

**Requirements of industrial action in South Africa and Germany – A
Comparison**

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A. Chapter One: Introduction

The right to strike and the recourse to lock-out are an integral part of the collective bargaining system. The rationale behind collective bargaining is the fact that when bargaining over terms and conditions of employment a single employee is in a naturally weaker position than employers.¹ An employer may easily ignore demands of single employees because the refusal to work of a single employee will usually not harm an employer at all. Only if a group of employees addresses certain demands with the power to potentially withhold their labour, an employer will be forced to engage in bargaining in order to prevent the business from the harm a hold-up might cause. Also, employers have various possibilities to push through their interests. The Constitutional Court mentioned namely dismissal, the employment of alternative or replacement labour, unilateral changes of terms and conditions of employment, and lock-outs.² Single employees do not have similar weapons at hand. Termination of employment contracts is no alternative for employees either because in times of unemployment rates of 27.8 % (2004) in South Africa³ and 12.5 % (March 2005) in Germany⁴ employers will not struggle to replace employees who terminated their contract and employees will struggle to find new employment. Acting together

¹ See the decisions of the Constitutional Courts in both countries: BVerfGE 84, 212, at 229; *In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC)* at para 66.

² *In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC)* at para 66. Note that the Court only mentioned these as theoretical possibilities without judging their legality. In result, the court just wanted to point out that a right to lock-out does not have to be established only because a right to strike has been established. The court found that because employers have other possibilities to react to strikes, lock-outs are not the general counterpart of strikes but rather one possibility to react amongst others. The legality of other possible forms of reaction cannot be discussed at this point.

³ 'Fitting the pieces together: a composite view of government's strategy to assist the unemployed in South Africa 1994 – 2004' on the website of the South African Regional Poverty Network: www.sarpn.org.za, accessed on 01.04.2005. This rate is determined by using the strict definition. Using the expanded definition the unemployment rate would amount to 41.2 %.

⁴ Website of the German Federal Bureau for Statistics (Statistisches Bundesamt): www.destatis.de/indicators/d/arb210.ad.htm, accessed on 01.04.2005.

employees do have the chance to put pressure on employers in order to push through some of their demands. But, to be able to do that employees must have tools, which actually have the potential to pressurise employers. Thus, the ability to use economic power is a prerequisite of a functioning collective bargaining system. From this it follows that employees and their trade unions must have the possibility to engage in strike action in order to become an equivalent collective bargaining partner. As the Constitutional Court of the Republic of South Africa points out, lock-outs are only one weapon between a series of other weapons and ‘not always and necessarily equivalent’.⁵ Thus, the right to lock-out is not the equivalent counterbalance to the right to strike. But, as strike action, locking out employees is the main subject of the law of industrial action because its nature, the intermission of large parts of labour, is similar to the former. Also, locking out employees is a useful and commonly used weapon to fight back employees’ actions in order to reduce harm done to the employers’ business by strike action.⁶

Thus, it can be stated that the task of the law of industrial action is to balance out the weapons of employers and employees in order to promote an overall equal bargaining power between them. How this is being done in South Africa and in Germany will be of special importance to this mini-thesis.

⁵ In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC) at para 66.

⁶ Note that the total workdays lost due to strikes and other forms of work stoppages amounted to 2 625 535 in 1999 and 919 780 in 2003 in South Africa. (from the Annual Report on Industrial Action in 2003 from the Department of Labour at <http://www.labour.gov.za/download/10108/Useful%20Documents%20-%20Industrial%20Action%20Annual%20Report%202003.pdf>). In Germany, that number amounted to a 36.507 days in the period between 1997 and 1999, which constitutes an average of 12.169 workdays lost per year. (Zunkunftsagentur Brandenburg GmbH 2003: www.politische-bildung-brandenburg.de/links/investitionsbedingungenin-brandenburg.pdf, accessed on 04.04.2005) The dramatic economic loss that might follow lost workdays shows the example of industrial action recently taken by gold miners (NUM) in August 05. The Deutsche Security estimated a loss of approximately 28.000 ounces of gold and 79 million rand in lost revenue per day. See BBC News 07.08.2005 at <http://news.bbc.co.uk/1/hi/business/4129142.stm> (accessed on 16.08.2005).

Because of the severe damage industrial action can do to businesses and society as a whole, this investigation will also explore what the procedures are in both countries to prevent industrial action if possible and to provide for industrial action to be only the last resort in the course of arriving at agreements.

The exploration will also show that the understanding and content of industrial action, especially of the definition of strikes, is quite different in both countries.

Because the reason for this different understanding and for many other problems in the field of industrial action is to be found in differences in the collective bargaining system the survey will investigate these differences and the specifics of the German system of collective bargaining system where necessary.

The constitutional framework setting parameters for legislation and jurisdiction has a great influence on the different shape of this system, and thereby, also on the law of industrial action. Therefore, this mini-thesis will also examine the constitutional basis of the law of industrial action as well as other sources of law important in that context. The analysis will show that, especially in Germany, the constitutional framework of industrial action influences the subordinate law of industrial action and many of its problems immensely.

More than in other fields of law, the law of industrial action, especially in Germany, is depending on its interpretation and development by courts and academics. Therefore, the paper will regard these voices intensively. In the course of the investigation of legislation, jurisprudence and voices of the academic world the paper will develop an own view where this seems appropriate. When presenting the German law, which is mostly principle related, some dogmatic backgrounds will be explored as well.

It will be shown that the South African law of industrial action is regulated in great detail. In Germany no legislation regulating the law of industrial action exists at all.

The courts developed common law principles that set a framework for an extensive jurisdiction on all issues of industrial action. These principles are usually very general and constitute evaluations, with which the courts can solve the majority of legal problems appearing in the context of industrial action. To understand the jurisdiction of the courts it is necessary to discuss these fundamental principles of the law of industrial action in Germany as well.

The general approach of the mini-thesis will be two-staged. The first task of the paper will be the investigation of how the law of industrial action is shaped in either country, which specific problems occur in South Africa and Germany, and how the different legal systems solve these. The second stage will be the comparison of the different legal approaches.



The main aim of this comparison is to contribute to a dialogue about the problems of law between Germany and South Africa. Such a dialogue has the potential to break dogmatic deadlocks and can bring legal opinions in different countries closer together, and therefore, can contribute to an exchange of ideas between the compared countries.⁷ As with comparative law in general, another task of this comparison must be the final evaluation whether solutions found in one country could be adopted in the other.

Such a comparison between Germany and South Africa seems to be particularly interesting because of the great economic ties between these countries. The trade volume between South Africa and Germany amounts to eight billion Euro.⁸ From a

⁷ See also Zweigert K, Koetz H (1996) *Einfuehrung in die Rechtsvergleichung* (3rd ed) 3.

⁸ See website of the German Department of Foreign Affairs: http://www.auswaertiges-amt.de/www/de/laenderinfos/laender/laender_ausgabe_html?type_id=14&land_id=162, accessed on 12.10.2004.

German point of view, it is by far the largest on the African continent and has doubled since 1994.⁹ At the moment there are 450 Germany enterprises in South Africa with more than 70000 employees.¹⁰ In that context a determination of the similarities and differences between the law of industrial action in both countries might be of interest to investors from Germany as well as from South Africa, especially because of the immense economic impacts strikes can result in.

B. Chapter Two: The right to strike and the recourse to lock-out

I. The legal origin and sources of the right to strike and the recourse to lock-out



1. Germany

a. The Constitution of the Federal Republic of Germany

Being the supreme law of the German legal system the first source to look at when exploring the sources of industrial action in Germany is the Constitution of the Federal Republic of Germany.¹¹

The German Constitution does not explicitly contain a right to strike or lock-out. Art 9 (3) of the Constitution guarantees only the right for any profession to found associations in order to maintain and promote labour- and economic standards. The

⁹ See website of the German Department of Foreign Affairs: http://www.auswaertiges-amt.de/www/de/laenderinfos/laender/laender_ausgabe_html?type_id=14&land_id=162, accessed on 12.10.2004.

¹⁰ See website of the German Department of Foreign Affairs: http://www.auswaertiges-amt.de/www/de/laenderinfos/laender/laender_ausgabe_html?type_id=14&land_id=162, accessed on 12.10.2004.

¹¹ Grundgesetz - GG.

German Constitutional Court¹² and the Federal Labour Court¹³ constantly decided that this regulation also provides for the legal instrument of industrial action for trade unions and employer's organisations¹⁴. This means that through the jurisdiction of the courts the legal instrument of industrial action is constitutionally guaranteed, but only in a collective sense without including an individual right to strike.¹⁵ In order to understand how the courts established this specific constitutional guarantee from the general formulation of art 9 (3) GG and what its content is, the interpretation of art 9 (3) GG needs to be examined.

Art 9 (3) GG reads as follows:

‘The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to article 12a, to paragraphs (2) and (3) of article 35, to paragraph (4) of article 87a, or to article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.’¹⁶

¹² Bundesverfassungsgericht (BVerfG).

¹³ Bundesarbeitsgericht (BAG).

¹⁴ See e.g. BVerfGE 91 NZA 809.

¹⁵ Dütz (2003) *Arbeitsrecht* para 596.

¹⁶ This last sentence of art 9 (3) GG does not have any impact on the content of the constitutional guarantee of the right to industrial action and thus will be ignored in the following investigation.

The provision protects any coalition¹⁷, which is based on a voluntary, legal and private amalgamation, which is determined to have indefinite duration and shows democratic organisational structures.¹⁸ This definition embraces associations or companies as long as those serve the purpose of maintaining or promoting labour- or economic standards.¹⁹ These range from citizen's action groups to big companies.²⁰ The main scope of application of the provision is the embracement of trade unions and employers' organisations, though.²¹ This includes a so-called "individual freedom to associate (individuelle Vereinigungsfreiheit)" and a so-called "collective freedom to associate (kollektive Koalitionsfreiheit)".²² The individual freedom to associate provides for every person, and thus for every employee, to found a union and to join a union.²³ Importantly, this individual freedom to join unions is limited to this very right and does not extend to an individual right to strike.

Thus, the far more important freedom in the context of industrial action is the "collective freedom to associate". This freedom guarantees the independent and continued existence of coalitions and the possibility to carry out their activities independently.²⁴ The thereby protected main activity of trade unions and employers' organisations is concluding collective bargaining agreements.²⁵ As a result, the courts constantly decided that part of art 9 (3) GG is also autonomy of the collective bargaining system (so-called "Tarifautonomie").

¹⁷ Note that the terms "coalition" and "association" are used in the same sense by courts and academics when determining the scope of art 9 (3) GG. See Duetz, W (2003) *Arbeitsrecht* (8th ed) para 596, who uses the term "coalition" and Dietrich T, Hanau P, Schaub G (2004) *Erfurter Kommentar zum Arbeitsrecht* (4th ed) 108, who use the term „association“.

¹⁸ Dütz W (2003) *Arbeitsrecht* (8th ed) para 458.

¹⁹ Jarass H D, Pieroth B (2000) *Grundgesetz für die Bundesrepublik Deutschland* (5th ed) Art 9 para 3.

²⁰ Jarass H D, Pieroth B (2000) *Grundgesetz für die Bundesrepublik Deutschland* (5th ed) Art 9 para 3 and para 4.

²¹ See Dütz W (2003) *Arbeitsrecht* (8th ed) para 473-482.

²² Hromadka W Maschmann F (2004) *Arbeitsrecht Band 2* (3rd ed) § 12 para 33.

²³ Jarass H D, Pieroth B (2000) *Grundgesetz für die Bundesrepublik Deutschland* (5th ed) Art 9 para 25.

²⁴ BVerfGE 94, 268, at 283.

²⁵ Jarass H D, Pieroth B (2000) *Grundgesetz für die Bundesrepublik Deutschland* (5th ed) Art 9 para 29.

The German Constitutional Court (Bundesverfassungsgericht) defined the content of this autonomy as follows:

‘The goal of the autonomy of the collective bargaining system is to level out the structural inferiority of employees when bargaining over terms and conditions of employment through collective action and to make an approximate equal bargaining over terms and conditions of employment possible.’²⁶

The freedom of the collective bargaining system also includes the coalitions’ freedom to bargain over terms and conditions of employment without any interference of public organs and without public legislation.²⁷



Following these definitions the Constitutional court then decided that part of the guarantee of the autonomy of the collective bargaining system must be the possibility for trade unions as well as employers' organisations to push through their demands.²⁸

The tool of the parties involved in the collective bargaining procedure for pushing through demands can only be industrial action. Thus, the law of industrial action is considered to have a “helping function” (“Hilfsfunktion”) to the autonomy of the collective bargaining system. The reason for this conclusion seems obvious. Because the parties to the collective bargaining procedure are independent from public interference²⁹ when bargaining over collective agreements they need to have a weapon to push through demands. Otherwise arriving at agreements would be almost

²⁶ BVerfGE 84, 212, at 229. Note that the South African Constitutional Court reached a similar conclusion in the Certification Judgement of the new Constitution in 1996: *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at para 66.

²⁷ BVerfGE 4, 96, at 106.

²⁸ BVerfGE 1991 NZA 809.

²⁹ BVerfGE 1991 NZA 809: This independence from public interference also excludes any public arbitration.

impossible for the parties. Besides, if especially trade unions did not have the chance to take strike action the goal of the autonomy of the collective bargaining system to lift the power of employees through collective bargaining could not be achieved. This reasoning explains why industrial action helps to keep the collective bargaining system independent (helping function). Therefore, because the autonomy of the collective bargaining system is protected by art 9 (3) GG the possibility to engage in industrial action is provided for by this article as well.³⁰

It is important to realise at this point that all of these guarantees provided for by art 9 (3) GG are part of the “collective freedom to associate” and the coalitions' right to carry out their activities independently. Hence, the German Constitution provides for the possibility to engage in industrial action only for coalitions, meaning trade unions and employers' organisations, and not for individuals. Any subordinate law will give effect to the fact that industrial action can only be taken collectively as a tool to promote only the goals that can be regulated by the collective bargaining parties. This relatively narrow interpretation also excludes the possibility to take strike action in order to protest against social and economic policies that have a direct impact on the interests of workers.³¹ This will impact immensely on the requirements for strikes and lock-outs as established by the courts.³²

b. Constitutions of the German states

Besides the Grundgesetz, which is the supreme law for any public action in Germany, there exist various subordinate Constitutions in different German states. Some of

³⁰ Bundesarbeitsgericht (Federal Labour Appeal Court – BAG) 1985 NZA 504.

³¹ See opposed to that under B I. 2. the interpretation of ILO Convention *Freedom of Association and Protection of the Rights to Organise* 87 of 1948 by the ILO Committee on Freedom of Association in ILO *Freedom of Association* 1994, and the interpretation of s 23 (2) (c) Republic of South Africa.

³² See at Chapter B. IV. 2. b...

these Constitutions constitute a right to strike and even a right to lock-out expressly.³³ In practice, these provisions are negligible, though. Art 31 GG declares that in case of a collision between any law of states and any federal law the former is invalid. Because according to the courts' interpretation of art 9 (3) GG stating that strikes and lock-outs are only protected as rights of trade unions and employers' organisations any subordinate provision that establishes an individual right to strike or lock-out would be considered invalid. If a subordinate provision also provides only for a collective right to industrial action no such coalition can be established and the state law remains valid with the same content of the federal law.³⁴

c. International law

Part 2 art 6 Nr. 4 of the European Social Charter makes no substantive difference to the law of industrial action because, according to the jurisdiction of the BAG, it only protects collective industrial action also. Therefore, this provision does not establish an individual right to strike or lock-out and does not implement any changes to the German law of industrial action.³⁵

The same conclusion is valid for art 11 (1) of the European Convention on Human Rights.³⁶

Another source of international law guaranteeing a right to strike that is relevant to Germany is art 8 subsection 1 d) of the UN-Pact on economic, social and cultural rights from 19.12.1966. This pact is directly applicable in Germany³⁷ but does not implement any changes to the law of industrial action either, because art 8 subsection

³³ See art 27 (2) of the Constitution of Berlin, art 51 (2) of the Constitution of Brandenburg.

³⁴ Because of that the Constitutions of the different German states do not make a substantive difference for the law of industrial action in Germany and no closer investigation needs to be made.

³⁵ See BAG 1988 NZA 883.

³⁶ Hromadka W Maschmann F (2004) *Arbeitsrecht Band 2* (3rd ed) § 14 at para 11-13.

³⁷ It was ratified 23.11.1973 by the Federal Republic of Germany.

1 d) of the pact provides only for a guarantee of the right to strike within the scope of this right that the national law of the different member states provide for. Therefore, its scope is not wider than the scope of art. 9 (3) GG.

The UN-Committee on Human Rights also decided on 18.07.1986 that the right to found trade unions and to join them, which is provided for in art 22 of the UN-Pact on citizen and political rights, does not include a right to strike.³⁸ In result, this provision does also not affect the German law.

Important in this context is art 3 of the ILO Convention No. 87 and its interpretation by the General Survey '*ILO Freedom of Association, the right to organise and collective bargaining and rural workers' organisations 1994*'. ILO Convention No. 87 has been ratified by Germany and transformed into federal law in 1958. Thus, it is binding in Germany.³⁹ But, according to the decision of the German Constitutional Court, ILO Convention No.87 does not provide for any rights that art. 9 (3) GG does not provide for.⁴⁰ The wording of art 3 of Convention No.87 does not establish a guarantee of the right to industrial action. However, the interpretation of the Convention by the General Survey '*ILO Freedom of Association, the right to organise and collective bargaining and rural workers' organisations 1994*' does create strong differences between the German law of industrial action and this survey in important parts.⁴¹ However, this interpretation of Convention No. 87 cannot be binding to the member states because, according to art. 37 of the Constitution of the

³⁸ Richardi R, Wlotzke O et al (2000) Muenchener Handbuch zum Arbeitsrecht Band III (2nd ed) 556; Murswiek ,Unzulässigkeit einer auf das Streikrecht gestützten Menschenrechtsbeschwerde' (1988) Juristische Schulung 65.

³⁹ see BVerfGE 58, 233, at 255.

⁴⁰ BVerfGE 58, 233, at 255.

⁴¹ These differences between the ILO Convention and the German law refer to the secondary strikes, protest action and peaceful occupations of operations. See for details on these differences and the solutions of the German law: Chapter B. V. 2., C. 2., B VI. 1. b..

ILO, only the ICJ is appointed to conclude binding interpretations.⁴² The ICJ has not yet been engaged with questions concerning industrial action. In result, only Convention No. 87 is binding in Germany since its transformation into German law, but does not implement any rights that art. 9 (3) GG does not already provide for. The General Survey ILO *Freedom of Association, the right to organise and collective bargaining and rural workers' organisations* 1994' cannot unfold any binding effect to the German law because it was not issued by the ICJ.⁴³

d. Subordinate legislation

The so far described sources only establish the institution of industrial action. Due to its character as a constitutional article the formulation of art 9 (3) GG as the relevant provision for this institution is rather vague. Like any constitutional regulation it can only set a framework, which must be filled. But, in Germany, subordinate legislation only regulates few specific issues regarding isolated problems of industrial action. For example, s 74 (2) WCA⁴⁴ prohibits industrial action as a weapon to push through demands when a works council bargains over terms and conditions of employment with a single employer. Other than that, the legislature has not codified any regulations concerning requirements or consequences of industrial action.

⁴² see also Richardi R, Wlotzke O et al (2000) *Muenchener Handbuch zum Arbeitsrecht Band III* (2nd ed) 556.

⁴³ Note that the situation in South Africa is different. Art 19 No. 6 of the Constitution of the ILO obligates the members to scrutinise whether a suggestion shall be integrated into national legislation. S 3 (c) LRA explicitly regulates that by interpreting the Act, one must consider the 'the public international law obligations of the republic'. Thereby, the law of the ILO and its interpretation of Conventions by the ILO have been integrated into the LRA. On top of that, as will be shown below, the provisions of the LRA regulating the law of industrial action have been designed in compliance with Convention No. 87 and its interpretation. See Du Toit D et al (2003) *Labour Relations Law* (4th ed) 273.

⁴⁴ Works Constitution Act (Betriebsverfassungsgesetz). The WCA regulates the relationship between employers and works councils as the main body of workers participation on workplace-level.

e. Collective agreements

The collective bargaining parties have the possibility to regulate different issues concerning industrial action in collective agreements. The collective bargaining parties so far only regulated details on peace obligations, conciliation procedures and essential services.⁴⁵ Collective agreements that regulate industrial action comprehensively have not been concluded so far, although the BAG even invited the parties to do so.⁴⁶

f. Statutes of employers' organisations and trade unions

Also, statutes of trade unions and employers' organisations set procedural rules for industrial action taken by them. These statutes are only binding for the members of the organisation, which laid these down, though.⁴⁷



g. Common law

Although the German law is based on civil law, the Constitutional court accepted that in the field of industrial action the courts, and not the legislature, develop rules concerning requirements and consequences of such industrial action.⁴⁸ But, by creating a collective right to industrial action, the German Constitution established the basis and also the limitation for the courts' development of the law. While art 9 (3) GG remains the central statute, on which the courts must rely on by developing the law, details of the law of industrial action are created by them.

⁴⁵ Hromadka W Maschmann F (2001) *Arbeitsrecht Band 2 Kollektivarbeitsrecht & Arbeitsstreitigkeiten* (2nd ed) 142.

⁴⁶ BAG 1980 DB 1266.

Hromadka W Maschmann F (2001) *Arbeitsrecht Band 2 Kollektivarbeitsrecht & Arbeitsstreitigkeiten* (2nd ed) 142.

⁴⁷ Dütz (2003) *Arbeitsrecht* (8th ed) para 608.

⁴⁸ BAG 1980 DB 1266.

In other words, it can be constituted that in Germany art 9 (3) GG sets a framework for the law of industrial action, which on one hand is wide enough to allow the Labour courts to develop specifics, but sets one important limitation, namely the collective orientation of all industrial action.

2. South Africa

a. The Constitution of the Republic of South Africa

S 23 (2) (c) of the Constitution of the Republic of South Africa⁴⁹ provides for the right to strike. By doing this without any limitation it differs from the interim Constitution which constituted a right to strike only 'for the purposes of collective bargaining'. The result of this change is that employees do now have the right to strike over social and economic policies that have direct impact on the interest of workers.⁵⁰ This approach is in accordance with the view of the ILO.⁵¹

Another difference to the interim Constitution is that the final Constitution does not expressly include a right to lock-out anymore.⁵² But, the Constitutional Court found that the right to engage in collective bargaining includes the right to use economic power.⁵³ Locking out employees, the court then concluded, is only one of them. Thus, it does not need to be entrenched in the Constitution but is rather part of the general employers' right to engage in collective bargaining. Therefore, while the right to lock-out is not expressly guaranteed by the Constitution anymore its introduction into the

⁴⁹ Act 108 of 1996.

⁵⁰ Du Toit "Labour and the Bill of Rights" in (1997) *Bill of Rights Compendium* at 4B26, Cheadle MH, Davis DM, Haysom NRL (2002) *South African Constitutional Law: The Bill of Rights* 23.

⁵¹ see ILO *Freedom of Association and Collective Bargaining* 1994 at para 165. For the application of international law see B. I. 2. b.. For details on the right to protest action see C 1..

⁵² See s 27 (5) of the interim Constitution of the Republic of South Africa Act 200 1993.

⁵³ *In re: Certification of the Constitution of the Republic of South Africa, 1996* (10) *BCLR* 1253 (CC) at para 64.

LRA reflects the legislature's decision to use the weapon of locking out employees as a part of the balance of economic powers between the collective bargaining parties.

b. International law

In South Africa, international law obligations are very important for the law of industrial action. According to s 39 (1) (b) of the Constitution of South Africa international law must be considered when the Bill of Rights is interpreted. For any legislation s 233 of the Constitution regulates 'that when interpreting any legislation every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

S 231 (2) of the Constitution constitutes that an international agreement is binding for the Republic of South Africa if it has been approved by resolution by the responsible organs. S 231 (4) of the Constitution regulates that any international agreement becomes law in South Africa when it is enacted into law by national legislation. Also, self-executing provisions of an agreement, which has been approved by parliament, become law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. On top of that, s 232 of the Constitution provides that even customary international law is law in South Africa unless it is inconsistent with the Constitution or an act of parliament. The partially discussed question whether i.e. Convention No. 87 can be considered customary international law, does not have to be decided at this point because Convention 87 has been ratified by South Africa on 19.02.1996.⁵⁴

⁵⁴ See for the ratification of Convention 87: <http://www.ilo.org/ilolex/english/convdisp2.htm>. See for the discussion i.e. Du Toit D et al (2003) *Labour Relations Law* (4th ed) 65; Erasmus & Jordaan 'South Africa and the ILO: Towards a new relationship' (1993/1994) 19 SAJIL 65 as cited in Du Toit D et al (2003) *Labour Relations Law* (4th ed) 65.

Besides the Constitutional regulations, s 3 (c) of the LRA demands that any interpretation of the LRA must be in compliance with South Africa's international law obligations, i.e., ILO Conventions.

Therefore, also international law obligations that have been approved by the National Assembly and National Council of Provinces constitute a source of law for industrial action. This happens when international law is converted into national legislation, it is self-executing or international customary law. It must also be considered when interpreting either the Bill of Rights or the LRA.

c. The Labour Relations Act 66 of 1995

In South Africa, the main source for the law of industrial action is the LRA.⁵⁵ S 64 - s 77 LRA regulate the procedural as well as substantive requirements for strikes, lock-outs and protest action. The LRA also contains other norms, which regulate different legal matters related to industrial action. One example is s 187 (1) (a) LRA, which prohibits a dismissal of workers on grounds of their involvement in strike action.

d. Case law

Besides legislation, the interpretation of the relevant statutes by courts is essential for the law of industrial action in South Africa as well.

3. Comparison

The sources of the law of industrial action are similar in both countries, namely the Constitution, international law, subordinate legislation, and case law. The content of

⁵⁵ Labour Relations Act 66 of 1995 (LRA) para 614.

these sources differ, though. Especially the constitutional provisions set different frameworks for subordinate legislation and jurisdiction.

One difference is that in South Africa a right to strike has been established in the Constitution, whereas the German Constitution does not explicitly recognise a right to strike.

There are two main reasons for the decision not to include a right to strike in the German Constitution. Different members of the committee that formulated the new Constitution after World War II⁵⁶ proposed motions to include a right to strike while all members agreed that political strikes and strikes of civil servants should be excluded.⁵⁷ But, the committee could not agree on a formulation and it recognised the danger that a constitutional guarantee of the right to strike could become overloaded with case law.⁵⁸

Also, the law of industrial does not have the same importance in Germany as in South Africa. Many issues that could potentially lead to industrial action as a result of dead ends in collective bargaining rounds are placed on workplace level. On this level works' councils that must be established according to the WCA bargain with employers about many issues, which are subject to collective bargaining in South Africa. But, in case of a deadlock in negotiations between a works council and an employer no strike action is allowed.⁵⁹ In the result, industrial action does not occur as often in Germany as it does in South Africa.

Thus, the members of the "Parlamentarische Rat" probably did not feel a need to include a right to strike into the Constitution.

⁵⁶ The so-called Parlamentarischer Rat.

⁵⁷ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) para 80.

⁵⁸ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) para 80; The dangers of the constitutionalisation of labour rights are subject to a legal discussion worldwide. See e.g. Hepple, B "The right to strike: A case study in constitutionalisation" presented at the seminar: Constitutionalism and Labour Law, Oliver Tambo Moot Court, Monday 23 February 2004.

⁵⁹ See s 74 (2) WCA.

For the Constitutional assembly in South Africa the circumstances were totally different. Strike action in South Africa has always been a main weapon for solving problems between labour and employers. Labour relations in South Africa can be called more adversarial compared to Germany. A functional system of workers participation on plant level, which excludes strike action when bargaining about certain issues, could not be established so far.⁶⁰ On top of that, the importance of strikes comes with their political history. Strikes have been a common tool to express political demands and played an important role in the struggle for democracy in South Africa.

It is submitted that all of these facts must be considered important reasons for the establishment of a right to strike in the Constitution of South Africa.

Another major difference is the fact that the South African Constitution inherits even an individual right to strike whereas the German Constitutional Court interpreted art 9 (3) GG as only protecting industrial action carried out by associations. Therefore, the range for protected strike action is wider in South Africa. Two or three employees, in certain cases even only one employee, have the possibility to take strike action without the consent or even against the will of their trade union.⁶¹

Obviously the Constitutional assembly wanted to give employees a greater amount of freedom to push through their demands.

The Constitutions of both countries do not mention a right to lock-out expressly. Since the German Constitution does not even guarantee a right to strike expressly, providing for a right to lock-out would lead to an unjustifiable imbalance between employers and labour.

⁶⁰ See Du Toit 'Collective bargaining and worker participation' (2000) 21 *ILJ* 1544; Summers 'Workplace Forums from a Comparative Perspective' (1995) 16 *ILJ* 806.

