WEAKENING COLLECTIVE BARGAINING AND INDUSTRIAL ACTION IN SOUTH AFRICA: PROBLEMATISING THE RISKS OF REWARDING NON-STRIKERS

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I INTRODUCTION

The practice of rewarding non-striking employees with bonuses and other incentives has generated an intense debate in South Africa.[1] Whilst employers argue that rewarding non-strikers is necessary for incentivising employees not to withdraw their labour, striking employees and their unions maintain that the practice has a negative effect on the exercise of the right to strike.[2] The argument is that striking employees would be dissuaded from joining strikes based on the lure of reward thereby substantially weakening employees' collective bargaining efforts as well as undermining the objectives of that particular strike.[3] This article presents a discussion on the legality and ramifications of the practice of rewarding non-striking employees with extra payment.[4] It argues that rewarding

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[1] C Marumoagae 'Legality of Paying a Gratuity to Non-striking Employees' (2012) July *De Rebus* 4; J Romeyn 'Striking a Balance: The Need for Further Reform of the Law Relating to Industrial Action' *http://aphnew.aph.govau/binaries/library/pubs/rp/2007-08/08rp33.pdf* (accessed 18 September 2020); L Chamberlain 'Assessing Enabling Rights: Striking Similarities in Troubling Implementation of the Rights to Protest and Access to Information in South Africa' (2016) *African Human Rights Law Journal* 373; T Ngcukaitobi 'Strike law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) *Industrial Law Journal* 840.

[2] KO Odeku 'An Overview of the Right to Strike Phenomenon in South Africa' (2014) *Mediterranean Journal of Social Sciences* 697; B Hepple et al *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2016) 23; C Chinguno 'Marikana Massacre and Strike Violence Post-Apartheid' (2011) *Global Labour Journal* 167.

[3] KJ Selala 'The Right to Strike and the Future of Collective Bargaining in South Africa: An Exploratory Analysis' (2014) III *International Journal of Social Sciences* 115.

[4] K Ewing 'Laws against Strikes Revisited' in C Barnard et al (eds) *The Future of Labour Law* (2004).

non-strikers may be anti-bargaining, anti-democratic and unduly infringe on the constitutionally protected right to strike.[5]

The right to strike is an important right which must not be undermined by rewarding non-striking employees.[6] The right to strike provides a mechanism to resolve labour conflicts which emanate from the inequality of bargaining power which defines the employer and employee's relationship.[7] So long as employers and employees have divergent interests and objectives there will be at least the potential for conflicts.[8] According to Kolb and Putnam[9], labour related disputes are a persistent fact of organisational life: as employees perform their duties, various degrees of conflict will occur.[10] There are two powerful tools that are employed in such cases as a way to redress the employment disputes: *(a)* collective bargaining and *(b)* striking.[11] When the collective bargaining process has broken down due to the lack of a meeting of minds, employees will go on strike.[12] When employees are striking, employers' production will be negatively affected.

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[5] M Brassey 'The Dismissal of Strikers' (1990) *Industrial Law Journal* 233.

[6] Section 23 of the Constitution of the Republic of South Africa, 1996.

[7] H Cheadle 'Constitutionalising the Right to Strike' in B Hepple, R le Roux & S Sciarra (eds) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2015) 68; B Adell 'Regulating Strikes in Essential and Other Services after the New Trilogy' (2011) *Canadian Labour and Employment Law Journal* 413; R le Roux & T Cohen 'Understanding the Limitations to the Right to Strike in Essential and Public Services in the SADC Region' (2016) *Potchefstroom Electronic Law Journal* 6.

[8] BO Omisore & AR Abiodun 'Organizational Conflicts: Causes, Effects and Remedies' (2014) *International Journal of Academic Research in Economics and Management Sciences* 119; E Fergus 'Reflections on the (Dys)functionality of Strikes to Collective Bargaining: Recent Developments' (2016) 37(3) *Industrial Law Journal* 1540; M Tenza 'The Link between Replacement Labour and Eruption of Violence During Industrial Action' (2016) *Obiter* 109; S Van Eck & T Kujinga 'The Role of the Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence in *National Union of Food Beverage Wine Spirits and Allied Workers v Universal Product Network* (Pty) Ltd (2016) 37 *ILJ* 476 LC' (2017) *Potchefstroom Electronic Law Journal* 2.

[9] DM Kolb & LL Putnam 'The Multiple Faces of Conflict in Organizations' (1992) *Journal of Organizational Behavior* 311.

[10] At 311.

[11] M Budeli 'Understanding the right to Freedom of Association' (2010) *Comparative and International Law Journal of Southern Africa* 27; Cliffe Dekker Hofmeyr *From Recognition to Strike: An Overview of Collective Labour Law* (2014) 2.

[12] PAK le Roux 'Claims for Compensation Arising from Strikes and Lockouts' (2013) *Contemporary Labour Law* 11; PAK le Roux 'Defining the Right to Strike' (2004) *Contemporary Labour Law* 16.

