AN ANALYSIS OF LEGAL IMPLICATIONS FOR PARTICIPATING IN AN UNPROTECTED STRIKE

by

MASHALE B. MAWASHA

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Supervisor: PROFESSOR ERNEST MANAMELA

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DECLARATION

I, Mashale B. Mawasha hereby declare that **"An analysis of legal implications for participating in an unprotected strike"** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

As signed — 23 October 2013
SIGNATURE — DATE
(Mr)

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SUMMARY

The effective management of a strike is generally a challenging phenomenon which impacts on employers, employees and the general public. The main purpose of this study was to analyse the legal implications of employees' participation in an unprotected strike. The study also explored requirements for a strike to be protected in compliance with the prescribed legislation. From the literary review, cases and legislation, it became clear that compliance plays a key role when a consideration is taken by employees to take part in a strike during dispute resolution.

In analysing the legal consequences for participating in an unprotected strike, a finding was made that employers in the end have an upper hand in that when all due processes and procedures are followed, they are empowered to dismiss employees. Legislation and international standards form the cornerstone upon which dispute resolution mechanisms and the rights of employers and employees are derived from.

KEYWORDS

Protected strike; unprotected strike; compliance; dismissal; employers; employees; legislation, requirements; procedure; dispute resolution

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LIST OF ABBREVIATIONS

FAWU	Food and Allied Workers Union
NUM	National Union of Mineworkers
NUMSA	National Union of Metal Workers of South Africa
POPCRU	Police and Prisons Civil Rights Union
SAAPAWU	South African Agricultural Plantation and Allied Workers Union
SAMWU	South African Municipal Workers Union
SANDU	South African National Defence Union
SAPU	South African Police Union
SATAWU	South African Transport and Allied Workers Union

CHAPTER 1

INTRODUCTION, PURPOSE STATEMENT, DEFINITION OF CONCEPTS AND LEGISLATIVE FRAMEWORK

1.1. Introduction

Strike action has over the years remained a thorny and highly contested issue for both employees and employers. In all matters of labour relations in the workplace, it has always stood above other matters as one issue which in many instances diluted a cordial relationship that may exist between employees and employers. It is an integral part of the collective bargaining process which places many employers in a difficult situation. In other words, for production to be optimum and sustained, a strike action would indeed not contribute positively to such a desired environment from the perspective of employers.

A pertinent question that needs to be raised is 'why a strike action takes place in the first instance while its consequences are far reaching?' A strike action generally takes place as a last resort exercised by employees with the aim of achieving a specific objective. It is a mechanism that is used by employees to exert pressure on the employer to yield to a particular demand of mutual interest. Mention should be made that it is an accepted phenomenon that every action has consequences, either positive or negative. In an attempt to respond to an earlier question as to why a strike action takes place despite the fact that sometimes it may lead to undesirable outcome, perhaps it would be proper and crucial to shed light on what is actually implied by a strike. An explicit definition thereof would be provided in the ensuing section that deals with the definition of concepts.

1.2. Problem statement and purpose

The right of employees to strike is affirmed by the Constitution of the Republic of South Africa in terms of section 23 (2) (c)[1] (the Constitution). It should also be noted that all the rights as contemplated in the Constitution, have some limitations as encapsulated in section 36 (1-2). Section 39 (1-3) of the Constitution further places into context implications for striking employees especially those participating in an unprotected strike in the sense that it gives impetus as regard to the interpretation of the rights, which have to be consistent with the principles and values as outlined in the subsections mentioned above.

The Constitution on its own however does not give any detail regarding implications for those acting incongruently in relation to the rights, hence the need to unpack the study with

[1] Constitution of the Republic of South Africa 108 of 1996.

special reference to the relevant statutes. One such statute is the Labour Relations Act 66 of 1995 (the LRA).[2]

From the very beginning, the purpose of granting protection to striking employees was and still is to encourage them to comply with the statutory provisions even before and or while contemplating to resort to industrial action. Under the ambit of the 1956 Labour Relations Act, non-compliance provided the employers with the opportunity to pursue criminal liability and it was also characterised by possible dismissal.[3] There is however a sharp contrast between the LRA and its predecessor of 1956. In terms of the LRA, in an event of an unprotected strike taking place, there shall be the following legal consequences:[4]

- the Labour Court has jurisdiction to interdict strikes not in compliance with the Act; [5]
- employers can sue for compensation for losses occasioned by an unprotected strike; [6]
- employers may dismiss employees who participate in a strike that does not comply with the provisions of the LRA. [7]

With all of the above in mind, one is able to make an in-depth investigation as to the implications for participating in an unprotected strike. As much as the hand of the employer is strengthened when dealing with an unprotected strike, similarly, the employer is not at liberty to rely solely on the common law right to dismiss or perhaps on the premise that the strikers had conducted themselves illegally.[8]

From its inception, the LRA aimed at advancing economic development, social justice, labour peace and democratisation of the workplace as outlined in its section 1.[9] The Act has been crafted in such a manner that it is not in conflict with the Constitution.

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[2] Section 68 (1) of the Labour Relations Act 66 of 1995.

[3] Grogan John *Workplace Law* 9th ed (Juta Cape Town 2007) at 403.

[4] See section 68 (1) of the LRA.

[5] See section 68 (1) (a) of the LRA.

[6] See section 68 (1) (b) of the LRA.

[7] See section 68 (5) of the LRA.

[8] Grogan *op cit* note 3 at 409.

[9] See section 1 of the LRA.

The research will cover a discussion on what constitutes an unprotected strike and then analyse the legal implications thereof. It will determine whether an unprotected strike is illegal. It will further establish whether an employee who participates in an unprotected strike, waves his/her right to be heard before dismissal and lastly whether in an unprotected strike environment, the employer is bestowed with a right to summarily dismiss employees on strike.

The study's main purpose is to analyse in depth the legal implications of employees' participation in an unprotected strike. The focal point of this study shall be the implications of non-compliance with legislative requirements when taking part in an unprotected industrial action. Ultimately, the analysis of the consequences thereof shall assist the study to determine ways and means through which a proactive approach can be devised in order to minimise the negative impact of (unprotected) strikes by way of exhausting all the avenues provided for by legislation in order to improve relations. The study shall provide tangible suggestions to both employees and employers to resolve disputes amicably.

1.3. Definition of concepts

Section 213 of the LRA defines a strike as follows:

> "a partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory;"[10]

It therefore follows that any wilful refusal to work which is outside the definition as outlined by the LRA, constitutes a breach of contract which may be treated as a disciplinary offence. It suffices to assert that as much as a strike plays a particular role in the collective bargaining environment in that it attempts or strives to correct the inherent inequality of power in the employment relationship, at common law a strike constitutes a breach of contract which empowers the employer to summarily dismiss or terminate a contract of employment.[11] Grogan further outlines the criteria which a work stoppage should fulfil in order to qualify as a strike as follows:

- there must indeed be a work stoppage;
- the stoppage must involve a certain number of employees;

[10] See section 213 of the LRA.

[11] Grogan *op cit* note 3 at 377.

- the chief objective of such a work stoppage should be to remedy a grievance or a dispute; and
- the issue in dispute must at all times be of mutual interest between the employer and the employees.[12]

The universality which characterises the concept of a strike can also be traced in the United States of America (the US) as defined by section 501(2) of the Labor Management Relations Act[13] when it defines a strike as:

> "any concerted stoppage of work, concerted slowdown or other concerted interruption of operations by employees."

The above definition includes refusal by workers to deliver goods, and/or service the operations of an organised establishment or an enterprise.[14]

In essence, a strike is characterised by the withholding of labour and it is regarded as a powerful weapon which employees use as a remedy when conflicts arise between themselves and the employer. It follows that when a process of bargaining fails, there has to be some means of dissociating the two parties (employer and employees) involved. The employer ought to strive very hard in making sure that unnecessary conflicts with employees do not degenerate into strikes or similar actions.