⁶¹ See the definition of strike in s 213 of the LRA, which demands for a strike only a 'concerted refusal to work'. For details on how many employees must act together and the constitutionality of the formulation 'concerted', see B. II. 1. b..

The South African Constitutional court basically comes to the same conclusions when stating that the right to collective bargaining inherits a right to use some economic power and that the possibility to lock-out is only one of them.⁶² It is submitted that this reasoning is convincing. Employers have in fact more weapons at hand than only locking out employees. Because they hold these other weapons giving them a constitutional guarantee equal to the right to strike would also lead to an imbalance between the parties of collective bargaining. The so-called 'parity of arms' would be abolished.⁶³ Also, the potential pressure from trade unions and discussions, which were expected to come up in case of an inclusion of the right to lock-out in the Constitution, gave reason not to include such a right. In result, the influence of a tremendous mobilisation of employees by the trade union movement led to the dispensation of the introduction of a right to lock-out into the final Constitution.⁶⁴ This is a similarity to Germany where legislature also feared to aggravate discussions between employers' organisations, trade unions and itself.

In result, both constitutions accept lock-outs as a weapon of industrial action without expressly providing for it.

The other major difference between the law of industrial action in the compared countries is that in South Africa the right to strike, lock-out, protest action and picketing etc. is formulated in subordinate law whereas in Germany, no such legislation comprehensively regulating the law of industrial action has been formulated. At first glance, this seems particularly interesting since the German system of law is based on Roman law, in which, besides interpretation by courts,

⁶² *In re: Certification of the Constitution of the Republic of South Africa, 1996* (10) BCLR 1253 (CC) at para 64.

⁶³ The 'parity of arms' will become very important when it comes to the definition of lock-outs and the substantive requirements of strikes and lock-outs as well as to certain picketing actions. Especially to the legality of strikes in Germany the notion of parity is essential.

⁶⁴ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 298 Fn 146.

statutes are constituting the main source of law. Various reasons can be found for that fact.⁶⁵ Again, the legislatures' fear to cause tremendous political conflicts plays a major role.⁶⁶ The South African system of law is based on Roman Dutch law.⁶⁷ But, the codification of the law progresses further and further in South Africa.⁶⁸ Therefore, it is not surprising that the legislature codified such an important part of labour law like the law of industrial action.

II. The definition of the right to strike and the distinction between strikes and other conflicts

1. South Africa

S 213 of the LRA defines strikes as follows:

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

a. The persons included in the definition

The definition covers current employees as well as persons, who have been employed.

⁶⁵ See for a detailed discussion about the reasons in: Panel discussion at the 52. German Lawyers Conference: Codification of labour law? Record R on the 52. German Lawyers Conference, 1978. (Podiumsdiskussion des 51. Deutschen Juristentages: Kodifizierung des Arbeitsrechts? Sitzungsbericht R zum 52. Deutschen Juristentages, 1978).

⁶⁶ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) 64.

⁶⁷ Zweigert K, Koetz H *Einfuehrung in die Rechtsvergleichung* (3rd ed) 227-231.

⁶⁸ See for a detailed comparative analysis of the South African system of law and the German system of law: Zweigert K, Koetz H *Einfuehrung in die Rechtsvergleichung* (3rd ed) 227-231.

According to the definition of 'employee' in s 213 LRA independent contractors are excluded from the right to strike.

The very wide definition could easily lead to the conclusion that every person that used to be employed can take strike action against her/his former employer. In *FGWU v Minister of Safety and Security*⁶⁹ Grogan AJ put some limitation on the formulation. The judgement points out that only employees as defined in s 213 LRA could initiate strike action.⁷⁰ Furthermore, referring to the case of *NAAWU v Borg Warner SA (Pty) Ltd*⁷¹ Grogan AJ found that the employment relationship can extend beyond the formal termination of the contract of employment.⁷² Thus, a dismissal of employees that take part in a protected strike, and therefore a dismissal in contravention of s 67 (4) LRA, does not terminate the employment relationship. Opposed to that, the employment relationship of employees taking part in an unprotected strike comes to an end immediately after the formal termination of the employment relationship.⁷³ In agreement with du Toit⁷⁴ it is submitted that also in cases of fair dismissals the employment relationship should be considered existent as long as the dismissed employees challenge their dismissal.⁷⁵ The cases of an automatically unfair dismissal according to s 187 LRA and a fair dismissal that is being challenged are analogous in one crucial point. An automatically unfair dismissal is absolutely invalid. In case of a challenged dismissal the validity of the dismissal is not cleared, yet. To deprive employees of their right to strike during this phase does not seem just.⁷⁶

⁶⁹ In the Labour Court of South Africa, held at Port Elizabeth, case No P50898/98 from www.caselaw.co.za.

⁷⁰ At para 11.

⁷¹ 1994 (15) *ILJ* 509 (A).

⁷² At para 16.

⁷³ At para 21.

⁷⁴ Du Toit et al (2003) *Labour Relations Law* (4th ed) 277.

⁷⁵ Du Toit et al (2003) *Labour Relations Law* (4th ed) 277.

⁷⁶ Du Toit et al (2003) *Labour Relations Law* (4th ed) 277.

Note that the LRA generally entitles employees seeking re-employment or reinstatement to exercise their rights in this period.

The formulation 'by the same employer or different employees' on one hand entitles employees of different employers to participate in the same strike (multi-employer strike) as long as all employees go on strike for the same grievance or dispute. Such multi-employer strikes are quite common in cases in which workers of employers that are associated with others go on strike or within a certain industry, in which all employees fight in respect of the same grievances or disputes.⁷⁷ But also, the definition is wide enough to embrace sympathy and secondary strikes.⁷⁸

b. The shape of strike action: 'concerted refusal to work, or the retardation or obstruction of work'

A 'concerted refusal to work' is easily recognisable if a certain number of employees stop doing the work they are contractually obliged to do during regular working hours.



Formerly discussed was the question whether a stoppage of voluntary overtime work is embraced by the strike definition as well. Declining the findings of a number of cases⁷⁹ the legislature stipulated that 'work in this definition includes overtime work, whether it is voluntary or compulsory'.

The question whether refusal to perform voluntary but habitually performed work is embraced by the term 'work' is being answered differently.

⁷⁷ Du Toit et al (2003) *Labour Relations Law* (4th ed) 277.

⁷⁸ Myburgh A, Wade R, "Meaning of strike - The new strike definition" (1996/1997) 13 *Employment Law* 22 at 23.

⁷⁹ See e.g. *SA Breweries Ltd v FAWU* 1988 (9) *ILJ* 244 (W); *SA Breweries Ltd v FAWU* 1989 (10) *ILJ* 844 (A).

According to one view the inclusion of voluntary overtime work in the definition of work must be considered an exception. Outside the scope of overtime work only the stoppage of contractually obliged work could constitute a strike.⁸⁰

Another academic view sees voluntary, but habitually performed work embraced by the strike definition.⁸¹ This conclusion is the consequence of a purposive approach to the interpretation of s 213 LRA.⁸² This view takes into account the important goal of the act to advance 'labour peace'.⁸³ One of the instruments to achieve this goal in the context of industrial action is the obligation of the parties to refer disputes to an appropriate council for conciliation.⁸⁴ It is submitted that the argument that a concerted refusal to perform habitually performed work is no less an intense exercise of economic power than a concerted refusal to perform obligatory work is to be supported.⁸⁵

Thus, the strike definition of s 213 includes habitually performed work independent from its performance during regular working hours or overtime.

Another problem in the context of the 'work' definition has been raised in *Simba (Pty) Ltd v FAWU*⁸⁶. The court had to answer the question whether a refusal to perform work, which is contrary to any law or collective agreement is embraced by the strike definition and therefore can amount to a strike. The court found that the term 'work' cannot include any work, the performance of which would be contrary to any law or

⁸⁰ Myburgh, A, Wade, R, "Meaning of strike - The new strike definition" (1996/1997) 13 *Employment Law* 22 at 23.

⁸¹ Du Toit et al (2003) *Labour Relations Law* (4th ed) 274-275; Thompson C, Benjamin P (2003) *South African Labour Law, Vol. One* (Revision Service 45) AA1 – 306.

⁸² Du Toit et al (2003) *Labour Relations Law* (4th ed) 274.

⁸³ S 1 LRA.

⁸⁴ Du Toit et al (2003) *Labour Relations Law* (4th ed) 275.

⁸⁵ This is the argument du Toit and Thompson/Benjamin give for their reasoning that habitually performed work should be included in the strike definition.

⁸⁶ 1997 (5) *BLLR* 602 (LC).

collective agreement because 'to hold otherwise would be contrary to public policy and would sanction a contravention of the BCEA'.⁸⁷

It is submitted that the question whether a refusal to work amounts to a strike should only be judged by the intention of the striking employees. If their goal is remedying a grievance or resolving a dispute in respect of any matter of mutual interest between them and their employer their action must be considered a strike even if the work they are supposed to perform would be illegal. If the employees only refuse to carry out illegal work because of its illegality such a refusal cannot be embraced by the strike definition.⁸⁸

'Refusal to work, or the retardation or obstruction of work' includes partial as well as complete refusals of work. Partial refusals can be seen in go-slows⁸⁹, blacking⁹⁰, overtime bans, working to rule as well as other forms of obstruction or retardation of work.⁹¹



A 'concerted' refusal to work implies that at least two employees must jointly refuse to work. In cases, in which a single employee has the ability to bring operations to a halt due to her/his position in the production process it has been argued that her/his single action should be considered a 'concerted' refusal to work as long as she/he arranged the halt of the production process with others.⁹² It is submitted that because

⁸⁷ At 612.

⁸⁸ See for similar findings Toit et al (2003) *Labour Relations Law* (4th ed) 275.

⁸⁹ *Ceramic Industries Ltd t/a Beta Sanitary Ware v National Construction Building & Allied Workers Union* 1997 (1) *BLLR* 1 (LAC).

⁹⁰ Thompson C, Benjamin P (2003) *South African Labour Law, Volt One* (Revision Service 45) AA1 – 305. Blacking means the 'refusal to handle goods of an employer whose employees are striking'.

⁹¹ See Thompson C, Benjamin P (2003) *South African Labour Law, Volt One* (Revision Service 45) AA1 – 305.

⁹² Thompson C, Benjamin P (2003) *South African Labour Law, Volt One* (Revision Service 45) AA1 – 307.

such an action has the same effects on the production process this argumentation seems coherent.

It is also submitted that the formulation ‘concerted refusal to work’ is a justifiable limitation of s 23 (2) (c) of the Constitution, which provides for a right to strike for ‘every worker’. Even though the constitution provides for an individual right to strike the object of the exercise of industrial action is to evolve pressure to push through collective demands.⁹³ That is what the term ‘concerted’ aims to guarantee. Demands a single employee raises must be solved either by contract with the employer or by the courts. Only if the action of a single employee is of a collective nature, as described above, this action might amount to a strike. What the constitution addresses is that every employee has the right to take part in collective strike action, independently from how many employees take part in it or if a trade union is involved.

c. Objectives of strike action



aa. ‘for the purpose of remedying a grievance or resolving a dispute’

Any strike action must be taken ‘for the purpose of remedying a grievance or resolving a dispute’. The strike definition under the LRA 28 of 1956 embraced only strike action to ‘induce or compel compliance with demands or proposals’.⁹⁴ While this old definition only embraced disputes over demands the new definition includes strikes ‘for the purpose of remedying a grievance’. Thus, the new definition widens the scope of application of the strike provisions.

⁹³ See also: Thompson C, Benjamin P (2003) *South African Labour Law, Volt One* (Revision Service 45) AA1 – 307, that emphasize the collective nature of strike action.

⁹⁴ *MWASA v Facts Investors Guide (Pty) Ltd* 1986 (7) ILJ 313 (IC).

Firstly, the definition of the term 'dispute' does not only include disputes in case an employer is aware of the strikers' demand and that there is a resultant conflict. The definition of 'dispute' in s 213 also includes alleged disputes. The result is that it is sufficient if there is a dispute only in the eyes of the strikers.⁹⁵

The introduction of the formulation 'remedying a grievance' into the current LRA lets even a grievance suffice, which has not yet led to a dispute. It is important, though, that a strike commences after the grievance or the dispute arose. Only then can its purpose be seen as remedying the grievance or resolving the dispute. If the stoppage of work is the reason for the dispute, the refusal to work can not be regarded a strike.⁹⁶

Overall, the new strike definition includes any action, which is intended to 'demonstrate displeasure, vent grievances, support demands, or place pressure on the employer to achieve collective, work-related goals'.⁹⁷

bb. 'matter of mutual interest between employer and employee'

The refusal to work must be carried out with regard to an industrial goal, a 'matter of mutual interest between employer and employee'.

Embraced are all work-related issues.⁹⁸ With regard to the interpretation of the phrase under previous legislation it is generally accepted that it must be interpreted widely.⁹⁹

⁹⁵ Myburgh, A, Wade, R, "Meaning of strike - The new strike definition" (1996/1997) 13 *Employment Law* 22 at 25.

⁹⁶ See *Simba (Pty) Ltd v FAWU* 1998 (9) BLLR 971 (LC) with reference to *Du Toit D et al* (2003) *Labour Relations Law* (4th ed) 278, *FAWU v Rainbow Chicken Farms* 2000 (1) BLLR 70 (LC).

⁹⁷ *Toit et al* (2003) *Labour Relations Law* (4th ed) 278.

The issues named in s 24 (1) of the Labour Relations Act 28 of 1956, may be of help for the interpretation of the phrase.

Also, the notion to refer to subjects, in which an employer is obligated to consult with a workplace forum¹⁰⁰, and in which bargaining councils may develop proposals on policy and legislation¹⁰¹, is ingenious. By placing these issues between employers and employees' representations the legislature made them 'matters of mutual interest'.¹⁰² Because of that, some critics' argument that legislature implemented the possibility of protest action¹⁰³ to cover such socio-economic issues is not convincing. The difference between a strike and protest action should rather be determined on the facts whether the opponent of the strikers is legislature or an employer.¹⁰⁴ If it is the legislature which shall be forced to change or implement certain legislation the action should qualify as protest action. If the target of the action is an employer the action should qualify as a strike.



The formulation 'between employer and employee' includes any grievance or dispute an employer is involved in. This covers employees that join their fellow employees

⁹⁸ Grogan J (2001) *Workplace Law* (6th ed) 326; Thompson C, Benjamin P (2003) *South African Labour Law, Vol. One* (Revison Service 45) AA1 – 308.

⁹⁹ With reference to inter alia *Rand Tyres & Accessories v Industrial Council for the Motor Industry (Transvaal)* 1941 TPD 108 see du Toit et al (2003) *Labour Relations Law* (4th ed) 279; Grogan (2001) *Workplace Law* (6th ed) 326; Thompson C, Benjamin P (2003) *South African Labour Law, Vol. One* (Revison Service 45) AA1 – 308.

¹⁰⁰ S 84 (1) LRA.

¹⁰¹ S 28 (1) (h) LRA. du Toit et al (2003) *Labour Relations Law* (4th ed) 279. Du Toit considers the following issues of proposals submittable for bargaining councils: Trade and investment policy, economic policy, employment and social policy affecting the sector and area.

¹⁰² Myburgh, A, Wade, R, "Meaning of strike - The new strike definition" (1996/1997) 13 *Employment Law* 22 at 26.

¹⁰³ S 77 LRA.

¹⁰⁴ du Toit et al (2003) *Labour Relations Law* (4th ed) 280; Thompson C, Benjamin P (2003) *South African Labour Law, Vol One* (Revison Service 45) AA1 – 308.

although they are not members of the same bargaining unit¹⁰⁵ as well as employees of a different employer supporting an employees' strike against their employer.¹⁰⁶

2. Germany

As mentioned before, in Germany, it is left to the courts and academics to develop definitions for the terms 'industrial action' and 'strike'. To understand the definition of strike in Germany it is important to realise that different lawyers offer two different definitions of industrial action, which shape the definition of strike and differ in the crucial characteristic of the goal industrial action seeks to achieve.

a. Strikable goals

The first definition seems to let almost any goal suffice:

'Industrial action takes place when either employers or employees take actions collectively to disturb the employment relationship in order to achieve a certain goal.'¹⁰⁷

The second definition being offered defines the goal more precisely:

'Industrial action takes place when either employers or employees take actions collectively to disturb the employment relationship in order to achieve a goal related to a matter of interest as opposed to a matter of rights.'¹⁰⁸

¹⁰⁵ *CWIU v Plascon Decorative (Pty) Ltd* 1998 JOL 3750 (LAC) at 29.

¹⁰⁶ For secondary strikes - see s 66 LRA.

¹⁰⁷ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) 13; Zoellner W, Loritz K G (1998) *Arbeitsrecht* (5th ed) 445.

Related to these definitions of industrial action, strikes are either defined as a collective refusal of the duty to work in order to achieve a certain goal¹⁰⁹, or to achieve a goal related to a matter of interest¹¹⁰.

The term 'matters of interest' refers to issues, which are being regulated in future collective agreements.

To understand what kind of issues are strikeable in Germany, according to the second definition it is necessary to explain what issues are being regulated in collective agreements.

The Collective Bargaining Agreements Act¹¹¹ is the source for the law of collective bargaining. S 1 (1) of the Collective Agreements Act defines the issues that can be regulated in collective agreements and reads as follows:



'Collective bargaining agreements shall govern the rights and obligations of the parties thereto and contain legal norms which may regulate the content, commencement and termination of employment relationships and matters relating to the operation of works and legal aspects of the works' constitution.'¹¹²

¹⁰⁸ Duetz, W (2003) *Arbeitsrecht* (8th ed) 279; Hromadka W Maschmann F (2001) *Arbeitsrecht Band 2 Kollektivarbeitsrecht & Arbeitsstreitigkeiten* (2nd ed) 153; Schaub G (2002) *Arbeitsrechtshandbuch* (10th ed) 1892.

¹⁰⁹ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) 17..

¹¹⁰ Duetz, W (2003) *Arbeitsrecht* (8th ed) 290; Hromadka W Maschmann F (2001) *Arbeitsrecht Band 2 Kollektivarbeitsrecht & Arbeitsstreitigkeiten* (2nd ed) 157; Schaub G (2002) *Arbeitsrechtshandbuch* (10th ed) 1890.

¹¹¹ Tarifvertragsgesetz (TVG): Translation from: Lingemann S, v Steinau-Steinrück R, Mengel A (2003) *Employment & Labour Law in Germany* 313.

¹¹² Translation from: Lingemann S, v Steinau-Steinrück R, Mengel A (2003) *Employment & Labour Law in Germany* 313.

Besides governing the rights and obligations of the bargaining parties¹¹³ collective agreements most importantly include norms that govern terms and conditions of employment.

Therefore, according to the second definition only such terms and conditions of employment are strikeable that the bargaining parties negotiate about. This would exclude any other work-related issues, such as dismissal of workers, single disciplinary actions of employers or the keeping of safety standards. Disputes about all of these issues would have to be settled by the labour courts.¹¹⁴

Opposed to that view, according to the first definition a refusal to work because of a dispute over already existing rights would also qualify as a strike. This definition includes any collective refusal to work including political stay-aways, strikes over dismissals or cases, in which an employer omits to pay remuneration.

At first glance, this difference between the definitions sounds essential because the first definition puts far more disputes within the scope of strike law. The latter strictly follows the notion of industrial action in Germany being a tool to arrive at collective agreements between the collective bargaining parties.

Academics proposing the first definition argue that the legality of a refusal to work should not rely on the formulation of the terms 'industrial action' and 'strike' but should be answered in a separate test.¹¹⁵ They include political strikes and strikes over already existing rights into the definition of strike but when testing the legality of the

¹¹³ Examples for such rights and obligations are the termination of the agreement (Lingemann S, v Steinau-Steinrück R, Mengel A (2003) *Employment & Labour Law in Germany* 58). All collective agreements are concluded for a fixed term and include the duty not to engage in industrial action for the time the collective agreement is valid (Zoellner W, Loritz K G (1998) *Arbeitsrecht* (5th ed) 391).

¹¹⁴ Duetz, W (2003) *Arbeitsrecht* (8th ed) 282. For a similar regulation see s 65 (1) (c) LRA. This provision makes two important exemptions, though. For details see Chapter B. IV. 2. a. dd..

¹¹⁵ Academics following the first interpretation consider the collective refusal to work in order to put pressure on an employer in a dispute over rights legal. See Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) 28.

strike come to the conclusion that such strikes are illegal.¹¹⁶ Thus, they come to the same result as the academics that propose the second definition.

It is submitted that this approach should be rejected. The academics taking the view that almost any refusal to perform work amounts to strike action per definition ignore the fact that, constitutionally and according to s 1 (1) TVG, industrial action is unavoidably connected to the collective bargaining process. The right to take industrial action follows the constitutional right to bargain collectively. Thus, refusing to work with the aim to put pressure on employers to convince them to carry out their existing obligations is not being regarded industrial action in Germany. Industrial action can only refer to the collective bargaining process. Hence, a refusal to work can only be deemed a strike where it supports goals related to collective bargaining.

b. Disturbance of the employment relationship

Either of the named formulations demands a disturbance of the employment relationship: This formulation includes complete refusals to work, go-slows, as well as picketing actions.¹¹⁷ A refusal to work exists if employees do not appear at the workplace or if they do appear but refuse to fulfil their obligations.¹¹⁸ Embraced is overtime work as well as habitually performed work.¹¹⁹ The possibility to work overtime and habitually performed work is either regulated in a collective agreement, in a works agreement¹²⁰, in the contract of employment or in certain cases according

¹¹⁶ See Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) 78-82. A similar approach has been chosen by the South African legislature, which consists of a relatively wide strike definition but requires that the issue in dispute is not justiciable (s 65(1)(c), LRA). For details see Chapter B. Iv. 2. a. dd..

¹¹⁷ Schaub G (2002) *Arbeitsrechtshandbuch* (10th ed) 1889.

¹¹⁸ Hromadka W Maschmann F (2001) *Arbeitsrecht Band 2 Kollektivarbeitsrecht & Arbeitsstreitigkeiten* (2nd ed) 157.

¹¹⁹ Hromadka W Maschmann F (2001) *Arbeitsrecht Band 2 Kollektivarbeitsrecht & Arbeitsstreitigkeiten* (2nd ed) 157.

¹²⁰ A works agreement is an agreement between a works council and an employer, s 77 (2) WCA.

to the discretion of the employer.¹²¹ In either of these cases the duty to perform such work becomes part of the contract of employment because all of these legal sources define and shape that contract. Thus, not performing such work disturbs the employment relationship and amounts to a strike.

c. Actions taken collectively

The described actions must be taken collectively. The term ‘collectively’ corresponds to the term ‘concerted’ in South African law. The meaning of the term differs from the South African terminology, though. Again, the function of industrial action for collective bargaining is crucial. To determine what the term ‘collectively’ means for German strike law s 2 (1) of the TVG must be interpreted.



It reads as follows:

‘The parties to a collective bargaining agreement shall be trade unions, individual employers or associations of employers.’¹²²

As described before; the goal of strike action can only be to put pressure on employers with the intention that they give in to employees’ demands during collective bargaining. S 2 (1) TVG provides that on the employees’ side such an agreement must be concluded by a trade union. Therefore, it is less the employees’ demands but more the trade union’s demands that are being supported by strike action. Because the right to strike is only an annex to the collective bargaining

¹²¹ Duetz, W (2003) *Arbeitsrecht* (8th ed) 35. The right to instruct employees to perform work not specifically defined in the employment contract is called ‘Direktionsrecht’. This ‘Direktionsrecht’ is part of any employment contract and is limited by the provisions laid down in the employment contract.

¹²² Translation from: Lingemann S, v Steinau-Steinrück R, Mengel A (2003) *Employment & Labour Law in Germany* 313.

procedure ('helping function') only trade unions can initiate strike action. Neither academics nor courts dispute this.¹²³ Firstly, this follows the Constitutional understanding of industrial action being an instrument only to promote the collective bargaining process. Therefore, it is not only necessary for employees to act concertedly but to be led by a trade union.¹²⁴

d. Employees' actions

Like in South Africa, strikes are restricted to employment relationships. This excludes independent contractors, civil servants, judges as well as soldiers.¹²⁵

Due to centralised bargaining, in Germany, multi-employer strikes are very common. In general, parties do not negotiate over collective agreements only for a plant but for a whole sector.¹²⁶ That means that any employee, which is a member of the trade union involved in the bargaining process, has an interest in the outcome of the negotiations. Thus, in case such employees strike at a plant in which strike action has not been taken yet, but within the bargaining sector, such a strike is considered a primary strike and these employees are embraced by the strike definition as primary strikers.¹²⁷

3. Comparison

The South African strike definition and the German strike definition have a very different scope regarding who can initiate strike action.

¹²³ See for example: BAG AP Nr. 32, 58 zu Art 9 GG *Arbeitskampf*; Lingemann S, v Steinau-Steinrück R, Mengel A (2003) *Employment & Labour Law in Germany* 58.

¹²⁴ For details see Chapter B. IV. 2. b. aaa..

¹²⁵ Duetz, W (2003) *Arbeitsrecht* (8th ed) 280.

¹²⁶ This sector is the so-called "Tarifgebiet (bargaining sector)".

¹²⁷ The reasons for the general prohibition of secondary strikes will be investigated after the description of the substantive requirements of strikes. For details: Chapter B. V. 2..

Firstly, in South Africa, at least civil servants may engage in strike action whereas in Germany this group is excluded from the right to engage in strike action.¹²⁸

The scope of multi-employer strikes is similar because in as long as employees of different employers fight for the same grievance or dispute they are considered primary strikers.

However, the main difference between the two definitions is a more basic one. In Germany strikes are closely connected to collective bargaining. Strike-law is designed only as a weapon to push through demands that can be regulated in collective agreements. Only trade unions can call for and lead strikes whereas in South Africa any concerted refusal to work suffices.

The main reason for that can be found in the constitutional framework of industrial action. While in Germany the right to industrial action is only an annex to help the collective bargaining parties to conclude agreements there is no room at all for strikes that are initiated by employees and not by trade unions. Such actions are considered unprotected 'wildcat strikes'.¹²⁹ Opposed to that, in South Africa, a 'concerted refusal to work, or the retardation or obstruction of work' suffices. The Constitutional basis for the right to strike in South Africa is much different to the German Constitutional framework. The individual right to strike guaranteed for in s 23 (2) (c) of the Constitution provides for a right to strike, which is independent from trade unions.

The goals the parties seek to achieve with the weapon of industrial action seem by definition quite different. According to the opinion submitted above, in Germany, any action not taken for the purpose of promoting a goal subject to collective bargaining cannot be a strike by definition. The range of disputes embraced by the South African

¹²⁸ see s 71 (10) LRA read with s 213 LRA.

¹²⁹ So-called 'Wilde Streiks'. See Duetz W (2003) *Arbeitsrecht* (8th ed) 293.

strike definition is far wider. That does not mean that strike action is really permissible on any ground. The South African legislature also realised that strike action needs to be limited. Similar to the German limitations it introduced s 65 (1) (c) LRA, which limits strike action to disputes of interest. S 65 (1) (c) LRA excludes from strike action any dispute that may be referred to arbitration or adjudication.¹³⁰ Thereby, the definition regards a big amount of disputes strikeable while s 65 (1) (c) LRA renders a certain group of disputes, namely rights disputes, unstrikeable. The approach to exclude such matters, not by definition but via limitation, is similar to the approach some German academics suggest. They also define the right to strike wider and limit it later on. In South Africa, taking this route seems coherent. The constitutionally guaranteed right to strike is not per definition connected to collective bargaining. Thus, there is no need to exclude certain disputes from the strike definition. In Germany, the right to strike is constitutionally connected only to support collective bargaining. As pointed out before, a work stoppage with any other reason than a dispute over a matter subject to collective bargaining can per definition not be deemed a strike in Germany.

With regard to the persons that might be involved in industrial action, the definitions in both countries show no substantial differences.

III. The definition of the recourse to lock-out

1. South Africa

S 213 of the LRA defines 'lock-out' as follows:

¹³⁰ See a detailed discussion on the topic of substantive limitations on the right to strike and lock-out below: Chapter B. IV. 2..

‘the exclusion by an employer of employees from the employer’s workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees’ contracts of employment in the course of or for the purpose of that exclusion.’

The LRA grants employers only a recourse to lock-out. The legislature dispensed to introduce a right to lock-out in the Act. Different to the right to strike the Constitution does not implement a duty for the legislature to provide for a right to lock-out.¹³¹ But, the fact that employers are legally allowed to lock-out employees makes the recourse to lock-out to all intents and purposes a statutory right.

The main difference between the formulations ‘recourse’ and ‘right’ is to be seen in ss 5 and 7 LRA, in which rights that are formally called ‘rights’ enjoy special protection.

