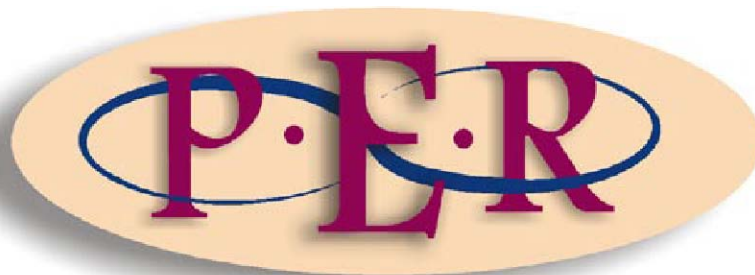


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**PUBLIC SERVANTS' RIGHT TO STRIKE IN LESOTHO, BOTSWANA AND
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1 Introduction

Freedom of association and its cornerstone, the right to strike, are integral to effective labour relations and a free and democratic society. Industrial action serves as a vital counterpoint to managerial prerogative and ensures a fair balance between employer and employee interests in the workplace. The International Labour Organisation (ILO) has promulgated a number of conventions and recommendations promoting the freedom of association,¹ including the *Convention on Freedom and Protection of the Right to Organise*² (Convention No 87) and the *Convention on the Right to Organise and Collective Bargaining*³ (Convention No 98).⁴ Convention No 87 protects the rights of workers and employers without differentiation to establish and join organisations for occupational purposes and guarantees their free functioning. Convention No 98 prohibits anti-union discrimination at the workplace and protects against employers' interference in the affairs of employees' organisations. These two conventions are amongst the most ratified conventions of the ILO.⁵ By ratifying these conventions, member states undertake to extend the rights and freedoms contained in or created by the conventions to their respective nationals.

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¹ *Freedom of Association and Protection of the Right to Organise Convention* 87 of 1948; *Right to Organise and Collective Bargaining Convention* 98 of 1949; *Workers Representatives Convention* 135 of 1971 (and accompanying *Workers Representatives Recommendation* 143 of 1971); *Rural Workers Organisations Convention* 141 of 1975 (and accompanying *Rural Workers Organisations Recommendation* 149 of 1975); *Labour Relations (Public Service) Convention* 151 of 1978 (and accompanying *Labour Relations (Public Service) Recommendation* 159 of 1978); *Collective Bargaining Convention* 154 of 1981 (and accompanying *Collective Bargaining Recommendation* 163 of 1981); *Right of Association (Non-Metropolitan Territories) Convention* 84 of 1947; and *Right of Association (Agriculture) Convention* 11 of 1921.

² *Freedom of Association and Protection of the Right to Organise Convention* 87 of 1948.

³ *Right to Organise and Collective Bargaining Convention* 98 of 1949.

⁴ Seady and Benjamin 1990 *ILJ* 439.

⁵ ILO 2014 http://www.ilo.org/Search3/search.do?searchWhat=most+ratified+conventions&locale=en_US.

In Southern Africa the countries of Botswana,⁶ Lesotho⁷ and South Africa,⁸ as members of the ILO, have ratified both Conventions No 87 and No 98. In all three of these countries their respective *Constitutions* guarantee the freedom of association, subject to reasonable limitation. Nonetheless in Lesotho it is unlawful for public officers to embark on strike action, considerably inhibiting such employees' freedom of association.

This paper considers whether the limitations imposed on the freedom and right to strike of public officers in Lesotho are in breach of international obligations and are reasonable and justifiable in a free and democratic society committed to the rule of law. In so doing a comparative analysis of the jurisdictions of South Africa and Botswana is undertaken.

2 International conventions regulating freedom of association

The *ILO Constitution* of 1919 recognises that universal and lasting peace can only be achieved if based on social peace,⁹ a principle affirmed by the *Philadelphia Declaration* of 1944 that provides that "freedom of association and expression are essential to sustained progress".¹⁰ ILO Conventions No 87 and No 98 enunciate the ILO's commitment to the protection and promotion of employer and employees' freedom of association. The UN *International Covenant on Economic, Social and Cultural Rights* of 1966 recognises the right to strike and requires state parties to undertake to guarantee the right to strike in its municipal laws.¹¹ The UN Commission on Human Rights, charged with safeguarding the right or freedom to strike, notes that recognition of the freedom of association alone is not sufficient for

⁶ Ratified on 22 December 1997. The *Labour Relations (Public Service) Convention* 151 of 1978 was also ratified.

⁷ Both Conventions were ratified by Lesotho on 30 October 1966.

⁸ Both Conventions were ratified by South Africa on 18 February 1996.

⁹ Preamble of the *International Labour Organisation Constitution* (1919) that has its roots in the *Treaty of Versailles* (1919). The preamble of the Treaty affirms freedom of trade unions. ILO 2014 <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>.

¹⁰ Seady and Benjamin 1990 *ILJ* 439.

¹¹ Article 8(1)(d) of the *International Covenant on Economic, Social and Cultural Rights* (1966).

purposes of protecting the interests of workers, as the most effective means of protection is the guarantee of the right to strike.¹²

Two significant resolutions of the International Labour Conference provide guidelines for ILO policy promoting the right to strike in member states. The first, the *Resolution Concerning the Abolition of Anti-Trade Union Legislation in State Members of the International Labour Organisation*, urges member states to enact laws "to ensure the effective and unrestricted exercise of trade union rights, including the right to strike by workers".¹³ The second, the *Resolution Concerning Trade Union Rights and their Relation to Civil Liberties*, emphasises the need for "measures to ensure full and universal respect for trade union rights in their broadest sense paying particular attention, *inter alia*, on the right to strike".¹⁴ Decisions of the ILO's supervisory bodies, especially those of the Committee on the Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations provide further support for the right to strike. The Committee on Freedom of Association has ruled that strikes are part and parcel of trade union activities¹⁵ and constitute "one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests".¹⁶ The Committee of Experts has endorsed this view, adding that the right to strike by workers is not only exercised to achieve better working conditions but also used as a tool to facilitate "solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to workers".¹⁷

¹² Mthombeni 1990 *CILSA* 341.

