THE CONTRIBUTION OF THE LABOUR COURT TO THE DEVELOPMENT OF STRIKE LAW

by

LIVHUWANI ADOLPHUS NENGOVHELA

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Supervisor: Prof JA van der Walt
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SUMMARY

The Labour Relations Act 66 of 1995 brought a number of changes in the labour relations environment from its inception on 11 November 1996. The Act codified Industrial Court decisions that were already established under the strike-law jurisprudence from the Labour Relations Act 28 of 1956. These general changes to the law also impact on the strike-law regime. The purpose of this paper is to give an overview of the contributions made by the Labour Courts\(^1\) in developing strike law from the inception of the Act.

The Labour Courts have made a number of decisions that have helped in clarifying the provisions of the Act. One should hasten to say that this has never been a smooth process by the courts. It will further be shown in this paper that some of the court decisions were not well accepted in the light of other considerations, such as the Constitution and the previous Industrial Court decisions. On some occasions the Constitutional Court had to intervene in order to clarify the intention of the legislature.

For the purpose of effectively dealing with this topic, I shall briefly give the historical context of strike law in the form of common-law position, and the strike-law position before the Bill of Rights and the Constitution. I shall then endeavour to identify the legislative provision of the Act when it comes to strike-law provisions, at the same time identifying the important court decisions that were made.

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\(^1\) Labour Courts referring to both the Labour Court and the Labour Appeal Court.
CHAPTER 1
INTRODUCTION

The Labour Relations Act\(^2\) of 1995 (hereafter the Act) makes detailed provision for strike law. This Act replaces the old Labour Relations Act\(^3\) of 1956 (hereafter the old Act), which had different strike-law provisions. The Labour Relations Act is an enabling legislation that seeks to bring into effect the constitutional\(^4\) right to strike. The challenge of the Labour Courts is to interpret the Act consistently with the constitutional right to strike.

The issue of strikes and strike law need a good understanding by Labour Lawyers and Industrial Relations Practitioners because it is a reality, and forms an important part of our labour laws. The Department of Labour’s Annual Report on Industrial action\(^5\) identified the following general features of industrial action during 1998:

- About four million workdays were lost because of strikes in 1998.

- The average duration of reported labour disputes was 7.3 working days, with the longest dispute involving the loss of 86 workdays.

- Approximately R48, 3 million in wages was lost due to industrial action.

- More than 26% of employers reported the use of replacement labour during the strike action.

- Assault, intimidation and damage to property during industrial action were widely reported during strikes and lockouts. Approximately 11 people were reported to have lost their lives.

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\(^3\) Labour Relations Act 28 of 1956.
\(^4\) Republic of South Africa Constitution Act 108 of 1996.
• 73% of the industrial action reported to the Department of Labour was in compliance with the provisions of the Act.

• Eighty strikes or work stoppages occurred in services deemed to be essential services by the Essential Services Committee in terms of section 7(8) of the Labour Relations Act. Approximately 10 797 workdays were lost due to industrial action in essential services.

The above picture, although the report is not most recent, reflect that almost all areas of the provisions of strike laws were covered. Although there are no proper statistics on the number of court cases generated by these industrial actions and lock-outs, there have been “… as many strike and lock-out cases as there have been strikes and lock-outs … even the obvious required the Labour Court’s stamp of approval”.

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CHAPTER 2
COMMON LAW AND STRIKE

Modern labour law seeks to regulate industrial conflict for the purpose of industrial peace. The complex nature of protections and immunities of the contending powers in labour law should be understood within the context of its common law origin of prohibition. What statutory interventions did was to free strike of the shackles of criminal law.\(^7\)

Consideration has also to be made for the fact that our common law has developed mainly out of Roman-Dutch law, and Roman law afforded little recognition of the employment relationship. This is because the Roman contemporary economy was largely based on slavery and independent contractors.\(^8\)

At common law, a strike is a material breach of contract of employment. The notion of collectivity in the employment relationship was therefore not recognised. A collective withdrawal of labour to enforce a demand may be followed by summary dismissal. The strikers are thus not protected from dismissal under common law.

This common-law position was confirmed in the decision of *R v Smit*.\(^9\) In this case Smit, and other strikers were dismissed for striking and were also charged with trespassing for remaining on the premises after their dismissal. The strikers argued that the strike was legal and therefore the employer could not dismiss. Watermeyer AJ rejected the argument and concluded that:

> "At common law an employer clearly has the right to dismiss a servant who refuses to carry out his contractual obligation to work. Counsel was unable to point to, and I have been unable to find any provision in Act 36 of 1937, which ‘legalizes’ strikes in the sense that it authorizes an employee to break his contract of employment by participating in a strike. All that the Act has done is to declare that striking in certain circumstances constitutes a criminal offence. If those circumstances are not present then no criminal offence is committed and in that limited sense the strike is ‘legal’. It does not, however, follow that an

\(^7\) Cheadle in Brassey, Cameron, Cheadle and Olivier *The New Labour Law* (1987) at 241.
\(^9\) 1955 (1) SA 239 (C).
employer is deprived of his Common Law right to dismiss an employee who refuses to work.”

The court’s approach to the law on strikes must be viewed in the context of the above-mentioned common-law position, which did not view strikes as legitimate tools used in collective bargaining. The common-law position on strikes has been eroded by legislation.

\[\text{At 241H.}\]
CHAPTER 3
STATUTORY POSITION PRIOR TO THE CONSTITUTION

Section 65 of the old Labour Relations Act permitted only strikes that were functional to collective bargaining. There was no fundamental right to strike but only freedom to strike. It required the statutory conciliation machinery provided for in the Act to be in invoked before engaging in a strike. Where there was an industrial council, the dispute, giving rise to the strike, was referred to the industrial council. Where there was no industrial council, an application had to be made to the Minister for the establishment of a conciliation board. Strikes that conformed to the requirements of section 65 were indemnified from criminal and civil proceedings in terms of section 79.

This meant that an employer could not interdict or sue workers and their trade unions for engaging in a legal strike. There was no provision for the protection of strikers involved in legal strikes. The old Act was silent on the employer's right to dismissal, but the Industrial Court used its unfair labour practice to whittle down this employer's common-law right to dismiss strikers for breach of contract. The common-law position is clear: strikers have no protection at all. At common law, said Watermeyer AJ in \textit{R v Smit}, \textsuperscript{13} “an employer clearly has the right to dismiss a servant who refuses to carry out his contractual obligation to work”.

A strike could be legal if preceded by a ballot. \textsuperscript{14} The requirement was that, unless the majority of members of the union in good standing have voted by ballot in favour of strike action, it was an offence to call or take part in the strike. The failure to hold a pre-strike ballot could result in an illegal strike. In summary, the old Act made it almost impossible for the union to meet the legal requirements of a strike.

The question whether lawful strikers have any protection from dismissal was first considered in \textit{Die Raad van Mynvakbonde v Die Kamer van Mynwese van Suid-}

\begin{footnotesize}
\textsuperscript{11} S 65(1)(d)(i).
\textsuperscript{12} S 65(1)(ii).
\textsuperscript{13} 1955 (1) SA 329 (C) at 241H; \textit{Marievale Consolidated Mines v NUM} (1986) 7 ILJ 108 (W) and Brummer “A Contractual Right to Strike” (1986) 7 ILJ 653.
\textsuperscript{14} S 65(2) and see also \textit{NUM v Deelkraal Gold Mining Co (Pty) Ltd} (1987) 8 ILJ 147 (IC) 212.
\end{footnotesize}
where the Industrial Court held that it was entirely possible that the dismissal of lawful strikers might be an unfair labour practice.

The court adopted a basket of factors in determining if the dismissal constituted unfair labour practice. These factors were the cause, nature, extent and purpose of the strike, the circumstances of the employees, employers and others. In the celebrated decision of NUM v Marievale Consolidated Mines the Industrial Court accepted explicitly that the dismissal of striking employees could constitute an unfair labour practice. In doing so, it followed the approach in the Die Raad van Mynvakbonde decision, and had regard to a variety of factors deemed relevant in determining the issue.

The court said that the employer, unlike the employees, was not prepared to compromise or even to subject the deadlock to alternative dispute resolution. The court held that the attitude and behaviour of the employer amounted to an unfair labour practice. This, the court held, was what eventually resulted in the dismissals. The court found for the union and ordered for the reinstatement of lawful strikers in terms of section 43 of the Act. According to Myburgh J (as he then was) the impact of the Marievale judgment on the industry was dramatic. Employers, according to him, were obliged to accept the unpalatable new facts of life.

A third party, the Industrial Court, had jurisdiction to reinstate striking workers albeit that the dismissal was lawful. The issue in relation to the dismissal of strikers was one of fairness and not lawfulness. The concept of fairness was an elusive one, incapable of exact formulation. Employers were at risk, having dismissed strikers and replaced them with a new workforce, should the Industrial Court, some months

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17 (1986) 7 ILJ (IC) and see also Brassey “In the Firing Line the Dismissal of Strikers” (1987) Vol 4(1) Employment Law 1.
18 At 151A and E.
19 At 151D.
20 In Benjamin, Jacobus and Albertyn “Strikes, Lockouts and Arbitration in South African Labour Law” (1989) at 31 and see also Louw “A New Light on Legal Strikes” the Marievale Case (1986) 8 MD 44 at 48 and “Striking it Right” 2(3) Employment Law 44. He is an ex-judge of the Labour Courts and now General Counsel of Anglogold.
later, order the reinstatement of those dismissed. Myburgh\textsuperscript{21} further asserted that the effect of the decision was that the employers were obliged to act conservatively. In the past the instinct of many employers was to act precipitately, to dismiss quickly. However, as a result of this \textit{Marievale} judgment in the Industrial Court, the “good old days” for employers were gone.

A brake had been placed on an employer’s ability to dismiss strikers. In \textit{Natal Die Casting v President of the Industrial Court}\textsuperscript{22} the court found for the union and reinstated the strikers where the employer had been bargaining in bad faith for almost a year before the strike. According to Thompson,\textsuperscript{23} the rationale underlying these decisions would appear to be that an employer is entitled to take economic counter measures, such as the employment of temporary labour to protect his business operations. He cannot exploit a dispute situation to rid himself of a unionised workforce.

Cheadle\textsuperscript{24} has noted that the basket of factors listed by the courts were not factors, as much as they were indicative of the facts which might be relevant. According to him there was no coherence; one court would rely on one factor, another would overlook it, others would eschew any reliance on factors. He stated that these factors were unclear, uncertain and too limited. The proper approach, Cheadle suggested, was to infer from the statute in order to establish the purpose in a logical, coherent manner.

Despite the criticisms, the Industrial and Labour Appeal Courts had on numerous subsequent decisions determined the fairness of the dismissal of the strikers with reference to one or more of the factors.\textsuperscript{25}

\textsuperscript{21} At 32.
\textsuperscript{22} (1987) 8 ILJ 254 (IC).
\textsuperscript{23} Thompson “Trade Unions Using the Law” in Corder \textit{Essays on Law and Social Practice in South Africa} at 345.
\textsuperscript{24} Cheadle in Brassey \textit{et al} \textit{The New Labour Law} at 257 and see also Cheadle \textit{et al} Current \textit{Labour Law} (1994) at 78-9.
\textsuperscript{25} \textit{NUM v East Rand Gold and Uranium Co Ltd} (1991) 12 ILJ 1221 (AD) at 1239–41; see also Thompson “Towards the Right to Strike” (1988) 4(4) \textit{Employment Law} 63.
In *Black Allied Workers Union v Palm Beach Hotel*, and *Black Allied Workers Union v Asoka*\(^\text{26}\) the court in both cases accepted that employers have a contractual right to dismiss striking workers, but held that the court would control the exercise of that right.

The contractual approach underlined the decision of majority of Labour Appeal Court in *Perskorporasie van SA Bpk v Media Association of SA*,\(^\text{27}\) where the court stated that the use of the term “a right to strike” is misleading and unfortunate. It went further to state that neither common law nor the Labour Relations Act grants such a right. The court held that it would only in exceptional circumstances protect strikers against dismissal and deny the employer its common-law remedy where the dismissal appeared to be an unfair labour practice.