Therefore, two important aspects can be identified under which this wording becomes important. First, employers cannot object to a union that tries to put pressure on them via boycotts, etc., to refrain from taking lock-out action according to s 7 (2) (b) LRA.¹³² This would only be possible if the recourse to lock-out was a formal ‘right’ because only then such a trade union’s action would have to be considered to ‘prevent an employer from exercising any right’ in terms of s 7 (2) (b) LRA and, thus, would

¹³¹ See s 23 of the Constitution and the reasoning of the Constitutional Court in *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at para 66. The Constitutional Court did not prohibit the inclusion of a right to lock-out in the LRA but found that it is not constitutionally necessary to provide for such a right.

¹³² Du Toit D et al (2003) *Labour Relations Law* (4th ed) 298 ; Grogan J (2001) *Workplace Law* (6th ed) 370.

violate this provision. The attempt to prevent an employer from exercising the possibility (recourse) to lock-out employees is not embraced by s 7 (2) (b) LRA.

Furthermore, a right to lock-out would lead to a right to implement replacement labour during offensive lock-outs as well.¹³³ Replacement labour in such a situation is now expressly prohibited by s 76 (1) (b) LRA.

According to the definition a lock-out takes place only in case an employer forces employees to remain outside the workplace physically.¹³⁴

It is not important whether the employer breaches the employees' contracts of employment or not. While Grogan cannot imagine a situation, in which an employer excludes employees from the workplace without breaching the employees' entitlement to remuneration assuming they tender their service¹³⁵, du Toit offers a good example of a case in which a lock-out might take place without a breach of contract.¹³⁶



The wording 'for the purpose of that exclusion' makes it clear that the definition does not contemplate a breach of contract without an exclusion from the workplace.

The purpose of the exclusion must be to pressure employees 'to accept a demand in respect of any matter of mutual interest between employer and employee. The meaning of matters of mutual interest has been discussed above.¹³⁷ Excluded are demands employees are contractually obliged to perform.¹³⁸ Because terms and conditions of employment, like e.g. salary, are one of the most important issues of the

¹³³ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 298; Grogan J (2001) *Workplace Law* (6th ed) 370.

¹³⁴ Grogan J (2001) *Workplace Law* (6th ed) 370.

¹³⁵ Grogan J (2001) *Workplace Law* (6th ed) 370.

¹³⁶ See Du Toit D et al (2003) *Labour Relations Law* (4th ed) 281 for details.

¹³⁷ See B. II.1. c. bb..

¹³⁸ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 281.

relationship between employees and employers, demands to change contractual terms are also embraced by the wording 'matters of mutual interest'. The difference between duties employees are contractually obliged to perform and duties an employer seeks to introduce by locking out employees is that the former is a duty that has already been established while the latter is one employers aim to introduce for the future. The solution of the latter disputes are left up to power play while the former disputes can be resolved by the courts.

Secondary lock-outs are not embraced by the definition. This follows from the wording 'the exclusion of employees by an employer for the purpose of compelling the employees to accept a demand'. A secondary lock-out is a lock-out, in which an employer excludes employees in order to compel the employees of other employers to accept a certain demand. The cited passage of the definition clearly indicates that the definition only contemplates exclusions of employees of an employer to make them, not others, compel with her/his demands.¹³⁹

Consequently, employers facing employees taking secondary strike action are not entitled to lock-out their employees. In case the striking employees bring the production in the workplace to a standstill the employer is still obliged to pay remuneration for the non-striking employees. This would lead to a significant imbalance of power between employees and employers. The employers' side would most likely be forced to accept the employees' demands because they could not bear the costs anymore.

The judgement of Zondo JP in *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others*¹⁴⁰ made it clear that even in case of the existence of an

¹³⁹ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 281.

¹⁴⁰ 2003 (24) *ILJ* 133 (LAC) at 134-135.

employer's demand concerning a matter of mutual interest such an employer is allowed to dismiss employees if she/he can submit operational requirements according to s 188 (1) (a) (ii) LRA and is not trying to compel the dismissed employees to accept the matter of mutual interest.¹⁴¹ In the named case the employer dismissed employees for operational requirements after they did not compel with certain amendments to the terms and conditions of employment, inter alia the shift system. The court held that because the employer dismissed the employees finally it did not try to make them compel to its demands but to wanted to get rid of them and was in line with s 188 (1) (a) (ii) LRA without violating s 187 (1) (c) LRA.

From this it can be concluded that in case of a secondary strike an employer may dismiss employees if she/he can submit that operational requirements are the real reason for the dismissal and that she/he is dismissing the employees finally.

It is submitted that this finding is to be supported. In order to keep power play in balance, employers being "attacked" by a secondary strike should have the possibility to dismiss employees taking part in such a secondary lock-out for operational requirements.¹⁴² This way the mentioned parity of weapons can be established. Du Toit recognises the rationale of the narrow lock-out definition in the fact that a right to secondary lock-outs would cause an imbalance between the employees' power and the employers' power since these have various other weapons at hand.¹⁴³ It must be agreed upon du Toit's findings that thereby the LRA rejects the idea of strikes and lock-outs representing a 'parity of arms'.¹⁴⁴

¹⁴¹ In such a case the dismissal would have been automatically unfair according to s 187 (1) (c) LRA.

¹⁴² See also *SACWU v Afrox Ltd* 1999 (10) *BLLR* 1005 (LAC) at para 30. The Court found that a dismissal for operational requirements can be fair even if the reasons for the dismissal are caused by a protected strike or its consequences provided that the requirements for such a dismissal are met (s 189 and s 189A LRA).

¹⁴³ Such as dismissals for operational requirements.

¹⁴⁴ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 282. Note that the parity between the weapons of industrial action is the dominant measure for the legality of industrial action in Germany. If certain actions taken by employers or employees are considered disproportionate and therefore

2. Germany

In Germany no discussion has taken place whether employers should have the right or only the possibility to lock-out. But, the question, which role lock-outs play in the concept of equal bargaining power, and whether they are legal or illegal, has been interpreted very differently during the period of jurisdiction between 1955 and now.¹⁴⁵

The result of these discussions is that lock-outs are permitted only to a certain extent.

Lock-outs in Germany are defined as the planned exclusion of more than one worker from work by one or more employers coupled with the denial to pay remuneration in order to achieve goals that can be regulated in a collective agreement.¹⁴⁶

In addition to this definition the courts developed principles that must accompany such action to render it legal. Firstly, the BAG found that lock-outs might be introduced *uno actu* or gradually, meaning that employers might lock-out all employees at once or groups of employees after another.¹⁴⁷ Secondly, it is necessary for an employer to expressly declare that she/he is performing a lock-out with the exclusion of the workers.¹⁴⁸ Therefore, it is not sufficient to just send employees home without any further explanation. The result of such behaviour would be a breach of contract. In case an employers' organisation authorises its members to perform lock-outs it is necessary to inform the employees about the authorisation.¹⁴⁹

disrupting the balance between the weapons of employers and employees, the German law of industrial action considers such actions illegal. Specifics will be discussed below at Chapter B. IV. 2. b. cc. bbb..

¹⁴⁵ See Weiss M (1995) *Labour Law and Industrial Relations in Germany* 158.

¹⁴⁶ Hromadka W Maschmann F (2001) *Arbeitsrecht Band 2 Kollektivarbeitsrecht & Arbeitsstreitigkeiten* (2nd ed) 151; Schaub G (2002) *Arbeitsrechtshandbuch* (10th ed) 1891.

¹⁴⁷ BAG, AP Nr. 10 zu Art 9 GG *Arbeitskampf*.

¹⁴⁸ BAG, AP Nr. 137 zu Art 9 GG *Arbeitskampf*.

¹⁴⁹ BAG, AP Nr. 140 zu Art 9 GG *Arbeitskampf*.

As in South Africa the action constituting a lock-out is the exclusion of the workers from the workplace.

The goals the employer seeks to achieve correspond to the goals the employees seek to achieve via strike action. Thus, they can only lock-out employees in order to make them comply with demands, which are supposed to be regulated in a collective bargaining agreement, namely terms and conditions of employment.

Secondary lock-outs might occur in two situations, which must be evaluated differently in Germany.

Firstly, employers might lock-out employees that are themselves on a secondary strike. Secondly, employers might lock-out employees, initially, to make employees of another employer comply with demands of their employer.

The reasons for the different evaluation of these situations are to be found in the requirements for strikes and lock-outs. Consequently, they will be described within the chapter dealing with the requirements for industrial action.¹⁵⁰

Lock-outs in Germany can occur as “Angriffsaussperrung (offensive lock-out)”, “Abwehraussperrung (defensive lock-out)”, “suspendierende Aussperrung (suspending lock-out)” or “loesende Aussperrung (break-away lock-out)”.

A “suspending lock-out” is a lock-out, in which all contractual duties are suspended for the duration of the industrial action if the lock-out is legal. A “break-away lock-out” is a lock-out, in which the contracts of employment of all locked-out employees

¹⁵⁰ See Chapter B. IV 2. b..

are being terminated.¹⁵¹ An offensive lock-out is a lock-out with which an employer does not respond to strike action but begins industrial action with a lock-out while a defensive lock-out is used as a response to strike action.¹⁵²

3. Comparison

The action that constitutes a lock-out is defined similarly in both countries.

But, the goals that employers seek to achieve with a lock-out vary. As seen in the context of the definition of strike, the Constitutional framework for the law of industrial action makes a wider scope of the definition of lock-outs possible in South Africa.¹⁵³

Although there was not discussion in Germany whether employers should have a right to lock-out employees or only a recourse to lock-out it is accepted that locking-out employees is not a right in the sense that any action interfering the exercise of locking-out employees is prohibited. In Germany, there is no provision like s 7 (2) (b) LRA. But, the notion that actions like boycotts, picketing, etc., must be allowed in order to get employers to take back the exclusion of employees from the workplace is generally accepted. Therefore, the fact that, with respect to s 7 (2) (b) LRA, locking-out

employees is not considered a right in South Africa is in accordance with the German understanding of lock-outs and the legality of actions that try to prevent an employer from locking-out.¹⁵⁴

¹⁵¹ Whether the different types of lock-outs are legal or illegal will be subject to the chapter dealing with the requirements for industrial action below. See Chapter B. IV. 2. b..

¹⁵² Duetz, W (2003) *Arbeitsrecht* (8th ed) 285.

¹⁵³ For the difference between the strikeable, and thus also lock-outable, issues in South Africa and Germany see the discussion within the comparison between the different definitions of strike at B. II. 3..

¹⁵⁴ The main differences between lock-outs in South Africa and Germany are to be found in their procedural and substantive requirements and will therefore be discussed below in Chapters B. IV. 1. c. and 2. c..

IV. Requirements for industrial action

1. Procedural requirements

a. South Africa

S 64 LRA sets procedural requirements for strikes and lock-outs. The procedural stages employers, as well as employees, must take until industrial action is permitted are as follows:

First, the 'issue in dispute' must be referred to a bargaining council or the CCMA.¹⁵⁵ If the dispute cannot be settled, the council must issue a certificate stating that the dispute is unresolved.¹⁵⁶ From this point on strike action can be taken, provided 48 hour written strike notice in the private sector¹⁵⁷ or 7 days written strike notice in the public sector¹⁵⁸ has been given. If the bargaining council or the CCMA do not issue a certificate within thirty days of the referral, notice of strike can be given without a certificate.¹⁵⁹

¹⁵⁵ S 64 (1) (a) LRA.

¹⁵⁶ S 64 (1) (a) (i) LRA.

¹⁵⁷ S 64 (1) (b) LRA.

¹⁵⁸ S 64 (1) (d) LRA.

¹⁵⁹ S 64 (1) (a) (ii) LRA.

aa. Conciliation

Either employees or an employer might refer the dispute to one of the named councils. Either party can rely on the referral of the other.¹⁶⁰

Because an issue is only strikeable after conciliation over this issue has taken place it is important to determine exactly whether the issue referred to a council is the same issue over which strike action is being taken. The courts decided to look beyond the formal declaration of the issue and to investigate the real underlying dispute.¹⁶¹ It is important and sufficient that the substance of the dispute has been addressed at conciliation stage.¹⁶²

After a dispute has been referred to a council for conciliation or arbitration all members of a trade union are entitled to strike even if these members are employed at other workplaces of the employer.¹⁶³



bb. Notice

The notice preceding any strike action must generally be given to the employer.¹⁶⁴ In case the parties dispute about an issue relating to a collective agreement, which is supposed to be regulated in a bargaining council, the trade-union must give notice to the council.¹⁶⁵ If the employer is a member of an employers' organisation, which is party to the dispute, notice must be given to the organisation.¹⁶⁶ In both of these cases

¹⁶⁰ *Afrox v SA Chemical Workers Union (1)* 1997 (18) ILJ 399 (LC) at 404C, with reference to *NTE Ltd v Ngubane* 1992 (13) ILJ 910 (LAC).

¹⁶¹ *Fidelity Guard Holdings (Pty) Ltd v Professional Transport Workers Union* 1997 (9) BLLR 1125 (LAC) at 1129; *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction & Allied Workers Union & others* 1997 (6) BLLR 697 (LAC) at 703.

¹⁶² *Defy Appliances (Pty) Ltd v NUMSA* 2001 (12) BLLR 1328 (LC).

¹⁶³ *Afrox v SA Chemical Workers Union (1)* 1997 (18) ILJ 399 (LC). This is correct for all trade union members whether or not they were listed in the application of the conciliation board.

¹⁶⁴ S 64 (1) (b) LRA.

¹⁶⁵ S 64 (1) (b) (i) LRA.

¹⁶⁶ S 64 (1) (b) (ii) LRA.

no notice needs to be given to the employer.¹⁶⁷ Zondo J gave the reasons for this interpretation of the statute in *Tiger Wheels Babelegi (Pty) Ltd v NUMSA*¹⁶⁸:

A requirement for trade unions to give strike notice to all employers whose employees seek to go on strike 'would make it almost impossible to have an industry-wide strike'.

Similar to that, employers must give lock-out notice to trade unions they are disputing with or to employees if there is no trade union representing these.¹⁶⁹ Employers must also give notice to a bargaining council if the issue in dispute relates to a collective agreement to be concluded in such a council.¹⁷⁰

In a variety of judgements the courts developed principles on the subject of strike and lock-out notices regarding their timing and content.

The timing of the commencement of a strike was the subject of the case *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction & Allied Workers Union (2)*¹⁷¹. The trade-union declared in their notice that the strike could commence 'any time after 48 hours from the date of this notice'.

Froneman GJP held that the notice must include a specific time for the commencement of the strike.¹⁷² He found that the primary reason of the strike notice is the possibility for an employer to prepare for the strike action and take steps to protect the business.

It is submitted that these findings undermine the very essence of strike action.

Obviously, the purpose of a strike notice is the possibility to prepare for future

¹⁶⁷ Thompson C, Benjamin P (2003) *South African Labour Law, Vol. One* (Revision Service 45) at AA1-314.

¹⁶⁸ 1998 JOL 4081 (LC) at para 21.

¹⁶⁹ S 64 (1) (c) LRA.

¹⁷⁰ S 64 (1) (c) LRA.

¹⁷¹ 1997 (6) BLLR 697 (LAC).

¹⁷² At 702.

interruptions of the production process. An employer does not have to be prepared for any eventualities, though. The nature of strike action is that it can be shaped and changed during power-play according to the needs of specific situations. Surprising the economic opponent is an inherent part of power-play. The interests of an employer are sufficiently protected with the obligation of a strike-notice because from then on she/he can prepare for the strike.

The Labour Court in *PSA v Minister of Justice and Constitutional Development* reasoned similarly to this critique.¹⁷³

The court held that the statement of the concrete demand in a strike notice is just a formality and therefore not necessary since the employer must have become aware of the issue in dispute through the preceding procedure of bargaining, conciliation, etc..¹⁷⁴

With regard to the objection of the employer that the strike notice did not contain any information which kind of strike actions the strikers were going to take, the court argued somewhat analogously to the submitted argument above. As with the exact time of the commencement of a strike, the surprising momentum of tactics and strategies of strike action is essential for a successful strike. The effects of any strike would fade immensely if the employer could prepare for any strategy of the trade-union.

Also, the court stated that a strike notice need not give an employer information for what period of time strike action will take place and reasoned that the uncertainty of the end of a strike promotes the very goal of industrial action, namely to get the

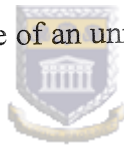
¹⁷³ 2001 (11) *BLLR* 1250 (LC).

¹⁷⁴ Notice that in *CAWU v Modern Concrete Works* 1999 (10) *BLLR* 1020 (LC) a lock-out notice was found insufficient by the court because it did not specify the concrete grievance or demand giving raise to the lock-out action. It is submitted that this view should be rejected in line with the arguments set out above.

opponent to give in to the demands of the strikers. If an employer can be certain that a strike will end after a specified period of time the pressure on him to potentially compel with the trade union's demands will be radically reduced.

A potential waiver of the right to strike was discussed in *Tiger Wheels Babelegi (Pty) Ltd v NUMSA*.¹⁷⁵ The strike actually commenced three days after the day, which the trade union announced for the beginning of the strike. Firstly, the court found that the obligation to give notice couldn't be interpreted as to include a waiver of the right to strike or lock-out in case of non-compliance with s 64 (1) (b) LRA. The court reasoned that if an employer has prepared herself/himself for a strike to commence on a certain day these preparations would be of the same effect some three days later.

But, the court also stated that in case of an unreasonable delay the right to strike could be waived.



In *PSA v Minister of Justice and Constitutional Development*¹⁷⁶ a delay occurred between the submission of the demand and the beginning of the strike. The court found that even an unreasonable delay would not lead to a waiver of the right to strike. A delay can only be one factor among others that determine whether a union decided not to strike anymore.

Besides these principles, the Labour Court in *Transportation Motor Spares v NUMSA*¹⁷⁷ decided that an interruption of a strike does not demand a new notice when the strike is being continued after the interruption.

¹⁷⁵ 1998 JOL 4081 (LC).

¹⁷⁶ 2001 (11) BLLR 1250 (LC).

¹⁷⁷ 1999 (1) BLLR 78 (LC).

It is also sufficient to give notice to a person responsible for industrial relations in the holding company of the company that strike action is supposed to take place in.¹⁷⁸

The consequences of a given strike or lock-out notice are the following:

First, every employee of the employer that is a member of the notice-giving trade-union can strike. This does not depend on whether the striking employees are themselves in dispute with the employer.¹⁷⁹ It is also not important whether the employees are outside the bargaining unit or in different operations.¹⁸⁰

cc. Advisory arbitration

The current law does not impose a general duty to bargain on the parties.¹⁸¹ But, if the issue in dispute is a refusal to bargain, s 64 (2) LRA demands that an arbitration award by the CCMA or another recognised council must be issued before industrial action might be taken. The act specifies a 'refusal to bargain' in which case an arbitration award must be issued as follows:

A refusal to bargain includes-

(a) a refusal-

(i) to recognise a trade union as a collective bargaining agent; or

¹⁷⁸ *Sealy of SA (Pty) Ltd v PPWAWU* 1997 (4) *BLLR* 421 (LC).

¹⁷⁹ *Afrox Ltd v SACWU* 1997 (18) *ILJ* 399 (LC).

¹⁸⁰ See Du Toit D et al (2003) *Labour Relations Law* (4th ed) 286.

¹⁸¹ Thompson C, Benjamin P (2003) *South African Labour Law, Vol. One* (Revision Service 45) at AA1-316. The reasons for dispensing with such a duty is the promotion of voluntarism in labour relations and the limitation of the role of the judiciary in the collective bargaining process.

(ii) to agree to establish a bargaining council;

(b) a withdrawal of recognition of a collective bargaining agent; and

(c) a resignation of a party from a bargaining council;

(d) a dispute about-

(i) appropriate bargaining units;



(ii) appropriate bargaining levels; or

(iii) bargaining subjects.

The issued award is not binding.¹⁸² Thus, any party may take industrial action even if adverse advice has been given in the award.

dd. Exemptions to the statutory procedures

S 64 (3) of the LRA provides for a number of exemptions to the statutory procedures.

¹⁸² C, Benjamin P (2003) *South African Labour Law, Vol. One* (Revision Service 45) at AA1-317.

It reads:

The requirements of subsection (1) do not apply to a strike or a lock-out if:

(a) the parties to the dispute are members of a council, and the dispute has been dealt with by that council in accordance with its constitution;

(b) the strike or lock-out conforms with the procedures in a collective agreement;

(c) the employees strike in response to a lock-out by their employer that does not comply with the provisions of this Chapter;



(d) the employer locks out its employees in response to their taking part in a strike that does not conform with the provisions of this Chapter; or

(e) the employer fails to comply with the requirements of subsections (4) and (5).

Due to the goal of promoting voluntarism s 64 (3) (a) and (b) of the LRA respects the procedural requirements the parties agreed on.¹⁸³ In case striking employees do not follow the procedures put down in a collective agreement or the constitution of a council referred to in s 64 (3) (a) LRA, but are in accordance with the procedures

¹⁸³ See Du Toit D et al (2003) *Labour Relations Law* (4th ed) 287.

demanded by the LRA itself, the strike action taken is considered legal.¹⁸⁴ According to Landman AJ would-be strikers do not have to make a choice between the two procedures, ‘insofar as there may be an overlap between the two procedures’.

It is submitted that criticism of these findings is legitimate. If the parties agreed on certain procedures they should be obliged to follow these. Where parties to an agreement autonomously set rules for their behaviour towards each other these rules should not be easily circumvented.¹⁸⁵

S 64 (3) (c) and (d) give effect to the notion of self defence. Where unprotected industrial action is taken the opposing party may respond without regard for the procedural requirements as well.



S 64 (3) (e) provides for the possibility to take strike action without following the required procedure if an employer fails to comply with her/his obligation to either not implement planned terms and conditions of employment unilaterally or restore the previous terms and conditions of employment in case a trade union has referred a dispute about a unilateral change of terms and conditions of employment to conciliation.¹⁸⁶

Obviously the scope of the provision depends strongly on the meaning of the terms ‘unilateral changes’ and ‘terms and conditions of employment’. The leading case for

¹⁸⁴ *Columbus Joint Venture t/a Columbus Stainless Steel v National Union of Metalworkers of SA* 1997 (10) *BLLR* 1292 (LC).

¹⁸⁵ see also Thompson C, Benjamin P (2003) *South African Labour Law, Vol. One* (Revision Service 45) at AA1-318.

¹⁸⁶ See s 64 (4) of the LRA. It is necessary that the employee or trade union referring the dispute to a council or the CCMA requires the employer in the referral to either not implement the change or restore the pre-existing conditions. S 64 (5) of the LRA demands that an employer complies with s 64 (4) of the LRA within 48 hours of service of the referral on the employer.

the interpretation of these terms is *SAMRI v Toyota of South Africa Motors (Pty) Ltd*¹⁸⁷. The court held that terms and conditions of employment are changed unilaterally if they are being implemented without the consent of the employees.¹⁸⁸ In the given case the implementation followed consultation and some employees even accepted the benefits offered by the employer. The court considered these preceding consultations not sufficient for consent.¹⁸⁹

Regarding the terminology ‘terms and conditions of employment’ the court found that not only contractual terms are included in this term but also the offered vehicle benefit. Such a benefit was regarded part of the overall remuneration package, and thus, part of the terms and conditions of employment.



ee. Balloting

S 65 (2) (b) of the Labour Relations Act 28 of 1956 considered a preceding ballot a requirement for any strike action. The result was that employers could interdict strike action with the argument that there was some kind of failure in the balloting procedure. Under the new Act no such balloting is necessary to gain strike protection. S 95 (5) (p) LRA requires trade unions and employers’ organisations to provide for a ballot in their constitutions. According to s 95 (5) (q) LRA, members refusing to take part in a strike if no ballot was held or in case the majority of the voting members did not vote in favour of strike action cannot be disciplined. The result of these

¹⁸⁷ 1998 (6) *BLLR* 616 (LC).

¹⁸⁸ At 620.

¹⁸⁹ At 620.

provisions is that compliance with balloting procedures is now a matter between trade unions respectively employers' organisations and their members.¹⁹⁰

b. Germany

In general, there are much fewer procedural requirements preceding industrial action in Germany. In the context of procedural requirements the so-called ultima ratio principle becomes important which sets certain important limitations.

aa. The Content of the ultima ratio principle

It cannot be classified clearly whether the ultima ratio principle is a procedural requirement of industrial action or rather a substantive limitation.

But, the limitations on the right to take industrial action which follow this principle correspond to the procedural requirements of industrial action in South African law. Therefore, these limitations will be discussed in this chapter of the survey.

The ultima ratio principle is part of the principle of proportionality, which will be discussed in detail below. It constitutes that any industrial action must be suitable to achieve its goal and more importantly, must be requisite. That means that if there is a milder but equally effective way to pressurise the other party than the chosen weapon, the industrial action taken is considered illegal.¹⁹¹ Therefore, industrial action can only be the last resort.¹⁹²

¹⁹⁰ Thompson C, Benjamin P (2003) *South African Labour Law, Vol. One* (Revision Service 45) at AA1-322.

¹⁹¹ BAG GS, AP Nr. 1 zu Art 9 GG *Arbeitskampf*.

¹⁹² BAG GS, AP Nr. 1 zu Art 9 GG *Arbeitskampf*.

One result of this principle is that industrial action may only be taken if collective bargaining completely failed because, as mentioned before, industrial action in Germany is always related to concrete collective bargaining procedures.

Shortly before a valid collective agreement comes to its temporal end, trade unions and employers' organisations or a single employer¹⁹³ engage in collective bargaining over the new terms and conditions of employment. Only if these negotiations fail, may industrial action be taken.¹⁹⁴

However, the BAG set standards for the failure of collective bargaining fairly low.¹⁹⁵ It constituted that the parties alone must answer the question whether collective bargaining actually failed. It held that scrutinising whether the parties could have bargained further before taking industrial action would constitute a censorship of the autonomy of the collective bargaining system. On top of that, the court found that failure of bargaining does not have to be expressly declared. Engaging in industrial action implies that the parties consider the bargaining process at a deadlock. The result is that any party can engage in industrial action, whenever it wants to, whether the bargaining process objectively came to a deadlock or not. Consequently, the party taking industrial action must only prove that it raised a demand and that no consent could be reached.¹⁹⁶

It is submitted that these findings should be criticised. The ultima ratio principle is recognised as one of the major limitations of the right of industrial action since

¹⁹³ A single employer is only party to the collective agreement in the relatively rare case of a „Haustarifvertrag“ (collective agreement on plant level).

¹⁹⁴ BAG GS, *AP Nr. 1 zu Art 9 GG Arbeitskampf*.

¹⁹⁵ See BAG 1988 NZA 846.

¹⁹⁶ Duetz, W (2003) *Arbeitsrecht* (8th ed) 305.

1955.¹⁹⁷ As long as the parties have the possibility to arrive at an agreement without industrial action, and all of its negative consequences, they should be held to continue bargaining. If the courts avoid scrutinising the keeping of the principle, the parties might be reluctant to act in accordance with it. The result could be an increase of strike action in cases in which bargaining might still have been successful.

But, the low standards applied by the BAG do not change the general notion that industrial action may only be relied on as the last resort.

bb. Conciliation or arbitration as part of the ultima ratio principle?

The question whether the ultima ratio principle demands that conciliation or even arbitration¹⁹⁸ must take place before industrial action can be taken has been answered differently.



The majority of academics draw the obligation of conciliation before taking industrial action from the ultima ratio principle.¹⁹⁹

In an early judgement the BAG also demanded conciliation as well.²⁰⁰ Later on, the court dispensed with this demand²⁰¹ but suggested that the parties should put the obligation to engage in conciliation before taking the adversarial path of industrial action into their collective agreements.²⁰² In practice, the parties determine an conciliator to negotiate between them before they engage in industrial action. Often this is not even an expert in labour law but rather a respected person both parties have trust in.²⁰³ If the parties include such an obligation in their collective agreements, the

¹⁹⁷ The leading case of BAG GS, *AP Nr. 1 zu Art 9 GG Arbeitskampf* dates 28.01.1955.

¹⁹⁸ Arbitration meaning that decisions found by the arbitration organ are binding for the parties whereas conciliation only includes advisory conciliation without any binding effect.

duty to follow this procedural requirement flows directly from the contractual part of the collective agreement.²⁰⁴

But, the BAG did not yet decide whether not following such autonomously concluded pre-strike conciliation renders industrial action illegal.

Whether this should be the case should be answered by taking the rationale of pre-strike conciliation into account.

This rationale is not primarily the avoidance of financial losses due to industrial action, but the intensive intervention in legal positions of the opposing party, especially the pressure on the freedom of will of the other side during industrial action.²⁰⁵ Such a pressure can only be justifiable when the attacked party obstructs negotiating, negotiations have been unsuccessful or continuing negotiations are not reasonable anymore.²⁰⁶ On top of that, it must be recognised that the avoidance of unnecessary strikes is not only in the interest of the power-play parties but also in the interest of the public.²⁰⁷

Consequently, it is submitted that if the parties included pre-strike conciliation in a collective agreement any industrial action taken without such conciliation must be considered illegal.