¹³ *Resolution Concerning the Abolition of Anti-Trade Union Legislation in State Members of the International Labour Organisation* (1957) 783.

¹⁴ *Resolution Concerning Trade Union Rights and their Relation to Civil Liberties* (1970) 735-736; Gernigon, Odero and Guido *ILO Principles Concerning the Right to Strike* 1998 1; Hodges-Aeberhard and Odero 1987 *ILR* 543-545; Dugard *International Law* 198.

¹⁵ *ILO Digest of Decisions* 3rd ed para 360.

¹⁶ *ILO Digest of Decisions* 3rd ed para 200. It should be noted, however, that this view is not unanimously shared by the employer parties to the ILO tripartite structure, giving rise to tensions within the organisation. Cradden 2014 <http://newunionism.wordpress.com/2014/03/17/ilo-workers-representatives-call-employers-bluff-on-right-to-strike>.

¹⁷ *ILO General Survey, International Labour Conference, 69th Session* para 200; Dugard *International Law* 199.

The ILO, through these supervisory bodies, has affirmed the principle of the right to strike subject to restrictions that are deemed reasonable in a free and democratic society.¹⁸ These restrictions, the ILO notes, should be contained in a statutory instrument or an Act of Parliament, depending on the laws of the member state. The ILO confirms that a prohibition on the right to strike may generally be justifiable in the event of "an acute national emergency".¹⁹ It recognises further that the right to strike may legitimately be restricted or prohibited in the case of members of the police and armed forces, certain public officers "exercising authority"²⁰ in the name of the state and workers in essential services properly so called.²¹ In determining the ambit of the limitation on "public officers exercising authority in the name of the state", much depends upon the nature of the public servants' functions, the impact of such services on the public and the specific legal system involved.²² In this regard the Committee of Experts has observed that "a too broad definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers").²³ It has suggested one solution might be "not to impose a total prohibition of strikes, but rather to provide for the maintaining by a defined and limited category of staff of a negotiated minimum service when a total and prolonged stoppage might result in serious consequences for the public".²⁴ Members of the police and armed forces are expressly excluded from the operation of Convention No 87, from which the right to strike is derived.²⁵ Outside these

¹⁸ ILO *General Survey, International Labour Conference, 69th Session* paras 199-223.

¹⁹ ILO *General Survey, International Labour Conference, 69th Session* para 570. However, even in such situations, it should only be for a limited period of time. It is important to note that in times of "national emergency", the responsibility of suspending strike on grounds of national security or public health should not lie with the government, but with an independent body which enjoys confidence of all parties concerned.

²⁰ ILO *General Survey, International Labour Conference, 81st Session* 68 para 158.

²¹ Okene 2007 *Sri Lanka J Int'l L* 200.

²² Some legal systems classify public servants in different categories, with different status, obligations and rights, while such distinctions do not exist in other systems or do not have the same consequences.

²³ Gernigon, Odero and Guido 1998 *ILO Principles Concerning the Right to Strike* 19-21; ILO *General Survey, International Labour Conference, 81st Session* para 158.

²⁴ Gernigon, Odero and Guido 1998 *ILO Principles Concerning the Right to Strike* 19-21; ILO *General Survey, International Labour Conference, 81st Session* para 158.

²⁵ This does not deprive the member states of the discretion to extend the rights under the Convention to these categories of workers.

exceptions, a prohibition or restriction imposed on the right to strike will be contrary to international labour standards.²⁶

Essential services are defined by the ILO as those services "whose interruption would endanger the life, personal safety or health of the whole or part of the population".²⁷ What is "essential" depends on the particular circumstances of each country, however the ILO urges member states in designating services as essential to respect the objective criteria in the definition.²⁸ Furthermore, this concept is not absolute and non-essential services may become essential if the strike lasts beyond a period of time "thus endangering the life, personal safety or health of the whole or part of the population".²⁹ The Committee on Freedom of Association cautions that the principle justifying the prohibition of strikes in essential services might be rendered meaningless if strike action is prohibited in undertakings that are not performing essential services in the strict meaning of the term. Thus it would not be appropriate to designate all state owned undertakings as essential without distinguishing between those which are genuinely essential and those that are not.³⁰ The Committee of Experts accepted further that such restrictions on the rights of essential services to strike are acceptable, provided that they are accompanied by "adequate, impartial and speedy conciliation and arbitration proceedings"³¹ to effectively address disputes of interest.

3 Freedom of association in Lesotho

The modern day Kingdom of Lesotho (formerly Basutoland) attained its independence on 4 October 1966, becoming a sovereign state. As a sovereign state, it adopted its first constitution, the *Lesotho Independence Order*³² which provides for

²⁶ ILO *Digest of Decisions* 5th ed para 525.

²⁷ ILO *Digest of Decisions* 3rd ed para 540-564; *Right to Organise and Collective Bargaining Convention* 98 of 1949.

²⁹ ILO *Digest of Decisions* 5th ed para 581.

²⁹ ILO *Digest of Decisions* 5th ed para 582.

³⁰ ILO *Digest of Decisions* 5th ed paras 584-586. The Committee accepted as essential services: "the hospital sector, electricity services, water supply, telecommunications services, police and armed forces, fire fighting services, prison services, provision of food to pupil in schools and cleaning of schools and air traffic control services".

³¹ ILO *Report on South Africa*. See also Du Toit *et al Labour Relations Law* 271.

