Exploring legal alternatives to remedy problems associated with prolonged and lengthy strikes in South Africa

Samuel Macaleni Masombuka

22840869

Dissertation submitted in partial fulfilment of the requirements for the degree Magister legum in Labour law at the Potchefstroom Campus of the North-West University

Supervisor: Dr Monray Botha

16 November 2015

ABSTRACT

Key concepts: The right to strike, freedom of association, trade union rivalry, collective bargaining, duty to bargain, duty to bargaining in good faith, duration of strike, interest arbitration.

In South Africa the *Constitution of the Republic of South Africa,* 1996 hereafter referred to as (the Constitution) is the supreme law and any conduct inconsistent with the Constitution is invalid. In terms of section 23(2)(c) of the Constitution "every worker has the right to strike". Section 64(1) of the Labour Relations Act (LRA) gives effect to section 23(2)(c) of the Constitution by providing that workers have the right to strike and employers have recourse to lock out. Appreciating the fact that workers have a constitutional right to partake in strike action, trade unions appreciate the workers' constitutional right to strike. They make full use of it and, to some extent, rely too much on such right.

South Africa is a victim of prolonged and violent strike action. One example of such prolonged and lengthy strike action is the Marikana strike action which lasted for five consecutive months. Even though workers do have the right to strike, it is highly doubtable that the legislator's intention was that workers could strike for five consecutive months. Strike actions do not function in a vacuum; they affect many concerned parties – the employer and employees and also peripheral stakeholders. More often than not strike actions affect people not related to the strike, and also the economy of the applicable community and the country as a whole. Strike actions have become a daily occurrence in South Africa, whether the strike is about wage increase or poor service delivery.

What is troubling is the fact that the LRA is silent on the duration of strike actions. Nowhere in the LRA is it stipulated how long a strike action may last. One thing is clear: Workers cannot strike forever, even though they have a constitutional right to strike. No right in the Constitution is absolute, all rights may be limited. That is the factual position despite the fact that strike actions do not function in a vacuum.

Strikes do not inflict economic harm on the employers only, but also the public at large including the striking employees. What further worsen matters, is the

ineffectiveness of the current collective bargaining system. The LRA is profoundly in favour of the principle of majoritarianism. Several provisions in the LRA favour majority unions. To name one as an example: Section 18 which states that an employer and the majority union may conclude a collective agreement setting out the thresholds for representivity in the workplace. So unions who do not meet such thresholds as agreed upon, cannot engage with the employer in collective bargaining.

Furthermore the South African collective bargaining system makes use of closed shop and agency shop agreements which clearly send out a message to minority unions to grow or stagnate. Such support of the LRA for majority unions tends to render the collective bargaining system ineffective because minority unions also have a constitutional right to partake in collective bargain. Because there is in law no duty upon an employer to engage in collective bargaining with a union, trade unions are left with no other option but to initiate a strike action.

Much emphasis is placed on the right to strike. However, the same emphasis is not placed on the regulation of such right. South African labour legislations are silent on the duration of strike actions. Enshrining the right to strike in the Constitution and not duly regulating it can have severe consequences as was witnessed at Marikana.

The primary objective of this dissertation is to '*Explore legal alternatives to remedy problems associated with prolonged and lengthy strike actions in South Africa'*. This will be done by examining legal alternatives such as interest arbitration, to some extent strike balloting, and the possibility to reintroduce the following legal alternatives: Duty to bargain collectively; duty to bargain in good faith; and the abandoning of closed shop and agency shop agreements.

OPSOMMING

Sleutel woorde: Reg om te staak, vryheid van assosiasie, vakbond wedywering, kollektiewe bedinging, verplinting om te beding, verpligting om in goeie trou te beding, duur van stakings, belange arbitrasie.

In Suid-Afrika is die Grondwet van die Republiek van Suid-Afrika, 1996 hierna verwys as (die Grondwet) die hoogste reg en enige optrede wat strydig is met die Grondwet is ongeldig. In terme van artikel 23(2)(c) van die Grondwet het "elke werker die reg om te staak". Artikel 64(1) van die Wet op Arbeidsverhoudinge (WAV) gee regskrag aan artikel 23(2)(c) van die Grondwet deur te bepaal dat werkers die reg het om te staak en werkgewers mag hulle tot uitsluiting aanwend.

Met in agneming van die feit dat werkers 'n reg het om te staak, maak vakbonde voldoende gebruik van sodanige reg en soms maak vakbonde te veel staat op die reg om te staak. Suid-Afrika is 'n slagoffer van landurige en geweldadige stakings. Een voorbeeld van so landurige staking is die Marikana staking wat vir vyf agtereenvolgende maande geduur het. Selfs al het werkers die reg om te staak is dit hoogs onwaarskynlik dat dit die wetgewer se bedoeling was dat werkers vir vyf agtereenvolgende maande kan staak. Stakings funksioneer nie in 'n vakuum nie, hulle affekteer verskeie partye, naamlik, die werkgewer, werknemer sowel as belanghebbendes.

Dit is dikwels die geval dat stakings persone wat geen belang by 'n staking het nie kan benadeel, stakings beïnvloed ook die ekonomie van die toepaslike gemeenskap en soms die ekonomie van die land in geheel. Stakings het 'n daaglikse gebeurtenis geword in Suid-Afrika, of die staking handel oor loonverhoging of dienslewering. Wat kommer wek is die feit dat die WAV stil is oor die duur van stakings. Nêrens in die WAV is daar 'n bepaling wat handel oor die duur van stakings nie. Een ding is wel duidelik: Werkers kan nie vir ewig staak nie, selfs al het hulle 'n grondwetlike reg om te staak. Geen reg in die Grondwet is absoluut nie, alle regte kan beperk word.

Dit is die feitelike posisie ten spyte van die feit dat stakings nie 'n vacuum funksioneer nie. Stakings veroorsaak nie net ekonomiese skade vir die werkgewer nie, maar vir die breë publiek en stakende werkers. Wat die saak verder vererger is die ondoeltreffendheid

van die huidige kollektiewe bedingingstelsel. Die WAV is ongetwyfeld ten gunste van die beginsel van meerderheidstem. Verskeie bepalings in die WAV is ten gunste van meerderheid vakbonde. Ter illustrasie, artikel 18 van die WAV bepaal dat ’n werkgewer en ’n meerderheid vakbond ’n kollektiewe ooreenkoms kan sluit waarin die drempels vir verteenwoordiging in die werkplek vas gestel word. Vakbonde wat dus nie aan die dremplesvereiste voldoen nie kan nie betrokke raak by kollektiewe bedinging met ’n werkgewer nie.

Voorts maak die Suid-Afrikaanse kollektiewe bedingingstelsel gebruik van ‘geslote geledere en agentskap werkplek ooreenkomste wat ’n duidelike boodskap aan minderheidsvakbonde oordra dat hul moet groei of stagneer. Diè voorkeur en ondersteuning wat die WAV aan meerderheid vakonde verleen, is geneig om die kollektiewe bedingingstelsel minder doeltrefend te maak aangesien minderheidsvakbonde ook ’n grondwetlike reg het om kollektiewe te beding. Huidiglik rus daar geen regplig op ’n werkgewer om te beding nie. Indien die werkgewer dus weir om met ’n vakbond te beding het sodanige vakbond geen ander keuse as om te staak nie.

Baie klem word geplaas op die reg om te staak, maar dieselfde klem word nie geplaas op die regulering van sodanige reg nie. Die Suid-Afrikaanse arbeidswetgewing is stil oor die duur van stakings. Die erkening van die grondwetlike reg om te staak noodsaak regulering en beperkings in die uitoefening van die reg om moontlike negatiewe gevolge, soos wat tydens die Marikana-geval ervaar is, te voorkom. Die primêre doel van hierdie verhandeling is om ‘*wetlike alternatiewe tot geskilbeslegting wat met voortslepende staking verband hou, te verken* . Dit kan gedoen word deur onder andere wetlike alternatiewe soos belange-arbitrasie en stemming per stembrief as alternatiewe te ondersoek. Daar word voorgestel dat die volgende konsepte heroorweeg moet word: die plig om kollektief te beding, die plig om in goeie trout e beding en te besef dat die rol van kollektiewe ooreenkomste, soos geslote geledere en agentskap werkplek-ooreenkomste in kollektiewe verband, uitgedien is.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

Amcu	Association of Mineworkers and Construction Union
CC	Constitutional Court
CWU	Communication Workers Union
FAWU	Food and Allied Workers Union
ILJ	Industrial Labour Journal
LAC	Labour Appeal Court
LC	Labour Court
NAWU	National Agricultural Workers' Union
NPSU	National Public Service Unit
NUM	National Union of Mineworkers
LRA	Labour Relations Act
PER	Potchefstroom Electronic Reference
RDO	Rock Drill Officer
SANDU	South African National Defence Union
SCA	Supreme Court of Appeal

Chapter 1: Introduction and problem statement

1.1 Introduction

> "Although the freedom to strike has traditionally been essential to operation of the collective bargaining system, strikes of excessive number and duration ought to be viewed as symptoms of grave malfunction within the system."[1]

The right to strike is recognised in South Africa and internationally as a fundamental right.[2] Of particular importance for labour law is section 23 of the *Constitution of the Republic of South Africa*, 1996, hereafter referred to as the Constitution. Both the *Constitution*[3] and the *Labour Relations Act* 66 of 1995[4] (hereafter referred to as the LRA) guarantees to all employees the right to strike. It is evident that section 23(2)(c) of the Constitution and section 64(1) of the LRA are directly applicable to employees; however, employers are not left without any remedy as section 64(1) of the LRA also provides that "every employer has recourse to lockout".

What is sometimes overlooked in South Africa is the fact that all strikes must have a purpose.[5] One cannot simply embark on a strike action merely because an agreement could not be reached; there must be a purpose for the strike.[6] Budeli[7] is of the view that "employees' right to strike is an essential component of their right to freedom of association". The learned author is further of the opinion that strike action is one of the weapons wielded by trade unions when collective bargaining fails.[8]

The right to strike section [23(2)(c)], freedom of association (section 18) and the right to engage in collective bargaining [section 23(5)] of the Constitution all play a prominent role in the collective bargaining framework.[9] In particular, the right to strike is a vital weapon in the hands of employees to combat the powers of employers, to put pressure

---

1 Morris 1976 *IRLJ* 436.
2 Chicktay 2010 *Obiter* 260.
3 Sec 23(2)(c).
4 Sec 64(1).
5 Chicktay 2010 *Obiter* 262.
6 Chicktay 2010 *Obiter* 262.
7 Budeli 2013 *CILSA* 308.
8 Budeli 2013 *CILSA* 308.
9 Budeli 2013 *CILSA* 308.

on employers to consent to their demands, and to ensure the presence of the employer at the bargaining table. It is argued that the decision to strike is rooted in one of the most powerful international labour rights in the arena of employment equity.[10] However, one must not forget that in South Africa there is no such right as an absolute right; all the rights codified in the Constitution are subject to limitation under section 36 of the Constitution, also known as the limitation clause.[11]

Furthermore, strikes do not function in a vacuum. Strikes affect the employees, employers, industry and the country as a whole. Labour unrest has become a daily feature in South African news.[12] Brand[13] argues that strikes are very common in South Africa and the outcomes of those strikes often result in major losses for both employees and employers. It is further reported that labour disputes are nothing new in South Africa. Strike actions and threats thereof have dominated the news headlines in recent weeks.[14] Newspaper articles ask fundamentally important questions such as: Is the country's collective bargaining structure still valid?[15]

According to Schutte and Lukhele long and extended strikes indicate the strained labour relations in the country.[16] With the current trend of strike actions in South Africa a valid argument can be put forward to the effect that trade unions nowadays tend to rely more on strike action as a measure of putting pressure on employers to accede to their demands. In the South African context, experience has shown that trade unions would strike until the employer accedes to their demands irrespective of how long the strike action lasts.[17] It is understood that a strike action that lasts for a long time can have dire consequences for any country's economy:

---

10 Gericke 2012 *THRHR* 566.
11 Section 36.
12 Schutte and Lukhele 2013 *ACMM* 69.
13 Brand "The potential for interest arbitration in South Africa" 60-64.
14 Anon 2015 http://www.moneyweb.com/news/political-economy-analysis/south-africas-num-to-strike-in-coal-sector-sunday.
15 Anon 2015 http://www.moneyweb.com/news/political-economy-analysis/south-africas-num-to-strike-in-coal-sector-sunday.
16 Schutte and Lukhele 2013 *ACMM* 69.
17 Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.

> The increase in strike action, as supported by COSATU, and the decline in productivity has created a degree of economic instability in South Africa and reduced government revenues due to production declines.[18]

It is evident that a strike action, irrespective of its duration, does have dire consequences for a country's economy. Thus an argument can be put forward that a strike action that lasts longer than a month would adversely affect the economy of a country and all parties involved. These include employers, employees and, largely, people who are not even part of the strike action.[19] Enoch Godongwana, economic transformation cluster head of the African National Congress (hereafter referred to as the ANC), has also raised concerns about strike actions in South Africa. Godongwana argued that:

> There are two issues in strikes we are grappling with, the first thing is the violent nature of strikes and the second issue relating to strike is the length of strikes.[20]

It tends to be clear that the length of strike actions is a major concern for the government of South Africa. *The Labour Relations Amendment Act* was referred back to the President as it failed to address key problems, notably long and violent strikes.[21] Unfortunately, the current LRA is silent on the issues of long and prolonged strike actions. Schutte and Lukhele made the argument that the inability of workers and employers to deal effectively with strike action has dire consequences for the economic and social stability of the country.[22]

There is some truth in the argument made by Schutte and Lukhele for the simple reason that, as of yet, there is rather minimal control over the duration of strikes in South Africa, and there is limited power to intervene in the public interest. The very fact that there is no single legislation in South Africa regulating the duration of strike actions is a great setback for the collective bargaining process in the country. This is so because strike

---

18 Schutte and Lukhele 2013 *ACMM* 71.

19 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.

20 Seccombe 2014 http://www.bdlive.co.za. /business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.

21 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.

22 Schutte and Lukhele 2013 *ACMM* 69.

actions do not function in a vacuum. Parties both inside and out of the bargaining framework are affected by strike actions.

One of the purposes of the LRA is to promote and facilitate collective bargaining at the workplace and sectoral level.[23] However, it is highly doubtable whether this purpose of the LRA is or being fulfilled in South Africa. Currently section 23(5) of the Constitution does not impose a duty to bargain; it is evident that collective bargaining assumes willingness on each side.

Moreover in the judgment of *SANDU v Minister of Defence*[24] the court held that section 23(5) of the Constitution does not impose an obligation upon the employer to bargain collectively with a trade union, and neither was there any legislative duty to do so. Theoretically, if an employer is not willing to bargain with a trade union, the trade union will have to rely on industrial action. That is an action which is currently not duly regulated in South Africa. The effect of the SANDU case is that any party now wishing to claim a right to bargain not sourced in subordinate legislation, collective agreement or contract must persuade a court that a judicially enforceable duty to bargain could be read into the Labour Relations Act.[25] However, by closer examination it seems as if the lack of a duty to bargain collectively is not the only factor contributing to lengthy strikes in South Africa. Another contributing factor to lengthy strikes, and also defeating the objectives of the LRA as well as the objectives of collective bargaining, is trade union rivalry. It is argued that the killing of 44 people at Marikana also highlights the depth of internal politics between unions.[26]

The two factors that play a prominent role in inter-union rivalry are: 1. For a union to be recognised by law for collective bargaining purposes as a majority union, it has to attain a membership of 50% plus 1 of the workforce.[27] 2. Unions survive on workers'

---

23 Section 1.
24 *SANDU v Minister of Defence* 2003 24 *ILJ* 1495 (T).
25 Grogan *Workplace Law* 347.
26 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.
27 Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.

subscriptions, often calculated as a percentage of their salaries.[28] These two factors put immense pressure on trade unions to grow because some provisions in the LRA favour larger unions at the expense of minority unions.[29] Thus, for a trade union to remain relevant in the workplace, it must grow and remain relevant to its members. An argument could be made that, if members are satisfied with a trade union, they would remain members of that union; however, if they are not satisfied the opposite would be true. A trade union without its members is a powerless body.