The *Perskor’s* decision according to Le Roux and Van Niekerk\(^\text{28}\) had its basis from the common-law rule that an employee refusing to work commits a material breach of the employment contract, entitling the employer to dismiss the employee.

Dennis Davis (as he then was)\(^\text{29}\) has sharply criticised the decision for its exclusive reliance upon questions of legality and criminality rather than upon the fairness or legitimacy of the strike action. These criticisms should now be read in the light of the Appellate Division decision in *NUM v East Rand Gold and Uranium Company Ltd*, supra.

The *Perskor’s* decision was confirmed by the approached in *NUMSA v Vetsak Co-Operative Ltd*.\(^\text{30}\) The court held that the old Act did not deprive an employer of his common law right to dismiss an employee who refused to perform his contractual obligations. It held further that a fundamental right to strike is not our law, and it has

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\(^{26}\) (1988) 9 ILJ (IC) and (1989) 10 ILJ 167 (IC).

\(^{27}\) (1991) 12 ILJ 86 (LAC) and see also *Marievale Consolidated Mines v NUM* supra fn 16. The Court granted an eviction order and held that it was irrelevant that the strike was not prohibited by s 65 of the LRA, the decision should be contracted with *Perskorporasie van SA Bpk v MWASA* (1993) 14 ILJ 938 (LAC) at 949A-B.

\(^{28}\) See supra fn 15 at 296.

\(^{29}\) See “The Jurisdiction of Industrial Relations in South Africa” (1991) 12 ILJ 1181 at 1189. He is now a judge on the Cape of Good Hope Provincial Division of the High Court and see also a conference paper by judge Myburgh entitled “Dismissal of Striking Workers” (1991) delivered at the 4th Annual Labour Law Conference, Durban.

\(^{30}\) (1991) 12 ILJ 564 (LAC).
certainly not been introduced by the old Act. The contractual approach was accepted by the Appellate Division.\textsuperscript{31}

In \textit{BAWU v Blue Water Prestige Hotels}\textsuperscript{32} workers were dismissed for engaging in a lawful strike. After five years they were reinstated with approximately two and half years’ back pay. The starting point of the approach in \textit{Blue Waters} was to recognise that a legal strike was functional to collective bargaining. That is because:

“The collective negotiations between the parties are taken seriously by each other because of awful risk they face if a settlement is not reached. Either of them may exercise its right to inflict economic harm upon the other. In that sense that threat of a strike or a lock-out is conducive and function to collective bargaining. The right to strike is important and necessary to a system of collective bargaining. It underpins the system and it obliges the parties to engage thoughtfully with each other.

\textit{It helps to focus their minds on the issues at stake and to weigh up carefully the costs of a failure to reach agreement.}\textsuperscript{33}

According to Basson\textsuperscript{34} the Labour Appeal Court in the \textit{Blue Waters} decision has unequivocally confirmed the important role of strike action in the process of collective bargaining. She stated that it could be argued that the effect of this decision was that a right to strike had finally been established in the Labour Appeal Court. According to her the far-reaching effects of the decision are the following:\textsuperscript{35}

- Workers who take part in a legal strike cannot be dismissed simply for taking part in strike action. It was held that dismissal is not a legitimate economic weapon, as this would render legal strike action ineffective.\textsuperscript{36}

\textsuperscript{31} \textit{NUMSA v Vetsak Co-operative Ltd} (1996) 17 ILJ 455 (A); s 67 of the Act now abolishes this approach.
\textsuperscript{32} (1993) 14 ILJ 963 (LAC) and see also further comment on the case by Cheadle “Black Mountains and Blue Waters” 9(6) \textit{Employment Law} 122 at 125.
\textsuperscript{33} At 971J – 972B.
\textsuperscript{34} “The Labour Appeal Court and The Right to Strike” (1994) 6(1) \textit{SA Merc LJ} 104 at 111; the court’s view is in line with that expressed by the Appellate Division in \textit{NUM v ERGO} (1991) 12 ILJ 1221 (A) at 1237F.
\textsuperscript{35} At 113-117.
\textsuperscript{36} This decision should be compared with \textit{OK Bazaars (1929) Ltd v SACCAWU} (1993) 14 ILJ 362 (LAC) at 364H where the Court agreed with the contention that an employer may invoke the “legitimate weapon of dismissal” to counter the economic weapon of a strike.
• Although the court did not elaborate on the effects of recognising the right to strike in preference of the freedom to strike, the court has in effect ruled that the contracts of employment are suspended for the duration of the strike or at least until such a time as imminent financial devastation can be shown by the employer, after which an employer may be justified to dismiss for operational reasons.

• In view of the fact that the legality of a strike grants immunity from dismissal, strike grants strikers immunity from dismissal. Any form of unlawful or unfair action, which takes place in conjunction with or at the same time as the strike, will have to be dealt with separately from the strike action.

It is, as Martin Brassey has observed, a paradox that it is necessary to protect industrial warfare in order to secure industrial peace.37

The final legal argument in the Blue Waters decision held accordingly that the employees engaged in a legal strike do not constitute misconduct, and accordingly strikers cannot be dismissed on that ground.38 Cheadle39 said the Blue Waters decision marks a break with the traditional methods of using factors to determine the fairness of dismissing legal strikers. The Blue Waters decision held that, subject to two exceptions, namely essential services and irreparable harm to the business, strikers engaged in legal strikes should not be dismissed.

The “notion of irreparable economic hardship” as used in the Blue Waters decision was rejected by the majority of the Labour Appeal Court in NUM v Black Mountain Mineral Development Co (Pty) Ltd.40 The court considered the limitations to be too restrictive in the sense that it appeared to require an employer to wait until irreparable harm was about to occur, or had occurred, before acting to protect its interests.41 The court preferred a formulation that entitled an employer to exercise the right to dismissal once there was a “likelihood of substantial economic loss”.

38 At 197E-I.
40 (1994) 15 ILJ 1005 (LAC) and see also Employment Law 9(6) 122.
41 At 1012B.
The dissenting judgment by one of the assessors\(^\text{42}\) was the test to be applied as to whether the operational requirements of the employers justified the termination of employment weight, in the light of compelling policy arguments favouring the protection of strikers against dismissals. He argued that the respondent was not suffering real economic hardship, such as to entitle it to dismiss the strikers. He further accepted the functionality of strike to collective bargaining as mentioned in *Blue Waters* supra.

Chris Albertyn\(^\text{43}\) criticised the *Black Mountain* decision for abusing the reasoning in *Blue Waters*. He stated further that the court had no sympathy for collective bargaining, no sense of shifting the balance of power in negotiations, nor willingness to promote self-regulation. Before dismissals can be justified, as Rycroft\(^\text{44}\) puts it,

> “It will have to be shown that the employer’s legitimate and substantial business interest outweighs the employees’ interest in retaining their bargaining strength in a continued strike.”

Dismissal must be necessary for the continued viability of the business and not just convenient. In *NUMSA v Boart MSA*\(^\text{45}\) the employer had dismissed employees engaged in a strike that was functional to collective bargaining. The striking employees were replaced by temporary employees. The striking employees were replaced on the same day as the interdict was heard. The court held that the real reason for dismissing the strikers was *Boart MSA’s* wishes to retain the new temporary employees. The court held that the striking employees were not being disloyal to the employer by participating in a strike, they were merely exercising their rights as members of a union which had an industry-wide strike after bargaining unsuccessfully, but in good faith, over a period of five to six months on wages and conditions of employment. The court\(^\text{46}\) unanimously found that the dismissal of strikers constituted an unfair labour practice and retrospectively ordered reinstatement.

\(^{42}\) For an application of the test see the minority judgment of Murphy Assessor in *NUM v Black Mountain* (1994) 15 *ILJ* 1005 (LAC).

\(^{43}\) See “Striking the Balance” 11(2) *Employment Law* at 38-39.

\(^{44}\) “The Employer’s Level of Tolerance in a Strike” (1993) 14 *ILJ* 285 at 289.

\(^{45}\) (1995) 16 *ILJ* 1469 (LAC) and see also analysis by Lagrange *Annual Survey* (1995) 558.

\(^{46}\) At 1481-2.
In *Cobra Watertech v NUMSA*\(^{47}\) the court considered the test of a likelihood of substantial economic loss and rejected it on the basis that it required the court:

> “to enter the arena after the event, to decide whether and to what extent each party had acted rationally in the process of bargaining, having regard to the employer's financial circumstances.”\(^{48}\)

The court commented in passing on the “economic hardship” adopted in *Blue Waters* case. The *Cobra Watertech* decision provided the most far-reaching protection as it was held by the court that a strike-bound employer could never resort to the ultimate weapon of dismissal.

In *Hotel Catering Commercial & Allied Workers Union v Awerbuch's Bargain House*\(^{49}\) the court, confronted with principles established in *Blue Waters*, took a step backward and approved the decisions\(^{50}\) in which the old-basket-of-factors approach and contractual principles were emphasised. The court upheld the dismissals on the basis that, amongst others, the strike and other conduct of the employees had resulted in economic loss and public embarrassment of the employer.

In *NUMSA v Rand Bright Steel*\(^{51}\) the court supported the criticism of the *Blue Waters* decision in the majority judgment in the *Black Mountain* decision, and noted that it was not incumbent upon an employer to know, immediately prior to the dismissal, that it was on the verge of financial extinction. It stated that:

> “Once the strike has brought to bear whatever pressure it may and there is little prospect of settlement in the near future, it is unfair to require of an employer that he should simply permit his viability to be destroyed in the hope that a settlement might be achieved before it is too late to matter.”\(^{52}\)

\(^{47}\) (1995) 16 IJ 607 (LAC) and see the comment by Grogan on the case “Pleading Poverty: Can Legal Strikers be Dismissed?” (6) Employment Law 126.

\(^{48}\) At 161F.

\(^{49}\) (1995) 16 IJ 163 (IC).

\(^{50}\) SACWU v Sasol Industries (1990) 11 IJ 1031 (LAC) and *Perskor supra* 27.

\(^{51}\) (1995) 16 IJ 668 (IC).

\(^{52}\) *Supra* at 687B.
In *NUMSA v Vetsak Co-operative (Pty) Ltd* the Appellate Division was for the first time called upon to deliberate on the dismissals by an employer of employees engaged in a lawful strike. The question was whether legal strikers could be fairly dismissed where there was no basis for dismissal other than that their employer wanted to bring the strike to an end.

The five-members bench unanimously ruled that legal strikers could be dismissed for doing no more that refusing to work until their demands were met. There was no misconduct, no financial losses suffered and the strike was legal in every respect.

In applying their value judgments, two members of the bench found that the dismissal was unfair and the other three that the dismissal was not. According to the majority judgment the strikers did not deserve protection at the time of their dismissal, as the strike was no longer functional to collective bargaining. The majority held that the lawfulness of the strike was not the overriding factor. The majority in the *Vetsak* decision was not interested as to whether the employer was facing economic extinction or the likelihood of substantial economic loss. The court had the opportunity to determine test, but held that it was not possible to formulate a definite test.

The Appellate Division decision had the support from Fabricius SC who has stated:

“I submit that this is the first judgment of the Appellate that has followed the correct approach from a philosophical jurisprudential point of view, with great respect of course. It decided the issue on facts without being unduly, if at all, shackled by so-called principles, rules, or guidelines in the context that I have endeavoured to describe above. It has therefore given the concept or notion of value judgment its proper place in Labour relations.”

The Appellate Division in *NUM v Black Mountain Mineral Development Co (Pty) Ltd* unanimously reaffirmed the decision in *NUMSA v Vetsak* that a striking employee

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53 (1996) 17 ILJ 455 (A) and see also the criticism of this decision by Grogan “Set-back for Strikers, Vetsak Passes the AD’s test” (1996) 12(6) Employment Law 114 at 117-8 as well as Cooper in Cheadle et al Current Labour Law (1996) at 63.

54 Minority judgment was delivered by Smalberger JA with Scott JA concurring at 478I.

55 It was delivered by Nienaber JA with Marais JA and Zulman AJA concurring at 469H.


may not be dismissed merely for striking, for otherwise the right to strike would have no content, and collective bargaining as an instrument of industrial peace would be largely undermined.