³² *Lesotho Independence Order*, 1966, printed in supplement to Government Gazette No 4.

freedom of association for a number of purposes including labour purposes.³³ Upon attaining sovereignty, the first Parliament of Lesotho acceded to all international obligations of the former Basutoland, including its commitment to the *ILO Constitution*, and ratified Conventions No 87 and No 98.³⁴ As Lesotho is a dualist state international treaties do not automatically become part of its domestic law upon ratification³⁵ and instead have to be incorporated into municipal laws to become legally binding. An act of transformation by an appropriate state organ is needed before the provisions of the treaty can operate within the national legal system, with transformation taking the form of a Parliamentary enactment incorporating the treaty norms directly into domestic law or a statute copying all or part of the treaty.³⁶ In the event of any conflict between domestic and international law, domestic law takes precedence in order to preserve the sovereignty of the State. Nonetheless constitutional and statutory provisions are to be construed, where possible, in such a manner as to uphold international obligations.

Upon independence Lesotho acceded to all other laws that operated within Basutoland, including the *Trade Unions and Trade Dispute Law*.³⁷ This Act provided that:

This law shall apply to all government and local authorities and all persons in service of the Crown in Basutoland, in the same manner as if they were private employers or employees as the case may be.³⁸

Lesotho further acceded to the *Public Service Proclamation* of 1952 which regulated public officers and allowed their participation in trade unions and trade unions'

³³ S 15(1) of the *Lesotho Independence Order*, 1966 provided that "every person shall be entitled to and (without his own consent) shall not be hindered in his enjoyment, of freedom of assembly and association, that is to say, freedom to assemble and associate with other persons and in particular to form and belong to trade unions...".

³⁴ Both Conventions were ratified on 30 October 1966.

³⁵ According to the dualist school of thought, international law and municipal law differ radically in the matter of subjects of the law, sources and substance and a rule of international law can never *per se* become part of the law of the land. It must be made so by an authority of the state. Dugard *International Law* 42.

³⁶ *Botswana Public Employees Union v The Minister of Labour and Home Affairs* MAHLO-000674-11 (unreported) para 190.

³⁷ *Trade Unions and Trade Dispute Law* 11 of 1964.

³⁸ S 2(2) of the *Trade Unions and Trade Dispute Law* 11 of 1964.

activities. This Act was later repealed and replaced by the *Public Service Act*³⁹ that endorsed the principle of freedom of association without distinction.⁴⁰ However, the *Essential Services Act*,⁴¹ enacted in 1975, listed virtually all public officers as essential services providers⁴² - and as such prohibited them from engaging in strike action.

The ILO resultantly called for an update of Lesotho's labour laws to comply with international labour standards.⁴³ With the assistance of the ILO, the *Labour Code* of 1992⁴⁴ was enacted, which repealed all other labour laws in place prior to its enactment. Section 6 of the *Labour Code* provides that all employees and employers have equally guaranteed freedom of association and section 168 confers upon all employers and employees the right to join and/or establish organisations of their own choice without prior authorization of the government.⁴⁵

Despite the enactment of the *Labour Code*, the *Public Service Act* of 1995⁴⁶ was subsequently enacted to regulate public officers. Section 35 of the Act expressly excluded public officers from the scope of the *Labour Code*. Section 31 of the Act provided that:

- (1) Public officers may form and establish a staff association or staff associations under the provisions of the Societies Act 1966.
- (2) Notwithstanding any other law, public officers shall not become members of any trade union registered under the Labour Code Order 1992.

Following the enactment of the *Public Service Act* of 1995, all public officers' trade unions registered in terms of the *Labour Code* ceased to exist. As a result the

³⁹ *Public Service Act* 12 of 1968; the 1968 Act was later repealed by the *Public Service Act* 8 of 1973 which was also repealed by the *Public Service Act* 3 of 1979.

⁴⁰ The compliance was *prima facie* because, though the 1979 Act was enacted after the enactment of the *Essential Services Act* 34 of 1975, a literal reading of the former suggested that public officers' freedom of association was still intact.

⁴¹ *Essential Services Act* 34 of 1975.

⁴² S 17 of the *Essential Services Act* 34 of 1975.

⁴³ Lethobane "Tripartite Conference on the Labour Code Order".

⁴⁴ *Labour Code Order* 24 of 1992.

⁴⁵ It was necessary to include this provision because prior to the enactment of the Code, the government tended to randomly add to the essential services list, for instance, the banking services were declared as essential following the strike of the Standard Bank and Barclays Banks employees in 1981.

⁴⁶ *Public Service Act* 13 of 1995.

Lesotho Union of Public Employees (LUPE) challenged the constitutionality of the Act in *LUPE v The Speaker of the National Assembly*,⁴⁷ contending that sections 31(2) and 35 were unconstitutional, as they were inconsistent with section 16 of the *Constitution* that guarantees freedom of association.⁴⁸ LUPE argued that the limitation imposed by sections 3 (2) and 35 on the freedom of association of public officers infringed the state's obligations under international law⁴⁹ and violated their constitutional rights, as the limitation was neither necessary nor justifiable in a democratic society.⁵⁰ The government of Lesotho, in justification of the limitation, argued that public officers are denied the freedom to strike so as "to prevent a situation whereby untenable claims for remuneration may be made by public officers when the government has no means to meet them".⁵¹

The High Court held that, in terms of section 16(2) of the *Constitution*,⁵² the state may impose restrictions on public officers provided that such restrictions are justifiable. The court found that sections 31 and 35 pursued the legitimate aim of the preservation of a sound economy and did not abridge the rights protected by section 16(1) to a greater extent than is necessary in a democratic society.⁵³ The court noted that freedom of association in Lesotho is not an absolute right and constitutionally recognised limitations extend to the 'interests of defence, public

⁴⁷ *LUPE v the Speaker of the National Assembly* 1997 11 BLLR 1485 (Les).

⁴⁸ S 16(1) of the *Public Service Act* 13 of 1995 provides that "[e]very person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, cultural, recreational and similar purposes".

