] The police have been required to intervene when discordant strikers have engaged in attacks against fellow workers.[199] The violence during public sector strikes in 2006 and 2010 was nothing less than inhumane, as nurses went through wards and physically ripped drips from the arms of patients.[200] The disruptions caused by the strikes prevented many patients from collecting their medication as medical institutes were compelled to close their facilities.[201] Strikers even disrupted surgical theatres[202] and prevented patients from entering hospitals to receive treatment, with the exception of permitting patients who required antiretroviral medication to enter the

189 Section 36 of the *Constitution*; Iles 2007 *SAJHR* 71.
190 Section 72 of the LRA.
191 Anon 2010 *IMIESA* 9.
192 Chapter 2 of the *Constitution*.
193 Makgetla *Weekly Mail and Guardian* 10.
194 Connolly 2013 *AJCR* 88. In 2009 51 strikes were recorded, 67 strikes in 2011, 99 strikes in 2012, 114 strikes in 2013, 88 strikes in 2014 and between the years 2005 and 2015 strikes have resulted in 5.2 million working days lost. See Lusanda *Impact of Violence and Intimidation on Strike Actions* 21.
195 Selala 2014 *IJSS* 121.
196 Connolly 2013 *AJCR* 88.
197 Bailey *Cape Argus* 4.
198 Mawade *The Herald* 2.
199 Nzapheza *The Citizen* 1.
200 Zulu *Nation in Crisis* 210.
201 Veenstra *et al* 2010 *Globalisation and Health* 2.
202 Smit *The Guardian* [1].

hospitals.[203] These strikes spread into the education sector and deprived children of their right to education.[204] Schools were obliged to suspend teaching for a protracted period of time after teachers violently stormed classrooms, forcing co-workers to participate in the strike.[205]

These heinous acts of violence, which have taken place during strike action, have inhumanly violated the rights of non-striking employees and the public at large. It is apparent from the description of strike violence given above that the acts of violence conflict with the fundamental rights provided in the *Constitution*, which are vital to freedom and democracy, including the protection of rights relating to health, safety and security and the general concern over public interest.[206] Thus, it is submitted that there should be a greater inclination to interpret section 65(1)(b)of the LRA more strictly to limit the right to strike in order to promote these fundamental rights.[207] These acts of violence serve as a motivation for the limitation of the right to strike. Strikes are essentially "economic" tools that are used to coerce an employer to accede to employees' demands. However, when violence and the violation of basic human rights during strikes are used as a mechanism of coercion for obtaining demands then strikes must be viewed from a sterner perspective that would restrain the right to strike rather than permit a liberal interpretation of the right to strike. Violence during strikes negates the purpose of strike action and should be prevented. When strike action causes the infringement of basic human rights, there should be a greater disposition to utilise means of limiting this right, as a more severe approach is needed in addressing violent strike action. It is further submitted that one of the means of limiting the right to strike would be a strict interpretation of section 64(1)(b) of the LRA. As discussed previously, section 36 of the *Constitution* allows for the limitation of rights when such a right conflicts with fundamental human rights. This serves as a basis for the limitation of the right to strike. A stricter interpretation of the procedural requirements in section 64(1)(b) of the LRA would provide the judiciary with the opportunity to interpret this section, which would ensure limitations to the implementation to the right to strike. The limitation of the right to strike should be undertaken in the light of the current position of violent strike action within the country and the severe effect of strikes on South Africa. Thus consideration needs to be given to whether a

203 Anon *Mail & Guardian* [3].
204 Section 29 of the *Constitution*.
205 UNDP Global Centre for Public Service Excellence *Motivation of Public Service Officials* 4.
206 Section 10 of the *Constitution*.
207 Servais Date unknown https://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Servais.pdf.

stricter interpretation of legislation would contribute towards decreasing violent and uncertain strike action.

