

# The Right to Strike and Replacement Labour: South African Practice Viewed from an International Law Perspective



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## Abstract

South Africa is a member of the International Labour Organisation (hereafter the ILO), an establishment that sets international labour law standards through its conventions, recommendations and expert supervisory committees. Also, South African courts have an obligation to interpret labour provisions in accordance with international law and customs. This paper examines whether by way of the *Labour Relations Act* of 1995 (hereafter the LRA) the current regulation of both the right to strike and the use of replacement labour during strikes falls within the ambits of internationally and constitutionally acceptable labour norms.

Strike action constitutes a temporary and concerted withdrawal of work. On the other hand, replacement labour maintains production and undermines the effect of the withdrawal of labour. Consequently, the ILO views the appointment of strike-breakers during legal strikes in non-essential services as a violation of the right to organise and collective bargaining, and in a number of countries replacement labour is prohibited. The *Constitution of the Republic of South Africa*, 1996 enshrines every worker's right to strike and the LRA gives effect to this right. However, the foundation of this right is ostensibly brought into question by the LRA in as far as it permits employers to make use of replacement labour during strike action. This article investigates whether replacement labour undermines the right to strike in South Africa and considers to what extent labour legislation may be misaligned with international norms. In conclusion the research makes findings and proposes alternatives that may be considered to resolve this seemingly skewed situation.

## Keywords

Labour Law, Replacement labour, International Labour Organisation, The Right to Strike.

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## 1 Introduction

Internationally, it is far from clear precisely what constitutes a "strike".<sup>1</sup> However, though statutory definitions differ,<sup>2</sup> it is widely accepted that it consists of at least two elements.<sup>3</sup> First, there has to be a temporary interruption (or withdrawal) of work, and secondly, it concerns concerted action.<sup>4</sup> According to Kahn-Freund, the goal of "a strike is a concerted *stoppage* of work" by workers in an effort to have their grievances addressed after failed collective bargaining attempts.<sup>5</sup>

In the context of these elements the employment of persons to maintain production during a strike or lock-out is controversial. The employment of "scab" or "replacement" labour strengthens the hand of employers and in essence threatens "to rob strike action of much of its effect".<sup>6</sup> Consequently, it is prohibited in a number of countries and strictly regulated in others.<sup>7</sup> The International Labour Organisation (hereafter the ILO) views the use of replacement labour during legal strikes in non-essential services as a violation of the right to freedom of association.<sup>8</sup>

Section 23(2)(c) of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution, 1996*) enshrines "every" worker's "right to strike",

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<sup>1</sup> Waas "Introduction" 1. Hepple "Freedom to Strike and its Rationale" 28 confirms that there is no systematic and detailed code on strikes.

<sup>2</sup> See, for example, the definition of "strike" in s 213 of the *Labour Relations Act 66 of 1995* (hereafter the LRA).

<sup>3</sup> Hepple "Freedom to Strike and its Rationale" 28; Waas "Introduction" 2, 18. Strike action mostly is related to collective bargaining and it serves as organised labour's economic weapon to force employers to reach a collective agreement.

<sup>4</sup> Hepple "Freedom to Strike and its Rationale" 28-29 highlights that the individual withdrawal of labour does not amount to a strike. Okene 2012 *JJC* 243 further confirms that there should be an intentional agreement on the part of the participants to strike. They accept the temporary consequences and a strike is not just a spontaneous uncoordinated activity.

<sup>5</sup> Kahn-Freund *Labour and the Law* 226, emphasis added. Also see Davies and Freedland *Kahn-Freund's Labour and the Law* 293.

<sup>6</sup> Cheadle *et al Strikes and the Law* 65. It should be noted that the term "scab" is a derogatory term which refers to external persons that enter the workplace to continue with the work of employees on strike.

<sup>7</sup> Waas "Introduction" 61. Also see the discussion in para 2.4 below.

<sup>8</sup> See the discussion in para 2.4 below; Cheadle *et al Strikes and the Law* 66.

section 23(5) confers on every employer and every employee the right to "engage in collective bargaining", and section 23(1) guarantees to both employers and employees a right to fair labour practices.<sup>9</sup> The *Labour Relations Act* 66 of 1995 (hereafter the LRA) was promulgated to give effect to these labour rights<sup>10</sup> and it provides that "every employee has the right to strike and every employer has a recourse to lock-out".<sup>11</sup> However, on the face of it the foundation of this right is brought into question by the LRA in as far as it permits employers to make use of replacement labour during a strike.<sup>12</sup>

The *Constitution*, 1996 requires that the interpretation of legislation must be in accordance with international law.<sup>13</sup> It is against this background that this contribution investigates whether replacement labour in fact undermines the right to strike or whether it is justifiable in terms of section 36 of the *Constitution*, 1996. If it does clash with the right to strike, to what extent is South Africa's regulation misaligned with international norms? The article also explores what should be done to remedy the situation.

This research commences by analysing the ILO's position regarding the exercise of the right to strike and the use of replacement labour. Secondly, it explores the constitutional right to strike and its interaction with the use of replacement labour within the ambits of the fundamental right to fair labour practices and the right to engage in collective bargaining. Thirdly, it considers the LRA's position regarding strikes, lock-outs and replacement labour. Fourthly, it considers whether replacement labour could be one of the reasons for violent strikes in the sphere of collective bargaining. In the final instance the article formulates its findings and makes

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<sup>9</sup> See *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) (hereafter *NEHAWU v UCT*), where the Constitutional Court grappled with the meaning of "fair labour practices".

<sup>10</sup> Section 1 of the LRA.

<sup>11</sup> Section 46(1) of the LRA. Section 213 of the LRA defines a strike as the "partial or complete concerted refusal to work, ... by persons who are or have been employed by the same employer ..., for the purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest ..., and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory."

<sup>12</sup> Section 76(1)(b) of the LRA.

<sup>13</sup> Sections 39 and 233 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*, 1996). *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* 2003 24 ILJ 305 (CC) (hereafter *Bader Bop*) para 28 acknowledged that "in interpreting s 23 of the Constitution an important source of international law will be the conventions and recommendations of the ILO." Also see *SA Transport & Allied Workers Union v Moloto* 2012 33 ILJ 2549 (CC) para 58.

recommendations to resolve some of the inherent tensions among these apparently conflicting rights.

## 2 The International Labour Organisation

### 2.1 History, structure and influence of the ILO

Subsequent to the First World War it was realised that in order to extend the protection of workers' rights under capitalism, co-operation between trade unions, organised industry and governments would be essential.<sup>14</sup> This sense prompted the founding fathers of the ILO to establish the institution's tripartite structure, which would provide labour, business and government with an equal say in the process of standard setting.<sup>15</sup> South Africa was a signatory to the *Treaty of Versailles* in 1919, which led to the establishment of the ILO.<sup>16</sup> A key reason behind the establishment of the ILO was to establish uniform norms which apply to all member countries.<sup>17</sup>

The ILO has relatively weak enforcement mechanisms of its established labour norms.<sup>18</sup> Although the ILO's Constitution serves as a binding treaty among member states,<sup>19</sup> it does not establish an "international labour parliament" that has the power to bind sovereign states.<sup>20</sup> Instead, it provides for the voluntary acceptance of conventions, which once ratified become binding on those member countries.<sup>21</sup> The ILO's supervisory bodies then "take such action as may be necessary to make effective" the provisions of the convention.<sup>22</sup> Should a member state not give effect to its obligations contained in a ratified convention, complaints may be lodged with the ILO's supervisory bodies.<sup>23</sup> For the most part the ILO relies on its

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<sup>14</sup> Hepple *Labour Laws and Global Trade* 29; Cheadle *et al Strikes and the Law* 7-9.

