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Strike Violence: Should Protected Strikes Lose their Protected Status due to Violence?

By

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Supervisor

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DECLARATION

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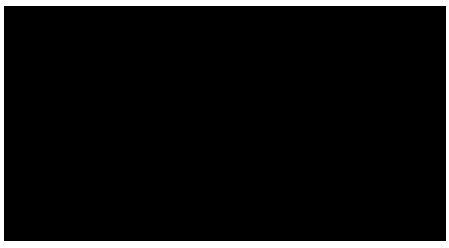

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To my mother, Ms Nombeko Dlamini, I remember the day you picked me up from King Williams Town in 1994 as a young single mother and said in Xhosa, "*Uze uqinise ufokotho kwedini kuse kude apho siyakhona*". Indeed, our journey has been long, and to me you are the definition of the strength of a woman, "*imbhokodo*", no son could have wished for a better mother.

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CHAPTER ONE: INTRODUCTION TO STRIKES AND STRIKE VIOLENCE

1.1. General Background and Introduction

South Africa is a country emerging from a dark past based on racial oppression and economic marginalisation. The majority of South African citizens were marginalised because of different skin pigmentation. During this period in South African history, the black working-class citizens of the country had little to no industrial rights.[1] This socio-economic marginalisation resulted in inequality, the hallmarks of which are still prevalent in South African society today.[2]

Since the dark days in the 1800s there has been an evolution of industrial rights, including the right to strike.[3] The right to strike is now entrenched in s23 (Bill of Rights) of the Constitution of the Republic of South Africa.[4] The Bill of Rights in the Constitution entrenches the right to strike as an unqualified right, however, s23 in the Bill of Rights provides no express provisions on the manner in which the right to strike must be exercised/enjoyed. The Labour Relations Act [5] (LRA) was enacted to give effect to s23 of the Constitution.[6] A strike is defined in terms of s213 of the LRA as follows:

> 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 .[7]

The right to strike is one of the essential rights established by the Constitution in terms of s 23,[8] and as emphasised by Van Niekerk J, "strikes are a fundamental basic human right".[9] The right

[1] J F Myburgh '100 Years Strike Law' (2004) *ILJ* 963
[2] T Ngcukaitobi 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 *ILJ* 843
[3] J S Harington, N D McGlashan E Z Chelkowska 'A Century of Migrant Labour in the Gold Mines of South Africa' *JSAIMM* (2004) 2.
[4] Section 23 of the Constitution of the Republic of South Africa 1996 (hereinafter referred to as the Constitution).
[5] Labour Relations Act 1995.
[6] Note 4 above
[7] Note 5 above, s 213.
[8] Note 4 above.
[9] *Tsogo (Pty) Ltd t/a Montecasino v Future South Africa's Workers Union & Others* 2012 33 ILJ 998 (LC) para 13.

to strike is also an essential mechanism for employees and trade unions in collective bargaining with employers.[10] In recent times - whilst exercising their right to strike and picketing - employees have resorted to violence. Violence against people and the destruction of property has been identified as "strike violence". [11]

1.2. Defining Strike Violence

In defining strike violence and the meaning thereof - there is a need to firstly observe these two concepts separately. These two concepts are "strike" in terms of industrial action and "violence" as a physical act. A strike/striking is an industrial action defined in terms of s 213 of the LRA, while violence is a physical act that is aimed and perpetrated at a person or property to cause physical harm to the person and destruction of property.[12] Violence that cannot be justified against a person or property becomes a criminal act, whereas violence that is justified, such as self-defence or violence of necessity, exonerates a person from criminal liability.[13] Strike violence is when the violence is imbued in the industrial action, meaning that when unions or workers embark on a strike some striking workers commit acts of violence against non-striking employees, replacement workers, employers' property and other acts of violence during pickets.[14] Following strike action an employer either accedes to workers' demands or a compromise is reached between the employer and the workers/union.[15]

During the collective bargaining process between the employer and employee there are two options: a compromise is reached between the parties or no compromise is reached between the parties. In the event that an employer accedes to the strikers' demands or the attainment of an amenable compromise, such accession or compromise results in the strike being called off - which then directly results in the ending of the violence that was being perpetrated by the striking workers. This formulates the reality that there is an undisputable causal link between the violent conduct perpetrated by workers during the strike and the strike itself. Categorically, strike violence is violence that is in furtherance of a strike, and without the strike there would be no violence perpetrated.[16]

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[10] E Manamela M Budeli 'Employee's Right to Strike and Violence in South Africa' (2013) *XLVI CILSA* 308.
[11] Note 10 above 323
[12] A Myburgh 'Interdicting Protected Strikes on Account of Violence' (2018) *ILJ* 39 720
[13] Note 9 above.
[14] Note 10 above 324.
[15] Note 10 above 309.
[16] Note 10 above 336.

Arising from the above text are schools of thought on whether or not a protected strike should lose its status because of violence. Rycroft argues that a strike that is beset by unacceptable levels of violence should lose its protected status, because such a strike ceases to be functional to collective bargaining.[17] Fergus, however, is critical of the functionality principle advanced by Rycroft, and instead advances the argument that a balancing of constitutional rights, right to security and right to protection of property should be weighed against the right to strike in strikes that are engulfed in violence.[18] Myburgh proposes that a court should change the status of a strike on the account of violence, if the violence gives striking employees an "illegitimate and unfair advantage" in the bargaining process.[19] It is clear firstly that there are serious issues of violence during strikes, and that secondly there are many different schools of thought on addressing the matter.

It is essential that an examination of the functionality principle advanced by Rycroft[20] and endorsed by Van Niekerk J in *National Union of Food Beverage Wine Spirits v Universal Products Network (Pty) Ltd,*[21] and an examination of the proposals of Myburgh[22] and Fergus[23] be carried out. Of importance though is the issue that such an examination cannot only take place in terms of labour legislation or industrial action, or in a vacuum. Such examination must incorporate the historic and current societal issues that employees and employers face in South Africa. This includes the concept defined as "structural violence", which is a "form of violence where some social structure or social institution purportedly harms people by preventing them from meeting their basic needs*"*.[24] Also to be taken cognisance of are other spheres of legislation pertaining to criminal justice and gatherings.

[17] A Rycroft 'Can a Protected Strike Lose its Status?' (2012) *ILJ* 33 826.
[18] E Fergus 'Reflections on the Dysfunctional of Strikes to Collective Bargaining, Recent Developments' (2016) *ILJ* 1550.
[19] Note 12 above, 709.
[20] Note 17 above.
[21] *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers & others* (2016) 37 ILJ 476 (LC)
[22] Note 12 above.
[23] Note 18 above.
[24] Note 2 above 840.

1.3. South African Courts' Views on Strike Violence and the Functionality Principle

The courts have thus begun to illustrate discontentment with this violence and there is currently a developing jurisprudence which postulates that the courts are now open to being persuaded to removing of the status of a protected strike as soon as high levels of violence are displayed by strikers.[25] To date though, no courts have handed down any judgements that declare a protected strike unprotected on account of violence.[26]

However, some courts have opened up to the possibility of declaring a lawful protected strike unprotected as an attempt to deter striking workers from conducting acts of violence during strikes. The pronouncements of cases such as *Tsogo Pty Ltd t/a Montecasino v Future SA Workers Union & Others*[27] and *National Union of Food Beverage Wine Spirits v Universal Products Network (Pty)Ltd*[28] have indicated that courts may be prepared to hand down declaratory orders to change the status of strikes from being protected to unprotected if such strikes are characterised by a lot of violence. Rycroft has suggested that the test that ought to be used in instances where strikes become violent is whether or not the strike is functional to collective bargaining.[29] Rycroft's test is thus that a protected strike loses its protected status once violence intensifies to such a level "that the strike no longer promotes functional collective bargaining and is therefore no longer deserving of its protected status".[30]

The acts of violence during strikes are usually conflated with picketing, which are two distinct constitutional rights which appear to result in a convoluted and somewhat misguided conclusion that strikes must lose their status due to the violence that habitually transpires during pickets.[31] A critical inspection needs to be conducted to review the basis of strike action in terms of the principles of the law and legality, taking into consideration intrinsic factors concerning whether or not courts ought to be persuaded to further limit the right to strike. In reality, violence seems to work for striking employees as it ultimately forces a breakthrough in deadlocked situations. Myburgh describes this not as exerting economic pressure but as exerting "economic duress", because the bargaining power of employees is obtained through

[25] Note 17 above 821.
[26] *Tsogo v Future South Africa's Workers Union & Others* supra note 9, 1004.
[27] *Tsogo v Future South Africa's Workers Union & Others* supra note 9.
[28] *National Union of Food Beverage Wine Spirits v Universal Products Network* supra note 21.
[29] Note 17 above, 821.
[30] Note 17 above, 826.
[31] Ibid

"illegitimate and unconscionable" violence which forces employers into submission.[32] An infamous example is the Marikana massacre of 2012, where striking rock drillers ultimately received a 22 per cent increase in their wages.[33] A reasonable conclusion ought to be drawn by the courts on whether the changing of a strike's status will yield the desired/intended effect of curtailing violence during strikes.

If the purpose of the limitation does not yield the intended effects, then the proposed limitation will be an unjustified limitation of a right in an open democracy.[34] "Historically there is naturally a systemic imbalance of power between employees and employers"[35], with the employers possessing more bargaining power than the employees. The purpose of a protected strike is designed to provide employees with the ultimate bargaining leverage against employers, and this right ought not to be easily limited because it has taken years for the vast majority workers to attain this right. Any further limitation of this right, including the changing of the protected status of a strike, must be justifiable in an open and transparent democracy.[36] In the *Ex Parte Chairperson of the Constitutional Assembly: In re Certificate of the Constitution of the Republic of South Africa,* the court emphasised the meaning of collective bargaining:

> "Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers".[37]

There seems to be a fallacy created by the courts and Rycroft in failing to differentiate between the right to strike and the right to picket in these two cases. This does not mean that violence only happens during picketing.[38] The proposed jurisprudence is that the functionality of a strike is causally linked to the conduct of the strikers during picketing, and in events where the

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[32] Note 12 above 720.
[33] D Fordlund *'The Bermuda Connection Profit Shifting Inequality at Lonmin 1999-2012'* Available at http://aidc.org.za/download/Illicit-capital-flows/BermudaLonmin04low.pdf Accessed on 20/03/2019
[34] S Van Eck T Kujinga 'The Role of Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence' in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network* (Pty) Ltd (2016) ILJ 37, 477
[35] G Hogbin 'Power in Employment Relationship: Is there an Imbalance?' *New Zealand Roundtable* (2006) 1.
[36] Constitution, s 36.
[37] *Ex Parte Chairperson of the Constitutional Assembly: In re Certificate of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) 795.
[38] Note 12 above, 720.

violence of a strike reaches levels whereby the purpose of the strike becomes an irrelevant/secondary issue, the strike will lose its protected status.

The test/proposal by Rycroft, that violent strikes not functional to collective bargaining consequently lose their protected status, leaves certain issues to be addressed. Two issues arise from this: firstly, what constitutes a strike that is functional or not functional to collective bargaining? Secondly, is it correct to isolate/detach strikes from collective bargaining? There is a fundamental question that has to be answered in terms of the part/role that strikes play in the collective bargaining process: Are strikes just an auxiliary tool to collective bargaining or are strikes at the centre of collective bargaining? Courts appear to be in the process of establishing a requirement that is not established in the Constitution or in the LRA; specifically the requirement that in order for a strike to be protected, it must be *"*functional to collective bargaining". South African common law, before the Constitutional dispensation, established the functionality principle. This principle deals primarily with workers' demands, the lawfulness of the demands and the duration of strikes (in terms of prolonged strikes and the impact they have on the employer).[39]

1.4. Statement of Purpose and Rationale for the Study

The objective of this dissertation is to examine the notion that a protected strike ceases to be functional to collective bargaining in circumstances where the strike is engulfed in violence. This principle does not appear to exist in our legal framework. In our law, once a strike is protected it means that such a strike is inherently functional to collective bargaining. At what point, if at all, will violence render a strike not functional to collective bargaining? It is critical to examine whether the violent conduct perpetuated by the strikers in protected strikes is purely a criminal issue. There has been a failure by the criminal justice system to bring perpetrators to justice. This failure by the criminal justice system to effectively deal with violent strikes has resulted in a simple proposed consequence - that violent strikes should lose their protected status. [40] More crucially, this dissertation aims at examining the legal principle/s and

[39] Note 11 above, 713.
[40] A Rycoft "What can be done about strike-related violence?" (2012) *Journal Faculty of Law*. Para 2.2

circumstances, if any, that a court of law should consider when deciding whether or not to change the status of a protected strike to that of an unprotected strike, due to violent conduct.

