

**THE EXTENT OF THE RIGHT  
TO STRIKE IN  
SOUTH AFRICAN LABOUR LAW**

**by**

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## SUMMARY

South Africa emerges from a history where, workers, and in particular African workers, were excluded from enjoying labour rights and particularly the right to strike, without consequences. Participation in industrial action was treated as a delict or even a criminal offence by employers and the state. A history where participation in a strike was treated as breach of contract and therefore the employer could dismiss striking employees at will.

The first democratic elections in South Africa introduced a Constitutional democracy. The Constitution introduced the Bill of Rights in terms whereof the right of every employee to form and join trade unions and to participate in its activities and programmes and to strike was entrenched. Section 27 of the Constitution provides that national legislation shall be enacted to give effect to its purpose and to regulate labour matters, hence the Labour Relations Act of 1995.

This study will show that the Labour Relations Act of 1995 marked a major change in South Africa's statutory industrial relations system. Following the transition to the new political dispensation and a democratic system, the LRA encapsulated the new government's aims to reconstruct and democratise the economy and society. It ushered in a new order where employers and workers had the opportunity to move away from the adversarialism that had characterised their relations in the past. It promoted more orderly collective bargaining and greater co-operation at workplace and industry levels, and provided an expeditious dispute resolution system.

This study also takes a closer view of the provisions of international instruments and institutions such the International Labour Organisation and it, further, does a comparative analysis of the provisions of strike law in other jurisdictions like the United States of America, Canada and the United Kingdom.

This study shows further that, while South Africa has democratised the workplace and done away with legislation, policies and practices that discriminated against the majority of the workers and deprived them of the rights that were otherwise enjoyed by their white counterparts to form and join unions and to participate in the activities of the unions, including participating in a strike and while it has made provisions for a protected strike under the LRA and while South Africa has tried to level the playing field and brought some equilibrium in the power between workers and employers, the very same right to participate in a strike and to compel employers to accede to their demands is taken away by the provision in the LRA that allows employers to lock them out and replace them with temporary workers.

## CHAPTER ONE

### INTRODUCTION

This treatise investigates strike law in South Africa. It investigates the history of strike law as it prevailed before South Africa gained democracy to what the law provides in the current democratic dispensation. It closely canvasses the provisions of the Constitution as well as the Labour Relations Act (LRA) and makes a comparison with other jurisdictions. It also considers International Law. This study does not profess to be archetypal in the field of strike law, rather it seeks to input to the South African labour law jurisprudence.

Prior to the recommendations of the Wiehahn Commission and the introduction of the Labour Relations Act,<sup>1</sup> workers in South Africa, in particular African workers, did not enjoy a right to strike without consequences. Participation in industrial action was treated as a delictual or even criminal offence by employers and the government. Workers could be criminally prosecuted, not only for criminal conduct during strike action but for the mere participation in a strike.

Employers always enjoyed the right to criminally prosecute workers who participate in strike action and/ or to dismiss them for such participation. Participation in a strike was treated as breach of contract and therefore the employer had access to various remedies in terms of the law, including but not limited to order of specific performance and/or to dismiss striking employees.

As a response to decades of worker oppression with respect to right to strike, and with the introduction of the new political order hence new labour dispensation in South Africa the LRA was promulgated, which provided for a right to strike after observation of the provisions of Chapter IV of the Act. The right to strike in the LRA was given rise to by the interim

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<sup>1</sup> 66 of 1995.

Constitution of the Republic of South Africa Act,<sup>2</sup> and later the final Constitution of the Republic of South Africa Act.<sup>3</sup> The Constitution provides in section 23 that “every employee has a right to form and join trade unions and to participate in its activities and programmes and to strike”. The Constitution further provides for the enactment of national legislation to give effect to and to regulate this right, hence the promulgation of the LRA.

The Republic of South Africa further became re-admitted as a member of the International Labour Organisation (ILO) and amongst the ILO Conventions that South Africa ratified was Conventions 87<sup>4</sup> and 98.<sup>5</sup>

The influence of international labour law and the Constitution gave rise to Chapter IV of the LRA. This chapter deals with strikes and lock-outs. After protracted negotiations at National Economic Development and Labour Council (NEDLAC) workers right to strike was born. This, as indicated earlier, was in response to and aimed at putting an end to decades of oppression to workers under the old labour dispensation. The previous Labour Relations Act also allowed for a legal strike, but the contractual remedies of an employer in such a case remained. This has been hailed as an achievement by labour unions, in that workers could now go on strike without fear of being dismissed or criminally prosecuted. A procedure was however put in place for workers to comply with before the strike could be protected.

The rationale behind the legalisation of strike was to achieve some sort of balance of power between employers and workers. This was aimed at giving meaning to collective bargaining and to give workers a sword through which they could compel employers to accede to their demands, notwithstanding the employers’ right not to pay salaries of striking employees. This was supposed to ensure that “collective bargaining was not collective begging”, hence called economic power play. Workers would withhold their labour potential and the employers on the other hand would withhold salaries and wages or economic power, so to speak.

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<sup>2</sup> 200 of 1993.

<sup>3</sup> 108 of 1996.

<sup>4</sup> This Convention is about “Freedom of Association and Protection of the Right to Organize”.

<sup>5</sup> This Convention is about “The Right to Organize and to Bargain Collectively”.

Employers felt that this was not enough and they bargained for a corresponding right to the right to strike and after some considerable negotiations a compromised position was reached. Employers were then afforded recourse to lock-out, as opposed to a right.

The question that needs to be dealt with now is how far “recourse to lock out” can go. It is clear from practical cases, as the right to strike and the recourse to lock-out are being exercised that this is deeper than meets the eye. The recourse to lock-out has taken different shapes through court judgments. There are different implications for a defensive lock out and for an offensive one, as commonly known. For instance, an employer who implements a lock-out in response to a strike or even a strike notice may hire replacement labour to perform the job of the striking employees. On the other hand an employer who implements an offensive lock-out in an attempt to compel workers to accede to a demand or offer in the case of wage negotiations, may not bring in replacement labour, or scab labour as popularly called.

This option to employers to hire replacement labour is the problem that will be put under microscope in this study. Does this not have the effect of undermining the real reason for the introduction of the right to strike? Is it not ironical that a right to economic power play is given by one hand and taken away by another hand (replacement labour)? This is tantamount to getting into a boxing ring in a boxing match but the rules applied to the two boxers are different. The one boxer is told that he cannot use his feet but the other one is allowed to. One’s economic power can hardly be said to be put to a test if, in any event, one has the option to hire replacement labour to cancel out any economic effect of the strike.

The second question that arises is whether or not the frustration that this gap in our law brings to striking workers is to a great extent the reason for the violence and senseless killings that have been experienced in almost every strike action in the last two years at least? Here is a group of workers desperately trying to compel the employer, through a protected strike, to accede to their demands, even at the expense of not earning a salary or wage. On the other hand here is replacement labour defeating that very same purpose and rendering insignificant the strike action and softening the blow for the employer. Is this not tantamount to the law setting up the working class against itself?

This study seeks to highlight that the law as it relates to strikes and lock-outs still has some fundamental shortcomings the addressing of which may bring some resolution to some of the

problems experienced during strike action. To this end this treatise will take a closer look at the following aspects:

1. The history of strike law in South Africa.
2. The influence of the Constitutional democracy to the right to strike.
3. The provisions of chapter four of the Labour Relations Act.
4. The comparison with other countries and International law.

Chapter 2 examines the history of industrial relations in South Africa, in particular as it relates to strike law. Chapter 3 takes a closer look at the constitutional era, *ie* the impact of the constitutional right to strike. Chapter 4 will put under microscope the provisions of chapter four of the LRA. Chapter 5 will be a comparison study between the right to strike in chapter four of the LRA and international law as well as other countries like the US, UK and Canada. The discussion, whether or nor the right to strike in chapter four of the LRA is too limited compared to other countries, is concluded in chapter 6.

## CHAPTER TWO

### STRIKE LAW IN SOUTH AFRICA: A HISTORICAL OVERVIEW

#### 2 1 INTRODUCTION

“The individualism of legal rules places the worker at a disadvantage as against capital and it is only through collective action, by combining the power of the labour against the combined power of the capital, that workers can muster a sanction sufficiently strong to ensure a fair regulation of the employment relationship.”<sup>6</sup>

A right to strike has been called an essential element in collective bargaining, not only because the threat of a strike ensures that the employer will bargain more fairly but also because collective refusal to work balances the employer’s ability to lock out the workers or shut down the business, argues Alan.

Kahn-Freud, describing the main purpose of labour law as addressing any disequilibrium of power, has said “there can be no equilibrium in industrial relations without a freedom to strike”.<sup>7</sup> Lord Wright said in a leading case<sup>8</sup> “The right to strike is an essential element in the principle of collective bargaining”. If workers could not, in the last resort, collectively refuse to work, they could not bargain collectively, adds Paul. It is conceivable, though, that the freedom to strike cannot be unlimited.

The ability of workers to achieve parity must be comparable to that of the employer to enforce its demands. The lock-out is not the true equivalent of the employee’s ability to withhold their labour. The latter must be posed against the employer’s position as owner and controller of industrial capital from which is derived its power to maintain and change production (and, ultimately, employment terms) unilaterally.<sup>9</sup>

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<sup>6</sup> Rycroft and Jordaan *A Guide to South African Labour Law* (1990) 206.

<sup>7</sup> Davies and Freedland *Kahn-Freund’s Labour and the Law* (1983) 3<sup>rd</sup> ed 291-292.

<sup>8</sup> *Crofters Harris Tweed v Veitch* [1942] A.C. 435 at 463.

<sup>9</sup> Rycroft and Jordaan 108.

Strikes, by their nature, are intended to cause the employer economic harm. By withholding their labour, the employees hope to bring production to a halt, causing him to lose business and to sustain overhead expenses without the prospect of income, in the expectation, that should the losses be sufficiently substantial, the employer will accede to their demand, says Cheadle.<sup>10</sup>

The right to strike is prescribed by stipulating that a strike must be “functional” to collective bargaining before the law will provide immunity from the criminal, delictual and contractual consequences of a strike.

In essence, the history of strike law has been a progression from the criminalization of strikes to the granting of immunity from the consequences of lawful strikes. This means that there has been a progression from the prohibition of strikes to the permitting of strikes, to the permitting of strikes, to the protection of strikes, to the pre-emption of strikes. The unlawful strike has potentially, criminal, delictual and contractual consequences, the lawful strike protects the striker from these consequences.<sup>11</sup>

## **2 2 HISTORICAL BACKGROUND**

Although there was a series of major strikes in 1913 and 1914, the pivotal event in the development of the strike law in South Africa was the 1922 Rand Rebellion, when armed commandos of white miners clashed with police, resulting in the death of 153 persons and a further 534 being wounded.

