

The powers of the Labour Court: court orders and the enforcement thereof during violent strikes

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ABSTRACT

Over the years, South Africa has been plagued by prolonged, violent and destructive strikes. Adversarial behaviour to voice demands has unfortunately become entrenched as a tradition in South Africa. This deep-rooted culture of striking has resulted in noteworthy challenges for which there have not been easy solutions on the side of the relevant structures, including the Labour Court. The Labour Court has heard and decided several cases related to strikes of a prolonged, violent and destructive nature. Employers often approach the Labour Court for an interdict to prevent the unlawful conduct in contemplation or in furtherance of an unprotected strike. Despite this, it seems that the failure to obey court interdicts has become progressively prevalent in South Africa. This has subsequently led to contempt of court proceedings instigated by an employer in the Labour Court where an interdict has been disregarded by a union and its members. Ultimately, this research is intended to evaluate the effectiveness of the Labour Court orders and the enforcement thereof in curbing prolonged, violent and destructive strikes. Enforcement relates to consistency, the delivery of just outcomes and the ability of the law in the hands of the Labour Court to stop or bring change to human behaviour during lengthy, violent and destructive strikes. The study provides an informed view of the effectiveness of the Labour Court orders and the extent to which the Labour Court can intervene in preventing prolonged, violent and destructive strikes. The research also aimed to determine whether including compulsory interest arbitration as part of the powers of the Labour Court would go a long way in curbing the occurrence of long, violent and destructive strikes.

Key words: prolonged, destructive and violent strikes; Labour Court; interdict; contempt of court; compulsory or interest arbitration; adversarial

TABLE OF CONTENTS

ABSTRACT	II
LIST OF ABBREVIATIONS	VII
Chapter 1 INTRODUCTION	1
1	1
Chapter 2 LABOUR COURT INTERDICTS	9
2	9
2.1 <i>Introduction</i>	9
2.2 <i>South African perspective with regard to the Labour Court powers: granting interdicts</i>	13
2.2.1 <i>Constitution of the Republic of South Africa 1996</i>	13
2.2.1.1 <i>The Labour Relations Act 66 of 1995</i>	13
2.3 <i>What are interdicts?</i>	14
2.3.1 <i>Requirements of an interdict</i>	15
2.4 <i>Case study in relation to Labour Court interdicts.....</i>	18
2.4.1 <i>Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers' Union & others.....</i>	19
2.4.2 <i>Robertson Winery (Pty) Ltd v CSAAWU</i>	20
2.5 <i>Conclusion.....</i>	28

**Chapter 3 THE ENFORCEMENT OF LABOUR COURT ORDERS
(INTERDICTS) 31**

3 31

3.1 *Introduction* 31

**3.2 *Trade union duties and liabilities with regard to the
enforcement of Labour Court orders (interdicts)* 33**

3.2.1 *Liability of unions in relation to disregarding court orders* 35

3.2.1.1 *Liability of trade unions for contempt of court through case law* 36

3.2.2 *Liability towards third parties through the RGA* 39

3.2.2.1 *Section 11 of the RGA* 40

3.3 *Contempt of Labour Court orders* 43

3.3.1 *What are contempt of court orders?* 44

3.3.2 *Burden of proof in contempt of court proceedings* 45

3.4 *Contempt of court proceedings through case law* 45

**3.4.1 *Nominal nature of sentences with regard to contempt of Labour
Court order proceedings* 49**

3.5 *Conclusion* 52

**Chapter 4 INTEREST OR COMPULSORY ARBITRATION AS AN
ALTERNATIVE 55**

4 55

4.1 *Introduction* 55

4.2	<i>What is compulsory or interest arbitration?</i>	57
4.2.1	<i>The CCMA and the Labour Court as dispute resolution institutions</i>	58
4.3	<i>Compulsory interest arbitration</i>	61
4.3.1	<i>Compulsory arbitration in essential services.....</i>	62
4.3.1	<i>Compulsory interest arbitration as part of the powers of the Labour Court</i>	64
4.4	<i>Arguments against compulsory arbitration.....</i>	66
4.5	<i>Proposed amendments to Section 69 (12) of the LRA</i>	68
4.6	<i>Conclusion.....</i>	71
Chapter 5 CONCLUSION AND RECOMMENDATIONS		74
5	<i>.....</i>	74
5.1	<i>Introduction.....</i>	74
5.2	<i>Conclusions</i>	75
5.2.1	<i>Non-compliance with Labour Court interdicts.....</i>	75
5.2.2	<i>Enforcement of court orders.....</i>	77
5.2.3	<i>Contempt of Labour Court orders</i>	77
5.2.4	<i>Nominal nature of sentences with regard to contempt of Labour Court orders proceedings</i>	78
5.2.5	<i>Non-existence of compulsory interest arbitration</i>	80
5.3	<i>Recommendations</i>	80
5.3.1	<i>Nominal nature of sentences</i>	81

5.3.2	<i>Educating Unions.....</i>	82
5.3.3	<i>Statutory duty to bargain in good faith.....</i>	83
5.3.4	<i>Interest Arbitration</i>	83
5.3.5	<i>Suspension of a strike.....</i>	84
BIBLIOGRAPHY		86

LIST OF ABBREVIATIONS

EU	European Union
CCMA	Commission for Conciliation Mediation and Arbitration
CEPPAWU	Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union
COSATU	Congress of South African Trade Unions
CSAAWU	Commercial, Stevedoring Agricultural and Allied Workers' Union
FAWU	National Union of Food Beverage Wine Spirits and Allied Workers
ILO	International Labour Organisation
LRA	Labour Relations Act 66 of 1995
LRAB	Labour Relations Amendment Bill
NUM	National Union of Mineworkers
RGAs	Regulation of Gatherings Act 205 of 1993
SAMWU	South African Municipal Workers Union

Chapter 1 INTRODUCTION

1

Strike action is considered an important tool to collective bargaining. However, problems arise when strikes last longer and are of a violent nature. This affects innocent third parties, the employer's property, and the economic welfare of the employer. The 2006 security members' strike,¹ the 2012 Marikana mine employees strike² and the truck drivers' strike in 2005³ are indicative of the problems that arise from strike action in South Africa.⁴ These strikes not only took the lives of police officials and protesting employees, but also affected non-unionised members and their families.⁵ The Labour Court regularly deals with applications for interdicts due to unprotected strikes of a prolonged, violent and destructive nature. In addition, most of the interdicts granted by the Labour Court have failed to have a salutary effect on the behaviour of unions and their members.⁶ This has led to contempt of court proceedings initiated by the employer in the Labour Court. Accordingly, the purpose of this research is to evaluate the powers of the Labour Court to determine whether it is effective in curbing the occurrence of violent, lengthy and destructive strikes.

Section 150 of the *Labour Relations Act*⁷ provides for the establishment of the Labour Court, while section 158 provides for the powers of the Labour Court.⁸ The *LRA* states that the Labour Court has the power to grant urgent interim relief,⁹ an interdict¹⁰ and an order directing performance of a particular act in order to remedy a wrong and give effect

¹ During the strike by security employees who were SATAWU members, fifty people lost their lives, damage to property was estimated at R1.5 million (See Manamela and Mpofari 2013 *CILSA* 322-323).

² The Marikana strike resulted in the deaths of mineworkers and police officials. Others were left badly injured and many arrests were made. Also, property was badly damaged (See Manamela and Mpofari 2013 *CILSA* 322-323).

³ The truck drivers' strike resulted in trucks being set on fire and non-strikers were assaulted (See Manamela and Mpofari 2013 *CILSA* 322-323).

⁴ Manamela and Mpofari 2013 *CILSA* 322-323.

⁵ Some of these violent unprotected strikes involved threats to family members of non-strikers.

⁶ Myburgh 2013 *Contemporary Labour Law* 3

⁷ *Labour Relations Act* 66 of 1995 (Hereinafter referred to as the *LRA*).

⁸ Section 150 and 158 of the *LRA*.

⁹ Section 158 (1) (i) of the *LRA*.

¹⁰ Section 158 (1) (ii) of the *LRA*.

to the functions of the *LRA* amongst others.¹¹ In terms of section 157 of the *LRA*,¹² the Labour Court has the power to exercise the above-mentioned powers.

Section 157 of the *LRA* provides for the jurisdiction upon which the Labour Court can exercise these powers.¹³ The Labour Court has jurisdiction to entertain all employment and labour relations.¹⁴ Therefore, the Labour Court is one of the dispute resolution mechanisms provided for by the *LRA*.

Van Niekerk *et al*¹⁵ state that for one truly to appreciate dispute resolution measures, it is essential to define what a dispute is. Section 213 of the *LRA* only defines a dispute as an alleged dispute and does not give a definition in the substantive sense.¹⁶ There are two types of disputes within the purview of labour relations, namely disputes of rights and disputes of interest. Disputes of rights arise over breaches, the interpretation and the application of existing duties stated in a contract, collective agreement or any other legal instrument.¹⁷ These rights are either arbitrated or adjudicated by the Commission of Conciliation Mediation and Arbitration,¹⁸ bargaining councils or the Labour Court.¹⁹ On the other hand, disputes of interest are the creation of new rights resolved by collective bargaining, which may lead to industrial action.²⁰

The *LRA* states one of its purposes to be the provision of simpler methods and procedures of dispute resolution.²¹ The *LRA* further adds that these simpler methods of dispute resolution can also be through independent alternate dispute resolution services accredited for that purpose, including the Labour Court.²² This means that labour dispute

¹¹ Section 158 (1) (iii) of the *LRA*.

¹² Section 157 of the *LRA*.

¹³ Section 157 (1) of the *LRA*.

¹⁴ Section 157 (2) (a) of the *LRA*.

¹⁵ Van Niekerk *et al* *Law at Work* 444.

¹⁶ Section 213 of the *LRA*; Van Niekerk *et al* *Law at Work* 444; Section 213 of the *LRA* only explains dispute as an "alleged dispute".

¹⁷ Grogan *Workplace Law* 355.

¹⁸ Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as the *CCMA*).

¹⁹ *Hospersa & another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC) para 9.

²⁰ *University of Witwatersrand Johannesburg v Commissioner Hutchinson* 2001 ILJ 2496 (LC) 2499 para 7-8; Botha 2015 *Obiter* 201.

²¹ Purposes of the *LRA*.

²² Purposes of the *LRA*.

resolution has to be conducted in a streamlined manner, efficiently, expeditiously, effectively and inexpensively in the spirit and promotion of effective labour dispute resolution.²³

One could ask whether the Labour Court is efficiently and effectively achieving the mandate as provided for in the *LRA*.²⁴ In other words, the question may be whether the Labour Court is efficiently exercising its powers as stated in section 158 of the *LRA* in relation to the granting of interdicts to curb prolonged, violent and destructive strikes effectively. Also, is the Labour Court effective in the enforcement of these interdicts? These are some of the aspects that this research will attempt to evaluate. It may be argued that the Labour Court has failed to eliminate the occurrence of violent strikes through the powers vested in section 158 of the *LRA*. One may further argue that this mandate stems from the fact that the Labour Court has to intervene when it appears that a strike is no longer functional.²⁵ For this reason, one of the challenges faced by the Labour Court as a dispute resolution mechanism is that the *LRA* in section 158 does not expressly grant the Labour Court the power to order a suspension of a violent strike due to the adversarial nature of the strike.²⁶

The Labour Court may only issue an interdict in terms of Section 158 (1) (a) (ii) of the *LRA*.²⁷ According to the *Labour Relations Draft Amendment Bill* 2012, an amendment was proposed to Section 69 of the *LRA*.²⁸ The amendment provided that in disputes that involved pickets, the Labour Court could grant relief.²⁹ This means that the proposed amendments suggested that the Labour Court should be granted the power to suspend a strike in appropriate circumstances, like a national or local crisis.³⁰ However, this

²³ Dispute resolution mechanisms have to act in promotion of the purposes of the *LRA* in section 1 (d) (iv) being effective dispute resolution.

²⁴ The mandate stated in section 1 (d) (iv) of the *LRA*.

²⁵ Botha 2016 *THRHR* 79 387. Strike action has to be proportional; it has to be suitable to the demands being made, the strike has to be necessary as a means of last resort where all other measures have failed and the strike has to be reasonable (See Botha 2016 *THRHR* 79 387-388).

²⁶ Section 158 of the *LRA* does not include strike violence.

²⁷ Section 158 1 (a) (ii) of the *LRA* empowers the Labour Court to grant interdicts; The purpose of an interdict is to prevent misconduct during strikes (See chapter 2 para 2.3).

²⁸ Section 69 of the *LRA* is on picketing rules.

²⁹ Section 9 of the *Memorandum of Objects on Labour Relations Amendment Bill, 2012*.

³⁰ Section 9 of the *Memorandum of Objects on Labour Relations Amendment Bill, 2012*.

provision was never included in the final *LRA* and the *LRA* does not offer new possibilities for the Labour Court in dealing with strike misconduct or unprocedural industrial action.³¹

An interdict is effective at the start of strike violence, but does not extend to consequences of the strike violence and the effect on third parties affected. Section 67(2) of the *LRA* supports this by affording protection for engaging in a protected strike.³² However, regardless of the powers of the Labour Court to interdict strike misconduct as provided for in Section 158 of the *LRA*, the *LRA* remains silent on third party and employer's rights where protected strikes shift to violence.³³ The *LRA* gives the Labour Court the power to grant interdicts, but does not include the suspension or granting of an interdict on account of strike violence and the extension of these powers to affected third parties and employers.³⁴ Consequently, it may be argued that the Labour Court's powers as provided for in Section 158 of the *LRA* are limited to granting an interdict. This section does not include strike violence.

The Labour Court can grant interdicts to restrain the misconduct associated with unprotected strikes.³⁵ This is to prevent a union from continuing with its unlawful activities during strike action.³⁶ However, more often than not, interdicts are disregarded by unions and their members. The Labour Court has to intervene when it appears that a strike is no longer functional in terms of its dominant purpose or when trade unions no longer have any interest in the resolution of a dispute.³⁷ This duty is rooted in Section 158 of the *LRA*.³⁸ In *Tsogo Sun Casinos (Pty) Ltd v Future of SA Workers Union*,³⁹ a strike erupted which led to violence, theft, assault and malicious damage to property. Van Niekerk J stated that,

³¹ Rycroft 2015 *ILJ* 6.

³² Section 67 (2) of the *LRA* provides for immunity in a protected strike. Section 67 (2) of the *LRA* states that a person does not commit a delict or breach of contract by taking part in a protected strike or any conduct in furtherance of a protected strike.

³³ Fergus 2016 37 *ILJ* 1537.

³⁴ Fergus 2016 37 *ILJ* 1537.

³⁵ Tenza *The liability of trade union for conduct of their members during strikes* 108.

³⁶ Tenza *The liability of trade union for conduct of their members during strikes* 108.

³⁷ Botha 2016 *THRHR* 79 387.

³⁸ Botha 2016 *THRHR* 79 387, This mandate stems from the fact that the Labour Court has to intervene when a strike is no longer functional to its purpose.

³⁹ *Tsogo Sun Casinos (Pty) Ltd v Future of SA Workers Union & Others* 2012 22 *ILJ* 998 (LC) (see detailed discussion in chapter 2 para 2.4.1).

...this court will always intervene to protect both the right to strike and the right to peaceful picketing. This is an integral part of the courts mandate conferred by the *Constitution* and *Labour Relations Act*. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy a protected status.⁴⁰

This illustrates that the Labour Court has to intervene when the strike loses its purpose. Also, the Labour Court has to intervene when the right to strike is abused through engagement in violence as a means of dispute resolution.

However, it may be argued that the Labour Court has failed in some circumstances to curb the occurrence of prolonged, violent and destructive strikes through interdicts. This is because the Labour Court grants interdicts, but perhaps fails to enforce them since such interdicts may be ignored. This has led to violent strikes escalating instead of stopping.⁴¹ The Labour Court does grant the interdicts, which may have a beneficial effect to reduce the violence and destructive nature of strikes. However, proper enforcement is required.⁴² Proper enforcement of interdicts may require the adequate communication of the interdict notice to the striking employees, including the notification of subsequent consequences of noncompliance with the interdict.⁴³ It should also be noted that the duties of unions during strike action may play a big role in the enforcement of court orders. Among other things, unions have to obey court orders and have their members comply as well. Failure to abide by court orders may lead to contempt of court proceedings in the Labour Court where the liability of the union will be determined.

However, Benjamin⁴⁴ submits that in recent years, violence and destructive behaviour has led to an observable infringement of the *LRA* and the Labour Court orders. The infringement of court orders has subsequently led to contempt of court proceedings in the Labour Court. An observable infringement of court orders was established in *Modise*

⁴⁰ *Tsogo Sun Casinos (Pty) Ltd v Future of SA Workers Union & Others* 2012 22 ILJ 998 (LC) para 13.

⁴¹ Reference is made to *Food and Allied Workers Union and others v Premier Foods Ltd t/a Blue Ribbon Salt River* [2012] 12 BLLR 1222 (LAC) and *Modise v Steve's Spar Blackheath* (2000) 21 ILJ 519 (LAC).

⁴² SlaterD 2015 <http://www.polity.org.za/article/no-easy-way-forward-over-strike-action-2015-01-16>.

⁴³ SlaterD 2015 <http://www.polity.org.za/article/no-easy-way-forward-over-strike-action-2015-01-16>.

⁴⁴ Benjamin 2014 *ILJ* 9.

v Steve's Spar Blackheath.⁴⁵ In this case, the strikers failed to obey an interdict sought to prohibit the strike. In the Labour Appeal Court, Conradie JA stated that,

...it is becoming distressingly obvious that court orders are, by employers and employees alike, not invariably treated with the respect they ought to command...Obedience to a court order is foundational to a state based on the rule of law.⁴⁶

This highlights a serious concern in the sense that court orders seem to be ignored by trade unions and their members, although they should be afforded the necessary respect and compliance they command.

Another case dealing with the disregard of the Labour Court interdict is that of *Food and Allied Workers Union and others v Premier Foods Ltd t/a Blue Ribbon Salt River*.⁴⁷ This case involved violence and misconduct during strikes. Non-striking employees were harassed and threats of death to their families were made if they do not join the strike.⁴⁸ In addition, shots were fired and non-strikers' vehicles were bombed.⁴⁹ A witness identified as one of the perpetrators was killed.⁵⁰ Also, delivery vans were held and the drivers harassed. The employer had to appoint private security in order to control the violent strike.⁵¹ In this case, Landman AJ stated that,

...an interdict was sought and obtained in the Labour Court... A commencement was made with an application for contempt of court but it was not finalized. The strike was eventually settled about two months later on 9 May 2007.⁵²

The above cases illustrate situations where interdicts have been ignored and show the prevalence of a state of unlawfulness.

⁴⁵ *Modise v Steve's Spar Blackheath* (2000) 21 ILJ 519 (LAC).

⁴⁶ *Modise v Steve's Spar Blackheath* (2000) 21 ILJ 519 (LAC) par 13.

⁴⁷ *Food and Allied Workers Union and others v Premier Foods Ltd t/a Blue Ribbon Salt River* [2012] 12 BLLR 1222 (LAC) (See chapter 2 para 2.4.4).

⁴⁸ *Food and Allied Workers Union and others v Premier Foods Ltd t/a Blue Ribbon Salt River* [2012] 12 BLLR 1222 (LAC) para 4.

⁴⁹ *Food and Allied Workers Union and others v Premier Foods Ltd t/a Blue Ribbon Salt River* [2012] 12 BLLR 1222 (LAC) para 4.

⁵⁰ *Food and Allied Workers Union and others v Premier Foods Ltd t/a Blue Ribbon Salt River* [2012] 12 BLLR 1222 (LAC) para 4.

⁵¹ *Food and Allied Workers Union and others v Premier Foods Ltd t/a Blue Ribbon Salt River* [2012] 12 BLLR 1222 (LAC) paras 4-6.

⁵² *Food and Allied Workers Union and others v Premier Foods Ltd t/a Blue Ribbon Salt River* [2012] 12 BLLR 1222 (LAC) 10-14.

However, the Labour Court may provide a remedy where an interdict was disregarded. This is done through contempt of court proceedings. An applicant can resort to a contempt of court application where an interdict by the Labour Court has been disregarded.⁵³ Contempt of court proceedings are provided for in Section 142 (4) of the *LRA*. Accordingly, an employer may institute contempt of court proceedings in the Labour Court where an interdict had been granted but disregarded by a union and its members. However, another aspect addressed in this research is the effectiveness of contempt of court proceedings as part of the powers of the Labour Court to determine whether the Labour Court is effective in curbing prolonged, violent and destructive strikes by means of such proceedings. It should be noted that the enforcement of the Labour Court interdicts was also evaluated through the duties and liabilities of trade unions during industrial action. This is linked to contempt of court proceedings where a union has failed to discharge its duties towards obeying court orders and ensuring that its members comply with the interdict as well.

Relevant to the powers of the Labour Court is the suggestion that compulsory or interest arbitration be included as part of the powers of the Labour Court to curb the occurrence of prolonged, violent and destructive strikes. The 1956 *Labour Relations Act*⁵⁴ provided for compulsory arbitration in Section 46.⁵⁵ However, this provision for compulsory arbitration was not included in the most recent *LRA*. It has been argued that in situations where strikes become prolonged, violent and destructive, the Labour Court has to have the power to not only suspend such a strike, but also to order the parties to undergo compulsory arbitration.⁵⁶ Compulsory interest arbitration is explained as a process where an arbitrator is appointed for the parties to a dispute.⁵⁷ This entails the involvement of a third party or facilitator to intervene to resolve issues on which parties fail to reach an agreement.⁵⁸ Compulsory interest arbitration as part of the powers of the Labour Court

⁵³ Achmat *The right to strike and its limitations* 35-36.

⁵⁴ *Labour Relations Act* 28 of 1956 (hereinafter referred to as 1956 *LRA*).

⁵⁵ section 46 (2) of the 1956 *LRA* provided for compulsory arbitration. This section provided that where an industrial council or a conciliation board has failed to resolve a matter within 30 days from the date of referral or by reason of the circumstances listed therein, then this industrial council or conciliation board shall report to the Director-General and what follows will be a referral to arbitration

⁵⁶ Botha *Employee participation and voice in companies: A legal perspective* 222.

⁵⁷ Brand 2016 *Interest Arbitration-Potential for South Africa* 5.

⁵⁸ Tenza 2015 *Law, Democracy & Development* 229.

was suggested after a five-month long platinum miners' strike in 2014 to remedy the occurrence of prolonged, violent and destructive strikes.⁵⁹

The aim of the research is to determine the effectiveness of Labour Court orders and their enforcement in an attempt to curb prolonged, violent and destructive strikes. This includes determining the extent to which the Labour Court may intervene with the enforcement of its orders in preventing prolonged, violent and destructive strikes. In order to achieve this, the study first deals with the powers of the Labour Court to grant interdicts. Thereafter, the study continues with a discussion on the enforcement of court interdicts. This is discussed in relation to the duties and liabilities of trade unions. Linked to this, contempt of court proceedings are discussed where unions and their members fail to comply with the Labour Court interdict. Thereafter, compulsory interest arbitration as proposed as part of the powers of the Labour Court to curb the occurrence of lengthy, violent and destructive strikes is discussed. The study provides an informed view of the effectiveness of the Labour Court orders and the extent to which the Labour Court can intervene in preventing prolonged, violent and destructive strikes. In furtherance, the research determines whether including compulsory interest arbitration as part of the powers of the Labour Court would go a long way in curbing the occurrence of long, violent and destructive strikes.

⁵⁹ Botha *Employee participation and voice in companies: A legal perspective* 222.