Essential to this will be to assess the powers of the court, to determine whether the Constitution or the legislation empowers the courts to declare a protected strike unprotected, and to clearly define the point where a strike ceases to be functional to collective bargaining. Additionally, there is a necessity to critically examine the LRA and our common law on instances that will necessitate the courts to remove the status of a protected strike during violence. The LRA does not have a provision that empowers the court to declare a protected violent strike as unprotected, in the event that the courts conclude that the violent strike is no longer functional to collective bargaining.[41] There is no provision in the LRA that states, that strike violence nullifies the stoppage or retardation of work for the purpose of remedying a grievance or matter of mutual interest. The demand of the strike is not nullified by the violence of striking workers. The only time the LRA allows courts to intervene in labour matters is in instances when striking workers have refused to comply with the substantive and procedural requirements of s 64 and 213 of the LRA, which makes such strikes automatically unprotected and unlawful. The remedy for strikes that do not meet the substantive and procedural requirements of the abovementioned sections is by way of court interdicts by employers to the employees.

South Africa is a country based on the rule of law. It is a constitutional democracy, with the Constitution as the supreme law of the land.[42] The courts are entrusted in terms of Chapter 8, s165 of the Constitution, with dispensing of justice and the adjudication of legal matters. The powers of the courts are found in s165 (2) which states, "the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice".[43]

It is trite in our judicial system that the courts only possess powers granted by the law (legislation and common law) and the Constitution.[44] The courts (High Courts) moreover develop the common law, once there is a gap in the law. As the present situation indicates, there appears to be no gap in industrial law, labour law and security law regarding strikes. The only

[41] Note 17 above, 826.
[42] Constitution, s 2.
[43] Constitution, s 165(2).
[44] Note 4 above.

gap is the means or methods consummate to dealing with protected strikes that are violent; positioned inversely, there is systematic failure in the enforcement of criminal law regarding strike violence. It seems that there is a gap in terms of enforcement of prohibitive criminal law regarding violence. Violence is a form of criminal activity, and s 205(5)[45] of the Constitution states that the South African Police Service (SAPS) is entrusted with preventing and investigating crimes, protecting citizens, maintaining law and order and enforcing the law.[46] Violent conduct is an assault on law and order, therefore the SAPS is constitutionally bound to maintain law and order. The Regulations of Gathering Act[47] which falls under the ambit of the SAPS regulates gatherings and remedies for people who do not adhere to the Act. S9 of the aforementioned Act empowers the SAPS to deal decisively with people who contravene the Act.[48]

Violent conduct is a criminal offence, not to be dealt with by the labour courts but by the criminal justice system. Current legislation, specifically the LRA, is purposely silent on the changing of protected strike status due to violence. Legislation drafters at no time envisaged that there would be so much strike violence in a Constitutional democracy, comparable to the gripping strike violence of the 1980s.[49] South African democracy and constitutionalism is built on the doctrine of separation of power. It would be a violation of the spirit of the Constitution if the right of workers to strike is further limited due to a failure by the constitutionally empowered organs of state to fulfil their constitutional mandate.

The courts perform a critical role in society to protect and promote the rights of citizens and consequently should not promote industrial action characterised by criminal conduct.[50] In *Tsogo,* [51] the court pronounced that:

[45] Constitution, s 205(5).
[46] Ibid.
[47] Regulations of Gathering Act 1993.
[48] Ibid.
[49] A Rycoft "What can be done about strike-related violence?" (2012) *Journal Faculty of Law*.
[50] Note 17 above, 821.
[51] *Tsogo* supra note 9.

> "When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status."

The above characterisation bodes the notion that there is a difference between applying economic pressure and criminal conduct during strike action. The labour courts should examine whether violence is a labour law issue and also whether the characterisation of the workers by the court assumes a negative or biased attitude towards the workers as a mob rather than as employees. Absent, however, is a judicial test as to what constitutes violence that would compel a court to remove the protected status of a strike.[52] The second characterisation is whether a strike marred by violence continues to serve its purpose in a demand or matter of mutual interest between the employees and employer.[53]

1.5. Structure of the Study

This study will be divided into four chapters: Chapter one provides an overview of the past and current law in terms of protected and unprotected strikes. Chapter two will discusses the historic background of the right to strikes. Chapter two deliberates on the origins of elements (trade unionism, functionality principle and structural violence) that formulate a critical part of this study. Chapter three discusses the right to strike, the requirements of protected strikes, and the difference between protected and unprotected strikes. Chapter four discusses employees' and employers' positions in terms of strikes, focusing on socio-economic rights and the role of government and the police in strikes. Chapter five recommendations and conclusion, discusses the functionality principle and whether strikes should lose their protected status. A causal link between all previous chapters helps the researcher to reach a conclusion.

1.6. Research Questions

a. To what extent is striking supplementary to collective bargaining, or is a strike part and parcel of collective bargaining?

b. What defines a strike that is functional to collective bargaining, and is such a principle part of the legal framework?

[52] Note 12 above, 721.
[53] Note 18 above, 1548.

c. The role of labour courts in strike violence; are the remedies being adequately enforced by the law enforcement agencies?
d. What would the changing of the status of a protected strike to that of an unprotected strike achieve in curbing strike violence?

1.7. Research Methodology

In this dissertation a qualitative method will be used. The sources that will be used are desktop sources such as legislation, journal articles by academics, case law, labour relations books, internet sources and the Constitution of the Republic of South Africa.

1.8. Literature Review

Strike violence has become an albatross for law and order in South Africa. The victims of this violence during industrial action include the employer, fellow employees, third parties (South African citizens), and public and private property. This violence occurs in both protected and unprotected strikes. The focus of this research centres around whether or not changing the status of a protected strike will assist in deterring violence during strike action. This research topic will, importantly, add to the limited information available to authors, the courts and academics in this field. In the pursuit of this central research aim, it is critical to examine the extent to which courts can declare a protected strike unprotected. More importantly, it is necessary to examine and define the jurisprudential direction of the circumstances in which a strike can be declared no longer functional to collective bargaining, due to violence.[54]

Workers form the backbone of the economy of a country, providing their labour for remuneration and reward, and the low income earners in South Africa are commonly known as the "working class".[55] The right to strike is the ultimate economic force used by employees to force employers to accept their demands for greater remuneration and rewards.[56] A protected strike confers immunity to employees while striking, as this immunity prohibits employers from dismissing employees due to delictual claims (loss of income by the employers) in terms

[54] K Khumalo 'Developing the Crime of Public Violence as a Remedy to Violation of the Rights of Non-Protesters during Violent Protesters and Strikes: A Critical Analysis of South African Jurisprudence' Rhodes University, Unpublished LLM thesis (2001) 580.
[55] M Leibbrandt I Woolard H McEwen C Koep 'Employment and Inequality Outcomes in South Africa' *Southern Africa Labour and Development Research Unit* (2010) 20.
[56] Note 18 above, 1537.

of breach of contract.[57] These provisions permit employees to exercise their right to strike, devoid of fear of dismissal or delictual claims. In essence, s 67(2) of the LRA[58] facilitates the enjoyment of a Constitutional right and it promotes that right in terms of s 39 of the Constitution.[59] The immunity granted by the aforementioned section does not, however, cover criminal conduct – including violent conduct by employees during strikes – and consequently an employer may dismiss an employee who participates in violence during strikes for misconduct.[60]

The right to strike must be read in conjunction with s17 of the Constitution, regarding the right to assemble.[61] During strikes, workers picket outside the employers' premises for various reasons, such as to persuade replacement employees from working; to persuade other employees to join their strike; and as a form of demonstration.[62] These demonstrations are common when strikes take place, and are often marred by violence and unruly behaviour. Violence is a criminal act and not part of industrial relations, therefore strike violence is public violence, and as suggested, it should be dealt with purely as a criminal act.[63]

[57] LRA, s 67(2).
[58] Constitution, s 39.
[59] Note 4 above.
[60] S 67(8) of the LRA.
[61] Note 4 above.
[62] LRA, s 69.
[63] Note 54 above, 580.

CHAPTER TWO: HISTORICAL BACKGROUND OF THE RIGHT TO STRIKE

2.1. History of Strikes

This chapter discusses the historic background of the right to strike and trade unionism. The background forms a critical element on the role that trade unionism played in the formulation of the right to strike. More critically, this chapter examines the origins of the "functionality principle" and "structural violence". These two are important in determining a rationale on whether a protected strike should lose its protected status due to violence. This historic background is intended to provide a holistic comprehension of strikes and the evolution of the right to strike in South Africa.

South Africa is a country moulded by people from diverse ethnicities and religious groups. The history of industrial action and strikes began with the commencement of industrialisation in South Africa. Industrialisation commenced in the latter 1800s after the discovery of diamonds and gold in 1867 and 1886 respectively.[64] At the commencement of industrialisation in South Africa, the local indigenous population did not possess the prerequisite skills for industrialisation. The foundation of the South African industrialisation was mining, and due to the non-existence of skilled labour in the country at the time, the mining companies hired white skilled migrants from Europe. Prior to the Anglo Boer War from 1899-1902, there was labour legislation regulating the workers' right to strike, but this only recognised white employees.[65]

Industrial action began in the early 1900s, and strikes became a weapon used by these white migrant labourers.[66] The first strike in 1907 was race based, where white migrant workers embarked on a strike to force the mining companies to change the ratio of white supervisors to black workers.[67] The right to strike in the South African context was born from white privilege based on inequality and racial exclusion. It is evident that the right to strike cannot be separated from structural violence. Although there were many violent strikes by white workers for their perceived injustices, their reasons for striking were not generalisable to black workers, and strike action was only exploited by the white minority. As white workers were the only recognised workers, the black workers were deprived of a fundamental weapon for bargaining

[64] S Van der Velden W Visser 'Strikes in the Netherlands and South Africa 1900-1998, A Comparison' (2006) *SALRJ* 301, 55.
[65] Note 1 above 962.
[66] Ibid.
[67] Ibid.

since its inception, given that this weapon was reserved for the white minority only.[68] During this period the laws of the country violated the Latin principle, *Actus Regis Nemini Est Damnosa* (The law will not work a wrong). A wrong was committed against the majority of the workers as they were deprived of a critical weapon with which to bargain with their employers.[69]

Additional legislation was passed, and in 1909 the Industrial Disputes Prevention Act[70] made provision for collective bargaining and conciliation for white workers, but excluded public servants and black people.[71] This Act defined an employee as a white person, a definition which clearly excluded black people.[72] This affirmed that the right to strike was for the elite and did not apply to all workers. It was an "exclusive club" in which one's skin colour determined one's "membership", and these were the seeds of structural violence. This Act allowed for white unions to be formed, but it was only in 1915 that the Chamber of Mines recognised unions. This recognition came as a result of the militant strikes that took place from 1913-14.[73] The above illustrates that a strike is a fundamental weapon in collective bargaining in that a strike not only forces the employer to accept demands, it additionally serves as a facilitator in the process of collective bargaining as it brings employers to the negotiation table.

After the First World War, a pattern of behaviour/conduct of using violence emerged by striking workers that would last through the decades, and it appeared to be more frequent in a constitutional democracy. The Rand Rebellion of 1922[74]served as a fundamental turning point regarding the workers' right to strike. The Rebellion, during which about 20 000 white miners took part in a strike, started in February 1922 and was marred by gross violence, destruction of state property and the killing of black non-striking labourers.[75] The violence became so out of control that martial law was declared and the state armed forces killed 153 white miners.[76]

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[68] Industrial Conciliation Act 1924.
[69] Note 1 above 964.
[70] Industrial Disputes Prevention Act 1909.
[71] Note 1 above 962
[72] Note 70 above, s 1(j).
[73] Note 70 above, s 2.3.
[74] Munro K "*Take a drive and see the sites associated with the 1922 Rand Revolt"*Available at http://www.theheritageportal.co.za/article/take-drive-and-see-sites-associated-1922-rand-revolt Accessed on 26/01/19.
[75] Ibid.
[76] Ibid. (Strike violence will be further discussed in Chapter 3).

