The Practice of Strikes In South Africa: Lessons from the Marikana Quagmire

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Abstract

This article reflects on the issue of strikes in South Africa, drawing from the terrible catastrophic incident which happened at Lonmin Mine where thirty-four (34) people were killed during August 2012. This incident is today recognised as “The Marikana massacre”. Employees of Lonmin Platinum Mine (Rustenburg) embarked on an unprotected strike mainly demanding wage increment inter alia. The premediated strike resulted in arrests, abysmal injuries and deaths of employees and two peace officers. Of course, the Constitution, 1996, Labour Relations Act 66 of 1995 and other international instruments provides employees with the right to strike. Within the same ambit, employees are also obligated to exercise their right within particular frameworks, with discipline and in accordance with the democratic precepts of constitutional supremacy governance. Hence, it is asserted that employees and their trade unions should take into account the provisions of the law and respect other people’s rights when exercising this right to strike. Furthermore, strikers must exercise their right peacefully and unarmed. Such observance will significantly ensure immunity from civil and criminal liability, and strengthen the fundamental values of the Constitution, 1996.

Keywords: Right to strike, protected and unprotected strike, employees/workers, trade unions, workplace relations

Introduction

South Africa’s mining industry continues to experience continuous strikes like never before. The activity of mining is amongst the critical aspects of South Africa’s socio-economic development. Hence, mining and its mineral resources can be regarded as the bedrock of the country’s economy as its total reserves constitute the world’s most valuable, with an estimated worth of R20.3-trillion ($2.5-trillion). According to the Chamber of Mines, a total mining expenditure in 2010 was R441-billion, of which R78.4-billion went on salaries and wages for mine employees. This is drawn from the fact that, in South Africa mines employ some 500,000 workers directly and the same number indirectly. Looking at these numbers, it can be deduced that the industry employs a large number of population compared to other employment sectors in the country. The nature and extent of the many people employed in the mining sector necessitates the need for the presence of trade unions which will represent the interests of employees. These unions play a crucial role in the workplace relations. Unions become the mouthpiece which they represent in a particular sector or workplace. As Woolman put it, “a single voice is likely to be drowned out in our polity a choir is far more likely to get its massage across”.

It is indisputable that in every employment relations, there would always be disputes on both rights and interests, issues of the workers. Because the employers wield more power than the employees in this type of instances (power play), employees find limited alternatives and therefore eventually resort to strike in order to exert pressure on the employer to surrender to their demand.


2 ibid. note that words “employees” and “workers” will be used alternatively in this article. The Labour Relations Act 66 of 1995 (hereinafter referred to as ‘the Act’) in its section 213 defines an “employee” as: (a) any person, excluding an independent contractor, who works for another person for or on the state and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer.


4 Hereinafter referred to as ‘unions’. Section 213 of the Labour Relations Act 66 of 1995, a “trade union” means an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers’ organisations;


6 According to section 213 of the Act, a “strike” means 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, and every reference to “work” in this definition includes overtime work, whether it is voluntary or compulsory.”
South African labour laws distinguish between two types of disputes in this regard. We have disputes of right and disputes of interest. Accordingly, employees cannot strike over the dispute of right. However, they may resort to strike in dispute involving their interests. A dispute of interest includes *inter alia* disputes about a failure to reach an agreement. A failure to agree on salary increment would be a practical example of interest based dispute. A dispute of right is a dispute arising from dissatisfaction by the workers regarding the exercise, protection or enjoyment of a right in the Constitution or other legislation.

It is normally through unions that employees will collectively raise their voices in relation to their interest dispute or demand against an employer through a strike. During a strike, the workers normally picket or demonstrate inside or outside the premises of the employer depending on their agreement. This situation is in most instances characterised by singing, chanting slogans and waving placards outlining their demands. In some instances strikes are unfortunately accompanied by some actions of violence and crime such as looting, assaults, damage to property and even killing of people. In this regard, the South African labour laws distinguish between protected and unprotected strike. A protected strike is one which is protected by the law, whereas the other is self-explanatory. The Constitution of Republic of South Africa, 1996 guarantees everyone the right to strike. The Constitution further requires legislation to be passed in order to give effect to the rights contained in the Bill of Rights. To this effect, the legislature in 1995 passed the Labour Relations Act (LRA). The Act recognises the employees’ right to strike and sets out procedures to be followed thereto. Because a strike in its nature involves a gathering by employees, the Regulation of Gatherings Act then become necessary to further regulate the activities, conduct and actions of the employees.