A further argument could be made that, although parties often do make use of collective bargaining, particularly conciliation, it is done for the sole reason of meeting the minimum requirements set out in legislation. As already stated trade unions are relying more and more on strike action as a mechanism of reaching agreements with employers[30] despite the fact that strike actions are ill regulated in South African labour legislation. Schutte and Lukhele submit that:

> To achieve labour harmony, better relations and communications between workers and employers are needed to ensure shorter strikes. Shorter strikes prove their point and impact less dramatically on profits for employers and also on the economy as a whole. Better support for negotiations from both unions and employers will strengthen the negotiating table.[31]

The argument advanced by Schutte and Lukhele is valid, particularly the argument that shorter strikes prove their point and impact less dramatically on the profits of employers and also on the economy as a whole. It is true that people who are not involved in a strike often feel the impact of a strike in their daily lives.[32] The least South African legislation can do is to enable parties to resolve labour disputes timeously. However, it should be mentioned that the concerns about lengthy strikes did not go unnoticed; the South African government is rethinking the regulation of strikes i.e.:

> Apart from the reservations expressed by the DA, since the amendment act was passed, the government has had a major rethink about the strike provisions, indicating its desire

---

28 Grogan *Workplace Law* 349.
29 Section 18 and Section 23.
30 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.
31 Schutte and Lukhele 2013 *ACMM* 73.
32 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.

> to introduce further amendments. In particular Labour Minister Mildred Oliphant has said she wanted to introduce compulsory strike balloting and a provision for interest arbitration.[33]

The government is considering interest arbitration and strike balloting as options to combat the battle against lengthy strikes. The United States of America is one of the countries making use of interest arbitration to combat prolonged and violent strikes. Horton argues that:

> Interest arbitration is becoming more popular, and therefore more important, as the final step in state and local government formal collective bargaining programs.[34]

The extract above argues that interest arbitration is becoming more popular and also more important. If that is so, why is South Africa not making use of interest arbitration in the private sector? The answer to this question will be discussed extensively later on in this dissertation. Reference has been made to interest arbitration but nowhere is it said what it is or what it entails. Anderson and Krause[35] provided the following definition of interest arbitration:

> Interest arbitration is the process in which the terms and conditions of the employment contract are established by a binding decision of the arbitration panel.

Unlike collective bargaining, particularly conciliation, the decision of the arbitrator or arbitration panel is binding upon the parties and, should it happen that one of the parties is unsatisfied with the decision of the arbitrator, there are certain procedures in place that such a party can follow to review a decision of the arbitrator.[36] According to Brand "South Africa could benefit enormously from better use of interest arbitration".[37] From the discussion in this introduction, it tends to suggest that there are possible solutions to remedy prolonged and lengthy strikes in South Africa. The primary objective of this dissertation is to '*explore legal alternatives to remedy problems associated with lengthy and prolonged strike actions in South Africa'.*

---

33 Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.
34 Horton 2014 *IRL Review* 497.
35 Anderson and Krause 1987 *Fordham Law Review* 153.
36 Anderson and Krause 1987 *Fordham Law Review* 153.
37 Brand "The potential for interest arbitration in South Africa" 60-64.

In an attempt to answer the research question extensively, this dissertation is going to address the following issues in the respective chapters: Chapter 1 will focus on the introduction, problem statement, the right of employees to freedom of association and union rivalry. In Chapter 2 the focus will be on the collective bargaining framework including the duty to bargain. Chapter 3 will address issues related to the right to strike and the employers' options during strikes. Chapter 4 will focus on interest arbitration as a possible solution to remedy prolonged and lengthy strikes; and Chapter 5 will deal with Conclusions and Recommendations. The following sources will be consulted in answering the research question: legislation, case law, law journals, textbooks, international instruments and internet sources.

1.1.1 The right to freedom of association in the labour law perspective

For employees to be able to take part in collective bargaining, strikes and other activities of a trade union they require to be empowered by legislation to join a trade union of their choice. It would be nonsensical to confer upon employees the right to strike or to participate in collective bargaining without first guaranteeing them the right to freedom of association.[38] From a labour law perspective freedom of association is a fundamental labour right.[39]

The right to freedom of association in the workplace entitles workers to form and join workers' organisations and to take part in the activities of such organisations, be it striking or electing representatives.[40] Even though much emphasis is place on the workers' right to freedom of association, it is important to mention that the right to freedom of association also applies to employers. Stated differently, employers also have a constitutional right to freedom of association. The right to freedom of association is held in high esteem in South Africa and is also recognised and protected internationally.[41]

---

38 Budeli 2009 *Fundamina* 59.
39 Budeli 2009 *Fundamina* 59.
40 Budeli 2009 *Fundamina* 59.
41 Van Niekerk and Smit *Law@work* 365.

It is argued that the right to freedom of association has been linked to other democratic rights, such as freedom of expression, freedom of assembly and the right to dignity.[42] Given this, it is evident that the right to freedom of association is a very important fundamental right in South Africa. Thus, if the right to freedom of association is violated a series of other rights would also be violated in the process namely the right to strike, freedom of expression and the right to engage in collective bargaining.[43]

It is then justified to classify the right to freedom of association as one of the cornerstones of collective bargaining. Without freedom of association there will be no collective bargaining; the process will tend to be collective begging.[44] It is further argued that, without the right to freedom of association, workers are at risk of being isolated and powerless.[45] According to Du Toit[46] the right to freedom of association entails the following:

> Every employee is given the right to form and join a trade union, to take part in its activities and to hold office, and such rights are protected for employees, as well as work seekers, against interference by any employer, trade union or other person.

Some of the aspects discussed by Du Toit above hold a great danger to the right to freedom of association, for example the right of a senior manager to hold office in a trade union; it is evident that a conflict of interest might occur in such a situation. That argument is however beyond the scope of this dissertation. What is of immense importance at this stage is that the Constitution says "everyone has the right to freedom of association",[47] and article 2 of the International Labour Organisation Convention 87 (hereafter referred to as the ILO Convention 87) provides that:

> Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choice without previous authorisation.

---

42 Van Niekerk and Smit *Law@work* 365.
43 Van Niekerk and Smit *Law@work* 365.
44 Van Niekerk and Smit Law@work 365.
45 Budeli 2009 *Fundamina* 58.
46 Du Toit *et al Labour Relations Law* 33.
47 Section 18.

The ILO Convention 87 confirms that freedom of association is also protected internationally. The protection of the right to freedom of association is further extended by article 3(2) of the ILO Convention 87, which states that "authorities shall refrain from any interference that would restrict this right or impede the lawful exercise thereof". South Africa, being a member state of this convention, is obliged to uphold the provisions of the convention. The South African government is thus prohibited from interfering with the right to freedom of association or to impede the lawful exercise thereof. Alex de Tocqueville, as quoted by Budeli, argued that:

> "The right to freedom of association is almost inalienable in its nature as the right of personal liberty and no legislator can attack freedom of association without impairing the very foundation of society".[48]

If one carefully analyses the above quote of de Tocqueville it is evident that the author compares the right to freedom of association to the right of personal liberty, and the reason why the author makes such a comparison is solely to illustrate the fundamental importance of the right to freedom of association.[49] The legislator must be very cautious when attempting to limit the right to freedom of association because doing so might impair the very foundation of society.

Despite the importance of the right to freedom of association it remains a contested concept in the South African law.[50] On the one hand are those who argue that freedom of association is a liberal-political right; on the other hand there are those who are of the view that the right to freedom of association is a functional guarantee protected to secure a clearly defined social purpose.[51] Consequently, the right to freedom of association has been interpreted in many different ways by various authors. Olivier, quoted by Budeli, argued as follows:

> The right to freedom of association in labour relations can be defined as those legal and moral rights of workers to form unions, to join unions of their choice and to demand that their unions function independently.[52]

---

48 Budeli 2010 *Obiter* 16.
49 Budeli 2010 *Obiter* 16.
50 Budeli 2010 *Obiter* 17.
51 Budeli 2010 *Obiter* 17.
52 Budeli 2010 *Obiter* 17.

Olivier's definition is correct. However, an argument could be made that it fails to assist one in comprehending the full scope of the right to freedom of association. On the other hand Kirkland provided a much more extensive and accurate definition of freedom of association defining freedom of association as follows:

> Freedom of association simply means the right of ordinary people who share common interest to form their own institutions in order to advance those interests and to shelter them against arbitrary power of the state, the employer or other strongholds of self-interest.[53]

The most important phrase in that entire definition is 'common interest'. That is the primary purpose why people associate in the first place. One could make out a valid argument that it is rare that people who have no common interest would be enthusiastic or willing to associate with one another; people associate for various reasons including intimate, cultural or religious reasons.[54] The phrase 'common interest' in the definition of freedom of association sheds some light on why agreements such as closed shop and agency shop agreements are a great danger to the right to freedom of association.

In such agreements, employees are compelled to associate with an organisation with which they do not share a 'common interest'. Thus, an argument could be made that closed shop and agency shop agreements violate the core value of freedom of association, which is the freedom to associate with an organisation of one's own choosing.[55] According to Budeli the right to freedom of association comprises of three elements, namely:

> The freedom to organise in terms of which individual workers join together, choose spokespersons and combine economic resources for common good; the freedom to choose between good organizations so as to enable the worker to join and work through the organization which he/she believes speaks best for his/her needs and desires; and the freedom not to join trade unions at all. This entails the right of individuals to refuse to participate in collective action and to insist on acting alone.[56]

The element of freedom of association undermined most by closed shop and agency shop agreements, it could be argued, is the last element – the freedom not to join a trade

---

53 Budeli 2010 *Obiter* 17.
54 Budeli 2010 *Obiter* 17.
55 Budeli 2010 *Obiter* 17.
56 Budeli 2010 *Obiter* 21.

union at all. The above argument tends to advance the view that employees do have the right to refuse to participate in collective action and to insist on acting alone.[57] This dissertation supports this argument. If a worker is entitled to associate with an organisation of his/her choice, the worker should also be protected in circumstances where he/she does not desire to associate with a certain organisation.

Compelling an employee to join a certain union thus clearly violates the last element of the right to freedom of association.[58] In accordance with this argument, the state and employers are not entitled to restrain employees from associating together based on common interest and they are precluded from compelling individuals to join organisations of which those individuals do not approve.[59] Budeli[60] is of the view that the right not to associate aims at:

> Protecting the individual against being grouped together with other individuals with whom he or she does not agree or for purposes that he or she does not approve.

Even if it is so that employees do have the right not to associate, the difficulty is caused by the fact that the right not to associate is not explicitly dealt with by legislation. Stated differently there is no legislation making provision for the negative right not to associate.[61] Various authors differ on this point. Rautenbach, as quoted by Budeli, is in favour of the view that "freedom of association includes both the positive right to associate and the negative right not to associate". The learned author's rationale is that adult people have the right to associate with or dissociate from whom they choose.[62] Therefore, according to Rautenbach the freedom to join a trade union also implies the freedom not to join a trade union. Albertyn supports Rautenbach's argument that freedom of association means that one can choose whether one wants to associate with an organisation or not.[63] Albertyn, even goes further than Rautenbach to argue that:

---

57 Budeli 2010 *Obiter* 17.
58 Budeli 2010 *Obiter* 17.
59 Budeli 2010 *Obiter* 23.
60 Budeli 2010 *Obiter* 29.
61 Budeli 2010 *Obiter* 23
62 Budeli 2010 *Obiter* 28.
63 Budeli 2010 *Obiter* 28.

> In a just society, which recognizes human rights, one should not be compelled to associate with either those whom one does not want to meet, or to involve one in matters that are not of one's interest or concern.[64]

The argument made by Albertyn is sound. South Africa is a constitutional democratic country that upholds the rule of law including respect and recognition of human rights.[65] The right to freedom of association is a fundamental human right and agreements such as closed shop and agency shop agreement, it is argued, violates such human right which South Africa claims to recognise, respect, protect and promote.[66]

According to Hayek closed shop agreement undermines individual freedom and it reinforces trade union power by coercive means.[67] The learned author makes an argument that has not yet been made in South African labour law, and that argument is that closed shop agreements should be treated as contracts *contra bones mores*.[68] Whether Hayek's argument would survive legal scrutiny remains to be seen as no case as of yet has addressed the issue of closed shop agreements extensively.[69] A possible conclusion that could be made in this instance is that the right to freedom of association should be interpreted to include both the positive and the negative right to associate.

However, it appears not to be that easy according to Kahn-Freud as quoted by Budeli:

> It is "bad logic" to conclude from the positive to the negative freedom. The fact that a given Constitution guarantees the positive freedom of organization does not mean that it guarantees the negative freedom of organisation.[70]

At first glimpse one might be convinced by the argument of Kahn-Freud. However, Kahn-Freud's argument could be countered with the following argument; it does not appreciate section 39 of the Constitution, which clearly states that whenever interpreting the Bill of Rights our courts and tribunals must promote the values of the Constitution based on human dignity, equality and freedom.[71]

---

64 Budeli 2010 *Obiter* 30.
65 Section 2.
66 Section 7(2).
67 Budeli 2010 *Obiter* 30.
68 Budeli 2010 *Obiter* 30.
69 Budeli 2010 *Obiter* 30.
70 Budeli 2010 *Obiter* 30.
71 Section 39(1).

It is difficult to comprehend how compelling an employee to join an organisation which the employee does not approve of, or does not have a 'common interest' with, would promote the values of the Constitution. Such an act of compulsion raises some complex questions. Where is human dignity in compelling an employee to join an organisation that according to him/her does not represent his/her interests? Where is equality in compelling an employee to join a certain union? Where is freedom in subjecting an employee to an organisation that such employee does not approve of?

These are rather complex questions requiring answers. Currently it appears as if closed shop agreements do not provide those answers. Furthermore, a valid argument could be made that closed shop agreements compromise the freedom of workers to associate for the freedom of unions to pursue their objectives effectively.[72] It is also not for any trade union to conclude a closed shop agreement with an employer. The LRA tends to favour the principle of majoritarianism. Only a majority trade union may negotiate with an employer concerning closed shop agreements. This practice causes tension between unions resulting in trade-union rivalry.

1.1.1.1 Trade union rivalry in South Africa

It must be stated from the outset that the drafters of the 1996 Constitution placed much emphasis on the rights of trade unions than the drafters of the Interim Constitution did.[73] However, none of these rights is enough to ensure that trade unions perform their functions effectively.[74] Apart from the constitutional rights of trade unions Chapter 3 of the LRA grants trade unions certain organisational rights in an attempt to enable trade unions to function effectively in a given workplace.[75] Trade unions play a prominent role in the business environment.[76] However, trade union rivalry has added a new dimension to the process of collective bargaining in South Africa.

---

72 Budeli 2010 *Obiter* 29.
73 Grogan "Labour Relations" 486-515.
74 Grogan "Labour Relations" 486-515.
75 Chapter III.
76 Schoeman 2013 *PER/ PELJ* 241.

It is reported that the killing of 44 people at Marikana in 2012 highlighted the depth of internal politics between unions.[77] The report of the Marikana commission of inquiry states that trade union rivalry contributed to some extent to the killing of the 44 people. The report went as far as to state that actions could have been taken by the concerned trade unions respectively to prevent the strike.[78]

The Marikana Commission of Inquiry (hereafter referred to as the Commission) found that the National Union of Mineworkers (hereafter referred to as NUM) knew that the Rock Drill Officers (hereafter referred to as RDOs) at Lonmin were being underpaid and that their complaints were legitimate.[79] The RDOs demanded a basic salary of R12 500 per month. However, NUM distanced itself from the demands of the RDOs' reasoning that it had a two-year collective agreement with Lonmin preventing its members from striking.[80] The Commission was clearly not satisfied with NUM's reasoning and was of the view that:

> NUM could have approached Lonmin in a bid to open talks on amending the wage agreement. This course of action was open to NUM given its position at Lonmin at the time.[81]

From the above extract, it is evident that had NUM opened talks with the Lonmin management with regard to amendments to the wage agreement, a different outcome might have been reached. However, NUM persisted with its argument that it had no mandate from the RDOs and therefore could not bargain outside the collective bargaining structures.[82] From a legal point of view one can appreciate NUM's argument in that the collective bargaining system is not as flexible as to allow trade unions to bargain without a mandate from their members. However, given the seriousness of the Marikana strike NUM cannot be allowed to hide behind that argument.

---

77 Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.
78 Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf.
79 Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf.
80 Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf.
81 Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf.
82 Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf.

