AN APPRAISAL OF STRIKE LAW IN SOUTH AFRICA

by

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In memory of
my parents
the late
Tom and Coral Crompton
PREFACE

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SUMMARY

The recent amendments made to employment laws and in particular the rewriting of the South African Labour Relations Act has brought into focus the diverse and conflicting interests of employers and employees, which is a concern of labour law analysts.

This appraisal of South African strike law examines the statutory and judicially established labour law in regard to the phenomenon of collective industrial action by employees and the regulation of its occurrence.

Historical developments in strike law are traced from the early 1900’s. A period of segregated trade unionism, led ultimately to the introduction of a more inclusive system of regulation, which has in turn been modified to bring the law into line with the new constitutional imperatives. Industrial action occurred, often unregulated and regardless of statutory limitations, and in particular that industrial action which related to mass protest action, now recognized as a specific form of strike.

The now repealed Labour Relations Act 28 of 1956 is examined with regard to its strike regulating provisions, and identification of what were then new, unrecognized forms of strike action. It has allowed concepts and principles to be developed, under the unfair labour practice jurisdiction of the Industrial Court, much of which has been incorporated in the new Labour Relations Act.

The legislation on strike law, which has been developed over the years, has been refined by the constitutional imperatives introduced to the national legal system. The relevant aspects of the new Constitution Act 108 of 1996 and its pervasive effect on strike law are examined. The right to strike in South African labour law, together with the protection of collective bargaining, is now constitutionally entrenched, and the right to strike is now accepted as a necessary adjunct to collective bargaining.

It is necessary to give effect to the Constitution in national legislation, and the Labour Relations Act 66 of 1995 endeavours to accomplish this in chapter IV in regard to strike law, which, it could be argued, limits rather than gives expression to the right to strike.
The Labour Relations Act of 1995 is then discussed with reference to protected and prohibited strikes, and unregulated strike action. It will be evident that the Act has endeavoured to contain unprocedural and productivity draining industrial action, by subjecting rights disputes to arbitration and Labour Court adjudication, subject to certain exceptions.

The recourse to lock-out, as the employer’s prerogative and general corollary of strike action, is briefly discussed.

The case law relating to strikes is discussed in respect of both the 1956 Act and the new Labour Relations Act of 1995. Among the issues explored are the strike provisions which have been developed in statute and labour related common law, such as the identification of issues in dispute, notice of strike, the issuing of ultimatums, the audi alteram partem rule and the court’s approach to protected and unprotected strikes.

The intention is to determine trends resulting from amendments to the law and draw inferences regarding, in particular, the unregulated form of strikes that occur within the scope of the protections offered by the Act. It is the intention to determine whether the desired effect has been achieved by implementing legislative reforms in response to public policy considerations.
CHAPTER 1
AIM OF TREATISE

The regulation of industrial action, and the right to strike has been a concern of jurists and legislation since the emergence of modern economic systems and industrialisation, which resulted in the emergence of capital and labour interests, generally constituting distinct and opposing interest groups.¹

It has been stated that the law should be seen as a secondary force in industrial and labour relations, providing legal regulation of the strike phenomenon in the form of collective labour law.² Legal regulation implies statutory intervention in what is essentially an economic relationship between employers and employees. Modern labour legislation seeks to regulate this labour relationship in an orderly and equitable manner, and can be regarded as an instrument by which democratic values are infused into employment relations. This pluralistic approach does not enjoy universal recognition, and in many national states the strike weapon is entirely prohibited.

The right to strike in South Africa is now constitutionally entrenched and is accepted as a necessary adjunct to collective bargaining.³ Numerous writings deal with the right to strike, strike causation, strike measurement and handling.

It may be argued that an important objective of the South African Labour Relations Act No 66 of 1995 (“the 1995 Act”) is to promote labour peace.⁴ The 1995 Act attempts to remedy inter alia a pre-existing high incidence of unprocedural strikes, technical pre-strike procedures and a lack of coherence in court decisions,⁵ which prevailed under the previous Act.⁶ One of the principal concerns of the drafters of the 1995 Act was the high incidence of “unnecessary” strikes, and the manifest failure to resolve strikes over issues that do not have major cost implications or involve matters of principle.

³ Grogan Workplace Law 255.
It is of interest to determine any trends resulting from amendments to the law on strikes, for instance, whether the desired effect has been achieved by implementing legislative reforms.

As a result, one has attempted to establish the effect of the 1995 and previous amendments on strike law. What reduction has there been, if any, in unprocedural strikes? Do employer remedies balance out, in terms of the balance of power, with employee remedies? To what extent is the law satisfying the requirements of collective bargaining? Or are there internal limitations or other impediments to the constitutional and legal remedies available? An analytical and practical approach is utilized, which includes an examination of the legal remedies, institutions and procedures available to the labour fraternity. This is done on the premise that insufficient comprehension of the law on strikes prevails, and sufficient background on strike law will be included to allow for an expression of ideas or suggestions that one may consider when applying one’s mind to the concept.
CHAPTER 2
HISTORICAL OVERVIEW

From 1908 to 1918, a succession of labour laws was introduced, which succeeded the Masters and Servant legislation. The new laws dealt with labour disputes in specific industrial sectors such as mining and railroads.\(^7\)

A pivotal development was the 1922 Rand Rebellion. This was preceded by a series of major strikes in 1913 and 1914. The 1922 rebellion demonstrated the power of unregulated strikes, and this led to the promulgation of the Industrial Conciliation Act 11 of 1924. This legislation was introduced in an attempt to regulate relations between management and organised labour. Act 36 of 1937 was a revision thereof, establishing Industrial Tribunals, which were later to be replaced by the Industrial Court in the 1980’s since 1979.

After 1948, a comprehensive review by the Botha Commission of Enquiry led to legislated, racially segregated trade unions, job reservation, and precluded blacks from joining registered trade unions. Government labour policies became increasingly repressive during the 1950’s, which made it difficult for trade unions to function effectively.\(^8\)

During the period 1953 to 1973, strikes by black workers were prohibited by the Black Labour Relations Regulation Act 48 of 1953.\(^9\) In 1973 that Act was amended to allow for a restricted right to strike for black workers, in limited circumstances.\(^10\) This followed a wave of unregulated strikes involving 70 000 black workers, which started in Durban in 1973. The result was a dramatic growth in trade union membership over the next five years. The Bantu Labour Relations Amendment Act introduced a separate legislative framework for black workers. A dualistic labour relations system prevailed until the 1980’s.

The Industrial Conciliation Act 28 of 1956 did not include most black workers in its definition of “employee”, reflecting tightened controls over non-racial unionisation by the

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\(^7\) Examples include legislation such as the Transvaal Industrial Disputes Prevention Act 20 of 1909, the Native Labour Regulation Act of 1911, the Railways Regulation Act of 1908 and the Railways and Harbours Service Act of 1912.

\(^8\) Lodge *Black Politics Since 1945* (1987) 188.

\(^9\) Also known as the Native Labour (Settlement of Disputes) Act.

State. The Industrial Conciliation Amendment Act 94 of 1979 made the lawful strike instrument accessible to black workers, and black trade unions could be incorporated into the dispute resolution mechanisms of the then existing industrial councils and conciliation boards.\(^\text{11}\) This was made possible by the release of the recommendations of the 1979 Wiehahn Commission established in 1976,\(^\text{12}\) which *inter alia* advocated deracialised labour laws. The Industrial Conciliation Act was renamed as the Labour Relations Act 28 of 1956.\(^\text{13}\)

The Industrial Court was established in 1981 by Amendment Act 94 of 1979, to introduce a mechanism which sought to replace unnecessary strike action with a judicial enquiry into the dispute.\(^\text{14}\) The Industrial Court provided protection for strikers under its status quo jurisdiction,\(^\text{15}\) its unfair labour practice jurisdiction to temporarily suspend the introduction of a strike,\(^\text{16}\) and its powers to make final determinations.\(^\text{17}\) The Industrial Court, in addition to replacing the existing tribunals, was intended to relieve the pressure on the ordinary courts.\(^\text{18}\)

According to Myburgh,\(^\text{19}\) in South Africa prior to 1980, the lawful strike as an element in collective bargaining was seldom used, rather the threat of strike action itself was sufficient. A study of strike data from 1960 to 1982 recorded strike activity in 1982 as being the highest since 1960, mostly related to wage issues, but strike incidence was low in comparison to international data.\(^\text{20}\)

The status of the Industrial Court was settled in *SA Technical Officials Association v President of the Industrial Court*.\(^\text{21}\) It was a quasi-judicial tribunal, and initially, the only remedy in the absence of any appeal mechanism was the common law right of review before the Supreme Court, with a right to appeal against an order of a division of the Supreme Court to the appellate division.\(^\text{22}\)

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\(^\text{13}\) Grogan *Workplace Law* 256.


\(^\text{15}\) S 43(4)(b)(ii).

\(^\text{16}\) Ss 43(4)(b)(iii) and 46(9).

\(^\text{17}\) Myburgh *The Law on Strikes and Dismissals Revisited* 1.

\(^\text{18}\) Rycroft and Jordaan (1992) 249.

\(^\text{19}\) Myburgh *The Law on Strikes and Dismissals* 27.


\(^\text{21}\) (1986) 6 *ILJ* 186 (A).

The court’s powers were wide ranging, which the appellate division was led to describe as “draconian”.23 However the Industrial Court accepted the persuasive influence of decisions of foreign jurisdictions, and was also receptive to international labour organisation conventions and recommendations.

In 1988, impetus was given to the potential development of the law by the creation of a right of appeal from the Industrial Court to a Labour Appeal Court, and for the first time an appeal with leave lay to the Supreme Court of Appeal.

The right to strike is now recognised as a necessary adjunct to collective bargaining, and was constitutionally entrenched in section 23 of the Republic of South Africa Constitution Act.24 However, it is evident from the ruling in Ex parte Chairman of Constitutional Assembly25 that the employer’s right to lock-out was not given the same status, since

“employers enjoy greater social and economic power than individual workers, who need to act in concert to provide them collectively with sufficient power to bargain effectively”.

The South African labour law on strikes and lock-outs evolved slowly during the period 1980 to 2000, according to Myburgh.26 The law was developed by an interpretation by the courts of the provisions of the former Labour Relations Act 28 of 1956 (“the 1956 Act”) and the exercise of its unfair labour practice jurisdiction by the Industrial Court. The 1956 Act also provided striking workers with immunity from prosecution at section 65 and immunity from delictual or contractual liability at section 79.

The triad of protections, also referred to as the “golden formula”27 in English and other sources of labour law, was based on the functional importance of the strike to collective bargaining.28 The means and purpose of a strike could, depending on the application of this formula, separate the unlawful strike from the lawful strike.29

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23 Ibid.
24 Grogan Workplace Law 323.
26 Myburgh The Law on Strikes and Dismissals 1.
27 Ss 65, 79 and the court’s protection of strikers from dismissal under its status quo and unfair labour practice jurisdiction.
28 Brassey, Cameron, Cheadle and Olivier The New Labour Law (1987) 244.
29 Rycroft and Jordaan (1992) 207.
The Amendment Act 83 of 1988 introduced contentious amendments to the 1956 Labour Relations Act, which set further limitations on the freedom to strike or to take other forms of industrial action. An automatic right of appeal from a decision of the Industrial Court existed, to a newly established Labour Appeal Court, which suggested a tighter form of control than review proceedings. Following three years of protest, further amendments were introduced in Act 9 of 1991, which mainly restored the pre-1988 provisions. The South African employers consultative committee on labour affairs entered into negotiations with COSATU and NACTU to conclude an agreement on suggested amendments to the 1956 Act. The Labour Relations Amendment Bill became law on 1 May 1991, and regulations were also amended, reflecting a historical agreement between the main actors in the industrial relations arena.

