

**THE ROLE OF STRIKE ACTION IN COLLECTIVE  
BARGAINING WITH MORE EMPHASIS ON THE SOUTH  
AFRICAN LABOUR RELATIONS**

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## **1. Introduction**

The relationship in the employment environment is unfortunately based on inequality that is vertical in terms of power. The employer is the source of authority while the employee has no authority. Historically, the employer and employee relationship was known as a master/servant relationship, and even today, this relationship is still there but in a narrowed different form. The only difference today is that, the worker/employer relationship is statutorily regulated and still the inequality is prominent. It has been established that conflict of interest is inherent in the employment relationship because of the inequality between the owners of means of production and owners of labour.<sup>1</sup> There are other factors that fuelled industrial conflict namely, the control/ownership over the means of production such as capital, machinery, technology, know-how, and decision-making in the enterprise, and the unequal distribution of the fruits of production. In the circle of production, the employers with the exception of labour that is owned by the employees, control almost all of the means of production.

It is an undisputed fact that conflict of interest in the workplace is based on power and subordination. It will always exist as long as there is inequality in the employment relationship. The chances that employers and employees will ever be equal partners are not possible because of the nature of the global economy. The later is driven by competition that is based on profit making. In the process, employees are exposed to exploitation, i.e low pay and poor working conditions. Therefore, the industrial conflict has to be contained or managed constructively. The question arose; how could employees protect themselves against their employers? Collective bargaining is the answer and is defined as follows:

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<sup>1</sup> Rycroft and Jordaan *A Guide to South African Labour Law* 114.

“A voluntary process for reconciling the conflict of interests and aspirations of management and labour through the joint regulation of terms and conditions of employment.”<sup>2</sup>

Collective bargaining is a continuous process of give and take. It is initiated by trade unions<sup>3</sup> and fulfils three basic functions namely:

- (a) it fulfils an economic function, in that it serves as a device for the regulation of individual and collective workplace relations, and the institutionalisation of industrial conflict;
- (b) it fulfils a social function, in that it establishes a system of industrial justice which protects employees from arbitrary action by management and which recognizes their right to human dignity; and
- (c) it serves a political function, in that it brings a measure of democracy to industrial life, giving employees a say in matters, that affect their work lives.

The *Labour Relations Act 66 of 1995 as amended (LRA)* has made a model provision of collective bargaining, which is set out to bring greater coherence and reduce the high levels of adversarial characteristic of collective bargaining.<sup>4</sup> Section 1(c) and (d) of the LRA defines the primary objects of the LRA as “to provide a framework within which employees and their trade unions, employers, and employers’ organizations can;

- (a) collectively bargain to determine wages, terms and conditions of employment and matters of mutual interests; and
- (b) formulate industrial policies and promote orderly collective bargaining at the workplace and sector level.”

The end product of collective bargaining is a hybrid of voluntarism, inducement and compulsion based on economic power. The legal rules relating to freedom of association and organisational rights are all aimed at making collective

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<sup>2</sup> Rycroft and Jordaan *A Guide to South African Labour Law* 116.

<sup>3</sup> Bendix *Industrial Relations in South Africa* 249

<sup>4</sup> Du Toit et al *Labour Relations Law: A Comprehensive Guide* 227.

bargaining possible. In terms of the LRA there is no general duty to bargain by employers and trade unions. An employer may refuse to engage with a trade union and in turn, the trade union can take strike action in respect of such a refusal to bargain. This is a dispute of interest and is subjected to power play. In pursuing the strike route, the union will have to comply with the provisions of the LRA in order to have its strike action protected.

It has been established that the under mentioned requirements must be in existence in order to allow collective bargaining to be effective:

- freedom of association, meaning that employees should be free to form trade unions and employers should also be able to form employers' organization;
- trade unions and employers organization should be willing to bargain;
- employees participating in protected strike should be protected by law; and
- collective agreements should be legally binding.

These requirements are statutorily protected by the *Constitution of the Republic of South Africa, 1996*<sup>5</sup> and *Labour Relations Act 66 of 1995* with the exception of the duty to bargain, which is voluntary.

It is submitted that the LRA promotes a pluralistic approach to the grant of bargaining entitlements, endorsing unions, which are sufficiently representative and not necessarily enjoying majority support. The aim of LRA in this regard is to discourage a proliferation of bargaining agents at both sectoral and workplace level. The LRA fosters collaboration between the different unions, as well as between organised business and labour at central level. It is said that these objectives hope to achieve, by wielding the proverbial carrot rather than the stick, unions acting jointly and those joining councils enjoying greater

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<sup>5</sup> *Constitution of the Republic of South Africa, 1996* will hereinafter be referred to as the Constitution.

rights.<sup>6</sup> Collective bargaining is not the exclusive domain of majority unions and minority unions have also the right to bargain collectively over the recognition of their shop stewards.<sup>7</sup> However, according to the court, this does not mean that the same considerations are necessarily applicable in the event of a right closely associated with collective bargaining, namely, the right to disclosure of relevant information, which is in terms of section 16 of the LRA likewise, available to majority unions only.<sup>8</sup>

In order for the role of strike action in collective bargaining to be understood, one needs to define it first. The definition of a strike contained in the LRA reads as follows:

“Strike ‘means’ 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.”<sup>9</sup>

The definition of a strike indicates that it has three elements or requirements namely: an action or omission of a prescribed nature, an action or omission must be concerted, and that an action or omission must have a prescribed purpose. Strike as an element of collective action may only be used to achieve collective goals of a trade union or group of employees.

Internationally it has been recognised that collective bargaining alone is not good enough to address labour relationships at the workplace. The imbalance of economic power is too wide between employers and trade unions/employees. Hence as a result most countries legalised the use of strike

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<sup>6</sup> Du Toit et al *The Labour Relations Act* of 1995 126-127.

<sup>7</sup> *NUMSA others v Bader Bop (Pty) Ltd and another* 2003 2 BCLR 182 (CC).

<sup>8</sup> Olivier “*Statutory Employment Relations in South Africa*” in Slabbert et al *Managing Employment Relations in South Africa* 73.

<sup>9</sup> Section 213 of the LRA.

action to give effect to collective bargaining. Strikes are allowed with certain qualifications. This point will be unpacked later in the discussion. A strike is meant to inflict economic harm on the employers with the aim of compelling them to accede to trade unions demands resulting from collective bargaining. Statutorily,<sup>10</sup> employers are not obliged to pay employees while on strike be it protected or not. The ultimate intention of a strike was captured by the Labour Appeal Court when it held 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 worker’s demands than have his/her business harmed further by the strike. The essence of a lock-out is that the employer denies the locked-out employees the opportunity to earn their wages, thereby causing financial harm to the locked-out employees, in the hope that after a certain point, the financial harm or pain inflicted on the employees would have been so much that they would consider that they would rather agree to the employer’s demands than continue to be subjected to the lock-out and to lose more wages.”<sup>11</sup>

The impact of strike action is known that it may lead to substantial economic and social damage. It is my view that the damage, which is accompanied by the strike action, is meant to force the parties to compromise and reach an agreement because it hurts both parties although the severity of the harm is not the same.