The Appeal Division was confronted with a two-fold inquiry, whether the ultimatum in all the circumstances amounted to an unfair labour practice; if not, whether the conduct of the employer constituted an unfair labour practice. The court, after weighing up all the relevant factors, found that the ultimatum was not premature. The court held further that to protect the strike action beyond that point would be detrimental, not only to the interest of both sides, but also to those of the community at large.\(^{58}\)

In regard to the second inquiry it was held that the tactic adopted by the employer of offering to implement its wage offer as from the date on which it was accepted within a specified time was a legitimate bargaining ploy.\(^{59}\) The court did not even consider the approach followed in *Cobra Watertech v NUMSA*. It held that the dismissal was both substantively fair, and dismissed that appeal with costs. The *Vetsak* and *Black Mountain* decisions are now the final words on the dismissal of legal strikers under the old Labour Relations Act.

\(^{58}\) At 451D.
\(^{59}\) At 451H.
CHAPTER 4
THE CONSTITUTIONAL RIGHT TO STRIKE

The Act\(^{60}\) provides that one of its primary objectives is to give effect to the constitutionally guaranteed rights contained in section 23(2) of the Constitution,\(^{61}\) including the right to strike. When the Labour Relations Act was promulgated, the Interim Constitution\(^{62}\) was still in place, and the right to strike was guaranteed in section 27(4). Section 27(4) of the Interim Constitution guaranteeing workers the right to strike for the purpose of collective bargaining. The Constitution, in section 23(2)(c), on the other hand, guarantees every worker “the right to strike”. The wording differences between the two sections may be subtle, but it is indeed a qualitative one. It appears that the Constitution created or widens the space for the courts to be able to interpret the enabling legislation.

Another fundamental difference between the provisions of the Interim Constitution and the Constitution is that the Constitution only provides for the right to strike, and not the right to lock-out. The reason is that it is wrong to see the lock-out as simply the employer equivalent of the employee’s right to strike. The right to strike is essential to bolster collective bargaining and thereby to give employees the power to bargain effectively with employers. The employers on the other hand have more economic strength that ensures them that they can bargain effectively. That is why the strike enjoys constitutional protection, whereas the lock-out does not.

It will be seen later that the courts have, from the inception of the Act, endeavoured to maintain the balance between the Constitutional right to strike, and the limitations provided for in the Act.

The Constitution\(^{63}\) provides that “every worker has the right to strike”. The right to strike, just like any other right, is not absolute. This right is hedged by both

\(^{60}\) S 1(a).
\(^{63}\) S 23(2)(C).
procedural and substantive limitations. The constitutional right to strike should not be read in isolation in spite of the fact that this right is expressed in unlimited terms.

In *SA National Security Employers Association v TGWU* it was also raised that the limitation to the provision of the right to strike in the Constitution, should not lightly be referred to if it were not expressly provided for in the Act. It seems the court, in this case was raising a flag to the courts that they should not deliberately find an implied restriction to the right to strike.

This view was further expressed in the Labour Appeal Court judgment of *Mzeku v Volkswagen SA (Pty) Ltd.* This was when the appellants raised an argument that they had a constitutional right to strike, and that they also derive the right from the International Labour Organisation (ILO) Conventions. Zondo JP, however, was of the view that the submission of the applicants was too “wholly without foundation”. This is because the applicants were reading the Constitution and the relevant ILO Conventions without referral to the enabling legislation – Chapter IV of the Labour Relations Act, which provides for the limitations.

It is Puke Maserumule’s argument that the Labour Relations Act, and the Labour Courts have failed to protect the right to strike, guaranteed by the Constitution. Particularly this is due to the fact that the Labour Courts have been pre-occupied with giving effect to the limitation of the right to strike. Because of the limitations provided by the Act on the Constitutional right to strike, the courts should refrain from making further restrictions when interpreting the Act.

Maserumule, in supporting his argument referred to the early decisions of the Labour Appeal Court. The first one was in *BSA v Cosatu,* where the majority decision of the LAC interdicted the planned protest action in terms of section 77 of the Act. The basis for the majority was that the protest action did not comply with one of the three

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64 Thompson and Benjamin *South African Labour Law* Volume One at AA1-304.
65 *CWIU v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 ILJ 321 (LAC) at 327A.
67 (2001) 22 ILJ 1575 (LAC) at 1584A.
68 Conventions 87 and 98 of the ILO.
70 (1997) 18 ILJ 474 (LAC) at 492E.
procedural steps. The second one was in *Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU (2)*,\(^{71}\) where the LAC decided that the strike notice regarding 48 hours was defective.

It was Maserumule’s argument that the LAC in these judgments emphasised compliance with the Act, as opposed to promoting a full exercise of the right to strike.

Maserumule\(^{72}\) further raised the question of constitutionality of the LAC decision in *Bader Bop (Pty) Ltd v National Union of Metal Workers of SA*.\(^{73}\) In a majority decision of Zondo JP, and Du Plessis AJA, the LAC decided that the minority union has no right to strike in demand of organisational rights contained in section 11-16 of the Act.

Although the LAC judgments discussed above seem to have failed to protect the right to strike, guaranteed by section 23 of the constitution, there are a number of other judgments where the LAC has protected the Constitutional right to strike. Some of the cases will be discussed later in this paper.

### 4.1 THE CONSTITUTIONAL COURT POSITION

The Constitutional Court has brought some certainty on the issues that have constitutional protection, including strikes. In *Xinwa v Volkswagen of SA (Pty) Ltd*,\(^{74}\) the Constitutional Court clarified the following:

- Its (the Constitutional Court) willingness to hear matters emanating from the Labour Appeal Court by dealing with the merits of the application for leave to appeal without any inquiry into whether or not an appeal could be made to the Constitutional Court in respect of a judgment of the LAC dealing with an unfair dismissal dispute.\(^{75}\)

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\(^{71}\) (1997) 18 *ILJ* 671 (LAC).
\(^{73}\) (2002) 23 *ILJ* 104 (LAC).
\(^{74}\) (2003) 24 *ILJ* 1077 (CC).
\(^{75}\) At 1082A-C.
• It endorsed the view of the LAC\textsuperscript{76} that the kind of the pre-dismissal hearing to be offered to employees engaged in an unprotected strike, depends on the circumstances.

In \textit{National Union of Metalworkers of SA v Bader Bop (Pty) Ltd}\textsuperscript{77} the Constitutional Court overruled the majority judgement of the LAC and decided that the minority union has a right to strike. The following pointers are established from this judgement:

• The Constitutional Court re-affirmed its jurisdiction to hear appeals from the LAC.\textsuperscript{78}

• The protection of constitutional rights as more important than orderly collective bargaining.

• The link between freedom of association and the right to strike.\textsuperscript{79}

• The absence of a specific prohibition in the Act prohibiting strike action by a minority union in respect with organisational rights, is an indication that the legislature did not intend to prohibit such a strike.\textsuperscript{80}

\textsuperscript{76} In \textit{Mzeku v Volkswagen SA (Pty) Ltd} (2001) 22 ILJ 1575. See also \textit{Modise v Steve Spar} (2000) 21 ILJ (LAC); \textit{Blackheath} ILJ 340 and \textit{Karras t/a Floraline v SA Scooter & Transport Allied Workers Union} (2000) 21 ILJ 2612 (LAC).

\textsuperscript{77} (2003) 24 ILJ 305 (CC).

\textsuperscript{78} The court had already made this view in \textit{NEHAWU v University of Cape Town} (2003) 24 ILJ 95 (CC). At 312A and 318A-C.

\textsuperscript{79} At 321A-C.

\textsuperscript{80} At 322F-H.
CHAPTER 5
STATUTORY PROVISIONS

The legislative framework governing strike-law is located in the Labour Relations Act. The Act covers issues relating to the right to strike and recourse to lock-out, limitations on the right to strike or recourse to lock-out, secondary strikes, strike in compliance and not in compliance with the Act, picketing, essential services, dispute about essential services, maintenance services, replacement labour and protest action.

5.1 DEFINITION OF STRIKE

The Act defines a strike as:

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

The work stoppage must therefore comply with the criteria that have been set by the definition above, in order for it to be deemed a strike-action. Although the definition seems to be straightforward and not ambiguous, there are a number of “work stoppage” cases that could not make it through the definition of a strike.

Brassey regards a strike definition as having three distinctive features, each of which must be present before there can be said to be a strike under the Act. There must be a requisite act or omission, it must be concerted, and it must be directed at the achievement of a specific purpose.

81 S 64–77, (Chapter IV).
5.1.1 REFUSAL TO WORK

According to Du Toit\textsuperscript{84} the new Act has resolved the dilemma in respect of overtime bans since it expressly provides that the reference to “work” includes overtime work, whether the overtime is voluntary or compulsory. A decision in \textit{SA Breweries Ltd v Food and Allied Workers Union}\textsuperscript{85} confirms this view even under the old Act. The duration and extent of work stoppages is irrelevant, and therefore the partial strikes such as go-slow, work-to-rule and grasshopper stoppages may constitute a strike as per the definition.

5.1.2 COLLECTIVE REFUSAL TO WORK

The definition sees a work stoppage as a joint action by a number of employees to make it a strike action. The strikers need not be the employees of the employer being targeted by the industrial action, or even employees of the same employer. The definition thus accommodates \textit{sympathy} or \textit{secondary} strikes.

A single employee can therefore not be on strike, in spite of him/her refusing to work.\textsuperscript{86} Brassey\textsuperscript{87} regards this as a misconception of the true nature of a strike since it excludes a multitude of single employees such as domestic workers. He is of the view that such a provision may not stand the constitutionality test. Since the Constitutional Court has not tested this, the provision is still part of our strike law.

5.1.3 TO RESOLVE A DISPUTE OF MUTUAL INTEREST

The Act requires that for a collective action to be a strike, it must be intended to resolve a grievance or dispute which is of mutual interest. In \textit{Food & Allied Workers Union v Rainbow Chicken Farms}\textsuperscript{88} the court held that, although there was a collective action, the action was not embarked upon to remedy a grievance or to

\textsuperscript{84} Du Toit, Woolfrey, Murphy, Godfrey, Bosch and Christie \textit{Labour Relations Law: A Comprehensive Guide} (2003) 4\textsuperscript{th} ed at 274.
\textsuperscript{85} (1989) 10 ILJ 884 (A).
\textsuperscript{86} PETUSA on behalf of Viljoen and Media 24 Ltd (2002) 23 ILJ 779 (CCMA).
\textsuperscript{87} Supra fn 83 at A9:31.
\textsuperscript{88} (2000) 21 ILJ 615 (LC).
resolve a dispute as is contemplated by section 213 of the Act.

In this case the dismissed employees were butchers who were Muslims, employed to slaughter chickens according to the Halaal standards required by the Muslim Judicial Council. The butchers stayed away on a Muslim religious holiday, *Eid ul Fitr*, since the employer refused to grant them day-off for their religious holiday.

The court’s finding\(^{89}\) was that the employees’ conduct of staying away to celebrate their religious holiday was a collective action not amounting to a strike. The employees made no demand to which the employer could accede; they simply stayed away on principle. The employer could therefore have disciplined the employees on the basis of unauthorised absence or absence without leave.

\(^{89}\) At 621D-F.
CHAPTER 6
CASE LAW CONTRIBUTION

The cases discussed hereunder are of important contribution to the developments of strike-law jurisprudence from the inception of the Act until to date. The author would hasten to say that it is not his intention to exhaust all the cases under strike law. He will start with a short case review of two important strike cases, and thereafter go through the different aspects of strike law from the case law perspective.

6.1 THE STATE ATTORNEYS STRIKE

In Public Servants Association of SA v The Minister of Justice & Constitutional Development, the Public Servants Association of South Africa (hereafter the PSA), being one of the recognised unions in the Public Service, approached the Labour Court for final declaration that the strike of State Attorneys is lawful, and for an interdict against the employer from taking disciplinary action and subsequently dismissing employees.

The issue in dispute was the failure of the parties to resolve the demand by State Attorneys to have a 50% increase in their salaries since they were paid less than other professionals in the department of Justice; and even far less than in their counterparts in the private sector.