<sup>15</sup> Hepple *Labour Laws and Global Trade* 29-33.

<sup>16</sup> Van Niekerk and Smit *Law@work* 23. In 1961 the International Labour Conference adopted a resolution calling for South Africa to withdraw from the ILO and in 1964 South Africa gave notice of its intention to resign.

<sup>17</sup> Alston "Labour Rights as Human Rights" 14.

<sup>18</sup> Maupain "Is the ILO Effective in Upholding Workers' Rights?" 92-94.

<sup>19</sup> Rubin *Code of International Labour Law* 3. When a state becomes a member of the ILO it accepts the fundamental principles contained in the *International Labour Organisation Constitution* (1919) (hereafter *ILO Constitution*). Also see a 26 of the *Vienna Convention on the Law of Treaties* (1969).

<sup>20</sup> Van Niekerk and Smit *Law@work* 25.

<sup>21</sup> Rubin *Code of International Labour Law* 5. However, there are eight core ILO conventions that are binding on member states without a need for their ratification.

<sup>22</sup> Article 19, para 5(d) of the *ILO Constitution*.

<sup>23</sup> Article 22 of the *ILO Constitution*.

status and on encouragement to influence member states to give effect to international labour standards.<sup>24</sup>

Initially, the ILO played only an indirect role in the development of South African labour law.<sup>25</sup> However, with the introduction of democracy in 1994 the landscape changed. South Africa was readmitted as a member of the international community and the *Constitution*, 1996 expressly recognises international law as a foundational principle of democracy.<sup>26</sup>

Sections 39(1)(b) and (c) of the *Constitution*, 1996 provide that international law "must" be considered and that foreign law "may" be taken into account by courts and tribunals.<sup>27</sup> Furthermore, one of the purposes of the LRA is "to give effect to obligations incurred by the Republic as a member state" of the ILO.<sup>28</sup> The decisions of the ILO's expert committees, such as the Committee of Experts on the Application of Conventions and Recommendations (hereafter the CEACR) and the Committee on Freedom of Association (hereafter the CFA), form a source of international law.<sup>29</sup> Despite their non-binding nature the supervisory bodies' observations have been accepted by many judicial bodies to be of highly persuasive legal value.<sup>30</sup> A classic example of drawing more from conventions than is explicitly contained in the instruments is evident from the expert committees' elucidation of the right to strike from the *Freedom of Association and Protection of the Right to Organise Convention*, 1948, No 87 (hereafter *Convention 87* of 1948) and the *Right to Organise and Collective Bargaining Convention*, 1951, No 98 (hereafter *Convention 98* of 1951).<sup>31</sup>

South African courts rely not only on binding and non-binding conventions but also take heed of the pronouncements of the expert committees and the contents of ILO recommendations.<sup>32</sup> In *S v Makwanyane*<sup>33</sup> the Constitutional Court held that the judiciary should rely on both ratified

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<sup>24</sup> Van Niekerk and Smit *Law@work* 25.

<sup>25</sup> Novitz "International and Regional Framework" 46.

<sup>26</sup> Van Niekerk and Smit *Law@work* 23.

<sup>27</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 39.

<sup>28</sup> Section 1(b) of the LRA.

<sup>29</sup> Du Toit *et al Labour Law Relations* 78 explain that the principles laid down by the CFA derive from over 2 500 cases that are published in the ILO *Digest of Decisions* 2006.

<sup>30</sup> Novitz *International and European Protection* 95; Gravel and Charbonneau-Jobin 2003 <https://goo.gl/w6WYvG> 9; and Thomas *et al* 2015 <https://goo.gl/MwkgR1> 255.

<sup>31</sup> See the discussion that follows in para 2.2 below.

<sup>32</sup> Cheadle *et al Strikes and the Law* 10.

<sup>33</sup> *S v Makwanyane* 1995 3 SA 391 (CC). At para 35 the Court held "in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions."

conventions and those to which South Africa is not a party. *Bader Bop*<sup>34</sup> also considered the ILO's expert committee decisions to determine whether a minority trade union has the right to strike when it seeks to gain organisational rights in order to collectively bargain. Based on these principles the Court held that minority trade unions do have the right to strike to gain organisational rights. Therefore, in accordance with South African law there can be no doubt that the right to strike and the associated regulation of the use of replacement labour must be interpreted in a manner that is consistent with the ILO position as articulated by the supervisory committees.

## **2.2 Is there an internationally recognised right to strike?**

ILO conventions do not make provision for an explicit right to strike. However, the ILO's expert committees have interpreted the provisions of *Conventions* 87 of 1948 and 98 of 1951 as containing a derivative right to strike.<sup>35</sup> This right flows from "a liberal interpretation of freedom of association" and the explicit right to organise and collectively bargain by the CFA and CEACR.<sup>36</sup> Article 3 of *Convention* 87 of 1948 states that:

3. (1) 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.

3. (2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

In a manner complementary to *Convention* 87 of 1948, article 4 of *Convention* 98 of 1951 affirms that:

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.

Novitz highlights the fact that in interpreting the above provisions the CFA has consistently regarded the right to strike "as one of the essential means through which workers and their organisations may promote and defend their economic interests" when collective bargaining fails.<sup>37</sup> The CFA deems the right to strike as "an intrinsic corollary to the right to organise protected

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<sup>34</sup> *Bader Bop* paras 27-31.

<sup>35</sup> Cheadle *et al Strikes and the Law* 12-14.

<sup>36</sup> Novitz "International and Regional Framework" 47.

<sup>37</sup> ILO *Digest of Decisions* 2006 para 522.

by *Convention 87* of 1948".<sup>38</sup> Also, Ben-Israel aptly states that common sense dictates that the removal of the right to strike would be inconsistent with other internationally-recognised principles, such as the proscription of slavery and the abolition of forced labour.<sup>39</sup> It is submitted that this argument can be taken one step further by adding that the right to withhold work is the direct opposite of forced labour.

The ILO has refrained from defining strike action in an effort to prevent concrete limitations being formulated against legitimate types of strike action.<sup>40</sup> This lack of a definition has resulted in the right being disputed by employers' representatives in the tripartite body of the ILO in particular.<sup>41</sup> They have also questioned the authority of the CEACR to interpret *Convention 87* of 1948 as it has done<sup>42</sup> and have argued that the tripartite constituents of the ILO never intended the adoption of this right.<sup>43</sup>

Nevertheless, it seems that challenges to the ILO's supervisory bodies' stance with regard to a right to strike by employer groups have at least partially subsided. In February 2015 at an ILO tripartite meeting the Workers' and Employers' Groups issued a joint statement which stated that the:

right to take industrial action by workers and employers in support of their legitimate industrial interests is recognized by the constituents of the ILO.<sup>44</sup>

The statement also recognised the mandate and the legitimacy of the CEACR to formulate decisions in this regard.<sup>45</sup> From this statement we conclude that international law establishes an embedded right to strike.

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<sup>38</sup> ILO *Digest of Decisions* 2006 para 523.

<sup>39</sup> Ben-Israel *International Labour Standards* 23. It is submitted that the right to withhold work is the direct opposite of forced labour. Also see arts 4 and 6 of the *Universal Declaration of Human Rights* (1948).

<sup>40</sup> Gerigon, Otero and Guido 1998 <https://goo.gl/wvvJih> 11.

