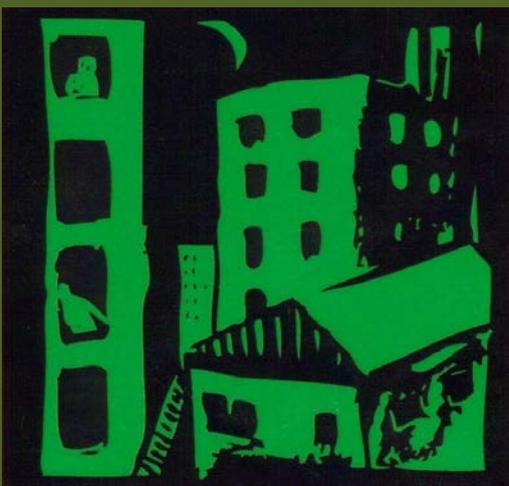


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Time for the Tide to Change for Rules of Engagement in Labour Law: A Proposal for Effective Wage Dispute Resolution

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1 INTRODUCTION

A recent plethora of instances of labour unrests and in particular lengthy wage strikes indicate that South African labour law is in need of reform.¹ All the more so, if dispute settlement between

*This article was initially drafted when I was working as an assistant at Unisa in 2013. I am grateful to Prof ME Manamela for his valuable comments on an earlier draft. However, I am responsible for the final draft and all errors are mine alone.

¹ Department of Labour 'Industrial Action Report' (2008) available at http://www.labour.gov.za/DOL/downloads/documents/annual-reports/industrial-action-annual-report/2008/industrialaction08_chpt3.pdf (accessed 29 Nov 2013). Also see Patel S 'Employment under pressure – inclusive strategies in everybody's interest' (2011) available at <http://transformationaudit.org/blog/wp-content/uploads/2012/02/Chapter-2.pdf> (accessed 26 November 2013).

trade unions and employers is prolonged resulting in workers suffering financial loss. In some instances, trade unions use the bargaining process as grist to the mill of their own agendas,² and this culminates in employees and employers absorbing the full impact of the prolonged strikes. Some of these prolonged strikes not only have an adverse financial effect on the employees' income but also have a negative impact on certain sectors of the economy. Unemployment³ and to a relative extent loss of income, for both employers and employees, are a major concern in South Africa. It is for these reasons that the law ought to try another tack, and that labour policy has to change under the pressure of necessity. Accordingly, the thesis of this article is motivated by recent improprieties in industrial actions.⁴ In truth, any system of law needs to serve its purpose efficiently, otherwise it should be reformed.⁵ A developing economy should as far as necessary evade needless strikes, in that such strikes have a negative impact on both employment and economic growth.⁶ The effect of the unreasonable demands (wages) on employment in general cannot be undervalued. In most cases costly demands may lead the employer to resort to retrenchment of workers, possibly for operational reasons.⁷ Therefore, for the protection of workers employment, wage increments must be reasonable and affordable.

It will be illustrated that a system ought to be formulated not only to increase efficiency in the bargaining process, but also to abate needless strikes and the resultant adverse effect on the economy. This article, therefore, is focussed on sectors that have a significant impact on the economy if production were to cease,⁸ and with those that

² Ngamlana C 'Woes of the Tripartite Alliance' (2012) available at <http://www.afesis.org.za/index.php/local-governance/93-local-governance-articles/831-woes-of-the-tripartite-alliance> (date of use 20 June 2013).

³ See Maswanganyi N 'SA unemployment rate rises in first quarter' (2013) <http://www.bdlive.co.za/economy/2013/05/06/sa-unemployment-rate-rises-in-first-quarter> (accessed 29 November 2013).

⁴ The term industrial action means a strike or other disruptive action used in an industrial dispute.

⁵ These sentiments were echoed by the then Mining Minister Ngoako Ramatlhodi, who stated: 'the lengthy platinum strike could have been settled much sooner if the CCMA and Nedlac had done their jobs. The strike took so long to resolve partly because our institutions like Nedlac and the CCMA need to work. Well, I'm not the minister of labour. But obviously in the light of what happened, I think all our institutions should be strengthened. But it doesn't help to strengthen the CCMA when the whole regime stays the same. The entire labour relations regime has to be revisited.' Barron C 'CCMA and Nedlac to Blame: Ramatlhodi' *Sunday Times: Business Times* (29 Jun 2014) at 1.

⁶ Exporters and importers of agricultural produce and seafood, referring to the Transnet strike, indicated that South Africa cannot afford another strike of this nature at ports as such strikes have a direct impact on the South African trade balance and the economy as a whole. Therefore, all the parties involved in facilitating exportation should quickly resolve their disputes; Economic Research Division 'Estimated impact of the Transnet strike action on traders of agricultural products and seafood' (2010) available at http://www.nda.agric.za/docs/economic_analysis/estimated_impact.pdf (accessed 20 June 2013) at 10.

⁷ *SACWU v Afrox Ltd* (1998) 19 ILJ 62 (LC).

⁸ Sectors like Transnet, the banking sector, and the energy sector, especially the oil sector which is concerned with crude oil refinement and the supply of petrol and diesel. This list is, however, not exhaustive. The Department of Trade and Industry may provide categories under which sectors may fall for the purpose of determining which of those sectors should be regulated.

offer essential services.⁹ The establishment of an efficient dispute resolution process in these sectors will secure the protection of the rights of those who are not part of the dispute.¹⁰ A further aim is to establish a process that values and advances the needs of employees and enhances what the employer is capable of offering. Instead of the settlements being centred on what employees and employers think to be a reasonable¹¹ demand or offer, a shift has to necessitate the prioritisation of both parties' financial standing. In this sort of system the aim is entirely to strike a reasonable balance in the bargaining process for both parties concerned. Economically the employer should be able to meet the demands without having to risk insolvency or resort to the retrenchment of employees to offset increasing costs. Socially employees must also be able to live on the salary they receive. This sort of balancing is basic if the process of collective bargaining is to prove effective and efficient. Employers cannot pay employees small wages while concurrently profiting enormously from the undertaking. Fairness and parity¹² should be the basis for the wage settlements.

2 THE PURPOSE OF STRIKES AND THE RIGHT TO STRIKE IN A NUTSHELL

In past years many legal systems, South African law included, regarded industrial actions as a form of criminal offence.¹³ Grogan asserts that the odds were stacked against employees as the employer could pressurise employees to accede to just about any offer or face a lawsuit for damages caused by their strike action.¹⁴ Employees had no effective weapons at their disposal to mount a defence if the employer was reluctant to heed their demands.¹⁵ In such situations, the threat by employees to withdraw their labour was an empty one if the employer could simply dismiss the strikers and replace them with more compliant workers.¹⁶ While the threat to strike remained an empty threat the balance of power at the bargaining table was tilted so much in favour of the employer that collective bargaining was regarded as nothing more than collective begging.¹⁷

⁹ '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 Services; see s 213 of the Labour Relations Act 66 of 1995 (LRA).

¹⁰ See fn 71 below.

¹¹ The connotation reasonable in this instance implies a subjective state of mind. This proposal aims to provide an efficient bargaining system where matters have to be viewed objectively. That implies that all factors have to be considered when assessing what is reasonable and what is not. The factors that have to be considered are the financial standing of the employer, the inflation rate, the workers' demands, and any matters that might prove useful with regard to the settlement.

¹² The word parity is not intended to imply that the employer and the employee should share the profits of an undertaking equally, but is intended to mean that the remuneration should be fair when weighed against the profits an undertaking generates.

¹³ Grogan J *Collective labour law* 2 ed (Cape Town: Juta 2014) at 191.

¹⁴ Grogan (2014) at 191.

¹⁵ Grogan (2014) at 191.

¹⁶ Grogan (2014) at 191.

¹⁷ Grogan (2014) at 191.

The progression from the criminalisation of strikes to the provision of the right to strike in the Constitution of the Republic of South Africa 1996 (Constitution) was gradually realized.¹⁸ In recent years, parties to collective bargaining have the liberty to settle disputes of interest away from the courts.¹⁹ Accordingly the parties are free to determine their own battlefield rules and strategy.

While bargaining can be seen as more or less similar to warfare, it is injudicious to push the analogy between warfare and strike action too far.²⁰ To equate strike action with warfare may lead to misconceptions, not the least of which is to regard strikes as a justification to draw other weapons to intimidate and induce surrender.²¹ The notion of comparing strikes to total warfare has recently caused much tumult. Strikes are intended to serve a specific purpose and thus any action taken in pursuit of fulfilling that purpose has to be within legal confines. There should be no deviation from this even when efforts are made to compel the employer to change its mind. Consequently, a strike has to fall within the ambit of the pertinent laws. Section 213 of the LRA defines strike as:

‘the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same 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’.