¹⁹⁹ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) at paras 202, 688ff., 699; Hromadka W Maschmann F (2001) *Arbeitsrecht Band 2 Kollektivarbeitsrecht & Arbeitsstreitigkeiten* (2nd ed) 162; Zoellner W, Loritz K G (1998) *Arbeitsrecht* (5th ed) 460.

²⁰⁰ BAG AP Nr. 43 zu Art 9 GG *Arbeitskampf*.

²⁰¹ BAG AP Nr. 81 zu Art 9 GG *Arbeitskampf*.

²⁰² BAG AP Nr. 43 zu Art 9 GG *Arbeitskampf*.

²⁰³ Such arbitrators are mostly former politicians like former Minister Presidents of a state or a former Minister for Economical or Labour Affairs.

²⁰⁴ Duetz, W (2003) *Arbeitsrecht* (8th ed) 493-505. Collective agreements consist of two parts. One part is the contractual part, which regulates the rights and duties of the bargaining parties. The other part sets minimum standards of terms and conditions of employment for the employees that are members of the trade union concluding the agreement with the employer or employers' organisation.

²⁰⁵ See Pickler E 'Ultima-ratio-Prinzip und Tarifautonomie' (1982) 6 *Recht der Arbeit* 331 at 349.

²⁰⁶ See Pickler E 'Ultima-ratio-Prinzip und Tarifautonomie' (1982) 6 *Recht der Arbeit* 331 at 349.

²⁰⁷ Lieb M (2003) *Arbeitsrecht* (8th ed) 197.

It is generally accepted that the state cannot force the collective bargaining parties into arbitration resulting in binding decisions.²⁰⁸ This principle is valid, either if the state provides for the arbitration body itself, or if the state institutes a neutral third party that serves as arbitration body. The basis for this absolute principle lies in art 9 (3) GG.

As described before art 9 (3) GG includes the ‘right to form associations to safeguard and improve working and economic conditions’. This formulation guarantees that such associations can bargain over working and economic conditions autonomously without any interference of the state.²⁰⁹ This right is considered the core of art 9 (3) GG.²¹⁰ Like in South African constitutional law, infringements of rights included in the Bill of Rights might be justified in Germany under certain circumstances as well.²¹¹ But, art 19 (3) GG provides that the core of a right included in the Bill of Rights may not be infringed at all. There can be no justification for such an infringement.²¹² Hence, any infringement of the core of art 9 (3) GG that the collective bargaining parties may bargain over any issues relating to working and economic conditions autonomously, without any interference of the state, would be unconstitutional. Therefore, an arbitration procedure, in which the state or a third party instituted by the state could judge and determine the outcome of negotiations between the bargaining parties would be unconstitutional.

²⁰⁸ Richardi R, Wlotzke O et al (2000) *Muenchener Handbuch zum Arbeitsrecht Band III* (2nd ed) 146 and 841.

²⁰⁹ Richardi R, Wlotzke O et al (2000) *Muenchener Handbuch zum Arbeitsrecht Band III* (2nd ed) 146.

²¹⁰ Richardi R, Wlotzke O et al (2000) *Muenchener Handbuch zum Arbeitsrecht Band III* (2nd ed) 146.

²¹¹ See s 36 (1) of the Constitution of the Republic of South Africa. See for the possibility of the infringement of rights of the Bill of Rights in Germany: Pieroth B, Schlink B (2003) *Grundrechte Staatsrecht II* (19th ed) 50-78.

²¹² See Jarass H Pieroth B (2002) *Grundgesetz fuer die Bundesrepublik Deutschland* (6th ed) 497-498.

cc. Balloting

The ultima ratio principle does not demand a ballot before strike-action. The obligation to hold a ballot before strike action might be part of the statutes a trade union gives itself. However, disregarding its own rules does not impact on the relationship to the employers' organisation or the opposing employer. Consequently, the legality of a strike is not influenced if balloting does not take place.²¹³ But, in such a case the members of the trade-union are not obliged to follow the call to go on strike.²¹⁴ Depending on the statutes of the individual trade union, those organs of the trade union that did not follow the procedures can be held responsible by the competent committee up to the exclusion of the person.²¹⁵

dd. So-called "Warnstreiks (warning strikes)"

The question whether so-called warning strikes violate the ultima ratio principle has been discussed for a long time. A warning strike is a strike that takes place after the so-called "Friedenspflicht-(Peace Obligation)" ends and before collective bargaining fails, and thus, before the described procedural requirement of a deadlock in bargaining is met.²¹⁶ They are spontaneous short strikes in one or more enterprises that last only a few hours.²¹⁷ Their intention is to show the employers' organisation that the employees are willing and strong enough to strike. If the ultima ratio principle

²¹³ Hromadka W Maschmann F (2001) *Arbeitsrecht Band 2 Kollektivarbeitsrecht & Arbeitsstreitigkeiten* (2nd ed) 162.

²¹⁴ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) 300.

²¹⁵ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) 300.

²¹⁶ The "Friedenspflicht" must be categorised as a substantive limitation and will thus be discussed below. Its basic meaning is that in every collective bargaining agreement there is a regulation, either expressly or implied, that as long as the current agreement is valid no industrial action over the terms and conditions of employment specified in the valid agreement might be taken.

²¹⁷ Weiss M (1995) *Labour Law and Industrial Relations in Germany* 153.

was to be applied to these kinds of strikes they would have to be called illegal because they take place too early.

The BAG changed its jurisprudence on this issue various times. The first decision of the BAG on this topic was in 1976.²¹⁸ The courts had to evaluate a strike lasting only 2-3 hours in one establishment, within the industry and region that bargaining was limited to. The court legalised the strike. The court held that the ultima ratio principle was 'only meant for a strike of longer duration or of an indefinite period.[] If the only intention of a strike is to promote the negotiations by showing the opposing party the readiness of the employees to go on strike, then this mild pressure may be exerted before the means of negotiation are exhausted'.²¹⁹ The court found that such a procedure is coherent with the general principle of proportionality²²⁰ because its aim is not to engage in an unlimited strike if negotiations have not failed yet.²²¹ Hence, this decision is based on the reasoning that in the past such warning strikes often turned out to lead to quicker compromises and thereby eliminated the necessity of an unlimited strike.²²²

The result of this judgement was that the ultima ratio principle did not apply to warning strikes anymore but only to strikes that took place after negotiations came to a deadlock. Following this decision trade-unions, namely the Metalworkers Union and the Union for the Printing Industry, developed the tactic of "new mobility" meaning rotating warning strikes within the area covered by a collective agreement. That meant that they produced a great number of short strikes closely following each other

²¹⁸ BAG AP Nr. 51 zu Art 9 GG Arbeitskampf

²¹⁹ At 611.

²²⁰ See discussion below.

²²¹ At 611.

²²² Weiss M (1995) *Labour Law and Industrial Relations in Germany* 153.

in different enterprises. All of these strikes were granted the protection of warning strikes.

This tactic proved to be very effective. The advantage was that employers could not anticipate where industrial action would take place next, and thus, could not prepare for such action. The pressure that was put on employers was enormous and could not be distinguished from the pressure of unlimited strikes anymore. This was especially the case, when such strikes took place in a few key enterprises, and thus a whole industrial branch was brought to a standstill, with very limited commitment of trade unions because firstly, only few employees must go on strike for a very short time, and the unions did not grant any benefits to their members during warning strikes.²²³

The courts then had to decide whether these “rotating strikes” were to be measured against the requirements of a “normal” strike or warning strike. If these strikes were considered “normal” strikes they would have been unlawful because they would have violated the ultima ratio principle. In the second case they would have to be considered legal because after the decision of the BAG, the ultima ratio principle was not applicable to warning strikes. The second leading decision on this topic dealt with this new type of union strategy.²²⁴ The BAG declared the strategy of “new mobility” legal because it considered the strikes initiated under this strategy to be warning strikes.

The decision was strongly debated. Especially employers and employers’ organisations questioned the constitutionality of the decision.²²⁵ As mentioned before, keeping the balance of power between the parties constitutes the most important substantive requirement for any industrial action in Germany. The “rotating warning”

²²³ Weiss M (1995) *Labour Law and Industrial Relations in Germany* 154.

²²⁴ BAG AP Nr. 81 zu Art 9 GG *Arbeitskampf*.

²²⁵ Weiss M (1995) *Labour Law and Industrial Relations in Germany* 154.

strikes, argued the employers, would destroy this balance because their effect was so immense, and the costs for trade unions relatively low. Because of that, trade unions could keep up this enormous pressure for a long time and employers' organisations would have to give in to trade-unions' demands very quickly.

The BAG adapted this reasoning in 1988 and gave up the preferential treatment of warning strikes.²²⁶ It stated that the ultima ration principle is applicable to warning strikes as well because it found that the strategy of “rotating warning strikes” was putting just as much pressure on employers as so-called “Erzwingungsstreiks (forcing strikes)”.²²⁷ But, as mentioned before, the court lowered the preconditions to be fulfilled for the beginning of strike action. Without the need for a formal declaration that collective bargaining had broken down and the notion that, by engaging in strike action, such a deadlock in bargaining is implied, “warning strikes” are still possible at any time. They are then considered “forcing strikes”. It must be kept in mind that the commencement of a strike does not hinder the continuation of collective bargaining. Thus, warning strikes are only theoretically considered illegal. In practice this form of striking is always permissible because by engaging in a warning strike, collective bargaining is considered to be stuck in a deadlock and the ultima ratio principle is not applicable anymore while collective bargaining continues. Therefore, “warning strikes” even as “rotating strikes” are still possible at any time during collective bargaining rounds because they are always considered “forcing strikes”.

It is submitted that the approach of the BAG in this decision must be criticised. The ultima ratio principle is important to prevent unnecessary industrial action with all of

²²⁶ BAG AP Nr. 108 zu Art 9 GG *Arbeitskampf*. The „Erzwingungsstreiks“ are usually unlimited strikes with the intention not only to show power, but also to ultimately force the employers' side to give in to demands.

²²⁷ A “forcing strike” is a “normal strike”. Its purpose is to force the employers' organisation to comply with the unions' demands while, theoretically, a “warning strike” only seeks to show the employers that the members of the trade-union are willing and strong enough to strike.

its consequences. Extensive strike action during collective bargaining rounds disturbs the balance of power between the bargaining parties, which is essential for fair and reasonable compromises between the parties.

Consequently, the courts should apply the ultima ratio principle to any strike. Exceptions should only be made if a strike, before failure of collective bargaining, supports the bargaining process without disturbing the balance of power. Because mild pressure has the potential to support the process of arriving at agreements, few “warning strikes” over a short period of time should be permissible. These strikes are not meant to finally make the employers’ side comply with a certain demand. Since the ultima ratio principle only seeks to prevent “real” power play before bargaining has proved to be unsuccessful such strike action does not violate the ultima ratio principle.



The strategy of “rotating warning strikes”, respectively “new mobility”, produces far more pressure than single, short “warning strikes”. Here, power play begins before collective bargaining has failed. Unlike “forcing strikes”, which may only begin after the failure of collective bargaining and which cover a whole area, employers do not know where strike action takes place next. As described before, trade unions gain a great advantage through this kind of strike action since employers cannot react adequately. As explained above, for that reason “rotating strikes” violate the ultima ratio principle and should be prohibited. In practice, the courts should evaluate every case separately and should apply the ultima ratio principle strictly.

c. Comparison

Generally, it can be noticed that the procedural requirements for industrial action are regulated in great detail in South Africa, while in Germany the courts established rather general principles. The procedures of conciliation and arbitration are expressly regulated and the prerequisite of balloting was explicitly taken out of legislation. Thereby, the legislature clearly stated its will with regard to which procedural requirements must be followed and which not. Since the German legislature remains silent on these issues, the courts had to judge, which prerequisites industrial action in Germany should have. The BAG established the fairly general principle of *ultima ratio*, which it applied to the questions whether arbitration before industrial action needs to take place and whether “warning strikes” are permissible.

The South African legislature decided that conciliation²²⁸ or advisory arbitration²²⁹ is a compulsory prerequisite of industrial action. The German courts reject the notion of compulsory arbitration or any kind of conciliation. They leave it up to the parties to decide whether they wish to engage in such procedures or not. Arbitration that is resulting in binding decisions is an absolute taboo in Germany. As explained, the autonomy of the collective bargaining system is seen to be at stake. This strong attitude against such arbitration has its roots in the history of the “Weimarer Republik”.²³⁰ The so-called “Schlichtungsverordnung-Decree on arbitration” of the “Republic of Weimar” allowed the state to declare results of mediation proceedings binding.²³¹ The state used this possibility extensively. Resulting from that, the state basically determined the content of collective bargaining agreements. Thereby, it

²²⁸ S 64 (1) LRA.

²²⁹ S 64 (2) LRA in case the issue in dispute concerns a refusal to bargain.

²³⁰ The “Republic of Weimar” was the first German democratic republic. It was found after WWI and lasted from 1919 to 1933.

²³¹ This decree is dated 29.12.1923.

abolished de facto the autonomy of the collective bargaining system. After the “Third Reich” broke down the Constitutional assembly emphasised that the collective bargaining parties must have the right to determine terms and conditions of employment autonomously, without any interference of the state. Because of the described bad experiences during the “Republic of Weimar”, art 9 (3) GG was introduced into the Constitution, which provides for the core-right of the autonomy of the collective bargaining parties. Because of these historical aspects and art 9 (3) GG, arbitration that allows the state to determine the content of collective bargaining agreements is strictly prohibited.

In South Africa, although conciliation and in some cases advisory arbitration is a prerequisite of any industrial action, neither of the councils mentioned in s 64 LRA can make a binding decision for the parties as well. Their aim is to settle the dispute between the parties in order to prevent industrial action.



This rationale has its place in German strike law as well. The ultima ratio principle is based on the very notion that industrial action should only be the last resort in the process of concluding collective agreements. The prohibition of strikes, preceding failure of collective bargaining, and the compulsory conciliation and arbitration procedures in South African law, represent the will to prevent unnecessary strike action when there might still be a way of avoiding it.

In Germany, no notice need be given before a party can engage in industrial action. In practice such a notice does not seem necessary in Germany. As soon as it is foreseeable that collective bargaining fails, trade unions always announce that they will engage in industrial action. This is considered the last possibility to finally make the employers' side comply with the unions' demands. Because collective bargaining mostly takes place on centralised levels, it is usually very public. The trade unions

representatives use the media to declare that strike action is unavoidable after the employers' organisation refused to give in to their demands. Therefore, employers are always aware of oncoming strikes. This environment of collective bargaining and industrial action seems to be the reason why the courts in Germany never constituted an obligation to give notice before the commencement of industrial action.

Balloting is treated similarly in both countries. Disregarding the requirement to hold a ballot before strike action does not render a strike illegal in either country because such a requirement is only binding for trade unions in relation to their members in both countries.

2. Substantive Limitations



a. South Africa

Besides the discussed procedural requirements, s 65 LRA provides for a number of substantive limitations on the right to strike.

In detail, s 65 contains the following limitations:

(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if-

(a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;

(b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;

(d) that person is engaged in-

(i) an essential service; or

(ii) a maintenance service.



(2) (a) Despite section 65(1)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.

(b) If the registered trade union has given notice of the proposed strike in terms of section 64(1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.

(3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out-

(a) if that person is bound by-

(i) any arbitration award or collective agreement that regulates the issue in dispute; or

(ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or

(b) any determination made in terms of the Wage Act and that regulates the issue in dispute, during the first year of that determination.

aa. The scope of the regulation

The limitations set out in s 65 LRA are valid for any person that takes part 'in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out'. This phrase embraces 'any conduct that was engaged in during the course of a strike, was pursuant thereto and served to advance it'.²³²

²³² *Coin Security Group (Pty) Ltd v SANUSO* 1998 (19) *ILJ* 43 (C) at 48.

bb. S 65 (1) (a) LRA – Collective Agreements prohibiting industrial action in respect to the issue in dispute

Collective agreements may prohibit the engagement in strike action. S 65 (1) (a) LRA renders strike action unprotected if an employee strikes although a collective agreement prohibits such action. Because the right to strike is fundamental it can only be waived in a collective agreement as defined in s 213 of the LRA. A single employee would mostly be in a bargaining position that is too weak to decline the pressure of an employer to waive her/his right to strike.²³³ Trade unions, as powerful opponents of employers and their organisations, cannot be pressurised that easily.²³⁴

S 65 (1) (a) of the LRA applies only to agreements, which prohibit strikes substantively. This was held by the Labour Appeal Court in *Country Fair Foods (Pty) Ltd v FAWU*²³⁵. The court found that a prohibition of strike action, when procedural requirements have not been met, is not embraced by s 65 (1) (a) of the LRA.

Two peculiarities regarding employees included in such an agreement must be mentioned. Firstly, s 65 (1) (a) LRA in connection with s 23 (1) (d) LRA results in the fact that a collective agreement prohibiting strike action binds employees that are not members of the concluding trade union, so called 'non-party' employees. In such a case these employees are being deprived of their constitutional right to strike.²³⁶ S 23 (1) (d) LRA obviously reflects strongly the notion of majoritarian trade-union

²³³ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 290.

²³⁴ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 290.

²³⁵ 2001 (5) *BLLR* 494 (LAC).

²³⁶ As provided for in s 23 (2) (c) of the Constitution of the Republic of South Africa.

representation underlying the LRA.²³⁷ Also, the object of the LRA to promote collective bargaining at sectoral levels according to s 1 (d) (i) and (ii) LRA seems important in that context because centralised bargaining becomes more effective if more employees are embraced by a collective agreement. On the other hand, the crucial question is whether a trade union can waive a constitutional right of non-members, and therefore, of employees that have not entitled the union to waive that right in any way. Whether the named principles justify such an intense limitation of non-members' constitutional rights has not been decided yet.

It is submitted that this is not the case. A waiver of such important and fundamental rights, like constitutional rights, cannot be executed by an organisation the person is not a member of. By guaranteeing a person such constitutional rights, the constitutional assembly regarded these rights principles every person, in that case employees, should hold. A waiver of such rights must be left up to the persons holding the right or at least to an organisation of which these persons chose to be members. Another person or organisation should not be entitled to waive citizens' rights, legislature decided to be essential in an open and democratic society.

It is submitted that even contracting away constitutional rights by a trade union, in the name of its members, might not be justified. Becoming a member of an organisation does not imply consent with a waiver of fundamental rights. As pointed out before, the principle underlying the Bill of Rights is that any person included in the scope of a constitutional right shall hold this right. This is not only a privilege of that certain person but also a basic and fundamental decision regarding how society in South Africa should be shaped. According to these thoughts, a waiver of such rights might

²³⁷ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 290.

be regarded possible maybe in exceptional circumstances and should be based on a personal decision of the person holding the right.

The goal to promote orderly collective bargaining on centralised levels as an abstract principle is an important one for a labour environment that used to be dominated by an adversarial climate. However, without taking a definite standpoint on this difficult question it is submitted that there are at least serious arguments supporting the denial of a justification of a trade union's possibility to waive individual constitutional rights, either of its members or of non-members on grounds of the named abstract principle.

The second group of employees that might be bound by a collective agreement prohibiting strike action, is the group of former members of the union, concluding such an agreement. In *Vista University v Botha*²³⁸ the Labour Court had to decide about the legality of a strike that was claimed to be violating a binding collective agreement, which provided for rights disputes to be referred to arbitration. The court interdicted the strike. With regard to s 23 (2) LRA it found that employees that were formerly members of the union were bound by the agreement even after they resigned from their union membership.

cc. S 65 (1) (b) LRA – Agreements requiring referral of dispute to arbitration

There exists an important difference in wording between s 65 (1) (a) LRA and s 65 (1) (b) LRA. While the former embraces only collective agreements the latter inherits no such limitation. Thus, individual agreements requiring a referral of disputes to

²³⁸ 1997 (18) *ILJ* 1040 (LC) as cited in Thompson C, Benjamin P (2003) *South African Labour Law*, Vol. One (Revision Service 45) AA1-32.

arbitration are possible.²³⁹ Again, the question must be raised if an enforcement of such an agreement, concluded by an employer and an employee, would be constitutional. The fact that single employees are in a far weaker position than employers and that they can easily be pressured by employers, provides another reason supporting the opinion that a waiver of the right to strike should be restricted more than the LRA does.²⁴⁰

dd. S 65 (1) (c) LRA-Disputes that are a party has the right to refer to arbitration or the Labour Court

As already referred to within the discussion of the strike definition, s 65 (1) (c) LRA draws a definite line between disputes over rights and disputes over interests.²⁴¹ This conclusion can be drawn from the clear formulation of s 65 (1) (c) LRA. The issue in dispute need not actually have been referred to arbitration or adjudication yet, but the mere possibility suffices.

The practical consequence is that industrial action concerning the following issues is not permissible: freedom of association (s 9); the interpretation and application of collective agreements (s 24); agency and closed shop agreements (s 24 (6)) and (7); admission or expulsion from bargaining councils (s 56); picketing (s 69); workplace forum disputes concerning matters reserved for joint decision-making (s 86); dismissals and unfair labour practices.²⁴² Rights disputes can be solved by the application of objective standards and arbitration and adjudication are considered to be

²³⁹ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 290.

²⁴⁰ See above for additional thoughts on the topic.

²⁴¹ Disputes over rights are disputes over existing rights, such as the right not to be unfairly dismissed. Disputes of interest are disputes over the creation of future rights, namely terms and conditions of employment.

²⁴² Enumeration taken from Grogan J (2001) *Workplace Law* (6th ed) 333 with further reference to various caselaw.

more suitable to these issues.²⁴³ Interest disputes should be left to the parties involved in power-play.²⁴⁴ Courts should interfere in this power-play as little as possible.

It is important to notice that s 65 (1) (c) LRA mentions only issues that can be referred to arbitration or adjudication in terms of the LRA. Thus, in case other legislation provides for the opportunity to refer a dispute to arbitration or adjudication industrial action is still permissible.²⁴⁵ This reasoning was recently confirmed again by the Labour Court in *TSI Holdings (Pty) Ltd & others v NUMSA & others*²⁴⁶. The wording of s 65 (1) (c) LRA is to be criticised. Not including other legislation containing justiciable issues into s 65 (1) (c) LRA does not seem reasonable. If such issues mentioned in the LRA are best dealt with through arbitration and adjudication there is no reason why strike action over rights disputes should be allowed only because the right subject to the dispute is mentioned in other legislation.

Whether a dispute is about a rights-issue or a matter of interest cannot always be determined easily. A good example is the judgement of the Labour Appeal Court in *Ceramic Industries Ltd v NCBAWU*²⁴⁷. Two issues were in dispute in these cases. The first was the non-payment of wages during an unprotected strike. The second was a claim for dismissals of managers, that had allegedly harassed employees. The Labour Court found that non-payment of wages must be adjudicated by the Labour Court according to s 158 (1) (a) (iii) LRA because the order in casu could direct the performance of the act of paying the wages. The issue of harassment was recognised as a rights issue by the court. Consequently, strike action was not permissible either. But, the court also held that industrial action could be taken in respect of the demand

²⁴³ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 291.

²⁴⁴ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 291.

²⁴⁵ *Moneyla v Bruce Jacobs t/a LV Construction* 1998 (19) *ILJ* 75 (LC) at 84.

²⁴⁶ 2004 (6) *BLLR* 600 (LC).

²⁴⁷ *Ceramic Industries Ltd v NCBAWU* 1997 (6) *BLLR* 697 (LAC).

to dismiss the managers. The court reasoned that the dispute in the latter respect could not be arbitrated.

The Labour Appeal Court contradicted the findings of the Labour Court and provided a test concerning the determination of disputes in cases in which a trade union combines a justiciable demand with a non justiciable one because the remedy for the latter is not provided for by the LRA.

The court formulated this test as follows:

‘The refusal of a demand, or the failure to remedy a grievance, always needs to be examined in order to ascertain the real dispute underlying the demand or remedy. The demand or remedy will always be sought to rectify the real, underlying dispute. It is the nature of that dispute that determines whether a strike in relation to it is permissible or not.’²⁴⁸



In summary, the court suggests that a demand that is not justiciable in terms of the LRA and that has been added to a complaint or grievance, which must be adjudicated in terms of the LRA, cannot change the true nature of the dispute. The courts must always investigate what that true nature of the dispute is.

In case unions want to strike about different issues, about some of which strike action is permissible and about some of which is not, they have the possibility to gain strike protection if they give up the impermissible demand.²⁴⁹

²⁴⁸ *Ceramic Industries Ltd v NCBWU* 1997 (6) *BLLR* 697 (LAC) at 703.

²⁴⁹ *Samancor Ltd & another v NUMSA* 1999 (11) *BLLR* 1202 (LC).

The Act provides for two exceptions to the rule that interest disputes are not open to strike action.

The first exception is organisational rights. The Act permits strike action regarding the following rights: trade union access, stop-order facilities, the election of trade union representatives and leave for trade union activities.²⁵⁰ The LRA stipulates arbitration of these disputes according to s 65 (2) (a) LRA. But, s 65 (2) (b) LRA regulates that a trade union loses its right to refer the issue to arbitration for 12 months after it has given strike notice on this matter. This implies that, although the union loses its right to refer the issue to arbitration for 12 months, strike action is generally permissible.

The second exception refers to dismissals for operational reasons by employers with more than 50 employees.²⁵¹ S 189A (2) (b) LRA provides for the possibility to engage in industrial action in a case in which an employer employs more than 50 employees and dismisses a certain amount of employees specified in s 189A (1) LRA. Again, the trade unions must decide whether to challenge the dismissals in court or whether they want to take the industrial action route.²⁵²

ee. S 65 (1) (d) LRA - Prohibition of industrial action in essential and maintenance services

The named section prohibits any industrial action of employees employed in essential services or maintenance services.²⁵³

²⁵⁰ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 292.

²⁵¹ S 189A LRA.

²⁵² See s 189A (10) LRA.

²⁵³ For details see below at Chapter B. VII. 1..

ff. S 65 (3) (a) (i) LRA – Prohibition of industrial action in case of a collective agreement regulating the issue in dispute

During the validity of a collective agreement the parties should stick to the outcome of their negotiations. This provision sets the basis for industrial peace during the time an agreement is valid.²⁵⁴ *South African National Security Employer's Association v TGWU*²⁵⁵ states that industrial action might be taken over issues not regulated in the collective agreement.²⁵⁶

Obviously, the formulation of the subsection and especially the term 'regulates' must be interpreted. The interpretation of a similar phrase used by the old Act is still regarded relevant.²⁵⁷ S 65 (1) (a) of the Labour Relations Act 28 of 1956 has been interpreted as allowing industrial action regarding improved or actual wages in cases in which the award or agreement provides only for minimum wages.²⁵⁸

Under the current Act, the Labour Court has taken a similar standpoint. In *PSA v Minister of Justice and Constitutional Development & Others*²⁵⁹ the court held that s 65 (3) (a) (i) LRA does not permit strike action over a one-off pay increase for certain employees while a collective agreement regulated an annual salary increase for all public servants.

²⁵⁴ This policy consideration is strongly reflected in the German law of industrial action.

²⁵⁵ 1998 (4) *BLLR* 364 (LAC).

²⁵⁶ This is the result of the German law as well. For details see below Chapter B. IV. 2. b. bb...

²⁵⁷ Thompson C, Benjamin P (2003) *South African Labour Law, Vol. One* (Revision Service 45) AA1-325.

²⁵⁸ Thompson C, Benjamin P (2003) *South African Labour Law, Vol. One* (Revision Service 45) AA1-325 with reference to the following cases: *Black Allied Workers Union v Asoka Hotel* 1989 (10) *ILJ* 167 (IC); *Steel Enigeering and Allied Workers Union v BRC Weldemesh* 1991 (12) *ILJ* 1304 (IC); *Vereeniging Refractories Limited v Building Construction and Allied Workers Union* 1989 (10) *ILJ* 79 (W); *SA Woodworkers Union v Rutherford Joinery* 1990 (11) *ILJ* 695 (IC).

²⁵⁹ 2001 (11) *BLLR* 1250 (LC).

Both of these judgements declare s 65 (3) (a) (i) LRA to stipulate a relative peace obligation rather than an absolute one.²⁶⁰

gg. S 65 (3) (a) (i) LRA – Prohibition of industrial action in case of an arbitration award regulating the issue in dispute

An arbitration award in the sense of the provision might be an award of the CCMA, a bargaining council, an accredited agency or a private (non-accredited) arbitration body.²⁶¹ The policy consideration underlying this provision is that the parties shall accept the results of the named arbitration institutions. The parties should not have the possibility to engage in power-play just because they do not like the decision of the council to which they referred the dispute.²⁶²

If arbitration fails and industrial action on the issue is permitted, the parties are free to engage in such action after the arbitration procedure.²⁶³

hh. S 65 (3) (a) (i) LRA and s 65 (3) (b) LRA – Wage determinations

The Wage Act 5 of 1957 has been replaced by the Basic Conditions of Employment Act 75 of 1997. With that change in legislation no substantive change should have followed.²⁶⁴

²⁶⁰ See Thompson C, Benjamin P (2003) *South African Labour Law, Vol. One* (Revision Service 45) AA1-325. It is important to notice at that point that in the German law of industrial action the terminology of a relative and an absolute peace obligation exists as well. However, the terms have been given a different meaning by the courts. For details see below at Chapter B. Iv. 2. b. bb..