The Industrial Court was obliged to develop its own jurisprudence while referring to international authorities. Among others, critics cited a lack of coherence in the decisions of the separate divisions of the Labour Appeal Court, the high incidence of unprocedural strikes, and technical pre-strike procedures.

“The courts progressively developed an ever more bewildering array of criteria. There is no coherence: one court will rely on a factor, another will discard it in its entirety, others again will eschew any reliance on factors at all”.

Other criticisms included the lengthy legal procedures, the old collective bargaining system was confined to the defence of narrow, sectional interests, and the need for a more speedy conciliation and dispute resolution procedure. The 1956 Act was also due for an overhaul since there were so many amendments to the principal Act and regulations. With the introduction of a new democratic dispensation in South Africa in 1994, it was necessary to rewrite the Labour Relations Act and other labour statutes, in order to give effect to the Constitution.

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31 SACCOLA.
32 Congress of South African Trade Unions.
33 National African Congress of Trade Unions.
34 These were considered together with recommendations of the National Manpower Commission.
The Labour Relations Act 66 of 1995, prepared by the Cheadle Commission, attempted to change the adversarial stance of the old dispensation to a more co-operative one. Among others, the number of illegal strikes was not declining and the courts backlog was significant.

What is evident from this analysis is that public policy considerations played a key role in the legislative amendments that occurred. Apart from the overhaul of labour legislation in 1995, the most significant of the previous amendments were: the 1920’s following the Rand Rebellion; the 1950’s as a result of the Botha Commission’s recommendations introducing segregation; and the 1980’s following the implementation of some of the recommendations of the Wiehahn Commission, which reintroduced non-racial unionism and extended the freedom to strike.

The 1988 amendments were a reaction to perceived excessive industrial action, underpinned by the prevailing political unrest and successive states of emergency. Workers had experienced elements of democratisation in the workplace, which raised their awareness.

The 1991 amendments were a response to threats of national industrial action and confirmed the power of workers, and the negative impact of the strike weapon on the economy.

The legislative reforms that have transpired since 1994 reflected new public policy considerations which include the overhaul of the five labour laws identified, in an attempt to be globally competitive through regulated flexibility.

In 1997 Cheadle reported that the law on strikes and lock-outs was still in a transitional phase. The Labour Relations Act 66 of 1995 had then only recently been promulgated, but it had been observed that the court had been active in dispensing urgent relief against illegal strikes, picketing and lock-outs.  

The labour laws were amended again since 1995. The 2002 amendments included the introduction of the right to strike as an option in response to mass retrenchments. The right to strike in response to mass retrenchments was introduced in response to union pressure and it

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was suggested that the large number of retrenchments belies any suggestion of inadequate flexibility. 38

CHAPTER 3

THE LABOUR RELATIONS ACT 28 OF 1956

The main purpose of this labour legislation\textsuperscript{39} in respect of strike action, was \textit{inter alia} to provide for regulated dispute resolution in the realm of collective bargaining before the commencement of strike action or legal action. The Labour Relations Act 28 of 1956 (“the 1956 Act”) contained some substantive limitations, such as section 65 proscribing the freedom to strike, did not apply to all employees and criminalised those responsible for striking before using the statutory dispute resolution procedures.\textsuperscript{40} Employees in sectors such as education and the public service were governed by separate legislation.\textsuperscript{41}

3.1 Definitions

The definitions of the strike and unfair labour practice are examined. Strikes were defined in section 1 of the 1956 Act as

“any one or more of the following acts or omissions by any body or number of persons that who are or who have been employed by either the same employer or by different employers-

(a) the refusal or failure to continue work (whether the discontinuance is complete or partial) or to resume their work or to comply with the terms and conditions of employment applicable to them, or the retardation by them of the progress of work, or the obstruction by them of work, or

(b) the breach or termination by them of their contracts of employment, if –

(i) that refusal, failure, retardation, obstruction, breach or termination is in pursuance of any combination, agreement, or understanding between them, whether expressed or not; and

(ii) the purpose of that refusal, failure, retardation, obstruction, breach or termination is to induce or compel any person by whom they or any other persons are or who have been employed –

(aa) to agree or to comply with any demand or proposals concerning terms or conditions of employment or other matters made by or on behalf of them or any of them or any other persons who are or who have been employed; or

(bb) to refrain from giving effect to any intention to change conditions of employment, or, if such change has been made, to restore the terms or conditions to those which existed before the change was made; or

(cc) to employ or suspend or terminate the employment of any person.”

\textsuperscript{39} \textit{Industrial Conciliation Act} – long title substituted 1979-1981.

\textsuperscript{40} Excluded were those employed in agriculture \textit{aka} farming operations, domestic and essential services, police, soldiers and spies.

\textsuperscript{41} The Education Labour Relations Act 146 of 1993; Public Service Labour Relations Act 102 of 1993; Agriculture Labour Act 147 of 1993.
Section 65 read with paragraph (ii) of the strike definition, proscribed any other purpose. The strike was defined widely to cover virtually all forms of collective, concerted worker pressure on the employer with the purpose of enforcing a demand connected with the employment relationship. Problems were encountered in interpreting the definition’s provisions, for instance, conflicts between subsections (a) and (b)(ii). The function of a strike was essentially explained as an attempt to break to break a deadlock situation in negotiations over such matters as collective agreements, and disproportionately harmful strikes would attract the court’s intervention.

The elements confirming the existence of a strike, derived from a breakdown of the definition, were (i) a cessation of work, (ii) through collective action of employees with a common purpose, (iii) accompanied by a demand to induce or compel the employer or a secondary employer to agree with or accept the proposals of striking employees.

Various forms of strikes were recognised in case law, as a result of this definition.

A stayaway, which may be labour related, political or both, were significant events in the history of unionism in South Africa. Although the Labour Appeal Court characterized political stayaways as illegal in Amcoal Colliery and Industrial Operations Ltd v NUM, it was subsequently accepted that stay-away-related dismissals could be held to be unfair. Participation could be legitimate in, for instance, circumstances closely related to labour or employment issues, an approach also accepted by some arbitrators.

In respect of overtime bans, one of two forms identified was an overtime ban in breach of a contractual obligation, which would constitute a strike as defined. This obligation could also arise by tacit agreement where there is a long-standing practice of working overtime. The other form of overtime ban was voluntary, and the refusal did not constitute a strike as

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44 Rycroft and Jordaan (1992) 280.
46 Rycroft and Jordaan supra 280.
defined, but could still amount to an unfair labour practice.\textsuperscript{51} Section 8(1) of the Basic Conditions of Employment Act\textsuperscript{52} also prohibited overtime not in terms of an agreement concluded between an employer and employees.\textsuperscript{53}

Other forms of judicially acknowledged worker pressure, achieved by a partial or complete stoppage or retardation of work, included: a work-to-rule as a strategy to slow down and so disrupt the production process; a go slow; and a sit-in by workers, the purpose of which is to deny employer’s control of, or access to work processes. A work stoppage was a refusal to work, typically not linked to an industrial demand.\textsuperscript{54} Secondary or sympathy strikes and picketing could be curtailed by resorting to the 1956 Act’s provisions, for instance in terms of the unfair labour practice jurisdiction, if not in criminal law proceedings.

The employer’s statutorily acknowledged remedies were urgent interdicts and lock-outs, the unlawful version of which would not enjoy the same recognition and protection, where dismissal was not contemplated or permitted.

The purpose of identifying the various forms of worker pressure by the courts, usually by reference to the strike definition, could be regarded as an attempt to distinguish strikers who had acted lawfully by participating in the conciliation process, from those who had acted unlawfully.\textsuperscript{55} It is suggested that the other forms of strike action were partly acknowledged in recognition of international jurisprudence and practice, and as a result of the application of the court’s unfair labour practice jurisdiction.

The unfair labour practice definition was amended frequently during the term of the 1956 Act, in 1982, 1988 and again in 1991. The original 1979 definition was drafted in general terms as:

> “any practice which in the opinion of the industrial court, constitutes an unfair labour practice”.

\textsuperscript{51} Although there have been contrary judgments reflecting a lack of unanimous approach: see Amalgamated Beverage Industries Ltd v FAWU (1988) 9 ILJ 252 (IC); and the contemporaneous judgment in Plascon Evans Paint (Natal) v CWIU (1988) 9 ILJ 231 (D).

\textsuperscript{52} 3 of 1983, now repealed.

\textsuperscript{53} In terms of the definition of strike in 1995 Act, all overtime is specifically included.

\textsuperscript{54} Rycroft and Jordaan (1992) 218 220.

\textsuperscript{55} Le Roux and Van Niekerk The South African Law of Unfair Dismissal 16.
It is clear that this definition was open-ended in the extreme. Following the 1982 amendments to the unfair labour practice definition, more direct access to the court through the status quo order was possible. The court began to consider \textit{inter alia} the fairness of the dismissal of striking employees.\textsuperscript{56} The principle that such employees could be reinstated was accepted in an early matter, \textit{MAWU v Stobar Reinforcing (Pty) Ltd}\textsuperscript{57} in which dismissals relating to a go-slow were considered.\textsuperscript{58} It is significant that the court was able to intervene to remedy infringements of the rules of collective bargaining.

It is significant that both strikes and lock-outs were brought into the scope of the definition, until the 1991 amendments excluded strikes and lock-outs.\textsuperscript{59} The court’s unfair labour practice jurisdiction evidently filled the vacuum that existed in strike law, where it was, for instance, silent on matters such as unlawful but otherwise legitimate and fair strike action.\textsuperscript{60} The court was able to develop the fairness concept, to the extent that conduct that may otherwise be entirely lawful could still be unfair.\textsuperscript{61}

The introduction of the unfair labour practice jurisdiction gave rise to a situation where the lawfulness or legality of a party’s actions was not conclusive of the matter, since the disputing party was able secure relief on the basis that such conduct was unfair.\textsuperscript{62} It has also been held that participation in an unlawful strike did not preclude the dispute giving rise to that strike being categorized as resulting from an alleged unfair labour practice on the part of the employer, enabling the court to retain its jurisdiction to hear the application.\textsuperscript{63}

\textsuperscript{56} Certain forms of conduct during a strike or lock-out could also constitute an unfair labour practice, such as acts of violence, action in contravention of a collective agreement, failure to resolve illegal strikes, or eviction of employees.  
\textsuperscript{57} (1983) \textit{4 ILJ} 84 (IC).  
\textsuperscript{58} Reinstatement was also considered in \textit{Die Raad Van Mynvakbonde v Die Kamer Van Mynwese van Suid-Afrika} (1984) \textit{5 ILJ} 344 (IC); \textit{MWASA v Argus Printing and Publishing Company Ltd} (1984) \textit{5 ILJ} 16 (IC).  
\textsuperscript{59} The 1991 ULP definition defined same as “any act or omission other than a strike or lock-out which has or may have the effect that (i) any employees may be unfairly affected or employment opportunities or work security is or may be prejudiced thereby, (ii) the business of any employer is or may be unfairly affected or disrupted thereby, (iii) labour unrest may be created thereby, (iv) the labour relationship between employer and employee is or may be detrimentally affected thereby”.  
\textsuperscript{60} It was relied on when there was no evident statutory interpretation, remedy or express provision dealing with the issue.  
\textsuperscript{61} \textit{Council of Mining Unions v Chamber of Mines of South Africa} (1985) \textit{6 ILJ} 293 (IC) 295C.  
\textsuperscript{63} \textit{Natal Die Casting Co (Pty) Ltd v President, Industrial Court} (1987) \textit{8 ILJ} 245 251 B.
3.2 The Legal Strike

The legal dispute procedure or process following a deadlock at the workplace over a rights or interest dispute was to proceed to a conciliation at a Department of Labour conciliation board, applicable bargaining council, or another forum in terms of a binding collective agreement. If the dispute remained unresolved, or on cessation of section 45 arbitration proceedings, the strike weapon could be utilised. It remained open to a party to invoke a separate procedure providing a remedy at section 17(11)(aA) for urgent interim relief at 48 hours notice. This provision gave the court power to urgently grant an interdict or any other order in the case of any action prohibited in terms of section 65, or other interim relief, in terms of section 17(11) read with sections 43 or 46 of the 1956 Act.

