

Violent Strikes and Their Effects on Fundamental Rights in South Africa¹

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Abstract

The Violent strikes are serious problems in South Africa. However, the international and regional legal frameworks, the Constitution as well as the national legislation provide for the protection of the right to strike for employees. Workers are therefore entitled to exercise their right to strike under the prescribed legal frameworks. The strikes are frequently characterised by violence and harm in every sector. There are compelling reasons for employees to embark on strikes and they are discouraged from engaging in acts of misconduct during strikes. Violent strikes have devastating effects on the fundamental rights of individuals. They usually cause injury to members of the community and non-striking workers. Therefore, they unreasonable and unjustifiably limit the freedom to exercise the fundamental rights. The use of violence during strikes is a major concern as it negatively defeats the purpose of strikes. Such violence has a negative impact on the lives of non-striking employees and undermine the rights to property, dignity, trade, freedom and security of the person. Striking employees must take reasonable steps to avoid violence and ensure the protection of fundamental rights of all other persons during the strikes.

Keywords: right to strike, employees, employers, workplace, fundamental rights, violence.

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1. Introduction

Whether a strike is protected or not, there are certain legal repercussions for protected and unprotected strikes.⁴ The right to strike is protected in the Constitution and Labour Relations Act (LRA) and employees are allowed to strike provided that they comply with the necessary conditions. The employees have to take necessary steps to avoid engaging in misconduct during strikes. Despite this requirement, the experience indicates that violence often occurs during strike. Violence is a major concern during strikes in South Africa. Violent strikes have a negative effect on both employees' and employers' rights and cause instability in the workplace. They also disrupt daily operations and put human life, employment, security, and property at risk.⁵

The right to strike is enshrined in the South African Constitution.⁶ The LRA has established a legal framework for protected strikes.⁷ Despite the legal provisions, strikes in South Africa are excessively violent and inflict damage to property, cause injuries to persons and in certain circumstances, they even result in deaths of individuals. Violent strikes have a devastating impact on workplace and the public at large; they also cause injury to members of the community and non-striking workers. This article discusses the consequences of violence during protected and unprotected strikes, its effects on the fundamental rights of employers, employees and any other persons that may be negatively affected by the violent strikes. Furthermore, the article also discusses violent strikes in the mining industry and their impact on the fundamental rights of the people.⁸

¹ This journal article is developed from the LLM mini-dissertation submitted in 2022.

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⁴ Ernest Manamela & Mpofari Budeli, "Employees' Right to Strike and Violence in South Africa", XL VI *CILSA* (2013), p. 308.

⁵ Ibid, page 310.

⁶ Constitution of the Republic of South Africa, 1996, section 23; Ernest Manamela & Mpofari Budeli, "Employees' Right to Strike and Violence in South Africa", XL VI *CILSA* (2013), pp. 309 – 310.

⁷ Labour Relations Act 66 of 1995, section 64 (1); Ernest Manamela & Mpofari Budeli, "Employees' Right to Strike and Violence in South Africa", XL VI *CILSA* (2013), pp. 321 – 322.

⁸ Karin Calitz, "Violent, Frequent and Lengthy Strikes in South Africa: Is the Use of Replacement Labour Part of the Problem?", 28 (3) SA Merc LJ (2016), pp. 436 – 437; Ernest Manamela & Mpofari Budeli, "Employees' Right to Strike and Violence in South Africa", XL VI *CILSA* (2013), pp. 323.

2. An overview of violence during strikes in South Africa

In *Nkomati Mining*, about 150 Nkomati employees engaged in an unprotected strike. During this strike, buildings were thrashed and set alight, vehicles were set on fire, tyres were burnt on the road surfaces and workers were intimidated to engage in the unprotected strike.⁹ Nkomati suffered approximately R7 million in lost revenue. In order to identify and describe employees who committed various acts of misconduct during the unprotected strike, managers and supervisors were urged to view the video footage. Throughout this process, 14 employees were identified.¹⁰ Only 11 employees were found guilty of damage to the company's property and violated its health and safety regulations. Criminal charges were laid against these employees.¹¹

In the incident relating to burning the company's property in *Nkomati Mining*, the Commissioner indicated that it was undisputable that the perpetrators were present and actively involved in the removal of a tyre-based barrier and its placement behind the grader before the tyres were set on fire. It was also undisputed that by continuing to place tyres on the front side of the fire, they appeared to bring the fire closer to the grader.¹² It was not in dispute that the grader subsequently caught fire and was vandalised.¹³ The Commissioner concluded that the applicants and the other striking workers collaborated, acted collectively and deliberately in setting fire alight. They assembled tyres that were used to generate a safety barrier, stacked them, and set them alight behind the grader.¹⁴