There is a view held by some scholars that:

“If the law were to ban strikes by employees, that would effectively end collective bargaining. It would deprive the union of the ultimate lever it has to extent it has to extract concessions from a recalcitrant employer. In the eyes of trade unionists, it would leave the employees with no more than the right to collective begging.”<sup>12</sup>

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<sup>10</sup> Section 67 (3) of the LRA.

<sup>11</sup> *Stuttafords Department Stores Ltd v SA Clothing & Textile Workers Union* 2001 22 ILJ 414 (LAC) at 422E-G

<sup>12</sup> *Weiler Reconcilable Differences – New Directions in Canadian Labour Law* 67.

The purpose of this research is to demonstrate the role of strike action in collective bargaining in the South African context and how our laws regulate the use or application of strike in collective bargaining process. An attempt will also be made to compare South Africa, Germany, Belgium, and United Kingdom to establish the extent to which strike action and collective bargaining are protected and how they operate.

## **2. Interpretation of Section 23(2)(c) and (5) of the Constitution**

The South African law recognises the importance of the role of strike action in labour relations. As a result, the right to strike and other labour law rights are protected as fundamental rights by the Constitution<sup>13</sup> such as the following:

- the right to fair labour practice;
- the right of workers to form and join a trade union and to participate in the activities and programmes of a trade union as well as the right of employers to form and join an employers' organisation and to participate in the activities and programmes of an employers' organization; and
- the right to organise and engage in collective bargaining.

Labour law rights are constitutionally entrenched. This means that it is difficult for parliament to change the Constitution than ordinary law. It is submitted that the Constitution is drafted with an eye to the future. It must be capable of growth and development in order to meet the changing circumstances.<sup>14</sup> The rights set out in section 23 of the Constitution provide a primary framework within which the labour statutes must be interpreted. The courts and others applying the statutes must distil the values underlying these rights and interpret the statutes in a way that gives effect to them.<sup>15</sup> Included in the rights conferred on trade unions and their members by section 23(2) of the Constitution is the

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<sup>13</sup> *The Constitution of the Republic of South Africa*, 1996 section 23.

<sup>14</sup> Du Toit et al *Labour Relations Law: A Comprehensive Guide* 58.

<sup>15</sup> Du Toit et al *Labour Relations Law: A Comprehensive Guide* 60.

right of every worker to strike. The Interim Constitution balanced this right to strike with an employer's recourse to lock-out for purposes of collective bargaining.<sup>16</sup> This right of recourse to the lock-out was excluded from the final Constitution. This exclusion was challenged during the constitutional certification process as failing to meet the requirements of CP XXVIII, requiring provision in the final Constitution of a 'right to engage in collective bargaining'. The Constitutional Court held that the right to exercise some economic power is implicit in the right to collective bargaining, but found it unnecessary to determine the nature and extent of this right. A statutory right of every employer to have recourse to the lock-out is recognized in the LRA.<sup>17</sup> It should be noted that recourse to lock-out action means something less than a right to strike.<sup>18</sup>

The employer/employee relationship in the workplace is inherently based on unequal economic power as a result, employees are at the mercy of employers. The engagement of a strike action as an economic weapon to protect employees' interests has changed the balance of power in the employment relationship. The inequality has been significantly narrowed in the workplace by the constitutional right to strike. At the time the Constitution was being certified by the Constitutional Court, employers raised their concern that their right to lock-out employees should be contained in the Constitution to counteract the right to strike and the Constitutional Court declined, indicating that the two are not balancing one another. The employers' interests are still protected by the right to organise and engage in collective bargaining.<sup>19</sup> The right to strike is a

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<sup>16</sup> Currie and De Waal *The Bill of Rights Handbook* 513.

<sup>17</sup> *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC).

<sup>18</sup> *Olivier Strikes, Lock-out and Related Actions* 78.

<sup>19</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 17 ILJ 821 (CC).

necessary adjunct to collective bargaining, as it corrects the inherent inequality of power in the employment relationship.<sup>20</sup>

The right conferred on trade unions and their members by section 23(2) of the Constitution is the right of every worker to strike. The Constitution is effectively providing protection for strikers going beyond collective bargaining such as strikes promoting or defending the socio-economic interests of workers and political strikes. With regard to political strikes, the International Labour Organization Committee of Experts and International Labour Organization Committee on Freedom of Association have limited the extension of the right to strike and exclude purely political motives,<sup>21</sup> given the interpretation directives contained in the Constitution which stipulates that the courts must take the principles of international law into account when interpreting the Bill of Rights.<sup>22</sup>

Protest action with the purpose of promoting or defending the socio-economic interests of workers is regulated by section 77 of the LRA. The LRA does not protect all forms of protest action. The LRA requires that one should look to the purpose of the protest action in determining whether or not it is to be afforded legislative protection. If the purpose is purely political, it will not be protected.<sup>23</sup> If the purpose is to advance a socio-economic aim, it will be protected.<sup>24</sup> Given that employers are seldom, if ever in a position to resolve disputes of an essentially political nature, and that trade unions have other means by which they might attempt to influence the political debates, this limitation on the right to strike will probably survive constitutional challenge.<sup>25</sup>

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<sup>20</sup> Grogan *Workplace Law* 326.

<sup>21</sup> Currie and De Waal *The Bill of Rights Handbook* 513.

<sup>22</sup> *The Constitution of the Republic of South Africa*, 1996 section 39 (1).

<sup>23</sup> Du Plessis *A Practical Guide to Labour Law* 364.

<sup>24</sup> *Government of the Western Cape Province v Cosatu* 1998 12 BLLR 1286 (LC)

<sup>25</sup> Currie and De Waal *The Bill of Rights Handbook* 513.

There are two Conventions of the International Labour Organization, which are relevant in the context of strikes. First, is the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and secondly which is of considerable importance is the International Labour Organization's Right to Organize and Collective Bargaining Convention 98 of 1949. South Africa has ratified these conventions, and is therefore bound to comply with their provisions. The LRA states in section 3 that its provision must be interpreted in compliance with the international law obligations of South Africa.<sup>26</sup>

The International Labour Organization's Freedom of Association Committee has interpreted Article 3 of Convention 87 of 1948 to include the right to strike. The International Labour Standards formulated and laid down ILO Conventions and Recommendation continues to play an important role in interpreting the LRA and the scope of the right to strike. The Constitutional Court has applied International Standards in reaching the decision in *National Union of Metalworkers and others v Bader Bop (Pty) Ltd and another*.<sup>27</sup>

The right to strike is well recognised in international instruments and is also enshrined in a number of modern constitutions. The International Convention on Economic, Social and Cultural Rights Article 8(1)(d) and the European Social Charter Article 6(4) also recognise the right to strike. The LRA accommodates and links to the Constitution in a number of ways. The LRA reflects and confirms the fundamental rights, especially the rights contained in section 23 of the Constitution. The LRA contains a dual reference to the Constitution in its interpretation clause. Section 3(a) of the LRA read with section 1(a) states that the Act (LRA) must be interpreted to give effect to the fundamental rights set out in section 23 of the Constitution, while section 3(b) states that the Act must be interpreted in compliance with the Constitution.