A Court has described the purpose of a strike as follows:

‘Strikes, by their nature, are intended to cause the employer economic harm. By withholding their labour, the employees hope to bring production to a halt, causing him to lose business and to sustain overhead expenses without the prospect of income, in the expectation, that should the losses be sufficiently substantial, the employer will accede to their demands.’²²

It is quite clear that strikes serve as a means to an end where an impasse in negotiation is hard to break.²³ Thus, strikes serve as a tool to pressure the employer to consider the employees’ demands.²⁴ Owing to the usefulness of strikes as an instrument for employees to break impasses, their importance is buttressed by the Constitution and labour legislation.²⁵ The Constitution²⁶ comprises fundamental rights which must be

¹⁸ See Myburg JF “100 years of strike law” 2004 25 *ILJ* 962: the author here canvasses the issue of the right to strike from the primitive years, to the current years where a distinction can be drawn between protected strikes and unprotected strikes and the consequences of such strikes.

¹⁹ *Afrox Ltd v SACWU* (1997) 18 *ILJ* 406 (LC) at 410E.

²⁰ Grogan (2014) at 191.

²¹ Grogan (2014) at 191.

²² *VNR Steel (Pty) Ltd v NUMSA* 1995 *ILJ* 1483 (LAC).

²³ See *CWIU v Plascon Decorative Inland (Pty) Ltd* [1998] 12 *BLLR* 1191 (LAC).

²⁴ The history of the right to strike and different levels of collective bargaining are provided elsewhere; see generally Steenkamp A, Stelzner S & Badernhorst N ‘The right to bargain collectively’ (2004) 25 *ILJ* 943-961.

²⁵ Section 64 of the LRA and s 23(2)(c) of the Constitution.

²⁶ Section 2 of the Constitution, states that the Constitution is above all other laws, thus every law contained in it overrides any other law.

promoted, protected, and respected.²⁷ One of the rights rooted in the Constitution is the right to strike.²⁸ Not only is this right a constitutional right but it is also echoed in the LRA.²⁹

The right to strike is not absolute and has to be weighed against other rights. The Constitution provides that every right is subject to the limitation clause.³⁰ The LRA limits the right to strike in certain respect/s. The LRA also provides conditions that need to be met in order for a strike to be protected.³¹ The right to strike should be limited in the interest of employees, employers and the public. The LRA also affords employees mechanisms to give impetus to their strike, such as the right to picket for the purpose of demonstrating in support of a strike.³²

There are numerous factors that may induce employees to strike. Within any industrial relations regime there will commonly exist displeasure ranging from generalized discontent, through dissatisfaction with procedures, and on to focused problems, such as earnings.³³ However, the major factor in South Africa seems to be that the socio-economic needs of a large number of citizens remain unsatisfied notwithstanding political change.³⁴ Thus, the need to increase financial income seem/s to be the main catalyst for strikes.³⁵ Similarly, inequality, poverty, and unemployment in South Africa afford the social and economic need to escalate the belief in wage increases. In the context of inequality, poverty, and unemployment, the noticeable exhibition of tactless utterance/s by union and political leadership fuels the fire of greater expectation of rewards for lower and middle class workers.³⁶ In a sense the majority of the population are led to believe that economic empowerment cannot be attained without a tussle: thus economic evolution can only be realized through effective combat. Economic suppression, poverty and anger are the main generators of strikes and perhaps the blatant display of violence. These factors appear to fuel strikes and may possibly justify the aura of bellicosity, but should never be the initiator of the subsequent violence.

²⁷ See s 7 of the Constitution.

²⁸ Section 23(2)(c) of the Constitution.

²⁹ Section 64 of the LRA 66 of 1995. See also Maserumule P 'A perspective on developments in strike law' (2001) 22 *ILJ* 45-51, where the author discusses the role of the LRA, the Constitution and the courts' involvement with regard to the right to strike, its limits and enforcement. The author is of the view that the courts are not doing enough to foster the right to strike.

³⁰ See ss 23 & 36 of the Constitution.

³¹ Sections 64 & 65 of the LRA.

³² Section 69 of the LRA.

³³ Kelly JE & Nicholson N "The causation of strikes: A review of theoretical approaches and potential contribution of social psychology" (1980) 33 *Human Relations* 853 at 872.

³⁴ Bendix S *Industrial Relations in South Africa* (Cape Town: Juta 2010) at 653-4; Visser W 'A racially divided class: Strikes in South Africa 1973- 2004' in van der Velden S *et al* (eds) *Strikes Around the World, 1968-2005* (Amsterdam: Aksant Academic Publishers 2007) at 40-60.

³⁵ Murwirapachena G "Exploring the incidents of strikes in post - Apartheid South Africa" (2014) 13 *International Business & Economics Research Journal* 553 at 554-5.

³⁶ Murwirapachena (2014) at 556.

The right to strike and the interest to realize a social or economic goal as clarified are not without boundaries, as other persons' rights have to be respected when strikers embark on industrial action. This article asserts that the commission of violence³⁷ during strikes is not in accord with the law. The ill acts committed during strikes are not only against the principles of the LRA³⁸ but also against the ethos of the Constitution.³⁹ Thus, the need to enforce rules that govern employer and employee engagements⁴⁰ in wage disputes should not be understated, the more so if the law is to lend credence to the Constitution and the underlying laws.

3 COLLECTIVE BARGAINING IN WAGE NEGOTIATION

Collective bargaining involves the right of freedom of association and protection of the right to organize.⁴¹ The International Labour Organization (ILO) states that 'workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization'.⁴² Although the right to organize and bargain collectively is recognized through international conventions, the rule of law of the land should not be flouted when parties exercise their labour rights. Thus, when exercising the rights founded on the ILO Convention, workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land.⁴³ Any rule whether it is intended to promote workers' rights, increase economic growth or protect the public must be respected. Collective labour law, equally, directly affects the balance of power between political, social and economic forces, in what are often very different cultural and historical contexts, such that frequently strong resistance emerges to changing the established order.⁴⁴ The balancing does also allow people to engage in activities that may have the impact of advancing their economic and social lives. The socio-economic forces generally direct our predilection to economic or political orientation, and the groups we are likely to associate with.

Thus, the kind of socio-economic philosophy one is probably to adopt would be dependent on which side of the fence one happens to be. The capitalists, on the one hand, will support the idea of maximum profits at any cost or at little cost, depending on which would prove more lucrative.⁴⁵ The equalists (for lack of a better word), on the other hand, will advocate the sharing of profits, ignoring the risk incurred by

³⁷ Incidents like damage to the private property of persons who have very little to do with employees' strike action have become all too common.

³⁸ Section 69(1) of the LRA.

³⁹ Section 17 of the Constitution.

⁴⁰ By 'rules of engagement' I mean the current rules that govern the manner in which interest based dispute/s are resolved.

⁴¹ Grogan (2014) at 22-36.

⁴² Article 2 of Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87).

⁴³ Article 8 of Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87).

⁴⁴ von Potobsky G 'Freedom of association: the impact of Convention No. 87 and ILO action' (1998) 137 *Int'l Labour Rev* 195 at 196.

⁴⁵ Cowan R & Rizzo MJ (eds) *Profits & morality* (Chicago: University of Chicago Press 1995).

management, investors and owners in starting an enterprise. From both sides, one thing is clear, namely, that everyone wants to earn more (this obviously excludes the communists' ⁴⁶ theory of wealth). This shows that the aim of the parties concerned is to earn more. This is the reality in wage negotiations and is fairly reflected in the trade unions' goal of representing the majority of workers. ⁴⁷ As a consequence of earning more, it has become profitable for trade unions to represent the majority of the workers in wage negotiations. ⁴⁸

Given this state of affairs, competition has become rife among competing trade unions to be the best union. ⁴⁹ By virtue of this, some unions have in the past steered negotiations in an unreasonable manner so as to appease their members. ⁵⁰ In some cases one trade union seemed to thrust its political agenda to the fore to show its tripartite alliance partners that, if need be, it has the muscle to impose its philosophy. ⁵¹ One such occasion involved a State-owned company. ⁵² The State-owned freight logistics group Transnet made a last-ditch effort to reach an agreement with its trade unions to avert the planned industrial actions that could paralyse the country's railways, ports and pipelines. ⁵³ The South African Transport and Allied Workers Union (SATAWU) and the United Transport and Allied Trade Union (UTATU) had indicated that strike action

⁴⁶Communism (from Latin *communis* – common, universal) is a socialist movement with the aim of creating a classless, moneyless, and stateless social system structured upon common ownership of the means of production, as well as a social, political and economic ideology that aims at the establishment of this social order; see Engels F *Principals of communism* (Germany: Eduard Bernstein 1847) and Bukharin N & Preobrazhensky EA *The ABC of Communism* (London: Penguin Books 1969).

⁴⁷ The Marikana tragedy provides support for this statement. See also fn 49 below.

⁴⁸ Dhlwayo R 'The rise or fall of trade unions in South Africa: the Marikana incident' (2012) available at <http://www.polity.org.za/article/the-rise-or-fall-of-trade-unions-in-south-africa-the-marikana-incident-2012-10-11>, [accessed 20 June 2013].