The rebellion demonstrated the power of unregulated strikes and resulted in the government passing the Industrial Conciliations Act<sup>12</sup> which imposed limitations on the right to strike by making a strike illegal unless the statutory requirements of attempting to settle the dispute in either the industrial council or conciliation board were adhered to.<sup>13</sup>

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<sup>10</sup> Brassey, Cameron, Cheadle and Olivier *The New Labour Law* (1987) 241.

<sup>11</sup> Rycroft and Jordaan 207.

<sup>12</sup> 11 of 1924.

<sup>13</sup> Rycroft and Jordaan 208.

Most Black workers were excluded from the definition of employee in terms of the Act. Consequently, Black workers did not have a right to legal strike. Black workers relied on the common law and were governed by the Native Labour (Settlement of disputes) Act 48 of 1953. This was until 1973 when 70 000 Black workers went on strike in Durban. The state reacted by setting up liaison committees and, for the first time, making it possible for Black workers to strike legally once procedure in terms of the Black Labour Relations Regulation Amendment Act 70 of 1973 were followed.

The 1976 Soweto uprisings prompted further concessions in the labour field: the recommendations of the Wiehahn Commission led to a restructuring of the industrial legislation specifically incorporating black trade unions in the dispute-resolution procedures.

In 1988 controversial amendments to the Labour Relations Act were made which curtail the freedom to strike and to take other forms of industrial action in the form of the Labour Relations Amendment Act.<sup>14</sup> The controversial enactment and contents of the 1988 amendments to the Labour Relations Act added to a widespread feeling of dissatisfaction with the statutory regulations of industrial conflict which remained unresolved despite attempts by SACCOLA, COSATU, NACTU and Manpower representatives.<sup>15</sup>

In achieving its purpose of requiring an attempt to be made at dispute resolution before industrial action is embarked upon, the Labour Relations Act criminalises those who strike before using the statutory dispute-resolution procedures. The Act, in section 65 sets out the circumstances which must prevail and the procedures which must be followed before the strike is lawful.

The Labour Relations Act 1995<sup>16</sup> marked a major change in South Africa's statutory industrial relations system. Following the transition to political democracy, the LRA encapsulated the new government's aims to reconstruct and democratise the economy and society as applied in the labour relations arena. In particular, it introduced new institutions aimed at giving employers and workers an opportunity to break with the intense and adversarialism that had characterised their relations in the past, at promoting more orderly

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<sup>14</sup> 83 of 1988.

<sup>15</sup> Rycroft *The Private Regulation of Industrial Conflict* (1989).

<sup>16</sup> 66 of 1995.

collective bargaining and greater co-operation at workplace and industry levels, and at providing an expeditious dispute resolution system.<sup>17</sup>

### **2 3 THE INDUSTRIAL CONCILIATION ACT, 1924<sup>18</sup>**

More than a decade of spiralling labour unrest within a rudimentary statutory framework culminated in the revolt of white mineworkers on the rand in 1922. The response by the government was introduction of the Industrial Conciliations Act.<sup>19</sup> The act provided for the registration of employer's organisations and trade unions excluding pass-bearing Africans and indentured Indian workers. The establishment of industrial councils by agreement between employer's organisation and registered trade union(s) promoted centralised collective bargaining. Where there was no industrial council the Act provided for the creation of an *ad hoc* conciliation board for bargaining and dispute resolution between trade unions or employees and employers' organisations or employers.

Strikes and lock-out were illegal during the currency of any agreement that prohibited such action and were also prohibited until the issue in dispute had been submitted to the relevant industrial council or conciliation board. African workers were excluded from the definition of "employee", and therefore from membership of registered trade unions, from direct representation on industrial councils and from conciliation boards.

### **2 4 THE INDUSTRIAL CONCILIATION ACT, 1956<sup>20</sup>**

The Native Laws Amendment Act<sup>21</sup> extended influx control to African women, thereby closing the loophole that had been created by the Industrial Conciliations Act<sup>22</sup> which had allowed them the status of "employees". In the next year the Native Labour (Settlement of Disputes) Act<sup>23</sup> was passed. In terms of this Act African workers could still not form or join registered trade unions and were prohibited from striking. Three years later a new

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<sup>17</sup> Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw *Labour Relations Law: A Comprehensive Guide* (1996) 5.

<sup>18</sup> 11 of 1924.

<sup>19</sup> Du Toit *et al* 6.

<sup>20</sup> 28 of 1956.

<sup>21</sup> 54 of 1952.

<sup>22</sup> 36 of 1937.

<sup>23</sup> 48 of 1953.

consolidated Industrial Conciliations Act was promulgated. The new Act further entrenched the racial division of workers.

By the late 1970s the dual system of industrial relations had become practically unworkable. In 1977 the government appointed the Wiehahn Commission of Inquiry into Labour Legislation which in 1979, recommended a number of reforms that would fundamentally change the system. The changes were enacted in a series of amendments over the next four years, in the course of which the name of the statute changed to the Labour Relations Act.

## **2 5 STRIKE ACTION UNDER THE LABOUR RELATIONS ACT, 1956<sup>24</sup>**

“If it is accepted that collective bargaining is the best way to resolve disputes and if it is accepted that the right to withhold one’s labour (ie to strike) is part and parcel of this process (‘collective bargaining without the right to strike is collective begging’), then it follows, firstly, that the object of the law should not be to criminalise striking, but to regulate it. Secondly, the fact that strikers lose their income for the duration of a strike, will, in most cases, automatically limit the duration of the strike.”<sup>25</sup>

The logic of strike in collective bargaining and its relations to the market economy is illustrated by Weiler:

“The employer’s operations are shut down without any employees to run them. The employer loses the flow of revenues. Thus both sides are being hurt economically. They experience viscerally the pain of disagreement with their opposite numbers at the bargaining table. Soon they realise that it is much less painful to agree, even if they do have to move considerably closer to the terms proposed by the other side. In that way strike action plays an indispensable role in resolving deadlock in a collective bargaining relationship.”<sup>26</sup>

The Act defined a strike as

“any one or more of the following acts or omissions by any body or number of persons who are or have been employed either by the same employer or different employers –

- (a) a refusal or failure by them to continue to work (whether the discontinuance is complete or partial) or to resume their work or to accept re-employment or to comply with the terms or conditions of employment applicable to them, or the retardation by them of the progress of work, or the obstruction by them of work; or

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<sup>24</sup> Act 28 of 1956.

<sup>25</sup> Du Plessis, Fouche, Jordaan and Van Wyk *A Practical Guide to Labour Law* (1996) 2<sup>nd</sup> ed 163.

<sup>26</sup> Rycroft and Jordaan 106.

- (b) the breach or termination by them of their contracts of employment, if:
  - (i) that refusal, failure, retardation, obstruction, breach or termination is in pursuance of any combination, agreement or understanding between them, whether expressed or not; and
  - (ii) the purpose of that refusal, failure, obstruction, breach or termination is to induce or compel any person by whom they or any other persons are or have been employed:
    - (aa) to agree to or to comply with any demand or proposal concerning terms or conditions of employment or other matter made by or on behalf of them or any of them or any other persons who are or have been employed; or
    - (bb) to refrain from giving effect to any intention to change terms or conditions of employment, or, if such a change has been made, to restore the terms or conditions to those that existed before the change was made; or
    - (cc) to employ or to suspend or terminate the employment of any person.”

## **2 6 THE LABOUR RELATIONS AMENDMENT ACT, 1988<sup>27</sup>**

Partially codifying the unfair labour practice concept, the Amendment Act included unprocedural strikes and lock-outs in the definition of an unfair labour practice.<sup>28</sup> The codified unfair labour practice concept also included certain forms of sympathy strikes and repeat strikes, amongst other things. The amendments had serious implications for workers and trade unions. However, the government and employers had underestimated the opposition that COSATU could mobilise. Against the background of a rising tide of political protest the South African Employer’s Consultative Committee on Labour Affairs (SACCOLA) met with COSATU and NACTU during 1989 and 1990 to discuss the crisis. The parties finally agreed to return to the previous dispensation. This agreement was formalised as the so called “Laboria Minute” of 14 September 1990. The LRA was amended to remove many of the objectionable features introduced in 1988.<sup>29</sup>

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<sup>27</sup> 83 of 1988.

<sup>28</sup> Du Toit *et al* 14.

<sup>29</sup> Du Toit *et al* 15.

## 27 RESTRICTION OF INDUSTRIAL ACTION

The employer traditionally controls the formation, content and termination of the employment relationship. The right to do so is historically linked to its ownership of industrial capital and control over the enterprise. Normally there is no parity of bargaining power between employer and individual employee.<sup>30</sup> Only by acting in concert and armed with strike action can employees possibly attain a measure of equilibrium with their employer's bargaining position<sup>31</sup> and thereby ensure a balanced outcome to the collective bargaining process.<sup>32</sup> It could be argued that equilibrium could be attained by restricting the "right" of the employer to lock-out employees.<sup>33</sup> The lock-out is neither socially nor legally equivalent to the strike. The true equivalent of the strike sanction is the employer's power to act unilaterally which is derived from its power to act unilaterally, which is derived from its powers of ownership and control. In the absence of a right to challenge unilateral conduct by the employer through a concerted withdrawal of labour, there can be no equilibrium between the parties.<sup>34</sup>

Section 65 of the Labour Relations Act, 1956 provided that no employee or other persons shall instigate a strike or incite any employee to take part in or to continue a strike or take part in a strike or in the continuation of a strike, and no employer or other person shall instigate a lock-out or incite any employer or other person to take part in or to continue a lock-out or in the continuation of a lock-out –

- (a) during the period of the currency of any agreement, award or determination which in terms of this Act is binding on employees or employers who are or would be concerned in the strike or lock-out or any provision of which deals with the matter giving occasion for the strike or lock-out; or
- (b) during the period of one year reckoned from the date of application of a notice under section 14 (2) of the Wage Act, 1957 (Act 5 of 1957), in respect of a determination made under that Act, which is binding upon employees or employers who are or would

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<sup>30</sup> Davies and Freedland 695.

<sup>31</sup> Davies and Freedland 890.

<sup>32</sup> Cheadle *The New Labour Law* 242-245.

<sup>33</sup> Brassey *The New Labour Law* 133-134.