⁴⁹ The applicants referred the Court to art 23(4) of the *Universal Declaration of Human Rights* (1948) which provides that everyone has a right to join and form trade unions for purposes of protecting interests at the workplace.

⁵⁰ S 16(3) of the *Constitution of Lesotho*, 1993 provides that "[a] person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the Court that that provision or as the case may be, the thing done under the authority thereof does not abridge the rights and freedoms guaranteed by subsection (1) to a greater extent that is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2)(a) of for any of the purposes specified in subsection (2)(b) or (c)".

⁵¹ *LUPE v the Speaker of the National Assembly* Civ/Apn/341/95 11, reported in *LUPE v the Speaker of the National Assembly* 1997 11 BLLR 1485 (Les).

⁵² S 16(2)(c) of the *Constitution of Lesotho*, 1993 limits this right by providing that "[n]othing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of any law to the extent that the law in question makes provision ... (c) for the purpose of imposing restrictions upon public officers".

⁵³ S 16(3) of the *Constitution of Lesotho*, 1993.

safety, public order, public morality, public health and protection of rights and freedoms of others and in the instance of public sector employees, freedom of association may also be limited for purposes of imposing restrictions upon public officers.⁵⁴ It accordingly dismissed the application, finding that:

the impugned legislation pursues the legitimate aim listed in section 1 (2)(c) of the Constitution. It seems to me that there is a proper balance between the applicant's interests of establishing staff association or staff associations in order to enjoy the fundamental human right of freedom of association and the general public interest of preserving a sound economy of the country.⁵⁵

In response to this decision the Congress of Lesotho Trade Unions (COLETU) referred the matter to the ILO, arguing before the Governing Body Committee on Freedom of Association that the legislation failed to comply with Conventions No 87 and No 98. The ILO consequently ordered the government to make appropriate changes to the legislation complained of, in order to comply with international obligations.⁵⁶

The *Public Service Act* of 2005 (PSA)⁵⁷ was subsequently enacted, which to date regulates public officers in Lesotho. The *Labour Code* continues to regulate employees in the private sector. In terms of the PSA, as in the 1995 Act, public officers cannot form and/or join trade unions⁵⁸ and it is illegal for public officers to embark upon strike action.⁵⁹ While section 17 of the PSA establishes a Conciliation Board to conciliate over disputes of interest in the public sector,⁶⁰ awards made are merely advisory in nature and are not binding on the parties. Public officers are thus left with limited recourse in unresolved disputes of interest.⁶¹

⁵⁴ S 16(2)(c) of the *Constitution of Lesotho*, 1993.

⁵⁵ *LUPE v the Speaker of the National Assembly* 1997 11 BLLR 1485 (Les) 1495.

⁵⁶ Maema *Unionism and Public Service Reform* 36.

⁵⁷ *Public Service Act* 1 of 2005 (PSA).

⁵⁸ S 21 of PSA provides that "public officers shall be entitled to freedom of association in accordance with s 16(1) of the Constitution". S 22(1) provides that pursuant to s 21, public officers may form and/or join public officers' association (in terms of the *Society's Act* 1966) for purposes of collective bargaining. Note, however that s 168 of the *Labour Code* provides that employees may form and/or join trade unions which should be registered in terms of the Code. In essence therefore, public officers are not allowed to form and/or join trade unions.

⁵⁹ S 19(1) of PSA provides that "public officers shall not engage in a strike".

⁶⁰ S 17(1) of PSA.

⁶¹ S 17(4) of PSA.

In assessing whether the limitation on public officers' freedom to strike is justifiable in a democratic society in which the rule of law is embraced, the principle of proportionality must be applied. This principle provides that a limitation of the Bill of Rights will be justifiable "only when it is necessary in the light of the interests advanced as weighed against the requirements of a democratic society"⁶² - thereby striking a balance between competing interests.⁶³ The Canadian Supreme Court in *Regina v Oakes*⁶⁴ held that, in determining whether a limitation is justified or not, there is a need to engage in a two-stage process. The first stage requires the applicant to show how the legislation in question infringes upon the rights and freedoms enshrined in the Bill of Rights, both as a matter of interpretation and of fact.⁶⁵ The second stage requires the court to determine whether the law adopted is reasonable and demonstrably justifiable.⁶⁶ The two-stage process allows the state to justify the law by reference to its purpose and to the three-tier proportionality test as follows:⁶⁷

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair as little as possible the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom [Bill of Rights], and the objective which has been identified as of sufficient importance.⁶⁸

The Canadian limitation test is echoed in section 16(3) of the *Constitution of Lesotho* and has been applied by the High Court of Lesotho.⁶⁹ In order to satisfy the limitation test, governmental action or law must be proportionate to the interests protected and a balance should be struck between societal interests and those of the State.⁷⁰ Thus, for section 19 of the PSA to withstand scrutiny there should be a pressing need to protect the state's interests in a stable economy that legitimately

⁶² Sarkin 1998-1999 *J Const L* 188.

⁶³ Sarkin 1998-1999 *J Const L* 188.

⁶⁴ *Regina v Oakes* 1986 1 SCR 103.

⁶⁵ *Regina v Oakes* 1986 1 SCR 103 135.

⁶⁶ *Regina v Oakes* 1986 1 SCR 103 136.

⁶⁷ Sarkin 1998-1999 *J Const L* 187.

⁶⁸ *Regina v Oakes* 1986 1 SCR 103 139.

⁶⁹ *Ts'epe v IEC* 2005 LSHC 96 (27 April 2005) in limiting the right enshrined in s 20(1) of the *Constitution*.

⁷⁰ *LUPE v the Speaker of the National Assembly* 1997 11 BLLR 1485 (Les) 1491.

overrides public officers' fundamental rights to strike. This requirement of proportionality is clearly not satisfied in Lesotho, as public officers are left remediless and vulnerable.

