The Right to Strike and the Future of Collective Bargaining in South Africa:
An Exploratory Analysis.

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Abstract

Section 23 of the Constitution of the Republic of South Africa confers on every worker the right
to strike. It further provides that every trade union, employers’ organization and employer has
the right to engage in collective bargaining, and goes on to provide that national legislation may
be enacted to regulate the process. The Labour Relations Act of 1995, enacted specifically to
give effect to these constitutional rights, gives effect to the right to strike by providing
procedures for the exercise of the right, and protections for strikes in the collective bargaining
context. Interestingly, the Act does not provide for the duty to bargain. With the current wave of
industrial action sweeping across the South African labour industry, the issue of the interplay
between the workers’ right to strike and to bargain collectively with the employer remains one of
the topical issues in the South African labour law discourse. The critical question that this paper
seeks to address is whether the right to collective bargaining extends to an entitlement for
workers to exercise collective power by striking, in the event that the bargaining process reaches
impasse. This paper thus seeks to explore these concepts in an attempt to see what is at stake in
deriving an entitlement to strike from what looks like a very abstract entitlement to bargain. The
results of this exploration will then be brought to bear on some particular problems to do with the
scope of the right to strike in South Africa. The paper argues that the current constitutional and
statutory framework on collective labour dispute resolution in South Africa is flawed, and calls
for urgent attention.

Keywords: Constitution; right to strike; collective bargaining; labour law; Labour Relations Act.
1. Introduction.

Section 23 of the Constitution of the Republic of South Africa confers on every worker the right to strike. It further provides that every trade union, employers' organization and employer has the right to engage in collective bargaining, and goes on to provide that national legislation may be enacted to regulate the process.\(^1\) The Labour Relations Act 66 of 1995 was since enacted by parliament of the Republic of South Africa specifically to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.\(^2\)\(^3\)

The right to strike, it has been said, is a crucial weapon in the armoury of organised labour,\(^3\) and a keystone of modern industrial society. As Mcfarlane (1981:12) opined, no society which lacks that right can be democratic. Any society which seeks to become democratic must secure that right. Thus, without the right to strike, trade unions become pathetic, powerless bodies and the rule of management is absolute.\(^4\)

In at least two cases of the Constitutional Court of South Africa, namely Re Certification of the Constitution of the Republic of South Africa\(^5\) and National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd and Minister of Labour\(^6\) the importance of the right to strike was particularly emphasized. In both cases the Constitutional Court held that it is through industrial action that workers are able to assert their bargaining power in employment relationship. In re Certification of the Constitution of the Republic of South Africa\(^7\) in particular the Constitutional Court understood the right to strike to be an essential component of collective bargaining. It described collective bargaining as including a right on the part of those who engage in collective bargaining to exercise economic power against their adversaries. In other words, once a right to collective bargaining is recognized, implicit within it will be the right to exercise some economic power against other partners in collective bargaining. In similar spirit, O’Regan J in National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd and Minister of Labour\(^8\) said the following about the constitutional recognition of the right to strike:

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[T]hat \text{ right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in}
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1. Section 23(2) of the Constitution states that (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.
2. Section 1(a) of the Labour Relations Act.
3. Okene, (2007:30) ; See also Brassey (1990:233)"; Maserumule (2001:45)
5. Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)
6. National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd and Minister of Labour 2003 (2) BCLR 182 (CC)
7. Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)
8. National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd and Minister of Labour 2003 (2) BCLR 182 (CC)
section 23, therefore, the importance of those rights in promoting a fair working environment must be understood. It is also important to comprehend the dynamic nature of the wage-work bargain and the context within which it takes place. Care must be taken to avoid setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change.

Although the recognition of the right to strike as both a constitutional and statutory right for workers is well settled in South Africa, numerous problems have in recent years emerged which necessarily suggest that the current South African legislative framework calls for urgent reconsideration. With its ambitious objective being the promotion of economic development, social justice, labour peace and democracy in the workplace, the South African Labour Relations Act has arguably continuously failed to realize these critical objectives. Unsurprisingly, the issue of the interplay between the workers’ right to strike and the right to bargain collectively with the employer has remained one of the topical issues in the contemporary South African labour law discourse. Central to this debate has been, among other considerations, the implications of an unlimited right to strike on employment relationships, and in general the question about the role of collective bargaining in dispute resolution. While some legislative attempts have been made recently to reduce the impact of strikes in the country in general, the extent to which the legislative reform should be made has continued to be a subject of contention among organized labour, business and the government. These concerns, in essence, revolve broadly around the question of how to balance economic development with concerns for social justice.