The negotiations to resolve this demand started in February 2000, and they took place in both the Public Service Co-ordinating Bargaining Council (PSCBC) and in the Sectoral Bargaining Council (SBC), and through bilateral discussions between the PSA, Department of Justice, the Treasury as well as the Department of Public Service and Administration (the DPSA). Despite these endeavours no agreement was arrived at.

Parallel to this the state with all other recognised unions (including the PSA) were involved in annual wage negotiations for the 2000/2001 financial year. The general
salary increases were subsequently concluded by the CBC as a collective agreement on the 28 September 2000. The agreement included the State Attorneys, since they were also represented at the CBC, and they fall within the ambit of the bargaining unit.

On 16 November 2000 the PSA referred the State Attorneys’ dispute to the SBC, and later to CBC for conciliation. The CBC issued an unresolved dispute certificate on 9 April 2001. The PSA only gave notice in terms of section 64(1)(d) of the Act on 8 August 2001, indicating that State Attorneys who were members of the PSA would embark on a strike action with effect from 3 September 2001.

The Department of Justice\textsuperscript{91} was of the view that the strike was unprotected and issued an ultimatum that all employees on strike should return to work by 7 September 2001 at 08h00, and if they fail to do so, disciplinary action would be taken against them, and such disciplinary action might include dismissal.

The arguments of the State,\textsuperscript{92} in their view that the strike was unprotected, was based on the following reasons:

(i) Some State Attorneys comprise the Corps of Senior Managers, and they are therefore not entitled to strike. They do not form part of the bargaining unit and their salary increases are regulated by “ministerial determinations”.

(ii) The initial PSA demand of a 50% increase has been superseded by PSA’s acceptance of the State’s offer of 6.5% in the PSCBC. This increase was implemented in respect of all PSA members, including striking employees.

(iii) The demand by the PSA and the certificate have become stale by reason of the effluxion of time.

\textsuperscript{91} At 2310D.
\textsuperscript{92} At 2311-2312G.
(iv) The strike notice is defective in that it does not mention the demand that forms the subject matter of the strike, and that the notice does not state the nature of the action.93

Judge Landman,94 however, held a different view of the arguments raised by the State. His response was as follows:

(i) State Attorneys, who are Senior Managers and therefore not members of the Bargaining Unit, cannot be precluded from joining their colleagues in participating in a protected strike. If the strike by other attorneys is protected, so are the actions of the State Attorneys at senior managerial level. He correctly draws the attention to Plascon and Afrox cases.95

(ii) The demand for a 50% rise in the case of the State Attorneys' salaries was not coupled to any annual wage agreement for any particular financial year. It was intended to be on a once-off basis to address the salary-gap issue. Secondly, the issue never formed part of the 2000/2001 annual salary negotiations at the CBC. Thirdly, certain specific sectors of the Public Service have the practice of negotiating additional salary increases for the specific sectors, notwithstanding the conclusion of the annual agreement in the CBC, for example, Safety and Security, Health and Education sectors.

(iii) The PSA did not waive its right to strike; it had not made an election to strike or not to strike. The PSA did not abandon its right to strike. The State was also not prejudiced by the delay save for the inconveniences that normally flow from the strike.

(iv) The demand need not be set out in the strike notice since the negotiations shall have thoroughly explored the issue in dispute. Landman J96 decided that the

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93 At 2310B.
94 At 2316A-2317E.
95 See Afrox Ltd v SA Chemical Workers Union (1) (1997) 18 ILJ 399 (LC) at 403I and Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd supra at 330A.
96 At 2320D.
stating of a grievance in a strike notice is a mere formality since the strike notice shall have been preceded by –

(a) negotiations during which the issue between the parties will have been thoroughly explored and positions will have been taken;

(b) the statutory referral notice or privately agreed process will have set out the demand. If the notice failed to specify the grievance, assuming that the employer had been unaware of it, the employer could address an interrogatory to the strikers or their agent; and

(c) the conciliation meeting or series of meetings would have created an opportunity to explore the nature and ambit of the demand.

The court subsequently decided that the strike was protected in terms of section 64 of the Labour Relations Act. The State was also interdicted from taking disciplinary actions against the striking members of the PSA.

This case also confirmed that the party applying for final interdict had to show that:

• it had a clear right;
• the other party had threatened to interfere with that right; and
• the applicant had no alternative remedy.

This judgment shows a sharp deviation from other earlier strike-law cases. It deviates from the Western Platinum Limited v National Union of Mineworkers decision when it comes to the issue that the right to “strike has become stale because of the effluxion of time”. This is because the Act provides no guidelines as to within what period employees must give notice once they have obtained a certificate of non-resolution of the dispute.

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97 At 2311A.
Waglay J (in *Western Platinum*) decided that the strike notice had become stale because of the union’s unreasonable delay. He concluded that:  

“I do not believe that employees should simply refer a dispute in terms of section 64(I)(a) and having obtained a certificate of non-resolution of the dispute or after the expiry of 30 days from the date of referral make reference to the dispute after six months and thereafter again hibernate for a period of two months at a time and then decide to take action, particularly where the dispute it seeks to resolve is of a limited duration.”

Landman J (in the *Public Service* case), on the other hand, refuses to use the principle that the right to strike has become stale because of the effluxion of time. He commented that:

“There has been no communication by the PSA to the respondents that it waives its right to strike on the demands of the State Attorneys. There has been no overt action, which would tend to show that the PSA has waived or renounced its rights.”

Another important contribution of this case is that the court refused to be bogged down to the detail technical requirement of the strike law provisions of the Act. While the issue in dispute, or the demand, was the major reason for the interdict to succeed in *Business South Africa* Landman J, on the other hand says that the setting out of demand in the strike notice is a mere formality. This judgment therefore recognises the constitutional limitations of the right to strike that are inherent in the Act, and it does not want to further restrict the right of the union to strike unnecessarily.

6.2 THE VOLKSWAGEN CASE

6.2.1 ARBITRATION

The demand in the Volkswagen strike was that NUMSA should lift the suspension of

99 At 2512D-E.
100 Supra fn 90 at 2320.
101 *Business South Africa v Congress of South African Trade Unions (COSATU)* (1997) 18 ILJ 474 (LAC). This is the first case in which the LAC was used as a Court of first instance.
102 It involves the following cases: *Mzeku v Volkswagen of SA (Pty) Ltd* (2001) 22 ILJ 771 (CCMA); *Volkswagen SA (Pty) Ltd v Brand NO* (2001) 22 ILJ 993 (LC); *Mzeku v Volkswagen SA (Pty) Ltd* (2001) 22 ILJ 1575 (LAC); *Xinwa v Volkswagen SA (Pty) Ltd* supra.
103 *Mzeku v Volkswagen of SA (Pty) Ltd* supra.
13 shop stewards against whom the union was contemplating disciplinary action. At arbitration level Commissioner Brand found the dismissal of strikers to be substantively fair, but procedurally unfair. The most controversial aspect of Commissioner Brand’s judgment was when he ordered the reinstatement of employees, and not awarding them compensation since he found that dismissal was only procedurally unfair.\textsuperscript{104}

The jurisdiction of strikes disputes lies with the Labour Court. The parties, however, agreed to have their dispute arbitrated by the Commission in terms of section 141(1) of the Act. Under normal circumstances such disputes go to the Commission only for conciliation, and if conciliation fails, to the Labour Court for adjudication.

The Commissioner decided that the dismissal was procedurally unfair. He was persuaded to come to this conclusion because he was of the view that he was bound by the \textit{Steve’s Spar}\textsuperscript{105} decision. This case established that illegal strikers are entitled to a hearing before they are dismissed. The Commissioner decided that the dismissal was procedurally unfair since the employer failed to conduct hearings before the strikers were dismissed. The employer therefore failed to observe the \textit{audi alteram partem} rule.\textsuperscript{106}

The \textit{audi} rule is about the right to be heard before a decision is taken that may affect a person’s rights, property or interests.

The Commissioner further stated that he acknowledged several attempts that were made by the employer to discuss the matter with representatives of the shop stewards concerned, and was also prepared to speak to the committee selected by workers.\textsuperscript{107} He was, however, of the view that the intention of these attempts by the employer was to resolve the dispute, which formed the subject matter of the strike, and to convince the strikers to return back to work. The attempts were not made to invite them to defend their conduct and possible dismissal. The Commissioner

\textsuperscript{104} At 798F.
\textsuperscript{105} \textit{Modise v Steve’s Spar Blackheath} (2000) 21 ILJ 519 (LAC). A discussion on this case will take place further in this paper.
\textsuperscript{106} Supra fn 103 at 796E.
\textsuperscript{107} At 796C.
emphasised the different purpose of an ultimatum, and a hearing in observing the *audi* rule.\(^{108}\)

The main criticism of this decision, and correctly so, is that the Commissioner took a rigid view of *Steve’s Spar*.\(^{109}\) In observing the *audi* rule, there is no expectation that the employer should conduct formal individual inquiries. Individual circumstances of each case should be considered, and a hearing may be conducted through the representatives, collectively or through a written representation by strikers.

After finding that the dismissal of strikers at Volkswagen was procedurally unfair, the Commissioner decided to reinstate all strikers with no retrospective effect.\(^{110}\) The Commissioner reasoned the matter as follows, in coming to his decision to award relief of reinstatement when his finding was based only on procedural unfairness.\(^{111}\)

> “I have found that the dismissal of the applicants was only procedurally unfair, but in my view s193 does not contemplate that I may not order reinstatement or re-employment where the dismissal is only procedurally unfair. In my view I have a discretion to order reinstatement or re-employment retrospectively or not, or even from a date in the future, or order compensation only. There is no convincing evidence before me that a continued employment relationship would be intolerable or that it would not be reasonably practicable for the respondent to reinstate or re-employ the applicants.”

The Act,\(^{112}\) when it comes to remedies for unfair dismissal, provides as follows:

> “1. If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the court or the arbitrator may –

> (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

> (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date, not earlier than the date of dismissal; or

> (c) order the employer to pay compensation to the employee.”

\(^{108}\) At 797.


\(^{110}\) At 799.

\(^{111}\) At 789-799.

\(^{112}\) S 193 of the Labour Relations Act.
2. The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissed are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is only because the employer did not follow a fair procedure.”

The Commissioner stated that he has discretion to award reinstatement or re-employment, or not to, even if his finding was only based on procedural unfairness. Section 193(2)(d) seems not to grant him this discretion. The wording of the Act seems to say that if there is only procedural unfairness, there cannot be a relief of reinstatement or re-employment. This view is confirmed by the Labour Court and the Labour Appeal Court decisions discussed below.

The Commissioner’s assertion is supported by Du Toit,\textsuperscript{113} when he says that the Labour Court or an arbitrator is not precluded from ordering reinstatement in the event of procedurally unfair dismissal. Brassey,\textsuperscript{114} also, is of the view that the procedural non-compliance may provide basis for reinstatement. He indicated that this can happen in instances were adherence to proper procedure has the potential to obviate the need to dismiss, for example in retrenchment cases.

Another important aspect of the arbitrator’s decision was that the work stoppage in Volkswagen did not constitute a strike in terms of the law. The strikers were demanding that NUMSA should withdraw the suspension of its 13 shop stewards. The dispute was therefore over an internal Union dispute. The Commissioner correctly found that the work stoppage does not fall within the definition of a strike in terms of the Act.\textsuperscript{115}

\textsuperscript{113} Supra fn 84 at 417.
\textsuperscript{114} Supra fn 83 at A8:71.
\textsuperscript{115} S 213 of the Labour Relations Act.
6.2.2 VOLKSWAGEN GOES TO LABOUR COURT

Volkswagen took the Commissioner Brand’s award to the Labour Court for review. Volkswagen was aggrieved by the decision that the dismissal was procedurally unfair, and the Commissioner’s decision of ordering re-instatement, despite the fact that he could not find the dismissal to be substantively unfair. The workers filed a counter-application to review on the basis that the Commissioner should also have found the dismissal to have been substantively unfair and they be granted reinstatement retrospectively to the date of their dismissal.

It is interesting to note that both the dismissed strikers, Volkswagen and the CCMA Commissioner went through the whole arbitration process having a different understanding of how, or on what basis the CCMA was arbitrating the dispute, and not the Labour Court adjudicating. Representatives of the workers contended that the arbitration process was a consensual one in terms of section 141(1) of the Act. Volkswagen pointed out that the matter was properly referred for arbitration by the CCMA in terms of section 191(5)(a), since the workers did not allege that their dispute falls within section 191(5)(b)(iii).