4 The right to strike in South Africa

South Africa ratified Conventions No 87 and No 98 on 18 February 1996.⁷¹ In keeping with its international obligations, section 23 of the *Constitution* of South Africa provides that "every worker has the right (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike".⁷² The South African Constitutional Court in the *Certification of the Constitution of the Republic of South Africa, 1996*⁷³ held that strike action is "the primary mechanism through which workers exercise collective power and the right to strike enables workers to bargain effectively with their employers".⁷⁴ In support of this, the Constitutional Court in *NUMSA v Bader Bop (Pty) Ltd*⁷⁵ held that:

The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood.⁷⁶

Historically, South African labour law distinguished between private and public sector employees⁷⁷ with the *Labour Relations Act* of 1956⁷⁸ applying to the private sector and the *Public Service Act*⁷⁹ to the public sector. The *Labour Relations Act* (LRA) of 1995,⁸⁰ that repealed and replaced the *Labour Relations Act* of 1956, regulates all sectors and does not differentiate between public and private sector employees.⁸¹

⁷¹ ILO 2012 RSA http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO::P11200_COUNTRY_ID:102888.

⁷² South Africa is one of the three Southern African countries where the right to strike enjoys constitutional protection. The other two are Malawi and Namibia (see s 31(4) and 21(1) of their *Constitutions* respectively).

⁷³ *Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC).

⁷⁴ *Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 66.

⁷⁵ *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BCLR 182 (CC).

⁷⁶ *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BCLR 182 (CC) para 13.

⁷⁷ Steward 1995 *ILJ* 15.

⁷⁸ *Labour Relations Act* 28 of 1956.

⁷⁹ *Public Service Act* 111 of 1984, which was repealed by the *Public Service Act* 101 of 1994.

⁸⁰ *Labour Relations Act* 66 of 1995 (LRA).

⁸¹ Rycroft 1996 *S Afr Hum Rts Y B* 141.

The LRA was enacted to give effect to the constitutional labour rights, contained in section 23 of the *Constitution*, and South Africa's international obligations. In furtherance of these objectives section 64 of the LRA protects the right to strike for all employees in South Africa in respect of disputes of interest.⁸² However, the LRA prohibits strikes where there is a collective agreement binding on parties to the employment relationship, which agreement prohibits strikes in respect of the dispute in issue.⁸³ The same prohibition applies where a collective agreement prescribes compulsory arbitration over the issue in dispute,⁸⁴ where the dispute may be referred to the Labour Court in terms of the Act⁸⁵ or in the instance of essential services.⁸⁶

The LRA affords strikers that comply with the provisions of the Act special protection from delictual or contractual liability.⁸⁷ Furthermore dismissal of lawful strikers is prohibited,⁸⁸ unless justified on the basis of misconduct committed during the strike.⁸⁹ The right to strike extends further to procedurally compliant protest action, as section 77(1)(a) of the LRA provides that "every employee who is not engaged in essential or maintenance services has the right to partake in protest action" organised by their trade union or federation of trade unions.⁹⁰ To qualify for protection in terms of section 67 of the LRA, the purpose of such protest should be to pursue the "socio economic interests" of the workers.⁹¹ While certain provisions of the LRA are applicable only to public sector employees,⁹² none of these specific provisions pertain to the right to strike and the provisions of the LRA dealing with strikes apply to public officers *mutatis mutandis*.

⁸² The right to strike arises provided that there has been an attempt to conciliate the dispute which attempt has failed or a period of 30 days has elapsed from the date of the referral of the dispute to conciliation and 48 hours (or at least 7 days where the State is the employer) notice has been given prior to the commencement of the strike action.

⁸³ S 65(1)(a) of the LRA.

⁸⁴ S 65(1)(b) of the LRA..

⁸⁵ S 65(1)(c) of the LRA.

⁸⁶ S 65 (1)(d)(i) of the LRA.

⁸⁷ S 67 of the LRA.

⁸⁸ S 67(4) of the LRA.

⁸⁹ S 67(5) of the LRA.

⁹⁰ Cassim 2008 *ILJ* 2350.

⁹¹ *Government of the Western Cape Province v COSATU* 1998 12 BLLR 1286 (LC).

⁹² Ss 35-38, Schedule 1 and Part D of Schedule 7 of the LRA.

Section 65(1)(d)(i) provides that no person may take part in a strike if that person is engaged in an essential service. Section 213 of the LRA 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.

In *SAPS v POPCRU*⁹³ the Constitutional Court, in considering whether to grant a strike interdict against members of the South African Police Service participating in a public service strike, considered the ambit of essential services. The Court held that:

In order to ascertain the meaning of essential service, regard must be had to the purpose of the legislation and the context in which the phrase appears. An important purpose of the LRA is to give effect the right to strike entrenched in s 23(2)(c) of the Constitution. The interpretative process must give effect to this purpose within the other purposes of the LRA. The question must thus not be construed in isolation, but in the context of the other provisions in the LRA and the SAPS Act. For this reason, a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike. Were legislation to define essential service too broadly, this would impermissibly limit the right to strike.

The Constitutional Court concluded that not all employees of the SAPS are engaged in essential services; only employees who have been designated as such in terms of s 29 of the SAPS Act.⁹⁴

Apart from the two services specifically designated as essential services in the LRA, the determination of essential services in South Africa is decided by the Essential Services Committee.⁹⁵ The Committee, guided by the legislative definition of essential services, considers the specific service rendered by the employees, regardless of whether such employees emanate from the public or private sector. A dispute of interest in the essential services is to be resolved by conciliation followed by compulsory arbitration, with the award being binding on both parties unless

⁹³ *SAPS v POPCRU* 2011 32 *ILJ* 1603 (CC).

⁹⁴ *SAPS v POPCRU* 2011 32 *ILJ* 1603 (CC) para 39.