<sup>34</sup> Rycroft and Jordaan 96-97.

be concerned in the strike or lock-out, and any provisions of which deals with the matter giving occasion for the strike or lock-out; or

(c) if the employees or employers who are or would be concerned in the strike or lock-out, are employees or employers referred to in sub-section (1) of *forty-six*;<sup>35</sup>

(d) when neither paragraph (a) nor paragraph (b) nor paragraph (c) applies –

(i) if there is an industrial council having jurisdiction, unless the matter giving occasion for the strike or lock-out has been considered by that council and until

(aa) the secretary of the council or a person designated by the council for that purpose, has reported thereon to the Director-General in writing; or

(bb) a period of 30 days reckoned from the date on which the matter was submitted to the council, or such longer period as the council may fix, has expired,

Whichever occurs first; or

(ii) if there is no such council, unless application has been made under section 35 for the establishment of a conciliation board for the consideration of the said matter and until –

(aa) the chairman of the conciliation board or a person designated by the chairman for that purpose, has reported thereon to the Director-General in writing; or

(bb) the period or periods envisaged by section 36 (1) (a) have expired,

Whichever occurs first; or

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<sup>35</sup> S 46 provides for compulsory arbitration in the event that the Industrial Council or Conciliation Board has failed to settle a dispute and has resolved that further deliberations will not result in the settlement of the dispute.

- (iii) if it has been decided in terms of section *forty-five* to refer the matter to arbitration pending the settlement of the dispute and the cessation of the arbitration proceedings in terms of sub-section (15) of section *forty-five* or the making of an award, whichever event occurs first.

## 28 LOCK-OUTS

Just as workers can withdraw their labour by striking, so an employer can withdraw the opportunity for the workers to work by locking them out of the premises, discontinuing the business or terminating their contracts of employment. The lock out represented the employer's ultimate economic weapon. The circumstances which must prevail and procedures which must be followed for the strike to be protected are similar for a lawful lock-out.<sup>36</sup>

The Labour Relations Act<sup>37</sup> defined a lock-out as

“any one or more of the following acts or omissions by a person who is or has been an employer –

- (a) the exclusion by him of any body or number of persons who are or have been in his employ from any premises on or in which work provided by him is or has been performed; or
- (b) the total or partial discontinuance by him of his business or of the provision of work; or
- (c) the breach or termination by him of the contracts of employment of any body or number of persons in his employ; or
- (d) the refusal or failure by him to re-employ any body or number of persons who have been in his employ,

if the purpose of that exclusion, discontinuance, breach, termination, refusal or failure is to induce or compel any persons, who are or have been in his employ or in the employ of other persons –

- (i) to agree to or comply with any demand or proposal concerning the terms or conditions of employment or other matters made by him or on his behalf or by or on behalf of any other person who is or has been an employer; or

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<sup>36</sup> Rycroft and Jordaan 221.

<sup>37</sup> 28 of 1956.

- (ii) to accept any change in terms or conditions of employment; or
- (iii) to agree to the employment or the suspension or termination of the employment of any person.”<sup>38</sup>

The Labour Relations Amendment Act defined the lock-out as

“any one or more of the following acts or omissions by a person who is or has been an employer –

- (a) the exclusion by him of any body or number of persons who are or have been in his employ from any premises on or in which work provided by him is or has been performed; or
- (b) the total or partial discontinuance by him of his business or of the provision of work; or
- (c) the breach or termination by him of the contracts of employment of any body or number of persons in his employ; or
- (d) the refusal or failure by him to re-employ any body or number of persons who have been in his employ,

if the purpose of that exclusion , discontinuance, breach, termination, refusal or failure is to induce or compel any persons, who are or have been in his employ or the employ of other persons –

- (i) to agree to or comply with any demand proposal concerning terms or conditions of employment or other matters made by him or on is behalf or by or on behalf of any other person who is or has been an employer; or
- (ii) to accept any change in terms or conditions of employment; or
- (iii) to agree to the employment or the suspension or termination of employment of any person.”<sup>39</sup>

The Industrial Court hesitated to assist employers participating in an illegal lock-out. The court would interdict an employer from illegally locking out workers<sup>40</sup> and would treat as an unfair labour practice the continuance of a lock-out after workers have submitted to those demands made prior to the lock-out.

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<sup>38</sup> Du Plessis *et al* 167 –168.

<sup>39</sup> Rycroft and Jordaan 222.

<sup>40</sup> In *NUTW v Jaguar Shoes (Pty) Ltd* (1985) 6 *ILJ* 92 (IC) an interdict was granted to prevent the lock-out of workers for refusing to work illegal overtime.

**CHAPTER THREE**  
**THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA: THE**  
**CONSTITUTIONAL RIGHT TO STRIKE**

**3 1 INTRODUCTION**

Chapter 3, on fundamental rights, of the interim Constitution of South Africa Act<sup>41</sup> provides, in terms of section 27<sup>42</sup> the employee's right to strike and employer's corresponding recourse to lock-out.

The interim Constitution expressly recognises and protects the employee's right to strike while section 27(5) confirms the employers recourse to lock-out.

The final<sup>43</sup> Constitution's position is slightly different in that it does not expressly recognise the employer's right or recourse to lock-out. However this recourse is provided for in the Labour Relations Act.<sup>44</sup>

The Constitutional Court has confirmed the constitutional right to strike under the Constitution in a number of cases, including the *SANDU* and the *Bader Bop* cases.

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<sup>41</sup> 200 of 1993.

<sup>42</sup> (1) Every person shall have the right to fair labour practices.  
(2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.  
(3) Workers and employers shall have the right to organise and bargain collectively.  
(4) Workers shall have the right to strike for the purpose of collective bargaining.  
(5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1).

<sup>43</sup> Act 108 of 1996.

<sup>44</sup> 66 of 1995.

### 3 2 THE RIGHT TO STRIKE IN THE CONSTITUTION

The Constitution recognises the right to strike, however, unlike the interim Constitution it does not entrench the employer's recourse to lock-out. This absence of the recourse was challenged by Business South Africa.<sup>45</sup> The objection was that clauses 23 and 241 of the Constitution do not comply with principle XXVIII (read with principle XII) and principle IV respectively. Principle XXVIII requires that:

- (a) the right of employees and employers to engage in collective bargaining be recognised;
- (b) the right to collective bargaining be protected;
- (c) parity be maintained between the collective bargaining rights conferred upon employees and those conferred upon employers.

Business South Africa argued that

“clause 23(2)(c) confers upon workers the right to strike, and thereby protects their right to engage in collective bargaining. No equivalent protection has, however, been afforded to employers”.

They added that Cameron *et al* in *The New Labour Relations Act*<sup>46</sup> correctly identify the relationship between collective bargaining and industrial action:

“The guarantor of the institution of collective bargaining is the threat of industrial action. No threat is effective unless there is a real possibility of its eventuality. Strikes and lock-outs are integral features of collective bargaining and unless they are afforded protection ... the threat becomes non-existent. Without the potential for pain, there would be no serious endeavour to negotiate and conclude a collective settlement.”

Chapter 2 of the Constitution - Bill of Rights section 23 – (Labour Relations) provides that:

- “(1) Everyone has the right to fair labour practices.
- (2) Every worker has the right

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<sup>45</sup> <http://lawspace.law.uct.ac.za:8080/dspace/bitstream/2165/228/10/OTH10.PDF>: the application to certify the new constitutional text in terms of s 71 of the Constitution of the Republic of South Africa, 1993.

<sup>46</sup> At 4.

- (a) to form and join a trade union;
  - (b) to participate in the activities and programmes of a trade union; and
  - (c) to strike.
- (3) Every employer has the right
- (a) to form and join an employers' organisation; and
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).<sup>47</sup>

The right or recourse of employers to lock-out is conspicuous by its absence in the in the final Constitution. The drafters of the final Constitution have excluded the right to lock-out from constitutional protection. This has been backed by the Constitutional Court in the *Certification Judgment*<sup>48</sup> and it is against this background that the employers lodged the constitutional challenge.

The objectors, in the *Certification* matter argued that the omission of the employer's right to lock-out in the Constitution was in breach of Constitutional Principles II and XXVIII. Principle XXVIII provides that:

“Notwithstanding provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practice.”

The objectors argued that in order to engage effectively in collective bargaining, bargaining parties must have a right to exercise economic power against each other. Accordingly, went the argument, the right to lock-out should be expressly recognised in the Constitution. The

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<sup>47</sup> The rights in the Bill of Rights may be limited only in terms of 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;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

Except as provided in ss (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

<sup>48</sup> *Certification of the Constitution of the Republic of South Africa 1996*, 1996 (4) SA 744; 1996 (10) BCLR 1251 at 1248.

court held that while it is correct that collective bargaining implies a right on the part of those who engage in collective bargaining to exercise economic power against their adversaries, the Principle does not require that the Constitution expressly recognise any particular mechanism for the exercise of economic power on behalf of workers or employers.

The objectors also argued that by including the right to strike and omitting the right to lock-out, the employer's right to engage in collective bargaining is accorded less status than the right of workers. The court held, however, that the effect of including the right to strike does not diminish the right of employers to engage in bargaining, nor does it weaken their right to exercise economic power against workers.

The court objected to the proposition that the right of employers to lock-out is the necessary equivalent of the right of workers to strike. The court held that collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. In theory, the court held, employers may exercise power against workers through a range of weapons, such as dismissal, the employment of replacement/alternative labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace.

The objectors advanced a further argument that the inclusion of the right to strike necessarily implies that legislation protecting the right to lock-out, such as the Labour Relations Act, would be unconstitutional. The court held that such an argument was based on a wrong premise. The fact that the right to strike is included in the Constitutional text does not necessarily mean that a legislative provision permitting lock-out is unconstitutional, or indeed that the provisions in the LRA permitting lock-out are unconstitutional.

The right to strike has been pronounced upon in a number of Constitutional Court judgments. In *SANDU*<sup>49</sup> the court ruled in favour of the applicant, the South African National Defence Union. This case concerns the question whether it is constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions.

Section 126B of the Defence Act provides as follows:

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<sup>49</sup> *South African National Defence Union v Minister of Defence* (CCT27/98) [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615 (26 May 1999).

- “(1) A member of the Permanent Force shall not be or become a member of any trade union as defined in section 1 of the Labour Relations Act, 1956 (Act 28 of 1956): Provided that this provision shall not preclude any member of such Force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister.
- (2) Without derogating from the provisions of sections 4(h) and 10 of the Military Discipline Code, a member of the South African Defence Force who is subject to the said Military Discipline Code, shall not strike or perform any act of public protest or participate in any strike or act of public protest or conspire with or incite or encourage, instigate or command any other person (whether or not such person is a member of the South African Defence Force or an officer or employee referred to in section 83A(2) serving in the South African Defence Force or a member of any auxiliary or nursing service established under this Act) to strike or to perform such an act or to participate in a strike or such an act.
- (3) A member of the South African Defence Force who contravenes subsection (1) or (2), shall be guilty of an offence.”

In determining the right to join trade unions and accordingly to participate in a strike the Constitutional Court had to determine whether members of the National Defence Force were employees in terms of the definition of employee. The court had to also consider international law.