The implication is that when employees down tools anytime during working hours, or perhaps to decline to continue with their work, that action on its own is considered to be a concerted refusal to work which in turn constitutes a strike. Of paramount importance is to take note that a stoppage by one employee does not necessarily constitute a strike in that for a strike to qualify as such, employees have to be in a group with an agreed common purpose and the action must be concerted. Downing of tools for different reasons does not fall under this ambit, similarly, employees acting independently to down tools for the same grievance, also does not constitute a strike.[15]

The above discussion is important in order for one to comprehend other related concepts which are embedded in a strike action such as primary and secondary strikes, wildcat strikes and the role and impact of legislation in dealing with such eventualities. Note should be

[12] *Ibid* at 378.

[13] Section 501 (2) of the Labor Management Relations Act of 1947.

[14] Goldman *Labor and Employment Law in the United States* (Kluwer The Hague 1996) at 327.

[15] Grogan *op cit* note 3 at 379.

made that the legal implication of participating in an unprotected strike may not fully be understood without examining what a protected strike entails. A distinction has therefore to be made between a protected and unprotected strike action. These are the two main elements which form the base of this study.

1.3.1. Protected strike

In general terms, there is a distinction between strikes that comply with section 64 of the LRA and others which fail to do so. The ones that do comply are referred to as protected and those that do not are referred to as unprotected strikes. For a strike to enjoy protection, the employees must comply with section 64 of the LRA unless if there are specific procedures provided for in a collective agreement which binds the parties involved. One aspect that needs to be considered is that both the 1956 Labour Relations Act and the LRA do not provide for criminal sanctions against strikers or any form of protest action which does not comply with their provisions.[16] The LRA provides for protection against dismissal as well as civil action only when the strikers comply with the prescripts of the statute.[17] It is further implied that no protection whatsoever shall be provided if strikers do not conform to the requirements of what constitutes a protected strike.[18]

Protection of strikers is manifold in that employees who are seen to be engaged in such an act (strike) are usually those who fall within a bargaining unit agreed upon by the parties. It is the same category of employees that fall within such a bargaining unit that will embark on a strike action, not only for the sake of it but in support of a particular demand of mutual interest. It does not remain the sole discretion of the employer in determining the status of the strike – as to whether such an action is legal or not, that is the jurisdiction of the Labour Court.[19] The argument here is that the employer cannot decide on the course of action and its subsequent outcome relying on his/her discretion to declare a strike either protected or not.

In *SAAPAWU Free State & Others v Fourie & Another* [20] employees got dismissed for having participated in a lawful strike which the employer thought it was illegal. The employer here failed to consider the fact that the jurisdiction of determining the legality of any strike

[16] Section 79(1) of the Labour Relations Act no 28 of 1956/ see also section 67 (4) of the LRA.

[17] See section 67 (4) and (6) (a) of the LRA.

[18] Grogan *op cit* note 3 at 383.

[19] Le Roux *"Who can join a strike?"* February 2007 16(7) CLL at 78.

[20] *SAAPAWU Free State & Others v Fourie & Another [2007] 1 BLLR 67* (LC).

action rests entirely with the Labour Court. The Court had to rule on whether the dismissal was fair and also whether a fair procedure was followed. On the strength and basis of the evidence and arguments advanced, the Court held that the dismissal was considered unfair in terms of the provisions of section 187 (1) (a) of the LRA.[21] In many instances, what the employer considers to be fair may be contradicted by the courts because they base their decisions on matters of law and fact.

Any protection provided for by the legislation has to comply with certain requirements which shall be examined later in the study. The current approach is that legislation does not necessarily require that before employees who happen to be members of a particular trade union can embark on a protected strike it should have been the ones who referred the issue in dispute to the council or the Commission for Conciliation, Mediation and Arbitration (the CCMA). Employees who happen not to belong to a union are not prohibited from joining a protected strike action on condition that the statutory requirements would have been complied with and the notice has been served on the employer for such an action.[22]

Strike action is considered as an economic sanction used by employees to force the employer to accede to a particular demand of mutual interest.[23]For a strike to achieve a desired outcome, it has to be legal in order for employees to be protected from dismissal. The Canadian legal framework prescribes that the process leading to a legal strike must be timely and should follow all the relevant and necessary conciliation procedures which are laid down by legislation.[24]

In an event employers and employees are unable to resolve the issue in dispute on time; any such failure may lead to the development of a protected sympathy strike which is widely known as a secondary strike. For a secondary strike to enjoy protection, it must also comply with certain requirements as envisaged by section 66 of the LRA.[25] First and foremost, a sympathy strike has to be undertaken by workers in sympathy or in support of employees engaged by another employer. Section 66 (1) of the LRA recognises a secondary strike and defines it as "conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a

[21] See section 187 (1) (a) of the LRA.

[22] Le Roux *op cit* note 19 at 80.

[23] Arthurs HW et al *Labour Law and Industrial Relations in Canada* 3rd ed (Kluwer Deventer 1988) at 251.

[24] *Ibid* at 251.

[25] See section 66 of the LRA.

demand that has been referred to a council if striking employees, employed within the registered scope of that council, have a material interest in that demand"[26] Sub-section 2(a)-(c) further gives impetus of protection of such action by stipulating that "no person may take part in a secondary strike unless-

(a) the strike that is to be supported complies with the provisions of sections 64 and 65;
(b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organisation of which that employer is a member, has received notice of the proposed secondary strike at least seven days prior to its commencement; and
(c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer."[27]

In deciding whether a secondary strike enjoys protection, a Court has to determine a nexus between the primary and the secondary strikes. It must also determine the effect of the secondary strike on the secondary employer as to whether such an action would yield any desired effect, for the secondary employer, which is an economic sanction. Such an example is illustrated by the Court's decision in *Billinton Aluminium SA Ltd v NUMSA & Others*.[28] It held that indeed there was a nexus between the primary employer, Samancor and the secondary employer, BASAL which necessitated it to rule in favour of the respondent union. It is common course that members of the respondent union at BASAL had embarked on a sympathy strike in support of a primary strike at Samancor. In the final analysis, the Court was also of the view and satisfied that the effect of the secondary strike on the secondary employer, when viewed in terms of economic value, would be huge. It therefore on the above basis held that a secondary strike would enjoy protection.

1.3.2. Unprotected strike

The primary effect of a strike action is a legitimate means that is used by employees to exert pressure on the employer to reach a particular outcome. According to Bendix, strikes may take place for one or more of the following reasons:

- display of dissatisfaction by employees against management (employer);
- a way of demonstrating collective strength;
- a means to put pressure on the employer to agree on a particular issue or issues;
- a way of strengthening a union's position; and

[26] See section 66 (1) of the LRA.

[27] See section 66 (2) (a)-(c) of the LRA.

[28] *Billinton Aluminium SA Ltd v NUMSA & Others (2001) 22 ILJ 2434* (LC).

- a display of solidarity with other employees who may be perceived to be under siege by the employer.[29]

The above give direction as to what may eventually lead to an unprotected strike action. Above all, whatever dispute that may arise between the employer and the employees it has to be of mutual interest. In the course of resolving a dispute, there are certain prescripts which are stipulated in the labour legislation which must be complied with as contemplated by sections 133-150 of the LRA.[30] Failure to comply with such requirements, any protest/strike action would be considered unprotected by the court. All the requirements pertaining to compliance would be dealt with at a later stage.