It can be said that after the year 2000, trade unions in South Africa somehow appear to have lost their primary role of promoting and protecting the employment rights and interests of workers. Today, trade unions have become more of political parties, aligned very much to known political parties or rather represent political parties and responsibilities of trade unions where workers have embarked in a strike (protected or not)? Are the trade unions an extension of political parties? Who should be held responsible for delicts (both civil and criminal) committed by workers while embarked on a strike? It is against this backdrop that this article seeks to develop a hypothesis of answers by reflecting on the right to strike and liability on the misconducts committed by employees in protected and unprotected strikes. This article is premised on the incident which led to the Marikana massacre. Further attention will focus on the constitutional and international law regulating the right to strike. Relevant case law dealing with the delicts committed by workers while in a protected or unprotected strike will also be consulted.

1.1 The historical developments of the right to strike in South Africa

The South African strike law can be traced back in the 1922 Rand Rebellion were a large number of white miners clashed with the police. This incident led to the killing of 153 persons and a further 534 being wounded. Due to lack of strike regulation during that time, the government then decided in 1924 to pass the Industrial Conciliations Act which imposed limitations on the right to strike by making a strike illegal unless the statutory requirements of attempting to settle the dispute in either the industrial council or conciliation board were adhered to. This apartheid legislation never regarded black workers to be employees. It was discriminatory in nature. This meant that Black workers were not permitted to form or join a trade union or to strike. Black workers’ employment relations were regulated by common law and governed by the Native Labour (Settlement of disputes) Act. At common law, strikes and other industrial actions were not protected by the law and constituted a breach of contract entitling the employer to summarily terminate the workers’ employment and also constitute delictual liability on the part of the workers whereby the employer can recover damages against such employees. In 1956, the Industrial Conciliation Act was

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7 In terms of section 1 of the Citation of the Constitutional Laws Act 5 of 2005 which came into operation on 27 June 2005 all references to the Constitution of the Republic of South Africa Act 108 of 1996, have been replaced by the Constitution of Republic of South Africa, 1996. (hereinafter referred to as “the Constitution”).

8 Ibid, section 23(1)(c).

9 Act 55 of 1996.


11 It must be noted that for the purpose of this work the term “industrial action” and “strike” will often be used interchangeably to discuss the worker’s right to strike as well as to assemble, picket, demonstrate and present petitions.


13 Act 11 of 1924.


15 Act 48 of 1953.

passed in parliament. The primary purpose of the Act was to separate the trade unions along racial lines, with the aim of weakening the unions and further excluded black workers from registering under the Act. 23 The exclusion had the effect that black unions, not being allowed to register, were also not allowed to join industrial council or apply for conciliation boards, and therefore could not institute any legal action. 24 In 1973 about 100 000 workers in Durban, KwaZulu-Natal embarked on strike action to demand higher wages. Other workers joined in, engulfing Durban’s entire industrial heartland in strike activity. 20 The strikes soon spread to other major centers in the country, prompting the formation of a number of industrially demarcated unions, starting in Durban and Pietermaritzburg. 21 This unions formation gave rise to the Labour Relations Act 22 of 1956.

In 1988 several amendments were made in the LRA. The amendments included freedom to strike and to take other forms of industrial action. The Labour Relations Amendment Act of 1988 was born. 25 In terms of this Act, the right to strike became a legitimised right and the requirements and procedures were also set out. In 1994, South Africa saw the first democratic and all inclusive elections. In 1995, the Act would be overhauled into that which mirrors the current constitutional and democratic dispensation.

Since then, the South African industrial/strike actions continue to enjoy recognition and protection by law. The country’s laws permit workers to embark on strike. This is amplified by the LRA which grants every employee the right to strike and every employer the recourse to lockout striking employees subject to limitations. 24


At the dawn of democracy, the right to strike was initially envisaged in the Interim Constitution. 26 The Constitution provided in part that: ‘…workers shall have the right to strike for the purpose of collective bargaining.’ 26 Further, that the employer shall have recourse to lock-out striking workers. This recourse was relating to the bargaining power between the employer and the employees. It has since been removed in the Final Constitution when it repealed the Interim Constitution in 1996.

According to section 2 of the Constitution, it reign supreme in all laws of the republic. In addition to the worker’s right to strike in section 23, the Constitution further allows everyone to associate freely as well as to assemble, picket, demonstrate and present petitions peacefully and unarm. 29 Commenting on the importance of the right to assemble, Chief Justice of the Constitutional Court, Mogoeng Mogoeng, CJ said: ‘The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights’. 30

The LRA was passed primarily to give effect to section 23 of the Constitution and for the purpose of this article to regulate the right to strike and the recourse to lock-out in conformity with the Constitution. 31 The Act defines a strike in section 213 as:

The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or who 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, and every reference to “work” in this definition includes overtime work, whether it is voluntary or compulsory.