Chapter 2 LABOUR COURT INTERDICTS

2

2.1 Introduction

South Africa is a constitutional democracy. In a democratic society, there has to be mechanisms that regulate the terms and conditions of collective employment by way of representation.⁶⁰ The channel granted this responsibility is collective bargaining.⁶¹ The evolution of collective bargaining in South Africa runs parallel the struggle throughout the apartheid era up to where it is currently. Du Toit⁶² highlights the evolution of collective bargaining briefly by pointing out that it was first established in countries such as Britain as a key aspect in labour market regulation, followed by industrialised and industrialising countries, including South Africa a decade later.⁶³ In South Africa, employers were initially resistant to involvement in the system of collective bargaining.⁶⁴ The *Industrial Conciliation Act*⁶⁵ had in place relevant structures for collective bargaining and thus allowed employees to strike in certain circumstances.⁶⁶ However, black people were not included in the *ICA* and this continued for the first 50 years of the act.⁶⁷ The consequence of this was that black people could not legally strike, effectively resulting in the oppression of the right to strike.⁶⁸

In 1948, the Botha Commission⁶⁹ seemed to rescue the situation by providing recommendations to the government, one being the legal recognition of black trade

⁶⁰ Godfrey, Maree, Du Toit and Theron *Collective Bargaining in South Africa* 3.

⁶¹ Godfrey, Maree, Du Toit and Theron *Collective Bargaining in South Africa* 3.

⁶² Du Toit 2007 *ILJ* 1405.

⁶³ Du Toit 2007 *ILJ* 1405.

⁶⁴ Godfrey, Maree, Du Toit and Theron *Collective Labour Law in South Africa* 75.

⁶⁵ Industrial Conciliation Act 11 of 1924 (hereinafter referred to as the *ICA*)

⁶⁶ Godfrey, Maree, Du Toit and Theron *Collective Labour Law in South Africa* 75. The downside was that unions could not force employers to agree to the establishment of industrial councils which aided in collective bargaining.

⁶⁷ Matete *The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho* 14-15.

⁶⁸ Matete *The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho* 14-15 (own emphasis).

⁶⁹ The period before 1979 illustrated oppression upon black people and engagement in collective bargaining. However, this did not deter black people from creating and joining trade unions. This led to an undesirable labour relations environment thus the National Party led government tried to remedy

unions by the government, but with a prohibition on striking.⁷⁰ Unfortunately, the government refused this and that led to a collective bargaining structure of oppression until a gradual change occurred in the 1970s.⁷¹ A different approach was provided by the Wiehahn Commission⁷² in 1979. At that point, collective bargaining was used at industrial councils with white employees, and at plant level with black employees.⁷³ This commission recommended the establishment of the Industrial Court aimed at quashing unfair labour practices, thus introducing a new form of centralised bargaining which black unions were not interested in.⁷⁴ Black people continued bargaining at plant level with some employers reluctant to engage in such bargaining.⁷⁵ Consequently, this led to more strikes leaving the employer with no choice but to sign recognition agreements with black unions.⁷⁶ This forced the legislature to limit collective bargaining within a centralised system.⁷⁷

The period after 1990 brought about drastic changes to collective bargaining.⁷⁸ Political transition in South Africa and the influence of international law obligations led to the promulgation of the 1995 *LRA*.⁷⁹ This illustrates the struggle experienced in collective bargaining and the oppression involved especially towards black people to where it currently is now. The history described above suggests that this may have contributed to

the situation by setting up the Botha Commission in 1948. (see Matete *The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho* 14-15)

⁷⁰ Grogan *Collective Labour Law* 127.

⁷¹ Grogan *Collective Labour Law* 127.

⁷² The government appointed the Wiehahn Commission to investigate the labour legislation of South Africa. This is because the period after 1979 illustrated an increase in the number of trade unions especially among black people. The government even went as far as to ban individuals who promoted black trade unions and to pass legislation limiting the power of black unions including engaging in strike action. (see Matete *The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho* 16).

⁷³ Matete *The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho* 16.

⁷⁴ Matete *The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho* 17.

⁷⁵ Matete *The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho* 17.

⁷⁶ Matete *The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho* 17.

⁷⁷ Matete *The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho* 17.

⁷⁸ Godfrey, Maree, Du Toit and Theron *Collective Labour Law in South Africa* 80. There was improvement towards encouragement of employers and employees to enact their own agreements and this led to an increase in trade unions.

⁷⁹ Matete *The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho* 11.

the adversarial nature of collective bargaining, which is characterised by violence and destruction during strikes. This is because the history as described above is characterised by inequalities between the recognition of black unions and white unions. It is noteworthy that trade unions are the central pillar of collective bargaining but black unions were not allowed to partake in strike action for a considerable amount of time.⁸⁰ However, this changed after the Wiehan Commission in 1979 as discussed above. This means that before the Wiehan Commission, the racially exclusive labour relations structure and suppressing apartheid regime led to massive and destructive strike action.⁸¹ The belief in the use of strike action as a remedy has since become a tradition.

Collective bargaining has been explained to be a process where employers and organised groups of employees attempt to settle their conflict through mutual accommodation.⁸² Just as warfare is seen as an extension of diplomacy, strikes too can be regarded as an extension of collective bargaining in the sense that the mere threat of destruction and violence fuels bargaining.⁸³ In South Africa, employees believe that engagement in such strikes brings efficient resolution of disputes.⁸⁴

However, this belief in the use of violence and destructive behaviour to voice demands and to compel employers to meet demands seems to have become entrenched as a tradition in South Africa.⁸⁵ This makes one wonder whether this still fits within the aims of the *LRA* to promote labour peace and orderly collective bargaining as envisaged by the *Constitution of the Republic of South Africa*.⁸⁶ The right to strike is set in motion when the demands of the employee are not met through collective bargaining, thus making it an economic weapon.⁸⁷ Therefore, this right has become central to collective bargaining.⁸⁸

⁸⁰ Matete *The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho* 14-15.

⁸¹ Vettori *Alternative means to regulate the employment relationship in the changing world of work* 4.

⁸² Grogan *Workplace Law* 405.

⁸³ Grogan, *Collective Labour Law* 11.

⁸⁴ Grogan, *Collective Labour Law* 11.

⁸⁵ Botha *Employee participation and voice in companies: A legal perspective* 239, strikes take longer and are of a violent and destructive nature.

⁸⁶ The Constitution of the Republic of South Africa 1996 (hereinafter referred to as the *Constitution*); The purposes of the *LRA* include the promotion of orderly collective bargaining, efficient dispute resolution mechanisms and regulation of strikes in promotion of labour peace.

⁸⁷ Botha *Employee participation and voice in companies: A legal perspective* 219.

⁸⁸ Botha *Employee participation and voice in companies: A legal perspective* 219.

Collective bargaining seeks to balance the unequal bargaining power between an employer and employee.⁸⁹ This has been described as an adversarial process in South Africa.⁹⁰ In an attempt to strike a balance between the powers of the employer and those of the employee, the Labour Court can intervene by granting an interdict.⁹¹ The Labour Court has been empowered to resolve disputes of rights as a dispute resolution mechanism in South Africa.⁹² This deep-rooted culture of striking in South Africa has produced noteworthy challenges which the relevant structures have not had easy solutions. This includes the Labour Court.⁹³

The Labour Court has had heard and decided several cases⁹⁴ related to violence during a strike as a destructive form of industrial action in South Africa.⁹⁵ Employers are faced with a lack of resources, expertise and powers when it comes to controlling a violent and destructive strike. All they can do is to approach the Labour Court for an interdict.⁹⁶ This is to interdict the unlawful acts in contemplation or in furtherance of an unprotected strike.⁹⁷ Ryrcoft⁹⁸ submits that with regard to,

...the strike context, labour law is proving to be an inadequate framework to regulate mob violence and criminal activity.⁹⁹

This chapter focuses on the powers of the Labour Court especially with regard to the granting of interdicts. Collective bargaining has been described as an adversarial process requiring intervention by the law in circumstances where a strike loses its protective status by becoming violent and destructive. This is where the Labour Court intervenes by granting interdicts as one of its vested powers.¹⁰⁰ The discussion begins by setting out the legal foundation of the South African perspective on the powers of the labour court

⁸⁹ Botha 2015 *PER* 1812).

⁹⁰ Employees use strike action to coerce the employer to give in to their demands (Botha 2015 *PER* 1812).

⁹¹ Botha *Employee participation and voice in companies: A legal perspective* 220.

⁹² Van Niekerk *et al Law at Work* 444.

⁹³ Slater 2015 <http://www.polity.org.za/article/no-easy-way-forward-over-strike-action-2015-01-16> accessed 17-08-2017

⁹⁴ See chapter 2 para 2.4 and chapter 3 para 3.4 for a discussion on these cases.

⁹⁵ Ryrcoft 2013 *LLRNIC* 1.

⁹⁶ Ryrcoft 2013 *LLRNIC* 1 (own emphasis added).

⁹⁷ Tenza *The liability of trade union for conduct of their members during strikes* 108.

⁹⁸ Ryrcoft 2013 *LLRNIC*.

⁹⁹ Ryrcoft 2013 *LLRNIC* 1.

¹⁰⁰ Section 158 of the *LRA*.

Secondly, the discussion evaluates what court interdicts entail in the context of the Labour Court and the requirements and legal force of interdicts granted by the Labour Court. The purpose of this chapter is to determine the powers of the Labour Court to grant interdicts, including the extent to which the Labour Court intervenes by granting an interdict during violent and destructive strikes. This provides a link to the next chapter, which deals with the effectiveness of enforcement of such interdicts and contempt of court proceedings where interdicts have been disregarded.

2.2 South African perspective with regard to the Labour Court powers: granting interdicts

2.2.1 Constitution of the Republic of South Africa 1996¹⁰¹

The starting point in the discussion is the *Constitution* as the supreme law in South Africa.¹⁰² The *Constitution* provides for the right to strike in Section 23. This right is a constitutionally protected fundamental right. This means that the state and all state organs have to respect, promote and fulfil the exercise of the right to strike.¹⁰³ Therefore, relevant to the study is that Section 165 (1) of the *Constitution* provides that judicial authority is entrusted in the courts and that such exercise of power has to be applied without fear, favour or prejudice.¹⁰⁴ Section 165 (1) of the *Constitution* ensures that the court's authority is effective by ensuring that court orders are binding on all persons and organs of state.¹⁰⁵ The Labour Court's powers are provided for by the *Constitution* and also the *LRA*, which gives effect to the provisions of the *Constitution* as the supreme law.

2.2.1.1 The Labour Relations Act 66 of 1995

The purposes of the *LRA* include the provision of simpler methods of dispute resolution through independent alternative dispute resolution channels that are qualified for this

¹⁰¹ The *Constitution of the Republic of South Africa* (hereinafter referred to as the *Constitution*).

¹⁰² Section 2 of the *Constitution* states that the *Constitution* is the supreme law. See paras 2.3 and 2.4 for jurisprudence incorporating the right to strike and the powers of the Labour court.

¹⁰³ Section 7 (2) of the *Constitution*; Olivier *Social Security* para 34.

¹⁰⁴ Section 65 (1) of the *Constitution* provides for the binding force of court orders thus interdicts are binding.

¹⁰⁵ Dube 2017 *Without Prejudice* 10.

purpose.¹⁰⁶ This includes the Labour Court, since the purposes of the *LRA* also highlights the establishment of the Labour Court and Labour Appeal Court with exclusive jurisdiction to deal with matters that arise from the *LRA*.¹⁰⁷ It is also noteworthy that dispute resolution has to promote and be in accordance with the purposes of the *LRA*.¹⁰⁸

The right to strike is not solely provided for by the *Constitution* as mentioned above. This right is also provided for in Section 64 of the *LRA*. The Labour Court as a dispute resolution mechanism was established by Section 51 of the *LRA*. The *LRA* goes further to provide for the powers of the Labour Court, being the granting of urgent interim relief and the issuing of interdicts.¹⁰⁹ The Labour Court therefore has the powers to hear all employment and labour relations matters.¹¹⁰

2.3 What are interdicts?

An interdict has been defined as a court order which orders a person to refrain from engaging in a particular act.¹¹¹ Thus, an interdict can be described as an urgent court order where the concerned applicant can approach the court *ex parte* in order to obtain a temporary restraining order against the defendant(s).¹¹² This is to restrain the defendants from continuing with its wrongful activities.¹¹³ Section 68 (1) of the *LRA* gives the Labour Court the power to grant interdicts, but this does not apply to essential and maintenance services.¹¹⁴ Therefore, except in cases that involve essential and maintenance services, an interdict can only be granted in relation to a strike concerning a certain issue and is not allowed to be in a manner that may deprive employees of their fundamental right to strike.¹¹⁵ This court order is granted where a party requires a

¹⁰⁶ Long title *LRA*.

¹⁰⁷ Long title *LRA*.

¹⁰⁸ Section 1 (d) (iv) of the *LRA* states the one of the objectives of the *LRA* to be effective resolution of labour disputes.

¹⁰⁹ Section 68(1) (a) (i) and (ii) of the *LRA*.

¹¹⁰ Section 157(2) (a) of the *LRA*.

¹¹¹ Manamela and Budeli 2013 *cilsa* 329.

¹¹² Tenza *The liability of trade union for conduct of their members during strikes* 108; *Thompson v Voges* (1988) 1 SA 691 (AD) at p711.

¹¹³ Tenza *The liability of trade union for conduct of their members during strikes* 108.

¹¹⁴ Achmat *The right to strike and its limitations* 35.

¹¹⁵ Achmat *The right to strike and its limitations* 35.

safeguarding mechanism against an unlawful intrusion with his or her rights.¹¹⁶ This is in situations where a person with an interest foresees that the other party may act in a manner contrary to the law, resulting in the infringement of his or her rights.¹¹⁷

An interdict has to have a constructive effect on the violent nature of strikes. Should strikes be allowed to become destructive and violent, this will result in defeating the main purpose of collective bargaining.¹¹⁸ This is because the economic power would then be to the advantage of a trade union alone, leading to economic duress.¹¹⁹ Economic duress in this case would mean that an employer would sign collective agreements under duress and be coerced to agree to the demands of a trade union.¹²⁰ Economic duress is the signing of a contract under threat and there is no alternative option. In this case, an employer would feel forced to accept the demands. This would no doubt create an imbalance in the relationship between employer and employees.¹²¹ Employers can therefore approach the court to protect themselves from suffering irreparable damage that may arise from the wrongful activities of trade unions and their members.¹²²

2.3.1 Requirements of an interdict

In order for a court interdict to be granted, an applicant applies *ex parte* to the court on an urgent basis. The court then issues an interim interdict ordering the party against whom the interdict has been ordered to show good cause as to why a final order should not be made against them.¹²³ Therefore, for an interdict to be granted, certain requirements have to be met. These requirements were highlighted in *NCSPCA v Openshow*.¹²⁴ The court stated,

A *prima facie* or clear right: what is required here is proof of facts that establish the existence of a right in terms of substantive law; A well-grounded apprehension of

¹¹⁶ Section 68 of the *LRA* authorises an employer to apply to the Labour Court for an interdict against anyone engaged in an unprotected strike or any conduct in furtherance of an unprotected strike.

¹¹⁷ Tenza *The liability of trade union for conduct of their members during strikes* 108.

¹¹⁸ Myburgh 2013 *Contemporary Labour Law* 4.

¹¹⁹ Myburgh 2013 *Contemporary Labour Law* 4.

¹²⁰ Myburgh 2013 *Contemporary Labour Law* 6 (own emphasis).

¹²¹ Achmat *The right to strike and its limitations* 37.

¹²² Tenza *The liability of trade union for conduct of their members during strikes* 108. In this case, the defendant would be a trade union or its members.

¹²³ Tenza *The liability of trade union for conduct of their members during strikes* 36.

¹²⁴ *NCSPCA v Openshow* (2013) 34 ILJ 2589 (LC) (hereinafter referred to as the *NCSPCA* case).

irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; Balance of convenience favours the granting of an interim interdict; and The applicant has no other satisfactory remedy.¹²⁵

The above view by the Labour Court provides for the grounds upon which the applicant has to satisfy the court before an interdict can be granted. Therefore, for purposes of this study, an employer would have to prove that the strike by a union and its members is unprotected and likely to cause irreparable harm.

In *SA Post Office Ltd (SAPO) v TAS Appointment & Management Services CC & others*,¹²⁶ the SAPO made an application in the Labour Court to prevent an unprotected strike by employees of the post office supplied by a temporary employment service. In determining whether SAPO had *locus standi* to bring an application for an interdict, the Labour Court noted that the *LRA* does not expressly state who may apply for an interdict.¹²⁷ The only requirement was that the SAPO had to show that the strike was unprotected and infringed on its legal rights, thus the interdict was granted.¹²⁸

In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers' Union & Others*,¹²⁹ the union prevented people from entering or leaving the employer's premises, interfered with traffic, assaulted persons and damaged property on and near the employer's premises.¹³⁰ The court successfully granted an interdict restricting the union and its members from their misconduct.¹³¹ It seems that the Labour Court will come to the rescue of an employer where strikers engage in acts of misconduct and such acts threaten to bring damage or irreparable harm for an employer.

Therefore the legal force of interdicts is to prevent misconduct during strikes where such misconduct results in violence and disruption during a protected strike.¹³² It is noteworthy

¹²⁵ *NCSPCA* case at 437B.

¹²⁶ In *SA Post Office Ltd (SAPO) v TAS Appointment & Management services CC & Others* (2012) 33 ILJ 1958 (LC) (hereinafter referred to as the *SAPO* case).

¹²⁷ *SAPO* case at para1964H.

¹²⁸ *SAPO* case at paras 1964H and 1865A.

¹²⁹ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers' Union & Others* (2012) 33 ILJ 998 (LC) (hereinafter referred to as *Tsogo* case) This case will be discussed in more detail on the case study.

¹³⁰ *Tsogo* case para 4.

¹³¹ *Tsogo* case para 2.

¹³² Ryrcoft 2013 *LLRNIC* 1 (own emphasis added); Manamela and Budeli 2013 *cilsa* 329; section 64 of the *LRA* is on the right to strike and section 65 of the *LRA* is on the limitations on the right to strike.

that an unprotected strike is not in itself a criminal offence punishable by law but is however an act of misconduct in furtherance of a strike.¹³³ An unprotected strike is one that does not comply with sections 64 and 65 of the *LRA*.¹³⁴ This means that an employer can take action against striking employees such as applying for an interdict.¹³⁵ In *Woolworths (Pty) Ltd V SACCAWU*,¹³⁶ the court stated that the Labour Court will always be sympathetic to employers where violence has erupted during a strike.¹³⁷ Further, that this is the kind of behaviour upon which the court could readily grant an interdict.¹³⁸

Events for which an employer can seek an interdict against a union's strike misconduct include the murder of non-strikers, the malicious destruction of property, the intimidation of families or management, and in extreme cases street-based traders as well.¹³⁹ When this occurs, employers are faced with no other option but to resort to the Labour Court to seek an interdict to put a stop to strikes of this nature or certain aspects of the strike.¹⁴⁰ What follows is that an employer also has a remedy to later seek a court order for the compensation of any loss incurred in relation to the strike.¹⁴¹ However, Rycroft¹⁴² submits that even though there are legal mechanisms in place in the form of interdicts and orders for compensation, such mechanisms are mostly reactive and punitive, thus requiring a more holistic approach.¹⁴³ This means that most of these mechanisms are responsive and disciplinary but lack greater understanding of the psychological, sociological as well as economic factors that lead to mob violence.¹⁴⁴

¹³³ Manamela and Budeli 2013 *cilsa* 329.

¹³⁴ Tenza *The liability of trade union for conduct of their members during strikes* 36.

¹³⁵ Tenza *The liability of trade union for conduct of their members during strikes* 36 (own emphasis).

¹³⁶ *Woolworths (Pty) Ltd V SACCAWU* (2006) 27 ILJ 1234 (LC) (hereinafter referred to a *Woolworths* case).

¹³⁷ *Woolworths* case p1236.

¹³⁸ *Woolworths* case p1236.

¹³⁹ Ryrcoft 2013 *LLRNIC* 1.

¹⁴⁰ Ryrcoft 2013 *LLRNIC* 1.

¹⁴¹ Ryrcoft 2013 *LLRNIC* 1.

¹⁴² Ryrcoft 2013 *LLRNIC*.

¹⁴³ Ryrcoft 2013 *LLRNIC* 16.

¹⁴⁴ Ryrcoft 2013 *LLRNIC* 16.

It has been common in South Africa for the Labour Court to grant interdicts.¹⁴⁵ These interdicts have sometimes had a salutary effect in the decrease of violence, although it has been suggested that they need proper enforcement.¹⁴⁶ An interdict can be an effective means to prevent strike misconduct only if the court order obtains respect from trade unions and its members.¹⁴⁷ However, recent events illustrated that an interdict is no longer an effective measuring tool, thus the Labour Court's approach is to allow employers to use hearsay evidence where witnesses refuse to testify.¹⁴⁸ An interdict is a court order, which means that breaching an interdict shall result in contempt of court proceedings against unions and their counterparts.¹⁴⁹ The following are some of the cases where interdicts have been sought in the Labour Court.

2.4 Case study in relation to Labour Court interdicts

The South African Institute of Race Relations issued a report following a survey on strike-related violence.¹⁵⁰ This report indicated that there were 181 strike-related deaths in the years between 1999 and 2012, together with 313 injuries and 3 058 arrests for public violence during strikes.¹⁵¹ In addition, a 2015 Department of Labour report also noted that there was a significant increase in the number of unprotected strikes from 14% in 2014 to 55% in 2015.¹⁵² During a recent survey, the Department of Labour Report indicated that out of 122 strikes in 2016, 59% were unprotected.¹⁵³ It is evident from the

¹⁴⁵ This is due to the adversarial nature of collective bargaining which leads to prolonged, violent and destructive strikes which leave the employer with no choice but to approach the Labour Court for an interdict. Evidence to this will be discussed in the case study that will follow.

¹⁴⁶ Slater 2015 <http://www.polity.org.za/article/no-easy-way-forward-over-strike-action-2015-01-16> accessed 17-08-2017; Enforcement of interdicts shall be discussed in detail in chapter 3.

¹⁴⁷ Achmat *The right to strike and its limitations* 35.

¹⁴⁸ Achmat *The right to strike and its limitations* 38;

¹⁴⁹ Slater 2015 <http://www.polity.org.za/article/no-easy-way-forward-over-strike-action-2015-01-16> accessed 17-08-2017; Contempt of court proceedings shall be discussed in Chapter 3.

¹⁵⁰ SAIRR 2013 <http://irr.org.za/reports-and-publications/media-releases/Strike%20violence.pdf/> accessed 05-03 2018; Benjamin 2016 <http://www.cth.co.za/wpcontent/uploads/2016/09/South-African-Labour-Law-A-Twenty-Year-Review.pdf> 22-23 accessed 05-03-2018.

¹⁵¹ SAIRR 2013 <http://irr.org.za/reports-and-publications/media-releases/Strike%20violence.pdf/> accessed 05-03 2018; Benjamin 2016 <http://www.cth.co.za/wpcontent/uploads/2016/09/South-African-Labour-Law-A-Twenty-Year-Review.pdf> 22-23 accessed 05-03-2018.

¹⁵² DoL 2014 http://www.labour.gov.za/DOL/downloads/documents/annual-reports/industrial-action-annual-report/2015/industrialaction_2015.pdf accessed 01-03-2018.

¹⁵³ DoL 2014 http://www.labour.gov.za/DOL/downloads/documents/annual-reports/industrial-action-annual-report/2015/industrialaction_2016.pdf accessed 01-03-2018.

deaths, injuries and arrests stated in the survey that violence and destructive behaviour have contributed to the increase in the number of unprotected strikes. This means that violent and destructive strikes are prevalent in South Africa, thus the need for interdicts and the proper and effective enforcement of such interdicts.