The demands of the RDOs were legitimate and NUM knew that, if they needed a mandate from them (the RDOs), they would have got one.[83] NUM was however not the only trade union involved in the Marikana strike. The Association of Mineworkers and Construction Union (hereafter referred to as AMCU) also played a fundamental role.[84] From the outset it was evident to the Commission that there was some rivalry between NUM and AMCU. The Commission heard that a high placed AMCU member said the following: "This NUM. How are we going to kill it, this NUM? We hate NUM."[85] Right from the outset it was evident that AMCU was at Marikana to do business and not to advance the interest of the RDOs, and that is evident from the discussion between AMCU's leader, Mr Mathunjwa, and Mr Kwadi:

> "**Mr Kwadi**: Okay, Joseph I think it is clear to me what you are saying. You basically say you will go to the mountain on condition that you get some king of guarantee that the company will negotiate with AMCU on the demands of the people that are on the mountain. That is what you are saying; it is. **Mr Mathunjwa**: or whether AMCU will be part of the demand. I mean according to those people whom they want to negotiate on their behalf, yes." [86]

From the conversation it is clear that AMCU used the Marikana strike to further its own business interests and to recruit new members.[87] The Commission found that AMCU used the platform to recruit new members and to incite strikers to believe that NUM has been oppressing the black nation for 30 years.[88] Given the serious nature of the strike it was time for the two unions to join forces and promote the interest of the workers. However, the intensity of the rivalry obstructed the logic of the involved leaders. The Marikana strike illustrates the devastating consequences of union rivalry.

Some unions are being accused by employees of having too cosy a relationship with management.[89] Any individual involved in the trade union industry would know that such an accusation could be detrimental to any union.

---

83 Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf.
84 Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf.
85 Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf.
86 Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf. The "yes" in the quotation is underlined in the original document.
87 Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf.
88 Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf.
89 Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.

The strength and effectiveness of any union striving to succeed in the labour industry is its members. An increase in membership means progress and prosperity for a trade union, and a decrease in membership means quite the opposite.[90] For a union to stay relevant and effective it must strive to increase its membership. That explains why a union cannot afford to have its members accusing it of being too cosy with management.

Workers join trade unions for various reasons. The most obvious are to obtain security of employment and economic benefit.[91] Therefore, it would not be illogical to infer that, if workers for some reason are of the opinion that a certain trade union they belong to does not provide them with security of employment and economic benefit, the chances are good that those workers would look for another trade union to represent them. This is exactly what happened to NUM when the union lost its members to Amcu. One of the employees was quoted as saying:

> "I stopped being a member of the NUM…every day, when we're in the strikes like this, they just told us 'go back home' without any reason that can satisfy us".[92]

What is clear from the above extract is that the workers were evidently not satisfied with the manner in which NUM represented them and as a result the workers defected to Amcu. All these factors put immense pressure on trade unions to keep their members satisfied at all times.

What further drives trade union rivalry in South Africa is the LRA's support for the principle of majoritarianism. Currie and De Waal[93] are of the view that, whilst the LRA does encourage the formation of unions, it (LRA) displays a 'distinct preference' for majoritarianism. The learned author's concern is the constitutional right of the minority unions to engage in collective bargaining, given the fact that the minority unions still play an important role in the labour system.[94] Minority unions are faced with various statutory

---

90 Marikana commission of inquiry para 31
91 Grogan Workplace Law 312.
92 Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.
93 Grogan "Labour Relations" 487-515.
94 Grogan "Labour Relations" 487-515.

obstacles that they sometimes cannot overcome, for example the threshold for the acquisition of organisational rights that is reserved for majority unions.[95]

According to Cohen the LRA unequivocally promotes the policy choice of majoritarianism.[96] The policy of majoritarianism complicates the position of minority unions. Stated differently it is because of the policy choice of majoritarianism that minority unions face various obstacles. Section 18(1) of the LRA enables an employer and a majority union to enter into collective agreements setting thresholds of representivity.[97]

The rationale to justify the policy choice of majoritarianism, according to Cohen, is to "minimise proliferation of trade unions in a single workplace and to encourage the system of a representative trade union".[98] The incentive of this argument is that fewer big trade unions would be effective representatives of workers' interests in the collective bargaining process.[99] The majoritarianism policy has reached such support that a collective agreement concluded between a majority union and an employer enjoys preference over the organisational rights of minority unions.[100]

It is evident that minority unions face obstacles that prevent them from being able to enjoy their constitutional rights to engage in collective bargaining.[101] The message to minority unions is thus loud and clear: grow or stagnate.[102] According to Kruger and Tshoose[103] the LRA promotes a collective bargaining process in which the position of majority unions is enhanced while minority unions are marginalised.

The effect of section 18 is that it enables majority unions to set inordinately high thresholds for representivity, as a result ensuring that minority unions lose recognition where such thresholds cannot be met.[104] Furthermore section 23(1)(d) of the LRA allows employers and majority unions to extend collective agreements reached between them

---

95 Grogan "Labour Relations" 487-515.
96 Cohen 2014 *PER* 1.
97 Cohen 2014 *PER* 1.
98 Cohen 2014 *PER* 1.
99 Cohen 2014 *PER* 1
100 Cohen 2014 *PER* 1.
101 Kruger and Tshoose 2013 *PER* 288.
102 Kruger abd Tshoose 2013 *PER* 288.
103 Kruger and Tshoose 2013 *PER* 288.
104 Kruher and Tshoose 2013 *PER* 290.

to employees who are not members of the majority union.[105] This provision has the effect of binding minority unions and their members even if they do not wish to be bound by such an agreement.[106]

It is my submission that the LRA also contributes to the intensity of trade union rivalry. Unions realise that they could lose recognition in the workplace, and a union without members is a powerless body; thus a union would do anything within the legal framework to retain its members and to keep its members satisfied at all times and sometimes at all costs.[107]

Trade unions in South Africa have been accused of entering the collective bargaining process with a predetermined position of mind, thus making it next to impossible to make effective use of the collective bargaining system.[108] It seems that trade unions are relying more and more on strike action.[109] Unions in South Africa are relying on an ill-regulated action. Strikes are ill regulated in South Africa in the sense that there is no legislation regulating the duration of strikes. It is highly doubtful that the legislature, when including the right to strike in the law books, intended strikes to last for prolonged periods. To include the right to strike as a constitutional right and not duly regulate it has severe consequences. Despite the fact that strikes are not duly regulated by South African labour legislation, it (strikes) plays a very important role in the collective bargaining process.

---

105 Grogan "Labour Relations" 487-515.
106 Grogan "Labour Relations" 487-515.
107 Cohen 2014 PER 1.
108 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.
109 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.

Chapter 2: Collective labour law in South Africa

2.1 Collective labour law and collective bargaining

Section 1(d)(i) of the LRA states that one of the purposes of the LRA is to promote "orderly collective bargaining". What constitutes "orderly collective bargaining" is not clear yet. The act does not provide any indication as to what constitutes orderly collective bargaining. Furthermore, the LRA does not contain a definition of what is collective bargaining.[110] According to Van Niekerk and Smit the Act does not say much about the nature of collective bargaining, how it should take place and between whom, and on what topics.[111] It is argued that the reason for this is that our law does not impose a legal duty on employers and trade unions to bargain.[112]

It is argued that, because of the voluntary nature of collective bargaining there is, in theory at least, no need to determine what constitutes collective bargaining.[113] However, various authors have attempted to define collective bargaining and they have achieved success in their endeavour. Nevertheless, before embarking on defining collective bargaining one must first comprehend the system in which collective bargaining functions, and that is collective labour law. Grogan[114] defines collective labour law as follows:

> Collective labour law then consist of the rules and principles that govern the relationship between labour collectives and employers, who may in turn be organised into their collectives.

What is clear from the extract above is that collective labour law attempts to promote both the interest of employers and employees.[115] What makes this such a difficult task is the fact that collective labour law attempts to promote the interest of two different groups with different objectives, and to add to the difficulty collective labour law leaves it to the parties to determine the outcome of disputes by way of power play.[116] For employees

---

110 Bassoon, Christianson and Garber *Essential Labour Law* 253.
111 Van Niekerk and Smit *Law@work* 385.
112 Bassoon *et al Essential Labour Law* 253.
113 Bassoon *et al Essential Labour Law* 253.
114 Grogan *Collective Labour Law* 1.
115 Grogan *Collective Labour Law* 1.
116 Grogan *Collective Labour Law* 2.

power play means embarking on a strike, and for employers it means locking out employees.

A possible inference one could make is that there is at least to some extent a link between prolonged strikes and the system of power play promoted by the LRA. It is so that trade unions tend to rely more and more on power play to resolve disputes or to put pressure on employers to accede to their demands.[117] What is furthermore alarming is the fact that the law and the courts play a minimal role in the collective bargaining process. Courts can only intervene when one of the parties has breached the rules that they (the parties) had agreed on.

It appears that the courts also withheld themselves from providing a suitable definition for the term collective bargaining.[118] As previously stated various authors have attempted to define the term collective bargaining and they have done so successfully. According to Basson et al.[119] collective bargaining can be defined as follow:

> A process whereby employers (or employers' organisations) bargain with employee representatives (trade unions) about terms and conditions of employment and other matters of mutual interest.

On the other hand Grogan also not deviates much from the definition provided by Basson et al. According to Grogan:

> Collective bargaining is the process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation.[120]

One thing is certain from both definitions – collective bargaining is a process designed for dispute resolution. When there is a dispute between an employer and an employee concerning a matter of mutual interest collective bargaining is the process to be utilised to resolve such a dispute. It is obvious that the objective of collective bargaining is to reach an agreement.[121] Being a voluntary process, Grogan[122] submits that collective

---

117 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.
118 Basson *et al Essential Labour Law* 253.
119 Basson, Christianson and Garber *Essential Labour Law* 253.
120 Grogan *Workplace Law* 405.
121 Grogan *Workplace Law* 405.
122 Grogan *Workplace Law* 405.

bargaining assumes willingness from each side to not only listen to and consider the representation of the other party, but to abandon fixed positions where possible to reach an agreement.

Grogan's submission is supported by the judgment of *MAWU v Hart Ltd*[123] where the court held that:

> There is a distinct and substantial difference between consultation and bargaining. To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement as an end result, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term 'negotiate' is akin to bargaining and means to confer with a view to compromise or come to an agreement.

What is evident from the submission of Grogan and the above-mentioned judgment is that the parties should where possible abandon fixed positions; in other words, a party should not engage in collective bargaining with a predetermined mind.[124] They should always be willing to listen to and consider the representation of the other party to reach an agreement. Grogan's submission is valid. However, it does not seem to be applicable or to be the position in South Africa. More and more parties are engaging in collective bargaining with fixed positions.[125]

A recent example of the collective bargaining process being undermined is the wage talks in the public sector. It was alleged that the state's "inflexibility" in the wage talks was undermining collective bargaining.[126] Maluleke, COSATU's chief negotiator, argued that:

> The action against the Treasury was a consequence of Mr Nene's budgeting for no more than a 6,6% increase. That announcement undermined collective bargaining. It showed clearly that we are not bargaining with the Public Service and Administrative Department but with the Treasury. Why do we need to bargain if the (finance) minister has already declared the increase?[127]

---

123 *MAWU v Hart Ltd* 1985 6 ILJ 478.

124 Grogan *Workplace Law* 405.

125 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.

126 Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.

127 Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.

Maluleke's argument is not obscure in that it is clear that the state entered the collective bargaining process from a fixed position. In other words, the state knew how far the bargaining process could go. As such, it is not a problem but it is detrimental to the other party because the state should listen to and consider the submissions of the other party to reach an agreement.[128] Grogan submitted that collective bargaining assumes willingness on each side.[129] If that is so, is there any legal duty to bargain collectively? In other words, can one participant compel another to bargain with it?

2.1.1.1 The right to bargain collectively in the South African perspective

In South Africa, the right to bargain collectively is regulated in two ways: through the *Constitution* and the LRA.[130] In essence, the LRA gives effect to the constitutional right to engage in collective bargaining. According to Du Toit et al.[131] the content of the right to engage in collective bargaining is unclear. Du Toit is of the view that the central question is whether a right to engage in collective bargaining is synonymous with a right to bargain.[132]

It is an immensely important question, which Du Toit et al. raise should one interpret the right to engage in collective bargaining to mean the same as a right to collective bargaining. In other words, does the right to engage in collective bargaining impose a duty to bargaining? Du Toit et al.[133] are of the view that a 'right to engage in collective bargaining', as opposed to a 'right to bargain collectively', connotes a freedom rather than a positive right.

It is evident that there is support for the notion of voluntarism rather than a duty to bargain. According to Currie and De Waal[134] the Constitution does not prescribe that employees and employers must engage in collective bargaining, or that failure by one party to engage with another collectively constitutes an infringement of the other's

---

128 Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.
129 Grogan *Workplace Law* 405.
130 Molusi 2010 *Obiter* 161.
131 Du Toit *et al Labour Relations Law* 243.
132 Du Toit *et al Labour Relations Law* 243.
133 Du Toit *et al Labour Relations Law* 243.
134 Grogan "Labour Relations" 486-515.

constitutional right. Ferreira also makes an argument[135] that "collective bargaining is governed by the fact that employers and employees are mutually dependent". Ferreira's argument is straightforward in the sense that the author is of the view that the relationship between an employer and an employee should be governed by the fact that they are "mutually dependent", meaning that any other form of governance, such as legal intervention, would affect the relationship negatively.

From the outset, it should be stated that a single employee could not be a party to collective bargaining.[136] The effect of this statement is that the right to engage in collective bargaining is not an individual right but a collective right. An individual employee cannot approach a court of law to give effect to its right to engage in collective bargaining. That sheds some light on the nature of section 23(5) of the Constitution. Seen differently section 23(5) of the Constitution excludes an individual employee from being a party to collective bargaining.

The right to bargain collectively is only granted to a trade union, an employer and an employers' organisation. Thus, an individual employee may not be a party to collective bargaining in terms of section 23(5) of the Constitution. The LRA favours the voluntarism system of collective bargaining. In other words, collective bargaining assumes willingness from the parties engaged in the process. The LRA does not prescribe the procedure to be followed; it only provides a framework within which collective bargaining should take place. The last hope of unions to force employers to bargain with it was lessened by the court in *NPSU v National Negotiating Forum*[137] when the court held that:

> The Act does not prescribe to parties who they should bargain with, what they should bargain about or whether they should bargain at all. In this regime, the courts have no right to intervene and influence collectively bargained outcomes.[138]

It is evident from the above extract that our courts are reluctant to intervene in the process of collective bargaining or agendas associated with the process. Our courts play

---

135 Ferreira 2008 *JPA* 196.
136 Basson, Christianson and Garbers *Essential Labour Law* 253.
137 *NPSU v National Negotiating Forum* 1991 4 BLLR 361 (LC).
138 Para 52.

a passive role when it comes to collective bargaining. Despite the fact that the right to engage in collective bargaining is a constitutional right, a trade union cannot compel an employer to bargain with it unless the union resorts to a strike. A valid argument could be made that, unlike any other constitutional right, a trade union cannot rely directly on its constitutional right enshrined in section 23(5) of the Constitution to compel an employer to engage in collective bargaining.

2.1.1.2 Constitutional duty to bargain

Fundamental changes are required in the South African collective bargaining framework to combat lengthy and prolonged strike actions. It is undisputed that the LRA does provide unions with specific organisational rights. However, the LRA itself is silent on how these rights may be enforced to bargain with employers.[139] What is clear thus far is that, beyond guaranteeing organisational rights, the LRA does not expressly impose a duty to bargain.

It the submission of the author that the problem lies not so much with the regulation of strike actions, but with what happens prior to a strike action taking place; in other words, the attitudes of the parties prior to a strike action taking place. I further submit that the attitudes of the parties are influenced by various factors. One such factor is the absence of a constitutional duty to bargain. History shows that the Wiehahn commission left it to the Industrial Court to give content to the concept of unfair labour practice[140] that is currently enshrined in section 23(1) of the constitution.[141]

Under the stewardship of the Industrial Court, it was advocated that a refusal to bargain in certain circumstances constituted unfair labour practice.[142] The unions were entitled to approach the Industrial Court in certain circumstances to compel an employer to bargain with it. It is noted that various factors were taken into consideration to determine whether an employer's refusal to bargaining constituted unfair labour practice, including the

---

139 Grogan "Labour Relations" 488-515.
140 Van Niekerk and Smit *Law@work* 386.
141 Section 23(1).
142 Van Niekerk and Smit *Law@work* 386.

interest of the employer, non-union employees and efficient management.[143] The fact that the court considered certain factors to determine whether a refusal constituted an unfair labour practice implies that the duty to bargaining was not an absolute right.