In the same vain, section 69 of the LRA allows picketing in support of a protected strike, but employees must do
so in accordance with the Code of Good Practice on Picketing. According to item 3 of this Code, ‘the purpose of picket shall be to peacefully encourage non-striking employees and members of the public to oppose a lock-out or to support strikers involved in a protected strike. The nature of that support can vary. It may be to encourage employees not to work during the strike or lock-out. It may be to dissuade replacement labour from working. It may also be to persuade members of the public or other employers and their employees not to do business with the employer’.

In this regard, Woolman asserts that mass protests continue to be an important form of political engagement and continue to play an essential role in any liberal democracy. In essence, section 69 of the LRA seeks to give effect to Constitutional right to picketing in respect of a picket in support of a protected strike or a lock-out. In doing so, the section requires the strikers or picketers to first meet the substantive as well as the procedural requirements for industrial action.

3. The International Perspective On The Right To Strike

The right to strike finds proponents from international instruments. Strike is well recognised internationally as a human right. Article 18 (1) (d) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) mandates countries that are member state to the covenant to promote, protect and respect the right to strike, provided the right is exercised in compliance with the laws of that particular country. South Africa ratified this convention and others conventions. Of relevance in this regard are Freedom of Association and the Protection of the Right to Organise to picket in respect of a picket in support of a protected strike or a lock-out. In so doing, the section requires the strikers or picketers to first meet the substantive as well as the procedural requirements for industrial action.

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4. Procedural Issues With Regards To The Right To Strike

4.1 Substantive requirements for industrial action

According to the LRA, strike action is not permitted if –

a) The parties have agreed to refer the issue in dispute to arbitration;

b) The dispute has to be referred to arbitration or the Labour Court under the LRA;

c) A Collective Agreement, Arbitration Award or Wage Determination regulates the issue in dispute;

d) The strikers are employed in an essential service or a maintenance service.

4.2 The Procedural Regulation Of Strikes

Section 64 of the LRA introduces procedural limitations on the constitutional right to strike and includes the following:

a) The dispute must be referred for conciliation before a strike will be permitted;

b) The CCMA or Bargaining Council must attempt to resolve the dispute by conciliation;

c) A certificate stating that the dispute remains unresolved must have been issued;

Written notice of a strike must be given to the employer on 48 hours’ notice in the private sector and 7 days’ notice if the state is the employer. It must be emphasised that protection of a strike is crucial for the protection of a picket. The Code of Good Practice on Picketing further requires a registered trade union and employer to agree to picketing rules before the commencement of the strike or picket. In addition, this Code requires that:

The registered trade union must appoint a convenor to oversee the picket. The convenor must be a member or an official of the trade union. That person should have, at all times, a copy of section 69 of this Act, a copy of these guidelines, any collective agreement or rules regulating pickets and a copy of the resolution and formal authorisation of the picket by the registered trade union. These documents are important for the purposes of persuading the persons participating in the picket to comply with the law.


33 ICESCR of 16 December 1966. See further article 6 (4) of the European Social Charter; and article 8 (2) of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.

34 Venter, R et al ‘Labour Relations in South Africa’ (2011) at p500.

35 87 of 1948.

36 98 of 1949.


40 Ibid.

41 Item 4 (1) of the Code.
These documents may also be important to establish the lawfulness and the protected nature of the picket to the employer, the public and in particular to the police.\(^{42}\)

The Code further obliges such a convenor to notify the employer, the responsible person appointed in terms of section 2(4)(a) of the Regulation of Gatherings Act, 1993 and the police of the intended picket.\(^{43}\)

In terms of item 6 (4) of the code, ‘a registered trade union should appoint picket marshals to monitor the picket, they should have the telephone numbers of the convenor, the trade union office and any persons appointed to oversee the picket, in the absence of the convenor. The marshals should wear arm bands to identify themselves as marshals. The trade union should instruct the marshals on the law, any agreed picketing rules or where no agreed rules exist any picketing rules that have been stipulated by the CCMA, this Code of Conduct and the steps to be taken to ensure that the picket is conducted peacefully’.