8 Conclusion

The LRA has been a defining piece of legislation in South Africa. It has effectively included every employee under its banner in an attempt to implement equality within labour relations and redress the injustices of apartheid within labour relations.[208] The main purpose of the LRA is to provide an economic and accessible dispute resolution framework. The essence of these procedures is to ensure that employers and their employees equally contribute to growth, harmony and the productivity of the workplace.[209] The dispute resolution framework instilled by the LRA seeks to create a harmonious working environment that would lead to increased productivity and stability in the workplace. This in turn seeks to advance the purpose of the LRA, which is to ensure the improvement of the socio-economic interests of society at large, as a productive workforce leads to greater output and consequently economic growth. It is clearly evident from the exploration of the LRA in this article that an extensive framework has been developed to resolve disputes, rather than having employees resort to strike action. The entrenchment of the right to strike is therefore indicative of the legislature's attempt to balance the interests of employees and employers. The enforcement of this right is a positive development in our law. The right to strike, however, is not an absolute right, and consequently substantive[210] and procedural requirements[211] have been endorsed in the LRA to limit the right to strike and ensure that it is not abused.

In *Moloto* the Constitutional Court held that the LRA regulates the right to strike. Thus, there does not have to be any further justification or additional limitations to these explicit limitations, which are necessary for the effective regulation of the right.[212] However it is evident from the above discussion that even though there are clear and precise procedures stipulated in section 64 of the LRA for engaging in lawful strikes, these enactments have not been entirely effective in orderly strike action.

In the instance where the legislature has not explicitly stated that non-unionised employees should provide notice of their intention to strike, it is

208 Cheminais *et al Fundamentals of Public Personnel Management* 106.
209 Smith and Wood 1998 *Work Employ Soc* 482.
210 Section 213 of the LRA.
211 Section 64 of the LRA.
212 *New National Party of SA v Government of the Republic of SA* 1999 5 BCLR 489 (CC).

submitted that this necessitates that the judiciary interprets such provisions in the light of orderly collective bargaining that would give effect to fundamental rights of society as a whole and not merely focus its attention on the consequences to employees.[213] The purpose of a strike is simply to coerce an employer to do or not to do something.[214] However, the implementation of strike action is not as simple; thus, a stricter interpretation of the legislation regulating strikes is paramount to guard against abuse.[215] It is acknowledged that one of the functions of the judiciary is to interpret legislation. It is submitted that the judiciary should interpret section 64(1)(b) of the LRA to provide a stricter interpretation of the procedural requirements of the right to strike in an attempt to prevent violent strike action and ensure the advancement of orderly collective bargaining, which is one of the objectives of the LRA.

Bibliography

Literature

Adell 2011 *CLELJ*
Adell B "Regulating Strikes in Essential (and Other) Services after the 'New Trilogy'" 2011 *CLELJ* 413-447

Anon 2010 *IMIESA*
Anon "The Right to Strike: Government Perspective" Nov 2010 *IMIESA* 9

Anon *Mail & Guardian*
Anon "Strikers Defy Court Order at Durban Hospital" *Mail & Guardian* (23 August 2010) [3]

Alexander 2010 *Rev Afr Polit Econ*
Alexander P "Rebellion of the Poor: South Africa's Service Delivery Protests - A Preliminary Analysis" 2010 *Rev Afr Polit Econ* 25-40

Anstey, Grogan and Ngcukaitobi *Collective Bargaining*
Anstey M, Grogan J and Ngcukaitobi T *Collective Bargaining in the Workplace* (Juta Cape Town 2011)

Bailey *Cape Argus*

213 Ardell 2011 *CLELJ* 414.

214 *Food & General Workers' Union v Minister of Safety & Security* 1999 20 ILJ 1258 (LC) para 15.

215 Thomas *Government and the Economy Today* 248; Rabb and Rotberg *Industrialization and Urbanization* 138; Paukert and Robinson *Incomes Policies in the Wider Context* 159.

Bailey C "Trains Suspended after Coaches Torched" *Cape Argus* (18 May 2006) 4

Benjamin *Assessing South Africa's CCMA*
Benjamin P *Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)* (ILO Geneva 2013)

Benjamin, Bhorat and Cheadle 2010 *Int Labour Rev*
Benjamin P, Bhorat H and Cheadle H "The Cost of 'Doing Business' and Labour Regulation: The Case of South Africa" 2010 *Int Labour Rev* 73-91

Bhorat, Pauw and Mncube *Understanding the Efficiency and Effectiveness of the Dispute Resolution System*
Bhorat H, Pauw K and Mncube L *Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data* (Development Policy Research Unit, University of Cape Town Cape Town 2007)

Bhorat, Van der Westhuizen and Goga *Analysing Wage Formation*
Bhorat H, Van der Westhuizen C and Goga S *Analysing Wage Formation in the South African Labour Market: The Role of Bargaining Councils* (Development Policy Research Unit, University of Cape Town Cape Town 2007)