Against this backdrop, the focus of this paper is principally on the contemporary legal climate in South Africa and in particular the way in which the current labour legislative framework impacts on the ability of both the trade unions and employers alike to champion their respective interests in their labour relationships. The point of departure in this analysis is a general overview of the legislative scheme relating to the right to strike in South Africa. This overview places the position in modern South African law in context, and highlights some of the conceptual problems to do with the right to strike in general. In view of the unstable economic conditions and the volatile labour relations climate that currently exist in the country, and taking into account the negative effects of strikes on labour relationships in general, this paper argues that the current legislative framework, which grants an unlimited right to strike, is fundamentally flawed in the sense that it defeats the very purpose of the Labour Relations Act, which is said to be to promote economic development, social justice, and most critically labour peace and democratisation of the workplace.

2. The Right to Strike under the South African Labour Relations Act: An Overview

It is important to mention at the outset that the Labour Relations Act was enacted specifically to give effect to the labour rights entrenched in section 23 of the Constitution. In giving effect to the right to strike guaranteed in section 23 of the Constitution, the Labour Relations Act provides in section 64(1) that ‘every employee has the right to strike and every employer has the recourse to lock-out’.

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9 Section 1 of the Labour Relations Act
A strike is defined in section 213 of the Labour Relations Act 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 employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee. In broader terms, the Labour Relations Act aims in the main to provide, among other objectives, a comprehensive framework for collective bargaining including the exercise of the right to strike in South Africa. The emphasis of the Act is clearly on collective bargaining rather than individual labour rights. The Act lays down the specific procedures which must be followed by employees in order to enjoy the right to strike. Traditionally, a distinction is drawn between a protected and unprotected strike. Protected strikes are generally those strikes which are undertaken in compliance with the provisions of the Act. The employees who participate in a protected strike are thus protected against any form of victimization by the employer. These employees are especially protected against dismissal and civil legal proceedings by the employer. On the other hand, unprotected strikes are those which do not comply with the procedural requirements of the Act. For these kinds of strikes, typically called wildcat strikes in South Africa, the Labour Court has exclusive jurisdiction to interdict or restrain. Participation in an unprotected strike may therefore constitute a fair reason for the dismissal of an employee.

However, like in other constitutional jurisdictions in the world, the right to strike in South Africa is surrounded with numerous limitations. These include the existence of a binding collective agreement or arbitration award that prohibits a strike in respect of the issue in dispute, and