To avoid such economic consequences, employers usually reward non-strikers for maintaining the company's production during a crippling strike.[13]

Sitting on equal plane in terms of significance, are the keenest objections raised by employees and their union about extra payment to non-strikers. At the core is the likely detrimental effect on future strikes.[14] In fact, striking employees would be dissuaded from joining strikes based on the lure of reward.[15] In other words, this practice of rewarding non-strikers has the effect of weakening the employees' collective bargaining effort, or at most sowing discord and disunity amongst members of a union and the workforce.[16] In this sense, additional payments undermine the right to strike and invariably tilt the scales of power in favour of the employer.[17] Also arising is the acute free-rider problem: if the striking employees' demands are met, the non-striking employees who fall within the bargaining unit, and who had performed the tasks of those on strike in addition to their own, would end up benefiting twice.[18] First, non-strikers would receive the salary increment resulting from the sacrifices made by their colleagues, and secondly, from extra income derived from the strike action.[19] The question is whether offering bonuses to non-striking employees who went beyond the call of duty and performed the duties of the striking employees contravenes section 5 of the Labour Relations Act.[20]

This article is divided into three parts. The first part examines the constitutional and legislative protection of the right to strike with its corollary of collective bargaining, and other mandatory provisions.[21]

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[13] NT Rwodzi & N Lubisi 'Introducing a Serpent into the Garden of Collective Bargaining: A Case Analysis of *Numsa Obo Members v Elements Six Productions (Pty) Ltd* (2017) ZALCJHB 35' (2019) *Potchefstroom Electronic Law Journal* 3; A Myburgh 'The Failure to Obey Interdicts Prohibiting Strikes and Violence: The Implications for Labour Law and the Rule of Law' (2013) *Contemporary Labour Law* 2.

[14] S Estreicher 'Collective Bargaining or "Collective Begging"? Reflections on Anti-strikebreaker Legislation' (1994) *Michigan Law Review* 579.

[15] Marumoagae (note 1 above) 4.

[16] Chinguno (note 2 above) 162.

[17] J Grogan *Collective Labour Law* (2010) 244.

[18] MM Botha & W Germishuys 'The Promotion of Orderly Collective Bargaining and Effective Dispute Resolution, the Dynamic Labour Market and the Powers of the Labour Court' (2018) *Journal of Contemporary Roman-Dutch Law* 532.

[19] *NUMSA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC); (2003) 24 *ILJ* 305 (CC) paras 26, 65; *Kem-Lin Fashions CC v Brunton* (2001) 22 *ILJ* 109 (LAC) paras 17–18.

[20] Act 66 of 1995.

[21] DC Subramanien & JL Joseph 'The Right to Strike under the Labour Relations Act 66 of 1995 and Possible Factors for Consideration that Would Promote the Objectives of the LRA' (2019) *Potchefstroom Electronic Law Journal*

The second part discusses challenges of rewarding non-striking workers including weaknesses and inconsistencies in the implementation of these practices in the workplace. This discussion of the legal ramifications of rewarding non-striking employees who voluntarily elect to sustain economic production by performing the duties of the striking employees is presented in the context of section 5 of the Labour Relations Act and other ancillary provisions.[22] Since the foundational cases of *CWIU v BP SA* and *OK Bazaars (1929) Ltd v SACCAWU* (1993),[23] recourse by employers to defeat a protected strike by paying incentives, rewards or bonuses to non-strikers dressed up as 'innocent' rewards for 'hard work' has been and still is, a veritable ground for litigation.[24] There is no doubt that non-striking employees cannot be forced by their employers to do the task of striking employees.[25] Paying bonuses to non-strikers to perform the tasks of strikers is tantamount to replacing labour and this practice has a tremendous effect on collective bargaining and strikes.[26] The LRA is silent on whether an employer can politely request non-striking employees to voluntarily perform such task.[27] In the final part, the article will discuss the

1; D Dickinson 'Contracting out of the Constitution: Labour Brokers, Post Office Casual Workers and the Failure of South Africa's Industrial Relations Framework' (2017) *Journal of Southern African Studies* 790; A Rycroft 'What Can Be Done about Strike-Related Violence?' (2014) *International Journal of Comparative Labour Law and Industrial Relations* 199, 200; K Calitz 'Violent, Frequent and Lengthy Strikes in South Africa: Is the Use of Replacement Labour Part of the Problem?'(2016) *South African Mercantile Law Journal* 437; Ngcukaitobi (note 1 above) 840; K Von Holdt 'Institutionalisation, Strike Violence and Local Moral Orders Transformation: Critical Perspectives on Southern Africa' *https://muse.jhu.edu/article/383716/pdf* (accessed 21 September 2020); Selala (note 3 above) 116; B Hepple 'The Right to Strike in an International Context' *http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Hepple.pdf* (accessed 21 September 2020); S Adelman 'The Marikana Massacre, the Rule of Law and South Africa's Violent Democracy' (2015) *Hague Journal on the Rule of Law* 6.

[22] Chamberlain (note 1 above) 371.

[23] *CWIU v BP SA* (1991) 12 *ILJ* 599 (IC); *OK Bazaars (1929) Ltd v SACCAWU* (1993) 14 *ILJ* 362 (LAC); B Hepple, R le Roux & S Sciarra (eds) *Laws against Strikes: The South African Experience in an International and Comparative Perspective* (2016) 6.

[24] Hepple et al (note 23 above) 6.

[25] B Waas 'Strike as a Fundamental Right of the Workers and its Risks of Conflicting with other Fundamental Rights of the Citizens' *https://islssl.org/wp-content/uploads/2013/01/Strike-Waas.pdf* (accessed on 20 September 2020).

[26] Marumoagae (note 1 above) 4.