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<sup>26</sup> Basson et al *Essential Labour Law* 282.

<sup>27</sup> 2003 24 *ILJ* 305 (CC).

Section 3(a) read with section 1(a) requires a value-based interpretation even of provisions, which are *prima facie* constitutional.<sup>28</sup>

The LRA has made attempts to ensure that its provisions do not infringe any of the rights contained in the Constitution especially section 23, which directly deals with labour law rights. This is especially important because to the extent that the LRA reflects and confirms some of the rights contained in the Constitution, it also means that the LRA regulates and even limits these constitutional rights. This means that the way in which the LRA reflects and confirms constitutional rights becomes important. This raises the question whether such regulation constitutes an acceptable limitation on these basic rights. For example; are the closed shops and agency shops as provided for in the LRA, an infringement of the constitutional right to join a trade union or not to join? It is my view that these provisions of the LRA need to be tested at the Constitutional Court to determine whether they comply with section 36 of the Constitution because they are definitely limiting the constitutional rights of employees.

Section 23(5) of the Constitution confers on every trade union, employer's organisation and employer the right to engage in collective bargaining. It is important to note the wording of this section and its implications for the reach of the right. The wording in the Interim Constitution was phrased as follows; 'Workers and employers shall have the right to organise and to bargain collectively.' Significantly, the wording changed in section 23(5) of the Constitution to provide a 'right to engage in collective bargaining.'<sup>29</sup> The Constitution also permits national legislation to regulate collective bargaining. In terms of the Interim Constitution workers and employers were legally bound to engage in collective bargaining, while under the final Constitution the right is

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<sup>28</sup> Du Toit et al *Labour Relations Law: A Comprehensive Guide* 62

<sup>29</sup> Cheadle "Labour Relations" in Cheadle et al *South African Constitutional Law: The Bill of Rights* 388.

subjected to internal limitation clause which states that ‘every trade union and every employers’ organisation has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining.’<sup>30</sup> This provision has an internal limitation besides section 36 of the Constitution. The absence of “shall” in the current constitutional clause<sup>31</sup> of collective bargaining makes the big difference in the application of this clause. It does not have that out right compelling force of compliance as it was contained in the Interim Constitution.

The right provided by section 23(5) of the Constitution is composed of the three elements: first, the freedom to bargain collectively, that is viewed as the negative right to collective bargaining and implying that the state may not enact legislation that prohibits or has the effect of prohibiting collective bargaining;<sup>32</sup> secondly, the right of one of the parties to the bargaining process to exercise economic power against the opposing party (strike or lock-out). This right may further be explained by referring to the Constitutional Court decision reached in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa (first certification decision)*<sup>33</sup> whereby it was held that the right to bargain collectively implied the right to exercise economic power against the other party in the bargaining process. This implies that the employer may institute a lock-out against its employees. The recent court judgment in *National Union of Metalworkers and others v Fry’s Metal (Pty) Ltd*<sup>34</sup>, confirmed the earlier decision held by the Labour Appeal Court,<sup>35</sup> that employers can finally dismiss employees, for operational

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<sup>30</sup> Section 23(5) of the Constitution.

<sup>31</sup> Section 25(5) of the Constitution

<sup>32</sup> Cheadle “Labour Relations” in Cheadle et al *South African Constitutional Law: The Bill of Rights* 389

<sup>33</sup> 1996 4 SA 744 (CC).

<sup>34</sup> 2005 26 ILJ 689 (SCA)

<sup>35</sup> *Fry’s Metals (Pty) Ltd v National Union of Metalworkers of SA & others* 2003 24 ILJ 133 (LAC)

requirements when the employees have refused to accept changes to their terms and conditions of employment.

The LRA would seem to have removed the duty to bargain collectively which the Industrial Court earlier imposed on contending parties in the exercise of its unfair labour practice jurisdiction. It is stated that the LRA promotes collective bargaining by providing a series of organisational rights for unions and by fully protecting the right to strike. Since collective bargaining is no longer compelled by the LRA, the resolution of bargaining disputes is left to an exercise of industrial muscle. However, by extending and bolstering the right to strike, the legislature has effectively empowered unions to have recourse to the right to strike as an integral aspect of collective bargaining process.<sup>36</sup>

Collective bargaining is cast as a right in section 23 of the Constitution and the LRA provides the organisational framework in terms of which that right is to be exercised. The right and exercise of the right may, however be threatened by a number of aspects of the labour relations regime set out in the LRA. The most obvious threats are the introduction of minimum wage legislation and extension of collective agreements to non-parties, both of which amount to the imposition of a standard as opposed to a standard arrived at through collective bargaining.<sup>37</sup>

The interpretation of section 23(5) of the Constitution appears to be problematic when it has to be applied in certain sectors of our society, such as in military. The LRA does not cover the military personnel. However, it should be noted that the Bill of Rights applies to everyone who live in the Republic of South Africa. In *South African National Defence Union v Minister of Defence*<sup>38</sup> the Constitutional Court held that soldiers could be classified as 'akin' to

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<sup>36</sup> Currie and De Waal *The Bill of Rights Handbook* 514.

<sup>37</sup> Currie and De Waal *The Bill of Rights Handbook* 514.

<sup>38</sup> *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) (SANDU).

employees and therefore 'workers' for the purposes of section 23 of the Constitution. The provision of *Defence Act 44* of 1957 and its regulations that prohibited soldiers from belonging to trade unions were held to be unconstitutional and were therefore declared invalid. After some acrimony, an order was applied for compelling the SANDF to bargain with the union and the application was dismissed<sup>39</sup> where the court held that although section 23(5) of the Constitution grants trade unions the right to engage in collective bargaining, or the freedom to bargain collectively, it does not impose an obligation to bargain on the other side.

Further applications were then heard in the High Court by Smit J,<sup>40</sup> whereby a decision was reached that collective bargaining is central to a proper exercise of the rights conferred by the provisions of section 23 of the Constitution. The court further argued that there is no reason, why one's right to engage in collective bargaining may not impose a correlative obligation on another to engage in collective bargaining. The decision in SANDU 3 by Smit J held that the constitutional right of workers to engage in collective bargaining imposes a correlative obligation on employers to bargain with unions who have the right to bargain.

The decisions taken in the two SANDU cases have created confusion regarding the interpretation of section 25(5) of the Constitution. With regard to these decisions Grogan raised a question whether does it mean that the unions would by-pass the LRA and Labour Courts to secure a right to bargain, by relying directly on the Constitution. It is my view that it should not be the case because within section 23(5) of the Constitution, there is a provision that stipulates that 'national legislation may be enacted to regulate collective bargaining to the extent that the legislation may limit a right in this chapter. The limitation must

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<sup>39</sup> *South African National Defence Union v Minister of Defence* 2003 24 JLL 1495 (T) (SANDU 2).