11 Miscke (2004:51)
12 Section 64 of the Labour Relations Act
13 Section 67(1) of the Labour Relations Act. See SA Chemical Workers Union and others v Sentrachem Ltd (1998) 9 ILJ 410 (IC), where the Industrial Court sought to draw a distinction between legitimate and illegitimate strikes. This is however subject to the qualification in section 67(5) that employers may reserve the right to dismiss workers related to the workers’ conduct during the strike, or for reasons based on employer’s operational requirements. See FAU v National Co-operative Dairies Ltd (1989) 10 ILJ 490 (IC); Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel (1993) 14 ILJ 963 (LAC); SACWU v Afrox Ltd (1999) 20 ILJ 1718 (LAC)
14 This is however subject to the qualification in section 67(5) that employers may reserve the right to dismiss workers related to the workers’ conduct during the strike, or for reasons based on employer’s operational requirements. See FAU v National Co-operative Dairies Ltd (1989) 10 ILJ 490 (IC); Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel (1993) 14 ILJ 963 (LAC); SACWU v Afrox Ltd (1999) 20 ILJ 1718 (LAC)
15 Section 67 of the Labour Relations Act. The critical importance of compliance with the statutory requirement, e.g notice of intention to strike in terms of section 64 of the Act was singularly demonstrated by the Labour Appeal Court in County Fair foods (Pty) Ltd v Food and Allied Workers Union (2001) 22 ILJ 1103 (LAC) where the Court held that even where the strikers do not comply with the provisions of a collective agreement before striking but nevertheless comply with the Labour Relations Act, the strike will be protected. See also section 187(1)(a) of the Act which renders automatically unfair dismissal for participation in a strike that complies with the provisions of the Act. Also Brasseys et al The New Labour Law at 80-82.
16 Section 67(4) of the Labour Relations Act. Also, Section 68(5) of the Labour Relations Act provides: “Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not a dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account”. Item 6(1) of the Code of Good Practice provides: (1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including – (a) the seriousness of the contravention of this Act; (b) attempts to comply with this Act; and (c) whether or not the strike was in response to unjustified conduct by the employer.
17 Section 65(1)(a) of the Labour Relations Act. See NUMSA and others v Hendor Mining Supplies [2003] 10 BLLR 1057 (LC).
18 Section 65(1)(b) of the Labour Relations Act.
also a prohibition on striking for conflicts of rights, as distinct from conflicts of interests.\textsuperscript{19} Furthermore, in terms of section 65(1)(d) of the Labour Relations Act no person may take part in a strike if that person is engaged in an essential service or a maintenance service. The definition of essential service for the purposes of 65(1)(d) is to be found in section 213 of the Labour Relations Act. In terms of section 213 of the Labour Relations Act, essential service means – (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; (b) the parliamentary service; (c) the South African police Service. A maintenance service, on the other hand, is described in section 75 of the Act as the service the interruption of which has the effect of material physical destruction to any working area, plant or machinery.

The Labour Relations Act also creates a dispute resolution system, with the Commission for Conciliation Mediation and Arbitration (the CCMA) being the most important structure charged with conciliation of most disputes.\textsuperscript{20} All matters of mutual interest must be resolved by industrial action after conciliation has failed unless the parties have agreed to subject such matter to arbitration.\textsuperscript{21}

3. Collecting Bargaining and the Right to Strike

As it was mentioned above, strike is integral to the system of collective bargaining.\textsuperscript{22} The right to bargain collectively stems from the principle of freedom of association and the right to organize.\textsuperscript{23} According to Bruce \textit{et al} (1991:194), collective bargaining, as the bargaining process between labour and management in the labour relations system, is characterised by the urgency to reach a decision as a result of social, economic and legal pressures. As Davies and Freedland (1983:69) also observed, “by engaging in collective bargaining with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secured.”\textsuperscript{24} In practice, however, experience has shown that the success and/or failure of the bargaining process, is dependent on the level of maturity and strength of the workers’ and employers’ organizations or their representatives.

Generally parties resort to a strike when they have reached a deadlock in their negotiations. From a functional point of view, a strike provides the bargaining power necessary to drive meaningful and fair collective bargaining. As the Labour Appeal Court held in \textit{Stuttafords v SACTWU}\textsuperscript{25} the rationale behind strike action is to inflict economic harm on the employer so that the employer can accede to employees’ demands.

\textsuperscript{19} Section 65(1)(c) of the Labour Relations Act.
\textsuperscript{20} Chapter 7, section 112-126 of the Labour Relations Act.
\textsuperscript{21} The Powers of the CCMA to resolve disputes are dealt with in sections 133-144 of the Labour Relations Act.
\textsuperscript{22} Myburgh “100 Years of Strike Law” 2004 25 ILJ 962 966
\textsuperscript{23} Budeli ‘Understanding the right to freedom of association at the workplace: its components and scope’ (2010) vol 31/1 Obiter 16–33 at 27–28.
\textsuperscript{24} Davies and Freedland \textit{Kahn-Freund’s Labour and the Law} (1983) 3\textsuperscript{rd} ed
\textsuperscript{25} \textit{Stuttafords v SACTWU} [2001] 1 BLLR 47 (LAC)
The relationship between collective bargaining and industrial action is neatly described by Cameron et al (1987) with the following observation: “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 logic of strike in collective bargaining and its relations to the market economy is further illustrated by Rycroft and Jordan (1990:206) as follows: “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”.