[27] KG Dau-Schmidt, SD Harris & O Lobel *Labour and Employment Law* (2009) 96.

circumstances in which employers might be said to undermine the right to strike by paying non-striking employees who elect to continue working during a strike a gratuity over and above their normal remuneration.[28] The objective of this part is to explore the possibilities of reforming the law to include a proviso that prohibits an employer from requesting non-strikers to perform the work of the strikers.[29]

II THE CONSTITUTIONAL AND LEGISLATIVE PROTECTION OF THE RIGHT TO STRIKE: CHARTING THE LANDSCAPE

When it comes to issues of employment it is important to look at constitutional and statutory context. In this regard it is worth mentioning freedom of association in section 18, the right to engage in collective bargaining and the right to strike in section 23. The Constitution of the Republic of South Africa in section 23 confers on every employee the right to strike.[30] It further provides that every trade union, employers' organisation and employer has the right to engage in collective bargaining, and goes on to provide that national legislation may be enacted to regulate the process.[31] The Labour Relations Act 66 of 1995 was enacted by the Parliament of South Africa to give effect to the fundamental rights conferred by section 23 of the Constitution. The right to strike, it has been said, is a crucial weapon in the armoury of organised labour, and a keystone of modern industrial society.[32]

The right to protest is internationally recognised in various treaties, including the International Covenant on Civil and Political Rights[33] and the European Convention of Human Rights' Article 11 on freedom of peaceful assembly and association which provides that 'Everyone has

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[28] G Heald *Why is Collective Bargaining Failing in South Africa*? (2016) 4.

[29] E Webster 'Marikana and Beyond: New Dynamics in Strikes in South Africa' 2017 *Global Labour Journal* 139.

[30] The Constitution of the Republic of South Africa, 1996.

[31] Section 23 of the Constitution. Some of the salient objectives of section 23 include regulation of the organisational rights of trade unions; the promotion and facilitation of collective bargaining at the workplace and at sectoral level; regulation of the right to strike and the recourse to lock-out in conformity with the Constitution; and also the promotion of employee participation in decision-making through the establishment of workplace forums.

[32] Subramanien & Joseph (note 21 above) 3.

[33] See Article 21 of the International Convention of Civil and Political Rights (16 December 1966) and Article 8 of the International Convention on Economic, Social and Cultural Rights (16 December 1966).

the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interest.'[34]

The right to strike is a form of dispute settlement mechanism corollary to collective bargaining and is resorted to when parties have reached a deadlock in negotiations.[35] The right has been described as an indispensable component of a democratic society and justified as a countervailing force to the power of capital.[36] It is the ultimate weapon in persuading the other party to bargain. Strikes occur due to a failure in the process of fixing working conditions through voluntary collective bargaining. ILO instruments do not explicitly deal with the right to strike, but its supervisory bodies, in particular the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, have long recognised the right to strike as an essential means available to workers for the promotion and protection of their economic and social rights.[37] Article 3 of Convention 87[38] states that:

> *3. (1) Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*
>
> *(2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

Article 4 of the Right to Organise and Collective Bargaining Convention, No 98, 1951 also recognises that:

> *Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*

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[34] See Article 11 of the European Convention on Human Rights (3 September 1953).

[35] See *Eskom Holdings (Pty) Ltd v National Union of Mineworkers* (2009) 30 *ILJ* 894 (LC).

[36] B Nkabinde 'The Right to Strike, an Essential Component of Workplace Democracy: Its Scope and Global Economy' 2009 *Maryland Journal of International Law* 276.

[37] C Hofmann 'The Right to Strike and the International Labour Organization' *http://library.fes.de/pdf-files/iez//10775.pdf* (accessed 27 September 2020).

[38] Freedom of Association and Protection of the Right to Organise Convention, No 87, 1948 (hereinafter Convention 87 of 1948).

These two conventions are stated as two of the eight core ILO conventions in the Declaration on Fundamental Principles and Rights at Work 1998.[39] Convention 87 is regarded as a principal source of international obligations in the world of work.[40] Article 2 of the Convention provides that workers have the right to join and establish organisations of their own choice without authorisation.[41] It is clear from the wording of this Convention that governments must refrain from interfering with trade unions when performing their duties as union members.

South Africa has given effect to its obligation by entrenching the right to collective bargaining as a constitutional right, and by providing extensively for collective bargaining in labour law. These rights are entrenched in Chapter Two of the Bill of Rights.

In this vein, section 23(2)*(c)* of the South African Constitution guarantees that every worker has the right to strike.[42] The Constitution protects this right by providing the necessary procedures for the exercise of the right. The LRA, on the other hand, in section 64(1) provides that 'every employee has the right to strike, and every employer has the recourse to a lock-out'.[43] A strike is then defined in section 213 of the LRA as:

> *the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory*[44]

When one looks at the definition of a strike which contemplates some form of stoppage in work, it becomes clear that strikes, by their nature, are intended to cause the employer economic harm.[45] By withholding their labour, the employees hope to bring production to a halt, causing the employer to lose business and to sustain overhead expenses without the prospect of income, in the expectation that, should the losses be sufficiently substantial, the employer will accede to their demands.[46]

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39 Convention 87 of 1948 (note 38 above).

40 A van Niekerk, N Smit, M Christianson, M McGregor & BPS Van Eck *Law@work* (2018) 389.

41 See Article 2 of ILO Convention No 87.

42 Section 23 of the Constitution.

43 Section 64 of the LRA.

44 Section 213 of the LRA.

45 *Stuttafords Department Stores Ltd v SACTWU* (2001) 22 *ILJ* 414 (LAC).