Section 39 of the Constitution provides that when a court is interpreting chapter 2 of the Constitution, it must consider international law. The court held:

“In my view, the conventions and recommendations of the International Labour Organisation (the ILO), one of the oldest existing international organisations, are important resources for considering the meaning and scope of ‘worker’ as used in section 23 of our Constitution.”

It held, further, that Article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 87 of 1948, the first major Convention of the ILO concerning freedom of association, which South Africa ratified in 1995, provides that:

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

Article 9(1) of the same Convention provides:

“The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws and regulations.”

The court concluded therefore that:

“If the approach of the ILO is adopted, it would seem to follow that when section 23(2) speaks of ‘worker’, it should be interpreted to include members of the armed forces, even though the relationship they have with the Defence Force is unusual and not identical to an ordinary employment relationship. The peculiar character of the Defence Force may well mean that some of the rights conferred upon ‘workers’ and ‘employers’ as well as ‘trade unions’ and ‘employers’ organisations’ by section 23 may be justifiably limited.”

The court, having concluded that members of the National Defence Force qualify the definition of “worker” in terms of section 23(2) of the Constitution, held that the provisions of section 126B(1) of the Defence Act infringe their right to form and join trade unions

Another ground breaking decision of the Constitutional Court was in the *Bader Bop*<sup>50</sup> case. The key question in the case is whether a minority union and its members are entitled to take lawful strike action to persuade an employer to recognise its shop stewards. The LAC held that such strike action is unlawful and unprotected.

On 16 August 1999 the first applicant (the union) wrote to the first respondent (the employer) claiming to represent a large number of its employees. Several meetings between the union and the employer then took place at which the union sought to persuade the employer to grant it the organisational rights contemplated by sections 12 - 15 of the Act. It was common cause between the parties, however, that the union represented not a majority, but only about 26% of the workers at the employer’s workplace. The employer’s attitude was that it was willing to afford the union access to its premises as contemplated by section 12, and stop-order facilities as contemplated by section 13. As the union was not representative of a majority of its workforce, it was not willing to recognise the union’s shop stewards, nor was it willing to bargain collectively with the union.<sup>51</sup>

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<sup>50</sup> *National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd* (CCT14/02) [2002] ZACC 30; 2003 (2) BCLR 182 (13 December 2002).

<sup>51</sup> The rights conferred by ss 14 and 16 are conferred upon trade unions that have as members a majority of the employees employed in the workplace. S 14 of the Act provides as follows:

“Trade union representatives

- (1) In this section, ‘representative trade union’ means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.
- (2) In any workplace in which at least 10 members of a representative trade union are employed, those members are entitled to elect from among themselves –

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- (a) if there are 10 members of the trade union employed in the workplace, one trade union representative;
  - (b) if there are more than 10 members of the trade union employed in the workplace, two trade union representatives;
  - (c) if there are more than 50 members of the trade union employed in the workplace, two trade union representatives for the first 50 members, plus a further one trade union representative for every additional 50 members up to a maximum of seven trade union representatives;
  - (d) if there are more than 300 members of the trade union employed in the workplace, seven trade union representatives for the first 300 members, plus one additional trade union representative for every 100 additional members up to a maximum of 10 trade union representatives;
  - (e) if there are more than 600 members of the trade union employed in the workplace, 10 trade union representatives for the first 600 members, plus one additional trade union representative for every 200 additional members up to a maximum of 12 trade union representatives; and
  - (f) if there are more than 1000 members of the trade union employed in the workplace, 12 trade union representatives for the first 1000 members, plus one additional trade union representative for every 500 additional members up to a maximum of 20 trade union representatives.
- (3) The constitution of the representative trade union governs the nomination, election, term of office and removal from office of a trade union representative.
  - (4) A trade union representative has the right to perform the following functions –
    - (a) at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings;
    - (b) to monitor the employer’s compliance with the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer;
    - (c) to report any alleged contravention of the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer to –
      - (i) the employer;
      - (ii) the representative trade union; and
      - (iii) any responsible authority or agency; and
    - (d) to perform any other function agreed to between the representative trade union and the employer.
  - (5) Subject to reasonable conditions, a trade union representative is entitled to take reasonable time off with pay during working hours –
    - (a) to perform the functions of a trade union representative; and
    - (b) to be trained in any subject relevant to the performance of the functions of a trade union representative.”

On the other hand Section 16 of the Act provides as follows:

“Disclosure of information

- (1) For the purposes of this section, ‘representative trade union’ means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.
- (2) Subject to subsection (5), an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14(4).
- (3) Subject to subsection (5), whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining.
- (4) The employer must notify the trade union representative or the representative trade union in writing if any information disclosed in terms of subsection (2) or (3) is confidential.
- (5) An employer is not required to disclose information –

The union then declared a dispute over the question of organisational rights and, in particular, the question of the recognition of its shop stewards and its right to bargain collectively on behalf of its members. That dispute was referred to conciliation at the Commission for Conciliation, Mediation and Arbitration (the CCMA) but, despite a meeting at the CCMA, remained unresolved. Thereafter the union informed the company that it intended to institute strike action in terms of Chapter IV of the Act.

The employer's view was that the union was not entitled to take strike action to demand the recognition of its shop stewards and it accordingly approached the Labour Court for an interdict. The union argued that it was entitled to take strike action, that it had followed the necessary procedures and that the strike was therefore protected in terms of the Act. The Labour Court dismissed the application for an interdict, whereupon the employer appealed to the LAC, which upheld the appeal and granted the interdict.

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- (a) that is legally privileged;
  - (b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;
  - (c) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
  - (d) that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.
- (6) If there is a dispute about what information is required to be disclosed in terms of this section, any party to the dispute may refer the dispute in writing to the Commission.
  - (7) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.
  - (8) The Commission must attempt to resolve the dispute through conciliation.
  - (9) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.
  - (10) In any dispute about the disclosure of information contemplated in subsection (6), the commissioner must first decide whether or not the information is relevant.
  - (11) If the commissioner decides that the information is relevant and if it is information contemplated in subsection (5)(c) or (d), the commissioner must balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to perform effectively the functions referred to in section 14(4) or the ability of a representative trade union to engage effectively in consultation or collective bargaining.
  - (12) If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to the employee or employer.
  - (13) When making an order in terms of subsection (12), the commissioner must take into account any breach of confidentiality in respect of information disclosed in terms of this section at that workplace and may refuse to order the disclosure of the information or any other confidential information which might otherwise be disclosed for a period specified in the arbitration award.
  - (14) In any dispute about an alleged breach of confidentiality, the commissioner may order that the right to disclosure of information in that workplace be withdrawn for a period specified in the arbitration award."

The applicants then approached the Constitutional Court, arguing that on the interpretation of the relevant provisions of the Act adopted by the majority of the LAC, the provisions constitute an infringement of their right to strike enshrined in section 23 of the Constitution. They contended that the provisions could be construed consistently with the Constitution. In the alternative, they argued that if the interpretation adopted by the LAC was correct, the Act was unconstitutional in that it constituted an unjustifiable limitation of the right to strike.

In determining the matter, the court examined section 39(1) of the Constitution which provides that:

“When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.”

There are two key ILO Conventions relevant to the issue at hand: the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)<sup>52</sup> and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).<sup>53</sup>

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<sup>52</sup> Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions:

- Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.
- Workers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
- The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.
- Workers’ and employers’ organisations shall not be liable to be dissolved or suspended by administrative authority.
- Workers’ and employers’ organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.
- The provisions of articles 2, 3 and 4 hereof apply to federations and confederations of workers’ and employers’ organisations.
- The acquisition of legal personality by workers’ and employers’ organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of articles 2, 3 and 4 hereof.

In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

In the result, the court concluded

“I conclude therefore that the relevant provisions of the Act can be read so as to avoid the limitation of fundamental rights occasioned by the interpretation placed upon those provisions by the LAC. It must follow that the interpretation adopted by the majority in the LAC is not the constitutionally appropriate interpretation of the relevant provisions of the Act. This reasoning, however, should not be considered to preclude the right of the legislature to limit the rights in this fashion or any other, if it can do so in a justifiable way for an important governmental purpose. Such a case was not made out and need not be considered further here. I should also add that the question of the limitation of the rights of minority unions in relation to disclosure of information as contemplated by

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The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation, the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

In this Convention the term “organisation” means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

<sup>53</sup> Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

Such protection shall apply more particularly in respect of acts calculated to –

- (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
- (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Workers’ and employers’ organisations shall enjoy adequate protection against any acts of interference by each other or each other’s agents or members in their establishment, functioning or administration.

In particular, acts which are designed to promote the establishment of workers’ organisations under the domination of employers or employers’ organisations, or to support workers’ organisations by financial or other means, with the object of placing such organisations under the control of employers or employers’ organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

section 16 of the Act may well raise different issues which could result in a different outcome. It is not necessary to consider that further here.”

The two cases are a clear indication of the court’s attitude in respect of the constitutional rights enshrined in section 27 of the Constitution and how the court will prefer an interpretation that is less restrictive of the right, international law and, sometimes, foreign law.

## **CHAPTER FOUR**

### **THE LABOUR RELATIONS ACT: THE LRA PROVISIONS ON THE RIGHT TO STRIKE AND ITS LIMITATIONS**

#### **4 1 INTRODUCTION**

The Constitution of the Republic of South Africa is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligation imposed by it must be fulfilled.<sup>54</sup>

Chapter 2 of the Constitution provides, as already mentioned in Chapter 3 para 3 2 above, everyone with the fundamental right to fair labour practices, including the right of every worker to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike.

It also provides to employers the equivalent right to form and join an employers' organisation; and to participate in the activities and programmes of an employers' organisation. The Chapter also provides every trade union, employers' organisation and employer the right to engage in collective bargaining.

It is noteworthy that, as mentioned in chapter three, the final Constitution, unlike the interim Constitution, only provides for a right of workers to strike<sup>55</sup> and does not provide employers with a corresponding recourse to lock-out striking workers.

The Labour Relations Act<sup>56</sup> in chapter IV regulates industrial action and brings it in line with the Constitution and international law. The Act provides that strike action must be preceded by conciliation.<sup>57</sup> The Act also recognises domestic dispute procedures.<sup>58</sup> The Act, further,

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<sup>54</sup> S 2.

<sup>55</sup> S 23(2)(c).

<sup>56</sup> 66 of 1995 (LRA).

<sup>57</sup> S 64(1) provides that –

denies protection to strikes based on disputes for which the Act provides that they can be resolved through arbitration or adjudication, known as “rights disputes”. There are, however, certain disputes that can be either resolved through strike action or arbitration.

Acquisition of the right to strike has provided trade unions with the strongest incentive for complying with the Act, as non-compliance no longer attracts criminal action albeit does render employees liable to discipline, including dismissal. It may also expose employees and their trade unions to civil liability.<sup>59</sup>

The right to strike in contrast to the, supposedly, more limited “recourse” to lock-out is supposed to be one of the means by which the Act attempts to bring about a shift in the balance of power between employers and employees.