⁴⁹ '[R]ivalry between the AMCU and the NUM is widely blamed for feeding the violence. The AMCU, which has expanded rapidly this year at the expense of NUM, is seen as the more militant union and has been linked to aggressive tactics to win wage increases. It has gained ground in an environment where workers have been dissatisfied with improvements in quality of life since the end of apartheid, particularly for those in the lower wage brackets'; see Chapple I & Barnett E 'What's behind the South African mine violence?' (2012) available at <http://edition.cnn.com/2012/08/17/world/africa/marikana-south-africa-mine-shootings/>; (accessed 30 September 2013). See also Sosibo K 'Union wars complicate Northam strike deal' (2013) available at <http://mg.co.za/article/2013-11-29-union-wars-complicate-northam-strike-deal> (accessed 29 November 2013). The moral of the story is that trade unions seem to do whatever is necessary to benefit their course. This includes persisting with demands that are unrealistic and not being honest with their members and employers. At time the unions actions includes the demands of rights and recognition which by law they are not entitled to, see Railway Africa 'Court Stops Transnet strike' (2013) available at <http://www.railwaysafrica.com/blog/2013/10/court-stops-transnet-strike/> (accessed 26 November 2013).

⁵⁰ See fn 49 above.

⁵¹ See Ngamlana (accessed 20 June 2013).

⁵²Transnet said it was concerned about Satawu's leadership, since the union misrepresented its offer to workers. 'The key focus of the new offer was, at the request of the Satawu-elected leadership, a focus on increasing the pensionable earnings of employees and if necessary reducing the non-pensionable elements, such as allowances'. See 'Transnet labour unions to march to Parliament' (2010) available at <http://www.skillsportal.co.za/page/human-resource/industrial-relations/512329-Transnet-labour-unions-to-march-to-Parliament> (accessed 20 June 2013).

⁵³Prinsloo L 'Transnet raises affordability concerns as unions gear up for strike' (2010) available at <http://www.engineeringnews.co.za/article/transnet-raises-affordability-concerns-as-unions-gear-up-for-strike-2010-05-06> (accessed 19 November 2012).

was in the offing.⁵⁴ The unions seem to be willing to do whatever was possible to assert the workers' demands. This is marked by the unions' march to Parliament to petition for a wage increase.⁵⁵ In some instances there are striking power plays which hold very little direct benefit for the workers.⁵⁶ Even when a realistic offer is made by the employer, the unions appear to lack influence or are unable to sway the workers to return to work. This is often attended by the obvious loss of income, owing to the policy of no work no pay.

Strikes create financial traps and economic agony for employees. The pressure to strike may generate the pleasure of wage increment/s and equally the discomfort of the ensuing losses. The loss of income during strikes places a heavy burden on the already destitute employees and their families. But the heaviest loss is the loss of employment. Hence, every time workers strike, they risk striking themselves out of jobs. While in most cases employment is affected directly by strikes, there are also secondary consequences of strikes on employment that stem from shutdowns of firms, trade deficits, and low investment, among others.⁵⁷ Similarly violence during strikes carries social, economic and political consequences. Violence during strike/s may lead to the death or severe injury of breadwinners, trapping their families in poverty. This translates into government's and society's responsibility of fiscally assisting the injured workers, retrenched people, and bereaved families, especially through payments for the disabled, unemployment benefits, and social grants, respectively.⁵⁸

The financial effects of a strike are at times felt far beyond the parties concerned. For example, the effect of a strike by Transnet employees will be felt by other industries as well.⁵⁹ The three-week strike action by Transnet employees cost the country millions of Rands as it curtailed exports of metals, cars, fruit, wine and other products to various destinations across the world, as well as imports of vehicle parts, fuel supplies and other products from across the world.⁶⁰ Supply chains were severely disrupted and in some cases export contracts were permanently lost.⁶¹ The agricultural sector is heavily dependent on Transnet for the shipment of products. Agriculture is one of those sectors that play a very significant role in the country's economy and is particularly dependent

⁵⁴ Prinsloo (2010).

⁵⁵ 'Transnet labour unions to march to Parliament' (2010).

⁵⁶ Trade unions proposed strikes during the 2010 FIFA World Cup preparations to compel government to heed their demands, see Johwa W *Cosatu* 'plans to protest against increase in electricity prices' (2010) available at <http://ccs.ukzn.ac.za/default.asp?3,28,11,3589> (accessed 05 January 2014).

⁵⁷ Murwirapachena (2014) at 558.

⁵⁸ Murwirapachena (2014) at 558.

⁵⁹ For example, the agricultural industry was adversely affected by the strike. The fruit industry was the worst hit, losing R150 million on the exportation of fruit, while the wine industry lost R0,69 million. The seafood industry incurred losses amounting to R5,56 million. Importers of prawns and salmon lost R250 000 during this time. The meat industry was also affected, with losses amounting to R5,4 million. In total, traders of agricultural products and seafood lost about R162 million because of the strike. See Economic Research Division 'Estimated impact of the Transnet strike action on traders of agricultural products and seafood' (2010) available at http://www.nda.agric.za/docs/economic_analysis/estimated_impact.pdf (accessed 10 January 2013).

⁶⁰ Economic Research Division (2010) at 2.

⁶¹ Economic Research Division (2010) at 2.

on a reliable and flexible transportation system.⁶² As a result of the strike action, about 75 percent of the fruit exporters experienced losses totalling R40 million as they had to pay for storage at the harbours.⁶³ Another R40 million was lost due to deterioration in the quality of the fruit. Some fruit exporters were placed in an awkward position when 100 containers of fruit that had been intended for exportation ended up being dumped, this resulted in losses of about R20 million.⁶⁴ Other losses, amounting to R50 million, occurred because fruit-exporting institutions forfeited better returns owing to late arrivals at the market, the absence of empty containers at the port, congestion surcharges and resultant harvesting problems or inability to harvest.⁶⁵ The exporters and importers of agricultural products and seafood emphasised that ports should preferably be partly or fully privatised.⁶⁶ Importing and exporting institutions are of the opinion that ports should be declared strategic businesses for the country and also declared essential facilities offering essential services, and that employees in this sectors should not be allowed to strike.⁶⁷

The strike modus operandi in its current format has triggered anarchy in the essential services,⁶⁸ where the lives of many were put in jeopardy. In terms of the LRA, workers providing essential services have a very limited right to embark on industrial action, except where a collective agreement has been concluded designating an essential service as a minimum service/maintenance service.⁶⁹ However, in the present set-up this rule seems to be ignored by unions and members alike.⁷⁰ Strikes have forced some sectors of essential services to a standstill. For example, it has been reported that ‘thousands of people living with HIV/Aids were at risk of developing resistance to Aids drugs as a result of defaulting on treatment because of the public servants’ strike’.⁷¹

⁶² Economic Research Division (2010) at 2.

⁶³ Economic Research Division (2010) at 8.

⁶⁴ Economic Research Division (2010) at 8.

⁶⁵ Economic Research Division (2010) at 8.

⁶⁶ Economic Research Division (2010) at 10. It would be quite interesting to see whether privatisation could be a remedy for such strikes, but there is indeed doubt whether such a course would solve the problem. If one looks at strike action in the mining industry, which is privately owned, one discovers that privatisation is no guarantee that such strikes will not recur.

⁶⁷ See fn 69.

⁶⁸ An essential service is defined in s 213 of the LRA as: ‘(i) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; (ii) the Parliamentary service; and the South African Police Service’.

⁶⁹ See s 65(1) of the LRA states ‘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- (d) that person is engaged in- (i) an essential service; or (ii) a maintenance service. Section 70(1) of the LRA states ‘any party to a dispute that is precluded from participating in a strike or a lock-out because that party is engaged in an essential service may refer the dispute in writing to (a) a council, if the parties to the dispute fall within the registered scope of that council; or (b) the Commission’.

⁷⁰ Pillay D ‘Essential Services: developing tools for minimum service agreements’ (2012) 33 *ILJ* 801.

⁷¹ Ledwaba L ‘Strike hits at the heart of Aids epidemic’ *City Press* (5 September 2010) at 4. It is evident that workers in the essential services sector are not entitled to engage in strikes. Current rules of collective bargaining seem to be ineffective in guiding employer and employees to reach settlements in wage negotiation/s quickly. This modus operandi seems to have created avenues for disgruntle essential service workers to engage in unlawful strikes. This kind of situation calls for the rethinking of the collective bargaining rules in respect of interest based disputes.

What is most problematic is that even established rules of law are at times ignored by unions and their members.⁷² As a result of the prolonged strike 'many antiretroviral (ARV) clinics stopped functioning'.⁷³ The shutdown meant that patients who ran out of ARV drugs could not get more. The process of getting new patients onto the government's ARV programme was also dealt a blow. Even if people had the money to buy the drugs over the counter they were unable to do so because they needed a prescription from a doctor and doctors were on strike.⁷⁴ Such a situation creates a conflict between constitutional rights in that the Constitution provides for a right to strike, but also provides for a right to life. In *S v Makwanyane*⁷⁵ the Court stated that the right to life is valued above all other rights, hence, reform is required to inhibit such life-threatening illegal strikes from recurring at the peril of innocent bystanders.

