

**PICKETING IN TERMS OF THE LABOUR RELATIONS ACT 66 OF 1995**

by

**LINDON CLIFFORD LEYSATH**

submitted in part fulfilment of the requirements for  
the degree of

**MASTER OF LAWS**

at the

**UNIVERSITY OF SOUTH AFRICA**

**SUPERVISOR : PROF A C BASSON**

**NOVEMBER 1997**

## SUMMARY

---

Picketing, a method used by employees, collectively, to assert their demands against employers, is a controversial subject arising from the conflict of interest existing between labour and employers!

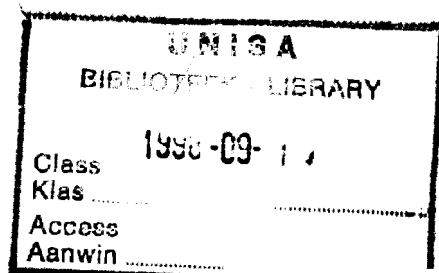
Previously, South African law neither forbade nor regulated picketing. Consequently, no immunity from civil liability existed in relation to a person's conduct during a picket.

Presently, picketing is regulated by section 17 of the Constitution of the Republic of South Africa Act 108 of 1996 (right to picket) and section 69 of the Labour Relations Act 66 of 1995, which provides for a protected picket (one that complies with the requirements of section 69) whereby immunity from civil liability attaches to a person's conduct during a picket. These provisions and their coexistence is examined, comparing foreign law where relevant, in an attempt to provide a foundation for a topic relatively disregarded. Section 69 reveals elements of uncertainty and vagueness.

Title of Thesis:           **PICKETING IN TERMS OF THE  
LABOUR RELATIONS ACT 66 OF 1995**

Key terms:

Definition of picketing; Common law picketing; Picketing in terms of Constitution; Circumstances in which picket allowed; Persons affected by picket; Persons allowed to picket; Place of picket; Manner of picket; Resolution of disputes about picketing; Legal protection.



## BIBLIOGRAPHY

---

- Arthurs Prof H W , Carter Prof D D, Fudge Prof J, Glasbeeck Prof H J *Labor Law and Industrial Relations in Canada* 4<sup>th</sup> Edition 1993 Butterworths Kluwer
- Benjamin Albertyn Jacobus Strikes, Lock-outs and Arbitration in South African Labour Law 1989 Juta & Co
- Botha C J *Statutory Interpretation* 2<sup>nd</sup> Edition 1994 Juta & Co
- Brassey M Cameron E Cheadle H Olivier M *The New Labour Law* 1987 Juta
- Code of Practice ....Picketing (1992) as created and regulated by the Trade Union and Labour Relations (Consolidation) Act of 1992 in terms of Sections 199-208.
- Currie David P *The Constitution of the Federal Republic of Germany* 1994 University of Chicago Press.
- Davies Paul, Freedland Mark *Kahn-Freund's Labour and the Law* 3<sup>rd</sup> Edition 1983 London Stevens & Sons
- Davis D "Picketing" (1988) Vol. 9 No. 1 *Industrial Law Journal* 26.
- Hardin Patrick *The Developing Labour Law* 3<sup>rd</sup> Edition Vol. 2 1995 BNA Books
- Hogg *Constitutional Law of Canada* 3<sup>rd</sup> Edition 1992 Carswell
- Hunt James W , Strongin Patricia K *The Law of the Workplace* 3<sup>rd</sup> Edition 1994 BNA Books
- Kahn Peggy, Lewis Norman, Livock Rowland & Wiles Paul *Picketing* 1983 Routledge & Kegan Paul plc
- Kraut Jayson *American Jurisprudence* 2<sup>nd</sup> Edition Vol. 16A 1979 The Lawyers Co-operative Publishing Co
- Landman "The New Right to Picket" (1966) Vol. 6 No. 5 *Contemporary Labour Law* 41.
- Le Roux P A K "The Labour Court : some early decisions" (1997) Vol. 6 No. 8 *Contemporary Labour Law* 71
- Miller Victor Craig Kenneth *Employment Law in Scotland* 1<sup>st</sup> Edition 1991 T & T Clark.
- Neethling Potgieter Visser *The Law of Delict* 2<sup>nd</sup> Edition 1992 Butterworths
- Ngqiyaza Bonile "CCMA helps to cut number of strikes" in the *Business Day* dated 30/09/1997.
- Pitt Gwyneth *Employment Law* 2<sup>nd</sup> Edition 1995 Sweet & Maxwell *The Pocket Oxford Dictionary* 7<sup>th</sup> Edition, Oxford University Press.
- Twomey David P *Labor and Employment Law* 9<sup>th</sup> Edition 1994 South Western Publishing Co

.....	17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29
.....	30, 31, 32, 33, 34, 35, 36, 37
Chapter IV.....	1, 9, 10, 13
Chapter VI .....	12
Chapter VII .....	29
section (1) (a).....	35
section (1) (c).....	13
section (1) (d).....	13
section 3 (a).....	7
section 3 (b).....	7
section 64.....	10, 13
section 64 (1).....	9
section 64 (3) (c).....	10
section 67.....	5, 9, 26, 27, 28
section 67 (1).....	9
section 67 (2).....	26, 30
section 67 (2) (a).....	27
section 67 (2) (b).....	27
section 67 (3).....	29, 30
section 67 (3) (a).....	30
section 67 (3) (b).....	30
section 67 (4).....	29
section 67 (5).....	29
section 67 (6).....	26, 27, 30, 31
section 67 (7).....	30
section 67 (8) .....	5, 17, 27
section 67 (9) .....	5, 17, 18, 27
section 69.....	1, 8, 10, 11, 12, 17, 20, 21, 23, 24, 26, 28, 29, 31, 32, 33, 35, 36, 37
section 69 (1).....	12, 14, 16, 18, 19, 20, 21, 22, 23, 31, 33
section 69 (1) (a).....	9
section 69 (1) (b).....	9, 10
section 69 (2) .....	6, 17, 22, 28, 31, 33
section 69 (2) (a).....	11, 14, 16
section 69 (2) (b).....	21, 22
section 69 (3).....	22
section 69 (4).....	20, 23, 31, 32
section 69 (5).....	20, 23, 31, 32
section 69 (5) (a).....	14, 15, 20
section 69 (5) (b).....	20
section 69 (6) .....	21, 22
section 69 (7) .....	5, 17, 26, 27, 28, 29, 30, 31, 32, 33
section 69 (8).....	22, 23, 24, 25, 31, 32, 33, 34, 36
section 69 (8) (a) .....	22, 23, 25
section 69 (8) (b).....	22, 23
section 69 (8) (c).....	23, 24

section 69 (8) (d).....	23
section 69 (9).....	23, 24, 31
section 69 (10).....	24, 25, 26, 31
section 69 (11).....	23, 24, 31, 32, 33, 34
section 95 (c).....	13
section 135.....	25
section 151 (2).....	34
section 157 (1).....	25, 33
section 157 (4).....	25, 26
section 157 (4) (a).....	26
section 158 (1) (j).....	33
section 213.....	10, 15

Trespass Act 6 of 1959.....	5, 22
-----------------------------	-------

Wage Act 5 of 1957.....	18, 28
-------------------------	--------

## CANADA

Constitution of Canada Act of 1982 .....	8, 19
section 2 (c) .....	8, 19

Labour Relations Code S.B.C. 1992, c.82.....	2, 13, 15, 16
section 1 (1).....	2
section 3.....	15
section 65 (3).....	13
section 65 (7).....	15
section 66 (a).....	16
section 66.....	18

## ENGLAND

Code of Practice ... Picketing (1992).....	18, 21
--	--------

Trade Union and Labour Relations (Consolidation) Act of 1992.....	3, 13, 16, 18, 19, 21
section 119 – 208.....	18
section 218.....	21
section 219.....	3, 21

section 219 (3) .....	18
section 220.....	3, 13, 18, 19, 21
section 220 (1) (a).....	13, 16
section 220 (1) (b).....	13, 16
section 221.....	21

## **GERMANY**

Basic Law for the Federal Republic of Germany of May 23, 1949 as amended to December 1, 1993 .....	19
--	----

## **UNITED STATES OF AMERICA**

Constitution of the United States of America.....	8, 16, 17, 19
First Amendment.....	8, 16, 17, 19
Fourteenth Amendment.....	8

## TABLE OF CASES

---

### SOUTH AFRICA

*Du Plessis vs De Klerk* 1996 (3) SA 850 (CC).....6, 7

*Lomati Mill Barberton (a Division of Sappi Timber Industries) vs  
Paper Printing, Wood and Allied Workers Union and others* (1997)  
18 *Industrial Law Journal* 178 (LC).....24, 25, 26, 28, 32, 33, 35

*Mondi Paper (a Division of Mondi Ltd) vs Paper Printing,  
Wood and Allied Workers Union and others* (1997)  
18 *Industrial Law Journal* 84 (D)..... 34, 35, 37

### CANADA

*Irwin Toy vs Quebec* (1989) 1 S.C.R. 927. ....8

### UNITED STATES OF AMERICA

*Food Employees Local 590 vs Logan Valley Plaza*  
391 US 308, 68 LRRM 2209 (1968).....16

*Hudgens vs NLRB* 424 US 507, 91 LRRM 2489 (1976).....16

*Thornhill vs The State of Alabama* 310 US 88, 6 LRRM 697 (1940).....8

# TABLES OF CONTENTS

---

TITLE PAGE OF DISSERTATION.....	i
SUMMARY.....	ii
BIBLIOGRAPHY.....	iii
TABLE OF STATUTES.....	iv, v, vi, vii
TABLE OF CASES.....	viii
1. INTRODUCTION.....	1
2. THE DEFINITION OF A PICKET.....	2
3. PICKETING AT COMMON LAW.....	4
4. PICKETING IN TERMS OF THE SOUTH AFRICAN CONSTITUTION.....	6
5. PICKETING AND THE NEW LABOUR RELATIONS ACT 66 OF 1995.....	8
5.1 The circumstances in which a picket is allowed.....	8
5.2 The employer who is affected by a picket.....	11
5.3 Persons who may stage a picket.....	12
5.4 The place where a picket is staged.....	14
5.5 The manner in which a picket is conducted.....	18
5.6 The resolution of disputes about picketing.....	23
5.7 The legal protection afforded under the Labour Relations Act 66 of 1995.....	26
6. MISCELLANEOUS CONSIDERATIONS.....	31
7. CONCLUSION.....	35
INDEX.....	38, 39, 40, 41, 42
DECLARATION OF INTENT.....	43



## TABLE OF STATUTES

---

### SOUTH AFRICA

Basic Conditions of Employment Act 3 of 1983.....	18, 28
Constitution of the Republic of South Africa Act 200 of 1993.....	6, 7
section 35 (3).....	6, 7
section 98.....	7
Constitution of the Republic of South Africa Act 108 of 1996.....	1, 6, 7, 8, 12, 13, 16, 17, 18, 19, 20, 28, 29, 35, 36
Chapter 2.....	6
section 7 (2).....	6
section 7 (3).....	7, 18, 28
section 8 (1).....	6, 17
section 8 (2).....	7
section 8 (3).....	7
section 8 (4).....	7
section 9.....	8, 12, 20
section 16.....	29
section 17.....	6, 8, 12, 16, 17, 18, 19, 35
section 23.....	1
section 36.....	7, 8, 12, 17, 18, 28, 29, 36
section 39 (2).....	6, 7, 13, 17, 19
Draft Labour Relations Bill of 1995 Government Gazette Notice No 97 of 1995.....	9
Internal Security Act 74 of 1982.....	5, 18
Intimidation Act 72 of 1982.....	5
Labour Relations Act 28 of 1956.....	4, 5
section 65.....	4
section 79.....	4, 5
Labour Relations Act 66 of 1995.....	1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16,

# PICKETING IN TERMS OF THE LABOUR RELATIONS ACT 66 OF 1995.

## 1. INTRODUCTION

Picketing has always been a controversial subject by its nature, predominantly due to the fact that there has always been a conflict of interest between organised labour and employers<sup>1</sup>. Employers seek the ultimate advantage of profit gain, whereas, employees/workers seek a decent wage to enable them to survive. This controversy is further exacerbated by the fact that the conduct of persons taking part in the picket will inevitably constitute a breach of some law or other (common law, statute or criminal law). Contrary to this, it is generally accepted that employees have the option of asserting their demands against the employer by collectively standing together. Collective action can take a variety of forms such as strike action and picketing<sup>2</sup>. As such, the law seeks to balance the conflicting interests of employers and workers<sup>3</sup>. The law does this in South Africa, presently, and in the context of picketing, by the operation of section 69 of the Labour Relations Act 66 of 1995, which provides for a right to picket peacefully. Section 69 of the Labour Relations Act 66 of 1995 takes into account the interests of employers and employees by allowing for a picket in defined circumstances. An analysis of section 69 of the Labour Relations Act 66 of 1995 will form the basis of this dissertation.