Ninety years later, state armed forces gunned down 44 striking miners in the Marikana massacre of August 2012.[77] Violence during industrial action has thus been part of industrial action ever since the right to strike was exercised by workers in South Africa. Above all, the manner in which law enforcement (including police, security guards and soldiers) handles violent strikes is still the same as it was in 1922, with the use of deadly and brutal force.

Following the Rand Rebellion, a conciliation system was introduced through the 1924 Industrial Conciliation Act.[78] This system limited the right to strike by imposing compulsory conciliation and mediation before a strike could be declared. Non-white workers were not included in the 1924 Act, as the definition of "employee" excluded pass-bearing "natives". The Union of South Africa had the clear intention of marginalising the majority of the proletariats - black South Africans. The intention was to exclude the majority of workers who were not white from collective bargaining, and Africans, Indians and Coloureds were treated as mere tools and denied their basic human right of human dignity to fight for better working conditions and better wages through strike action.[79] This mistreatment of workers resulted in the birth of trade unionism in order to fight for industrial rights.

2.2. Trade Unionism

Trade unionism was born in South Africa with the intention of "remedying the imbalance of bargaining power within the employment relationship".[80] The most fundamental reason for the existence of trade unions is to address the power imbalance between employees and employers, and industrial action/strikes are the machinery that is used as leverage by the workers in that balance.[81] From 1924 to 1979, black workers began to create unions and embark on strikes, even though illegally. The turning point for black industrial emancipation in collective bargaining was in 1973; the mass strike from sectors in Durban, wherein between 60 000 and 100 000 employees embarked on a strike to demand better wages.[82] The 1973 strike gave birth to trade union activism. The Industrial Conciliation Act of 1956, also known as the LRA of 1956, was based on racial segregation. It illegalised interracial unions, banned strikes for black

[77] Note 2 above 386.
[78] Industrial Conciliation Act 1924.
[79] G Adler, E Webster '*Challenging Transition Theory: The Labour Movement, Radical Reform, and Transition to Democracy in South Africa*' (1995) Politics Society Vol 23, No. 1, 77-78
[80] P Benjamin 'Labour Law Beyond Employment' (2012) *Acta Juridica* 22.
[81] Ibid.
[82] Note 1 above 963.

people, and banned strikes for white people in certain sectors. Trade unionism was born out of the desperation of the workers during the period of the "laws of dispossession",[83] where black people were deprived of land rights, hence they could not own mines and farms.

It can be argued that trade unionism was born from resistance against the exploitation of workers by the mining companies, who made huge profits by employing black migrant workers from rural areas in KwaZulu-Natal, the Eastern Cape (Bantustan Homelands), Zimbabwe and Mozambique.[84] The only response that workers had seemingly identified was to tackle this exploitation by organising the working class. In 1918 the first trade union was founded, called the Industrial Workers of Africa, which made trade unionism the voice of workers born from structural inequality.[85] This was the birth of workers' voices and unity as a progressive step in the attainment of the right to strike for purposes of collective bargaining.

The birth of trade unionism resulted in an upsurge of labour strikes by black workers during the 1970s because of the fact that they had previously been frustrated and deprived of their basic right to bargain.[86] This defiance led to the government forming the Wiehahn Commission of Enquiry in 1977.[87] The irony of this was that the weapon of strike action was the weapon that forced the government to establish an enquiry. The commission was set up to investigate labour laws and more prudently, how to control trade unions. The commission revolved around industrial rights, especially for black workers to gain industrial rights, including the right to strike. Among the recommendations made by the Wiehahn Commission of Enquiry to the government, were the following actions:

(i) Legal recognition of black trade unions and migrant workers;
(ii) Abolition of statutory job reservation;
(iii) Retention of the closed shop bargaining system;
(iv) The creation of a National Manpower Commission; and
(v) The introduction of an Industrial Court to resolve industrial litigation.

[83] L Gentle L Callinicos L J M Jansen N Nieftagodien R Jordi '*A History of Trade Unionism in South Africa*' by Workers' World Media Productions 2018 3, accessed 7 January 2020.
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Wiehahn Commission Report 1979 available at http://psimg.jstor.org/fsi/img/pdf/t0/10.5555/al.sff.document.nuun1979_27_final.pdf accessed 08/98/2018

The Wiehahn Commission's recommendations in 1979 revolutionised industrial action. This led to the Labour Relations Amendment Act of 1981, which amended the Labour Relations Act of 1956 to allow black workers to legitimately participate in collective bargaining. The LRA of 1956, amended in 1981, was finally repealed by the LRA of 1995.

The above historic background illustrates the evolution of the workers' right to strike. This evolution began in the late 1800s with the prohibition of industrial rights, including the right to strike. From 1900 to 1924, this right was enjoyed by a small minority (white workers) but was still heavily restricted. Due to the rapid industrialisation of South Africa from 1924 to 1956, the LRA of 1956 was introduced, but this Act still excluded the majority of working class citizens. It was only in 1981 that the majority of the working class started to enjoy this right, but it was only granted in limited form to the black majority until the current LRA. This background serves as a history lesson and cautions that any further limitation to the right to strike must not be adopted arbitrarily or at face value. Any further limitation to the right to strike in a democratic state must take cognisance of the historic deprivation of the enjoyment of this right.

2.3. The Origins of the Functionality Principle

The principle of being "functional to collective bargaining" that is being proposed to deal with violent strikes was often used before the LRA was enacted, and before the adoption of the Constitution.[88] Remnants of this principle of being "functional to bargaining" are found in the 1996 case of *National Union of Metalworkers v Vetsak Co-operative Ltd & others*,[89] where a court reasoned that the strike was no longer functional to collective bargaining because the strike lasted for an indefinite period, and the employer could ill afford the economic loss for an indefinite time period. This term, "functional to bargaining", was used in the 1993 case of *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel*,[90] but in a different context, as the employer wanted to dismiss workers who were striking. The court held that if an employer were permitted to dismiss workers who were striking, then the strike would cease

[88] Ibid.
[89] *National Union of Metalworkers v Vetsak Co-operative Ltd & Others* 1996 (4) SA 577 (A) 590.
[90] *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 *ILJ* 963 (LAC).

to be "functional to collective bargaining".[91] In *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA & Others*[92] in 2014, there was a dispute around the term "mutual interest", as the applicant (the employer) stated that some of the demands of the strikers were unreasonable, and therefore not "functional to collective bargaining". A case referred to by Fergus,[93] *Modise & Others v Steve's Spar Blackheath*, [94] tried to define what was meant by "functional to bargaining" as it was argued that a "strike in support of a demand which is unattainable (or wholly unreasonable) is not one which is functional to collective bargaining".

The last two cases dealt with the notion that a strike with an unattainable or unreasonable demand is not functional to collective bargaining, thus creating a casual nexus between the demand and the functionality of a strike for collective bargaining. Put differently, a functional strike must have an attainable or reasonable demand. As stated by Rycroft, functionality relates to the reason for the strike and not the conduct of the strike.[95] It is, as a result, incumbent on the court to find a causal link between violence perpetuated by strikers and the principle of functionality to collective bargaining. Rycroft thus argues that the test that should be used by courts in deciding to declare a protected strike unprotected is the following: "has misconduct (violence) taken place to the extent that the strike no longer promotes functional collective bargaining?" In an obiter dictum, the court agreed with this test in *National Union of Food Beverage Wine Spirits v Universal Products Network (Pty) Ltd*.[96]

The argument advanced by Rycroft, however, does not take into account that the right to strike is also an individual right. Each and every citizen has the right to enjoyment of a protected strike. A strike does not become violent; individuals become violent. Thus, recourse must and should only be against the violent strikers and not against the strike or the strikers in general.[97] Above all, this test fails to take cognisance of the fact that the right to picket is a completely separate right and falls outside the definition of a strike in terms of s 213 of the LRA.[98] This test may seem at face value to unfairly violate employees' individual rights to participate

[91] Ibid.
[92] *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA & others* (2014) 35 ILJ 3241 (LC)
[93] Note 18 above.
[94] *Modise & Others v Steve's Spar Blackheath* 2001 (2) SA 406 (LAC); (2000) 21 *ILJ* 519 (LAC), 114.
[95] Note 17 above, 825.
[96] *National Union of Food Beverage Wine Spirits* supra 21, 488.
[97] Note 54, 578.
[98] LRA, s 213.

peacefully in strikes.[99] Employees' right to strike should be observed within the socio-economic conditions that employees ply their labour and live in South Africa.

2.4. Structural Violence

The history of industrial action and the right to strike cannot be separated from the socio-economic conditions that South Africa has experienced. It would be disingenuous to assess the right strike and strike violence in isolation from the past and present socio-economic conditions of South African citizens. The concept of structural violence is accurate in the South African context. Gatlung defines structural violence as "violence built into the structure and shows up as unequal power and consequently as unequal life chance". [100]Structural violence is the reason why South Africa, with more than 100 years since the commencement of industrialisation, still experiences violent strikes in the present day, and the violence is due to the legacy of inequality that still persists.[101]

Structural violence exists in South Africa mainly because of colonisation and the apartheid policy of 1948 that lasted until 1994.[102] Violence and brutality became entrenched in communities, and violence became an indoctrinated way of resolving matters in South African society.[103] The indoctrination stemmed from the brutality of the South African Police Force and the South African Defence Force who killed protestors, and one of the most prominent cases was the Sharpeville massacre and student uprising of 1976.[104] In 1994 the most fundamental change was the move from a racist political and labour policy to a non-racial constitutional democracy. However, this transition did not address related tendencies like the structural violence imbedded in society, and entrenched in the LRA of 1995.[105] The pre-1994 socio-economic rights of the apartheid era were for the benefit of the white minority people, who were allocated the majority of the state's resources in health, education, transport and housing, at the expense of the black majority. The "structure" of apartheid deprived black

[99] Note 54 above, 590.
[100] J Gatlung 'Violence, Peace and Peace Research' *Journal of Peace Research* 6(3) 171.
[101] Note 3 above, 67.
[102]A Muller 'Linking Poverty and Violence: The South African Scenario'(2013) *African Journal on Conflict Resolution* 13(3) 45.
[103] Note 102 above, 54.
[104] Note 102 above, 57.
[105] S Henkeman '*How Violence and Racism are Related, and Why It All Matters*' Available at http://www.polity.org.za/article/how-violence-and-racism-are-related-and-why-it-all-matters-2016-09-22 Accessed on 5/03/2019.

people of the tools to educate/skill themselves in order for them to earn a decent living and contribute to the economics of South Africa. In quintessence the apartheid "structure" denied the majority people of South Africa "equal life chances". [106]

The majority of the people were deprived of the right to own land and were forcibly removed from urban areas, which gave rise to townships and hostels with limited space for black people with large families. Consequently, 100 years of socio-economic marginalisation of black South Africans has resulted in the present day millions of uneducated and unskilled people who earn low wages; wages that fail to meet their basic needs.[107] The right to strike has come full circle, from being non-existent, to being a right of a chosen few, and finally to being a constitutionally protected right.

The evolution of the right to strike has taken more than nine decades to be recognised as a constitutionally entrenched right. The enjoyment of the right to strike should never be interpreted in isolation. Rather, it appears that the right to strike should be interpreted within the historic context of South African society. Structural violence is a key factor in the determination on whether the enjoyment of the right to strike should be further curtailed/limited. Within this context it is equally important to observe the functionality principle within the context of our law. More importantly, the functionality principle was not based on the conduct of workers during strikes but on elements of strikes.

[106] Note 102 above, 53.
[107] Note 3 above, 67.

CHAPTER THREE: THE RIGHT TO STRIKE

The evolution of the right to strike has given birth to the current constitutionally protected right to strike. It is of importance in this chapter to critical evaluate the limitations of the right to strike within context of the constitution and the LRA. Of more significance this chapter will discuss strike violence within the contexts of a protected and unprotected. Assessing whether the status of strike plays significant role in strike violence.