Measures are commonly adopted to limit the adverse effects of strikes on the public, employees and employer, but these measures appears to be unsuccessful. The court orders that were issued to pressure essential service workers to return to work, in the abovementioned illegal strike, seemed to have no effect. During the public servants strike the government had to offer an olive branch to essential service workers who had defied court orders to return to work, as part of a sweetened deal to get strikers to end their 18-day-old strike.⁷⁶ Although unions are mainly mandated by their members regarding what is an appropriate offer, they nevertheless carry sufficient influence to end strikes in most cases. In the aforesaid public service "illegal" strike the union seemed to hold all the cards in the game of wage negotiations. On the one hand, the South African Democratic teachers Union (SADTU), the National Education, Health and Allied Workers Union (NEHAWU) and the Police and Prisons Civil Rights Union (POPCRU), the biggest of the Cosatu-affiliated public service unions,⁷⁷ rejected the government's offer.⁷⁸ On the other hand, none of the Independent Labour Caucus (ILC) unions had made up their minds about whether to continue with the strike. The decision on whether to continue the strike was to be announced after COSATU and the ILC trade union bosses had met to consider government's offer.⁷⁹ This illustrates the influence trade unions have in deciding when industrial action is to cease. In practice much of what is considered acceptable in wage negotiations depends on the union's opinion of the offer.

It would, however, be erroneous to ignore the role employers' play in wage negotiations. Some employers set out to save costs at the expense of their employees with the aim of pushing profits up. It would be judicious of the employers to appreciate the role of employees in creating wealth for an entity. Reducing employees to the level of slave workers is indeed incongruent with the labour laws, which are enacted to

⁷² The right to strike is limited when coming to essential service workers, see s 65 of the LRA.

⁷³ Ledwaba (2010) at 4.

⁷⁴ Ledwaba (2010) at 4.

⁷⁵ 1995 (6) BCLR 665 (CC).

⁷⁶ Waldner M "Signs of new life in wage talks" *City Press* (5 September 2010) at 4.

⁷⁷ Waldner (2010) at 4.

⁷⁸ Waldner (2010) at 4.

⁷⁹ Waldner (2010) at 4.

protect workers from exploitation of any kind.⁸⁰ It is of paramount importance that the workers should be remunerated in accordance with the wealth they generate. Employers should act sensibly to promote an efficient and effective dispute resolution. This involves appreciation of the employees' worth and the increment of wages in accordance with the economic position.

During the strike of petrol attendants, it was revealed that workers took home at month-end a miserly wage of between R1100 and R1200.⁸¹ Most of this remuneration had to be spent on transportation to work. Thus, the workers could not do much with the wages they collected from their employer/s. Situations of this kind call for the levelling of the economic and social⁸² playing fields. The introduction of the minimum wage has, however, transformed the wages petrol attendants receive. Current rates are recorded as R1,126 a week in September 2018, increasing to R1,313 for the 2018/19 period. This translates to just over R4,500 a month, currently, moving up to R5,250 a month next year.

In this light, the government noticed that it is important that resources should be available to remunerate workers according to their worth.⁸³ This involves a painstaking balancing act that requires special expertise.⁸⁴ On the one hand, employers need to be mindful of the fact that employees must be compensated according to their worth and should not unreasonably pursue ways to save costs at the expense of employees.⁸⁵ On the other hand, the employees should be realistic, and this implies asking for wages that are affordable. In most cases the employer will have full knowledge of the financial and economic feasibility of the wage demands. The workers, on the other hand, will be unable to understand such documentation even if it is provided – this is where unions should play a critical role. Steps ought to be taken to ensure that strikes do not drag on for unreasonable periods of time, and also to ensure that there is fair play with regard to the remuneration of employees and the employers' competence to remunerate.

⁸⁰ Motala M 'Domestic workers in South Africa: It's modern day slavery' (2010); available at <http://sacsis.org.za/site/article/473.1>: (accessed 29 November 2013).

⁸¹ Waldner M 'Attendants run on empty' *City Press* (5 September 2010) at 10.

⁸² See the preamble to the Constitution where it is stated that the object of the Constitution is to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. It has to be said that there cannot be social justice where there is no fairness and equality in labour relations.

⁸³ See part 4.2 below.

⁸⁴ See suggested solutions below at part 4.

⁸⁵ For instance, it has been reported that the CEO of Checkers was earning about R600 million per annum, while an average worker was taking home around R30 000 per annum. This discrepancy in remuneration cannot be reasonably justified in an ideal world. Although an investor, or for that matter a CEO, has to take risks which employees do not have to assume personally, it is necessary that the input of employees into the success of the organisation be recognised when they are remunerated.

4 A NEED FOR CHANGE TOWARDS A SYSTEMATIC AND EFFICIENT FORUM: RECOMMENDATIONS

The lawmakers need to revisit the general policies of wage negotiations. It is recommended that the present labour rules should be improved with regulations that will curb lack of restraint in wage negotiations. The reform needs to force a shift to a more proficient wage dispute resolution process.

4.1 The need for trade unions to employ lawyers and accountants during negotiations in the bargaining process

One of the manifest deficiencies in the current collective bargaining system is the lack of the appropriate formal qualifications that a trade union negotiator ought to possess.⁸⁶ This creates a bargaining system in which one party *may* lack insight into the underlying legal principles or lack the relevant economic and accounting expertise. This submission is not intended to suggest that all union negotiators lack adequate expertise. It is true to aver that trade unions employ the services of different people with sought-after expertise in different fields of profession. However, it is also fair that there should be a requirement that any trade union official involved in dispute resolution must possess a certain minimum educational qualification.⁸⁷

Where there is insufficient knowledge, negotiations are likely to be unreasonably prolonged owing to one or two parties lacking understanding⁸⁸ of the necessary financial or legal principles involved.⁸⁹ This possibly creates a situation where unreasonable demands drag on for an unnecessary period of time. In the Transnet strike it was noted that the Transnet group had seen annual wage increases of about percent higher than inflation for the past seven years, whereas the company's productivity had decreased by 4 percent.⁹⁰ This shows that the employees were getting more from the entity than they were generating. Such was the tenacity of the trade unions in demanding more and getting it that they swore to continue with their unreasonable demands. The trade union was persistent in its unreasonable demands and often affirmed its position with the following statement: 'If they came back with less than that we would need to go into mandating (with members), the strike will continue

⁸⁶ See fns 112 and 119 for the current collective bargaining procedure.

⁸⁷ An almost similar suggestion now forms part of item 8 of the Draft Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.

⁸⁸ Pinkley RL 'Impact of knowledge regarding alternatives to settlement in dyadic negotiations: Whose knowledge counts?' (1995) 80 *Journal of Applied Psychology* 403.

⁸⁹ Although it is correct to argue that lack of knowledge is not the sole contributor to prolonged strikes, it will similarly be unwise to aver that lack of knowledge does not affect negotiations in strikes. Common sense dictates that a person with insufficient knowledge and skill will take much longer adapt to issues than someone with apposite skill. Where the employer makes statements like: 'We will keep our door open for genuine talks to seek a solution to the dispute when the unions are ready for a realistic and fair settlement', this indicates that there is a need for a sound knowledge of current economic conditions as well as an appreciation of what the employer can afford. See Transnet labour unions to march to Parliament (2010).

⁹⁰ Prinsloo (2010).

until further notice.⁹¹ These statements demonstrate the necessity for negotiations to be conducted by those qualified to do so.⁹² Such negotiators will be able to balance employees' demands, the company's financial situation and current economic conditions in the country.

For instance, it would be irrational for a company to continuously increase wages beyond the inflation rate while experiencing a decline in production. In this situation there is a probability that workers will be retrenched to allow the employer to limit increasing costs. This in turn would push the unemployment figures higher and impose a huge burden of work on the remaining workforce.

During the Transnet strike union members went on strike for a number of weeks. This resulted in workers losing income. This state of affairs confirms the need for properly qualified persons to conduct negotiations on behalf of employees and who will be able to advise employees on what constitutes a fair offer and what does not.

4.2 The recommended bargaining process

The current bargaining process is fraught with problems. Providing the parties with the autonomy to determine the forum to hear their dispute and to choose the rules of engagement has indeed caused societal quandary.

In this section of the article I intend to contrast the South African regime with a regime of analogous stature, mainly to assess how trade disputes are dealt with in a similar jurisdiction. The Indian system seems apposite for such a comparative appraisal since India is a developing country and has experienced a time when any labour dispute could trigger a strike. Thus measures had to be formulated to limit unreasonable strikes.

4.2.1 Wage dispute resolution in India

In India, labour dispute resolutions between the employer and workers are regulated by the Industrial Disputes Act.⁹³ Dispute settlement is moreover addressed by the Collective Bargaining Convention,⁹⁴ which provides the bodies and procedures for the settlement of labour disputes.⁹⁵ Historically industrial disputes arose in a myriad of

⁹¹ SAPA 'Satawu: Transnet strike unavoidable' (2010) available at [http://www.news24.com/SouthAfrica/News/Satawu-Transnet-strike-unavoidable-20100507_\(accessed 19 November 2012\)](http://www.news24.com/SouthAfrica/News/Satawu-Transnet-strike-unavoidable-20100507_(accessed 19 November 2012)).