---

<sup>1</sup> Paul Davies, Mark Freedland *Kahn-Freund's Labour and the Law* 3<sup>rd</sup> Edition 1983 London Stevens & Sons at page 65, 66,67; Peggy Kahn, Norman Lewis, Rowland Livock & Paul Wiles *Picketing* 1983 Routledge & Kegan Paul plc at page 53.

<sup>2</sup> James W Hunt Patricia K Strongin *The Law of the Workplace* 3<sup>rd</sup> Edition 1994 BNA Books at page 193; Peggy Kahn, Norman Lewis, Rowland Livock & Paul Wiles *Picketing* 1983 Routledge & Kegan Paul plc at page 57; see chapter IV of the Labour Relations Act 66 of 1995 and section 23 of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>3</sup> Paul Davies, Mark Freedland *Kahn-Freund's Labour and the Law* 3<sup>rd</sup> Edition 1983 London Stevens & Sons at page 65, 66.

## 2. THE DEFINITION OF A PICKET

Ordinarily a picket is not a term capable of exhaustive and exact definition. The dictionary<sup>4</sup> defines a picket as :

“one or more persons stationed by strikers outside place of work to dissuade others from entering”<sup>5</sup>.

A local author<sup>6</sup> defines a picket as action involving :

“some form of gathering or congregation of employees who would see their primary task as :-

1. Communicating information about the strike to the unaware;
2. To persuade non-strikers to join the strike; and
3. To prevent, by moral pressure or physical obstruction, scabs from operating the plant”.

The Labour Relations Code of British Columbia<sup>7</sup> authoritatively defines a picket as :

“attending at or near a person’s place of business, operations or employment for the purpose of persuading or attempting to persuade anyone not to

- (a) enter that place of business, operations or employment,
- (b) deal in or handle that person’s products, or
- (c) do business with that person,

and a similar act at such a place that has an equivalent purpose”.

A Canadian labour text<sup>8</sup> defines picketing as having 3 basic elements namely, (1) the presence of one or more persons, (2) communication by spoken or written messages, or through behaviour, and (3) an intention by presence or

---

<sup>4</sup> *The Pocket Oxford Dictionary* 7<sup>th</sup> Edition, Oxford University Press.

<sup>5</sup> *The Pocket Oxford Dictionary* 7<sup>th</sup> Edition, Oxford University Press also gives the word “picket” a military connotation by defining it as “small body of troops acting as patrol”.

<sup>6</sup> Professor D Davis “Picketing” (1988) Vol. 9 No. 1 *Industrial Law Journal* at page 26.

<sup>7</sup> Section 1 (1) of the Labour Relations Code S.B.C. 1992, c.82.

<sup>8</sup> Prof H W Arthurs Prof D D Carter Prof J Fadge Prof H J Glasbeek *Labor Law and Industrial Relations in Canada* 4<sup>th</sup> Edition 1993 Butterworths Kluwer at paragraphs 651-652 on page 273.

communication to secure a sympathetic response from third persons, e.g. customers who will cease to deal with a struck employer, prospective employees who will decline to accept employment in a struck enterprise, or suppliers who will interrupt shipments of materials required to sustain production in a struck plant.

An American labour text<sup>9</sup> refers to a picket as :

“an attempt by workers or a union to elicit the support for their positions by advertising their side of the dispute to other workers and to the public”.

The English law<sup>10</sup> gives protection to pickets for the purpose of :

“peacefully obtaining or communicating information or peacefully persuading any person to work or abstain from working”.

What is apparent from these definitions is the element of persuasion to achieve a tactical objective of preventing other workers and suppliers of the employer from dealing with the employer<sup>11</sup>. Beyond such objectives lie further underlying objectives such as getting the employer to accede to demands which form the subject of strike action<sup>12</sup>. In general, and having regard to the definitions above, one understands picketing to occur where striking workers station themselves at or near their employer's place of employment in an effort to persuade other parties such as non-strikers, customers and suppliers of the employer not to work and not to do business with the employer.

---

<sup>9</sup> James W Hunt Patricia K Strongin *The Law of the Workplace* 3<sup>rd</sup> Edition 1994 BNA Books at page 193, 194.

<sup>10</sup> Gwyneth Pitt *Employment Law* 2<sup>nd</sup> Edition 1995 Sweet & Maxwell at page 344; section 220 read with section 219 of the British Trade Union and Labour Relations (Consolidation) Act of 1992.

<sup>11</sup> Peggy Kahn, Norman Lewis, Rowland Livock & Paul Wiles *Picketing* 1983 Routledge & Kegan Paul plc at page 57, 58.

<sup>12</sup> Benjamin Albertyn Jacobus *Strikes, Lock-outs and Arbitration in South African Labour Law* 1989 Juta & Co at page 55.

### 3. PICKETING AT COMMON LAW

Picketing was never forbidden by South African law except that one who participated in a picket exposed himself to civil liability in that his conduct during the picket could amount to a delict (e.g. defamatory statements made during the course of a picket), or his actions could constitute a breach of contract in that by taking part in a picket one is failing to perform one's obligation to work in terms of a contract of employment. A breach of contract in these circumstances could give rise to the employee's dismissal. Such dismissal could naturally be attacked as being unfair. One's conduct during a picket could also potentially form the basis of an interdict.

The question arises whether there was any immunity or protection against civil liability prior to the coming in of the Labour Relations Act 66 of 1995. No express protection was afforded in law or in terms of the Labour Relations Act 28 of 1956. However, section 79 of the Labour Relations Act 28 of 1956 provides that no civil proceedings may be brought in any court of law against any employee, any employer, registered trade union or employers organisation or against any member, office bearer, or official of such a union or organisation, in respect of any breach of contract, breach of statutory duty or delict (except defamation) committed by the employee, employer, union or organisation or by that member, office bearer, official or organisation, *in furtherance of a strike or lock-out*. Although, this section predominantly is a provision aimed at strikes, it could be argued that a picket is conduct *in furtherance of a strike or lock-out* and as such is protected in terms of this provision. The protection envisaged by this section fell away if the act causing damage constituted a criminal offence or if the requirements for a lawful strike under section 65 of Labour Relations Act 28 of 1956 were not complied with<sup>13</sup>.

---

<sup>13</sup> Section 79 of the Labour Relations Act 28 of 1956.

South Africa had many criminal provisions which made picketing a precarious activity. These criminal laws had a negative affect on picketing and according to Benjamin<sup>14</sup> disturbed the balance of bargaining power in favour of employers. The Internal Security Act 74 of 1982, the Trespass Act 6 of 1959 and the Intimidation Act 72 of 1982 and other by-laws regulating traffic flows and obstruction of pavements were applied<sup>15</sup>. An academic writer<sup>16</sup> makes the point that the criminal regulation of Industrial Relations should be dispensed with as it has no deterrent affect on strike action. In support of this view he states that strike action has increased significantly and that most of these strikes were illegal. He states further that there was a reluctance to prosecute and this had the effect of bringing the law into disrepute even though this reluctance was politically and socially justified.

In view of the fact that a lot of strike action in our past history was illegal<sup>17</sup> and, at least, some conduct during a picket would amount to criminal conduct it seems that the protection afforded by section 79 of Labour Relations Act 28 of 1956, if accepted to be applicable, would have been ineffective. The new Labour Relations Act 66 of 1995 expressly recognises the right to picket and affords participants protection against civil liability<sup>18</sup>. The protection afforded against civil liability also does not extend to criminal offences<sup>19</sup>. Consequently, one may ask how effective the protection afforded against civil liability will be under the new Labour Relations Act 66 of 1995! In this regard, one is referred to the discussion of how certain laws are not deemed to be criminal offences for the purposes of determining civil liability under the new Labour Relations Act 66 of 1995<sup>20</sup>. One is referred further to discussion of the terms “despite any law

---

<sup>14</sup> Benjamin Albertyn Jacobus *Strikes, Lock-outs and Arbitration in South African Labour Law* 1989 Juta & Co at page 54.

<sup>15</sup> Professor D Davis “Picketing” (1988) Vol. 9 No. 1 *Industrial Law Journal* at page 33-36.

<sup>16</sup> M Brassey E Cameron H Cheadle M Olivier *The New Labour Law* 1987 Juta at page 252.

<sup>17</sup> M Brassey E Cameron H Cheadle M Olivier *The New Labour Law* 1987 Juta at page 252.

<sup>18</sup> Section 69 (7) read with section 67 of the Labour Relations Act 66 of 1995.

<sup>19</sup> Section 69 (7) read with section 67 (8) of the Labour Relations Act 66 of 1995.

<sup>20</sup> Section 69 (7) read with section 67 (9) of the Labour Relations Act 66 of 1995; see the discussion hereof under the heading “The legal protection afforded under the Labour Relations Act 66 of 1995” at page 26 of this dissertation.

regulating the right of assembly” later on in this dissertation under the heading “The place where a picket is staged”<sup>21</sup>.

#### 4. PICKETING IN TERMS OF THE SOUTH AFRICAN CONSTITUTION

The South African Constitution (hereafter called the Constitution)<sup>22</sup> has introduced the concept of a Bill of Rights into South Africa<sup>23</sup>. The Bill of Rights, in terms of section 17, gives everyone the right to picket peacefully and unarmed. It is clear from section 8 (1) and section 7 (2) of the Constitution that the Bill of Rights is applicable to the relationship between the organs of state and the individual (natural and juristic persons) – the so called vertical application - the decision in *Du Plessis vs De Klerk*<sup>24</sup> emphasizes this. The justification for the so called vertical application of the Constitution was based on various reasons including, but not limited to, the interpretation of the Constitution itself<sup>25</sup> as well as to the possible total negation of customary law.<sup>26</sup> The rights in the Bill are not applicable to the relationship between private litigants – the so-called horizontal application<sup>27</sup>. However, section 39 (2) of the Constitution provides for the courts to interpret legislation and develop the common law and customary law in order to promote the spirit, purport, and the objects of the Bill of Rights. In the *Du Plessis* case<sup>28</sup>, the corresponding provision was section 35 (3) of the 1993 Constitution<sup>29</sup>. The court held that section 35 (3) of the Constitution of the

---

<sup>21</sup> See the discussion of section 69 (2) of the Labour Relations Act 66 of 1995 at page 17 of this dissertation.

<sup>22</sup> The Constitution of the Republic of South Africa Act 108 of 1996.