<sup>40</sup> *South African National Defence Union v Minister of Defence* 2003 24 JLL 2101 (T) (SANDU 3).

comply with section 36(1) of the Constitution. Therefore the LRA has opted not to regulate collective bargaining, but rather provisions have been made by the LRA, that allow unions to have organizational rights and the right to engage in collective bargaining, but the bargaining and agreement, if reached are through economic power.

It is submitted that the decision in SANDU 3, should not have over looked the unique relationship that exist between the military and the Ministry of Defence. The *Defence Act 44* of 1957 best regulates this relationship. The court should have relied on the limitation clause in the Constitution. It is my opinion that rights contained in section 23 of the Constitution may be limited in case of the military personnel, however, the Constitutional Court<sup>41</sup> has decided otherwise. Cheadle believes that there is no need for collective bargaining to be imposed on employers to bargain, rather disputes should be referred to arbitration or Labour or High Court in cases where employees are not allowed to strike.<sup>42</sup>

Section 36 of the Constitution subjects a limitation of a fundamental right to a threefold test in terms of which the limitation must be:

- contained in a law of general application;
- reasonable and
- justifiable in an open and democratic society based on human dignity, equality and freedom.

In order to determine whether a limitation of a fundamental right passes constitutional muster, two questions must be asked; firstly, whether there has been an actual or threaten infringement of the right in question? And secondly, whether there is sufficiently justification for the infringement?<sup>43</sup>

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<sup>41</sup> *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) (SANDU 3).

<sup>42</sup> Cheadle “*Labour Relations*” in Cheadle et al *South African Constitutional Law: The Bill of Rights* 100-101.

<sup>43</sup> Rautenbach and Malherbe *Constitutional Law* 325.

The limitation clause of the Constitution implies that the Bill of Rights may be limited in the interests of the general society or by the competing rights of others. Sections 64 and 65 of the LRA have limitation provisions with regard to strike and lock-out. The LRA in its provisions has inherent limitations in the definitions of a strike and lock-out. Such industrial action may only be undertaken for specified reasons, for example, the strike will usually be protected if specified procedures have been met by certain parties to a dispute, such as those involved in essential services, may not take part in a protected strike.<sup>44</sup>

The limitation on the right to strike may also be determined by the nature of the issue, which has caused the dispute. For instance, issues relating to disputes of interpretation of collective agreements must be referred to arbitration or Labour Court. The limitation with regard to strike may be classified as procedural and substantive. Procedural limitation refers to procedures that have to be followed before employees may embark on a protected strike. For example employees may not engage in a strike action if they are bound by the agreement, and strike action might have the effect of endangering life, health or safety is prohibited and persons employed in 'essential services' or 'maintenance services' are prohibited from engaging in strike action.<sup>45</sup> Substantive limitation refers to disputes of rights as opposed to disputes of interests. Rights of disputes are best resolved by third party intervention such as arbitration or Labour Court.<sup>46</sup>

### **3. The Impact of Strike Action on Collective Bargaining**

Labour relations is characterised by inherent conflict. There is a need to ensure that industrial conflict is constructive rather than destructive. Therefore, the best

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<sup>44</sup> Basson et al *Essential Labour Law* 283.

<sup>45</sup> Currie and De Waal *The Bill of Rights Handbook* 515.

<sup>46</sup> Currie and De Waal *The Bill of Rights Handbook* 515.

way of minimising industrial conflict is through the promotion of collective bargaining, which is echoed by section 1 of the LRA. In essence, collective bargaining is a proper and even necessary method for settling disputes and the setting of minimum conditions of service. The guiding principle of resolving employer/employee conflict is that of 'industrial self government' as opted for by the LRA. It means that the employer and employee relationship, which relates to conflict, is left to the parties themselves to make arrangements, which will regulate those relationships as well as the relationship between the individual employer and the individual employee.

The LRA recognizes two protective mechanisms that are; freedom of association and the right to organise, which are originated from the Constitution. The protective rights are necessary for collective bargaining, for instance freedom of association makes it possible for employees to associate, that is to form trade unions and participate in unions activities. The right to organise implies that trade unions have the right to recruit members to liaise meaningfully with their members and to be supported in other way in order to be able to exist and function effectively as equal partners of the employer. It is for this reason that the LRA in compliance with the principles, which are honoured universally by the International Labour Organisation, and developed labour relations systems, recognise that at least certain trade unions in principle have certain rights for purposes of engaging effectively in collective bargaining.

Prior to the LRA being introduced, it was evident then that the manner, in which collective bargaining was conducted, was far from being able to address the imbalance of power between the employers and employees. It has been established that collective bargaining does not flourish where one party can safely ignore the other. To bring about greater parity, employees and trade

unions have been equipped with an array of rights that include organizational rights and right to strike.<sup>47</sup>

The LRA grants trade unions a number of organizational rights to which they are entitled to. These rights pave the way for the union's entry to the workplace and therefore, set the preconditions for recruitment of members and subsequently collective bargaining, whether at plant or industry level.<sup>48</sup> Some of these rights are accorded to a majority-registered union only, while other rights are accorded to a sufficiently representative registered trade union. The exercise of organizational rights is not subjected to negotiation but to legal prescription. An employer and a union may conclude a collective agreement to regulate organizational rights<sup>49</sup> Registered unions that are parties to a council automatically have the rights of access<sup>50</sup> and deduction of union subscriptions<sup>51</sup> in respect of all workplaces within the registered scope of the council regardless of their representativeness in any particular workplace.<sup>52</sup> Rights of access to the workplace; deduction of union subscriptions from members' salaries and leave during working hours for union office bearers are enjoyed by sufficiently representative unions. In addition to these rights mentioned above, a majority union also has the rights to: disclosure of information; appointment of union representatives of workplaces and paid leave for representatives.<sup>53</sup>

If there is a dispute over the exercise of organisational rights, can the union rely on strike action? The answer is no, the union will have to follow sections 21-22 of the LRA. Which stipulates that the dispute must be referred to the CCMA. As a dispute of right, a union may not strike over it.

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<sup>47</sup> Du Toit et al *Labour Relations Law: A Comprehensive Guide* 229-230.

<sup>48</sup> Bendix *Industrial Relations in South Africa* 278.

<sup>49</sup> Section 20 of the LRA.

<sup>50</sup> Section 12 of the LRA.

<sup>51</sup> Section 13 of the LRA.

<sup>52</sup> Section 19 of the LRA.

<sup>53</sup> Du Plessis et al *A Practical Guide to Labour Law* 233-234.