Given the voluntary nature of collective bargaining process in South Africa, the success of collective bargaining more often than not depends on the willingness of the parties involved and to a limited extent on the availability of efficient dispute resolution systems. As Halton Cheadle (1987) has also observed, it is one of the ironies of collective bargaining that its very object, industrial peace, should depend on the threat of conflict. “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.”

In trying to understand the relationship between collective bargaining and strike, the South African courts appear to have understood their role in establishing and maintaining principles of labour law as strictly limited. The South African courts have therefore recognized that judicial legislation is imprecise in scope and that its consequences are difficult to determine (Kalula 2004). They have also recognized that disputes of interest are best left to the exercise of the economic power of the respective collectivities of labour and capital. As Davis summarises it in his contribution in the Canadian Labour and Empleymnt Journal, the South African Constitutional Court has early in the development of its jurisprudence, recognized the boundary between the use of substantive labour rights to determine disputes and the exercise of collective economic power on the part of either of the two parties - the collectivity of employees and the owner of capital.

4. The effects of strike on employment relationship

26 Brassey, M; Cameron, E; Cheadle, H and Olivier, M The New Labour Law (1987) Juta & Co Ltd
29 Davis The South African Law of Strikes Viewed from the Perspective of B.C. Health 15 Canadian Lab. & Emp. L.J. 193 2009-2010
30 Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)
In general, it is common knowledge that strike actions have a varied and wide-ranging negative impact. While during a strike the workers lose income due to absence from work, the employers also lose business. As Bendix (1998:248) has noted, strike action is never undertaken without a loss to both sides. From a business perspective, the shutting down of a business no doubt spells disaster for everyone concerned. While highlighting the importance of the right to strike in the labour relations context, it is also important to point out that the inconsiderate exercise of the right has remained the major cause of strained employment relationships in South Africa.

In terms of individual employment relationship, it is interesting to note that during a strike action not only the striking workers but also those employees who do not want to take part in the strike are affected. While the striking workers have no right to claim continued payment of their wages in terms of the employment contract, there is equally no right to guaranteed daily pay for non-striking workers if the industrial action takes place within the premises of the employer. It is also debatable if non-strikers have a right to claim compensation against the employer for not being provided with work in terms of individual employment contract. In practice, however, most employers will pay non-striking workers their full wages in a bid to put pressure on the striking workers to return to work.

Although the right to strike is constitutionally protected in South Africa, incidents of violence and intimidation have largely characterized industrial actions in many quarters of employment disputes in South Africa. While most of the violent strikes are largely unprotected, various forms of intimidations have been witnessed among striking workers against non-striking workers. Generally these acts of intimidation are resorted during picketing outside the employer’s premises and in some cases turning the picketing area into a war zone between striking and non-striking workers. In certain instances non-striking workers have been prevented from going to work by the striking workers through acts of intimidation and in some extreme cases violent attacks on them and their families. Thus, to properly appreciate the impact of a strike action in South Africa, it is helpful to consider the recent events in the mining industry.

4.1 The Marikana strike

The Marikana Lonmin strike began on the 9th August 2012 by approximately three thousand rock drill operators (RDOs) with a demand for salary increases from about R4000 to R12500. The strike was marked by a series of acts of violence, intimidation and assault which culminated in the massacre of 34 strikers by the South African Police on 16 August 2012. Although unprotected in terms of the Labour Relations Act, the strike and in particular the tragic loss of lives marked one of the darkest chapters in the history of South African labour relations. According to some commentators the Marikana action was a strike by the poor against the state and the rich. The RDOs, being the ones doing the toughest, most dangerous and production critical core mining function, have held long standing perceptions of underpayment compared to their colleagues in the industry. While most of them are functionally illiterate and have no hope of career progression, the conditions of their employment and living conditions in general are also appalling. Most of them live under harsh conditions in shacks around the mines with no

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31 Justice Malala (The Guardian Friday 17 August 2012)
access to clean water and sanitation. In his comment in *The Guardian* Justice Malala described the Marikana story as the exposition of South Africa’s structural weaknesses. He singled out poverty, inequality and unemployment as some of the underlying causes of the Marikana incident. This may sound true considering the gross poverty and the level of inequality in South Africa. But these are not the only causes of the Marikana strike. According to insiders in the mining industry, the role of NUM as the then majority trade union at Lonmin contributed immensely to the strike. According to the sources the strike was allegedly largely characterized by general dissatisfaction on the part of the RDOs against the NUM leadership who according to the RDOs failed to advance their interest during the wage negotiations with the employer.

