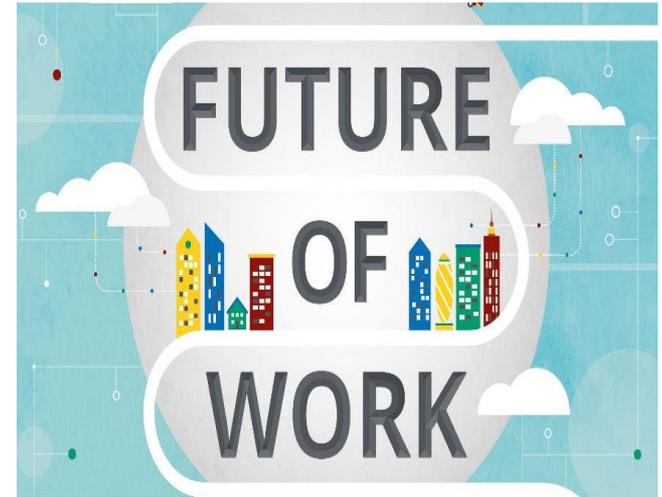
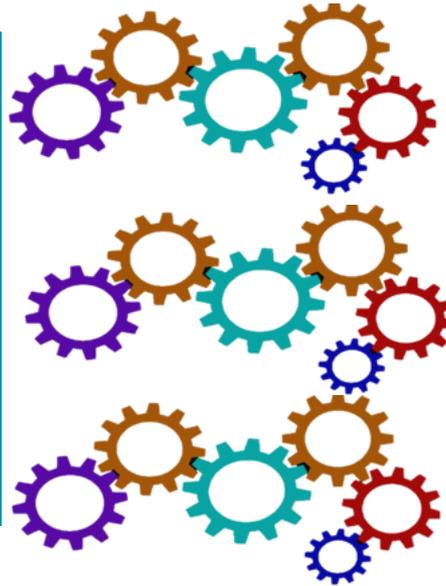
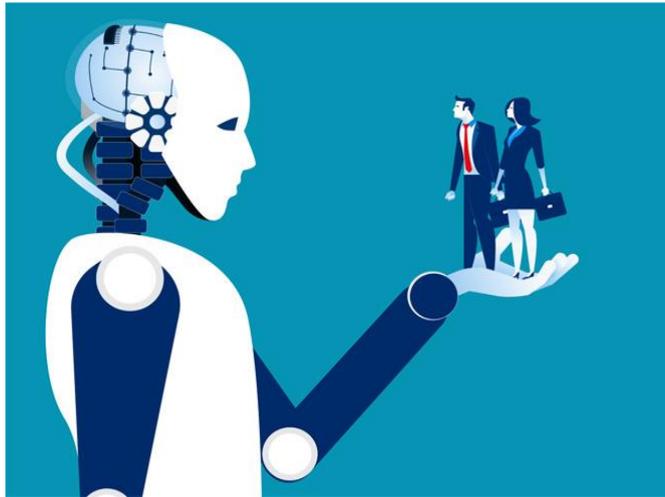




**PLENARY 3:
AN INVESTIGATION INTO THE CAUSES OF VIOLENT STRIKES IN
SOUTH AFRICA: SOME LESSONS FROM FOREIGN LAW AND POSSIBLE
SOLUTIONS
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PRESENTATION OUTLINE



1. INTRODUCTION

2. DEFICIENCY IN THE BARGAINING SYSTEM

3. FOREIGN LAW & LESSONS FOR SA

4. AMENDMENTS TO LRA

5. CONCLUSION

AN INVESTIGATION INTO THE CAUSES OF VIOLENT STRIKES IN SOUTH AFRICA: SOME LESSONS FROM FOREIGN LAW AND POSSIBLE SOLUTIONS

INTRODUCTION



- Workers have intensified their conduct during strikes.
- In recent years, strikes have been characterised by vandalism and damage to property.
- Deficiency in the bargaining system are some of the causes of violent conduct.
- Absence of ballot requirement and interest arbitration.
- Use of replacement labour during a strike – source of anger.
- Inequality in remuneration.