*2.4.1 Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers' Union & others*¹⁵⁴

This case illustrates the extent to which strikes can become extremely violent.¹⁵⁵ This case concerned violent protesting that involved the emptying of refuse bins in the middle of the road outside the casino, the burning of tyres in the road, roadblocks made from twenty-litre water bottles and packets of crushed glass being scattered onto the road.¹⁵⁶ Concrete dustbins were uprooted and rolled into the road, causing destruction.¹⁵⁷ Furthermore, the police endured brick attacks, vehicles were damaged, including those belonging to patrons, and even passengers were violently dragged out of vehicles and assaulted.¹⁵⁸ This led to the employer approaching the court for an interdict, which was granted.¹⁵⁹ The purpose of the interdict was to restrict the union and its members from obstructing vehicles and persons from entering or leaving the employer's premises.¹⁶⁰ Also, it restricted the union and its members from protesting or being in the vicinity of the employer's premises, interfering with traffic, intimidating or assaulting people and damaging property near and on the employer's premises.¹⁶¹

The Labour Court stated that it is within its power to intervene to protect the fundamental right to strike and the right to peaceful picketing.¹⁶² It went further to note that this mandate is integral to the powers of the Labour Court that are conferred by the *Constitution* and the *LRA*.¹⁶³ However, it acknowledged that the right to strike is tarnished

¹⁵⁴ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of South African Workers' Union & Others* (2012) 33 ILJ 998 (LC) (hereinafter referred to as *Tsogo* case).

¹⁵⁵ Ryrcoft 2013 *LLRNIC* 8.

¹⁵⁶ *Tsogo* case para 4.

¹⁵⁷ *Tsogo* case para 4.

¹⁵⁸ *Tsogo* case para 4.

¹⁵⁹ *Tsogo* case para 2.

¹⁶⁰ *Tsogo* case para 2.

¹⁶¹ *Tsogo* case para 2.

¹⁶² *Tsogo* case para 13.

¹⁶³ *Tsogo* case para 13.

and eventually obscured when those who pursue it engage in malicious acts of gratuitous violence as a means to achieve their goals.¹⁶⁴ This means that it is the duty of the Labour Court to act if approached to intervene when there is misconduct during a protected strike as this tarnishes the right to strike. This illustrates one of the circumstances in which the Labour Court can intervene and grant an interdict.

2.4.2 *Robertson Winery (Pty) Ltd v CSAAWU*¹⁶⁵

This case dealt with the circumstances where an interdict was granted, but a union and its members nonetheless disregarded the court order, leading to contempt of court proceedings. CSAAWU called its members out on a strike after a deadlock following a wage dispute with Robertson Winery.¹⁶⁶ CSAAWU and its members sang songs that contained hate speech against Robertson Winery and also promoted the use of weapons.¹⁶⁷ Also, CSAAWU did not in any way prevent strikers from intimidating replacement labour.¹⁶⁸ Furthermore, the union did not prevent the strikers from keeping replacement labour from going to work.¹⁶⁹ Thus, all these actions amounted to the contravention of the Labour Court order, being an interdict.¹⁷⁰ In the early days of the strike,¹⁷¹ Robertson Winery had obtained an interdict in the Labour Court.¹⁷² The purpose of this interdict was to restrain CSAAWU and its members from engaging in unlawful conduct in furtherance of a protected strike.¹⁷³

However, even after the interdict was granted, the strike continued. This was evidenced four days later after agreeing on the terms of the interdict and picketing rules.¹⁷⁴ Photographs of CSAAWU's striking members outside of Robertson Winery armed with sticks, sjamboks and a golf club were posted on CSAAWU's Facebook page.¹⁷⁵ Additional

¹⁶⁴ *Tsogo* case para 13; Ryrcoft 2013 *LLRNIC* 9.

¹⁶⁵ *Robertson Winery (Pty) Ltd v Commercial, Stevedoring Agricultural and Allied Workers' Union (CSAAWU)* case no. C 555/16 hereinafter referred to as the *CSAAWU* case.

¹⁶⁶ *CSAAWU* case para 1.

¹⁶⁷ *CSAAWU* case paras 4, 5 and 7.

¹⁶⁸ *CSAAWU* case paras 4, 5 and 7.

¹⁶⁹ *CSAAWU* case paras 4, 5 and 7.

¹⁷⁰ *CSAAWU* case paras 4, 5 and 7.

¹⁷¹ *CSAAWU* case para 1. 12 weeks before the strike ended, Robertson winery obtained an interdict.

¹⁷² *CSAAWU* case para 1.

¹⁷³ *CSAAWU* case para 1.

¹⁷⁴ *CSAAWU* case para 10.

¹⁷⁵ *CSAAWU* case para 10.

to this, was the singing of hate speech songs and the intimidation of replacement labour.¹⁷⁶ The strike was drawn out, already twelve weeks old at the time of judgement thus prolonged, violent and destructive.¹⁷⁷

This led to the claim that CSAAWU and its counterparts had acted in contempt of the Labour Court order granted 12 weeks before the strike stopped. This was the case because the interdict prevented intimidation, harassment, threats to employees, including replacement labour, access to main entrance and gate, destruction of daily business operations, damage of property and the use of weapons or the placing of tyres on Robertson Winery's premises.¹⁷⁸ In addition to the interdict, picketing rules had been agreed on by both parties to the employment relationship preventing the already mentioned circumstances.¹⁷⁹ However, CSAAWU and its members contravened the provisions of the interdict and the picketing rules agreed on.

This case illustrates a situation where a strike becomes violent and the Labour Court intervenes by granting an interdict. In addition, the Labour Court further instituted contempt of court proceedings where the interdict was ignored. However, the true challenge is with regard to the enforcement of court interdicts. The *Tsogo* and *CSAAWU* cases illustrate this problem well.¹⁸⁰ Court orders, in this case interdicts, are often contravened by unions and employees as illustrated.

2.4.3 *Betafence SA (Pty) Ltd v NUMSA*¹⁸¹

The Labour Court has stated that it observes a problem with obedience of court orders.¹⁸² This observation relates to the fact that employees have developed a habit of disregarding the Labour Court orders, especially strike interdicts.¹⁸³ This unacceptable disregard for Labour Court orders has in some cases been aggravated and/or encouraged by the trade

¹⁷⁶ *CSAAWU* case para 11.

¹⁷⁷ *CSAAWU* case para 1.

¹⁷⁸ *CSAAWU* case para 8.

¹⁷⁹ *CSAAWU* case para 9.

¹⁸⁰ Enforcement of the Labour Court interdicts will be discussed in chapter 3.

¹⁸¹ *Betafence SA (Pty) Ltd v NUMSA* [2016] ZALCCT 33 (hereinafter referred to as *Betafence Case*).

¹⁸² *Betafence Case* para 54.

¹⁸³ *Betafence Case* para 54.

unions.¹⁸⁴ Sometimes trade unions are unable to control employees and to steer them towards compliance with such court orders.¹⁸⁵ With Labour Court interdicts, the result is that non-compliance by employees is sometimes found to be wilful and *mala fide*.¹⁸⁶ The true question would then be: is the Labour Court doing much to give weight to interdicts to ensure strict compliance?

The Labour Court in *Betafence* further stated that this level of contempt will someday lead to the rule of law becoming meaningless should it remain unchecked.¹⁸⁷ The end to this would sadly be anarchy and mayhem, which unfortunately are already existing characteristics attributed to industrial action in South Africa.¹⁸⁸ This is without a doubt against constitutional democracy and the aims of the *LRA* to promote labour peace and efficient dispute resolution.¹⁸⁹ A strict approach by the Labour Court seems to be a remedy to this slippery slope.¹⁹⁰ It is therefore essential to take cognisance of Labour Court orders as binding instruments and failure to adhere to it should no doubt be subjected to a fine or imprisonment.¹⁹¹

2.4.4 The extent to which a Labour Court can grant an interdict during violent strikes

Having discussed the above cases on strike violence and interdicts, Rycroft¹⁹² states that the critical question is, to what extent of violence and misconduct can the Labour court intervene with interdicts?¹⁹³ Rycroft¹⁹⁴ submitted that in such a situation, the Labour Court would have to ask whether the alleged misconduct has occurred to such an extent that the strike ceases to be in promotion of collective bargaining, thus no longer deserving of its protected status.¹⁹⁵ Therefore, this would lead the Labour Court to weigh the levels of

¹⁸⁴ *Betafence* Case para 54

¹⁸⁵ *Betafence* Case para 54.

¹⁸⁶ *Betafence* Case para 54.

¹⁸⁷ *Betafence* Case para 55.

¹⁸⁸ *Betafence* Case para 55.

¹⁸⁹ *Betafence* Case para 55.

¹⁹⁰ *Betafence* Case para 55.

¹⁹¹ Coetzer <http://www.labourguide.co.za/most-recent/2371-labour-court-hands-down-r1million-fine-for-contempt-of-court> accessed 17-08-2017 (own emphasis added).

¹⁹² Rycroft 2013 *LLRNIC* 9.

¹⁹³ Rycroft 2013 *LLRNIC* 9.

¹⁹⁴ Rycroft 2013 *LLRNIC*.

¹⁹⁵ Rycroft 2013 *LLRNIC* 9.

violence as well as the relevant efforts by the concerned trade union to prevent such violence.¹⁹⁶

On the other hand, *National Union of Food Beverage Wine Spirits and Allied Workers (FAWU) v Universal Product Network (Pty) Ltd*¹⁹⁷ introduced a somewhat similar approach mentioned above. In this case, the employer alleged that the strike embarked on by FAWU and its members ceased to be protected when it shifted to being violent and political. The Labour Court was required to make an order declaring such strike to be unprotected on the basis that the strike was no longer functional to collective bargaining. This contention was brought about by the high levels of violence and the political nature of the strike during its protected status.¹⁹⁸

Due to these acts of misconduct, an interdict was sought to restrain FAWU and its members from additional misconduct in furtherance of the strike.¹⁹⁹ The Labour Court stated that on the face of the evidence provided, FAWU and its members acted in breach of the interim interdict that was granted.²⁰⁰ The court also noted that a contempt of court application was made due to the misconduct of FAWU and its members towards the interim interdict, but however remains pending.²⁰¹ This means that in this case, an interdict was sought and an application for contempt of court was made but never finalised,²⁰² thus having no effect on the amount of violence.²⁰³

¹⁹⁶ Ryrcoft 2013 LLRNIC9.

¹⁹⁷ *National Union of Food Beverage Wine Spirits and Allied Workers (FAWU) v Universal Product Network (Pty) Ltd* (2016) 37 ILJ 476 (LC) (hereinafter referred to as *FAWU case*).

¹⁹⁸ *FAWU case* paras 4, 5 and 6, Non-strikers were harassed; employees and their relatives were visited in their homes and harassed with the threat of death. What followed were fire shots and bombing of non-strikers' vehicles leading to the killing of a witness who identified one of the perpetrators, threats were made to senior management which led to protection by security guards whose vehicles were shot, delivery vans were held, drivers harassed thus private security engagement costs increased

¹⁹⁹ *FAWU case* paras 2, 8 and 18.

²⁰⁰ *FAWU case* para 40. The court emphasises that any act of intimidation and violence or the threat of violence is to be deplored in the strongest terms.

²⁰¹ *FAWU case* paras 18 and 40.

²⁰² The finalisation of contempt of court proceedings may to some extent have a deterrent effect on the violence associated with unprotected strikes even though the effectiveness of this remedy remains questionable (see discussion in chapter 3 paras 3.3 and 3.4).

²⁰³ *FAWU case* para 18.

The Labour Court acknowledged that violent strikes are dysfunctional to collective bargaining and could be interdicted.²⁰⁴ However, in this case the Labour Court found the levels and the nature of the strike to not have been so severe to declare it detrimental to collective bargaining.²⁰⁵ This was premised on the fact that the efforts made by FAWU to curb the acts of violence and to disassociate itself from such acts seemed sincere to the court.²⁰⁶ What was interesting is that despite the violence that included murder of innocent parties and the destruction of employer's and third parties' property amongst many others, the Labour Court nonetheless implied that the protected status of a strike can only be in dispute if the violence exceeds a certain threshold.²⁰⁷ Meaning that a threshold cannot be said to have been crossed when the purpose of the strike initially to pursue a mutual interest becomes focused on other purposes.²⁰⁸

However, *Tsogo* and *CSAAWU* both dealt with extreme levels of violence as in the *FAWU* case and nonetheless interdicts were successfully granted. This leads to realisation that this threshold is far from clear, as evident from the *FAWU* case. The judgement suggests that the Labour Court is not quick to intervene in circumstances where the strike remains functional to collective bargaining, even in the existence of violence.²⁰⁹ The Labour Court in *FAWU* engaged an approach that the court should not easily limit the constitutional right to strike.²¹⁰ In the *CSAAWU* case, the Labour Court cited *FAWU v In2Food (Pty) Ltd*.²¹¹ The court stated that the time has come for trade unions to be held accountable

²⁰⁴ *FAWU* case para 39; Fergus 2016 *ILJ* 1537.

²⁰⁵ *FAWU* case para 39; Fergus 2016 *ILJ* 1537; Coetzer <http://www.labourguide.co.za/most-recent/2242-a-new-remedy-for-violent-strikes> accessed 17-08-2017.

²⁰⁶ *FAWU* case para 39.

²⁰⁷ *FAWU* case para 41; Coetzer <http://www.labourguide.co.za/most-recent/2242-a-new-remedy-for-violent-strikes> accessed 17-08-2017 (Own emphasis added).

²⁰⁸ *FAWU* case paras 41 and 42. The court stated that there is no evidence proving that the strike was no longer functional to collective bargaining and assumed a political purpose due to the involvement of a political party EFF in the strike. The court further stated that it is common in South Africa or anywhere else for a political party to express its solidarity with striking workers and to identify with the cause. Also, that the fact that one or more of the opportunistic travellers choose to express their own views or pursue their interests during the strike does not come as a surprise. In this circumstances, a threshold cannot be said to have been crossed.

²⁰⁹ Coetzer <http://www.labourguide.co.za/most-recent/2242-a-new-remedy-for-violent-strikes> accessed 17-08-2017.

²¹⁰ cli- edekkerhofmeyr.com 2017 *Employment strike guide*.

²¹¹ *FAWU v In2Food (Pty) Ltd* (2014) 35 *ILJ* 2767 (LAC) (hereinafter referred to as *in2Food* case) Paras 18 and 19.

for their members' actions.²¹² This is because unions have for a long time glibly washed their hands of their members' acts of misconduct.²¹³ However, the court further stated that even though the *LRA* makes it easy for unions to go on a protected strike, this right is not without any limitations.²¹⁴ This means that firstly, Section 64 of the *LRA* has to be complied with and has to be in line with Section 17 of the *Constitution*.²¹⁵ Also, Section 36 of the *Constitution* places a limitation on the right to strike.²¹⁶ Section 36 states that:

(1) The rights in the Bill of Rights may be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation;²¹⁷

Therefore, it is clear that even though the right to strike is a constitutionally protected right, it is not without any limitations, thus not absolute.²¹⁸ The right to strike also has its roots in Convention 87 and 98 of the International Labour Organisation.²¹⁹ However, the *ILO* also advises that the fundamental right to strike is not an end in itself.²²⁰ Even though this right to strike in section 23 of the *Constitution* seems unrestricted, it has to be borne in mind that like any other right in the *Constitution*, it is not an absolute right.²²¹

In addition, there cannot be any justification for any type of violence associated with strikes and in furtherance of strikes.²²² In *SATWU v Garvas*,²²³ the court held that the right to assemble and peaceful picketing in Section 17 of the *Constitution* is subject to limitation.²²⁴ This is in circumstances where participants show no intention of acting

²¹² *CSAAWU* case Para 53; *in2Food* case paras 18 and 19.

²¹³ *CSAAWU* case Para 53; *in2Food* case paras 18 and 19.

²¹⁴ *CSAAWU* case Para 53; *in2Food* case paras 18 and 19.

²¹⁵ Section 17 of the *Constitution* is on the right to assemble and peaceful picketing; Section 64 of the *LRA* is on the right to strike; *CSAAWU* case para 53; *in2Food* case paras 18 and 19.

²¹⁶ Section 36 of the *Constitution*.

²¹⁷ Section 36 of the *Constitution*.

²¹⁸ *CSAAWU* case para 53; *in2Food* case paras 18 and 19; Gericke 2012 *THRHR* 567.

²¹⁹ International Labour Organisation (hereinafter referred to as the *ILO*).

²²⁰ Achmat *The right to strike and its limitations* 24.

²²¹ Section 36 of the *Constitution*; Gericke 2012 *THRHR* 567.

²²² *CSAAWU* case para 53; *in2Food* case paras 18 and 19.

²²³ *SATAWU v Garvas* (2012) 33 ILJ 1593 (CC) (hereinafter referred to as the *Garvas* case).

²²⁴ *Garvas* case para 19. The court stated that this limitation has to be balanced against the right of individual members of the public to dignity, freedom from violence and arbitrary deprivation of property, all which are affected by riot damage. Thus this limitation is reasonable and justifiable in a democratic society based on dignity, equality and freedom.

peacefully during a protected strike.²²⁵ This proposition has even received recognition from the European Court of Human Rights.²²⁶ The Constitutional Court noted that if an individual remains peaceful in his or her intentions, then such person does not lose the enjoyment of the right to peaceful assembly due to punishable acts committed by others during the demonstration.²²⁷ However, the Labour Court in *FAWU* found that declaring a strike as unlawful depends on the nature and degree of the violence proving that the strike is no longer functional to collective bargaining.²²⁸ In this case the strike was seen as functional even though the strikers showed no intention of a peaceful strike.

It seems this decision in *FAWU* makes no changes to the possible consequences brought about by violent strikes if the violence of the strike itself does not guarantee loss of protection. This is no doubt detrimental to the country's labour relations. It is also unfortunate that the *LRA* does not expressly provide that violence can terminate the protected status of strike. However, the *LRA* in Section 67 (8) states that the provisions of Sections 67(2)²²⁹ and 67(6)²³⁰ will not apply where acts in furtherance of a strike is an offence. Therefore, violence as an act of misconduct is an offence as implied by the *LRA*. However, the decision in *FAWU* illustrates the circumstances where the Labour Court fails to promote orderly collective bargaining and efficient dispute resolution by refusal to grant interdicts in circumstances where they ought to be granted. The decision in *FAWU* brings about confusion about the extent of the powers of the Labour Court during violent strikes. This also brings confusion and uncertainty as to what mechanism is used to determine the threshold in order to conclude that the violence exceeds a certain level

²²⁵ *South African National Defence Union v Minister of Defence* (1999) 4 SA 469 (CC) at para 480E.

²²⁶ *Ziliberg v Molodova* ECHR (Application No 61821/00) Para 2; *Cisse v France* ECHR (Application No 51346/99) para 50; and *Christians Against Racism & Fascism v United Kingdom* (1998) 21 DR 138 (Application No 8440/78) para 4.

²²⁷ *South African National Defence Union v Minister of Defence* (1999) 4 SA 469 (CC) at 480E.

²²⁸ *Ziliberg v Molodova* ECHR (Application No 61821/00) para 2; *Cisse v France* ECHR (Application No 51346/99) para 50; and *Christians Against Racism & Fascism v United Kingdom* (1998) 21 DR 138 (Application No 8440/78) para 4.

²²⁸ cli- edekkerhofmeyr.com 2017 *Employment strike guide*.

²²⁹ Section 67 (2) of the *LRA* states that a person does not commit a delict or breach of contract for participating in a protected strike

²³⁰ Section 67 (6) of the *LRA* states that no civil proceedings may be instituted against a person who participates in a protected strike.

and thus requires an interdict to be granted. There cannot be any excuse for any form of violence in strikes as it leads to inexcusable results.²³¹

It should be remembered that the right to strike is a constitutional right provided for by Section 23 of the *Constitution*. By virtue of this, it is noteworthy that there is no such thing as an illegal strike,²³² but it can be a protected or unprotected one. Therefore, a Labour Court's interdict does not actually interdict a strike, but rather the unlawful misconduct that occurs during a protected strike.²³³ This is strengthened by the fact that the right to strike is not absolute, but may be limited by the limitation clause in Section 36 of the *Constitution*. However, this seems like the same unlawful misconduct that the Labour Court in *FAWU* case had to interdict, but failed.

However, it has been suggested that the powers of the Labour Court be extended to stop violent strikes as there is no rule in South Africa that empowers the Labour Court due to the constitutional nature of the right to strike.²³⁴ This was emphasised by the 2012 *Labour Relations Amendment Bill*²³⁵ which proposes a new Section 69 (12) of the *LRA*. According to this proposal, the Labour Court would be enabled to suspend a strike based on violence that transpired during a picket.²³⁶ This would be the case even if the perpetrators cannot be individually identified.²³⁷ Myburgh²³⁸ states that it should be noted that this new Section 69 (12) would only be applicable where there has been a breach of picketing rules, which are only established by the *CCMA*.²³⁹ This means that the Labour Court will remain powerless to interdict a strike on account of violence.²⁴⁰ Also, the result of this amendment will be that it is only applicable to violence that is committed within the immediate surroundings of the workplace and not misconduct committed offsite.²⁴¹

²³¹ *CSAAWU* case para 53; *in2Food* case paras 18 and 19.

²³² What is illegal is not the strike itself but rather the misconduct that occurs during the strike.

²³³ Amandla December 2016 <http://aidc.org.za/%EF%BB%BFstrike-interdicts-upset-balance/> accessed 17-08-2017.

²³⁴ Tenza 2015 *Law, Democracy and Development* 225 (own emphasis added).

²³⁵ Labour Relations Amendment Bill 2012 (hereinafter referred to as the *LRAB*).

²³⁶ Section 9 of the *LRAB*; Myburgh 2013 *Contemporary Labour Law* 7.

²³⁷ Myburgh 2013 *Contemporary Labour Law* 7.

²³⁸ Myburgh 2013 *Contemporary Labour Law* 7.

²³⁹ Myburgh 2013 *Contemporary Labour Law* 7.

²⁴⁰ Myburgh 2013 *Contemporary Labour Law* 7.

²⁴¹ Myburgh 2013 *Contemporary Labour Law* 3.

2.5 Conclusion

This chapter has evaluated the powers of the Labour Court especially with regard to interdicts. This included the requirements of an interdict application in the Labour Court. It was established that before an interdict is granted, an employer has to meet certain requirements. The employer has to first establish a *prima facie* right.²⁴² This is established by reasons that irreparable harm will be suffered by such employer should the relief not be granted and that no other remedies are available for the employer.²⁴³ According to the *SAPO* case, it seems that the *LRA* does not expressly state who can apply for an interdict. However, what is of importance is for the employer to show that the strike was unprotected and infringed on its legal rights, thus the interdict must be granted.²⁴⁴

The legal effect of interdicts is to restrict acts of misconduct by the union and its members during violent strikes. However, the study realised that interdicts do not have the salutary effect they are meant to have anymore. This is evidenced by violent strikes in South Africa leading to many applications for interdicts before the Labour Court.²⁴⁵ The inference may be drawn through case law that violent and destructive strikes are prevalent in South Africa and interdicts have been ignored by unions and their members such as in the *CSAAWU* case. However, the *Betafence* case emphasised the fact that there has to be a strict approach by the Labour Courts to ensure compliance with its court orders. Labour Court orders are binding instruments that have to be complied with and what better way to ensure compliance if not through the issuer of such orders, being the Labour Court.

The extent to which the Labour Court may grant interdicts was also dealt with. This included the need to weigh the levels of violence, and *FAWU* illustrated the failure of the Labour Court in this aspect. Such failure mainly related to the determination of thresholds of violence by the Labour Court to classify a strike being dysfunctional to collective bargaining. This brings vagueness in the powers of the Labour Court with regard to granting interdicts. The *FAWU* case stated that the Labour Court should not easily interfere in the enjoyment of the constitutional right to strike even though there were

²⁴² Achmat *The right to strike and its limitations* 35.

²⁴³ Achmat *The right to strike and its limitations* 35.

²⁴⁴ *SAPO* case at paras 1964H and 1865A.