The Marikana strike was not the first nor was the only unprotected strike by miners in South Africa in 2012. In October 2012 over 12000 striking miners were dismissed by Amplats for engaging in unprotected strike. Perhaps owing to the influence of Marikana, several other unprotected strikes took hold in the gold, agriculture and transportation sectors. According to reuters the three-week-long transport sector strike saw workers lose a total of R271 million in wages while employers suffered a R1.2 billion loss a week. In the gold sector the South African bullion miner Gold Fields also reported that a quarter of its 46,000 workers had embarked on a wildcat strike in the latest labour unrest to hit the mining industry of Africa's top economy. In all these strikes the strikers either lost in terms of wages and in certain situations their employment.

Recently on 23 January 2014 after proper notices were served by the AMCU union to the employer. The union demanded a basic monthly wage of R12500.00 for the lowest paid underground workers. The South African media had since reported that in average more than 70000 members of Amcu at Amplats, Lonmin and Impala Platinum joined the strike in support of their demand for a R12 500 basic monthly wage for the lowest-paid underground workers. So far this strike has been regarded as the worst to hit the South African platinum sector and the economy of the country in general. Despite the lengthy duration of the strike and the resultant effects of the strike on the striking mineworkers, the president of the union was reported to have said that the union members were not relenting on their demand for a *living wage* (R12500). At the time of writing this paper, there was still no foreseeable end to the strike which has so far claimed several lives following some acts of violence among the strikers.

4.2 Government’s reaction

In an effort to curb the wave of unprotected strikes in South Africa, the Minister of Labour tabled in March 2012 the Labour Relations Amendment Bill before parliament for approval. As reported in the media then, according to the spokesperson for the Department of Labour, the

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32 The Guardian, Friday 17 August 2012
33 Gavin Hartford, The mining industry wave: what are the causes and what are the solutions? (source unknown); http://www.mineweb.com/mineweb/content/en/mineweb-fast-news?oid=157722&sn=Detail
34 David Dolan and Ed Stoddard, http://uk.reuters.com/article/2013/01/23/uk-safrica-farms-idUKBRE90M0A520130123
36 http://www.mineweb.com/mineweb/content/en/mineweb-gold-news?oid=157731&sn=Detail
unions would in terms of the amendments introduced in the Bill conduct ballots to ensure that the majority of members agreed on the need to strike. The perception was that several unlawful acts such as violence and damage to property mostly occur where only a minority supported the cause for their strike. However, the requirement that trade unions should conduct a ballot prior to calling a strike was met with strong opposition from the labour federation, the Congress of South African Trade Unions (COSATU). In the heated debate in the National Assembly in June 2012, Cosatu argued that unions still have the right how to consult workers before calling a strike. Presumably because of its close ties with the government, COSATU successfully blocked this proposed amendment and the eleventh hour change to the draft Bill was since made effectively doing away with the requirement for strike balloting. The Bill was since adopted by the National Assembly in Parliament on 20 August 2013.

Recently on 24 March 2014, presumably as a result of the Marikana massacre in 2012, the department of Labour was reportedly engaged in arranging a labour summit between business, organized labour and government to address the challenges facing labour relations in the country. According to the reports, there has recently been a shift in thinking in both the government and the ANC (the ruling party) circles that the existing legal provisions have had limited effect on long and violent strikes that disrupt the economy of the country. One of the possible reforms to be introduced during the summit would be the reinstatement of the provision dealing with compulsory ballotling before embarking on a strike, and possibly a compulsory arbitration or adjudication of strike disputes.

It is submitted that this is a positive step on the part of government. Since the most serious labour disputes involve critical sectors sustaining the country’s economy such as mining and agriculture, the government should no doubt take lead and intervene in these kinds of industrial disputes by ensuring that the disputes are prevented before they start or resolved amicably between the parties without resorting to industrial action.