An indication has already been made earlier that the Labour Court has exclusive jurisdiction on matters pertaining to whether a strike is protected or not. Unprotected strike action can also take a form of what is generally referred to as a wildcat strike. Like the name suggests, it takes place without any warning whatsoever for various reasons. In Britain a wildcat strike is also called an unofficial strike in that it is not sanctioned by a union.[31] In other words, such action is not recognised by the executive of the union and it is unofficial and unconstitutional (in terms of the union's constitution). Still in the British context, unconstitutional implies that procedures are not followed. Procedures in essence specify a series of meetings (conciliation) in an attempt to avert a strike itself by addressing a grievance which would pave a way to peaceful resolution before the commencement of a strike.[32]

According to the British Department of Employment, the highest number of strikes in Britain is constituted by both the unofficial and unconstitutional work stoppages. In some instances, wildcat strikes are directed against some policies or agreements accepted by union leaders.[33] The above is not farfetched from the developments here in South Africa in view of what has reportedly transpired at Lonmin Marikana mine near Rustenburg in August 2012 whereby employees disagreed with a collective agreement between the union, NUM and the management on remuneration.[34] It therefore suffices to conclude that such strikes which

[29] Bendix Sonia *Industrial Relations in South Africa* 5th ed (Juta Cape Town 2010) at 653.

[30] See sections 133-150 of the LRA.

[31] Hyman Richard 4th ed *Strikes* (Macmillan Houndmills 1989) at 39.

[32] *Ibid* at 39.

[33] *Ibid* at 43.

[34] See http://dailymaverick.co.za/opinionista/2012-10-12-marikana-prequel-num-and-the-mu...visited on 18 October 2012.

take place without the endorsement of the union and also not in compliance with the statutory requirements remain unprotected and therefore illegal.

A strike would always remain unprotected if it takes place under the following circumstances:

- employees bound by a collective agreement which in the main prohibits them from taking part in any strike action especially when a dispute itself requires arbitration;[35]
- any situation wherein the issue in dispute can be referred for arbitration or even to the Labour Court;[36]
- when employees are signatories of a binding arbitration award, collective agreement or Ministerial determination of Basic Conditions of Employment Act which determines the regulation on the dispute at issue;[37]
- engagement of employees in essential or maintenance services;[38]and
- when employees engage in work stoppages which are not covered in any way by the definition of a strike.[39]

1.4. Legislative framework

It remains undisputed that it would be very difficult to discuss any concept that emanates from strike without taking an in-depth look at the concept of 'strike' itself. The starting point shall be the role of legislation as a framework within which all parties concerned get affected. There is no doubt that the main key role-players here are the workers and the employers, either in the public or private sector. Both sectors are continually affected by a strike action at some point in their operations.

Notably, the right to strike is regarded as an international phenomenon. It is a general concept that is found in the International Labour Organisation (the ILO) Constitution by which it imposes a legal obligation of a universal scope applied to all member states.[40] The same right is also a treaty based right under positive international law conferred by Article 8 paragraph 1(a) of the International Covenant on Economic, Social and Cultural Rights (the

[35] See section 65 (1) (a) and (b) of the LRA.

[36] See section 65 (1) (c) of the LRA.

[37] See sections 44 and 65 (3) (a) (i) of the LRA.

[38] Grogan *op cit* note 3 at 388-392/ See also section 65 (1) (d) (i) and (ii) of the LRA.

[39] Grogan *op cit* note 3 at 393.

[40] Ben-Israel Ruth *International Labour Standards: The Case of Freedom to Strike* (Kluwer Deventer 1988) at 4-6/ see also Article 1(3) of the International Labour Organisation Constitution.

ICESCR) - by which it imposes a legal obligation of a limited scope which is applicable only to States which ratified this Covenant.[41] The system of labour relations which on the onset is meant to comply with the concept of freedom of association and collective bargaining, needs a point of reference which is fixed and at the same time fundamental. In actual fact, freedom to strike finds its classification as a right under International Law which is derived from the United Nations' adoption of the Universal Declaration of Human Rights, which was extended into the socio-economic area under the ICESCR.[42] It is also of paramount importance to give appreciation to the historical developments in order to understand the freedom to strike.

The historical development of labour relations informed a progressive shift from the individual activity to collective activity which emanated from the Industrial Revolution.[43] Interestingly, at the beginning of the Industrial Revolution, employees were in dismal inferior position and defenceless whereas employers exercised an upper hand. It was a prerogative of employers to hire and fire employees willingly and in essence this state of affairs infringed on the employees' right to equality and the right to work.[44] An important role played by collective bargaining in the transition from individual to collective bargaining is that it brought in a balance on the relationship between the employer and the employee. The ultimate result of the collective power of the workers was then reflected in them being organised in trade unions.

It is always critical to have a thorough examination of the right to free collective bargaining as well as the right to strike which have to be looked at in the context of freedom of association. The above assertion is in line with the ILO Committee of Experts and the Committee on Freedom of Association which both give an interpretation of Article 3 of Convention No.87.[45] It pertains to the right of organisations to undertake actions to defend themselves and their members' interests which implies the right to engage in a strike action and free collective bargaining. Notably, the right to strike remains a major power weapon by which the workers use against employers, which at the same time can also be a devastating

[41] Ben-Israel *op cit* note 40 at 3/ see also Article 8 1 (a) and (d) of the International Covenant on Economic, Social and Cultural Rights.

[42] Ben-Israel *op cit* note 40 at 13/ see also Article 23 (1) and (4) of the United Nations' Universal Declaration of Human Rights.

[43] Ben-Israel *op cit* note 40 at 26.

[44] *Ibid* at 26.

[45] Betten Lammy *International Labour Law* (Kluwer Deventer 1993) at 67/ see also Article 3 of ILO Convention 87.

weapon that has the potential to put industrial undertakings into jeopardy. It is especially so in a prolonged and unprotected strike environment where there is no end in sight.

The legality of the right to strike differs from one country to another. Just like in South Africa, the right to strike in France and Italy remains a constitutional right of a worker. It follows that in both France and Italy workers can call a strike even if they are members of a union that is bound by a peace obligation.[46] Peace obligation is synonymous with no strike clause wherein unions have an agreement with the employers not to call a strike during a period of a collective agreement. Like many other countries in the world, South Africa is a signatory of a number of United Nations' Conventions which give impetus to workers to enjoy similar right.

Section 23 (2) (c) of the Constitution is clear when it stipulates that "every worker has the right to strike.''[47] In dealing with the sub-section, it should be read with section18 of the Constitution which alludes to freedom of association.[48] The juxtaposition of the right to strike and the recourse to lock-out should not be ignored. The Constitutional Court found the above to be so important that it had to pronounce itself when dealing with the Constitutional principles in *Ex Parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa.*[49] The Court held that in failing to protect the right of workers who bargain collectively in concert and the employers who engage in collective bargaining individually, it would go against the language of Constitutional Principle.

In its obligation in fulfilling the mandate provided for by the Constitution, section 4 of the LRA[50] complements section18 of the Constitution when dealing with the employees' right to freedom of association. Attention should be drawn to section 4 (2) (a) of the LRA when it states that "every member of a trade union has the right, subject to the constitution of that trade union - to participate in its lawful activities" read with section 4 (3) (a) when it exudes that "every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation – to participate in its lawful activities"[51] A

[46] Betten *op cit* note 45 at 113.

[47] See section 23 (2) (c) of the Constitution.

[48] See section 18 of the Constitution.

[49] *Ex Parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa (1996) 17 ILJ 821* (CC).

[50] See section 4 of the LRA.

[51] See section 4 (2) (a) and (3) (a) of the LRA.

striking element in both sub-sections is the emphasis on lawful activities. It therefore follows that anything outside lawful activities would not enjoy any protection, and this includes unlawful/unprotected strikes.