#### **4 2 DEFINITION OF A “STRIKE” AND “LOCK-OUT”**

The Act defines a strike as “the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employers, for the purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employees, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory”.<sup>60</sup>

A lock-out, on the other hand is defined as “the exclusion by an employer of employees from the employer’s workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the

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Every employee has the right to strike and every employer has recourse to lock-out if –

- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and
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  - (i) a certificate stating that the dispute remains unresolved has been issued; or
  - (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission.

<sup>58</sup> S 64(3) provides that –

The requirements of ss (1) do not apply to a strike or a lock-out if –

- (a) the parties to the dispute are members of a council, and the dispute has been dealt with by that council in accordance with its constitution;
- (b) the strike or lock-out conforms with the procedures in a collective agreement.

<sup>59</sup> Du Toit *et al Labour Relations Law* 291.

<sup>60</sup> S 213.

employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion".<sup>61</sup>

The Act provides in section 64(1) that every employee has the right to strike and every employer has recourse to lock-out if the prerequisites of a protected strike or protected lock-out, in the Act, have been complied with. The Act, therefore, provides limitations to the right of workers to strike and employers to lock-out, if the provisions of the Act have not been complied with.<sup>62</sup>

It is clear, therefore, that all that is required for a strike or a lock-out to be protected is compliance with the Chapter IV and the only limitations are those set out in section 65 above.

Section 76 of the Act provides that

- “(1) An employer may not take into employment any person –
  - (a) to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or
  - (b) for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.
- (2) For the purpose of this section, ‘take into employment’ includes engaging the services of a temporary employment service or an independent contractor.”

#### **4 3 REPLACEMENT LABOUR IS AN INDIRECT LIMITATION**

The question of replacement labour was a key point of contention in the negotiation process leading up to the enactment of the Act.

“The possibility of employing persons to maintain production during a strike or lock-out must clearly strengthen an employer’s hand while, from a union point of view, it must threaten to rob strike action of much of its effect. Replacement labour is also an issue of public concern because of its potential to trigger violence during a strike or lock-out.”<sup>63</sup>

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<sup>61</sup> *Ibid.*

<sup>62</sup> S 65.

<sup>63</sup> Du Toit *et al* 332.

This was evident in the security strike between March and June 2006 where scores of non-striking security guards were killed and others attacked.<sup>64</sup>

This view has been shared by a number of labour law writers and was expressed by Jonathan Joffe in his article “Violence and the Law”:

“The use of replacement workers undermines the structural elements that ensure the internal cohesion of the collective bargaining system, by introducing a foreign body into a dispute between two clearly identified parties. It upsets the economic balance of power, compromises the freedom of expression of workers engaging in a strike or lockout, shifts the original neutral ground of the dispute, and leads eventually to a perception of exploitation of the individual. The question of the replacement of workers engaging in industrial action must be examined systematically and not by simply relying on certain characteristics of the dynamics of disputes, such as their frequency or duration. These facts must nevertheless be considered. The conclusion to be drawn from my analysis is that there is, on the whole, a situation of illegitimacy that Parliament must condemn in no uncertain terms.”

Cheadle argued that strikes, by their nature, are intended to cause the employer economic harm. By withholding their labour, the employees hope to bring production to a halt, causing him to lose business and to sustain overhead expenses without the prospect of income, in the expectation, that should the losses be sufficiently substantial, the employer will accede to their demand.

Kahn-Freud, described the main purpose of labour law as addressing any disequilibrium of power. He argued that “there can be no equilibrium in industrial relations without a freedom to strike”.<sup>65</sup> He quotes Lord Wright in *Crofter Harris Tweed v Veitch* case:

“The right to strike is an essential element in the principle of collective bargaining.”

If workers could not, in the last resort, collectively refuse to work, they could not bargain collectively.

The ILO Committee on Freedom of Association only considers replacement of strikers to be justified under two circumstances:

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<sup>64</sup> Mail & Guardian on line, Johannesburg South Africa, 24 March and 02 April 2006 as well as Business Report 22 June 2006.

<sup>65</sup> Davies and Freedland *Kahn-Freund's Labour and the Law*.

- (a) in the event of a strike in an essential service, where a strike is prohibited by law, and
- (b) when a situation of acute national crisis arises (ILO, 1996d, paras. 570 and 574)

The Committee of Experts has considered that

“a special problem arises when legislation or practice allows enterprises to recruit workers to replace their own employees on legal strike. The difficulty is even more serious if, under legislative provisions or case law, strikers do not, as of right, find their job waiting for them at the end of the dispute. The committee considers that this type of provision or practice seriously impairs the right to strike and affects the free exercise of trade union rights (ILO, 1994a, para. 175)”.<sup>66</sup>

Although the trade unions were unsuccessful in their bid to secure an outright prohibition of replacement labour, the Act prohibits it in two areas, namely

“They may not take into employment any person

- (a) to continue or maintain production during a protected strike if the whole or part of the employer’s service has been designated as maintenance service;<sup>67</sup> or
- (b) to perform the work of any employee who is locked out, unless the lock-out is in response to a strike.<sup>68</sup>

Du Toit<sup>69</sup> argues that “take into employment” means that an employer may use its existing employees for the to perform the work of striking employees but may not employ new persons to do so, either on a temporary on permanent basis. This position was confirmed in *SACTWU* case.<sup>70</sup>

The phrase “in response to a strike” has been interpreted as including both protected and unprotected strikes. A lock-out is in response to a strike if a lock-out notice is issued after notice of a strike has been given, irrespective of whether the strike has commenced or not.<sup>71</sup>

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<sup>66</sup> Gernigo *et al* *ILO Principles*.

<sup>67</sup> S 76(1)(a).

<sup>68</sup> S 76(1)(b).

<sup>69</sup> Du Toit *et al* 333.

<sup>70</sup> *SACTWU v Coats SA (Pty) Ltd* [2001] 8 BLLR 971 (LC).

<sup>71</sup> In *Technikon SA v NUTESA* [2001] 1 BLLR 58 (LAC) the lock-out was due to begin on the same day as the strike. The court cautioned against equating a lock-out “in response to a strike” with a “defensive lock-out”, pointing out that the Act does not distinguish between defensive and offensive lock-outs but simply permits replacement labour to be used when a lock-out is in response to a strike.

If the employer commences a lock-out in response to a strike and the strike is subsequently terminated, the employer may continue to employ replacement labour until the lock-out ceases.<sup>72</sup>

This in essence means that the employer can continue with the lock-out and at the same time the use of replacement labour for as long as the employer wishes, unless the employees accept the employer's offer or demand.

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<sup>72</sup> *Ntimane v Agrinet* [1999] 3 BLLR 248 (LC).

**CHAPTER FIVE**  
**IS THE RIGHT TO STRIKE IN THE LABOUR RELATIONS ACT TOO LIMITED: A COMPARISON WITH INTERNATIONAL LAW AND OTHER JURISDICTIONS**

**5 1 INTERNATIONAL LAW CONCERNING THE RIGHT TO STRIKE**

Two resolutions of the International Labour Organisation itself which provide guidelines for ILO policy in one way or another emphasized the recognition of the right to strike in member states. The resolution concerning the abolition of “anti trade union legislation” in the states members of the ILO, in 1957, called for the adoption of laws ensuring unrestricted and effective exercise of trade union right, including the right to strike. Similarly the Resolution concerning Trade Unions Rights and Their Relation to Civil Liberties, adopted in 1970.<sup>73</sup>

The most widely ratified international instrument is Art.8 of the International Covenant on Economic, Social and Cultural Rights of December 19, 1966 (ICESCR). The parties to this covenant oblige themselves to guarantee the right to strike “in conformity with the laws of the particular country”. The ILO was neither in Convention No 87 nor in Convention No 98 occupied explicitly with the right to strike.<sup>74</sup>

**5 2 HIRING OF WORKERS TO REPLACE STRIKERS**

The ILO Committee on Freedom of Association only considers replacement of strikers to be justified under two circumstances:

- (a) in the event of a strike in an essential service, where a strike is prohibited by law, and
- (b) when a situation of acute national crisis arises (ILO, 1996d, paras. 570 and 574).

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<sup>73</sup> Gernigo, Odero and Guido *ILO Principles Concerning The Right To Strike* (2000) International Labour Organization.

<sup>74</sup> Kluwer *Comparative Labour Law and Industrial Relations* (1982).

The Committee of Experts has considered that

“a special problem rises when legislation or practice allows enterprises to recruit workers to replace their own employees on legal strike. The difficulty is even more serious if, under legislative provisions or case law, strikers do not, as of right, find their job waiting for them at the end of the dispute. The committee considers that this type of provision or practice seriously impairs the right to strike and affects the free exercise of trade union rights (ILO, 1994a, para. 175)”<sup>75</sup>.

### 5.3 THE RIGHT TO STRIKE IN CANADA

Canada adopted a constitutionally entrenched Charter of Rights and Freedoms in 1982.<sup>76</sup> Although they had ample opportunity to do so, the trade union movement did not argue for the entrenchment of labour rights, submitted Arthurs.<sup>77</sup>

During the inter-war years, the Supreme Court and the Privy Council in Westminster, then Canada’s final court of appeal, held that labour law was a matter of “property and civil rights” and of “a merely local and private nature in the province” and therefore *prima facie* subject to provincial, and not federal, regulation.<sup>78</sup> Moreover, it held that neither the general power nor the treaty power nor the power over inter-provincial and international commerce authorized the federal government to enter the field.<sup>79</sup> As a result, 90% of Canadian workers come under provincial jurisdiction, only 10% under federal jurisdiction, says Arthurs.

In the Federal jurisdiction<sup>80</sup> compulsory vote by secret ballot is conducted before a strike; (valid for 60 days or any longer period agreed to in writing by the parties); and result are determined by a majority of those in the unit who vote. Vote is not required if a legal lockout has occurred. At least 72 hours' notice has to be given to the other party and a copy sent to the Minister of Labour. Notice is not required if a legal strike/lockout by the other party has occurred.

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<sup>75</sup> Gernigo *et al* 46-7.

<sup>76</sup> Constitution Act 1982.

<sup>77</sup> [harthurs@osgoode.yorku.ca](mailto:harthurs@osgoode.yorku.ca), York University.

<sup>78</sup> *Toronto Electric Commissioners v Snider* [1925] 2 DLR 5 (PC).

<sup>79</sup> *Canada (Attorney General) v Ontario (Attorney General)* [1937] A.C. 326 (P.C.).

<sup>80</sup> General Private Sector Collective Bargaining Legislation.

In several provinces, the law still contains restrictions on the right to form a union, to bargain collectively and to strike, particularly in the public sector. The government of Quebec imposed a collective agreement on its public sector workers, thereby denying their bargaining rights and taking away their right to strike. Diamond workers were threatened with disciplinary action for taking part in a legal strike.