<sup>23</sup> Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>24</sup> *Du Plessis vs De Klerk* 1996 (3) SA 850 (CC) at page 854 E-G; the decision in the aforementioned case concerned the application of the Constitution of the Republic of South Africa Act 200 of 1993. It is submitted that the decision is applicable to the new Constitution of the Republic of South Africa Act 108 of 1996 in that the provisions of the new Constitution are in principle based on the old Constitution and the reasons advanced by the court in *Du Plessis vs De Klerk* 1996 (3) SA 850 (CC) in favour of the vertical application of the Constitution do find application to the new Constitution for e.g. see Sachs J's Judgement at page 935 B-E.

<sup>25</sup> See Generally *Du Plessis vs De Klerk* 1996 (3) SA 850 (CC) at page 871 C, 854 B-E and Kentridge A J's Judgement at page 876-878.

<sup>26</sup> See *Du Plessis vs De Klerk* 1996 (3) SA 850 (CC) at page 935 B-E as per Sachs J's Judgement.

<sup>27</sup> See *Du Plessis vs De Klerk* 1996 (3) SA 850 (CC) at page 854 E-G.

<sup>28</sup> See *Du Plessis vs De Klerk* 1996 (3) SA 850 (CC).

<sup>29</sup> Section 35 (3) of the Constitution of the Republic of South Africa Act 200 of 1993 provides for,

Republic of South Africa Act 200 of 1993, introduced an indirect application of the fundamental rights to private law<sup>30</sup>. The court held that the courts should not invalidate rules of common law inconsistent with the Chapter 3 rights or declare them unconstitutional, instead the development of common law must be pursued by the courts in the normal course as opposed to the Constitutional Court's powers under section 98 of the Constitution of the Republic of South Africa Act 200 of 1993<sup>31</sup>. It is submitted that legislation has to be applied and interpreted according to the object of the Bill of Rights, to the extent that the provision permits<sup>32</sup>.

It must be emphasized that the rights comprising the Bill of Rights can be limited by the operation of section 36 of the Constitution (the limitations clause). Therefore, the question arises, with reference to the relationship between private litigants, whether the Courts should interpret legislation and develop the common law and customary law taking into account the possible limitations on the rights expressed in the Bill of Rights. It is submitted that this is the case for the reason that any other interpretation would be developing legislation and the common law in accordance with absolute rights. This is not in accordance with section 7 (3) of the Constitution. Section 8 (2), (3) and (4) of the Constitution confirm this. It must be remembered that the decision in *Du Plessis vs De Klerk* provided that where a court makes a decision on the development of common law then such decision subject to appeal in the normal way<sup>33</sup>. Only once the normal appeal stages have been exhausted does the Constitutional Court has jurisdiction to determine whether the development or interpretation is in accordance with the objects and purport of the Bill of Rights<sup>34</sup>.

---

"In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter".

Section 39 (2) of the Constitution of the Republic of South Africa Act 108 of 1996 has virtually the same wording.

<sup>30</sup> *Du Plessis vs De Klerk* 1996 (3) SA 850 (CC) at page 854 F-I, 885 E-H.

<sup>31</sup> *Du Plessis vs De Klerk* 1996 (3) SA 850 (CC) at page 854 F-I, 855 A-C, 887 E-G.

<sup>32</sup> Such as the Labour Relations Act 66 of 1995; also see section 3(a) and 3(b) of the aforementioned Act.

<sup>33</sup> *Du Plessis vs De Klerk* 1996 (3) SA 850 (CC) at page 855 A-C.

<sup>34</sup> See section 39 (2) of the Constitution of the Republic of South Africa Act 108 of 1996.



Section 69 of the Labour Relations Act 66 of 1995 is a limitation on the right to picket in terms of section 17 of the Constitution and possibly the equality clause in section 9 of the Constitution. The question arises whether section 69 of the Labour Relations Act 66 of 1995 is a justifiable limitation in terms of section 36 of the Constitution, bearing in mind the vertical and horizontal application of the Constitution. The extent to which the provisions of section 69 of the Labour Relations Act 66 of 1995 infringe on the rights as protected by the Constitution and the extent to which this is justified will be explored under the various headings explaining and detailing the right to picket under section 69 of Labour Relations Act 66 of 1995.

A phenomenon has arisen in the United States of America<sup>35</sup> and Canada<sup>36</sup> to protect the right to picket under the right to freedom of expression. Because the right to picket is expressly provided for in terms of section 17 of the Constitution it seem certain that the right to picket will probably be regulated as one relating to assembly rather than expression.

## **5. PICKETING AND THE NEW LABOUR RELATIONS ACT 66 OF 1995**

### **5.1 The circumstances in which a picket is allowed.**

---

<sup>35</sup> American law sees picketing as falling within the area of free discussion as provided for in the First and Fourteenth Amendments of the United States Constitution – see in general David P Twomey *Labor and Employment Law* 9<sup>th</sup> Edition 1994 South Western Publishing Co at page 209; see further the *Thornhill vs The State of Alabama* 310 US 88,6 LRRM 697 (1940) as reproduced in David P Twomey *Labor and Employment Law* 9<sup>th</sup> Edition 1994 South Western Publishing Co at pages 209-213 (especially page 212); because the right to picket peacefully was equated with freedom of speech it was protected from abridgement by the State under the Fourteenth Amendment – for a general discussion of how the right to picket peacefully was extended to something more than free speech and how it became subject to State regulation see Patrick Hardin *The Developing Labour Law* 3<sup>rd</sup> Edition Vol. 2 1995 BNA Books at pages 1090-1091.

<sup>36</sup> Picketing is protected as a right to freedom of expression as it has a ‘communicative’ element to it. Expression has been defined by the Supreme Court of Canada (*Irwin Toy vs Quebec* (1989) 1 S.C.R. 927 at 968) as “activity is expressive if it attempts to convey meaning” – see Hogg *Constitutional Law of Canada* 3<sup>rd</sup> Edition 1992 Carswell at page 963; Hogg at page 990 also sees picketing as being protected under the right to assembly in terms of section 2(c) of the Canadian Constitution.

A picket can only be held in support of a protected strike or a lock-out (protected or unprotected)<sup>37</sup>. Section 213 of the Labour Relations Act 66 of 1995 gives the definition of a strike or lock-out. However, nothing is mentioned as to whether the strike or lock-out is protected or not. One can deduce from Chapter IV of the Labour Relations Act 66 of 1995 read with section 67 (1) of the Labour Relations Act 66 of 1995 that a protected strike and protected lock-out is one that complies with the provisions of Chapter IV of the Labour Relations Act 66 of 1995. This in essence, without going into a detailed analysis of the laws relating to protected strikes, means that a protected strike is one that complies with the provisions of Chapter IV of the Labour Relations Act 66 of 1995.

A striking feature of section 69 (1) (a) of the Labour Relations Act 66 of 1995 is the fact that it only provides for a picket in relation to protected strikes. One will see from a short reading of the Labour Relations Act 66 of 1995 that section 67 gives certain protection to strikers from civil liability provided the strike is protected. As such the Labour Relations Act 66 of 1995 promotes protected strikes and discourages strikes not in conformity with the Act (unprocedural strike). The provisions in Chapter IV dealing with conciliation<sup>38</sup> before a strike is allowed to take place, seek to settle disputes and to avoid strike action. Therefore one can contend that strike action must be resorted to as a last resort. Failure to comply with these requirements of Chapter IV simply ignores the objects of the Labour Relations Act 66 of 1995. The right to picket is afforded to protected strikes only to encourage compliance with the provisions of Chapter IV which in turn will encourage compliance with the objects of the Labour Relations Act 66 of 1995, which is to minimize strike action<sup>39</sup>.

---

<sup>37</sup> Section 69 (1)(a) and (b) of the Labour Relations Act 66 of 1995.

<sup>38</sup> Section 64 (1) Labour Relations Act 66 of 1995.

<sup>39</sup> See the explanatory memorandum of the Draft Labour Relations Bill of 1995 published in the Government Gazette under Notice No. 97 of 1995 at page 128, 129; see further section 1 (d) (iv) of the Labour Relations Act 66 of 1995; see the article by Bonile Ngqiyaza, "CCMA helps to cut number of strikes" in the *Business Day* dated 30/09/1997.

One will notice that the right to picket in terms of section 69 (1) (b) of the Labour Relations Act 66 of 1995 is given to any lock-out and not just a protected lock-out. The reason is that there is no moral or justifiable argument preventing picketing an employer who has failed to undertake a protected lock-out<sup>40</sup>. Support can be found in the Labour Relations Act 66 of 1995 itself for this proposition in that employees of an employer can go on strike in response to an unprotected lock-out of the employer without having to follow the procedural requirements of section 64 (1) of the Labour Relations Act 66 of 1995 which are required for a protected strike<sup>41</sup>.

As the right to picket is provided for only in relation to protected strikes, it is necessary to determine the time at which a protected strike comes into being. The definition of a strike by its nature requires that there must be a concerted refusal to work or a retardation or obstruction of work<sup>42</sup>. The strike is made protected if it complies with the requirements of section 64 of the Labour Relations Act 66 of 1995, therefore, one can say that a protected strike only comes into being once the requirements of Chapter IV of the Labour Relations Act 66 of 1995 have been complied with and there has been a concerted refusal to work, or a retardation or obstruction of work. It is submitted that this must occur before a picket can be staged in terms of section 69 of the Labour Relations Act 66 of 1995.

As the right to picket is provided for with regard to any lock-out, it is necessary to determine the time at which a lock-out comes into being. A lock-out requires exclusion by the employer of the employees from the employer's work-place<sup>43</sup>. A lock-out is not qualified as protected or unprotected in terms of section 69 of the Labour Relations Act 66 of 1995. However, if the employer engages in a protected lock-out, then the procedural requirements of Chapter IV of the Labour

---

<sup>40</sup> Landman "The New Right to Picket" (1966) Vol. 6 No. 5 *Contemporary Labour Law* at page 42.

<sup>41</sup> Section 64 (3)(c) of the Labour Relations Act 66 of 1995.

<sup>42</sup> Section 213 of the Labour Relations Act 66 of 1995.

<sup>43</sup> Section 213 of the Labour Relations Act 66 of 1995.

Relations Act 66 of 1995 must also be complied with before the picket in terms of section 69 of the Labour Relations Act 66 of 1995 can occur. If a lock-out is unprotected then the picket can be staged directly after the act of exclusion.

## 5.2 The employer who is affected by a picket

The employer who is affected by the picket is not defined in section 69 of the Labour Relations Act 66 of 1995. The Labour Relations Act 66 of 1995 is so broad and does not qualify the word “employer”. Such an unlimited word is unworkable and is in need of delimitation. Usually in the context of Industrial Relations and a strike, the employees of an employer alongside the union try to reinforce strike action against their own employer by staging a picket. However, the concept of a secondary picket<sup>44</sup> has developed whereby, a supplier of an employer hit by a strike (struck employer) is picketed so that he will sever his business ties with the struck employer. It is submitted that secondary picketing is permitted in terms of the Labour Relations Act 66 of 1995 as section 69 (2)(a) of the Labour Relations Act 66 of 1995 refers to “an employer” with no qualification as to whether the employer is the employer affected by the strike or the lock-out. This in turn has economic repercussions for independent and innocent third parties who do business with a struck employer for example, a third party, being a supplier of affected employer, who succumbs to picketers demands and severs his contractual relationship with the affected employer. In principle the affected employer has a claim against the picketers for the interference of his contractual relationship if he does not receive his performance or if his obligations are increased<sup>45</sup>. It is further submitted that the term employer is limited by the definition<sup>46</sup> of picket within the context of Labour Relations Act 66 of 1995 so that at most the struck employer and his suppliers are employers within the meaning of the Labour Relations Act 66 of 1995.