The right to freedom of association is better illustrated in *Nkutha & Others v Fuel Gas Installations (Pty) Ltd*.[52] Without focusing too much attention on the merits of arguments presented by the parties and the evidence adduced, the Court was of the view that there was *prima facie* evidence of infringement by the employer to discourage employees from becoming members of a union. It further held that the employer was discriminatory against members of a union as opposed to non-union members. In actual fact preference was given to non-union members by giving incentives to them ahead of union members. The unprotected strike that the applicants embarked on was precipitated by the actions of the employer. Be as it may, procedures for taking part in a protected strike remain very clear in terms of the legislation. Unfortunately, as observed in the proceedings of the above case law, applicants failed dismally to comply with the requirements. Preference of non-union members at the expense of union members by the employer was considered to be prejudicial in nature and therefore not acceptable. The conduct of the employer infringed on the right of workers to exercise their right to freedom of association and a work stoppage that followed constituted a strike in terms of section 213 of the LRA. In that the strike did not comply with the requirements as outlined, the Court held that it constituted an unprotected strike.

Under the LRA regime, there is no provision for criminal sanction against employees who take part in a strike or protest action that do not comply with its provisions and an indication has already been made earlier about circumstances under which employees would enjoy protection. Under no any other circumstances is protection provided if strikers do not conform to the requirements and it should be noted further that employees participating in an unprotected strike run a huge risk of being dismissed. Again, any strike in support of forcing the employer to act illegally, would not be protected. A typical example is found in *TSI Holdings (Pty) Ltd & others v Numsa and Others.*[53] In this case the strike was in support of an unlawful demand. The Court held a view that the *court a quo* had erred in declaring the strike to be protected whereas in terms of the evidence adduced, the Court above came to a different conclusion. It further held that the respondents indeed did not demand any alternative sanction to the purported perpetrator of a racist remark other than dismissal. The

[52] *Nkutha & Others v Fuel Gas Installations (Pty) Ltd (2000) 21 ILJ 218* (LC).

[53] *TSI Holdings (Pty) Ltd & others v Numsa and others [2006] 7 BLLR 631* (LAC).

employer could not accede to such a demand as it would constitute unfair labour practice against the alleged perpetrator in terms of section 185 (b) of the LRA when it says "every employee has the right not to be - subjected to unfair labour practice."[54]

It is interesting to note that the LRA itself permeates the limited circumstances under which the right to strike can be exercised as encapsulated in section 65. The Act also places emphasis on the penalties for exercising the right to strike other than as prescribed. This signifies the fact that it has not really been the objective of the LRA to rise to the protection of the right to strike, but to give effect to the limitation of such a right.[55] Arguably, the main concern of the courts have always bordered on the limitation of the right to strike as envisaged by the Act (LRA) in terms of which it also gives effect to the prescripts on such a limitation to a strike. The limitation is not exclusive in that it also provides procedure and substance by offering an alternative dispute resolution mechanism.[56] Over and above all these, participation in an unprotected strike may constitute a fair reason to dismiss workers and an employer is further empowered by the same Act to dismiss workers engaged in a protected strike action for operational reasons and misconduct during the strike action only when procedures are followed to the latter. Basically, provision of legislation crafts a framework within which to respond to questions posed earlier on. It is also within the same framework that requirements and procedures for a protected strike are flagged out.

1.5. Conclusion

Apart from gaining an insight about what the above concepts entail, of utmost importance is the role of legislation. Legislation forms a foundation upon which this study is based. In actual fact it provides a framework which determines the legality or illegality of a strike and a lockout. It is also clear from the above discussion that the ILO has been very much influential in the crafting of the South African labour legislation. It is therefore incumbent upon all (employers and employees) to observe the prescripts of applicable legislation in order for their actions (strikes or lock-outs) to be protected.

[54] See section 185 (b) of the LRA.

[55] Maserumule Puke *"A perspective on developments in strike law"* (2001) 22 ILJ at 46.

[56] *Ibid* at 49.

CHAPTER 2

PROCEDURAL REQUIREMENTS FOR THE PROTECTION OF STRIKES AND THE LEGAL POSITION OF UNPROTECTED STRIKES

2.1. Introduction

It is fundamental to highlight that the law plays a specific role in each and every country as the main catalyst of social and economic makeup. South Africa as well, is no exception. Any system of labour law which is meant to comply with the concept of freedom of association and collective bargaining needs to be empowered by a particular legislation.[57] The LRA therefore plays a key role in regulating the requirements for a protected strike.[58]

2.1.1. The impact of international standards regarding the legality of a strike

A direct link can be drawn between the LRA and Article 10 of Convention 87of the United Nations (the UN) - which stipulates that freedom of association is premised on the right to organise which is a right that enables employees to further and defend their economic and social interests. It further specifies the organisations to which the Convention applies which are organisations of workers or of employers established for furthering and defending the interests of workers or of employers.[59] The inference thereof is that as much as in South Africa, the LRA plays a key role as regards the requirements pertaining to a protected strike; other countries around the world have their own legislative framework in managing industrial action.

The legal protection for industrial action in Australia for instance, is provided for in the Industrial Relations Reform Act of 1993.[60] The main purpose this Act is to regulate enterprise level collective bargaining. The Act also heralded a new era of regulation which focused on the suppression of unprotected industrial action.[61] It could be deduced from the above background that there are specific statutory requirements and procedures that need to be complied with by those contemplating to embark on a strike or protest action. In dealing with the requirements for a strike to be protected, reference would also be made to the concept of

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[57] See sections 4 and 6 of the LRA.

[58] See section 67 of the LRA.

[59] McCrystal Shae *The Right to Strike in Australia* (The Federation Press Sydney 2010) at 30/ see also Article 10 of ILO Convention 87.

[60] Section 80 of the Industrial Relations Reform Act of 1993.

[61] McCrystal *op cit* note 59 at 75.

a lock-out, which is recourse available to employers when dealing with a strike action. It is particularly relevant in that for a lock-out to be protected, it also has to meet certain requirements. The requirements for both a protected strike and recourse to lock-out and limitations thereof are explicitly outlined in sections 64-65 of the LRA.

2.1.2. Procedural requirements pertaining to a protected strike

For a strike to be protected a matter in dispute must have been referred to the bargaining council or the CCMA for conciliation. A strike may not take place until the council or the CCMA has certified that parties have been unable to resolve a dispute, or if 30 days have lapsed since the first referral.[62] A dispute referred to the CCMA has to be resolved within 30 days unless the parties have an agreement to extend the period. In an event a dispute is over refusal to bargain, an advisory award must first be issued.[63] There must be a clear coherence between the issue referred for conciliation and the one over which a strike is embarked upon. It therefore intimates that employees may not demand one thing and embark on a strike over a totally different issue. If for example a strike is over a dispute on salaries, a strike that may follow should be in coherence with such a demand. In *TSI Holdings (Pty) Ltd & others v Numsa and Others*[64] once again, the respondents could not convince the Court that their demand for a strike was indeed not in support of an unlawful demand, concerning the dismissal of the alleged racist supervisor. The Court was of the view that the demand should at least have been of forcing the employer to institute fair disciplinary enquiry against such an employee before even considering to dismiss him. From the above it follows that the strike was not in coherence with what they were actually demanding.

Of critical importance is that a notice of 48 hours must be given in an event the time lapsing without any resolution of a dispute (seven days if the state is the employer). This is provided for by section 64(1) (b) of the LRA[65] which demands that the notice must be in a written form before the actual commencement of a strike and this is affirmed in *Ceramic Industries Ltd t/a*

[62] Grogan *op cit* note 3 at 383.

[63] See section 64 (2) of the LRA.

[64] *Supra* note 53.

[65] See section 64 (1) (b) of the LRA.