²⁶¹ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 293.

²⁶² Du Toit D et al (2003) *Labour Relations Law* (4th ed) 293.

²⁶³ *Defy Appliances (Pty) Ltd v NUMSA* 2001 (12) *BLLR* 1328 (LC).

²⁶⁴ See for the problem that s 65 (3) LRA has not been amended by ‘sectoral determinations under the Basic Conditions of Employment Act’: Du Toit D et al (2003) *Labour Relations Law* (4th ed) 294.

ii. S 65 (3) LRA – subject to a collective agreement

This formulation of s 65 (3) LRA provides for the parties to circumvent the regulations of 65 (3) LRA by collective agreement.

b. Germany

Besides few subordinate legislature, etc., the substantive limitations of industrial action in Germany mainly follow general principles that have been developed by courts and academics. As shown before some of these principles also contain procedural rules, but, all of them do set substantive limitations on the right to strike. Using these abstract principles the courts found solutions to various concrete problems of industrial action. Therefore, the limitations on industrial action in Germany cannot be understood without an understanding of the general principles underlying these limitations.

Firstly, one should take a look on the development of these principles. During the years of this development different approaches have been chosen. First, a principle from criminal law dominated the discussion. This principle is called ‘Sozialadäquanz (social adequacy)’.²⁶⁵ Its basic meaning is that an action is not illegal if the prevailing norms of society consider such an action adequate.²⁶⁶

The notion of ‘social adequacy’ has been put aside and the idea of industrial action as ultima ratio dominated the discussions. Although this principle is not the dominating one anymore, it is still important for the timing of industrial action.²⁶⁷ Today the

²⁶⁵ Lieb M (2003) *Arbeitsrecht (8th ed)* 189.

²⁶⁶ Schoenke A, Schroeder H (2001) *Strafgesetzbuch (26th ed)* 167.

²⁶⁷ See above at Chapter B. IV. 1. b. dd...

ultima ratio principle is only part of the general principle of proportionality.²⁶⁸ This means that industrial action must be proportional, which is only the case if a collective agreement can be concluded via industrial action pressure from the collective bargaining parties.²⁶⁹

Besides that, as mentioned before, the requirements for industrial action in Germany are inevitably connected to the collective bargaining system. Generally, industrial action is protected because of its “helping function” to the collective bargaining system. But, art 9 (3) GG is not only the justification for industrial action but sets also limits to it. Outside the collective bargaining process industrial action cannot be justified. That is the reason why the TVG, which concretises the “autonomy of the collective bargaining system” and art 9 (3) GG, determines requirements for industrial action in Germany. That means that on one hand industrial action must be limited because of its negative effects. On the other, it must only be permitted in an intensity that makes balanced agreements possible.²⁷⁰

On top of the principle of proportionality the BAG established the principle of parity. This principle impacted strongly on subsequent jurisprudence creating requirements for industrial action. Parity means that in order to be able to conclude agreements freely in the private sphere the parties must be approximately of equal power. The Constitutional Court agreed with the BAG on that principle.²⁷¹ The principle of parity

²⁶⁸ Lieb M (2003) *Arbeitsrecht (8th ed)* 189. see above.

²⁶⁹ The principle of proportionality is mainly important for the time of the commencement of industrial action. It is described shortly at this point again because it is an important part of the historical development of the law of industrial action in Germany. Also, it will be shown below that this principle affects also other requirements of industrial action.

²⁷⁰ Lieb M (2003) *Arbeitsrecht (8th ed)* 190.

²⁷¹ BVerfGE 1991 NZA 809.

becomes important in three cases. The first is the limitation of the number of employees that might be locked-out. The second is the reasoning behind the “risk of industrial action doctrine”²⁷², and the third is the notion that secondary strikes are generally prohibited.²⁷³

Overall, the requirements for industrial action are rooted in different sources. The main source is art 9 (3) GG, which is the basis of the named principles and builds the foundation on which the single requirements are based. Giving effect to art 9(3) GG subordinate legislation represents the second “layer” of legal sources from which the Labour courts draw requirements for industrial action. The following chapter will describe the fundamental principles on the basis of art 9 (3) GG. Furthermore it will investigate the requirements for industrial action and will explore the connection between the described principles and the single requirements.

Some of the problems that occur cannot be solved only by one principle and the borders between these principles are fluent. The following investigation will offer one scheme, which helps to systematise the various principles developed by courts and academics and the different problems of the law of industrial action.²⁷⁴

The following requirements, which will be discussed in depth below, can be identified in the jurisprudence of the Labour Courts²⁷⁵:

²⁷² Arbeitskämpfrisikolehre. This doctrine is important for the legal consequences of industrial action.

²⁷³ An in-depth discussion on the principle of parity and its effects on the named problems of the law of industrial action will be delivered below at Chapter B. IV. 2. b. cc. bbb..

²⁷⁴ See Duetz, W (2003) *Arbeitsrecht* (8th ed) 286-287 for a similar scheme.

²⁷⁵ This tabulation is only meant as an overview, which will be filled in detail below.

1. Requirements following art 9 (3) GG and subordinate legislation directly
 - a) Leadership by collective bargaining party
 - b) Collective agreement as the goal
 - aa) Goal can be regulated by collective agreement
 - bb) Goal is the conclusion of a collective agreement
 - cc) Identity of opposing collective bargaining party and opponent of the industrial action
 - c) No violation of compulsory law
 - aa) Constitutional law
 - bb) Subordinate law

2. Peace obligation



3. General principles of the law of industrial action

- a) Free selection of weapons
- b) Parity
- c) Proportionality in a wider sense
 - aa) ultima ratio principle (discussed in detail above)
 - bb) proportionality in a narrow sense

aa. Requirements following from art 9 (3) GG and subordinate legislation directly

aaa. Leadership by a collective bargaining party

Industrial action must be led by the collective bargaining parties. As mentioned above, industrial action in Germany is considered only as a vehicle to support collective bargaining. Employees can carry out work stoppages, picketing, etc., only if collective bargaining takes place.

This requirement is rooted in s 1 TVG read with s 2 TVG and art 9 (3) GG which show that only collective bargaining parties can conclude collective agreements, and thus, only these parties to collective bargaining can call for industrial action.

The most important part of s 2 TVG in this context is subsection (1), which reads as follows:²⁷⁶



‘Party to collective agreements are trade unions, single employers and employers’ organisations.’

A strike, which has not been initiated by a trade union, is called a ‘wildcat strike’²⁷⁷ and is not permissible under any circumstances.²⁷⁸ But, an association has the possibility to take over a wildcat strike after its commencement.²⁷⁹ According to what has been described before the reason is obvious. The reason for the prohibition of wildcat strikes is that they are not led by a trade union.

²⁷⁶ For the wording of s 1 TVG see above in Chapter B. II. 2. a..

²⁷⁷ ‚Wilder Streik‘

²⁷⁸ BAG AP Nr. 33 zu Art 9 GG Arbeitskampf.

²⁷⁹ BAG AP Nr. 3 zu Art 9 GG Arbeitskampf.

Two aspects related to strike action are important in this context. Firstly, the BAG considers the termination of employment contracts by a large group of employees to be an act of industrial action because in case it is coupled with a demand that can be regulated in a collective agreement it is collective denial to work for such a demand and, thus, a strike. In the given case this action was not led by an association, and the court found that art 9 (3) GG does not protect such an action because of the principle that every industrial action must be led by a collective bargaining party. Such concerted terminations of employment contracts are considered unprotected strikes.²⁸⁰ Secondly, the BAG considers keeping back contractual duties by employees because their employer does not carry out her/his duties illegal if the employees do not expressly inform the employer that they claim an individual right.²⁸¹



Because industrial action carried out by employers must also be led by an association, wildcat lock-outs are also possible. If the goal of industrial action is the conclusion of a collective agreement at plant level²⁸² it is generally possible for single employers to lock-out employees without a formal resolution of the employers' association. But, in most cases industrial action accompanies collective bargaining on a centralised level with the goal of the conclusion of a collective agreement for all employers and employees of a certain area. In these cases a lock-out must be preceded by a resolution of an employers' organisation. Otherwise the lock-out will be considered an illegal wildcat lock-out.²⁸³

²⁸⁰ BAG 1966 DB 905.

²⁸¹ BAG AP Nr. 32 zu Art 9 GG *Arbeitskampf*. Such keeping back of e.g. work performance because an employer fails to pay remuneration must usually be treated as an individual breach of the contract of employment by each employee and not as a collective action. Generally, the result is a dispute of rights.

²⁸² ‚Firmentarifvertrag‘.

²⁸³ BAG 1996 NZA 389.

bbb. Collective agreement as the goal

Because art 9 (3) GG read with s 1 TVG and s 2 TVG constitute that industrial action might only be taken in order to conclude collective agreements, the intention of the parties must be the conclusion of such agreements.²⁸⁴ Furthermore, any industrial action must be aimed at the party that has the power to fulfil the demands of the party taking the action.

aaaa. Goal can be regulated by collective agreement

The demands of the party engaging in industrial action must be in accordance with art 9 (3) GG read with s 1 (1) TVG. That means that these demands must seek to improve working and economic conditions²⁸⁵ and, more specifically, must seek to set 'legal norms, which may regulate the content, commencement and termination of employment relationships and matters relating to the operation of a business, as well as legal aspects of the works' constitution'²⁸⁶. Demands outside of that scope are not subject to collective bargaining and are not open to industrial action.

Besides that, a demand cannot be regulated in a collective agreement if it violates constitutional law or compulsory subordinate law.²⁸⁷ Examples for demands that cannot be regulated in a collective agreement are the following:

²⁸⁴ BAG 1972 NZA 143.

²⁸⁵ See Art 9 (3) GG.

²⁸⁶ See s 1(1) TVG.

²⁸⁷ It is important not to mix up the legality of the demand, which represents the reason why industrial action is taken, with the question whether different actions taken violate Constitutional or subordinate law.

Discriminating wage differences between men and women, which would violate the prohibition of discrimination of the first sentence of art 3 (2) GG²⁸⁸.

The demand for higher wages than a collective agreement provides for, would violate s 4 (3) TVG because a collective agreement can only contain minimum standards. A demand for higher wages would go beyond the regulation of a minimum standard.²⁸⁹

The already mentioned fact that disputes of right are not strikeable also roots in the requirement that the goal of any industrial action must be a demand that is open to regulation in a collective agreement. Trade unions and employers' organisations cannot solve rights disputes via collective agreements.²⁹⁰

bbbb. Goal is the conclusion of a collective agreement

The employees must seek to actually conclude a collective agreement. This requirement prevents employees from engaging in strike action with the aim of pressuring employers to conclude a works agreement. In order to maintain peace in the workplace, s 74 (2) WCA²⁹¹ prohibits any industrial action between a works

²⁸⁸ The first sentence of Art 3 (2) GG has the following wording: 'Men and women inherit the same rights'.

²⁸⁹ S 4 (3) TVG reads as follows: 'Differing agreements are only permissible if they are permitted by the collective agreement or if they contain a difference in favour of the employee.' The result of this provision is that collective agreements set minimum standards and that individual contracts of employment may differ to the collective agreement only upwards in favour of the employee. But, the provision also contains the principle that during the validity of a collective agreement a strike for higher wages than the collective agreement provides for, is not permitted. See Duetz, W (2003) *Arbeitsrecht* (8th ed) 288.

²⁹⁰ From the discussed requirement the prohibition of political and demonstrative strikes (politische Streiks and Demonstrationsstreiks) can be concluded. Others see the reason for the prohibition in the requirement that the identity of opposing collective bargaining party and opponent of the industrial action must be identical. For structural purposes the prohibition of such strikes in Germany will be discussed in context of the South African protest action at Chapter C..

²⁹¹ Betriebsverfassungsgesetz.

council and an employer. That means that, in order to arrive at a works agreement, any engagement in industrial action is illegal.

cccc. Identity of opposing collective bargaining party and opponent of the industrial action

Only the opposing party in collective bargaining negotiations can be compelled by a demand of the party taking industrial action. Therefore, the party against which industrial action is being taken must be the opponent of the collective bargaining procedure.²⁹²

ccc. No violation of compulsory law

Not only the goal of industrial action but also the specific activities carried out, must not violate either Constitutional law or subordinate law.

aaaa. Constitutional law

As described before, art 9 (3) GG contains the right to found and join associations. So-called selective lock-outs²⁹³, which are lock-outs of trade-union members only, violate this right provided for in art 9 (3) GG.²⁹⁴ The reason for that conclusion is that such lock-outs may pressure employees not to become a member of a union or to leave a union in order not to be locked-out. Through this pressure, the right to join a

²⁹² There occur three main problems within the scope of this requirement. These problems are secondary strikes, political strikes and demonstrative strikes. With reference to this requirement the named problems will be discussed below at Chapters B. V. 2. C..

²⁹³ Selektivaussperrungen.

²⁹⁴ BAG AP Nr. 66 zu Art 9 GG Arbeitskampf.

union might be seriously infringed. On top of that, the so-called outsiders²⁹⁵ would benefit from the confrontation just as the union-members do, without having to put in any commitment.²⁹⁶

bbbb. Subordinate law

One important section for the legality of bonuses paid to non-strikers and financial sanctions on strikers is s 612a BGB.²⁹⁷ The legality of such payments will be discussed below.²⁹⁸

Obviously, actions taken by any party in the course of industrial action must not violate criminal law.²⁹⁹



bb. Peace obligation

Industrial action of any association that is party to a valid collective agreement, that has been concluded with the same party the association seeks to take industrial action against, is illegal at least to the extent that the issue is regulated in the collective agreement because implicit part of any collective agreement is a relative peace obligation. This relative peace obligation prohibits any industrial action about all

²⁹⁵ Aussenseiter. Outsiders are employees that are not member of a trade union.

²⁹⁶ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) 135.

Outsiders do not directly benefit from a collective agreement because according to s 3 (1) TVG a collective agreement is only binding for the members of the trade-union that is party to the agreement. But, employers do mostly grant outsiders the same terms and conditions of employment as the collective agreement provides for in order to detain them from becoming union members. S 3 (1) TVG reads as follows: 'Members of the parties to a collective agreement and the employer who is himself a party thereto shall be bound by the collective bargaining agreement.'

²⁹⁷ See for South Africa s 5 LRA, which also be discussed below at B Vi. 2. a. aa..

²⁹⁸ Payments of bonuses to non-strikers and financial sanctions upon strikers will be classified as other employers' weapons besides locking-out and will be discussed in the adequate context below at Chapter B. VI. 2. b. aa..

²⁹⁹ This requirement will become essential for the discussion of permissible picketing actions. See at Chapter B. VI. 1. b..

issues regulated in a valid collective agreement before this agreement reaches its temporal limit.³⁰⁰

On top of that, the parties to a collective agreement can also include an absolute peace obligation. This is an obligation preventing industrial action even over issues not subject to the current collective agreement.³⁰¹ Such an obligation must be regulated explicitly in a collective agreement.³⁰²

cc. General principles of the law of industrial action

Because of the lack of legislation, the courts developed general principles that also limit industrial action.

aaa. Free selection of weapons



Generally, because of changing working and economical conditions, associations must have the possibility to develop new kinds of weapons of industrial action within the limits of the law.³⁰³

bbb. Parity

A leading principle of the German law of industrial action is the principle of parity.

³⁰⁰ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) 138.

³⁰¹ Duetz, W (2003) *Arbeitsrecht* (8th ed) 235.

³⁰² Duetz, W (2003) *Arbeitsrecht* (8th ed) 235.

³⁰³ BVerfGE 1995 NZA 754 at 756. Different employers' weapons of industrial action as well as picketing weapons will be discussed below at Chapter B. VI.

aaaa. The notion of parity

The autonomy of the collective bargaining system as an independent, private instrument to balance the interests between employers and labour can only function properly if the collective bargaining parties have approximately equal chances to influence the agreements they conclude.³⁰⁴ This chance is called parity.³⁰⁵ The notion of parity is an important principle for the question whether employers' and employees' weapons, and especially the main weapons of strikes and lock-outs, are in balance or if one party inherits disproportionately too much power. In such a case the courts must scrutinise whether certain exercises carried out by one party in the course of industrial action should be prohibited.

Within the jurisprudence of the Labour Courts, as well as in the academic field, there exists a vital discussion what the normative content of parity is. The general question that needs to be answered is: How is parity being measured?

There are three identifiable main lines of arguments in the discussion.

The formal notion of parity considers strikes and lock-outs generally equal in any relation.³⁰⁶

³⁰⁴ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) 101.

³⁰⁵ See BAG AP Nr. 66 zu Art 9 GG *Arbeitskampf*.

³⁰⁶ BAG AP NR. 1 zu Art 9 GG *Arbeitskampf*.

The normative notion of parity does not regard the factual relationship of power between the parties.³⁰⁷ It considers the powers of the parties and their weapons of industrial action equal because the law considers them equal.

Other academics plead for a general view and include all factors of the economy as well as social and political views (socio-economic general view).³⁰⁸

A different measure takes the so-called abstract-material parity.³⁰⁹ According to this view one factor must be the factual relationship of power between the parties. But, the advocates of this opinion do not consider any speciality of a single process of industrial action like its goal, the economic situation, or the number of trade-union members in a workplace. The measure is a long-term, general judgement considering only which limitations the law must generally set in order to create an abstract balance of powers between the collective bargaining parties. In other words, this view suggests to determine what regulations must be made to create a balance of power in general without taking into account the single situation of the workplace. Thereby it considers how, in general, certain actions affect employers economically³¹⁰ or how certain actions of employers affect the power of employees' industrial action³¹¹. Thus, the only factor is the effects certain actions have on the power of the opposing party.

³⁰⁷ Mayer-Maly 'Aussperrung und Paritaet' (1979) *Der Betrieb* 95 at 98; Richardi 'Die Verhaeltnismaessigkeit von Streik und Aussperrung' (1978) *Neue juristische Wochenzeitschrift* 2057 at 2061.

³⁰⁸ Daeubler 'Die unverhaeltnismaessige Aussperrung' (1972) *Juristische Schulung* 642 at 645; Wohlgemut 'Aussperrung und Grundgesetz' (1979) *Betriebsberater* 111 at 115; Wolter 'Aussperrung, Paritaet und Verhaeltnismaessigkeit' (1979) *Arbeit und Recht* 193 at 197.

³⁰⁹ BAG AP Nr. 43 zu Art 9 GG Arbeitskampf; BAG 1991 NZA 809.

³¹⁰ For example, boycotts, strikes, occupations etc..

³¹¹ For example, bonuses paid to outsiders, dismissals during industrial action etc..

On this abstract basis this theory determines the protection or illegality of certain industrial actions.

It is submitted that the notion of abstract-material parity is preferable. The formal and the normative notion of parity are not useful because they do not consider the reality of the factual differences of power between trade unions and employers' organisations. Therefore, this view is only of an academic nature and not practical for the reality of industrial action procedures. The academics pleading for a general view do not consider the shape of the system of collective bargaining. The system of collective bargaining in Germany exists only to safeguard and improve working and economic conditions.³¹² Parity as a prerequisite for a functioning collective bargaining system must draw its measures from this field and cannot become an instrument of a global, political, and social balancing of interests. The law of industrial action cannot fulfil this expectation, anyway. In result, only the factual relationship of power between the bargaining parties, which should be evaluated in a long-term judgement, can be the relevant measure. Therefore, the law must evaluate whether certain actions generally disturb the balance of powers or possibly serve this balance. Regarding any detail of each case does not constitute a principle but makes the notion of parity an unreliable measure. This means also that the factual differences in a given bargaining relationship can be ignored if they differ from the general long-term judgement.

³¹² Art 9 (3) GG.

bbbb. Legality of different weapons of industrial action measured on the notion of parity

(1) Strikes

Strikes are permissible measured on the principle of parity because they improve the position of trade unions and abolish the naturally existing imbalance between trade-unions and employers.³¹³

(2) Lock-outs

Because employers are naturally in a stronger position one must differentiate between different kinds of lock-outs.



(a) Offensive lock-outs

An offensive lock-out is generally prohibited because employers' organisations usually do not have the need to attack the side of labour since, generally, industrial action is being started with the goal to improve working conditions.³¹⁴ Locking-out employees, who have not initiated strike action before, would improve the power of employers even more and would violate the principle of parity.³¹⁵ Obviously that takes away an important possibility for employers to change terms and conditions of employment in order to increase operational effectiveness. But, because they have the possibility to use discretion to a certain extent and dismiss employees on grounds of operational requirements they are de nature in a stronger bargaining position than the

³¹³ BAG 1980 DB 1266.

³¹⁴ Duetz, W (2003) *Arbeitsrecht* (8th ed) 296.

³¹⁵ Duetz, W (2003) *Arbeitsrecht* (8th ed) 296.

side of labour. Especially in times of high unemployment rates, employers can threaten labour with further dismissals on operational grounds if trade unions do not give in to their demands. The result is that, factually, offensive lock-outs are not necessary to pressurise the side of labour because the threat of further dismissals is usually enough to weaken the bargaining position of the trade unions.

(b) Defensive lock-outs

Defensive lock-outs are generally permitted in order to balance a negotiation imbalance after the commencement of a strike.

(3) Occupation and blockade of the operation

These weapons will be discussed below.³¹⁶



ccc. Proportionality

Proportionality is a legal principle originally developed in public law. In public law it means that any public act addressed at a citizen must be proportional. The principle consists of four parts. Firstly, the goal the state wants to realise must be legitimate.³¹⁷ Secondly, any public act must be suitable in relation to the goal that the act seeks to achieve.³¹⁸ Thirdly, such an act must be requisite.³¹⁹ That means that the act must be the mildest possible infringement of a citizen's rights. If there is any less infringing act possible, with which the goal could be equally effectively achieved, only this

³¹⁶ With these employees' weapons will be dealt in chapter B: VI. 1.. There, their legality will be measured on the principle of parity.

³¹⁷ Ipsen, J (2004) Staatsrecht II (7th ed) 53.

³¹⁸ Ipsen, J (2004) Staatsrecht II (7th ed) 53.

³¹⁹ Ipsen, J (2004) Staatsrecht II (7th ed) 54.

milder intervention of a citizen's rights can be legal. The last stage is called "appropriateness or proportionality in a narrower sense".³²⁰ At this stage the lawyer must scrutinise whether the act seems proportional in relation to the goal it seeks to achieve. The BAG as well as the Constitutional Court decided that proportionality as a general legal principle is also applicable to labour law.³²¹ In the law of industrial action only the last two stages of the test of proportionality are important. Therefore, industrial action must be requisite and appropriate.

aaaa. The ultima ratio principle³²²

The principle that industrial action must be requisite is identical to the already explained ultima ratio principle, which became important for the procedural requirements of industrial action. But, there are also substantive limitations on industrial action following that principle.

So-called termination lock-outs are especially subject to the ultima ratio test.

So-called termination lock-outs³²³ are lock-outs in the course of which the contract of employment is terminated. These lock-outs must be measured against the ultima ratio principle. Thus, the question is whether these lock-outs are requisite, meaning that there must not be any other weapon of industrial action potentially achieving the same goal in a milder way.

³²⁰ Ipsen, J (2004) Staatsrecht II (7th ed) 54.

³²¹ BAG GS 1971 DB 1061; BVerfGE 1991 NZA 809.

³²² Some aspects of the ultima-ratio principle have been discussed above because these are best comparable to the procedural requirements in the South African law of industrial action. Other aspects of the principle are of substantive nature, and thus, must be mentioned at this point.

³²³ Loesende Aussperrung.

Termination lock-outs have generally been considered illegal.³²⁴ The major Senate of the BAG decided in 1971 that an offensive break away lock-out is not permissible while a defensive break away lock-out should be allowed in cases in which a suspending lock-out is not the milder weapon.³²⁵

Academics generally reject the possibility of any termination lock-outs.³²⁶ Their argument is that by allowing termination lock-outs employers can evade the strict requirements for dismissals laid down in the DPA.³²⁷

The BAG considered this problem as well and supplied employees, whose contract of employment is terminated in the course of a termination lock-out, with a right to reinstatement after the end of industrial action.³²⁸

The result of this jurisprudence is that there is practically no difference between termination lock-outs and lock-outs that only suspend the contractual duties of the parties for the duration of industrial action, because in both cases, employees have the right to go back to work with the same conditions as before. Thus, there seems to be no need for the permission of termination lock-outs.³²⁹

³²⁴ Duetz, W (2003) *Arbeitsrecht* (8th ed) 306.

³²⁵ BAG GS AP Nr. 1 zu Art 9 GG *Arbeitskampf*. In the view of the court, a defensive termination lock-out might be milder if the strike lasts for a very long period of time or if the industrial action is carried out very intensely. According to the BAG, a termination lock-out might also be justified if an employer must restructure because of a strike. The court established the possibility of termination lock-outs besides suspending lock-outs and dismissals, which underlie a strict test.

³²⁶ See Duetz, W (2003) *Arbeitsrecht* (8th ed) 306.

³²⁷ See Duetz, W (2003) *Arbeitsrecht* (8th ed) 306.

³²⁸ BAG GS AP Nr. 1 zu Art 9 GG *Arbeitskampf*.

³²⁹ See also Duetz, 'Die Grenzen von Aussperrung und arbeitskampfbedingter Entgeltverweigerung nach Risikoprinzipien und Kurzarbeitsregeln' (1979) Beil. 14 *Der Betrieb* 3.

bbbb. Appropriateness or proportionality in a narrower sense

The test to be applied in labour law is similar to the original test applied in public law. The kind of industrial action taken must not be disproportionate to the consequences following these actions. With this general principle, various problems of industrial action can be evaluated.

(1) The precept of fair industrial action

From the principle of appropriateness it follows that industrial action must be carried out fairly.

Some academics find that go-slows are an unfair weapon of industrial action. They argue that the employer could not react adequately to such go-slows. One argument is that an employer could not replace employees taking part in a go-slow because their jobs are still occupied.³³⁰ Furthermore, the employer could not withhold remuneration and a lock-out would harm him even more.³³¹

It is submitted that go-slows' consequences are much milder than a strikes' consequences. Therefore, like in South Africa, go-slows should be considered legitimate weapons of industrial action.

(2) Appropriateness of different tools of industrial action

On the basis of the principle of appropriateness the courts developed different limitations on the right to take industrial action.

³³⁰ Richardi R, Wlotzke O et al (2000) *Muenchener Handbuch zum Arbeitsrecht Band III* (2nd ed) 644.
³³¹ Richardi R, Wlotzke O et al (2000) *Muenchener Handbuch zum Arbeitsrecht Band III* (2nd ed) 644.

(a) The area in which industrial action might be taken

Industrial action might only be taken in a so-called collective agreement area³³². Outside this area industrial action has been considered disproportionate.

To understand what a collective agreement area is, again, the nature of centralised collective bargaining must be regarded. As pointed out before, in Germany, any industrial action must be led by an association with the goal to arrive at a collective agreement. These collective agreements are mostly not only valid for a single business but for the whole area in which the bargaining trade union and employers' organisation has members in. This area is called the collective bargaining area. On the other hand, such an agreement is only valid in this area and can claim no validity for any other business. That means that usually not a single employer "fights" only his employees but rather an employers' organisation fights a trade union.

Because the goal of industrial action is the conclusion of a collective agreement for a certain region, such action is only permitted within the limits of this certain region. Lock-outs or strikes outside the borders of that region would pressure the opposing party unnecessarily and disproportionately. Therefore, such industrial action is prohibited.³³³

³³² Tarifgebiet.

³³³ Outside the "Tarifgebiet" neither a trade union nor an employers' organisation can give in to any demand because only in the "Tarifgebiet" the parties negotiate and take industrial action to arrive at a collective agreement.

(b) The limitation on defensive lock-outs and the so-called arithmetic of industrial action³³⁴

Unlike offensive lock-outs, defensive lock-outs are generally permitted. The number of locked-out employees must be proportionate. Therefore, the BAG developed an, often criticised, arithmetic of industrial action, limiting the possibility to lock-out defensively. The term is somewhat misleading since the arithmetic does only limit lock-outs and not strike action.

To understand what the BAG tries to address with its arithmetic, another term, which is important in that context, must be explained. This term is called industrial action area³³⁵. This is the area within the collective bargaining area in which industrial action takes place.

Often unions put only a few employees in a few businesses on strike. These employees are usually employed in key positions.³³⁶ The result is that with relatively little commitment on the side of labour, huge parts of a branch, often embracing the whole collective bargaining area, are forced to a standstill. The result is that employers must pay remuneration to a large numbers of non-striking employees although they have almost no production output. The trade union on the other side does not have to pay a lot of benefits to their members because of the few striking members. The outcome is a strong imbalance between labour and employers. In such a situation, any employers' organisation would be tempted to give in to demands fairly early.