3.1. The Right to Strike under the Interim Constitution

In present day South Africa, the right to strike is now a fundamental right, and strikes in accordance with the LRA are divided into protected and unprotected.[108] The importance of this right in the collective bargaining process was profoundly stated by Ngcobo J as follows:

> "The right to strike is essential to the process of collective bargaining. It is what makes collective bargaining work. It is to the process of collective bargaining what an engine is to a motor".[109]

The above quotation/metaphor illustrates the true essence of what a strike is in terms of collective bargaining; a strike is the "heart" of collective bargaining. It pumps the "blood" in collective bargaining and gives collective bargaining "life". Collective bargaining without striking is a "broken winged bird that cannot fly, it is a barren field frozen in snow".[110] This vital "organ" to collective bargaining only came full circle in 1993 when it became a constitutional right in the Interim Constitution,[111] under the chapter of Fundamental Rights, s 27(4) which stated that, "workers shall have the right to strike for the purpose of collective bargaining". The right to strike has been interpreted by the courts of law to give true effect and meaning to the right, as a constitutionally entrenched right.

This was further illustrated in the case of *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd and Others*,[112] where the majority of the judges held that it was fair for an

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[108] LRA, 1995.
[109] *NUMSA & Others V Bader Bop (Pty) & Others 24 ILJ* 305 (CC) 367.
[110] H Langston '*Poem Dreams*' Available at https://study.com/academy/lesson/dreams-by-langstonhughes-summary-analysis.html Accessed on 26/01/19.
[111] Constitution of Republic 1993.
[112] *National Union of Metalworkers of SA* supra 89, para 11.

employee who was on a legal strike to be dismissed for prolonged absenteeism and/or absconding.[113] The Industrial Court held that once there was a deadlock between an employer and employee, or if neither parties wanted to compromise, then such a strike was not functional to collective bargaining. The Industrial Court often failed to protect workers by not allowing workers to fully utilise the right to strike. The rationale was confirmed in the matter of *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd,* [114] and although it was held that the "right or freedom to strike is fundamental to the system of collective bargaining",[115] the court nevertheless held that an employer was well within his or her rights to dismiss workers under common law. During the Interim Constitution period, workers could not freely enjoy a constitutionally entrenched right without the fear of repercussions, and dismissal in particular.

S 213 of the LRA clearly defines what a strike is, and intrinsically states that no single person can embark on a strike; it needs to be a collective of workers. A strike is defined in s 213 of the LRA[116] as the withholding of labour and/or manpower by more than one person against a specific employer, for a specific reason. A fundamental aspect of the definition is that the withholding of labour and/or manpower should have a purpose.[117] Arranged in layman's terms, persons (workers) must only withhold their labour and/or manpower from the employer for matters remedying grievances or resolving a dispute in respect of any matter of mutual interest. The definition of what constitutes a matter of mutual interest is still being interpreted in our courts, with no definite meaning.

3.2. Protected Strikes in Terms of the LRA

The LRA gives effect to s 23(2)(c) of the Constitution, and s 64 provides the governing provisions of a protected strike. S 64 of the LRA sets out the legislative procedure for exercising of the right to embark on what is commonly known as a protected strike. A protected strike guarantees certain immunity for striking workers. Employees who participate in a protected strike cannot be held liable in terms of delictual damages and breach of contract, as stated in s 67(2) (a)(b) of the LRA. More importantly, employees who strike cannot be dismissed in terms

[113] Ibid.
[114] *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* 1997 (4) SA 51 (SCA); (1997) 18 ILJ 439 (SCA).
[115] *National Union of Mineworkers* supra note 114, 442.
[116] Note 6 above.
[117] *TSI Holdings (Pty) Ltd & Others v National Union of Metalworkers of SA & Others* (2006) 27 ILJ 1483 (LAC).

of s 67(4) of the LRA. Such a dismissal is automatically unfair, as stipulated by s 187(1)(a) of the aforementioned Act. This signifies the evolution of the right since the early and late 1990s, during which the courts, in matters such as the *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd and Others,*[118] viewed strikes as a breach of contract and dismissal was the only weapon that an employer could use against striking workers. The immunity granted by s 67(2) (a)(b) and s 67(4) of the LRAk granted the right to strike – the "sharp and mighty sword"[119] that employees needed to utilise against employers when engaging in collective bargaining. Such immunity does not, however, extend to misconduct, and employers can fairly dismiss workers engaging in misconduct, in terms of s 67(5).

The right to strike, like all rights in the Bill of Rights, is not absolute.[120] There are limitations in the exercising of the right to strike, and as with any limitation to a right, these must be reasonable and justifiable in an open and democratic society. S 64 and s 65 of the LRA, read together with the definition (s 213), limits the right to strike by prescribing procedures to follow in order for a strike to be protected.[121] Failure to adhere to these provisions results in a strike being unprotected, and workers thus lose their immunity from dismissal and civil liability in terms s 65 of the LRA. In quintessence, these two sections do not apply positive conditions to the right to strike, but rather apply restrictive conditions on workers in exercising the right to strike in the manner protected by the LRA.

The right to strike is also substantively limited by the definition itself, which states that workers can only strike regarding "matters of mutual interest".[122] The importance of this limitation is that it goes to the heart of the "functional to collective bargaining" principle. A strike that is not conducted for a "matter of mutual interest" ceases to be functional to collective bargaining. The courts have, however, in reality refrained from defining and placing limits on the scope of "matters of mutual interest".[123] In the case of *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA*,[124] the court was quite explicit that there was no

[118] *National Union of Metalworkers of SA* supra 89.
[119] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016) 1.
[120] Note 10 above 334.
[121] P Maserumule 'A Perspective on Developments in Strike Law' (2001) 22 *ILJ* 45.
[122] LRA, s 213.
[123] 1bid.
[124] *Vanachem* supra note 92.

clear definition or specific requirements in defining matters of mutual interest. The court held that in determining a "matter of mutual interest", the court's role was limited:

> "In a voluntarist system such as that established by the LRA, the courts have no role in determining the merits of any demand made during the bargaining process, nor are they empowered to make any value judgment as to whether a demand promotes or secures the common good of the enterprise. The court is empowered to intervene if and only if a demand made in support of a strike or lock-out does not comply with the substantive". [125]

This judgment acknowledges two critical issues: firstly, that the labour courts have limited powers and secondly, that "matters of mutual interest" are a substantive limitation to the right to strike and should not be easily imposed during collective bargaining.

In the matter of *De Beers Consolidated Mines Ltd v CCMA*,[126] the court held that matters of "mutual interest" should be interpreted as meaning "any issue concerning employment". In the case of *Rand Tyres & Accessories v Industrial Council for the Motor Industry,*[127] the court held that "whatever can be fairly and reasonably regarded as calculated to promote the wellbeing of trade concern must be of mutual interest". This evidently demonstrates that the labour courts have difficulty in interpreting this limitation. The further limitation of the right strike must be applied with extreme caution and consideration. The proposal of the limitation of the status of a protected strike due to violence will pose serious difficulty without any underlining legislation. It appears that a functional strike is a strike where there is a recognisable and achievable "matter of mutual interest", and in the absence of a matter of mutual interest a strike should cease to be functional to collective bargaining.

Changing the status of a protected strike is a substantive limitation on the account of violence because it involves the evaluation of the conduct by workers. The functionality of a strike rests with the purpose of the strike. The proposed functionality test, as correctly asserted by Fergus in analysing Rycroft's test, poses a great difficulty for the courts. The functionality test places

[125] *Vanachem* supra note 92, 3249.
[126] *De Beers Consolidated Mines Ltd v CCMA* [2000] 5 BLLR 578 (LC) 581(C).
[127] Rand Tyres & Accessories v Industrial Council for the Motor Industry (Transvaal) 1941 TPD 108)

a burden on the court to make a value judgement on a series of issues such as the degree of the violence and the role of the union in curbing the violence during a protected strike.[128]

Academics have proposed tests to be used for violent strikes. Rycroft proposes the following test: "has misconduct taken place to an extent that the strike no longer promotes functional collective bargaining, and is therefore no longer deserving of its protected status?" [129] Myburgh's proposed test is that "strike violence" causes a bargaining power imbalance.[130] Violence during strikes "renders the bargaining illegitimate or unconscionable". Myburgh advances that where strike violence has an effect on the "bargaining power between parties", then such a strike should lose its protection.[131] In essence, the status of a strike should be changed when the "impact" of the strike violence unfairly and unlawfully exerts economic pressure on an employer to force them to accede to the demands of the workers.

The above tests advanced by Rycroft and Myburgh completely fail to consider the role of the SAPS in maintaining law and order. In order for any country to be functional, law and order must be maintained. South Africa is a country based on law and order, therefore strike violence should be dealt with within the ambit of maintaining law and order. Fergus proposes that courts should engage in the weighing up of the right to strike and other constitutional rights to freedom and security [132] when strikes turn violent, so as to determine whether or not a strike still enjoys its protected status. However, this is flawed if the role of the SAPS is not considered, as the SAPS is constitutionally bound to protect the rights to freedom and security from all criminal elements, including the right to strike. The changing of the protected status of a strike due to violent conduct of the workers reasonably infers that in the event that this punishment is handed down by the court, it will result in future deterrence of violence, as workers would lose their immunity conferred by the LRA. This in the South African context is a misconception though, as unprotected strikes are also violent, and at times even more violent than protected strikes.

[128] Note 18 above 1546.
[129] Note 17 above 826.
[130] Note 12 above 708.
[131] Note 12 above 710.
[132] Constitution, s 12

3.3. Unprotected Strikes

The limitations on the right to strike resonate with the *naissance* of unprotected strikes, in that an unprotected strike is a strike that fails to comply with the provisions of s 64 of the LRA, [133] or does not meet the definition of a strike, as outlined in s 213.[134] Workers who embark on unprotected strikes lose the immunity granted to them by s 67 of the LRA. Unprotected strikes are often referred to colloquially as "wildcat" or "unprocedural" strikes due to the fact that they fail to adhere to the prescripts of s 64 and s 213. The LRA grants employers remedies against employees who embark on an unprotected strike. Employers can apply for a court interdict (in terms of s 68(1)(a)(i)(ii) of the LRA)[135] to stop or prevent the employees from embarking on a strike, employers have the power to fairly dismiss workers,[136] and employers can claim delictual damages against employees/trade unions engaged in an unprotected strike.[137]

S 68 of the LRA is a consequence of the limitations on the right to strike, and these limitations are further extended by definition in s 213 of the LRA. Unprotected strikes emerge in two scenarios, firstly, in cases where employees have not followed the procedure prescribed in terms of s 64 of the LRA. It was stated in *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & Others*[138] that a strike will be unprotected if the workers engaging in a strike are disqualified from striking by a collective agreement.[139] The strike will be also unprotected if strikers strike without the issuing of a certificate by the Commissioner stating that the matter remains unresolved, or if the strikers have not timeously furnished the employer with a 48-hour notice to strike.

Substantive limitations of a right to strike are the demands that employees submit to employers. Employees must submit their demand/s to the employer and such demand/s must be lawful.[140] In *Bidvest Food Services (Pty) Ltd and NUMSA, Gallant & 158 Others*,[141] the applicant – a food service business – refused to grant the respondent constitutional organisational rights in

[133] LRA, s 64.
[134] LRA, s 213.
[135] LRA, s 68(1)(a)(i)(ii).
[136] LRA, s 68(5).
[137] LRA, s 68(1)(b)(i)(ii).
[138] *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & Others* (1999) 20 ILJ 82 (LAC).
[139] *Fidelity Guards Holdings* supra note 138, 87.
[140] *Tsi Holdings (Pty) Limited and Others* supra 117 above 1496.
[141] *Bidvest Food Services (Pty) Ltd and NUMSA, Gallant & 158 Others Bidvest Food Services (Pty) Ltd and NUMSA, Gallant & 158 Others(2015) 36 ILJ 1292(LC).*

the workplace [142] due to the fact that the respondent's constitution limited its scope to metalworkers. The respondent had declared a dispute and subsequently a strike for organisational rights in the workplace. The applicant had launched an urgent application, arguing that the strike was unlawful/unprotected due to the fact that the demand was unlawful, as the union wanted organisational rights in forums beyond its scope. The court held that the applicant was wrong to characterise the strike as an unlawful/unprotected strike because of the demand, as a strike merely has to be a "concerted" refusal to work in a matter of "mutual interest".[143] The strike in this matter followed the procedures of s 64 of the LRA, and was therefore lawful. This judgement exemplifies the fact that employers often use technicalities in order to circumvent the right to strike, by declaring strikes unprotected due to the nature of the demands of the employees.