‘Although the picket may be held in any place to which the public has access, the picket may not interfere with the constitutional rights of other persons’\(^{44}\). ‘The Code also requires picketers to conduct themselves in a peaceful, unarmed and lawful manner.\(^{45}\) The conduct includes picketers not to physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employers premises\(^{46}\) and not to commit any action which may be unlawful, including but not limited to any action which is, or may be perceived to be violent.\(^{47}\)

The same goes to secondary strikes,\(^{48}\) in order to be protected, the picket must further satisfy the requirements of a lawful secondary strike in terms of section 66 of the LRA. This is because the definition of ‘secondary strike’ in section 66 includes ‘conduct in contemplation or furtherance of a strike’. A picket constitute “conduct in contemplation or furtherance of a strike.” The code further places responsibility on the police to enforce the criminal law. In terms of the Code, police may arrest picketers for participation in violent conduct or attending a picket armed with dangerous weapons. They may take steps to protect the public if they are of the view that the picket is not peaceful and is likely to lead to violence.\(^{49}\)

Protection of a strike or picket in terms of the LRA absolves one from disciplinary hearing and being held responsible for a delict or a breach of contract. This means that the employer may not sue a person or a union for damages caused by a picket.\(^{50}\) It must however be emphasised that, the Act does not absolve or protect criminal acts committed by employees while embarked on either protected or unprotected strike.

Accordingly, dismissal of employees who had been granted protection from delictual and civil liability was held to be anomalous in SACWU and others v Sentra-chem.\(^{51}\) were the Labour Appeal Court concluded that, dismissal of striking workers amounted to unfair labour practice since they have been dismissed for no other reason than avoidance of a bargaining relationship. However, if the employees commit an act of violence while engaged in a protected strike, then such employees may be held both civil and criminally liable for their actions. It should be emphasised that the Constitution\(^{52}\) and other laws requires the demonstrators, assemblers and picketers to exercise their rights peacefully and unarmed. An amplification of this can be found in Woolman where she stated that:

“one readily identifiable class of assemblies, demonstrations and pickets excluded from the protection of the right are those that are not peaceful”.\(^{53}\)

This sentiments where further shared by Hlophe HJ when he said, where the gathering is not peaceful, organisers or trade unions that have organised the gatherings cannot as a result rely on the protection of section 17 of the Constitution.\(^{54}\)

4.3 Exemptions From Statutory Procedures

In certain instances, industrial action may be protected even though the procedural requirements of the LRA have not been followed. This includes the following:

a) If the parties to the dispute are covered by a Council constitution or a Collective Agreement that sets out dispute procedures, and they follow these;

b) If the other party locks-out in defiance of the statutory procedures;

\(^{42}\) Item 6 (1) of the Code.
\(^{43}\) Item 6 (2) of the Code.
\(^{44}\) Item 6 (5) of the Code.
\(^{45}\) Item 6 (6) of the Code.
\(^{46}\) Item 6 (6) (a) of the Code.
\(^{47}\) Item 6 (6) (b) of the Code.
\(^{48}\) A secondary strike can be described as ‘strikes in support of the primary strike’.
\(^{49}\) Item 7 (3) of the Code.
\(^{50}\) Item 8 (1) of the Code.
\(^{51}\) 1988 OLJ 210 (IC).
\(^{52}\) See Section 17.
\(^{54}\) Garvis and Others v SATAWU (Minister for Safety and Security, Third Party) (Ibid) at para 29.
c) If an employer fails to maintain or restore pre-existing terms and conditions of employment where employees or their union have invoked the status quo remedy provided for in Section 64 (4) of the LRA and asked the employer in the dispute referral to do so.  


57 A trade union which was representing majority of workers during the time of the strike. (With a membership of approximately 300,000 in South Africa).

58 With a total membership of 50,000.

59 Ibid.

60 Ibid.


observed that the Police were publicly seen shooting the miners, execution style. The NPA succumbed to public opinion pressure and dropped the charges of the arrested miners.

The situation attracted immense attention across the world from all spheres of life. Many people flocked to Marikana, including the union leaders, political leaders, religious leaders, traditional leaders, ministers, business people and many more. These people’s presence in the area had both positive and negative influence on Marikana situation. President Jacob Zuma appointed a judicial commission of inquiry to probe Marikana massacre.  

52 The proceedings of the Commission are on-going, though have been marked by controversies on various occasions. The remaining stuck to their demands and continued with actions which involved continuous threats and intimidation of non-striking employees and management. Graeme Hosken reported that: “groups of heavily armed strikers, many allegedly carrying drums of petrol, are said to be moving through Wonderkop squatter camp situated close to the mine’s main shafts at night, threatening to burn down the homes of non-strikers and kill their families”.

Hosken further interviewed non-striking mine workers on condition of anonymity. One of the interviewees, employed as a mine shift supervisor said:

“the strikers come at night. They come in groups. They have weapons and cans of petrol. They know which people are working and wait until we finish our shifts. They wait until we are asleep and then come. Another said the gangs, often numbering 10 or more, forced non-strikers to open their doors. They attacked my neighbour last night. I heard him screaming and pleading for help. When I came outside he was kneeling on the ground. His family, including his small children, were with him. They were pointing a gun at his children and threatening to kill them in front of him. They said he had two choices - either he could stop working or his children would die”.  