<sup>41</sup> The employers' group of representatives staged a walk out of the 2012 ILO's Conference Committee on the Application of Standards. The employers considered it as unacceptable that the CEACR interpreted *Convention 87* as containing a right to strike. Novitz "International and Regional Framework" 55; Weiss "Re-Inventing Labour Law?" 43.

<sup>42</sup> See above.

<sup>43</sup> IOE 2014 <http://www.ioe-emp.org/index.php?id=1449>. Also see Madhuku *Labour Law in Zimbabwe* 430, who states that the absence of such an explicit reference does not mean the right does not exist in international law.

<sup>44</sup> ILO 2015 <https://goo.gl/ksw9Pg>. Also see Novitz "International and Regional Framework" 57.

<sup>45</sup> See above.

### 2.3 Regulation of the right to strike

Apart from collective bargaining the CFA and the CEACR consistently have stated that the right to strike is a legitimate means by which workers promote and protect their economic interests<sup>46</sup> and that this right is subject to regulation.<sup>47</sup> So, for example, the CFA endorses limitations on strikes in respect of "essential services"<sup>48</sup> and in the event of "an acute national emergency".<sup>49</sup> It also accepts that limitations pertaining to notice periods and balloting may be imposed by member states as long as these are thought not to "place substantial limitation on the means of [strike] action".<sup>50</sup> In this connection Ben-Israel adds that where the right to strike is restricted there should be adequate compulsory alternatives to the right to strike.<sup>51</sup>

Article 8 of *Convention 87* of 1948 states that workers and their associations have an obligation to respect the law of the land.<sup>52</sup> The CFA emphasises that in furthering and defending the interests of workers there is an implicit obligation in the right to strike that it be done peacefully.<sup>53</sup> However, this recognition is balanced against the fact that a strike by its very nature is an inconvenience to the employer and the community. Rallying and blockades often occur at picket lines and the ILO *Digest of Decisions* reiterates that

[t]aking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful. The case is different, however, when picketing is accompanied by violence or coercion of

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<sup>46</sup> ILO *Digest of Decisions* 1994 para 139 confirms that there must be "genuine" legislative intent to protect the exercise of the right to strike, in order to prevent industrial anarchy.

<sup>47</sup> ILO *Freedom of Association* 2006 para 547 states: "The conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organisations". Also see Ben-Israel *International Labour Standards* 94.

<sup>48</sup> ILO *Digest of Decisions* 2006 para 583 defines "essential services" as those "the interruption of which would endanger the life, personal safety or health of the whole or part of the population".

<sup>49</sup> ILO *Digest of Decisions* 2006 para 570.

<sup>50</sup> ILO *Digest of Decisions* 2006 para 547.

<sup>51</sup> Ben-Israel *International Labour Standards* 103. There are various compensatory methods that can be used, which range from binding arbitration, third party advisory awards, and minimum wages.

<sup>52</sup> However, the law of the land must not unreasonably impair the rights of workers and their right to freedom of association. The CFA considered such an instance in Case No 965 (Malaysia) Report No 211 (1981) paras 179-182. Here, government officials had the power to ban strikes for a period of 6 months. The CFA concluded that such interference was not justifiable.

<sup>53</sup> Ben-Israel *International Labour Standards* 94.

non-strikers in an attempt to interfere with their freedom to work; such acts constitute criminal offences in many countries.<sup>54</sup>

There can be no misgivings about the fact that the ILO rejects strike action which causes physical harm.<sup>55</sup> Therefore, although the CFA asserts that there is a right to strike, it accepts that limits may be placed on a strike action which "might lose its peaceful character".<sup>56</sup>

#### **2.4 Does the ILO permit recourse to replacement labour?**

The ILO's expert committees have adopted clear pronouncements regarding the issue of the use of replacement labour. The first relates to the use of such services during lawful and unlawful strikes. The ILO *Digest of Decisions* 2006, states that:

If a strike is legal, recourse to the use of labour drawn from outside the undertaking to replace the strikers for an indeterminate period entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights.<sup>57</sup>

From this it is clear that the CFA is concerned about the use of replacement labour during legal strikes as this may undermine the right to strike. However it seems that the door to using replacement labour is left open during unlawful strikes. Gernigon *et al* note that the problem of replacement labour becomes even more serious when the work of employees engaged in the strike is no longer available to them after the termination of the strike.<sup>58</sup> This could happen when the employer restructures the workplace, or should workers who have been locked out be dismissed.

Secondly, the CFA points out that replacement labour should be permitted only in instances where workers are involved in essential services. Paragraph 632 of the ILO *Digest of Decisions* 2006 provides that

[t]he hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association.<sup>59</sup>

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<sup>54</sup> ILO *Digest of Decisions* 2006 para 651.

<sup>55</sup> Gerigon, Odero and Guido 1998 <https://goo.gl/wvvJih> 42. According to the authors the abuses of the exercise of the right to strike may take many forms. Examples are strikes that contravene ILO provisions, that constitute violent and criminal activities, and that advance purely political demands.

<sup>56</sup> ILO *Digest of Decisions* 2006 para 612, refers to Case No 1131 (Burkina Faso) Report No 222 (1983) para 95.

<sup>57</sup> ILO *Digest of Decisions* 2006 para 633.

<sup>58</sup> Gerigon, Odero and Guido 1998 <https://goo.gl/wvvJih> 46-47.

<sup>59</sup> Gerigon, Odero and Guido 1998 <https://goo.gl/wvvJih> 46-47.

Added to this, the CFA provides a restrictive definition of the term "essential service". It states that

- (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population).<sup>60</sup>

In the third instance, the CFA makes a further exception.<sup>61</sup> The right to strike may be limited and replacement labour may be used in relation to a portion of a workforce, which is classified as a "minimum service", which is defined as:

- (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term);
- (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and
- (3) in public services of fundamental importance.<sup>62</sup>

However, as a safeguard the CFA adds that "the trade union organisations should be able to participate" with employers when defining a minimum service.<sup>63</sup> The ILO notes that the workers' right to strike is often undermined through the excessive use of unilateral and dictated minimum services.<sup>64</sup>

The above principles confirm that replacement labour should not be used by employers as a mechanism to limit the effects of a strike during the process of collective bargaining. Replacement labour should not be used during legal strikes and should be considered only where essential or minimum services have been designated and collectively agreed upon.

In this connection Waas and Ben-Israel confirm that numerous countries prohibit the hiring of replacement labour during strikes.<sup>65</sup> However, replacement labour is regulated varyingly in different countries.<sup>66</sup> Whereas some countries strictly prohibit all internal or external replacement labour (as in Greece), other countries prohibit only the recruitment of employees from outside the employer's workforce to continue production during a strike

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<sup>60</sup> ILO *Digest of Decisions* 2006 para 576.

<sup>61</sup> Ben-Israel *International Labour Standards* 114.

<sup>62</sup> ILO *Digest of Decisions* 2006 para 606.

<sup>63</sup> ILO *Digest of Decisions* 2006 para 609

<sup>64</sup> Gerigon, Odero and Guido 1998 <https://goo.gl/wvvJih> 31.

<sup>65</sup> Waas "Introduction" 61-62.

<sup>66</sup> Waas "Introduction" 61.

(as in Argentina, the Czech Republic, Lithuania and Slovenia). In France the use of strike-breakers is subject to criminal sanction, but in the Russian Federation temporary agency workers may be employed.<sup>67</sup> The United States of America permits employers to appoint replacement labour on a permanent basis.<sup>68</sup> It remains to be seen to what extent the legal dispensation in South Africa measures up to the benchmark established by the ILO's expert committees.