Other applicable provisions pertaining to lawful strikes were the “golden formula” or triad of protections, being section 65; section 79 conferring a general immunity; and the court’s protection of strikers from dismissal under its status quo and unfair labour practice jurisdiction, or for participating in strikes substantially in compliance with section 65.

Section 65 required that the union gave notice of strike in terms of section 65(1)(d)(i) and (ii). A strike ballot would then be conducted in terms of section 65(2)(b), at which members in good standing would vote. A strike would then commence, which would be either lawful, if there had been a majority vote by secret ballot of union members in good standing, or per se prohibited or unlawful in status. The reason for the strike had to be the same as the reason for the dispute arising in the first place. It was an offence to call or take part in a strike if the parties belonged to an industrial council whose constitution provided for arbitration of an unresolved dispute.

In respect of illegal strikes, a further procedure developed in judge-made law, requiring an employer to issue an ultimatum, and then to conduct pre-dismissal hearings before taking the final decision to dismiss. The 1956 Act did not contain any express provisions governing

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64 Such as union recognition, wages, interpretation of collective agreement.
65 S 43(4) orders for interim reinstatement, restoration of terms and conditions of employment or abstention from unfair labour practices; s 46(9).
68 In terms of s 65(2) of the 1956 Act.
69 Discussed infra at 3.3 Illegal Strikes.
the dismissal of legal strikers, and such cases were dealt with under the unfair labour practice jurisdiction of the Industrial Court.

The 1998 amendments introduced section 79(2), which created a statutory delict, in terms of which unions bore the onus of proving that illegal strike action by their members was without the authority of the union, in order to avoid liability for damages. The 1991 amendment restored the onus of proof to rest with the party alleging that it has suffered damages.

Following the 1991 amendments, section 17(11)(a) would still function as a facility for urgent interim relief pending section 43 orders. As a limited remedy, section 17D interdicts and orders in respect of strikes and lock-outs could be utilised.

Section 65 of the 1965 Act set out the circumstances which had to prevail and the procedures to be followed before a strike or lock-out was considered to be lawful, by specifying negative rights - those circumstances when a strike or lock-out may not be held. These limitations included

“(i) During the period of currency of any binding agreement, award or determination and any provision dealing with the matter giving rise to the strike or lock-out and which binds the parties concerned.
(ii) Within one year of the publication of a determination made by the Wage Board under the Wage Act 5 of 1957 which covers the matter in dispute, and any relevant provisions.
(iii) If the parties concerned were essential service employers/employees as referred to in s 46(1), being employees of local government or other designated sectors, who could not strike or lock-out in any circumstances.
(iv) Where the above limitations did not apply, the strike or lock-out remained prohibited unless the dispute had been referred to an industrial council having jurisdiction, or application had been made for a conciliation board, and the council or board had reported to the Minister or director general in writing, or a period of 30 days had expired, whichever occurred first,

The points of attack often favoured by employers dealt with the defective issuing of the section 65 strike notice, or irregularities in the conducting of a pre-strike ballot.

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71 Tanner “Making Amends- The New Look LRA” 95.
72 That is, functional to collective bargaining.
73 Rycroft and Jordaan (1992) 272.
In *Rainbow Chicken Farms (Pty) Ltd v FAWU*\(^74\) the court ruled that the strike was prohibited, since the issue in dispute was regulated by a collective agreement that provided for arbitration as a private dispute settlement process, and this route was still open to pursue. It was similarly confirmed in *Pick 'n Pay (Pty) Ltd v SACCAWU*\(^75\) that the strike in question was prohibited, since the matter giving rise to the strike was bound by or was the subject matter of a collective agreement.

The failure to conduct a pre-strike ballot resulted in an illegal strike,\(^76\) but this was not necessarily conclusive of the matter, nor did it necessarily make the strike wrongful for the purposes of delictual liability.

It was judicially confirmed that a pre-strike ballot had to be proper, and it was also one of the points of procedural compliance necessary in order to make the strike legal.\(^77\) The employer had *locus standi* to enforce compliance,\(^78\) and was provided with an expedient to interdict strikes on the basis that the ballot procedures were defective.\(^79\)

In *PPAWU v Solid Doors (Pty) Ltd*\(^80\) the Industrial Court considered the strike ballot to be defective, since the process did not comply with section 8(6)(b) and section 65(2) of the 1956 Act. The influence of the unfair labour practice jurisdiction was evident since the matter did not stand or fall on the question of a defective ballot. Similarly in *Modise v Steve’s Spar Blackheath*,\(^81\) the court insisted on a proper balloting process.

### 3.3 The Illegal Strike

A strike not in compliance with section 65 of the 1965 Act was illegal in status. While the threat of strike action itself may have been sufficient before prior to 1980\(^82\) there were several

\(^74\) (1997) 8 BLLR 1081 (LC).
\(^75\) (1998) 19 ILJ 1546 (LC).
\(^76\) Rycroft and Jordaan (1992) 212.
\(^77\) Sasol Industries (Pty) Ltd v SA Chemical Workers Union (1990) 11 ILJ 1011 (LAC).
\(^79\) Defective and material irregularities in pre-strike ballots were considered in *Edgars Stores Ltd v CCAWU; FCRAWU & NUDAW* (1991) 2 (12) SALLR 51(IC); *HOTELICA on behalf of J Sibanda & 22 others v Late Night Al’s (Pty) Ltd* (1992) 13 ILJ 636 (IC); *NUMSA, Radebe and 34 others v Jumbo Products CC* (1991) 2 (11) SALLR 42 (IC); *NUMSA v Jumbo Products CC* (1991) 12 ILJ 1048 (IC).
\(^80\) (2001) 22 ILJ 292 (IC).
\(^81\) (2000) 20 ILJ 519 (LAC).
\(^82\) Myburgh *The Law on Strikes and Dismissals Revisited* 27.
unprocedural, non-compliant or illegal strikes during the term of the 1956 Act. The court’s unfair labour practice protection was extended to workers who failed to comply with the Act’s provisions, but whose strike conduct could be regarded as “legitimate” or acceptable. As a result of this tolerance toward illegal strikers, the balance of power invariably shifted out of court. The state also ceased prosecuting illegal strikers. If workers could strike without fear of prosecution, yet be reinstated by the court’s following dismissal, then there could not be much purpose in actively utilising the statutory mediation and arbitration structures.

The court distinguished between legal and illegal strikes in SA Chemical Workers Union v Sentrachem Ltd. An illegal wildcat strike occurred when workers broke ranks with the union in NUMSA v Fry’s Metals (Pty) Ltd and they were subsequently dismissed. A wildcat strike conducted independently of the union should constitute a form of illegal and interdictable strike. In TGWU v Dolphin’s Cartage (Pty) Ltd workers who engaged in a wildcat strike were fairly dismissed and, although not trite law, it was then not considered necessary to always consult the union before doing so.

The move away from the codification of unfair labour practices in the 1991 amendments gave the court scope to act as a law making body, and so to give content to and develop the rules regarding unfair labour practices, and it was suggested that the legislature had moved closer to establishing a right to strike and to lock-out in law.

The court has stated that, under certain circumstances, it would come to the assistance of illegal strikers. In FAWU v Rocklands Poultry (Pty) Ltd, the court stated that illegal strikers would only be assisted -

“where the strikers are able to rely on some ground of justification, such as necessity, self defence or provocation.”

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83 Ibid.
87 (1991) 2(12) SALLR 35 (IC).
88 Van der Walt and Van der Walt supra 5.
89 (1991) 2(5) SALLR 38 (IC).
90 Reference was also made to such assistance in Ndamane v Marble Lime Industries Limited (1991) 12 ILJ 148; FAWU, Hendricks v Cape Slaughtering, Flaying, Dressing Company (Pty) Ltd (1991) 2(1) SALLR 29 (IC) 31; NUM v Amcoal Collieries and Industrial Operations Ltd (1991) 2(9) SALLR 17 (IC) 19H.
The question to be resolved was whether illegal strikers were worthy of protection. In *BAWU v Palm Beach Hotel,*\(^{91}\) the court stated that

“It is a matter of public policy not to come to the assistance of illegal strikers except in situations where their conduct can be justified … [T]hey do not come to court with clean hands – they disregard the Act yet seek the protection of the Act”.

In *Tshabalala v Minister of Health*\(^{93}\) Goldstone J stated that as a matter of public policy he did not believe -

“That a court should order the reinstatement of an employee who admits or is found to have participated in an illegal strike”.

Kirk-Cohen J\(^{94}\) held that Goldstone J was not dealing with an unfair labour practice in *Tshabalala supra,* but with general principles of public policy and coming to court with clean hands, but these principles apply with equal if not greater force in casu. This view was endorsed by Daniels J in *Amcoal Collieries & Industrial Operations Ltd v NUM,*\(^{95}\) and was supported in *H van der Berg (Pty) Ltd t/a Mattress Manufacturing v SEAWUSA.*\(^{96}\)

It has been mentioned above that the approach of the Industrial Court was generally unprincipled and indicative of an absence of coherent principles, in respect of the court’s jurisprudence on the related issue of strike dismissals.\(^{97}\) Wade stated that any attempt to infer principles from the facts considered relevant by the court was a speculative exercise, providing an unsuitable basis for the regulation of future conduct by practitioners.\(^{98}\) It is submitted that this assessment has become dated over time. In respect of the Appellate Division of the Supreme Court of Appeals, a coherent jurisprudence emerged in a number of

\(^{91}\) (1988) 9 ILJ 1016 (IC) 1022.

\(^{92}\) The sentiment of assistance was echoed in *Tshabalala v Minister of Health and Welfare* (1986) 17 ILJ 168 (W) 179B-D; *Sasol Industries (Pty) Ltd v SACWU* (1990) 11 ILJ 1010 (LAC).

\(^{93}\) (1987) (1) SA 513 (W) 523B.

\(^{94}\) *Sasol Industries (Pty) Ltd v SA Chemical Workers Union* (1990) 11 ILJ 1010 (LAC) 1037G.


\(^{96}\) *H van der Berg (Pty) Ltd t/a Mattress Manufacturing v Steel, Engineering and Allied Workers Union of South Africa* (1991) 2(11) SALLR 48 (IC) 54K 55A. It was also reiterated in *H van der Berg* that the holding of disciplinary hearings prior to dismissing (illegal) strikers would not always be necessary to render their dismissals procedurally fair. This view was also expressed in *NUMSA v Haggie Rand Limited* (1991) 2(1) SALLR 29 (IC); *FAWU v Cape Slaughtering supra; NUMSA v Vital Engineering (Pty) Ltd* (1991) 2(8) SALLR 35 (IC).

\(^{97}\) Wade *The Legal Protection of Workers on Strike* (1992) 182.

\(^{98}\) Ibid 182.
judgements from *PACT v PPAWU* \(^{100}\) in 1994, until 1999. \(^{101}\) But the outcome of any determination of the lower courts remained uncertain, despite unanimity on the correct approach to adopt in considering whether dismissals of strikers constituted an unfair labour practice.

The terms “functional” and “legitimate” were used by the courts in respect of compliant strikes that adhere to the *prima facie* principles of collective bargaining. “Acceptable” strikes were not functional to collective bargaining in the defined sense but were considered to be worthy of protection. The enquiry was directed at establishing the existence of grounds that tend to excuse *prima facie* non-adherence to the principles of collective bargaining. \(^{102}\) This jurisprudence is relevant in that it lays a foundation for the handling of the “unregulated” category of strikes identified under the 1995 Act. \(^{103}\) It is evident that the 1991 amendments to the 1956 Act allowed for the development of jurisprudence contributing to strike law, and a number of principles were established and confirmed in the 1990’s. *NUM v Black Mountain Mineral Development Company (Pty) Ltd* \(^{104}\) was the final word on strike related dismissals. The 1956 Act fell short in respect of an express right to strike. Nor did it contemplate the dismissal of legal strikers, the disciplining of illegal strikers, and certain forms of strike which fell within the definition of such conduct.