Betta Sanitaryware v National Construction Building and Allied Workers Union & Others[66] in which Froneman DPJ said the following:

> "In summary: The provisions of s 64 (1) (b) need to be interpreted and applied in a manner which gives best effect to the primary objects of the Act and its specific purpose. That needs to be done within the constraints of the language used in the section. One of the primary objects of the Act is to promote orderly collective bargaining. Section 64 (1)(b) gives expression to this object by requiring written notice of the commencement of the proposed strike. The section's specific purpose is to give an employer advance warning of the proposed strike so that an employer may prepare for the power-play that will follow.That specific purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence. In the present case, the notice is defective for that reason. The provisions of s 64(1)(b) were not complied with. The proposed strike would thus have been unlawful and should, accordingly, have been interdicted."

The above does not necessarily oblige the employees in any way to commence striking at the time stipulated in the notice as long as it falls within the 48 hours period of notice. Should the employees for one reason or another, suspend the strike temporarily, there would be no need for them to issue a fresh notice to resume the action again. In referring any matter in dispute to the courts, either party must notify the other of such an intention. In *SATAWU v Nastro Freight (Pty) Ltd*[67] the issue in dispute was the employer's unilateral change to terms and conditions of employment contract. The Court established that the employer was not sufficiently provided with a notice for referral of a dispute to the council. The onus always remains with the applicant to prove that indeed papers were served accordingly to the other party.

Similarly, the critical nature of giving a notice before embarking on a strike action is practised worldwide. In the US, notice of a strike is embedded in the National Labor Relations Act[68] which envisages that referral has to comply with a 30 days period.[69] On the same note, in Canada, a lawful strike is described as the one which is designed to gain economic objective which is timely in the sense that all relevant and necessary conciliation procedures as laid down by legislation must have been exhausted.[70] The period between the notice for an

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[66] *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building and Allied Workers Union & Others (1997) 18 ILJ 716* (LC).

[67] *SATAWU v Nastro Freight (Pty) Ltd [2006] 8 BLLR 749* (LC).

[68] Section 8 (d) (3) of the National Labor Relations Act of 1935.

[69] Goldman *op cit* note 14 at 328.

[70] Arthurs *op cit* note 23 at 257.

intention to strike and the actual strike is not artificial, but is to give the strikers time to assess their position because anything is possible during that period.

The LRA also provides for deviation from compliance with the above requirements in terms of section 64(3) which can be summarised as follows:

- where both parties belong to a particular bargaining council and the dispute is dealt with in terms of the constitution of that council;
- where parties have complied with the provisions of a collective agreement by which they are bound;
- where the strike is in response to an illegal lock-out by the employer; and
- where the employer has unilaterally changed the terms and conditions of employment and subsequently failed to comply with a request to rescind such a decision within a period of 30 days[71]

2.2. The legal position of unprotected strikes

Circumstances under which employees may not engage in a strike are clearly set out in section 65 of the LRA.[72] It should be pointed out that when employees are bound by a collective agreement which prohibits them from striking over an issue in dispute which requires arbitration, they are not necessarily precluded from taking part in a strike over an issue relating to a future agreement.[73] A strike is also prohibited where the issue in dispute can be referred to the Labour Court or be resolved through arbitration.[74] The above prohibition is generally applicable where either party has a right to refer a particular dispute to arbitration or adjudication by the Labour Court.[75] In this instance, if the employer enjoys such a right, it means employees may not strike.[76]

[71] See section 64 (3) of the LRA.

[72] See section 65 of the LRA.

[73] Grogan *op cit* note 3 at 388.

[74] See section 65 (1) (c) of the LRA.

[75] Grogan *op cit* note 3 at 388.

[76] *Ibid* at 388.

Section 65 (3) further gives impetus on the limitations on the right to strikes if a person is bound by any arbitration award or collective agreement and by a Ministerial determination which specifically regulates the issue in dispute.[77]

At common law the employer holds the right to dismiss workers who engage in industrial action because refusal to work translates into the breach of individual contract. In effect, the dismissal of workers ends the negotiation process – but the strike itself is a legitimate means of exerting pressure to reach a particular outcome and the action itself is generally defined as a temporary means to achieve the outcome.[78] Section 65 of the LRA gives a proper perspective and context in the limitation on the right to strike. A striking feature in all circumstances under which a strike may not be protected is in the essential and maintenance services.[79] This needs special attention in that it is highly contested by parties as to what actually constitutes essential and maintenance service. The definition thereof is provided in terms of section 213 of the LRA which defines essential service as

> (a) "a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
>
> (b) the parliamentary service;
>
> (c) the South African Police Service;"[80]

The above is important in that should any service be declared essential, it therefore means employees falling in that category would be prohibited from embarking on a strike and should they insist on a strike, such action would automatically not be protected. It follows that employers may apply to the Essential Services Committee for a particular service to be declared essential. Extreme care should be exercised here as employees in any sector may challenge their prohibition from striking using section 23 of the Constitution read with section 64 (1) of the LRA. Such a challenge was mounted in *SANDU v Minister of Defence & Others; Minister of Defence & Others v SANDU & Others*[81] dubbed SANDU I, II and III, where the court found in the latter two that the employer had the duty to bargain. This decision relied heavily on section 23 of the Constitution. It should however be noted that the

[77] See section (3) (a) (i) and (ii) of the LRA.

[78] Bendix *op cit* note 29 at 651.

[79] See section 65 (1) (d) of the LRA.

[80] See section 213 of the LRA.

[81] *SANDU v Minister of Defence & Others; Minister of Defence & Others v SANDU & Others (2006) 11 BLLR 1043* (SCA).

National Defence Force does not fall under the scope of the LRA. Police unions such as Police and Prisons Civil Rights Union (POPCRU) and South African Police Union (SAPU), would at some stage also mount a serious challenge in demanding a right to strike for all their members as it is already taking place with the law enforcement officers in the transport sector.[82]

Sight and focus should not be lost on what the concept of essential service entails. It requires that certain services need particular protection against disruption. The services deemed to be essential differ from one country to another. In certain countries essential services extend to all activities which the government may consider appropriate or all strikes that may be contrary to public order, the general interest or economic development.[83] In the Phillipines for instance, the definition of essential services extends to companies engaged in the generation or distribution of energy, banks, hospitals and export orientated industries.[84] In South Korea such services encompass stock transaction and banking whereas in Malaysia, any section of any service on the working of which the safety of employees or of the establishment relating thereto depends, such as banking, postal and telephone services.[85]

The Western approach is generally to allow special provisions to be invoked if industrial action is considered to be of a threatening nature with dire consequences. Subsequent to this, in the US, if the President considers that a dispute affecting an entire industry or a substantial part thereof would impact the national health or safety, special procedures would be invoked such as prohibiting a strike action therefore declaring it unprotected.[86] The French approach is that strikers employed in a service or enterprise deemed essential or indispensable, would be requested to provide for the needs of the nation first.[87] In Germany unions have adopted a self-restrained procedure to areas or services referred to as plants vital to sustain life[88] and the British perspective identifies five categories as essential services namely; police, armed forces, merchant seamen, postal workers and

[82] Annual Industrial Action Report 2009 at 10.

[83] Morris S Gillian *Strikes in Essential Services* (Mansell London 1986) at 7.

[84] *Ibid* at 7.

[85] *Ibid* at 7.

[86] *Ibid* at 8.

[87] *Ibid* at 8.

[88] *Ibid* at 8.

telecommunications. Strikes in all of the British essential services are restricted in terms of section 5 of the Conspiracy and Protection of Property Act of 1875.[89] The above provides a framework within which legislation impacts on workers' participation in an unprotected strike.

2.3. Conclusion

It is evident from the above discussion that for a strike action to be protected it has to meet certain requirements. The above assertion refers specifically to a protected strike to be declared as such. Indeed there are certain procedures and requirements that need to be followed and met before a strike can be declared protected and legal. In the South African context for instance, the requirements and procedures are all stipulated in the LRA. A strike which does not take place within the scope of the LRA as required shall therefore be declared unprotected and illegal.