²⁴⁵ See para 2.4.

high levels of violence and destructive behaviour by a union and its members. Despite this, the right to strike is not an absolute right and has its limitations. Such limitations could play a huge role in curbing the violent nature of strikes. If the right to strike was an absolute right, this would no doubt be opening the floodgate to abuse. Such abuse can be seen by the violent strikes already engaged in and the interdicts ignored by unions and their members.

In addition, the *FAWU* case illustrates that the Labour Court's powers may be limited where a strike remains functional to collective bargaining, but extreme violence still exists. Nonetheless, the Labour Court has to intervene when strike misconduct occurs. However, it seems the decision in *FAWU* makes no changes to the possible consequences brought about by violent strikes if the violence of the strike itself does not guarantee loss of protection. Without any express provisions by the *LRA*, the decision in the *FAWU* case only brings about confusion as to the extent of the Labour Court's powers to intervene by granting interdicts during violent strikes.

The court in the *FAWU* case states that the acts of the union and its counterparts did not exceed the acceptable threshold with regard to violence and destructive behaviour. This was the case despite the amount of violence and acts of misconduct also present in the *Tsogo* and *CSAAWU* cases where interdicts were granted. This brings confusion as to which criteria should be used to determine the threshold in order to conclude that violence exceeds a certain level, therefore requiring an interdict to be granted. However, *In2Food* and *CSAAWU* stated that there cannot be any justification for the type of violence associated with strikes and in furtherance of strikes.²⁴⁶ For this reason, it seems quite impractical to justify the amount of violence by placing thresholds to determine whether a certain level of violence has exceeded the threshold in order to determine the granting of an interdict. This would allow violence to prevail in strikes and that can only have consequences such as riot damage.

Although the Labour Court is determined to curb the acts of misconduct of unions and their members through interdicts, this may not be enough. This is because interdicts are

²⁴⁶ *CSAAWU* case para 53; *in2Food* case paras 18 and 19.

disregarded and the bigger problem may be the enforcement of these interdicts. Could the Labour Court not be effective enough in the enforcement of its court orders, thus leading to disregard of its interdicts? Also, the remedy for an employer where interdicts are disregarded is contempt of court proceedings. The next question would then be whether this remedy as provided for by the Labour Court is effective enough. These will be discussed in the next chapter.

Chapter 3 THE ENFORCEMENT OF LABOUR COURT ORDERS (INTERDICTS)

3

3.1 Introduction

The focus in this chapter is the enforcement of Labour Court orders. This will be in relation to the duties and liabilities of trade unions, contempt of court proceedings together with the nominal nature of sentences in contempt of court proceedings. This chapter therefore deals with the effectiveness of enforcement of the Labour Court interdicts during unprotected strikes.

It is important to briefly discuss dispute resolution before the discussion on enforcement of Labour Court orders. Dispute resolution mechanisms have without a doubt become an essential component of labour relations.²⁴⁷ What then is a dispute? The *LRA* in Section 213 provides a rather vague definition of a dispute. It states that a dispute "includes an alleged dispute."²⁴⁸ This section unfortunately does not go any further to define a dispute.²⁴⁹ However, it is apparent that a dispute usually arises when two parties maintain different views, thus resulting in a conflict.²⁵⁰ This means that there has to be a demand and there has to be the communication of this demand to another party.²⁵¹ What follows is that this other party has to at the very least be given an opportunity to comply with the demand.²⁵² This means that the failure by this party to comply with the demand may lead to a dispute.

²⁴⁷ This is in promotion of section 1 (d) (iv) of the *LRA* which states that the aims of the act include the effective resolution of disputes; Mboh *The effectiveness of dispute resolution mechanisms in South African labour law systems: A critical analysis* 13.

²⁴⁸ Section 213 of the *LRA*.

²⁴⁹ Mboh *The effectiveness of dispute resolution mechanisms in South African labour law systems: A critical analysis* 13.

²⁵⁰ Mboh *The effectiveness of dispute resolution mechanisms in South African labour law systems: A critical analysis* 13.

²⁵¹ Mboh *The effectiveness of dispute resolution mechanisms in South African labour law systems: A critical analysis* 13.

²⁵² Bosch *et al Labour Relations Law* 92.

Dispute resolution could be defined as the various methods used to resolve disputes between parties in a conflict.²⁵³ These various methods include negotiation, mediation, arbitration and litigation, among others.²⁵⁴ For purposes of the discussion on the enforcement of Labour Court orders, the focus will be on litigation as a form of dispute resolution. This entails litigation by the Labour Court as part of its vested powers provided for in the *LRA*.²⁵⁵

The previous chapter dealt with the granting of interdicts as part of the dispute resolution mechanisms by the Labour Court. Therefore, having discussed what dispute resolution is, this chapter deals with the enforcement of Labour Court interdicts. For the purposes of this study, enforcement shall relate to effectiveness within spheres of the legal system.²⁵⁶ The measurement will be in terms of consistency, the delivery of just outcomes and the ability of the Labour Court to stop or bring change to human behaviour during strikes.²⁵⁷ There are various definitions for enforcement. However, for purposes of this study enforcement will be the extent to which the law will deal with a particular issue.²⁵⁸ It also includes how well the law in the hands of the Labour Court deals with this issue.²⁵⁹

The Labour Court's mandate is to provide effective and efficient dispute resolution and one of the mechanisms towards achieving this goal is court interdicts.²⁶⁰ Thus, enforcement relates to how well the Labour Court exercises its mandate²⁶¹ during violent and destructive strikes. Further, whether the Labour Court has been able to provide just

²⁵³ Mboh *The effectiveness of dispute resolution mechanisms in South African labour law systems: A critical analysis* 14.

²⁵⁴ Povey 2005 *Journal of South African Institution of Engineering* 2-7.

²⁵⁵ Section 158 of the *LRA*.

²⁵⁶ Mboh *The effectiveness of dispute resolution mechanisms in South African labour law systems: A critical analysis* 15.

²⁵⁷ Mboh *The effectiveness of dispute resolution mechanisms in South African labour law systems: A critical analysis* 15.

²⁵⁸ Mboh *The effectiveness of dispute resolution mechanisms in South African labour law systems: A critical analysis* 15.

²⁵⁹ Mboh *The effectiveness of dispute resolution mechanisms in South African labour law systems: A critical analysis* 15 (own emphasis).

²⁶⁰ Section 158 (1) (a) (ii) of the *LRA*.

²⁶¹ Section 1 (d) of the *LRA* states the powers of the Labour Court to provide effective and efficient dispute resolution mechanisms.

outcomes and most importantly, capable to bring change to human behaviour during these harsh circumstances.

Firstly, the discussion begins with the duties and powers of trade unions during violent strikes concerning the enforcement of court orders where the Labour Court has granted an interdict. A discussion on contempt of court orders then follows. This will be in situations where trade union representatives and their counterparts have disobeyed these interdicts. Lastly, coupled with the discussion of contempt of court orders, the nature of sentences that may be granted in contempt of court orders are dealt with. This is done in order to assess the efficiency and effectiveness of the Labour Court in the delivery of sentences and a need for harsher sentences.

3.2 Trade union duties and liabilities with regard to the enforcement of Labour Court orders (interdicts)

Violent and destructive strikes have become prevalent in the South African labour relations system.²⁶² Recent years have seen industrial action being characterised by violent and destructive behaviour with observable contempt of the *LRA* and Labour Court orders.²⁶³ Employers have suspected that the cause of this is the influence of trade unions on employees.²⁶⁴ They argue that this influence is mostly realised where trade union officials coerce employees to continue with strike action and fail to do much when the strike makes a turn for the worst.²⁶⁵ It seems that in most circumstances, trade unions do this despite notable improvements towards their demands and wage offers in response to those demands.²⁶⁶ In addition, this may even be the case where the economic conditions prove that further improvements towards the demands are not feasible.²⁶⁷

Section 17 of the *Constitution* places an obligation on a trade union to ensure a peaceful gathering without any form of risk of injury to persons or damage to property.²⁶⁸ Section

²⁶² See Botha 2015 *DeJure* 239 (Strikes take longer and are of a violent and destructive nature).

²⁶³ Benjamin 2014 *ILJ* 10.

²⁶⁴ Tenza 2017 *Merc LJ* 66.

²⁶⁵ Tenza 2017 *Merc LJ* 67 (own emphasis added).

²⁶⁶ Tenza 2017 *Merc LJ* 67.

²⁶⁷ Tenza 2017 *Merc LJ* 67.

²⁶⁸ Section 17 of the *Constitution*.

17 of the *Constitution* states that everyone has the right to peaceful and unarmed assembly.²⁶⁹ This section therefore protects peaceful and unarmed assemblies, demonstrations, and pickets.²⁷⁰ It is for these reasons that trade unions should be mindful that Section 17 of the *Constitution* would not be applicable to gatherings that have resulted in the injury of persons and damage to property.²⁷¹ This is because the constitutional right to picket²⁷² coupled with the constitutional right of employees to strike²⁷³ has to balance with the rights of the employer and the rights of third parties.²⁷⁴ However, even though Section 17 of the *Constitution* makes the above provisions, Section 11(1) of the *Regulation of Gatherings Act*²⁷⁵ places a limitation on these rights.²⁷⁶

Therefore, it is the obligation of trade unions to take all reasonable steps to prevent violence, injury to persons, damage to property and other acts of misconduct associated with a strike by its members.²⁷⁷ The consequences of non-compliance with these obligations include unions having to deal with the reality of vicarious liability.²⁷⁸ This would be liability arising from bad faith negotiations, destructive violent actions during strikes and the promotion of unprotected strikes.²⁷⁹ It is without a doubt that all these are against the spirit and purposes of the *LRA* to promote labour peace and orderly collective bargaining.²⁸⁰ Trade unions therefore have a responsibility to be mindful of how they conduct themselves during collective bargaining and the manner in which they promote their members' interests.²⁸¹ This obligation extends to taking responsibility for members' actions during strikes as well.²⁸²

²⁶⁹ Section 17 of the *Constitution*.

²⁷⁰ Tenza 2017 *Merc LJ* 66.

²⁷¹ Pumla *A trade union's liability for damages caused during a strike* 50.

²⁷² Section 17 of the *Constitution*.

²⁷³ Section 17 of the *Constitution*; Section 64 of the *LRA*.

²⁷⁴ Pumla *A trade union's liability for damages caused during a strike* 50.

²⁷⁵ Regulation of Gathering Act 205 of 1993 (hereinafter referred to as *RGA*).

²⁷⁶ Manamela and Budeli 2013 *cilsa* 333; Further discussion on the *RGA* and the limitations it places will be conducted in para 2.2.

²⁷⁷ Manamela and Budeli 2013 *cilsa* 333.

²⁷⁸ Botha 2015 *DeJure* 346; Manamela and Budeli 2013 *cilsa* 333.

²⁷⁹ Botha 2015 *DeJure* 346-347.

²⁸⁰ Section 1 of the *LRA*; Botha Botha 2015 *DeJure* 347.

²⁸¹ Botha 2015 *DeJure* 347.

²⁸² Botha 2015 *DeJure* 347.

3.2.1 Liability of unions in relation to disregarding court orders

Rightfully, an employer cannot sue a union for the damage and financial loss arising from a protected strike.²⁸³ This means that for a strike to fit the description of a protected strike, it has to meet the requirements laid down by Section 64 of the *LRA*.²⁸⁴ Situations where misconduct and unlawful acts of destructive violent behaviour occur during a protected strike, this will entitle an employer to apply for a declaratory order.²⁸⁵ This is in accordance with Section 158(1) (a) (iv) of the *LRA*,²⁸⁶ which declares a strike unprotected. In the instance where an employer applies for a declaratory order, the consequences of this is that the protected status of a strike will be lost.²⁸⁷ If the strikers continue, the employer can further apply for an interdict as per Section 158(1) (a) (ii) of the *LRA*.²⁸⁸ Even though the *LRA* does not expressly make a provision that a strike can lose its protected status, this is implied in the powers of the Labour Court as provided for in Section 158 of the *LRA*.²⁸⁹ In the *Tsogo sun* case the court said the following:²⁹⁰

This court will always intervene to protect the right to strike and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the *Constitution* and the *LRA*. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status. .²⁹¹

The above quote illustrates the court's concern and the need to intervene when a strike has escalated to violent, destructive, and intolerable behaviour.²⁹² The concern is in situations where a protected strike has lost its protected status or is likely to lose its protected status. This means that the Labour Court protects the right to strike, but will intervene in situations where there is no peaceful exercise of this right. In the

²⁸³ Pumla *A trade union's liability for damages caused during a strike* 21.

²⁸⁴ Section 64 of the *LRA* is on the right to strike and recourse to lock out. Section 64 (1) of the *LRA* is on the requirements for a protected strike.

²⁸⁵ Pumla *A trade union's liability for damages caused during a strike* 21.

²⁸⁶ Section 158 (1)(a)(iv) of the *LRA*.

²⁸⁷ Rycroft 2014 *IJCLIR* 9.

²⁸⁸ Section 158 (1)(a)(ii) of the *LRA*.

²⁸⁹ *Tsogo sun* case para 13 (See Chapter 2 Para 2.4.1).

²⁹⁰ *Tsogo Sun* case para 13.

²⁹¹ *Tsogo Sun* case para 13.

²⁹² Pumla *A trade union's liability for damages caused during a strike* 22.

circumstances where the strike's protected status is lost, the employer is required to supply *prima facie* evidence in support of allegations against a trade union. Therefore, as mentioned earlier, it is the obligation of trade unions to prevent strike action from losing its protected status. This consequently creates liability on the trade union punishable by law.

3.2.1.1 Liability of trade unions for contempt of court through case law

*Eskom Ltd v National Union of Mineworkers*²⁹³ deals with the requirements or elements an employer has to prove in order to prove vicarious liability on the part of trade unions for damages incurred during an unprotected strike. It also deals with the difficulties borne by the employer in proving that a trade union or its members are liable for damages caused by the unlawful acts of such unions and its counterparts. This happens where the employer is not able to prove that the union members committed the wrongful act and that the union was liable for its members' unlawful actions during an unprotected strike.²⁹⁴

In this case, union members who were part of a strike organised by the union²⁹⁵ caused the employer to incur damages to the amount of R6 million.²⁹⁶ These strikers engaged in misconduct that included violence and vandalism to the property of Eskom.²⁹⁷ Eskom then claimed that the union was vicariously liable for the damages.²⁹⁸ Eskom sued *NUM* in the High Court in order to recover damages incurred during the strike.²⁹⁹ The basis of Eskom's claim was that it alleged that the culprits who caused the damage did so in furtherance of *NUM*'s purpose, thus *NUM* is vicariously liable for the damages.³⁰⁰ Eskom's claim was also based on *NUM*'s negligence in ensuring that the strike was peaceful as part of its duties.³⁰¹ This duty takes its roots from Section 17 of the *Constitution*. Lastly, Eskom

²⁹³ *Eskom Ltd v National Union of Mineworkers* (2001) 22 ILJ 618 (w) (hereinafter referred to as *Eskom case*); Manamela and Budeli 2013 *cilsa* 333.

²⁹⁴ Manamela and Budeli 2013 *cilsa* 333.

²⁹⁵ The strike was organised by the National Union of Mineworkers (hereinafter referred to as *NUM*).

²⁹⁶ *Eskom case* para B (620).

²⁹⁷ *Eskom case* para B, C and D (620).

²⁹⁸ *Eskom case* para B, C and D (620).

²⁹⁹ *Eskom case* para G (618).

³⁰⁰ *Eskom case* para G (618).

³⁰¹ *Eskom case* para G (618).

claimed that the damages resulted from the breach by *NUM* to ensure overall that its members do not cause any damage to property during the strike.³⁰²

For delictual liability to arise in terms of Section 67 (8) of the *LRA*,³⁰³ all elements giving rise to liability have to be met before the protection afforded by Section 67 (6) is lost.³⁰⁴ This means that for sub-sections (6) and (8) to be applicable, there has to be proof that the conduct of the workers during the strike turned violent, caused damage to property or harm to members of the society or non-strikers.³⁰⁵ In the absence of this evidence, these sections shall not have any application.³⁰⁶ In this case, the court found that the facts alleged in the particulars of claim are not supportive of the fact that the conduct of the defendant union's members constituted a picket in support of a strike.³⁰⁷ This means that the evidence provided before the court was not enough to prove that the conduct of the workers during the strike turned violent and caused damage to property or harm to members of the society. Thus sub-section (6) and (8) could not be applicable.

In *Mondi Ltd v CEPPAWU and Others*,³⁰⁸ the difficulties associated with finding unions liable for the actions of their members come into view. In this case, employees during a protected strike switched off the employer's machinery, resulting in damages to the amount of R673 855.³⁰⁹ The employer claimed that the union was liable for the damages.³¹⁰ This claim was based on the unlawful act of the union members by switching off machinery during a protected strike. In addressing the issue of whether *CEPPAWU* was vicariously liable, the Labour Court held that it has to be proven that the union acted in common purpose by authorising the behaviour of the employees.³¹¹ This means that

³⁰² *Eskom* case para G (618).

³⁰³ Section 67 (8) of the *LRA* states that the provisions of sections 67 (2) and 67 (6) will not apply any act during or in furtherance to a strike that is an offence.

³⁰⁴ Section 67 (6) of the *LRA* states that civil proceedings may not be instituted against a person participating in a strike or against any conduct in furtherance or in contemplation of a strike; *Tenza The liability of trade union for conduct of their members during strikes* 124.

³⁰⁵ *Tenza The liability of trade union for conduct of their members during strikes* 124.

³⁰⁶ *Eskom* case at para D (623); *Tenza The liability of trade union for conduct of their members during strikes* 124.

³⁰⁷ *Eskom* case at para D (623).

³⁰⁸ *Mondi Ltd v CEPPAWU and Others* (2005) 26 1458 (LC) (hereinafter referred to as *Mondi* case).

³⁰⁹ *Mondi* case at para 3.

³¹⁰ *Mondi* case at para 3.

³¹¹ *Mondi* case at para 29, the applicant has to prove a wrongful act accompanied by *culpa* or *dolus* committed by someone other than the first respondent but for which the respondent is legally liable

the court has to establish whether a relationship was in existence between the union members and the union.³¹² This is to establish whether *CEPPWAWU* could be held vicariously liable for the actions of its members.³¹³ The Labour Court found the evidence insufficient to identify the employees that were responsible for switching off the machinery and the union was not held vicariously liable.³¹⁴ Therefore, without establishing a link between the union members who caused the damages and the union, it is hard for an employer to be able to claim damages.

The *LRA* unfortunately does not expressly provide for regulation or prohibition of any specific unlawful act of union members during strike action³¹⁵ towards the employer and third parties.³¹⁶ However, such a matter can be dealt with in terms of the law of delict or prosecution according to criminal law.³¹⁷ Therefore, a union can be found liable for damages where it has failed to meet the requirements of a protected strike as per Section 64 and 65 of the *LRA*.³¹⁸ Furthermore, for an employer to succeed, it has to prove that the wrongdoer is a union member or acting on behalf of the union, and that this wrongdoer intentionally caused the loss and the extent of the loss.³¹⁹ However, in the *Mondi* case, the employer was found to not have provided sufficient evidence to identify the employees responsible for the damages incurred.³²⁰ *Eskom* and *Mondi* illustrate the difficulties on the part of the employer to prove the liability of the wrongdoer, in this case a trade union.

The case of *Xtrata South Africa (Pty) Ltd v Association of Mine Workers and Construction Union (AMWCU)*³²¹ provides a summary of the requirements that oblige a union to take responsibility for the conduct of its members during unprotected strikes. The first ground

and caused the applicant to suffer foreseeable loss. Also that the applicant has to show that the same act it relies on for its claim, is an offence.

³¹² Gericke 2012 *THRHR* 579.

³¹³ Gericke 2012 *THRHR* 579.

³¹⁴ *Mondi* case at para 29.

³¹⁵ This is regardless of whether the strike is protected or not.

³¹⁶ Gericke 2012 *THRHR* 575.

³¹⁷ Gericke 2012 *THRHR* 575.

³¹⁸ Rycroft 2014 *IJCLIR* 7.

³¹⁹ Le Roux 2013 *CLL* 11.

³²⁰ *Mondi* case para 36, The employer had an obligation to prove the commission of the crime and to prove who committed such a crime as well.

³²¹ *Xtrata South Africa (Pty) Ltd v Association of Mine Workers and Construction Union (AMWCU)* [2014] ZALCJHB (hereinafter referred to as *Xtrata* case).

is that of compliance with Section 17 of the *Constitution*,³²² which places an obligation on a union to ensure that the members act accordingly.³²³ The second ground is the guardian relationship between a union and its members, which obliges a union to guide its members to avoid unlawful activities.³²⁴ Linked to the guardian relationship is good faith bargaining between an employer and a union during collective bargaining.³²⁵ A union has to bargain in good faith on behalf of its members. This is essential in safeguarding that union members comply with the *LRA* and any lawful court order inclusive of an interdict.³²⁶ This is because a union has to be responsible for its members during collective bargaining and during the strike as well.³²⁷

3.2.2 Liability towards third parties through the *RGA*

The introduction of the *RGA* was an attempt to reconcile the right of assemblers with the interests of the state to maintain public order.³²⁸ The *RGA*, similar to the *LRA* recognises everyone's right to peaceful and unarmed assembly.³²⁹ It also places duties on authorities to facilitate peaceful protest and the right to assemble through the facilitation of negotiations with the organisers of such actions.³³⁰ This is mainly to prevent injury to persons and riot damage together with the consequences that follow. The *RGA* also explains riot damage as,

...any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering.³³¹

From the above definition, "any person" could be construed to include third parties. This means that an injury or death of such persons could result in the imposition of liability upon trade unions and their office bearers. This is in terms of Section 11 of the *RGA*.

³²² Section 17 of the Constitution provides for the right to peaceful assembly.

³²³ *Xtrata case* para 36.

³²⁴ *Xtrata case* para 36.

³²⁵ *Xtrata case* para 36.

³²⁶ *Xtrata case* para 38.

³²⁷ *Xtrata case* paras 37-38.

³²⁸ *Brand et al South African Constitutional Law* 556.

³²⁹ Section 64 of the *LRA* provides for the right to strike; *Pumla A trade union's liability for damages caused during a strike* 44.

³³⁰ *Pumla A trade union's liability for damages caused during a strike* 44.

³³¹ Section 1 of the *RGA*.

3.2.2.1 Section 11 of the RGA

Relevant to the discussion on liability of trade unions is Section 11 of the *RGA*. Section 11 of the *RGA* states that liability can be the result of the actions of participants in a gathering that lead to a riot that causes damage. Section 11(1) of the *RGA* states that:

(1) If any riot, damage occurs as a result of-

(a) a gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener;

(b) a demonstration, every person participating in such demonstration,

shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer... together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection.³³²

This section creates a specific statutory liability in addition to any other common law liability that is based on existing principles of delict.³³³ This statutory liability created by Section 11(2) of the *RGA* means the trade union concerned or its members should not intentionally or negligently cause injury to persons or riot damage to property.³³⁴ This depicts that failure to abide by this section could lead to undesired results on the part of trade unions. However, a union is not entirely without any options to escape liability because Section 11(2) of the *RGA* has three requirements that a union has to satisfy the court before it could be found liable.³³⁵

Firstly, the union did not in any way allow or connive in the act or omission that caused the damage in question.³³⁶ Secondly, that the act or omission does not fall within the scope of the objectives of the gathering or demonstration.³³⁷ Furthermore, the injury or damage caused by the gathering or demonstration in question was not reasonably

³³² Section 11(1) of the *RGA*.

³³³ Le Roux 2014 *CLL* 31.

³³⁴ Le Roux 2014 *CLL* 32-.

³³⁵ Pumla *A trade union's liability for damages caused during a strike* 45.

³³⁶ Section 11(2)(a) of the *RGA*.