The court, in *National Union of Mine Workers and Others v. Black Mountain Mining (Pty) Ltd*,¹⁵ had to evaluate the dismissal of two employees who were both shop stewards of the respondent. Both applications were dismissed due to the acts of misconducts and violent behaviour committed during the strike.¹⁶ The court ruled that an employer had the right to take necessary measures to institute disciplinary action against employees who participated in violent strikes. Employees, who engage in protected strikes, must know that they may only participate in legal activities that furthers the course of their protected strike.¹⁷

3. Legal consequences available for unlawful activities during strikes

3.1. Consequences for violence in protected and unprotected strikes

a) Civil liability. According to section 67 of the LRA, participating in a protected strike or taking any further action to support or promote the protected strike does not constitute a misconduct.¹⁸ No civil action can be laid against any person based on his or her engagement in a protected strike. On the contrary, the employees who engage or participate in violent activities during protected strike which result in the employer suffering loss, will, however, be held liable and the employer can institute a civil action for liability against such employees.¹⁹ The same civil liability applies to employees who participate in unprotected strikes. Furthermore, the employers can institute disciplinary actions against employees who engage in unprotected strikes. Employees are discouraged from engaging in unprotected strikes and committing any actions that attract civil liability during protected or unprotected strikes.

b) Interdict. Employees are not protected from any unlawful conduct during strike. Therefore,

⁹ Nkosana Christian Phakathi, "What to do About Unprotected Strike at Nkomati Mine?" (LLM Dissertation, University of Cape Town, 2020), 12 – 13.

¹⁰ Ibid, pages 12 – 13.

¹¹ Ibid, pages 12 – 13.

¹² Ibid, pages 12 – 16.

¹³ Ibid, pages 12 – 16.

¹⁴ Ibid, pages 12 – 16.

¹⁵ *National Union of Mine workers and others v Black Mountain Mining Pty Ltd* (2010) 3 BLLR 281 (LC), para 2.

¹⁶ Ibid, para 2.

¹⁷ Ibid, page 33.

¹⁸ Labour Relations Act 66 of 1995, section 67.

¹⁹ Ibid, section 67.

the employer can obtain interdict against employees who participate in unlawful conduct during a protected strike.²⁰ The employer may apply to the Labour Court for an order interdicting any person from committing violent acts of misconduct.

A strike that does not adhere to the LRA's substantive and procedural requirements and standards is unprotected and may thus be restrained. Section 68(1) (a) of the LRA provides that the Labour Court has complete jurisdiction to prevent anyone from taking part in an unprotected strike or in any unlawful behaviour that supports the strike.²¹ An interdict is one of the tools at an employers' disposal to prevent injury or damage caused by the illegal actions of striking employees. Reverting to the unprotected strike at Nkomati, it is regrettable that the employer did not request interdict. At the point, Nkomati management believed that it would resolve the strike through engagement with the union leaders.²²

c) Dismissal for violent acts in a protected and unprotected strike. In terms of section 67(4) of the LRA, an employer may not dismiss employees who are engaged in a protected strike. If such employees are dismissed, the dismissal will automatically be unfair. Employees participating in a protected strike cannot be dismissed for the reason of just participating in a strike.²³ This protection is accorded to employees to facilitate them to fully exercise their constitutional right to strike and enhance their rights.

Employees who engage in unlawful violent conduct while on a protected strike can be fairly dismissed by their employer.²⁴ Even criminal charges may be laid by the employer against such employees.²⁵ Section 67's protection against civil liability arises from lawful industrial activity, not from culpability for wrongful and illegal activities. The immunity under section 67 of the LRA relates to an employee's action that is taken to address a demand or resolve an issue in respect of any matter of mutual interest between the employers and employees. Unacceptable behaviour and illegal conduct, such as assault, intimidation, and damage to property, will result in civil and criminal liabilities.²⁶

The employer who dismisses employees participating in a protected strike, based on misconduct, must ensure that the dismissal is fair, and is in line with the preconditions for a fair dismissal based on misconduct.²⁷ The dismissal must be fair and be based on a fair reason related to the employer's conduct and the procedure followed in the dismissal must also be fair.²⁸ Therefore, the dismissal must be substantively and procedurally fair in order to comply with labour laws.