In other words, there were circumstances where it was fair for an employer to refuse to bargain with a trade union. What is further interesting is the fact that the Interim Constitution made provision for the right to bargain collectively. The phrase was later interpreted by the court in *SANDU v Minister of Defence*[144] to mean that there is a correlative duty upon the other party to bargain. The court was of the view that the fact that there is a constitutional right to bargain, imposes a duty upon the other party to bargain, therefore the two were inseparable.

Under the Interim Constitution the right to bargain collectively was a right, not a freedom, meaning that a trade union could rely directly on the constitutional provision to force an employer to bargain with it. According to Du Plessis, Fouchè and Jordaan[145] the Industrial Court was initially hesitant to acknowledge a general duty to bargain. It was only in the judgment of *Food and Allied Workers' Union v Spekenham Supreme*[146] where the court for the first time expressed itself in favour of a general duty to bargain. After the judgment of the court in the above-mentioned case, a general duty to bargaining was established.

A duty to bargain did not only exist, but there was a duty on the parties to bargain in good faith. According to Du Plessis, Fouchè and Jordaan[147] a duty to bargain involves an obligation on the parties to bargain with the honest intention of reaching agreement. Therefore, under jurisprudence of the Industrial Court there was not only a duty to bargain collectively but also a duty to bargain in good faith. It is the author's submission that a combination of a duty to bargain and duty to bargain in good faith is an immensely important combination in labour employment relations.

---

143 Van Niekerk and Smit *Law@work* 386.
144 *SANDU v Minister of Defence* 2003 24 ILJ 1495 (T).
145 Du Plessis, Fouchè and Jordaan *A practical guide to labour law* 136.
146 *Food and Allied Workers' union v Spekenham Supreme* 1988 9 ILJ 628 (IC).
147 Du Plessis, Fochè and Jordaan *A practical guide to labour law* 137.

In the United States of America, under its unfair labour practice, it is included that if an employer refuses to bargain with a union, such an employer is guilty of unfair labour practice because such an employer violates its duty to bargain in good faith.[148] Thus, the duty to bargain collectively and the duty to bargain in good faith are inseparable; one cannot exist without the other one. The author postulates that the South African collective bargaining system requires a similar system in order to assist with combatting lengthy and prolonged strikes. It is further argued that, by altering the attitudes of the parties towards collective bargaining, we would be one step closer to combatting lengthy and prolonged strikes.

It is worth mentioning that both the Constitution and the LRA do not refer to a duty to engage in collective bargaining. Section 23(5) of the Constitution confers the right to engage in collective bargaining on every trade union, employers' organisation and employer.[149] As previously stated, the right to engage in collective bargaining is not a right per se but a freedom; in other words, there is no enforceable duty to bargain. Matters of mutual interest can be negated.[150] South African courts are reluctant to interpret section 23(5) of the Constitution in a manner that forces it to impose a duty to bargain. The Supreme Court of Appeal is of the view that section 23(5) is open to the following interpretation:

> It may mean that the contemplated legislation to regulate collective bargaining must provide for an employer or a union called upon to bargain to comply with the demand on pain of being ordered to do so. On the other hand, it may mean that the envisaged national legislation must provide the framework within which employer, employers' organisations and employees may bargain, or it may mean no more than that no legislative or other government act may effectively prohibit collective bargaining.[151]

Because of the voluntary nature of the collective bargaining system in South Africa, it is evident that the courts are in favour of the second interpretation – national legislation must only provide a framework in which collective bargaining can take place. There is support for such a position of voluntarism, according to Davis et al. as quoted by Molusi:

---

148 Anon. "Duty of labor union to bargain collectively in good faith: An unresolved issue" 319.
149 Grogan *Workplace Law* 409.
150 Ferreira 2014 JPA 196.
151 *SANDU v Minister of Defence* 2006 27 ILJ 2276 (SCA).

> The Committee states, in its digest of decisions, that collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse measures of compulsion, which would alter the voluntary nature of such bargaining.[152]

From the above extract, it is clear that the support for a voluntary system of collective bargaining has substantial support in the labour law discipline, both internationally and nationally. In South African law, the judgment of the Supreme Court of Appeal in *SANDU v Minster of Defence*[153] remains authoritative. The right to engage in collective bargaining is a freedom that may not be violated; however, it does not impose a duty to bargain.[154] The Constitutional Court provided the following reasons as to why it would not be advisable to interpret section 23(5) of the Constitution in a manner that renders it to impose a duty to bargain:

> It should be noted that were section 23(5) to establish a justiciable duty to bargain, enforceable by either employers or unions outside of a legislative framework to regulate that duty, Courts might be drawn into a range of controversial industrial relations issues. These issues would include questions relating to the level at which bargaining should take place (i.e. the level of the workplace, at the level of an enterprise, or at industrial level); the level of union membership required to give rise to that duty; the topics of bargaining and the manner of bargaining. These are difficult issues, which have been regulated in different ways in the recent past in South Africa.[155]

Even though the court did not expressly state that it is in favour of a voluntary system of collective bargaining, it is clear from the wording of the judgment that the court is reluctant to impose a duty to bargain. It is my submission that the reasons of the court overlooked the important question: Should there be a duty to bargain or not? The court was concerned with justifying why there should not be a duty to bargain and, in the process, read too much into such a duty. The author submits that imposing a duty to bargain would not draw courts into controversial industrial relations issues as held by the court, because the duty to bargain would merely entail a constitutional duty to bargain as it fell under the jurisprudence of the Industrial Court.

Matters such as representativeness and level of bargaining would be left to the parties to determine. It is my argument that one cannot have a constitutional right or freedom

---

152 Molusi 2010 *Obiter* 159.
153 *SANDU v Minster of Defence* 2006 27 ILJ 2276 (SCA).
154 Grogan *Workplace Law* 409.
155 *SANDU v Minster of Defence* 2007 9 BLLR 785 (CC).

when one cannot enforce it. If a trade union and an employers' organisation or employer cannot, in terms of section 23(5) of the Constitution, force each other to bargain collectively, then section 23(5) of the Constitution is of no use. It is further my contention that the absenteeism of a duty to bargain does in fact influence the parties' attitude towards collective bargaining. In other words, the self-regulation nature of a collective bargaining framework in South Africa is negatively affecting the collective bargaining process. Currently in South Africa, should an employer for some reason refuse to bargain with a trade union, it constitutes a legitimate ground for a strike.[156] One thing of concern is the emphasis placed on the right to strike given the fact that strike actions are not duly regulated in South Africa.

Too much emphasis cannot be place on an action that is ill regulated. According to Van Niekerk and Smit[157] there are authors who argue that leaving bargaining to the exercise of economic power play would contribute to industrial unrest. The argument of these authors is not without any basis. It is reported that in 2012 a total of 99 strikes were recorded,[158] and clearly this provides some substance to the argument of the authors that leaving bargaining for the exercise of economic power play would contribute to labour unrest. Notably almost half of those strikes were illegal and characterised by violence.[159] The collective bargaining framework places too much emphasis on self-regulation and economic power play. It the author's submission that the arguments of the abovementioned authors do hold some truth; the LRA is losing the battle against lengthy and prolonged strikes and to some extent due to the absenteeism of both a constitutional duty to bargain and a duty to bargaining in good faith.

2.1.1.2.1 Duty to bargaining in good faith

Under the 1956 LRA employers and employees were obliged to bargain and to bargaining in good faith[160] However, the current LRA contains no specific provision for a duty to

---

156 Ferreira 2014 *JPA* 196.
157 Van Niekerk and Smit *Law@work* 387.
158 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.
159 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.
160 Grogan "Labour Relations" 488-515.

bargain in good faith. In other words, there is no explicit obligation on the side of the employer or the union representing the employees to bargain in good faith. However, it should be noted that it is imperative for the parties to bargain in good faith.[161] Effective collective bargaining, to a certain extent, relies on good faith bargaining. Despite the imperative role good faith bargaining plays in collective bargaining, the LRA does not hold a provision promoting good faith bargaining. To make matters worse the LRA does not define the term good faith bargaining; so the question remains: What is good faith bargaining?

Some authors are of the view that good faith bargaining involves an obligation on the parties to bargain with the honest intention of reaching agreement.[162] The definition refers to an obligation. However, it is unclear whether the obligation is a legal or a moral obligation as the LRA does not make provision for a duty to bargaining in good faith. According to Samuel[163] good faith bargaining entails that the party concerned should display a sincere intention to achieve resolution by not exhibiting behaviours that suggest a predetermined position. Samuel's definition is premised on the view that, if a party exhibits behaviour that suggests a predetermined position such a party would be guilty of contravening its obligation to bargain in good faith.

Samuel's definition would only suffice in a state where there is a legal duty on the parties concerned to bargain in good faith in order to hold a party contravening such an obligation accountable for doing so. In South Africa both employers and unions have been accused of entering collective bargaining with a predetermined position. A recent example of such behaviour is the wage talks between the public sector unions and the Treasury, where it was alleged by the unions that the fact that the Treasury budgeted for an increase of 6.6% was a clear indication that the Treasury entered collective bargaining with a predetermined position and, in the process, undermined collective bargaining.[164]

---

161 Samuel 2013 *JCM* 242.
162 Du Plessis, Fochè and Jordaan *A practical guide to labour law* 137.
163 Samuel 2013 *JCM* 242.
164 Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.

According to Samuel's[165] argument both parties should make proposals and concessions that show willingness to reach a mutual agreement. In the example above there was clearly neither a proposal nor willingness to reach a mutual agreement. The parties already determined the outcome of the collective bargaining prior to engaging in the process. Without a legal obligation on the parties to bargain in good faith, the courts cannot intervene in cases of alleged bad faith bargaining.

It appears that in the United States of America there exists a duty to bargain in good faith and the courts may review negotiations to determine whether in fact the parties negotiated in good faith.[166] The American Supreme Court in the *West Hartford Education Ass'n v Decourcy*[167] stated the following in relation to the duty to bargain in good faith:

> The duty to bargain in good faith has generally been defined as an obligation to participate actively in deliberations so as to indicate a present intention to find a basis for agreement… Not only must the employer have an open mind and a sincere desire to reach an agreement, but also a sincere effort has to be made to reach a common ground.[168]

It is argued that, in determining whether the parties did in fact bargain in good faith, the courts consider the totality of the parties' conduct throughout the negotiations.[169] The courts are imposed with the role of being guardians of the negotiations; to review the conduct of the parties if it is called upon to do so. The duty to bargain in good faith is based on the principle of willingness from both parties to reach an agreement of common ground. In another matter involving General Electric, the National Labour Relations Board stated that:

> A party who enters negotiations with a take it or leave it attitude violates its duty to bargain although it goes through the forms of bargaining, does not insist on any illegal or non-mandatory bargaining proposals and wants to sign an agreement. For good faith bargaining means more than 'going through the motions of bargaining'.[170]

The National Labour Relations Board correctly observed that good faith bargaining means more than 'going through the motions of bargaining'. It is the author's submission that,

---

165 Samuel 2013 *JCM* 242.
166 Clark "Duty to bargain" 58.
167 *West Hartford Education Ass 'n v Decourcy* 1972 162 Conn. 566, 295 A. 25 562.
168 Para 552.
169 Clark "Duty to bargain" 58.
170 150 NLRB 194-195.

in some instances, it happens that parties enter collective bargaining for the sole reason of satisfying the prerequisite set by legislation. By imposing a duty to engage in collective bargaining and a duty to bargaining in good faith, I submit, would assist South Africa significantly in combatting prolonged and lengthy strikes.

By imposing this duty the courts would be empowered to compel parties not only to engage in collective bargaining, but also to bargaining in good faith, and to review the conduct of the parties to determine whether they negotiated in good faith. By empowering courts to do so, it would encourage parties to prepare extensively for collective bargaining and not merely rely on strike action to resolve matters of mutual interest. In the process, the parties' attitude towards collective bargaining would change.

Chapter 3: The right of employees to strike in the South African context

3.1 Employees' right to strike

In South Africa employees have a statutory right to embark on a protected strike. A protected strike is one that meets all the prerequisites of a strike in terms of section 64(1) of the LRA. Section 187(1)(a) of the LRA goes one step further to state that an employer may not dismiss an employee for participating or indicating an intention to participate in a protected strike. However, it is of immense importance to note that an employee who makes himself/herself guilty of misconduct during a strike action may be dismissed irrespective of whether the strike is protected or not. Henceforth a strike action may constitute a delict, for which the employer may claim damages from the responsible parties.[171] Section 187(1)(a) is a good example of the protection that strike actions enjoy in South African labour legislation.

According to Manamela and Budeli[172] employees' right to strike is an essential component of their freedom of association. This argument is premised on the fact that a single employee cannot embark on a strike. Furthermore, a strike action is viewed as an essential element in collective bargaining for the reason that it ensures that an employer will bargain more fairly.[173] With that it should not be understood that the right to strike guarantees that an employer will indeed bargain fairly. What constitutes fair bargaining is a matter open for interpretation.

According to Chicktay strikes promote democracy, particularly in the workplace.[174] The learned author supports his statement by arguing that, because employers are the owners of capital and they determine employees' conditions of employment, employees on the other hand form and join unions to counter the powers of the employer and by this exercise they gain greater say in the workplace.[175] Sachs, as quoted by Manamela

---

171 Grogan *Workplace Law* 429.
172 Manamela and Budeli "Employees' right to strike and violence in South Africa" 308.
173 Du Plessis *et al A practical guide to labour* law 305.
174 Chicktay 2006 *Obiter* 346.
175 Chicktay 2006 *Obiter* 346.

and Budeli,[176] argues that the right to establish and join trade unions, the right to collective bargaining, and the right to strike are the three pillars of working people to defend all their other rights. I am in agreement with the argument made by Sachs for the reason that one cannot over-emphasise the importance of the right of employees to strike. Without the right to strike, employees would find themselves in a vulnerable position as it is generally accepted that collective bargaining, without the right to strike, is collective going begging. Mcllroy is quoted arguing that:

> As long as our society is divided between those who own and control the means of production and those who only have the ability to work, strikes will be inevitable because they are the ultimate means workers have of protecting themselves.[177]

The right to strike serves as a measure to strike a balance between the powers of the employer and those of the employees, if any. As further illustration of the importance of the right to strike Grunfeld made the following observation:

> If one set of human beings is placed in a position of unchecked industrial authority over another set, to expect the former to keep the interest of the latter constantly in mind and, for example to increase the latter's earnings as soon as the surplus income is available…is to place on human nature a strain it was never designed to bear.[178]

The extract above is of immense importance as it cautions against too much power vesting in one party in collective bargaining. It is trite to state the fact that there exists a power imbalance between employers and employees and, as result thereof, the essence of the right to strike is to address the issue of power imbalance between employers and employees. Employees strike for various reasons. The most common are low wages and low or non-existent bonuses.[179]

Grunfeld's argument is true because workers are still grappling with employers for wage increases today. Due to the increase in the number of strike actions caused by wage disputes an argument could be made that employers do not take it upon themselves to ensure that the wages of workers are market-related at all times, or such that the workers would be able to survive. Expecting employers to keep the interest of workers constantly

---

176 Manamela and Budeli "Employees' right to strike and violence in South Africa" 309.
177 Chicktay 2006 *Obiter* 346.
178 Manamela and Budeli "Employees' right to strike and violence in South Africa" 309.
179 Schutte and Lukhele "The real toll of South Africa's labour aggressiveness" 69.

in mind, and to increase the workers' earnings as soon as the surplus income is available, Grunfeld correctly remarked that it "is to place on human nature a strain it was never designed to bear". Chicktay is of the view that without the right to strike employees would not be taken seriously during bargaining.[180]

The Labour Appeal Court, in *Stuttafords Department Stores Ltd v SA Clothing & Textile Workers Union*,[181] was of the view that:

> The very reason why employees resort to strikes is to inflict economic harm on their employer so that the latter can accede to their demands. A strike is meant to subject an employer to such economic harm that he would consider that he would rather agree to the workers' demands that [sic] have his business harmed further by the strike.[182]

It is evident from the wording of the court that the primary objective of a strike action is to inflict economic harm on an employer to influence the employer to accede to the demands of the employees. Chicktay brings another dimension to the right of employees to strike – the dimension that involves human dignity. The learned author is of the view that:

> The right to strike is also a violation of one's right to dignity. Workers find a sense of self-worth in their work, which is hindered if they are exploited by employers and have no say in this environment. One of the most effective ways in which workers can have a meaningful say in the workplace is if they have the power to halt production.[183]

What the learned author is in fact arguing is that "strikes allow workers to retain their dignity and to show that they are not just cogs in a machine".[184] It is debatable whether striking for five months achieves the primary objective of a strike, which is to inflict economic harm. However, it is my submission that if a strike action lasts for more than two months it is clearly not succeeding in its purpose to inflict economic harm, thus other means should be employed to reach an agreement. A threat of a strike must be of such a nature that it influences the employer to accede to the demands of the employees. In the absence of such a threat, dire consequences may follow.