46 H Cheadle 'Strikes' in M Brassey et al (eds) *The New Labour Law* (1987) 244.

The LRA gives effect to the right to strike by providing a clear and detailed framework on how the right should be exercised. The current legislative framework allows for a voluntary system of collective bargaining backed by the freedom of parties to resort to coercive power.

In *Gobile*,[47] three employees refused to work overtime and on public holidays because they alleged, contrary to their employer's view, that they were contractually not obliged to do so. Their refusal to work was not accompanied by any express demand. The Labour Appeal Court inquired into the purpose of their action in order to decide whether their refusal to work constituted a strike.[48] The court held that the employees' aim was to make their employer accede to their perception of what their contractual obligations should be. Therefore, their actions constituted a strike.[49]

According to Cliffe Dekker Hofmeyr a strike typically occurs for two reasons. An economic strike occurs over issues regarding wages, hours and workers losing their jobs. It should be noted that when this type of strike occurs, a worker puts their job at risk,[50] whereas a labour practices strike is initiated to protest unfair labour practices by an employer. In this type of strike, employees can retain their status as well as their right to be reinstated when the strike is over.[51] In other words, when a strike occurs it is either through concerted action or withdrawal of labour.[52] Dickinson[53] advances the view that 'strikes constitute the withdrawal of labour'. In a protected strike, one which takes place within the LRA's framework, workers forfeit their wages for the duration of the strike – 'no work, no pay' – but their jobs are protected and, once the strike is over, they can return to work. It is during this period that the employer experiences loss of production because there tends to be a lot of protesting which is aligned with persuading other workers to join the strike. If some workers choose not to join the strike, this can weaken the collective bargaining between the employer and the employees.

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47 *Gobile v BP Southern Africa (Pty) Ltd* (1999) 20 *ILJ* 2027 (LAC).

48 TJA Cohen et al *Trade Unions and the Law in South Africa* (2009) 48.

49 *Gobile* (note 47 above *)* para 9.

50 Cliffe Dekker Hofmeyr *Strike Guideline, https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/practice-areas/downloads/Employment-Strike-Guideline.pdf* (accessed 22 September 2020). See also T Metcalf 'Tactics Used by Labor Unions: Striking & Collective Bargaining' *https://smallbusiness.chron.com/tactics-used-labor-unions-striking-collective-bargaining-61541.html*.

51 Hofmeyr (note 50 above).

52 Hofmeyr (note 50 above).

53 Dickinson (note 21 above) 8.

Some jurisdictions do not have the protection provided by our LRA. For instance, in Zimbabwe the Labour Act provides for fines for strikes and pickets that disrupt the normal operation of services.[54] Furthermore, any violation of the right to work of non-strikers, and in respect of minimum services, is a disciplinary offence and renders striking workers liable to civil and penal sanctions. The right to strike[55] is strengthened by the right to freedom of association,[56] and the right to engage in collective bargaining.[57] Another point of note is that the LRA guarantees the fundamental right to freedom of association. This encompasses the right of every employee and employer to choose whether to associate with a group of employees, a trade union or a group of employers or an employers' organisation, respectively. South Africa has entrenched the right to collective bargaining as a constitutional right, and by providing extensively for collective bargaining in labour law.[58]

At the core of the Labour Relations Act's guarantee of the fundamental right of freedom of association is the right of every employee to take part in the formation of a trade union and become a member of a trade union.[59] A corollary of trade union membership is the right to participate in lawful activities.[60] This brings to the fore the pivotal provisions of section 5(1) and 5(3) which read as follows:

> *(1) No person may discriminate against an employee for exercising any right conferred by this Act . . .*
>
> *(3) No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.*

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[54] Section 104 of Labour Act 17 of 2002 [Chapter: 28:01] (as amended 1 February 2006).

[55] Section 23(2)*(c)* of the Constitution.

[56] Section 18 of the Constitution provides: 'Everyone has the right to freedom of association'.

[57] Section 23(5) of the Constitution provides:
'Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).'

[58] Chinguno (note 2 above) 162.

[59] *IMATU v Rustenburg Transitional Council* (2000) 21 *ILJ* 377 (LC) 383A–D. See also *Keshwar v SANCA* (1991) 12 *ILJ* 816 (IC).

[60] *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 *ILJ* 2153 (LAC).

Freedom of association is further strengthened by section 187 of the LRA, which concerns automatically unfair dismissals. Section 187(1)*(a)* of the LRA provides that:

> *A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is— (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV.*[61]

The endorsement of trade union rights within the Constitution,[62] as well as the LRA,[63] essentially provided for stronger protection of the rights of employees.[64] A trade union can be described as the in-between body that bridges the gap between an employer and an employee.[65] Essentially the role of a trade union is to safeguard the existing rights of its members and also to improve and enhance these rights.[66] All employees are entitled to join and participate in trade union activities.[67] Therefore, trade unions are essential to furthering the concepts of equality and democracy in the workplace, as they promote the interests of employees by ensuring that employees are placed in an equal position to their employers.[68]

In terms of section 187(1)*(a)*, to dismiss an employee for joining or participating in the affairs of a union is therefore automatically unfair. An interesting question which may follow, is whether a managerial employee who holds office and is a trade union member, may exercise these rights.[69] When managerial employees join a trade union, they commit themselves to a body whose primary object is to maximise the

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61 Section 187(1)*(a)* of the LRA.

62 Section 23(2) of the Constitution.

63 Section 65 of the LRA.

64 A Botes 'The History of Labour Hire in Namibia: A Lesson for South Africa' (2013) *Potchefstroom Electronic Law Journal* 525.