---

<sup>44</sup> David P Twomey *Labor and Employment Law* 9<sup>th</sup> Edition 1994 South Western Publishing Co at page 209.

<sup>45</sup> Neethling Potgieter Visser *The Law of Delict* 2<sup>nd</sup> Edition 1992 Butterworths at page 256-259.

<sup>46</sup> Refer to the heading “The definition of a picket” at page 2 of this dissertation.

### 5.3 Persons who may stage a picket

Section 69 of the Labour Relations Act 66 of 1995 sees the right to picket as a collective right and not as an individual right as the right to picket is conferred on registered trade unions only – section 69 (1) of the Labour Relations Act 66 of 1995 requires that such trade unions may “authorise” a picket. A registered trade union is a trade union registered in terms of the provisions of Chapter VI of the Labour Relations Act 66 of 1995. The right to picket, if authorised by a registered union, will be conducted by members of the union and its supporters. As such the persons capable of conducting the picket are numerous in number. This has a number of consequences. Persons who are not employed by the employer can be part of the picket. This definition gives credence to the view of mass picketing. Because the right to picket in terms of section 69 (1) of the Labour Relations Act 66 of 1995 is conferred on registered trade unions only, constitutional problems arise. Where the Constitution has vertical application<sup>47</sup>, employees of the state can in principle rely on the infringement of their constitutional right to equality in terms of section 9 of the Constitution. Section 9 of the Constitution provides that everyone has the right to equal protection and benefit of the law. Unregistered trade unions having state employees as members can likewise do the same. There is also the possibility that the right to picket in terms of section 17 of the Constitution is violated by section 69 (1) of the Labour Relations Act 66 of 1995 in that the individuals right to picket is subjected to the limitation of prior authorisation by a registered union. However, the effect of section 36 of the Constitution will have to be seen. Where the Constitution has horizontal application the same principles apply except that the courts will have to interpret section 69 (1) of the Labour Relations Act 66 of 1995 in accordance with the spirit, objects and purport of the Constitution<sup>48</sup>.

The question arises whether there is any justification, in terms of section 36 of the Constitution, for conferring the right to picket on registered trade unions only.

---

<sup>47</sup> See the discussion under the heading “Picketing in terms of the South African Constitution” at page 6 of this dissertation.

Justification exists in that trade unions play such a necessary and important function in collective bargaining<sup>49</sup>. This requires some form of regulation e.g. the Labour Relations Act 66 of 1995 requires that trade unions have to comply with certain equality provisions in their constitutions before registration is allowed<sup>50</sup>. By allowing only registered unions the right to picket then unions with discriminatory constitutions have no choice but to register in terms of the provisions of the Labour Relations Act 66 of 1995 to acquire such a right. This could possibly justify the distinction between registered and unregistered unions. However, it does not explain why the right to picket is not given **directly** to employees. Perhaps, guidance can be obtained in this regard from the Labour Relations Act 66 of 1995 itself, albeit in terms of other provisions. In terms of the strike provision in Chapter IV<sup>51</sup> of the Labour Relations Act 66 of 1995, the right to strike is afforded to employees. As picketing is an ancillary activity in relation to a strike (in support of the strike), then it seems uncertain why employees get the right to strike and registered trade unions get the right to picket. The British Columbia Code<sup>52</sup> confers the right to picket on a trade union, a member or members who are lawfully on strike. English law allows “a person” to picket<sup>53</sup>. “A person” is delimited to the extent that it is an employee of the employer<sup>54</sup> or a union official of a trade union<sup>55</sup>. American law allows for employees to picket<sup>56</sup>. American and Canadian law are of some use in this regard because of the commonality of a Bill of Rights.

---

<sup>48</sup> Section 39 (2) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>49</sup> Section 1(c) and 1(d) of the Labour Relation Act 66 of 1995.

<sup>50</sup> Section 95 (6) of the Labour Relation Act 66 of 1995.

<sup>51</sup> Section 64 of the Labour Relation Act 66 of 1995.

<sup>52</sup> Section 65 (3) of the Labour Relations Code S.B.C. 1992, c.82 of British Columbia; The Code as aforesaid was chosen as a point of reference because British Columbia is the only Province in Canada which specifically regulates picketing in a statute – the other Provinces simply rely on ordinary common law principles – see Prof. H W Arthurs *Labour Law and Industrial Relations in Canada* 4<sup>th</sup> Edition 1993 Kluwer Butterworths at page 274, 275 at paragraph 655.

<sup>53</sup> Section 220 of the Trade Union and Labour Relations (Consolidation) Act of 1992.

<sup>54</sup> Section 220 (1)(a) of the Trade Union and Labour Relations (Consolidation) Act of 1992.

<sup>55</sup> Section 220 (1)(b) of the Trade Union and Labour Relations (Consolidation) Act of 1992.

<sup>56</sup> James W Hunt Patricia K Strongin *The Law of the Workplace* 3<sup>rd</sup> Edition 1994 BNA Books at page 194.

#### 5.4 The place where a picket is staged

Section 69 (2)(a) of the Labour Relations Act 66 of 1995 confers the right to strike at any place to which the public has access but outside the premises of the employer. "Premises" is not defined in the Labour Relations Act 66 of 1995. Logical reasoning indicates that the word "premises" means the place where the employer carries on his business operations. Where major corporations are concerned and the corporation is divided up into several branches and divisions the possibility exists that the place of each branch or division means the "premises" of the employer. As stated previously, section 69 (1) of the Labour Relations Act 66 of 1995 provides through the term "supporters" for the fact that the picketers do not have to be the employees of the picketed employer. Section 69 (2) (a) of the Labour Relations Act 66 of 1995 refers to "an employer", hence the term employer is not qualified<sup>57</sup>. Consequently, as long as the picket is in support of a protected strike or any lock-out, it does not matter which employer is hit by the picket. This seems very broad however, one must remember that the picket is limited by its definition<sup>58</sup>. From the aforesaid, it is tenable then to consider that as the Labour Relations Act 66 of 1995 impliedly authorises secondary picketing then there is no reason why any branch or division of a company cannot be picketed as being the "premises" of the employer. Afterall, the effect of a picket is to prevent suppliers and customers from dealing with the company<sup>59</sup>.

A further point indicating that premises includes all the branches and divisions of a company is section 69 (5)(a) of the Labour Relations Act 66 of 1995. Section 69 (5)(a) of the Labour Relations Act 66 of 1995 requires that the Commission for Conciliation Mediation and Arbitration (hereafter called the CCMA) must decide on rules regulating the conduct of the picket if the parties cannot agree thereto.

In so doing, the commission is required to take into account the personal

---

<sup>57</sup> Refer to the heading "The employer who is affected by a picket" at page 11 of this dissertation.

<sup>58</sup> Refer to the heading "The Definition of a Picket" at page 2 of this dissertation.

<sup>59</sup> Refer to the heading "The Definition of a Picket" at page 2 of this dissertation.

circumstances of the “work-place” or other “premises”<sup>60</sup>. Work-place is defined in section 213 of the Labour Relations Act 66 of 1995. Paragraph c<sup>61</sup> under the definition of “work-place” defines the “work-place” to mean “in all other instances, the place or places where employees work”. This means the geographical place where the employees actually work or it could mean all the places where the employees of the employer work. However, paragraph c clarifies this by stating that if the employer carries on or conducts two or more operations which are independent of one another by reason of their size, function or organisation then the place of the separate operation is deemed to be the “work-place”. From the aforesaid, it is easy to see how difficult this definition is to interpret. Therefore, I submit that the reason why the legislator included the word “premises” after “work-place” in section 69 (5)(a) of the Labour Relations Act 66 of 1995 is to make it clear that “premises” applies to a wider definition than just where the employee actually works.

An inquiry into how other jurisdictions deal with the place where the picket is to be held could possibly prove useful. In the Canadian province of British Columbia the right to picket is expressly set out in terms of section 65 (7) of the Labour Relations Code<sup>62</sup> which provides that specific divisions or other parts of a corporation or firm, if they are separate and distinct operations, are treated as separate employers. Section 3 of the Labour Relations Code<sup>63</sup> limits the place where the picket is to be held at or near a site or place where a member of the trade union performs work under the control and direction of the employer. The English law<sup>64</sup> provides for the picket to be held “at or near his own place of work”. Picketing is limited to the actual place where the employee works for the employer. Unfortunately, these examples cannot be of any use in determining the meaning of “premises” as Canadian law and British law do not set out secondary picketing and the picket only applies to employees, trade unions and its members

---

<sup>60</sup> Section 69 (5)(a) of the Labour Relations Act 66 of 1995.

<sup>61</sup> Section 213 of the Labour Relations Act 66 of 1995.

<sup>62</sup> Labour Relations Code S.B.C. 1992, c.82 of British Columbia.

<sup>63</sup> Labour Relations Code S.B.C. 1992, c.82 of British Columbia.



and not to its supporters as provided in section 69 (1) of the Labour Relations Act 66 of 1995.

What is the situation if the employer is situated in a Mall with several other employers who are in no way connected with his business? If one looks at the provision in section 69 (2)(a) of the Labour Relations Act 66 of 1995 one sees that the provision refers to, “any place to which the public has access”. As such, a Mall could be the stage where the production of the picket unfolds. Canada has solved this problem by the enactment of various statutes such as the Code of British Columbia which provides that “no action or proceeding may be brought for petty trespass to any land to which a member of the public ordinarily has access”<sup>65</sup>. American law has also given support to this view<sup>66</sup> by holding that picketing was Constitutionally protected in a shopping center because the shopping center served as the community business block and was freely accessible and open to people in the area and those who were passing through<sup>67</sup>. However, American law has conflicting decisions regarding this point<sup>68</sup>.

Section 69 (2)(a) of the Labour Relations Act 66 of 1995 envisages that a picket can take place in “any place to which the public has access”. Access is not defined nor qualified – does this mean that persons may stage a picket in a prison for example? It should be pointed out that although this provision is in accordance with the right to picket in terms of section 17 of the Constitution, however, it does not provide for any limitation. In America, peaceful assembly,

---

<sup>64</sup> Section 220 (1)(a) and (b) of the Trade Union and Labour Relations (Consolidation) Act of 1992.

<sup>65</sup> Section 66 (a) of the Labour Relations Code S.B.C. 1992, c.82 of British Columbia; for more references see Professor Arthurs *Labour Law and Industrial Relations in Canada* 4<sup>th</sup> Edition 1993 Kluwer Butterworths at paragraph 705 page 290.

<sup>66</sup> *Food Employees Local 590 vs Logan Valley Plaza* 391 US 308,68 LRRM 2209 (1968).

<sup>67</sup> *Food Employees Local 590 vs Logan Valley Plaza* 391 US 308,68 LRRM 2209 (1968) at page 2213; see the discussion of the *Logan Valley* case in Patrick Hardin *The Developing Labour Law* 3<sup>rd</sup> Edition Vol. 2 page 1091.

<sup>68</sup> *Food Employees Local 590 vs Logan Valley Plaza* 391 US 308,68 LRRM 2209 (1968) and *Hudgens vs NLRB* 424 US 507,91 LRRM 2489 (1976); see Patrick Hardin *The Developing Labour Law* 3<sup>rd</sup> Edition Vol 2 pages 1092 and 1093 where he gives a good summary of how the decision in the *Logan Valley Case* was overruled by the Supreme Court of America in the *Hudgens Case* where it was stated that there was no First Amendment right to picket or to contact the public inside a privately owned shopping centre or mall.

which is protected in terms of the First Amendment does not mean that a picket can be held on all property to which the public has access<sup>69</sup>. I submit that the term “access” should be restrictively interpreted in line with the limitations as envisaged in section 36 of the Constitution. After all, the courts have the function of developing and interpreting statutes in accordance with the spirit, purport and objects of the Bill of Rights of the Constitution<sup>70</sup>.