The Commissioner could not remedy the situation since the pre-arbitration minute he referred to which supported the Commissioner’s note of consensus could not be made available for the court. Judge Landman had to assume that the Commissioner’s note was correct.

Judge Landman took a narrow or traditional test of review in reviewing the Commissioner’s award. He was deviating from the interventionist’s approach, which was caused by the “glaring instances of injustice” that came about because of inexperience and lack of legal background of a large number of Commission for Conciliation Mediation and Arbitration (CCMA) arbitrators. He held that “for better or for worse” the time had come to accept that the legislature actually intended CCMA awards to be virtually shielded from the judicial interference, except on the
The court did not hesitate to uphold the Commissioner’s decision that the dismissal was substantively fair. Judge Landman described it as follows:\textsuperscript{121}

\textit{“In the result I am satisfied that the Commissioner correctly proceeded from the premise that the industrial action in question did not constitute a strike but rather collective action which constituted a breach of contract and which could be characterised as misconduct. The finding by the Commissioner that the dismissals were substantively fair cannot be assailed.”}

Another aspect that the court had to decide on was whether the Commissioner was correct in deciding that the dismissals were procedurally unfair. Judge Landman agreed to the fact that the Commissioner, and himself, are bound by the decision in \textit{Steve’s Spar}\textsuperscript{122} and the confirmation in \textit{Karras}.\textsuperscript{123} Therefore the Commissioner was obliged to inquire into whether Volkswagen had held an inquiry before the employees were dismissed or not.\textsuperscript{124}

In spite of being bound by the judgment in \textit{Steve’s Spar}, Judge Landman made it clear that he disagreed with the decision. He associated himself with the minority judgments of Nugget AJA in \textit{Karras} and of Conradie JA in \textit{Steve’s Spar}.\textsuperscript{125} They both seem to be saying that if strikers fail to obey a simple ultimatum, it will be even more difficult for them to attend a disciplinary hearing. He, however, refused to review the Commissioner’s decision.

Landman J concluded as follows:\textsuperscript{126}

\textit{“I have examined the reasoning advanced by Mr Wallis (for Volkswagen). But there are no grounds for holding that the award is defective. I think the Commissioner applied the Steve’s Spar case strictly but it was for him to apply the law and his application of the law in this manner does not render the award defective. He did what the Labour Appeal Court enjoined him to do.”}

\textsuperscript{120} At 1010F.
\textsuperscript{121} At 1013C-D.
\textsuperscript{122} Supra fn 105 at 519.
\textsuperscript{123} \textit{Karras t/a Floraline v SASTAWU} (2000) 21 ILJ 2612 (LAC).
\textsuperscript{124} Supra at 1015H.
\textsuperscript{125} The details of the two cases will be discussed later under the relevant topic.
\textsuperscript{126} Supra at 1016G.
The court therefore refused to review the Commissioner’s decision.

Lastly, the court had to consider if the Commissioner was competent to award reinstatement of the workers whose dismissal was found to be only procedurally unfair. Landman J concluded that, since the dismissal was only procedurally unfair, the court may not order reinstatement or re-employment. He decided as follows:127

“I therefore conclude that section 193 does not contemplate that the Commissioner may order reinstatement or re-employment where the dismissal is only procedurally unfair. The Commissioner misdirected himself as to the nature of the relief, which he could competently order. In making the order which he did, the Commissioner exceeded his powers.”

The court subsequently decided that the workers should not be granted any relief in respect of the procedurally unfair dismissal.

6.2.3 LABOUR APPEAL COURT128

On appeal the workers had argued that the Labour Court had made two fatal mistakes. The first one was the:

- upholding of the Commissioner’s finding that their dismissal was substantively fair; and

- ruling that the workers were not entitled to reinstatement.

Volkswagen, on the other hand challenged the Labour Court’s ruling that the Commissioner’s finding that the dismissal was procedurally unfair, was not reviewable.

The court rejected the workers’ argument that they had a right to strike in terms of the Constitution129 and International Labour Organisation (ILO)130 Conventions without

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127 At 1020–1021F.
128 Mzeku v Volkswagen SA (Pty) Ltd supra.
130 Conventions 87 and 98 of the International Labour Organisation.
referring to enabling legislation, which is the Act. The workers could not explain their conduct. The court concluded\textsuperscript{131} that the only possible reason the work stoppage could have taken place was to compel the National Union of Metalworkers of South Africa (NUMSA) to reinstate its shop stewards, or to force Volkswagen to do so. The workers could therefore not justify their work stoppage. The court, however, accepted that the workers were on strike “in the dictionary sense”.

It was held that the Commissioner’s finding that the dismissal of the workers was substantively fair was justifiable and correct.

The Labour Appeal Court agreed that the Commissioner was right to follow the decision in \textit{Steve’s Spar}. The proper inquiry before the Commissioner was whether Volkswagen had given workers an opportunity to “state their case” before dismissing them. The Labour Appeal Court\textsuperscript{132} found that Volkswagen observed the \textit{audi} rule since there were a number of meetings between management and representatives of strikers: a meeting with NUMSA officials (note that the dismissed never resigned from the union), correspondences between parties and a meeting between management and a delegation from striking workers. The Labour Appeal Court therefore upheld the decision of the Labour Court stating that the \textit{audi alterem partem} rule was observed in Volkswagen. Therefore the dismissal was procedurally fair.

The next decision the Labour Appeal Court had to make was whether the decision by the Commissioner that Volkswagen did not observe the \textit{audi} rule was reviewable or not. The Labour Appeal Court answered this in the affirmative and reviewed the decision of the Commissioner. Grogan\textsuperscript{133} summarised the reasoning of the court as follows:

\begin{quote}
“\textbf{The Court found, first that the Commissioner ignored material evidence and reached an incorrect conclusion on the facts (ie VW had not given workers a fair opportunity to state their case); second, the Commissioner committed an error of Law by requiring VW to deal with “strikers” directly whereas the Company was required by the LRA to deal with their Union, in this case NUMSA. Even if the}\n\end{quote}

\textsuperscript{131} At 1582–1583A-D.
\textsuperscript{132} At 1595J–1596A.
\textsuperscript{133} Grogan “What was Expected of VW” (2001) Vol 17(4) \textit{Employment Law} at 13.
The saga of employees dismissed by Volkswagen was concluded following the judgment of the Constitutional Court. In *Xinwa v Volkswagen SA*\(^{134}\) the dismissed employees appealed against the ruling of the Labour Appeal Court that the dismissal had been procedurally unfair, and requested the Constitutional Court to reinstate them.\(^{135}\) The Constitutional Court endorsed the Labour Appeal Court’s finding that the dismissal had indeed been procedurally fair.

The Constitutional Court adopted the same approach of the LAC when it decided that the nature of the hearing prior to the dismissal of strikers, depended on the circumstances. The hearing that was conducted by Volkswagen for its strikers was accepted as fair under the circumstances.\(^{136}\)

### 6.3 ISSUE IN DISPUTE

The issue in dispute or the grievance has always been a fundamental matter during work stoppages. The *Volkswagen* and the *State Attorneys* cases discussed above also deal with this issue. The courts are very keen to go behind what is said and inquire into what the real issue in dispute was all about.\(^{137}\) The issue in dispute must also be the same issue that was referred to the Commission or Bargaining Council for Conciliation, and must be the same issue in dispute that is the subject matter of the strike or lock-out.

An issue in dispute is a fundamental determinant of whether a work stoppage constitutes a protected strike or not. For example, one should determine first if the

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\(^{134}\) (2003) 24 ILJ 1077 (CC).

\(^{135}\) At 1079B.

\(^{136}\) At 1083E.

demand is a dispute of “right” or of “interest”. Cheadle,\textsuperscript{138} however, says that the shorthand “rights dispute” description of the types of strikes proscribed by section 65 should be done with care since the section does not prohibit strikes in respect of all the right disputes.

In \textit{SVR Mill Services}\textsuperscript{139} the National Union of Metalworkers (NUMSA) called a strike because it alleged that the employer unilaterally altered the terms and conditions of employment by introducing a four-shift system. The employer, on the other hand indicated that its intention to introduce a four-shift system was a result of the union demand. The employer further argued that this conduct constituted an agreement with the union, and the union could not therefore go on strike since this was a rights dispute. The court held that a dispute over the existence of an agreement was not one that was proscribed by the Labour Relations Act, and therefore the employees might strike over the issue. The conclusion would have been different if the agreement was reduced into writing to a collective agreement.\textsuperscript{140}

Du Toit\textsuperscript{141} differs from the decision in \textit{SVR Mill Services}, and Cheadle’s assertion. He is of the opinion that disputes of rights are taken out of the realm of industrial action. He further argues that such disputes should be resolved in an appropriate forum, while interests disputes, which do not easily lend themselves to third party determination, should be resolved by the exercise of power if conciliation fails.

In \textit{Ceramic Industries t/a Betta Sanitary Ware v National Construction Building & Allied Workers Unions},\textsuperscript{142} the court granted an interim interdict against a strike, which had been called in respect of three disputes, two of which were held to be disputed that the union had a right to refer to the Labour Court in terms of section 65 of the Act.

\textsuperscript{139} \textit{SVR Mill Services (Pty) Ltd v National Union of Metalworkers of SA} (2001) 22 ILJ 1408 (LC).
\textsuperscript{140} Cheadle \textit{et al} (2001) at 71.
\textsuperscript{141} Supra fn 83 at 31-32.
\textsuperscript{142} (1997) 18 ILJ 550 (LC). See also \textit{Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2)} (1997) 18 ILJ 671 (LAC).
The third dispute concerned a demand to stop requiring workers to work in excess of their agreed performance targets.

The dispute was settled by the CCMA through conciliation. The court held that, as soon as the issue in dispute giving rise to the strike had been settled, any strike which continued beyond that point, caused the reason for using economic muscle to fall away. Accordingly, the court held that a strike over a matter that had been settled was not a strike as defined and therefore was not capable of acquiring that status of a protected strike.

The identification and classification of an issue in dispute is continuously a problem to the courts. Zondo J (as he then was) was confronted with the issue of two approaches that were adopted by the Labour Appeal Court in determining the issue in dispute in a strike or a lock-out. In Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union (2), the Labour Appeal Court differentiated between the complaint and the demand. It was indicated that if the complaint concerned a justifiable issue, then it did not matter that the Act did not offer the remedy sought by the demand. Cheadle says it means that:

“… if a complaint is coupled with a demand, the Court should only look at the complaint and not the demand because a party may seek to characterise the dispute by adding a demand to a justifiable complaint in order to render it non-justifiable”.

In Fidelity Guards Holding (Pty) Ltd v Professional Transport Union, the court, according to Zondo J, disregarded the complaint and concentrated on the demand, deviating from its earlier prescription. The Labour Appeal Court held that there was no real difference in the approach adopted in the two cases. The courts were merely ascertaining the true or real issue in dispute by looking at the substance of the issue in dispute and not its form.

143 At 556A.
144 He is now the Judge President of the Labour Court and the Labour Appeal Court, in Adams v Coin Security Group (Pty) Ltd (1999) 20 ILJ 1192 (LC).
Zondo J, in Adams, followed the *Fidelity Guards* approach which phrased the test as follows: “What is it that the employer was required to do in order for the strike to be called off or ended?”\(^{149}\) If the answer to this question was a relief that could be adjudicated or arbitrated in the circumstance of the dispute, then the employees might not strike in respect of that dispute.

### 6.4 WHAT CONSTITUTES A STRIKE?

In most strike cases, the courts always would want to establish if the work stoppage was a strike in terms of the definition of the strike or not.\(^{150}\) Although the definition of the strike seems to be very straightforward, in some instances it has been very difficult to establish if a work stoppage constitutes a strike or not.