### 3 The South African *Constitution*, 1996

#### 3.1 *The Bill of Rights*

South Africa's constitutional democracy rests on the foundation of the *Constitution*, 1996 which serves as the supreme law of the country. Section 2 states that the Bill of Rights "is a cornerstone of democracy" which affirms the values of human dignity, equality and freedom in South Africa. As indicated above, the *Constitution*, 1996 supports the principle that international law should be applied when interpreting the laws of the land.<sup>69</sup>

The *Bill of Rights* enshrines a number of principles which regulate workers' and employers' rights. These include the right to equality, the right not to be subjected to slavery or forced labour, freedom of assembly and to picket, freedom of association, freedom of trade, occupation and profession, the right to fair labour practices, the right to strike and the right to engage in collective bargaining.<sup>70</sup>

Cheadle makes the following prominent points about provisions contained in various constitutions. First, by their very nature human rights are not comprehensively defined. Secondly, these rights are subject to the way they are defined and limited in such constitutions. Thirdly, national legislation gives effect to these broadly-stated rights.<sup>71</sup> South Africa is no exception. The *Constitution*, 1996 makes specific reference to the fact that constitutional rights may be restricted by the limitation clause and by national laws of general application.<sup>72</sup> The question remains whether the

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<sup>67</sup> Waas "Introduction" 61.

<sup>68</sup> Waas "Introduction" 61.

<sup>69</sup> Sections 39 and 233 of the *Constitution*, 1996.

<sup>70</sup> Sections 9, 12, 17, 18, 22, 23(1), 23(2)(c) and 23(5) of the *Constitution*, 1996.

<sup>71</sup> Cheadle "Constitutionalising the Right to Strike" 68, 73 and 78.

<sup>72</sup> Section 36 of the *Constitution*, 1996 provides that such limitations must be "reasonable and justifiable in an open and democratic society" taking into account among others the following factors: "The nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose."

*Constitution*, 1996 regards the right to strike, as does the ILO, as a mechanism for workers "to promote and defend their economic interests".<sup>73</sup> Furthermore, is the use of replacement labour in line with the underlying philosophy of the *Constitution*, 1996?

### **3.2 The rights to strike and to engage in collective bargaining**

Contrary to the approach adopted by the ILO, and countries such as Canada, Germany and Sweden, in South Africa the right to strike is not derived from the right to freedom of association.<sup>74</sup> The right to strike is an independent individual human right which must be exercised collectively. Stated differently, the right attaches to individuals and trade unions do not have a monopoly in calling a strike.<sup>75</sup> Section 23(2)(c) of the *Constitution*, 1996 states that "every worker has the right to strike".<sup>76</sup> The LRA defines the notion of a strike,<sup>77</sup> limits strike action in respect *inter alia* of essential and minimum services<sup>78</sup> and regulates the use of replacement labour.<sup>79</sup> However, these limitations must align with what is permissible in terms of the *Constitution*, 1996.

South Africa's *Interim Constitution*, 1993<sup>80</sup> provided that "[w]orkers shall have the right to strike for the purpose of collective bargaining"<sup>81</sup> and "[e]mployers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired".<sup>82</sup> Contrary to this provision, the *Constitution*, 1996 contains no reference to lock-outs. During the certification proceedings in 1996 employer representatives challenged this omission. They argued that the exclusion diminished the status of the employers' right to engage in collective bargaining. In *Ex parte Chairperson*

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<sup>73</sup> ILO *Digest of Decisions* 2006 para 522.

<sup>74</sup> Hepple "Freedom to Strike and its Rationale" 31-32. In Germany, for example, the federal constitution contains no express right to strike, but the Federal Labour Court has derived such a right from a 9(3) of the *Constitution*, which guarantees freedom of association.

<sup>75</sup> In Germany, for example, only trade unions are permitted to call out a strike.

<sup>76</sup> Cheadle "Labour Relations" 365.

<sup>77</sup> Section 213 of the LRA.

<sup>78</sup> Section 65(1)(d) of the LRA. Section 75(1) defines a "maintenance service" if "the interruption of that service has the effect of material physical destruction to any working area, plant or machinery". In the absence of a collective agreement in this regard, an employer may apply to the essential service committee for a determination to declare that a part or the whole of his or her business is a maintenance service.

<sup>79</sup> Section 76 of the LRA.

<sup>80</sup> *Constitution of the Republic of South Africa Act* 200 of 1993 (hereafter the *Constitution*, 1993).

<sup>81</sup> Section 27(4) of the *Constitution*, 1993.

<sup>82</sup> Section 27(5) of the *Constitution*, 1993.

of the Constitutional Assembly: *In re Certification of the Constitution of the Republic of South Africa*,<sup>83</sup> (hereafter *In re Certification*) the Constitutional Court disagreed with the employer objections and held as follows:

The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock out are not always and necessarily equivalent.<sup>84</sup>

The Court reasoned that the right to strike and the right to lock-out are not equivalent and do not require the same protection.<sup>85</sup> It acknowledged that workers' right to engage in collective bargaining is based on the fact that "employers enjoy greater social and economic power" than workers and that "[w]orkers exercise collective power" through strike action.<sup>86</sup> In theory, the Court held, employers exercise power through a range of measures such as dismissal, replacement labour and lock-outs,<sup>87</sup> which places them in a bargaining position superior to that of employees. Moreover, the Court held that the "right of employers to use economic sanctions" will be regulated by labour legislation and that that these "will always be subject to constitutional scrutiny".<sup>88</sup>

From the above it is clear that the Constitutional Court identified the right to strike as being *sui generis*. Cheadle points to the uniqueness of the right in so far as it sanctions the infliction of harm on others.<sup>89</sup> This characteristic is not found in any of the other constitutional rights. He says that this harm is economic in nature as it stops the production of goods and the delivery of services.<sup>90</sup>

With regard to the right to engage in collective bargaining the *Interim Constitution*, 1993 made provision for the right to strike only "for the purpose of collective bargaining".<sup>91</sup> Hepple notes that in some countries, such as Germany, Great Britain, and the United States of America, the right to strike

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<sup>83</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA* 1996 17 ILJ 821 (CC) (hereafter *In re Certification*).

<sup>84</sup> *In re Certification* para 66.

<sup>85</sup> Also see *SA Police Service v Police & Prison Civil Rights Union* 2011 32 ILJ 1603 (CC) para 19.

<sup>86</sup> *In re Certification* para 66.

<sup>87</sup> *In re Certification* para 66.

<sup>88</sup> *In re Certification* para 67.

<sup>89</sup> Cheadle "Constitutionalising the Right to Strike" 70.

<sup>90</sup> Cheadle "Constitutionalising the Right to Strike" 70.

<sup>91</sup> Section 27(4) of the *Constitution*, 1993.

is seen as a mere economic freedom which is always associated with collective bargaining.<sup>92</sup> Its scope is not broad to the extent – as in France and Italy - to include political pressure on governments. Whereas the *Interim Constitution*, 1993 seemed to limit this right to an economic freedom for the purpose of collective bargaining, the *Constitution*, 1996 removed this link.

Section 23(2)(c) provides that every worker has the right to strike and, separately from this, section 23(5) provides that every trade union, employers' organisation and employer "has the right to engage in collective bargaining." The LRA also draws a distinction in as far as workers may withdraw their labour in support of socio-political demands through "protest action"<sup>93</sup> and, parallel to this capacity, workers have the right to strike about any "matter of mutual interest".<sup>94</sup> In *Minister of Defence v SA National Defence Union*<sup>95</sup> the Supreme Court of Appeal held that in relation to the principles established in ILO conventions, which prefer voluntarism, the *Constitution*, 1996 "does not impose on employers and employees a judicially enforceable duty to bargain."