³³⁴ Arbeitskämpfarithmetik.

³³⁵ Kampfgebiet.

³³⁶ Any strike within the collective bargaining area is not a secondary strike because the opponent is always the same employers' organisation, and therefore, the primary opponent that can fulfil the demands of the trade union. A secondary strike only occurs if strike action is taken outside the "Tarifgebiet". For details see Chapter B. V..

Another important aspect is the employers' solidarity with each other. In case strike action takes place in only a few businesses, other employers that are not affected by the strikes, might not show solidarity with their fellow employers. If an employers' organisation has the possibility to instruct employers not yet affected by strikes to lock-out employees in their businesses, and thus, widen the industrial action area, more employers would be involved and solidarity could be kept up. These are the reasons why defensive lock-outs in the whole collective bargaining area in businesses, in which no strike action has been taken yet, are generally permitted.

The result is that even if employees strike only in, for example, three or four businesses, the employers' organisation might lock-out employees in various other businesses within the collective bargaining area. That way a trade-union must pay more benefits to locked-out employees while employers can suspend the contracts of employment of locked-out employees and can dispense from their obligation to pay remuneration. All of this leads to a fairer balance of power between the parties.

But, in order not to disadvantage the side of labour the number of employees that can be locked-out, although in their business no strike action takes place, must be limited. That leads to the assumption that this number must be proportionate.

In result, the BAG decided that the proportionality of such defensive lock-outs must be measured on the number of employees being locked-out as a response to a strike.³³⁷ The court found that if a trade-union calls up to 25 % of all employees of a collective bargaining area to go on strike, an employers' organisation might widen the industrial action area and lock-out another 25 % of all employees in the collective bargaining area.³³⁸ If a trade union calls more than 25 % of the employees of the

³³⁷ BAG 1980 DB 1266; BAG 1980 DB 1274.

³³⁸ BAG 1980 DB 1266 at 1274.

collective bargaining area to engage in strike action the need to keep up solidarity and to suspend more contracts of employment is lower. Here again, a total of 50 % of all employees is the limit. That means that employers might lock-out as many employees as they want to as long as the overall amount of striking or locked-out employees does not exceed 50 %.³³⁹ The court found that ‘overall, it is the impression of the Senate that a disturbance of parity can not be feared anymore if approximately half of all employees of a collective bargaining area are either called on strike or are being locked-out’.³⁴⁰

Consequently, lock-outs would not be possible at all, if a trade-union called at least 50 % of all employees to engage in strike action. Because of that, the jurisprudence of the BAG must be criticised. The result of this jurisprudence is that the unions alone can decide in which businesses industrial action takes place. Employers cannot choose anymore, in which business it would tactically be best to lock-out employees. The arithmetic of the BAG should not only be of disadvantage to employers. A consistent approach would be to allow trade unions to call only 25 % of all employees to go on strike. The employers’ organisation would then have the chance to decide themselves how to answer to the strikes tactically.³⁴¹ In such a case, just as the trade unions, employers could decide where and when they lock-out which employees up to 25 % of them. According to the BAG a trade-union could call for strike, e.g., 48 % of all employees in a collective bargaining area and employers could in response lock-out only another 2 %. In such a case there would be not room for the employers’ organisation to decide where to lock-out employees tactically best. The trade union,

³³⁹ BAG 1980 DB 1266 at 1274.

For example, if a trade union calls 49 % of the employees of a certain „Tarifgebiet“ to go on strike, the employers might only lock-out another 1 % of all employees.

³⁴⁰ BAG 1980 DB 1266 at 1274.

³⁴¹ See also Seiter X ‚Die neue Aussperrungsrechtsprechung des Bundesarbeitsgerichts‘ (1981) *Recht der Arbeit* 65 at 81; Lieb M ‚Gedanken zur Aussperrung‘ (1980) *Der Betrieb* 2188.

on the other hand, could use 48 % of all employees in the area to strike in tactically important positions. This leads to a tremendous disadvantage for employers.

dd. Partial illegality of industrial action

As in South Africa, strike action may occur on grounds of partially justifiable reasons and partially illegal reasons.³⁴²

The BAG judges the legality of industrial action with regard to the main demand of the parties.³⁴³ If this main demand is not one industrial action might be taken about, the strike or lock-out must be considered illegal. If there is more than one main demand, the illegality of only one demand is enough to render the whole industrial action illegal.³⁴⁴

Some academics take a more differentiating approach and consider causality authoritative. Brox and Ruethers claim that if a certain industrial action would have commenced at the same time in the same manner as if the unprotected demand was not raised, the strike should be regarded legal.³⁴⁵ That means that if the employer did not give in to the protected demands of the trade union as well as the unprotected demand, then this was not causal for the industrial action.

c. Comparison

While the substantive requirements for industrial action in the compared countries show both, similarities and differences, this part of the law of industrial action reflects

³⁴² For example, a strike commences with both, the goal to achieve higher remuneration and the demand to dismiss a superior employee. .

³⁴³ BAG 1955 DB 779.

³⁴⁴ BAG AP Nr. 10 zu Art 9 GG *Arbeitskampf*.

³⁴⁵ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) 97.

its different framework very strongly. The substantive requirements in South Africa are regulated in great detail in the Labour Relations Act, while in Germany courts and academics refer to a number of principles to set up concrete, substantive rules for industrial action.

The provisions of s 65 (1) (a) LRA and s 65 (3) (a) (i) LRA find its equivalent in the peace obligation in Germany. Similar to s 65 (1) (a) and s 65 (3) (a) (i) LRA, the peace obligation in Germany prohibits any industrial action about issues which are either part of a still valid collective agreement³⁴⁶ or, beyond that, about any issue the parties expressly decided no industrial action should be taken about during the validity of a collective agreement³⁴⁷. The absolute peace obligation in Germany corresponds to s 65 (1) (a) LRA while the relative peace obligation that is implied in any collective agreement corresponds to s 65 (3) (a) (i) LRA. Consequently, in both countries, the parties to collective bargaining can themselves determine that industrial action cannot be taken over certain issues. Because in Germany single employees do not even hold an individual right to strike, only such trade unions can waive the right to strike over certain issues.³⁴⁸

The possibility to contract out the regulation of s 65 (3) (a) (i) LRA because of the first sentence of S 65 (3) LRA, in Germany, follows from the fact that the relative as well as the absolute peace obligation is either implied or explicitly regulated in a collective agreement. These obligations are subject to the parties' will and not determined by law. They are free to either not constitute an absolute peace obligation or explicitly regulate that in a concluded collective agreement, no relative peace

³⁴⁶ Relative peace obligation.

³⁴⁷ Absolute peace obligation.

³⁴⁸ For the South African law see S 65 (1) (a) LRA.

obligation shall be implied. For the sake of industrial peace and economic reliability the implied relative peace obligation is almost never excluded while the integration of an absolute peace obligation is rarer.

The problem of non-union members being deprived of their right to strike, on grounds of a collective agreement, does not appear in Germany because no collective agreement can pull such employees into its scope.³⁴⁹

In Germany, there exists no regulation comparable to s 65 (1) (b) LRA. The main reason is that no sophisticated system of conciliation and arbitration has been set up in Germany. Besides some regulations in the WCA that provide for arbitration in order to keep a peaceful environment in the workplace, disputes are mainly regulated by adjudication or via industrial action. Therefore, agreements that might regulate the referral of disputes to conciliation or arbitration are not common. This is also the reason why, in Germany, there is no such rule as s 65 (3) (a) (i) LRA, concerning arbitration awards regulating the issue in dispute.³⁵⁰

With regard to the prohibition of industrial action in cases in which the dispute might be adjudicated, the German law is stricter than the South African law. In Germany, no industrial action might be taken over any issue that is one of already existing rights. Consequently, such issues must be referred to the courts. The similar regulation of s 65 (1) (c) LRA provides only for a prohibition of industrial action in cases in which the LRA gives one party the right to refer the dispute to arbitration or adjudication. As pointed out before, this provision is somewhat inconsequential. The general idea that the courts should stay out of power play is the same in both countries. The fact that

³⁴⁹ For South Africa see s 23 (1) (d) LRA. For Germany see s 3 (1) TVG, which regulates that only union members are bound by a collective agreement.

³⁵⁰ While in many countries of the world mediation, arbitration and conciliation becomes more and more common and important, in Germany, almost no such institutions exist.

the LRA makes the two described exceptions to this rule shows that it is less strict on this issue.

If some of a trade union's demands are strikeable and others are not, the case of *Samancor Ltd & another v NUMSA*³⁵¹ suggests that a union must give up impermissible demands. This finding is identical with the judgement of the BAG. It found that one illegal demand is enough to make the whole industrial action illegal. It is submitted that the approach offered by Brox and Ruethers should be adopted in both countries in order to shorten the possibility to strike over the other legal demands as little as possible. The causality test offered by them seems to be ingenious. As long as an illegal demand does not become causal for strike action there seems to be no reason to render the action illegal and factually deprive the trade union and their members of their right to strike over the legal issues.



The reasons for the fact that the German law of industrial action is very strict on the requirement that any such action must be led by a collective bargaining party and must have the conclusion of a collective agreement as its goal have already been described in depth above. But again, the scope of issues the parties may take industrial action about is very different. While the terminology 'dispute of interest' means any dispute that is not based on an alleged right, and is strikeable only to very broad limits of legality, etc., the German notion that strike action might only be taken to set minimum standards, and therefore the scope of strike action, is much stricter.

A major difference between the law of industrial action in both countries is the notion of parity and its consequences for the employers' possibility to lock-out. In both countries the law of industrial action is designed to balance out the powers of the

³⁵¹ 1999 (11) *BLLR* 1202 (LC).

parties involved. However, because of centralised bargaining, in Germany, it is important to differentiate between the collective bargaining area and the industrial action area. In South Africa, these areas are mostly the same, since bargaining takes place on a plant level in many cases. No limitation on the number of potentially locked-out employees exists in South Africa whereas, in Germany, the BAG developed a fairly complicated arithmetic of industrial action. This arithmetic, although often criticised, has been installed in order to find a balance of power within the whole collective bargaining area. Since the area for which a collective agreement is being concluded is mostly not as large or such an agreement is restricted to plant level, in South Africa, a balance of power can be found more easily. Here, this balance is mostly restricted to the parties at a plant level whereas in Germany a balance involving a large number of businesses must be regarded.



A main difference is also the possibility of employers in South Africa to lock-out employees offensively. The definition of lock-out in s 213 LRA provides for employers to exclude employees from the workplace in order to make them compel to accept a demand whereas in Germany the notion of parity is used to prohibit such lock-outs. It is submitted that, by using the long-term judgement for the evaluation of parity, offensive lock-outs should be permitted in Germany as well. The economic situation and unemployment rates in Germany are worsening from year to year. Many employers are forced to dismiss employees on grounds of operational requirements. It would be better for both sides if employers had the chance to pressurise employees to give in to some of their economic demands in order to keep up employment for a larger number of employees even if they would have to work for worse conditions.

V. Secondary strikes

Different to primary strikes, secondary strikes are directed against an employer that is not the addressee of the employees' grievance or dispute. The strikers simply go on strike to support the goals of the primary strike of other employees and have no direct interest in the outcome of this primary strike. The affected employer and the addressee of the grievances or dispute are not identical, which is a major problem for the German law where the opponent of the industrial action must generally be identical with the opposing collective bargaining party. The goal of the secondary strikers is that their employer exerts some influence on the employers involved in primary industrial action. Because the secondary employer cannot give in to the employee' demands this is the only way for him to stop the secondary strikes and get her/his business going properly again. Also, in case the opposing party of the primary strike is not a single employer but an organisation, pressure on this organisation will improve as soon as the secondary strikers refuse to do their work and the employers organisation will be tempted to give in to the employees' demands earlier. Overall, secondary strikes are a very effective way to pressure the employers' side. However, the legality of such industrial action is answered differently in both countries. As will be explained below, it is submitted that both views, the general legality of secondary strikes in South Africa and the general illegality of them in Germany is coherent with the different legal frameworks in either country.

1. South Africa

S 66 LRA provides for a definition of secondary strikes and the requirements for such strike action.

Beyond the general content of secondary strikes as explained above, the definition of secondary strikes as laid down in s 66 (1) LRA was subject to application and interpretation by the courts.³⁵²

Firstly, the Labour Court found that, irrespective of what name a union gives their action, a secondary strike takes place only if the requirements of the definition laid down in s 66 LRA are met.³⁵³

Another crucial question that arose in court was, if co-workers striking in support of a demand of their striking co-employees were on a secondary strike or a primary strike.³⁵⁴ The court held that a strike of employees that are party to the same employment relationship is always a primary strike and within the scope of s 64

³⁵² S 66 LRA reads as follows:

- (1) In this section "secondary strike" means a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand and referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand.
- (2) No person may take part in a secondary strike unless-
 - (a) the strike that is to be supported complies with the provisions of sections 64 and 65;
 - (b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement; and
 - (c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.
- (3) Subject to section 68(2) and (3), a secondary employer may apply to the Labour Court for an interdict to prohibit or limit a secondary strike that contravenes subsection (2).
- (4) Any person who is a party to proceedings in terms of subsection (3), or the Labour Court, may request the Commission to conduct an urgent investigation to assist the Court to determine whether the requirements of subsection (2)(c) have been met.
- (5) On receipt of a request made in terms of subsection (4), the Commission must appoint a suitably qualified person to conduct the investigation, and then submit, as soon as possible, a report to the Labour Court.
- (6) The Labour Court must take account of the Commission's report in terms of subsection (5) before making an order.

³⁵³ See *Afrox v SA Chemical Workers Union* (1) 1997 (18) *ILJ* 399 (LC).

³⁵⁴ *CWIU V Plascon Decorative (Inland) (Pty) Ltd* 1998 *JOL* 3750 (LAC).

LRA.³⁵⁵ This finding is coherent with the definition of secondary strikes set out by s 66 LRA and the rationale of the named provision.³⁵⁶

Another part of the definition that is subject to interpretation is the phrase ‘material interest’. A ‘material interest’ in a demand referred to a bargaining council exists when the outcome of the negotiations in that council would influence their chance in the negotiation process.³⁵⁷ This interest must be considered material if it is of consequence.³⁵⁸ In *Barlows Manufacturing Co Ltd v MAWU*³⁵⁹ the court determined that a material interest exist, if a demand has a ‘specific effect and value’ for the secondary strikers.³⁶⁰

The stipulation was obviously introduced to cover cases in which an agreement concluded in a council governs only a sector of an industry. If this agreement is likely to influence the content of agreements in sectors in which an alleged secondary strike takes place, the workers on strike in that section will have a material interest in the demand referred to the council because the demand does have a specific effect and value to them. Therefore, they will be on a primary strike.

If a strike is to be deemed a secondary strike its legality must be tested against the requirements set out in s 66 (2) LRA. Firstly, the primary strike must be protected, and therefore comply with s 64 and s 65 LRA.

S 66 (2) (b) LRA provides for the necessity not only to give notice to either the employer or the employers’ organisation but demands receipt of this notice as well.

³⁵⁵ See also *Afrox v SA Chemical Workers Union (1)* 1997 (18) ILJ 399 (LC).

³⁵⁶ ‘other employees against their employer’

³⁵⁷ Brasse M. S. M. (1998) *Employment and Labour Law-Commentary on the Labour Relations Act* A4: 32A.

³⁵⁸ Brasse M. S. M. (1998) *Employment and Labour Law-Commentary on the Labour Relations Act* A4: 32A.

³⁵⁹ 1988 (9) ILJ 995 (IC).

³⁶⁰ At 1006A.

In *Sealy of SA (Pty) Ltd & others v PPWAWU*³⁶¹ it was held that receipt of the notice by a holding company suffices.

The strike notice must be received at least seven days prior to the commencement of the strike. This wording is in contrast to Froneman DJP's findings in the judgement of *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction & Allied Workers Union (2)*³⁶². In this judgement, he found that the notice of a primary strike must include a specific time for its commencement. But, the wording of s 64 (1) (b) LRA differs from the phrasing used in s 66 (2) (b) LRA. The former requires notice 'of the commencement of the strike' while the latter only requires 'notice of the proposed secondary strike'. This difference implies that, in case of secondary strikes, the notice must only inform of the intention to engage in secondary strike action, without giving the information about the time of the commencement. Thus, Froneman's interpretation is to be rejected.

In s 66 (2) (c) LRA the requirement of proportionality is stipulated.³⁶³ The formulation of the subsection regulates that the larger the effect of a secondary strike on the primary employer is, the more it is likely to be considered protected even if it has a strong negative impact on the secondary employer.³⁶⁴ On the other hand, if the impact on the primary employer is negligible then a secondary strike is more likely to be considered unprotected.

³⁶¹ 1997 (4) *BLLR* 421 (LC).

³⁶² 1997 (6) *BLLR* 697 (LAC).

³⁶³ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 303.

³⁶⁴ For, example, if the secondary employer is a component supplier of the primary employer, the impact on the primary employer's business could be immense because the fabrication of certain parts might become impossible without the components. See also Du Toit D et al (2003) *Labour Relations Law* (4th ed) 303.

The Labour Court in *Samancor Ltd v NUMSA*³⁶⁵ first investigated what impact the secondary strike had on the primary employer's business. In the given case, the secondary employer supplied the primary employer with 80 % of chrome for its production and held 33 1/3 % of the primary employer's business.³⁶⁶ From these facts the influence of the secondary strike on the primary employer's business was immense. In the second stage of the enquiry, Landman J determined the proportionality of the secondary strike. He constituted that the feasibility of the secondary strike is not part of the standard to be applied. The test stipulated by him 'involves a determination of the possible outcomes as opposed to the probable results'.³⁶⁷ The court then proceeded with its measure for the determination of proportionality by stating that the 'nature and extent' of the secondary strike is the relevant issue and not the damage done to the secondary employer.³⁶⁸

Another important recent judgement is the case of *Billiton Aluminium SA v NUMSA*³⁶⁹. Firstly, the judgement also adopted the view expressed by Landman J that the damage inflicted on the secondary employer's business is no indication of the proportionality of a secondary strike.³⁷⁰ Secondly, the court held that a relationship between the secondary employer and the primary employer is necessary.³⁷¹ In comparison to the German law it is important to mention that in the named case it sufficed that the same company owned both, the primary and the secondary business. The court held that this indirect relationship could lead to a 'vulnerability of all three

³⁶⁵ 1999 (11) *BLLR* 1202 (LC).

³⁶⁶ See at paras 16-18.

³⁶⁷ At para 24.

³⁶⁸ With nature and extend the court meant withholding labour, timing and other ramifications. On the facts of the case Landman J found that the employees on secondary strike should have limited their action on the division producing the chrome for the primary employer.

³⁶⁹ 2002 (1) *BLLR* 38 (LC).

³⁷⁰ At para 10.

³⁷¹ At para 19. This confirms the same view found in *Sealy of SA (Pty) Ltd v PPWAWU* 1997 (18) *ILJ* 671 (LAC).

to the effect of market sentiment on their share prices and so could cause the secondary strike to have an effect on the primary employer indirectly'.³⁷²

2. Germany

A secondary strike³⁷³ in Germany occurs if employees engage in strike action outside of a collective bargaining area in order to support a primary strike. As long as employees strike in businesses within the collective bargaining area they only widen the industrial action area. Such strikes are considered primary strikes. These strikes are directed against the opponent that is the addressee of their demands, namely the employers' organisation that is responsible for collective bargaining in the collective bargaining area.

Where the South African law gives a clear answer as to whether secondary are a legal weapon of industrial action or not, the German law was not always as clear on this issue.

Before 1985 some academics regarded secondary strikes permissible.³⁷⁴

But, in 1985 the BAG clearly stated that secondary strikes are not permissible and this view is now generally accepted.³⁷⁵

It is submitted that the opinion of the BAG is to be supported because secondary strikes violate various limitations on the right to industrial action that are very important to the German law of industrial action.

³⁷² See for particularities on secondary strikes in case of retrenchment disputes s 189A LRA. Fall lesen.

³⁷³ Sympathy strike.

³⁷⁴ Wohlgenut 'Rechtsfragen der Solidaritätsstreiks' (1980) *Arbeit und Recht* 33 at 35.

³⁷⁵ BAG 1985 NZA 504.

The main argument of the BAG was that secondary strikes do not have the goal to directly conclude a collective agreement.³⁷⁶

Although, in conclusion he finds secondary strikes illegal as well, Lieb argues that this limitation cannot claim validity for secondary strikes because, in his view, it is suited only to primary strikes.³⁷⁷ However, Lieb disregards the influence of art 9 (3) GG.³⁷⁸ A strike can only support a union's fight for a collective agreement in a certain region. In an area where no collective bargaining takes place, industrial action is not protected by the Constitution.³⁷⁹ Also, the requirement that the opponent of the industrial action is not identical with the opposing collective bargaining party is not met³⁸⁰. On top of that, secondary strikes are not requisite. As described above, the preferable abstract-material notion of parity generally considers the power of the parties equal. Weapons of industrial action are permissible only if they are requisite to balance out imbalances that have occurred.³⁸¹ It is submitted that the other weapons of industrial action, which employees have available, are sufficient. Therefore, industrial action with all of its consequences should not be extended if there are no severe reasons for such an extension.³⁸²

In the named case, the BAG developed various important exceptions to its finding that secondary strikes are generally not permissible. If an employer, in whose business secondary strike action takes place, gives up her/his neutrality by taking over the production of the employer, in whose business primary industrial action takes place,

³⁷⁶ BAG 1985 NZA 504 at 507.

³⁷⁷ Lieb M (2003) *Arbeitsrecht* (8th ed) 228.

³⁷⁸ Lieb M (2003) *Arbeitsrecht* (8th ed) 228.

³⁷⁹ Lieb M (2003) *Arbeitsrecht* (8th ed) 228.

³⁸⁰ Duetz, W (2003) *Arbeitsrecht* (8th ed) 296.

³⁸¹ As seen above, that is why strikes are permissible but defensive lock-outs only up to certain intensity.

³⁸² Richardi R, Wlotzke O et al (2000) *Muenchener Handbuch zum Arbeitsrecht Band III* (2nd ed) 652.

then secondary strikes shall be permissible.³⁸³ The court also determined an exception if the economic relationship between the businesses in which primary and secondary strike action takes place, makes the enterprises economically speaking an entity even if the secondary business is legally independent.³⁸⁴ The court did not define in which cases such an entity can be assumed but referred to another of its decisions.³⁸⁵ In this case the connection of two companies was as follows:

The same persons owned both companies or had general authority for both companies.³⁸⁶ Both companies used the same rooms for their business and one company supplied the other almost exclusively with goods that the other distributed.³⁸⁷

This referencing suggests that the requirements for the exceptions developed by the BAG seem to be so narrow that they almost never play a role in practice.³⁸⁸ Thus, the described exceptions do not change the general finding of the judgement that secondary strikes are not allowed.

This result obviously does not comply with the ‘General Survey ILO *Freedom of Association, the right to organise and collective bargaining and rural workers’ organisations* 1994’ on ILO Convention No 87, which provides for a right to take secondary strike action. However, as described before this interpretation of Convention No. 87 is not binding law in Germany.³⁸⁹

³⁸³ BAG 1985 NZA 504 at 507.

³⁸⁴ BAG 1985 NZA 504 at 508.

³⁸⁵ This was the case of BAG 1964 NZA 1291.

³⁸⁶ BAG 1964 NZA 1291 at 1293.

³⁸⁷ BAG 1964 NZA 1291 at 1293.

³⁸⁸ See also Cooper C, ‘Sympathy strikes’ (1995) 16 *ILJ* 759 at 770.

³⁸⁹ See Chapter B. I. 1. c..

3. Comparison

Obviously the main difference between Germany and South Africa regarding secondary strikes is their general legality in South Africa and their general illegality in Germany. The German law of industrial action seems to be somewhat inflexible on that issue. On one hand, secondary strikes seem to be a very effective way of industrial action and do also comply with the general freedom to select any weapon of industrial action. The reason why they cannot be allowed in Germany are the principles, which have been established over the years. These principles seem to make some forms of industrial action, like secondary strikes, impossible, and hence, delay the development of such new forms. But overall, as shown above, these very principles are a logical consequence of the collective bargaining system from which the shape of industrial action is so dependent.

In South Africa on the other hand, no such strict principles exist. While secondary strikes were also permitted before the enactment of the new LRA without being subject to any specific regulation, the legislature could freely shape the requirements and consequences for secondary strikes. The strict limitations due to a centralised collective bargaining system do not exist in South Africa. In result, it seems coherent that regarding the principles secondary strikes are considered illegal in Germany and that with respect to the principle of parity some exceptions are made while there is no reason to render such strike action generally illegal in South Africa.

At first glance, the requirement of a relationship between primary and secondary employers seems to be similar in both countries. However, by taking a closer look, it turns out that these requirements have a very different content in both countries.

One main difference is that, following the notion of parity, a secondary strike in Germany can only be permissible if a secondary employer becomes part of the powerplay herself/himself because she/he gives up neutrality or is economically an unity with the primary employer. In South Africa it is not necessary that a secondary employer is taking part in power play. Of importance is only the impact secondary strike action has on a primary employer and the nature and extent of the secondary strike.

With regard to a relationship between secondary and primary employers, in South Africa, it suffices if there is an indirect influence on the primary employer through the secondary strike. This might already be the case if there is a legal connection between the companies. In Germany, an economic unity between a primary and a secondary employer is necessary to render a secondary strike permissible. Such a unity demands far more than, for example, the existence of a common parent company and an influence on share prices. It seems that the primary and the secondary employer must economically be one and the same even if they are legally independent.

VI. Alternative employees' and employers' weapons of industrial action³⁹⁰

1. Alternative employees' weapons and picketing

Picketing can best be described as activities by persons that are positioned close to an employer's premises and who aim to persuade employees willing to work to join

³⁹⁰ On the employees side picketing is one of these weapons. But, the chapter must be widened above the scope of classical picketing actions because in Germany other weapons like boycotts etc. are practised weapons of industrial action as well.

strike action.³⁹¹ Pickets may also try to prevent an employer from taking on substitute workers or appeal to suppliers or customers to boycott the opposed employer.³⁹² Such actions can increase the effectiveness of strike action immensely and are a very common toll accompanying industrial action.

a. South Africa

Picketing in South Africa can be either primary, at the premises of the own employer, or secondary, at the premises of another employer. Picketing is protected by various constitutional rights, namely the freedom of expression³⁹³, the freedom to assembly³⁹⁴, and the right to demonstrate³⁹⁵, as well as the rights to picket³⁹⁶ and to present petitions³⁹⁷.

It is expressly regulated in s 69 of the LRA³⁹⁸ and with regard to its constitutional entrenchment any rule limiting the right to picket must pass the test of s 36 of the Constitution.³⁹⁹

³⁹¹ Dietrich T, Hanau P, Schaub G (2004) *Erfurter Kommentar zum Arbeitsrecht (4th ed)* 131.

³⁹² See Du Toit D et al (2003) *Labour Relations Law (4th ed)* 304.

³⁹³ S 16 of the Constitution.

³⁹⁴ S 17 of the Constitution.

³⁹⁵ S 17 of the Constitution.

³⁹⁶ S 17 of the Constitution.

³⁹⁷ S 17 of the Constitution. See Du Toit "Labour and the Bill of Rights" in (1997) *Bill of Rights Compendium* at 4B31.

³⁹⁸ S 69 of the LRA reads as follows:

- (1) A registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating-
 - (a) in support of any protected strike; or
 - (b) in opposition to any lockout.
- (2) Despite any law regulating the right of assembly, a picket authorised terms of I subsection (1), may be-
 - (a) in any place to which the public has access but outside the premises of an employer; or
 - (b) with the permission of the employer, inside the employer's premises.
- (3) The permission referred to in subsection (2)(b) may not be unreasonably withheld.
- (4) If requested to do so by the registered trade union or the employer, the Commission must attempt to secure an agreement between the parties to

The basic rules for picketing are provided for in s 69 (1) and s 69 (2) LRA and by the Code of Good Practice on Picketing.

The first important limitation put down in s 69 (1) LRA is that any picket must be authorised by a registered trade union.⁴⁰⁰ S 69 (1) LRA also provides the opportunity for supporters, which embraces non-union members as well as the public⁴⁰¹, to participate in the picket.

the dispute on rules that should apply to any picket in relation to that strike or lock-out.

(5) If there is no agreement, the Commission must establish picketing rules, and in doing so must take account of-

- (a) the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised; and
- (b) any relevant code of good practice.

(6) The rules established by the Commission may provide for picketing by employees on their employer's premises if the Commission is satisfied that the employer's permission has been unreasonably withheld.

(7) The provisions of section 67, read with the changes required by the context, apply to the call for, organisation of, or participation in a picket that complies with the provisions of this section.