⁹⁵ Ss 70-71 of the LRA.

Parliament resolves otherwise.⁹⁶ As the Committee is a creature of statute, in discharging its duties, it remains subject to the rules of natural justice.

Accordingly public officers in South Africa have the right to strike, provided that the provisions of the LRA have been complied with and provided that they do not constitute an essential service. This protection extends not only to strike action conducted for the purposes of collective bargaining, but also to protest action for purposes of pursuing the socio economic interests of workers.

5 The right to strike in Botswana

Like Lesotho, Botswana (previously Bechuanaland Protectorate) was a former protectorate of Great Britain⁹⁷ and as a result the *Constitution of Botswana* is virtually identical to that of Lesotho. Section 13 of the Bill of Rights guarantees freedom of assembly and association with section 13(1) providing that:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.

While this constitutional provision makes no specific mention of the right or freedom to strike, a purposive interpretation of freedom of association necessitates its inclusion.⁹⁸ This interpretation complies with international labour standards and is consistent with the liberal interpretation consistently adopted by the judiciary of Botswana in interpreting constitutional provisions in general.⁹⁹

However, the importance of section 13(1) of the *Constitution* is, in respect of public officers, vitiated by section 13(2)(c) that provides that freedom of association may

⁹⁶ S 74 of the LRA. Where Parliament resolves that the award is not binding on the State on terms of s 74(5)(b), the matter will be remitted to the bargaining council or CCMA as the case may be to be heard *de novo*, both in conciliation and arbitration if necessary.

⁹⁷ The Bechuanaland Protectorate was established on 31 March 1885 and upon gaining independence on 30 September 1966, it became the Republic of Botswana as it is known today.

⁹⁸ In *Retail Wholesalers v Government of Saskatchewan* 1985 19 DLR 609 613-629, the Saskatchewan Court of Appeal held that "the freedom to bargain collectively of which the right to withdraw services is integral, lies at the very centre of the existence of an association of workers. To remove their freedom to withhold their labour is to sterilise their association".

⁹⁹ *Attorney General v Unity Dow* 1992 LRC (Const) 623; *Attorney General v Moagi* 1981 BLR 1 (CA) 32.

be limited *inter alia* for purposes of imposing "restrictions on public officers, local government officers and teachers". On this basis public officers in Botswana were historically denied the right to join or form a trade union and ultimately to strike. In terms of section 2(1) of the former *Trade Unions and Employers' Association Act*,¹⁰⁰ public officers were prohibited from joining and/or forming trade unions. The Act defined an employee as any individual "who has entered into a contract of employment for the hire of his labour provided that such individual is not a public officer or somebody employed by a local authority unless he belongs to the industrial class or workers for the public corporation or parastatal".¹⁰¹ Public officers, not being employees in terms of the law, were thus excluded from the operation of section 13(1) of the *Constitution*.

Prior to 2003 the law on strikes in Botswana was, in most respects, similar to that of the United Kingdom.¹⁰² There was no express legislative reference to a right to strike, with reference being made only to "unlawful industrial action".¹⁰³ Strikes were lawful unless declared otherwise, with the exception of essential service providers, and there were no set procedures or preconditions to be satisfied before workers could embark on a strike. While providing in theory wide protection to strike action, in reality the government's power to declare any industrial action as unlawful potentially amounted to a severe restriction on the right to strike.

The *Trade Dispute Act* (TDA),¹⁰⁴ enacted in 2004, provided that every party to a dispute of interest has the right to strike or lock-out where the procedure (stipulated in the Act) for a lawful strike has been followed.¹⁰⁵ By defining an employee as "any person who has entered into a contract of employment for the hire of his labour",

¹⁰⁰ *Trade Unions and Employers' Association Act*, 1984; in *Attorney General obo Director of Public Service Management v Botswana Landboards and Local Authorities Workers' Union* 2013 6 BLLR 533 (BWCA), Kirby JP held that "unionism was not permitted by section 13(2)(c) of the Constitution, which exempts laws which impose restrictions upon public officers, employees of local government bodies, or teachers from being held to breach the right to freedom of assembly".

¹⁰¹ S 2(2) of the *Trade Unions and Employers' Association Act*, 1984.

¹⁰² ILO *Digest of Decisions* 4th ed 515.

¹⁰³ *Trade Dispute Act* (CAP 48:02).

¹⁰⁴ *Trade Dispute Act* 15 of 2004 (TDA).

¹⁰⁵ S 39 of the TDA; *Botswana Land Board and Local Authorities Workers Union v Attorney General* MAHLB-000631-11 (unreported) para 10.

excluding members of the "disciplined forces"¹⁰⁶ and "prison services",¹⁰⁷ public officers were included in the scope of the Act. In *Attorney General obo Director of Public Service Management v Botswana Landboards and Local Authorities Workers' Union*¹⁰⁸ the Court noted that, following Botswana's ratification of Conventions No 87 and No 98 in 1997, public officers in Botswana were accorded the right to strike for the first time.¹⁰⁹

Essential services are defined in the TDA as "any of the services contained in the schedule".¹¹⁰ In terms of section 49 of the TDA a Minister is empowered to amend the schedule by publishing an order in the Gazette. In 2008 the *Public Service Act* (PSA)¹¹¹ was promulgated which expressly regulated public servants. Essential services are defined in the PSA as "those services the interruption of which would endanger the life, personal safety or health of a whole or part of the population", and include the services listed under the schedule to the TDA.¹¹² The PSA provides further that public officers that wilfully breach their employment contract, with the effect that the public is deprived of an essential service, commit a criminal offence in the absence of a credible defence.¹¹³

In 2011 public officers in Botswana embarked on unprecedented industrial action for the first time in the history of the country,¹¹⁴ lasting almost two months.¹¹⁵ On 17 June 2011, (seven days after the last day of the strike) the Minister of Labour and Home Affairs passed *Statutory Instrument 49*,¹¹⁶ amending the TDA and designating

¹⁰⁶ Botswana Defence Force, Botswana Police Service and Local Police Service. S 2 of the TDA.