It is submitted that collective bargaining and the exercise of the right to strike are largely organic processes in which workers and employers determine the extent and intensity of their bargaining methods. Therefore, a party can neither be forced to bargain nor instructed on how to bargain. A key bargaining method is the collective temporary withdrawal of labour known as strike action. In the light of this, is it fair in a constitutional sense for an employer to use replacement labour during a strike?

### **3.3 Right to fair labour practices**

Apart from an explicit right to strike, the *Constitution*, 1996 makes provision for a right to fair labour practices. Section 23(1) is broad in scope according to its wording, as "everyone has the right to fair labour practices".<sup>96</sup> The Constitutional Court in *NEHAWU v UCT*<sup>97</sup> did not define what fair labour practices entail.<sup>98</sup> However, the Court did note that:

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<sup>92</sup> Hepple "Freedom to Strike and its Rationale" 30.

<sup>93</sup> Section 77 of the LRA.

<sup>94</sup> Section 213 of the LRA.

<sup>95</sup> *Minister of Defence v SA National Defence Union* 2006 27 ILJ 2276 (SCA) para 5.

<sup>96</sup> Currie and De Waal *Bill of Rights Handbook* 474. The right to fair labour practices has its origins in equity jurisdiction, as recommended by the Wiehahn Commission.

<sup>97</sup> *NEHAWU v UCT*.

<sup>98</sup> *NEHAWU v UCT* para 33 confirmed: "Our Constitution is unique in constitutionalising the right to fair labour practice. ... The concept of fair labour practice is incapable of precise definition".

the focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices.<sup>99</sup>

Instead of defining the term, the Court stated that fairness dictates not only that the interests of workers but also those of employers, particularly their operational requirements,<sup>100</sup> should be balanced and assessed.<sup>101</sup> The Court justified this open-endedness on the basis that the definition of fair labour practices should not become concrete, which would make it obsolete, "as social and economic conditions change".<sup>102</sup>

It should be reiterated that the right to fair labour practices should not be interpreted as a call for equal rights for employers and employees.<sup>103</sup> Yet, fairness is an important and unique constitutional value in labour relations,<sup>104</sup> which "arise from the relationship between workers, employers and their respective organisations".<sup>105</sup> Therefore, what is fair in an employment relationship should be determined to a large extent through the organic process of collective bargaining and the operational requirements of the employer.<sup>106</sup> It is argued that the reason for this is that collective agreements between an employer and their employees are often more reflective of the intentions and capacities of the actual parties than general legislative or judicial impositions.

It is in terms of this understanding of the right to fair labour practices that the use of replacement labour should be considered from the collective bargaining and operational requirement perspectives of both employees and employers. On the one hand it is argued that it goes against the grain of constitutional principles to exercise the right to strike in a manner that causes an acute national emergency or that infringes upon another person's rights to property and bodily integrity. Therefore, though it limits the right to strike, the use of replacement labour in essential and maintenance services

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<sup>99</sup> *NEHAWU v UCT* para 40.

<sup>100</sup> Section 213 of the LRA.

<sup>101</sup> *NEHAWU v UCT* para 38.

<sup>102</sup> *Bader Bop* para 13.

<sup>103</sup> *NEHAWU v UCT* para 40. This article does not argue that employers and employees should be treated equally, but rather that both parties should be treated fairly.

<sup>104</sup> Cheadle "Labour Relations" 376 states that the primary function of the Bill of Rights is to test the constitutionality of laws and rather than conduct. However, the concept of fairness is a constitutional exception where the evaluation of conduct does occur.

<sup>105</sup> Cheadle "Labour Relations" 364-365.

<sup>106</sup> Devenish *South African Constitution* 126.

constitutes a fair labour practice in so far as it prevents irreparable operational harm.

On the other hand the use of replacement labour should not occur during the process of collective bargaining in as much as it limits the right to strike. It cannot be deemed justifiable to permit the use of replacement labour during lawful strikes when the practice occurs outside essential and maintenance services, as it would perpetuate the employer's superior bargaining position in as far as it could nullify the strike. The practice militates against ILO norms and limits the constitutional right to strike.

## **4 The LRA, strikes and replacement labour**

### **4.1 Objectives and interpretation of the LRA**

Section 1 of the LRA charts an aspirational direction for South Africa in advancing "economic development, social justice, labour peace and the democratisation of the workplace". In order to attain these goals the designers of the LRA set out a number of objectives. The first is to give effect to the fundamental labour rights established by the *Constitution*, 1996.<sup>107</sup> Secondly, the LRA strives to give effect to obligations South Africa incurs as a member of the ILO.<sup>108</sup> Thirdly, it establishes a framework within which employees and employers collectively can bargain to determine wages, the conditions of employment and operational requirements.<sup>109</sup> Finally, the LRA promotes "orderly collective bargaining" at sectoral and workplace levels and promotes effective labour dispute resolution.<sup>110</sup> Some of these ideals have not been met as the collective bargaining landscape is often characterised by lengthy, non-procedural and violent strikes.<sup>111</sup>

### **4.2 Regulating the right to strike**

Section 64(1) of the LRA provides that "every employee has the right to strike and every employer has recourse to lock-out". None of the LRA's procedural requirements restricts the right to strike to the extent that would concern the ILO's expert committees. The term "strike" is broad enough to include partial work stoppages and covers all "disputes of mutual interest

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<sup>107</sup> Section 1(a) of the LRA.

<sup>108</sup> Section 1(b) of the LRA.

<sup>109</sup> Section 1(c) of the LRA. Also see s 213, which defines "operational requirements" as "requirements based on the economic, technological, structural or similar needs of an employer".

<sup>110</sup> Section 1(d) of the LRA.

<sup>111</sup> Cheadle *et al Strikes and the Law* 27-31.

between employer and employee".<sup>112</sup> Disputes in employment relationships can be broadly categorised as falling either under disputes of a legal nature (disputes of right) or disputes over a clash of interests.<sup>113</sup> Deadlocked disputes are subject to compulsory conciliation by a neutral third party, workers must notify employers before engaging in a strike, and employers must notify workers of recourse to a lock-out before engaging in such action.<sup>114</sup> There are no requirements in relation to a strike ballot at the workplace and no state department plays a role in sanctioning strikes or lock-outs.<sup>115</sup>

The LRA's substantive requirements similarly do not raise concern. There are three main limitations on the right to strike. The first relates to no-strike or peace clauses contained in collective agreements. Section 65(1)(a) of the LRA states that a party "may [not] take part in a strike or a lock-out ... if that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute". Secondly, workers of "essential" and "maintenance" services may not strike and must refer their disputes to compulsory arbitration.<sup>116</sup> There is nothing controversial about these limitations. Most categories of public servants have the right to strike and the definitions of essential and maintenance services align with the definitions contained in the ILO *Digest of Decisions*.<sup>117</sup> Thirdly, although the LRA does not make a clear distinction between disputes of right and disputes of interest, it does provide that a person may not take part in a strike if "the issue in dispute" may be referred to arbitration or to the Labour Court in terms of the LRA.<sup>118</sup>

If the above-mentioned procedural and substantive requirements are complied with, the strike is deemed to be "protected".<sup>119</sup> Conversely, strikes that are not in compliance with the provisions of the LRA are "unprotected"

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<sup>112</sup> Section 213 of the LRA.