David Masilo whose cousin was also killed during the police shootings added that: “It is too dangerous to go to work. The gangs come at night. Several of those caught...


64 Ibid.
were made to kneel on the ground and pray. They had petrol poured over them. They were told that if they continue to work they and their families will be burnt," he said. Masilo also said many miners wanted to go back to work but were scared. “Not everyone agrees with what is happening. People do not like the killings. Yes, the bosses must pay us more, a lot more, but killing people is not right.”

Terrified for the worst, the government deployed South African National Defence Force (SANDF), to support the Police in their operation”.66

Following the massacre, questions about impact on the mining industry, the South African economy and the political playground became widespread.67 Commenting on the miners’ collective charge (common purpose) of murder, Pierre de Vos, a law expert at the University of Cape Town, wrote in a blog entry that: “This is bizarre and shocking and represents a flagrant abuse of the criminal justice system in an effort to protect the police and/or politicians.”68 De Vos further added that: “the apartheid state often used this provision to secure a criminal conviction against one or more of the leaders of a protest march or against leaders of struggle organisations like the African National Congress (ANC).”69 Indeed, it was flabbergasting. Ironically, the Marikana strike inspired several other uprisings in the North-West and other provinces. These included; the Royal Bafokeng Platinum, AngloGold Ashanti, Gold One, Atlasta Resources, KDC, Harmony Gold and others. Subsequently, many employees were dismissed70 and arrested.71 In 2014, the Marikana massacre remain a quagmire. It is an indictment on the law to help us get out of this quagmire. A critical question that ought to be resolved includes; who must be liable for all the damages?

6. Trade Unionism And Delictual Liability
As indicted, the South African Constitution provides for both freedom to associate and disassociate. In the employment relations context, it means that every employee is allowed to join or terminate his membership with a trade union. The best way of avoiding delictual liability in case of illegal strike will be to disassociate. This duty is placed on both the union and its members. In Marikana, the concerned unions72 failed to discourage their members participating in such strike. The union leaders further failed to provide leadership to workers leaving them to run amok.73 Dhluleyo asserts that the unions should not have supported the illegal strike but should have rather followed the set processes to express their grievances.74 This was irresponsible on their part and they should shoulder some of the blame.75

7. The Regulation Of Gatherings Act 205 Of 1993
The objective of the Act is to regulate the holding of public gatherings and demonstrations at certain places.76 In its preamble, the Act guarantees every person the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so. The Act provides further that the exercise of such right shall take place peacefully and with due regard to the rights of others. Section 11(1) of the Regulation of Gatherings Act creates a liability on the organizer of a gathering who is allegedly liable for riot damage resulting from that gathering.77 In Garvis and Others v SATAWU (Minister for Safety and Security, Third Party),78 trade union, the South African (SATAWU) embarked on a protected strike on 16 May 2006 in the Cape Town City Bowl. The strike escalated into a

66 Ibid.
70 Ibid.
73 Ibid.
74 Ibid.
75 Ibid.
76 See the purpose and preamble to the Regulation of Gatherings Act.
77 Interpreting this section Jafta J said: “The convener is held jointly and severally liable together with the person who caused or contributed to the damage”. SATAWU v Garvis and Others (2011) ZASCA 152 at para 95.
78 2010 (6) SA 280 (WCC).
full scale riot leading to deaths of nearly 50 people and
damage causing damage and loss of private and Cape
Town Municipal Council property. Hlophe HJ said: “the
Regulation of Gathering Act now provides for a civil
liability to ensue to an organisation or trade union under
whose auspices a gathering is conducted and requires of
such trade union or organisation to prove all three ele-
ments of section 11 (2) in order to escape liability for
riot damage as it is defined in that Act”. Further that:
“the trade union or such organisation to appoint a con-
venor of the gathering, the local authority to identify a
responsible person and the South African Police Service
to appoint a suitable qualified member to represent them
at the consultations and negotiations contemplated in the
Act”. The purpose of section 11 is not only to protect
rights. It should also be viewed in the light of promoting
order and the rule of law. It also seeks to deter vi-
cence”. The court found that the scheme of the Act
Regulation of Gathering Act, including its section 11, is
aimed at restricting unlawful, violent behaviour that vo-
lates the rights of others and ensuring that organizers of
those gatherings are held liable. The High Court held
that section 17 of the Constitution is not implicated by
section 11(2) (b) of the Regulation of Gatherings Act
because the right to freedom of assembly does not ex-
tend to gatherings which are not peaceful and section
11(2)(b) does not have a chilling effec-
t on the exercise of
the right. SATAWU appealed to the Supreme Court of
Appeal. The Supreme Court of Appeal upheld the deci-
sion of the High Court, asserting that the scheme of the
Regulation of Gatherings Act including section 11, is
aimed at restricting unlawful, violent behaviour that vio-
lates the rights of others and ensuring that organizers of
those gatherings are held liable. At the Constitutional
Court, Mogoeng CJ reasoned that, “An organization will
escape liability only if the act or omission that caused the
damage was not reasonably foreseeable and if it took
reasonable steps within its power to prevent that act or
omission”. The section requires that reasonable steps
within the power of the organizer must be taken to pre-
vent the act or omission that is reasonably foreseeable.
Mogoeng CJ emphasised that: “organisations are re-
quired to be alive to the possibility of damage and to
cater for it from the beginning of the planning of the
protest action until the end of the protest action”. Mogo-
eng CJ held that the limitation on the right to as-
semble is reasonable and justifiable in an open and dem-
ocratic society based on human dignity, equality and
freedom.