65 SKR Sundar 'Trade Unions and Civil Society: Issues and Strategies' (2007) *Indian Journal of Industrial Relations* 713. See also R Grawitzky 'Collective Bargaining in Times of Crisis: A Case Study of South Africa' (2011) ILO 1.

66 SKR Sundar 'Emerging Trends in Employment Relations in India' 2007 *Indian Journal of Industrial Relations* 714.

67 J Grogan *Collective Labour Law* (2007) 34.

68 M Finnemore & R van Rensburg *Contemporary Labour Relations* (2002) 139.

69 *IMATU v Rustenburg Transitional Council* (note 59 above) 378H–379C where the following functions of managerial employees were identified: (i) to give advice; (ii) to make recommendations to councillors who formulate policy and (iii) to direct, motivate and discipline other staff under their control. It is clear from these functions why managerial employees must enjoy the trust and confidence of their employer to perform functionally in terms of their employment contracts.

benefits their members derive from the employer. Therefore, by joining a trade union an employee commits himself to a body that stands in direct opposition to his employer; hence there can be a breach of the duty of fidelity owed by an employee to his employer.

Section 1 of the Act states that the purpose of the LRA is to advance economic development, social justice, labour peace, and the democratisation of the workplace by fulfilling the primary objectives of the Act. These include the promotion of orderly collective bargaining, collective bargaining at sectoral level, employee participation in decision-making in the workplace, and the effective resolution of labour disputes.[70]

The court's enforcement of the LRA's dispute resolution framework is further illustrated in *Mackay*,[71] where the court stated that:

> *[A]ll disputes arising from the employer-employee relationship must be effectively resolved. Such disputes are resolved through conciliation, arbitration and adjudication, and those of a collective nature through collective bargaining. In the light of the aforegoing it is clear that it could never have been intended that some disputes arising out of the employer-employee relationship are incapable of resolution in terms of the Act.*[72]

The court envisioned that the labour dispute resolution framework is deemed effective in protecting the rights of employees.[73] Furthermore, the protection of employees' rights is enforced through the process of collective bargaining within the dispute resolution system.[74] In *National Police Services Union,*[75] the court pointed out that the LRA does not place any duty on either the employer or the employee to engage in the bargaining process. The courts are not given authority to determine or influence the result of the bargaining process. The outcome of such negotiations is entirely dependent on the parties themselves.[76] This ruling essentially portrays that

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[70] These goals were reiterated in the case of *NUMSA v Bader Bop* (note 19 above) para 26, where the court held that the Act sought to provide a framework whereby both employees and employers and their organisation could participate in collective bargaining with an emphasis on bargaining at sectoral level, employee participation in decisions in the workplace and the effective resolution of labour disputes.

[71] *Mackay v ABSA Group* (2000) 21 *ILJ* 2054 (LC).

[72] *Mackay* (note 71 above) para 15.

[73] *Mackay* (note 71 above) para 15.

[74] FJ Steadman, J Brand & C Lotter et al *Labour Dispute Resolution* (2009) 30.

[75] *National Police Services Union v National Negotiating Forum* (1999) 20 *ILJ* 1081 (LC) (hereinafter referred to as *National Negotiating Forum*).

[76] *National Negotiating Forum* (note 75 above) para 52.

both parties to the bargaining process must be given equal power which instils democracy within labour relations.[77]

It is undisputed that the balance of power in employment relationships favours employers over employees, so strikes are used as tools by employees to bring some sort of balance.[78] Botha argues that refusal to work grants employees a significant voice regarding what goes on in the workplace.[79] Similarly, Estreicher opines that 'without the right to strike, collective bargaining becomes collective begging.'[80] Chicktay, on the other hand, advances the view that a strike action enables employees to retain their dignity by showing the employer that they are 'not just cogs in a machine'.[81] In addition, the Constitution entrenches the right of workers to go on strike.[82] The right to strike is not only recognised in the domestic or national laws of countries, but also by international law, as fundamental to the protection of workers' rights.[83] The endorsement of trade union rights within the Constitution, as well as section 65 of the LRA, essentially provides for stronger protection of the rights of employees.[84] The LRA protects strikers against dismissal as long as they comply with the requirements of the Act. A trade union can be described as the in-between body that bridges the gap between an employer and an employee.[85] All employees are entitled to join and participate in trade union activities.[86]

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[77] D Du Toit 'Industrial Democracy in South Africa's Transition' (1997) *Law, Democracy and Development* 42.

[78] E Manamela & M Budeli 'Employees' right to strike and violence in South Africa' (2013) *Comparative and International Law Journal of Southern Africa* 323; Myburgh (note 13 above) 1.

[79] MM Botha 'Responsible Unionism During Collective Bargaining and Industrial Action: Are We Ready Yet?' 2015 *De Jure* 332.

[80] Estreicher (note 14 above) 578.

[81] MA Chicktay 'Placing the Right to Strike Within a Human Rights Framework' (2006) *Obiter* 348.

[82] Section 23(2) of the Constitution.

[83] SB Gericke 'Revisiting the Liability of Trade Unions and/or Their Members During Strikes: Lessons to be Learnt from Case Law' (2012) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 567. See also the International Convention on Economic, Social and Cultural Rights of 1996, the European Social Charter of 1961, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988.

[84] S Hayter & J Visser (eds) *Collective Agreements: Extending Labour Protection* (2018) 142.

[85] Hayter & Visser (note 84 above).