EXAMPLES OF VIOLENT ACTS DURING INDUSTRIAL ACTION



- The 2006 security guards' strike in Cape Town resulted in damage to municipal and private property (*Garvis v SATAWU*).
- In February 2011, SATAWU members allegedly smashed windows of 10 trucks and pulled drivers out of their vehicles to force them to join their march.
- In 2011, NUMSA members allegedly vandalised factory property, intimidated and assaulted non-striking factory workers.
- In August 2011, SAMWU members allegedly smashed shops, car windows, including the looting and destruction of plastic bins in Cape Town.

EXAMPLES OF VIOLENT ACTS DURING INDUSTRIAL ACTION



- In February 2012, near Impala Platinum (Rustenburg), NUMSA members allegedly burnt tyres, torched a police station and stoned police officers and private vehicles.
- In 2012, SATAWU members allegedly torched six trains in Johannesburg.
- In May 2012, CWU members allegedly attacked a Post Office van in central Johannesburg, and pelted it with stones.

EXAMPLES OF VIOLENT ACTS DURING INDUSTRIAL ACTION



- In 2012, during a truck drivers' strike affiliated to SATAWU, cars were stoned and trucks set alight across South Africa.
- In March 2016, SAMWU members employed by Pikitup trashed bins and attacked replacement workers.

CAUSES: ABSENCE OF BALLOT REQUIREMENT



- A strike supported by a minority can be less effective.
- Ballot: to test whether majority of employees support the strike.
- Ballot was a requirement under the 1956 legislation, but did not produce results.
- Ballot was proposed in the 2012 Amendment Bill, labour opposed it.
- Rycroft argues that the ballot was not demanding and labour should have accepted it as it brought in nothing new.

CAUSES: USE OF SCAB LABOUR – S 76 OF THE LRA



- The aim is to keep production going.
- The clause seem to be biased in favour of employers.
- Advantage: ensures that the business does not totally shut down with workers eventually having no work.
- Disadvantage: it triggers violence, brings anger to employees, delays dispute settlements and increases hostility, *Mahlangu v SATAWU*.
- In Isiphingo, the use of scabs was the root cause of violence and it ended up being the fight against foreigners in Umlazi Township in 2014/15.

CAUSES: MAJORITARIAN PRINCIPLE AND SHIFT IN LABOUR DYNAMICS



- Section 23(1)(d) read with section 32(2) of the LRA strengthens this principle.
- Majoritarian principle vs section 18 of the Constitution.
- Dissatisfaction with the union resulting in breach of trust – (Hepple *The future of labour law* 1996).
- Increased gap between union leaders and members – a union is a mandate-driven organisation.
- Allegations of bribery by union negotiators who accept low wage hikes from management.

LENGHTY STRIKES - INTEREST ARBITRATION



- Long strikes have a negative effect on the economy and workers.
- An example is a strike in the platinum sector that lasted for four months (2014).
- Despite the remedy of interdict, the LC should be empowered to stop long strikes.
- NEDLAC is still considering this with labour not convinced that it will be in the interest of workers if agreed to.
- SA should borrow lessons from countries where interest arbitration is in use.

POVERTY



- Poverty is a wider problem facing SA in general (Landman T *Human Rights* 2006).
- SA failed to meet the 2015 millennium goals and now the targets are set for 2030.
- In Marikana, the development of shacks in the ‘Shackland’ adjacent to Lonmin created two families for migrant workers i.e. one in the Pondoland or Lesotho and the other one in the Shackland occupied by ‘Dinyatsi’ – 2nd wife/partner.
- So, the strike became a socio-economic issue (*Ngcukaitobi* at 840).

EXAMPLE OF MARIKANA: THE OLD MIGRANT LABOUR SYSTEM



- Characterised by single men's hostel.
- Failure by management to improve on this system and provision of cash subsidy for miners who stay outside the hostel.
- Development of shacks with increased responsibilities for miners.
- Increased responsibilities resulted in demands for increased wages to meet daily needs for survival.
- Failure by the mine management to meet the R12 500 minimum wage demand for RDO.