Hence, persons who seek to exercise their rights to free-
dom of assembly and demonstration do so in the
knowledge that there is an appropriate regulatory
framework that is aimed at the protection of all persons.
The limitation of the right to strike and assemble peace-
fully is a justifiable limitation in terms of section 36 of
the Constitution. The imposition of liability is reasona-
ble and necessary in order to protect the constitutional
rights of the public, which are worthy of constitutional
protection at all times.

The LRA provides remedy to an employer or employees
faced with strike or lock-out not in compliance with its
provisions. It confers the court with the power to inter-
dict a strike or lock-out or any conduct in contemplation
of a strike or lock-out that does not comply with the pro-
visions of Chapter VI of the LRA. It also confers courts
with powers to order payment of just and equitable com-
ensation, for any loss attributable to the strike or lock-
out that does not comply with the provisions of Chapter
VI of the LRA. The gist of section 68 (1) (b) of the
LRA is that a trade union or its members, or both, can be
held liable for losses occasioned. In terms of section 68 of
the LRA, there should be consequences for unprotected

79 Section 11(1) of this Act provides: “If any riot damage
occurs as a result of—

(a) a gathering, every organization on behalf of or under the
auspices of which that gathering was held, or, if not so
held, the convener;

(b) a demonstration, every person participating in such
demonstration, shall, subject to subsection (2), be jointly
and severally liable for that riot damage as a joint
wrongdoer contemplated in Chapter II of the Apportion-
ment of Damages Act, 1956 (Act No. 34 of 1956),
together with any other person who unlawfully caused
or contributed to such riot damage and any other organiz-
ization or person who is liable therefor in terms of this
subsection.”

80 Garvis and Others v SATAWU (Minister for Safety and
Security, Third Party) 2010 (6) SA 280 (WCC) at paras 12 and
14.

81 Ibid, at para 41. See also SATAWU v Garvis and Others
(2011) ZASCA 152 at para 13 where the Constitutional
Court also referred to Section 1(e) of the Constitution. Also in,
Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3)
BCLR 241 (CC) and Fedsure Life Assurance Ltd and Others v
Greater Johannesburg Transitional Metropolitan Council and Others [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12)
BCLR 1458 (CC).

82 See SATAWU v Garvis and Others (2012) ZACC 13 at para
19.

83 Ibid, at para 22.

84 Ibid, at para 41.

85 Ibid at para 43.

86 Ibid at para 44.

87 Ibid at para 84.

88 Garvis and Others v SATAWU (Minister for Safety and
Security, Third Party) 2010 (6) SA 280 (WCC) at paras 31 -32.


90 Section 68 (1)(a)(i) and (ii).

91 Section 68 (1)(b).
The issue is whether liability in delict has been established on the admissible evidence. According to Neethling for a conduct to constitute a delict, elements such as, the act, wrongfulness, fault, causation and damage must be present. The applicant’s claim lies in delict under the lex aquilia. If the applicant is relying on the doctrine of vicarious liability, it must prove a wrongful act, i.e one accompanied by culpa or dolus committed by someone. Furthermore the applicant must show that the act upon which it relies for its claim for damages is an offence.

After finding that the trade union instigated the strike, the court in Rustenburg Platinum Mines Limited v Mouth Peace Workers Union ordered Mouth Peace Workers Union to pay compensation to the sum of R100 000,00 in respect of the losses suffered by Rustenburg Platinum Mines as a result of an unprotected strike. The court evinced that three requirements need to be satisfied in this regard, namely; that the strike must be unprotected, losses are consequence of that strike and that the liable party participated in that strike or committed acts in contemplation or furtherance of that strike.