The LRA further gives an impetus as to how to go about in dealing with an unprotected strike. In the end, every country has its own legislation which empowers it in providing the prescripts which make a strike to be protected and also how to deal with an unprotected strike.

[89]Section 5 of the Conspiracy and Protection of Property Act of 1875.

CHAPTER 3

AN ANALYSIS OF LEGAL IMPLICATIONS FOR PARTICIPATING IN AN UNPROTECTED STRIKE

3.1. Introduction

It does not come as a surprise that the consequences of an unprotected strike are far reaching in many ways. The animosity that develops between the employees who embark on an unprotected strike and their fellow employees who do not support it is far reaching. The same animosity extends to the employer which generally takes a long time to heal.

An employer faced with an unprotected strike gets leverage in recourse to lock-out.[90] By all accounts, a lock-out is an employer's economic weapon that gets used during the collective bargaining process to compel employees to accept the offer or proposal on the table.[91] In order for the employer's action to qualify as a lock-out, the exclusion of the employees must be accompanied by a demand related to a matter of mutual interest between the employer and the employee.[92] It should however be hastily cautioned that the employer's recourse to lock-out should be used as a means to defend rather than an instrument with which to attack. It is provided for in section 64 of the LRA that every employer has recourse to lock-out. For an employer to exercise this right, there are certain requirements that need to be complied with as stipulated in the same section and are applicable in response to a protected strike.[93] The employer is exempted from complying with statutory requirements if the lock-out is in response to an unprotected strike.

Dismissal is another option available to employers dealing with a strike not in compliance with requirements of a protected strike. Of immediate consequence for participating in such a strike is that the action on its own constitutes a fair reason to dismiss workers.[94] It is an act of misconduct.[95] However it cannot be justified to dismiss workers who participate in an unprotected strike without following due processes. The Code of Good Practice: Dismissal (the Code) of the LRA serves as a guideline to employers on how to deal with employees

[90] Grogan *op cit* note 3 at 428.

[91] *Ibid* at 428.

[92] See section 213 of the LRA.

[93] See section 64 of the LRA.

[94] See section 68 (5) of the LRA.

[95] See section 67(5) of the LRA/ see also Schedule 8 Code of Good Practice: Dismissal item 6 (1) of the LRA.

who take part in unprotected strike action. Key to those guidelines is procedure and substance which form the base upon which any disciplinary enquiry envisaged should be followed. It cannot be good enough to rely on common law in dismissing employees participating in an unprotected strike because that would constitute unfair labour practice as contemplated in section 188 (1) (b) when it stipulates that "a dismissal that is not automatically unfair, is unfair if the employer fails to prove- that the dismissal was effected in accordance with a fair procedure."[96] The above also includes employees who take part in an unprotected strike.

Employers have an option of applying for restraining interdicts against unprotected strikers in terms of section 68 (1) (a) of the LRA.[97] In terms of this section, the Labour Court has exclusive jurisdiction to grant an interdict restraining any person from participating in an illegal strike. An order granted by the Labour Court can relate only to a strike over a particular issue, failing which may be perceived to constitute an unreasonable limitation of the employees' constitutional right to strike.[98]

Application for compensation for loss attributable to an unprotected strike is another option available to employers in terms of section 68 (1) (b) of the LRA.[99] The employer must prove that indeed he/she suffered a loss. Compensation will not be granted if the employer fails to provide proof for any loss occasioned by an unprotected strike.[100]

3.2. An analysis of legal implications for participating in an unprotected strike

The term "legal" always carry a certain meaning which applies in a particular context. Central to the context is whether an unprotected strike constitutes an illegal act or not. By implication, does it mean when an employee embarks on an unprotected strike, such an act can be equated with an illegal activity or not.

First and foremost, any act which is in the form of strike or lock-out which is not in compliance with section 64 of the LRA would be deemed unprotected. In seeking clarity as to whether an unprotected strike constitutes an illegal act, perhaps it would be proper to refer to the Concise Oxford English Dictionary when defining both legal and illegal concepts.

[96] See section 188 (1) (a) of the LRA.

[97] See section 68 (1) (a) of the LRA.

[98] Grogan *op cit* note 3 at 404.

[99] See section 68 (1) (b) of the LRA.

[100] Grogan *op cit* note 3 at 405.

"Legal" means – "relating to, based on, required by the law,"[101] and "illegal" means – "contrary to or forbidden by law"[102] These are raised in order to avoid any form of contradiction in the discussion. Based on the above it therefore implies that any act which is contrary to the law would be illegal, which means an unprotected strike is an illegal act. It is illegal in that it does not comply with the prescripts of section 64 of the LRA.

A point that needs to be raised is whether there are any other legal means that an employer could pursue other than recourse to lock-out in response to an illegal strike. Pursuant to the fact that non compliance with the LRA in the context of unprotected strike may not constitute a criminal offence, it may however result in legal consequences as stipulated in section 68 of the LRA[103] and summed as follows:

> (a) Interdicts by the Labour Court- which has exclusive jurisdiction to interdict strikes not in compliance with the Act;
>
> (b) Employers are able to sue for compensation for losses occasioned by an unprotected strike; and
>
> (c) Employers are provided with a fair reason to dismiss employees who participate in a strike that does not comply with the provisions of the LRA

3.2.1. Interdict

In interdicting an unprotected strike, it should be noted that such a restriction may be either partial or full and the application thereof must comply with the minimum of 48 hours notice of an intention to interdict a strike. In an event a written notice of the commencement of the proposed strike or lock-out was given to the applicant within a minimum period of 10 days before the commencement of the proposed strike or lock-out, the applicant must give at least 5 days' notice to the respondent of an application for an order in terms of subsection (1) *(a)*.[104] The minimum notice requirement is not applicable to an employer or an employee engaged in an essential service or a maintenance service.[105] The notice given must be in

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[101] Soanes Catherin and Stevenson Angus (eds) *Concise Oxford English Dictionary* 11th ed (Oxford University Press Oxford) at 813.

[102] *Ibid* at 709.

[103] See section 68 of the LRA.

[104] See section 68 (1) (a) and (3) of the LRA.

[105] See section 68 (4) of the LRA.

writing and the employer must motivate that if such an interdict is not provided, there shall be a well grounded apprehension of irreparable harm.[106]

In dismissing the application for an interdict by the applicant employer, in *Country Fair Foods v Hotel Liquor Catering Commercial & Allied Workers Union & Others*[107] Murphy AJ had this to say:

> "Accordingly, for the foregoing reasons, I am persuaded that the first respondent gave a valid written notice of the commencement of the proposed strike at least 10 days before its proposed commencement and therefore that the applicant was obliged to give 5 days' notice of its application for an interdict in terms of section 68(3) of the LRA." The Court held that the interdict was prematurely sought on the basis that "The 5-day period, had it been afforded, could have allowed for fuller reflection and may have produced a result not involving litigation. That is its purpose and this Court should loath to descend into the collective bargaining process by means of the drastic remedy of an interdict when the compulsory period for reflection and reconsideration has been denied."

3.2.2. Compensation

Compensation may be ordered by the Labour Court for any loss that may be attributed to an unprotected strike or lock-out which do not meet statutory requirements. In deciding on the above, the Court also takes into account the degree at which it should award just and equitable compensation which Landis summarises as follows:

- the extent to which attempts were made to comply with the law;
- whether the strike action was premeditated or just spontaneous;
- whether the strike was in response to unjustified conduct by either party to a dispute;
- whether there was any compliance with the restraining order;
- whether the action is in the interest of collective bargaining; and
- the duration of the action itself and the financial position of the employer, trade union or employees respectively.[108]

The financial consideration was a determining factor in the Court's decision in *Mangaung Local Municipality v SAMWU*[109]. The initial claim by the applicant employer was in excess of

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[106] Grogan *op cit* note 3 at 404.