<sup>113</sup> Spielmans 1939 AER 299. Also see Newaj and van Eck 2016 PELJ 6; and *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* 2001 22 ILJ 701 (LC) para 25, where the Court stated "Disputes over a failure to agree to proposals for the creation of new rights or the diminution of existing rights are disputes of interest".

<sup>114</sup> Section 64(1) of the LRA.

<sup>115</sup> However, see s 95(5)(o)(p) and (q) of the LRA. Also see Cheadle *et al Strikes and the Law* 70-72.

<sup>116</sup> Section 65(1)(d) of the LRA. Le Roux and Cohen 2016 PELJ 5 observe that South Africa has a liberal approach to essential services.

<sup>117</sup> Cheadle *et al Strikes and the Law* 94.

<sup>118</sup> Section 65(1)(c) of the LRA.

<sup>119</sup> Van Niekerk and Smit *Law@work* 461-462.

and the Labour Court has exclusive jurisdiction to interdict the strike or to award compensation.<sup>120</sup>

The LRA's immunities associated with protected strikes bolster the right to strike. These strikes do not amount to a delict or a breach of contract which could attract civil action<sup>121</sup> and the dismissal of striking workers is automatically unfair and severe sanctions follow against employers.<sup>122</sup> It is argued that a withdrawal of labour causes the employer economic harm, yet the LRA establishes a level playing field in as far as there is no obligation to remunerate an employee for services not rendered during the strike.<sup>123</sup> The LRA protects workers in as far as they may request the employer not to discontinue payment in kind such as accommodation or food parcels during the strike.<sup>124</sup> Violent conduct under no circumstances constitutes a legitimate means of inflicting economic harm.<sup>125</sup>

Apart from the exceptions discussed below, during the course of protected and unprotected strikes, the LRA does not limit employers to make use of replacement labour during the process of collective bargaining. Employers may also retaliate by means of a lock-out of workers who may have elected to continue with their work.<sup>126</sup> Such action brings all production to a halt and, as can be expected, creates a greater sense of urgency to conclude a collective agreement. The LRA does not place a time limit on the duration of protected strikes, and strikes may continue until the demands of the employees are met or employees are dismissed based on operational requirements.<sup>127</sup>

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<sup>120</sup> Rycroft 2014 *IJCLLIR* 203.

<sup>121</sup> Section 67(2) of the LRA.

<sup>122</sup> Conversely, participation in an unprotected strike may constitute a good reason for dismissal in terms of s 68(5) of the LRA.

<sup>123</sup> Section 67(3) of the LRA.

<sup>124</sup> Section 67(3)(b) of the LRA states that "after the end of the strike or lock-out, the employer may recover the monetary value of the payment in kind ... by way of civil proceedings".

<sup>125</sup> Rycroft 2014 *IJCLLIR* 203-206 advocates that the Labour Court may have the authority to withdraw the protected legal status of a strike that is marred by violence. Although Rycroft's arguments may seem appealing, the LRA does not grant it such powers. See Fergus 2016 *ILJ* 1548 and Van Eck and Kujinga 2017 *PELJ* 19 in this regard.

<sup>126</sup> Section 64(3)(c) of the LRA.

<sup>127</sup> Section 67(5) of the LRA. Also see Van Eck and Kujinga 2017 *PELJ* 19 note that the Labour Court has no authority to alter the legal status of a strike; and Fergus 2016 *ILJ* 1548.

### 4.3 Replacement labour during strikes

During negotiations over the LRA in the mid-1990s, South Africa's trade union movement argued for a total ban on replacement labour.<sup>128</sup> However, they were not successful and employers have a relatively generous dispensation regarding the continuing of production during strikes. The LRA imposes only three limitations on the use of replacement labour.

First, the LRA states that an employer may not employ someone to continue production during a protected strike if the employer's service "has been designated a maintenance service", the interruption of which will cause "destruction to any working area, plant or machinery".<sup>129</sup> The ILO specifically endorses the limitation of the right to strike only in essential and minimum services<sup>130</sup> but not in respect of maintenance services. It is against this background that Van Niekerk and Smit express the opinion that certain operations within a workplace need to be maintained through labour agreements to prevent the operations from being irreparably damaged.<sup>131</sup> However, in South Africa the conclusion of minimum service agreements is not a common feature in the workplace.<sup>132</sup> Nevertheless, it is noted that the ILO is cautious about the excessive use of minimum service agreements because of their ability to undermine the infliction of economic harm that strikes are meant to inflict.<sup>133</sup>

Secondly, the LRA places some restrictions on the use of replacement labour during a lock-out. It states that an employer may not employ replacement labour to perform the work of an employee who is locked out, "unless the lock-out is in response to a strike".<sup>134</sup> The phrase "unless the lock-out is in response to a strike" is key in permitting employers to use

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<sup>128</sup> Du Toit *et al Labour Relations Law* 27, 378.

<sup>129</sup> Sections 75, 76(1)(a) of the LRA.

<sup>130</sup> However, the ILO *Digest of Decisions* 2006 para 605, states that in "one case, the legislation provided that occupational organisations in all branches of activity were obliged to ensure that the staff necessary for the safety of machinery and ... continued to work ... These restrictions on the right to strike were considered to be acceptable". Cheadle *et al Strikes and the Law* 101-102 observe that within the South African context maintenance and minimum services are distinct categories.

<sup>131</sup> Van Niekerk and Smit *Law@work* 454.

<sup>132</sup> Cheadle *et al Strikes and the Law* 99-101 observe that according to the CCMA, between 1 January 2015 and 20 November 2016, only 9 out of 30 minimum service agreements had been ratified.

<sup>133</sup> ILO *Digest of Decisions* 2006 para 612, read together with para 633; Cohen and Le Roux "Liability, Sanctions and other Consequences" 141.

<sup>134</sup> Section 76(1)(b) of the LRA.

replacement labour.<sup>135</sup> Therefore, the limitation applies only on the rare occasion when an employer "jumps the gun" in collective bargaining with a lock-out before a strike. In other words, there is no limitation on replacement labour if there is no lock-out or in the more common situation where lock-outs occur as the employer's response to a strike. It is against this definition of lock-out and an interpretation of section 76(1)(b) of the LRA that the recourse to lock-out may be utilised by the employer in an offensive or a defensive manner.<sup>136</sup>

Thirdly, the LRA provides that the words "take into employment" includes engaging the services of a "temporary employment service or an independent contractor".<sup>137</sup> Therefore the restriction *inter alia* covers part-time, indefinitely employed, agency workers and independent contractors employed from outside the employer's workforce.

A number of important uncertainties about the use of replacement labour were addressed in the seminal Labour Appeal Court decision *Technikon SA v National Union of Technikon Employees of SA*,<sup>138</sup> (hereafter *Technikon SA*). In this instance employees engaged in a protected strike and the employer responded by issuing a notice to lock-out. The trade union implored the Court to adopt a purposive approach when interpreting the LRA by permitting the employer to make use of replacement labour only during unprotected strikes as otherwise it "would render the workers' right to strike nugatory".<sup>139</sup>

*Technikon SA* rejected the argument and held that as workers have a right to strike so employers have a right to lock-out.<sup>140</sup> In both instances, the Court held, the right to strike and the recourse to lock-out are subject only to the limitations set out in section 65 of the LRA, namely where a peace clause exists, where the workers are engaged in essential services, and where it concerns a dispute of right.<sup>141</sup> *Technikon SA* concluded that to permit employers the right to use replacement labour only during

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<sup>135</sup> Section 213 of the LRA defines a "lock-out" 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".

<sup>136</sup> It is noted that the LRA does not make an explicit distinction between "offensive" and "defensive" lock-outs.