The phrase “despite any law regulating the right of assembly” appears in terms of section 69 (2) of the Labour Relations Act 66 of 1995. What is the effect of these words? Does it imply that a peaceful picket can be held in conflict with municipal by-laws and criminal provisions prohibiting the assembly of people! A literal interpretation of this implies that picketing in contravention of these provisions can be undertaken. However, it is submitted that the picket must be conducted in accordance with other laws and that the aforementioned phrase does not give the picketers a licence to do what they desire. If the law in question is of doubtful constitutional validity, the picket could be proceeded with but, the parties could be subjected to criminal prosecution. If a prosecution is proceeded with, the law could be attacked as an infringement of the right to assembly<sup>71</sup> on the basis that the state is a party to the litigation (vertical application)<sup>72</sup>. If this is the case, then what is the need for the phrase? A possible explanation for this is the fact that section 69 of the Labour Relations Act 66 of 1995 should be seen as a measure protecting picketers from the consequences of civil liability. Section 69 (7) of the Labour Relations Act 66 of 1995 read with section 67 (8) of the Labour Relations Act 66 of 1995 provides that a picketer will not receive the protection against civil liability if the act in contemplation or furtherance of a picket is an offence. Section 67 (9) of the Labour Relations Act 66 of 1995 provides expressly that an act in furtherance or contemplation of a picket which

---

<sup>69</sup> See Jayson Kraut *American Jurisprudence 2<sup>nd</sup> Edition* Vol. 16A 1979 The Lawyers Co-operative Publishing Co generally at pages 425, 426 and pages 402, 403, 404, 405 (where it relates to freedom of speech and expression).

<sup>70</sup> Section 39 (2) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>71</sup> Section 17 of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>72</sup> Section 8 (1) of the Constitution of the Republic of South Africa Act 108 of 1996.

contravenes the Basic Conditions of Employment Act 3 of 1983 or the Wage Act 5 of 1957 does not constitute an offence for the purposes of civil liability. Section 67 (9) of the Labour Relations Act 66 of 1995 does not imply that an infringement of the Basic Conditions of Employment Act or Wage Act will take away the criminal liability attached to it but only that it will not be deemed a criminal offence when deciding if someone is liable on a civil basis. It is submitted that the phrase<sup>73</sup> should be seen as a provision deeming contraventions of other criminal provisions not criminal offences for the purposes of determining civil liability. This can be explained with reference to the effect that the Internal Security Act 74 of 1982<sup>74</sup> had on gatherings. This interpretation is in accordance with the Constitution where the rights as entrenched in the Bill of Rights are not seen as absolute but capable of limitations<sup>75</sup>. With this interpretation the right to picket in terms of section 17 of the Constitution is not seen as an inviolate absolute right. English law<sup>76</sup> states that a person who commits a criminal offence during a picket is still liable to prosecution. This even more so in view of the fact that section 219 (3) read with section 220 of the British Trade Union and Labour Relations (Consolidation) Act of 1992 only protects a picketer from civil liability. The British Columbia Code<sup>77</sup> protects picketers from certain forms of civil liability. It does not protect them from criminal liability.

## **5.5 The manner in which a picket is conducted**

Section 69 (1) of the Labour Relations Act 66 of 1995 requires the picket to be peaceful. As such, it is in conformity with the Constitution which provides in terms of section 17 for the right to peaceful assembly and picketing. The element of peacefulness is prevalent in most countries relating to the right of

---

<sup>73</sup> "Despite any law regulating the right of assembly" in section 69 (2) of the Labour Relations Act 66 of 1995.

<sup>74</sup> See Professor Davis "Picketing" Vol. 9 No. 1 *Industrial Law Journal* (1988) at page 34.

<sup>75</sup> Section 36 and section 7 (3) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>76</sup> Section C paragraph 41 of the Code of Practice ... Picketing (1992) as created and regulated by the Trade Union and Labour Relations (Consolidation) Act of 1992 in terms of sections 199 to 208; see further section 219(3) read with section 220 of the Trade Union and Labour Relations (Consolidation) Act of 1992.

<sup>77</sup> Section 66 of the Labour Relations Code S.B.C. 1992, c.82 of British Columbia.

assembly. The United States First Amendment provides for the right to assembly peaceably<sup>78</sup>. The Canadian Constitution<sup>79</sup> through its charter of rights provides in section 2 (c) for the freedom of peaceful assembly. The German Constitution<sup>80</sup> in terms of Article 8 (1) provides for peaceful assembly. Article 11 (1) of the European Convention on Human Rights provides for the right to freedom of peaceful assembly. Even if one moves away from these constitutionally protected rights one will still see that the requirement of peacefulness is essentially a requirement for a legal picket in most foreign jurisdictions. Section 220 of the British Trade Union and Labour Relations Consolidation Act of 1992 provides for picketing which has the purpose of “peacefully obtaining or communicating information or peacefully persuading”. Scottish law has a similar requirement<sup>81</sup>.

Section 17 of the Constitution provides for the right to picket without arms. I submit that section 69 (1) of the Labour Relations Act 66 of 1995 has to be interpreted in accordance with the objects, purport and spirit of the Bill of Rights<sup>82</sup>. Section 69 (1) of the Labour Relations Act 66 of 1995 only provides for a peaceful picket – no mention is made of being armed. I submit that the interpretation of the word peaceful in section 69 (1) of the Labour Relations Act 66 of 1995 should include being unarmed. Therefore, once picketers are armed then section 69 (1) of the Labour Relations Act 66 of 1995 is not complied with and the picket is not protected.

Section 69 (1) of the Labour Relations Act 66 of 1995 does not provide for how a picket is to be conducted by the union or picketers. Landman<sup>83</sup> maintains that the legislature’s intention was to create the rules or conduct for a picket by agreement between the parties. One can infer that this is correct from the provisions of

---

<sup>78</sup> For a general outline of the right of assembly see Jayson Kraut *American Jurisprudence* 2<sup>nd</sup> Edition Vol. 16A 1979 The Lawyer Co-operative Publishing Co. at pages 415-426.

<sup>79</sup> The Canadian Constitution Act of 1982.

<sup>80</sup> The German Constitution as reproduced in David P Currie *The Constitution of the Federal Republic of Germany* 1994 University of Chicago Press at page 343.

<sup>81</sup> Victor Craig Kenneth Miller *Employment Law in Scotland* 1<sup>st</sup> Edition 1991 T & T Clark at page 338.

<sup>82</sup> Section 39 (2) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>83</sup> Landman “The New Right to Picket” (1996) Vol. 6 No. 5 *Contemporary Labour Law* page 43.

section 69 of the Labour Relations Act 66 of 1995 itself. Section 69 (4) of the Labour Relations Act 66 of 1995 provides for the CCMA, on application from the employer or a registered trade union, to attempt to get an agreement between the parties to a dispute on the rules to be applied to the picket. Failing an agreement section 69 (5) of the Labour Relations Act 66 of 1995 provides for the fact that the CCMA must determine the rules which will apply to the picket taking into account various factors. Therefore, one can imply that if an agreement regarding the conduct of the picket exists between the registered trade union and the employer no recourse is needed to the CCMA. This agreement then is applicable to the conduct of the picket. As stated above, failing an agreement on the rules for the conduct of the picket being reached between the parties only a registered trade union or an employer can apply to the CCMA. This has constitutional implications in terms of the breach of section 9 of the Constitution as discussed under the heading “Persons who may stage a picket”<sup>84</sup>. In essence, we are concerned with a potential infringement of the right to equality. However, section 69 (4) of the Labour Relations Act 66 of 1995 does not really pose the same equality problems that section 69 (1) of the Labour Relations Act 66 of 1995 poses in that, section 69 (4) of the Labour Relations Act 66 of 1995 presupposes that a picket will be proceeded with (all that has to be determined are the rules regulating the conduct of a picket), whereas section 69 (1) of the Labour Relations Act 66 of 1995 requires a registered trade union’s authorisation to stage a picket in the first place.

As said previously, if the parties to a dispute cannot agree on the rules relating to the conduct of the picket then the CCMA decides what these rules are to be. The CCMA is required by section 69 (5)(a) and (b) of the Labour Relations Act 66 of 1995 to take into account two requirements i.e. a) the particular circumstances of the work-place and, b) any relevant code of good practice. This definition is not

---

<sup>84</sup> See page 12 of this dissertation.

exhaustive and Landman<sup>85</sup> gives a list of other factors which should be addressed in deciding on the rules. No code of good practice exists in relation to picketing at the moment. A Code of good practice exists in the United Kingdom<sup>86</sup>. This Code is in essence a restatement of the British law regulating pickets<sup>87</sup>. The relevant aspect of this Code in a South African context is that pickets are subject to the criminal law<sup>88</sup>. This has relevance to the discussion under the heading “The place where a picket is staged” of this dissertation where the phrase “despite any laws regulating the right of assembly”<sup>89</sup> is discussed. The aforesaid Code limits the numbers of persons who are allowed on the picket line at any one time to six persons<sup>90</sup> due to the reason that violence and disorder on the picket line are more likely to occur if there are excessive numbers<sup>91</sup>. However, the limitation on the number of persons taking part in the picket does not have any significance to our law of picketing as section 69 of the Labour Relations Act 66 of 1995 allows mass picketing in that section 69 (1) of the Labour Relations Act 66 of 1995 refers to registered trade unions, members **and their supporters**.

Section 69 (6) of the Labour Relations Act 66 of 1995 provides for the fact that the CCMA may make a rule that the picket may be conducted on the premises of the employer if the employer’s permission as contemplated in section 69 (2)(b) of the Labour Relations Act 66 of 1995 has been unreasonably withheld. Section 69 (6) of the Labour Relations Act 66 of 1995 restricts the persons who may conduct a picket on the employer’s premises to the employer’s employees only. This is so despite the large contingent of persons mentioned in section 69 (1) of the Labour Relations Act 66 of 1995 who may conduct a picket. Section 69 (6) of the Labour Relations Act 66 of 1995 has the possible effect of excluding section 69’s application to a secondary picket. Section 69 (6) of the Labour Relations

---

<sup>85</sup> Landman “The New Right to Picket” (1996) Vol. 6 No. 5 *Contemporary Labour Law* page 43.

<sup>86</sup> Code of Practice ....Picketing (1992) as created and regulated by the Trade Union and Labour Relations (Consolidation) Act of 1992 in terms of sections 199-208.

<sup>87</sup> Sections 218 to 221 of the Trade Union and Labour Relations (Consolidation) Act of 1992 .

<sup>88</sup> Section C paragraph 41-44 of the Code of Practice..Picketing (1992).

<sup>89</sup> See page 14 of this dissertation.

<sup>90</sup> Paragraph 51 of the Code of Practice..Picketing (1992).

<sup>91</sup> Paragraph 48-51 of the Code of Practice..Picketing (1992).

Act 66 of 1995 encroaches upon the rights of the owner to the use and enjoyment of his land under the broader guise of ownership. Nevertheless, such an infringement could give rise to criminal prosecution by the mechanism of the Trespass Act<sup>92</sup>. Because of section 69 (6) of the Labour Relations Act 66 of 1995 it is submitted that it is highly unlikely that a Court would find a trespass in terms of section 69 (6) of the Labour Relations Act 66 of 1995 as being unlawful.