[107] *Country Fair Foods v Hotel Liquor Catering Commercial & Allied Workers Union & Others [2006] 5* BLLR 478 (LC).

[108] Landis Helga and Grossett Lesley *Employment and the Law: A Practical Guide for the Workplace* (Juta Lansdowne 2003) at 344.

[109] *Mangaung Local Municipality v SAMWU [2003] 3 BLLR* (LC).

R270 000 but the compensation order was reduced to R25 000. It was in a way the Court's approach to send a message to union members that embarking on an unprotected strike and the destruction of property is intolerable. Above all, the Court was mindful of the financial position of the respondent union in its award. In determining compensation for any loss attributable to an unprotected strike, the onus lies with the employer to prove that indeed the loss suffered was associated with the act of an unprotected strike.

3.2.3. Dismissal

At all times, in making a determination as to whether the dismissal of striking workers constitutes an unfair labour practice or not, it remains the courts' obligation to have regard to fairness towards both the employers and employees. As Myburgh correctly puts it, "there are no underdogs."[110] The implication is that the employer is not given a free hand in dismissing striking workers even when the strike is unprotected because such determination rests with the Labour Court and the Court would consider a number of factors when arriving at its decision. Some of those factors include the legality of the strike, the behaviour of parties, flexibility of parties, the cause, purpose and functionality of the strike.[111]

Substantive fairness has to be traced back to the Code as it makes provision that just like in all other dismissals, when employers contemplate to dismiss workers for participating in an unprotected strike, the process must always be procedurally and substantively fair.[112] In many instances, courts are reluctant to uphold the dismissal of striking workers *en masse*. For example in *Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Union & others*[113]wherein the workers had embarked on an unprotected strike. The Industrial Court reinstated them on the basis that the strike lasted for an hour and few minutes and no damage to property was reported.

Almost similarly, in *NUMSA & others v Atlantis Forge (Pty) Ltd*[114] the unprotected action of workers had lasted for a short period. The Labour Court held that their dismissal may well have been justified, but for the fact that their conduct was not unbecoming, the Court felt strongly that they should be reinstated. The reinstatement of the employees in *FAWU &*

[110] Myburgh JF *"100 years of strike law"* (2004) 25 ILJ at 966.

[111] *Ibid* at 967.

[112] See Code of Good Practice: Dismissal item 6 of the LRA.

[113] *Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Union & others (1995) 16 ILJ 233* (IC).

[114] *NUMSA & others v Atlantis Forge (Pty) Ltd (2005) 26 ILJ 1984* (LC).

others v Rainbow Farms[115] was mainly based on the fact that the employees were prepared to make up for the lost time during their illegal stay-away. The main consideration was not necessarily to reinstate them retrospectively because the Court was of the view that their short notice to stay away would have appeared to undermine the authority of the respondent employer. The above discussion indicates that although participation in an unprotected strike is illegal, employers should not be too hasty in dismissing employees.

The Code requires that when confronted with an unprotected strike, the employer should contact union officials at the earliest and convenient opportunity before dismissing unprotected strikers.[116] The main reason for contacting a union is to discuss the course of action the employer intends adopting. The above would most likely apply when employees are union members. Another reason associated with contacting the union officials is to give the union space to persuade its members to return to work in an event of a wildcat strike (it takes place without the knowledge of the union). The consultation with the union also serves as a pre-dismissal hearing but it is not necessarily to give the union the opportunity to delay matters in order to allow the unprotected strikers to exert more pressure through the means of an illegal strike.

An ultimatum is another requirement which the Code demands from the employers to issue before unprotected strikers could be dismissed.[117] The purpose of an ultimatum is to provide strikers with the opportunity to reconsider their positions before termination of their contracts and it further provides the employer with the necessary opportunity not to act irrationally in anger. The issuing of such an ultimatum must be reasonably fair. It implies that there must be an intense consideration on the developments prior to the issuing of the ultimatum and the time allowed for compliance. The ultimatum must be clear and unambiguous in terms of what is required of the employees who participate in an unprotected strike as well as the sanction that may be imposed if they fail to comply with the ultimatum. It should be in the medium that the employees would understand and reasonable time must be provided for the employees to comply.[118]

The importance of a pre-dismissal hearing should not be underestimated in any situation dealing with the dismissal or contemplating to dismiss employees who participate in an

[115] *FAWU & Others v Rainbow Farms (2000)21 ILJ 615* (LC).

[116] See Code of Good Practice: Dismissal item 6 (2).

[117] *Ibid.*

[118] *Ibid.*

unprotected strike. The dismissal of workers who embarked on an unprotected strike in *NUM & Others v Billard Contractors CC & Another*[119] was considered by the Court to be unfair mainly on a matter of procedure. The Court held that the actions of employees constituted a substantive fair reason to dismiss them as they failed to comply with the legal requirements for protection. The ultimatum which the employer issued came under severe scrutiny as the union applicant contended that its members were not given sufficient time to reflect on the notice after it was issued.

It is in the best interest of all parties concerned to always have space to hear the other side. Primarily, the hearing will assist to determine the reasons of the employees' continued unprotected action even when an ultimatum has been issued. The judgement in *Modise & Others v Steve's Spar Blackheath*[120] is a typical example of dismissing unprotected strikers without affording them an opportunity to be heard. A divided Court came to a conclusion as per majority decision that in addition to issuing an ultimatum, the *audi alteram partem* principle gives entitlement to unprotected strikers to a fair pre-dismissal procedure. In arriving at the decision, the Court had to rely on item 6 of the Code which requires the employer to contact a trade union official to discuss the course of action the employer intends to adopt. This affirms that the *audi* rule is applicable and relevant even when a strike action is unprotected. In the end the Court found the dismissal of employees to be substantively fair but procedurally unfair in that the employer failed to serve employees with a proper ultimatum informing them that their action was unlawful.

It is immaterial whether a strike is protected or not, the fact of the matter is that employees deserve to be given an opportunity to be heard irrespective of whether an ultimatum has been issued or not. The unprotected strikers will always bear the onus of justification for non-compliance with the ultimatum. In *WG Davey (Pty) Ltd v National Union of Metalworkers of SA*[121] for instance, it was established that not all workers were able to comply with the ultimatum issued by the appellant employer. It was the Court's view that the employer was drastic in implementing the ultimatum and the act itself was considered to be intransigent and ultimately the employer was ordered to reinstate them.

Employers cannot rely only on common law in dismissing striking workers, procedures and guidelines as prescribed by the Code should also be followed. A decision in *NUM & others v*

[119] *NUM & Others v Billard Contractors CC & Another [2006] 12 BLLR 1191* (LC).

[120] *Modise & Others v Steve's Spar Blackheath (2000) 21 ILJ* 519 (LAC).

[121] *WG Davey (Pty) Ltd v National Union of Metalworkers of SA (1999) 20 ILJ 2017 (*SCA).

Billard Contractors CC & another[122]confirms the fact that an employer cannot just dismiss even when employees embarked on an unprotected strike without due processes. The Labour Court made a determination that a hearing must be held before an ultimatum is issued. This is to provide the employees with sufficient time to reflect on and also to respond to the ultimatum by way of either complying with it or rejecting it.

It is without doubt that employers are not at liberty to dismiss workers who participate in an unprotected strike as and when it pleases them. All due processes as outlined should be adhered to. It would be a fair assessment to conclude that employees who participate in an unprotected strike become more exposed to adverse consequences which may include dismissal.

3.3. Conclusion

Every action has consequences. This is also applicable to an unprotected strike. Once employees decide to embark on any form of a strike, they should know from the beginning that their action shall be followed by consequences. It is therefore very important for employees to ascertain the status of their strike before they commence the action. Trade unions must play a critical role when it comes to guiding and leading their members in strike actions.

The legality or illegality of any form of a strike shall be determined by the legislation that regulates such an action.