Grogan \(^{105}\) stated that the legality of industrial action should not be determined only by reference to contractual obligations and possible prejudice to individuals, but also public policy considerations and the intention of the legislature. This statement holds true of the new dispensation introduced to strike law in 1995.

It can be deduced that the 1956 Act became in increasingly worker friendly, in regard to strike law. It was not always necessary to ensure a legally compliant strike in order to secure relief from the courts, and is sufficient proof that the contract based approach to strike dismissals is no longer of any relevance.

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99 The principles established are discussed at 5.12 *infra.*
100 (1994) 15 *ILJ* 65 (A).
101 Myburgh *The Law on Strikes and Dismissals* 1.
102 Wade *supra* 186.
103 Discussed in Chapter 5 *infra.*
The law should serve as a secondary force regulating the conduct of parties, accepting the primacy of collective bargaining as the desired means of resolving disputes. It should follow that strikes which are functional to collective bargaining deserve protection since it encourages trade unions to comply with the procedures or principles promoted by the Act.\textsuperscript{106} Incentives and encouragement are required in addition to the whip of compulsion.

It remains to be determined to what extent the protection of strikers is evident under the 1995 Act.

\textsuperscript{106} Brassey \textit{et al} The New Labour Law 261.
CHAPTER 4
STRIKING A BALANCE: THE CONSTITUTION

4.1 The Republic of South Africa Constitution Act 106 of 1996

The primary objects of the Constitution include giving effect to and regulating the fundamental rights conferred by section 27 of the Constitution Act, and to give effect to obligations incurred by the Republic as a member of the international labour organization.\(^\text{107}\)
The purpose of the Constitution Act includes: advancing economic development, social justice, labour peace and democratization of the workplace.

Section 39(2) of the Constitution Act requires the courts, when interpreting legislation, to “promote the spirit, purport and objects” of the Bill of Rights, which asserts the right to strike.

The 1995 Act should give effect to and regulate the fundamental and constitutionally guaranteed labour relations rights conferred by section 23 of the Constitution Act. The Constitution Act entrenches several other fundamental rights, such as freedom of association, which may impact on employment relations. The 1995 Act asserts the right to strike at section 64. The 1956 Act failed to give adequate expression to this right.

Factors compelling reform of the 1956 Act included overwhelming policy imperatives,\(^\text{108}\) and the need to bring the Labour Relations Act,\(^\text{109}\) the main statute regulating collective bargaining and industrial action, in line with the Constitution Act.\(^\text{110}\) Some of the provisions of the 1956 Act were also in conflict with, and possibly in breach of the Constitution, as well as provisions of the now repealed statutes for the education and public sectors.\(^\text{111}\)

\(^{107}\) An autonomous organ of the United Nations Charter, whose instruments, non-binding recommendations and conventions, have been ratified or adopted by SA, relating to freedom of association, such as Convention 158 of 1982 and Recommendation 166 of 1982.

\(^{108}\) Du Toit Labour Relations Law 21.

\(^{109}\) 66 of 1995.

\(^{110}\) S 8 of the Republic of South Africa Constitution Act 108 of 1996 states that the Bill of Rights applies to all law, and binds the legislature, executive and all organs of the state, which could also include institutions regarded as “public” in other spheres of law.

\(^{111}\) Le Roux and Van Niekerk The South African Law of Unfair Dismissal 323 324.
4.2 The Constitutional Right to Strike

While section 27(4) of the interim Constitution guaranteed workers the right to strike for the purpose of collective bargaining, the revised Constitution Act simply guarantees workers “the right to strike”. This is a constitutionally guaranteed labour relations right conferred by section 23(2)(c) of the Constitution Act and is given effect by section 64 and other provisions of the 1995 Act.

The right to strike is regarded as a necessary adjunct to collective bargaining, and the Constitutional Court supports this right. The employer’s right to lock-out was not granted the same status, instead, a recourse to lock-out was granted. The reasoning is that

“employers enjoy greater social and economic power than individual workers”

who need to act in concert to provide them collectively with sufficient power to bargain effectively.\(^{112}\)

Acquisition of the right to strike, and the accompanying protection, provides a strong incentive for complying with the 1995 Act.\(^{113}\) Although the constitutional right to strike is unrestricted, it is not unfettered. Duties or obligations are the corollary of rights. The 1995 Act, in giving effect to the Constitution Act has emphasized the limited circumstances under which the right to strike may be exercised. These relate to procedure, subject matter in dispute, and the persons entitled to exercise the right to strike.

It has been contended that sections 64 to 66 and 77 to the 1995 Act contain no positive rights in respect of strike action.\(^{114}\) In this regard, a comparison between chapter IV of the 1995 Act and other legislation enacted to give effect to other rights contained in the Constitution is instructive.\(^{115}\) Maserumule\(^{116}\) contends that the 1995 Act does not adequately give effect to the right to strike, but is a law of general application that limits the right to strike, in that the

\(^{112}\) Ex parte Chairperson of the Constitutional Assembly.

\(^{113}\) Du Toit Labour Relations Law 223.

\(^{114}\) Maserumule “A Perspective on Developments in Strike Law” (2001) 22 ILJ 46.


\(^{116}\) Maserumule supra 46.
chapter IV provisions of the 1995 Act mentioned supra, contains no positive rights in respect of strike action.

The result is that the jurisprudence that has developed around strike law is about enforcing the limitation of the right to strike, not on how to give effect and expression to the right to strike. In this regard, it is submitted that the judiciary can only interpret the law within the enabling provisions of the 1995 Act, which is intended to give effect to the right, which must involve limitations, since the right can clearly not be unfettered.

4.3 Tipping the Scales

Although reference was made to the right to strike in the 1956 Act, it was more appropriately described as a freedom to strike. Both the 1956 and the 1995 Labour Relations Bill protected the resort to strike or lock-out with a reasonable degree of symmetry in law. It could be argued that a shift to asymmetrical parity occurred when the drafters included a right to strike as a fundamental right and excluded a right to lock-out in the final Constitution.117 The inference is that the balance of power generally favours the employer sufficiently to deny it parity in constitutional law, and this position may prevail in collective bargaining generally.

From another perspective, the employer’s right to engage in industrial action such as a lock-out does not require further constitutional protection, since the constitution protects the employer’s rights to engage in collective bargaining and recourse to industrial action as an inherent part of this process.118

An open question exists as to whether the lock-out is itself possibly in breach of the Constitution.119 It has also been suggested that the relative powerlessness under which the striking worker labours against an aggressive employer determined to introduce changes in the workplace, is contrary to the spirit and letter of international obligations which serve to protect the right to strike.120 It could be that the blame for this must be directed at the employer, who in the nineteenth century is on record as having resorted to lock out workers

118 Creamer supra 2.
119 Du Toit Labour Relations Law 32.
with the deliberate intention of breaking up union solidarity.\textsuperscript{121} A principle established in the Industrial Court was that the freedom to threaten strike action and if necessary, to carry out that threat, is protected because, in an imperfect world, the system of collective bargaining requires it.\textsuperscript{122}

It is concluded that the scales have tipped in favour of the worker, at least at the level of constitutional guarantees. The impact thereof can be detected in judicially established labour law. In \textit{Bader Bop v NUM}\textsuperscript{123} the Labour Appeal Court preferred an interpretation of the 1995 Act’s provisions which preserve the right of minority unions to engage in a protected strike in support of a demand for organisational rights. If the right to strike is accepted as a necessary adjunct to collective bargaining, it is in the context of collective bargaining that the balance of power between employer and employee should ultimately be evaluated.

\textsuperscript{121}Brassey “The Dismissal of Strikers” (1990) 11 \textit{ILJ} 213.
\textsuperscript{122}Myburgh \textit{The Law on Strikes and Dismissals} 2.
\textsuperscript{123}\textit{Bader Pop (Pty) Ltd v National Union of Metalworkers} (2002) 23 \textit{ILJ} 104 (LAC).
CHAPTER 5
THE LABOUR RELATIONS ACT 66 OF 1995

5.1 Introduction

The preamble and section 1 to the 1995 Act state that its purpose *inter alia*, is to give effect to section 23 of the Republic of South Africa Constitution Act.\(^\text{124}\) Section 23 of the Constitution includes reference to the right to fair labour practices and at section 23(2)(c), the right to strike. Section 3 of the 1995 Act states that any person applying this Act must interpret its provisions to give effect to its primary objects, in compliance with the Constitution, and in compliance with the public international law obligations of the Republic.

Chapter IV of the 1995 Act regulates industrial action and builds upon the pre-existing strike law, while it is transformed so as to bring it in line with the Constitution, and relevant ILO standards.

5.2 Reforms and Innovations

The 1995 Act recognizes the right to engage in industrial action, at least in principle if not in practice. Perhaps the most innovating provision is the introduction of a constitutionally entrenched right to strike, accompanied by strong protection against dismissal and other acts of victimisation relative to strike action.

Key legislative changes that distinguish the 1995 Act from the 1956 Act in respect of strike law include: the introduction of advisory arbitration as a pre-strike requirement in respect of a dispute concerning a refusal to bargain; parties are relieved of their obligations to observe procedural requirements where the disputing party’s action is not in conformity with the provisions of the 1995 Act; strikers enjoy indemnity from criminal prosecution in respect of protected strike action; dismissal relating to strike participation is prohibited but dismissal for operational requirements or a fair reason relating to conduct remains; and the right to strike over a mass retrenchment dispute is introduced.

\(^{124}\) 108 of 1996.
The pre-strike conciliation procedures were streamlined. Participation in or conduct in furtherance of a strike or lock-out under certain circumstances, will deprive strikers of protection. The 1995 Act also recognises domestic dispute procedures.\textsuperscript{125}

Further innovations include the removal of the ballot as a factor affecting the legality of a strike or lock-out;\textsuperscript{126} the recognition and regulation of picketing, strikes and protest action; and the introduction of “minimum” and “maintenance” services.\textsuperscript{127} The unfair labour practice jurisdiction of the court in respect of strikes and lock-outs was abolished.

The 1995 Act makes no express provision for a duty to bargain.\textsuperscript{128} To fill the void left by the demise of the unfair labour practice jurisdiction, the right to strike is supplemented by strong constitutional guarantees for freedom of association and organisational rights.\textsuperscript{129} Collective bargaining remains to be determined by the relative strength of the parties.

Sections 64 to 77 in chapter IV of the 1995 Act contain provisions regulating the right to strike and recourse to lock-out, and prescribes the procedures\textsuperscript{130} to be complied with prior to exercising the right to strike or recourse to lock-out.\textsuperscript{131} Sections 68 and 76 respectively govern compliant strikes or lock-outs, and the legal consequences of a strike or lock-out not in compliance with the Act. Strikes and lock-outs in respect of rights disputes are generally prohibited.