In *Western Platinum Limited v National Union of Mineworkers*\(^ {151}\) the demand of the union was that the employer should cancel the contract with the catering company, and award the same contract to another company which the union preferred. The employer argued that the strike was unprotected because:\(^ {152}\)

- the referral to the CCMA of October 1999 had no consequence since the Commissioner “dismissed” the referral because of lack of jurisdiction;
- the issue in dispute was a rights dispute arising out of an alleged breach of an agreed procedure for awarding the catering contract;
- the strike notice only stated that the strike would commence on 15 March on or before 15h00; and

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\(^{149}\) *Supra* at 1208D.

\(^{150}\) S 213 of the Labour Relations Act.

\(^{151}\) (2000) 21 *ILJ* 2502 (LC).

\(^{152}\) At 2511D.
• the certificate of outcome by the CCMA, issued in December 1998, had become invalid in March 2000 when the strike commenced.

The court agreed with the employer that the referral of October 1999 had no consequence since section 64(1)(a) had contemplated that a referral that was accepted by the CCMA, should either be followed by conciliation or the expiry of the 30 days. The court also agreed that the December 1998 Certificate of Outcome had become stale by the effluxion of time, and therefore the union had lost the right to strike. This decision was criticised by Judge Landman in his judgment in the Public Service Association case\textsuperscript{153} that was discussed in detail above.

At the arbitration level and at the Labour Court of the Volkswagen case,\textsuperscript{154} both the arbitrator and the Judge were of the view that the work stoppage did not constitute a strike. The reason was that the demand or the grievance of the strikers was not against the employer, but against the decision by NUMSA to suspend its 13 shop stewards. This case was dealt with in detail above.

In Food & Allied Workers Union v Rainbow Chicken Farms\textsuperscript{155} it was decided that the work stoppage by the workers who practised the Islamic faith, did not constitute a strike after they failed to go to work on an Islamic holiday.

The purpose of the employees’ collective refusal to work, it was decided, was not to put pressure on the employer to remedy a grievance or resolve a dispute, but to spend the day in the manner contemplated by their religion. This means that if employees demand a day off, they do not go on strike if they go ahead and take a day off in defiance of the management decision not to. They are, however, guilty of being absent without leave, but not for striking as per the definition of the Act.

\textsuperscript{153} (2001) 22 ILJ 2303 (LC) at 2311.
\textsuperscript{154} Supra fn 103 and fn 116.
\textsuperscript{155} (2000) 21 ILJ 615 (LC).
6.5 COLLECTIVE AGREEMENTS

6.5.1 PROCEDURE

The courts seem to have made a decision on the status of collective agreements that covers dispute resolution mechanisms in cases of strike. The question is: should the procedural provisions of the collective agreement be followed, or do parties need to follow the procedural requirements of the Act? In *County Fair Foods*\(^\text{156}\) it was decided that the pre-strike provisions of collective agreements need not be followed if found to be in compliance with the Act. Workers have a choice whether to follow a collective agreement or to follow the provisions of the Act.

The fact of this case is that *County Fair Foods (Pty) Ltd* had a collective agreement with the Food and Allied Workers Union (FAWU) in terms of the Act that dates back to 1991. The agreement contains a dispute procedure to be followed in instances where there are collective disputes. Such procedure contemplates the convening of meetings between would-be strikers and management with an intention of averting industrial action. A dispute should be referred to private mediation first before parties can resort to statutory procedures.

In this instance a dispute arose in July 1998 over a rationalisation exercise by the employer. The union did not follow the applicable internal dispute procedure, but referred the dispute to the Commission for Conciliation Mediation and Arbitration. The union issued a strike notice, stating its intention to strike after the conciliation. The Commissioner had issued a certificate stating that the dispute remained unresolved.

In response to this the employer launched an urgent application to interdict the proposed strike. Its contention was that the strike would not be protected since the union failed to follow the dispute resolution procedure provided by the recognition agreement, *ie* a number of meetings and referral of dispute to mediation. The Labour Court dismissed this application and refused leave to appeal.

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\(^{156}\) *County Fair Foods (Pty) Ltd v Food & Allied Workers Union* (2001) 22 ILJ 1103 (LAC). See also *Rustenburg Base Metal Refineries (Pty) Ltd v NUM* (2002) 6 BLLR 586 (LC).
The Judge President later granted leave to appeal after the employer had petitioned for leave to appeal. The employer contended in the Labour Appeal Court that the strike would have been unprotected since the union failed to follow the pre-strike procedures envisaged by section 65\(^{157}\) which provided that:

“That limitations on right to strike or recourse to lock-out. No person may take part in a strike or a lock-out if that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute.”

This argument did not find any favour from the Labour Appeal Court. Zondo JP in a unanimous decision of the Labour Appeal Court,\(^{158}\) held as follows:

“What the legislature has sought to achieve is to give parties a choice of either following a pre-strike dispute procedure contained in a collective agreement following the statutory procedure in section 64(1). Compliance with either procedure suffices to confer on employees the right to strike and the resultant strike acquires the status of a protected strike with all the benefits and consequences, which flow from such status. I have considered the question whether there could be any basis on which, applying purposive interpretation, it could be said that a strike which has been resorted to without prior compliance with a procedure in a collective agreement but has complied with the procedure of section 64(1) of the Act can nevertheless be said to be a protected strike. I do not think that this can be said without the Court unjustifiably usurping the legislative function. In those circumstances I conclude that this point must also fail.”

This decision does not only confirm the Labour Court decision of Mlambo J (as he then was) but also the earlier decision of Landman J in the \(^{159}\) case, where the latter reasoned as follows:

“…there are two avenues which a would-be striker may follow in order to ensure that a strike is a protected one, i.e. in compliance with the Act. The one method is to comply with section 64(1). The second is to comply with the procedures laid down in collective agreement. The choice of using the one or other avenue is that of the would-be strikers. I think it is also envisaged that the would-be strikers have no obligation to make an election between the two, in so far as there may be an overlap between the two procedures. Once the would-be strikers have complied with the Act, even though they were trying to comply with the agreement they would then be entitled to strike and the strike would be protected.”

\(^{157}\) S 65(1)(a).
\(^{158}\) County Fair Foods (Pty) Ltd v FAWU (2001) at 499.
\(^{159}\) Columbus Joint Venture t/a Columbus Stainless Steel v National Union of Metal Workers of South Africa (1998) 19 ILJ 279 LC at 281J-282A.
Cheadle\textsuperscript{160} agrees with this reasoning, particularly the wording of section 64(3), which support the interpretation. Thompson\textsuperscript{161} says that the decisions are in law “strictly correct”. The unhappy consequence is that carefully customised and agreed dispute procedures regulating pre-strike dispute resolution now count for little. The parties should, however, be able to use their own agreement enforcement mechanisms - as required by section 24(1), and assuming they are adequately crafted - to oblige fidelity to their own pacts.

Grogan\textsuperscript{162} seems to be of a different view about this matter. He says that “cooling off” meetings may satisfy needs differently from those satisfied by formal conciliation meetings under the Act. He also said that Country Fair may have been assisted by the Act.\textsuperscript{163} However, despite the dissenting views of Grogan and Thompson, \textit{County Fair} has become our strike jurisprudence on collective agreements procedures.

\textbf{6.5.2 CONTENT OF COLLECTIVE AGREEMENT}

The Act\textsuperscript{164} provides that no person may take part in a strike or lock-out if that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute. Employees are not precluded from striking over an issue caused by a current agreement in support of demands relating to a future agreement.\textsuperscript{165} In \textit{South African National Security Employers Association v TGWU}\textsuperscript{166} the court considered this issue and decided that section 65(3)(a)(i) provides that parties are bound by the terms of a collective agreement for the period that is operative.

In the \textit{Public Service Association}\textsuperscript{167} decision discussed above the currency of the collective agreement was also raised by the employer while attempting to interdict the strikers. This is when the union was demanding a 50% increase of State

\textsuperscript{161} In Cheadle \textit{et al} \textit{Current Labour Law} (2001) at 47.
\textsuperscript{162} Grogan “Worker’s Choice Selecting Pre-strike Procedures” (August 2001) \textit{Employment Law} at 18.
\textsuperscript{163} S 64(3)(b).
\textsuperscript{164} S 65(i)(a).
\textsuperscript{165} See Grogan \textit{Workplace Law} (2001) at 333.
\textsuperscript{166} (1998) 4 BLLR 364 (LAC).
\textsuperscript{167} \textit{Supra} fn 89 at 2314D-E.
Attorneys’ salary after centrally concluding a 6.5% collective agreement with other unions. The court held that the 50% demand was not covered by the 6.5% collective agreement, but a separate demand.

6.6 STRIKE NOTICE

In Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA168 the Labour Court was called upon to decide on the status of the strike notice that was served on the Council but not to the employer, and the status of the strike when the strikers failed to commence their strike on the indicated day of the strike notice, but only three days or so later.

In this case Zondo J decided that it was sufficient for the strikers to serve their strike notice only to the Council.169 The National Union of Mineworkers of South Africa (NUMSA) and the South African Motor Industry Employees Association (SAMIEA) are the important players in the Motor Industry Bargaining Council. The employer is not a member of SAMIEA, and therefore not member of the Council. The employer was, however, bound by a collective agreement previously concluded in the Council, which had been extended to non-parties by the Minister of Labour in terms of section 32 of the Act. Such collective agreement related to minimum terms and conditions of employment.

Judge Zondo, in deciding that the notice that had been given to the Council was sufficient and that there was no obligation to the union to give separate notice to the applicant, considered that:

- In interpreting section 64(1)(b)(i) one should acknowledge that those provisions are a procedural limitation to the right to strike which in turn is a constitutional right to strike.170

169 At 687A-B.
170 At 686B.
• The language used in section 64(1)(b)(i) is plain. The notice must be given either to the employer or to a council or to an employers’ organisation depending on the circumstances.  

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• The exception in section 64(1)(b)(i) is because the bargaining council is taken as a forum which is a representative of the industry and if notice is given to Council, it must be deemed to have been given to all employers who fall within the scope.  

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• The interpretation of the Act that requires notification to each and every employer would make it almost impossible to have an industry-wide strike and this will defeat the primary object of the Act.  

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The other matter which the court was called to decide upon was whether the union had waived its right to strike or not. The strike notice by NUMSA stated that the strike would commence on 1 September, but the union only went on to commence their strike on 4 September. The court decided that the employees and their union did not waive their right to strike, and therefore they were entitled to commence their strike on 4 September. The delay was not unreasonable since the delay did not defeat the purpose of giving notice which was to give the employer advance warning in order that it might prepare for the power play that would follow.

The court also remarked that:  

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“If the employer on the appointed day has his replacement labour ready and the normal work force does not go on strike, the employer can lock the would-be strikers out and his replacement labour can work in the interim.”

Cheadle did not accept this contention by the court, and he stated that if the employer locks out under the circumstance, it becomes an offensive lock-out, and the employer may not use replacement labour in an offensive lock-out.

171 At 687A.
172 At 686.
173 At 686D.
174 At 687.
175 At 689A.
176 Cheadle et al Current Labour Law (1999) at 73. See also s 76(b) of the Labour Relations Act.
It seems Western Platinum\textsuperscript{177} came at the right time to clarify Ceramic Industries. In \textit{casu}, NUMSA notified the employer that the strike would commence on Wednesday 15 March 2000 “on or before 15:00”. While relying on Ceramic Industries, the employer argued that there was no compliance with section 64(1)(b) because the notice did not specify the exact time of the commencement of the strike.

Judge Waglay differentiated between the two cases in that in Ceramic Industries\textsuperscript{178} the trade union did not specify the date and time but in that case, the date and time were specified. He further argued that the purpose of the notice identified in Ceramic Industries was achieved. The court was satisfied that the strike notice complied with section 64(1)(b).