³³⁷ Section 11(1)(b) of the *RGA*.

foreseeable to the union.³³⁸ Thirdly, the union took all the reasonable steps within its power in preventing the act or omission causing the injury or damage to property.³³⁹

*SA Transport and Allied Workers Union v Garvis*³⁴⁰ illustrates how a trade union's responsibilities can be extended in circumstances where the union and its members choose to take part in a public strike.³⁴¹ In this case, a claim for compensation was instituted against a trade union for the damages that resulted from a gathering. *SATAWU* had originally embarked on a protected strike that later shifted to the injury of several people as well as riot damages to the amount of R1.5 million and the arrest of 39 people.³⁴² The issue before the court was whether Section 11(2) of the *RG*A was valid and constitutional, but also if it could relieve the union when it comes to liability. This is because the union was contesting the constitutional validity of Section 11 (2) of the *RG*A. It is noteworthy that Section 11 of the *RG*A imposes a joint and several liability upon trade unions and this liability arises where there is riot damage and injury to persons caused by the trade union or their members participating in a demonstration or gathering.³⁴³

The trade union *SATAWU* argued that Section 11(2) of the *RG*A is irrational since it requires the union to take all the reasonable steps to prevent the act or omission resulting in riot damage and injury to persons.³⁴⁴ It further argued that this is the case even in circumstances where the act or omission was not reasonably foreseeable.³⁴⁵ It also argued that Section 11 (2) of the *RG*A placed a limitation on the right to freedom of assembly and that such limitation could not be justified.³⁴⁶ The Constitutional Court found that Section 11 (2) was constitutionally valid.³⁴⁷

³³⁸ Section 11(1)(b) of the *RG*A.

³³⁹ Section 11(1) (c) of the *RG*A, provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.

³⁴⁰ *SA Transport and Allied Workers Union v Garvis* (2012) 33 ILJ 1593 (CC) (hereinafter referred to as the *Garvis* case).

³⁴¹ Botha 2015 *DeJure* 347.

³⁴² *Garvis* case para 12.

³⁴³ *Brand et al South African Constitutional Law* 558.

³⁴⁴ *Garvis* case para 16.

³⁴⁵ *Garvis* case para 16.

³⁴⁶ *Garvis* case para 16.

³⁴⁷ *Garvis* case para 39.

However, the Constitutional Court stated that gatherings in their own nature are not easily manageable and thus call for extraordinary measures to eliminate potential harm.³⁴⁸ The court continued that the,

...approach adopted by Parliament appears to be that, except in the limited circumstances defined in Section 11 (2), organisations must live with the consequences of their actions, with the result that harm triggered by their decisions to organise a gathering would be placed at their doorsteps.³⁴⁹

The above view indicates that the courts will not take lightly the behaviour of unions who try to avoid vicarious liability. Unions should embark on a strike being mindful of the consequences that may follow. Even though the strike by *SATAWU* had originally started as a protected strike, the strike ended in damages to property.³⁵⁰ There were also several injuries to innocent third parties³⁵¹ and a number of arrests were made.³⁵² The decision in this case thus makes it difficult for a union to avoid liability and defend itself against any claims arising out of it and its members' actions.³⁵³ It prevents unions from trying to escape the consequences of their unlawful actions. Thus, any slight movement away from the duties imposed by the *Constitution* and the *LRA* may lead to untold detrimental effects for trade unions.³⁵⁴

In *FAWU* case,³⁵⁵ it was held that it is not acceptable for a union and its members to force an employer through acts of violence and criminal activities to accede to their demands.³⁵⁶ This norm was described by the court to be weakening the fundamental values of the *Constitution*.³⁵⁷ Furthermore, it irreparably undermines the future relations between employees and employers.³⁵⁸ This may serve as evidence that the Labour Court is

³⁴⁸ *Garvis* case para 39.

³⁴⁹ *Garvis* case para 39.

³⁵⁰ *Garvis* case para 12; Grogan 2012 *Employment Law Journal* 11.

³⁵¹ Ordinary citizens who had no part in the strike.

³⁵² *Garvis* case para 12; Grogan 2012 *Employment Law Journal* 11.

³⁵³ Le Roux 2014 *CLL* 31.

³⁵⁴ *Pumla A trade union's liability for damages caused during a strike* 49, courts will no longer tolerate unlawful conduct from trade unions members during strikes.

³⁵⁵ See chapter 2 para 2.4.4.

³⁵⁶ *FAWU* case para 6.

³⁵⁷ *FAWU* case para 6.

³⁵⁸ *FAWU* case para 6.

determined to curb the behaviour of unions and its members by providing a forceful approach to avoid misconduct during strikes.³⁵⁹

It is clear that unions have the duty to avoid criminal activities and engaging in misconduct during strikes. However, even though courts are firm in their approach to curb such behaviour, there are many situations where a union and its members ignore or fail to heed Labour Court orders. These include cases where the Labour Court successfully granted an employer an interdict and the union and its members nonetheless clearly continued with their prohibited behaviour. This behaviour shows disregard for the Labour Courts orders. The next step for an employer after an interdict is disobeyed, is contempt of court proceedings in the Labour Court. A detailed explanation of these proceedings is essential. This would help to clarify whether the Labour Court through contempt of court proceedings is doing much to curb violence in strikes and to ensure that its orders (interdicts) are enforced.

3.3 Contempt of Labour Court orders

The South African labour relations as previously referred to as adversarial³⁶⁰ in nature brings forth occurrences of violence and damage to property by both identified and unidentified perpetrators who fail to obey court interdicts.³⁶¹ It is understood that this adversarial nature only brings frustration for an employer with regard to who should take responsibility for the damages incurred during violent strikes. It seems that the failure to obey court interdicts has become progressively prevalent over the years in South Africa.³⁶² The Labour Court is not without a remedy when it comes to court interdicts being disobeyed. This remedy is through contempt of court proceedings. Even so, the effectiveness of contempt of court proceedings as part of the powers of the Labour Court remains questionable.

³⁵⁹ Pumla *A trade union's liability for damages caused during a strike* 50.

³⁶⁰ Botha *Employee participation and voice in companies: A legal perspective* 138.

³⁶¹ *RAM Transport SA (Pty) Ltd v SA Transport & Allied Workers Union & Others* (2011) 32 ILJ (hereinafter referred to as *RAM case*) (own emphasis added).

³⁶² Myburgh 2013 *Contemporary Labour Law* 3.

3.3.1 What are contempt of court orders?

A contempt of court application is resorted to where an interdict by the Labour Court has not been complied with.³⁶³ The test in place for this application is the establishment of whether a breach was committed deliberately or *mala fide*. For purposes of this study, this would mean whether the union and its members' unruly behaviour and misconduct³⁶⁴ during a strike was done deliberately or not. Contempt of court is therefore the unlawful deliberate violation or interference in the administration of justice in a matter that is pending before a judicial authority.³⁶⁵ An employer's first step is to obtain a declaratory order³⁶⁶ in the Labour Court to declare a strike as unprotected. If the strikers continue, the employer can further apply for an interdict.³⁶⁷ Where an interdict is disregarded by the union and its members, contempt of court proceedings become relevant.

Contempt of court proceedings are provided for in the *LRA*. Section 142 (4) of the *LRA* provides for contempt of court proceedings in the Labour Court where a party has failed to comply with an award that orders performance of an act.³⁶⁸ It has been acknowledged by Myburgh³⁶⁹ that the failure to obey court orders has become a norm due to the countless situations of unprotected strikes.³⁷⁰ It is no longer surprising when the courts on return dates are informed that the recipients of the court orders either refused to receive them, threw them on the ground or ignored them blatantly.³⁷¹ This type of conduct most certainly casts doubt on the Labour Court as a dispute resolution institute.

³⁶³ Achmat *The right to strike and its limitations* 35-36, in Britain this order can be applied for to reinforce the interdict order and this is the case in South Africa as well. It has been apparent that interdicts are ignored even where criminal charges are brought against a person thus employers decide to apply for contempt of court so as to reinforce the interim interdict orders.

³⁶⁴ Disobeying a Labour court interdict.

³⁶⁵ Vettori 2013 *Mercantile LJ* 251; *Muthwa & Others v Allifa Spices* (2006) 27 ILJ 2390 (cc) at para 9.

³⁶⁶ Section 158 (1)(a)(iv) of the *LRA*.

³⁶⁷ Section 158 (1)(a)(ii) of the *LRA*.

³⁶⁸ Section 142 (4) of the *LRA*.

³⁶⁹ Myburgh 2013 *Contemporary Labour Law* 3.

³⁷⁰ Myburgh 2013 *Contemporary Labour Law* 3.

³⁷¹ Myburgh 2013 *Contemporary Labour Law* 3; Conradie JA in *Modise & Others v Steve's Spar Blackhealth* (2000) 21 ILJ 519 (LAC) at para 120.

However, the Labour Court has been infuriated by such behaviour and has attempted to address it. Davis JA³⁷² stated that for a functional democracy and the promotion of the rule of law and to avoid taking matters into own hands, there has to be certain adjustments.³⁷³ These include that the whole society should frown upon anyone whose conduct disobeys an order of court and encourages others to do the same.³⁷⁴ This would also encourage parties to have faith in the courts and to not attempt to resolve matters through physical fights or violence.³⁷⁵ Therefore, where proven that the Labour Court's orders were disregarded, it is well within the Labour Court's powers to deal with the issue uncompromisingly through contempt of court proceedings.³⁷⁶

3.3.2 Burden of proof in contempt of court proceedings

The test for burden of proof in contempt of court proceedings is beyond a reasonable doubt.³⁷⁷ This means that it is the duty of the employer to provide the court with sufficient evidence to support the onus of proof.³⁷⁸ There are some guiding principles for an employer who opts to enforce court orders through contempt of court proceedings. These include drafting an interdict in a broad manner so that a wide range of potential conduct may fall within it.³⁷⁹ In addition, this order has to also place a positive obligation on the union to ensure compliance of its members.³⁸⁰

3.4 Contempt of court proceedings through case law

The Labour Court has dealt with contempt of court orders and some of these cases are discussed in this section. The first case is the *CSSAWU* case.³⁸¹ In this case, *CSSAWU*

³⁷² North West Star (Pty) Ltd v Serobatse & Another (2005) 26 ILJ 56 (LAC) at para 17 (hereinafter referred to as *North Star* case).

³⁷³ *North Star* case para 17.

³⁷⁴ *North Star* case para 17.

³⁷⁵ *North Star* case para 17 (own emphasis added).

³⁷⁶ *Ram* case at para 9.

³⁷⁷ Lowu and Moodley 2016 <https://www.golegal.co.za/contempt-court-proceedings-labour-court> accessed 18 February 2018

³⁷⁸ Lowu and Moodley 2016 <https://www.golegal.co.za/contempt-court-proceedings-labour-court> accessed 18 February 2018.

³⁷⁹ Lowu and Moodley 2016 <https://www.golegal.co.za/contempt-court-proceedings-labour-court> accessed 18 February 2018.

³⁸⁰ Lowu and Moodley 2016 <https://www.golegal.co.za/contempt-court-proceedings-labour-court> accessed 18 February 2018.

³⁸¹ See chapter 2 para 2.4.2.

initially called a protected strike after a wage dispute and Robertson Winery obtained an interdict to restrain the union from unlawful conduct.³⁸² The interdict prohibited the union and its office bearers from engaging in acts of misconduct during the strike.³⁸³ Robertson alleged that *CSAAWU* and some of its office bearers were in contempt of court for failure to adhere to the interdict granted in the Labour Court. The issue was therefore whether the union and its office bearers were in contempt of court.³⁸⁴

The finding of the court was that *CSAAWU* was found to be in contempt of court and the court further issued a fine of R50 000 against the union.³⁸⁵ The court put emphasis on the fact that a breach of a court order will always remain a very serious matter.³⁸⁶ This is because such conduct undermines the rule of law.³⁸⁷ In addition, with regard to collective bargaining, such behaviour undermines the constitutional right to strike and to picket peacefully and unarmed.³⁸⁸ This only shows that the Labour Court views the breaches of its court orders very seriously, even in situations where breach does not amount to any violence or damage to property.³⁸⁹ However, it would seem that the Labour Court is more effective when it comes to remedy, but not the enforcement of its court orders in entirety.³⁹⁰ This is because unions and their members easily disregard court orders, that is interdicts. However, the harsher punishment against unions through contempt of court proceedings as a remedy on the part of employers offers more fruitful results than the effect of an interdict.

Another case dealing with the contempt of court proceedings is that of *Pikitup Johannesburg (Pty) Ltd v SAMWU*.³⁹¹ In this case, employees of a waste collection company, also members of *SAWMU*, embarked on an unprotected strike.³⁹² This strike

³⁸² *CSAAWU* case paras 4, 5 and 8.

³⁸³ *CSAAWU* case paras 4, 5 and 8.

³⁸⁴ *CSAAWU* case para 4-5.

³⁸⁵ *CSAAWU* case para 69, even though the employer had claimed R500 000.

³⁸⁶ *CSAAWU* case para 55-59.

³⁸⁷ *CSAAWU* case para 55-59.

³⁸⁸ *CSAAWU* case para 55-59.

³⁸⁹ *CSAAWU* case para 55-59.

³⁹⁰ This is because the Labour Court grants interdicts and the enforcement of such interdicts fails since unions and their members disregard such orders. The remedy of Contempt of court proceedings that follows after disregarding interim orders seems more efficient than the enforcement of interdicts.

³⁹¹ *Pikitup Johannesburg (Pty) Ltd v SAMWU* [2016] ZALCJHB 149 (hereinafter referred to as *Pikitup* case).

³⁹² *Pikitup* para 1 and para 25.

was followed by various acts of violence that led to the company obtaining an interdict in the Labour Court.³⁹³ The company successfully obtained this interdict, which aimed at prohibiting employees from committing further acts of violence and misconduct that posed a potential to interfere in the company's operations.³⁹⁴

Despite the court order, *SAMWU* and its members continued with the strike, which ended approximately two weeks after the interdict was granted.³⁹⁵ During the strike, *SAMWU* and its members committed various acts of violence and unlawful conduct aimed at interfering with the company's waste collection.³⁹⁶ These acts included preventing non-striking employees from working, blocking access to depots, trashing, burning and emptying waste in the Braamfontein central business district of Johannesburg.³⁹⁷ Therefore, the issue before the court was whether *SAMWU* acted in contempt of court.

The court held that in its view, the union and its members had publicly undermined the court's authority.³⁹⁸ The court found that *SAMWU* and its members were in contempt of court order due to the failure to abide by the requirements of the interdict on the prohibited actions.³⁹⁹ The court stated that the conduct of the strikers after the interdict was granted openly contravened the court order on a dramatic scale.⁴⁰⁰ The court was therefore not satisfied that *SAMWU* had established a reasonable doubt that it and its members' acts during the strike were not intentional and against the interdict.⁴⁰¹ The court made a final order and granted punitive costs against *SAMWU*.⁴⁰² However, the court was faced with what penalty is appropriate in such circumstances.⁴⁰³

The Labour Court alluded to have applied a "stern approach" towards unions and their members in the *Betafence* case.⁴⁰⁴ The facts of the case were that the employees asked

³⁹³ *Pickitup* para 12.

³⁹⁴ *Pickitup* para 1.

³⁹⁵ *Pickitup* para 11.

³⁹⁶ *Pickitup* para 12.

³⁹⁷ *Pickitup* para 12.

³⁹⁸ *Pickitup* case para 25.

³⁹⁹ *Pickitup* case para 25, see also para 13.

⁴⁰⁰ *Pickitup* case para 25.

⁴⁰¹ *Pickitup* case para 37.

⁴⁰² *Pickitup* case para 38-39.

⁴⁰³ *Pickitup* case para 38; The discussion on the penalties awarded by the Labour Court in contempt of court proceedings will follow in Section 3.4.1.

⁴⁰⁴ See chapter 2 para 2.4.3.

to meet with management on the 6th of April 2016 in order to propose their demands.⁴⁰⁵ However, the next day the employees failed to report for duty, but instead commenced a picket, and despite *NUMSA*'s involvement they refused to report for duty.⁴⁰⁶ None of the efforts by Betafence could persuade the employees to return for duty, leaving Betafence to lodge an urgent application in the Labour Court for an interdict.⁴⁰⁷ This order was granted and the requirements of the interdict included the immediate suspension of the strike and the employees to return to work.⁴⁰⁸ Despite the interdict, the employees nonetheless continued with the strike, resulting in the matter appearing again before the Labour Court on the 15th of April 2016.⁴⁰⁹

An order was issued interdicting the employees from embarking on any industrial action and for *NUMSA* to show cause as to why it should not be held in contempt of court. On the return date, *NUMSA* stated that the employees refused to take the union's advice to stop the strike and the conduct of the strikers was due to frustration with the conduct of Betafence.⁴¹⁰ The court held that no amount of frustration by an employer can mitigate such level of contempt towards court orders.⁴¹¹ In addition, the Court said that this level of contempt has reached a peak that if it goes unchecked, the rule of law will become meaningless.⁴¹² This will in return aggravate the adversarial nature of labour relations as witnessed.⁴¹³ Therefore, the Labour Court found the union and its members in contempt of court and ordered a fine. The next section discusses the penalties awarded in contempt of court proceedings.

⁴⁰⁵ *Betafence* case para 8.

⁴⁰⁶ *Betafence* case para 8.

⁴⁰⁷ *Betafence* case para 8.

⁴⁰⁸ *Betafence* case para 1 and 2.

⁴⁰⁹ *Betafence* case para 3.

⁴¹⁰ *Betafence* case para 54.

⁴¹¹ *Betafence* case para 55.

⁴¹² *Betafence* case para 55, this unruly behavior will result in anarchy and mayhem which is the characteristics of most industrial action.

⁴¹³ *Betafence* case para 55.

3.4.1 Nominal nature of sentences with regard to contempt of Labour Court order proceedings

The powers of the Labour Court in contempt of court proceedings include the awarding of compensation.⁴¹⁴ The Labour Court may in the circumstances order the payment of just and equitable compensation for the loss incurred by an employer due to an unprotected strike.⁴¹⁵ However, it is noteworthy that such compensation may not be awarded to an employer who fails to prove that it suffered any loss.⁴¹⁶ In granting an order for payment of compensation, the Labour Court has to consider whether attempts were made to meet the provisions in Sections 64 and 65 of the *LRA*.⁴¹⁷ In furtherance of this point is the extent of the attempts and consideration as to whether the strike was premeditated or not.⁴¹⁸ Therefore, a union and its members can be held responsible for the losses as a result of an unprotected strike.⁴¹⁹

The case of *Algoa Bus Company v SATAWU & Others*⁴²⁰ is an illustration of the awarding of compensation for losses as a result of an unprotected strike. The company made a claim for compensation against *SATAWU* and its members for financial losses to the value of R465 001.34. These costs were incurred during an unlawful strike where an interdict was granted.⁴²¹ The court held that it is within the options available to an employer to claim for compensation of losses actually incurred during an unprotected strike.⁴²² The court found the union in contempt of court since the strike was pre-meditated.⁴²³ Also,

⁴¹⁴ Section 68 (1) (b) of the *LRA*; Manamela and Budeli 2013 *cilsa* 329.

⁴¹⁵ Manamela and Budeli 2013 *cilsa* 329.

⁴¹⁶ Manamela and Budeli 2013 *cilsa* 329.

⁴¹⁷ Section 64 of the *LRA* is on the right to strike and section 65 of the *LRA* is on the limitations of the right to strike.

⁴¹⁸ Section 68 (1) (b) (i) (aa) (bb) (cc) (dd) of the *LRA* states that the Labour court has jurisdiction to order payment of just and equitable compensation where a strike did not comply with section 64 and 65 of the *LRA*. Just and equitable compensation will be made considering whether attempts were made to comply with sections 64 and 65, whether the strike was premeditated and whether the strike was in response to an unjustified conduct by another party to the dispute. Also whether there was compliance with an order granted.

⁴¹⁹ Manamela and Budeli 2013 *cilsa* 330.

⁴²⁰ *Algoa Bus Company v SATAWU & others* [2010] 2 BLLR 149 (LC) (hereinafter referred to as *Algoa* case).

⁴²¹ *Algoa* case para 19, the consequence of the strike was that the buses did not operate on most routes during the strike thus resulting in the damages of R465 001.34.

⁴²² *Algoa* case para 25 and para 44; Manamela and Budeli 2013 *cilsa* 330.

⁴²³ *Algoa* case para 40.

the union and its members did not make any attempts to comply with the *LRA*.⁴²⁴ The court further stated that the strike was not in furtherance of orderly collective bargaining and that even though it lasted a short while, the strike caused a loss to the company.⁴²⁵ However, the court stated that the amount awarded need not necessarily be the full compensation for the loss suffered.⁴²⁶ The reason for this is that the meaning of "just and equitable" compensation in Section 68(1)(b) of the *LRA* refers to fairness when calculating the amount of compensation.⁴²⁷ Therefore, the court stated that the calculation by the company for the losses incurred was inaccurate.⁴²⁸ The court made an order against the union and its members to pay the company only R100 000 from the R465 000.⁴²⁹ The court went further to order the payment of this R100 000 in monthly instalments of R50.⁴³⁰ It should be noted that *SATAWU* had admitted to the loss suffered and asked the court to reduce the amount of loss suffered by the employer.⁴³¹ This may open doors to abuse and the non-consideration of financial prejudice that stands to be suffered by an employer during unprotected strikes.

This finding illustrates how the remedy of awarding costs in contempt of court proceedings is quite ineffective in the hands of the Labour Court.⁴³² This is because unions will easily escape the full wrath of liability for its actions if courts are ready to reduce the amount awarded against unions. In addition, one of the difficulties on the part of the employer is quantifying the exact financial loss as a result of an unprotected strike.⁴³³ An employer may not be able to be accurate in the estimation of costs, including the estimation of costs for future income.⁴³⁴ This means that if the court is of the opinion that the amount claimed by the employer is not just and equitable, then this may result in the

⁴²⁴ *Algoa* case para 40.

⁴²⁵ *Algoa* case para 40.

⁴²⁶ *Algoa* case para 39.

⁴²⁷ *Algoa* case para 44.

⁴²⁸ *Algoa* case para 39, the strike did not endure for two days as alleged by the company but rather for a day.

⁴²⁹ *Algoa* case para 3 of the Order.

⁴³⁰ *Algoa* case para 3 of the Order.

⁴³¹ *Algoa* case paras 28-29.

⁴³² Manamela and Budeli 2013 *cilsa* 330.

⁴³³ Simelane *An evaluation of section 68(1)(b) of the Labour Relations Act 66 of 1995: How effective is the remedy?* 30.

⁴³⁴ Simelane *An evaluation of section 68(1)(b) of the Labour Relations Act 66 of 1995: How effective is the remedy?* 30

reduction of the original amount claimed. This may consequently affect the future income for the company of the employer.

In the *Betafence* case⁴³⁵ the Labour Court ordered the union to pay compensation to the amount of R1 000 000 for the damages towards the company resulting from the unprotected strike.⁴³⁶ However, this fine was suspended for two years on the condition that the union and its members are not found guilty of contempt of court again in that period.⁴³⁷ Both cases discussed above illustrate the willingness of the Labour Court to take a stern approach towards unions and their members who act in contempt of court orders. A stern approach is important for the effectiveness of the powers of the Labour Court. The measurement of effectiveness is terms of consistency, the delivery of just outcomes and the ability of the Labour Court to stop or bring change to human behaviour during strikes.⁴³⁸

However, the submission in this study is that the nominal nature of the compensation awards hinders the effectiveness of the enforcement of court orders by the Labour Court. The reason is that unions and their members may continue with their contempt of court orders because they know that they will get an award of costs that is slightly less than the original damage. This does not fall within the principles of consistency, the delivery of just outcomes and the ability to change human behaviour during unprotected strikes, as it is required of the Labour Court. In the worst-case scenario, unions may believe they will get away with a suspended order of costs and this cannot be a healthy approach for a democratic labour relations system. The judiciary seems to be the weakest of the three arms of government, even though its manifest independence and authority are very essential.⁴³⁹ Without any support from the public, the judiciary cannot function properly.⁴⁴⁰

It is for this reason that the Labour Court has to function effectively and efficiently for all parties so that in the final analysis, the people believe in the integrity of the judicial

⁴³⁵ See chapter 2 para 2.4.3.