(8) Any party to a dispute about any of the following issues may refer the dispute in writing to the Commission-

- (a) an allegation that the effective use of the right to picket is being undermined;
- (b) an alleged material contravention of subsection (1) or (2);
- (c) an alleged material breach of an agreement concluded in terms of subsection (4); or
- (d) an alleged material breach of a rule established in terms of subsection (5).

(9) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(10) The Commission must attempt to resolve the dispute through conciliation.

(11) If the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.

³⁹⁹ Du Toit "Labour and the Bill of Rights" in (1997) *Bill of Rights Compendium* at 4B31.

⁴⁰⁰ The Code of Good Practice regulates specifics on the authorisation in Item 2 (1). This item reads as follows:

- (1) A picket contemplated in section 69 of *this Act* must be authorised by a registered *trade union*. The authorisation must be made in accordance with the *trade union's* constitution. That means that there must either be a resolution authorising the picket or a resolution permitting a *trade union official* to authorise a picket in terms of section 69(1). The actual authorisation should be formal and in writing. A copy of the resolution and, if necessary, the formal authorisation ought to be served on the *employer* before the commencement of the picket.

Du Toit D et al (2003) *Labour Relations Law* (4th ed) 306. The reason for this requirement is that unions shall take responsibility for the picketing activities.

⁴⁰¹ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 306.

S 69 (1) LRA also requires that the picket must be peaceful. While persuasion is allowed intimidation and violence are prohibited and might lead to civil and criminal liability under the Intimidation Act.⁴⁰²

In Item 6 (6) of the Code of good practice some rules for peaceful picketing are laid down. According to this subsection picketers may carry placards, chant slogans, sing and dance. Subsection 7 regulates what picketers may not do. They may not 'physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employers premises' or 'commit any action which may be unlawful, including but not limited to any action which is, or may be perceived to be violent'.⁴⁰³

In addition to these specifications of the Code, the Labour Court set certain standards in *Picardi Hotels Ltd v FGWU*⁴⁰⁴. The court found that the following activities are permissible:



'to stand outside the gates of the applicant's premises if it is a public area and if that is in furtherance of their strike;

to hold, display and wave placards on which would be written what they want to communicate to their employer, to the public as well as to anyone who may have dealings with the employer provided what is written on the placards does not constitute a criminal offence;

⁴⁰² Act 72 of 1982.

⁴⁰³ Item 6 (7) of the Code of Good Practice Picketing.

⁴⁰⁴ 1999 (6) *BLLR* 601 (LC) at para 25.

to speak to those whom the employer may be seeking to employ as temporary labour or replacement labour with a view to persuading them not to work for the employer during the strike so as to support the strike;

to speak to, or communicate with, members of the public, customers of the employer and those who have business dealings with the employer as a show of support for their strike or to suspend their dealings with the employer pending the resolution of the dispute giving rise to the strike;

(to) sing, chant and dance in furtherance of their strike to draw the public's attention to their strike or to the dispute giving rise to the strike'.⁴⁰⁵

Compliance with all of these standards is supposed to be advanced by the demand to appoint a convenor and the recommendation to appoint marshals by the trade union.⁴⁰⁶ The employer shall appoint a person representing her/him during the picket.⁴⁰⁷



S 69 (1) (a) and (b) LRA regulate the events in which picketing may be allowed. Picketing is allowed only to support a protected strike or in opposition to a lock-out.

According to s 69 (2) (a) and (b) LRA picketing may take place outside an employer's premises or, with the permission of the employer, inside an employer's premises. The former formulation 'an employer' suggests that workers might engage in picketing outside any employers premises, while the latter regulates that provided for the existence of the permission, picketing on premises is only allowed on the property of the employer in question.

⁴⁰⁵ At 1921B-F.

⁴⁰⁶ Code of Good Practice on Picketing item 6 (1) and item 6 (4).

⁴⁰⁷ Item 6 (3) of the Code of Good Practice on Picketing.

The employer may not unreasonably withhold such permission.⁴⁰⁸ This regulation states that if an employer cannot prove that the entry of picketing employees would disrupt the production process, then he is obliged to let them enter.⁴⁰⁹

It is also important that the parties can, with help of the CCMA, set rules that apply to pickets themselves.⁴¹⁰ If one of the parties, employer or trade union, asked the CCMA to secure such an agreement but no such agreement is reached, the CCMA can set rules itself.⁴¹¹

b. Germany

Like in South Africa other weapons of industrial action than strikes exist. In Germany, these actions in Germany include boycotts, blockades or occupations of employers' operations and typical picketing actions. The right to picketing is embraced by the right to strike and follows art 9 (3) GG directly.⁴¹² That means that only employees holding a right to strike may engage in picketing.⁴¹³ Consequently, because secondary strikes are generally not allowed in Germany secondary picketing is impermissible as well. Provided none of the narrow exceptions for the permission of secondary strikes exist, the following remarks are only relevant for primary picketing.

⁴⁰⁸ S 69 (3) LRA.

⁴⁰⁹ See for the goal of the subsection Du Toit D et al (2003) *Labour Relations Law* (4th ed) 308.

⁴¹⁰ S 69 (4) LRA.

⁴¹¹ See for details s 69 (5) (6) and (7) and the Code of Good Practice on Picketing (4).

⁴¹² BAG AP Nr. 108 zu Art 9 GG *Arbeitskampf* at 10.

⁴¹³ Picketing is only allowed in order to support a protected strike.

One possible tool supporting strikes is the boycott. In such a case, employees hinder an employer to exercise her/his business activities. One possibility is to pressure an employer not to employ certain job-seekers or to appeal to employees not to sign contracts of employment with certain employers.⁴¹⁴ The other possibility is to appeal to other businesses to cut off the employer from services or goods.⁴¹⁵ Such boycott actions are considered legitimate weapons of industrial action and generally permitted within the broad limitation that violence or massive intimidation of suppliers or job-seekers, etc., would be illegal.

In industrial action situations it is, for example, possible for strikers to call on third parties to break their contracts with the employer, e.g. not to deliver unfinished goods.⁴¹⁶ Normally such a call would be considered an enticement to breach of contract by the striking and boycotting employees and would be illegal in terms of any employee's duty to considerateness based on the contract of employment and ss 241 (2), 242 BGB.⁴¹⁷

Other conceivable employees' actions are the blockade or occupation of an employers' operation in order to keep away customers, deliveries and employees willing to perform work, which are, in practice, both considered illegal by academics as well as courts.⁴¹⁸

One reason is that these actions violate the law. The occupation of an operation must be considered an unlawful entry, and thus, violating s 123 of the German criminal

⁴¹⁴ The later is e.g. the case if trade unions call employees/job-seekers not to get employed by an employer in order to do the work that striking union members are not willing to perform.

⁴¹⁵ Duetz, W (2003) *Arbeitsrecht* (8th ed) 610a.

⁴¹⁶ Gamillscheg F (1997) *Kollektives Arbeitsrecht Bd. I* 1054.

⁴¹⁷ Duetz, W (2003) *Arbeitsrecht* (8th ed). This duty embraces the considerateness with respect to the rights, any objects of legal protection and legitimate interests of an employer. This duty is drawn from the very broadly formulated ss 241 (2), 242 BGB, which regulate that any contractual partner must be considerate of the interests of the other.

⁴¹⁸ See BAG AP Nr. 108 zu Art 9 GG *Arbeitskampf*.

code, which penalises unlawful entries. Also, it is not requisite to produce parity because an employer cannot adequately respond to blockades and occupations. Because of their immense impact and the lack of possibilities to respond to them these actions would cause an imbalance of power.⁴¹⁹

The 'General Survey ILO *Freedom of Association, the right to organise and collective bargaining and rural workers' organisations* 1994' with reference to ILO Convention No. 87 allows for peaceful occupations of operations. As explained above, this interpretation is not binding for the German law.⁴²⁰

Besides the limitations on the described activities, picketing is generally allowed in Germany but is subject to strict limitations flowing from the precept of fair industrial action.

Authority for these strict limitations is a judgement of the BAG from 1988.⁴²¹ The court found that only pleading and persuasion are allowed.⁴²² Disproportionately impertinent disturbances of colleagues or other persons, when they try to access or leave the premises of an employer, are forbidden.⁴²³ As a result, it is not allowed to block the access or exit of an employers' premises, to form human chains or walls, to build extremely narrow alleys coupled with the humiliation of passing employees or to check the identity of passing employees as well as frisking their belongings.⁴²⁴

Picketing actions violating criminal law are under any circumstances not permissible. For example, a picket blocking the premises of an employer for employees willing to

⁴¹⁹ Duetz, W (2003) *Arbeitsrecht* (8th ed) 303.

⁴²⁰ See Chapter B. I. 1. c..

⁴²¹ BAG AP Nr. 108 zu Art 9 GG *Arbeitskampf*.

⁴²² BAG AP Nr. 108 zu Art 9 GG *Arbeitskampf* at 10.

⁴²³ See T, Hanau P, Schaub G (2004) *Erfurter Kommentar zum Arbeitsrecht* (4th ed) 131.

⁴²⁴ BAG AP Nr. 108 zu Art 9 GG *Arbeitskampf* at 10..

work⁴²⁵ or threatening⁴²⁶, insulting⁴²⁷ or even physically abusing⁴²⁸ other employees or an employer, are violating criminal law and are illegal.

c. Comparison

The content of and the limitations on the right to picket are quite similar in South Africa and Germany.

In Germany, employees not organised in a trade union might join a strike as they can in South Africa because every employee has the right to strike if the strike is led by a trade union. Therefore, any employee has the right to take part in picketing.⁴²⁹ On top of that, the outcome of the strike is to their benefit.⁴³⁰ There seems to be no reason why members of the public should not be allowed to take part either, as long as they follow the described limitations.



In both countries picketing may only occur if the strike the employees are involved in is protected.

The prohibition of secondary picketing in Germany is the consequence of the prohibition of secondary strikes. Because picketing can only take place if strike action is allowed, secondary strikes must generally be prohibited.

In both countries entering employers' premises without permission is prohibited, as well as any intimidation of others or violations of criminal law.

⁴²⁵ Unlawful compulsion according to s 240 of the German criminal code.

⁴²⁶ Threatening is accusable according to s 241 of the German criminal code.

⁴²⁷ Insult according to s 185 of the German criminal code.

⁴²⁸ Physical injury according to s 223 of the German criminal code.

⁴²⁹ BAG AP Nr. 130 zu Art 9 GG Arbeitskampf.

⁴³⁰ The collective agreement, which is concluded after power-play, is not binding for non-union members directly, s 3 (1) TVG. But, in practice, most employers accommodate the contracts of employment of the outsiders to the new collective agreement. The reason is that try to prevent outsiders from becoming union-members in order to gain the advantages of collective agreements. Higher union-membership rates would only strengthen trade unions.

Because there is no such institution like the CCMA in Germany, no such council can provide for additional rules. However, it is possible in Germany to set rules for picketing in collective agreements.

2. Other employers' weapons of industrial action

Besides locking-out employees, employers may also use other weapons to respond to industrial action.

a. South Africa

aa. Sanctions upon strikers and bonuses paid to non-strikers

Employers could try to undermine industrial action taken by employees by imposing financial sanctions upon strikers or by paying bonuses to non-strikers. By doing this solidarity between employees might crack and their actions could easily become ineffective.

Such employer' actions could be in conflict with s 5 (1), S 5 (2) (c) (vi), s 5 (2) (b) and s 5 (3) LRA, which state that no person may 'discriminate against'⁴³¹ or 'prejudice'⁴³² an employee for exercising any right conferred by the Act, or 'prevent'⁴³³ an employee from exercising a right conferred by the Act, or 'advantage, or promise to advantage' an employee in return for not exercising any right conferred by the Act.⁴³⁴

⁴³¹ S 5 (1) LRA.

⁴³² S 5 (2) (c) (vi) LRA.

⁴³³ S 5 (2) (b) LRA.

⁴³⁴ S 5 (3) LRA.

Under the old LRA, the courts partially decided that such payments were not unfair.⁴³⁵ Under the current Act, in the case of *FAWU v Pets Products (Pty) Ltd*⁴³⁶, the Labour Court found that such employers' actions infringe the named sections of the LRA. In the given case, an employer gave a R200 voucher to non-striking employees to reward them for overtime work performed due to a strike. The union that initiated the strike claimed that this was an infringement of s 5 (1) LRA and s 5 (3) LRA, while the employer argued that the cause for the payment was the hard work done by the non-strikers and not their abstention from striking. The court ascertained that the non-strikers were awarded the bonus because they did not take part in the strike. The reason for this conclusion was that there was no practice of remunerating employees for overtime work at all, however, in this specific case overtime work was being remunerated. Accordingly, these benefits must have been granted for the denial to participate in the strike.



bb. Dismissal of striking employees

The dismissal of employees in a period in which industrial action takes place, creates a conflict between the interests of employers, which might be able to claim operational requirements for a dismissal, and the interest of employees not be discriminated because of their participation in a strike. Also, if there was no limitation on the right to dismiss employees during industrial action, employers would not even have to use the recourse to lock-out because they could just dismiss striking employees and employ different ones. In result, the courts developed ways to

⁴³⁵ See *CWIU v BP South Africa* 1992 (12) ILJ 599 (IC); *SACCAWU v OK Bazaars* 1995 (4) LCD 385 (A).

⁴³⁶ 2000 (7) BLLR 781 (LC).

determine in which cases a dismissal during industrial action periods can be considered justified and in which cases it must be considered illegal.

In South Africa, the dismissal of employees participating in or supporting a protected strike is regularly within the scope of all of the following provisions. Firstly, s 67 (4) LRA and s 187 (1) (a) LRA are applicable. These provisions state that no employee participating in or supporting a protected strike shall be dismissed and that such dismissals are automatically unfair. However, also s 67 (5) LRA, which states that a fair dismissal is not precluded if it is related to an employee's conduct during a protected strike or for reasons based on operational requirements, must be considered in such cases.

From the application of all of these provisions the question arises, under which circumstances a dismissal during protected strike action is be considered fair or unfair?



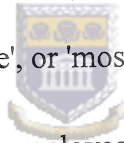
The leading case on this issue is the judgement of the Labour Appeal Court in *SACWU v Afrox Ltd*⁴³⁷. The court held that a dismissal based on operational requirements is allowed, even if the operational requirements were caused by a protected strike.

The court then ascertained a twofold test, which is best explained in the words of the court:

‘The first enquiry in such a case would be to determine the reason for the dismissal of the striking employees. If that reason is for participation or support (or intended participation or support) of a protected strike, and not for operational requirements, the dismissal will be automatically unfair (section 187 (1) (a)). The enquiry into the

⁴³⁷ 1999 (10) *BLLR* 1005 (LAC).

reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilised here (Compare *S v Mokgethi and others* 1990 (1) SA 32 (A) at 39D - 41A; *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34). The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there were no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal.⁴³⁸



According to this test dismissals of employees participating in a protected strike are possible as long as the 'main' or 'dominant' or 'proximate', or 'most likely' cause of the dismissal was not the participation or support of the strike but rather operational requirements or another conduct of the dismissed employee. If the employer can prove that the latter were the reasons for the dismissal, it is not automatically unfair. However, it might still be unfair if the employer cannot prove that she/he complied with the procedural requirements of a fair dismissal.⁴³⁹

Obviously, dismissing employees participating in an unprotected strike is possible as well. S 68 (5) LRA provides that 'participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal', i.e. based on conduct. For the

⁴³⁸ At paras 31-32.

⁴³⁹ In the discussed context the employer must usually prove the existence of operational requirements.

determination whether such a dismissal was fair or not, the Code of Good Practice: Dismissal in Schedule 8, provides guidelines. In subitems (1) and (2) of Item 6 of Schedule 8 it provides for certain requirements for such a dismissal. The most important ones are the following. The substantive fairness of such a dismissal must be measured in particular with regard to ‘the seriousness of the contravention of this Act⁴⁴⁰, ‘attempts made to comply with this Act’⁴⁴¹, and ‘whether or not the strike was in response to unjustified conduct by the employer’⁴⁴². Besides these substantive requirements, Item 6 (2) of the Code provides for procedural requirements. These are, that the employer must contact a trade union representative to discuss the course of action it intends to adopt at the earliest opportunity. Also, the employer should issue an ultimatum that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum.⁴⁴³

The requirements for the substantive fairness of the dismissal constitute a test determining how serious the contravention of the Act is and whether the strikers or the trade union tried to comply with the Act.

The ultimatum tends to give strikers the chance to re-think their conduct and abstain from continuing to take part in the strike.

It will be shown that without specified legislation the German law comes to similar results.

⁴⁴⁰ Item 6 (1) (a).

⁴⁴¹ Item 6 (1) (b).

⁴⁴² Item 6 (1) (c).

⁴⁴³ There has also been a major controversy whether, in addition, the strikers have a right to a fair hearing before dismissal. The LAC ruled that according to the *audi alteram partem* principle the employees must be heard before dismissal. See the cases of *Modise v Steve's Spar Blackheath* 2000 (5) BLLR 496 (LAC); *Karras v SASTAWU* 2001 (1) BLLR 1 (LAC); *Mzeku v Volkswagen SA (Pty)* 2001 (8) BLLR 857 (LAC).

cc. Replacement Labour

Replacement labour is surely a tool that has a tremendous influence on the balance of power during industrial action and must be considered a strong weapon of industrial action on the employers' side. If an employer can maintain production during strikes, such a strikes will definitely do very less harm to her/his business as otherwise. Thus, she/he will be able to withstand the demands of labour much longer. Thereby, the effects of a strike will be strongly reduced. In result, the possibility to replace employees during strikes or lock-outs is a very sensitive topic, which has been heavily discussed before the enactment of the LRA.⁴⁴⁴ S 76 of the LRA, which regulates the issue of replacement labour contains a compromise between the interests of employers and labour.

Firstly, replacement labour during industrial action is generally permitted. However, s 76 (1) (a) and (b) LRA read with s 76 (2) LRA prohibit replacement labour in the case of maintenance services and in case of lock-outs that were not in response of strike action but initiated the industrial action.⁴⁴⁵ The formulation 'in response to a strike' has been interpreted in the sense that lock-out notice was issued after strike notice has been given.⁴⁴⁶ It is not necessary that strike action has already set in.⁴⁴⁷ The relevant moment for the evaluation whether the lock-out was in response to a strike or not is only its beginning. Even if the employees cease to strike later, the lock-out initially implemented in response will not lose this status.⁴⁴⁸

⁴⁴⁴ See for details on the negotiation process: Du Toit D et al (2003) *Labour Relations Law* (4th ed) 27-2.

⁴⁴⁵ See for details: Du Toit D et al (2003) *Labour Relations Law* (4th ed) 316-317. The German law calls such lock-outs 'offensive lock-outs'.

⁴⁴⁶ *Technikon SA v NUTESA* 2001 (1) *BLLR* 58 (LAC).

⁴⁴⁷ *Technikon SA v NUTESA* 2001 (1) *BLLR* 58 (LAC).

⁴⁴⁸ *Ntimane v Agrinet* 1999 (2) *BLLR* 248 (LC).

The formulation 'take into employment' used in s 76 LRA excludes current employees from the prohibition of performing replacement labour, but embraces new employees that are being employed either temporarily or permanently⁴⁴⁹, as well as independent contractors and persons provided by a temporary employment service.⁴⁵⁰

b. Germany

aa. Sanctions upon strikers and bonuses paid to non-strikers

S 612a of the German Civil Code⁴⁵¹ protects employees who engage in strike action because it prevents employers from discriminating against employees for the exercise of their rights in a 'legitimate manner'.⁴⁵² The content of this section is almost identical with s 5 (1), s 5 (2) (c) (vi), s 5 (2) (b) and s 5 (3) LRA. The payment of so-called bonuses for strike-breakers⁴⁵³ might be in conflict with s 612a BGB because these bonuses might undermine a trade union's right to take industrial action guaranteed by art 9 (3) GG.

The BAG differentiates between bonuses paid during strike action and bonuses paid after strike action. The court considers bonuses paid during strike action legal. The principle of the general freedom to select any industrial weapon permits the payment of these bonuses.⁴⁵⁴ The payment of bonuses to outsiders does not undermine the freedom to associate but is part of the employers' right to respond to strike action with a chosen weapon.⁴⁵⁵ But, the court also found that an employers' right to fight strikes

⁴⁴⁹ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 316-317.

⁴⁵⁰ S 76 (2) LRA.

⁴⁵¹ Buergerliches Gesetzbuch (BGB).

⁴⁵² S 612 a of the German Civil Code reads as follows: 'An employer may not discriminate against an employee in any agreement or measure because the employee has exercised his or her rights in a legitimate manner'.

⁴⁵³ Streikbruchprämien.

⁴⁵⁴ BAG 1993 NZA 1135 at 1137. See for details on that principle below.

⁴⁵⁵ BAG 1993 NZA 1135 at 1137.

does not embrace bonuses paid to strike-breakers after the end of strike action. After the end of a strike, such payments are no weapon of industrial action anymore, and thus, not protected by the general freedom to select any industrial weapon. Therefore, according to the BAG, payments of bonuses after the end of industrial action are illegal and violate s 612a BGB.⁴⁵⁶

Only if non-striking employees must bear a workload during a strike, which exceeds the ordinary increased workload that naturally appears during strikes considerably, then bonuses for non-striking employees are permissible.⁴⁵⁷

S 612a BGB also prohibits financial sanctioning of strikers. Any financial sanction would discriminate striking employees because they exercised one of their rights in a legitimate manner.



bb. Dismissal of striking employees

Like in South Africa the question under which circumstances dismissals during or after strike action are permissible must be raised in Germany. The German law comes to similar results as the South African law. There are two types of dismissals in Germany, which must be differentiated in that context. The first is the termination of the contract of employment without notice according to s 626 (1) BGB. The second is the termination with notice, s 622 BGB. The former does not have to regard the Dismissal Protection Act while the later must be measured against the provisions of this Act.

In contrast to South Africa, there does not exist a provision rendering dismissals on grounds of the participation in or furtherance of a protected strike unfair.

⁴⁵⁶ BAG 1993 NZA 39 at 41.

⁴⁵⁷ BAG 1993 NZA 267.

The wording of s 626 (1) BGB, which provides for the possibility of the termination without notice, could lead to the conclusion that the mere participation, even in a protected strike, would give an employer the right to dismiss an employee.⁴⁵⁸ From the wording of the regulation, one could conclude that such a good cause might be the refusal to perform work an employee is contractually obliged to do, and that by taking part in strike action such an employee must take the risk of dismissal. However, the BAG judges the situation differently.⁴⁵⁹ Because the law constitutes that during legal industrial action all contractual duties are suspended⁴⁶⁰, the mere refusal to perform work cannot provide a ‘good cause’ in the sense of s 626 (1) BGB.

But, if the position of an employee ceases to exist because the business shut down or because of other restructuring actions due to the strike, a ‘good cause’ may be submitted by the employer. The reason is that mere operational requirements can constitute such a ‘good cause’.⁴⁶¹ Thus, even if the operational requirements that lead to a dismissal result from a strike, they are valid reasons for a termination of an employment contract.⁴⁶²

In case an employer cannot prove a ‘good cause’ in the sense of s 626 (1) BGB she/he might still have the chance to dismiss a striking employee with notice in the context of a protected strike. A dismissal with notice is only possible if one of three reasons listed in the DPA is given. According to s 1 (2) DPA ‘a dismissal is socially

⁴⁵⁸ S 626 (1) BGB reads as follows: ‘The employment relationship may be terminated without notice by either contractual party for good cause if circumstances are present which, taking the entire situation of the individual case into account and weighing the interests of both parties, render it unreasonable to expect the terminating party to continue the employment relationship until the termination period or until the agreed upon conclusion of the employment relationship’. Translation from: Lingemann S, v Steinau-Steinrück R, Mengel A (2003) *Employment & Labour Law in Germany* 313.

⁴⁵⁹ BAG AP Nr. 39 zu Art 9 GG *Arbeitskampf*.

⁴⁶⁰ See BAG AP Nr. 39 zu Art 9 GG *Arbeitskampf*. In this decision the court constituted for the first time that break-away lock-outs are impermissible and only suspending lock-outs are legal.

⁴⁶¹ BAG AP Nr. 16 zu § 626 BGB.

⁴⁶² See Rütters, ‘Zur Beseitigung von Arbeitsverträgen durch Aussperrung’ (1969) *Der Betrieb* 967 at 971.

unjustified if it is not due to reasons related to the person, the conduct of the employee, or to compelling operational requirements'. Because the duty to perform work is suspended during protected strike action, the denial to perform work cannot constitute a reason related to the conduct of the employee.⁴⁶³ Similar to the termination without notice, mainly strong operational requirements can justify a dismissal of a striking employee.⁴⁶⁴ That means that if the reason for a dismissal during a protected strike is an employers' need to restructure or due to other operational requirements, such a dismissal would be permissible.⁴⁶⁵

The court did not formulate a sophisticated test with which it could scrutinise whether an employer dismissed an employee because of her/his participation in a protected strike or on grounds of operational requirements. The court just stated that it scrutinises whether the operational requirements really exist or not.⁴⁶⁶

The dismissal of employees taking part in an unprotected strike follows the ordinary legislative requirements of either s 626 BGB or the DPA. Participating in an unprotected strike constitutes a breach of contract and might lead to dismissal for misconduct with or without notice. It is necessary that the dismissed employee can be held liable for withholding her/his obligation to render services.⁴⁶⁷ Since strike action is usually led by a trade union and single employees trust in the judgement of their union with regard to the protection of the strike they are usually not liable.

A different evaluation must be made in case of wildcat strikes, if the employees know exactly that their action is not protected because it is not led by a trade union.

⁴⁶³ Brox H, Ruethers B (1982) *Arbeitskampfrecht* (2nd ed) at 189.

⁴⁶⁴ BAG AP Nr. 39 zu Art 9 GG Arbeitskampf.

⁴⁶⁵ BAG AP Nr. 39 zu Art 9 GG Arbeitskampf.

⁴⁶⁶ BAG AP Nr. 39 zu Art 9 GG Arbeitskampf at 6.

⁴⁶⁷ Duetz, W (2003) *Arbeitsrecht* 326.

In case an employer dismisses an employee for such misconduct with notice, the general rule that the employer must firstly submit dissuasion must be met.⁴⁶⁸

But often even dismissals without notice will be permitted.⁴⁶⁹

cc. Shutting down of the operation (Betriebsstillegung)

According to the BAG an employer may totally shut down the operation of the business with the result of the suspension of the primary contractual duties.⁴⁷⁰

Formally, the BAG did not consider this reaction a weapon of industrial action but more of a last resort an employer might turn to if an operation of the business is not possible anymore at all.⁴⁷¹ The difference to locking out employees is that in case of shutting down the operation not only a number of contracts of employment are suspended but the whole business with all employment contracts is shut down. According to the lock-out arithmetic of the BAG locking out 100 % of all employees willing to work is not possible for employers.⁴⁷² Therefore, shutting down the whole operation cannot be considered a lock-out.

dd. Barring (Sperr)

Similar to the nature of boycotts on the employees' side, employers could decide to agree not to employ any members of a trade union for a certain period of time.

⁴⁶⁸ BAG AP Nr. 52 zu Art 9 GG Arbeitskampf. Before any dismissal with notice on grounds of misconduct a dissuasion must be submitted informing the employee that he will be dismissed if she/he will not change her/his conduct.

⁴⁶⁹ See BAG AP Nr. 41 zu Art 9 GG Arbeitskampf. If an employee's misconduct is so severe that a dismissal without notice is justified no dissuasion is necessary.

⁴⁷⁰ BAG 1994 NZA 1097.

⁴⁷¹ BAG 1996 NZA 209 and 214.

⁴⁷² It is submitted that the possibility of shutting down the operation must be considered a weapon of industrial action which does not comply with the standards the BAG developed at all, especially the lock-out arithmetic. But, because shutting down the whole operation with the result of no production output at all does basically never happen, this reaction will not be discussed in greater detail.

However, barring represents a violation of the positive freedom to associate laid down in art 9 (3) GG. If employers refuse to employ workers that are members of a union, they infringe their right to join such union, and hence, violate art 9 (3) GG.⁴⁷³

ee. Replacement labour

Obviously, German employers do also have a huge interest in replacing strikers with replacement labour. There is no regulation or jurisprudence prohibiting replacement labour in Germany. Because industrial action usually does not last very long employers will mostly try to get fellow employees that are not on strike to do the work of the strikers and will not employ new employees they will have trouble to get rid of after industrial action ended. But, employees that do not want to take over work of strikers are not obliged to do so because their employer cannot force them to deceive their fellow employees, with whom they have to work together again after the strike or lock-out.⁴⁷⁴

c. Comparison

Concerning the prohibition of payments of bonuses to non-strikers and financial sanctions on strikers the law in both countries gives very similar answers. The sections prohibiting discrimination etc. in South Africa and s 626 BGB in Germany both prohibit the implementation of sanctions on strikers and the payment of bonuses to strike-breakers in most cases.