From various provisions of the LRA, collective bargaining is a compulsory requirement for making the referral of certain types of disputes to a Council or CCMA. This is an indication reflecting the importance of collective bargaining as a primary mechanism for settling labour disputes. The most important of these are probably the provisions relating to strikes or lock-out and unfair dismissal and unfair labour practice disputes

In its promotion of collective bargaining, the LRA confined itself, rather than granting unions and employers certain rights and leaving it to them to determine whether and to what extent such rights should be exercised in the process of collective bargaining. The aim of the LRA is to secure only the means of collective bargaining without prescribing or empowering the courts to prescribe how these means should be exercised.<sup>54</sup>

It has been seen throughout the development of our labour relations, that collective bargaining, as the basic process of settling disputes was not achieving the desired goals. It must be remembered that the sole objective of collective bargaining is to conclude an agreement. In cases where the parties cannot find common ground, the employees and/or trade unions may engage the strike, as an economic tool as pressure. Strike formalities must be complied with in order to enjoy statutory protection,<sup>55</sup> which is not completely guaranteed by labour law, as it will be shown later. Strike as an element of dispute settling mechanisms like collective bargaining, is not the means to an end rather it complements the means to realise the end results or agreement in an effective way. It is submitted that strike is an integral and necessary consequence of an industrial relations in a market economy, which is predominantly controlled by economic power. The effects of a strike go in two ways. It economically hurts both parties in the employment relationship. What differs is the degree of damage and for how long the parties can sustain economic pains.

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<sup>54</sup> Grogan *Workplace Law* 274.

<sup>55</sup> Section 64 of the LRA.

### **3.1 Protection against dismissal in the course of a protected strike**

Parties involved in a strike experience viscerally the pain of disagreement with their opposite numbers at the bargaining table. Sooner, they realized that it is much less painful to agree even if they have move considerably closer to the terms proposed by the other side. In that way, strike action plays an indispensable role in resolving deadlocks in collective bargaining relationship.<sup>56</sup>

Section 67(2) of LRA stipulates that participation in a protected strike does not amount to a breach of contract. The implication is that the legislature views protected strike as functional to collective bargaining process and effectively provides for the suspension of the obligations arising from the employment relationship for the duration of the strike.

Protected strikes have positive legal consequences for employees who participate in protected strikes, although to a certain extent. It is submitted that the main purpose of a strike action is to cause an employer economic harm in order to compel the employer to comply with the employee's demands. According to common law an employer can sue strikers or their trade unions for losses, which it has suffered as a result of the strike action on the ground that the employees and their trade union have committed a delict. The employer may also approach the court for an interdict and may also be able to claim damages from strikes and or/dismiss them because in most instances, they will be breaching their contracts of employment through their refusal to work. It is held that these common law consequences undermine the role that strikes can play in support of collective bargaining

Due to the fact that these common law rules would have undermined industrial action and its role in collective bargaining, the LRA has made specific

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<sup>56</sup> Rycroft and Jordan *A Guide to South African Labour Law* 143.

provisions in this regard. The following are the most important rights accorded persons organizing or participating in a protected strike in terms of section 67 of the LRA:

(i) An employee does not commit a delict or breach of contract by taking part in a protected strike or any conduct in contemplation or in furtherance of a protected strike;

(ii) Section 67(6) of the LRA stipulates that no civil legal proceedings may be instituted against any person because of that person's participation in a protected strike and conduct in contemplation or in furtherance of a protected strike is also protected against civil liability. The exact meaning of this concept "any conduct in contemplation or in furtherance of a protected strike" is not defined by the LRA, therefore, it is assumed that the courts will have to determine the meaning of this phrase should a dispute arise around it. The immunity against civil liability also covers the alleged breaches of strike and picketing rules except possibly, to the extent where they overlap with criminal offences. This decision was held by the court in *Lomati Mill Barberton v Paper Printing Wood & Allied Workers Union & others*.<sup>57</sup> The issue of defamation during the course of strike action is whether it has the protection or not, because previously the LRA of 1956 did not offer it protection. But if one was to analyse it, would appear that it is not protected, simply because defamation is another form of misconduct. When it is committed during normal working condition, the employees become subjected to disciplinary hearing. But however, it will have to be tested in court.

(iii) Under normal circumstances, it is a serious breach of contract to refuse to comply with the most basic contractual duty that is to work. Normally, in such event an employer will be entitled to summarily dismiss the striking employees. However, section 67(4) of the LRA provides that employers may not dismiss employees for taking part in a protected strike or for any conduct in

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<sup>57</sup> 1997 18 ILJ 178 (LC).

contemplation or furtherance of a protected strike. It is explained that the rationale for protecting strikers against dismissal is to ensure that collective bargaining continues to be functional and denies the employer the opportunity to take punitive action against the strikers. It is also to ensure that the rights of employees in employment are not jeopardized and to maintain the purpose of strike.<sup>58</sup>

### **3.2 Dismissal of employees in the course of a protected strike**

Section 67(5) of the LRA stipulates that employees participating in a protected strike may be dismissed for one or two reasons; misconduct committed during the course of a strike or for the employer 's operational requirements.

It is submitted that employees who commit misconduct in the course of a strike action, even though the strike may as such be protected, can be disciplined and dismissed on that basis. Examples are employees who have been found guilty of acts of violence or intimidation during the course of strike.<sup>59</sup> An employer who decides to dismiss employees under these circumstances must ensure that dismissal is fair and in accordance with statutory requirements for a fair dismissal for misconduct. It has also been confirmed by the court that an employer need not to wait until the end of a protected strike before it may institute a disciplinary enquiry for acts of misconduct during the said strike.<sup>60</sup>

The LRA explicitly envisages the possibility that strikers may be dismissed in the event that the operational requirements of the employer necessitated such

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<sup>58</sup> *Black Allied Workers Union & others v Prestige Hotels CC t/a Blue Waters Hotel* 1993 14 ILJ 963 (LAC).

<sup>59</sup> *Buthlezi v Labour for Africa (Pty) Ltd* 1991 12 ILJ 1022 (LAC); *NUM v Haggie Rand Ltd* 1991 12 ILJ 1022 (LAC).

<sup>60</sup> *CEPPWAWU & others v Metrofile (Pty) Ltd* 2004 25 ILJ 231 (LAC). In here the court indicated that there is no provision of LRA which either expressly or by necessary implication is to effect that an employer may not convene a disciplinary hearing against an employee taking part in a protected strike while such a strike is in progress. Having noted this decision, it appears that there would be a problem in conducting the hearing fairly; one, how would the employee be notified, two, would the shop stewards or any other employee representative be available or be able to represent the employee under the circumstances and finally would this be reasonable under those circumstances to hold an enquiry? Or if the employer dismiss them in absentia would it be validly fair?

steps. It goes without saying that the strike itself can be cause of such action to be taken. In this regard the normal provision of the LRA regarding dismissal based on the employer's operational requirements apply. The implication is that the employer has to consult properly, consider alternatives, apply fair selection criteria and pay severance benefits.<sup>61</sup> The dismissal should also be substantially and procedurally fair. In proving this, the employer will have to show that dismissals were not merely because of the employee's participation in the strike, as this would be automatically unfair and that the dismissal is validly and fairly related to the economic, structural or similar needs of the employer.<sup>62</sup>

It has been raised that there are two conflicting considerations, regarding the dismissal of employees in a protected strike: it is submitted that the right to strike is constitutionally protected, but the employer has the right to dismissal for operational requirements.<sup>63</sup> It should be borne in mind that the purpose of strike action is to give effect to collective bargaining through the use of an economic tool, which is known to cause economic harm, i.e. place economic pressure on the employer and this right cannot be unlimited without reasonable grounds. For this right to be limited, requirements of section 36 of the Constitution should be complied with in full.