3.4. Strike Violence During Picketing

Both in protected and unprotected picketing the conduct by striking workers is perpetuated to exert maximum pressure on the employers to accede to the strikers' demands. Picketing is a form of demonstration by workers to voice their displeasure at the employer for failure to meet or accede to their demands. The critical point to comprehend is that during strikes, workers assemble at the workplace or outside the workplace to picket. Often this picketing is marred by violence, damage to property, the barricading of roads (burning of tyres), and the hurling of insults, both verbally and on placards. This conduct causes a nuisance to the employer and the neighbours of the employers (third parties), and at times to communities and the wider society. In South Africa, pickets are often confused with strikes.[144]

These are, in fact, two different concepts: striking is merely the withholding of labour (refusal to work) or the retardation of work, and strikes can be conducted by staying at home (stayaways) as this will still constitute a strike.[145] A strike can proceed without picketing, but one cannot picket without striking.[146] There is a need to evaluate pickets during strikes.

[142] LRA, s 21.
[143] *Bidvest Food Services (Pty) Ltd* supra 141 above 1296
[144] Note 12 above 710.
[145] J Grogan '*Collective Labour'* 2nd ed. (2014) 388.
[146] LRA, s 77.

Picketing is a vital component for workers in convincing the employer to meet workers' demands during strikes; "it grants the bird (the strike) the necessary wings to fly high". [147]

Picketing is a constitutionally protected right in terms of s 17 of the Constitution of the Republic South Africa.[148] Within the Constitution, this right has limitations: it must be exercised peacefully and picketers must remain unarmed. The same sentiment is echoed in the Regulation of Gatherings Act.[149] In the LRA, picketing by striking workers is provided for in s 69 (1), which states that:

> (1) A registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating-
> (a) in support of any protected strike; or
> (b) in opposition to any lockout.[150]

The limitations of picketing were further emphasised in the *SA Transport & Allied Workers Union & Another v Garvas & Others* [151] wherein Chief Justice M Mogoeng explicitly stated that :

> "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions. This means that everyone who is unarmed has the right to go out and assemble with others to demonstrate, picket and present petitions to others for any lawful purpose".[152]

Picketing is an imperative factor in industrial action [153] and its purpose cannot be understated, as it critically forces the issues that are in dispute to be addressed. It is "ammunition" for workers to compel their employer to resolve or meet their demands expediently. The Regulations of Gatherings Act[154] provides effect to the right to picket. S 8 of the aforementioned Act states that the gatherings must be unarmed, and must be within the regulated area. The Regulations of Gatherings Act, s 8(5) and 8(6), sets out precisely the manner in which picketing should be conducted, and these sub-sections prohibit the use of offensive language and the use

[147] Note 110
[148] Constitution, s 17.
[149] Note 47
[150] LRA, s 69 (1)
[151] *SA Transport & Allied Workers Union & Another v Garvas & Others* (2012) 33 ILJ 1593 (CC)
[152] Note 18 above 1596.
[153] *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & Others* (2018) 39 ILJ 613 (LC).
[154] Note 47.

of violence or language that instigates violence against people. All and any actions in contravention of s 8(5) and s 8(6) are statutory violations that carry criminal liability.[155]
S 69(2) (a) and 69(2) (b) of the LRA permit picketing in industrial strikes to take place inside or outside the premises of the employer.[156] In most situations the employer and striking workers agree on picketing rules, and the employer cannot unreasonably withhold permission to picket. The LRA provides a limitation in that picketing workers can only picket lawfully if the strike is protected. If workers picket in an unprotected strike, then such picketing is unlawful/illegal and in contravention of the Regulations of Gatherings Act.[157] Striking workers picketing during protected strikes is a rallying call to convince non-striking workers to join the strike, and to exert maximum pressure on the employer to accede to their demands.[158] Picketing also serves the purpose of discouraging members of the public and the employer's clients from doing business with the employer.[159] Picketing and demonstrations create a powerful voice for the employees to be heard and for the voices of workers to be taken seriously and attentively by the employer. [160]

The demonstrations during picketing are aimed at arousing support for employees during a strike. Picketing violence is driven by mob psychology and mentality, where workers act in concert with criminal intent during picketing.[161] The gathering of employees or any other picketing assembly as a group leads to what is referred to by Rycroft [162] as the "weakening of moral constraints" of workers. There are factors that make striking workers violent during strikes, the first of which is authorisation.[163] Authorisation to act violently happens the moment strike leaders (union leaders) allow workers to conduct themselves in a violent manner and fail to act at all or fail to act timeously to stop these violent acts. This leads to routinisation;[164] and routinisation is when violence becomes the *modus operandi* for the workers. This violence is

[155] Note 47, s 8(5) and s8(6).
[156] LRA, s 69(2) (a) and s 69(2) (b)
[157] Note 47, s 8(5)
[158] S Woolman '*Bill of Rights Handbook Chapter Seventeen Assembly, Demonstration and Petition*' (6th Ed). Cape Town: Juta (2013) 377.
[159] C C Mulcahy S H Schweppe 'Strikes Picketing and Job Actions by Public Employees, 59(1) *Marquette Law Review* (1976) 133-44
[160] Note 158 above 378.
[161] A Rycroft 'What Can Be Done About Strike–related Violence?; Vogelman L 'Some Psychological Factors to Consider in Strikes, Collective Violence and the Killing of Non-strikers: Violence in Contemporary South Africa'; H C Kellman 'Violence without Moral Constraints' (1973) *Journal of Social Issues* 29(4).
[162] Note above 161, 12.
[163] Ibid.
[164] Ibid.

conducted with the sense of belief that such immoral behaviour is acceptable, resulting in the third factor, namely dehumanisation.[165] Dehumanisation of non-striking workers includes the employer, and is violence directed by striking workers against other workers and employers.

It is submitted that dehumanisation during picketing is distinguishable from conduct of industrial action and criminal conduct. Striking workers purposely overlook the fact that non-striking workers are their colleagues, and more importantly that non-striking workers are other human beings - with children, mothers, fathers, brothers, sisters, cousins, friends or relatives. The non-striking workers, just as with the striking workers, are working to provide for their families and live a life with dignity. The critical question is; do violent pickets and violence against other employees nullify the purpose of the retardation or the stoppage of work for matters of mutual interest or for resolving grievances? This then leads to the ultimate question; should the labour courts interdict the violent pickets in accordance with the Regulations of Gatherings Act?[166] Certainly the courts should interdict those that are violent. The courts ought not only to characterise this violence in the context of industrial action but also in the context of criminality. The ignoring and the disobeying of the courts by striking workers to desist from unlawful violent conduct is a serious violation of the courts' power and a disregard for the rule of law.

The case of *Tsogo Sun*[167] has given birth to the notion that a strike marred in violence should maybe lose its protected status. There was in this case a clear distinction between picketing and striking, as in *Tsogo Sun* the employees were only engaged in violent conduct during picketing. The workers' conduct included blockading the streets, intimidation, stopping of customers and the destruction of property, and these are all criminal offences. Despite this criminal conduct the strike still met the requirements of the definition of a strike in terms of s 213 of the LRA.[168] In order for a protected strike to lose its protection due to violence, a legislative change to the definition of a strike is required. This change ought to read: "striking workers who engage in picketing and commit gross acts of violence render the strike not functional to collective bargaining and undeserving of its protected status". The manner in which workers behave

[165] Ibid.
[166] Note 47.
[167] *Tsogo* supra note 9.
[168] LRA, s 213.

during strikes has nothing do with the elements and requirements of a strike. Additionally, violence does not only emerge during picketing; strike violence also ensues outside of picketing. During the 1980s and 1990s, non-striking workers were killed in their homes.[169] In the days leading up to the Marikana massacre, a shop steward was killed whilst in the office.[170] It is a notable point that some employees are of the perception and understanding that violence is the ultimate method for use during a strike to get an employer to accede to their demands.

Strike violence takes place in both protected and unprotected, the right to strike has various limitations. Critically, the right to strike is not exercised in a vacuum, the right to strike is exercised with other rights. These rights include the right to assemble legislated by the Regulations of Gatherings Act. It is submitted that the peaceful enjoyment of these rights is the responsibility of SAPS, as the constitutional body that is mandate to keep law and order. Any further limitation of the right to strike must take into consideration the bargaining positions of the employees and employers.

[169] Note 161 above, 12.
[170] Ibid.

CHAPTER FOUR: VARIOUS POSITIONS ON STRIKES

In determining the critical question of whether there should be further limitations to the right to strike, it is important to examine the social conditions of South Africa. These include the socio–economic rights of workers within the theory of structural violence. The exercising of the right to strike impacts both employees and employer. It is imperative that both positions are appropriately understood in collective bargaining before determination is made on whether a protected strike should lose its protected status on the account of violence.

4.1. Employees' Position on Strikes: Structural Violence and Socio-economic Rights

The true nature of collective bargaining is that there are two "adversaries" engaged in a power play to outwit one another into submission. In this context the opponents are the employees and the employer. A poem was written in the 1950s about the plight of black people in Harlem.[171] This poem spoke about the burning anger in the black community that was building to the point of eruption. The anger was in relation to universal suffrage and equal rights (American civil rights) for black people in the United States of America, who for centuries had been treated as second class citizens, and perceived as inferior human beings despite slavery being abolished in 1865. Langston Hughes wrote a telling poem probing what happens if a system frustrates the hopes of people to such an extent that those frustrations erupt. The poem is called *Dream Deferred*:[172]

> "What happens to a dream deferred?
>
> Does it dry up
> like a raisin in
> the sun?
> Or fester like a
> sore - And then
> run?
> Does it stink like
> rotten meat? Or crust
> and sugar over- like a
> syrupy sweet? Maybe

[171] L Hughes '*Dreams Deferred*' Available at https://www.poetryfoundation.org/poems/46548/harlem accessed on 25/02/2019
[172] Ibid.

it just sags like a
heavy load.
Or does it explode?"

The above poem describes structural violence; the 'structure' in structural violence is the "economic, political, legal, religious or cultural factors that shape how persons and people in communities interact within a social system".[173] In South Africa the economic system or the wealth of the country is in the hands of a few people; there are only 43,600[174] people in South Africa who possess assets worth more than a million rands in a country with 50 million citizens. In 2015 it was estimated that people living below the poverty line numbered 30,4 million, and these are people who cannot afford the basic necessities of food, clothing, and transportation.[175] The domino effect of these statistics is that only a minority of the country's citizens have access to resources, political power, good legal advisors, quality education - especially higher education, and more prudently access to more wealth. Inequality is built into the fabric of the South African social system (the structure). "These structures are violent because they reproduce violence by marginalising people and communities, constraining their capabilities and agency, assaulting their dignity, and sustaining inequalities".[176]

From 2005 to 2015 South Africa had an average of 85 strikes per year,[177] with 55 per cent of the aforementioned strikes unprotected and violent.[178] More than 20 years since the advent of democracy (1994), South Africa still experiences a high number of strikes, especially violent strikes. It seems that the promise of 1994 has not been fulfilled or achieved, as the promise of industrial action free of violence, intimidation and destruction has not been ushered in by the adoption of the Constitution. The "dream" (equality, better wages, better working conditions and better opportunities) of a better life for workers appears not to have been achieved because of the "structure" of South African society. The violence seen during strikes suggests that the "dreams" and aspirations of workers have been "deferred" to such an extent that it manifests and "explodes" into violence.

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[173] B Rylko-Bauer and P Farmer '*Structural Violence, Poverty, and Social Suffering, The Oxford Handbook of the Social Science of Poverty'* (2016), 1.
[174] K Wilkinson 'Factsheet: South Africa's official poverty numbers' *Africa Check* (2018) Available at https://africacheck.org/factsheets/ factsheet-south-africas-official-poverty-numbers/ accessed 10/02/19.
[175] Ibid.
[176] Note 173 above 49.
[177] Department of Labour '*Industrial Action Annual Report 2017*' Available at http://www.labour.gov.za/DOL/downloads/documents/annual-reports/industrial-Action-annual-report/2017/iar2017.pdf accessed 10/12/2018.
[178] Ibid.