In Mangaung Local Municipality v SAMWU, Maresumule AJ resonated similar views that given a holistic approach, Section 68(1)(b)(i)-(iv), clearly requires that either a trade union or its members or both be held liable for damages consequent to an unprotected strike. On that note, it is inferred that employees would be liable because they participated in the strike and are to that extent, the direct cause of the losses suffered by their employer, whereas a trade union can be liable if it calls for a strike which is unprotected and which leads to losses by the employer and other parties. In this case, the court found SAMWU liable for losses that the Mangaung Local Municipality suffered as a result of the unprotected strike by its members and ordered SAMWU to pay compensation in the amount of R25 000-00.

In Algoa Bus Company v SATAWU & others employees embarked on an unlawful strike. Consequently, many buses of the employer did not operate and that resulted in the employer suffering a financial loss that it alleged amounted to R465001.34 due to reduction of passengers. The court ordered the trade unions to compensate the employer for the losses suffered.

These jurisprudence teaches us that, apart from observing the requirements of section 67 and section 68, employers are also required to comply with Chapter IV of the LRA and the procedural requirements laid in section 64 in particular. In case of a picket, the requirements of section 69 must then be followed. Section 68 deals specifically with strikes or lock-outs not in compliance with the Act. In terms of section 68 of the Act, the Labour Court has jurisdiction to interdict any person from participating in an unprotected strike or lock-out and to order just and equitable compensation for any loss attributed to or conduct in contemplation or furtherance of the strike or lock-out. In terms of this section a trade union or its members, or both, can be held liable for losses occasioned. Alternatively, the employer may dismiss the unprotected strikers for participating in an unprotected strike or for operational requirements as a result of that strike. However, when dismissing employees, employers must always follow the procedure laid in the Act. In linking our jurisprudence with Marikana massacre, it becomes apparent that the trade unions and the employees would to a large extent have some proportion of liability should it found that they were the prime instigators of the unprotected strike.

8. Conclusion
Evidently, the Marikana incident was the result of an unprotected strike. However, it has been observed that stakeholders such as trade unions, employers, other government departments and officials have attempted to absolve themselves from taking responsibility. Considerate of the fact that the employees of Lonmin mine embarked on an unprotected strike or picket, whichever is best suitable, it becomes very important to reiterate the position of the law. In this regard, unprotected strikes, assemblies, demonstrations and pickets do not have a space in the South African law in general as well as the country’s labour law in particular. Hence, the Constitution guarantees every worker the right to strike, assemble, demonstrate, picket, present petitions and associate freely, but it requires that these right and freedoms associated with it should not be abused as they come with responsibilities which includes acting in accordance with certain requirements, following particular proce-

95 (2001) 22 ILJ 2035 (LC).
97 Ibid, at para 43.
98 (2010) 2 BLLR 149 (LC)
99 See also Textile Workers
100 In this regard, see in particular section 68 (1) (b) of the LRA. In Mangaung Local Municipality v SAMWU (2003) 24 ILJ (LC) at para 43, the court reasoned that the question is whether a trade union can be held liable not because it called for or instigated the strike, but because it failed to take any steps to bring the strike to an end, i.e. by omission.
dures and conduct oneself in a certain manner. In that regard, only peaceful and unarmed strikes will be afford-
ed constitutional protection. An important comment about section 17 of the Constitution made by Mogoeng CJ needs to be highlighted, he said: “…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….” This therefore requires that we diligently reflect on the experi-
ence of Marikana. The Lonmin strikers were clearly not acting in accordance with the expectations of the law. Their strike and conduct therefore did not match this assertion of Chief Justice Mogoeng. Therefore, a fundamental question which opens space for further le-
gal commentaries is who must be held liable for the damages suffered? This would include the resultant deaths and other damages to properties?

Scholarly approaches would certainly assist in proffering a solution in this regard. According to Jafta J, it matters not that the gathering was peaceful or violent. As long as damage occurs as a result of the gathering the convener should be liable, whether that damage was caused before or after the gathering or even if the damage was not di-
rectly caused by the gathering. Well, this would an approach which is much consequences orientated. It means that even if the strike is authorised, the resulting damages should still be attributed to the convener. It is submitted that this approach has a potential to lead to absurdi-
ity, and in the end defeat the objects of section 17 and 18 of the Constitution, making them difficult if not impossible to enforce. The most important thing to be noted is that each right comes with responsibilities and that for as long as the strikers or picketers flow with this in mind, any such liability should be premised on crim-
inal law, which shall assist in resolving individual crim-
inals conduct. Therefore, it should be that in instances where the strike is authorised, yet individual employees decides to take the law into their own hands, they should be handled individually. It would not sound just that a union should carry such a responsibility for hooliganism, unless in instances where such could easily be attributed to the conduct of the union representative.