By granting a regulated right to strike and a more limited “recourse” to lock-out, the Constitution Act and 1995 Act attempt to bring about a shift towards parity in the balance of power between employers and employees. Whether this is achieved in practice remains to be determined by the relative strength of the parties.

\begin{itemize}
  \item \textsuperscript{125} Du Toit \textit{Labour Relations Law} 223.
  \item \textsuperscript{126} Strike ballots are now an “internal” requirement which may include ballots conducted for workplace forum activities or to vote for the dissolution thereof. Guidelines on balloting regarding closed shop agreements were promulgated by notice 903 in GG 18926 of 1998-06-05.
  \item \textsuperscript{127} Du Toit \textit{Labour Relations Law} 223.
  \item \textsuperscript{128} Under the 1956 Act, the courts were able to establish and enforce such a duty under their general unfair labour practice jurisdiction.
  \item \textsuperscript{129} Du Toit \textit{Labour Relations Law} 224.
  \item \textsuperscript{130} 48 hours notice of the commencement of the strike or lock-out.
  \item \textsuperscript{131} These procedures were confirmed in \textit{Ceramic Industries t/a Beta Sanitaryware v National Construction, Building and Allied Workers Union (2)} (1997) 18 ILJ 399 (LC).
\end{itemize}
5.3 Definition of Strike

The strike related definitions contained at section 213 of the 1995 Act include

“ ‘Strike’ - means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or who 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 similarity to the strike definition in the 1956 Act is in respect of the partial or complete refusal to work. Overtime is specifically included. Strikes are defined to mean what they are: stoppages to demonstrate displeasure, vent grievances or support demands, by placing pressure on the employer in order to achieve collective, work-related, goals.\(^\text{132}\)

In *Simba (Pty) Ltd v FAWU*\(^\text{133}\) the Labour Appeal Court determined that a refusal to comply with an agreed but illegal system of staggered lunch breaks did not constitute a *retardation* of work amounting to a strike.\(^\text{134}\) By redefining a strike in this way, the legislature resolved the strike-stoppage dualism implicit in the earlier definition.

The meaning of a grievance and a “matter of mutual interest” is left open to interpretation, however, the grievance or dispute must relate to “a matter of mutual interest between employer and employee”. The courts have consistently interpreted the phrase “matter of mutual interest between employer and employee” in the widest possible sense.\(^\text{135}\)

In *Rand Tyres & Accessories v Industrial Council for the Motor Industry (Transvaal)*\(^\text{136}\) the court stated –

“Whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned, must be of mutual interest to them; and there can be no justification for restricting in any way powers which the Legislature has been at the greatest pains to frame in the widest possible language.”

\(^\text{132}\) Du Toit *Labour Relations Law* 232.  
\(^\text{133}\) (1997) 18 *ILJ* 558 (LAC).  
\(^\text{134}\) The work arrangement was in contravention of the Basic Conditions of Employment Act 3 of 1983.  
\(^\text{135}\) Du Toit *Labour Relations Law* 232.  
\(^\text{136}\) 1941 TPD 108.
Du Toit\textsuperscript{137} suggests that the comprehensive list of matters specified in section 24\textsuperscript{138} of the 1956 Act is likely to constitute the minimum core of matters contemplated. Further guidance could be obtained from the \textit{British Trade Union and Labour Relations Act} of 1974.\textsuperscript{139}

It is necessary for the court to establish what a strike is about, in order to determine the real issue in dispute and so confirm whether the court has jurisdiction. At section 213

\begin{quote}
‘issue in dispute’ in relation to a strike or lock-out, means the demand, grievance, or dispute that forms the subject matter of the strike or lock-out.
’dispute’ includes ‘an alleged dispute’ ”.
\end{quote}

The forms of industrial action acknowledged, whether protected or not, include the partial or complete primary strike, secondary strike, picketing, protest action, and the employer response, the lock-out.

\textbf{5.4 Definition of Lock-out}

A lock-out is defined as

\begin{quote}
‘the exclusion of employees from the employer’s workplace, by an employer, the purpose of which is to compel employees to accept a demand in respect of any matter of mutual interest’.
\end{quote}

This definition applies whether or not the employer breaches the employee’s contracts in the course of or for the purpose of the exclusion.\textsuperscript{141} The lock-out is the employer’s recourse, used either defensively in response to strike action or offensively, as an economic weapon during

\textsuperscript{137}Du Toit \textit{Labour Relations Law} 232.

\textsuperscript{138}That is, matters which could be included in an industrial council agreement.

\textsuperscript{139}Which defines a “trade dispute” as a dispute between workers and their employer relating wholly or mainly to one of the following:

\begin{itemize}
\item[(a)] terms and conditions of employment, or the physical work conditions;
\item[(b)] engagement or termination or suspension of employment or the duties of employment;
\item[(c)] allocation of work or the duties of employment as between workers or groups of workers;
\item[(d)] matters of discipline;
\item[(e)] the membership or non-membership of a trade union;
\item[(f)] facilities for officials of trade unions; and
\item[(g)] machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including recognition of a union by an employer or employers’ association.
\end{itemize}

\textsuperscript{140}A “matter of mutual interest” can be interpreted widely, and could be extended to include any issue affecting the interests of employers and employees.

\textsuperscript{141}Grogan \textit{Workplace Law} 377.
the collective bargaining process. The use of replacement labour is prohibited in an offensive lock out.\textsuperscript{142} The lock-out must be implemented to achieve a legitimate purpose.

A lock-out is a collective action: an employer cannot lock out an individual employee.\textsuperscript{143} To enjoy protection, the employer should avoid migrating a dispute from the zone of collective bargaining to the zone of rights. In \textit{FAWU v Heidelberg Spar}\textsuperscript{144} the union sought to interdict an unprotected lock-out, since the employer had imposed further conditions upon the return of workers from a protected strike, and refused to accept their tender of services. In \textit{MWASA v Independent Newspapers (Pty) Ltd}\textsuperscript{145} it was held that the employer was not obliged to institute a lock-out to compel employees to accept unilateral amendments to their terms and conditions of employment as an alternative to retrenchment. In contrast, the employer successfully instituted a protected lock-out of workers who refused to work overtime in \textit{SACCAWU v Rea Sebetsa}.\textsuperscript{146}

The lock-out must comply with the statutory limitations in order to be protected, failing which it endures the consequences of an unprotected lock-out. Employees who are unlawfully locked out can seek restraining orders against the employer or claim compensation for loss by way of the provisions of section 68. In \textit{SACTWU v Stuttafords}\textsuperscript{147} an unprotected lock-out occurred in an offensive lock-out situation. In \textit{3M SA (Pty) Ltd v SACCAWU}\textsuperscript{148} the employer took an unprotected lock-out on appeal. The workers had rendered defective service, and the Labour Appeal Court held that on this basis, it was valid to lock them out and withhold payment of their wages. An employer seeking to interdict unlawful behaviour by strikers during a strike and defensive lock-out may have ulterior motives.\textsuperscript{149} In respect of dismissal of locked out workers, it was held in \textit{NUM v Via Doro Manufacturing Ltd}\textsuperscript{150} that it did not behove the employer to dismiss for operational reasons during an unprotected lock-out.\textsuperscript{151}

\textsuperscript{142} National Union of Technikon Employees of SA v Technikon SA (2000) 5 LLD 407 (LC).
\textsuperscript{143} Schoeman v Samsung Electronics SA (Pty) Ltd (1997) 18 ILJ 1058 (LC). The same exclusion should apply to one-person strikes.
\textsuperscript{144} (2000) 5 Labour Law Digest 291 (LC).
\textsuperscript{145} (2002) 5 BLLR 452 (LC). Similarly in \textit{NUCCA WU v Transnet t/a Portnet} (2000) 5 LLD 568 (LC) it was not permissible to unilaterally vary contracts of day workers and deny them employment, which in casu constituted an unprotected lock-out.
\textsuperscript{146} (2000) 5 LLD 468 (LC).
\textsuperscript{147} (1999) 20 ILJ 2692 (LC).
\textsuperscript{148} (2001) 5 BLLR 483 (LAC).
\textsuperscript{149} Midlands Pine Products (Pty) Ltd v CEPPWAWU (2002) 23 ILJ 2276 (LAC).
\textsuperscript{150} (2000) 5 LLD 306 (LC).
\textsuperscript{151} The employer had locked out employees who had withheld service due to non-payment of wages by the employer.
5.5 Protected Strikes

Protected strikes or lock-outs are those as defined which comply with the provisions of sections 64, 65 and 67 at Chapter IV to the 1995 Act, which imposes procedural requirements and substantive limitations on the use of strikes. For a strike to be proper, the stoppage should comply with some of the following criteria::

(i) there should be a work stoppage;
(ii) by a number of employees;
(iii) for the purpose of remedying a grievance or resolving a dispute;
(iv) the issue in dispute must be a matter of mutual interest between employer and employer.

The procedural requirements are a prelude to a protected strike, and this includes conciliation, notice of commencement of strike or lock-out, adherence to time periods, and advisory arbitration where applicable, prior to protected strike action.

In terms of section 64(1)(a), the issue in dispute is referred either to a bargaining council or to the CCMA for conciliation. Failing settlement, a certificate of outcome is issued, or a period of 30 days from the date of referral of the dispute must elapse.

At least 48 hours written notice of commencement of strike must be given to the other party in terms of section 64(1)(b). Striking is permissible only over that issue, and notice of proposed strike should be given to the employer. Discharge of the said conciliation and notice requirements by either party entitles the other party to take industrial action over the dispute.

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152 Grogan Workplace Law 327.
153 Commission for Conciliation, Mediation and Arbitration.
154 Where the state is the employer the required notice period in terms of s 64(1)(d) is 7 days.
155 If the employer is a member of an employer’s organisation that is a party to the dispute, s 64(b)(ii) requires that notice be given to that employer’s organisation. If the issue in dispute relates to a collective agreement to be concluded in a bargaining council, s 64(1)(b)(i) stipulates that such notice must be given to that council.
Advisory arbitration is required if the issue in dispute concerns a refusal to bargain. Section 64(2) requires that a commissioner must make an advisory award before notice of the proposed industrial action is given in terms of section 64(1)(b) or (c). In terms of section 64(3), parties may dispense with the statutory procedures in section 64(1) and (2) in the following circumstances –

“(a) the parties to the dispute are members of a bargaining council, which has dealt with that dispute in accordance with its constitution;
(b) the strike conforms with procedures contained in a collective agreement;
(c) the employees strike in response to a lock-out by their employer that does not comply with the provisions of the Act;
(d) the employer locks out its employees in response to their taking part in a strike that does not conform with the provisions of the Act; or
(e) the employer fails to comply with a status quo notice issued by an employee or trade union in terms of s 64(3)(e).”

In the event of an employer failing to comply with a “status quo” notice in terms of section 64(3)(e), the employees may dispense with statutory procedures and immediately go out on strike, or they or their trade union can apply for an interdict in the Labour Court to enforce compliance.

The section 65 substantive limitations are similar to those at section 65 of the 1956 Act and include

“(a) where that person is bound by a collective agreement prohibiting a strike or lock-out in respect of the issue in dispute or an agreement to refer the dispute to arbitration;
(b) the issue in dispute is justiciable (one that a party has the right to refer to arbitration or the Labour Court for adjudication);
(c) where that person is engaged in an essential or maintenance service;
(d) where that person is bound by an arbitration award, collective agreement, ministerial determination or a determination made in terms of the Basic Conditions of Employment Act 75 of 1997 regulating the disputed issue;

156 In terms of s 135(1)(c).
157 The extent of protection under s 64(4) depends on the meaning of the phrase “unilateral change to terms and conditions of employment”. See Staff Association for the Motor and Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Ltd (1997) 19 ILJ 374 (LC) a unilateral change is one made without the consent of the employees. On this approach, it will not assist an employer to claim that changes were introduced following consultation or negotiation if, in the final analysis, the employer was unable to gain the consent of the employees.
158 To comply within the 48 hour period contemplated in s 64(5).
159 This notice replaced the industrial court’s power to make status quo orders under the 1956 Act, and regulates a dispute concerning a unilateral change to terms and conditions of employment referred to a council or the CCMA.
160 S 158(1)(b) read with s 64(5) of the 1995 Act.
161 Despite s 65(1)(c), s 65(2)(b) concerns disputes about organizational rights conferred under Ch III and enables employees to strike to enforce their right to exercise certain of these arbitrable rights. If a trade union gives notice of its intention to strike over such a matter, it forfeits the right to refer the matter to arbitration for 12 months from the date of notice.
where employees engage in work stoppages not covered by the definition of ‘strike’ or in protest action which does not relate to the socio-economic interest of employees, or in contravention or contempt of an order by the Labour Court regarding the duration or form of the strike.”