<sup>137</sup> Section 76(1)(c) of the LRA.

<sup>138</sup> *Technikon SA v National Union of Technikon Employees of SA* 2001 22 ILJ 427 (LAC) (hereafter *Technikon SA*).

<sup>139</sup> *Technikon SA* para 34.

<sup>140</sup> *Technikon SA* para 30.

<sup>141</sup> *Technikon SA* para 35.

unprotected strikes is devoid of merit.<sup>142</sup> The Court expressed the opinion that the policy behind the right to strike and replacement labour was to create a harmonious labour environment.<sup>143</sup> It reasoned that

the rationale behind s 76(1)(b) is that if an employer decides to institute a lock-out as the aggressor ..., it may not employ temporary replacement labour. That is to discourage the resort by employers to lock-outs. The rationale is to try and let employers resort to lock-outs only in those circumstances where ... the lock-out is 'in response to' a strike.<sup>144</sup>

Though *Technikon SA* presents a technically correct interpretation of the LRA, it is argued that the decision is a disappointment for a number of reasons. First, the decision adopts a narrow approach by relying on an earlier dictum of the Labour Court where it was held that "purposive interpretation is no licence to ignore the language used in a statute which is not the subject of interpretation".<sup>145</sup> It is submitted that courts should be open to a broader interpretation of provisions which give effect to constitutional rights such as the right to strike.

Secondly, *Technikon SA* seemed to equate the right to strike and the right to lock-out as equivalent economic measures and to be oblivious to *In re Certification's* reasoning regarding the disparity of the right to strike and the right to lock-out. Thirdly, the Court did not reflect upon the ILO expert committee's decisions in weighing up whether or not it is appropriate to permit the use of replacement labour.

More recently in *SA Commercial Catering & Allied Workers Union v Sun International*,<sup>146</sup> (hereafter *Sun International*) the Labour Court adopted an approach that it is argued is more enlightened. In this case the employees gave notice of a limited duration strike (25<sup>th</sup> to 28<sup>th</sup> of September 2015) and the employer replied with a notice of a lock-out and recourse to replacement labour in response to the strike, which would last until the employer's final offer had been accepted. The trade union applied for an interdict against the employer, who planned to make use of replacement labour after the date on which their strike had ceased. The employer argued that it was entitled to employ replacement labour in response to a strike and that this right endures until it ceases the lock-out.

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<sup>142</sup> *Technikon SA* para 44.

<sup>143</sup> *Technikon SA* para 43.

<sup>144</sup> *Technikon SA* para 42.

<sup>145</sup> *Transportation Motor Spares v National Union of Metalworkers of SA* 1999 20 ILJ 690 (LC).

<sup>146</sup> *SA Commercial Catering & Allied Workers Union v Sun International* 2016 37 ILJ 215 (LC) (hereafter *Sun International*).

*Sun International* observed that section 76(1)(b) of the LRA limits replacement labour during lock-outs when the employer is the aggressor, but that it does not limit replacement labour when it is used "in response to a strike". The question was whether replacement labour could be utilised after the strike had come to an end on 28 September.

In what is viewed as a positive development the Court held that the constitutionally protected right to strike is not equivalent to the statutory right to lock-out.<sup>147</sup> When interpreting the provision the Court noted that the *Constitution* has no internal limitation of the right to strike. Thus, an employer's use of replacement labour during a retaliatory lock-out should be narrowly construed so as not to unduly restrict the constitutional right.<sup>148</sup> The Court observed that the ILO's expert committees recognise that in order to guarantee the right to strike, workers who participate in a "lawful strike should be permitted to return to work once the strike has ended."<sup>149</sup> *Sun International* concluded that once the strike ends on 28 September replacement labour cannot be used as it is no longer in response to a strike.<sup>150</sup>

It can be concluded that the LRA provides employers with a much broader freedom to use replacement labour during collective bargaining than the ILO permits. In the view of the ILO the way in which the LRA permits the appointment of strike-breakers in instances where there are no lock-outs and in instances where there is a lock-out in response to a strike undermines the right to strike.

## **5 Areas of concern pertaining to collective bargaining in South Africa?**

Kahn-Freund notes that "the important thing to do is to find out why strikes occur, and to remove their causes."<sup>151</sup> There is no doubt that the institution of collective bargaining in South Africa increasingly is incapable of resolving disputes of interest, particularly those pertaining to wages and operational costs.<sup>152</sup> The number of days lost to strikes remains persistently high and is

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<sup>147</sup> *Sun International* para 17.

<sup>148</sup> *Sun International* para 18. The Court relied on *SA Transport & Allied Workers Union v Moloto* 2012 33 ILJ 2549 (CC) para 43 in this regard.

<sup>149</sup> *Sun International* para 17.

<sup>150</sup> *Sun International* para 19 marks a significant departure from *Ntimane v Agrinet t/a Vetsak (Pty) Ltd* 1999 20 ILJ 896 (LC), where it was held that the right to employ replacement labour endures until the protected lock-out and not the strike ceases.

<sup>151</sup> Kahn-Freund *Labour and the Law* 223.

<sup>152</sup> Heald *Why is Collective Bargaining Failing in South Africa?* 1.

evidence of the failure of collective bargaining.<sup>153</sup> There are many reasons why collective bargaining is not successful in resolving more employment disputes. These include inequality, failed expectations, deep-rooted conflict and operational requirement changes in the workplace as a result of the revolution in information technology and other market forces.<sup>154</sup>

A number of scholars believe that the use of replacement labour can be added to the list of what contributes to violent strikes.<sup>155</sup> For example, Von Holdt mentions that socio-economic factors, particularly wage inequality in the workplace, arouse a sense of injustice that turns to "mob-justice" against replacement labour because of the frustration felt as to the impact of such workers on collective bargaining.<sup>156</sup> The tragedy at Marikana serves as a stark reminder of how volatile South Africa's collective bargaining processes can be.<sup>157</sup>

Kahn-Freund states that where collective bargaining fails, "power stands against power".<sup>158</sup> However, eventually there is a point at which an employer is incapable of or even unwilling to bargain with employees on strike. For reasons of such economic, technological, structural or similar needs, section 67(5) of the LRA permits an employer fairly to dismiss employees on strike for a reason based on the employer's operational requirements.<sup>159</sup> Therefore the existence of section 67(5) of the LRA should be a constant

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<sup>153</sup> DoL 2014 [http://www.labour.gov.za/DOL/downloads/documents/annual-reports/industrial-action-annual-report/2015/industrualaction\\_2015.pdf](http://www.labour.gov.za/DOL/downloads/documents/annual-reports/industrial-action-annual-report/2015/industrualaction_2015.pdf), reports a significant rise in unprotected strikes, up from 48% in 2014 to at least 55% of the total number of strikes in 2015. Also see DoL 2016 [http://www.labour.gov.za/DOL/downloads/documents/annual-reports/industrial-action-annual-report/2016/industrualaction\\_2016.pdf](http://www.labour.gov.za/DOL/downloads/documents/annual-reports/industrial-action-annual-report/2016/industrualaction_2016.pdf), where a more recent report recorded that out of the 122 strikes that year, 59% were unprotected.

<sup>154</sup> Cheadle *et al Strikes and the Law* 31. Also see Heald *Why is Collective Bargaining Failing in South Africa?* 1-3, who in greater detail addresses sociological factors that contribute to the failure of collective bargaining.

<sup>155</sup> Tenza 2016 *Obiter* 116. Also see Calitz 2016 *SA Merc LJ* 459; Tenza 2015 *LDD* 219; and Von Holdt 2010 <https://muse.jhu.edu/article/383716/pdf> 146-147.