---

180 Chicktay 2006 *Obiter* 347.
181 *Stuttafords Department Stores Ltd v SA Clothing & Textile Workers* Union 2001 22 ILJ 414 (LAC).
182 Para 422E.
183 Chicktay 2006 *Obiter* 347.
184 Chicktay 2006 *Obiter* 347.

A good example of where the primary objective of a strike was defeated is the 2012 Marikana strike when the employees were on strike for five months. It is my submission that the fact that the employees had to strike for five months is a clear indication that the strike was ineffective and defeated the purpose of a strike, which is to inflict economic harm. It is not my argument that no harm was inflicted; however, the employees felt the impact of the strike more than their employers did.

A valid argument could be made that the mere fact that employees had to strike for five months is enough to suggest that the strike was clearly not achieving its purpose, and other means had to be employed to reach an agreement. In the Marikana case it was clear that power play was unable to resolve the dispute and the labour legislation made no other avenue available for the parties to resolve the matter. In essence that is also the problem with South African labour legislation. It does not address the issue of disputes that remain unresolved after power play or industrial action. Those issues are left for the parties to decide by relying on the principle of willingness.

A complex question that remains to be answered is the following: Is the willingness principle working effectively in South Africa, taking into account the devastating events of Marikana? It is my submission that the willingness principle is not working effectively, and legislation intervention is required to assist South African labour legislation to combat prolonged and lengthy strike actions. What does the South African labour legislation in fact regulate about strikes?

3.1.1 Strike action in the South African labour legislation context

In terms of common law a strike action in fact constitutes a breach of contract, which in return entitles an employer to dismiss an employee because of breach of contract.[185] To the contrary section 67(2)(a) of the LRA states that a person does not commit a breach of contract by taking part in a protected strike. Given the common law position, the right to strike is constitutionally entrenched[186] and any legislation or conduct inconsistent with the Constitution is invalid.[187] Thus section 23(2)(c) of the Constitution supersedes the

---

185 Grogan *Workplace Law* 429.
186 Section 23(2)(c).
187 Section 2.

common law position. Further the LRA also guarantees employees the right to strike provided it is a protected strike.[188]

It appears from the wording of the LRA that the Act only intends to protect employees engaged in a protected strike and the reason for this contention is to be found in the fact that the LRA sets out certain requirements that must be met for employees to be protected whilst participating in a strike action. Despite the importance of the right to strike, similar to any other constitutional right, the right to strike is not absolute. In other words, it may be limited.

Section 213 of the LRA defines a strike as follows:

> The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a 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.[189]

By close examination of the definition, one will realise that the definition consists of various elements that will be dealt with separately. These elements are prerequisites for the existence of a strike; a mere refusal to work does not in all cases constitute a strike as is generally accepted by laypersons. According to Grogan, employees are deemed on strike where they mistakenly believe that they are not contractually obliged to do the work they have declined to perform, given that they have the intention to induce their employer to comply with their demand.[190]

The first element is refusal to work. What is to be understood by refusal to work is the following: It is the refusal by employees to do work that the employees were contractually obliged to do including refusal to do voluntary overtime.[191] According to Van Niekerk and Smit a strike need not necessarily amount to a complete withdrawal of labour, meaning that a strike can assume a variety of forms. This includes a partial refusal that means employees perform some duties but not others, retardation of work (the so-called go-

---

188 Section 64(1).
189 Section 213.
190 Grogan *Workplace Law* 430.
191 Van Niekerk and Smit *Law@work* 417.

slow) and obstruction of work where the workers affect production.[192] In the judgment of *Simba (Pty) Ltd v FAWU*[193] the court was clear in that the word 'work' in the definition of strike does not include illegal work; thus employees refusing to do illegal work in terms of the LRA are not on strike.

The second element is collective action. Du Plessis et al. convincingly argue that an individual worker who withholds his labour is not on strike.[194] Van Niekerk and Smit[195] support the argument made by Du Plessis et al. Van Niekerk and Smit argue that the right to strike is part of the collective bargaining process. It is by its very nature a collective action. It is not difficult to comprehend the arguments made by Van Niekerk and Smit, and Du Plessis et al. for the sole reason that an individual worker would not be able to inflict economic harm to an employer in the same way that a group would. This argument was supported by the court in *Schoeman v Samsung Electronics (Pty) Ltd*[196] where the court held that an individual employee could not strike; thus, in South African labour legislation a strike action is a collective action.

The third and last element is the purpose of the strike. Like any other action a strike action should also have a purpose. According to Van Niekerk and Smit[197] "the purpose-related requirement of the definition distinguishes a strike from other forms of work stoppage." The learned authors are of the view that central to a strike should be the demand that gives rise to it, and such a demand should reflect the required purpose that a dispute be resolved.[198] Therefore it is contended by Van Niekerk and Smit[199] "if employees refuse work but do not seek to remedy a grievance, there is no strike in terms of the definition". According to Grogan[200] there must either be a grievance or a dispute before workers can be deemed to be on strike; the mere fact that workers mutually resolve to stay away from work does not in itself constitute a strike.

---

192 Van Niekerk and Smit *Law@work* 417.
193 *Simba (Pty) Ltd v FAWU* 1997 5 BLLR 602 (LC).
194 Du Plessis *et al* A practical guide to labour law 306.
195 Van Niekerk and Smit *Law@work* 418.
196 *Schoeman v Samsung Electronics (Pty)* Ltd 1997 10 BLLR 1364 (LC).
197 Van Niekerk and Smit *Law@work* 418.
198 Van Niekerk and Smit *Law@work* 418.
199 Van Niekerk and Smit *Law@work* 419.
200 Grogan *Workplace Law* 433.

Given the importance of a strike action, it is important to bear in mind the fact that strike actions do not function in a vacuum. Strike actions not only affect the employer and employees but also the economy of a country as a whole. This makes due regulation of strike actions a necessity. In South Africa statistics show that between 2008 and 2012, 348 strike actions in total were recorded, 99 in 2012, 67 in 2011, 74 in 2010, 51 in 2009, and 57 in 2008.[201] The statistics speak for itself. The LRA is clearly not doing enough to combat strike actions in South Africa. This contention is substantiated by the fact that section 64(1), which deals with the regulation of strike actions, nowhere suggests any avenue to be followed when a strike action has lasted for a long period or has lost its functionality.

The primary objective of a strike action is to inflict economic harm on an employer to induce an employer to accede to the demands of the employees. However, a strike that lasts for a long period is clearly not succeeding in its objective and the LRA should make options available to employees to employ should a strike action not succeed. It is the author's submission that a strike action that goes on for a long time affects the employees more than it affects the employer. Employees receive no income while striking.

Some employers can manage to survive a strike that lasts for a month or two. However, some workers on the other hand cannot afford to be deprived of an income for two months. A strike action is meant to benefit the employees, not to affect them negatively. A strike is supposed to be a weapon in the hands of the employees but currently their own weapon is killing the employees.

Attempts were made in the 1956 LRA to regulate strike actions. A system of strike ballots was introduced to ensure the legality of a strike.[202] The primary objective of a strike ballot is simply to test whether a majority of trade union members are in favour of a strike.[203] It may therefore be argued that the main objective is evidently not to regulate a strike action but to democratically test whether the majority really is in favour of it. Rycroft notes that:

---

201 Schutte and Lukhele "The real toll of South Africa's aggressiveness" 69.
202 Rycroft 2015 *ILJ* 6.
203 Rycroft 2015 *ILJ* 6.

> A majority decision to strike also serves the purpose of signalling to the employer that there is a collective determination to withhold labour, and this may well shift the employer's bargaining position.[204]

In view of the use of the word "may" in the above extract it is a self-evident indication that the fact that a strike ballot was or is held does not guarantee that the employer is going to alter its bargaining position. Furthermore, there is nothing in the strike ballot process that suggests that it is as a process able to combat prolonged or lengthy strike actions. A further concern is that the process of strike ballots can be abused and manipulated.[205]

Rycroft[206] argues, and correctly so, that in certain instances the agenda of a trade union may not be that of its members. The danger the learned author is attempting to caution against is that members of a certain trade union might vote for a strike action unaware of the hidden agenda of the trade union officials calling for such a strike action. Further, also the fact that in the past employers were able to interdict strikes if a union failed in its duty to conduct a ballot, or the ballot was indeed conducted but was defective.[207] In other words, it was in law possible for an employer to approach a court of law to obtain an interdict against a strike action on the basis that a ballot was not conducted or the conducted ballot was defective and thus is invalid.

COSATU, through its general secretary, took the stance that strike ballots could be easily manipulated by employers to delay strike action.[208] Rycroft[209] notes that in the pre-1995 era "irregularities over strike ballots were used by employers to stall a strike". It goes even further – employers were also in a position to dismiss employees for participating in a strike action because the ballot was irregular. In other words, if a ballot is irregular the strike action is deemed to be unprotected.

The legislator, however, appreciated the difficulties caused by the strike ballot process and did not include the requirements for a strike ballot in the 1995 LRA. Taking into

---

204 Rycroft 2015 *ILJ* 6.
205 Rycroft 2015 *ILJ* 7.
206 Rycroft 2015 *ILJ* 7.
207 Rycroft 2015 *ILJ* 7.
208 Rycroft 2015 *ILJ* 7.
209 Rycroft 2015 *ILJ* 7.

consideration the above arguments, it is my submission that the inclusion of a strike ballot as a requirement for a protected strike would complicate the already struggling collective bargaining system in South Africa. It would provide employers with an opportunity to delay strike actions and also, to some extent, to undermine collective bargaining.

Section 64(1) of the LRA does not only protect the right of employees to strike; it also provides employers with a recourse to lock out employees from the workplace; therefore employers are entitled to prohibit employees from entering the workplace in terms of the LRA. A lockout is a weapon of the employer to counter the deadly weapon of employees: the right to strike.

3.1.1.1 The employer's recourse to lock out

Section 64(1) of the LRA confers upon employers recourse to lock out employees. Unlike section 23(2)(c) of the Constitution the right of employees to strike, employers' right to lock out is not constitutionally enshrined. In other words, an employer does not have a Constitutional right to lock out employees. The Interim Constitution of 1993 did however contain the recourse to lock out but the recourse was excluded from the 1996 Constitution.[210] The main argument that dominated the exclusion of the recourse to lock out was that strikes and lockout should not be treated equally.[211] In the judgement of *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996[212] the Constitutional Court upheld the argument made for the exclusion of the recourse to lock out from the final Constitution of 1996, the court held that:

> The effect of including the right to strike does not diminish the right of employers to engage in bargaining, nor does it weaken their right to exercise economic power against workers. The right to bargain collectively is expressly recognised by the text [of the 1996 Constitution].[213]

---

210 Basson *et al Essential Labour Law* 281.
211 Basson *et al Essential Labour Law* 281.
212 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 17 821 (CC).
213 At para 840.

The court was clear in its view that including the recourse to lock out would only be a repetition as the right to bargain collectively is expressly recognised by the text of the 1996 Constitution. In other words, the right to bargain collectively already contains or implies the recourse to lock out. Throughout its reasoning the court maintained the position that the right to strike is not equivalent to the right to lock out. According to Basson et al.[214] the effect of the judgement of the Constitutional Court is that employees' right to strike is expressly protected by section 23(2)(c) of the Constitution and the right of employers to lockout is not expressly entrenched.

However, this does not compromise the position of employers as the court correctly explained that including the right to strike does not weaken employers' right to exercise economic power against workers. Van Niekerk and Smit[215] are of the opinion that an employer merely has recourse to lock out in terms of the LRA and not a right to lock out. Consequently the author is of the view that there is a difference between a right and recourse. The learned authors do not explain what the difference is.

Du Toit et al.,[216] in an attempt to address the difference between a right to lock out and recourse to lock out, remarked "had employers been granted a 'right' to lock out, they would have been entitled to interdict trade unions' conduct". It is argued by Van Niekerk and Smit[217] that a lockout "is a form of industrial action that may be exercised by the employer". The definition of a lockout does not differ much from that of a strike. In terms of section 213 of the LRA a lockout is:

> The exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion.[218]

Therefore, just like a strike action assist employees to compel an employer to accept their demands, lockouts assist an employer to compel its workers to accept a demand in

---

214 Basson *et al Essential Labour Law* 282.
215 Van Niekerk and Smit *Law@work* 438.
216 Du Toit *et al Labour Relations Law* 314.
217 Van Niekerk and Smit *Law@work* 438.
218 Section 213.

respect of a matter of mutual interest. To the contrary lockouts go even further than strikes in that an employer is entitled to breach employment contracts of the employees. Du Toit et al.[219] warns that "a breach of contract in itself is no longer regarded a possible form of lockout". In other words, an employer is prohibited from withdrawing contractual benefits as a way of inducing compliance with its demand.[220] It is further argued by Du Toit et al.[221] that the exclusion of employees must be accompanied by a demand and such a demand must involve something more than simply requiring employees to perform their contractual obligations.

Therefore, based on the argument of Du Toit et al. it seems fair to comment that a mere exclusion of workers from an employer's workplace without any demand accompanying such an exclusion will in law not constitute a lockout. There are various other ways an employer may use to counter the right of employees to strike. In other words, employers have many options during a protected strike. However, the extensive discussion of these options of an employer is beyond the scope of this dissertation. Consequently, or at least from a theoretical point of view, employees and employers have equal power in law because both have rights and remedies that can be used at any time if necessary. However, there is no absolute right in the South African jurisprudence.[222]

3.1.1.1.1 Limitations on the right to strike

As already indicated no right in the South African law is absolute and all rights are subject to the limitation clause in section 36 of the Constitution. The same principle applies to the right to strike in spite of its importance. The LRA, with regard to the right to strike, has specific substantive limitations. These limitations are to be found in section 65 of the LRA. Section 65 of the LRA contains six prohibitions on strikes under certain circumstances.[223] In other words, employees may not engage in a strike under these circumstances. Section 65(1) of the LRA is clear in its stipulation that no person may take

---

219 Du Toit *et al Labour Relations Law* 296.
220 Du Toit *et al Labour Relations Law* 298.
221 Du Toit *et al Labour Relations Law* 298.
222 Section 36.
223 Basson *et al Essential Labour Law* 290.

part in a strike or lockout or in any conduct in contemplation or furtherance of a strike or lockout if:

(a) That person is bound by a collective agreement that prohibits a strike or lockout in respect of the issue in dispute;

(b) That person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

(c) The issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;

(d) That person is engaged in-

(i) An essential service; or

(ii) A maintenance service

The limitations set out in section 65(1) of the LRA are straightforward and unambiguous; it does not take much effort to comprehend its application. Regarding the first limitation in terms of section 65(1)(a) it is clear that the legislator's intention was to prevent workers from striking where there is an agreement between the parties prohibiting workers to introduce industrial action over a particular issue at a particular time. Van Niekerk et al.[224] argues, and correctly so, that only a registered trade union can agree to waive the right to strike in terms of section 65(1)(a) of the LRA, and it is also understood that the collective agreement may bind non-parties to the agreement.

The Labour Appeal Court, in *Vodacom (Pty) Ltd v CWU*,[225] showed its support for section 65(1)(a) of the LRA when it held that, where a matter regulated by a collective agreement finds its way to the CCMA and a certificate is issued declaring the dispute unresolved, such a certificate is of no value because that certificate cannot trump the clear provisions of the limitation. When one takes the mentioned judgement it is evident that section 65(1)(a) agreements play a prominent role in the limitation of strike actions.