With regard to agreements requiring referral of a dispute to arbitration, the 1995 Act does not limit the issues that may be reserved for arbitration. An employee may therefore agree to refer both rights and interest disputes to arbitration and will, for the duration of the agreement, be prohibited from striking in respect of such dispute.

The distinction between rights and interest disputes and has been tightened up considerably. Section 65(1)(c) of the 1995 Act provides that, subject to exceptions, no person may participate in a strike or contemplated strike action, if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court—generally being rights disputes. If the right to refer a dispute to arbitration is in terms of another law and not the 1995 Act, then a strike or lock-out will be permissible.

The section 65 limitations on rights disputes gives expression to a widely accepted principle that the purpose of a strike is not to enforce existing rights but to create them. A legislative objective is also observed, namely, to reduce the incidence of strikes.

As regards dismissal for operational requirements of workers engaged in a protected strike, the Labour Appeal Court noted in SACWU v Afrox Ltd that the Constitution does not explicitly recognize a right to dismiss legally striking workers, although the employers’ right to dismiss for misconduct or operational requirements is retained. The dismissal of strikers is subject to the fairness requirement and if the strike is found to be the main or dominant reason for the dismissal, the dismissal is automatically unfair.

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162 Grogan Workplace Law 340.
163 Du Toit Labour Relations Law 244.
164 Rights disputes are about the interpretation or application of existing rights. Since they involve claims of rights, they are usually regarded as being more amenable to third party arbitration or adjudication. Disputes of interest arise out of the failure to agree on new terms & conditions of employment - they are open-ended and rooted in the exercise of power.
165 S 65(2)(a) concerning disputes about organizational rights conferred under Chapter III; s 189A(2)(b) concerning strikes in response to operational requirements massa dismissals.
166 The result is that certain employment disputes are amenable to adjudication and to industrial action.
168 Du Toit Labour Relations Law 245.
170 S 67(5).
5.6 Unprotected Strikes

The 1995 Act provides incentives such as protection for compliant strike action,\(^{171}\) in an effort to reduce the incidence of strikes. It does not prescribe criminal sanctions for unprotected strikes or protest action that does not comply with its provisions, save for instances such as contempt of court proceedings.\(^{172}\)

The remedies in respect of non-conforming or unprotected strike action include:

(i) an application to the Labour Court to interdict and restrain unlawful conduct;\(^{173}\)

(ii) a claim for compensation in respect of loss attributable to the strike or lock-out or related conduct;\(^{174}\)

(iii) to institute disciplinary action short of dismissal;

(iv) the right to dismiss an employee for participation in a strike, or conduct in contemplation or furtherance of a strike not conforming with the 1995 Act;

(v) to lock-out striking employees.

In *Rustenburg Platinum v Mouthpiece Workers Union*\(^{175}\) criteria for awarding and quantifying compensation were applied, and it was held that claims for losses must be based on loss from the strike itself, not for losses incurred by strikers conduct in furtherance of the strike.\(^{176}\)

In *County Fair Foods v FAWU*\(^{177}\) the employer applied to interdict a strike by the union on the basis that it was unprotected, since they had failed to follow the procedure in a collective

\(^{171}\) Such as protection from dismissal relating to participation in strike action and civil action.

\(^{172}\) Grogan *Workplace Law* 331.

\(^{173}\) S 68(1)(a).

\(^{174}\) S 68(1)(b).

\(^{175}\) (2002) 1 BLLR 84 (LC).

\(^{176}\) S 68 was subsequently amended in 2002 to include claims relating to ‘conduct’ in furtherance of a strike or lock-out.

\(^{177}\) (2001) 22 ILJ 1103 (LAC); *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA* (1998) 19 ILJ 279 (LC).
agreement. It was held that the union could elect to follow the collective agreement procedure or the statutory procedure in section 64(1). It could be argued that this violates the doctrine of *pacta sunt servanda*.

In *Business South Africa v COSATU*\(^{178}\) the view was expressed that in order to gain protection, the 1995 Act exacts the price of responsibility in that strikers must adhere to the statutory requirements for such protection. A concern has been expressed that the courts may be more concerned with the disruptive nature of strikes, which leads to the question whether the right to strike, limited by statute, is not in fact a privilege that must not be abused.\(^{179}\)

It was evident that the court’s unfair labour practice jurisdiction under the 1956 Act provided illegal strikers with some protection, and it appears that once more, the law prefers the non-punitive treatment of non-conforming strike conduct. The decisions in *County Fair Foods v FAWU* and *Modise v Steve’s Spar Blackheath*\(^{180}\) lend support to this observation.

The Labour Appeal Court noted in *SACWU v Afrox Ltd*\(^{181}\) that judgments decided under the 1956 Act, although relevant, should be treated with caution, since the right to strike was entrenched in the Constitution. The Constitution does not explicitly recognize a right to dismiss legally striking workers, although the employers’ right to dismiss for operational requirements or conduct is retained.

It has been suggested in *FAWU v Earlybird Farm (Pty) Ltd*\(^{182}\) that in addition to protected and unprotected strikes mentioned *supra*, a third possible category is the unregulated strike. Strikes in terms of section 65 issues are prohibited, but other strikes are protected if they comply with the provisions of chapter IV as a whole. It raises the question as to whether the 1995 Act recognizes a third category, unregulated strike action, which is not protected, not prohibited, yet is not unlawful.\(^{183}\) In *FAWU v Earlybird Farm*, the strike by drivers was unprocedural, in that it failed to satisfy the dependent conditions upon which a right to strike

\(^{178}\) (1997) 18 ILJ 474 (LAC) 5131J; 5171J.
\(^{179}\) Maserumule “A Perspective on Developments in Strike Law” 47.
\(^{180}\) (2000) 5 BLLR 496 (LAC).
\(^{181}\) (1999) 10 BLLR 1005 (LAC).
\(^{182}\) (2003) 1 BLLR 20 (LC).
\(^{183}\) Brassey *Commentary on the Labour Relations Act* A4: 3.
are conferred by section 64. Brassey AJ\textsuperscript{184} stated that it by no means follows that said strike was prohibited and so unlawful

"Section 64 contains no such prohibitions: it confers rights. Section 65, on the other hand, does create a set of prohibitions and they can be enforced . . [O]n this reasoning strikes fall into one of three categories: those that are protected; those that are prohibited; and those that are neither."\textsuperscript{185}

Striking employees are protected against dismissal in terms of section 67(4) if they comply with the section 64 requirements and other provisions in chapter IV.\textsuperscript{186} Employees dismissed for participating in a protected strike retain their employee status, for such dismissal will be automatically unfair.\textsuperscript{187} The unprotected striker is taken beyond the purview of the protected right to strike on the basis of misconduct, and is also exposed to civil claims by the employer. However unprotected strikers are subject to the protection of worker rights as stated in section 185 to the 1995 Act, and are subject to item 6(1) and (2) of the code of good practice: dismissal, that is, unless termination is effected on the basis of operational requirements or other conduct. The principle re-affirmed in \textit{TGWU v Coin Security Group (Pty) Ltd}\textsuperscript{188} is that participation in an unprotected strike is not sufficient to justify the dismissal of strikers.

Certain categories of unprotected strikes are not unlawful, and should therefore be managed according to a fair procedure. This is a basis is provided on which to approach the issue of unregulated strikes – those relating to issues that were brought before the court erroneously, or which are not specifically prohibited by section 65. It is submitted that constitutional imperatives may demand such an approach.

5.7 Secondary Strikes

The three preconditions for a successful secondary strike as contemplated in section 66 of the 1995 Act are:

\textsuperscript{184}25A.
\textsuperscript{185}On the facts the court found the dismissals to be procedurally unfair, and ordered the reinstatement of the dismissed workers, who went out on strike in the erroneous belief that they were employed at another plant. They were also, among others, not subjected to individuated and proper pre-dismissal hearings.
\textsuperscript{186}Brassey \textit{Commentary on the Labour Relations Act A4}: 4.
\textsuperscript{187}S 187(1)(a).
\textsuperscript{188}(2001) 4 BLLR 458 (LC).
(i) the primary strike must itself be protected, that is, it must comply with the requirements of sections 64 and 65 and chapter IV provisions;

(ii) seven days notice of the strike must be given to the secondary employer or employer’s organization;

(iii) the nature and extent of the secondary strike must be reasonable, in relation to its effect on the business of the primary employers - the proportionality requirement referred to in section 66(2)(c).\(^{189}\)

The first two conditions are procedure related, but “reasonable” in this context appears to focus on the impact the secondary strike will have on the business of the primary employer - the effect that the strike has on the secondary employer is not of importance.\(^{190}\) According to Mischke\(^{191}\) an important guideline that may be obtained from the jurisprudence of the German Federal Labour Court is that proportionality, in the context of strike action, can be used as a concept in protecting the interests of collective bargaining. The court has confirmed that there must be some link or nexus between the primary and secondary employer.\(^{192}\) This entails the first part of the inquiry. The fact that the secondary employer will incur heavy losses is not relevant.

In *Samancor v National Union of Metalworkers of South Africa*\(^ {193}\) the court appeared to identify and consider three elements in the determination of reasonableness of the strike.\(^ {194}\) Only when there is some form of causal link of harm,\(^ {195}\) is the secondary strike itself legitimate or proportional.\(^ {196}\)

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\(^{191}\) *Ibid* 36.

\(^{192}\) Sealy of South Africa (Pty) Ltd v PPWAWU (1997) 18 ILJ 392(LC); Billiton Aluminium SA Ltd v NUMSA (2002) 1 BLLR 38(LC); Afrox Ltd v SACWU (1997) 18 ILJ 399 (LC).

\(^ {193}\) (1999) 20 ILJ 2941 (LC).

\(^{194}\) These were: the harm done by the strike; the effect that the strike may have on the business of the secondary employer; and the nature and extent of the strike.

\(^{195}\) The secondary strike harming the business of the secondary and the primary employer.

\(^{196}\) Mischke *supra* 34.
The nexus identified between employers in *Sealy* does not exhaust the investigation as to the reasonableness of the secondary strike. It also remains to be determined whether the secondary strike will have an impact on the collective bargaining process.

### 5.8 Picketing

Section 69 provides for a broadly defined right to picket. In the event of a breach of either a CCMA – engineered agreement or the picketing rules, the Labour Court may intervene and grant equitable orders. The 1995 Act is supplemented by a code of good practice on picketing. The code contains a number of guidelines for ensuring that a picket proceeds peacefully.

Regarding the limits of a picket, it was held in *Picardi Hotels Ltd v FGWU* that employee conduct in seeking to dissuade customers from purchasing from the employer by chanting, singing and dancing did not exceed the bounds of a right to picket peacefully. In *Lomati Mill Barberton (a division of Sappi Timber Industries) v PPWAWU* the court declined to interdict a breach of strike and picketing rules since the strike was protected by the section 67(2) immunity.

### 5.9 Protest Action

The 1995 Act recognizes protest action, previously known as stayaways, as a peculiar socio-economic form of strike, which differs in the sense that it might not be aimed directly at the employer or other employers in general. Under the 1956 Act, protest action was regarded as collective absenteeism, resulting from calls to commemorate events, or in protest against government inaction or policy.

Protest action is defined at section 213 to the 1995 Act as -

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199 (1999) 6 BLLR 601 (LC) application in terms of s 158 (1)(a).
201 Grogan *Workplace Law* 330.
“the partial or concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of a strike”.

Section 77 of the 1995 Act gives statutory recognition to such protest action only when it is aimed at promoting or defending the said interests of workers, and has its origins in international labour organisation jurisprudence. The courts have indicated that the meaning of “socio-economic interests of workers” is not to be interpreted restrictively. Pre-authorization of any protest action by a union or trade union federation is required, on fourteen days prior notice to NEDLAC before commencement of the action. The Labour Court has jurisdiction to regulate the exercise of this right in accordance with the principles of proportionality.