<sup>156</sup> Tenza 2016 *Obiter* 116. Also see Calitz 2016 *SA Merc LJ* 459; Tenza 2015 *LDD* 219; and Von Holdt 2010 <https://muse.jhu.edu/article/383716/pdf> 146-147.

<sup>157</sup> Ngcukaitobi 2013 *ILJ* 846-848; Chinguno 2013 *GLJ* 163; Rycroft 2014 *IJCLLIR* 200; and Benjamin 2016 <http://www.cth.co.za/wp-content/uploads/2016/09/South-African-Labour-Law-A-Twenty-Year-Review.pdf> 23.

<sup>158</sup> Kahn-Freund *Labour and the Law* 55. The power Kahn-Freund refers to is the operational requirement capacity of an employer either to grant or deny the material interests of employees and the social collective power of employees to refuse to work through strike action until their demands are resolved. Also see Davies and Freedland *Kahn-Freund's Labour and the Law* 69 and Rycroft 2014 *IJCLLIR* 201, stating that it must be assumed that there is an inseparable link between collective bargaining and strike action.

<sup>159</sup> Section 67(5) of the LRA. Also see ss 189A and 213 of the LRA.

reminder to both employers and employees of the consequences of the failure to bargain and of the need to reconsider bargaining positions.<sup>160</sup>

This contribution accepts that strike action is an unwelcome and costly consequence of a failure to reach a collective bargaining consensus. The action impacts negatively on employers, employees and the broader public in general. Strikes have as their purpose the infliction of economic harm which places pressure on the parties to collective bargaining to reconsider their bargaining positions with a view to reaching an agreement. It is argued that an unjustified use of replacement labour unsettles the balance of bargaining power in favour of one of the parties; it reduces the risk of economic harm to the employer, which is designed to serve as catalyst for the resolution of the dispute. It renders the strikers powerless and causes frustration when workers see others perform their services and receive remuneration.

Measured against ILO norms, it is argued that there are areas of concern regarding the regulation of replacement labour in terms of the LRA and the effect that it may have on violent strikes. Some scholars contend that labour courts should adopt a stricter approach regarding the dismissal of workers engaged in unprotected strikes and when declaring violent strikes to be unlawful.<sup>161</sup> In response to a system in which collective bargaining seems to be in crisis there has been a significant advance made through social dialogue regarding the introduction of a *Draft Code of Good Practice: Collective Bargaining, Industrial Action and Picketing*<sup>162</sup> as well as through the introduction of a minimum wage.<sup>163</sup> However, we are not convinced that on their own and without revision of the use of replacement labour these legislative reforms will be adequate to foster successful collective bargaining in the future.

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<sup>160</sup> Stats SA 2017 <http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2017.pdf> 2. According to Statistics South Africa the official unemployment rate is at 27,7%. This means approximately 6 million people in South Africa are unemployed.

<sup>161</sup> Rycroft 2013 *ILJ* 864; Grogan *Dismissals* 644; and Le Roux 2010 *CLL* 6. The authors share the opinion that *Food & Allied Workers Union obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* 2012 33 *ILJ* 1779 (LAC) indicates a lenient attitude towards unprotected and violent strike misconduct. However, there has been strong condemnation of strike violence *KPMM Road and Earthworks (PTY) LTD v Association of Mineworkers and Construction Union* J 1520 / 2016. Here the Court found a trade union liable for breach of a court order against an unprotected strike and awarded a record amount of R1 000 000.00 against the trade union.

<sup>162</sup> DoL 2017 <http://www.labour.gov.za/DOL/downloads/documents/useful-documents/basic-conditions-of-employment/accordoncollectiveb.pdf>.

<sup>163</sup> *National Minimum Wage Bill* (GN 1275 in GG 41257 of 17 November 2017).

## 6 Findings and recommendations

A number of findings can be drawn from the preceding research. First, South Africa is a constitutional democracy with a *Bill of Rights* that guarantees every worker's right to strike. It accords both employers and workers the right to fair labour practices and to engage in collective bargaining. In the light of section 36 of the *Constitution*, 1996 these rights are subject to justifiable limitation. The courts are guided by international law when interpreting basic human rights and legislation which gives effect to the right to strike, especially in respect of ratified ILO conventions and the principles formulated by the ILO's expert committees.

Secondly, the ILO's expert committees recognise the significance of a right to strike within the context of the right to organise and collective bargaining. Furthermore the CFA in particular recognises that replacement labour has the potential to undermine both collective bargaining efforts and employee's exercise of strike action to induce collective bargaining. In their view replacement labour should be allowed only in the case of an illegal strike and in instances where employees are engaged in essential or minimum services that have been collectively determined, so as to prevent irreparable harm. Therefore, the regulation of replacement labour during strikes should ideally be subject to collective agreements.

Thirdly, with regard to the use of replacement labour the LRA is less restrictive than the pronouncements of the ILO's expert committees. Employers may unilaterally use replacement labour during protected strikes and the only restriction on its use is when they engage in a lock-out that is not in response to a strike and in the instance where the parties have agreed on a maintenance service. This lock-out responsive requirement, which permits an employer to use replacement labour during a strike, is not recognised by the ILO. The current regulation of replacement labour is clearly not conducive to peaceful and productive collective bargaining.

Finally, replacement labour may be a contributory factor as to why South Africa is plagued by violence during strikes and why collective bargaining is failing. South African policy makers have grappled with the issue of long, non-procedural and ferocious strikes ever since the tragic events at Marikana. The promotion of collective bargaining through social dialogue has produced significant advances through the introduction of a *Draft Code*

*of Good Practice: Collective Bargaining, Industrial Action and Picketing*<sup>164</sup> and proposing a minimum wage<sup>165</sup> for South Africa. It is submitted that these changes might not be sufficient to fully resolve the problems faced by the industrial relations system, but collective bargaining remains a good starting point.

It is submitted that this research highlights an issue which the social partners have not addressed during this round of law reforms to labour legislation, namely the use of replacement labour in the creation and promotion of an environment that is conducive to collective bargaining that is fair. The authors recommended that the social partners should debate whether it would not be more appropriate to reserve replacement labour to situations where unprotected strikes take place; and to instances where strikes do occur in essential and minimum services. It should also be considered whether it is appropriate to draw a distinction, as the LRA does, between the use of replacement labour when the employer is the aggressor and initiates a lock-out before a strike, and the situation when the lock-out is in response to a strike. Therefore, the phrase "unless the lock-out is in response to a strike" in terms of section 67(1)(b) of the LRA should possibly be removed, based on the fact that the ILO does not draw a link between lock-outs and the permissibility of replacement labour.

The regulation of replacement labour should appear on the agenda of future law reform. These deliberations should be inspired by constitutional values, the objectives of the LRA and principles developed by the ILO in better regulating the use of replacement labour during strikes in a manner that is harmonious and productive.

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<sup>165</sup> *National Minimum Wage Bill* (GN 1275 in GG 41257 of 17 November 2017).

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## List of Abbreviations

AER	American Economic Review
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CFA	Committee on Freedom of Association
CLL	Contemporary Labour Law
DoL	Department of Labour
GLJ	Global Labour Journal

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IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
ILJ	Industrial Law Journal
ILO	International Labour Organisation
IOE	International Organisation of Employers
JJCI	Journal of Jurisprudence and Contemporary Issues
LDD	Law Democracy and Development
LRA	Labour Relations Act 66 of 1995
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
Stats SA	Statistics South Africa