[86] P Hirschsohn 'The 'Hollowing-out' of Trade Union Democracy in COSATU? Members, Shop Stewards and the South African Communist Party' (2011) *Law, Democracy and Development* 284.

Therefore, trade unions are essential to the furtherance of concepts of equality and democracy in the workplace as they promote the interests of employees by ensuring that employees are placed in an equal position to their employers.[87]

III THE CONUNDRUM OF REWARDING NON-STRIKING WORKERS

The Constitution entrenches the right of workers to go on strike.[88] Although this is a constitutionally entrenched right, employees are not obliged to participate: they may choose not to exercise their right and rather continue with their normal work. In addition, the employers may decide to hire replacement workers. Section 76(1)*(b)* of the Labour Relations Act 66 of 1995, as amended, provides:

> *An employer may not take into employment any person— . . . (b) for the purpose of performing the work of any employee who is locked out unless the lock-out is in response to a strike.*[89]

Section 76(1)*(b)* of the LRA, which permits replacement of labour in response to a strike, seems to fuel violence in industrial actions. COSATU has even proposed that a limitation should be put on hiring replacement workers.[90] Section 76(1)*(b)* permits replacement of labour subject to exceptions. The interpretation of the exceptions was discussed in the recent case of *National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd*,[91] where the Constitutional Court held,

> *In interpreting the exception contained in s 76(1)(b), it is important to bear in mind the usual position governing the use of replacement labour during strikes and lock-outs. Subject to the one exception contained in s 76(1)(a), an employer may use replacement labour during a strike. But subject to the one exception contained in s 76(1)(b), an employer may not use replacement labour during a lock-out.*[92]

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[87] R Gomez & J Gomez 'Workplace Democracy for the 21st Century' *https://d3n8a8pro7vhmx.cloudfront.net/broadbent/pages/7736/attachments/original/1592501160/Workplace_Democracy.pdf?1592501160* (accessed 23 September 2021).

[88] Section 23(2) of the Constitution. See also section 64 of the LRA.

[89] Section 23(2) of the Constitution.

[90] K Calitz 'Violent, Frequent, and Lengthy Strikes in South Africa: Is the Use of Replacement Labour Part of the Problem?' (2016) 28(3) *South African Mercantile Law Journal* 440.

[91] *National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd* 2023 (4) SA 449 (CC); (2023) 44 *ILJ* 1189 (CC).

[92] *Trenstar* (note 91 above) para 39.

Employees see this provision as a severe limitation standing in their way towards the betterment of wages and living conditions.[93] Not only replacement labourers but also employees who do not participate in the strike action and keep working are victims of violence by strikers.[94] Tenza posits that 'once the employer has appointed replacement labour, it is believed that the desire to reach an agreement is removed, as the employer will be able to continue to operate as usual while the regular workforce is out on strike.'[95]

If employees go on strike, without non-strikers agreeing to work, the employers will experience a decline in production, which results in losing market share as well suffering reputational damage.[96] Therefore, to avoid economic harm, employers will simply reward volunteering employees for maintaining the viability of the enterprise during a crippling strike.[97] The questions that arises: Does offering bonuses to non-striking employees who went beyond the call of duty and performed the duties of the striking employees contravene section 5 of the LRA?[98] How compelling is the contention that the employer is simply rewarding volunteers for their efforts in ensuring that it fulfils clients' demands during a crippling strike? More accurately, what is significant here is that without non-strikers going the extra mile, the employer would have lost market share as well as suffering reputational damage. From a different perspective, can it be argued that the interests of the employer in safeguarding the viability of the enterprise override concerns about disproportionate treatment of striking employees?

There are both advantages and disadvantages in rewarding non-strikers. This is clear from the wording of sections 5 and 64 of the LRA.

The right to strike is conferred in the LRA by section 64(1), which states: 'Every employee has the right to strike'. The Committee on Freedom of Association only considers the replacement of strikers to be justified: (a) in the event of a strike in an essential service in which strikes are

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93 Calitz (note 90 above) 459.

94 Calitz (note 90 above) 441. Also see cases of *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 *ILJ* 1654 (LC); *Ntimane v Agrinet t/a Vetsak (Pty) Ltd* [1998] ZALC 98.

95 M Tenza 'Is the Employer Compelled to Provide Safe Working Conditions to Employees During a Violent Strike? (2021) *Law, Democracy, and Development* 257, 259.

96 Le Roux 'Claims for Compensation' (note 12 above) 11; Le Roux 'Defining the right to strike' (note 12 above) 16.

97 Rwodzi & Lubisi (note 13 above) 16; Myburgh (note 13 above) 2.

98 Act 66 of 1995.

forbidden by law, and (b) when a situation of acute national crisis arises.[99] The Committee of Experts has considered that:

> *A special problem arises when legislation or practice allows enterprises to recruit workers to replace their own employees on legal strike. The difficulty is even more serious if, under legislative provisions or case-law, strikers do not, as of right, find their job waiting for them at the end of the dispute. The Committee considers that this type of provision or practice seriously impairs the right to strike and affects the free exercise of trade union rights.*[100]