In *Business South Africa v COSATU* two issues of importance were raised in regard to the interpretation of provisions of the 1995 Act

(i) The notion of responsibility - to gain the benefit of protection the 1995 Act requires that employees who take part in strikes or protest action must adhere to the statutory requirements;

(ii) That the right to take part in industrial action is not necessarily an expression of the constitutional right to strike.

The majority in the judgement *supra* saw protest action as disruptive and prejudicial to economic development, and that the regulating provisions “were not necessarily to be interpreted in such a manner as to restrict the right as little as possible”.

However it is evident from the judgement in *Government of the Western Cape Province v COSATU* that the court will be slow to interfere with protest action if the sponsors have complied with the stated procedures. However in *Business South Africa* the Labour Appeal Court adopted a narrowly interpreted approach to the scope of the right to engage in protest

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202 Grogan *supra* 330.
205 (1997) 5 BLLR 511 (LAC).
action. The extent of the right involves the weighing up of that right and taking not only the right of employees and employers into account, but also the interests of the public at large and the effect on the national economy. In the circumstances, this limitation on protest action is apposite in view of the added responsibility that goes with staging protest action.

5.10 Operational Requirement Strikes

Section 189 to the 1995 Act sets out the procedure an employer must follow when it contemplates retrenching employees. The 2002 amendments provided a new section 189A,\(^{207}\) which allows employees, in the defined circumstances\(^{208}\) to strike in order to persuade the employer to avoid retrenchments. Section 198A(2)\(^{209}\) requires an employer contemplating retrenchment to give due notice, as dealt with in section 189. The CCMA or an accredited agency may also be requested to assist in a facilitation process. If this process does not succeed after a 60 day facilitation window is concluded and no consensus is achieved, the employer may give notice of termination. The employees can also give notice of intention to strike in terms of section 64(1)(b) or (d), or to refer a dispute about whether there is a fair reason for the retrenchment dismissal to the Labour Court. In response to the notice of strike, the employer is able to issue notice of lock-out.

If neither party selected facilitation, the employer may give 30 days notice of termination.\(^{210}\) The employees or their registered trade union may then choose to give notice of intention to strike, or to refer a dispute about the substantive fairness of the retrenchment dismissal to the Labour Court for adjudication. The referral to the Labour Court is withdrawn should the employees elect to revert to strike action. The performance of the facilitators who have acted for the CCMA or accredited agencies is assumed to be satisfactory, since there are no reports indicating the contrary in case law reviewed.

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\(^{207}\) Requires the parties facing possible mass retrenchments to engage in meaningful joint consensus-seeking process.

\(^{208}\) Larger employers who are contemplating large scale retrenchments.

\(^{209}\) Applicable to employers who employ 50 or more employees or experienced defined number of retrenchments in a twelve month period.

\(^{210}\) Grogan *Workplace Law* 216.
5.11 Essential and Maintenance Services

An Essential Services Committee is established by the Minister of Labour, in terms of section 70 to the 1995 Act. The committee may conduct investigations and designate essential and maintenance services, in whole or in part. The purpose is to counter what was initially experienced as public sector militancy. The services deemed essential vary between different legal systems, but the intended purpose is to counter the dislocation of particular services.

Section 75 governs maintenance services, defined as those services, the interruption of which has the effect of material destruction to any working area, plant or machinery. Application must be made to the Essential Services Committee or may be designated by agreement. The employee’s right to strike is compromised in favor of compulsory arbitration, which has its origins in earlier legislation. A prescribed right to employ replacement labour is set out in section 76. It follows that employers may apply to have certain services registered as maintenance or essential services, thus removing the threat of industrial action on operations.

5.12 The Approach of the Courts

Approaches that have been utilised by the courts in adjudicating strike dismissals and strike disputes are discussed. The principles established by the courts under the 1956 Act are summarised and three strike law related issues are discussed, namely, issue in dispute, the notice of strike and the strike ultimatum.

Under the 1956 Act, the earliest approach in use was the contract-based approach, that an economic strike was a manifestation of a breach of contract, with some variation on the application of common law rules. The fact that a strike was legal did not mean that strikers were protected from dismissal. The preferred view in *Seven Abel cc t/a The Crest Hotel v HARWU* was that the employer accepts the employee’s repudiation since they, by striking, dismiss themselves. This is an outdated approach, in view of the diminishing importance of

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211 After consulting NEDLAC and the Minister of Public Service and Administration.
214 Grogan *Workplace Law* 340.
contractual principles, in deference to public policy and equity considerations, the purpose and functionality of the strike, and the need to minimize harm by linking the strike to collective bargaining. It was seminal that in *SACWU v Sasol Industries (Pty) Ltd*, the court recorded an aversion to the contractual approach and made a statement on the developing strike law where it said the purpose of the economic strike

"is not to repudiate or cancel the contract but to induce the employer to vary one or more of its terms".

Rather, the fault lay with the employer who, by ordering a dismissal in response to strike action, repudiates the employment contract.

The holistic basket of factors approach has its origins in *Raad Van Mynvakbonde*, and these have been referred to by various proponents and critics. This approach produced a “complex, contradictory jurisprudence” but is significance in that the Industrial Court for the first time accepted that strikers should be protected from dismissal. Strikers enjoyed a “freedom” to strike, provided they complied with section 65 of the 1956 Act.

The functional approach is considered to be central to the policy considerations underlying the 1995 Act. It acknowledges that protection against dismissal is justified insofar as the strike remains conducive to collective bargaining. The employer’s economic circumstances and functionality are two determinative factors.

This approach is an attempt to define when a strike may be legitimate, acceptable or functional to collective bargaining, but legality is not always a guarantee of functionality.

The 1956 Act distinguished between the lawfulness or legality of the strike on the one part, and the fairness of the strike on the other part. The effect was to shift the enquiry from

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218 (1989) 10 ILJ 1031 (IC) 1054D.
219 *Raad van Mynvakbonde v Die Kamer van Mynwese* (1994) 5 ILJ 344 (IC).
strictly legal considerations, based on a common law approach to strikes, to aspects of equity, and whether a party’s conduct was conducive to sound industrial relations.\(^{225}\)

A number of principles were established in a line of judgements of the appellate division, Labour Appeal Court and the Industrial Court until 1999, but the outcome of any determination remained uncertain:\(^{226}\)

> “Collective bargaining with respect to matters of mutual interest is the preferred means of resolving labour disputes.

> The freedom to threaten to strike, and if necessary, to carry out the threat, is protected because the system of collective bargaining requires it.

> The employer’s ultimate counter weapon in the face of strike action is dismissal. An employee may not be dismissed merely for striking.”

It would be anomalous if workers are dismissed for striking in a legally compliant manner, when in terms of the 1956 Act they are granted immunity from penal and civil sanctions.\(^{227}\) In SACWU \textit{v} Varcoal Paints (Pty) Ltd \(^{228}\) it was also held that dismissal following an illegal strike does not preclude the court from examining the fairness of the dismissals.

The strike weapon had to be used with circumspection, discretion and respect for the rights of others and was to be used as a last resort and not as an indiscriminate sanction in the collective bargaining process.\(^{229}\) To ignore this ethos could cause strikers to lose the protection offered by the courts.\(^{230}\)

A point is reached in every strike, lawful or unlawful, where the employer will be justified in dismissing strikers, not for striking, but for prolonged absenteeism.

This view was expressed in NUMSA \textit{v} Vetsak Cooperative \textit{Ltd},\(^{231}\) in which event the employer “in fairness” is justified in terminating the employment relationship\(^{232}\) of striking

\(^{225}\) Rycroft and Jordaan (1992) 273.

\(^{226}\) Myburgh \textit{The Law on Strikes and Dismissals} 2 3.

\(^{227}\) SACWU \textit{v} Sentrachem \textit{Ltd} (1988) 9 \textit{ILJ} 410 (IC).

\(^{228}\) (1991) (2) (12) SALLR 46 (IC).

\(^{229}\) BAWU \textit{v} Edward Hotel (1989) 10 \textit{ILJ} 357 (IC) 371D.

\(^{230}\) Rycroft and Jordaan (1992) 274.

\(^{231}\) (1996) 6 BLLR 697 (AD).

\(^{232}\) As distinguished from the contract of employment.
employees. This view was confirmed in *NUM v Black Mountain Mineral Development Company (Pty) Ltd.*

Fairness involved a value and moral judgement, and among the relevant factors was

(i) there being no prospect of the dispute being resolved;

(ii) the employer suffering genuine economic hardship;

(iii) the ultimatum did not call on employees to accept the employer’s offer; and

(iv) the employees could outlast the employer.

The requirement of a fair procedure is met by giving of a reasonable ultimatum. Depending on the facts, it may be fair to dismiss without issuing an ultimatum.

A problematic area involved assessing at what point the fairness of a lawful strike became unfair. In *FBWU v Hercules Cold Storage (Pty) Ltd* the court suggested that any further justification for the strike ceased as soon as the strike achieved its object. Protection has been extended to illegal strikers where there was an acceptable reason for not making use of collective bargaining mechanisms and where there was compliance with genuine collective bargaining. The 1956 Act did not expressly or by necessary implication preclude the granting of relief to illegal strikers. In *Elm Street* and other cases, the court referred to the following factors in assessing acceptability or legitimacy of strike action

(i) whether there was an attempt to settle the dispute prior to the strike;

(ii) the parties approach and attitude during settlement negotiations;

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234 (1997) 18 *ILJ* 439 (SCA) 442G. The parity principle was also raised in regard to the subsequent dismissal of one group of strikers and not another group, who were not properly issued with an ultimatum.
235 See discussion infra.
237 *NUMSA v Elm Street Plastics t/a ADV Plastics* (1989) 10 *ILJ* 328 (IC) 335 B.
238 *Sasol Industries (Pty) Ltd v SA Chemical Workers Union* (1990) 11 *ILJ* 1011 (LAC).
239 *BAWU v Palm Beach Hotel* (1988) 9 *ILJ* 1016 (IC) 1023.
(iii) the nature and duration of the strike; and

(iv) the conduct of workers during the strike.\textsuperscript{240}

Where the dismissal of workers striking lawfully under the 1956 Act was declared to be unfair, the court made orders for reinstatement with or without retrospective effect, for compensation, compelling the employer to commence \textit{bona fide} negotiations, and ordering that strikers and non-strikers receive equal treatment in respect of wages.\textsuperscript{241}

The 1995 Act distinguishes between protected and unprotected strikes and section 65 limits the ambit of strikes mainly to interest disputes. To determine whether industrial action is affected by the section 65 proscription, the courts must first identify the issue in dispute as contemplated in section 65(1)(c). Unprotected strikes encompass rights disputes.\textsuperscript{242} The delineation between rights and interest disputes is often less than perfect,\textsuperscript{243} however there are also limits to the extent which a party can stretch the family of strikeable disputes.\textsuperscript{244}

The issue in dispute has been the subject of contention in more than one matter, in part due to the court’s differing approaches, and attempts by parties to change the nature of a dispute by calling it an interest dispute.