According to Item 7(a) of the Code, the employer must demonstrate that the employee who is fired has committed a dismissible conduct on a balance of probabilities.²⁹ This will entail, among other things, demonstrating that a rule existed, and the employee violated it. If a rule is present, it can be found in the employee's contract, a collective bargaining agreement, or a disciplinary code.³⁰ The employee must have been aware of the rule before it applies to him or her.

There is no requirement that the employer proves the employee's guilt beyond a reasonable doubt, as it is in a criminal law matter. The court ruled, in *Moahlodi v. East Rand Gold & Uranium Co. Ltd.*,³¹ that an employer did not have to be certain beyond a reasonable doubt that an employee had violated the law.³² The question to be answered was whether the employer had had a solid reason

²⁰ Ernest Manamela & Mpfari Budeli, "Employees' Right to Strike and Violence in South Africa", XL VI *CILSA* (2013), pp. 325.

²¹ Ibid, pages 326, 331.

²² Nkosana Christian Phakathi, "What to do About Unprotected Strike at Nkomati Mine?" (LLM Dissertation, University of Cape Town, 2020), 47-48.

²³ Labour Relations Act 66 of 1995, section 67 (4).

²⁴ Tembeka Ngcukaitobi, "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana", *ILJ* 34, Issue 4 (2013): 850.

²⁵ Ibid, page 857.

²⁶ Labour Relations Act 66 of 1995, section 67.

²⁷ Ernest Manamela and Mpfari Budeli, "Employees' Right to Strike and Violence in South Africa", XL VI *CILSA* (2013), p. 326.

²⁸ Ibid, page 327.

²⁹ *NSCAWU & others v. Coin Security Group* 1997 1 BLLR 85 (IC), para 32.

³⁰ Ibid, paras 32 – 33.

³¹ *Moahlodi v. East Rand Gold & Uranium Co Ltd* (1988) ILJ 597 (IC), para 12.

³² Ibid, para 12.

to suspect that the employee had committed the crime. It was sufficient if, after conducting his own research, he determined that the employee had committed the offense, provided that he gave the employee a fair chance to refute the claim by telling his side of the story.³³

Furthermore, in *Potgietersrus Platinum Ltd v. Commission for Conciliation, Mediation and Arbitration & others*,³⁴ because a CCMA Commissioner used the criminal standard of proof (beyond reasonable doubt), the arbitration award was overturned.³⁵ It must be proven, on the balance of probabilities, that each employee who participated in the act was involved. An act of wrongdoing must have a personal connection to the individuals. Identical situations must receive similar treatment if the employer wants to reprimand several employees for collective misconducts.³⁶ This is to ensure fairness in all the disciplinary proceedings against the employees who have committed misconduct.

d) Contempt of court. A contempt of court application can be requested if striking employees contravene an interdict. The court, in *Betafence South Africa (Pty) Ltd. v. NUMSA*,³⁷ considered the disregard of court orders by striking employees. The Constitutional Court emphasised that trade unions frequently served as the incitement to disregard court orders.³⁸ Where striking employees refused to respect court orders even on the advice of their trade union leadership, the most drastic results seemed to be justified. The refusal to adhere to court orders by those striking employees was seen as wilful and mala fide.³⁹ Contempt of court can attract severe punishment for striking employees as court orders must be respected.

e) Damages. In *Xstrata South Africa v. Association of Mineworkers and Construction Union and others*,⁴⁰ it was stated that by simply taking measures to avert harm from occurring without stopping the unlawful behaviour would not be sufficient to exempt the union from accountability and liability.⁴¹ The Labour Court ruled that when a trade union asked its members to participate in a strike, it meant that they would engage in different activities related to the strikes such as marches, rallies and petitions. Section 17 of the Constitution places an obligation on them to do so pacifically and unarmed, and they can also present petitions.⁴² Therefore, the trade union is also obligated to ensure that its members exercise their right to strike in a manner that is consistent with the Constitution and other laws.

f) Compensation. The LC may also order the payment of 'just and fair compensation' for any loss resulting from an unprotected and violent strike.⁴³ Such compensation will, however, not be afforded unless the employer can justify that it suffered loss, and that the loss resulted from the unprotected strike⁴⁴ or the misconduct of striking employees. The LC must consider whether attempts were made to abide by sections 64 and 65 of the LRA, the extent of those attempts, and if the strike was premeditated. Furthermore, it must be considered whether the strike was in retaliation to unjustified conduct by the opposing party to the dispute and whether an order or interdict issued under section 68(1)(a) was indeed followed.⁴⁵

According to section 68(1) (b), the union will be held responsible to cover the employer's losses due to the strike if it is aware of the situation but does not act without a valid reason. In the case of *Algoa Bus Business v. SATAWU & others*,⁴⁶ the bus company sued the union and the workers after losing R465 000 as a result of an illegal strike.⁴⁷ The court ruled that while employers had the right to claim compensation for the losses they really experienced as a result of an unlawful strike,

³³ Ibid, paras 12 – 18.