WAGE INEQUALITY



- Section 9 of the Constitution- full enjoyment of rights and freedoms.
- There is still a need to establish a voice for the marginalised (Webster 2015).
- There is increased income inequality with income concentrated at the top and wage gap widening each day.
- The question of promoting the equality clause on an uneven playing field seem to be a difficult task.

SOLUTIONS



- There is a need for government and private sector interventions to transform the migrant labour system – compliance with section 26 of the Constitution.
- Private sector must also play a role in the alleviation of poverty.
- Labour inspectors should keep checks on the bargaining system to see if it is still responsive to the needs of workers.
- Put mechanisms in place to deal with protracted strikes or “force” parties to end dispute: interest arbitration.
- Empower the Labour Court to intervene to end violent strikes.

AMENDMENTS TO THE LRA – S76 REPLACEMENT LABOUR



- The use of scab labour fuels tension among the employer's workforce.
- It delays the settlement of disputes as the employer feels less or no harm.
- Section 76 of the LRA should be amended to exclude the use of replacement labour as this will help speed up negotiations.
- Proposals need to be made to NEDLAC for this to change.

BORROWING FROM FOREIGN LAW – CANADA AND AUSTRALIA



- Section 39(1)(a) encourages the courts and tribunals to consider foreign law when interpreting the Bill of Rights.
- The constitutional law of SA was developed with the assistance of Canadian constitutional law.
- The Bill of Rights in Ch 2 of the Constitution is similar to the Canadian Charter of Rights.
- The EEA is also similar to the Canadian Employment Equity Act.

BALLOTS IN AUSTRALIA



- In Australia, the labour relations system compels unions to hold a ballot of members before they convene industrial action.
- The union must first get permission to ballot members from the labour relations tribunal.
- Majority of members must vote in favour of the proposed strike.
- The voting process is supervised by the Australian Electoral Commission (AEC) or an independent ballot agent.
- If there is no ballot undertaken prior to going on strike, such strike will be unlawful.

BALLOT REQUIREMENT IN CANADA



- A number of Canadian jurisdictions require employees to cast votes prior to participating in a strike.
- If the majority of the employees balloted, vote in support of the strike, the strike will take effect.
- If the majority of employees or members of the union that were balloted vote against the proposed strike, such a strike will not take effect.

LESSONS FROM AUSTRALIA AND CANADA



- Having a ballot requirement will help prevent industrial action from taking place in circumstances where it does not enjoy majority support.
- It will also help to quell violence and intimidation of non-strikers.
- The involvement of the independent electoral body or agent will ensure that voting is fair and transparent.
- Balloting members ensures that the intended action has the trust of the parties to the dispute as well as the trust of the public.

AMENDMENTS TO THE LRA



- There is a need to amend the LRA to include ballot requirement.
- If it becomes law, the voting process should be chaired by an independent electoral body like the IEC.
- If voting is conducted by the IEC, the dignity of strikes and industrial action, in general, will be restored.
- The involvement of the IEC will also ensure that the results are credible and can be trusted as a genuine outcome of the voting process since the voting process has been credible.

2017 LRA AMENDMENT BILL ON BALLOTS



- The Bill proposes, in line with union constitution, that a ballot should be recorded and be secret.
- A secret ballot prior to a strike is important to show that the employer is dealing with action supported by the majority of employees.
- A secret ballot as opposed to a “hands-up” system, will avoid the situation where unions put pressure on members to vote in favour of the strike.
- There is a strong belief that if voting takes place by a show of hands, intimidation may occur and some employees may be targeted by other employees.

2017 LRA AMENDMENT BILL ON BALLOTS



- A secret ballot prior to a protected strike will ensure that strikes are taken seriously, and they will not just be viewed as actions of ‘uncivilised hooligans’.
- However, the proposed ballot is not a requirement for a protected strike and may not necessarily change the way strikes take place in SA.
- A failure to ballot members in terms of the constitution of the union will not affect the legality or protection conferred on a strike (section 67(7) of the LRA).