[122] *Supra* note 119.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion

There is no doubt that in as much as the strike action remains a major power weapon of workers, similarly, it can also be a devastating instrument that can put industrial relations in serious predicament. Effectively, the withdrawal of labour means production get stagnated or come to a complete stop and if the action continues for too long, the cost can be enormous.[123] Naturally, any form of strike causes disturbances to production which in turn affect other establishments. If for argument sake, one section of a particular establishment goes on strike, other establishments also get affected as a result of the nature of economic activity. For instance, if transportation establishment embarks on a prolonged strike, it affects delivery of commodities such as food, money, fuel and many others resulting on the negative impact on the consumer. The above applies irrespective of whether the strike is protected or not.

The railway strike that took place in 1989 in Great Britain was estimated at a cost of £10million a day.[124] The miners' strike of 1984-1985 also in Great Britain, which was regarded as one of the bitterest industrial disputes in that country, when valued in terms of money, at its conclusion it amounted to £3 billion more than the war in the Falklands Islands.[125] In January 2012 the rock drillers embarked on a wildcat strike at Implats in Rustenburg of which its cost per day was huge and upon its conclusion in February, the cost thereof was in the region of R2,4 billion in lost revenue.[126] On the same breath, the Marikana Lonmin unprotected strike that began in August 2012, indeed with tragic consequences, came to an end at a huge cost.

A prolonged strike is most certainly to lead to dire economic consequences. It is on the basis of this that the employer would consider dismissing workers citing operational requirements. Even when dismissals are contemplated on the basis of operational requirements, certain procedures still have to be followed. Procedures for the dismissal of employees for operational reasons are outlined in detail in section189 of the LRA with special emphasis on

[123] Betten *op cit* note 45 at 105.

[124] *Ibid* at 105.

[125] See www.fifthinternational.org/content/great-miners'-strike-1984-85-30/04/2004 visited on 19 September 2012.

[126] See www.citypress.co.za/Tags/Companies/implats-2012/02/28 visited on 19 September 2012.

the process of consultations. The onus lies entirely on the employer to prove any fair reason to dismiss striking workers for operational reasons. The above takes place against the backdrop of a prolonged strike that is negatively affecting the viability of the employer's enterprise. Profoundly, the strike action in *SA Chemical Workers Union & Others v Afrox Ltd*[127] was found to be protected in terms of the prescripts of the LRA. The appellant union contended that the dismissal of workers was in response to a strike which the respondent employer disputed by stating that the dismissal was as a result of operational reasons. In its decision the Court held that indeed the continuance of a strike contributed immensely and also accelerated the informed decision by the employer to dismiss, albeit not the main, proximate or dominant cause for dismissal.

The Court was in the end satisfied that the respondent employer was able to discharge the onus of proving that the reason for the dismissal was not for the participation in the strike, but for operational reasons exacerbated by a strike. The respondent employer, Afrox, had further managed to comply with legislation on the matter of fair procedure which remained unchallenged. The above case gives a synopsis of the causal link between the dismissal of workers for operational reasons and the participation in a prolonged strike. A long endurance of an unprotected strike by the employer increases the likelihood of the court to sympathise with such an employer if fair procedure has been applied in dismissing such strikers.

The societal perception of a strike differs from one country to another. According to Hyman, the British society views strikes in three main contexts:

- firstly as an outdated, unnecessary or irrational act;
- secondly, as a means leading to severe economic disruption; and
- thirdly as a means through which a union exercises its excessive power.[128]

In general terms, there is a threefold economic risk placed on workers during a strike as intimated by Goldman:

(1) there are strikers who would not indulge in a risk of going without financial returns of their jobs which may be greater than the employer's ability to get along without their labour;
(2) the risk of whether the economic harm that their strike inflicts on the employer will do permanent damage which in turn will reduce the employer's prospects of operating at an improved level of worker benefits; and

[127] *SA Chemical Workers Union & Others v Afrox Ltd (1999) 20 ILJ* 1718 (LAC).

[128] Hyman *op cit* note 31 at 145.

(3) the risk as to whether the employees will continue to have their jobs when the economic conflict in the form of a strike ends.[129]

It becomes clear that based on the discussion in this study; one is able to have a thorough understanding of what really constitutes an unprotected strike and its legal implications. For a fact that a strike action is unprotected, it therefore means it is illegal. Employees, who participate in an unprotected strike, run a huge risk of being dismissed. The above statement does not necessarily imply that such employees wave their right be heard before dismissal. Lastly, the employer is not in any way bestowed with a right to summarily dismiss employees who engage in an unprotected strike without following procedures as outlined by the LRA.

4.2. Recommendations

On dealing with the averting of strikes, the British adopted what is referred to as “no strike” agreements. It actually entails an engagement between the unions and employers through voluntary “no strike” agreements in those sectors where strikes might threaten the national interest just like in the essential and maintenance services sectors. A similar approach is applied in South Africa as provided for by section 65 of the LRA.[130] This was made possible in Britain by the 1981 Green Paper on Trade Union Immunities.[131] The self restraint approach seeks to advise unions to make proper arrangements well in advance and with due notice in continuous consultation by agreements with the employer.

A practical recommendation is that parties should be allowed to formulate their own rules and procedures, not necessarily outside the scope and ambit of the legislation governing labour relations.

Landis suggests a comprehensive and yet useful list of recommendations to enhance labour peace which are indeed practical and are outlined as follows:

(1) there should always be agreement on rules before action occurs in the form of a written policy;
(2) there should be a commitment by both parties to sound industrial action which can only be used as a last resort;
(3) the respect for safety and security to ensure the protection of lives and property;

[129] Goldman *op cit* note 14 at 332.

[130] See section 65(1) (d).

[131] Morris *op cit* note 83 at 198/ see also the Green Paper on Trade Union Immunities of 1981.

(4) specific rules with regards to the conduct of strikers and action towards other employees and management;
(5) proper communication between the parties- to always negotiate in good faith
(6) to place into context the principle of "no work no pay"; and
(7) the use of security or police officers when it is an absolute necessity and as a last resort. [132]

It should be noted that collective bargaining in the mining industry is separated along the sectoral lines.[133] Bargaining in the coal and gold mines is centralised with the Chamber of Mines representing employers whereas in the platinum mines it takes place independently at enterprise level.[134] Lonmin Marikana, being a platinum mine, falls under this category. In the wake of Marikana situation which resulted from wildcat strikes in 2012 the following can be recommended:

- the establishment of a centralised bargaining forum in the platinum mining sector in line with section 32 of the LRA;[135]
- a strong consideration by employers especially in the mining sector to strike a balance between excessive profits and the employees' benefits;
- trade unions to realise that rivalry amongst themselves is no benefit to them in the long term during the process of collective bargaining;
- review on the concept of majority representativeness wherein a dominant union concludes agreements with the employer without taking into consideration the views of minority unions;
- the establishment of trust amongst unions themselves to be able to negotiate in good faith in the best interest of all employees irrespective of their affiliations and but not limited to;
- the agreement by parties involved in the bargaining process to abide by all the rules denouncing violence and intimidation.

[132] Landis *op cit* note 108 at 344.

[133] See www.cosatu.org.za/show.php visited on 22 August 2013.

[134] *Ibid.*

[135] See section 32 of the LRA.

The main benefit of centralised collective agreement is the legal effect thereof in terms of section 23 of the LRA.[136]

All of the above would indeed be situational as circumstances may differ from one entity to another. In the end, the South African labour relations and the collective bargaining process would seek serious review in the wake of Marikana and the unprotected strike actions in the mining industry at large. The process has been placed under immense strain given the amount of wildcat strikes during 2012 in the mining industry. The role of majority representative unions such as NUM has also become under scrutiny in terms of truly advancing the interests of workers.

[136] See section 23 of the LRA.

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