³⁴ *Potgietersrus Platinum Ltd v Commission for Conciliation, Mediation and Arbitration & others* 1999 ZALC 191 (29 June 1999).

³⁵ Ibid, paras 49 – 50.

³⁶ Ibid, paras 49 – 50.

³⁷ *Betafence South Africa (Pty) Ltd v. NUMSA* [2016] ZALCCT 33.

³⁸ Ibid, para 33.

³⁹ Ibid, para 33.

⁴⁰ *Xstrata South Africa v Association of Mineworkers and Construction Union and others* [2014] ZALCJHB 58, para 32.

⁴¹ Ibid, para 35.

⁴² Ibid, para 36.

⁴³ *Algoa Bus Business v SATAWU & others* 2014 8 BLLR786 (LC), para 8.

⁴⁴ Ibid, para 8.

⁴⁵ LRA 66 of 1995, section 68 (1).

⁴⁶ *Algoa Bus Business v. SATAWU & others* 2014 8 BLLR 789 (LC), para 8.

⁴⁷ Ibid, para 8.

the amount afforded need not fully make up for those losses. The union and employees were subsequently ordered, by the court to pay the business merely R100, 000 in monthly instalments of R50.⁴⁸ This indicates that, in some circumstances, the employers will not get the full compensation for the loss they underwent as a result of misconduct of employees during strikes. The authors argue that the courts should award full compensation for damages suffered by the employers as a result of the misconduct of employees during strikes.

g) Dismissal. According to section 68(5) of the LRA, participating in an unprotected strike or engaging in specific behaviours that further the unprotected strike may be a sufficient ground for dismissal.⁴⁹ However, participation in an unprotected strike and engaging in acts of misconducts during a strike does not necessarily justify dismissal. A dismissal will only be regarded as fair and equitable if it fulfils both substantive and procedural fairness.⁵⁰ This means that the employee must have committed a dismissable offence or conduct and the employer must follow a proper procedure in dismissing such employee in order to comply with the law.

In determining whether the dismissal of employees who have participated in an unprotected strike is fair or not, the court must consider the following factors: the seriousness of the failure to act in accordance with the provisions of the LRA, any attempts made to act in accordance with the laws, and whether the strike was in response to an unjustified and unlawful conduct of the employer.⁵¹ Furthermore, a procedural fair dismissal of employees who participated in an unprotected strike is required. To discuss the course of action the employers intend to pursue, they must speak with trade union officials as soon as it is practicable. The employer must issue an ultimatum to striking workers or their labour unions that their services will be terminated, thus giving them an opportunity to seek counsel and make an informed decision.⁵²

The employer may request a restraining order against the employees from the LC or High Court (HC) during an unprotected strike. A mandatory order may also be obtained to instruct the trade union to step in and take reasonable measures to stop or prevent violent conducts. The employer has the right to dismiss the employees who are responsible for violent behaviours.⁵³ The substantive and procedural requirements in section 188 and items 4(1) and 7 of the Code must be followed when dismissing employees for acts of misbehaviour committed during an unprotected strike.⁵⁴

Aspects relating to the dismissal of employees who commit acts of misconduct during a protected strike will apply even to the dismissal of employees for acts of misconduct during an unprotected strike. Courts generally examine the behaviours of strikers when deciding the fairness of their dismissal.⁵⁵ The employer can institute disciplinary actions at any time during a protected or an unprotected strike against employees who commit acts of misconduct.⁵⁶

h) Disciplinary action. Employees who participate in violent strikes may face a disciplinary action from their employers.⁵⁷ The LRA also empowers employers to discipline employees who committed improper violent behaviours during a strike, regardless of whether that strike is protected or not.⁵⁸ In *Nkomati Mining*, employees engaged in a strike that falls outside the scope of procedural requirements, which is a misconduct on its own. In this case, the striking employees committed a procedural illegality, and they could be subjected to disciplinary hearings. In fact, there was no referral of any dispute to conciliation nor strike notice, thus rendering the strike unprotected and the

⁴⁸ Ibid, para 8.