⁴³⁶ *Betafence* case para 63.

⁴³⁷ *Betafence* case para 63.

⁴³⁸ Brian Elliot *et al Encouraging Achievement-Gifted Education Resources* 1.

⁴³⁹ *S v Mambolo* 2001 (3) SA 409 (cc) (hereinafter referred to as *Mambolo* case) at para 16.

⁴⁴⁰ *Mambolo* case para 18-19.

system.⁴⁴¹ It is clear that the Labour Court will punish unions with the award of compensation against them where they or their members are guilty of strike violence as seen in the cases discussed above. However, these cases also portray the ineffectiveness of contempt of court proceedings when it comes to the nominal nature of the sentences or award of costs.

3.5 Conclusion

This chapter has evaluated the effectiveness of the enforcement of Labour Court orders as part of the Labour Court's mandate to resolve disputes effectively. Enforcement was evaluated through trade union duties and powers during violent and destructive strike action. The liability of unions was also evaluated. This included liability towards third parties and the provisions of Section 11 of the *RGA* on the liability of unions. This is because employers believe that the misconduct by strikers during strikes is mostly influenced by trade unions. The Labour Court has attempted to adopt an approach that ties unions to liability arising from riot damages and injury to persons during unprotected strikes by the union and its members. The study has evaluated these duties of unions to avoid riot damage incurred by an employer and liability for such.

Xtrata summarises some of the grounds that oblige a union to take responsibility for its members' actions as discussed in this chapter. It was held that Section 17 of the *Constitution* provides for the right to peaceful assembly and this in turn places an obligation upon a union to ensure that their members act accordingly.⁴⁴² This obligation is also reinforced by Section 11 of the *RGA*. The second ground stated in the *Xtrata* case is based on the guardian relationship between a union and its members.⁴⁴³ Due to this relationship, a union is obliged to lead and guide its members by ensuring that its members are acting lawfully to avoid riots.⁴⁴⁴ In addition to this, collective bargaining between an employer and a union means that the union has an obligation to good faith

⁴⁴¹ *Mambolo* case para 18-19, where the judiciary cannot function properly, thus results in the breakdown of the rule of law.

⁴⁴² *Xtrata* case para 36, section 17 not only provides a right but an obligation.

⁴⁴³ *Xtrata* case para 36.

⁴⁴⁴ *Xtrata* case para 36.

bargaining.⁴⁴⁵ This also means ensuring that its members comply with the *LRA*⁴⁴⁶ and any lawful court order.⁴⁴⁷

The court in *Xtrata* emphasised that a union is fully responsible for its members throughout the entire bargaining process and is obligated to take responsibility for its members during strikes as well.⁴⁴⁸ A union has to fully associate itself with the actions of its members during an illegal strike.⁴⁴⁹ Even though this is the case, the *Eskom* and *Mambolo* cases illustrate the difficulties associated with pinning liability on a union for the conduct of its members. Such difficulties include the burden of proof placed on an employer to prove that the union members are the perpetrators. In both cases, the courts found the employers to have had insufficient evidence against the unions. This left the employers frustrated over the damages that resulted.

Even though emphasis has been placed on the obligations of trade unions, the study found many instances where unions or their members disregard court orders. This has led to contempt of court proceedings in the Labour Court. The Labour Court during contempt of court proceedings has showed its concern and disregard for the actions of unions and their members in disobeying court orders. This is evident from the *CSAAWU*, *Pikitup* and *Betafence* cases. These cases involved misconduct of strikers during protected strikes, which resulted in riot damage on the part of employers. The Labour Court found the unions in contempt of court and warned that such behaviour by unions can no longer go unpunished by the court. The court in all three cases went further to make an order of costs upon the unions involved. The challenge discovered is the nominal nature of costs awarded by the Labour Court. The court in the *Algoa* case made an order of costs upon a trade union for only an alarming R100 000 of the R465 000 claimed by the employer. The court went further to order the payment of R50 monthly instalments by the union to the employer.

⁴⁴⁵ *Xtrata* case para 36 (own emphasis).

⁴⁴⁶ Provisions of the *LRA* being sections 64, 65 and 67 of the *LRA*.

⁴⁴⁷ *Xtrata* case para 38; court order in this case an interdict.

⁴⁴⁸ *Xtrata* case paras 37-38.

⁴⁴⁹ *Xtrata* case paras 37-38.

In the *Betafence* case, the order of costs against the union was to the amount of R1 000 000, but suspended for two years. This only provides evidence of the ineffective nature of the remedy of costs in contempt of court proceedings. This is because unions will escape liability for their actions and those of its members easily if courts are ready to reduce the amount awarded against unions. In addition, one of the difficulties identified for the employer is calculating the exact financial loss as a result of an unprotected strike. This means that the reduction in the amount awarded against unions is likely to impact future financial income and at the same time have unions escape full liability. This is also likely to open the floodgates to unions and their members disregarding the Labour Court's orders as is already the case rather than curbing this unruly behaviour.

It is noteworthy that the rule of law remains a foundational value of the *Constitution*. This requires the upholding of the dignity and authority of the courts.⁴⁵⁰ This is evidenced in the capacity of the courts to exercise their mandate effectively as provided for by the *Constitution* and the *LRA*.⁴⁵¹ It therefore follows that the disobedience towards court orders will only lead to rendering the Labour Court impotent and judicial authority a mere mockery.⁴⁵² For these reasons, the effectiveness of a court order is determined by the guarantee that they will be enforced.⁴⁵³ Without such assurance as has been realised by the study, enforcement of court orders is severely disrupted. Thus suggestions have been provided for a stricter approach by the Labour Court in enforcing its orders. Botha⁴⁵⁴ suggests that a form of compromise necessary to curb the adversarial nature of labour relations lies in the introduction of compulsory or interest arbitration to be ordered by the Labour Court. This will be discussed in the next chapter.

⁴⁵⁰ *Pheko and others v Ekuruleni Metropolitan Municipality* 2015 (6) BCLR 711 (CC) hereinafter referred to as *Pheko* case) para 1.

⁴⁵¹ *Pheko* case para 1.

⁴⁵² *Pheko* case para 1.

⁴⁵³ *Pheko* case para 1.

⁴⁵⁴ Botha MM *Employee participation and voice in companies: A legal perspective* 265.

Chapter 4 INTEREST OR COMPULSORY ARBITRATION AS AN ALTERNATIVE

4

4.1 Introduction

Strikes have become common in the South African labour relations system associated with the periodic wage negotiation between employers and trade unions.⁴⁵⁵ Often, these negotiations are associated with disruptive violence, intimidation and vandalism by strikers.⁴⁵⁶ This type of intimidation and violence was illustrated in the *FAWU* case, which involved the intimidation and harassment of non-strikers, threats of physical harm and death to employees in their homes, intimidation and harassment of the relatives of non-strikers amongst others.⁴⁵⁷ There have been a number of prolonged strikes in recent years that characterised the South African labour relations landscape as adversarial.⁴⁵⁸ This is illustrated by the *Tsogo*⁴⁵⁹ and *CSAAWU*⁴⁶⁰ cases, which dealt with extreme violence from striking employees.

It has been recognised that the characteristics of most of the strikes in South Africa are their unprocedural nature, extreme violence, intimidation and vandalism.⁴⁶¹ The five-month long Marikana⁴⁶² miners' strike depicts strike violence at its highest peak in South Africa.⁴⁶³ This clearly negates the intended purpose of strike action, which is to balance the economic power between an employer and employee.⁴⁶⁴ It instead places a lot of

⁴⁵⁵ Samuel 2016 *Journal of Contemporary Management* 1020.

⁴⁵⁶ Myburgh 2013 *Contemporary Labour Law* 4.

⁴⁵⁷ *FAWU* case paras 4, 5 and 6, Non-strikers were harassed; employees and their relatives were visited in their homes and harassed with the threat of death. What followed were fire shots and bombing of non-strikers' vehicles leading to the killing of a witness who identified one of the perpetrators, threats were made to senior management which led to protection by security guards whose vehicles were shot, delivery vans were held, drivers harassed thus private security engagement costs increased

⁴⁵⁸ Samuel 2016 *Journal of Contemporary Management* 1020.

⁴⁵⁹ See chapter 2 para 2.4.1.

⁴⁶⁰ See chapter 2 para 2.4.2.

⁴⁶¹ Samuel 2016 *Journal of Contemporary Management* 1021.

⁴⁶² Power and Gwanyanya *SUR* 62.

⁴⁶³ Power and Gwanyanya *SUR* 62, 34 protesting mineworkers were shot by the SAPS, further 79 were injured and 259 were arrested by the SAPS. The following week resulted in 10 more killings of striking mineworkers, two security guards and two members of the SAPS.

⁴⁶⁴ Samuel 2016 *Journal of Contemporary Management* 1021.

pressure on employers to accede to the demands of the employers, proving to be more of a "tactic" to intimidate and coerce employers to reach a settlement.⁴⁶⁵

For these reasons, the Labour Court has been faced with numerous applications from employers seeking interdicts to prohibit a strike that has lost its protected status due to acts of violence and destructive behaviour. The interdict is meant to restrict the acts of misconduct that are associated with violent and disruptive strikes. However, despite this remedy, cases such as in the *CSAAWU* case⁴⁶⁶ illustrate situations where interdicts are granted by the Labour Court but disregarded by a union and its members.⁴⁶⁷ In the *Betafence* case, the Labour Court made the observation that employees have developed a habit of disregarding Labour Court orders.⁴⁶⁸ This has in return led to contempt of court proceedings in the Labour Court, making such proceedings a questionable remedy with regard to effectiveness and the effectiveness of enforcement. This gives the Labour Court the responsibility to fulfil its mandate, which is the effective resolution of disputes.⁴⁶⁹

Within the purview of the labour circle, there have been suggestions that the Labour Court has to adopt and apply a more deterrent approach towards curbing violent and destructive strikes.⁴⁷⁰ Thus, it is suggested that in situations where strikes become violent and lengthy, the Labour Court has to not only suspend the strike, but order the parties to engage in compulsory arbitration.⁴⁷¹ After the five-month long platinum strike in 2014, the introduction of compulsory or interest arbitration in long and violent strikes was suggested.⁴⁷² This was due to frequent and high levels of strike activity coupled with violent and destructive behaviour. It was for these reasons that suggestions for the

⁴⁶⁵ Samuel 2016 *Journal of Contemporary Management* 1021.

⁴⁶⁶ See chapter 2 para 2.4.2.

⁴⁶⁷ See chapter 2 para 2.4.2.

⁴⁶⁸ See chapter 2 2.4.3.

⁴⁶⁹ Section 1(d)(iv) of the *LRA*.

⁴⁷⁰ Myburgh 2013 *Contemporary Labour Law* 1-10.

⁴⁷¹ Botha *Employee participation and voice in companies: A legal perspective* 222.

⁴⁷² Botha *Employee participation and voice in companies: A legal perspective* 222.

reintroduction of strike balloting⁴⁷³ and the use of compulsory or interest arbitration were made.⁴⁷⁴

This chapter deals with compulsory arbitration as proposed to curb the violent and destructive nature of strikes. The chapter first discusses what compulsory or interest arbitration entails and the institutions responsible for carrying out such compulsory or interest arbitration. This also includes the type of disputes eligible for compulsory or interest arbitration. The discussion continues with an investigation into compulsory interest arbitration in action as applied in essential services in order to provide reasons as to why the Labour Court should follow suit in other disputes. The advantages and disadvantages are briefly discussed. Lastly, the chapter looks into the efforts by the legislature to incorporate compulsory or interest arbitration as part of the powers of the Labour Court.

4.2 What is compulsory or interest arbitration?

For protracted strike action, where a strike no longer remains functional to collective bargaining, the *CCMA* or the Labour Court have to intervene by either suspending the strike or subjecting the parties to compulsory arbitration.⁴⁷⁵ However, the *LRA* does not provide for interest arbitration.⁴⁷⁶ Compulsory interest arbitration is explained to be a process where an arbitrator is imposed on the parties to a dispute.⁴⁷⁷ This is the involvement of a third party to intervene to resolve issues where parties fail to reach an agreement.⁴⁷⁸ It is required of such arbitrator to determine an interest dispute between the parties to the dispute.⁴⁷⁹ In South Africa, interest arbitration is applicable in essential services⁴⁸⁰ as an alternative to the right to strike. The arbitrator determines the dispute

⁴⁷³ The *LRA 1956* had a provision for strike balloting but this provision was not included in the *LRA*. The reintroduction of strike balloting was proposed as an amendment to section 64 of the *LRA*. However, this never made it to the final *LRA* amendment Act. (See Botha 2016 *THRHR* 383)

⁴⁷⁴ Botha 2016 *THRHR* 383.

⁴⁷⁵ Botha 2016 *THRHR* 383.

⁴⁷⁶ Botha 2016 *THRHR* 383.

⁴⁷⁷ Brand 2016 *Interest Arbitration-Potential for South Africa* 5.

⁴⁷⁸ Tenza 2015 *Law, Democracy & Development* 229.

⁴⁷⁹ Brand 2016 *Interest Arbitration-Potential for South Africa* 6.

⁴⁸⁰ Section 213 of the *LRA* defines essential services as one if interrupted may endanger life, personal safety or health of the whole or any part of the population. Section 65 (1) of the *LRA* prohibits workers in essential services from embarking in a strike.

as it would have been had the strike been permissible.⁴⁸¹ The reason for this prohibition in essential services is due to the need to balance other fundamental rights such as the right to healthcare, food, water and social security with the right to strike.⁴⁸² Essential services include soldiers in the South African Defence Force, law enforcement members of the South African Police Services and correctional services.⁴⁸³

4.2.1 The CCMA and the Labour Court as dispute resolution institutions

The *LRA* in Section 112 establishes the *CCMA* as an institution for the resolution of disputes between parties in an employment relationship.⁴⁸⁴ Section 115 of the *LRA* further provides for the functions of the *CCMA*.⁴⁸⁵ Section 115 (1)(b) of the *LRA* states that should the dispute remain unresolved after conciliation, arbitration of such dispute should follow.⁴⁸⁶ It is important to note that this chapter focuses only on interest disputes. This category of rights is not yet in existence but a party (trade union) intends to create such rights in a definite future time.⁴⁸⁷ This is in contrast to a right dispute, where the right is already in existence and is regulated by legislation, common law, customary work practices, a collective agreement or a contract of employment.⁴⁸⁸ Interest disputes may include a demand for higher wages or the improvement of work conditions.⁴⁸⁹ The resolution of such disputes includes negotiations between the aggrieved employee and the employer, conciliation by the *CCMA* or bargaining council or through embarking in strike action.⁴⁹⁰

The resolution of interest disputes takes place through the processes of conciliation and arbitration and embarking on strike action.⁴⁹¹ Disputes that have not been resolved by internal settlement procedures or through bargaining councils or recognised private

⁴⁸¹ Brand 2016 *Interest Arbitration-Potential for South Africa* 7.

⁴⁸² Samuel 2016 *Journal of Contemporary Management* 1031.

⁴⁸³ Grogan, *Workplace Law* 447; A detailed discussion on essential services will follow in para 4.3.1 of this chapter.

⁴⁸⁴ Section 112 of the *LRA*.

⁴⁸⁵ Section 115 of the *LRA*.

⁴⁸⁶ Section 115 (1)(b) of the *LRA*. Sections 136-138 of the *LRA* generally regulate arbitration under the auspices of the *CCMA*.

⁴⁸⁷ Basson *et al Essential Labour Law* 356.

⁴⁸⁸ Basson *et al Essential Labour Law* 356.

⁴⁸⁹ Samuel 2016 *Journal of Contemporary Management* 1018.

⁴⁹⁰ Samuel 2016 *Journal of Contemporary Management* 1018.

⁴⁹¹ Samuel 2016 *Journal of Contemporary Management* 1018.

agencies are first referred to the *CCMA* for conciliation.⁴⁹² They are first referred for conciliation before such disputes can go for arbitration.⁴⁹³

The *LRA* in Section 64(1) provides the procedural requirements that have to be met for a strike to be protected.⁴⁹⁴ These entail that a dispute has to be referred to the *CCMA* or a bargaining council with appropriate jurisdiction where applicable for conciliation.⁴⁹⁵ The *CCMA* then has to attempt to resolve the dispute through conciliation and if it remains unresolved within 30-days, the conciliator shall issue a certificate that describes the dispute as unresolved.⁴⁹⁶ The party that intends to embark on strike action or lock out will then have to give at least a 48 hours' notice of the proposed strike to the other party.⁴⁹⁷

The explanatory memorandum of the *LRA* defines the dominant function of the *CCMA* to be the resolution of disputes through conciliation in order to reduce the occurrence of industrial action and litigation.⁴⁹⁸ Therefore, conciliation is the first step in dispute resolution, followed by arbitration before recourse is made to the Labour Court. However, it seems conciliation has been challenged as an ineffective dispute resolution mechanism, thus greater responsibility lies in the Labour Court for the resolution of disputes.

The court in *Betafence* case⁴⁹⁹ emphasised this point. It appears from the *Betafence* case that in the Labour Court, the right of referral of disputes to arbitration arises purely from a "mere" referral for conciliation in the *CCMA*.⁵⁰⁰ This is either a referral or the lapse of 30 days from when the referral was made to the *CCMA* or bargaining council and it would suffice that the dispute remains unresolved.⁵⁰¹ Furthermore, it suffices whether a certificate for failure to resolve the dispute was issued or not.⁵⁰² This means that a mere referral for conciliation is enough for the dispute to proceed to the arbitration process. The reason for this is that in unfair dismissal disputes, an employee refers the matter

⁴⁹² Samuel 2016 *Journal of Contemporary Management* 1018.

⁴⁹³ Grogan *Workplace Law* 500.

⁴⁹⁴ Samuel 2016 *Journal of Contemporary Management* 1018.

⁴⁹⁵ Section 64 (1) of the *LRA*.

⁴⁹⁶ Section 64 (1) (a) of the *LRA*.

⁴⁹⁷ Section 64 (1) (b) of the *LRA*.

⁴⁹⁸ Benjamin 2013 *ILJ* 2442.

⁴⁹⁹ See chapter 2 para 2.4.3.

⁵⁰⁰ *Betafence* case para 15.

⁵⁰¹ *Betafence* Para 15.

⁵⁰² *Betafence* Para 15.

thus it would not make any sense to insist on a real conciliation process.⁵⁰³ This is because an employer on the other hand may not be interested and waiting for an unwilling party cannot be of much assistance in the speedy resolution of disputes that the *LRA* requires.⁵⁰⁴

The *Betafence* case made reference to *City of Johannesburg Metropolitan Municipality v SAMWU*.⁵⁰⁵ It was stated that it is not necessary for conciliation to be undertaken before a strike under the *LRA*.⁵⁰⁶ The *Metropolitan Municipality* case stated that Section 64 (1) (a) of the *LRA* implies that a 30-day lapse since the referral of a dispute for conciliation would suffice.⁵⁰⁷ For this reason, since conciliation is not a pre-condition for a strike to be protected, the result is that the commissioner's ruling is considered as an irrelevant factor.⁵⁰⁸ This means that if the powers of the commissioner's ruling are irrelevant, so conciliation becomes a mere 'box-ticking' procedure as Botha⁵⁰⁹ describes it.⁵¹⁰

The case of *Transport and Allied Workers Union of South Africa v PUTCO*⁵¹¹ clarified the true meaning of Section 64 (1)(b) of the *LRA*. The *PUTCO* case stated that conciliation attempts have to be conducted before industrial action is taken.⁵¹² Thus, Section 64 (1)(b) of the *LRA* acknowledges that a dispute occurs before conciliation, which means that the referral only arises when a dispute has arisen.⁵¹³ Industrial action is only opted for upon the failure to resolve a dispute through conciliation because a certificate by a bargaining council declared a matter unresolved after 30 days.⁵¹⁴ The Constitutional Court stated that

⁵⁰³ *Betafence* para 15.

⁵⁰⁴ *Betafence* para 15.

⁵⁰⁵ *Betafence* para 16; *City of Johannesburg Metropolitan Municipality v SAMWU* [2011] 7 BLLR 663 LC (hereinafter referred to as the *Metropolitan Municipality* case) Para 15.

⁵⁰⁶ *Metropolitan Municipality* case para 15.

⁵⁰⁷ *Metropolitan Municipality* case para 15.

⁵⁰⁸ *Metropolitan Municipality* case para 15.

⁵⁰⁹ Botha 2016 *THRH* 387.

⁵¹⁰ Botha 2016 *THRH* 387, Botha states that parties have to do away with this mentality and show serious intention and commitment in the resolution of disputes than merely complying with the procedure to obtain required results.

⁵¹¹ *Transport and Allied Workers Union of South Africa v PUTCO* [2016] 37 ILJ 1091 (CC) (hereinafter referred to as the *PUTCO* case).

⁵¹² *PUTCO* case paras 45 and 46.

⁵¹³ *PUTCO* case paras 45 and 46.

⁵¹⁴ *PUTCO* case para 46.

referral to conciliation should not be considered a mere perfunctory procedural step that has to be complied with in order to obtain a licence to embark on a strike.⁵¹⁵

Therefore, conciliation should not be a "mere obligatory charade and licence to industrial action."⁵¹⁶ The relevance is that if the parties undermine conciliation as the first step to resolution of disputes, this imposes more responsibility on the Labour Court to effectively resolve disputes. The Labour Court therefore has to conduct its mandate through interdicts and contempt of court proceedings. However, interdicts and contempt of court proceedings have not proven to be effective, thus the need for a stricter approach by the Labour Court through ordering compulsory interest arbitration upon the parties to a dispute.

4.3 Compulsory interest arbitration

The 1956 *Labour Relations Act* provided for compulsory arbitration in Section 46.⁵¹⁷ Section 46 (2)(a) of the *LRA* 1956 stated that where an industrial council or a conciliation board has failed to resolve a matter within 30 days from the date of referral or by reason of the listed circumstances, then the industrial council or conciliation board shall report to the Director-General.⁵¹⁸ The matter is then referred for arbitration for purposes of compulsory arbitration. However, this provision for compulsory arbitration was never included in the final *Labour Relations Amendment Act No. 6 of 2014*.⁵¹⁹ It seems that compulsory arbitration would be of assistance in the efficiency of dispute resolution by subjecting parties to compulsory arbitration to avoid violent and prolonged strikes.⁵²⁰

Despite the fact that strikes become violent and prolonged, to this effect the *LRA* lacks the provision for interest arbitration and suggestions have been brought forward for the introduction of compulsory or interest arbitration where strikes last longer.⁵²¹ Frequency, protractedness and violence as major characteristics of strikes in South Africa portray a

⁵¹⁵ *PUTCO* case paras 45 and 46.

⁵¹⁶ *Betafence* case para 19.

⁵¹⁷ *Labour Relations Act* 28 of 1956 (hereinafter referred to as *LRA* 1956).

⁵¹⁸ Section 46 (2)(a) of the *LRA* 1956.

⁵¹⁹ *Labour Relations Amendment Act* No. 6 of 2014 (hereinafter referred to as the *LRA amendment Act*)

⁵²⁰ Botha MM *Employee participation and voice in companies: A legal perspective* 365.

⁵²¹ Grogan *Collective Labour Law* 219.

sign of failure of the country's collective bargaining system as well as dispute resolution mechanisms.⁵²² Thus, the 2012 proposed amendments to the *LRA* were aimed at curbing the high levels of strike violence and misconduct through compulsory strike ballot and compulsory arbitration.⁵²³ However, the *LRA Amendment Act* did not include compulsory interest arbitration because of the opposition by the trade union federation, COSATU.⁵²⁴ The reasoning for this included that compulsory or interest arbitration is an unacceptable limitation to the constitutional right to strike.⁵²⁵ Thus, compulsory interest arbitration was not included in the *LRA Amendment Act*. It is noteworthy that the solution to the destructive and prolonged strikes could be through certain amendments to the *LRA*.⁵²⁶ Such amendments that have gained support from the Department of Labour include the reintroduction of compulsory arbitration as part of the powers of the Labour Court.⁵²⁷

Compulsory interest arbitration is currently only applicable to essential services. The study subsequently evaluates the reasons why compulsory interest arbitration is applied in essential services and the effectiveness thereof. This is done in order to determine reasons for including compulsory interest arbitration as part of the powers of the Labour Court to curb destructive and prolonged strikes.