5. The future of collective bargaining in South Africa: A need for change.

As stated above, collective bargaining is a means of regulating relations between management and employees and for settling disputes between them. Undoubtedly the concern with maintaining labour peace and on the other hand increasing productivity at workplace has always been the rationale behind collective bargaining. However, given the current South African situation, most especially the crises in the mining industry, a question one may ask is if there is a future for meaningful collective bargaining in South Africa in light of the recurrent industrial unrests? Or put differently, should the right to collective bargaining be extended to an entitlement for workers to exercise collective power by striking in the event that the bargaining process reaches impasse? Taking into account the ripple effects of strike actions in general, the answer should be located within the relevant legislation.

40 http://www.bdlive.co.za/national/labour/2014/03/24/government-opens-door-to-reforms-over-strikes
The limitation of the right to strike contained in section 65(1) of the Labour Relations Act and/or the powers given to the Labour Court in terms of section 68(1) of the Labour Relations Act are, in the opinion of the author hereof, inadequate if regard is had to huge impact of industrial action on the socio-economic interests of the parties involved. Arguably, section 65 of the Act does not address the broader issues relevant to industrial relationship and the extent to which strike action should be limited. In opinion of writer hereof, therefore, the current legislative framework does not seem to provide any positive solution to the industrial problems facing the country. Borrowing from the words of Stella Vittori, it is argued that a labour law dispensation that hopes to utilize collective bargaining as the main vehicle for the attainment of its objectives in today’s changed world, is less likely to succeed. It is suggested that if South Africa is to prevent a repeat of the likes of Marikana strikes, an urgent attention should be paid to the specific provisions of the Labour Relations Act dealing with the right to strike. An amendment to the Labour Relations Act should be considered confer more powers on the Labour Court to adjudicate industrial disputes with much flexibility than it does in terms of the current legislative framework. A specific provision should therefore be introduced into the Labour Relations Act to extend the powers of the Labour Court to include the jurisdiction to adjudicate on fairness of industrial demands. It is understood that this cannot be an overnight exercise but should be something worth prioritizing. Nonetheless, already in 1909 the Court in Blower v Van Noorden, per Innes J predicted that “there come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas and to keep pace with the requirements of changing conditions”. It is hoped that the South African lawmakers will soon come alive to this reality.

6. Conclusion

In South Africa, wages remains one of the most important factors that lead to strikes. Workers usually strike because they want higher wages and this demand arises because of the rise in the cost of living. On the other hand, employers also need to make profits. Balancing these interests, surely, is by no means an easy task. Trade unions and employers continue to face challenges to ensure that their respective interests are protected as far as possible under the current legislative provisions on the right to strike. As it has been argued above, it is evident that the current

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41 Section 65(1) of the Labour Relations Act provides: (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if – (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration; (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act; (d) that person is engaged in – (i) essential service; or (ii) maintenance service.

42 Section 68(1) of the Labour Relations Act provides that: (1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction – (a) to grant an interdict or order to restrain – (i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or (ii) any person from participating in a lock-out or any conduct in contemplation or in furtherance of a lock-out; (b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct...


44 Blower v Van Noorden 1909 TS 890 at 905
legislative framework relating to strike does not succeed in finding a proper balance between the respective interests of all the parties concerned. This is evidently true if one has regard to the remedies available to employers who are faced with situations of failing business because of a strike. While a provision is made in the legislation for employers to dismiss workers for operational reasons, it remains clearly impossible to regulate labour markets or the employment relationships by working against prevailing socio-economic circumstances. The legal recognition afforded to a lawful strike does not as well guarantee protection of workers against dismissal. While discussion about the termination of the employment contract is generally limited to the subject of dismissal, little attention is paid to the effects of strike action on individual employment relationships until at late stage. In the light of these facts, it is submitted that there needs to be a committed effort by the relevant parties concerned, namely labour unions, employer organizations and the government to consider legislative amendments to extend the limitation of the right to strike in South Africa. As suggested above, this could supposedly be done by introducing a provision in the legislation empowering the Labour Court to decide on the fairness of industrial demands. In that way the limits of the right to strike would be readily ascertainable from within the set legal rules and the eventual legitimacy of the strike would be easily determinable.

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