Blenk *European Labour Courts*
Blenk W *European Labour Courts: Industrial Action and Procedural Aspects* (ILO Geneva 1993)

Bolton *et al* 2007 *SAJIP*
Bolton D *et al* "Explaining Union Participation: The Effects of Union Commitment and Demographic Factors" 2007 *SAJIP* 74-79

Cheminais *et al Fundamentals of Public Personnel Management*
Cheminais J *et al The Fundamentals of Public Personnel Management* (Juta Cape Town 1998)

Chicktay "Employment, the Economy and Growth"
Chicktay M "Employment, the Economy and Growth: The Implications for Labour Law" in 26th Annual Labour Law Conference (30 July-1 August 2013 Johannesburg) 1-33

Committee of Experts "Freedom of Association and Collective Bargaining"

Committee of Experts on the Application of Conventions and Recommendations "Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations" (ILO Geneva 1983)

Connolly 2013 *AJCR*
Connolly L "Fragility and the State: Post-apartheid South Africa and the State-Society Contract in the 21st Century" 2013 *AJCR* 87-111

DLA Cliffe Dekker Hofmeyr *From Recognition to Strike*
DLA Cliffe Dekker Hofmeyr *From Recognition to Strike: An Overview of Collective Labour Law* (Cliffe Dekker Hofmeyr Pretoria 2014)

Du Toit and Ronnie 2012 *Acta Juridica*
Du Toit D and Ronnie R "The Necessary Evolution of Strike Law" 2012 *Acta Juridica* 195-218

Ferreira 2005 *Politeia*
Ferreira GM "The Development of South African Labour Law for the Past Ten Years (1994-2004)" 2005 *Politeia* 197-214

Gall 1997 *Rev Afr Polit Econ*
Gall G "Trade Unions and the ANC in the 'New' South Africa" 1997 *Rev Afr Polit Econ* 203-218

Gibson *South African Mercantile and Company Law*
Gibson R *South African Mercantile and Company Law* 8th ed (Juta Cape Town 2003)

Godfrey *et al Collective Bargaining*
Godfrey S *et al Collective Bargaining in South Africa: Past, Present and Future?* (Juta Cape Town 2010)

Gosai 2012 *Without Prejudice*
Gosai VB "Strike Action" 2012 *Without Prejudice* 27-28

Grogan *Dismissal*
Grogan J *Dismissal* 2nd ed (Juta Cape Town 2014)

Grogan *Dismissal, Discrimination and Unfair Labour Practices*
Grogan J *Dismissal, Discrimination and Unfair Labour Practices* 2nd ed (Juta Cape Town 2007)

Hanami and Blanpain *Industrial Conflict Resolution*

Hanami TA and Blanpain R *Industrial Conflict Resolution in Market Economics: A Study of Australia, The Federal Republic of Germany, Italy, Japan and the USA* 2nd ed (Kluwer Law and Taxation Deventer 1989)

Iles 2007 *SAJHR*
Iles K "A Fresh Look at Limitations: Unpacking Section 36" 2007 *SAJHR* 68-92

Kaufman 1989 *J Labor Res*
Kaufman BE "Labor's Inequality of Bargaining Power: Changes over Time and Implications for Public Policy" 1989 *J Labor Res* 285-298

Keith *Understanding the CCMA Rules and Procedures*
Keith D *Understanding the CCMA Rules and Procedures* (Juta Cape Town 2011)

Landis and Grosset *Employment and the Law*
Landis H and Grosset L *Employment and the Law: A Practical Guide for the Workplace* 3rd ed (Juta Cape Town 2014)

Le Roux 2012 *CLL*
Le Roux P "Giving Notice of Strike Action" 2012 *CLL* 41-50

Lusanda *Impact of Violence and Intimidation on Strike Actions*
Lusanda SK *The Impact of Violence and Intimidation on Strike Actions and their Effect on Union Membership in the Platinum Mining Industry* (MBA dissertation Gordan Institute of Business Science, University of Pretoria 2014)

Makgetla *Weekly Mail and Guardian*
Makgetla T "The Most Violent Post-Apartheid Strike" *Weekly Mail and Guardian* (4 May 2006) 10