2017: Draft Code of Good Practice: ballot



- The draft Code of Good Practice: Collective Bargaining, Industrial Action and Picketing (the Code) insists that compliance with the constitution with regards to balloting of members does not affect the protected status of a strike – this affirms section 67(7) of the LRA.
- The Code also provides that the voting in terms of section 95(5) must be secret.
- In terms of the Code, unions are urged to comply with their constitutions with regards to ballots even though non compliance does not invalidate the protected status of their strike action.

THE LRAA, 2014 & 2017 LRA BILL – VIOLENCE WHEN PICKETING



- The LRAA provides that the Labour Court may grant an order for an urgent interim relief which is just and equitable.
- The new provision empowers the Labour Court to order an interdict to stop picketers from continuing with their unlawful acts.
- The 2017 proposed amendment provides that the LC may make an order suspending a picket.

ADVISORY ARBITRATION



- In Australia the FWC can intervene and stop a protracted strike.
- In SA, section 150A of the proposed LRA amendments of 2017 seems to be aimed at dealing with protracted strikes.
- It allows the CCMA director to intervene in certain public interest circumstances.
- Section 150A(1): The director may do so voluntarily or on application by one of the parties to the dispute.
- There must be proof that the strike will affect one or more of the rights in the Bill of Rights or might be violent or may no longer be functional.

ADVISORY ARBITRATION PANEL



In terms of the new section 150A (2)(a) the director - on application from one of the parties or from the Minister, by agreement between the parties or if directed to do so by the Labour Court (subject to conditions) - must establish an advisory arbitration panel to attempt to resolve a dispute once a certificate of non-resolution has been issued / notification of strike or lock-out received, if –

- the director is of the view that the strike is no longer functional to collective bargaining; or
- there is an actual or imminent threat or use of violence / damage to property that affects the constitutional rights of others; or
- the strike may have a negative impact on the social or economic functioning of a community or society.

COMPOSITION OF THE PANEL



- The panel must consist of a senior commissioner as chairperson.
- Two assessors appointed by employer and union respectively who are parties to the dispute.
- If the union or the employer refuse to participate in the proceedings in terms of sec 150A, the director must employ a person with requisite expertise to represent their interests during proceedings.

FUNCTIONS AND POWERS OF THE CHAIRPERSON



- The chairperson, after consultation with assessors, must conduct arbitration in a manner s/he considers appropriate which must be quick and fair.
- Exercise powers of the commissioner in terms of section 142 of the LRA – settlement of disputes.
- Order the disclosure of relevant information.
- Within seven days, or within any reasonable period determined by the director, the panel must issue an advisory arbitration award.

CONTENT OF THE AWARD



It must be in the prescribed form and include

- The factual findings.
- Recommendations for the resolution of disputes.
- Reasons why the recommendations should be accepted by the parties.
- Seven day period within which the parties must accept or reject the recommendations.
- The award must be kept secret until the Minister disseminate it to the public.

ACCEPTANCE OR REJECTION OF THE ADVISORY AWARD



- The parties may reject the advisory award and recommendations within the seven day period and may do so by giving notice to the chairperson.
- If a party to the dispute rejects the recommendations it must, after consultation with its members, give reasons for rejection.

EFFECT OF ADVISORY ARBITRATION AWARD



- Once issued, it is binding on the party and its members if it has been accepted in terms of section 150C(b).
- An advisory arbitration award, once issued and accepted, has the status of a collective agreement.
- The bargaining council may apply to the Minister to have the award extended to persons who are not members of the parties to the council or have rejected the award in terms of section 150C(5)(c).
- If the parties have accepted the award, the Minister may extend the award in accordance with section 32 as if it a collective agreement.

CONCLUSION



- The issue of ballot requirement should be considered at NEDLAC with a serious intention of preventing unnecessary strikes.
- The use of replacement labour has long been a source of conflict in the workplace and needs to be addressed.
- Lessons from other countries will help to stabilise the labour system.

THANK YOU



NGiyathokoza! ro livhuwa!
dankie! ke a leboga! **ENKOSI!**
 thank you! **udo livhuwa!**
inkomu!
 ke a leboga! **ngiyabonga!**
siyabonga!