Who determines whether the consent of the employer is unreasonably withheld in terms of section 69 (3) of the Labour Relations Act 66 of 1995 read with section 69 (2)(b) of the Labour Relations Act 66 of 1995? There is no express provision dealing with this question. After consideration, one can possibly refer the dispute (i.e. the question whether consent has been withheld unreasonably) to the CCMA for conciliation under section 69 (8)(a) of the Labour Relations Act 66 of 1995 on the grounds that the effective use of the right to picket has been undermined. The rest of the sub-sections of section 69 (8) of the Labour Relations Act 66 of 1995 do not seem to have application to this question although section 69 (8)(b) may have some relevance. section 69 (8)(b) of the Labour Relations Act 66 of 1995 requires that a dispute concerning a contravention of section 69 (1) or (2) of the Labour Relations Act 66 of 1995 be referred to the CCMA for conciliation. A dispute as required by section 69 (8) of the Labour Relations Act 66 of 1995 can arise in the context of section 69 (2)(b) of the Labour Relations Act 66 of 1995 by virtue of the question whether the employer has consented to the picketing inside his premises. It is submitted that section 69 (8)(b) of the Labour Relations Act 66 of 1995 requires that the court must determine whether the required permission has been given or not. Hereby, the court is drawn into an artificial reasoning of having to declare that permission which has in fact not been given by the employer but which is unreasonably withheld by him is in fact permission given in terms of the Labour Relations Act 66 of 1995.

---

<sup>92</sup> Trespass Act 6 of 1959 ; see Professor Davis "Picketing" (1988) Vol. 9 No. 1 *Industrial law Journal* at page 35.

## 5.6 The resolution of disputes about picketing

Section 69 (8) of the Labour Relations Act 66 of 1995 read with section 69 (10) of the Labour Relations Act 66 of 1995 requires that disputes concerning matters mentioned in section 69 (8) (a) to (d) be referred to the CCMA. If the dispute cannot be settled by conciliation it is referred to the Labour Court for adjudication in terms of section 69 (11) of the Labour Relations Act 66 of 1995. Section 69 (8) of the Labour Relations Act 66 of 1995 must be read with section 69 (9) of the Labour Relations Act 66 of 1995, which requires that a copy of the referral of the dispute must be served on all parties to the dispute. The term “parties” is not defined. However, with reference to the fact that only a registered trade union may authorise a picket<sup>93</sup> and only an employer and registered trade union may apply to the CCMA<sup>94</sup> in an attempt to reach agreement on the rules for the conduct of the picket, it seems that the section 69 (8), (9) and (11) of the Labour Relations Act 66 of 1995 refer to the parties to the dispute as being a registered trade union and an employer.

Some interesting questions arise in connection with the agreements relating to the conduct of a picket. As explained earlier section 69 of the Labour Relations Act 66 of 1995 does not make provision for agreements concluded between the employer and union regarding the conduct of a strike without the intervention and aid of the CCMA (hereafter called a non CCMA agreement). Only agreements regulating the conduct of the picket concluded under the auspices of the CCMA are provided for in section 69 (4) and (5) of the Labour Relations Act 66 of 1995. Section 69 (8) of the Labour Relations Act 66 of 1995 likewise, makes no provision for the breach of an agreement other than the CCMA agreement. On a literal interpretation, this means that a breach of a non CCMA agreement cannot be referred to the CCMA and subsequently to the Labour Court for conciliation

---

<sup>93</sup> Section 69 (1) of the Labour Relations Act 66 of 1995.

<sup>94</sup> Section 69 (4) of the Labour Relations Act 66 of 1995.



and adjudication respectively<sup>95</sup>. In the *Lomati* case<sup>96</sup>, Landman A.J. refused to accept this interpretation.<sup>97</sup> The court accepted that section 69 (8) (c) of the Labour Relations Act 66 of 1995 did not literally include non CCMA agreement<sup>98</sup>. The court reasoned that the material part of section 69 (8) (c) of the Labour Relations Act 66 of 1995 was that a “breach of an agreement”<sup>99</sup> between the parties should be referred to the CCMA for conciliation. The court took a purposive approach and stated further that “an agreement mediated or brokered by some other agency other than the CCMA was neither here nor there”.<sup>100</sup> The decision can be supported to some extent by the fact that section 69 of the Labour Relations Act 66 of 1995 does not regulate the conduct of the picket but impliedly leaves such rules to be determined by the parties to the agreement<sup>101</sup>.

Nevertheless, if one looks at section 69 (8) of the Labour Relations Act 66 of 1995 one will see that it is clear and unambiguous. As such, there seems no juridical basis for extending the section to include agreements other than those concluded under the agency of the CCMA, even though such an interpretation could lead to the possible negation of non CCMA agreements. There seems to have been an omission on the part of the legislature in this regard. The ease with which this problem is overcome and explained in the *Lomati* case<sup>102</sup> can possibly be explained on the basis that it was common cause between the parties to the dispute that section 69 (8) of the Labour Relations Act 66 of 1995 actually applied to a non CCMA agreement. I submit that in order to use the provisions of

---

<sup>95</sup> Section 69 (8), (9), (10) and (11) of the Labour Relations Act 66 of 1995.

<sup>96</sup> *Lomati Mill Barberton (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC).

<sup>97</sup> *Lomati Mill Barberton case (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC) at page 181E-G.

<sup>98</sup> *Lomati Mill Barberton case (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC) at page 181 E-G.

<sup>99</sup> *Lomati Mill Barberton case (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC) at page 181 E-G.

<sup>100</sup> *Lomati Mill Barberton case (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC) at page 181 at E-G.

<sup>101</sup> See the discussion hereof under the heading “The manner in which a picket is conducted” at page 18 of this dissertation.

<sup>102</sup> *Lomati Mill Barberton case (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC).

section 69 (8) of the Labour Relations Act 66 of 1995, with specific reference to non CCMA agreements, one would have to try and fit a dispute in this regard under section 69 (8) (a) of the Labour Relations Act 66 of 1995 on the basis that the “effective use of the right to picket is being undermined”. On this basis it can be argued that without any rules regulating the conduct of the picket, how can the right to picket ever be deemed to be effective. Such a view is more in line with our law of statutory interpretation<sup>103</sup>.

A further issue raised in the *Lomati* decision<sup>104</sup> was whether a dispute as referred to in section 69 (8) of the Labour Relations Act 66 of 1995 has to be conciliated first or whether the Labour Court has jurisdiction to determine the dispute notwithstanding the fact that such conciliation has not taken place. section 69 (10) of the Labour Relations Act 66 of 1995 is couched in peremptory language “must”. This implies that in order for the Labour Court to have jurisdiction to determine the dispute under section 69 (8) of the Labour Relations Act 66 of 1995, the dispute must be conciliated by the CCMA. Landman A.J. in the *Lomati* case<sup>105</sup> determined that the Labour Court can dispense with the requirement of conciliation by the CCMA in terms of section 157 (4) of the Labour Relations Act 66 of 1995.<sup>106</sup> The court points out the desirability of doing this in cases of urgency<sup>107</sup>. My submission in this regard is that section 157 (4) of the Labour Relations Act 66 of 1995 does not grant the Labour Court the power to simply ignore the requirement of section 69 (10) of the Labour Relations Act 66 of 1995. The *Lomati* decision ignores the function of the conciliation provisions under section 135 of the Labour Relations Act 66 of 1995. Section 157 (1) of the Labour Relations Act 66 of 1995 provides that the Labour Court has exclusive

---

<sup>103</sup> See generally C. J. Botha *Statutory Interpretation* 2<sup>nd</sup> Edition 1994 Juta and Co.

<sup>104</sup> *Lomati Mill Barberton case (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC) at page 181 H-I.

<sup>105</sup> *Lomati Mill Barberton (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC).

<sup>106</sup> *Lomati Mill Barberton case (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC) at page 181 H-I.

<sup>107</sup> *Lomati Mill Barberton (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC) case at page 181 I.

jurisdiction over all matters which have to be determined by the Labour Court “except where this Act provides”. Section 69 (10) of the Labour Relations Act 66 of 1995 is a prerequisite for the jurisdiction of the Labour Court. Jurisdiction by its nature is the first concept that a court looks at to determine a dispute which comes before it. Primarily, the court must have jurisdiction before it can condone non compliance with a provision or rule. An interpretation based on section 157 (4) of the Labour Relations Act 66 of 1995 presupposes that the court has jurisdiction to determine a dispute but refuses to for various reasons. An interpretation that section 157 (4) of the Labour Relations Act 66 of 1995 gives the court the power to condone the fact that it does not have jurisdiction places the cart before the horse, so to speak. Juridically this is incorrect. Furthermore, one should bear in mind that section 157 (4)(a) of the Labour Relations Act 66 of 1995 does not expressly say that a court can ignore the conciliation process. In the interest of practicality, it would seem desirable to allow the Labour Court to dispense with the requirement of conciliation in matters of urgency. However, this power has not been given to the Labour Court.

#### **5.7 The legal protection afforded under the Labour Relations Act 66 of 1995**

Section 69 (7) of the Labour Relations Act 66 of 1995 provides, “the provisions of section 67 of the Labour Relations Act 66 of 1995, read with the changes required by the context, apply to the calling for, organisation of, or participation in a picket that complies with the provisions of this section.” In essence this means replacing the words strike and lock-out, which appear in section 67 of the Labour Relations Act 66 of 1995, with the word “picket”. This section means that a person does not commit a delict or breach of contract by calling for organising or taking part in a protected picket – section 69 (7) of the Labour Relations Act 66 of 1995 read with section 67 (2) of the Labour Relations Act 66 of 1995. A protected picket is one that complies with the requirements of section 69 of the Labour Relations Act 66 of 1995. Section 69 (7) of the Labour Relations Act 66 of 1995 read with section 67 (6) of the Labour Relations Act 66

of 1995 drives home the impact of section 67 (2)(a) and (2)(b) of the Labour Relations Act 66 of 1995 by providing that no civil proceedings may be instituted against any person who calls for, organises, or participates in a protected picket or in any conduct in contemplation or in furtherance of a protected picket.

Landman<sup>108</sup> submits that this is to avoid tactical litigation and to ensure the protection afforded against civil liability. Therefore, section 69 (7) read with section 67 (6) of the Labour Relations Act 66 of 1995 prevents the procuring of interdicts.

The question arises as to which persons are protected from civil liability. The persons protected are union members and its supporters<sup>109</sup>. Landman<sup>110</sup> raises the question against whom are the aforesaid persons protected? Landman<sup>111</sup> submits that the protection against civil liability applies to “anyone” who would be harmed by the breach of contract or the commission of the delict. I agree with this sentiment as the Labour Relations Act 66 of 1995 does not distinguish between primary and secondary picketing and as such does not limit picketing to an employer of the members of the union – it could apply to a supplier of the employer who employs the union members<sup>112</sup>.

Section 69 (7) of the Labour Relations Act 66 of 1995 read with section 67 (8) of the Labour Relations Act 66 of 1995 provides for the limitation of the protection afforded by section 67 of the Labour Relations Act 66 of 1995 against civil liability. It provides that a person will not receive the immunity from civil liability if the act committed is an offence. The offence is a criminal offence in terms of statute or common law<sup>113</sup>. Section 67 (9) of the Labour Relations Act 66

---

<sup>108</sup> Landman “The New Right to Picket” (1996) Vol. 6 No. 5 *Contemporary Labour Law* at page 44.

<sup>109</sup> Section 69 (1) read with section 67 (2) of the Labour Relations Act 66 of 1995.

<sup>110</sup> Landman “The New Right to Picket” (1996) Vol. 6 No. 5 *Contemporary Labour Law* at page 44.

<sup>111</sup> Landman “The New Right to Picket” (1996) Vol. 6 No. 5 *Contemporary Labour Law* at page 44.