There have been previously court judgments and proposed guidelines, which indicated that employers may dismiss strikers during protected strikes once they were able to prove that they have incurred irreparable economic harm or is on the verge of suffering from such harm or there is the possibility of a substantial economic loss.<sup>64</sup> In *NUMSA v Vetsak Co-operative Ltd & others*<sup>65</sup> the majority decision ruled that fairness and fairness alone should dictate whether protected

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<sup>61</sup> Sections 189 and 189A of the LRA

<sup>62</sup> Basson et al *Essential Labour Law* 309.

<sup>63</sup> Section 189 of the LRA.

<sup>64</sup> Basson et al *Essential Labour Law* 309

<sup>65</sup> 1996 17 ILJ 455 (A)

strikers might be dismissed. The fairness that is being referred to is applicable to both parties, strikers and employers. The validity of section 189 of the LRA with regard to dismissal of strikers participating in a protected strike on the basis of operational requirements seemed to be unfair on the side of the employees. It is my view that dismissal of employees participating in a protected strike is not justifiable and does not meet the limitation of the constitutional provision.<sup>66</sup> Section 189 of the LRA is more favourable to the employers by giving them the right to dismiss employees taking part in a protected strike. It is submitted that the reasons for limiting a right need to be exceptionally strong. Our Constitution permits the limitation of a right by law but requires the limitation to be justifiable. This means that the limitation must serve a purpose that most people would regard as importantly compelling. However, the importance of the purpose of limitation or restriction on a right will not be justifiable unless there are good reasons for thinking that the restriction would achieve the purpose it is designed for and that there is no other 'realistically available' way in which the purpose can be achieved without restricting a right.<sup>67</sup>

The dismissal of strikers participating in a protected strike undermines collective bargaining and infringes the constitutional rights of strikers. The application of section 189 of the LRA with regard to strikers participating in a protected strike does not appear to be justifiable, because it is only protecting the employers and again it is possible to have the impasse resolved in some way rather than dismissal. It needs to be noted that the nature of a strike is to bring about economic hardship or harm. It is a well-known and accepted fact that a strike hurts, although it is looked from one side of the employer. The economic harm experienced by employees is being down played and is grossly unfair because their economic loss does not necessarily hurt them alone but it affects their families at a larger scale. In fact employers can contain the effects of strike for

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<sup>66</sup> Section 36 of the Constitution

<sup>67</sup> Currie and De Waal *The Bill of Rights Handbook* 164.

instance, they have their businesses insured against economic losses whereas employees do not have such facilities at their disposal.

It is my view that employees participating in a protected strike are not well protected by law, because employers may apply section 189 of the LRA and dismiss the employees who are taking part in a protected strike. This section lacks parity because it makes no reference to the employees. The application of section 189 of the LRA in this context is too wide. Employers may abuse this right because it is very difficult to disprove that operational requirements are not in existence when such an allegation is made. It is a submission that I am making that it could have been better if the application of this clause was subjected to the approval of the courts before it is applied. It is against this background that one believes the limitation of a protected strike is not justifiable. The limitation has a negative impact on collective bargaining because of its one-sided approach to the problem that is, ending of a protected strike. The constitutionality of section 189 of the LRA especially when being applied to protected strike, needs to be tested.

It is a common law rule, that “no work, no pay” is applicable irrespective of the cause of not working. The rule is confirmed by section 67(3) of the LRA. Employees participating in a protected strike should not be discriminated against.<sup>68</sup> In practice, some employers pay bonuses and incentives to employees who do not participate in a protected strike. This practice is not specifically prohibited by the LRA, but it has however been held to fall foul of section 5 of the LRA.<sup>69</sup> The court in *FAWU and others v Pet Products (Pty) Ltd*<sup>70</sup> concluded that the payment of incentives, rewards or bonuses to non-strikers albeit that they dressed up as innocent rewards for hard work, but in reality

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<sup>68</sup> Section 5 of the LRA.

<sup>69</sup> *FAWU and others v Pet Products (Pty) Ltd* 2000 ILJ 1100 (LC)

<sup>70</sup> 2000 ILJ 1100 (LC).

undermines collective bargaining and infringes the rights contained in section 5 of the LRA.

The effects of an unprotected strike have a negative impact on collective bargaining because the strike would be lacking statutory protection, as a result striking employees would be vulnerable to a number of unpleasant sanctions. The employers would make use of section 68 of the LRA, which stipulates that the Labour Court has exclusive jurisdiction to grant an interdict or order restraining any person participating in a strike or any conduct in contemplation or in furtherance of a strike. The LRA also clothes the Labour Court with jurisdiction to order the payment of “just and equitable compensation” for any loss caused by the unprotected strike. As far as the granting of compensation is concerned, the Labour Court has to have regard to whether and to what extent attempts were made to comply with the LRA, whether the strike or lock-out was in response to unjustified conduct on the part of the employer; and whether there was compliance with an order restraining the strike or lock-out. The court also has to take into account the interests of orderly collective bargaining, the duration of the strike or lock-out and the financial position of the parties concerned.<sup>71</sup>

According to the LRA<sup>72</sup> the mere participation in an unprotected strike or certain forms of conduct in contemplation or furtherance of an unprotected strike may constitute a fair reason for dismissal, but the fairness of the dismissal must still be considered. Item 6 of the *Code of Good Practice in Schedule 8* of the LRA dealing with dismissal makes it clear that participation in such action constitute a misconduct, but both the substantive and procedural fairness of the dismissal has to be evaluated, bearing in mind factors such as the seriousness of

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<sup>71</sup> Basson et al *Essential Labour Law* 311.

<sup>72</sup> Section 68 (5) of the LRA.

the misconduct and requiring the employer to contact the union as soon as possible and to issue a proper ultimatum.

In some situations, employees who participate in unprotected strike are being given protection against dismissal by the courts through the application of Schedule 8 of the LRA. In *NUM and Others v Goldfields Security Ltd*,<sup>73</sup> the court held that the employer failed to make an effort to contact the trade union before dismissing the striking employees, therefore the dismissal was unfair. In *CAWU and Others v Klapmuts Concrete (Pty) Ltd*,<sup>74</sup> the court reached the conclusion that the conduct of the employer was unfair in that it knew when it sent the fax regarding the ultimatum to the union's offices, that there were no people there, despite that it went ahead and dismissed striking employees. What is being indicated in these cases is that employers should take into consideration the guidelines provided by schedule 8 before the dismissal of strikers for participating in unprotected strike.