According to Grogan[226] employers who in fact rely on the provisions of section 65(1)(a) must prove that the issue in dispute is indeed covered by the collective agreement. In

---

224 Van Niekerk and Smit *Law@work* 422.
225 *Vodacom (Pty) Ltd v CWU* 2010 8 BLLR 836 (LAC).
226 Grogan *Workplace Law* 442.

other words, an employer cannot merely avert that such an agreement exist; it must go one step further and prove that such a clause does in fact exist and it was agreed upon by the parties concerned. Grogan[227] further contends that employees are not precluded from striking over an issue covered by a current agreement in support of demands relating to a future agreement. Section 65(1)(a) and 65(1)(b) of the LRA have more or less the same application as they are both based on agreements agreed upon by the affected parties. The only difference is that section 65(1)(b) is wider in scope in that it refers to an agreement and not a collective agreement.[228]

However, it is argued that section 65(1)(c) is the most extensive statutory limitation on the right to strike.[229] Grogan[230] substantiates his argument stating that, under the current LRA, there is a strict division between disputes that must be resolved by arbitration and those that can only be resolved by industrial action. What the learned author is in fact arguing is that one cannot strike over a dispute that in law should be referred for adjudication. According to Grogan:

> Section 65(1)(c) does not require that the dispute must actually have been referred; it is enough that it can be referred.[231]

The burden of proof in terms of section 65(1)(c) is therefore not a difficult one; it must only be proved that the matter in dispute can be referred to arbitration or adjudication. Workers are therefore prohibited from striking over the following disputes:

> Freedom of association; organisational rights (except where the issue in dispute is about a matter dealt with in section 12 to 15); the interpretation and application of collective bargaining agreements; agency and closed-shop agreements; admission or expulsion from bargaining councils; picketing; dismissals and alleged unfair labour practices.[232]

Regarding all the above-mentioned disputes that workers are prohibited from striking over, it is however important to note that in some instances there may be borderline cases. In such cases, our courts tend to rely on the substance rather than the form to

---

227 Grogan *Workplace Law* 442.
228 Van Niekerk and Smit *Law@work* 423.
229 Grogan *Workplace Law* 443.
230 Grogan *Workplace Law* 443.
231 Grogan *Workplace Law* 443.
232 Grogan *Workplace Law* 443

identify the issue in dispute in terms of section 65(1)(c).[233] A good example of such preference is the *Ceramic Industries Ltd t/a Betta Sanitaryware v NCABAWU*[234] where the court held that:

> The union could not convert the nature of that underlying dispute into a non-justiciable one simply by adding a demand for a remedying falling outside those provided by the Act. The tail cannot wag the dog…the refusal of a demand in order to ascertain the real dispute underlying the demand or remedy. The demand or remedy will always be sought to rectify the real, underlying, dispute. It is the nature of the dispute that determines whether a strike in relation to it is permissible or not.[235]

This judgment therefore sets the test in relation to what is more complex to determine whether to strike or not. The test is substance over form. One should always look at the nature of the dispute and not how it is phrased by a litigant. It should also be noted that there are certain disputes that are unique. In this regard disputes about organisational rights fall into a different category. Disputes concerning organisational rights may either be arbitrated or workers may resort to a strike. The effect of this is consequently that a union that meets the required thresholds may elect either to strike or to refer the dispute for arbitration.

The position is slightly different for unions that do not meet the required thresholds. Such unions may exercise the right to strike in support of their demands.[236] Another limitation on the right to strike is to be found in section 65(1)(d) of the LRA, where employees engaged in essential and maintenance services are prohibited from striking. Grogan[237] argues, and correctly so, that their option is to rather refer their disputes for compulsory arbitration under section 74 of the LRA. Essential service is defined as follows:

> A service the interruption of which endangers the life, personal safety or health of the whole or any part of the population.[238]

From the definition, it is evident that the following services are indeed essential services: the Parliamentary Service and the South African Police Service. I am in agreement with

---

233 Van Niekerk and Smit *Law@work* 423.
234 *Ceramic Industries Ltd t/a Betta Sanitaryware v NCABAWU* 1997 18 ILJ 671 (LAC).
235 At para 724.
236 Van Niekerk and Smit *Law@work* 424.
237 Grogan *Workplace Law* 447.
238 Section 213.

the argument made by Grogan that the fact that the Parliamentary Service and the South African Police Service are essential services does not mean that all persons employed by these services are prohibited from striking.[239] Stated differently: Personnel rendering supporting services are not prohibited from striking; only those people who would endanger the lives of others are prohibited from striking.

The limitations on the right to strike also go on to prove the fact that employers are not left without any option with regard to strike action. Theoretically employers and their employees have equal power in terms of the law; everyone is equal before the law. However, it would be naïve to turn a blind eye to the existing cases of power imbalance between employers and employees. Theory and practice are not always in harmony, and for purposes of this dissertation there exists a power imbalance between employers and employees. Given the fact that the LRA does not provide any further avenue where a dispute cannot be resolved by way of industrial action, what other measure can one employ to avoid prolonged and lengthy strikes in South Africa?

---

[239] Grogan *Workplace Law* 447.

Chapter 4: Interest arbitration as a possible solution: A comparative analysis

4.1 Interest arbitration

The concept of compulsory arbitration is not a novel concept to the South African labour legislation. Persons engaged in essential services are compelled by law to make use of compulsory arbitration. Section 74 of the LRA regulates disputes that must be resolved by way of compulsory arbitration. In other words, employees engaged in certain services are prohibited from striking.[240] Any dispute between those employees and their employers must be resolved by way of compulsory arbitration.

From an American perspective, interest arbitration has a long-standing history when it comes to resolving labour disputes.[241] Interest arbitration is a process used in the United States of America mostly in the public sector. However, it is not limited to the public sector as the American private sector also makes use of interest arbitration.[242] In its early developmental stages, interest arbitration was used as a substitute for strike action in the United States of America.[243] What is fundamentally important about interest arbitration is the fact that it is generally used after other methods of resolving a bargaining impasse.[244] In other words, one can still make use of the normal dispute resolution methods and only when those methods do not succeed or resolve the dispute, would interest arbitration be employed.[245]

The argument supported in this dissertation is that in the South African context interest arbitration would be effectively utilised once it has become apparent that a dispute remained unresolved after workers have embarked on a strike action. This argument is

---

240 Section 74.

241 Morris 1976 IRLJ 428. "But viewing a longer span of industrial history, one perceives interest arbitration to have been the initial and, for extended period, the only type of arbitration used in the settlement of labor disputes".

242 Morris 1976 IRLJ 431."This country's most pervasive private sector experience with interest arbitration have occurred under wartime conditions".

243 Morris 1976 IRLJ 429. "While neither of those early industrial unions achieved their arbitration goals, several international unions affiliated with the less romantic and ideological neutral America Federation of labor established interest arbitration as a substitute for strikes in their respective industries".

244 Gaylord and Radelet "Interest arbitration- Pros, Cons and How Tos" 1.

245 Gaylord and Radelet "Interest arbitration- Pros, Cons and How Tos" 1.

made in view of the fact that the right to strike play such an important role in the South African collective bargaining framework, and it is a constitutional right to which every employee is entitled.[246] In both the South African and American collective bargaining framework, the right to strike is viewed as the cornerstone of collective bargaining.[247] From an American perspective Morris argues that:

> Among the relevant traditions is the role of the strike. Strikes have always been an essential element in collective bargaining in this country, even in the public sector where they are generally illegal.[248]

As already mentioned above the right to strike is also an essential element of the South African collective bargaining system.[249] An argument could thus be made that, because of the importance of the right to strike in the collective bargaining framework, a dispute should only be referred for interest arbitration after workers have embarked on a strike action. In so doing, interest arbitration would provide workers as well as employers with a further avenue to resolve a dispute where a dispute remains unresolved after embarking on a strike action.

One must concede that interest arbitration is a mechanism that is mostly used in the public sector. It therefore begs the question how interest arbitration would translate in the private sector. It is a known fact that the private and public sector differ and therefore, in the private sector, one would have to take into account factors such as company profitability, competiveness, and productivity standards.[250]

As already stated the private sector in the United States makes use of interest arbitration. Consequently it would be wise to learn a few lessons from the American system.[251] According to Morris[252] interest arbitration in the private sector in the USA has reigned supreme. The author argues that in the 'right conditions interest arbitration can argument

---

246 Section 23(2)(c).
247 Morris 1976 *IRLJ* 432.
248 Morris 1976 *IRLJ* 435.
249 Grogan "Labour Relations" 472-515. Grogan advances the argument that "the right to strike is generally considered a vital adjunct of the right to bargain collectively".
250 Gaylord and Radelet "Interest arbitration- Pros, Cons and How Tos" 2.
251 Morris 1976 *IRLJ* 431.
252 Morris 1976 *IRLJ* 494.

collective bargaining in advantageous ways'.[253] It is evident from Morris' argument that interest arbitration is indeed flexible enough to be implemented in the private sector. The learned author cautions that:

> Too much should not be expected from interest arbitration, for our industrial relations system is fundamentally dependent on private ordering by unions and employers; interest arbitration can only be a supplement, not an alternative.[254]

The argument made by Morris is in line with the argument advanced in this dissertation. Interest arbitration should not be an alternative for the right to strike or collective bargaining; it should be a supplement of the collective bargaining system. Morris quoted Sternstein who asked a fundamentally important question that is also an essential question that must be addressed by this dissertation. Sternstein asked whether arbitration is a viable substitute for a community-crippling strike.[255]

It appears that Sternstein held the view that interest arbitration could indeed be a viable substitute for a community crippling strike. Sternstein was convinced that arbitration 'reflects the human desire to have alternatives'.[256] From Sternstein's argument one could argue that in South Africa, particularly in the private sector, there is a human desire to have alternatives such as interest arbitration after workers have embarked on a prolonged and lengthy strike action. For successful arbitration, it is argued that 'accessibility' is the key.[257] 'Accessibility' is defined to mean 'those collective bargaining situations which meet certain conditions'.[258] Those conditions are the following:

> First, the relationship between the employer and the union must be matured. Second, accessibility cannot be applied to situations where, for whatever reasons, wages and working conditions have been substandard. Third accessibility cannot be applied where there has been a drastic change in management or in union representation or leadership. Finally, the viability of our national economy is based on progress by those in the workforce, not retrogression.[259]

---

253 Morris 1976 *IRLJ* 494.
254 Morris 1976 *IRLJ* 494.
255 Morris 1976 *IRLJ* 495.
256 Morris 1976 *IRLJ* 496.
257 Morris 1976 *IRLJ* 496.
258 Morris 1976 *IRLJ* 496.
259 Morris 1976 *IRLJ* 496.

Sternstein places much emphasis on the importance of a good relationship between the employer and the union. There are various options available to the employer and the unions to improve their relationship to create an environment for successful arbitration for example, to educate parties about the advantages of interest arbitration and to encourage the concerned parties to make proper use of the process.[260] Reference has been made throughout to the term 'interest arbitration'. However, a definition has not yet been provided for the term. Interest arbitration is defined as follows:

> Interest arbitration is a process in which the terms and conditions of the employment contract are established by a final and binding decision of the arbitration panel.[261]

Brand provides a more straightforward definition for interest arbitration than the one provided above. According to Brand:

> Interest arbitration is a process in which a third party hears the disputing parties' respective cases and then determines an interest dispute between them.[262]

Brand[263] further explains that an interest dispute is a dispute about the creation of a future right. On the other hand, a right dispute is a dispute about the interpretation and application of an already existing right. The learned author also explains that interest arbitration may be voluntary or compulsory.[264]

Regarding voluntary interest arbitration Brand contends that the parties "agree to arbitrate and to a mutually acceptable arbitrator".[265] Voluntary interest arbitration is further divided into two forms: automatic arbitration and ad hoc arbitration.

According to Brand:

> In automatic arbitration the parties agree that in the future all disputes of a particular kind will be referred to arbitration whereas in ad hoc arbitration the parties agree that a simple existing dispute will be referred to arbitration.[266]

---

260 Brand "The potential for interest arbitration in South Africa" 61-64.
261 Anderson and Krause 1987 *FLR* 153.
262 Brand "The potential for interest arbitration in South Africa" 61-64.
263 Brand "The potential for interest arbitration in South Africa" 61-64.
264 Brand "The potential for interest arbitration in South Africa" 61-64.
265 Brand "The potential for interest arbitration in South Africa" 61-64.
266 Brand "The potential for interest arbitration in South Africa" 61-64.

The position is slightly different with regard to compulsory interest arbitration. Compulsory arbitration is a purely legal process. The disputing parties are compelled by law to go to arbitration and an arbitrator is imposed on them.[267]

What is of fundamental importance is the fact that interest arbitration is a legislative process that entitles an arbitrator to write the terms of the parties' contract.[268] The essence of interest arbitration is the fact that it is a legislative process, and furthermore the decision of the arbitration panel is binding on the parties affected. In other words, the arbitration panel does not merely give an advisory award but the decision is binding on the parties.

Interest arbitration is fundamentally different from the other methods of dispute resolution for the sole reason that the arbitrator takes public interest into account when attempting to resolve a dispute; therefore it acknowledges the fact that a strike action does not only affect the parties involved in a strike but also the community and sometimes the country as a whole.

Anderson and Krause[269] contend that interest arbitration enables all employees to achieve favourable employment contract terms and that it is attained by offering an alternative to the right to strike. According to Faber and Katz[270] intervention in the form of interest arbitration is an alternative that has been used in many jurisdictions. There is some quarrel about the exact figure, but at least twenty states have adopted laws providing for interest arbitration to resolve disputes. However, the application of these statutes is commonly restricted to essential services.[271] It may without doubt be contended that interest arbitration does work in certain jurisdictions. With that background in mind the following question remains unanswered: Why is South Africa not making use of interest arbitration in its attempts to combat prolonged and lengthy strike actions? Generally

---

267 Brand "The potential for interest arbitration in South Africa" 61-64.
268 Morgan 2009 http://www.morganlewis.com
269 Anderson and Krause 1987 *FLR* 156.
270 Faber and Katz 1979 *ILR Review* 55.
271 Anderson and Krause 1987 *FLR* 157.

interest arbitration is rare in the private sector because parties use economic pressure to resolve disputes.[272]

In the South African context, a possible answer to this question may be the following: South Africa makes use of compulsory arbitration in the public sector because it is illegal for employees engaged in essential services to embark on a strike action. Therefore, disputes between those employees and their employers must be resolved by way of compulsory arbitration. On the other hand, in the private sector employees' right to strike is not limited as much as in the public sector provided the said strike meets with all the requirements set out in section 64(1) of the LRA.[273]

In South Africa, compulsory arbitration is implemented as a substitute for strike action and not as an ancillary or supplement of the collective bargaining system. Stated differently: It is the one or the other; both do not co-exist. It is evident from the American perspective that the private sector can also make successful use of interest arbitration.[274] Morris[275] extensively argued that, make effective use of interest arbitration it should be used as a supplement of the collective bargaining system and not as a substitute. Thus from Morris's argument it is evident that interest arbitration can be successfully implemented in the private sector.

It is therefore possible for South Africa to adopt interest arbitration in the private sector to combat prolonged, lengthy and community-crippling strike actions. However, interest arbitration should be implemented as suggested by Morris. It should be a supplement of the collective bargaining system and not a substitute.[276] This would mean that workers would still have their constitutional right to strike, and interest arbitration would only be invoked where a strike action loses its functionality or lasts for a long time. In doing so, it would ensure that workers practice their constitutional right to strike and if a dispute

---

272 Morgan 2009 http://www.morganlewis.com.
273 Section 64.
274 Morris 1976 *IRLJ* 431.
275 Morris 1976 *IRLJ* 431.
276 Morris 1976 *IRLJ* 431.

remains unresolved after embarking on a strike action, a further and final avenue of compulsory interest arbitration would be available as an alternative to settle a dispute.