<sup>112</sup> See the discussion under the heading “The employer who is affected by a picket” at page 11 of this dissertation.

<sup>113</sup> Landman “The New Right to Picket” (1996) Vol. 6 No. 5 *Contemporary Labour Law* at page 44; *Lomati Mill Barberton (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC) at page 184 D-E.

of 1995 provides that certain contraventions of the Basic Conditions of Employment Act<sup>114</sup> and the Wage Act<sup>115</sup> are not offences for the purposes of determining the protection afforded against civil liability. As explained earlier under the heading “The place where a picket is staged”<sup>116</sup> the term “despite any law regulating the right of assembly”<sup>117</sup> should be interpreted in the context of providing that a breach of a law regulating the right to assembly will not be construed as an offence for the purposes of determining liability on a civil basis, provided it is in terms of section 69 of the Labour Relations Act 66 of 1995.

Generally, one can say that pickets are accompanied by the carrying of posters and the communicating of messages verbally. These communications can possibly be defamatory. Does the protection afforded under section 69 (7) of the Labour Relations Act 66 of 1995 read with section 67 of the Labour Relations Act 66 of 1995 protect a picketer from civil liability in the form of defamation? An answer to this is the fact that defamation is a criminal offence in South Africa. The protections envisaged under section 69 (7) of the Labour Relations Act 66 of 1995 read with section 67 of the Labour Relations Act 66 of 1995 do not extend to situations involving the commission of a criminal offence. Therefore, where defamation is committed an aggrieved employer can institute a claim for damages based on delict. If it were not for the criminal sanctioning of defamation, a picketer could in principle have an absolute right to defame an employer in terms of the Labour Relations Act 66 of 1995. The idea of an absolute right to defame is not in accordance with the Constitution’s Bill of Rights which are capable of being limited in terms of section 36<sup>118</sup>. However, if defamation was decriminalised, how would one handle this aspect of defamation?

Referring to our discussion concerning the argument that a breach of an agreement relating to the rules for the conduct of the picket makes a picket

---

<sup>114</sup> Act 3 of 1983.

<sup>115</sup> Act 5 of 1957.

<sup>116</sup> See page 17 of this dissertation.

<sup>117</sup> Section 69 (2) of the Labour Relations Act 66 of 1995.

<sup>118</sup> Section 7 (3) of the Constitution of the Republic of South Africa Act 108 of 1996.

unprotected<sup>119</sup> even though the requirements of section 69 of the Labour Relations Act 66 of 1995 have been complied with, provides a possible solution to limiting an absolute right to the defame. In principle one can agree with picketers as to the rules for the conduct of the picket. One could agree that the defamatory communications must not be made during the picket. A definition of what constitutes a defamatory statement could also be agreed upon. If the picketers breach this agreement by making defamatory statements, then the picket is unprotected and civil liability is no longer excluded. Upon adjudication by the court, defamatory statements can be balanced against the freedom of speech provisions in the Constitution<sup>120</sup>.

Section 69 (7) of the Labour Relations Act 66 of 1995 read with section 67 (4) of the Labour Relations Act 66 of 1995 provides that an employee cannot be dismissed for participating in a protected picket or conduct in contemplation or in furtherance of a protected picket. However, section 67 (5) of the Labour Relations Act 66 of 1995 provides that an employer may fairly dismiss an employee, in accordance with Chapter VIII of the Labour Relations Act 66 of 1995 for reasons relating to the employee's conduct during the picket, or for a reason relating to the employer's operational requirements.

Further remedies are provided under section 67 (3) of the Labour Relations Act 66 of 1995 read with section 69 (7) of the Labour Relations Act 66 of 1995. These provisions require that an employer is not obliged to remunerate an employee for services that the employee does not render during a protected picket. This is so, even though no breach of contract has taken place<sup>121</sup>. The aforesaid is qualified in that if the employee's remuneration includes payment in kind in respect of accommodation, provision of food, and other basic amenities of life, the employer

---

<sup>119</sup> See this aspect discussed under the heading "Miscellaneous Considerations" at page 31 of this dissertation.

<sup>120</sup> Section 36 read with section 16 of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>121</sup> Section 69 (7) read with section 67 of the Labour Relations Act 66 of 1995.

cannot discontinue such payment during the length of the picket<sup>122</sup>. Section 67 (3)(b) read with section 69 (7) of the Labour Relations Act 66 of 1995 provides that the monetary amount of such payment in kind may be recovered by way of civil proceedings in the Labour Court by the employer.

One will recall that section 67 (6) of the Labour Relations Act 66 of 1995 read with section 69 (7) of the Labour Relations Act 66 of 1995 prevents civil proceedings in respect of the participation in a protected picket or in respect of any conduct in contemplation or in furtherance of a protected picket. Whether the civil proceedings in respect of the payment in kind refer to the civil proceedings as mentioned in section 67 (6) of the Labour Relations Act 66 of 1995 is a matter of some debate. Section 67 (3) of the Labour Relations Act 66 of 1995 specifically excludes the operation of section 67 (2) of the Labour Relations Act 66 of 1995 by the words “despite sub-section 2”. However, why section 67 (6) of the Labour Relations Act 66 of 1995 was not expressly excluded is a mystery. If one accepts Landman’s<sup>123</sup> proposition that section 67 (6) of the Labour Relations Act 66 of 1995 was enacted simply to avoid “tactical litigation”, then it is submitted that one must interpret section 67 (3)(b) of the Labour Relations Act 66 of 1995 not to fall within the prohibition of section 67 (6) of the Labour Relations Act 66 of 1995 because section 67 (3)(b) of the Labour Relations Act 66 of 1995 creates a sui generis action not based on delict or breach of contract.

The failure of a registered trade union or registered employer’s organisation to comply with a provision requiring a ballot to be conducted of its members in respect of when it intends to call a picket may not give rise to or constitute a ground for any litigation that will affect the legality of and protection conferred by section 67 (7) of the Labour Relations Act 66 of 1995 on the picket.

---

<sup>122</sup> Section 67 (3)(a) read with section 69 (7) of the Labour Relations Act 66 of 1995.

<sup>123</sup> Landman “The New Right to Picket” (1996) Vol. 6 No. 5 *Contemporary Labour Law* at page 44.

## 6. MISCELLANEOUS CONSIDERATIONS.

Is the picket still protected if the agreement regulating the rules for the conduct of the picket is breached? It can be argued that the picket is still protected on the basis that the agreement relating the conduct of the picket simply reinforces the already determined protected right to picket in terms of section 69 (1) of the Labour Relations Act 66 of 1995 and 69 (2) of the Labour Relations Act 66 of 1995. It can be argued that section 69 (4) and (5) of the Labour Relations Act 66 of 1995 simply expand upon a given or determined right. The breach of agreement may also overlap with the breach of section 69 (1) and (2) of the Labour Relations Act 66 of 1995. For example, a non peaceful picket. As such the picket will be unprotected, not because of the breach of the agreement but because of the breach of the requirements for a protected picket under section 69 of the Labour Relations Act 66 of 1995. If one accepts this construction, one must argue that section 69 (8), (9), (10) and (11) of the Labour Relations Act 66 of 1995, and the determination of the dispute by the Labour Court in terms of section 69 (11) of the Labour Relations Act 66 of 1995 is, in fact, not civil proceedings as mentioned in section 69 (7) of the Labour Relations Act 66 of 1995 read with section 67 (6) of the Labour Relations Act 66 of 1995. Any other interpretation in this regard would hi-light a conflict in the provision of section 69 of the Labour Relations Act 66 of 1995 i.e. section 69 (7) read with section 69 (8), (9), (10), and (11).

Secondly, and from another angle it can be argued that if an agreement regarding the rules for the conduct of the picket is breached and the picket remains protected, how can the court order compliance with the agreement if the picket is not subject to civil proceedings and liability under section 69 (7) of the Labour Relations Act 66 of 1995. As such, section 69 of the Labour Relations Act 66 of 1995 itself seem to imply that a breach of an agreement relating to the rules for the conduct of the picket makes the picket unprotected. How else does one explain a courts ability to determine a dispute under section 69 (8) of the Labour



Relations Act 66 of 1995 read with section 69 (11) of the Labour Relations Act 66 of 1995 given section 69 (7) of the Labour Relations Act 66 of 1995. The mere fact that a court can order compliance with an agreement regulating the rules for the conduct of a picket as the court did in the *Lomati* case<sup>124</sup> in fact, implies that the picket was unprotected. This approach requires that compliance with the agreement regulating the rules for the conduct of the picket is another requirement for a protected picket.

The second construction as aforesaid is in line with the fact that the remedy for the enforcement of the breach of a section 69 (4) or (5)<sup>125</sup> agreement is section 69 (8) of the Labour Relations Act 66 of 1995. However, as explained earlier, section 69 (8) of the Labour Relations Act 66 of 1995 does not refer to an agreement (non CCMA agreement) entered into except under the auspices of the CCMA. If the breach of a non CCMA agreement still left the picket protected, then no legal proceedings can be conducted in terms of section 69 (7) of the Labour Relations Act 66 of 1995 to enforce it at common law. Therefore, it is submitted that the observance of an agreement regulating the conduct of the picket, whether a CCMA agreement or non CCMA agreement, is a requirement for a protected picket under section 69 of the Labour Relations Act 66 of 1995. Hence, a breach of any agreement regulating picketing in fact makes the picket unprotected. One might ask how the observance of an agreement other than a CCMA agreement can be a requirement for a protected picket in view of the fact that section 69 of the Labour Relations Act 66 of 1995 does not expressly refer to such an agreement and section 69 (8) of the Labour Relations Act 66 of 1995 also does not provide for disputes in this regard to be settled by the CCMA. As explained earlier<sup>126</sup> a non CCMA agreement is implied into section 69 of the Labour Relations Act 66 of 1995, albeit not in terms of section 69 (8) of the Labour Relations Act 66 of 1995.

---

<sup>124</sup> *Lomati Mill Barberton (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC) at page 180 D-F, 181 J, 182 A-B.

<sup>125</sup> The Labour Relations Act 66 of 1995.

The importance of determining the above point lies in the fact that the answer determines whether the Labour Court or the Supreme Court can enforce a breach of a non CCMA agreement relating to picketing at common law. Essentially, the decision in the *Lomati* case<sup>127</sup> advocates upholding common law agreements relating to picketing. By the court ordering compliance with the non CCMA agreement, albeit in terms of section 69 (8) of the Labour Relations Act 66 of 1995, the court impliedly acknowledges that the breach of an agreement regulating picketing, in fact, makes the picket unprotected.

If the picket is unprotected there are a number of remedies available. Because the provisions of section 69 (7) of the Labour Relations Act 66 of 1995 do not apply to an unprotected picket (a picket which does not comply with the requirements of section 69 of the Labour Relations Act 66 of 1995), the injured party can bring an interdict or a claim based on contract or delict. The other mechanism is that the Labour Court can be approached under the procedure of section 69 (8) of the Labour Relations Act 66 of 1995 read with section 69 (11) of the Labour Relations Act 66 of 1995<sup>128</sup> where the dispute arises over an alleged contravention of section 69 (1) and (2) of the Labour Relations Act 66 of 1995 or a breach of the rules for the conduct of the picket determined under the auspices of the CCMA. Here the Labour Court adjudicates this dispute.

Section 158 (1)(j) of the Labour Relations Act 66 of 1995 provides for the Labour Court to deal with all matters necessary and incidental to performing its functions in terms of the Labour Relations Act 66 of 1995 or any other law. Section 157 (1) of the Labour Relations Act 66 of 1995 provides for the exclusive jurisdiction of the Labour Court in respect of all matters that elsewhere in terms of the Labour

---

<sup>126</sup> See the discussion under the heading "The manner in which a picket is conducted" at page 18 of this dissertation.