The courts under the 1956 LRA 'found nothing exceptionable about rewarding non-strikers for "going the extra mile", or for denying strikers privileges during and after strike action'.[101] As such, under the 1956 LRA, employers were allowed to reward non-striking employees for work they did during the strike, including the work of striking employees. This was because under the 1956 Act, strikes in South Africa were not recognised. For example, in *Chemical Workers Industrial Union v BP South Africa,*[102] some employees went on a legal strike relating to demands concerning wages and ancillary matters. After the strike had begun, the employer took a decision to pay bonuses to non-striking employees, who were requested to work longer hours than usual, as well as to those who were requested to perform tasks falling outside their job description. This was to reward such employees for continuing production during the strike.[103] The union was of the view that such conduct constituted an unfair labour practice in terms of the 1956 LRA. It was held that, in deciding to pay the bonuses, the employer's objective was to ensure that its business operations continued during the strike.[104] The court was convinced that the payment of the bonuses was a suitable and necessary measure for the employer to implement to combat the strike and, as such, it was a fair, reasonable and legitimate response to the strike. It also rejected the union's contention that the employer's payment of bonuses constituted victimisation of its striking members. The court held that the employer's

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[99] ILO *Compilation of decisions of the Committee on Freedom of Association* 6 ed (2018) 172.

[100] ILO, 1994. Freedom of Association and Collective Bargaining International Labour Conference, Geneva. See also B Gernigon, A Odero & H Guido *ILO Principles Concerning the Right to Strike* (2000).

[101] Grogan (note 17 above) 244.

[102] *Chemical Workers Industrial Union v BP South Africa* (1991) 12 *ILJ* 599 (IC).

[103] *Chemical Workers Industrial Union* (note 102 above) para 601.

[104] *Chemical Workers Industrial Union* (note 102 above) para 600.

payment of bonuses to certain of its employees not engaged in the legal strike at its business premises did not constitute an unfair labour practice.[105]

The LRA does not mention whether an employer can request non-striking employees to voluntarily perform tasks falling outside their job description. Furthermore, bribing non-strikers with some bonuses to perform the tasks of strikers is tantamount to replacing labour. Such an undertaking undermines the rights of employees to freely associate and take part in the lawful activities of their unions and amounts to discrimination. If employers are allowed to reward non-strikers it is clearly against the spirit of the LRA.

Section 5(1) of the LRA provides: 'No person may discriminate against an employee for exercising any right conferred by this Act.' As such, it has been correctly argued that 'where an employer pays gratuities to employees for not participating in a strike, such conduct will amount to an infringement of section 5(1)' of the LRA. By paying such a gratuity, an employer will send a message that, in future, for an employee to be awarded greater benefits when his colleagues down tools, he should continue working.[106]

Section 5(3) of the LRA provides that no one may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.[107]

By rewarding non-striking employees, employers are advantaging those employees in exchange for them not exercising a right conferred by the LRA, namely the right to strike. Such a reward would amount to an infringement of section 5(3) of the LRA. On the other hand, rewarding non-strikers can also be viewed as a promise to advantage employees who are on strike if they end their strike action, thereby creating an impression that if they do not take part in strike action, they will also be eligible for the rewards awarded to non-striking employees. Such initiative by the employer would affect an employee's decision in future as to whether or not to embark on a strike.[108] As such, the employer will be dictating whether or not employees should exercise their right to strike. I am of the view that such conduct by the employer cannot be justified under the current LRA.

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105 *Chemical Workers Industrial Union* (note 102 above) para 600.

106 A Basson, PAK le Roux & EML Strydom *Essential Labour Law* (2009) 253.

107 Act 66 of 1995.

108 Rwodzi & Lubisi (note 13 above) 16.

In *NUMSA obo Members v Element Six Production (Pty) Ltd*,[109] members of NUMSA, UASA and SAEWA had embarked upon a protected strike in pursuit of their wage demands. As to be expected, not all employees joined the protected strike. During the strike some of the non-striking employees performed extra duties, thereby enabling the employer to sustain production at a level sufficient to meet clients' demands. In appreciation of the non-striking employees' efforts in going the extra mile, the employer decided to pay them an additional amount termed 'a token of appreciation'.[110] In the aftermath of the strike, naturally, striking employees were aggrieved by selective payment bonuses. It is this dispute over payment of bonuses to non-strikers that found its way to the Labour Court.

The core issue before the Labour Court was whether the payment of bonuses to non-strikers amounted to unfair discrimination against striking employees. The applicants contended that rewarding non-strikers discriminated against striking employees for exercising a right as contemplated by section 5(1) of the LRA 1995 or constituted a prohibited advantage or promise of advantage for a person not exercising any right conferred by the Act or for not participating in any proceedings in terms of the Act as contemplated by section 5(3). On the other hand, the respondent retorted that it did not breach the provisions of section 5 and its payments were not discriminatory on any specified or unspecified ground.[111] The employer's second line of defence was that the criteria it had applied in making payments were objective and rational and did not contain any corrosive effect on future strikes.[112]

The court ruled that the payment of a 'token' to non-striking employees constituted differentiation, which amounted to discrimination within the confines of section 5 of the LRA[113] and that the discrimination was unfair in that the striking employees were prejudiced for their participation in the lawful activities of their trade union, and the exercise of their right to strike. A declaratory order was made prohibiting the employer from engaging in such an activity.

In *FAWU v Pets Products (Pty) Ltd*[114] the employer had paid vouchers to non-striking employees as a reward for the work that they performed

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109 *NUMSA obo Members v Element Six Production (Pty) Ltd* [2017] ZALCJHB 35 (hereinafter referred to as *NUMSA obo Members.*

110 *NUMSA obo Members* (note 109 above) para 3.3.

111 *NUMSA obo Members* (note 109 above) para 4.

112 *NUMSA obo Members* (note 109 above) para 10.9.

113 *NUMSA obo Members* (note 109 above) para 23.12.