Maree 2011 *SAJLR*
Maree J "Trends in the South African Collective Bargaining System in Comparative Perspective" 2011 *SAJLR* 7-37

Mawade *The Herald*
Mawade J "Guard Killed for not Taking Part in Strike" *The Herald (EP Herald)* (19 May 2006) 2

Molusi 2010 *Obiter*
Molusi AP "The Constitutional Duty to Engage in Collective Bargaining" 2010 *Obiter* 156-166

Muller, Bezuidenhout and Jooste *Healthcare Service Management*
Muller ME, Bezuidenhout MC and Jooste K *Healthcare Service Management* 2nd ed (Juta Cape Town 2011)

Nzapheza *The Citizen*
Nzapheza V "Security Thugs Go on Rampage" *The Citizen* (6 April 2006) 1

Okene and Emejuru 2015 *JLPG*
Okene OVC and Emejuru CT "The Disputes of Rights Versus Disputes of Interests' Dichotomy in Labour Law: The Case of Nigerian Labour Law" 2015 *JLPG* 135-140

Paukert and Robinson *Incomes Policies in the Wider Context*
Paukert F and Robinson D *Incomes Policies in the Wider Context: Wage, Price and Fiscal Initiatives in Developing Countries* (ILO Geneva1992)

Rabb and Rotberg *Industrialization and Urbanization*
Rabb TK and Rotberg RI *Industrialization and Urbanization: Studies in Interdisciplinary History* (Princeton University Press Princeton 1981)

Seedat *Effects of Strikes in the South African Gold Mining Industry*
Seedat A *The Effects of Strikes in the South African Gold Mining Industry on Shareholder Value* (LLM-dissertation University of the Witwatersrand 2013)

Selala 2014 *IJSS*
Selala K "The Right to Strike and the Future of Collective Bargaining in South Africa: An Exploratory Analysis" 2014 *IJSS* 115-126

Singh and Kumar *Employee Relations Management*
Singh PN and Kumar N *Employee Relations Management (*Pearson Education New Delhi 2011)

Smit *The Guardian*
Smit D "South African Public Sector Strike 'Endangering Lives'" *The Guardian* (23 August 2010) [1]

Smit and Fourie 2012 *De Jure*
Smit N and Fourie E "*Equity Aviation v SATAWU* (478/09) [2011] ZASCA 232 (30 November 2011): The Issue of Separate Strike Notices where Employees are not Members of the Trade Union" 2012 *De Jure* 426-436

Smith and Wood 1998 *Work Employ Soc*

Smith MR and Wood GT "The End of Apartheid and the Organization of Work in Manufacturing Plants in South Africa's Eastern Cape Province" 1998 *Work Employ Soc* 479-495

Spielmans 1939 *AER*
Spielmans JV "Labour Disputes on Rights and on Interests" 1939 *AER* 299-312

Steenkamp and Bosch 2012 *Acta Juridica*
Steenkamp A and Bosch C "Labour Dispute Resolution under the 1995 LRA: Problems, Pitfalls and Potential" 2012 *Acta Juridica* 120-147

Suchard 1982 *Africa Insight*
Suchard H "Labour Relations in South Africa: Retrospective and Prospective" 1982 *Africa Insight* 89-97

Tanner 1991 *Indicator SA*
Tanner C "Making Amends: The New Look LRA" 1991 *Indicator SA* 88-95

Thomas *Government and the Economy Today*
Thomas GP *Government and the Economy Today* (Manchester University Press Manchester 1992)

Thompson 1992 *ILJ*
Thompson C "Essential Services and the Unfair Labour Practice Remedy" 1992 *ILJ* 500-731

UNDP Global Centre for Public Service Excellence *Motivation of Public Service Officials*
UNDP Global Centre for Public Service Excellence *Motivation of Public Service Officials: Insights for Practitioners* (Oxford University Press Oxford 2014)

Van der Merwe and Du Plessis *Introduction to the Law of South Africa*
Van der Merwe CG and Du Plessis JE *Introduction to the Law of South Africa* (Kluwer Law International The Hague 2004)

Van Heerden 2011 *Without Prejudice*
Van Heerden A "Protected Strikes - Getting the Balance Right: Labour Law" 2011 *Without Prejudice* 66-67