<sup>127</sup> *Lomati Mill Barberton (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC) at page 182 A.

<sup>128</sup> P A K Le Roux "The Labour Court : some early decisions" (1997) Vol. 6 No. 8 *Contemporary Labour Law* at page 77.

Relations Act 66 of 1995 or in terms of any other law are to be determined by the Labour Court. Section 151 (2) of the Labour Relations Act 66 of 1995 also provides that the Labour Court is a Supreme Court equal to a division of the Supreme Court. The question in need of ascertainment is whether the Labour Court can decide whether a breach of contract has occurred or whether a delict has been committed in relation to a picket. Furthermore, can the Labour Court grant interdicts to prevent criminal and other riotous conduct during a picket or do these disputes fall within the jurisdiction of the Supreme Court? What is clear is that the *Mondi* decision<sup>129</sup> amounts to the following:- Where the act falls under the definition of picketing or, is a matter necessary and incidental to the performance of the Labour Court's functions in terms of the Labour Relations Act 66 of 1995, or where the act concerns itself with any other law relating to picketing, the Labour Court has exclusive jurisdiction to determine the issue<sup>130</sup>. Although the decision in *Mondi*<sup>131</sup> dealt with the Labour Court having exclusive jurisdiction to grant an interdict preventing criminal and delictual conduct there seems to be no reason why a breach of an agreement, e.g. a non CCMA agreement which cannot be adjudicated by the Labour Court under section 69 (8) of the Labour Relations Act 66 of 1995 read with section 69 (11) of the Labour Relations Act 66 of 1995, cannot be adjudicated by the Labour Court. Furthermore, if criminal and delictual conduct can be interdicted, then there is no reason why such conduct amounting to a delict cannot be adjudicated by the Labour Court, provided it relates to a picket. Landman AJ in the *Lomati* case<sup>132</sup> explains it as follows, "if a broad and purposive view is taken of the Labour Relations Act 66 of 1995 and the jurisdiction conferred on this Court [the Labour Court] then it is apparent that this court has jurisdiction over all strikes and lock-outs and conduct in contemplation or in furtherance of that action". This issue concerning competing jurisdictions

---

<sup>129</sup> *Mondi Paper (a Division of Mondi Ltd) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 84 (D) at page 90 B-D.

<sup>130</sup> *Mondi Paper (a Division of Mondi Ltd) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 84 (D) at page 90 B-D.

<sup>131</sup> *Mondi Paper (a Division of Mondi Ltd) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 84 (D) at page 90 B-I.

<sup>132</sup> *Lomati Mill Barberton (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC) at page 184 E-G.

of the Supreme Court and the Labour Court will have to be determined by the courts. Possibly, it may be found that the Labour Court and the Supreme Court have equal jurisdiction in regard to determining breaches of contract and delicts<sup>133</sup> flowing from picketing activity. As Nicholson J. intimated in the *Mondi* case, “.....the onus to show that the Supreme Court’s jurisdiction has been ousted is indeed a heavy onus”<sup>134</sup>.

## 7. CONCLUSION

From the foregoing discussion one can deduce that section 69 of Labour Relations Act 66 of 1995 suffers from uncertainty and vagueness. One cannot but foresee that a large amount of technical and unnecessary litigation potentially exists as a result of this provision – primarily this is an interpretation problem. Landman AJ, in the *Lomati* case<sup>135</sup>, set the ball rolling, so to speak, and made quite an extensive decision even though a large part thereof is subject to argument. It is submitted, that section 69 of the Labour Relations Act 66 of 1995 should be tackled by the Labour Court with vigour so as to set the interpretations to be attached to the various sub-sections of section 69 of the Labour Relations Act 66 of 1995.

Section 69 of the Labour Relations Act 66 of 1995 appears to have a number of provisions which conflict with the Constitution. As section 1 (a) of the Labour Relations Act 66 of 1995 specifically mentions one of the primary objects of the Labour Relations Act 66 of 1995 as giving effect to fundamental rights, one would have thought that these pitfalls would have been avoided. Nevertheless the provisions of section 69 of the Labour Relations Act 66 of 1995 are a limitation on the Constitutional right to picket in terms of section 17 of the

---

<sup>133</sup> *Lomati Mill Barberton (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC) at page 184 E-G.

<sup>134</sup> *Mondi Paper (a Division of Mondi Ltd) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 84 (D) at page 87 A-B.

<sup>135</sup> *Lomati Mill Barberton (a Division of Sappi Timber Industries) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 178 (LC).

Constitution and as such will endure the court's scrutiny in deciding whether they are justifiable or not in terms of section 36 of the Constitution.

Section 69 of the Labour Relations Act 66 of 1995 is a marked improvement on the common law in the sense that the right to picket is now expressly recognised and regulated. The law has unveiled a measure of certainty in this regard.

The Labour Relations Act 66 of 1995 suffers from the problem that one is uncertain which court/courts have jurisdiction to hear certain matters particularly in view of the fact that the Labour Court is a Supreme Court. Even though the Labour Relations Act 66 of 1995 has an exclusive jurisdiction clause, it still has to be interpreted. This can cause problems which can be seen from the *Mondi*<sup>136</sup> decision.

Section 69 (8) of the Labour Relations Act 66 of 1995 does not refer to a non-CCMA agreement relating to the rules for the conduct of the picket. It is submitted that this is a shortcoming in the provision and an oversight on the legislature's behalf.

Section 69 of the Labour Relations Act 66 of 1995 allows the rules for the conduct of the picket to be determined by agreement between the parties or under the auspices of the CCMA. However, this assumes that one has a situation where the parties are willing to agree on the rules for the conduct of the picket. In a situation where both parties are obstinate and refuse to agree to rules for the conduct of the picket and both parties refuse to refer the dispute in this regard to the CCMA for its determination, one can have a situation where a picket is protected under section 69 but no rules for its conduct exist. Where the CCMA attempts to get the parties to agree on rules for the conduct of the picket or where the CCMA determine the rules for the conduct of the picket, which will apply to

---

<sup>136</sup> *Mondi Paper (a Division of Mondi Ltd) vs Paper Printing, Wood and Allied Workers Union and others* (1997) 18 *Industrial Law Journal* 84 (D).

that picket, one assumes that one has an effective and efficient CCMA infrastructure in place. This remains to be seen.

It is submitted that section 69 of the Labour Relations Act 66 of 1995 is framed in a skeletal fashion and that a large amount of the '*meat*' still has to be added. From its structure one must assume that the drafters of this provision had in mind that picketing would take place primarily by agreement between the parties. Realistically, this does not take into account the often deeply dividing chasms between employers and employees.

The concepts of secondary picketing and mass picketing are not expressly dealt with in terms of section 69 of the Labour Relations Act 66 of 1995. It is submitted that both are permitted in terms of section 69 of the Labour Relations Act 66 of 1995<sup>137</sup>.

---

<sup>137</sup> See under the heading, "The employer who is affected by a picket" at page 11 of this dissertation. See under the heading, "Persons who may stage a picket" at page 12 of this dissertation.

# INDEX

---

ACCESS	
to picket venue .....	16, 17
ADJUDICATION OF DISPUTES – see PICKETING	
AGREEMENT	
on rules for the conduct of picket .....	9, 20, 23, 24, 31, 32, 33, 36
APPLICATION OF CONSTITUTION .....	6, 7, 12, 17
ASSEMBLY	
right of .....	6, 8, 17
BALLOT	30
BREACH OF AGREEMENT REGULATING PICKET .....	31, 32, 33
BREACH OF CONTRACT .....	4, 29
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION .....	14, 20, 21, 22, 23, 24, 25, 32, 33, 36, 37
CODE OF PRACTICE	
picketing .....	20, 21
COLLECTIVE ACTION .....	1
COMMON LAW	
picketing at .....	4, 5, 6
CONCILIATION .....	23, 25, 26
CONDUCT OF A PICKET see PICKETING	
CONFLICTING INTERESTS	
of employers and workers .....	1
CONSTITUTION	
picketing under .....	6, 7, 8

DEFAMATION .....	28, 29
DEFINITION	
of picket - see picketing .....	
of strike .....	9, 10
of premises .....	14, 15
DISMISSAL	
for participating in picket .....	4, 29
EMPLOYEE'S REMUNERATION	
during picket .....	29, 30
EMPLOYER	
affected by picket .....	11
interests of .....	1
permission of .....	21
FAIR DISMISSAL	
for picketing .....	29
FREEDOM OF EXPRESSION	
right to .....	8, 29
HORIZONTAL APPLICATION	
of Constitution .....	6, 7, 12, 17
IMMUNITY FROM CIVIL LIABILITY	
common law .....	4, 5
Labour Relations Act 28 of 1956 .....	4, 5
Labour Relations Act 66 of 1995 .....	17, 18, 26, 27, 28, 29, 30
INTERESTS	
of employers .....	1
of workers .....	1



<b>INTERFERENCE WITH CONTRACTUAL RELATIONSHIP</b>	
delict .....	11
<b>JURISDICTION OF LABOUR COURT</b> .....	26, 33, 34, 35, 36
<b>LIABILITY FOR PICKET – see PICKETING</b>	
<b>LIMITATION OF RIGHT TO PICKET – see PICKETING</b>	
<b>LOCK-OUT</b>	
definition of .....	10
protected .....	9
unprotected .....	10
<b>MASS PICKETING</b> .....	12, 21, 37
<b>OWNERSHIP</b>	
right of .....	22
use and enjoyment of .....	22
<b>OFFENCES</b>	
effect of, on picketing .....	4, 5, 17, 18, 21, 27, 28
<b>PICKETING</b>	
a collective right .....	12
an introduction to .....	1
at common law .....	4
authorization by registered trade union .....	12
circumstances in which allowed .....	8, 9, 10, 11
code of practice - see CODE OF PRACTICE	
definition of .....	2, 3
employer affected by .....	11
immunity from civil liability - see IMMUNITY FROM CIVIL LIABILITY	
in terms of Constitution .....	6, 7, 8

limitation on .....	7, 8, 12, 17
manner of conducting .....	18, 19, 20, 21, 22
mass .....	12, 21
peaceful .....	8, 6, 18, 19
persons who may stage .....	12
place where conducted .....	14, 15, 16, 17, 18
purpose of .....	1, 2, 3
resolution of disputes about .....	23, 24, 25, 26
right to picket .....	5, 6, 12, 16, 17, 18, 19, 35
role of CCMA - see COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	
rules for conduct of .....	14, 19, 20, 30, 31, 32, 33, 36
secondary - see SECONDARY PICKET	
unarmed .....	6, 19

REGISTERED TRADE UNION - see TRADE UNION

RIGHT TO PICKET - see PICKETING

RIGHT TO STRIKE ..... 13

RULES FOR CONDUCT OF PICKET - see PICKETING

SECONDARY PICKET ..... 11, 21, 37

**STRIKE**

definition of .....	9, 10
protected .....	9, 10
right to .....	13

**TRADE UNION**

registered .....	12, 30
authorization by, to conduct picket .....	12, 20
holding of ballots .....	30

**UNPROTECTED PICKET**

remedies available for .....	33, 34
------------------------------	--------

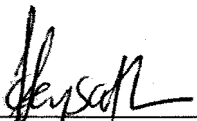
**VERTICAL APPLICATION**  
of constitution .....

**6, 7, 12, 17**

Student number : 889-463-9

I declare that

**“PICKETING IN TERMS OF THE LABOUR RELATIONS ACT 66 OF 1995” is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.**

  
\_\_\_\_\_  
SIGNATURE  
(MR L C LEYSATH)

18/11/97  
\_\_\_\_\_  
DATE