114 *FAWU v Pets Products (Pty) Ltd* (2000) 21 *ILJ* 1100 (LC).

during a strike.[115] The union argued that such payment contravened section 5(1) and (3) of the LRA in that it discriminated against strikers for exercising their right to strike and that the employer advantaged the non-strikers in exchange for not exercising their right to strike.[116] The union also argued that the effect of paying such vouchers was that those who did not strike were rewarded for doing so and those who did strike were penalised for doing so. It was further argued that this had the effect that the strikers and non-strikers were deterred from striking in future.[117] The employer argued that the payment of the vouchers was not a payment to those who did not strike, but to those who had worked during the strike and those who had 'gone the extra mile'. Further, that the payment was for the 'extra hard work' done by the non-strikers and that the employer had no ulterior motive in making the payment to the non-strikers.[118]

The court was of the view that the *sine qua non* for the payment was not so much the hard work performed by the non-strikers, but that the non-strikers did not go on strike and maintained production.[119] It was found that non-strikers were remunerated for overtime work and for work they did on weekends. The court held that the non-strikers did nothing extraordinary to warrant additional or extra payment other than what was provided for in their service contracts. In arriving at its decision, the court opined, 'the rights found in our Constitution and in the Act are hard-earned and well-deserved'.[120] The right to organise, the right to engage in collective bargaining, and the right to strike are priceless. After employing the well-known *Harksen* test in *Harksen v Lane*[121] the court held that where a person discriminates against employees for exercising their right to strike, which is conferred by this Act, then the unfairness of that discrimination is presumed although the contrary may still be established.[122] The court held that the employer had discriminated against the strikers for exercising their right to strike, and, by doing so, the employer infringed section 5(1) of the LRA.[123] Importantly, the court held that the employer had infringed section 5(3) of the LRA by providing vouchers to the non-strikers. The right to strike cannot be waived unless there is an agreement between

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115 *FAWU* (note 114 above) para 6.
116 *FAWU* (note 114 above) para 6.
117 *FAWU* (note 114 above) para 7.
118 *FAWU* (note 114 above) para 7.
119 *FAWU* (note 114 above) para 12.
120 *FAWU* (note 114 above) para 15.
121 *Harksen v Lane NO* 1998 (1) SA 300 (CC).
122 *FAWU* (note 114 above) para 20.
123 *FAWU* (note 114 above) para 21.

a trade union and the employer that regulates the issue. It was further held that there can be no justification for giving rewards to non-strikers because they refrained from exercising their statutory right to strike.[124]

Notably, the court found that the non-strikers were paid a benefit or a reward 'in exchange' for them not having exercised their right to strike conferred by the LRA.[125] Additionally, in *NUM v Namakwa Sands,*[126] the Labour Court found that the act of paying non-striking employees redeployment allowances, the provision of free meals and the excessive overtime worked contravened section 5 of the LRA.[127] However, the court also found that NUM had failed to show a causal link between the payment of the exceptional performance bonus and the participation in the strike. There was also no evidence to substantiate the allegation that the exceptional performance bonus was actually the annual performance bonus in disguise. In arriving at its conclusion, the court deviated from the reasoning set out in the above cases.[128] The court reasoned that just because some employees were participating in a strike, it did not mean that if an employee decided not to exercise this right of his own accord, then the employee should be denied contractual benefits. The inconsistency of the decisions of the court means that there is a need to adopt an express legislative provision which explicitly prohibits employers from rewarding non-striking employees due to the impact it has on the striking employees' rights and the integrity of the industrial action.[129]

IV CONCLUSION AND OPTIONS FOR LAW REFORM

This article has argued that the right to strike is a fundamental right which is strengthened by the right to freedom of association and the right to engage in collective bargaining.[130] It has argued that the practice of awarding bonuses to non-striking employees has the effect of weakening the employees' collective bargaining effort, or at most causing discord and disunity amongst members of a union, thus undermining the right to strike and invariably tilting the scales of the power play in favour

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124 *FAWU* (note 114 above) para 24.

125 *FAWU* (note 114 above) para 24.

126 *NUM v Namakwa Sands – A Division of Anglo Operations Ltd* (2008) 29 *ILJ* 698 (LC) para 1.

127 *NUM v Namakwa Sands* (note 126 above) para 44.

128 *NUM v Namakwa Sands* (note 126 above) para 45.

129 Marumoagae (note 1 above) 4.

130 Du Toit (note 77 above) 327.

of the employer.[131] When non-striking employees perform the tasks of striking employees, it means employers can continue with business as usual. Employers can use such practices as a strategy to negate and dilute the intended effects of the protected strike action embarked upon by employees.[132] This undoubtedly degrades the status of collective bargaining as a constitutional tool to resolve disputes and defeats the purpose of the LRA by undermining the rights of employees to freely associate and take part in the lawful activities of their unions.[133]

Considering the above, it can be submitted that section 5 of the LRA must be amended and an express proviso that prohibits an employer from requesting a non-striker to perform the work of the strikers must be inserted in the section. The new provision should provide that:

> *No employer shall discriminate against striking employees by awarding, rewarding, or paying gratuitous tokens including bonuses, and other allowances to non-striking employees.*

The above proviso will protect employees so that there are not dissuaded from joining strikes based on the lure of reward.

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131 *NUMSA obo Members* (note 109 above) para 18.4.

132 *NUMSA obo Members* (note 109 above) para 18.6.

133 *NUMSA obo Members* (note 109 above) para 18.7.