⁹² Section 14 of the LRA provides procedures for the election of shop stewards, and their duties. From a reading of the section it is quite obvious that any elected person may assume the office of shop steward without having to comply with any educational qualification requirements. Thus, the constitution of the trade union governs specific matters with regard to the election and removal of, and any requirement to be satisfied by a shop steward. To suggest that some educational qualification is necessary in trade negotiation/s does not imply that shop stewards may not be involved in any other matter. However, where negotiations may require a party to possess a certain technical skill it would not be unreasonable to suggest that personnel involved in such negotiations should possess relevant qualifications.

⁹³ Industrial Disputes Act 14 of 1947.

⁹⁴ Act 154 of 1981.

⁹⁵ Arputharaj MJ & Gayatri R "A critical analysis on efficacy of mechanism to industrial disputes resolution in India" (2014) *International Journal of Current Research and Academic Review* 328 at 329.

ways in the Indian jurisdiction.⁹⁶ For example, it was not too remote for trade unions to suggest that 'all workers should be given cars,' and this was the subject matter of an industrial dispute, since it was connected, however remotely, to the terms and conditions of employment.⁹⁷

Demands made by unions, generally preceding the negotiations for a long-term contract, were a common cause of major industrial disputes.⁹⁸ If a labour dispute remained unresolved, workers had recourse to engage in industrial action. Consequently, workers in India enjoy the right to strike. The right to strike in India resonates with similar rights in other jurisdictions, and is limited by mechanism of the law.⁹⁹ Although it is trite that Indian workers enjoy the right to strike, there are measures put in place to avert the misuse of this right. Thus, the right to strike, it is submitted, must be the weapon of last resort because if it is misused, it will create a problem in the production and financial profit of the industry.¹⁰⁰

The parties to a dispute of interest have to follow protocols when attempting to resolve their dispute. It is basic that the employer and workers have to engage in negotiations to resolve their dispute before resorting to other means. If a dispute remains unresolved the matter should go through the process of conciliation before it could be referred to the appropriate authorities for adjudication.¹⁰¹ After negotiations have failed or after seven days the process of conciliation has failed; workers may embark on a strike provided that such action is not prohibited and must provide a notice in the prescribed manner.¹⁰²

In India, similar to South Africa, the process of arbitration is not mandatory but voluntary in disputes of interest. In other words, it is within the discretion of the parties to elect to refer the matter to arbitration.¹⁰³ It is documented that the process of arbitration is seldom used, mainly because employers and trade unions find it difficult to mutually agree on a suitable arbitrator.¹⁰⁴ If the parties fail to settle their dispute via conciliation, and have eschewed the route of arbitration, governmental machinery takes effect. Industrial Tribunals are one form of government machinery, and are meant to assert jurisdiction over disputes of interest, inter alia, wage disputes, sharing of profits, compensatory and other allowances, and so on.¹⁰⁵ The determination of Industrial

⁹⁶ Lasing P & Kuruvilla S "Industrial dispute resolution in India in theory and practice" (1987) *Loyola of Los Angeles International and Comparative Law Review* 345 at 348.

⁹⁷ Lasing & Kuruvilla (1987) at 348.

⁹⁸ Lasing & Kuruvilla (1987) at 348.

⁹⁹ Section 22 of the Industrial Dispute Act No 14 of 1947 and Paul VVS 'India: right to strike under Industrial Disputes Act 1947' (2004) available at <http://www.mondaq.com/india/x/24797/Workforce+Management/Right+to+Strike+Under+Industrial+Dispute+Act+1947> (accessed 06 July 2015).

¹⁰⁰ Paul (2004).

¹⁰¹ Arputharaj & Gayatri (2014) at 337.

¹⁰² Section 24(2) of the Industrial Disputes Act 14 of 1947.

¹⁰³ Section 10A of the Industrial Disputes Act 14 of 1947.

¹⁰⁴ Arputharaj & Gayatri (2014) at 339 and Lasing & Kuruvilla (1987) at 358.

¹⁰⁵ Lasing & Kuruvilla (1987) at 362.

Tribunals have the force of law similar to those of a court.¹⁰⁶ Therefore, the decision handed down or the award sanctioned by a Tribunal is binding and final.¹⁰⁷ It is held that the Indian system does not avert strikes but is efficient in curbing the perpetuation of strikes.¹⁰⁸

4.2.2 *The current wage dispute resolution system in South Africa*

In South Africa, the dispute resolution machinery is not rigid, and therefore the route to resolving disputes of interest depends on the procedure the parties are likely to adopt.¹⁰⁹ The responsibility for dispute resolution is shared by employers, labour and the State jointly.¹¹⁰ There is, therefore, some flexibility with regard to the choice of a forum and also the rules to be adopted for the parties' dispute resolution process. The LRA encourages self-regulation with regard to dispute resolution.¹¹¹ The parties are therefore free to select a forum which will best suit their needs.¹¹² The procedures for resolving a dispute of interest are fairly straightforward.¹¹³ First, the in-house

¹⁰⁶ Sections 7A & 7B of the Industrial Disputes Act 14 of 1947.

¹⁰⁷ Sections 17(2) & 17A of the Industrial Disputes Act 14 of 1947.

¹⁰⁸ Lasing & Kuruvilla (1987) 345.

¹⁰⁹ Brand J et al *Labour dispute resolution 2* ed (Kenwyn: Juta 2008) at 40.

¹¹⁰ Brand et al (Juta 2008) at 45.

¹¹¹ Brand et al (Juta 2008) at 30.

¹¹² Parties can elect any of the following forums to resolve their dispute: private conciliation, statutory conciliation, private arbitration, statutory arbitration, or Labour Court adjudication. A decision of the Labour Court is appealable to, and subject to review by, the Labour Appeal Court. A decision by any other statutory body is subject to review only. However, one noticeable problem with interest-based dispute resolution is the lack of court authority. The lack of authority does not apply to the determination of the legitimacy of the industrial action but to the power to enforce or determine the reasonableness of a wage offer or demand. The only statutory bodies which may provide a forum for parties with interest-based disputes are the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining or statutory councils. However, their decisions are not binding on the parties concerned; thus these forums are reduced to nothing more than advisory bodies.

¹¹³ Sections 64(1)(a)-(d) of the LRA which states: '(1) Every employee has the right to strike and every employer has recourse to lock-out if- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and- (i) a certificate stating that the dispute remains unresolved has been issued; or (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that- (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless- (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or (c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or (d) the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c)'. Section 134 of the LRA states: '(1) any party to a dispute about a matter of mutual interest may refer the dispute in writing to the Commission, if the parties to the dispute are- (a) on the one side- (i) one or more trade unions; (ii) one or more employees; or (iii) one or more trade unions and one or more employees; and (b) on the other side - (i) one or more employers' organisations; (ii) one or more employers; or (iii) one or more employers' organisations and one or more employers. (2) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute'.

procedures (which normally involve dispute resolution by negotiation)¹¹⁴ must be exhausted. Secondly, if the dispute remains unresolved, then the route of conciliation becomes available to the parties.¹¹⁵ The parties, similar to the Indian regime, could elect to refer the matter to arbitration.¹¹⁶ If the matter is not referred to arbitration, the workers may resort to industrial action to force the employer to heed their demands. In recent times, a ballot would be arranged for employees to vote on whether to engage in industrial action.¹¹⁷ This sort of system has proved to be problematic in resolving disputes of interest in some of the critical sectors of the economy.¹¹⁸

In view of the above, it would be wise to adjust the rules of engagement for certain industries. The alteration of the rules, in my opinion, will benefit workers and increase the sustenance of economic growth. The proposed change in resolution of disputes of interest should bear upon sectors that provide minimum services and those with vast economic impact.

Unnecessarily prolonged strikes in the abovementioned sectors have the effect of bringing the economy to a standstill. The operative word here is 'unnecessary'. Although strikes are designed to influence the employer by causing it economic harm, this harm is intended for employers that negotiate in bad faith. Thus, the employer that has negotiated reasonably must not fall foul of industrial action rules. Law reform in this regard can play a major role in ensuring that the bargaining process is used for the benefit of workers and employers, and not for anything else. The aim is to ensure that dispute resolution becomes systematic and efficient. What is required is a simple and structured system in which an arbitrator is vested with powers to influence parties to a strike to agree on terms, and if necessary impose a ruling.¹¹⁹ In recent times

¹¹⁴Negotiation, as a method of dispute resolution, is a private, voluntary and consensual process whereby two (or more) disputants seek to resolve their differences personally by means of an agreement that governs their future relationship. In such a case, if the dispute remains unresolved, then the parties may approach a third party to help them to reach a compromise or agreement.

¹¹⁵In such cases, the parties usually approach the CCMA, or the bargaining or statutory council, or a private dispute resolution agency.

¹¹⁶ See Brand (2008) at 40

¹¹⁷ Section 95(5) of the LRA.

¹¹⁸ See parts 3 & 4.1 above.