⁴⁹ LRA 66 of 1995, section 68.

⁵⁰ Ibid, section 68 (5).

⁵¹ MM Mamabolo. "Dismissal of Unprotected Strikers and the Audi Alteram Partem Rule" (LLM Dissertation, North-West University, 2006), 3.

⁵² *NUM and Others Power Construction (Pty) Ltd.* 2017 38 ILJ 227 (LC), paras 24 and 25.

⁵³ Mlungisi Tenza, "Is the Employer Compelled to Provide Safe Working Conditions to Employees During a Violent Strike?", *LDD* 25, no. 1 (2022): 257, 265.

⁵⁴ Ibid, page 257.

⁵⁵ Marius Olivier, "Dismissal of Striking Workers: Procedural Requirements and Other Aspects", *De Rebus* (September 1993): 800.

⁵⁶ Mlungisi Tenza, "Is the Employer Compelled to Provide Safe Working Conditions to Employees During a Violent Strike?", *LDD* 25, no. 1 (2022): 265 - 266.

⁵⁷ Nkosana Christian Phakathi, "What to do About Unprotected Strike at Nkomati Mine?" (LLM Dissertation, University of Cape Town, 2020), 56 – 58.

⁵⁸ Ibid, pages 56 – 58.

employer was allowed to take disciplinary actions against employees who committed misconducts during the strike.⁵⁹ It is submitted that the employees who are planning to strike must comply with all substantive and procedural requirements for making a protected strike; otherwise the employer can institute disciplinary actions against them for their misdemeanours.

4. Crimes committed during protected and unprotected strikes

4.1. Assault

Assault is an illegal and purposeful use of force against a person, or the threat that such force will be used.⁶⁰ The actual use of physical force is not always necessary for assault to materialise.⁶¹ Forms of assault include fisticuffs, pushing, and shoving, as well as other interpersonal encounters. Physical attack against an employer, employee, client, and customer is considered a serious misconduct under item 3(4) of the Code.⁶²

4.2. Intimidation

Intimidation, which entails threats uttered seriously, is a ground for dismissal. In *Adcock Ingram Critical Care v. CCMA & others*,⁶³ the court ruled that statements did not have to be directed at a specific person to amount to intimidation. Furthermore, it was determined that words were intimidating if they were intended to "terrify".⁶⁴

4.3. Destruction or damage to property

Employees are required and expected to respect the property of their employers and avoid acting in conducts that will damage the property.⁶⁵ Destruction to property is the unlawful and purposeful damage to another person's property. In the mining context, strikers often damage the employer's property. This is regarded as a specific act of misconduct during the strike and is unlawful and therefore not acceptable.⁶⁶ Sometimes the strikers intentionally destroy the property of their employer and other persons. They often damage the properties in order to convey their exasperations and disappointments towards their employer.⁶⁷ In *Nkomati Mining*, the strikers damaged the employer's property, and it had financial implications on the employer. During the strike, the employees started stoning the control room and broke its windows, they further attempted to ignite the building and broke the doors by hurling stones and setting the strike control room alight.⁶⁸ They committed arson, which was a criminal offence and perpetrators were legally persecuted. This was a reminder that striking employees had to avoid any action that could lead to the commission of the crime.

5. Impacts of violent strikes on fundamental rights

The use of violence during strikes affects not only the strikers and the employers but also the fundamental rights of innocent members of the public, non-striking employees, and the environment

⁵⁹ Ibid, pages 56 – 58.

⁶⁰ Khulekani Khumalo, "The Meaning of 'Force', 'Violence' and 'Threats of Violence' for Purposes of the Crime of Public Violence", *SACJ* 29, no. 1 (2016): 46 – 47.

⁶¹ Ibid, page 46.

⁶² Ibid, pages 46 – 47.

⁶³ *Adcock Ingram Critical Care v. CCMA & others* 2001 ZALAC 10, para 2.

⁶⁴ Ibid, para 2.

⁶⁵ Nkosana Christian Phakathi, "What to do About Unprotected Strike at Nkomati Mine?" (LLM Dissertation, University of Cape Town, 2020), 64 – 65.

⁶⁶ Ibid, pages 64 – 65.

⁶⁷ Ibid, pages 64 – 65.