A critical analysis of the socio-economic conditions of workers is required to better comprehend the reasons for the high levels of violence during industrial strikes in a constitutional democracy.[179] Industrial relations problems are not merely legal or plainly industrial relations matters; there are numerous other underlying elements that cause tribulations that result in workers acting in a violent manner.[180] It is predominantly forgotten and not frequently reported that employees also suffer during strikes, because of the "no work, no pay" principle, so it is not just employers who suffer financial harm from the strikes.

A proposed reason for the violent strikes is inequality, as South Africa is one of the most unequal societies in the world.[181] The failure by employers and government to deliver socio-economic rights[182] to all workers, especially in the mining sector, has resulted in the violent strikes that South Africa has been witnessing for the past two decades. Marikana serves as the epitome of strike violence, underscored by the workers' plight, and poor socio-economic conditions post democracy. The Marikana massacre is the embodiment of a "dream deferred" for workers in South Africa. Discussions of the Marikana Massacre often centre on the demands of the workers for a salary raise from R 4500.00 to R12 500.00, and the killings that transpired during the unprotected strike. The socio-economic conditions of the mineworkers in Marikana and the inequality are very understated in discussions on the Marikana Massacre. Lonmin South Africa paid Lonmin London, the holding company, 1.6 billon Rands in commission (profits) between the years of 2008 - 2012.[183] At the Lonmin mine white workers on Grade A (the lowest salary bracket) earned R688 more than black workers (Grade A) in 2012.[184] The 12 directors of Lonmin were paid R48 000 000.00 in wages in 2012, while the blue-collared workers earned just R3500.00 - R6000.00 per month. South Africa is the biggest producer of platinum in the world and in 2014 South Africa produced over 110 000 out 161 000 kilograms of the world's platinum.[185] Despite this production, more than half of Lonmin's employees lived in shacks

[179] K Van Holdt '*Institutionalisation, Strike Violence and Local Moral Orders*' 128. Available at https://www researchgate.net/publication/236803952_Institutionalisation_strike_violence_and_local_moral_orders/link/553671670cf218056e94ff7e/download accessed on the 11/02/2019
[180] Note 156 above, 386.

[181]Note 33 above.
[182] Ibid.
[183] Ibid.
[184] Note 179 above 129.
[185] T Bell '*The 10 Biggest Platinum Producers*' Available at https://www.thebalance.com/the-10-biggest-platinum-producers-2014-2339735 accessed 12/03/2019.

made from zinc near the mines.[186] This is not good habitation during winter and summer.[187] It is not illogical to reason that this type of inequality is one of the deep root causes of strike violence. Inequality can be inferred as the principal source of violence in workers.

From the employees (mineworkers) in the mining sector's perspectives, every day at work poses a serious danger to their lives as they work hard under extreme conditions.[188] Notwithstanding this risk, mineworkers cannot afford a house, running water or electricity and they do not have the income to send their children to good schools and tertiary institutions. These are the basic rights for any South African citizen to live a life of dignity. Violence during strikes in South Africa is not a new phenomenon; It has been part of industrial action in South Africa for years, both during and post-apartheid, to such an extent that it can be called the *modus operandi* for striking workers. Even the methods/tactics used during strikes are reminiscent of the apartheid days, with blockading of roads, burning of tyres, and vandalism of the property of the employer and of third parties' property.[189] This by no means, means that violence should be justified, glorified or condoned. Violence remains a purely criminal act and it does not advance the principles located in the preamble of the constitution. Often such violence is met with counter violence by police and security forces, with the shooting (live ammunition in the Marikana massacre) and assaulting of workers.[190]

Most of the people who engage in strike violence are black people and the victims of systematic inequality.[191] In industrial relations there is wage inequality[192] and in 2008 ethnically African people were found to be the lowest wage earners (amongst Indians, coloureds and whites). South Africa was ranked 5th in the world in terms of wage inequality in 2004.[193] It can be reasonably inferred that it is this type of inequality that creates frustration and anger in workers. These frustrations run across all industries, from retail (Shoprite Checkers) to the mining industry (Anglo American) and these wage inequalities manifest themselves in the differences

[186] Note 33 above.
[187] Note 2 above 847.
[188] Note 33 above.
[189] T Petrus W Issacs-Martin 'Reflections on Violence and Scapegoating in the Strike and Protest Culture in South Africa: Africa Institute of South Africa' (2011) 41(2) *Africa Insight* 67.
[190] Note 33 above.
[191] Examples: Mineworkers, Truck Drivers, Farmworkers, Street Sweepers
[192] R Van Niekerk '*SA Executive Directors Not Overpaid*' Available at https://www moneyweb.co.za/news/companies-and-deals/sas-executive-directors-not-overpaid/ accessed on the 6/11/2017.
[193]Ibid.

between the salaries of the Chief Executive Officers (CEOs) and the employees.[194] On average the top CEOs in South Africa earn 725 times more in salaries than the average employees.[195] The Anglo American CEO earns 102 million Rand a year, a gap of 220 times more and the Shoprite Checkers CEO who earns 50 million Rand a year, and a gap of 725 times more than the average employee. It is these inequalities that cause discontent and anger amongst workers. To add to this, the average CEOs' increments are 10 per cent plus per annum and an average worker's increment is 8 per cent or less; this inequality is also one of the reasons that there is violence during industrial action. Violence then becomes the voice with which workers express their discontent with their employers about these disparities.

The use of violence by workers, even though it is criminal conduct, with the intention to act with criminal intent is perpetrated on the basis of industrial action.[196] Even though strikes are carried out in pursuit of an economic struggle, violence is used as a means to exert pressure to expedite the submission of the employer to the demands of the workers.[197] There is a South African enculturation that violence produces the desired results. Put differently, the only time that authority, employers in this case, responds or meets the demands of workers is when violence is used during strikes. An aspect that is not reported in the Marikana massacre is that after the massacre, the workers negotiated a wage increment of 22 per cent, and this increase is one of the highest wage increments to have occurred in South Africa.[198] The wage compromise was made to save lives and bring the violence on the platinum belt to an end.

Strike violence is not only aimed at the employer but at other non-striking workers and people as well, because often striking workers perceive non-striking workers as traitors; betrayers of the workers and the cause. Moreover, non-striking workers stand to benefit from negotiations or demands in the event that striking workers' demands are successful.[199] This builds up a lot of anger and resentment amongst the striking workers towards the non-striking workers, as they feel that, their "suffering and sacrifice will nourish the tree that will bear the fruits of demands

[194] Q Bronkhorst '*South Africa Massive Gap*' Available at https://businesstech.co.za/news/general/59173/south-africas-massive-wage-gap/ accessed on 12/03/2019.
[195] Note 192 above.
[196] E Diener 'Deindividuation, self-awareness, and disinhibition' (1979) *37*(7) *Journal of Personality and Social Psychology* 1160-1171.
[197] Note 191 above.
[198] O M Samuel 'Protracted Strikes and Statutory Intervention in South Africa Labour Relations Landscape' School of Economics & Business Sciences (University of the Witswaterand) 2016 13 *Journal of Contemporary Management* 1024.
[199] Ibid.

for all workers".[200] This anger and resentment then manifests in violence against the non-striking workers and the property of the employer, so the removal of the status of a protected strike might curb this strike violence. However, given the deep rooted origins of strike violence it appears that the changing of the status of a strike will serve only as a cosmetic exercise, as it does not adequately address the ending of strike violence. There are also various underlying societal challenges faced by workers that will not be addressed by the changing of the status of a strike due to violence, and as a consequence such violence will persist.

> In a city on a corner stands a house that's mighty grand;
> Where in glory and in splendour dwell the magnates of the Rand;
> What a system! What a crime;
> We can't mend it, we must end it;
> End it now and for all times;
> Up above the mining compound where he joins the picket line;
> He's a labour agitator and his life's not worth a dime.[201]

The lyrics of the song above, originally sung by British miners and subsequently adopted by the South African Communist Party, have symbolic significance: they symbolise the socio-economic divide between employee and employer in collective bargaining. The song also symbolises the bargaining position of the employer and employee. The employer is in a position of power as the controller of the economic resources but more importantly, the employer views industrial action as a nuisance and obstruction to production and productivity.

4.2. Employers' Views on Strikes

South Africa has a liberal economic system as it permits private ownership of property,[202] and permits private and public companies to be owned and run by citizens.[203] The economic system also entrenches a constitutional right for citizens to decide on individual trade.[204] S 23 of the Constitution and the LRA gives credence to the employer and employee relationship, of two people (including juristic persons) engaging in an economic contractual relationship. The employee works and the employer remunerates the employee for the work accomplished. Once

[200] S Mahlangu Paraphrasedbefore his hanging on the 6th of April 1979. https://www.sahistory.org.za/people/solomon-kalushi-mahlangu accessed 06/07/2019
[201] https://www.news24.com/news24/Archives/City-Press/What-a-system-What-a-crime-20150430 accessed on the 29/07/2017
[202] S 25 of the 1996 Constitution.
[203] Companies Act 71 of 2008.
[204] Constitution, s 22.

this relationship is established certain obligations are conferred by law on the employee and employer. The laws conferred to this employment relationship are there to protect and govern the relationship between employer and employee. These laws safeguard and ensure that each party treats the other party with fairness and in a manner that preserves and promotes their human dignity.

Employers are naturally profit driven, and violent strikes become an albatross around the necks of employers, especially when it comes to protracted strikes,[205] as the employers suffer enormous economic harm. Over and above this, employers have to contend with intimidation and violence against non-striking workers,[206] replacement workers and vandalism of company property. Employers are the main victims and targets of strike violence, and they are forced to endure the brunt of workers who act with mob mentality - with anger and frustration which leads to irrationality and criminal acts.

In 2014, over 100 non-striking workers were locked in factories in Vanderbilpark by striking NUMSA workers.[207] In 2007, striking union members killed and assaulted non-striking workers in their homes. It is these ordeals that employers have to deal with in terms of violent strikes.[208] The harm caused by violent strikes causes a negative domino effect on the employers, both in terms of economics (property damage and production) and human capital (skills and training). There is an undeniable reality (stated in Chapter Three) that violence accelerates and forces employers to respond decisively to the demands of workers.[209] Employers also contend with the violence directed at replacement workers, which prevents the replacement workers from entering the workplace, but above all else employers contend with violence that is perpetuated against employees who are not on strike. These are serious constitutional violations of the rights of an employer in terms of free trade and workers' individual rights.[210] To add insult to injury, employers still have to pay the non-striking workers even though they are prevented from working.

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[205] Note 198 above, 1026.
[206] Ibid.
[207] P De Wet *'The Jury is out on Strike Violence'* Available at https://mg.co.za/article/2014-07-10-the-jury-is-out-on-strike-violence accessed 04/04/2019.
[208] *Food and Allied Workers Union obo Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River; Premier Foods Ltd t/a Blue Ribbon Salt River v Food and Allied Workers Union obo Kapesi and Others* (CA7/2010) [2012] ZALAC 46.
[209] Note 12 above, 708.
[210] Ibid.

It is these actions that lead employers to perceive strikes as a hindrance to business and productivity, instead of as instruments for workers in collective bargaining, and as workers' ultimate and most powerful bargaining tool. This is best illustrated in the court interdicts brought by employers on technicalities in cases such as *Pikitup SOC Ltd v SA Municipal Workers Union on Behalf of Members*[211] and *Vanchem Vanadium Products Pty Ltd v National Union of Metalworkers of SA.* [212] In these cases employers focussed on the interpretation of the definition of "matter of mutual interest".[213] Even though this was not frivolous or pedantic litigation, these cases dealt with the fundamental issues of definition. The aforementioned cases indicate the apprehension that employers have regarding strikes and their willingness to raise technicalities to thwart striking workers. More importantly, it appears that the functionality of a strike rests with the striking employees meeting the definition and the procedures of a strike. The abovementioned cases vividly illustrate that workers cannot properly bargain or forcibly assert demands with an employer without striking, and strikes level the playing field in collective bargaining. In these matters it became clear that the employer wanted the strikes to be declared unlawful, but there is no guarantee that such a ruling will stop violence. In 2017, 59 per cent of the strikes in South Africa were unprotected,[214] and the majority of those strikes were engulfed in violence. The only reasonable inference that can be deduced is that the characterisation of a strike, whether its protected or unprotected, does not prevent workers from striking nor prevent violence. Consequently, the change of a strike's status from protected to unprotected will only empower the employer to dismiss the workers.