### 5 3 1 TRADE UNION RIGHTS IN LAW

Under federal legislation, workers in both the public and private sectors have the right to associate freely.<sup>81</sup> Trade union rights are officially guaranteed in federal legislation, although each province also has its own legislation, setting limitations on these rights. All workers have the right to strike, except for those in the public sector who provide essential services (with a few exceptions such as fire fighters in Nova Scotia who have the right to strike). Replacement labour may be used in industries governed by the Canada Labour Code.<sup>82</sup> Public and private sector workers have the right to organise and bargain collectively. The law protects collective bargaining, but again there are limitations which vary from province to province. The law prohibits anti-union discrimination.<sup>83</sup> Below are but a few examples of the provisions of various provincial legislation with respect to the right to strike:

**Alberta: exclusion and denial of the right to strike:** Categories of workers, including agricultural, horticultural and domestic workers are excluded from provincial labour relations' legislation and therefore the protection this provides.

The law on labour relations in the provincial civil service bans strikes by all employees of the province. Hospital workers, whether deemed to be providing essential services or not, are also collectively prohibited from striking. Workers involved in illegal strikes are liable for heavy fines and even prison sentences.

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<sup>81</sup> <http://survey07.ituc-csi.org/getcountry.php?IDCountry=CAN&IDLang=EN>: *Annual Survey of Violation of Trade Union Rights (2007)* ITUC CSI IGB.

<sup>82</sup> The *Canada Labour Code*, Part I, establishes a framework for collective bargaining in the federal private sector. The Canada Labour Relations Board, an independent quasi-judicial tribunal, is responsible for the interpretation and application of those provisions of the Code related to bargaining rights and unfair labour practices. The Federal Mediation and Conciliation Service of Human Resources Development Canada administer the dispute resolution provisions of the Code.

<sup>83</sup> <http://survey07.ituc-csi.org/getcountry.php?IDCountry=CAN&IDLang=EN> *Annual Survey of Violation of Trade Union Rights (2007)*.

Construction trades workers are forced to bargain at the same table in arbitrary groups of unions regardless of the wishes of the workers of their unions. Workers are subsequently prohibited from striking unless 60 per cent of the unions within a group, and 60 per cent of all union members affected, vote to do so.

In 2005, the provincial government invoked, for the first time ever, “Division 8” of the Labour Relations code to force construction workers to be represented by an organisation and contract they had not voted to support. Alberta labour laws continue prohibitions in contradiction of a Supreme Court of Canada ruling allowing secondary picketing.

Alberta legislation also authorises extensive intervention by the authorities in collective bargaining and allows the employer to bypass a trade union as the bargaining agent and to use replacement workers in a strike.

**British Columbia: collective bargaining undermined in the education and health sectors:**

In 2001, nurses and paramedical professionals in the province lost their right to strike, with the introduction of the Health Care Services Continuation Act, and had a collective “agreement” imposed on them by the Health Care Services Collective Agreement Act. Education was designated an “essential service” under the Skills Development and Labour Statutes Amendment Act, giving the authorities the power to deny teachers the right to strike.

Further limitations were introduced in 2002, with the adoption of the following three bills: the Education Service Collective Agreement Act (Bill 27); the Public Education Flexibility and Choice Act (Bill 28), and the Health and Social Services Delivery Improvement Act (Bill 29). The Acts completely eliminated or rewrote provisions in existing collective agreements that had been freely negotiated and afforded substantial protection for workers in the province. Furthermore, the removal of restrictive language gave health care and other employers the right to avoid the terms of binding collective agreements by “contracting out” to related employers who are not covered by such agreements. The legislation also permits the government to initiate action that could result in the cancellation of bargaining rights. The case was submitted to the ILO Committee on Freedom of Association, which urged the government to amend some provisions and review the collective bargaining issues raised. The health care unions challenged the legality of Bill 29. The court ruled in July 2004 that although the bill affected the unions’ bargaining strength, it was not unconstitutional.

Also in 2004, the Health Sector (Facilities Subsector) Collective Agreement Act (Bill 37) imposed terms and conditions favourable to the employer, ordered an effective 15 per cent decrease in compensation for the union members covered by the agreement, and ordered the end of their strike.

Again in 2004, the provincial government passed the Education Services Collective Agreement Amendment Bill (Bill 19) which modified or eliminated numerous provisions from freely negotiated collective agreements in the education sector, undermining the right of teachers' unions to act as bargaining agents for their members. The amendment overturned a successful court challenge by the British Columbia Teachers' Federation against an earlier arbitration award removing provisions from collective agreements and pre-empted any further challenges by stating the amendment applied "despite any decisions of a court to the contrary".

This was followed in 2005 by the Teachers' Collective Agreement Act (Bill 12), imposed while the teachers were involved in the first stages of industrial action (a work-to-rule) following a lengthy attempt to negotiate a new agreement. While the Act appeared to set out an extension of a current agreement, it was the latest piece of legislation taking away contract terms and imposing collective agreements on public school teachers.

The government also introduced the Crown Counsel Agreement Continuation Act (Bill 21) in 2005, rejecting an arbitration award granted under the terms of other legislation governing Crown Counsel and imposing its own salary terms on lawyers working for the Crown. The Act also prohibited the withdrawal of services.

**British Columbia denies nurse practitioners right to organise:** The Health Statutes Amendment Act excludes nurse practitioners in British Columbia from joining a union.

**Ontario: many restrictions:** Ontario's labour legislation continues to exclude agricultural and horticultural workers, as well as domestic workers, architects, dentists, land surveyors, lawyers and doctors. People taking part in community activities are also prevented by law from joining a trade union. A ruling by the Supreme Court of Canada in December 2001 declared that the Ontario law prohibiting the unionisation of agricultural workers was

unconstitutional. In October 2002, the government of Ontario passed the Agricultural Employees Protection Act which, according to the Ontario Federation of Labour, “basically gave agricultural workers the right to join a social club, but they still can't join a union or bargain collectively or strike”.

The Ontario Labour Relations Board lost the authority to order automatic union certification right after the election of the anti-labour Harris government in 1995. In early 2005 the new liberal government tabled a bill that would provide a card check certification process only to workers in the building trades, but not the rest of the workforce. The automatic certification, based on evidence of a signed union membership card, was a key cornerstone of the Ontario Labour Relations Act that applied to all workers prior to the Harris government. Its reinstatement - only for the building trades - was considered as a partial victory. The Act passed in the fall of 2005 remains, to many, as a systemic barrier to workers in other sectors joining a union.

Collective bargaining rights are heavily restricted in education under the terms of a 1997 law. This excludes school principals and assistant principals from taking part in the teachers' negotiating unit, which can only negotiate working conditions on an informal basis. The Ontario Education Act also establishes a de facto trade union monopoly, by designating the trade union recognised as the bargaining agent by name. If a dispute leads to strike action, arbitration can be imposed after three weeks. The global trade union federation, Education International, lodged a complaint with the ILO in October 2003 about legislation adopted by the outgoing government of Ontario that further narrowed the bargaining rights of teachers. It altered the definition of strikes and expanded the statutorily prescribed duties of teachers. In response to the critical conclusions of the ILO, the new government of Ontario said that it was committed to creating fair labour relations in Ontario's schools.

With the election of the new government in Ontario in 2005, the requirement to post workplace documents on the process to terminate bargaining rights has been repealed. The Ontario Labour Relations Act has also been amended to empower the Ontario Labour Relations Board to certify, without a vote, when the employer has grossly violated the law and intimidated the employees. The labour movement also gained the right to interim reinstatement for those fired during organising campaigns.

**New Brunswick: certain categories of workers excluded:** Agricultural and horticultural workers are excluded from the protection provided by the province's labour relations legislation. Casual workers in the public sector cannot affiliate to organisations of their choice and therefore cannot enjoy the corresponding rights such as collective bargaining.

**Quebec: organising rights denied to many, collective bargaining undermined:** In 2003, the provincial government introduced amendments to the Act on health and social services and the Act on early childhood centres and care services, which withdraws the definition of salaried employee from anyone performing a job "outside of the workplace". Under the Quebec labour code only "employees" enjoy the right to form unions. Hence, by redefining them as independent workers, the amendments deprived them of their previously recognised right to organise. Ironically, the Acts concerned were designed to promote a policy of non-institutional and home based care, yet it was the very people providing this care that were deprived of their basic rights by the amendments. Those unions that had been set up had their union status revoked, and their right to collective bargaining. The great majority of the workers concerned were women. In 2006 the ILO Committee on Freedom of Association condemned the government of Quebec for depriving thousands of workers of their right to be considered a salaried employee under the Labour Code and urged it to amend the Act.

In 2004, the Prosecutors Act (as amended by the act amending the Act respecting Attorney-General's Prosecutors) denied prosecutors the right to join a trade union and deprived them of protection against hindrances, reprisals or sanctions related to the exercise of trade union rights. The ILO has asked the government to ensure that prosecutors do have the right to join unions of their choice and enjoy protection against anti-union discrimination.

In December 2005 the Provincial Government passed a law, Act 43, imposing conditions of employment on employees in the Quebec public sector thereby violating their fundamental right to bargain collectively. The law renewed all collective agreements in the sector, modified unilaterally, with effect from 1 January 2006, until 31 March 2010. It also took away their right to strike, as Quebec labour law prohibits strikes during the term of a collective agreement (see below), without granting them an alternative procedure for the settlement of disputes such as mediation, conciliation or arbitration. The ILO's Committee on Freedom of Association emphasised that a legal provision which allows the employer to modify unilaterally the content of a signed collective agreement was contrary to the principles

of collective bargaining, and urged the government to amend Act 43 and review the excessive sanctions imposed on workers for violating the prohibition on strike action.

The right to strike is limited by two acts that give a very broad definition of essential services, and the provision that strikes may not take place during the term of a collective agreement.

**Manitoba:** The Public Schools Act bans teachers from going on strike and contains heavy fines for breaches of this law. It also provides for compulsory arbitration at the request of one of the parties if a dispute lasts more than 90 days. The police face similar restrictions.

**Prince Edward Island:** As with Ontario, the law effectively imposes a trade union monopoly by naming a bargaining agent in the Civil Service Act.

**Nova Scotia:** The same applies to Nova Scotia, where the bargaining agent is named in the Civic Service Collective Bargaining Act and in the Teachers' Collective Bargaining Act.

**Newfoundland:** The Public Service Act confers broad powers on the employer with regard to the procedure for the designation of "essential employees".