¹⁰⁷ S 2 of the TDA

¹⁰⁸ *Attorney General obo Director of Public Service Management v Botswana Landboards and Local Authorities Workers' Union* 2013 6 BLLR 533 (BWCA) 544.

¹⁰⁹ *Attorney General obo Director of Public Service Management v Botswana Landboards and Local Authorities Workers' Union* 2013 6 BLLR 533 (BWCA) 544. S 39 of the TDA gives employees who are a party to a dispute of interest a right to strike, provided that the procedure for a lawful strike has been followed.

¹¹⁰ Prior to 2011 the schedule listed essential services as being air traffic control services, vaccine laboratory, fire services, Bank of Botswana, health services, railways operations and maintenance services, sewerage services, transport and telecommunication services necessary to the operation of the water services.

¹¹¹ *Public Service Act* 30 of 2008 (PSA).

¹¹² Ss 49(6) and (7) of PSA.

¹¹³ Ss 49(4) and (5) of PSA.

¹¹⁴ Baakile and Tshukudu 2012 JPAG 127.

¹¹⁵ From 18 April until 10 June 2011.

¹¹⁶ *Statutory Instrument 49* of 2011.

certain additional services as essential. The newly designated services were "the veterinary services, teaching services, transport services, telecommunications services, diamond sorting, cutting and selling services and all support services in connection therewith". This amendment sought to ensure that those employees engaged in services, regarded as anchors to the economy, did not engage in strike action. The National Assembly annulled *Statutory Instrument 49* on 7 July 2011¹¹⁷ yet shortly thereafter, on 14 July 2011, *Statutory Instrument 57*¹¹⁸ was issued that re-enacted *Statutory Instrument 49* verbatim. The ILO Committee of Experts on Application of Conventions and Recommendations responded to such re-enactment as follows:¹¹⁹

The Committee once again recalls that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population (see General Survey of 1994 on freedom of association and collective bargaining, paragraph 159). The Committee considers that the new categories added to the Schedule do not constitute essential services in the strict sense of the term and therefore requests the Government to amend the Schedule accordingly.

In an application to the High Court in *Botswana Public Employees Union v The Minister of Labour and Home Affairs*¹²⁰ the applicants sought an order nullifying *Statutory Instrument 57* on a total of eight grounds¹²¹ - the essence of their

¹¹⁷ *Botswana Public Employees Union v The Minister of Labour and Home Affairs* MAHLO-000674-11 (unreported) para 22.

¹¹⁸ *Statutory Instrument 57* of 2011.

¹¹⁹ In the ILO *Observation Report, International Labour Conference, 101st Session*.

¹²⁰ *Botswana Public Employees Union v The Minister of Labour and Home Affairs* MAHLO-000674-11 (unreported).

¹²¹ The applicants argued that the amendment was promulgated by the Minister in exercise of his powers purportedly conferred by s 49 of the TDA, but that section was itself *ultra vires* s 86 of the *Constitution of Botswana, 1966* (it amounted to unconstitutional delegation of legislative powers by Parliament). Secondly, the applicants argued that the Minister failed to consult with the Labour Advisory Board prior to the enactment of the amendment, therefore the amendment was *ultra vires*. The third argument was that in terms of the *Statutory Instruments Act* (CAP 01:04) the Minister is not allowed to reissue a statutory instrument which has been annulled by the National Assembly. The fourth ground was that s 49 of the TDA does not allow the Minister to issue an order incompatible with Botswana's ILO obligations. The fifth ground was that by placing a limitation to the workers' right to strike, which limitation is not justifiable in a democratic society, the amendment was *ultra vires* s 13 of the *Constitution*. The other argument was that the amendment was an unreasonable exercise of delegated power, in so far as the Minister took into account irrelevant considerations. The last argument was that Botswana's membership to the ILO and ratification of Conventions gave rise to a legitimate expectation on the part of the applicants that the Minister would not include as "essential" services those services that did not meet ILO standards. The Ministers failure to consult them then rendered

argument being that the amendment was *ultra vires*. Dingake J held that the *Constitution of Botswana* and all other statutory provisions must be construed to uphold international law,¹²² yet observed that Botswana (like Lesotho) is a dualist state and treaties that it has ratified are not automatically binding but instead serve as aids to interpretation.¹²³ Nonetheless, the Court noted, a reasonable interpretation that is consistent with international law should be adopted over one that is inconsistent with international standards. Dingake J concluded that "[o]n a plain reading of Section 49, it does not authorise a Minister to pass a statutory instrument that violates international law or Botswana's international law obligations". The Court noted that Botswana is bound as a member of the ILO to its *Constitution*¹²⁴ and as *Statutory Instrument 57* introduced restrictions to workers' rights that were incompatible with Convention No 87 it was null and void.¹²⁵ The government of Botswana has appealed this decision and the appeal is pending before the Court of Appeal.

As a consequence of the public sector strikes almost 3 000 essential services employees were collectively dismissed, without a hearing, for taking part in an illegal strike and failing to comply with a strike interdict and various ultimatums to return to work. In considering the fairness of their dismissals, the Court of Appeal noted in *Attorney General v Botswana Landboards and Local Authorities Workers' Union*¹²⁶ that in Botswana, "public service strikes differ fundamentally from those in the private sector"¹²⁷ and in the instance of essential workers "competing fundamental rights, such as the right to life and to the protection of property and the general

the amendment susceptible to review. *Botswana Public Employees Union v The Minister of Labour and Home Affairs* MAHLO-000674-11 (unreported) para 28.