¹¹⁹ By law strikes must be commenced only with regard to matters of mutual interest. 'The use of the term mutual suggests that a matter falls within the scope of the LRA if it is of interest to both employees and employers, e.g. wages or hours of work. The LRA provides that where a dispute may be referred for either arbitration or adjudication under that Act, the parties may not strike. Such disputes are referred to, in common parlance, as "disputes of right", as opposed to "dispute of interest", which must be resolved by industrial action', see Grogan J *Labour litigation and dispute resolution* (Cape Town: Juta 2010) at 6. The courts have held that the term 'matters of mutual interest' covers a range of issues with regard to the workplace and commencement of industrial action, see *Rand tyres & Accessories v Industrial Council for the Motor Industry (Transvaal)* 1941 TPD 108. Although this article is concerned with matters of mutual rights, its focus is on interest based disputes. Thus, this article is not concerned with disputes of rights where rules of law contain procedures in respect of which the court has jurisdiction to adjudicate and deliver binding judgments, see ss 64(4) and 64(5) of the LRA which deals with matters of unilateral changes to the terms and conditions of employment. In the current regime the courts cannot provide binding judgments to settle disputes relating to wages. The CCMA and other advisory councils play a vital role in the mediation of the parties' disputes; however, the parties have the final say with regard to the acceptance or rejection of offers, see *Black Allied Workers Union v Umgeni Iron Works* (1990) 11 ILJ 589 (IC) at 591.

government officials were consulted to mediate on a dispute involving striking miners, this attempt bore no fruit.¹²⁰ It is then prudent to craft a structure where it is mandatory for parties to a strike to approach an arbitrator to settle the issue. However, it could be argued that the whole rationale of a wage dispute system is to try to resolve disputes by collective bargaining and negotiation, rather than to quickly resort to other measures. As noble and true as this argument may sound, the current system has made it possible for some parties to misuse the freedom to negotiate in good faith in dispute resolutions. It is quite misleading to argue that an arbitrator mandated process will determine who should or should not be allowed to bargain. The parties can still bargain inside and outside arbitration, the arbitrator only secures efficiency in dispute resolution.

4.2.3 The proposed wage dispute resolution system

The current procedure has to continue to a certain point to encourage self-regulation, that is, parties must mutually agree to terms. Since failure to speedily and mutually agree to terms is rather the norm than the exception, the law has to regulate the process of collective bargaining. The process that is likely to advance the workers' needs has to be structured in such a manner that an order of the arbitrator can bring the dispute to an end.

First, parties have to exhaust the available in-house procedures.¹²¹ If the matter remains unresolved then the route of reconciliation should be available. If the process of reconciliation fails to help parties settle their dispute, then the employees (in important sectors) can either elect to refer the matter for compulsory arbitration or engage in a strike. As a result, the employees are not deprived of their constitutional right to strike, but strikes are limited for the benefit of workers and employers alike.¹²² It must be kept in mind that the right to strike in wage disputes emanates from contractual rights. In other words, parties cannot engage in a wage strike without first exhausting contractual negotiations. That means that the employer and employee have to genuinely fail to reach a contractual compromise before this right is triggered. Therefore, where the law lays down measures to assist the parties to arrive to a compromise without needless delays, such technique cannot be unconstitutional. Particularly, if the employees trust that their demand is legitimate, and can even strike to assert their position. Therefore, if the employees believe that the employer is negotiating in bad faith, then the employees can withhold their labour until the dispute is settled by arbitration.

¹²⁰ The Minister of Mining was called in to help with the settlement of the wage strike in the prolonged platinum mine strike.

¹²¹ Employers, an employer's organisation, employees' representatives or trade unions may adopt their own in-house procedures.

¹²² Note that workers who are part of the 'important service' sectors should have a slightly unlimited right to strike, unlike the limited right enjoyed by essential services and maintenance services workers.

However, it must be noted, the limited right to strike for persons employed in an essential service or a maintenance service must remain.¹²³ Likewise, the employer of employees in essential services must remain without recourse to a lock-out.¹²⁴ The fact that essential services workers have a very limited right to strike has been confirmed by the courts in a number of cases.¹²⁵ In this respect, the concept 'important services' should be extended to industries that have an adverse effect on the economy (e.g. Transnet), where industrial action must be legally managed.¹²⁶ The procedures proposed in this article should cover the so-called "important services" and the minimum services sectors, since the 'essential services'¹²⁷ rules include mandatory arbitration where the disputes remain unresolved.

In terms of the rule of limitation of rights entrenched in the Constitution, it would be reasonable to limit the effect of a strike by way of arbitration, where the strike has failed to break the impasse. Compulsory arbitration should be triggered when parties fail to arrive at a settlement by a voluntary method; if there is a grave economic crisis, grave public dissatisfaction; any national emergency; or parties are ill balanced and the public interest is of prime importance.¹²⁸ The elapse of time after which the matter must be referred to arbitration after industrial action has commenced must depend on the importance of the sector, taking into account the interests of innocent third parties.¹²⁹

To speed up the process, it is important that the same forum that was involved with the processes of reconciliation should arbitrate the matter. However, personnel chairing these forums must be changed – thus, the person who chaired the reconciliation process will have to transfer the documents to the arbitrator. Therefore, there should be no need for parties to present new documents except for those containing new evidence.

Since arbitration is a command process, the decision will be binding on the parties. As in the case with litigation, in arbitration a decision in the form of an award is

¹²³ Section 65 (1)(d) of the LRA; s 72 of the Act states: The essential services committee may ratify any collective agreement that provides for the maintenance of minimum services in a service designated as an essential service. Also see s 75 of the Act with regard to what may be regarded as maintenance service.

¹²⁴ Section 65 (1)(d) of the LRA.

¹²⁵ See *Cape Local Authorities Employers Organisation v IMATU* 1996 ILJ 851; *Tshabalala v Minister of Health and Welfare* 1986 ILJ 168 (W); *Langeberg Foods Ltd v FAWU* 1992 ILJ 548 (E) and *NEHAWU/HOSPERSA v Western Province Blood Transfusion Service* 2000 ILJ 259.

¹²⁶ See fn 8 above.

¹²⁷ See fn 9 above.

¹²⁸ Mishra S 'Arbitration as a method of Industrial Dispute Resolution' (2013) available at <http://www.lawyersclubindia.com/articles/Arbitration-as-a-method-of-Industrial-Dispute-Resolution-5769.asp#.VZ-ehVKWhdg> (accessed 10 March 2014).

¹²⁹ It is therefore important that Department of Trade and Industry (DTi) must categorise certain industries, for example ports dealing with the importation and exportation of goods could be classed as category A; for the industry engaged in the delivery and transportation of fuel, the classification should be category B, the mining industry could be category C and so on. Thus, the period within which the arbitrator may be approached should depend on the category of the industry concerned. Thus, it could be suggested that in terms of category A, the parties must settle the matter via arbitration if the strike persist for a period longer than seven days; and so on.

imposed on the disputants.¹³⁰ The disputants will then have to consider whether to settle the dispute within their own discretion or have a third party impose a ruling on them. In a forum of this nature the arbitrator should be provided with what the parties consider to be their demands and offers. With the help of an assessor the arbitrator should determine whether the demand (for a wage increment) or the employer's offer is acceptable. An advantage of this procedure is that the forum may not be compelled to choose between one of the two figures brought before it. Thus, it is not compelled to make a choice on either the wage increase demanded or the employer's offer. This will prevent the forum from having to decide between one of the figures presented to it no matter how absurd or irrational that figure might be. Thus, after perusal of the documents and the merits of the arguments put to it, the forum can decide on the reasonability of the amount of an offer or demand. The forum may make an award only on the basis of the most reasonable amount after perusal of all relevant documentation.¹³¹ This amount is likely to be between the employer's offer and the wage increment demanded. This amount is what the parties usually settle for at the end of most protracted strikes.¹³² This does not imply that the middle amount is always a reasonable figure, since the increment demanded by the employees or the employer's offer could also be the reasonable amount. Every case will then have to be judged on its own merits.

If any party to the dispute is dissatisfied with the award, then that party can approach the court for a review or appeal. This avenue should be made available to the parties to ensure fair-play. To avoid clogging the court system the party can approach the Labour Appeal Court (LAC) directly and with its leave the court may agree to hear the matter. It must be noted that for a speedy process documentary evidence¹³³ must play a vital role and oral evidence should only be provided when necessary. A judge should sit with a qualified assessor¹³⁴ who is competent to advise the court on the matter brought before it. However, approaching the LAC should come with a certain

¹³⁰ In fact, under s 31 of the Arbitration Act 42 of 1965 an arbitral award can be made and enforced as an order of court.

¹³¹ The courts have hitherto pronounced on the reasonableness of offers (or figures) in terms of contract law, and as such, law forums should be no strangers in this field of dispute resolution. For case law where courts were competent to pronounce on the reasonableness of disputed amounts see the following cases, *Versfeld v SA Citrus Farms Ltd* 1930 AD 452 at 462; *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) and *Novick v Benjamin* 1972 (2) SA 842 (A). Although the Basic Conditions of Employment Act 75 of 1997 does not provide for general minimum rates of pay – ministerial determinations and sectoral determinations may provide the forum with prescribed minimum rates of remuneration. Inflation could also be a reliable determinant of the cost of living, and thus provide an appropriate measure for a wage increment. Thus, the ministerial determinations provide the law which the forum may rely on, and the amounts of the figures in dispute coupled with other economic factors (e.g. the inflation rate) presented to the forum, will provide the facts.