Cheadle,\textsuperscript{179} in conforming the reasoning of the court in this decision, further commented that:

\begin{quote}
“Although not referred to in Western Platinum, the Labour Appeal Court in Ceramic Industries recognises that the time of the strike may be expressed differently depending on the organisation of working time. So, for example, in a shift system the ‘exact time’ of the proposed strike in respect of a particular shift may be necessary.”
\end{quote}

The other issue that Judge Waglay had to decide on in this case, was the complaint that the issue in dispute was no longer current, because it had been superseded by a later dispute or had become stale through the effluxion of time. The court decided that a notice of the commencement of a strike had to be given within a reasonable time after the dispute had not been resolved through conciliation, and the delay of over “eighteen months” had rendered the dispute stale and the strike unprotected, particularly after finding that the union had no serious intention of proceeding with their strike action.\textsuperscript{180}

\textsuperscript{177} Western Platinum Ltd v National Union of Mine Workers (2000) 21 ILJ 2502 (LC).
\textsuperscript{178} The details of this case have already been discussed in detail above.
\textsuperscript{179} Cheadle \textit{et al} Current Labour Law (2001) at 73.
\textsuperscript{180} Supra at 2512C.
Judge Landman’s\textsuperscript{181} reasoning in the PSA case on the issue of a stale dispute and effluxion of time was different from that regarding \textit{Western Platinum}. Cheadle\textsuperscript{182} summarised his (Judge Landman’s) reasoning as follows:

“…the Labour Court, after a thorough analysis of the law relating to the English doctrine of ‘laches’, the common law of waiver and abandonment of claims and estoppels, concluded that a trade union must exercise the right to strike within a reasonable time. A delay in exercising the right does not on its own mean that the delay is unreasonable – the delay together with other circumstances must evince an intention to waive or abandon the claim or be stopped from asserting the right. In the circumstance of this case, the Labour Court found that a 19-month delay in exercising the right to strike was not unreasonable. The important circumstances identified by the Court were the lack of any overt act demonstrating a waiver of the right. There was no prejudice to the employer other than the inconvenience that normally flows from a strike. The common-law doctrines of waiver, abandonment and estoppels are not limitations on the constitutional right to strike. Those rules that provide for the self-limitation of the right are not themselves limitations on the exercise of the right”.

The reasoning in the two Labour Court cases, \textit{ie Public Servants Association and Western Platinum} is differing. The issue of stale dispute and the circumstances, in which the dispute might become stale, is therefore still subject to any interpretation by the Labour Court and by arbitrators. \textit{Ceramic Industries}, however, is an authority on its conclusion that the trade union must notify the employer of the specific time that the strike is going to commence. \textit{Western Platinum} correctly clarifies the precedent set by \textit{Ceramic Industries} on this matter.

\textbf{6.7 SECONDARY STRIKE}

It was mentioned above, while still dealing with the definition of strike, that such a definition is broad enough to include work stoppages, or industrial action by workers in sympathy with other strikers. The Act,\textsuperscript{183} however, provides a detailed definition of secondary strike, and provides for three conditions for it to be a protected strike:

- The primary strike must be protected,
- The secondary strikers must give seven (7) days notice about their intention to commence primary strike.

- The nature and extent of the secondary strike must be reasonable, in relation to that the secondary strike may have the business of the primary employer.

In *Afrox Ltd v SA Chemical Workers Union*\(^{184}\) the dispute arose with the Pretoria West Branch, but the union called for support from all its members. The union called this a secondary strike. The court rejected this secondary-strike labelling by the union and the argument by the employer, that it is an unprotected industrial action.

The court held that the issue in dispute was between the trade union and the employer. The industrial action by other members outside the Pretoria West Branch constituted a protected primary strike.

In *Sealy of South Africa (Pty) Ltd v Paper Printing Wood and Allied Workers Union (PPWAWU)*\(^{185}\) section 66(2)(c)\(^{186}\) was put to test.

The court held that there needs to be some relationship or nexus between the primary employer and the secondary employer(s) for the proposed strike at the business of the secondary employer(s) to have a possible direct or indirect effect on the business of the primary employer in such a way as to make the nature and extent of the secondary strike reasonable.\(^{187}\)

In *Samancor Ltd v NUMSA*\(^{188}\) the court had to decide on the reasonableness of the secondary strike. Cheadle and Van Rooyen\(^{189}\) were of the view that the court, in deciding that the secondary strike was reasonable, considered the following three elements:

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\(^{184}\) (1997) 18 ILJ 406 (LC).

\(^{185}\) (1997) 18 ILJ 392 (LC).

\(^{186}\) Labour Relations Act. The section provides for the relationship between the secondary and the primary employer.

\(^{187}\) Supra fn 185 at 395.

\(^{188}\) (1999) (20) ILJ 2941 (LC).

The harm done by the strike;
the effect that the strike may have on the business of the secondary employer;
the nature and extent of the strike.

In Hetex v SA Clothing & Textile Workers Union, the court was called upon to decide if the secondary strike was protected or not. The main focus of this case was whether or not the secondary strike would have had an effect on the business of the primary employer. This, held Pillay J, was to be determined by a question of fact in the balance of probability, with the threshold being pitched merely as a possible direct or indirect effect.

The secondary strike in this instance was being contemplated by workers whose employer was a supplier of raw materials to the primary employer. For this reason, the court held that there was indeed a possibility of the secondary strike influencing the primary employer. Pillay J remarked that:

“… the nature and extent of the secondary strike must be capable of having an effect on the primary employer’s business. The purpose of secondary strikes is to enable employees of the secondary employer to exert pressure on their employer to, in turn, put pressure on the primary employer to resolve its dispute with its employees. If a secondary strike is capable of achieving that purpose, it would be reasonable. If the possible effect of the secondary strike would be to influence collective bargaining between the primary employer and its employees, then it should be protected.”

6.8 CONSEQUENCES OF UNPROTECTED STRIKE

The Act provides the employers with the remedies of interdict, compensation for loss, and dismissal in instances where employees participate in unprotected strikes. It has become common practice that most strike cases that go to the Labour Courts start by employers applying for an interdict contending that the strike is unprocedural in one way or another. In exceptional instances the trade union approaches the court first. For example, in the Public Service Association decision discussed earlier, it

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191 At 2272J.
192 At 2272I.
193 S 68.
was the trade union that approached the Labour Court requesting protection after the employer had issued an ultimatum and threatened to dismiss the striking workers.

6.8.1 Dеликтual Liability

In *South Africa Municipal Workers Union v Jada*, the decision concerned an appeal against a judgment in Springs Magistrate Court. The appellant, SAMWU, was found liable for payment of damages to members who had been dismissed following an illegal strike under the old 1956 Act. The judgment is important since it delineates the principles that determine when a union can be exposed to delictual claim by its members, based on the duty to care. The court found that the employees had failed to prove the duty of care, and that the union was, in any event, the cause of the loss that the employees suffered. They (employees) accepted the risk of harm when they embarked on their strike action.

6.8.2 Dismissal

The Act provides that participation in an unprotected strike is a misconduct. Like in any other misconduct this does not automatically warrant dismissal. The legal requirements to be met before a strike could be protected have now been drastically relaxed as compared to those that existed in the old Act. The courts are therefore very reluctant to come to the protection of illegal strikers. They may, however, come to the rescue of employees if there had been provocation, or if there were efforts made to make the strike protected.

The comment by Cheadle is of importance when he says:

“*The Courts have shown themselves reluctant to come to the assistance of workers who have been dismissed for engaging in illegal strike action. Such action is regarded as serious misconduct as it constitutes a flouting of the law and is subversive to collective bargaining. Yet dismissal in the context of an illegal strike will not always necessarily be fair. Actions such as unacceptable*

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195 At 1357B-D.
196 Item 6 of Schedule 8 of the Labour Relations Act; *ie* Code of Good Practice: Dismissal.
197 See *Machabakywe v Pletonic CC t/a Pretonics Gear* (1996) 9 BLLR 1143 (IC).
198 Cheadle *et al* Current Labour Law (1996) at 64.
employer conduct which provoked the strike, and over-hasty employer action or failure by the employer to attempt to resolve the dispute may render the dismissal unfair. Participation in an unprotected strike may constitute a fair reason for dismissal, although this will not automatically be the case. The Code of Good Practice in the Act suggests certain criteria to be taken into account, among other things in determining whether the dismissal of unprotected strikers would be fair or not. The most important are the seriousness of the contravention of the Act, attempts made to comply with the Act, and whether or not the strike was in response to unjustified conduct by the employer.”

The Act envisages the following two circumstances in which dismissal during a protected strike could be permissible: This is when an employee engages in misconduct during a protected strike, or for operational requirements. Employees will therefore not be dismissed for merely participating in or furtherance of a protected strike.

In SA Chemical Workers Union v Afrox Ltd. the court held that the proper approach is to determine the reason for the dismissal. The dismissal becomes automatically unfair if the reason for dismissal is merely participation in a protected strike. If the reason was for operational requirements, the dismissal could have been fair depending on whether there was compliance with section 189 of the Act or not. If the employer could prove that the most likely reason was based on operational requirements, it will have to prove that the reason was fair.

The Labour Relations Amendment Act gives the union a choice of either going on strike over certain categories of retrenchment, or referring that dispute for adjudication by the Labour Court.

The protection of strikers from dismissal does not include protected strikers who involve themselves in acts of misconduct. Employees who misconduct during a protected strike are not protected from dismissal. The courts have interpreted this provision without any deviation.

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199 S 67(5) of the Labour Relations Act.
203 S 67(5).
strike may be dismissed for the misconduct, not for participating in a protected strike. A proper hearing should be conducted in this regard.

6.8.3 ULTIMATUM

The pattern of court decisions is that an employer is generally required to give strikers a clear ultimatum of reasonable duration before dismissing them. The court has not tolerated rushed and hastily taken decisions in issuing and implementing ultimatums.\(^\text{205}\)

The Act\(^\text{206}\) provides guidance to employers on the issuing of an ultimatum; it provides that:

“The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanctions will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.”

In Majola v D & A Timbers (Pty) Ltd\(^\text{207}\) the employer issued a notice to its illegal strikers to return to work by 12h30 on that day. The notice was further extended to 13h30 in a facsimile to the union. The employer addressed employees in a meeting at 13h30, and at 13h55 gave employees five minutes to resume work. The employees were dismissed at 14h00 since they had not resumed work. The court held that there had not been enough time for the employees to digest the ultimatum and that the final ultimatum was “totally inadequate”.

In Plascon Ink & Packaging Coating (Pty) Ltd v Ngcobo\(^\text{208}\) the court held that the ultimatum was fair. The employer had conducted a meeting with the shop steward and sent three letters to the union. Notices had been issued to employees and the written ultimatums were issued on the third day of the strike.


\(^{206}\) Item 6(2) of Schedule 8 of the Labour Relations Act.

\(^{207}\) Supra fn 205.

\(^{208}\) (1997) 18 ILJ 327 (LAC).
The courts have emphasised that the reasonableness of the deadline in an ultimatum had to be assessed in the interest of both the employer and the employees.\textsuperscript{209} From the judgments discussed above, it can be said with a certain measure of certainty that the courts will closely examine the facts in each and every case before they can decide on the reasonableness of the ultimatum.

\textbf{6.8.4 PRE-DISMISSAL HEARING}

It seemed that the issue of pre-dismissal procedures of unprotected strikers have long been settled. The general understanding was that the issuing of a fair and reasonable ultimatum was sufficient for the employer before he could terminate the employment of unprotected strikers.

This understanding suddenly evaporated after the judgment in \textit{Modise v Steve’s Spar Blackheath}.\textsuperscript{210} This case is an authority on its conclusion that the employer need to, in one way or another, observe the \textit{audi alterem partem} rule before dismissing unprotected strikers.

Before the dust had really settled on the debates about the decision in \textit{Steve’s Spar}, the decision was confirmed by another Labour Appeal Court case, \textit{Karras t/a Floraline v SASTAWU}.\textsuperscript{211} The Labour Court decision in \textit{Transport & General Workers Union v Coin Security (Pty) Ltd},\textsuperscript{212} and the Labour Appeal Court decision in \textit{Volkswagen SA (Pty) Ltd v Mzeku},\textsuperscript{213} in addition gave the courts an opportunity to clarify the \textit{Steve’s Spar} decision and confirmed that illegal striking employees are entitled to a hearing.

In \textit{Steve’s Spar} employees embarked on an unprotected strike in support of the union demand that the stores in the franchise should negotiate centrally on their

\textsuperscript{209} See \textit{Crown Footwear (Pty) Ltd v National Union of Leather Workers} (2002) 22 ILJ 1109 (LAC). Also see \textit{Coin Security Group (Pty) Ltd v Adams supra}.
\textsuperscript{210} \textit{Supra fn 105}.
\textsuperscript{211} (2000) 21 ILJ 2612 (LAC).
\textsuperscript{212} (2001) 22 ILJ 969 (LC).
\textsuperscript{213} \textit{Supra fn 68}.
behalf. The employees were dismissed after being given an ultimatum that they had failed to observe. The Industrial Court found that their dismissal was fair.