### 5 3 2 RIGHTS AND OBLIGATIONS DURING A STRIKE OR LOCK-OUT

"When bargaining breaks down and a strike or lockout takes place, people act quickly and sometimes with emotion or anger. It is no time for uncertainty or abstract debate about where the limits of permissible conduct lie.<sup>84</sup> Some of the more confrontational disputes have been made more emotional and difficult to settle because of threats of conduct clearly contrary to the intent of the Code. This was only possible because the law was buried deep in the case reports rather than plain for all to see."<sup>85</sup>

### 5 3 3 REPLACEMENT WORKERS

In his article, Jonathan Joffe<sup>86</sup> asserted that there are divided views on the issue of replacement labour. Labour was virtually unanimous in favouring a legislated prohibition on

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<sup>84</sup> [http://www110.hrdc-drhc.gc.ca/sfmc\\_fmcs/lcctr\\_tclcr/page42.html](http://www110.hrdc-drhc.gc.ca/sfmc_fmcs/lcctr_tclcr/page42.html): Sims, Blouin and Knopf Canadian Labour Code Part1, Review *Seeking A Balance*.

<sup>85</sup> Sims *et al Seeking A Balance* 42.

<sup>86</sup> Joffe *Violence and the Law in the 1989 Railway Strike* (1990).

the use of replacement workers (a so called “anti-scab” law). Management was equally unanimous in its opposition to such a proposal.

One argument advanced in favour of anti-replacement worker legislation, he adds, is the need to avoid violent incidents that can arise when replacement workers attempt to cross picket lines set up by striking or locked out workers.

No one favours violence, however caused. But violence is not, and need not be, an inevitable consequence of the use of replacement workers. Unions advance this argument somewhat gingerly, and employers resent it being advanced at all. In the employer’s view, to restrain its options because those on strike may become violent is seen as punishing the victim, not the perpetrator, says Jonathan.

Neither side of this argument is fully justified. Experience shows that violence most often occurs when replacement workers and strikers come into contact with each other in a heated labour dispute. Sensible measures to reduce that potential should be considered seriously. Sometimes it is the strikers that instigate violence and sometimes, but by no means at all times, this is due to encouragement from their leadership. We recognize the important efforts taken by many union leaders to discourage violence in such situations. But it is not always the fault of the strikers or their union. Replacement workers and front line supervisors have also, on occasion, engaged in their fair share of provocative conduct.<sup>87</sup> Guy Ryder adds:

“It is the threat of permanent job loss, and taunting about between replacement workers and strikers, that raises picket line pressures towards the potential for violence. Creating a clear statutory right to return to work, eliminating the threat of permanent replacement, should moderate some of the deepest tensions.”<sup>88</sup>

The use of replacement workers undermines the structural elements that ensure the internal cohesion of the collective bargaining system, by introducing a foreign body into a dispute between two clearly identified parties. It upsets the economic balance of power, compromises the freedom of expression of workers engaging in a strike or lockout, shifts the original neutral ground of the dispute, and leads eventually to a perception of exploitation of the individual. The question of the replacement of workers engaging in industrial action must be examined systematically and not by simply relying on certain characteristics of the dynamics of disputes, such as their frequency or duration. These facts must nevertheless be considered. The conclusion to be drawn from my analysis is

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<sup>87</sup> See Joffe *Violence and the Law*.

<sup>88</sup> General Secretary ITUC.

that there is, on the whole, a situation of illegitimacy that Parliament must condemn in no uncertain terms.”<sup>89</sup>

#### **5 4 THE RIGHT TO STRIKE IN UNITED KINGDOM (UK)**

The explanation of the approach to industrial relations law adopted by the Thatcher governments of the 1980s lies in the lessons learned from the perceived mistakes of the Heath government of the early 1970s.<sup>90</sup> In its Industrial Relations Act 1971 the Heath administration introduced, in a single step, an entirely new and comprehensive legal framework, covering the broad sweep of industrial relations, trade union and employment law. This Act was opposed by the trade unions, and more often than not ignored by employers.

The Employment Act 1988, which received the Royal Assent on 26 May 1988, was pursued since the Conservatives first came to power in 1979. The Conservative administration has since then issued a number of legislation on industrial relations and trade union law. In the field of strike law and industrial action, for example, the framework which stood in 1979 has now been amended or added to on four separate occasions.

The 1988 Act introduced a number of new controls and restrictions on the ability of unions and individuals to organise lawful industrial action. Individual union members were given a new right to restrain the conduct or support of action which does not enjoy support of a ballot. A number of important new requirements with which the ballot had to comply in order to secure legal validity were introduced. This Act, further, restricted the organisation of industrial lawful action over closed shop and union membership issues.<sup>91</sup>

In most European countries the right to strike is enshrined in, and protected by, a written Constitution. The contract of employment of those who strike is considered suspended for the duration of the strike. It is not considered to have been broken. Exceptions are the UK and Ireland.<sup>92</sup>

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<sup>89</sup> [http://www110.hrhc-drhc.gc.ca/sfmc\\_fmcs/lcctr\\_tclcr/page48.html](http://www110.hrhc-drhc.gc.ca/sfmc_fmcs/lcctr_tclcr/page48.html).

<sup>90</sup> Bowers and Auerbach *A Guide to the Employment Act 1988* (1988) 1.

<sup>91</sup> Bowers *et al* 7.

<sup>92</sup> Manfred Davidmann *The Right to Strike* (1996): <http://www.solhaam.org/articles/right.html>.

The UK has no written Constitution and the right to strike is not protected. Dependent on which side the government of the day represents, the law is changed to favour either owners and directors or else the working population. Conservative governments, for example, in power since 1979, had by 1996 passed something like eight Acts of Parliament reducing, indeed removing, basic rights of the working population.

Under this legislation any striker in the UK is considered to have broken his contract of employment as all those on strike may be sacked together without compensation. They may be sacked selectively when the strike is “unofficial”. The lack of protection applies regardless of the cause of the strike. So where an employer deliberately engineers a dispute it is the workforce which may be in breach of contract. The workforce is then exposed to dismissal without compensation, may lose redundancy payments, may be disqualified from unemployment benefit, and all without remedy for unfair dismissal.

In the western industrialised world like the UK, this wealthy country which is self-sufficient in oil, has become poverty-stricken, its economy in a mess. The ruling establishment apparently prefers to derive its wealth and profit from lowering the wages, standard of living and quality of life of the population, instead of leading the population in the economic struggle against foreign world-wide competition and sharing the spoils in fair and equitable manner with them.

Since 1875, legislation has provided limited protection for persons organising industrial action in contemplation or furtherance of a trade dispute. This protection has never taken the form of a positive right to strike; rather it has simply consisted of a system of immunities for particular heads of common law liability.<sup>93</sup> The Trade Disputes Act 1906, for example, accorded protection against specified torts where dispute organisers acted within the “golden formula”. Since 1980 the scope for lawful industrial action is considerably narrower than in 1906. The relevant legislation was brought together in the Trade Union and Labour relations (Consolidation) Act 1992, which was itself amended by the Trade Union Reform and Employment Rights Act 1993 and the Employment Relations Act 1999.

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<sup>93</sup> Sweet and Maxwell *Encyclopedia of Employment Law* (2002) Vol 2 [R.43] 1956.

In an important break with the past, the Employment Relation Act 1999 increased the statutory protection against dismissal for those taking part in industrial action by making it automatically unfair to dismiss an employee for taking “protected industrial action” in certain circumstances. However the Act still falls short of guaranteeing a right to strike.

Article 6(4) of the European Social Charter expressly recognises the “right of workers to collective action in cases of conflict of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into”. The Committee of Independent Experts that monitors compliance with the charter has found that the United Kingdom is in breach of this obligation because of the lack of protection against dismissal during strikes.<sup>94</sup>

In English law there was no positive right for workers to organise or participate in industrial action. “The law was a complex web of common law and statutory provisions, and the lack of any consistent approach is typified by the fact that there is no generally applicable legislative definition of a ‘strike’ or ‘lock-out’ despite the crucial importance of these concepts in a number of contexts”, adds Sweet.

Participation in a strike constituted breach of the employment contract despite a strike notice having been given, unless if the notice constitutes notice of termination or the contract makes provision for suspension. Employers could sue workers for damage the industrial action causes, withhold wages, and/ or dismiss workers without notice.

Since 1999, the position of employees taking part in the industrial action has become more secure. A dismissal will now, under the Employment Relations Act 1999, be automatically unfair where the employee is dismissed for taking “protected industrial action”. However the industrial action must be authorised by a union and must be covered by statutory immunities and should, normally last for no longer than eight weeks.<sup>95</sup>

The lack of a individual right to strike is mirrored at common law by the lack of a right to “lock-out”. A lock-out may constitute a breach of contract on the part of the employer unless

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<sup>94</sup> Sweet and Maxwell 1957.

<sup>95</sup> Sweet and Maxwell 1958.

workers are given notice of termination of appropriate length; such a breach entitles the workers to sue for damages for loss of wages during the lock-out, say Sweet.

It is submitted therefore that the freedom to take industrial action now exists in UK, albeit within tightly drawn limits determined by a welter of common law and statutory rules, the sheer complexity of which makes it extremely difficult to predict with certainty the legality of any proposed industrial action. Members of the House of Lords have suggested that the courts retain a residual discretion to grant an interlocutory injunction even if there is a likelihood that the defendant (strikers) will be able to establish a trade dispute defence where the industrial action may have disastrous consequences for the employer or the public at large.<sup>96</sup> Lastly it is worth mentioning that the State retains the powers to mitigate the effect of industrial disruption. These include the power to introduce State workers as replacement labour<sup>97</sup> and, when specific service is threatened, to take a wide range of other measures, except compelling strikers to resume work.

## **5 5 THE RIGHT TO STRIKE IN THE UNITED STATES OF AMERICA**

Neither of the two major ILO Conventions on Freedom of Association expressly refers to the right to strike. However, ILO's supervisory bodies have held that the right to strike is one of the essential means available to workers and their organisations for promoting and protecting their economic and social interests.<sup>98</sup> This right has been qualified and limited by the ILO. Strikes must be peaceful and may be subjected to certain pre-conditions determined through legislation. For instance, strikes by workers engaged in essential services may be prohibited or limited to some extent, through minimum service agreement.

Article 8 of the ICESCR<sup>99</sup> on Freedom of Association provides that States that are parties to the Covenant should undertake to ensure the right to strike, provided that it is exercised in conformity with the laws of the particular country.

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<sup>96</sup> Sweet and Maxwell 1961.

<sup>97</sup> Emergency Powers Act 1964, s.2.

<sup>98</sup> Lance and Diamond *Human Rights, Labour Rights and International Trade* (2003) 34.

<sup>99</sup> International Covenant on Economic, Social and Cultural Rights.