Having seen the consequences of an unprotected strike, the question arises; does an unprotected strike contribute meaningfully to the process of collective bargaining? It does not look like the unprotected strike add any value to collective bargaining, instead is rendering it useless because this kind of a strike does not have legitimate force to secure any agreement. During the course of the unprotected strike, the relationship between an employer and its employees or trade union is temporarily suspended. It needs to be remembered that the purpose of collective bargaining is to secure a collective agreement at the end, which is legally binding to the affected parties and in some other instances, it may be extended to non-parties provided certain requirements are met. Therefore, unprotected strike is of no effect to collective bargaining because its

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<sup>73</sup> 1999 20 *ILJ* 1553 (LC)

<sup>74</sup> 1996 17 *IJL* 725 (IC)

basis would have been unlawful and no legitimate bargaining would take place under such conditions.

#### **4. The status of the right to strike and right to engage in collective bargaining in Germany, Belgium and United Kingdom as compared to South Africa**

The rights relating to strikes and collective bargaining are internationally recognised in various treaties, charters and in the law of individual countries. Law, treaties and charters either directly or indirectly recognise these rights. The right to strike in South Africa is recognised statutorily and constitutionally.

In Germany, the German Constitution constitutionally guarantees the right to strike and the autonomy to bargain collectively. Article 9(3) of the German Constitution guarantees the freedom of association. This includes the right of the trade unions and employers associations to conclude a collective bargaining agreement. Accordingly, in Germany employees do not have an individual right to engage in industrial action and strikes not authorised by the unions are unlawful.<sup>75</sup> The right to strike in Germany has been limited by legislation and case law.

The Belgian Constitution does not contain a positive right to participate in strike action. However, the *Ordinary Act of 11 July 1990* ratifies the *European Social Charter of 1961*, which recognises the right to collective action, including the right to strike. Accordingly in Belgium there is an individual right for employees to take industrial action.

The United Kingdom does not have a constitution and there is no right to participate in the industrial action. However, the law does provide certain

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<sup>75</sup> Gerhard *Ius Laboris: International Employment Law, Pensions and Employee Benefits Alliance* 19.

immunities from liability at common law for the civil wrongs or torts most frequently committed in the course of taking industrial action. The availability of these immunities is subjected to a number of restrictions and mandatory rules, which are contained in the *Trade Union and Labour Relations (Consolidation) Act of 1992 as amended (TULRCA)*.

#### **4.1 German Law on Strike and Collective Bargaining**

Article 9(3) of the German Constitution is the equivalent of section 23(2) – (4) of the Constitution of the Republic of South Africa. In contrast with section 23(5) of the South African Constitution, no expression is made for trade unions, employers' associations and employers to engage in collective bargaining. However, according to the German Constitutional Court (*Bundesverfassungsgericht*), the so-called autonomy to bargain collectively (*Tarifautonomie*) is part of the constitutional guarantee of the freedom of association, it is argued that it would hardly make sense on the one hand, to give employees and employers the right to form associations and on the other, to withhold the right to collective bargaining. Strikes and lock-outs are regarded as indispensable to meaningful collective bargaining. Article 9(3) of the German Constitution forms the legal basis for a constitutional guarantee to strike and lock-out.<sup>76</sup>

Federal and state law does not contain general procedures for industrial action. These are normally contained in the bylaws of trade unions and employers associations. For example, trade union bylaws generally require a strike to be preceded by a ballot of union members followed by a strike call. The requirements for issuing a strike call includes information about the time, place and scope of the strike, as well as issuing a request to the employees without trade union membership to participate in the strike. Under the bylaws, all trade

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<sup>76</sup> Waas *A Comment on the South African Law on Strikes and lock-outs from a Germany Perspective* 1997 *ILJ* 214.

union members are obliged to participate in the strike. Collective bargaining agreements may also contain procedures for industrial action. Under German law, strike is permissible if its legal objective for industrial action is the achievement of a collective bargaining agreement. Collective bargaining agreements may include provisions about terms and conditions of employment such as; salary, bonus payments, overtime, leave and as well as conditions for dismissals. Finally in order to constitute a lawful strike, the strike must be organized or authorized by a trade union and affect members of the respective employers association. A strike, which is not called by the union, is a 'wildcat' strike and is unlawful.

The limitations on the right to engage in industrial action have been developed by the Supreme Court of Labour. Generally, to be legal, industrial action has to be 'appropriate and adequate'. The General principles of the Supreme Court of Labour for appropriate and adequate strike are that:

"A strike has to pursue legal objective and has to be necessary to achieve the objectives. It is allowed as the last option. Arbitration proceedings generally have priority. The strike must keep the rules of a fair fight and must not have the aims of destroying the opponent. After the end of the strike both parties have to contribute to the fastest and most extensive restoration of peace. Dismissals only by reason of participation in a legal strike are void"<sup>77</sup>.

The legality of a strike depends on the extent of the claims for a collective bargaining agreement. For example the affected company/association/industry must be a party to the collective bargaining agreement. Employers who are affected by the illegal spontaneous strike may claim damages against the individual employees. Trade unions are not liable for illegal spontaneous

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<sup>77</sup> Gerhard *Ius Laboris: International Employment Law, Pensions and Employee Benefits Alliance* 19.

strikes. Essential public services are generally excluded from industrial action. The levels of minimum services are normally agreed to in the collective bargaining agreements. Peace obligations are implied into all collective bargaining agreements. In the event of a breach of peace obligation, the union will be liable for damages by way of breach of contract.

Employment contracts are not terminated by reason of participation in a strike and it is unlawful to dismiss an employee on the basis that he/she has participated in a lawful strike. However, the employer is allowed to dismiss an employee during strike for reasons other than participation in the strike. This includes dismissal for economic or business reasons, even if the need to restructure was caused by the strike. On the other hand, participation in illegal strike action may justify an immediate dismissal, unless it can be proven that an employee was not able to recognise that the strike was illegal. During the course of the strike, which is illegal or legal employment, contracts are suspended. There is no entitlement to payment during a strike. Other obligations of the contract remain in effect during the strike such as obligations of non-competition and non-disclosure. An employer affected by non-unionised spontaneous strike is entitled to claim damages from the individual employees on the ground of breach of employment contract. The manner in which German labour laws regulate strike action and collective bargaining is mostly similar to the South African practices. We copied a lot from the German's labour law and also from other countries.

It can safely be concluded that the right to strike in our Constitution is derived from the German constitutional guarantee of the autonomy to bargaining collectively. Which implies that the strike is only guaranteed in so far as it relates to collective bargaining. This further means that the lawfulness of

industrial conflict is more restricted than is the case in the Republic of South Africa.<sup>78</sup>

#### **4.2 Belgium Law on Strike and Collective Bargaining**

In Belgium, the rights to strike, organise and bargain collectively are recognised, protected, and exercised freely by employees. Overall for a strike to be legal, the employees must have reasonable interest to engage in a strike. Practice shows that most strikes are commonly called for the terms and conditions of employment. The legality of a strike will not be determined by reference to its objectives but by any accompanying “*feitelijkheden/voies de faits*”. Examples are; illegal company occupations, use of violence and causing material damage during the strike.<sup>79</sup> In these cases the President of the Court of the first instance or the President of the Labour Court can intervene and put an end to the strike.