A major cause of violence during strikes resulting in the loss of life is employers who hire replacement workers during strikes, and non-striking workers.[215] Industrial action has been grappling with this issue of replacement workers, because for all intents and purposes replacement workers and non-striking workers defeat the objectives of a protected strike to exert economic pressure on the employers. It cannot, however, be a fair labour practice to use brutal force to deprive other workers of the enjoyment of their constitutional rights. Myburgh advances that the status of a strike should be changed, but on the justification that the violence "incapacitates the employer". The notion is quite accurate that "violence illegitimately

[211] *Pikitup SOC Ltd v SA Municipal Workers Union on Behalf of Members* (2014) 35 ILJ 983
[212] *Vanachem* supra note 92.
[213] LRA, s 213.
[214]Note 177.
[215] LRA, s 76.

increases the power of workers in collective bargaining".[216] The change of the status of a strike swings the "pendulum" of power back to the employer, as the employer is empowered to dismiss workers on strike. The practicality of the test advanced by Myburgh, given the number of unprotected strikes, is that in all probability the changing of the status of a strike will not stop violence. The labour courts will have to rely on the SAPS to effect court orders stating that a strike has been declared unprotected and is therefore unlawful.

4.3 South African Police Service on Strikes

The democratic dispensation has not succeeded in bringing about an end to the use of lethal force, brutality and violence by the police service towards the people of the Republic.[217] South Africa inherited the notorious riot police division that was previously in charge of protest action or strikes before the dawn of democracy. Police dealt with protesters and strikes using violence and brutality.[218] Violence and the use of deadly force thus seems to be ingrained in police culture, and this proved to be true on the fatal day of the 12th of August 2012. SAPS officers in the constitutional democracy gunned down 34 miners taking part in industrial action,[219] and this remains the darkest moment for industrial action since democracy. The Marikana massacre came against the backdrop of SAPS policy that was drafted in 1997 in terms of crowd control to have the SAPS brought in line with international norms and the spirit of the Constitution.[220]

There is a growing negative perception of the police and in October 2017 the National Union of Metalworkers South Africa (NUMSA) issued a statement stating that when six hundred workers went on strike at an aluminium plant owned by South 32,[221] three workers were injured when the police fired rubber bullets into the crowd of strikers. The role of the police in industrial action is to ensure that pickets are conducted in an orderly manner, property is protected, and that human lives are safeguarded. This includes the lives of the employer and the employer's representatives, so in principle the SAPS maintains law and order. Strikes and pickets that

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[216] Note 12 above 709.
[217] O Bilkis 'Crowd Control: Can Our Public Order Police Still Deliver?' Available at https://www.sajs.co.za/index.php/sacq/article/view/1001 accessed on 04/06/2019.
[218] J I Storneys J Rauch D Storey 'The Policing of Public Gatherings and Demonstrations in South Africa 1960 to 1994' Paper commissioned by The Commission on Truth and Reconciliation (TRC) Research Department May. Available at https://www.csvr.org.za/publications/1483-the-policing-of-public-gatherings-and-demonstrations-in-south-africa-1960-1994 accessed 10/12/2018
[219] Note 2 above, 842.
[220] Constitution.
[221] IndustriALL Global Union '*NUMSA Condemns Police Violence against Striking South 32 Workers'* Available at http://www.industriall-union.org/south-africa-numsa-condemns-police-violence-against-striking-south-32workers accessed on 04/06/2019

become engulfed in violence, a surge of violence, and a continuing strike mean that there is inadequate policing and that the police's intelligence unit is incompetent in finding the cause of the violence.[222] The Regulations of Gatherings Act was passed in parliament to enable the SAPS to effectively meet its constitutional mandate. The provisions in s 9 of this Act empower the SAPS to disperse gatherings marred by violence, grant the police powers to use force[223] and permit the police to use deadly force in extreme circumstances when lives and property are at risk.[224] To put it plainly, if the police fail to control a strike and picketing and the strikers resort to violence to such an extent that the court alleges that the strike is no longer functional to collective bargaining, then that strike will lose its protected status. The SAPS will then be perceived to have failed in its constitutional mandate to serve the people of the Republic and maintain law and order.

4.4 Government on Strikes

The government has a direct vested interest in industrial action, in both public and private sector strikes.[225] Paraphrasing from the Nkandla judgement,[226] the government is a constitutional body by design; the national pathfinder of the nation's constitutional project. Public sector and private sector strikes hinder the government's ability to deliver services, whether the strikes are by its teachers or any other government employees. The private sector is very critical to government as it contributes to economic growth that contributes to the fiscus through taxes and foreign direct investment, which enables the government to deliver on socio-economic rights in pursuit of realising the constitutional project.

Strikes, especially violent and protracted strikes, delay the constitutional project as foreign investors become reluctant to invest in a country that has protracted violent industrial action. The Minister of Minerals stated in 2016 that violent and protracted strikes have an adverse effect on the economy.[227] From 2008 to 2012, South Africa experienced 348 strikes

[222] K Khumalo 'Towards Resuscitating the Ailing Public Violence Jurisprudence: Lessons from History' (2017) 24 *SACJ*.
[223] Regulation of Gatherings Act, s 9(2)(b).
[224] Criminal Procedures Act 51 of 1977, s 49.
[225] P Theodore I M Wendy 'Reflections on Violence and Scapegoating in the Strike and Protest Culture in South Africa: Africa Institute of South Africa' (2011) 41(2) *Africa Insight* 49.
[226] *Economic Freedom Fighters v Speaker of the National Assembly and Others and Democratic Alliance v Speaker of the National Assembly and Others CCT 143/15 & CCT 171/15*.
[227] M Montsho 'Protracted Strikes Destroy Economy: Minister' Available at https://www.iol.co.za/business-report/economy/protrActed-strikes-destroy-economy-minister-1999784 accessed 14/08/17

cumulatively, at an economic loss of 660 million US dollars.[228] The platinum belt strikes culminating in the Marikana massacre had a direct effect on the economy, in that there was a drop in the gross domestic product in the platinum sector.[229]

By 2014 the South African economy had lost 6.1 billion Rands in salaries that were supposed to have been paid to workers. [230] The adverse effect that losses such as this have on the economy is that there is diminished circulation of money and the government loses fiscus income that could be used to advance service delivery. The South African government proposed amendments[231] in an effort to curb the high number of strikes, especially violent and prolonged strikes, however, it missed a fundamental point in its proposed amendments. The true essence of a strike is to cause economic harm to the employer, until that harm becomes unbearable and the employer capitulates. The AMCU strike of 2014 along the platinum belt that affected three major mining companies was also marred by violence and it lasted for five months, with devastating consequences to the economy. Government was powerless in bringing the strike to an end, even though it had devastating consequences on the economy. This lack of interference was quite correct because it respects the sanctity of the collective bargaining process between employer and employee. Government should not partake in collective bargaining between employees and employers or bring about law amendments that favour the employer, who is inherently in possession of strong bargaining power.[232]

As stated correctly by Caltiz, "labour legislation on its own cannot solve the problem of frequent, lengthy and violent strikes".[233] The desperation of government to find a solution to protracted and violent strikes became blatant with its second proposal to have arbitrations for protracted strikes.[234] This would have rendered the right to strike redundant in collective bargaining, as employers would have been at liberty not to give in to workers' demands and rely on arbitration to end the deadlock in collective bargaining. Strike arbitrations would have rendered the right to strike as a process in collective bargaining as no longer a weapon with which workers could exert economic pressure on employers. Hence there is a need for

[228] Note 227 above.
[229] Ibid.
[230] K Calitz 'Violent, Frequent and lengthy strikes in South Africa: Is the use of Replacement labour part of the problem' 2016 *SA MERC LJ* 436.
[231] Memorandum of objects Labour Relations Amendment Bill, 2012, Amendments to S 64 of the LRA ,1995
[232] Ibid.
[233] Note 230 above, 439.
[234] Note 231.

government not to pass on its responsibility but instead to protect and serve the people of South Africa.[235]

It appears that one of the main reasons that South Africa suffers from violent strikes is because of structural violence, as the promises that were ushered in during the dawn of democracy have not been realised by all citizens. As much as the LRA brought about significant changes in labour relations, it failed to address the socio-economic rights of workers: Twenty-six years post democracy South Africa still has mineworkers who live in zinc houses in informal settlements, and mine executives who earn millions of Rands in bonuses. The LRA did not adequately address inequality between employers and employees, and this includes the huge discrepancies in salaries between executives and workers who are not highly educated. It is this inequality that is indoctrinated in South African society that produces violence. It seems that the view of the employee is that not much has changed in 26 years, and the only way to change their circumstances is by force. The only forceful weapon in their limited arsenal is violence. There is something fundamentally wrong in society, which will not be addressed by changing the status of strikes. The systematic belief by employees that violence yields results can be argued as being borne from inequality.

Violence does not help the government's cause in dealing with investment confidence, nor does it help the employer in terms of productivity. Employers interpret employees that act violently as unreasonable people who act in a barbaric manner, without seeking to find the deep rooted cause of their violent behaviour. The placing of strike violence as purely a labour issue supposes that the injustices of the past and present should be disregarded. Inequality and poor socio-economic rights remain a critical role in the manner in which the courts should approach the further limitation of the right to strike.

[235] Ibid.

CHAPTER FIVE: COMMENTS AND RECOMMENDATIONS

The main objective of this dissertation has been to examine the definition of a strike that is functional to collective bargaining and whether or not this principle is part of the South African legal framework. Essentially: whether this principle should be applied in changing the status of strike that is marred by violence. Within the context of South Africa socio-economic conditions more pragmatically to analytically scrutinize whether this further limitation of the right to strike would be justifiable in open democracy.

5.1. Should a Protected Strike Lose its Status Due Violence?

The above account, perspective, jurisprudence, legislation and case law have laid the foundation to critically examine whether or not a protected strike should lose its status due to violence. This is a fundamental question in collective bargaining because it requires a skilled balancing act between the right of employees to strike, the protection of non-striking employees, the protection of the employer or the employer's representatives, and the protection of property and third parties. The violence conducted by workers is not perpetrated with the aim of acting in a criminal way, even though the violence is, in fact, criminal conduct. The violence is perpetrated by workers because there is a deep underlying belief that violence produces results. A study revealed that when polling their members, half of the COSATU (the largest union federation in 2012) members affirmed that violence was a necessary requirement for achieving an acceptable outcome for workers.[236] It is quite clear that there is a worker mentality or system of belief that says that it is only violence that produces the results that workers demand.

The definition of a strike, in terms of s 213 of the LRA, does not mention that a strike should be functional to collective bargaining. The functionality principle was initiated by *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel*[237] (hereinafter *BAWU*), after about 70 employees embarked on a strike. The court held that a strike by workers was "one of the weapons in the armoury of employees which may be used in the power play in the

[236] Note 12 above, 711.
[237] *Black Allied Workers Union & Others* supra note 90.

process of collective bargaining".[238] It can be argued that in reality and practically, striking is the only weapon that workers have to exert pressure on employers to meet their demands. In the *BAWU*[239] case, the principle of functionality was raised and the court held that a strike that was functional to collective bargaining was a lawful/legal strike. It is quite clear that the originators of the functionality principle were not concerned about the conduct of workers during strikes but rather with the legality of the strike, and the process by which a strike is established determines the functionality of the strike.