As already stated employees cannot strike forever. Even though employees do have a constitutional right to strike it is highly doubtable that it was the intention of the drafters of the Constitution that employees must strike for five consecutive months. The threat of interest arbitration is meant to urge the parties involved rather to come up with a mutual agreement than to face terms imposed by a third party.[277] That is in essence what distinguishes interest arbitration from other dispute resolution methods. However, there is still uncertainty regarding the strength of the threat of interest arbitration. In other words, would the threat of interest arbitration always force parties to reach mutual agreement and in the process avoid the interest arbitration process?[278]

The uncertainty surrounding interest arbitration is the incentive for most agreements. Consequently the threat of interest arbitration does in fact affect the mind-set of a negotiator. Ricketson[279] contends that interest arbitration may be less costly than a strike and a lockout. There are two types of interest arbitration procedures mainly used in the United States of America namely conventional and final offer arbitration.[280]

4.1.1 Types of interest arbitration procedures

As already mentioned there are two types of interest arbitration procedures mainly used in the United States of America namely the conventional and the final offer interest arbitration. However, the two types mentioned above are not the only kind of interest arbitration. Brand identified further varieties of interest arbitration, namely:

- Conventional arbitration of all unsettled claims;
- Selection of the last offer of the employer or of the union on an issue by issue basis;
- Selection of the last offer of the employer or of the union or the fact finder's report on a single package;

---

277 Ricketson 2013 *SLRCSS* 1.
278 Ricketson 2013 *SLRCSS* 1.
279 Ricketson 2013 *SLRCSS* 1.
280 Anderson and Krause 1987 *FLR* 157.

- Selection of the last offer of the employer or of the union or the fact finder's report on an issue by issue basis; and
- Separation of the dispute into economic and non-economic issues and employing one of the selection procedures outlined above.[281]

It is submitted by Ricketson[282] that the different methods are important in that they each have a different effect on the negotiation process. It is self-evident from Ricketson's submission that what might work in the one process is no guarantee that it is going to work in another process. Some statutes make it possible for the parties to choose voluntarily which procedure to use.[283] According to Anderson and Krause[284] some statutes go as far as to adopt a combination of conventional and final offer arbitration. It is argued that such combination treats economic and non-economic issues differently. The learned authors prefer the use of conventional interest arbitration due to the reason that "it gives the arbitrator the greatest latitude in deciding the issues in dispute".[285]

Evidence plays a fundamental role in interest arbitration. An arbitrator or an arbitration panel is presented with evidence from both the employer and union representing the employees.[286] The arbitrator is then tasked to examine the information provided by both parties including past agreements, similar agreements, and the parties' current offers.[287] After considering the information the arbitrator is required, based on the information, to consider an appropriate contract. Another immensely important aspect about interest arbitration is that almost all interest arbitration statutes either expressly or implicitly provide standards to guide the arbitrators in evaluating evidence and arguments presented by parties.[288]

By consulting the standards, the arbitrators know exactly which evidence is relevant and which is not. Because of this exercise, irrelevant evidence is disregarded and the arbitrator can only focus on the relevant information. It is argued that the statutory

---

281 Brand "The potential for interest arbitration in South Africa" 61-64.
282 Ricketson 2013 SLRCSS 2.
283 Anderson and Krause 1987 *FLR* 157.
284 Anderson and Krause 1987 *FLR* 157.
285 Anderson and Krause 1987 *FLR* 158.
286 Anderson and Krause 1987 *FLR* 158.
287 Anderson and Krause 1987 *FLR* 158.
288 Anderson and Krause 1987 *FLR* 158.

standards that the arbitrators must consider mostly include the following: The lawful authority of the employer, the interest and welfare of the public, the comparability of the wages, and the cost of living.[289]

Unlike other dispute resolution methods interest arbitration goes one step further to include the consideration of 'the interest and welfare of the public' and 'the cost of living'. Most strike actions in South Africa are about wages. Workers are dissatisfied with their wages. Their plight is that the cost of living is high but their wages are low.[290]

The plight of the workers goes to the heart of one of the standards considered in the interest arbitration process – 'cost of living'. It is self-evident that if most of the strike actions in South Africa are caused by unhappiness over wages, that one of the standards that has to be taken into consideration in the interest arbitration process is 'cost of living'. It must then follow that interest arbitration might provide a possible solution to lengthy and prolonged strike actions in South Africa. The argument is substantiated by the fact that interest arbitration goes to the root cause of prolonged and lengthy strike actions in South Africa.

Furthermore, it was already stated that strikes do not function in a vacuum. The public as a whole is affected when a strike action last for months. To the benefit of the interest arbitration process it does offer some protection to the public by obliging an arbitrator to take into consideration the 'interest and welfare of the public'.[291] That means that if a strike action is clearly affecting the public interest and welfare negatively an arbitrator should consider it when preparing his/her decision.

Both 'cost of living' and 'public interest and welfare' plays a prominent role in the interest arbitration process. What constitutes 'interest and welfare of the public' is not self-defining;[292] thus it may vary from state to state. What constitutes interest and welfare of

---

289 Anderson and Krause 1987 *FLR* 160.
290 Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.
291 Anderson and Krause 1987 *FLR* 160.
292 Anderson and Krause 1987 *FLR* 161.

the public in South Africa may differ from what constitutes interest and welfare of the public in New York.

It is of immense importance to decide beforehand which interest arbitration procedure is going to be utilised due to the reason that the procedures differ and the arbitrator or arbitration panel look for different things in each procedure. Ricketson offers the following argument regarding conventional interest arbitration:

> In the conventional interest arbitration, the arbitrator is free to give an award that is either one side's final offer, or somewhere between the final offers.[293]

The main idea behind this procedure is the uncertainty of where between the final offers the arbitrator will decide.[294] This uncertainty to a large extent forces the parties to do research and prepare well for the procedure in order to assist the arbitrator to arrive at the correct decision, given the fact that the decision of the arbitrator is binding on the parties. Ricketson[295] further argues that of the two methods of interest arbitration, conventional interest arbitration seems to lead to the best chance of reaching a negotiated settlement.

On the other hand final offer interest arbitration is newer than conventional interest arbitration and it is further divided into two different approaches.[296] The first approach is where the arbitrator looks at the full final offers of both sides, and based on those two final offers the arbitrator chooses one of them as being the best option.[297] The other approach is to look at each outstanding issue on an issue-by-issue basis and to choose one side's final offer over the other.[298]

The arbitrator is therefore required to examine the final offers of the parties and to decide which side has the fairest offer. The problem with this approach arises where both parties bona fide believe that their offer is fair. It makes it almost impossible for the parties to reach a settlement because they are under the impression that their respective offers are

---

293 Ricketson 2013 *SLRCSS* 2.
294 Ricketson 2013 *SLRCSS* 2.
295 Ricketson 2013 *SLRCSS* 2.
296 Ricketson 2013 *SLRCSS* 2.
297 Ricketson 2013 *SLRCSS* 2.
298 Ricketson 2013 *SLRCSS* 2.

fair. With the background in mind it seems fair to come to the conclusion that conventional interest arbitration is the better procedure to use, even more so in a country like South Africa where parties engaged in collective bargaining are usually reluctant to reach settlements timeously.[299] Like any other process, interest arbitration is not entirely immune against criticism.

4.1.1.1 Arguments for and against compulsory interest arbitration

Similar to any other process or procedure interest arbitration also has its pros and cons. To make an informed decision one has to study both the pros and the cons. Horton argues extensively that, in certain situations, interest arbitration may present the only practical means to avoid strikes that threaten vital public interest.[300] It is self-evident from the Marikana strike that parties often fail to appreciate the fact that public interest is affected during a strike action. It is even more so when a strike action lasts for an extended period. In instances such as the Marikana strike, action processes like interest arbitration are required to protect the interest of both concerned parties and the public at large.

Simply said it is unfair towards the public to suffer as a result of a strike that unnecessarily lasts for a long time. The plight is therefore that the LRA should make provision for procedures that will take public interest into consideration when dealing with parties who are unable or reluctant to reach an agreement. Horton further argues, and correctly so, that:

> Attempts to avoid or terminate certain strikes must be made for ethical reasons because they might result in the death or personal injury of individuals not involved in the dispute.[301]

By close examination of the argument made by Horton, one cannot help but to think of the Marikana strike where security guards, who were not per se involved in the dispute, were killed.[302] Horton exposes the dangers of certain strikes and the need to have

---

299 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.
300 Horton 2014 *ILR Review* 498.
301 Horton 2014 *ILR Review* 498.
302 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.

legislation governing such dysfunctional and prolonged strikes. At this stage it is evident that interest arbitration has the potential to be the solution for prolonged and lengthy strike actions.

The consequences of the Marikana strike action were such that the Minister of Labour communicated that she was considering the introduction of compulsory arbitration.[303] However, there are hurdles that one must clear before considering the introduction of compulsory arbitration. The first and most important challenge is the constitutionality of limiting the right to strike. Rycroft argues that:

> The Constitutional Court has recently ruled that it is not for a court to restrict the scope of collective bargaining tactics that, legitimately, may be robust. At the very moment when the strike is proving most effective the requirement to suspend the strike effectively dilutes and removes the weapon from employees.[304]

From Rycroft's argument it is crystal clear that the highest court in the country is reluctant to restrict the right to strike, even if a strike has devastating consequences. Much emphasis is placed on the right to strike by the courts, and rightly so, because the right to strike plays a fundamental role in collective bargaining. However, just like any right in the Bill of rights, the right to strike is also subject to limitation under section 36 of the Constitution. The courts should weigh the right to strike and public interest against each other. Who is suffering the most as result of the strike action? Is it the employer on whom the strike is intended to inflict economic harm or the public at large?

In South Africa no right is absolute. Even the right to strike is subject to limitation where it is clearly against the public interest.[305] Limiting the right to strike does not mean that workers do no longer have the right to strike. Workers may strike, however, for a certain period. In this dissertation it is suggested not exceeding two months.

The second argument advanced by Rycroft[306] is that compulsory arbitration provides an incentive to prolong a strike in order to get to compulsory arbitration. The following argument could be made to counter Rycroft's argument: The uncertainty of the outcome

---

303 Rycroft 2015 *ILJ* 15.
304 Rycroft 2015 *ILJ* 15.
305 Section 36.
306 Rycroft 2015 *ILJ* 15.

of the arbitration, and the fact that the decision of the arbitrator is binding on the parties, pose some threat to both the employer and the trade union. As a result, it would to some extent compel the parties to choose to agree to their own terms and conditions than to have a third party prescribing to them what to do. The fact that the decision of the arbitrator is not a forgone decision to a large extent forces the parties to settle the matter rather than to prolong a strike to get to compulsory arbitration.

Thirdly, Rycroft[307] is concerned about the obtaining of an arbitrator who has sufficient training to understand the short and long term planning of large employers. Rycroft has a valid argument. Skills shortage may pose some difficulties for interest arbitration. However, that does not mean that there are no other options available. No legislation in South Africa prohibits an arbitrator to consult an expert in complex matters such as the complexity of balance sheets, long-term planning, and the unpredictability of the markets. It is in fact a well-established practice in South African courts for judges to call on experts to assist in complex issues requiring expert knowledge; consequently, the argument of Rycroft that skills shortage should not be regarded as an absolute barrier for the introduction of compulsory interest arbitration.

Rycroft's[308] last argument is that legislation providing for compulsory arbitration will be out of step with recommendations of the ILO. What the learned author is in fact arguing here is that, by imposing compulsory arbitration, one will be violating the right of trade unions to organise their activities freely. Again, the argument made by the learned author is a valid and persuasive argument. However, for purposes of this dissertation the argument is not that compulsory interest arbitration should replace the right to strike.

Employees may take part in a strike. However, if a strike lasts longer than a certain period (according to this dissertation two months) and it is clear that no agreement is going to be reached soon the matter must be referred for compulsory interest arbitration in terms of legislation. Therefore compulsory interest arbitration would be an ancillary or supplement of the collective bargaining system and not a substitute.

---

307 Rycroft 2015 *ILJ* 16.
308 Rycroft 2015 *ILJ* 17.

The above shows that, despite the many arguments against compulsory arbitration, there are equally good arguments in favour of it. With that in mind, it is my submission that compulsory interest arbitration may provide a possible solution for prolonged and lengthy strike actions. It must be mentioned that the process does not end there; in a situation where one of the parties is not satisfied with the decision of the arbitrator, there are further options that the grieved party may explore.

4.1.1.1.1 The role of the courts of law

Interest arbitration is a unique legislative process in the sense that each state making use of the process has the ability to make its own rules regarding interest arbitration.[309] Not all states making use of interest arbitration view it the same:

> Most states that use interest arbitration have a system where arbitrators are allowed, and even encouraged, to mediate the disagreement throughout the arbitration proceedings. Other states see arbitration as more of a legal proceeding, where there are strict rules as regarding how each section of the contract is awarded. In these states, there are instances of judges overturning contracts due to not placing emphasis on certain criteria over others.[310]

What is clear from the above contentions is that, when a state envisages to implement interest arbitration into its collective bargaining system, it must be clear as to what form of interest arbitration it is going to use. Will it use the legal form of interest arbitration or the form where the arbitrator is allowed to mediate disagreements throughout the arbitration proceedings?

For a country such as South Africa with its struggle against violent and lengthy strike actions, it would be advisable to make use of the form of interest arbitration where arbitration is seen as a legal proceeding, where there are strict rules and where judges may overturn contracts due to not placing emphasis on certain criteria over others. An important aspect of the interest arbitration process is that a party cannot appeal the decision of an arbitrator but may take such decision on review to a court of law. Anderson and Krause contend that:

---

309 Ricketson 2013 *SLRCSS* 2.
310 Ricketson 2013 *SLRCSS* 2.

> To facilitate judicial review of interest arbitration awards, some statutes explicitly require that the arbitration panel specify the basis for its award.[311]

The learned authors went as far as to argue that it is not sufficient for an arbitration panel to merely state that it considered the statutory standards.[312] In other words, there must be concrete reasons for the decision made by an arbitration panel. The court in *Buffalo Police Benevolent Association v City of Buffalo*[313] held that a statement in an award that "all economic issues were considered" does not suffice. The review court must be guided by the award. In other words, the reasoning of the arbitration panel must be extensive and comprehensive.

In New York City objectivity and impartiality play a fundamental role when it comes to review proceedings.[314] It is argued that an interest arbitration award can be vacated if the award is not based on objective and impartial consideration of the entire record.[315] What is self-evident is the fact that the courts rely on procedural fairness and the existence of evidence to support or diverge from the conclusions of an interest arbitration panel. According to Anderson and Krause 'interest arbitration has proven an effective method of avoiding and resolving employment disputes'.[316] The authors substantiated their contention with the following argument:

> The acceptance of the constitutionality of interest arbitration by the courts and the acceptance of the process by the parties demonstrates that this important means of dispute settlement has been developed in accordance with our democratic principles.[317]

The fact that interest arbitration does provide a further avenue for an aggrieved party to challenge the decision of an arbitrator further strengthen the argument that South Africa would benefit from the process of interest arbitration. Currently the South African courts play a passive role when it comes to matters related to strike action. Due to the lack of jurisdiction, the courts cannot help but sit and look how dysfunctional and lengthy strike actions adversely affect the public interest. With the introduction of compulsory interest

---

311 Anderson and Krause 1987 *FLR* 165.
312 Anderson and Krause 1987 *FLR* 165.
313 *Buffalo Police Benevolent Association v City of* Buffalo 1986 19 PERB 7510, 7520.
314 Anderson and Krause 1987 *FLR* 166.
315 Anderson and Krause 1987 *FLR* 166.
316 Anderson and Krause 1987 *FLR* 172.
317 Anderson and Krause 1987 *FLR* 179.

arbitration, the courts would play a more active role in employment disputes; also to facilitate review proceedings based on the principles of procedure fairness and impartiality.

Chapter 5: Conclusions and recommendations

5.1 Conclusions

In South Africa the Constitution is the supreme law and in terms of the Constitution everyone has the right to freedom of association.[318] As yet there has not been a single case dealing with whether the right to associate also implies the right not to associate. What is clear is that the right to freedom of association is currently interpreted as a collective right and not an individual right.[319] That explains why closed shop and agency shop agreements are still legal in the South African jurisprudence despite the danger these agreements pose to the constitutional right of workers to associate with a trade union of their choice.[320]

The primary objective of closed shop and agency shop agreements violates the fundamental principle of the right to freedom of association, which is to associate with an organisation of one's choice.[321] Forcing workers to belong to a certain trade union contributes to a large extent to trade union rivalry in the sense that the union favoured by such an agreement sets bargaining thresholds beyond the reach of minority unions. This creates a situation where unions would do anything to acquire more members to stay relevant within the collective bargaining structures of an organisation because without its members a union is a powerless body.