Veenstra *et al* 2010 *Globalisation and Health*

Veenstra N *et al* "Unplanned Antiretroviral Treatment Interruptions in Southern Africa: How should We be Managing these?" 2010 *Globalisation and Health* 1-5

Vettori 2013 *SA Merc LJ*
Vettori S "Enforcement of Labour Arbitration Awards in South Africa" 2013 *SA Merc LJ* 245-254

Zulu *Nation in Crisis*
Zulu P *A Nation in Crisis: An Appeal for Morality* (Tafelberg Cape Town 2013)

Case law

Algoa Bus Company v SATAWU 2010 2 BLLR 149 (LC)

BHT Water Treatment (A Division of Afchem) (Pty) Ltd Incorporating PWTSA v CCMA 2002 2 BLLR 173 (LC)

Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction and Allied Workers Union 1997 6 BLLR 687 (LAC)

Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA 1996 4 SA 744 (CC)

Coin Security Group (Pty) Ltd v Adams 2000 4 BLLR 371 (LAC)

Chemical Energy Paper Printing Wood & Allied Workers Union v CTP Ltd 2013 34 ILJ 1966 (LC)

Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd 1999 20 ILJ 321 (LAC)

De Beer v Walker 1948 1 SA 340 (T)

De Beers Consolidated Mines Ltd v CCMA 2000 5 BLLR 578 (LC)

Durban City Council v Minister of Labour 1948 1 SA 220 (N)

East London (Pty) Ltd v National Union of Metalworkers of SA 2007 28 ILJ 642 (LC)

Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union 2011 32 ILJ 2894 (SCA)

FAWU v Rainbow Chicken Farms 2000 1 BLLR 70 (LC)

FAWU v Spekenham Supreme 1988 9 ILJ 628 (IC)

Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union (1) 1998 19 ILJ 260 (LAC)

Floraline v SASTAWU 1997 9 BLLR 1223 (LC)

Food & General Workers Union v Minister of Safety & Security 1999 20 ILJ 1258 (LC)

Gauteng Provinisale Administrasie v Scheepers 2000 21 ILJ 1304 (LAC)

HOSPERSA v Northern Cape Provincial Administration 2000 21 ILJ 1066 (LAC)

Islamic Unity Convention v Independent Broadcasting Authority 2002 5 BLLR 433 (CC)

Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & General Workers Union 2009 30 ILJ 1099 (LC)

Khosa v Minister of Social Development 1999 6 BCLR 615 (CC)

Macsteel (Pty) Ltd v NUMSA 1990 11 ILJ 995 (LAC)

Media Workers Association of SA v Facts Investors Guide (Pty) Ltd 1986 7 ILJ 313 (IC)

Media Workers Association of SA v The Argus Printing & Publishing Co Ltd 1984 5 ILJ 16 (IC)

Minister for Labour & Minister for Justice 1941 TPD 108

MITUSA v Transnet (Pty) Ltd 2009 23 ILJ 2213 (LAC)

National Union of Metalworkers of SA v Hendor Mining Supplies 2007 28 ILJ 1278 (LC)

National Union of Mineworkers v Bader Bop 2003 24 ILJ 305 (CC)

New National Party of SA v Government of the Republic of SA 1999 5 BCLR 489 (CC)

Ngewu, Masondo v Union Cooperative Bark and Sugar Co Ltd 1982 4 SA 390 (N)

NUM v CCMA 2011 32 ILJ 2104 (LAC)

Paper Wood & Allied Workers Union v Uniply (Pty) Ltd 1985 6 ILJ 255 (IC)

Pick 'n Pay (Pty) Ltd v SA Commercial Catering & Allied Workers Union 1998 19 ILJ 1546 (LC)

Pikitup (SOC) Ltd v SA Municipal Workers' Union obo Members 2014 35 ILJ 983 (LAC)

Poswa v Member of the Executive Council Responsible for Economic Affairs, Environment & Tourism, Eastern Cape 2001 3 SA 582 (SCA)

R v Canqan 1956 3 SA 366 (E)

R v Mtiyana 1952 4 SA 103 (N)

R v Smit 1995 1 SA 239 (K)

Raad van Mynvakbondde v Die Kamer van Mynwese 1984 5 ILJ 344 (IC)

Rand Tyres & Accessories v Industrial Council for the Motor Industry 1941 TPD 108

S v Zuma 1995 2 SA 642 (CC)