The courts have held that strikes which are not functional to collective bargaining are strikes that do not possess legitimacy, meaning, purpose,[240] or substance.[241] In the matter of *Modise & Others v Steve's SPAR Blackheath*,[242] the employer (SPAR) was granted an interdict by the industrial court in declaring a strike by SACCAWU as not functional to collective bargaining.[243]Jurisprudence provides a clear legal principle that a strike functional to collective bargaining is a strike that has met both procedural and substantive requirements of a strike; in present day law the procedure set out in s 64 and the definition of a strike in terms of s 213 of the LRA.[244]

The abovementioned court in *BAWU* served further to assert that an employer who is empowered to dismiss workers during a lawful strike would render the right to strike not functional to collective bargaining.[245] The essence of this judgement rested with the notion that in order for a strike to be functional, it must follow the legal prescripts. It emphasises the importance of a strike to workers as a tool for bargaining with an employer. A strike is dysfunctional in circumstances that authorise employers to dismiss employees during a lawful strike for no other reason than the employees being on strike.[246] "If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike… would cease to be functional to collective bargaining". The principle of

[238] *Black Allied Workers Union & Others* supra note 90, 965.
[239] Ibid.
[240] *TSI Holdings (Pty) Ltd* supra note 117*,* 48.
[241] Note 145 above 453.
[242] *Modise & Others v Steve's SPAR Blackheath* 2001 (2) SA 406 (LAC); (2000) 21 ILJ 519 (LAC)
[243] Ibid.
[244] Ibid.
[245] *Black Allied Workers Union & Others* supra note 236, 965.
[246] Ibid.

functionality relates to workers not being dismissed whilst embarking on a protected strike and this principle has been affirmed in various cases. [247]

The origins of the functionality principle were to protect the right to strike, but more importantly the above case made an unequivocal statement that in order for a strike to be functional to collective bargaining, the employees had to be granted fair and reasonable conditions to exercise the right to strike. The functionality of a strike has nothing to do with the conduct of workers, but has everything to do with the protection of their right to strike. In order for a strike to be functional it must protect workers that embark on a strike from dismissals (legal strikes prior to the LRA and protected strikes under present legislation).

The second functionality principle is that the demand, grievance and dispute in a matter of mutual interest must be lawful, reasonable and attainable, as this renders a strike functional to collective bargaining.[248] In *Vanachem* [249] the court dealt with an urgent interdict in which the applicant *(Vanachem*) applied for an interdict against NUMSA, and the reason was that the demands that NUMSA were striking for were regulated by a collective agreement. Further, the demands did not fall under the definition of matters of "mutual interest".[250] NUMSA had five demands, and Vanachem argued that two of the five demands by NUMSA were unreasonable, unfair and did not fall within the definition of "matters of mutual interest". The other three demands were regulated by a collective agreement.[251] *Vanchem* contended that the demand for the employment of a full time shop steward was "not conducive to functional bargaining" but the court found that the demand was fair, reasonable and that NUMSA was well within its rights to strike in support of the demand.[252] It is evident from this case that a strike functional to collective bargaining is a strike with a demand that is fair and reasonable. Rycroft seeks to transpose the functionality principle to the conduct of the strikers, especially the manner in which workers conduct themselves during picketing.[253]

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[247] *SA Federation of Civil Engineering Contractors on behalf of its Members National Union of Mineworkers & Another (2010) 31 ILJ 426 (LC) 21; Transport & Allied Workers Union of SA on behalf of Ngedle & Others v Unitrans Fuel & Chemical (Pty) Ltd (2016)* 37 ILJ 2485 (CC) 188.
[248] *Masilela & Others v Reinhart Transport (Pty) Ltd & Others* (2010) 31 ILJ 2942 (LC) 52.
[249] *Vanachem* supra note 90, 3241.
[250] *Vanachem* supra note 90, 3244.
[251] Ibid.
[252] Ibid.
[253] Note 17 above, 821.

In *Tsogo* [254] the strikers engaged in acts of violence against property while picketing, blockading roads and entrances and denying access by police and other persons. It was quite clear that during this picketing violence the workers were still in conformity with the definitions of a strike; however, the workers' conduct was in transgression of the right to assemble. Thus, the right to assemble was being contravened. It should have been the right to assemble that the court ought to have interdicted. This means that any interdict should have been brought against the right to assemble, and not against the strike. The responsibility of ensuring the compliance to interdicts and stopping violence rests with the SAPS.[255] An admission by the labour courts that police fail or are incompetent in enforcing court orders means that there is an admission of lawlessness and that the rule of law is not supreme in South Africa. The advocating for the changing of the status of a protected strike would be an unjustifiable limitation on the right to strike because of the police's failure to keep law and order. The changing of the status of a strike due to violence during picketing is a violation of the right to strike, as these two rights are clearly distinguishable.

Strikes are not an auxiliary part of collective bargaining and the protection of a strike is not "to promote collective bargaining".[256] Strikes are the "engine" of collective bargaining, and without strikes it can be said that there is no functional collective bargaining .[257] In the situation of a deadlock between employer and employee, the workers would possess no instrument to level the playing field or exert any pressure. Collective bargaining would cease to exist without striking as employees would be handicapped in forcing the employer to accede to their demands. Employers would be in position to merely ignore the demands of their workers, so the argument that protected strikes are there to promote collective bargaining appears to be fallacy. It was strike action that brought about the Wiehahn Commission[258] in 1981, that gave birth to the amendments of the LRA of 1956.[259] The notion that strikes promote collective bargaining means that collective bargaining can take place without strikes. There is, however, no other effective instrument that workers possess to force employers to accede to their

[254] *Tsogo* supra note 9, 910.
[255] Constitution, s 198.
[256] Ibid.
[257] Note 109 above.
[258] Note 87 above.
[259] Labour Relations Act 1956.

demands during collective bargaining. Collective bargaining would turn workers into "beggars"[260] as workers would have no power to exert pressure to achieve their demands.

What purpose would changing the status of a protected strike to that of an unprotected one serve? According to the LRA, the Labour Court was established to deal with labour matters (s 151) and has exclusive jurisdiction over labour matters according to s 157(1) of the Act. According to s 158, the Labour Court is empowered to "deal with all matters necessary or incidental to the performance of its function in terms of this Act or other law".[261] It is quite clear that strike violence is an incidental matter in terms of the LRA, thus it is incumbent on the labour court to protect non-striking workers, replacement workers, the employer's property and the employer. The functionality principle that is advanced by Rycroft[262] and Van Nierkerk J [263] does not deal with a strike that is functional substantively or procedurally, but rather with the conduct of the striking workers, with the aim of punishing the workers as a collective for the violence that transpires during strikes. Strikes that are imbued with violence do not lose their substantive definition in terms of s 213. A protected strike that is beset by violence is still functional to collective bargaining because such a strike falls within the ambit of the definition of a strike, in accordance with s 213 (refusal to work, retardation of work and/or obstruction of work on a matter of mutual interest).[264] The workers in a violent strike still exert economic pressure, and although this pressure might well be in an illegal form, it is pressure nonetheless. Violence just exacerbates that economic pressure, admittedly unfairly, on the employer.[265]

The advocating of the changing of a strike's status because of violent conduct by striking workers during pickets and strikes will result in punishment for workers by the courts, stated simply as, "if you do not behave, we will punish you by removing your protected status". In the South African context there is a body of evidence that suggests that workers have no qualms in embarking on unprotected strikes (see Chapter Three and four). The changing of the status of a strike will thus likely not result in the ending of a strike or strike violence. The only

[260] Note 18 above 1538.
[261] LRA, s 158.
[262] Note 17 above.
[263] *Tsogo* supra note 9.
[264] LRA, s 213.
[265] Note 12 above, 721.

reasonable, practical and underlying conclusion is that the removal of the status of a protected strike will result in the court granting the employer power to invoke s 67 of the LRA.[266]

This means that the employer will be empowered to interdict the strike,[267] seek delictual damages[268] and fairly dismiss workers.[269] In essence, the changing of the status of a strike empowers the employer to impose punitive sanctions against workers. Given the indoctrination of violence in protest action in South Africa, it would be remiss if the realms of conjecture were not ventured into, in relation to what could happen in the event that the status of a strike was changed. The employer would be empowered to fairly dismiss workers and claim delictual liabilities from these workers. This could result in the real possibility of more violence by workers dismissed or facing delictual claims, especially in the context that the majority of strikes in South Africa are unprotected.[270] There is an undisputable fact that violence ensues, regardless of whether a strike is protected or unprotected. The status of a strike is thus not the determining factor in whether a strike is violent or peaceful.

Violence and gross violence during strikes is not a failure of legitimate demands or procedures but rather the failure of the police to maintain law and order. Should the courts take the position to change the status of a strike due to violence, this will not only be a further limitation but also a circumvention of parliament's powers to create laws. More concerning, it will be an acknowledgement that the police are failing in their constitutional obligation. In terms of s 36 of the constitution, the limitation will not be justifiable and any limitation of the right to strike will not curtail or discourage violence, because as realised, unprotected strikes are also conducted in a violent manner. The limitation of the right to strike will instead only empower employers. The changing of a protected strike's status will also unfairly prejudice workers in collective bargaining who are not violent. As criminal conduct cannot be condoned, regardless of whether a strike is protected or unprotected, it is vital that law enforcement fulfil their constitutional obligation.

[266] LRA 67.
[267] LRA S 68(1)(a).
[268] LRA S 68(1)(b).
[269] LRA S 68(5).
[270] Note 198 above.

5.2. Conclusion

The right to strike in South Africa is the most important instrument of workers in collective bargaining, and the argument that has been posed by academics and courts on the changing of the status of the right to strike should take cognisance of the practical and additional burden on employees. The proposed limitation of a strike no longer being functional to collective bargaining will affect the workers adversely and striking would be much more difficult. The ethos of the Constitution is to protect workers' rights and not to unduly limit their enjoyment of these rights. Legally, the "functional to collective bargaining" principle that is proposed for application to violent strikes is not provided for in the Constitution and the LRA, and it is the job of the courts to interpret the law. It is submitted that the courts have a limited role to adjudicate and therefore cannot create laws. Law enforcement must also meet its constitutional obligation of ensuring interdicts are enforced and that law and order is restored when strikes are violent. The SAPS cannot exculpate itself from its constitutional responsibility, and the aim of changing the status of the right to strike is proposed as a deterrent to violence.

In all three proposals by Myburgh, Fergus and Rycroft for changing the status of a strike, none of them deal with the practicality of curbing strike violence. All the tests seem artificial, based on academic reasoning without pragmatism. If courts were to change the status of a strike in accordance with the tests set by Myburgh,[271] Fergus[272] and Rycroft,[273]the same courts would need the SAPS to execute the court order declaring that the protected strike marred with violence was now an unprotected strike. The same SAPS that had not yet been able to contain the violence would have to implement the interim court interdicts, safeguard workers and property, and would be relied upon to effect the court order stating that the strike was no longer protected. A protected strike should thus not lose its protected status because of violence, as the body of knowledge distinctly suggests that violence during strikes will not be stopped by changing the status of the strikes. Any legal route in curbing and deterring strike violence should be established within the criminal justice system. This might include amending the LRA to incorporate criminal sanctions, blacklisting of workers found guilty of strike misconduct and criminal liability for union/strike leaders who fall short of taking adequate precautions to curb strike violence.

[271] Note 12 above.
[272] Note 17 above.
[273] Note 18.

The right to strike is limited severely in terms of s 64 and s 65 of the LRA.[274] "Matters of mutual interest" substantively limit the right to strike and the "functionality" principle should remain with only this substantive requirement, as seen in cases that have already been decided upon. The South African landscape cannot be ignored by simply applying an "executive" approach (an approach that favours the employer). There is already an imbalance that is fundamental "structural violence" and a lack of socio-economic rights for workers. The manifestation of the violence has caused a predicament in the process of collective bargaining and this manifestation is caused by many factors, especially the lack of service delivery and of socio-economic rights.

South Africa is a country where inequality and structural violence are still prevalent, and it is important that these issues be addressed in order to cleanse the nation of violent conduct during protests. It is clear that strikes are an integral part of collective bargaining and the right to strike is already limited. Further limitation by changing the status of a protected strike would advance the unequal balance between employers and employees. It would open the floodgates for employers to seek applications/interdicts to change the statuses of strikes in order to dismiss workers. Above all else workers have a responsibility to ensure that the right to strike is exercised within the spirit of the constitution. "Workers must forever conduct their struggle on the high plane of dignity and discipline. Workers must not allow creative protest to degenerate into physical violence".[275]

[274] LRA, s 64 and 65

[275] M L King Jnr "I Have a Dream," Address Delivered at the March on Washington for Jobs and Freedom paraphrase. Available at http://teachtnhistory.org/file/I%20Have%20A%20Dream%20Speech.pdf 12/19/2019

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