The time has come that the legislator revisits the use of closed shop and agency shop agreements, because such agreements violates the following rights of workers and their trade unions: workers' right to freedom of association,[322] to "form and join a trade

---

318 Section 2 and Section 18.
319 Budeli 2010 *Obiter* 16.
320 See chapter 1 dealing with freedom of association.
321 Budeli 2010 *Obiter* 16.
322 Section 18.

union,[323] to "participate in the activities and programmes of a trade union,[324] and the trade unions' right to engage in collective bargaining.[325]

As witnessed at Marikana, unions would even use inappropriate platforms to recruit members,[326] because the message is loud and clear to the unions: grow or stagnate. The Marikana strike called for cooperation between the two trade unions involved, namely Amcu and NUM. However, the rivalry between the two unions was of such a nature that it obstructed logical thinking by the leaders of the respective unions. The LRA also does not do much to eradicate trade union rivalry. On the contrary, the LRA's support for the principle of majoritarianism contributes to the intensity of trade union rivalry.

Having provisions favouring larger unions at the expense of minority unions to a large extent intensifies union rivalry. As a result, minority unions are left with no choice but to use each and every platform available to them to recruit members. This also occurred at Marikana. Collective bargaining, if correctly regulated and implemented, could advance labour relations and orderly collective bargaining. The South African collective bargaining system is profoundly based on the principle of majoritarianism as not all unions may engage in collective bargaining with an employer. Only unions that are sufficiently representative are eligible to participate in the collective bargaining system.

In terms of section 18 of the LRA a majority union may conclude a collective agreement with an employer concerning representivity thresholds, etc.[327] Section 18 of the LRA clearly illustrates the support of the Act for the principle of majoritarianism. The Legislator should create an environment of cooperation between trade unions, in other words all unions should be equal before the law. Legislation should avoid contributing to rivalry between unions by using provision which favour larger unions at the expense of minority unions.[328]

---

323 Section 23(2)(a).
324 Section 23(2)(b).
325 Section 23(5).
326 Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024.
327 Section 18.
328 Kruger and Tsoobe 2013 *PER* 295.

The Constitution further does not expressly provide for a duty to engage in collective bargaining. In other words, employers and trade unions are not constitutionally obliged to engage in collective bargaining with one another.[329] Currently an employer may refuse to engage in collective bargaining with a trade union if it so wishes. However, one must add that in such circumstances a trade union is not left without recourse. A trade union may strike in order to compel an employer to engage with it in collective bargaining.[330]

In the light of trade union rivalry in South Africa the legislator should revisit provisions such as section 18, which clearly favours majority unions at the expense of minority unions.[331] The legislator should rethink the position of minority unions within the collective bargaining framework due to the fact that, even though minority unions are smaller in numbers then larger unions, minority unions still play a fundamental role in the workplace.[332] Provisions, such as section 18 of the LRA that clearly favours majority unions, should be amended to such an extent that it caters for both majority and minority unions.

Currently, in the South African jurisprudence, there is no expressed duty to bargain in good faith. The lack of such a duty to bargain in good faith to some extent does affect the attitudes of the parties towards the collective bargaining system. There is a need for both a duty to engage in collective bargaining and a duty to bargain in good faith. Again, the legislator is called to action to reintroduce the duty to bargain collectively and, whilst bargaining, to be compelled to bargain in good faith. Because the LRA gives effect to section 23(5) of the Constitution it should be revisited to reintroduce the duty to bargain collectively and in good faith. That would mean that parties would be legally obliged to bargain with each other and, whilst engaging in collective bargaining, the parties would be legally obliged to bargain with each other in good faith. This means that the parties should at all times avoid entering into collective bargaining with a predetermined position. There should be room for compromises.

---

329 Grogan *Workplace Law* 419.
330 Kruger and Tsoobe 2013 *PER* 295.
331 Kruger and Tsoobe 2013 *PER* 295.
332 Kruger and Tsoobe 2013 *PER* 295.

Strike action plays a fundamental role in the collective bargaining system. It is an ancillary of the collective bargaining system and not a substitute.[333] In terms of both the Constitution[334] and the LRA[335] every employee has the right to take part in a strike action. However, just like any other constitutional right, the right to strike is not an absolute right and it may be limited.[336] Interestingly, the right to strike is limited in two ways, namely, in terms of section 36 of the Constitution and section 65 of the LRA.

Strike actions are utilised by trade unions to induce employers to accede to their demands. The primary objective of a strike action is to inflict economic harm on an employer. In other words, it is supposed to serve as a threat to induce an employer to accede to the demands of workers.[337] However, strike actions in South Africa are currently not extensively regulated by legislation. That is so because, as it stands, there is no single legislation regulating the duration of strike actions.

Currently workers are in a position to strike for as long as the employer is not willing to accede to their demands. That can be for two to five months, as witnessed at Marikana. There is a need for the regulation of the duration of strike actions. It is highly doubtable that it was the legislator's intention for strike actions to last for a long period. Strike actions do not function in a vacuum. Besides the workers taking part in a strike action, other people are also affected by strike actions.[338] There is thus a need for the regulation of the duration of strike actions, and there is a need also for a system that would take into account the interest of the public when dealing with labour disputes which do affect the public.

What the legislator could do in this regard is to extend the scope of section 64 of the LRA, which already deals with strike actions, or to extend the scope of the definition of strike action in terms of section 213 of the LRA. Regarding section 64 of the LRA the legislator could include a further avenue, in this case interest arbitration, which compels

---

333 Manamela and Budeli "Employees' right to strike and violence in South Africa" 308.
334 Section 23(2)(c).
335 Section 64.
336 Section 36.
337 Manamela and Budeli "Employees' right to strike and violence in South Africa" 308.
338 Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike.

the parties to refer a dispute which remains unresolved after a strike action for interest arbitration. With regard to section 213 the definition of a strike could be broadened by adding a phrase such as: 'any dispute that remains unresolved after embarking on a strike action that lasted for two months must be referred for compulsory interest arbitration'.

Interest arbitration is a system that takes the public interest into consideration when dealing with labour disputes.[339] The scope of interest arbitration is much broader than the general arbitration processes.[340] Furthermore, the decision of the arbitrator or arbitration panel, unlike general arbitration, is binding upon the parties; it is not merely an arbitration award. That means that only a judgement of a court of law can overturn the decision of the arbitrator or the arbitration panel.[341] Interest arbitration provides courts with an active role in labour disputes. The courts are given the opportunity to have the final say in labour disputes that do reach the courts. In South Africa the interpretation and development of the law lies with the judiciary. It would thus make sense to give the judiciary an active role when it comes to labour disputes that do affect the public interest.[342]

The courts are the guardians of the Constitution and, in terms of the Constitution the judicial authority of the Republic is vested in the courts;[343] hence, it is for the courts to decide what does and does not constitute public interest, and the courts can only do that if they are enabled to do so. Interest arbitration is an appropriate system that allows courts to play a more active role in labour disputes that do affect the public interest.[344] It seems that interest arbitration could provide a possible solution to remedy problems associated with lengthy and prolonged strike actions in South Africa.

South Africa already makes use of interest arbitration in the public sector.[345] What remains to be done, is to implement compulsory interest arbitration in the private sector. America

339 Ricketson 2013 *SLRCSS* 2.
340 Ricketson 2013 *SLRCSS* 2.
341 Ricketson 2013 *SLRCSS* 2
342 Section 165.
343 Section 165.
344 Ricketson 2013 *SLRCSS* 2.
345 Section 74.

has shown that it is possible for interest arbitration to be utilised in the private sector.[346] From a South African perspective, interest arbitration should be implemented as a supplement of the collective bargaining framework and not as a substitute. Workers must still enjoy their constitutional right to partake in any activities of their unions including to strike. However, where a strike action exceeds two months and the dispute is still not resolved, such a dispute must be referred for interest arbitration. Because of the fact that strike actions have become a daily occurrence in South African news interest arbitration should be made a purely legislative process. It should, in other words, not be a voluntary process based on willingness of the parties.

5.1.1 Recommendations

- The legislator should revisit the application of closed shop and agency shop agreements as the two forms of agreement do affect the employees' constitutional right to freedom of association. A possible solution could be to do away with the system of closed shop and agency shop agreements. All unions should be treated the same irrespective of the number of its members.

- The legislator should also revisit some of the provisions of the LRA favouring majority unions at the expense of minority unions. This provision to a large extent contributes to trade union rivalry and also undermines the constitutional rights of minority unions. The legislator could amend the provisions favouring majority unions to such an extent that it makes the playing field equal for both majority and minority unions. For example, section 18 of the LRA could be amended to ensure that it does not only protect the rights of majority unions but also those of minority unions.

- There is a need for greater regulation of the collective bargaining system as the voluntarism system is not working effectively. Because of the voluntary nature of the system, the parties often do not give their full cooperation and this lack of

346 Morris 1976 *IRLJ* 431.

cooperation could sometimes have severe consequences. The suggestion is that collective bargaining should be a purely legislative process.

- South Africa should consider reintroducing the duty to bargain as well as the duty to bargain in good faith as it was applied under the 1956 LRA. Where there is a legal duty to behave in a certain way and one fails to do so, there are remedies in law that the aggrieved party may use. Thus, the legislator should consider reintroducing a duty to bargain collectively and a duty to bargain in good faith. Any party in breach of such a duty would be held liable. Introduction of such duties would compel the parties to cooperate with one another, and cooperation is at the heart of collective bargaining.

- There is a need to regulate the duration of strike actions. The LRA should prescribe the length of strike actions in order to avoid situations where strike actions last for up to five months. The legislator could limit the duration of strike actions to two months and, if the dispute remains unresolved after the two months, it must be referred for compulsory interest arbitration. Interest arbitration would thus be the final step in all disputes that remain unresolved after strike action.

- Educate parties about the advantages of interest arbitration and encourage them to make proper use of the process. The CCMA should be entrusted with the duty to educate parties about the process of interest arbitration. Compulsory seminars can be held to educate all stakeholders about the interest arbitration process.

- Interest arbitration should be considered as a possible solution for prolonged and lengthy strike action. It should not be utilised as a substitute for strike action but used in circumstances where a strike has lasted longer than the period prescribed by the LRA. In such circumstances, parties should be obliged to refer the matter for interest arbitration. For example, if interest arbitration had been applicable at the time of the Marikana strike action, the employer and unions would have been compelled by legislation to refer the matter for interest arbitration after two months. This means that the workers would not have been on strike for five consecutive months. Interest arbitration should be the last and final step in collective bargaining.

BIBLIOGRAPHY
Literature

Anderson and Krause 1987 *Fordham Law Review*

Anderson A and Krause L "Interest Arbitration: The Alternative to the Strike" 1987 *Fordham Law Review* 153-179

Basson *et al Essential Labour Law*

Basson *et al Essential Labour Law* 4th ed (Labour law publication2005)

Anon 1956 *Fordham Law Review*

Anon "Duty of labor union to bargain collectively in good faith: An unresolved issue" 1956 *Frodham Law Review* 319-330

Brand "The potential for interest arbitration in South Africa" 1-105

Brand J "The potential for interest arbitration in South Africa" in Brand J and Levy A *The* dispute *resolution* (JUTA Cape Town 2015) 1-105.

Budeli 2010 *Obiter*

Budeli M "Understanding the right to freedom of association at the workplace: Components and scope" 2010 *Obiter* 16-33

Budeli 2009 *Fundamina*

Budeli M "Workers' right to freedom of association and trade unionism in South Africa: A historical perspective" 2009 58-74

Chicktay 2012 *obiter*

Chicktay M."Definng the right to strike: A comparative analysis of international labour organisation standards and South African law" 2012 obiter 260-277

Clark "The Duty to bargain"

Clark R "The duty to bargain" 54-72

Cohen 2014 *PER*

Cohen T "Limiting organisational rights of minority unions: POPCRU V Ledwaba 2013 11 BLLR 1137 (LC)" 2014 *PER* 1-2

Du Toit *et al Labour Relations Law*

Du Toit D *et al Labour Relations Law* 3rd ed (Butterworths Durban 1999)

Du Toit *et al Labour Relations Lawand*

Du Toit D *et al Labour Relations Law* 5th ed (LexisNexis Durban 2006)

Du Plessis, Forchè and Jordaan *A practical guide to Labour Law*.

Gericke 2012 *THRHR*

Gericke SB "Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law" 2012 *THRHR* 566-585

Grogan *Collective Labour Law*

Grogan *Collective Labour Law* (Juta Grahamstown2007)

Grogan *Workplace Law*

Grogan *Workplace Law* 10th ed (Juta Grahamstown 2009)

Grogan "Labour Relations" 472-515

Grogan J "Labour Relations" in Currie and De Waal *The Bill of Rights Handbook* (JUTA Cape Town 2013) 472-515

Horton 1975 *Industrial and Labour Relations Review*

Horton R "Arbitration, Arbitrators, and the Public Interest" 1975 *Industrial and Labour Relations Review*" 497-507

Kruger and Tsoose 2013 *PER*

Kruger J and Tshoose CI "The impact of the LABOUR RELATIONS ACT on minority trade unions: a South African perspective" 285- 323

Manamela and Budeli 2013 *CILSA*

Manamela E and Budeli M"Employees' right to strike and violence in South Africa" 2013 *CILSA* 309-335

Molusi 2010 *obiter*

Molusi "THE CONSTITUTIONAL DUTY TO ENGAGE IN COLLECTIVE BARGAINING" 2010 o*biter* 156-166

Morris 1976 *Industrial Relations Law Journal*

Morris C "The role of interest arbitration in a collective bargaining system" 1976 *Industrial Relations Law Journal* 427-531

Ricketson 2013 *Schmidt Research Center Seminar Series*

Ricketson D "INTEREST ARBITRATION IMPASSE RATES" 2013 *Schmidt Research Centre Seminar Series* 1-12

Rycroft 2015 *ILJ*

Rycroft A "Strikes and the amendments to the LRA (2015) 36 ILJ 1 2015 ILJ" 2015 *ILJ* 1-93

Samuel 2013 *Journal of Contemporary Management*

Samuel M "THE MINEWORKERS' UNPROCEDURAL STRIKE: SETTING THE PATH FOR REDEFINING COLLECTIVE BARGAINING PRACTICE IN SOUTH AFRICA" 2013 *Journal of Contemporary Management* 239-258

Schoeman 2013 *PER*

Schoeman "The Rights granted to trade unions under the Companies Act 2008" 2013 *PER* 237-251

Schutte and Lukhele "The real toll of South Africa's labour aggressiveness"

Schutte and Lukhele "The real toll of South Africa's labour aggressiveness" 69-73

Van Niekerk and Smit *Law@work*

Van Niekerk et al Law@work 3rd ed (LexisNexis Cape Town 2014)

Case law

Buffalo Police Benevolent Association v City Buffalo 1986 19 PERB 7510

Ceramic Industries Ltd t/a Belta Sanitaryware v NCABAWU 1997 18 ILJ 671 (LAC)

Ex parte chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa, 1996 1996 17 821 (CC)

Food and Allied Workers Union v Spekenham Supreme 1988 9 ILJ 628 (IC)

NAWU v Hart Ltd 1985 6 ILJ 478

NPSU v National Negotiating Forum 1991 4 BLLR 361 (LC)

SANDU v Minister of Defence 2003 24 ILJ 1495 (T)

SANDU v Minister of Defence 2006 27 ILJ 2276 (SCA)

SANDU v Minister of Defence 2007 9 BLLR 785 (CC)

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

Simba (Pty) Ltd v FAWU 1997 5 BLLR 602 (LC)

Stuttafords Department Stores Ltd v SA Clothing & Textile Workers Union 2001 22 ILJ 414 (LAC)

Vodacom (Pty) Ltd v CWU 2010 8 BLLR 836 (LAC)

West Hartford Education Ass 'n v Decourcy 1972 162. Conn. 566, 295 A. 25 562

Legislation

Constitution of the Republic of South Africa, 1996

Labour Relations Act 66 of 1995

International Instruments

International Labour Organisation Convention 87 (Freedom of Association and the Right to Organise)

Internet Sources

Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf

Anon 2015 http://www.sahrc.org.za/home/21/files/marikana-report-1-pdf accessed 25 September 2015

Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike

Seccombe 2014 http://www.bdlive.co.za/business/mining/2014/11/10/lonmin-bears-brunt-of-five-month-strike accessed 20 March 2015

Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024

Anon 2014 http://www.fin24.com/Economy/Labour/News/Marikana-strike-haunts-SA-economy-20141024 accessed 20 March 2015

Morgan date unknown http://www.morganlewis.com

Morgan date unknown http://www.morganlewis.com accessed 17 March 2015