¹²² *Botswana Public Employees Union v The Minister of Labour and Home Affairs* MAHLO-000674-11 (unreported) para 192.

¹²³ *Botswana Public Employees Union v The Minister of Labour and Home Affairs* MAHLO-000674-11 (unreported) para 205.

¹²⁴ *Botswana Public Employees Union v The Minister of Labour and Home Affairs* MAHLO-000674-11 (unreported) para 220.

¹²⁵ *Botswana Public Employees Union v The Minister of Labour and Home Affairs* MAHLO-000674-11 (unreported) para 227.

¹²⁶ *Attorney General v Botswana Landboards and Local Authorities Workers' Union* 2013 34 ILJ 1875 (BotCA).

¹²⁷ *Attorney General v Botswana Landboards and Local Authorities Workers' Union* 2013 34 ILJ 1875 (BotCA) 1889.

public interest, must ultimately take precedence over the right to freedom of assembly, and over any right to strike that they may enjoy."¹²⁸ The court noted that:

In Botswana strikes are not a common occurrence. We have no 'strike season', and violence and destruction to property during industrial action is almost unknown. Generally industrial relations are good, with mutually acceptable salary increases being sensibly negotiated from time to time, both in the private sector and the public sector. This is to be expected in a country that has enjoyed peace and stability for more than 45 years since Independence. The public service, which is the backbone of the administration, enjoys a well-earned reputation for diligence and discipline which is difficult to match in the region. Botswana is also a country in which the rule of law is universally respected.¹²⁹

The court rejected the argument that only those strikers performing "essential" jobs within the essential services ought to be dismissed, noting that in Botswana "all employees in an essential service play an important role individually towards ensuring the effectiveness of the team"¹³⁰ and no basis exists for distinguishing them. The Court of Appeal was satisfied that, in the circumstances, all essential services strikers were fairly dismissed.

The freedom to strike in Botswana is viewed as a positive right that extends to both public and private sector employees alike, with the exception being workers that perform essential services. However unlike South Africa, where essential services are narrowly construed by an objective and independent Essential Services Committee, in Botswana services may be designated as essential by a Ministerial Order published in the Gazette. As a result many public sector employees are likely to fall within the broad interpretation of essential services adopted in Botswana, with little regard to the actual services performed. This expansive interpretation, together with the criminalisation of illegal essential services strikes in the public sector, leaves many public sector employees without the true freedom to strike.

¹²⁸ *Attorney General v Botswana Landboards and Local Authorities Workers' Union* 2013 34 ILJ 1875 (BotCA) 1890.

¹²⁹ *Attorney General v Botswana Landboards and Local Authorities Workers' Union* 2013 34 ILJ 1875 (BotCA) 1896.

¹³⁰ *Attorney General v Botswana Landboards and Local Authorities Workers' Union* 2013 34 ILJ 1875 (BotCA) 1911.

6 Conclusion

The ILO has observed that too broad a definition of the concept of "public servant" is likely to result in a wide restriction or even prohibition of the freedom to strike in the public sector.¹³¹ For this reason the Committee of Experts has endeavored to establish uniform criterion to examine the compatibility of legislation with the provisions of Convention No 87. The Committee has found it justifiable that public officers exercising authority in the name of the state may have their freedom to strike limited and/or prohibited.¹³² The Committee notes that except for those groups of public officers whose duties are clearly defined, in most instances the pertinent issue will be the degree to which the employees' duties reflect on the State. For this reason, the Committee suggests that, in borderline cases, a solution might be "not to impose a total prohibition of strikes, but rather to provide for the maintaining by a defined and limited category of staff, a negotiated minimum service when a total and prolonged stoppage might result in serious consequences for the public".¹³³

Restrictions on the rights of public officers to strike are permitted by the *Constitutions* of Lesotho, Botswana and South Africa, where such limitations are reasonable, necessary and justifiable in a democratic society. The limitation of this right in the context of public servants is endorsed by the ILO in the Freedom of Association Digest of Decisions and Principles which holds that "[t]he right to strike can be restricted or even prohibited in the public service or in essential services in so far as a strike there could cause serious hardship to the national community and provided that these limitations are accompanied by certain compensatory guarantees".¹³⁴

Public officers in Lesotho are deprived of the right to strike, without exception or justification. Furthermore in Lesotho no dispute resolution mechanism exists to effectively facilitate the final resolution of disputes of interest in the public sector. This is in direct violation of Lesotho's obligations as a member state of the ILO and

¹³¹ ILO *Digest of Decisions* 5th ed 118 para 575.

¹³² Gernigon, Odero and Guido 1998 *ILR* 19; ILO *Digest of Decisions* 5th ed 118, para 575.

¹³³ ILO *General Survey, International Labour Conference, 81st Session* para 158; Gernigon, Odero and Guido 1998 19.

¹³⁴ ILO *Digest of Decisions* 5th ed para 573.

its constitutional commitment to freedom of association and needs to be urgently addressed. As Kahn-Freund¹³⁵ insightfully noted:

No country I know of suppresses freedom to strike in peace time, except dictatorships and countries practicing racial discrimination ... a legal system which suppresses the freedom to strike puts the workers at the mercy of the employers.

¹³⁵ Khan-Freund *Labour and the Law* 234.

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LIST OF ABBREVIATIONS

CILSA	Comparative and International Law Journal of Southern Africa
COLETU	Congress of Lesotho Trade Unions
ILJ	Industrial Law Journal
ILO	International Labour Organisation
ILR	International Labour Review
J Const L	Journal of Constitutional Law
JPAG	Journal of Public Administration and Governance
LRA	Labour Relations Act
LUPE	Lesotho Union of Public Employees
PSA	Public Service Act
S Afr Hum Rts Y B	South African Human Rights Year Book
Sri Lanka J Int'l L	Sri Lanka Journal of International Law
TDA	Trade Disputes Act
UN	United Nations