⁴⁷³ See Duetz, W (2003) *Arbeitsrecht* (8th ed) 297.

⁴⁷⁴ Duetz, W (2003) *Arbeitsrecht* (8th ed) 321.

With regard to dismissals of employees taking part in protected strike action the courts in both countries allow dismissals of strikers if these are based on operational requirements even if these are a result of the strike action.

Also, by exploring the rationale of the judgement of the BAG and taking into account the wording of s 2 (1) DPA, no difference between the test developed in *SACWU v Afrox Ltd*⁴⁷⁵ and the German test developed to scrutinise whether a dismissal during a strike is really based on operational requirements or the participation in the strike can be found. The test to be applied according to s 2 (1) DPA is whether a dismissal is 'due to reasons related to [] compelling operational requirements.' Even if an employer can claim operational requirements for a dismissal of an employee taking part in a protected strike, the dismissal is still only 'due' to such a requirement if it was the real reason for the dismissal. If the employer just wants to get rid of a striker because of her/his participation in a strike, even if operational requirements exist, the dismissal was not 'due' to these requirements. This formulation basically contains the same test as developed in *SACWU v Afrox Ltd*⁴⁷⁶ where the court found that a dismissal can only be justified for operational requirements if these were the 'main', 'dominant or 'most likely' cause of the dismissal. A dismissal is only 'due' to reasons related to compelling operational requirements if these are the 'main' or 'dominant' or 'most likely' cause of the dismissal. Therefore, it is submitted that the tests applied in both countries is basically the same.

The requirements for dismissals of strikers taking part in an unprotected strike are similar in both countries. In Germany, a dismissal based on misconduct is only legal if the behaviour of an employee disturbed the relationship to her/his employer in a way that working together is not possible anymore. This is only the case, though, if the

⁴⁷⁵ 1999 (10) *BLLR* 1005 (LAC).

⁴⁷⁶ 1999 (10) *BLLR* 1005 (LAC).

conduct of the employee represented a serious contravention of the rules of industrial action set out above. If, for example, an employer is mistaken in the belief that her/his trade union leads a wildcat strike she/he takes part in, or believes that the procedural and substantive requirements of strike action are met, no such serious contravention can be assumed. As described before a deliberate participation in an unprotected strike, on the other hand, would qualify as a reason for dismissal based on misconduct.

The requirement of a submission of a dissuasion is comparable to the ultimatum an employer must give an employee taking part in an unprotected strike in South Africa. In both cases the employee is given something like a second chance. An important difference between South Africa and Germany is the consultation of trade union representatives. This difference can best be explained with the fact that, in line with the important function of works' councils in Germany, a works' council must be consulted before any dismissal.⁴⁷⁷ Because of that, no consultation with trade union representatives seems necessary. In the South African system, given the absence of workers' participation in practice, trade union representatives play a much more important role than in the German system of workers' participation.⁴⁷⁸

Shutting down the whole operation would be a form of lock-out in South Africa. It is submitted that it should be considered as such in Germany, as well. By declaring that it is not a weapon of industrial action, and therefore putting it beyond the scope of the measures to be applied to weapons of industrial action, the BAG theoretically sets the framework for a major imbalance between employers and labour.⁴⁷⁹ By applying

⁴⁷⁷ See s 102 of the Works' Constitution Act.

⁴⁷⁸ For example, shop stewards.

⁴⁷⁹ Again, see BAG 1996 NZA 209 and 214, where the court decided that shutting down the operation is not a tool of industrial action. As mentioned before, shutting down whole operations is more of a theoretical problem than a practical one.

these measures, namely the arithmetic of industrial action, these actions would be considered illegal because if a larger number of employers shuts down their whole businesses, employers would soon reach the 50 % line of all suspended contracts of employment in a collective bargaining area beyond which any lock-out is considered illegal. This sophisticated system of the arithmetic of industrial action seems dispensable, if employers could just shut down all operations with the result of a suspension of primary contractual duties of all employees in a collective bargaining area.

Barring is illegal in Germany. It is submitted that it would be illegal in South Africa as well. Every employee has the right to join a trade union.⁴⁸⁰ Not employing union members would constitute a discrimination of such workers and would violate s 5 (1) LRA. Secondly, it might prevent employees from exercising a right conferred by the LRA, thereby violating s 5 (2) (b) LRA.



With regard to replacement labour, labour law in both countries allows employers to use their discretion to make already employed employees take over work of strikers. On the other hand, it seems reasonable that these fellow employees cannot be forced to do so in order to keep up a productive atmosphere in the workplace. As to the employment of new employees, either temporary or permanently, which is generally allowed in South Africa, there is no prohibition in Germany either.⁴⁸¹ However, as mentioned before, strike action is mostly very short and comparatively few employees participate in strikes in Germany.⁴⁸² Obviously, it just does not pay for employers to

⁴⁸⁰ S 4 (1) (b) LRA.

⁴⁸¹ Except of the cases mentioned in s 76 (1) (a) and (b) LRA.

⁴⁸² Besides the fact that many disputes are solved on workplace level in works councils, many employees leave trade unions also. Note that in the time between 2000 and 2004 in average of only 4 working days per year per 1000 employees were lost due to strikes. <http://wko.at/statistik/eu/europa-streikdauer.pdf>.

employ new employees for a few days. That is also the reason why there is no law, either legislation or jurisprudence, on that topic in Germany.

VII. Essential services and maintenance services

Due to their importance essential and maintenance services are subject to particular regulation and jurisprudence in both countries. Industrial action is restricted in both cases in order to attenuate the long-term effects of such action. In essential services restrictions are implemented to the advantage of the public. It is generally accepted that industrial action must not harm essential objects of legal protection like, e.g., life, health safety. Although it will be shown that, in detail, the scope of essential services is different in both countries the general notion to protect the public from harm done to essential goods is the same.

The scope of protection of maintenance services is different. In these services industrial action is also subject to some restriction. These restrictions are for the sake of the employers. Industrial action is supposed to pressurise the opponent for certain period and must not destroy essential parts of the business for good. Such destruction would not be to the advantage of employers and employees because until, e.g., machinery is replaced or repaired no production and employment in these destroyed parts of the business will be possible.

Overall, it can be said that special rules for industrial action in these parts of a business are necessary and have been established in both countries quite reasonable.

1. South Africa

In South Africa, according to s 65 (1) (d) (i) LRA industrial action in essential services is prohibited.

The LRA defines an essential service as ‘a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population’.⁴⁸³ The Parliamentary service and the South African

Police Service are declared essential services expressly.⁴⁸⁴

On top of that, s 70 LRA provides for the establishment of an essential service committee which has the power to designate other services essential as well.⁴⁸⁵

Also, employers and employees may conclude a collective agreement ‘that provides for the maintenance of minimum services in a service designated as an essential service’.⁴⁸⁶ The essential service committee must ratify such an agreement.⁴⁸⁷

The result of such an agreement is that part of the essential service must be regarded a minimum service in which industrial action is prohibited whereas in other parts industrial action might be taken.⁴⁸⁸

Because the parties must not engage in industrial action, disputes between them are to be solved by conciliation or compulsory arbitration according to s 74 LRA.

S 65 (1) (d) (ii) LRA contemplates that industrial action shall also not take place in maintenance services.

Maintenance services are defined in s 75 (1) LRA:

⁴⁸³ S 213 ‘essential service’ (a).

⁴⁸⁴ S 213 ‘essential service’ (b) (c).

⁴⁸⁵ For the composition of the committee see s 70 LRA and for the procedure for designating services essential s 71 LRA.

⁴⁸⁶ S 72 LRA.

⁴⁸⁷ S 72 LRA.

⁴⁸⁸ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 313.

‘A service is a maintenance service if the interruption of that service has the effect of material physical destruction to any working area, plant or machinery.’

Beyond this definition, s 75 (2) LRA provides for the possibility to declare whole enterprises a maintenance service via collective agreement or by the essential service committee after application of an employer. Besides the prohibition of industrial action in a designated business, an employer may not employ replacement labour in case the service has been designated a maintenance service in whole or part.⁴⁸⁹ This provision is the counterpart of s 65 (1) (d) (ii) LRA.

2. Germany

The duty to perform essential services in Germany follows the principle that any industrial action must be fair. Industrial action in such services is not generally prohibited. A trade union initiating a strike in an essential service is obliged to organise that the necessary supply of these services is provided for.⁴⁹⁰ That means that in practice, only a certain number of employees of such a service might participate in a strike while others must at least provide for a basic supply of it.⁴⁹¹

The BAG determined that essential services are any goods or services essential for the survival of the population.⁴⁹² The industrial action parties must then determine what parts of the business are essential services in that sense.⁴⁹³ The parties have a wide

⁴⁸⁹ S 76 (1) (a) LRA. See especially Chapter B. VI. 2. a. cc..

⁴⁹⁰ Hromadka W Maschmann F (2001) *Arbeitsrecht Band 2 Kollektivarbeitsrecht & Arbeitsstreitigkeiten* (2nd ed) 169.

⁴⁹¹ That could mean that doctors would only do surgery to save lives or prevent serious harm to patient's health while refusing to supply not absolutely necessary services. In practice an employer and a works' council set up a plan regulating which employees must be at work at what time.

⁴⁹² BAG 1995 NZA 958 at 959.

Hromadka W Maschmann F (2001) *Arbeitsrecht Band 2 Kollektivarbeitsrecht & Arbeitsstreitigkeiten* (2nd ed) 161: Such as food, health, energy, water, traffic, postal services, communication services, fire departments, security.

⁴⁹³ BAG 1995 NZA 958 at 960.

prerogative regarding the judgement of whether a service or the provision of certain goods are essential or not.⁴⁹⁴ The courts only scrutinise whether the parties have mistaken the concept of essential services fundamentally.⁴⁹⁵ In case no such agreement can be concluded an employer may apply to court in order to gain a provisional order that determines a business or parts of it an essential service.⁴⁹⁶

Maintenance services are considered to be services that are requisite to prevent the destruction of production equipment.⁴⁹⁷ The duty to perform such services follows an obligation included in any collective agreement.⁴⁹⁸ With regard to which services must be provided for and which employees must provide these ,etc., the same rules that are valid for essential services apply.⁴⁹⁹

3. Comparison



The main difference between South Africa and Germany is that, in South Africa, in essential as well as maintenance services, industrial action is generally prohibited whereas, in Germany, industrial action is generally allowed and only minimum services must be provided for.

With regard to essential services, the exception stipulated by s 72 LRA is the rule in Germany because only parts of a business are considered essential. Employees that are not employed in essential parts have the possibility to go on strike and even employees working in essential parts of the business can strike temporarily in terms of

⁴⁹⁴ BAG 1995 *NZA* 958 at 959.

⁴⁹⁵ BAG 1995 *NZA* 958 at 960.

⁴⁹⁶ BAG AP Nr. 129 zu Art 9 GG Arbeitskampf.

⁴⁹⁷ BAG 1995 *NZA* 958 at 959.

⁴⁹⁸ Notice that industrial action takes only place if a collective agreement is terminated or becomes temporarily invalid soon. This invalid collective agreement implies a duty to perform maintenance services before a new collective agreement has been concluded. This duty is effective even if the collective agreement lost its validity.

⁴⁹⁹ See BAG 1995 *NZA* 958 at 959-960.

a plan agreed between the works' council and the employer. It is submitted that this approach is more flexible than considering whole enterprises essential services because in most business there are parts that are not essential to life, health, or personal safety.⁵⁰⁰ The same argument is valid for the provision of maintenance services.

Another interesting difference is that, in Germany, obviously many more services are considered essential than in South Africa. While these are limited to life, health, personal safety⁵⁰¹ and the parliamentary service in South Africa the spectrum of essential services is far wider in Germany.

Also, there is nothing compared to an essential service committee in Germany. The parties decide by themselves what an essential service is and the last word have the courts if one of the parties appeals to them.



C. Chapter Three: Protest action and political strikes

I. South Africa

In South Africa, according to s 77 LRA, protest action related to political issues, namely 'socio-economic interests of workers', is allowed. It will be shown that the idea of withholding work in order to push through political demands opposed to different terms and conditions of employment is strictly forbidden in Germany while in South Africa such action has a greater tradition and is therefore permitted.

⁵⁰⁰ For example, employees providing for administrative services.

⁵⁰¹ Including the South African Police Service.

The kinds of actions employees might take in the course of protest action are similar to the actions employees might take during strike action.⁵⁰²

The difference between the two forms of industrial action must be seen in its purpose.⁵⁰³ While protest action aims at promoting or defending socio-economic rights, strike action is targeted at remedying a grievance or resolving a dispute in respect of ‘a matter of mutual interest between employer and employee’.

The line between these different goals is not always easy to draw.

In the case of *Greater Johannesburg Transitional Metro Council v IMATU*⁵⁰⁴ the Labour court found that the privatisation of certain services was a matter of mutual interest rather than a socio-economic interest while also stating that, generally, some matters can be considered matters of mutual interest and socio-economic matters concurrently.



In the case of *Government of the Western Cape v Cosatu*⁵⁰⁵, the employees demanded parity in education spending between white and black schools. The court found that imbalances in the educational system resulted from government policy during the apartheid regime and that the employees had an interest in abolishing such imbalances for the sake of their children’s’ education.⁵⁰⁶

The findings of the courts are to be supported. The privatisation or, e.g., outsourcing of services is a matter that directly affects the employment relationship between employees and their employers, and is therefore a ‘purpose referred to in the

⁵⁰² See the definition of protest action in s 213 LRA.

⁵⁰³ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 318.

⁵⁰⁴ 2001 (9) *BLLR* 1063 (LC).

⁵⁰⁵ 1998 (12) *BLLR* 1286 (LC).

⁵⁰⁶ Because protest action is not permitted in Germany at all from describing details of the procedural requirements of the South African law will be abstained. Therefore, the leading case of *Business SA v COSATU*, in which Myburgh J developed mainly procedural rules for protest action will not be discussed at this point.

definition of strike'.⁵⁰⁷ Parity in education spending does not influence the employment relationship and must be considered a socio-economic issue.

These decisions imply that, overall, the less an issue affects the employment relationship between an employer and employee directly and the more it is of a general (political) complaint the more it must be considered a socio-economic interest.

II. Germany

In Germany, any strike action that does not have the conclusion of a collective agreement as its goal, is prohibited. The requirement of the identity of the opponent of the strike action and collective bargaining is not met. The addressee of the strike action is an employer but the real opponent is the state. The strike's aim really is a certain decision of the state, and thus, is not protected by art 9 (3) GG.⁵⁰⁸

As with other issues of industrial action the interpretation of ILO Convention No 87 by the 'General Survey ILO *Freedom of Association, the right to organise and collective bargaining and rural workers' organisations* 1994' includes a right to political strike action. Again, this interpretation is not binding for the German law of industrial action.⁵⁰⁹

⁵⁰⁷ See s 231 for the definition of protest action.

⁵⁰⁸ The prohibition of political strikes is generally accepted in Germany. Hence, in the last decades no political strike has been taken. Historically, the most important political strike was a general strike after WWI at the beginning of the Republic of Weimar, the so-called "Kapp-Putsch" in 1920.

⁵⁰⁹ Chapter B. I. 1. c..

III. Comparison

It is submitted that the permission of protest action in South Africa and the prohibition of any political strike activity in Germany, are rooted mainly in the history of strikes in both countries. Striking over political issues in South Africa became a frequent weapon of voteless workers that tried to put pressure on government bodies.⁵¹⁰ During the struggle for democracy, political actions of employees became part of the South African culture of industrial action.

Contrary to that, strike action in order to promote political demands has almost no history in Germany. There was only one important occasion, in which workers stopped to work in order to promote political goals. But, especially this occasion is still considered a bad example and one of the reasons why political strike action is forbidden in Germany. This occasion was the so-called 'Kapp-Putsch' during the Republic of Weimar. In that case, political strike action did not promote political processes positively, like they did in South Africa, but was exploited by political leaders who tried to pressure opposing political groups that were seeking power in a country in chaos. Political strikes were not imposed by workers but rather accommodated by political groups that were in charge for a limited period of time.⁵¹¹ In South Africa, it was also workers' leaders that called for political work stoppages. But, these actions actually helped the country to progress beyond the system of apartheid. Therefore, these work stoppages are considered a positive momentum and the possibility to withhold work to push through socio-economic demands is based on a positive tradition. In Germany, the only period in which political work stoppages

⁵¹⁰ See Du Toit D et al (2003) *Labour Relations Law* (4th ed) 317.

⁵¹¹ The best example is the "Kapp-Putsch" was initiated by a small group of royalists who invaded Berlin in 1920 and was successful in bringing down the democratically elected government of the SPD (Sozialdemokratische Partei Deutschlands). The SPD, traditionally rooted in the working-class environment, called all workers to go on strike to overturn the new government of the royalists. After four days the old government regained power.

were executed was in the Republic of Weimar, but, different to South Africa, with no positive effect at all. Consequently, political action taken by employees is not looked upon favourably in Germany. Also, from 1945 on employees in Germany had many other ways to express their political demands, mainly by fair elections, etc.,. For a long time, African employees in South Africa did not have these possibilities and the most effective way of pressuring the political leaders was withholding work. All of these circumstances lead to a tradition of protest action in South Africa whereas no such tradition did develop in Germany.

D. Chapter Four: Final Conclusions

In conclusion, there are various differences concerning detailed questions that have been explored and discussed above. But, the most fundamental differences of the law of industrial action are to be summarized and contextualised at this point.

Firstly, as forecasted in the introduction, the constitutional framework of the law of industrial action has a very important influence on this field of law. Therefore, the main focus when drawing general conclusions from this comparison must be laid on this framework and its consequences. Both constitutions provide for the possibility to engage in industrial action. However, the shape of these provisions is quite different. While the South African Constitution expressly provides for a right to strike, the German constitution only provides for the right to form associations to safeguard and improve working and economic conditions. Two more steps have been established by courts to come to the conclusion that industrial action is implied by that. Firstly, according to the courts, this formulation includes the right to engage in collective

bargaining autonomously. Secondly, in order to exert enough power on each other to push through certain demands, industrial action, including strikes and lock outs, must be allowed. Thereby, the German Constitution does not provide for a formal right but for the possibility to engage in industrial action. Besides the difference, that in South Africa a constitutional right to strike has been established, both Constitutions approve industrial action.

Closely connected to these different constitutional frameworks is the question which different goals industrial action might seek to achieve. While in Germany the goal of industrial action can only be the conclusion of a collective bargaining agreement, the grievance or dispute in South Africa must only be a matter of mutual interest. This shows that in South Africa industrial action is considered a more general tool to settle more kinds of disputes. This general aim of industrial action follows the constitutional and subordinate legislation, which both do not limit the possibility to engage in such action to trade-unions and employers organisations. If the South African legislature would take a similar approach to the German system, in which strike action might only be taken in order to promote collective bargaining, the possibility for unorganised employees to act concerted in order to form a strike would go astray because in South Africa, as in Germany, only trade-unions can conclude collective agreements.⁵¹²

In Germany the restriction of the goals industrial action might be taken for also follows the constitutional framework of industrial action as an annex to collective bargaining.

This constitutional framework is also the reason for a general barrier the courts set for industrial action in Germany, the notion of parity. In South Africa, no such general

⁵¹² See s 213 for the definition of collective agreement.

measure applicable to any industrial action has been established. The reason is that in Germany, because industrial action is only an annex to collective bargaining, which takes place mainly on centralised levels, something like a general barrier that provides for equal power between the parties in a wider area than on plant-level had to be established. Because collective bargaining areas are wider and the bargaining parties are trade unions and employers' organisations, equal power must not only be established on small levels but in the whole bargaining sector. In order to establish such a more or less abstract equal power in wide sectors the German law had to establish such an abstract measure, which has the ability to be applied to different concrete cases. These are the reasons why, in Germany, the core of the law of industrial action can be seen in the notion of parity. The South African law represents the idea of parity, with its content that the power between the parties of industrial action must be balanced out as well. However, the frame, in which this principle is to be applied, varies in both countries. While in South Africa the law balances the power of the parties on decentralised levels, mainly on plant level or smaller sectors, this principle must be applied to larger areas in Germany and a balance must be found between actions taken by employers' organisations and trade unions in these large areas. Strike or lock-out action taken in small parts of the area have the potential to destabilise the balance between the parties of power play as a whole. Legal constructions like the lock-out arithmetic of the BAG must be seen as an attempt to control this fragile balance. Such legal constructions are not necessary in South Africa.

When it comes to the organisation of strikes not only the constitutional roots influence the fact that, in Germany, only trade-unions can organise strikes, and not any group of employees like in South Africa. Obviously, as already mentioned within the analysis

which goals industrial action might seek to achieve in Germany, one reason for that leadership-requirement is the constitutional setting. This determines that only coalitions might take industrial action. But, the BAG also had political reasons to develop that principle. It found that, if only trade unions might call for strikes, these will usually be for relatively reasonable demands and that the rules that often serve public policy will be followed.⁵¹³ Also, ‘wildcat strikes’ would hinder the dual system of collective bargaining on centralised levels and works’ councils on plant level. If groups of employees could strike on plant level without the leadership of a trade union the well functioning system of works’ councils and especially the strict prohibition of strikes about works’ councils’ issues would be undermined.⁵¹⁴ Besides, with works’ councils on plant level employees have an organ to articulate their interests on that level.



Different to German works’ councils, the establishment of workplace forums, is not compulsory in South Africa, at all.⁵¹⁵ In result, the only way of pushing through demands in businesses, in which no registered trade union is present, is to strike, even without the consent of a union. The individual formulation of the right to strike in the Constitution as well as the LRA reflects that, in South Africa, striking is considered a weapon to push through any kind of demand. What is considered a wildcat strike in Germany is something the Constitution provides for in South Africa.

Besides the constitutional influences on the law of industrial action and the question how the consequences of this influence fit in the system of collective labour law in

⁵¹³ BAG AP Nr. 32 zu Art. 9 GG Arbeitskampf.

⁵¹⁴ See s 74 (2) WCA, which expressly prohibits any industrial action between employers and work’ councils.

⁵¹⁵ Compare s 1 WCA, which regulates that in businesses with at least 5 employees works’ councils are being established and s 80 LRA, which regulates that a trade union ‘may’ apply for the establishment of a workplace forum.

both countries, another general important difference is the emphasis of the South African law on certain procedures that must be followed preceding the engagement in industrial action while the German law basically only demands that collective bargaining failed. This difference roots most likely in the importance of industrial action. The goal of the South African procedural requirements is to use various ways to avoid industrial action because, although the number of workdays lost due to industrial action is decreasing at large, this weapon has been and is still being used quite frequently⁵¹⁶ and economic damage due to work stoppages can be severe. It is important to notice in that context that labour relations in South Africa are much more adversarial in comparison to Germany. Because industrial action takes place much more infrequently in Germany, German legislature and courts can be more relaxed on that issue. The necessity of a strike notice in South Africa compared to Germany, where with a 'warning strike' strike action might begin at any time after a trade union decided that collective bargaining failed, should be considered the most mentionable difference in that context.

A few comments must also be made on the socio-economic background of industrial action in both countries and its influence on the law.

The historical dimension of industrial action and politically motivated work-stoppages in South Africa led to a fairly detailed and sophisticated legislation and jurisprudence that seems to cover most problems that might occur surrounding that topic. Beyond that, as the number of workdays lost due to strikes and other work stoppages shows,

⁵¹⁶ See *ibid* at Chapter A, footnote 6.

strikes are still of great importance to South African labour relations.⁵¹⁷ In Germany, strikes and lock-outs are not of equal importance and the legislature desisted from a strict system of regulation. But, the principles developed by the courts provide for the possibility to solve all problems. However, the South African shape of the relevant legislation cannot be called inflexible either. It is submitted that they also represent the principle of 'regulated flexibility' that was one of the basic guidelines when establishing the new BCEA.⁵¹⁸ As examples show also the LRA reflects that very principle.⁵¹⁹ In general, with their different system of approaching industrial action, the law in both countries comes to fairly similar conclusions. The rules set for picketing, peace obligations and alternative weapons of industrial action, like the payment of bonuses, for example, follow similar lines of thought. But, because of its different shape and different economic situations, some problems that appear in one country do not seem to be too problematic in the other. For example, secondary strikes represent a problem more drastic for the law in Germany than in South Africa.

As to the question whether one country can learn from the other it is submitted that, especially considering potential future developments in South African and German labour law, both might pick up some of the solutions found in the other country. This will strongly depend on the development of the collective bargaining systems in South Africa and Germany. It is submitted that, at the moment, the either law of industrial action is coherent with the other collective labour law and the named socio-economic background in either country. For example, the important notion of parity is only

⁵¹⁷ But see the Annual Economic Report 2003 of the South African Reserve Bank:

www.reservebank.co.za, which clearly indicates that this number is steadily decreasing.

⁵¹⁸ See for the BCEA Pityana, S "Labour Law, employment and regulated flexibility" presented at the 1999 Annual IRASA conference; Standing G, J Sender and J Weeks (1996) *Restructuring the labour market: The South African challenge*.

⁵¹⁹ See, for example, s 65 (3) (a), in which collective agreements might diverge from the statutory regulations. Another example is s 64 (3) LRA.

useful in a system of centralised bargaining. On the other hand, the strict procedural requirements in South Africa seem to be a good tool to prevent unnecessary industrial action whereas in Germany the leadership of trade unions and employers' organisations as important social counterparts generally ensure that industrial action is only taken when necessary. Also, it seems to be absolutely reasonable to generally allow secondary strikes in South Africa because they are a very useful tool of pressurising employers.⁵²⁰ But, it is just as reasonable to generally prohibit them in Germany because of the various principles they violate that are, again, resulting from the centralised system of collective bargaining.⁵²¹ These are just a few examples that show that the very different framework, from the constitution to collective bargaining and the interaction with the different importance of workers' participation on plant level make the described differences necessary or at least reasonable. In general, adopting different approaches from a totally different system in a situation in which both systems seem to be well functioning does not seem necessary at present. But, single issues that are not coercively coupled with these fundamental differences between the systems might be adopted. For example, one important issue might be the evaluation of the legality of strike action in cases in which only one of various demands is unprotected.⁵²²

But, within the next years changes might be made to either system. One goal of the South African legislature when enacting the new LRA was to promote centralised bargaining at sectoral levels, s 1 (d) (ii) LRA. In practice, a system of mixed bargaining developed with both, centralised bargaining structures⁵²³ and collective

⁵²⁰ See Chapter B V.

⁵²¹ See Chapter B. V. 3.

⁵²² See B. IV. 2. c..

⁵²³ See ss 24-34 LRA.

bargaining at plant level.⁵²⁴ Another goal that has not yet been achieved is the promotion of more workers' participation on plant level by introducing workplace forums.⁵²⁵ But, if the development in South Africa will be that collective bargaining will become more and more centralised and workers' participation will develop, some of the principles of the German law of industrial action might be of value to South Africa as well. In that context the general measure of proportionality might be of special interest. Also, the notion of parity will become more and more important when power must be balanced out in a power play involving many employers and even more employees in a wide collective bargaining sector. Then, the South African law must find ways to establish equal bargaining power and could come to a different evaluation of, e.g., secondary strikes or of the question how many employees an employer might lock-out in a sector, in which a great number of employees has already been locked out by fellow employers. The measures the German law developed on these issues could at least inspire the South African legislature, jurisprudence and academics.

On the other hand, it also seems possible that bargaining will become more decentralised in Germany. Because businesses in collective bargaining areas often show very different productivity tendencies can be observed that want to allow employers and works' councils to also bargain over wages and the amount of working hours in order to arrive at more flexible agreements compared to agreements that are valid for a huge sector.⁵²⁶ In case the WCA was changed and allow for works' councils and employers to bargain over these issues on plant level, s 74 (2) WCA

⁵²⁴ Du Toit D et al (2003) *Labour Relations Law* (4th ed) 245.

⁵²⁵ See Du Toit 'Collective bargaining and worker participation' (2000) 21 *ILJ* 1544; Summers 'Workplace Forums from a Comparative Perspective' (1995) 16 *ILJ* 806.

⁵²⁶ At present the most important topics works' councils and employers might bargain over are regulated in s 87 WCA, which does not provide for these parties to bargain over the amount of working hours and wages.

would have to be changed as well and industrial action on plant level would have to be allowed because otherwise works' councils could not exert any power on employers to push through their demands. In such a situation the German law might adopt some of the South African solutions. Principles like parity will lose its weight and while the general measure of proportionality could be upheld it would most likely have to be transformed and narrowed down. For example, in such a case the South African way of allowing secondary strikes with some restrictions could be adopted. Also, the complicated arithmetic for the judgement of the legality of lock-outs would lose its importance on these levels and could be allowed only with the general limitations like the peace obligation, etc., which are quite similar in both countries, anyway.

Overall, while at the moment the different solutions found with respect to the problems of the law of industrial action fit into the collective labour law systems of either country, these solutions might be helpful to lawyers in both countries in case these systems shift towards each other in one way or the other.

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