¹³² The proof is provided by the Transnet 2010 strike.

¹³³ *Seccombe v Attorney-General* 1919 TPD 270 at 277. Only relevant document should be provided, and any conduct that appears to slowdown the process by the submission of irrelevant and long documents should be punished by the awarding of costs to the counterparty.

¹³⁴ The person should at least possess qualifications that will enable him or her to understand the financial documentation brought before the court and also be able to understand the economic feasibility of the proposed offer or the wage increment sought. As such the person has to possess an economic, financial or any relevant management qualification.

degree of risk and responsibility. The concerned party will have to approach the appeal court in the knowledge that there is a risk that costs will have to be paid if the court finds against it.¹³⁵ This stipulation is necessary to discourage disputants from approaching the court with frivolous and vexatious reviews or appeals.

Given this, it is highly doubtful that employers and trade unions would use the dispute resolution system for matters that have little value for employees. In this kind of process, workers' needs would be promoted and there would be no room for sideshows by the unions or employers. The employer, knowing that its offer is below average, would rather accede to the demand than have employees strike and have the matter referred to arbitration. Similarly, if logic prevails, the unions would advise workers to accept the employer's offer rather than embarking on a futile strike which is likely to end in arbitration and the possible granting of an unfavourable award. The parties could either elect to adjust their figures to arrive at an agreement or have the arbitrator adjust the figures for them.

This system is improbable to clog the process in a legal quagmire of rules, procedures, appeals and reviews and make the situation even more antagonistic, slower to resolve, and even worse as a result. The current system (which encourages self-regulation) without doubt has made it possible for trade unions and their members to be defiant of the rules of collective bargaining, and sometimes makes disputes appear impossible to resolve.¹³⁶ The proposed system contrasts with the present one, in that arbitration becomes compulsory and that the parties have a right to go on an outright strike after conciliation has failed, which implies that arbitration takes effect only after a certain strike period has elapsed. The establishment of the advisory arbitration panel has been proposed and implemented to manage certain industrial actions.¹³⁷

It is doubtful that if the proposed system was in place, the department brought into focus in Marikana would have emerged. This is so, because after the arbitrator has handed down a decision (and if necessary confirmed by the appeal court) any conduct contrary to that decision would amount to legal consequences, either civil or criminal. Thus, the employer would be entitled to interdict the illegal striker and seek relief for damage suffered.¹³⁸

¹³⁵The issue of budgetary constraints may legitimately be raised. But then, this issue has to be weighed against possible economic loss experienced in many sectors. However, the responsibility must be placed on the parties to a dispute to approach the court with legitimate grievances. This should be done by providing the forum with the jurisdiction to penalise the party that approaches the court with a frivolous claim or defence. The party that is found to have unreasonably approached the court will have to pay court costs and those of the opponent. This provision will curb any possible floods of frivolous appeals and provide legitimacy to the process.

¹³⁶ The saga of the 2014 Marikana strike, where the government also got involved to help resolve the dispute.

¹³⁷ Sections 150A, 150B, 150C & 150D have been inserted into the LRA to regulate and arbitrate certain labour issues pertaining to industrial action.

¹³⁸ In this regard the employer can interdict the employees involved in an illegal strike and claim compensation for loss suffered from the employees and trade unions involved: see *Algoa Bus Company (Pty) Limited v Transport Action Retail And General Workers Union (Thor Targwu)* [2015] 9 BLLR 952 (LC); *Verulam Sawmills (Pty) Ltd v Association of Mineworkers and Construction Union ('AMCU')* (2016) 37

It is to render ourselves defeatists to argue that the averseness of trade unions to abide by the rules would devalue any proposed system of law. It must be kept in mind that South Africa subscribes to the notion of the rule of law,¹³⁹ thus the law ought to impose its rules lest anarchy may reign supreme. Therefore, trade unions and members who undermine the rules should be adequately chastised, if need be.¹⁴⁰

4.3 The need for strikes to be restricted to prescribed places

I do not intend to attack the formulation of section 69 of the LRA or its soundness; neither do I intend to impugn its intended purpose. I do, however, intend to zero in on the erosion caused by the lack of its implementation and enforcement. The LRA set out the rules for picketing in support of a strike or in opposition to any lock-out.¹⁴¹ Strikers may picket in any place to which the public has access, whether it be inside or outside the employer's premises, provided that the employer grants permission to strikers to picket within work premises.¹⁴² Previously, the rules regarding the conduct of strikers during picketing were established through agreement between the parties to the dispute,¹⁴³ and if there was no agreement the commission established picketing rules.¹⁴⁴ However, this modus operandi did little to dispirit overzealous strikers, who were devoted to committing violence, from doing so. This led to the introduction of the Accord on Collective Bargaining and Industrial Action (Accord) which recognises various rights of strikers, non-strikers and the public.¹⁴⁵ All parties to a dispute are now encouraged to commit themselves to ensuring a speedy resolution of the dispute and to avert violence, intimidation and the threat of harm to person or property associated with industrial action.¹⁴⁶

The law sought to gain more control over strikes owing to the behaviour of certain striking workers. Constraining strikers to a prescribed area during picketing has now been proposed as a new law.¹⁴⁷ It is well documented that in recent times, loss of life and damage to property have become all too common during industrial actions and have plagued lawmakers.¹⁴⁸ The lawmakers therefore sought to moderate this situation

ILJ 246 (LC) (20 October 2015) and *Verulam Sawmills (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU)* unreported (J158015) [2016] ZALCJHB 100 (15 March 2016).

¹³⁹ See s 1(c) of the Constitution, 1996.

¹⁴⁰ *SACCAWU obo Mokebe v Pick'n Pay Retailers* (2018) 39 ILJ 201 (LAC) and *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union* (2018) 39 ILJ 546 (LAC). In these cases the Court issued punitive cost orders against trade unions when employers sought interdicts to stop unprotected strike action.

¹⁴¹ Section 69(1) of the LRA.

¹⁴² Section 69(2) of the LRA.

¹⁴³ Section 69(4) of the LRA

¹⁴⁴ Section 69(5) of the LRA

¹⁴⁵ See the preamble of the Accord.

¹⁴⁶ Section 7 of the Accord on Collective Bargaining and Industrial Action.

¹⁴⁷ Item 30 of Draft Code of Good Practice: Collective Bargaining, Industrial Action and Picketing (Draft Code).

¹⁴⁸ Tenza M 'An investigation into the causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions' (2015) 19 *Law Democracy & Development* 211 and Manamela E & Budeli M 'Employees' right to strike and violence in South Africa' (2013) 46 (3) *CILSA* 308.

by initiating codes of conduct during industrial action.¹⁴⁹ Incidents of violence have first brought home to the court/s the lesson that applying a measure of responsibility to trade unions and their striking members is far more compelling than to permit aberration.¹⁵⁰ Lawmakers followed suit by producing rules that limit demonstrations to prescribed areas, where striking workers will be identified when intimidating any persons, whether they are non-striking workers, customers of the company or even members of the public.¹⁵¹ Leaving the strike area with the intention of intimidating or causing public unrest constitute gross misconduct that warrants dismissal. This is sufficiently covered in the LRA; however, the conduct of some striking workers brings into focus the lack of any aspiration to enforce these provisions. This is far from wishing to suggest that such striking workers should be relegated to a part of the company premises that is out of sight, similar to being in detention, where their demonstration would be of no use.

Moreover, there should not be any need for strikers to carry weapons. This provision is contained in the Constitution.¹⁵² However, the acute issue is the failure to ensure that this provision is complied with. Such conduct should be considered to be a misconduct. The Constitution states that South Africa is a State that subscribes to the rule of law, and the law must be continuously upheld.¹⁵³ Thus, carrying weapons to intimidate or demonstrate is conduct which is in stark contrast with what the Constitution, LRA and Draft Code provides. Such conduct therefore contravenes the principle of the rule of law.¹⁵⁴ Those who argue in favour of carrying weapons on the basis of cultural practice ignore the very essence of the rules that are meant to protect all and to ensure safe demonstrations.¹⁵⁵ Whether the proposals in the Draft and the new rules present an old but dubious vintage in a new bottle will only be known with hindsight. As I have intimated, the problem is not necessarily the rules, it is the lack of strict law enforcement.

4.3.1 *The issue of damage caused by strikers*

The common law states that those who commit harm or damage to another or his property are legally liable for the payment of damages. The action of the defendant must

¹⁴⁹ The law has resorted to various measures, see ss 7, 9 and 10 of the Accord and item 33 of the Draft Code.

¹⁵⁰ See *SATAWU v Garvas* 2013 (1) SA 83 (CC) where the Court placed a measure of responsibility on the trade union and its members

¹⁵¹ Item 32 of the Draft Code.

¹⁵² Section 17 of the Constitution: 'Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions'.

¹⁵³ Section 1(c) of the Constitution: 'The Republic of South Africa is one, sovereign, democratic state founded on Supremacy of the constitution and the rule of law'.

¹⁵⁴ Section 17 of the Constitution.