4.3.1 Compulsory arbitration in essential services

Section 65 (1) of the *LRA* places a prohibition on workers who are engaged in essential services from striking.⁵²⁸ Essential services are defined by Section 213 of the *LRA* to include a service that if interrupted, may endanger life, the personal safety or the health of the general public or any part of the population.⁵²⁹ Examples of essential services

⁵²² Calitz 2016 *SA Merc LJ* 436 (own emphasis).

⁵²³ Calitz 2016 *SA Merc LJ* 436.

⁵²⁴ Calitz 2016 *SA Merc LJ* 436.

⁵²⁵ Paton 2014 *Effective action can be taken to reduce long violent strikes* 13 February 2014, available at <http://www.bdlive.co.za/opinion/2014/02/13/effective-action-can-be-taken-to-reduce-long-violent-strikes>. Accessed 20 March 2018.

⁵²⁶ Calitz 2016 *SA Merc LJ* 439.

⁵²⁷ Calitz 2016 *SA Merc LJ* 439.

⁵²⁸ Section 65 (1) of the *LRA*.

⁵²⁹ Section 213 of the *LRA*.

include members of the South African Police Services, Correctional services, the South African National Defence Force and other law enforcement agencies.⁵³⁰

In essential services, the Labour Court has the power to interdict a strike or any act that is in furtherance of such strike, and this can lead to contempt of court proceedings if ignored.⁵³¹ The purpose for the limitation on the right to strike action in essential services is to balance the right to strike with other fundamental rights such as the right to food, water and social security, among others.⁵³² In essential services, interest disputes are subjected to compulsory arbitration, thus a limitation of the right to strike. This also means that should employees participate in an unprotected strike, such employees may be prone to dismissal due to misconduct.⁵³³

The reasons for this statutory exclusion are to protect the life and property of citizens and to enhance the functioning of society.⁵³⁴ These seem to be the same values that have to be applicable when it comes to strike action in general. This means that strike action has to be conducted in a manner that considers the life and property of citizens so as to enhance the proper functioning of society. In essential services, due to the constitutional provision for everyone's entitlement to the right to strike, the *LRA* provided a unique platform for workers to facilitate collective bargaining with their employers or employer organisations.⁵³⁵ This unique mechanism is through compulsory arbitration. This has been described as a process that facilitates an effective institutionalised method of maintaining power equilibrium at the bargaining table.⁵³⁶ The substitution of strike action for compulsory interest arbitration is therefore seen as the advancement of industrial peace and the promotion of collective bargaining in an effective and peaceful manner.

⁵³⁰ Grogan *Workplace Law* 447.

⁵³¹ Cohen & Le Roux 2016 *PER* 8.

⁵³² Samuel 2016 *Journal of Contemporary Management* 1031.

⁵³³ Cohen & Le Roux 2016 *PER* 8.

⁵³⁴ Samuel 2016 *Journal of Contemporary Management* 1031, it is not every worker employed in essential services who is prohibited from striking. The prohibition is limited to workers who are engaged in the provision of core or maintenance services provided in section 72 of the *LRA*.

⁵³⁵ Samuel 2016 *Journal of Contemporary Management* 1031.

⁵³⁶ Brand 2011 3-4.

4.3.1 Compulsory interest arbitration as part of the powers of the Labour Court

Lengthy, violent strikes and destructive strikes in South Africa require a form of intervention that would strengthen the Labour Court's powers to curb the occurrence of such strikes. This means that there is need for a form of compromise in the regulation of strike action by the Labour Court.⁵³⁷ Botha⁵³⁸ suggests that if it is clear that the parties have reached a deadlock and the strike has lost its functionality, the Labour Court is not without options.⁵³⁹ The Labour Court has to intervene by forcing the parties to engage in compulsory arbitration.⁵⁴⁰ This may be done due to the nature of strikes in South Africa. A form of interest arbitration will be beneficial where strikes turn violent and destructive.⁵⁴¹ In Germany, the right to strike is said to be conditional on the capacity to bargain collectively, meaning that the parties can enjoy the right to strike only where such a right is necessary to ensure proper collective bargaining.⁵⁴² It follows that in Germany, there is an arbitration committee that resolves disputes between an employer and a works council where a deadlock has been reached.⁵⁴³ Botha⁵⁴⁴ further suggests that a similar body would be beneficial in South Africa and that where a deadlock has been reached, the dispute has to be referred to compulsory arbitration by the Labour Court, where it will be dealt with by an arbitration committee.⁵⁴⁵

Furthermore, a limitation should be placed on embarking on strike action and the workers have to return to work where the Labour Court has referred the dispute to compulsory

⁵³⁷ Botha MM *Employee participation and voice in companies: A legal perspective* 365.

⁵³⁸ Botha MM *Employee participation and voice in companies: A legal perspective*.

⁵³⁹ Botha MM *Employee participation and voice in companies: A legal perspective* 365.

⁵⁴⁰ Botha MM *Employee participation and voice in companies: A legal perspective* 365.

⁵⁴¹ Botha MM *Employee participation and voice in companies: A legal perspective* 365.

⁵⁴² Botha MM *Employee participation and voice in companies: A legal perspective* 365.

⁵⁴³ Botha MM *Employee participation and voice in companies: A legal perspective* 365, in Germany, two frameworks to collective bargaining were identified to be the Works agreements between employer and works council and the other being agreements between employers and trade unions. Works council in Germany provides employees with a voice through freedom of association concerning collective bargaining and industrial action and workplace forums in South Africa were duplicated from the German works councils.

⁵⁴⁴ Botha MM *Employee participation and voice in companies: A legal perspective*.

⁵⁴⁵ Botha MM *Employee participation and voice in companies: A legal perspective* 365.

arbitration.⁵⁴⁶ This temporary limitation on the right to strike may be for the period that the arbitrator will be handling the dispute. The importance of this practice is the enhancement of the principle of good faith bargaining between the parties.⁵⁴⁷ It will also prove to be beneficial for the re-establishment of trust between such parties.⁵⁴⁸ This practice also has the potential to restore the faith in the Labour Court as a dispute resolution mechanism. The same values mentioned for compulsory arbitration in essential services, being protection of life and property and the enhancement of the functionality of society, would be beneficial if this practice is followed. This also means balancing the right to strike together with other fundamental rights that have to be considered when exercising the right to strike.

This means that where the Labour Court has referred a dispute for compulsory arbitration, this would to some extent guarantee the safety of the population and their property from the adverse effects of strike-related violence and misconduct. This would also be an effective way to achieve power equilibrium between the two bargaining parties, as was mentioned for essential services. Therefore, it would be beneficial if the Labour Court would intervene and force the parties to resolve their issues through compulsory arbitration where a strike no longer remains functional to collective bargaining.⁵⁴⁹ However, it should be noted that it is not guaranteed that employees will not embark on unprotected strike action regardless of the consequence of being subjected to engage in compulsory arbitration. However, ordering parties to engage in this process would be part of the Labour Court's powers. Thus, non-compliance with the order would be unlawful and subject to contempt of court proceedings in the Labour Court. However, the study discovered that the nominal nature of the compensation awards in contempt of court proceedings might hinder the effectiveness of the enforcement of court orders.⁵⁵⁰ This nonetheless does not eliminate the deterrent effect that contempt of court proceedings may have on unions' behaviour of disobeying court orders.⁵⁵¹

⁵⁴⁶ Botha MM *Employee participation and voice in companies: A legal perspective* 365.

⁵⁴⁷ Botha MM *Employee participation and voice in companies: A legal perspective* 365.

⁵⁴⁸ Botha MM *Employee participation and voice in companies: A legal perspective* 365.

⁵⁴⁹ Botha 2016 *THRHR* 385.

⁵⁵⁰ See chapter 3 para 3.4.

⁵⁵¹ See chapter 3 para 3.3.

4.4 Arguments against compulsory arbitration

Even though compulsory interest arbitration is considered a vital step in curbing violent and protracted strikes, it has been regarded as "superficially attractive but fraught with difficulties."⁵⁵² The discussion now looks into some of the arguments against compulsory arbitration as a remedy to curb long, destructive and violent strikes in South Africa.

The first difficulty relates to the limitation of the right to strike being regarded as unacceptable and unconstitutional.⁵⁵³ It should be noted that with collective bargaining, there should be no form of intervention by the government or outside third parties.⁵⁵⁴ This includes that it is not within the powers of the court to dictate or restrict the scope or tactics used in collective bargaining, which may initially be robust.⁵⁵⁵ This means that the requirement to suspend a strike when it is proving to be effective in achieving the employee's demands dilutes and removes employees' only weapon from them.⁵⁵⁶ This means that putting a limitation on an employee's right to strike may hinder collective bargaining and the employee will be without means to counter the unequal bargaining power between them and the employer.

The fact that the right to strike should not be limited has gained support from the fact that conflict and the threat of conflict is essential to collective bargaining.⁵⁵⁷ In addition to this, legislation that would provide for compulsory arbitration will not be within the recommendations of the *ILO*.⁵⁵⁸ The *ILO* states that where compulsory arbitration restricts strike action, this hinders trade unions and their counterparts from free organisation and activities.⁵⁵⁹ The restriction of strike action could only be justifiable in public services and essential services.⁵⁶⁰ However, it seems that disregard is given to the negative effects of prolonged, violent and destructive strikes in South Africa. Also, the fact that the right to

⁵⁵² Rycroft 2015 *ILJ* 15.

⁵⁵³ See para 4.3.

⁵⁵⁴ Brand 2016 *Interest Arbitration-Potential for South Africa* 9.

⁵⁵⁵ Botha MM *Employee participation and voice in companies: A legal perspective* 222; Rycroft 2015 *ILJ* 15.

⁵⁵⁶ Rycroft 2015 *ILJ* 15.

⁵⁵⁷ Grogan, *Collective Labour Law* 11.

⁵⁵⁸ Rycroft 2015 *ILJ* 15.

⁵⁵⁹ Rycroft 2015 *ILJ* 15-17.

⁵⁶⁰ Rycroft 2015 *ILJ* 15-17.

strike is not without any limitations is problematic. There should be regard for the protection of human life and property during the exercise of this right and other fundamental rights.

The second challenge relates to the "chilling and narcotic" effects of interest arbitration on the behaviour of parties in the bargaining arena.⁵⁶¹ The chilling effect occurs when none of the parties is willing to compromise, thus creating a narcotic effect of dependency on the arbitration process as a solution.⁵⁶² The result of this would be the loss of the ability to engage in meaningful negotiations since this will create high hopes that the arbitrator will split the difference.⁵⁶³ This is closely linked to the third challenge that relates to the difficulty in getting arbitrators that have economic training and enough experience to consider the short-term and long-term planning of employers.⁵⁶⁴ Rycroft⁵⁶⁵ adds, "How easy will it be for Labour Court judges to assess the financial data in order to decide if the award is one which a reasonable arbitrator could reach?"⁵⁶⁶

Therefore, getting an arbitrator who has sufficient economic training for understanding a large employer's short-term and long-term planning would seem to be a difficult task.⁵⁶⁷ This means that an arbitrator would need to be familiar with the complexity of balance sheets and the unpredictability of the market, among other things.

The fourth challenge relates to the terms of reference for the arbitrator. Interest arbitration often deals with the criteria of affordability and comparability.⁵⁶⁸ However, such norms are by far unavailable in South Africa to provide assistance to an arbitrator when setting a wage offer that is comparable to that offered by other employers in the same sector, but the employer is able to pay more.⁵⁶⁹ Rycroft⁵⁷⁰ states that this means

⁵⁶¹ Botha MM *Employee participation and voice in companies: A legal perspective* 223.

⁵⁶² Botha MM *Employee participation and voice in companies: A legal perspective* 223.

⁵⁶³ Botha MM *Employee participation and voice in companies: A legal perspective* 223; Brand 2016 *Interest Arbitration-Potential for South Africa* 10.

⁵⁶⁴ Rycroft 2015 *ILJ* 15.

⁵⁶⁵ Rycroft 2015 *ILJ* 15.

⁵⁶⁶ Rycroft 2015 *ILJ* 15.

⁵⁶⁷ Rycroft 2015 *ILJ* 16.

⁵⁶⁸ Rycroft 2015 *ILJ* 15.

⁵⁶⁹ Rycroft 2015 *ILJ* 15.

⁵⁷⁰ Rycroft 2015 *ILJ*.

...will the terms of reference be 'a fair wage', and if so, what criteria are to be used in arriving at that figure? Will the final offer arbitration be used to avoid the chill factor or will an arbitrator be free to choose any wage between final offer and final demand? These matters need to be thought through carefully.⁵⁷¹

4.5 Proposed amendments to Section 69 (12) of the LRA

According to Rycroft,⁵⁷² those expecting a decisive and remedial legislative intervention to the disintegration of many of the *LRA*'s assumptions such as the efficient and peaceful resolution of disputes will be disappointed in the *LRA*'s amendments.⁵⁷³ Relevant to the study are the proposed amendments in relation to Section 69 (12) of the *LRA*. The *2012 Amendment Bill* anticipated the suspension of a strike or a lockout in a different perspective.⁵⁷⁴ The amendments made provision that in disputes that involved pickets, the Labour Court could grant relief.⁵⁷⁵ In the case of a trade union, this includes urgent interim relief that is just and equitable in the circumstances and includes the suspension of the strike or picket.⁵⁷⁶ In the case of an employer, the urgent interim relief includes the suspension of engaging replacement labour even if this is not barred by Section 76 of the *LRA* or suspending the lockout.⁵⁷⁷

This novel approach to curbing destructive, violent and prolonged strikes is viewed to have offered a significant impact on strike violence.⁵⁷⁸ Unfortunately, the portfolio committee deleted⁵⁷⁹ the proposed provisions and the *LRA Amendment Act* does not have any new possibilities for the Labour Court in dealing with strike misconduct or unprocedural industrial action.⁵⁸⁰ For this reason

⁵⁷¹ Rycroft 2015 *ILJ* 15.

⁵⁷² Rycroft 2015 *ILJ* 5.

⁵⁷³ Rycroft 2015 *ILJ* 5.

⁵⁷⁴ Botha 2016 *THRHR* 387.

⁵⁷⁵ Section 9 of the *LRAB*.

⁵⁷⁶ Section 9 of the *LRAB*.

⁵⁷⁷ Section 9 of the *LRAB*.

⁵⁷⁸ Rycroft 2015 *ILJ* 6.

⁵⁷⁹ The reason for deleting this provision is that the provision had far-reaching consequences. These included the fact that the power to suspend a strike would be capable of being abused by employers to frustrate industrial action. Thus currently, the relief provided by the Labour Court is only limited to unlawful conduct. (See Myburgh 2013 *CLL* 9).

⁵⁸⁰ Rycroft 2015 *ILJ* 6.

...perhaps a more onerous role will now fall to the LC to do what it has threatened: to remove the protected status of a strike where violence renders the strike dysfunctional.⁵⁸¹

This means that where violence and disruptive acts now displace the peaceful exercise of the right to strike, the Labour Court has to intervene by removing the protected status of the strike.

Botha⁵⁸² states that the striking out of the amendment is a lost opportunity in an attempt to control the negative impacts in relation to unprotected and protracted strikes.⁵⁸³ In addition, this is a lost opportunity to provide guidance in relation to appropriate conduct expected of the parties during collective bargaining inclusive of how and when they should use their industrial weapons to prevent abuse.⁵⁸⁴ Thus, this calls for stricter enforcement by the Labour Court, especially where a strike has lost its main purpose and has continued for long without achieving its purpose.⁵⁸⁵

This has led to the suggestion that in circumstances where a strike has lost its purpose, it should be within the powers of the Labour Court to force the parties to resolve the matter through compulsory arbitration.⁵⁸⁶ This is because it has to be borne in mind that there is a need for the re-examination of the disruptive effects of strike action on life, property and other fundamental rights.⁵⁸⁷ This also includes the well-being of workers and the corporation itself.⁵⁸⁸ Compulsory arbitration does not mean that the right to strike should be abolished or unjustifiably limited. Rather, the parties to a dispute at the bargaining table should seek alternative means in addressing issues instead of the use of industrial action, especially where such mechanism was used in a previous negotiation cycle.⁵⁸⁹ This alternative means in the form of compulsory arbitration as ordered by the Labour Court would prove to be an effective mechanism in curbing the consequences of

⁵⁸¹ *Tsogo Sun* case Para 13. When the tyranny of a mob displaces the peaceful exercise of strike action as the resolution of a dispute, consideration has to be made as to whether the strike continues to serve its purpose and whether it continues to enjoy protected status.

⁵⁸² Botha 2016 *THRHR* 385.

⁵⁸³ Botha 2016 *THRHR* 385.

⁵⁸⁴ Botha 2016 *THRHR* 385.

⁵⁸⁵ Botha 2016 *THRHR* 385.

⁵⁸⁶ Botha 2016 *THRHR* 385.

⁵⁸⁷ Botha 2016 *THRHR* 385 (own emphasis added).

⁵⁸⁸ Botha 2016 *THRHR* 385.

⁵⁸⁹ Botha 2016 *THRHR* 385.

industrial action and giving effect to the purpose of the *LRA*, which is the peaceful and effective resolution of disputes.⁵⁹⁰

For these reasons, Brand⁵⁹¹ suggests that the powers to grant appropriate and proportional relief in instances of any breach of law to any party whose rights were violated during industrial action should be given to the Labour Court.⁵⁹² Such power is inclusive of the suspension of the protected status of a strike for limited periods in cases of extreme violence and disruption.⁵⁹³ In addition, the suggestion is that the Labour Court should also be granted the power to lift the protected status of a strike in acute national emergencies.⁵⁹⁴ Acute national emergencies would include national emergencies that would impact on the national security or public health.⁵⁹⁵ It is in such circumstances where strike action has to be substituted by compulsory arbitration as a method of dispute resolution by the Labour Court.⁵⁹⁶ Brand⁵⁹⁷ states that these suggestions are of value and require tripartite consideration.⁵⁹⁸ In addition, these suggestions assume that unions and their members will be ready to accept them as dispute resolution methods.⁵⁹⁹ This is because institutionalisation is likely to remain incomplete and precarious where the underlying social order is disrupted or challenged.⁶⁰⁰

⁵⁹⁰ Section 1 (d) of the *LRA*.

⁵⁹¹ John Brand 2014 *How the Law Could Better Regulate the Right to Strike in South Africa*, a paper given at the 27th Annual Labour Law Conference August 2014.

⁵⁹² John Brand 2014 *How the Law could Better Regulate the Right to Strike in South Africa*, a paper given at the 27th Annual Labour Law Conference August 2014; Rycroft 2015 *ILJ* 18.

⁵⁹³ John Brand 2014 *How the Law could Better Regulate the Right to Strike in South Africa*, a paper given at the 27th Annual Labour Law Conference August 2014; Rycroft 2015 *ILJ* 18.

⁵⁹⁴ John Brand 2014 *How the Law could Better Regulate the Right to Strike in South Africa*, a paper given at the 27th Annual Labour Law Conference August 2014; Rycroft 2015 *ILJ* 18.

⁵⁹⁵ Cohen and Matee 2014 *PER* 1635.

⁵⁹⁶ John Brand 2014 *How the Law Could Better Regulate the Right to Strike in South Africa*, a paper given at the 27th Annual Labour Law Conference August 2014; Rycroft 2015 *ILJ* 18.

⁵⁹⁷ John Brand 2014 *How the Law could Better Regulate the Right to Strike in South Africa*, a paper given at the 27th Annual Labour Law Conference August 2014; Rycroft 2015 *ILJ* 18.

⁵⁹⁸ John Brand 2014 *How the Law could Better Regulate the Right to Strike in South Africa*, a paper given at the 27th Annual Labour Law Conference August 2014; Rycroft 2015 *ILJ* 18.

⁵⁹⁹ John Brand 2014 *How the Law could Better Regulate the Right to Strike in South Africa*, a paper given at the 27th Annual Labour Law Conference August 2014; Rycroft 2015 *ILJ* 18.

⁶⁰⁰ Rycroft 2015 *ILJ* 18.

4.6 Conclusion

This chapter has evaluated the suggestions for granting the Labour Court powers to order parties to compulsory arbitration in extreme circumstances where a strike becomes violent and disruptive. The chapter first evaluated conciliation by the CCMA as the first step in dispute resolution. It seems that parties to a dispute unfortunately consider conciliation as a mere tick-box procedure in order to get a license to industrial action. The *Betafence* case stated that the right of referral of disputes to arbitration arises purely from a referral for conciliation with the CCMA. It is therefore not necessary for the parties to undertake it.⁶⁰¹ This was also the conclusion in the *Metropolitan Municipality* case.⁶⁰² Therefore, the study realised that if conciliation is regarded as a mere obligation for the sake of procedure, then it cannot be an effective mechanism for the resolution of disputes. This shifts a greater responsibility towards the Labour Court to provide an effective mechanism of dispute resolution and give effect to the provisions of the LRA. This creates the need for including compulsory arbitration as part of the powers of the Labour Court.

Compulsory arbitration was explained and evaluated through its application in essential services. In essential services, compulsory arbitration as a substitute for industrial action is a unique way to balance the right to strike with other fundamental rights, such as the right to food, water and social security, among others.⁶⁰³ This is to protect life and property of human beings and enhance the proper functioning of society as a whole. In addition, compulsory arbitration facilitates collective bargaining in essential services by facilitating an effective institutionalised method of maintaining power equilibrium at the bargaining table. Therefore, this unique method is considered to be in promotion of industrial peace, as well as peaceful and effective collective bargaining the promotion of collective bargaining.

Due to the violent and protracted strikes in South Africa, the study realises the need for compulsory arbitration to be included as part of the powers of the Labour Court. This is

⁶⁰¹ *Betafence* Para 15.

⁶⁰² *Metropolitan Municipality* case Para 15.

⁶⁰³ Samuel 2016 *Journal of Contemporary Management* 1031.

to curb the violent and destructive strikes and to promote industrial peace as well as peaceful and effective collective bargaining as in essential services. The suggestion is that where a deadlock has been reached, that the parties should be subjected to compulsory arbitration. The importance of this practice will be the enhancement of the principle of good faith bargaining between the parties.⁶⁰⁴ It will also prove to be beneficial for the re-establishment of trust between such parties.⁶⁰⁵ Such a practice would also restore the faith in the Labour Court as a dispute resolution mechanism. This also means that the right to strike will be balanced with other fundamental human rights as applied in essential services.

However, there are arguments against compulsory arbitration that were highlighted. These include the limitation of the constitutional right to strike by introducing compulsory arbitration. However, regardless how novel these arguments may be, they seem to disregard the negative impact of violent and disruptive strikes on human life and property. This is also the case with regard to other fundamental human rights that have to be balanced against the right to strike. These arguments also have to regard the fact that the right to strike is not without any limitations.⁶⁰⁶

The chapter then looked into the proposed amendments to Section 69 (12) of the *LRA*. The *2012 Amendment Bill* provides that the Labour Court could grant urgent and interim relief by suspending a strike or picket in case of a trade union and for an employer, suspension on getting replacement labour. However, these amendments were never included in the final *LRA Amendment Act*. This is regarded as a lost opportunity to curb the adverse effects of prolonged, violent and destructive strikes in South Africa.

Brand⁶⁰⁷ suggests that the Labour Court has to be given the power to lift the protected status of a strike in national acute emergencies. It is in these circumstances that strike action has to be substituted by compulsory arbitration as a dispute resolution mechanism by the Labour Court. This is not to substitute the right to strike at all times, but rather to

⁶⁰⁴ Botha MM *Employee participation and voice in companies: A legal perspective* 365.