⁶⁸ Ibid, pages 64 – 65.

at large.⁶⁹ Violent strikes threatens the right to freedom, right to property, right to privacy, right to life, right to human dignity, right to bodily integrity and right to work.⁷⁰ South Africa experiences challenges with violent strikes.⁷¹ For example, in 2012, during the strike at *Lonmin* in *Marikana*, it emerged that many workers were dissatisfied with how the dominant union, the National Union of Mine Workers (NUM), conducted negotiations with the company. The new trade union called *Association of Mine & Construction Workers Union* (AMCU) wished to assert its presence in *Lonmin* Mine. In the Marikana case, the employees used the right to strike, as the ultimate weapon against their employer, to express their grievances and petitions. However, workers in the Marikana case were frustrated with their employer during negotiations, and they embarked on an unprotected strike. The police intervened and shot at the strikers and many people lost their lives and other were injured. This strike affected the fundamental rights of individuals including the right to life, right to freedom and security of persons, right to freedom of movement and right to property.⁷²

A violent and unprotected strike by AMCU caused fatalities, property damages, and adverse economic effects such as a depreciated currency, decreased international investment, reduced productivity, and increased unemployment in the concerned industries.⁷³ Furthermore, the South Africa's unduly protracted strike resolutions are detrimental to jobs, the economy, and the employer's business. The discussion of selected rights affected by the use of violence during strike appears below.⁷⁴

5.1. The right to property

In *Nkomati* Mining Industry, the striking employees went on and destroyed the company's property by setting it on fire. Consequently, they were charged for damage to company's property and were dismissed for misconduct committed during the strike.⁷⁵ In *Dunlop Mixing and Technical Services (Pty) Ltd. and Others v. National Union of Metalworkers of South Africa (NUMSA) obo Nganezi*,⁷⁶ the striking employees committed serious offences and misconducts which included damage to the employer's property. The employer applied to the Labour Court to stop the unlawful behaviours of the employees, and the LC granted the interdict which prevented the employees from continuing to strike.⁷⁷

Despite the interdict, the employees persisted in their strike and committed unlawful behaviours.⁷⁸ The employer dismissed the striking employees for their misconducts and the dismissal was challenged in the CCMA. The CCMA found that the dismissal of some of the striking employees was substantively and procedurally fair. Some of the dismissed employees demonstrated violent behaviours at the CCMA. This is a clear indication that misconducts and lawlessness during the strikes will never be tolerated. Striking employees must refrain themselves from committing damage to the property as it is a criminal offence, and the responsible perpetrators will be held to account.

5.2. The right to life

Both the right to life and the right to strike are provided to everyone in the Constitution

⁶⁹ Darren C. Subramanien and Judell L. Joseph, "The Right to Strike Under the Labour Relations Acts (LRA) and Possible Factors for Considerations that Would Promote the Objectives of the LRA", *PELJ* 22, no. 1 (2019): 22 – 25.

⁷⁰ *Ibid*, pages 22 – 25.

⁷¹ Luke Sinwell, "The Marikana Strike: The Origins of a Living Wage Demand and Changing Forms of Worker Struggles in Lonmin Platinum Mine, South Africa", *Labour, Capital and Society* 46: 1 & 2 (2013): 94.

⁷² *Ibid*, pages 94 – 95.

⁷³ *Ibid*, page 96.

⁷⁴ *Ibid*, page 96.

⁷⁵ Nkosana Christian Phakathi, "What to do About Unprotected Strike at Nkomati Mine?" (LLM Dissertation, University of Cape Town, 2020), 64.

⁷⁶ *National Union of Metalworkers of South Africa obo Nganezi v. Dunlop Mixing and Technical Services (Pty) Ltd. and Others* 2019 5 SA 354 (CC), paras 3 and 5.

⁷⁷ *Ibid*, para 4.

⁷⁸ *Ibid*, para 4.

through sections 11 and 23 respectively. As a result, they are fundamental rights accorded to persons. Whilst the right to life is an unconditional right, the right to strike is conditional and thus not absolute.⁷⁹ It is limited in terms of section 36 of the Constitution as well in terms sections 64 and 65 of the LRA. Section 64 of the LRA sets specific procedures to follow when employees wish to organise and participate in a strike. If these procedures are complied with or respected, a strike will accordingly be protected. However, if such procedures are not complied with or the striking employees commit unlawful conducts such as assault, intimidation, and damage to property during strike, the responsible persons can be held to account for their actions.⁸⁰