¹⁵⁵ Interesting enough, such persons do not usually carry these weapons at most ceremonies, while they do so during strikes and demonstrations, which by law must be free of weapons. It is quite ironic that such weapons are not carried at any other gathering but are preferred during strikes. One can only assume that these armaments are a means of intimidating and instilling fear in non-striking workers or the employer.

be wrongful and he must have *mens rea* (fault) for his actions.¹⁵⁶ Similarly, those who have the responsibility to ensure that certain people do not suffer damage, and omit to reasonably carry out this responsibility would be liable for damages to the party who suffers damage due to the omission. The question is - whether the defendant is negligent to be liable for damages.¹⁵⁷ The common law states that the principal would be held vicariously liable for the acts of the agent, if the action of the agent led to another suffering damage.¹⁵⁸ Similarly, the LRA empowers the courts to award damages in cases arising from violations of provisions of the LRA.¹⁵⁹ The court would consider these provisions of law when determining whether to hold the trade union and/or its striking members liable for the damage committed during strikes.¹⁶⁰

At times during a strike, strikers may cause damage to property. In *SATAWU v Garvas*,¹⁶¹ the Constitutional Court held that in terms of the Regulation of Gatherings Act¹⁶² organisers of any gathering would be vicariously liable for damages resulting from such a gathering. Liability will not flow only if an organiser proves:¹⁶³

- a) that he or it did not permit or connive at the act or omission which caused the damage in question, and
- b) that act or omission in question did not fall within the scope of the objectives of the gathering or demonstration and was not reasonably foreseeable; and
- c) that he or it took all reasonable steps within his or its power to prevent the act or omission in question.....

It is not only the organisers that will be held liable for the damage ensuing from such a gathering; any person participating will be jointly and severally liable if they have contributed to acts that resulted in damage to property.¹⁶⁴ The Court gave the following reasons for its decision:

“It is important to emphasise that it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection.¹⁶⁵ The fact that every right must be exercised with due regard to the rights of others cannot be overemphasised.¹⁶⁶ The organisers must therefore always reflect on and reconcile themselves with the risk of a violation of the rights of innocent bystanders which could result from forging ahead with the gathering. The Act does not negate the right to freedom of assembly, but merely

¹⁵⁶ *Wingaardt v Grobler and another* 2010 (6) SA 148 (ECG); *Administrateur, Transvaal v van der Merwe* 1994 (4) SA 347 (A) and *Marais v Richard* 1981 (1) SA 1157 (A)

¹⁵⁷ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Minister van Polisie v Ewels* 1975 (3) 590(A) and *Halliwell v Johannesburg Municipal Council* 1912 AD 659.

¹⁵⁸ *Government of the Republic of South Africa v Basdeo* 1996(1) 355 (A) and *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA) at para 7.

¹⁵⁹ Sections 68(b) & 158(1)(a)(vi) of the LRA.

¹⁶⁰ Cohen T, Rycroft A & Whitcher B *Trade unions and the law in South Africa* (LexisNexis 2009) at 83.

¹⁶¹ 2013 (1) SA 83 (CC).

¹⁶² Act 205 of 1993.

¹⁶³ See s 11(2) of the Regulation of Gatherings Act 205 of 1993.

¹⁶⁴ Section 11(1) of the Regulation of Gatherings Act 205 of 1993.

¹⁶⁵ *SATAWU v Garvas* at para 53.

¹⁶⁶ *SATAWU v Garvas* at para 68.

subjects the exercise of that right to strict conditions, in a way designed to moderate or prevent damage to property or injury to people.¹⁶⁷ The purpose of the section is to ensure that a gathering that becomes destructive and results in loss to others does not leave its victims without recourse.”¹⁶⁸

It is submitted that someone must be held accountable for any damage which may occur as a result of a gathering of striking workers. This is enough reason to restrict strikers to specific places where the identification of perpetrators would be possible. Where organisers elect to have striking workers march through the streets, they lay themselves open to the possibility that striking workers may vandalise private and public property. Where organisers foresaw the possibility of workers causing damage to property, and reconciled themselves to that possibility, they incur fault in the form of *dolus eventualis*. In cases where a reasonable person in the shoes of the organiser could have reasonably foreseen that striking workers would vent their anger on any property, but failed to take reasonable steps to prevent damage that might occur, fault takes the form of negligence.¹⁶⁹ It is in the interests of trade unions to have strikes restricted to particular areas where they can monitor their members and be able to identify any perpetrators of violence. This would also prevent criminals from taking the opportunity offered by strikes to loot and steal from innocent bystanders. In any case, the responsibility to ensure that strikes are carried on in an orderly and peaceful manner, whether at gatherings or during marches, remains with the organiser. It would therefore be ill-advised for the organiser to continue with the strike demonstrations where the possibility of violence exists.

The law does not, however, address the issue of breakaway strikers who engage in violent conduct that results in damage to property or loss of life. Such conduct, it is submitted, is altogether criminal: but how should the issue of damage to property be addressed? Should the organiser be held liable for the acts of those who have broken away and are no longer part of the gathering? Is the provision that an organiser should take reasonable steps to guard against any acts that may cause damage relevant here? The organiser cannot prevent such breakaway strikers from leaving the gathering to cause upheaval elsewhere. It would be unfair to hold organisers liable for acts of those who are no longer part of the gathering. It is for this reason that the law should have rules that are directed at breakaway strikers who in many cases are likely to cause harm to property or to non-strikers. Any identified member of a group of breakaway strikers should be held liable for the acts of others.

4.4 The benefits of the proposed reform

The process of arbitration appears to be the far more apposite mechanism to revolve wage disputes; in this process, real workers’ interests and priorities will take preference. This process will drive home the fact that unreasonable conduct will only

¹⁶⁷ *SATAWU v Garvas* at para 69.

¹⁶⁸ *SATAWU v Garvas* at para 80.

¹⁶⁹ *SATAWU v Garvas* at para 76.

lead the matter to arbitration, where an award will be imposed on the employer or employee. The process of dispute resolution will be ameliorated.

The possibility of violence is lessened if strikes are restricted to prescribed places. First, it becomes easier to identify the perpetrators of violence. Secondly, intimidation of non-striking workers would be abated – for example the situation where medical staff and patients are threatened by striking hospital cleaners. Security personnel will be at hand to prevent any attempt to intimidate and to cause damage to private or public property.

5 CONCLUSION

The law tends to notice only its most patent defects. Even so, the call for reform only grows louder when such defects personally affect the privileged masses or when unnecessary loss of life occurs. It is when a debate for law reform often becomes chronic. Labour law reform, in my opinion, has been long overdue. The chronology of recent labour disputes is largely comprised of what is impossible to ignore. The roles of government, trade unions and its members have become blurred, as unrestrained conduct is often left unreprimanded.

The government suggested mechanisms to improve the delivery of education; the teachers' unions did whatsoever possible to oppose such suggestions.¹⁷⁰ One is prompted to ask whether the unions have officially assumed political positions, and thus have a say in governmental policy formulation. Labour laws are primarily enacted to sustain a democratic society through advancing workers' rights; however, in some cases it seems the law is used for other reasons.¹⁷¹ The unions have created a period called the 'striking season'.¹⁷² Unsurprisingly, this declaration did not have many jumping up and down in rapture and screaming: 'Hip hip hurrah, the festive strike season will soon be upon us'. The law should be used for the purpose for which it was enacted and not for anything else.

It may appear that some of the statements made in this article are political; however, they are not intended to raise political issues. Then again, labour law has become infected with politics to such an extent that it has become impossible to separate the two. The article tries to untangle the law from politics. Although there is indubitably a correlation between law and politics, it is important that law should only be used for legal reasons. This is what the article strives to achieve.

What should concern lawmakers the most is the future the law intends to shape, and if the intention is to have a fecund labour-oriented future change is necessary.

¹⁷⁰ Government suggested that teaching should be regarded as an essential service where the right to strike is limited. This suggestion was intended to improve the delivery of education in government schools. Unfortunately this suggestion met serious opposition from trade unions.

¹⁷¹ See fn 52.

¹⁷² Sapa 'South Africa braces for 'strike season' (2013) available at <http://www.timeslive.co.za/local/2013/05/05/south-africa-braces-for-strike-season>, [accessed 05 June 2013].

There ought to be a twist in the accepted wisdom. Thus, positive criticism of an ailing regime ought to be taken heed of, if the aim is to create an efficient way of dealing with a matter that not only affects workers' rights but is also of economic concern. It ought to be noted that this exposition is not formulated to be a salutary prophylactic, but as an influence towards a more proficient system.¹⁷³ Ultimately, it is important to note that this article does not advocate for any economic systems. In fact, its aim is to address clear legal problems, even though there are some references to issues relating to the economy and politics. These are, however, the rudiments that are likely to be inherent in many labour law regimes.

¹⁷³Indeed objections could be raised; strike protagonists may attack this article on the basis that it is unrealistic and out of tune with everyday realities. On the other hand, it could be argued that in most cases a proposal to discard a culture and embrace a new way of doing things is usually met with objections and rejection. That, however, should not stop us from searching for new ways of improving an unsatisfactory approach to resolving labour disputes. From this perspective, this article is relevant and in tune with reality.