⁶⁰⁵ Botha MM *Employee participation and voice in companies: A legal perspective* 365.

⁶⁰⁶ See Chapter 2 Para 3.2.4 for the limitations on the right to strike.

⁶⁰⁷ John Brand 2014 *How the Law could Better Regulate the Right to Strike in South Africa*, a paper given at the 27th Annual Labour Law Conference August 2014.

limit the right to strike in instances where a strike no longer remains functional and deviates from its purpose. It is for these reasons that the study agrees with the submission that the Labour Court should have the power to subject parties to compulsory arbitration. This would be an alternative means of dispute resolution and would work towards curbing the adverse effects of long and violent strikes. This would also strike a balance between the right to strike and other fundamental human rights as well.

Chapter 5 CONCLUSION AND RECOMMENDATIONS

5

5.1 Introduction

The aims of this research were to evaluate the effectiveness of the Labour Court orders (interdicts) and the enforcement thereof in curbing lengthy, violent and destructive strikes. This aim was to evaluate whether the Labour Court's powers are effective and efficient enough in this regard. This has been in order to determine the extent in which the Labour Court can intervene. The rationale was to analyse the effectiveness of the powers of the Labour Court as a dispute resolution mechanism in circumstances of lengthy, violent and destructive strikes. The powers of the Labour Courts as a specialised institution include the effective and efficient resolution of disputes.⁶⁰⁸ Enforcement of the Labour Court orders has been in relation to consistency, the delivery of just outcomes and the ability of the law in the hands of the Labour Court to stop or bring change to human behaviour during violent strikes.⁶⁰⁹

It is without a doubt important to maintain peace at the workplace and to ensure the effective and timeous resolution of disputes.⁶¹⁰ However, it was established that disobedience of the Labour Court's orders is not a new phenomenon in South African labour relations. In fact, it is a continuous trend. This has resulted in prolonged, violent and destructive industrial action that has resulted in injury to people and damage to property. This has hindered the effectiveness of the powers of the Labour Court. An example that illustrates where the objectives of a strike were defeated and the powers of the Labour Court disobeyed is the five-month long Marikana strike in 2012.⁶¹¹

⁶⁰⁸ Section 1 (d) of the *LRA*.

⁶⁰⁹ Brian Elliot *et al Encouraging Achievement-Gifted Education Resources* 1.

⁶¹⁰ Mboh *The effectiveness of dispute resolution mechanisms in South African labour law systems: A critical analysis* 84.

⁶¹¹ Power and Gwanyanya *SUR* 62, 34 protesting mineworkers were shot by the SAPS, further 79 were injured and 259 were arrested by the SAPS. The following week resulted in 10 more killings of striking mineworkers, two security guards and two members of the SAPS.

5.2 Conclusions

5.2.1 Non-compliance with Labour Court interdicts

Chapter 2 of the research evaluated interdicts granted by the Labour Court. The legal effect of an interdict is the restriction of unlawful acts by unions and their members where such acts result in violence and destruction during a protected strike.⁶¹² However, it was established that interdicts lack the salutary effect that they were meant to have. This is because unions and their members openly disregard interdicts. This has indeed posed a challenge regarding the powers of the Labour Court and the effectiveness in curbing lengthy, violent and destructive strikes. This is because the Labour Court has been faced with many applications for interdicts due to the violent strikes, which have been a characteristic of the South African labour relations. The *CSSAWU*⁶¹³ and *Tsogo*⁶¹⁴ cases are examples of cases that dealt with the issue of unions and their members disregarding an interdict. In the *CSAAWU* case, during the strike's early days,⁶¹⁵ an interdict had been obtained in the Labour Court.⁶¹⁶ The purpose of this interdict was to restrain CSAAWU and its members from engaging in unlawful conduct in furtherance of a protected strike.⁶¹⁷ Unfortunately, even after the interdict was granted, the strike continued.

However, the *Betafence*⁶¹⁸ case emphasised that there is a need for a strict approach by the Labour Court so as to ensure compliance with its court orders. The *Tsogo* case also established that the Labour Court would intervene where the right to strike is tarnished and abused when those who embark on strike action engage in malicious acts of gratuitous violence.⁶¹⁹ Therefore, it is within the powers of the Labour Court to intervene by granting an interdict where a strike now turns violent and destructive and to intervene when an interdict is disregarded.

⁶¹² Manamela and Budeli 2013 *cilsa* 329

⁶¹³ See chapter 2 para 2.4.2.

⁶¹⁴ See Chapter 2 Para 2.4.1.

⁶¹⁵ *CSAAWU* case para 1. 12 weeks before the strike ended, Robertson winery obtained an interdict.

⁶¹⁶ *CSAAWU* case para 1.

⁶¹⁷ *CSAAWU* case para 1.

⁶¹⁸ See chapter 2 para 2.4.3.

⁶¹⁹ *Tsogo* case para 13; Ryrcoft 2013 *LLRNIC* 9.

Chapter 2 also evaluated the extent to which the Labour Court can grant an interdict. This included the weighing of the level of violence, and the *FAWU*⁶²⁰ case illustrated the failure by the labour court in this aspect. The study established that the decision in *FAWU* brings about vagueness in the powers of the Labour Court in granting interdicts. The *FAWU* case dealt with extreme levels of violence during a protected strike, but stated that the Labour Court should not be quick to intervene in the enjoyment of the constitutional right to strike. The Labour Court further held that the Labour Court's powers will be limited where a strike remains functional to collective bargaining, but extreme violence still exists. This is the case as long as the strike remains functional to collective bargaining. However, it is imperative for the Labour Court to intervene when strike misconduct occurs so as to prevent the unlawful acts resulting in violence and destruction. This has been stated by the *Tsogo* case that the Labour Courts have to intervene where the right to strike is tarnished and abused when those who embark on strike action engage in malicious acts of gratuitous violence.⁶²¹

In addition, the judgement in the *FAWU* case has to consider the fact that the right to strike is not without any limitations. There has to be consideration of the public interest and property when exercising the right to strike. If the right to strike was absolute, this would open the floodgates to abuse. It was established that such abuse has become a norm in South African labour relations. The decision in *FAWU* makes no changes to the possible consequences brought about by violent strikes if the violence of the strike itself does not guarantee loss of protection. Without any express provisions by the *LRA*, the decision in the *FAWU* case only brings about confusion as to the extent of the Labour Court's powers to intervene by granting interdicts during violent strikes.

Both the *Betafence* and *Tsogo* cases illustrate that the Labour Court is determined to address situations plagued by acts of misconduct of unions and their members through the granting of interdicts. However, unions still remain reluctant to abide by the Labour Courts interdicts, thus the need for a stricter approach by the Labour Court.

⁶²⁰ See chapter 2 para 2.4.4.

⁶²¹ *Tsogo* case para 13; Ryrcoft 2013 *LLRNIC* 9.

5.2.2 Enforcement of court orders

Chapter 3 of the research evaluated the effectiveness of Labour Court orders in pursuing its mandate to resolve labour disputes effectively. Enforcement was analysed through the duties and liabilities of unions towards their members and third parties. In addition to this, Section 11 of the *RGA* was also discussed. The Labour Court has formulated a mechanism tying unions to liability where their actions have resulted in injury to persons and riot damage to property. Firstly, it should be noted that Section 17 of the *Constitution* provides for the right to peaceful assembly and this also places an obligation upon a union to ensure that their members act accordingly.⁶²² This obligation is reinforced by Section 11 of the *RGA*. Trade unions have a guardian relationship with their members and this obliges them to lead and guide their members by making sure they do not act unlawfully.⁶²³ A union has to take full responsibility for the actions of its members throughout the bargaining process and strike action.⁶²⁴ However, it is not easy for an employer to prove that a union is liable for injury to persons or damage to property that resulted from the conduct of its members. The challenges were highlighted by the *Eskom*⁶²⁵ and *Mond*⁶²⁶ cases. The challenges included the burden of proof placed on the employer to prove that the union and its members are the perpetrators, thus liable. In both cases, the courts held that the employers had insufficient evidence against the unions to prove that they are liable.

5.2.3 Contempt of Labour Court orders

Chapter 3 went further to establish that where unions have openly disregarded interdicts, the employer may institute contempt of court proceedings in the Labour Court. The *CSAAWU*, *Pikitup*⁶²⁷ and *Betafence* cases illustrate the Labour Court's concern about the conduct of unions and their members in disobeying interdicts. These cases serve as evidence that the Labour Court will not tolerate such behaviour by unions and their

⁶²² *Xtrata* case para 36, section 17 not only provides a right but an obligation.

⁶²³ *Xtrata* case para 36.

⁶²⁴ *Xtrata* case paras 37-38.

⁶²⁵ See chapter 3 para 3.2.1.1

⁶²⁶ See chapter 3 para 3.2.1.1

⁶²⁷ See chapter 3 para 3.4.

members. These cases concerned the unlawful acts of strikers during protected strikes that resulted in the injury of persons and damage to property. The Labour Court found the unions in contempt and warned that such behaviour by unions will no longer be tolerated by the Labour Court. The court went further to make a cost order against the union involved.

5.2.4 Nominal nature of sentences with regard to contempt of Labour Court orders proceedings

The challenge established in this study in relation to the order of costs in contempt of court proceedings is the nominal nature of the costs awarded by the Labour Court. It is noteworthy that the Labour Court may order the payment of just and equitable compensation for the loss incurred by an employer resulting from an unprotected strike.⁶²⁸ This compensation may not be awarded to an employer who is unable to prove that it suffered any loss at the hands of a union and its members.⁶²⁹ This means that if an employer is able to prove the loss suffered, then a union and its members will be held liable for the losses incurred due to an unprotected strike.⁶³⁰ The *Algoa* case⁶³¹ illustrates a challenge in relation to the awarding of costs. In this case, the Labour Court made an order of costs against a trade union (*SATAWU*) to pay the company (Algoa Bus Company) only R100 000 out of R465 000 originally claimed by the company.⁶³²

The reasoning of the Labour Court is that it has to afford just and equitable compensation in accordance with the principle of fairness.⁶³³ The court even went further to order the payment of this R100 000 in instalments of R50 per month. It is submitted that this remedy offered by the Labour Court defeats its main purpose. The purpose of the remedy is to allow the employer to claim the losses incurred during a protected strike. This would include financial losses as well as future losses if the strike affected the everyday activities of the company and the equipment used. Therefore, if the Labour Court is able to reduce

⁶²⁸ Manamela and Budeli 2013 *cilsa* 329.

⁶²⁹ Manamela and Budeli 2013 *cilsa* 329.

⁶³⁰ Manamela and Budeli 2013 *cilsa* 330.

⁶³¹ See chapter 3 para 3.4.1.

⁶³² *Algoa* case para 3 of the Order.

⁶³³ *Algoa* case para 344, the meaning of "just and equitable" compensation in section 68(1)(b) of the *LRA* refers to fairness when calculating the amount of compensation.

the amount of compensation and to order an amount such as R50 in monthly instalments to cover the already reduced amount of R100 000, then this remedy is open to abuse by trade unions. This is because unions stand to escape the full wrath of liability for their misconduct during a protected strike. This also leaves an employer in a very unfavourable position if compensation of an amount of R100 000 is to be paid in monthly instalments of R50. It seems this remedy by the Labour Court does not command the harsh punishment upon unions for their misconduct that it is intended to portray.

In addition, the research found that one of the challenges for an employer is the difficulty in quantifying the exact financial loss as a result of an unprotected strike.⁶³⁴ It may be difficult for an employer to quantify an accurate estimation of costs, including costs for future income affected by an unprotected strike.⁶³⁵ This means that if the court is of the opinion that the amount claimed by an employer is not just and equitable, then this may result in the reduction of the original amount claimed. This may consequently affect the future income of an employer.

In the *Betafence* case,⁶³⁶ a fine ordered against a union of R1 000 000 was suspended for two years for damages incurred by an employer.⁶³⁷ The suspension was on condition that the union and their members are not found in contempt of court again during that period.⁶³⁸ It is submitted that a stern approach is vital for the effectiveness of the powers of the Labour Court. Both cases illustrate that the Labour Court is determined to provide a stern approach. However, effectiveness is measured in terms of consistency, the delivery of just outcomes and the ability of the Labour Court to stop or bring change to human behaviour during strikes. It seems that the nominal nature of sentences in contempt of court orders is not enough to bring just outcomes and to stop or bring change to the behaviour of unions during strikes. Unions and their members are likely to continue with their contempt on the notion that they will get a slightly less award of costs against

⁶³⁴ Simelane *An evaluation of section 68(1)(b) of the Labour Relations Act 66 of 1995: How effective is the remedy?* 30.

⁶³⁵ Simelane *An evaluation of section 68(1)(b) of the Labour Relations Act 66 of 1995: How effective is the remedy?* 30.

⁶³⁶ See chapter 2 para 2.4.3.

⁶³⁷ *Betafence* case para 63.

⁶³⁸ *Betafence* case para 63.

them than the original amount claimed. Either this or a suspension of the fine ordered against the union. This still leaves an employer in an unfavourable position.

The effectiveness of a court order depends on the guarantee that it will be enforced.⁶³⁹ Without such assurance as already established in the study, enforcement of court orders is severely disrupted. Suggestions have been provided for a stricter approach by the Labour Court in enforcing its orders. Suggestions have been made for the re-introduction of compulsory interest arbitration.

5.2.5 Non-existence of compulsory interest arbitration

Chapter 4 evaluated the suggestion for compulsory interest arbitration as part of a stricter approach for the Labour Court. It seems that conciliation in the hands of the *CCMA* is regarded by parties to a dispute as a mere tick-box activity for the sake of procedure. Therefore, this places greater responsibility on the Labour Court to provide an efficient and effective resolution of disputes to give effect to the provisions of the *LRA*. Due to the violent and protracted strikes in South Africa, there is a need for compulsory arbitration to be included as part of the Powers of the Labour Court. The 1956 *Labour Relations Act* provided for compulsory arbitration in Section 46.⁶⁴⁰ However, this provision for compulsory arbitration was never included in the final Labour Relations Amendment Act No. 6 of 2014.⁶⁴¹ Compulsory arbitration would provide an efficient mechanism of the resolution of disputes by subjecting the parties to compulsory arbitration in order to avoid violent and prolonged strikes.⁶⁴² Therefore, the challenge discovered is that compulsory interest arbitration is not included as part of the powers of the Labour Court.

5.3 Recommendations

Labour relations in South Africa is fraught with the struggle to resolve disputes. This has involved violence and destructive behaviour in the resolution of disputes in the workplace. Employers have had no choice but to resort to the courts of law, being the Labour Court.

⁶³⁹ *Pheko* case para 1.

⁶⁴⁰ *Labour Relations Act* 28 of 1956 (hereinafter referred to as *LRA* 1956).

⁶⁴¹ Labour Relations Amendment Act No. 6 of 2014 (hereinafter referred to as the *LRA amendment Act*)

⁶⁴² Botha MM *Employee participation and voice in companies: A legal perspective* 365.

The Labour Court has the huge task of exercising its powers to curb the violent and destructive behaviour during strikes. However, with unions and their counterparts continuously disobeying the Labour Court orders (interdicts), there is a need for the government to employ new polices in order to aid in promoting peace in the workplace. It is therefore imperative for a healthy labour relations system to promote peace and the effective resolution of disputes. This can happen once the parties exhaust all the necessary efforts and strategies in achieving this end.

5.3.1 Nominal nature of sentences

The Labour Court has to balance the principle of just and equitable compensation in favourable terms for both a union and an employer who has suffered loss. The Labour Court has portrayed disregard for the behaviour of unions in disobeying its orders. The Labour Court has also shown a disregard for unions' misconduct during protected strikes leading to injury to persons, damage to property and causing the employer to incur a loss. Therefore, it is imperative for the Labour Court in exercising its powers to provide a remedy for an employer to balance the principle of fairness in awarding compensation. This means that all factors have to be considered as part of the effective and efficient functioning of the Labour Court, and an employer should be allowed the opportunity to provide enough evidence to quantify the exact loss suffered.

The amount awarded against a union has to be sufficient to show that the Labour Court will not tolerate misconduct by unions and their members during protected strikes and at the same time provide a suitable remedy for an employer for the loss incurred. There is a need for a stricter approach to curb the unruly behaviour of unions in disregarding court orders, leading to losses incurred by an employer. An employer should not be allowed to suffer loss at the hands of a union that acted unlawfully and against the principles of industrial action provided for by the *Constitution*, the *LRA* and the *RGA*.

5.3.2 Educating Unions

An interdict is used to prevent violent and destructive conduct that is threatening an existing right or interest.⁶⁴³ It has been a custom for unions and their members to blatantly disregard interdicts. Therefore, unions have to be reminded that interdicts carry the weight of court orders and are the law. This means that failure to regard an interdict is full disregard of the law as a founding value of the *Constitution*.⁶⁴⁴ This further means the Labour Court also has the duty to look sternly into the issue of contempt of court orders. Trade unions may easily escape full liability for damages arising from the injury of persons, damages to property and loss of finances towards the employer if the Labour Court is willing to reduce the costs ordered against a trade union.

The author agrees with the recommendation by Mlungisi⁶⁴⁵ that the common law principle of vicarious liability should be extended to hold unions liable for injury to persons and damage to property during strikes.⁶⁴⁶ Since vicarious liability is not an established rule,⁶⁴⁷ the Labour Court should develop the common law in accordance with the objectives of the Bill of Rights.⁶⁴⁸ It should make unions vicariously liable for the injury to persons and damage to property that was a result of their conduct during strike action.⁶⁴⁹

Unions have to be educated about the consequences of their conduct in breaking the law by disregarding interdicts. This has to be done with greater consideration and understanding of the psychological, sociological and economic factors contributing to mob violence.⁶⁵⁰ Unions have to educate their counterparts on the consequences of unlawful conduct and they should take the necessary steps to avoid the injury of persons and damage to property.⁶⁵¹ The *Xtrata* case⁶⁵² and the *RGA*⁶⁵³ state that a union has to take all

⁶⁴³ Section 68 (1)(a) of the *LRA*.

⁶⁴⁴ Section 1 of the *Constitution*; Mlungisi *The liability of trade unions for conduct of their members during industrial action* 291.

⁶⁴⁵ Mlungisi *The liability of trade unions for conduct of their members during industrial action* 292.

⁶⁴⁶ Mlungisi *The liability of trade unions for conduct of their members during industrial action* 292.

⁶⁴⁷ Mlungisi *The liability of trade unions for conduct of their members during industrial action* 292.

⁶⁴⁸ Mlungisi *The liability of trade unions for conduct of their members during industrial action* 293.

⁶⁴⁹ Mlungisi *The liability of trade unions for conduct of their members during industrial action* 293.

⁶⁵⁰ Rycroft 2013 *LLRNC* 16.

⁶⁵¹ Mlungisi *The liability of trade unions for conduct of their members during industrial action* 294.

⁶⁵² See chapter 3 para 3.2.1.1.

⁶⁵³ Section 11(1)(b) of the *RGA*.

the necessary steps in preventing damage to property or injury to persons.⁶⁵⁴ However, merely taking steps to prevent damage to property or injury to persons without actually stopping the prohibited unlawful conduct cannot be sufficient to exempt unions from liability.⁶⁵⁵ This means that unions have to take extra steps to prevent the unlawful conduct by its members.

5.3.3 Statutory duty to bargain in good faith

The author agrees with the suggestion to introduce the statutory duty on social partners to negotiate in good faith.⁶⁵⁶ This duty was provided for prior to the *LRA*.⁶⁵⁷ Suggestion is for the re-introduction of this duty as part of the powers to be enforced by the Labour Court.⁶⁵⁸ This would go a long way in curbing the violent, lengthy and destructive strikes in South Africa. In addition to this, Brand⁶⁵⁹ suggests that all the social partners should be trained for skills in good faith negotiations and analysis skills.

5.3.4 Interest Arbitration

The re-introduction of compulsory interest arbitration should be considered as a means to curb lengthy, violent and destructive strikes. However, interest arbitration should not be considered as a substitute for strike action.⁶⁶⁰ Rather, it should be a mechanism used by the Labour Court where strikes last long and are no longer functional.⁶⁶¹ This mechanism cannot function without educating the relevant parties about the advantages.⁶⁶² It is suggested that the *CCMA* be the educator about the process of interest arbitration and this can be done through compulsory seminars to educate all

⁶⁵⁴ *Xtrata* case para 36.

⁶⁵⁵ Mlungisi *The liability of trade unions for conduct of their members during industrial action* 294.

⁶⁵⁶ Rycroft 2015 *ILJ* 17.

⁶⁵⁷ Rycroft 2015 *ILJ* 17.

⁶⁵⁸ Rycroft 2015 *ILJ* 17.

⁶⁵⁹ John Brand 2014 *How the Law Could Better Regulate the Right to Strike in South Africa*, a paper given at the 27th Annual Labour Law Conference August 2014.

⁶⁶⁰ Masombuka *Exploring legal alternatives to remedy problems associated with prolonged and lengthy strikes in South Africa* 68.

⁶⁶¹ Masombuka *Exploring legal alternatives to remedy problems associated with prolonged and lengthy strikes in South Africa* 68.

⁶⁶² Masombuka *Exploring legal alternatives to remedy problems associated with prolonged and lengthy strikes in South Africa* 68.

stakeholders.⁶⁶³ Interest arbitration is vital because unlike other dispute resolution mechanisms, it goes the extra mile to include the interest and welfare of the public.⁶⁶⁴ This means that where strike action has turned violent, destructive and has lost its functionality, this will have an effect on the public. Therefore, an arbitrator through interest arbitration considers the interest and welfare of the public in his or her decision.⁶⁶⁵

5.3.5 Suspension of a strike

The study evaluated the proposed amendments to Section 69 of the *LRA*. The 2012 amendments anticipated the suspension of a strike in a different light.⁶⁶⁶ The amendment provided that the Labour Court could provide just and equitable urgent interim relief by suspending a strike.⁶⁶⁷ This provision was meant to provide a significant impact on the violence and prolonged nature of strikes by suspending it.⁶⁶⁸ Unfortunately, this provision was not included in the *2014 Amendment Act* and there is no legislation that provides a mechanism for dealing with illegal or unprocedural strikes.⁶⁶⁹ Rycroft⁶⁷⁰ states that:

Perhaps a more onerous role will now fall to the LC to do what it has threatened: to remove the protected status of a strike where violence renders the strike dysfunctional.⁶⁷¹

This emphasises the suggestions made for the Labour Court to have the power to remove the protected status of a strike. This will be in circumstances where interdicts have been ignored and the strike has turned violent, destructive and lengthy, thus rendering it dysfunctional. In support of this, the Labour Court's powers may include lifting industrial action protection in the event of acute national emergency.⁶⁷² This is where compulsory

⁶⁶³ Masombuka *Exploring legal alternatives to remedy problems associated with prolonged and lengthy strikes in South Africa* 68.

⁶⁶⁴ Masombuka *Exploring legal alternatives to remedy problems associated with prolonged and lengthy strikes in South Africa* 55.

⁶⁶⁵ Masombuka *Exploring legal alternatives to remedy problems associated with prolonged and lengthy strikes in South Africa* 55.

⁶⁶⁶ Rycroft 2015 *ILJ* 6.

⁶⁶⁷ Rycroft 2015 *ILJ* 6.

⁶⁶⁸ Rycroft 2015 *ILJ* 6.

⁶⁶⁹ Rycroft 2015 *ILJ* 6.

⁶⁷⁰ Rycroft 2015 *ILJ* 6.

⁶⁷¹ Rycroft 2015 *ILJ* 6.

⁶⁷² Rycroft 2015 *ILJ* 19-20.

interest arbitration will be used as a substitute to strike action in order to determine the dispute.⁶⁷³

⁶⁷³ Rycroft 2015 *ILJ* 20.

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