In the majority decision of the Labour Appeal Court, Zondo AJP (as he then was) addressed the following issues:

- The company’s argument that the audi rule does not apply to unprotected strikers;
- contributions by labour lawyers and academics on the issue, and
- the dissenting judgment by Conradie JA.

In dealing with the company’s argument that there is no obligation in our law for the employer to observe the audi rule before it could dismiss strikers, Zondo AJP went to case law. He contended that case law referred to by the employer does not necessarily say that there is no obligation for the audi rule to be observed in general, but only in the circumstances of these cases.214

He also referred to a number of cases that concluded the employers in those cases had been obliged to observe the audi rule before they could dismiss.215 The cases included Bawu v Palm Beach Hotel216 and CWIU v Electrical Lamp Manufacturing of SA Pty Ltd.217

He also referred to a number of eminent academic writers and labour law practitioners including: Edwin Cameron (now Justice Cameron), Prof Martin Brassey, Prof Halton Cheadle, Alan Rycroft and Barney Jordaan, who, according Zondo AJP, in their respective articles indicated the need for the observance of the audi rule even under the strike dismissals.218

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214 Counsel for the defence had referred the Court to National Union of Metal Workers of South Africa v Vetsak Co-operative Ltd (1996) 17 ILJ 455 (A).
215 At 526G-H.
218 At 528B-C.
It was also Zondo AJP’s argument that striking workers are entitled to a hearing before they are dismissed since the decision to dismiss them affect their right to work and to remuneration. It was his opinion that there was no justification for creating a general exception in the case of strike dismissal since, when an employee goes on strike, that employee does not lose the basic right which he or she has to a hearing. His reasoning was that:

“Indeed, if going on strike made him lose such a right, then the law would be treating him worse than it does an employee who has stolen from his employer because such an employee would still be entitled to a hearing before he can be dismissed. If this is how our law treated an employee who may well be seeking to participate in the process of collective bargaining – for a strike is an integral part of the collective bargaining process – which our law seeks to promote, then in my judgment, that would demonstrate neither logic nor sense. Fortunately, I think on this point our law demonstrates more logic and sense than that.”

The court concluded by saying:

“In the light of the above I have no hesitation in concluding that in our law an employer is obliged to observe the audi rule when he contemplates dismissing strikers. As is the case with all general rules, there are exceptions … The form which the observance of the audi rule must take, will depend on the circumstances of each case, including whether there are any contractual or statutory provisions, which apply in a particular case. In some cases it will suffice to send a letter or memorandum to the strikers or their union or their representatives inviting them to make representations by a given time why they should not be dismissed for participating in an illegal strike.”

There have been a number of criticisms of this judgment, as many have said that, it imposes a procedural requirement on employers who are faced with illegal strikes to conduct individual formal hearings before dismissing them. This was also the interpretation of Commissioner Brand in the Volkswagen case discussed earlier on. These concerns were adequately addressed by Zondo AJP when he said that: “… the form which the observance of the audi rule must take will depend on the circumstances of each case”. The subsequent Karras and Volkswagen Labour Appeal Court decisions also contributed to settling these concerns.

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219 At 532F.
220 At 532G-H.
221 At 551G.
Both Grogan\textsuperscript{222} and Conradie JA\textsuperscript{223} referred to \textit{Coin Security},\textsuperscript{224} which in a unanimous judgment, decided that the strike was unprotected and only looked at the fairness of the ultimatum and not the requirement for the hearing. The weakness of comparing the two cases is:

- the requirement for a hearing was not considered in \textit{Coin Security};

- strikers in \textit{Coin Security} were guilty of misconduct, while those in Steve’s Spar were not; and

- the union in \textit{Coin Security} knew that their actions amounted to an unprotected strike whereas the union in \textit{Steve’s Spar} did not.

Myburgh JF\textsuperscript{225} analysed section 68(5) of the Act and item 6 of the Code of Good Practice: Dismissal and commented that \textit{Karras} should have read the Act together with the Constitution as the starting point. He concluded that since there was no express requirement for a hearing in the Act, the legislature therefore did not deem this to be a procedural requirement before dismissing unprotected strikers. Zondo AJP,\textsuperscript{226} however, says in his judgment that the discussion contemplated in item 6(2) of the Code was in the form of an observance of the \textit{audi} rule, and therefore the legislature expressly required a form of a hearing to take place before illegal strikers were to be dismissed.

Steve’s Spar has become the law, and therefore employers are expected to observe the \textit{audi} rule before dismissing unprotected strikers.

\textsuperscript{222} Grogan “Emasculating the Ultimatum, Pre-dismissal Hearings for Strikers” (2001) Vol 17 No 2 \textit{Employment Law} at 11.
\textsuperscript{223} Delivering his dissenting judgement.
\textsuperscript{224} Supra fn 209.
\textsuperscript{225} “100 Years of Strike law” (2004) \textit{ILJ} 962 at 973. Myburgh JF is the former Judge President of the Labour Court and the Labour Appeal Court.
\textsuperscript{226} \textit{Steve’s Spar} at 548G-J.
CHAPTER 7
CONCLUSION

From the above discussion it is clear that the courts have settled a large number of uncertainties that existed around the strike law provisions of the Act. This was done when the courts, through the passage of time, made significant decisions of precedent value in developing the strike jurisprudence. During the early years of the Act, the industry players always approached the courts to get a stamp of approval on even obvious issues. In the last three years, however, one observes a decline in reported cases of strike law. This is an indication, in the writer’s view, that there has been a gradual move to maturity of our strike-law jurisprudence. The courts have managed to put flesh to the bones of the legislation through their interpretation of the Act. In a number of years to come, one will probably battle to find court decisions that will be of precedent value to the strike jurisprudence.

One could also say that the level of certainty that was achieved in the strike-law jurisprudence has been a smooth process. It was sometimes characterised by inconsistent court decisions, conflicting judgments, and divided judgments in the Labour Appeal Courts. Of late, the Constitutional Court has had to intervene to give guidance to the courts on how to interpret the strike-law provisions of the Act in the light of the constitutionally guaranteed right to strike.

The controversy and uncertainty about the right to strike, the freedom to strike and the requirements for a legal strike that existed under the old Act, have much gained more clarity in the new Act. Under the old Act the court had to consider a basket of factors in dealing with strikes. The Bill of Rights of the Constitution has afforded the employees a fundamental right to strike, with the Act being the enabling legislation.

When the dust finally settled in the Volkswagen case, one could say that our labour laws can in some instances be very complicated. Such complications are

227 Predominantly the first four years, that is from 1997 to 2001.
229 Supra fn 102.
caused by the lack of clear direction and the ambiguous interpretation of the Act by the courts. Volkswagen, as discussed above, is one of the few strike-law cases that travelled the full marathon of the labour dispute resolution institution, starting from the CCMA, Labour Court, Labour Appeal Court and lastly, the Constitutional Court. When the Commissioner was called upon to decide on whether Volkswagen observed the *audi* rule, the Steve’s Spar decision could not help him with details in regard to which the criteria should be used to determine if the rule had been observed or not. Even the distinction between the ultimatum and the hearing was of no avail.

The main challenge of the courts was to maintain a balance between the constitutional right to strike and the limitations provided for in the Act. Maserumule argued that the courts and the Act itself have failed to protect the right to strike that is guaranteed by the Constitution. He argued such while analysing the decisions of the Labour Courts from the inception of the Act until October 2000. His conclusion was that:

> “… the labour courts have failed to protect the right to strike guaranteed by s 23 of the Constitution. It will further be argued that they have, instead, been preoccupied with giving effect to the limitations of that right, as reflected in chapter IV of the Act, and, in particular, the provisions of ss 64-66 and 77. The result has been that the jurisprudence that has developed around strike law is not on how to give effect to the right to strike but how to give effect to the limitation of that right that is prescribed by the LRA.”

Maserumule cannot be challenged on the conclusion he has come to, particularly considering the case law that he referred to. There are, however, a number of cases that have acknowledged that the Act is a limitation for the right to strike, and therefore must be interpreted restrictively. These decisions have started to protect the striking employees and have deviated from the narrow interpretation of the Act.

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231 The cases includes Steve’s Spar Blackheath, the LAC decision in the Volkswagen case and the Public Servants case.
It is interesting that in the *Public Service Association* case Landman J rejected the reasoning in the *Tiger Wheels Babelegi* case, and decided that the employees did not waive their right to strike because of the effluxion of time.\(^{234}\) This judgment (*Public Service Association*) is a good example of a decision where the court deviates from the detailed technical provision of the legislation, but attempts to interpret the Act consistently with the constitutional right to strike.

Sections 64-66 and section 77 of the Act actually provides for the limitations of the right to strike provided by the Constitution. The limitations of the right to strike are imposed by the procedural requirements to be complied with prior to the strike action, prohibitions of strike action under certain circumstances and prescribed procedures.

The other issue that the courts have not provided proper guidance for is the interpretation of section 193(2), particularly subsection (d). The Act seems very clear in its provision that reinstatement and re-employment are excluded where there is procedural unfairness. Both the Labour Court and the Labour Appeal Court stated that there are instances where reinstatement is possible when there has been only procedural unfairness. Except in retrenchment, these circumstances have not been properly identified and clearly elaborated on by the courts.

The issue of relief for unfairly dismissed strikers was perceived differently by the three dispute resolution institutions. The writer has already stated that on occasion the CCMA ordered reinstatement. The Labour Court then decided to grant no relief in respect of the procedurally unfair dismissal. The Labour Appeal Court finally did not have to decide on the relief since it decided that the dismissal was both procedurally and substantively fair. It seems, however, that the Labour Appeal Court could have decided on compensation, whereas the relief granted by the Commissioner was too lenient in his decision. This simply means that the decisions that emanate from our dispute resolution institutions are often unpredictable and confusing, and at the expense of the investing employers and the dismissed employees.

\(^{234}\) Interesting in that Puke Maserumule, representing the employer mainly used *Tiger Wheels Babelegi* in his several attempts to convince Landman J that the employees have waived their right to strike.
Another observation made is the trend of the decisions made by the courts, particularly the Labour Appeal Court. The early judgments of the court, starting from 1997, up to late 1999, focused narrowly on the Act without practically acknowledging the constitutional right to strike despite the pronouncement of the court in that regard.

The challenge of the courts during this period was, according to the writer’s view, a transformational matter. While the old Act only provided for the freedom to strike, and considered a basket of factors such as the period of the strike, the strike ballot and the issue in dispute before a strike could be legal. Suddenly there was a constitutionally guaranteed right to strike, the purpose of the Act amongst others being to give effect to this right, and to give effect to an obligation to South Africa as re-admitted member state of the International Labour organisation (ILO). These changes were overwhelming to the courts that now operated under a different legislative environment. That is the reason why during this period the courts continually went back and adopted the strike-law jurisprudence that was developed before 11 November 1996 under the old Act.

There have been notable changes in the court judgments from the end of 1999 to the beginning of 2000 were the courts started to give effect to the constitutional right to strike. This period experienced, for example, the introduction of the observance of the audi rule before dismissing unprotected strikers, or the pre-ultimatum hearing by the Steve’s Spar judgment.

This period also suffered setbacks in constitutionally guaranteeing the right to strike. For example, the judgment in Bader Bop (Pty) Ltd v National Union of Metal Workers of South Africa\textsuperscript{235} was that a minority could not embark on a protected strike in a support of a demand that it had to be granted organisational rights that required majority representation, such as recognition of shop stewards.

The intervention of the Constitutional Court in its judgments in Xinwa and Bader Bop is an important contribution to the strike-law jurisprudence. The principles set out in

\textsuperscript{235} (2002) 23 ILJ 104 (LAC).
Bader Bop clearly require the Labour Court judges and arbitrators to review their interpretation of the Act in regard to constitutionally guaranteed rights, including the right to strike. This decision will cause judges to deviate from interpreting the Act narrowly when dealing with strike law without considering the Constitution and International Conventions of the ILO.
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