There is no general limit on the scope of a strike. For example, a strike can occur in any industry subject to essential services requirements. The Joint Committees<sup>80</sup> must determine for the companies falling under their competence:

- The service levels that must be secured in the event of a strike or lock-out; and
- What are the vital public needs (services that need to be maintained in the event of a strike or lock-out).

The *Ordinary Act of August 24 1984* on the services of public interest in a peacetime and /or collective bargaining agreements contain requirements for minimum services levels during a strike. Some collective agreement at industry

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<sup>78</sup> Waas *A Comment on the South African Law on Strikes and lock-outs from a Germany Perspective* 1997 ILJ 233.

<sup>79</sup> Gerhard *Ius Laboris: International Employment Law, Pensions and Employee Benefits Alliance* 45.

<sup>80</sup> Committees at industry level comprised of employers and union representatives.

and /or company level contains social peace clauses. This is an agreement whereby the parties refrain from introducing new claims relating to an issue covered by the agreement during its term. It is important to note that a peace clause is only valid between parties to the collective bargaining. Social peace clauses do not bind individual employees. All individuals have the right to strike. Accordingly, there is no requirement for union support in order to strike. Strikers are permitted to achieve collective bargaining agreements. The employers' property rights and non-striking employees rights to work prevail.

Employment contracts are technically suspended during any periods of a strike. The employment relationship continues being in force and the period of strike does not count towards continuity of employment. A contract of employment is not automatically terminated by a strike, but only by resignation or dismissal. A strike as such cannot be the reason for dismissal. However, termination may be justified if the striking employees commit serious offences during the strike such as the use of violence or material damage and injury. As there is a right to strike, employers cannot claim damages, except in circumstances where the right to strike is clearly abused.

#### **4.3 The United Kingdom Law on Strike and Collective Bargaining**

The strike is protected if it is in contemplation or furtherance of a trade union disputes. Even if such a trade dispute exists, the union will lose its statutory immunity unless the industrial action has been properly instigated in accordance with the procedures laid down in *Trade Union and Labour Relations (Consolidation) Act 1992* as amended (TURLCA) and the *Code of Practice on Industrial Action and Ballot and Notices to Employees 2000*. There is no industrial right to participate in an industrial action. There are however, certain rights, which protect employees against dismissal. These rights are reduced if a strike is not authorised or endorsed by an independent trade union. The dismissal of an employee is automatically unfair if the reason or the

principle reason for the dismissal is taking part in industrial action, which is protected. The employer however, will have a right to dismiss an employee who participates in a non-official or unprotected strike provided that an employer apply parity in dismissing all the employees taking part in the industrial action.<sup>81</sup> Employment contracts are technically suspended during any periods of strike. Therefore, although the employee remains an employee of the employer the period of the strike does not count towards the employee's continuity of employment.

The strike organised by either individuals or non-independent trade unions are not recognised as being protected industrial action. If employees decide to strike without the support of a ballot, which an independent trade union has not authorized or endorsed, it will be a non-protected strike. Employees participating in unprotected strike are likely to lose their right to claim unfair dismissal, if dismissed for taking part and may be held personally liable for any losses incurred by the employer. It is lawful to have a strike in order to either achieve union recognition for collective bargaining purposes within the workplace or improve collective bargaining arrangements. Prior to the introduction of the statutory right for trade union recognition and collective bargaining in 1999, industrial action was often the only way for unions to achieve collective bargaining rights.<sup>82</sup>

Under the TULRCA, police and armed forces are excluded from taking part in industrial action. This will also potentially extends any group, which takes industrial action in breach of a contract, which puts at risk life, health or property. To do so may be a criminal offence. In addition, the Trade Union Congress introduced a Code of Practice in 1979 in relation to strike, which affect essential services. This Code of Practice has no legal effect. The provision

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<sup>81</sup> Selective dismissal/re-engagement is unfair.

<sup>82</sup> Gerhard *Ius Laboris: International Employment Law, Pensions and Employee Benefits Alliance* 42.

of collective bargaining agreements have no effects upon the law relating strikes, but may prevent strikes from occurring either because of extended dispute resolution procedures or where there is “no strike” clause in the agreement. A prohibition of this nature would have little or no effect on the employees’ ability to withdraw their labour. Even if such a term was incorporated into the individual’s contract of employment, it would be unenforceable as the employee on strike would already be in breach of their contract. However, the employer may be able to claim damages against the employees for resulting loss. It is rare to find an employer suing the union involved in unprotected strike, which is not in contemplation or furtherance of trade dispute or if it is otherwise unprotected. Damages that a union may be ordered to pay are limited according to the union’s size ranging \$10 000 for 15 members, and \$280 000 for 100 000 members or more.

## **5. Conclusion**

It has been demonstrated in this research that strike plays an important role in collective bargaining, although some of the restrictions imposed on it defeat the objective of strike. Collective bargaining as a process relies mainly on a continual power play between the parties and since the power balance is in a state of continual flux, collective bargaining is an ongoing dynamic process, in which the rules of the game may change from time to time.<sup>83</sup> Collective bargaining is aimed at securing collective agreements. In cases where a collective bargaining fails to bring about an agreement, then the strike becomes an option for employees and statutory requirements must be complied with.

In South African labour relations, collective bargaining and strike are constitutionally protected and are subjected to the limitation clause of the Constitution.<sup>84</sup> It is an international trend that employers are allowed to dismiss

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<sup>83</sup> Bendix *Industrial Relations in South Africa* 258.

<sup>84</sup> *The Constitution of the Republic of South Africa*, 1996 section 36

employees for participating in a protected strike, on the basis of operational requirements. It is my view that in our case section 189 of the LRA is one sided. The limitation that it imposes on a constitutional right appears to be unjustified. It needs to be noted that the nature of a strike is to economically harm the employer with the intention of pressuring the other party, in order to give in or compromise to a demand. It is my believe that protection given to employees participating in a protected strike is not good enough, given the fact that employees may be dismissed. It must be remembered that an idea of having a strike, is to create equilibrium that is a balance of power in the workplace and section 189 of the LRA is disturbing. In actual fact the LRA provision gives the employers the edge over the employees on top of the powers, which employers already have. Employees too, do suffer economic losses when they participate in a strike. One could argue that the position of the employees is a self-inflicted harm therefore there is no need to protect them. Employees should not be punished for exercising their constitutional right. It is my view that our law needs to review section 189 of the LRA, which appears to render collective bargaining non-effective with the limitation imposed on the right strike by section 189 of LRA. Our law needs to guarantee/create parity between the parties to a conflict especially regarding the fairness of section 189 of the LRA. The proposal in this regard is that once economic hardship becomes unbearable for one of the party, the matter should be referred to the courts where a decision would be taken. In this way the disparity would have been addressed.

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