The divergence among the Freedom of Association obligation of ILO Convention No 87, the ICESCR provisions and the obligations of the ICCPR<sup>100</sup> has been noted by the United States government. Ratification of the ICCPR<sup>101</sup> was not thought to bind the US to ensure the right to strike. It should be noted, however, that no reservation, declaration or understanding was made concerning this issue at the moment of ratification, presumably because the US did not wish to state officially that it did not accord workers the right to strike, adds Lance.

However the administration evinced concern regarding the conformity of the United State's legislation with international norms regarding the right to strike in ILO Conventions and in ICESCR.

Despite the administration's view concerning the ICCPR, the US is, nonetheless, committed to Freedom of Association and to the ILO's interpretation that this freedom implies the right to strike, by virtue of its membership in the ILO.

The US government has not directly denied this commitment. It has, however, denied in a case before the ILO Body that the permission that the US law accords to employers to replace striking workers does infringe on the right to strike.<sup>102</sup> In 1990 the IFL-CIO<sup>103</sup> brought a complaint against the US before the ILO Governing Body on Freedom of Association relating to the so-called "Mackay doctrine"<sup>104</sup> which permits employers to hire permanent replacement workers for strikers in certain types of strikes.

The US maintained that its laws guaranteed the right of association and the right to strike and that the "Mackay doctrine" did not violate the right to strike. The committee held, however, that the right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social rights. The Committee

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<sup>100</sup> International Covenant on Civil and Political Rights.

<sup>101</sup> The Human Rights Committee monitoring the ICCPR ruled in the Alberta case that the norm "Freedom of Association" in the ICCPR does not imply the right to strike.

<sup>102</sup> Lance *et al* 35.

<sup>103</sup> Illinois Federation of Labor and Congress of Industrial Organizations.

<sup>104</sup> *NLRB v Mackay Radio & Telegraph Co* 304 U.S. 333 (1938) is a 7-to-0 decision by the United States Supreme Court which held that workers who strike remain employees for the purposes of the National Labor Relations Act (NLRA). The Court granted the relief sought by the National Labor Relations Board, which sought to have the workers reinstated by the employer. However, the decision is much better known today for its obiter dicta in which the Court said that an employer may hire strikebreakers and is not bound to discharge any of them if or when the strike ends.

considered that this basic right is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker.

Efforts to amend the “Mackay doctrine” by legislation have been made by labour groups in the US to no avail. The “Strike Replacement Bill” aimed at amending this doctrine failed passage in 1994, concludes Lance.

## **5 6 THE RIGHT TO STRIKE IN SOUTH AFRICA**

The Constitution of the Republic of South Africa protects the right to strike, as been seen in the *Bader Bop* case and in the *Certification* matter, referred to in chapter four. It was also noted in this chapter that the final Constitution does not make provision for a lock-out.

The irony arose, however, in the *Volkswagen* case<sup>105</sup> when 1300 workers were dismissed for participating in a stoppage of work in support of 13 dissident shop stewards suspended by their union. The stoppage was in pursuit of an internal union dispute. It was therefore not regarded as a strike within the meaning of section 213 of the LRA. Professor Sir Bop Hepple asserts that whether the dispute was a matter of mutual interest between the employer and employee is essentially a question of facts for the Commissioner. He continues to argue whether the dissent of a significant number of workers was not a matter of mutual interest to the employer.

The CCMA Commissioner ordered the re-instatement of the workers on the basis that the dismissal, while substantively fair, was procedurally unfair. This decision was upheld by the Labour Court but re-instatement was not competent for procedural flaws. The Labour Appeal Court found that the dismissal was both procedurally and substantively fair. The Constitutional Court dismissed an application for leave to appeal on the grounds that the applicant lacked prospects of success in the appeal hearing.

Professor Neville Rubin, who represented the dismissed strikers, pointed out that the LAC was highly selective in its use of the Report of the supervisory committee of the ILO. In particular, he added, the LAC ignored the ILO Report’s reference to a strike as “one of the

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<sup>105</sup> *Mzoku v Volkswagen SA* (2001) 23 ILJ 771 (CCMA); (2001) 22 ILJ 993 (LC); (2001) 22 ILJ 1575 (LAC).

essential means available to workers and their organisations for promotion and protection of their economic and social interests”, and the Report’s statement that “these interests not only have to do with better working conditions and pursuing collective demands of an occupational nature”, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.

## **CHAPTER SIX**

### **CONCLUSION**

South Africa comes from a history where, workers, and in particular African workers, did not enjoy a right to strike without consequences. Participation in industrial action was treated as a delictual or criminal offence by employers and the government for mere participation in a strike. A history where participation in a strike was treated as breach of contract and therefore the employer could dismiss striking employees or order specific performance. The origins of labour rights are to be found in the history of the struggle against apartheid, as it were. The workplace was therefore a critical site of the struggle, characterised by deep-rooted inequalities, discrimination, segregation, job reservation and influx control. The laws ensured that there was no freedom of association, movement, or assembly.

This study has shown that the Labour Relations Act of 1995 marked a major change in South Africa's statutory industrial relations system. Following the transition to the new political dispensation and a democratic system, the LRA encapsulated the new government's aims to reconstruct and democratise the economy and society. It ushered in a new order where employers and workers had the opportunity to move away from the adversarialism that had characterised their relations in the past. It promoted more orderly collective bargaining and greater co-operation at workplace and industry levels, and provided an expeditious dispute resolution system.

The right to strike in the LRA was given rise by the Interim Constitution and subsequently the final Constitution of 1996. The Constitution entrenched the right of every employee to form and join trade unions and to participate in its activities and programmes and to strike.

In fulfilling the obligation of the Republic to international law, the Constitution provides that when interpreting the Bill of Rights, consideration must be given to international law and may also be given to foreign law.

To this end, this study has taken a closer view of the provisions of international instruments and institutions such the International Labour Organisation. The two pertinent ILO Conventions, *ie* Conventions 87 and 98 were considered. Another international instrument that was closely canvassed was Art 8 of the International Covenant on Economic, Social and Cultural Rights of December 19, 1966 (ICESCR) as well as the International Covenant on Civil and Political Rights (ICCPR).

It was noted that the ILO Committee on Freedom of Association, while not very vocal on the issue, but only considers replacement of strikers to be justified

1. in the event of a strike in an essential service, where a strike is prohibited by law, and
2. when a situation of acute national crisis arises.

The Committee of Experts' view was that: "a special problem rises when legislation or practice allows enterprises to recruit workers to replace their own employees on legal strike. The difficulty is even more serious if, under legislative provisions or case law, strikers do not, as of right, find their job waiting for them at the end of the dispute, as is the case in the United States. The committee considers that this type of provision or practice seriously impairs the right to strike and affects the free exercise of trade union rights.

This study, further, did a comparative analysis of the provisions of strike law in other jurisdictions like the United States of America, Canada and the United Kingdom.

In Canada it was noted that in the Federal jurisdiction compulsory vote by secret ballot is conducted before a strike; which has since been outlawed in South Africa under the new labour Relations Act; and result are determined by a majority of those in the unit who vote. Vote is not required if a legal lockout has occurred. At least 72 hours' notice has to be given to the other party and a copy sent to the Minister of Labour. Notice is not required if a legal strike/lockout by the other party has occurred.

It was further noted that, unlike in South Africa where one law applies across provinces and most sectors and industries, in Canada provinces determine their own laws. In most provinces the law still contains restrictions on the right to form a union, to bargain collectively and to strike, particularly in the public sector. The government of Quebec, for example, imposed a

collective agreement on its public sector workers, thereby denying their bargaining rights and taking away their right to strike.

It was also noted that that the UK has come a long way and strike law always depended on which government was in place. It was noted that the freedom to take industrial action now exists in UK, albeit still within tightly drawn limits determined by a welter of common law and statutory rules, the sheer complexity of which makes it extremely difficult to predict with certainty the legality of any proposed industrial action.

The courts retain a residual discretion to grant an interlocutory injunction even if there is a likelihood that the strikers will be able to establish a trade dispute defence, where the industrial action may have disastrous consequences for the employer or the public at large.

Lastly it is worth mentioning that the State in the UK still retains the powers to mitigate the effect of industrial disruption. These include the power to introduce State workers as replacement labour and, when specific service is threatened, to take a wide range of other measures, except compelling strikers to resume work.

It is clear that in the UK the State plays a very active role in industrial conflict, unlike in South Africa where the State leaves labour disputes to the employers and workers and only acts as a mediator and/or arbitrator, when required by law and or by the parties.

This study also revealed that while the United States government maintained that it respected the right of workers to strike and that the “Mackay doctrine” did not violate the right to strike, this basic right is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker.

It is submitted that, South Africa has democratised the workplace and done away with legislation that made it criminal for workers to participate in a strike and it has made provisions for a protected strike under the LRA. While South Africa has tried to level the playing field and brought some equilibrium in the power between workers and employers, I

agree with Cameron *et al* in: *The New Labour Relations Act*<sup>106</sup> where he correctly identified the relationship between collective bargaining and industrial action:

“The guarantor of the institution of collective bargaining is the threat of industrial action. No threat is effective unless there is a real possibility of its eventuality. Strikes and lock-outs are integral features of collective bargaining and unless they are afforded protection ... the threat becomes non-existent. Without the potential for pain, there would be no serious endeavour to negotiate and conclude a collective settlement.”

The last sentence in the above paragraph is worthy of note. If employers are allowed, during a protected lock-out (following a protected strike) to hire replacement labour, then the potential for pain does not exist and indeed, “no serious endeavour to negotiate and conclude a collective settlement” will be made.

The Constitutional Court, in the *Certification Case*, held that the right to lock-out striking workers is not necessarily the equivalent of the right of workers to strike. Allowing employers the right to lock-out accompanied by the right to hire replacement labour to replace striking employees defeats the very grain of the principle of “balance of power” in collective bargaining.

It is submitted, further, that this provision in section 76(1)(b) of the LRA has the potential to result in violent strike action.

This treatise constitutes an attempt at identifying a gap in the LRA and in particular Chapter IV of the Act that has the potential to frustrate the parties to a dispute and may result in violent industrial action.

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<sup>106</sup> At 4.

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South Africa is a State founded on the principles of a constitutional democracy. The 1996 Constitution is the successor of the earlier interim Constitution, Act 200 of 1993, which was brought into effect on 27 April 1994, following the first democratic elections in South Africa. Everyone has the right to fair labour practices; Every worker has the right to form and join a trade union and to participate in the union's activities; Every worker has the right to strike. This situation gave rise to the 1922 strike, one of the watershed moments in South African labour history. The result of this strike was the passing of the Industrial Conciliation Act in 1924. This Act was the direct forefather of the Industrial Conciliation Act of 1956, which was later, renamed the Labour Relations Act of 1956. Of the republic of south africa, 1996. As adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly. ISBN 978-0-621-39063-6. Constitution of the republic of south africa. the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by. 23. (1) Everyone has the right to fair labour practices. (2) Every worker has the right (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike.