

The Rights of South Africans to Life and to Strike: The Potential of Ubuntu Balance the Scales

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Abstract

This article deals with everyone's fundamental rights to life and to strike. By taking cognisance of the fact that there is no agreed universal definition of traditional values of humankind; inherently subjective and specific to a certain place; or of their relationship to internationally recognised human rights, this article deliberates the value of Ubuntu; traditional African values; to balance the scale between the said rights in the South African context. It is however recognised that traditional values; human dignity, freedom and responsibility; can internationally play an important role to balance conflicting rights. Focus is firstly placed on these rights as guaranteed by the Constitution of the Republic of South Africa. Due to the complexity of human rights, these rights are secondly, together with the concept of Ubuntu, clarified. A clear link is then drawn between these two rights and the conflict that currently exists between them, demarcated. It became evident that the recent strikes in South Africa had negative consequences on the community at large and individuals' right to life. Because of the sanctity of the right to life, the values identified by the Constitution and the similarities thereof with the spirit of Ubuntu; the potential of Ubuntu to counter imbalances is explored.

Keywords: right to life; right to strike; Ubuntu; human rights; democratic society; conflict; balance

1. Introduction

Since the adoption of the final Constitution of the Republic of South Africa, 108 of 1996 (hereafter Constitution) hope were placed in the idea of freedom and a better life for all. A guaranteed freedom and life to all which would open the doors to a positive future for at least the majority was promised. Yet, as pointed out by Meylahn,¹ all that remains of this noble ideal lies in the concrete practical facts that everyone in South Africa must endure on a daily basis. In this regard emphasis is placed on the violation of the fundamental right to a better life despite the values that are inherent to a democratic society.² To illustrate this, the existing conflict between the rights to life and to strike is demarcated and the possibility of the values that underlies Ubuntu to solve it, investigated.

2. Concept clarification

Since concepts and fundamental rights are often interpreted differently, the exact interpretation thereof for purposes of this article needs clarification.

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1. Johann-Albrecht Meylahn, "Imagining the beauty and hope of a colourful phoenix rising from the ashes of Marikana and service delivery protests: A post-foundational practical theological calling," *HTS Theological Studies* 1, V 70 (2014): 1 - 6.
 2. Jahangir, M. Saleem and Aneesa Shafi, "Status of human rights in democratic setup: Experiences from Kashmir," *Journal of Law and Conflict Resolution* 3, V 4, (2013): 41 - 47.

2.1 The right to life

The right to life could either be interpreted narrowly to refer to as a non-derogable (must be respected under all circumstances)³ right to be physically alive and to breath (physical-biological existence)⁴ or it could be interpreted broadly to include, among other, a personal (encompasses an individualised claim to a basic quality of life and meaningful existence, the principle of the “sanctity of life” should take precedence over other rights)⁵ right to the basic necessities of life, such as housing, education and health care. Chicktay,⁶ Labuschagne⁷ and Higgs⁸ suggest that a broad definition of the right to life should be adopted in order to provide citizens with socio-economic rights which enable them to fully enjoy human existence, without which life would be without meaning.

Serfontein⁹ alongside opines that the right to life – as a God-given right - entails a right to a quality life and thus a right to live a dignified life. This close link between the rights to human dignity and life is underscored by Constitutional Court’s decision in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*¹⁰ as well as the High Court’s decision in *Dladla v City of Johannesburg*¹¹ in acknowledging the prominence of the constitutional value of dignity - a justiciable and enforceable right - when interpreting the right to life.

The purpose of including the right to life as a qualified right in section 11 of the Constitution can be found in the overarching aim of the Constitution in its Preamble, namely “to aim at improving the quality of life of all citizens and to free everyone’s potential, thus guaranteeing all a life that is worth living.” Despite the fact that South African law does not provide for a hierarchy of fundamental rights,¹² the Constitutional Court in *S V Makwanyana*¹³ identified the rights to life and human dignity as the most superior fundamental rights. It is in view of this elevation of the right to life that the author of this article identified the conflict that emerges when the right to strike is being given effect to in a violent and selfish manner in practice.

2.2 The right to strike

The right to strike is guaranteed and protected in terms of section 23(2)(c) of the Constitution and regulated by section 64(1) of the *Labour Relations Act (LRA)* 66 of 1995. The aim of the LRA is to protect strikes for both collective bargaining and social and economic purposes that have an impact on workers’ interests.¹⁴ In this regard, Sachs¹⁵ regards the right to strike (standing on three pillars namely, the right to establish and join trade unions; the right to collective bargaining and the right to strike) as the key fundamental right that enables employees to fight for and defend their rights in pursuit of their demands (desired outcomes). The right to strike is, as such, viewed by Bhana¹⁶ as an investment and strikes as the giving up of current resources in the hope of gaining larger returns in the future.

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3. Dawid H. Van Wyk, John Dugard, Bertus De Villiers, and Dennis Davis, *Rights and constitutionalism: The New South African Legal Order* (United Kingdom: Oxford University Press, 1996), 660.
 4. Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (Cape Town: Juta, 2013), 289; Ignatius M. Rautenbach, *Rautenbach-Malherbe Constitutional law* 6th edition (Durban: Lexis Nexis 2012), 341.
 5. Raanan Gillon quoted by Hilarly White, “Dehydrate dementia patients to death to save money,” *British Medical Journal* (2012): editorial.
 6. Mohamed, A. Chicktay, “Placing the right to strike within a human rights framework,” *Obiter* 2, V 27 (2006): 344 - 350.
 7. Lappies, J.M.T. Labuschagne, “The European Court of Human Rights and the right to assisted suicide in international human rights law: comment,” *South African Journal of Criminal Justice* 1, V 17 (2004): 87 - 98.
 8. Neil T. Higgs, “Measuring and understanding the well-being of South Africans: Everyday quality of life in South Africa,” *Social Indicators Research* 2, V 81 (2007): 333.
 9. Erika M. Serfontein, “Onderwys, die weg na lewenskwaliteit - die optimale realiserings van die reg op lewe: navorsings- en oorsigartikel,” *Tydskrif vir Geesteswetenskappe* 1, V 55 (2015): 62 - 74.
 10. 2000 3 SA 936 (CC), para 35.
 11. 2014 6 SA 516 (GJ), para 35.
 12. Currie and De Waal.
 13. 1995 3 SA 391 (CC).
 14. Labuschagne; also see *Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC), para. 65.
 15. Albie Sachs, “The Bill of Rights and worker 4 rights: an ANC perspective” in Ebrahim Patel, ed., *Workers’ rights: from apartheid to democracy – what role for organised labour* (Kenwyn: Juta, 1994): 47.
 16. Narendra Bhana, “The effect of industrial strikes on the value of shares listed on the Johannesburg Stock Exchange,” *Investment Analyst Journal* 3, V 44 (1997): 1 – 6.

Strikes moreover aim at eliminating the ever-increasing salary gap between management and employees and the "dreadful" living conditions of most employees.¹⁷

Although legislation provides for specific procedures to be followed during strikes that may render them protected or unprotected, only the consequences of protected and lawful strikes on the rights of others to life are for purposes of this article investigated.

2.3 Ubuntu

When researching the effects of fundamental rights as guaranteed by the South African Constitution, it is essential to take cognisance of the unique identity of South Africans as they cannot be viewed apart from their country and people.¹⁸ Such an identity is generally based on the moral, spiritual, intellectual, and social norms underpinned by traditional African values such as individual and social responsibilities, respect for human life and sharing.¹⁹ Every South African is seen within the spirit of Ubuntu as part of a whole; he is a human-human: *I belong, therefore I exist*.²⁰ Everybody is related to one another.²¹ While dominant Western societies are essentially individualistic and attach minimum value to personal well-being, traditional African societies are strongly communal of nature.²² However, Chaplin²³ recognises Ubuntu as but an African word for a universal concept. To this author, Ubuntu entails the potential of being human and to value the best interests of the community above individual self-interest. As such, Ubuntu has global application as it entails helping others in the spirit of service, to be both honest and trustworthy and, above all, to respect others. It regards humanity as a central part of any eco-systems that has the potential of leading to a communal responsibility to sustain life for all. Chaplin continues to explain that, following the principles of Ubuntu, necessitates the equal sharing of available natural resources between and among generations. Dugard,²⁴ alongside interprets the right to self-determination, as embedded in section 235 of the Constitution, to demand that humans as a 'whole' enjoy this right and that it is not reserved only for some individuals.

In light of Shotter²⁵ emphasising the fact that research in the social sciences, of which the law forms part, cannot be conducted in a value-free way as is the case in the natural sciences, Ubuntu - representing the fundamental values of African ontologies, namely among other, respect for human beings, for human dignity and for human life, collective cooperation, a good disposition towards others, obedience, humility, solidarity, caring, interdependence, communalism, conformity²⁶ - should thus be taken cognisance of. As such, Ubuntu translates as humaneness, proposing a shift from confrontation to conciliation.²⁷ It is, furthermore regarded as fundamental in an open democratic society based on equality, human dignity and freedom.²⁸ An official definition provided to the term Ubuntu can be found in *The South African White Paper on Welfare*²⁹ in which it is summarised as "the principle of caring for each other's well-being and as a spirit of mutual support."

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- 17 Neasa, Unemployment because of SA labour laws, Aug 20 2014; Luke Alers, "Counting costs of mining strikes: Worst yet to come – analyst," *Thought Leaders*, July 22, 2014.
18. Ben J. De Klerk, *Liturgical involvement in society* (Potchefstroom: Theological Publications, 2013): 35-68.
19. Stuart Fowler, "Towards authentic development," *Koers - Bulletin for Christian Scholarship* 1 V 75 (2010): 135 - 148; see also *Paixão and another v Road Accident Fund* 2012 6 SA 377 (SCA), para 26 in which it was stated that the spirit of Ubuntu entails an obligation on a child to care for a needy parent.
20. Sonja Laden, "Middle-class matters, or How to keep Whites whiter, Colours Brighter, and Blacks Beautiful," *Critical Arts* 1-2, V 11 (1997): 134; Jacob Lief and Andrea Thompson, *I am because you are* (USA: Rodale Press Incorporated, 2015) 240 pages.
21. The principles of Ubuntu, entailing humanness based on the premises that "we are because of others".
22. Bhana, 5.
- 23 Kevin Chaplin, "The Ubuntu spirit in African communities," <http://www.doc4net.com>. (25 August 2015).
24. John Dugard, "International Law and the South African Constitution," *European Journal of International Law* 1, V 77 (1997): 1 - 10.
25. Mary Brydon-Miller, Dayydd Greenwood and Patricia Maguire, "Why action research?," *Action Research* 1, V 1 (2003): 9 – 28.
26. Nkondo M Kamwangamalu, "Ubuntu in South Africa: a sociolinguistic perspective to a pan African concept," *Critical Arts: South-North Cultural and Media Studies* 2, V 13 (1999): 24 - 41; Nomsa Makhudu, "Cultivating a climate of co-operation through Ubuntu" *Enterprise Magazine* 48 (1993): 40 - 41; Delanie Mthembu, "African values: Discovering the indigenous roots of management" in Ronnie Lessem and Barbara Nussbaum, eds., *Sawubona Africa: embracing four worlds in South Africa management* (Sandton: Zebra Print, 1996), 215 - 226.
27. *S v Makwanyane* 1995 3 SA 391 (CC); paras. 223 - 225; 263.
28. *Dikoko v Mokhatla* 2006 6 SA 235 (CC) paras. 68-69 & paras. 113-121.
- 29 *South African Government Gazette* dated 2 February 1996.

Each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through a recognition of the individual's humanity. Ubuntu means that people are people through other people. It also acknowledges both the right and the responsibilities of every citizen in promoting individual and societal well-being."

3. Fundamental rights contextualised

In order to bring about the practical realisation of fundamental rights, it is recognised that theoretical legislative frameworks³⁰ providing for such rights, should be researched within the broader social context in which they operate. This is, among other, necessary since the optimal realisation of fundamental rights depends upon a society's shared commitment to social justice.³¹

Researchers aiming at researching specific areas of the law generally employ a critical analysis of legislation, policies and case law in order to provide insight into how they may be changed and interpreted to understand legal phenomena. Fundamental rights *per se*, however, necessitates legal researcher to consider change within a society well beyond mere legislative frameworks.³² To fully comprehend human rights, an evaluative and critically reflecting process need to be followed, taking cognisance of sympathetic relationships that may generate increased individual autonomy whilst leading to the improvement and well-being of every human being's daily life, is essential.³³ Such research will, moreover, allow for the emerging of new practical knowledge in the quest of meaningful human existence, grounded on social principles such as, in this case, Ubuntu and participatory democracy.³⁴

The aim of this study is to demarcate the consequences of recent strikes in South Africa specifically on the community at large and individuals' right to life. With this done, the aim is to explore the potential of Ubuntu in its cultural context to counter the conflict that may arise in giving effect to these two fundamental rights in practice whilst still allowing for the harmonious co-existence of humans.³⁵ This is in line with the notion of Chaplin,³⁶ namely that Ubuntu is crucial to community building and development in, especially, developing countries in which it can be applied to empower marginalised minorities.

4. The link between the rights to life and to strike

Both the right to life and the right to strike are guaranteed to everyone by the Constitution through sections 11 and 23 respectively. As such they are fundamental rights.

In specifically referring to the rights to life, security of the person (section 12) and human dignity (section 10), the Constitutional Court in *Du Toit v Minister for Safety and Security*³⁷ underscored the eminence of fundamental rights. It was clearly stated that fundamental rights must at all times be protection from unlawful invasions. The role of the State in protecting fundamental rights was highlighted in *Carmichele v Minister of Safety and Security*.³⁸

In *casu*, the Constitutional Court referred to the negative duty imposed on the State not to perform any act that infringes the fundamental rights of any person. It was also argued that, under certain circumstances, the State could be obliged to provide proper protection through laws and structures to its people as elevated by the Preamble of the Constitution. This positive duty on the State, imposed by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights (Constitution: Chapter 2), was underscored in four other Constitutional Court cases.

30. Brydon-Miller, Greenwood and Maguire.

31. *Ibid.*, 10.

32. *Ibid.*

33. Richard Sagor, *Guiding School Improvement with Action Research* (USA: Association for Supervision and Curriculum Development, 2000), 2.

34. Peter Reason and Hilary Bradbury, *Handbook of Action Research: Participative Inquiry and Practice* (London: SAGE, 2001), 1; Currie and De Waal: Democracy entails openness, responsiveness and accountability which also form part of the basic values and principles of governance.

35. Ernest T. Stringer, *Action Research* (London: SAGE, 2014), 318.

36. Kevin Chaplin, "The Ubuntu spirit in African communities," <http://www.doc4net.com>. (25 August 2015).

37. 2010 1 SACR 1 (CC), para. 26.

38. *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC), para. 44.

In the matter of *Mohamed v President of the Republic of South Africa*³⁹ it was found that the State had a duty to protect a citizen from facing capital charges in America and in the *Minister of Home Affairs v Tsebe*⁴⁰ to protect a citizen's right to life by not deporting him unconditionally to Botswana where he faced the death penalty. In the other two cases the State's duty to protect a learner's right to a basic education⁴¹ and people's right of access to adequate housing and, concomitantly, their rights to life and human dignity were highlighted.⁴²

With regard to the link between the rights to life and to strike, De Vos and Freedman⁴³ indicate that the right to strike is closely associated with traditional civil and political rights (process rights) such as freedom of association, freedom of speech, the right to life, the right to dignity, and the right not to be subject to slavery and the right to property. The right to strike is moreover regarded by Chicktay⁴⁴ as an integral to the right to life.

The close link between these two rights is also highlighted by the notion that the right to strike is essential for humans to live a better life by empowering them to acquire a living wage and access to the basic necessities of life such as education, health care and housing.⁴⁵ As such, any refusal of the State to provide its citizens with such socio-economic rights constitutes a denial of their basic necessities of life and therefore violates their right to life.

5. The conflict between the rights to life and to strike

Whilst the right to life is an unqualified right, the right to strike is qualified and thus not absolute. It is limited in terms of section 36 of the Constitution - the limitation clause - as well in terms sections 64 and 65 of the LRA. The LRA (section 64) sets specific procedures to be followed when employees wish to engage in a strike. If these procedures are indeed followed, a strike will accordingly be a legal and protected strike. However, if such procedures are not complied with or employees' act violently and misconducting themselves (such as assault, intimidation, and damage to property during the course of a strike), the strike is illegal and unprotected.

As a constitutional guaranteed right, courts on various occasions, have however made it clear that the right to strike must not be limited unduly,⁴⁶ and by doing so prevent orderly collective bargaining protected strikes in order to promote the purpose of the LRA (section 64(1)(b) and the constitutional right to strike.⁴⁷ This is in line with the European Union's⁴⁸ view that traditional values must not be permitted to restrict the global value and enjoyment of human rights as well as the fact that traditions must not be raised to defend any violation of human rights.⁴⁹

The practice in South Africa conversely shows that bargaining is often left to industry representatives with little attention being paid to healthy workplace relations, thus hampering meaningful engagement at workplace level.

The result hereof is that industrial strikes and deadlocks have become the norm rather than the exception. Soko and Balchin⁵⁰ furthermore identify the growing distance between trade unions and their members as main cause of the instability experienced in South Africa's labour market.

As a result, South Africa has experienced a rise in strikes from 2009 (51 strikes) to 2012 (99 strikes) of which less than half of the 114 strikes (48 percent) recorded in 2013 was legal and thus protected.⁵¹

39. *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 3 SA 893 (CC).

40. *Minister of Home Affairs v Tsebe* 2012 5 467 (CC).

41. *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC). The human dignity of all educational partners was enhanced by enabling their voices to be heard and taken account of.

42. *Malan v City of Cape Town* 2014 6 SA 315 (CC), paras. 127 & 151.

43. Pierre De Vos and Warren Freedman, eds., *South African Constitutional Law in Context* (South Africa: Oxford University Press, 2014), 525.

44. Chicktay.

45. *Ibid.*, 348.

46. *S v Zuma* 1995 2 SA 642 (CC); *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* 1990 ILJ 321 (LAC); *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BCLR 182 (CC); *Business South Africa v The Congress of South African Trade Unions* 1997 6 BLLR 681 (LAC).

47. *Business South Africa v The Congress of South African Trade Unions* 1997 6 BLLR 681 (LAC).

48. European Union, Permanent Delegation to the United Nations Office and other international organisations. 'Contribution of the European Union: Traditional Values' Geneva, February 15, 2013.

49. Natural Justice (Lawyers for Communities and the Environment Mercantile Building, Cape Town), 'Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind: best practices'.

50. Mills Soko and Neil Balchin, "Breaking the deadlock in the South African labour market crisis," *South African Journal of International Affairs*, 1 V 16, (2009): 33 - 48.

Strikes are moreover increasingly being conducted in an extremely violent manner in all major sectors of the economy.⁵² As such, employees and civilians engaging in strikes and thus giving effect to their right to strike for *inter alia* better salaries, bonuses and other compensation, grievances, trade union recognition, working conditions, socio-economic and political conditions, as well as basic public services are abusing this right by sporadically turning parts of this country into war zones. As a direct consequence such strikes infringes on the right of others to a safe and secure environment (Constitution: section 24) which is a prerequisite for the optimal realisation of their right to life.

Giving effect to the right of life; entailing a life that is worth living; is moreover indirectly infringed upon by the fact that strikes lead to great economic losses. In this regard it was reported that South African employees, during the labour unrest in 2014, lost more than R11 billion in wages due to strikes.⁵³ This was mainly due to the five-month strike by nearly 70 000 members of the Association of Mineworkers and Construction Union. The strikes at Document Warehouse, Rumlund Construction, 3D Marketing, by the South African Transport and Allied Workers' Union and the National Union of Metalworkers of South Africa (Numsa) also contributed to economic losses.

In 2013 strikes in the car manufacturing industry furthermore caused the big car manufacturers such as Volkswagen, General Motors, Ford, Toyota and Mercedes-Benz huge economic losses.⁵⁴ The negative consequences of these strikes however went beyond national losses as it additionally led to less global investors being prepared to invest in the relevant sectors, thus limiting the inflow of income from abroad. During 2012 the strikes at the platinum mines in the North-west Province steered to a loss of almost 20 million, and eventually led to the Marikana⁵⁵ bloodbath during which 34 people lost their lives.⁵⁶

The Marikana-strike was however not the only strike that led to the killing of people. Over 50 people were killed during the strikes at Lonmin and at Impala Platinum. Labour Minister, Mildred Oliphant, reacted to these killings by questioning the logic of following strike action to the point of damaging workers' interests. This was said in light of the fact that strikes often result in low wage settlement percentages – it thus do not have the expected outcomes sought after by those embarking in a strike.

It is conversely not only the interests of employees that are damaged. With reference to the negative economic consequences of strikes in South Africa specifically, Meylahn⁵⁷ alludes to the negative impact thereof on the economic stability and on investor confidence in South Africa, which in turn influences the financial markets and by implication, the value of investments. Strikes moreover influence the marginalised with regard to, among other, job-security and fair wages. DeJonno,⁵⁸ alongside, reports on the effects of the strike amongst 11 percent of the workplace of Anglo American Platinum⁵⁹ on South Africa's future growth prospects with respect to lowering all export potential as well as this country's global credit rating (by widening the gap between government revenue and government spending).⁶⁰

It thus also led to a sharp decline in the company's profits, which in turn negatively affected the interests of its shareholders and those of taxpayers in general. Bhana's⁶¹ research, for example, found that strikes are especially associated with statistically significant, negative abnormal returns on market efficiency. Bhana refers to the fact that the effects of strikes are unpredictability and therefore unpreventable. As such, strikes remain to imply a permanent loss to shareholders.

51. Loyisa Sidimba, "Strikes cost SA workers over R11-billion," *Business News*. August 24, 2014.

52. Ruth Ben-Israel *International labour standards: the case of the freedom to strike* (Netherlands: Kluwer Law International 1988): 93; "Farm strikes turn violent" *IOL News*, January 10, 2013. Business News - the strikes on farms involving plus-minus 7 000 people giving rise to one of the most violent days in South African history.

53. Sidimba.

54. *Ibid.*

55. Niren Tolsi "Marikana: 'One year after the massacre'," *Mail and Guardian*, August 16, 2012.

56. Niren Tolsi, "Imagining a way forward after Marikana" *Rhodes Journalism Review* 1.V 33 (2013): 107 - 108.

57. Van Wyk, Dugard, De Villiers & Davis.

58. Peter DeJonno, "Mining strikes affect every person in the country," *Sunday Independent*, July 9, 2013 with contributions from Ethel Hazelhurst, Londiwe Buthelezi and Audrey D'Angelo.

59. SAnews.gov.za, "Modise welcomes suspension of mine strike" July 10, 2013.

60. SABC News, "Rand touches 10-week low on strikes, poor economic outlook," June 4, 2014: Tompson Reuters.

61. De Klerk.

In this regard, Ndenze⁶² reported that the wave of strikes concerning the mining as well as in the manufacturing sectors, in which 188 000 South Africans lost their jobs, are steering this country into the “sharpest” economic decline since 1967.

The taxi strikes of 2014⁶³ are another example of strikes not only encumbering South Africa’s overall economic enterprise, but also its global reputation since transportation is well known as a crucial engine for economic growth and social development.⁶⁴ These strikes left many people without transport to, among others, schools and work. Whilst on the topic of schools and access to education, mention must also be made of the negative effect of the two-month long Post Office strikes on, among others, distant learning students being unable to obtain their study material or submit their assignments through the post,⁶⁵ thus infringing on their right to education and concomitantly their right to a better life in future.

Bhuiyan and Machowski,⁶⁶ who conducted a research on the impact of a 20-day strike in Polokwane Hospital, concluded that strikes in general also have a serious and significant effect on public service delivery. This strike did not only lead to a lowering of the morale at the hospital itself but also deprived citizens of access to service delivery that could enhance their quality of life.

Regarding the recent violence nature of strikes in South Africa, it is also worth noting the impact thereof on the general social development of this country and in specific the effect thereof on the youth. In this regard, Thulare AJ noted in *S v PM*⁶⁷ that the right to life is sacred, basic to humanity itself and therefore enjoys constitutional protection at all times. The fact that the Bill of Rights guarantees the rights to life, freedom and security of the person, freedom from all forms of violence, privacy and not to be arbitrarily deprived of property, was underscored. As such the High Court pointed out that children, among others, are entitled to a safe and secure environment and therefore have a legitimate claim to play peacefully in the streets, to enjoy their youth, to run around and enjoy the peace and tranquillity of their neighbourhoods, without the fear, the apprehension and the insecurity which would constantly diminish the quality of their lives.

Pertaining to the State’s role amidst increasing violent strikes, Ndenze⁶⁸ suggests that it is the State’s responsibility to enlighten and respond to matters of public concern in order to bring about peaceful industrial relations. According to Hill-Lewis⁶⁹ and Neasa⁷⁰ the contrary is conversely evident and accordingly criticise the State’s “muddling,” extreme interference and “contradictory approach” to the National Development Plan which is fuelling unemployment, poverty and inequality. In this regard, Urbach⁷¹ opines that government must decide whether to continue catering only for the interests of the already employed or to start including the interests of the unemployed. Hill-Lewis therefore calls for decisive leadership and a government committed to job-creating and economic growth which has the potential to boost the economy and thus giving effect to everyone’s right to a better life.

With reference to the sanctity of life, the respective High Courts emphasised in both *S v Mathe*⁷² and *S v Makhakha*⁷³ that if one person kills another, such conduct is the ultimately infringes on the right to life. If people are thus allowed to be killed or kill others during exercising their rights to strike the effect thereof on, among other, the relevant families and communities must be taken into account by the State as it may radically change their view pertaining to their relationship with a democratically elected government which is supposed to protect them as citizens.

62. Babalo Ndenze, ‘Strikes hit economy hard’, *Independent Newspapers*, July 15, 2014. SAPA.

63. SAPA. “Taxi strikes ‘not good for economy’,” *City Press*, November 17, 2014.

64. SAPA, “Taxi strikes hamper economic drive: Johannesburg Chamber of Commerce and Industry (JCCI),” *The Star*, November 17, 2014.

65. Glorius Sefako, “Post office strike negatively affects UNISA students,” *SABC News*, February 7, 2014.

66. MMZU Bhuiyan and A Machowski, “Impact of 20-day strike in Polokwane Hospital (18 August - 6 September 2010),” *South African Medical Journal* 9, V 102 (2012): 55 - 756.

67. 2014 2 SACR 481 (GP), para. 57.

68. Babalo Ndenze, ‘Strikes hit economy hard’, *Independent Newspapers*. July 15, 2014 SAPA.

69. Geordin Hill-Lewis (Democratic Alliance spokesman for trade and industry), interviewed by Babalo Ndenze, *Daily News*, July 15, 2014 Reuters.

70. Neasa, Unemployment because of SA labour laws, Aug 20 2014.

71. Jasson Urbach, The nature, causes and outcomes of strike action in SA, Moneyweb.com. August 19, 2010.

72. *S v Mathe* 2014 2 SACR 298 (KZD), para. 29.

73. *S v Makhakha* 2014 2 SACR 457 (WCC), para. 15.

In order to protect its citizens during strikes, Lewis⁷⁴ noted that the police are currently engaging in more aggressive and violent tactics to enforce the prohibition of protests or to dissolve violent protests. While the police employed the Belgian method of crowd control and policed protests from a manageable distance in the past, paramilitary police units such as the Special Task Force and Tactical Response Teams have recently become the norm in crowd control. This has often resulted in more violent police responses to protests. The police have also switched to following the French method of crowd control - a much more violent and in-your-face style - since the 2010 Soccer World Cup which South Africa hosted.

As a result, Lewis⁷⁵ is of the opinion that South Africans' right to peacefully strike is being absorbed by manipulative bureaucratic practices and violent policing practices. In this regard, Nixon⁷⁶ cautions that the police currently have the tendency to act as the agents of 'a specific domination' rather than as guarantors of a 'general order' in moments of crisis. This is directly opposite of their mandate to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.⁷⁷

On the other side of the coin, unions engaging their members in a strike action must also remember that they have a duty towards society. Unions are required to take all reasonable steps to stop and prevent violence, the damaging of property and other acts of misconduct during a strike, in the absence of which unions can be held vicariously liable for the wrongful acts of their members.⁷⁸

In *Eskom Ltd v National Union of Mineworkers*,⁷⁹ the High Court recapped the qualified nature of the right to strike by stating that, although section 17 of the Constitution grants everyone the right to assemble, demonstrate, picket, and present petitions, all these rights must be exercised peacefully. These rights are further limited by section 11(1) of the *Regulation of Gatherings Act* 205 of 1993 which provides that, if any riot damage occurs as a result of a gathering or demonstration, the organisation/union or convener responsible for such gathering or demonstration, shall be jointly and severally liable together with any person who unlawfully caused or contributed to the damage.

The Supreme Court of Appeal, similarly, found a union vicariously liable for people being killed and property being damaged in the matter of *SATAWU v Garvis*.⁸⁰ The Constitutional Court on appeal concurred with the Supreme Court of Appeal by stating that, as the decision to assemble resides with the union, it should be responsible for any reasonably foreseeable damage arising from such assembly, as the purpose of section 11(2) is to protect the safety and property of the public from foreseeable possibility of damage.

6. Ubuntu: striking a balance between the rights to life and to strike

Democracy is frequently considered to be a government by the people; a form of government in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system.⁸¹

While recognising that the right to a better life is a mere minimum that is provided by any democracy, Jahangir and Shafi⁸² pose the question: *Is there life after democracy and if so, what sort of life will it be?* To answer this question they propose that democracy cannot remain an ideal or aspiration; it must become a living model.

After 21 years of democracy, South Africa is however still emerging from a long period of strictly controlled and constraining social, political, economic, cultural, and religious thinking and behaviour. This lead to a climate of conformity, self-imposed limitations and interpersonal caution due to a psychological fear of stepping outside the boundaries of social convention.

74. Stuart T Lewis, "The right to peaceful protest is dying in South Africa," *Rhodes Journalism Review* 1, V 33 (2013): 1 – 2.

75. *Ibid.*

76. Bill Nixon, "Waiting for Farlam: Marikana, social inequality and the relative autonomy of the police," *South African Crime Quarterly* 1, V 46 (2013): 11.

77. *Loureiro v Mvula W+Quakity Production (Pty) Ltd* 2014 3 SA 394 (CC).

78. *SACWU v Afrox Ltd* 1999 20 ILJ 1718 (LAC).

79. 2001 22 ILJ 618 (W): Eskom sued the union for more than R6 million in damages caused by the union-organised demonstration, during which premises were vandalised.

80. *SATAWU v Garvis* 2012 ZACC 13, para. 61.

81. Saleem and Shafi.

82. *Ibid.*, 46.

This, in turn, according to Chaplin,⁸³ reinforces competition instead of cooperation among society members who are unwilling to collaborate, share, and preserve. It moreover underpins taking advantage of others in order to gain more individual status instead of showing compassion to others and building a sense of belonging. Such a philosophy of separatism and advantage, as referred to by Chaplin, has the potential of eventually undermining the capacity of South Africa, its neighbours and nations all around the world to function with any measure of cohesion and stability.

Against the background of the recent labour strikes in South Africa, which are regarded as being the worst in this country's history, Soko and Balchin⁸⁴ identify the need for strong leaders to bring about fundamental structural changes in the South African labour market in order to generate the jobs needed to confront poverty and inequality as well as to address the violent nature of strikes in the country, leading to an increase in unemployment. The Minister of Labour, Mildre Oliphant however cautions that a quick fix or an emotional solution to the country's bitter labour relations will not be maintainable as violent strikes are mainly due to a lack of real transformation, socio-economic equity, mutual respect and trust in the workplace which have contributed to the frustration and anger amongst employees. In this regard, Neasa⁸⁵ concomitantly recognised the need for major changes requiring an enormous amount of political determination in order to eliminate the centralised (unequal) power provided by labour legislation to unions, which contradicts the internationally-favoured notion of decentralised bargaining arrangements⁸⁶ and contributes the "militant stance" of employees dealing with collective bargaining processes.⁸⁷ Badkar and Boesler⁸⁸ are similarly concerned that the presence of too many unionized employees might, through strike actions, force the increase of wages much faster than productivity growth, thereby exacerbating unemployment. As such, unions are, as put forward by Urbach,⁸⁹ ignoring the fact that worker productivity is the main determinant of what employers are willing to pay. By increasing remuneration levels well beyond productivity growth over the last decade unions have thus, according to the same author, enjoyed an undue amount of power in the work place and directly contributed to unemployment as it lead to the unwillingness of employers to take employees into employment. It is in this regard that Annual Labour Market Bulletin 2012/13 Report⁹⁰ called for radical changes to address the challenges ahead in order to move towards a more equal society by following an inclusive growth path.

Bhengu,⁹¹ subsequently suggests that South Africans in particular should start to live according to the key values of Ubuntu(ism)⁹² which coincides with the founding values of democracy⁹³ as demarcated in its Constitution (section 1). These core values include respect for human dignity, equality, the rule of law and the promotion of human rights and freedoms as well as a multi-party democracy to ensure accountability, responsiveness and openness. This consecutively entails conformity and reconciliation⁹⁴ in the midst of conflict and adversity.⁹⁵ Despite the fact that Ubuntu was excluded from South Africa's final Constitution of 1996 – it was indeed mentioned in the Interim Constitution of 1993, - the Constitutional Court has thus far not hesitated to give effect to the basic principles thereof.

83 Kevin Chaplin, "The Ubuntu spirit in African communities," <http://www.doc4net.com>. (25 August 2015).

84 Mills Soko and Neil Balchin, "Breaking the deadlock in the South African labour market crisis," *South African Journal of International Affairs*, 1 V 16, (2009): 33 - 48.

85 Neasa, Unemployment because of SA labour laws, Aug 20 2014.

86 Soko and Balchin.

87 Labour Minister, Olifant quoted by Soko and Balchin.

88 Mamta Badkar and Matthew Boesler, "Blame the unions: How South Africa blew its spot as the continent's most promising economy, Department of Labour, Oct 23, 2012. : <http://www.businessinsider.com/south-africa-unemployment-crisis-strikes-2012-10#ixzz3kJz3GNTi>

89 Jasson Urbach, The nature, causes and outcomes of strike action in SA, Moneyweb.com. August 19, 2010.

90 As issued by the Departmental Spokesman, Page Boikanyo, "South Africa's unemployment rate remains stubborn amidst a new economic trajectory – Labour's ALMB" South African Department of Labour, 2015.

91 Mfuniselwa J. Bhengu, *Ubuntu: The Essence of Democracy* (Cape Town: Novalis Press, 1996).

92. These values include human dignity, respect, inclusivity, compassion, concern, honesty, conformity and values of collective unity and group solidarity.

93. Mfuniselwa J. Bhengu, *Ubuntu: The Essence of Democracy* (Cape Town: Novalis Press, 1996).

94. Michael J. Battle, *Reconciliation: The Ubuntu Theology of Desmond Tutu* (Cleveland, Ohio: Pilgrims Press, 1997).

95. Delanie Mthembu, 'African values: Discovering the indigenous roots of management', in Ronnie Lessem and Barbara Nussbaum eds., *Sawubona Africa: embracing four worlds in South African management* (Sandton: Zebra Press, 1996), 215 - 226.

Both Judges Langa and Mokgoro in *S v Makwanyana*⁹⁶ whilst dealing with the death penalty, for example, linked respect for life and human dignity with Ubuntu as a well-established African philosophical concept underscoring the dominant theme of a culture based on Ubuntu, namely that the life of another person being at least as valuable as one's own. Judge Van der Merwe in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd.*,⁹⁷ while addressing the conflict between eviction orders and humans' fundamental right to housing, similarly found Ubuntu to remain to be an underlying motif of the Bill of Rights due the potential thereof to combine individual rights with a more communitarian philosophy.

As the purpose of the right to strike is mainly pursued to improve the social and economic conditions of specific employees and not for the common good of all citizens,⁹⁸ the abuse of the right to strike and the concomitant negative consequences flowing from the recent practical realisation thereof in the young democratic South Africa indeed infringes the right of all to a better life. In this regard, that Meylahn⁹⁹ poses the question whether the violence that accompanies current strike actions, is symbolic of a powerless frustration and a violent revulsion at the thought that the changes promised by the Constitution and democracy will not be realised?

Since Ubuntu presents a collective consciousness instead of an individualistic realisation and is regarded as the spirit of transformation,¹⁰⁰ it encompasses the notion of being sympathetic, respectful, caring and sensitive to the needs of others.¹⁰¹ Ubuntu is thus, as put forward by Dandala¹⁰² a fountain from which all conduct and attitudes should flow. It can, in view hereof be argued that ubuntu has the potential to balance the scale between the right to a better life for all in South Africa and the right to strike, which is employed to ensure a better life for only a sector of society, especially when the right to strike is abused and strike actions are insensitive to the needs and well-being of society as a whole.

In order to explore this potential of ubuntu, recent case law was analysed and the following were found in which ubuntu has already been successfully employed by courts to balance the legal scales when conflict between rights and legally protected interests arise.

In *Resnick v Government of the Republic of South Africa*¹⁰³ the High Court found, with reference to the statutory eviction of an unlawful occupier of land (Law of Property), that the spirit of ubuntu, promoting the normative notion of humanity, should be taken into account as a guideline to determine whether such an eviction is indeed just and equitable. In *casu*, the guidelines set forward by ubuntu were used as being of utmost importance to rule that an eviction was unjustified since the unlawful occupier persistently tried to hold on to her home in order to provide an education for her child within a stable environment.

The State's obligation to provide shelter for persons being evicted from land which they occupied unlawfully was similarly addressed in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd.*¹⁰⁴ While taking cognisance of the statutory mandated right pertaining to ownership, namely to evict unlawful occupiers of land, emphasis was placed on the fact that such evictions should always be just and equitable. In this regard the concept of ubuntu was recognised as a basic principle underlying legislation. Accordingly the court recognised that elements of grace and compassion should be instilled into the formal structures of the law. As such, competing interests, in *casu* between ownership rights and socio-economic rights should be balanced to promote the constitutional vision and underlying values of Ubuntu, namely that of a caring and respectful society based on human interdependence, good neighbourliness and shared concern.

96. 1995 (3) SA 391 (CC), paras. 225 and 308.

97. 2012 (2) SA 104 (CC), para. 74.

98. *Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC), para. 65.

99. Meylahn.

100. Nkonko M. Kamwangamalu, "Ubuntu in South Africa: a sociolinguistic perspective to a pan-African concept," *Critical Arts: South-North Cultural and Media Studies* 2. V 13 (1999): 24 - 41.

101. Earl Prinsloo, "The Ubuntu style of participatory management," in Jeanette G. Malherbe, ed., *Decolonizing the mind: Proceedings of the Second Colloquium on African Philosophy* (Pretoria: UNISA Research Unit for African Philosophy, 1996), 113 - 114.

102. Mvume Dandala, "Cows never die: Embracing African cosmology in the process of economic growth" in Ronnie Lessem and Barbara Nussbaum, eds., *Sawubona Africa: embracing four worlds in South African management* (Sandton: Zebra Press, 1996), 70 - 72.

103. 2014 (2) SA 337 (WCC), para. H 343E - H.

104. 2012 (2) SA 104 (CC), paras. 37-38.

In this regard the spirit of ubuntu was found to combine individual rights with a communitarian philosophy. In the dominium of the Law of Contract, the Constitutional Court in the matter of *Everfresh Market Virginia (Pty) Limited v Shoprite Checkers (Pty) Limited*¹⁰⁵ argued that the common law principle of *pacta sunt servanda* should be applied in line with the values of Ubuntu to such an extent that the parties to a lease contract, in this case, are obliged to negotiate the terms of their contract with each in a reasonable manner and in good faith. A similar stance was taken in the matter of *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal*¹⁰⁶ in which the Constitutional Court stressed that the Law of Contract must be saturated with constitutional values such as ubuntu and human dignity, and that contracting parties must relate in good faith. It was accordingly found that the conduct of the Department of Education to reduce the subsidies to independent schools unilaterally was impermissible.

Ubuntu was also established to be applicable with regard to criminal matters (Criminal Law) pertaining to the sentencing of murderers and other hard criminals. In *S v Magadani*¹⁰⁷ the accused's personal circumstances were found to even outweigh the seriousness of the crime. Since the murder *in casu* was particularly brutal and revolting (an extreme violation of the right to life), and the fact that the accused was not a first offender and considered to be beyond rehabilitation, he was sentenced to life imprisonment within the ambit of the spirit and underlying values of Ubuntu.

The effectiveness of short-term imprisonment, as a sentence for young first offenders with financial and social responsibilities, was alongside found by the High Court in *S v Sibiyi*¹⁰⁸ to often do more harm than good in instances where the offender poses no real threat to society in general. A suspended sentence, or sentence based on ubuntu (by effecting reconciliation between victim and offender) was accordingly deliberated to be a much more effective punishment.

In interpreting and applying the *Child's Justice Act, 75 of 2008*, the High Court in *S v JJ*¹⁰⁹ reiterated the importance of this Act, as per section 2(b), to promote the spirit of *ubuntu* in the child justice system. In another criminal matter, the Constitutional Court in *Van Vuren v Minister of Correctional Services*¹¹⁰ clearly stated that restorative justice is unmistakably linked to the foundational value or norm of *ubuntu* in the South African jurisprudence. Ubuntu, as entailing the value that to rehabilitate a criminal sentenced to life imprisonment to the extent that he/she is repossessed of the complete opportunity of his/her rights, is to recognise the inherent human dignity of the individual criminal, was employed. It was accordingly concluded that any release and parole policy must balance the rights of the criminal against those of the community, which specifically include the right to be protected against crime.

The principles of Ubuntu also came to the fore in the matter *NM v Presiding Officer of Children's Court, Krugersdorp*¹¹¹ in which section 150(1) of the Children's Act 38 of 2005 were interpreted. It became evident that this Act does not promote a distinction to be made between children who are living with caregivers, such as grandparents, who do owe them a common-law duty of support and those living with caregivers who do not owe them such support.

In keeping with the spirit of Ubuntu, the principles of the best interests of children (Constitution: section 28) and the non-discrimination clause (Constitution: section 9), the court found that all orphaned children must be treated equally before the law by allowing all of them access to government sources of support. The development of the principles underpinning customary law was, on the other hand, addressed in *MM v MN*.¹¹² The Constitutional Court explained that the revival of, in this case, Tsonga customary law to its rightful place under the Constitution entails, *inter alia*, that customary principles must be respected in as far as they provide a setting which contributes to the unity of family structures and the promotion of co-operation, a sense of belonging and responsibility in its members, as well as the development of healthy communitarian traditions like Ubuntu.

105. 2012 (1) SA 256 (CC), para. 50.

106. 2013 (4) SA 262 (CC), para. 17.

107. *S v Magadani* Case No: CC 2/99 9-11-2000 VHC Makhanya J 6 pages Serial No: 0321/2001 CD 13/2001.

108. *S v Sibiyi* 2010 (1) SACR 284 (GNP), para 13.

109. *S v JJ* 2013 (2) SACR 599 (WCC), para. 47.

110. 2012 (1) SACR 103 (CC), para. 51.

111. 2013 (4) SA 379 (GSJ), para. 24.

112. 2013 (4) SA 415 (CC), para. 24.

The potential of Ubuntu as entailing reconciliation was alluded to in *Du Toit v Minister of Safety and Security*.¹¹³ The Constitutional Court referred to the Constitution's purpose to lay a sound foundation for all South Africans to exceed the past divisions which allowed for remote violations of fundamental rights and the infringement of humanitarian values during violent conflicts, and to start a new chapter in this country's history. For this to transpire, emphasis was placed on the need for understanding rather than for revenge as well as on the need for ubuntu rather than for victimisation.

The Supreme Court of Appeal alongside pointed to the eminence of ubuntu in the pursuit of national unity, the well-being of all South-African citizens and the reconstruction of a harmonious society in the matter of *The Citizen 1978 (Pty) Ltd v McBride*.¹¹⁴ It was subsequently stated that an amnestied individual can no longer be considered a criminal in respect of deeds for which he was amnestied.

The founding values of the Constitution, namely non-racialism, equality and human dignity as they relate to the spirit of ubuntu was moreover employed by the Supreme Court of Appeal in *National Lotteries Board v South African Education and Environment Project*¹¹⁵ to decide on the validity of the board's decision pertaining to a policy precluding an organisation from obtaining public funding. Since the said organisation was precluded purely based upon its members' race, it was found to deepened mass poverty and social inequality, contrary to the founding values of the Constitution.

The spirit of Ubuntu, as embracing all citizens as brothers, was underscored in the case of *Afgriforum v Malema*.¹¹⁶ The fact that individual rights, such as the right to freedom of expression (Constitution: section 16) is not absolute and may lead to hate speech, was reiterated. No justification could thus be found for the singing of a song being regarded as extremely incriminated and hurtful by the target group.

Even the conduct of public officials, such as police officers when arresting persons, was subjected to the values of Ubuntu in the matter of *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security*.¹¹⁷ The conduct of the police while arresting private employers used as safety guards to protect the assets of their employees contrary to section 20(1)(a) *Private Security Industry Regulation Act* 56 of 2001 providing that only registered security service providers may perform security services, was heavily criticised. The Constitutional Court found the conduct of the police as disappointing, and even sanctionable. The conduct was condemned as being indicative of the police abusing their power and harassing people and communities. This became evident as the police did not, in any manner, endeavoured to respect the constitutional values of equality, human dignity and freedom (core Ubuntu-values) during the arrest procedures.

All administrative actions taken in accordance with the Constitution (section 33) and the *Promotion of Administrative Justice Act* 3 of 2000, must furthermore take the values underpinning Ubuntu into account. In *Koyane v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)*¹¹⁸ Mokgoro J emphasised that administrative officials are obliged to ensure that all administrative actions are taken in line with the constitutional values coupled with the values of Ubuntu. As such the public must be treated with the necessary respect and dignity. Any undue confrontation must accordingly be avoided. Ubuntu was also applied to the Law of Delict in *JT v Road Accident Fund*¹¹⁹ and in *Paixão v Road Accident Fund*.¹²⁰ With regard to specifically the duty of family members to support each other, the courts found that the spirit of Ubuntu is absent when a child does not support a needy parent. The impact of the morality of society and the voluntary assumption of such support was emphasised as relevant to the duty arising and being enforceable against third parties. It was subsequently argued that a duty of care is the outcome of a value judgment taking cognisance of many factors such as society's attitudes, sense of social relationships and concomitant responsibilities as well as the changing ideas of morals and justice,

113. 2010 (1) SACR 1 (CC), para. 14.

114. 2010 (4) SA 148 (SCA), para. 27

115. 2012 (4) SA 504 (SCA), para. 17.

116. 2011 (6) SA 240 (EqC), para. 108.

117. 2010 (2) SA 181 (CC), para. 78.

118. 2010 (4) SA 327 (CC), para. 62.

119. 2015 (1) SA 609 (GJ), para. 18 & 20.

120. 2012 (6) SA 377 (SCA), para 26, see also *Jacobs v Road Accident Fund* 2010 3 SA 263 (SE), *Fosi v Road Accident Fund* 2008 (3) SA 560 (C) and *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA).

The spirit of Ubuntu was correspondingly relied upon in *Mgaga v Minister of Police*¹²¹ pertaining to the duty of schools to create safe and secure environments for learners. The High Court found that, in view of the fact that educators done everything in their power to prevent the occurrence of assault between learners by constantly reinforcing the values of Ubuntu relating to tolerance and love towards each other, no negligence was present on the side of the educators.

Whilst addressing the importance of everyone's right to human dignity as guaranteed by section 10 of the Constitution, the Constitutional Court in *South African Police Service v Solidarity OBO Barnard*,¹²² cautioned against an atomistic approach. Emphasis was accordingly placed on the fact that individuals, bestowed with individual fundamental rights, must not view themselves as inaccessible, unique and unencumbered human beings. It was furthermore argued that the guaranteeing of fundamental rights have both an individualistic and collective desire. As such, individuals must always remember that their humanity is expressed through their relationships with others. It is in this regard that the spirit of Ubuntu, underscoring the interdependence of community members, finds application. The same stance was taken in the matter of *SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae) (2014)*.¹²³

7. Concluding remarks

Although both the rights to life and to strike is recognised as fundamental rights to which everyone has access, viewing these rights within the context in which they operate,¹²⁴ allowed the author to recognise that these rights, as guaranteed by South Africa's legal framework, can only be optimally analysed by taking cognisance of their practical application. It moreover allowed the author to state that fundamental rights can only be exercised insofar as they focus on achieving positive social change pertaining to the interdependence of human beings – an important value reinforced by Ubuntu.

The link between the rights to life and to strike was researched to demarcate the conflict that currently arises between them. It was moreover used to link the concept of Ubuntu as applied in recent case law to balance conflicting rights and interests in order to establish whether the spirit of Ubuntu can successfully be used to balance the legal scales when the right to a life that is worth living is threatened by strike actions.

It was subsequently found that, despite the right to strike being a fundamental right, it generally paths the way to individualistic gains. In the process it creates the potential of infringing the right to a better life for all South Africans. This, in turn was found to be contrary to the humanitarian values underscored by Ubuntu.

If the right to ownership, an exclusive right to property,¹²⁵ can be tampered to accommodate humaneness, the freedom of contract curtailed to lodge good faith and respect between contractual parties and the sentencing offenders can be done within the ambit of restorative justice, so can Ubuntu be employed to limit the right to strike in order to balance the scale between, especially the negative consequences arising from it and the right to a safe, secure, economic stable and a better life for all.

Bearing in mind the importance of Ubuntu as a traditional value in Africa and thus as part of South Africans' true identity, it is concluded that it can be employed to balance the scale between the entire society's right to a better life and those who wish to abuse their right to strike. The values strengthened by Ubuntu can guide everyone, when enforcing their human rights to do so not as isolated and unique human beings, but as community members who belong together, care for one another and remembers that their humanity is expressed through their relationships with others. For this to transpire, it is however necessary to engage all members of the community and the workplace in continuous dialogue. This can be the first step towards achieving a caring nation, with recognised democratic values and a social justice system that is based on equality, non-racism, non-sexism and human dignity.

121. 2014 JDR 0889 (GSJ).

122. 2014 (6) SA 123 (CC), para. 174.

123. 35 ILJ 2981 (CC), para. 174.

124. Kurt Lewin, *Field Theory in Social Science: Selected Theoretical Papers* (New York: Harper, 1975), 169.

125. *Chetty v Naidoo* 1974 (A).