The case of Marikana was clearly observed by the public that strikers were armed with knobkerries, pangas, spears and other related traditional weapons. This then prompt-
ed some understanding that the strike was an irresponsi-
able act, hence the need to establish the wrongdoer and eventually hold such liable. The question would be, where were the trade unions and what role did they play in dealing with the heavily armed strikers? Since the mine workers in Lonmin are members of different un-
ions, it was primarily the duty of union representatives to which strikers were affiliated to ensure that their mem-
bers comply with the LRA prior to commencing strike action, in particular section 64 of the LRA. The very unions should have further observed the Constitution as it is vested with the power supremacy over any law or conduct.

In a nutshell, it was the duty of the trade unions to repu-
diate the strike in writing to striking members and the employer as soon as it was practicable after the com-
 mencement of the strike. The union further had a duty to behave in a manner consistent with the repudiation by encouraging employees to return to work and discourag-
ing continued strike action, until such time when proce-
dures were followed to legalise their strike.

This article has also reflected on the modern trends of trade unionism, which is mystified with various epidem-
ics. Trade unions are today much politically orientated rather than being workers interests orientated. This has clearly diluted an understanding of their mandate in the modern political economy. Trade unions should embrace the ideology of responsible trade unionism, educate and encourage their membership to adhere to common prin-
ciples that echoed the need for the living democratic right to strike. What has also been observed is that gov-
ernance in South Africa seem to endorse that violence should be part of resolving disputes across the sectors of the society because in most instances, people’s issues are not attended to unless and until, they resort to violent protests. This is undoubtedly a disastrous trend and therefore should end. Inferred from the Marikana experi-
ence, it is submitted that South Africa is still going to be traumatised by the existence of wild cat strikes. There are various factors which contribute to this assertion. It is inclusive of amongst others, the worsening disparities of wealth between the rich and the poor, the deescalating levels of literacy/less educated population, lack of political will to transform various socio-economic dynamics of the country and poor governance in general.

From a legal point of view, it would be held that the trade unions in the case of Marikana have failed to ex-
cute their duties of ensuring a peaceful strike in compli-
ance with the law. This might be attributed to either de-
liberate ignorance of the law, by oversight or due to lack of knowledge. Therefore, that strike resulted into some incident of monumental crisis. Hence, the trade unions should at a certain point in time do some retrospection and ask if they could not have done better under those circumstances. They should honestly come to terms with the fact that cheap politicking is not worth such a hor-
rendous experience. Authors hereto, can only hope for better in terms of workers resolution of disputes, that once a dispute is declared, all parties should immediately

101 SATAWU v Garvis and Others (2011) ZASCA 152 at para 52.
102 Ibid at para 95.
engage and seek solutions through in-house processes in an amicable manner to avert instances such as the Marikana massacre. For trade unions, it is always important to be active in worker engagements for meaningful education and understanding of dispute resolution processes. Any failure on the part of a trade union to act in a manner that seek to peace, stability and socio-economic justice in the workplace should warrant some form of liability attaching on such a union. It is trite that trade unions would not want to be held liable for wrongs committed by their members during the protected or unprotected strike. Hence, it is advisable for trade unions to try to always adhere to the following useful guides;

a) trade unions must also ensure that their shop stewards acting in full authority are well acquainted, with the procedural requirements of such strike and legal consequences of unprotected strike;

b) the trade unions should always ensure that their members comply with the specifications as set out in the Labour Relations Act prior to commencing any strike action;

c) if the employees embark on unprotected strike, the unions of such employees must ensure that it repudiates such industrial action in writing to its representatives, striking members and the employers as soon as practicable after the commencement of the strike;

d) employees or members of a trade union must behave in a manner consistent with the repudiation by encouraging employees to return to work and discouraging continued strike action;

e) And, that the omission by a union representing striking employees to intervene in unprotected strike or delegating the responsibility to shop-stewards, who fail to discharge this obligation, can render such a union liable for losses suffered by the concerned employer.

Indeed, the miserable Marikana experience has afforded the Government, labour and businesses an opportunity to come to appreciate that the country is plagued with terrible social and economic ills which if left unresolved, would soon assume the status of atomic bombs. On a daily basis, industrial relations are becoming sour and sour. It is an indictment that some resolute action is indispensable. The Marikana experience serves just as an indictment and a warning!

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