During 2012, the strikes at the platinum mines in the North-West Province led to fatalities and bloodsheds.⁸¹ However, the Marikana strike was not the only strike that affected the right to life for persons; the Lonmin strike at Impala Platinum mine also led to fatalities and affected the right to life, during this strike over 50 people lost their lives.⁸² In response to these violent strikes, Mildred Oliphant, the Minister of Labour, questioned the logic of exercising the right to strike to the point where it jeopardised the interest of workers. This was due to the fact that strikes frequently resulted in low wage settlement percentages. Nevertheless, it did not have the expected and desired effect on the grievances of the striking employees.⁸³

Employees and other persons who engage in strike sometimes abuse the right to strike by sporadically turning the strike into violence.⁸⁴ As a direct consequence, such strikes infringe on the right of other persons to a safe and secure environment as stipulated in section 24 of the Constitution, which is a prerequisite for the optimal realisation of their right to life under section 11 of the Constitution.⁸⁵ Violent strikes negatively affect the right to life of persons as some individuals lose their lives during strikes. Striking employees have a duty to ensure the protection of the right to life for all persons in their vicinity where the strike occurs.

5.3. Right to freedom and security of persons and right to freedom of movement

According to section 12(1) (a) and (c) of the Constitution, everyone has the right to freedom and security of persons.⁸⁶ In addition, it also states that everyone has the right to be free from any type of violence, whether it derives from public or private sources. Section 21(1) stipulates that everyone has the constitutional right to freedom of movement. The right to strike is limited to the extent that it does not infringe the rights of all persons guaranteed in section 12 and section 21 of the Constitution. Nevertheless, violent strikes undermine the right to freedom and security of persons as well as the right to freedom of movement enshrined in the Constitution.⁸⁷ The misconducts during strikes, such as the use of violence, intimidation, and threats, infringe sections 12 and 21 of the Constitution to the extent that some persons fear to move and perform their daily activities during violent strikes. All persons must be free from all forms of violence. This is challenged during violent strikes as many individuals get affected by violence, are injured, and even lose their lives due to violence caused by the strike actions.⁸⁸

The right to freedom of assembly is enshrined in the Constitution.⁸⁹ However, this right may be limited in order to protect the rights of other persons who are affected by the violent strikes. It is

⁷⁹ Erika Serfontein, "The Rights of South Africans to Life and to Strike: The Potential of Ubuntu Balance", *International Journal of Arts and Humanities* 1, no. 1 (2015): 17 – 18.

⁸⁰ Ibid, pages 17 – 18.

⁸¹ Luke Sinwell, "The Marikana Strike: The Origins of a Living Wage Demand and Changing Forms of Worker Struggles in Lonmin Platinum Mine, South Africa", *Labour, Capital and Society* 46: 1 & 2 (2013): 114 – 115.

⁸² Ibid, page 94.

⁸³ Ibid, pages 94 – 95.

⁸⁴ Erika Serfontein, "The Rights of South Africans to Life and to Strike: The Potential of Ubuntu Balance", *International Journal of Arts and Humanities* 1, no. 1 (2015): 14 – 15.

⁸⁵ Ibid, pages 14 – 15.

⁸⁶ Ibid, page 15.

⁸⁷ Ibid, page 15.

⁸⁸ Ibid, page 15.

⁸⁹ Constitution of the Republic of South Africa, 1996, section 17.

submitted that striking employees must ensure that their activities do not unnecessarily affect the right to freedom and security of other persons who are not involved in the trike. Furthermore, the right to freedom of movement of other persons who are not involved in the strikes must be safeguarded. In this way, the individuals can exercise their right to strike without undermining the rights of other persons to perform their daily activities.

6. Is the crime of public violence failing adequately to protect fundamental rights of the employer and non-striking persons?

Public violence is defined as the unlawful and purposeful commission, by a group of persons, of an act or acts that are designed forcibly to disturb and distract the peace of the community or to violate the right of others. The violent strikes spread the crime of public violence as the strikers engage in violent conducts with the public and consequently the strikes undermine public peace and invade the rights of other persons.⁹⁰ Despite the existence of the crime of public violence, violent strikes are increasing, and one can question its deterrent effect. The failure of the crime of public violence to deter misconducts is also illustrated by the countless cases of violent strikes that violate the rights of non-strikers, notably the right to life, dignity, freedom, and personal safety.⁹¹

The employer usually seeks interdict from court to prevent employees from striking, but the state also must initiate criminal charges for public violence against perpetrators of criminal activities committed during strikes.⁹² The reluctance of law enforcement officers to pursue criminal charges for those who use public violence during strikes is one of the leading factors that lead to violent strikes in South Africa. Therefore, the crime of public violence does not play a significant role in protecting the fundamental rights of people affected by the violent strikes.⁹³ It is submitted that the state should charge for public violence for striking employees who engage in criminal activities during the strikes. In this way, the crime of public violence can adequately be a deterrent for individuals who engage in violent activities during strikes as they know that they will be prosecuted for their criminal conducts.