SA Breweries Ltd v Food & Allied Workers Union 1989 10 ILJ 844 (A)

SA Chemical Workers Union v Sentrachem Ltd 1998 9 ILJ 410 (IC)

SA Transport & Allied Workers Union v Moloto 2012 33 ILJ 2549 (CC)

SA Democratic Teachers Union v Minister of Education 2001 22 ILJ 2325 (LC)

SA Scooter & Transport Allied Workers Union v Karras t/a Floraline 1999 20 ILJ 2437 (LC)

Samancor Ltd v National Union of Metalworkers of SA 1999 20 ILJ 2941 (LC)

Sapeko Tea Estates (Pty) Ltd v Maake 2002 10 BLLR 1004 (LC)

SATAWU v Coin Reaction 2005 26 ILJ 150 (LC)

SATAWU v Garvas 2013 1 SA 83 (LC)

Schoeman v Samsung Electronics (Pty) Ltd 1997 10 BLLR 1364 (LC)

Simba (Pty) Ltd v Food & Allied Workers Union 1998 19 ILJ 1593 (LC)

Sithole v Nogwaza 1999 20 ILJ 2710 (LC)

Steel Mining & Commercial Workers Union v Brano Industries (Pty) Ltd 2000 21 ILJ 666 (LC)

Stuttafords v SACTWU 2001 1 BLLR 47 (LAC)

Tiger Food Brands Ltd t/a Albany Bakeries v Levy 2007 28 ILJ 1827 (LC)

TSI Holdings (Pty) Ltd v National Union of Metalworkers of SA 2006 27 ILJ 1483 (LAC)

University of the Witswatersrand Johannesburg v Commissioner Hutchinson 2001 22 ILJ 2496 (LC)

Legislation

Constitution of the Republic of South Africa, 1996

Labour Relations Act 28 of 1956

Labour Relations Act 66 of 1995

Occupational Health and Safety Act 85 of 1993

Internet sources

Bekker and Van der Walt 2010 https://duepublico.uni-duisburg-essen.de/servlets/DerivateServlet/Derivate-25689/09_Walt_Bekker_Strikes.pdf

Bekker I and Van der Walt L 2010 *The 2010 Mass Strike in the State Sector, South Africa: Positive Achievements but Serious Problems* https://duepublico.uni-duisburg-essen.de/servlets/DerivateServlet/Derivate-25689/09_Walt_Bekker_Strikes.pdf accessed 15 July 2015

Mottier and Bond Date unknown http://ccs.ukzn.ac.za/default.asp?2.27.3.1858

Mottier S and Bond P Date unknown *Social Protest in South Africa* http://ccs.ukzn.ac.za/default.asp?2.27.3.1858 accessed 15 June 2015

Romeyn Date unknown https://apo.org.au/node/1844
Romeyn J Date unknown *Striking a Balance: The Need for Further Reform of the Law Relating to Industrial Action* https://apo.org.au/node/1844 accessed 15 June 2015

Servais Date unknown https://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Servais.pdf
Servais JM Date unknown *The ILO Law and the Freedom to Strike* https://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Servais.pdf accessed 15 September 2015

List of Abbreviations

1956 LRA	Labour Relations Act 28 of 1956
1995 LRA	Labour Relations Act 66 of 1995
AER	American Economic Review
AJCR	African Journal on Conflict Resolution
CCMA	Commission for Conciliation Mediation and Arbitration
CLELJ	Canadian Labour and Employment Law Journal
CLL	Contemporary Labour Law
COSATU	Congress of SA Trade Unions
DfID	Department for International Development
IJSS	International Journal of Social Sciences
ILJ	Industrial Law Journal
ILO	International Labour Office
Int Labour Rev	International Labour Review
J Labor Res	Journal of Labor Research
JLPG	Journal of Law, Policy and Globalization
NUMSA	National Union of Metalworkers of South Africa
OHSA	Occupational Health and Safety Act 85 of 1993
Rev Afr Polit Econ	Review of African Political Economy
SA Merc LJ	South African Mercantile Law Journal
SAJHR	South African Journal on Human Rights
SAJIP	SA Journal of Industrial Psychology
SAJLR	South African Journal of Labour Relations
SATAWU	South African Transport and Allied Workers Union
UNDP	United Nations Development Programme
Work Employ Soc	Work, Employment and Society