7. Concluding remarks

The right to strike is very important in a democratic country like South Africa as it is a weapon that the employees can use to claim their rights from the employers. The employee cannot be dismissed for participating in protected, peaceful and unarmed strikes. The right to strike is a significant mechanism for employees, and the workers who wish to participate in strikes must follow both the substantive and procedural requirements for lawful strikes. Labour laws prohibit the use of violence during both protected and unprotected strikes. However, it is a challenge when striking employees do not obey the laws and engage in criminal activities by the use of violence during strikes. Therefore, the employees can be dismissed for unlawful activities committed during the strikes such as assault, intimidation, infringement of privacy and damage to property.⁹⁴ In addition, criminal charges can be initiated against striking employees who committed various crimes during the strikes.

Strikes often contain violence in practice and negatively affect the fundamental rights of people. The fundamental rights that are affected by the violent strikes include the right to property, right to life, right to freedom of movement, right to freedom and security of persons, right to privacy and right to dignity. Strikers should exercise their rights peacefully and refrain themselves from using violence during strike actions. This can promote a peaceful resolution of conflict between employees

⁹⁰ Alan Rycroft, "What Can Be Done about Strike-Related Violence?", *International Journal of Comparative Labour Law and Industrial Relations*, 30, issue 2 (2014): 199-202.

⁹¹ Khulekani Khumalo, "The Meaning of 'Force', 'Violence' and 'Threats of Violence' for Purposes of the Crime of Public Violence", *SACJ* 29, no. 1 (2016): 48, 51.

⁹² Alan Rycroft, "What Can Be Done about Strike-Related Violence?", *International Journal of Comparative Labour Law and Industrial Relations*, 30, issue 2 (2014): 199-202.

⁹³ *Ibid*, page 202.

⁹⁴ Ernest Manamela and Mpfari Budeli, "Employees' Right to Strike and Violence in South Africa", *CILJSA* 46, Issue 3 (2013): 308.

and employers in labour laws.⁹⁵ Striking employees can be held liable for any crimes they have committed during the strikes.

It is recommended that trade union officials should take reasonable steps to end violent strikes and encourage employees to go back to work. As violent strikes remain a challenge in South Africa, this research critically analyse the legal framework regulating strikes. The current legal framework does not allow union leaders to make adequate reasonable steps to end unprotected violent strikes.⁹⁶ In order to adequately address this issue, item 6(2) of the Code of Good Practice on Dismissal in Schedule 8 of the LRA should include sufficient guidelines in terms of addressing the violent strikes.⁹⁷ Trade union leaders should take reasonable measures to persuade employees to stop violent. They should also take necessary steps to prevent striking employees from committing criminal activities during strikes.

It is also recommended that the common law doctrine of vicarious liability should extended to the relationship between striking employees and their trade unions. The South African labour legislation does not recognise the vicarious liability of trade unions for the acts committed by employees during strikes. The inclusion of vicarious liability for trade unions for the misconducts committed by striking employees who are their members is necessary to ensure the adequate compensation for the employers for their properties that can be destroyed during strikes. This can also ensure that trade unions take responsibility and instruct their members to refrain from committing unlawful activities, such as destruction to properties, during strikes. Holding the trade unions accountable for the violent acts of their members committed during strikes can promote and strengthen the protection of individual rights recognised in the Constitution and may also minimise the violent strikes as the striking employees will be aware that their trade unions will be held liable for their unlawful conducts and will refrain from engaging in violent activities during strikes.

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⁹⁵ Khulekani Khumalo, "The Meaning of 'Force', 'Violence' and 'Threats of Violence' for Purposes of the Crime of Public Violence", *SACJ* 29, no. 1 (2016): 46 – 47.

⁹⁶ Nkosana Christian Phakathi, "What to do About Unprotected Strike at Nkomati Mine?" (LLM Dissertation, University of Cape Town, 2020), 79.

⁹⁷ *Ibid*, page 79.

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