In \textit{Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union},\textsuperscript{245} the strikers had referred two disputes to the CCMA - one concerned non-payment during an unprotected strike; another involved a complaint of victimization of shop stewards by managers, coupled with a demand for the dismissal of the managers. The first dispute was decided in favour of the employer.\textsuperscript{246} The Labour Court found that victimization was neither justiciable nor arbitrable, hence a permissible reason to strike. This was taken on appeal before the Labour Appeal Court,\textsuperscript{247} which held that the real dispute was not to be

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{240}] Rycroft and Jordaan (1992) 213.
\item[\textsuperscript{241}] Rycroft and Jordaan \textit{supra} 24.
\item[\textsuperscript{242}] Which are essentially justiciable or arbitrable.
\item[\textsuperscript{243}] Grogan \textit{Workplace Law} 35.
\item[\textsuperscript{244}] Grogan \textit{supra} 337.
\item[\textsuperscript{245}] (1) (1997) 18 \textit{ILJ} 716 (LC).
\item[\textsuperscript{246}] Landman decided that a dispute over non-payment of wages could be adjudicated by the labour court under s 158(1)(a)(iii) of the 1995 Act and therefore not a strikeable dispute.
\item[\textsuperscript{247}] \textit{Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union} (2) (1997) 18 \textit{ILJ} 671 (LAC).
\end{enumerate}
\end{footnotesize}
characterized by the remedy sought by the strikers, but by the grievance or underlying complaint that gave rise to the demand for the remedy. The demand flowed from an allegation of victimization, which was justiciable and so fell within section 65(1)(c). However the Labour Appeal Court’s approach in Ceramics should not be construed as implying that when a dispute involves a complaint coupled with a demand, the true issue in dispute must necessarily be sought in the complaint. The court did not follow this prescription in Fidelity Guards Holdings v Professional Transport Union,248 instead it concentrated on the demand. The Labour Appeal Court held in Coin Security Group (Pty) Ltd v Adams249 that there was no real difference in the two approaches adopted supra, in that in each the court looked at the substance of the dispute and not its form.

As Zondo J indicated in Monyela v Bruce Jacobs t/a LV Construction250 participation in a strike or lock-out is prohibited only if the issue in dispute is arbitrable or adjudicable in terms of the 1995 Act. However, this fact does not dispose of the question whether strikes or lock-outs are permissible in respect of that dispute. Problems can also arise where the issue in dispute undergoes some kind of transformation, intentionally or otherwise, while subject to statutory conciliation.251

The courts have, in a number of cases, been called upon to measure compliance with the strike notice provision.252 It is insufficient to merely state in a notice that the strike will commence at some later time.253 In Ceramic Industries Ltd t/a Betta Sanitaryware v NCBAWU254 the union served notice on the employer informing it that “a strike shall start at any time after 48 hours from the date of this notice”. The Labour Appeal Court held that the primary purpose of the strike notice is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence. Similarly, in respect of notice of lock-out, it was held in CAWU v Modern Concrete Works255 that the notice was defective in that it did not indicate when the lock-out would commence.

250 (1998) 19 ILJ 75 (LC).
251 Brassey Commentary on the Labour Relations Act A9:24.
252 S 64(1) (b) or (d). At least 48 hours notice of the commencement of the strike should be served on the employer, relevant bargaining council or employers organization.
253 Grogan Workplace Law 332.
The Labour Court took a more liberal view on compliance in *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA*. The question was whether the employees had waived their right to strike in that they failed to commence their strike on the day specified in the notice, only doing so some three days later. It was held that the employees were not obliged to commence striking at the stipulated time, and that the right to strike acquired by the giving of notice is not waived if the strike commences within a reasonable period after the stipulated time.

The issuing of a fair ultimatum, generally directed to illegal strikers, was one of the judicially established rules made under the 1956 Act, and the requirement was repeated in various decisions of the courts. In the public service, the now repealed Public Service Labour Relations Act made specific provision for the issuing of an ultimatum a call representations before the decision to dismiss was taken. The infusion of the audi alteram partem rule into labour law was the result of the adoption of the principles of natural justice from administrative law. The requirement to issue an ultimatum was infused in case law as a result of this association with the rules of natural justice. In terms of the 1995 Act, it is now required procedure, as set out in item 6 of the code of good practice: dismissal (“the code”) at schedule 8 to the Act.

The practice of issuing an ultimatum acknowledges the obligation of an employer to do more than that required of it at common law. It is also a final opportunity for employees to review the means adopted to resolve the dispute, and to take an informed decision. It simultaneously imposes a moral restraint on the employer, limiting dismissal to a last resort measure.

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257 Grogan *Workplace Law* 332.
258 *Plascon Inks and Packaging Coatings (Pty) Ltd v Ngcobo* (1997) 18 *ILJ* 32(7) (LAC) 337E-338E it was held that an ultimatum was required and pre-dismissal hearings were necessary in certain circumstances. In *casu* the court decided a hearing was not required, but it had only been dealing with the determination of guilt; *Performing Arts Council of the Transvaal (PACT) v PPWAWU* (1992) 13 *ILJ* 1439 (LAC), in which strikers sought their reinstatement following an illegal strike and subsequent dismissal; *PACT v PPWAWU* (1994) 15 *ILJ* 65 (A) where it was held that there may be instances where it is justifiable not to issue an ultimatum; *JB Haworth and Associates v Mpanya* (1992) 13 *ILJ* 604 (LAC); *Hendred Fruehauf Trailers Ltd v NUMSA* (1992) 13 *ILJ* 593 (LAC); *BAWU v Prestige Hotels cc t/a Blue Waters Hotel* (1993) 14 *ILJ* 936 (LAC) 971E-1, 973A-C; *BAWU v Palm Beach Hotel* (1991) 9 *ILJ* 1016 (IC) 1024D-E.
259 102 of 1993.
The purpose of the ultimatum has furthermore been dealt with in a number of authorities.\textsuperscript{263} The test is generally whether there has been enough time for the employees to digest the implications of the ultimatum and to seek advice from their trade union.\textsuperscript{264}

If strikers decided to heed an ultimatum, this required unconditional compliance, which meant that the striker’s terms and conditions of employment revert to what they were at the commencement of the strike. Where employees have complied or at least indicated a clear intention to meet the deadline stipulated in the ultimatum, their subsequent dismissal would likely be unfair.\textsuperscript{265} If the cause of the strike has been removed or addressed by the employer, a continuation of the strike by, for instance, rejecting the ultimatum could not be considered reasonable or responsible conduct.

It was accepted in *PPWAWU v Solid Doors*\textsuperscript{266} and other authorities that the following constituted the elements of a fair ultimatum:

\begin{enumerate}[(i)]
\item The ultimatum must be communicated in clear, unambiguous terms, in a medium understood by the strikers.\textsuperscript{267}
\item The terms of the ultimatum should state what is demanded of the strikers, when and where they are required to comply and what sanction will be imposed if they fail to comply with the ultimatum.\textsuperscript{267}
\item Sufficient time, from the moment of issuing the ultimatum must elapse to allow the workers to receive the ultimatum, digest and reflect on it, and to respond to it by either compliance or rejection.\textsuperscript{267}
\item Business necessity may be an additional element justifying the issuing of an ultimatum.\textsuperscript{268}
\end{enumerate}

\textsuperscript{263} The following were considered in *PPAWU v Solid Doors* (Pty) Ltd (2001) 22 *ILJ* 292 (IC); *BAWU v Prestige Hotels cc t/a Blue Waters Hotel*(1993) 14 *ILJ* 936 (LAC); *PACT v PPWAWU* (1992) 13 *ILJ* 1439 (LAC); *Plascon Inks and Packaging Coatings (Pty) Ltd v Ngcobo* (1997) 18 *ILJ* 327 (LAC), the dissenting judgement of Nujent AJA in *Karras t/a Floraline v SASTAWU* (2000) 21 *ILJ* 2612 (LAC) a matter under the 1995 Labour Relations Act.


\textsuperscript{265} Wade *The Legal Protection of Workers on Strike* (1992) 155.

\textsuperscript{266} (2001) 22 *ILJ* 292 (IC) 300 313D.

\textsuperscript{267} *Liberty Box and Bag Manufacturing Co (Pty) Ltd v PPWAWU* (1990) 11 *ILJ* 427 ARB.

\textsuperscript{268} *Plascon Inks and Packaging Coatings (Pty) Ltd v Ngcobo* (1997) 18 *ILJ* 327 (LAC).
The court held in *Majolo v D & A Timbers (Pty) Ltd*\(^{269}\) that the employer’s final ultimatum was “totally inadequate”. The first notice issued required a return to work at 12:30, and was extended to 13:30. At 13:55 this was extended by five minutes. The employees refused to return and were dismissed. Insufficient time was provided to enable the union to get to the premises and advise the employees, or to ascertain whether the union had actually received and dealt with the fax notice sent by the employer. The court considered it reasonable to extend the ultimatum to 14:00 on the following day.

Zondo AJP confirmed in *Modise v Steve’s Spar*\(^{270}\) that the ultimatum is not aimed at

> “eliciting any information or explanation from workers but to give workers an opportunity to reflect on their conduct, digest issues and if need be, seek advice before making the decision whether to heed the ultimatum or not”.

The dispute in *Modise v Steve’s Spar*\(^{271}\) concerned a demand for regional collective bargaining, which was incapable of achievement. The issues to be considered were the *audi* rule and the dismissal of illegal strikers, under the 1956 Act. The Labour Appeal Court considered whether the employer was obliged to offer illegal strikers pre-dismissal or pre-ultimatum hearings. The employees at Spar stores in the region went out on strike. The employer obtained an interim interdict in the Supreme Court, issued an ultimatum to the strikers and dismissed them, in writing, a day later. The Industrial Court dismissed the union’s application for a section 46(9) determination, and four of the affected employees took the decision on appeal.

The Labour Appeal Court ruled that the employer had not observed the *audi* rule before dismissing the appellants and found their dismissals to be unfair. Zondo AJP and Mogoeng AJA, concurring, confirmed that the employer was obliged to observe the *audi* rule\(^{272}\) when it contemplates dismissing strikers, and was of the view that this should probably be done prior to the issuing of an ultimatum rather than afterwards.

\(^{269}\) (1997) 18 *ILJ* 342 (LAC).


\(^{271}\) (2000) 5 *BLLR* 496 (LAC)

\(^{272}\) There were exceptions to the general rule, and the form of observance of the *audi* rule depends on the circumstances of each case.
Zondo AJP\textsuperscript{273} referred to the Labour Appeal Court’s new status under the 1995 Act, and was thereby led to rely on the provisions governing dismissal and industrial action in the code of good practice. The code\textsuperscript{274} details two steps: make contact with the union, if there is one, and then to issue an ultimatum. The court relied on this item to find that a pre-ultimatum hearing was necessary, referring to Grogan\textsuperscript{275} to interpret this provision.

Conradie JA (dissenting) preferred that it was not a requirement of the 1956 Act that illegal strikers be given a pre-ultimatum or pre-dismissal hearing, which was pointless. The strikers had engaged in an illegal strike, and their demand was incapable of achievement, which could in itself render the strike illegal. Conradie JA stated that the 1956 Act was silent on the question of a strike ultimatum, but non-observance had been judicially stigmatised as serious misconduct of a specialised kind by employees, which could be purged by complying with the ultimatum. Various decisions support the dismissal of strikers after no more than a fair ultimatum is given, which include NUMSA v SA Wire Company (Pty) Ltd,\textsuperscript{276} and NUMSA v Vetsak,\textsuperscript{277} the authority in which the audi rule was rejected.

A reading of Grogan\textsuperscript{278} seems to indicate only that some form of discussion should take place with the union or the striking workers as a safeguard, prior to issuing an ultimatum to the strikers. There is no indication that this must take the form of a disciplinary hearing or anything more. Grogan generally refers to the need to engage the union for common sense reasons.\textsuperscript{279}

Although contact with the union at the pre-ultimatum stage is now obiter, this view was criticised as amounting to the emasculating of the ultimatum. Conradie JA (dissenting)\textsuperscript{280} distinguished an ultimatum from a disciplinary enquiry, the former being a collective bargaining device for getting strikers back to work and which pre-supposes the unlawfulness of a strike.

\textsuperscript{273}548.
\textsuperscript{274}Item 6(2).
\textsuperscript{275}Workplace Law 297.
\textsuperscript{276}(1996) 17 ILJ 660 (LAC) at 275G.
\textsuperscript{277}NUMSA v Vetsak Co-operative Ltd (1996) 17 ILJ 455(A).
\textsuperscript{279}For instance, in the event of a wildcat strike that the union does not support or is not aware of, or in the event of a senior union official being able to intervene as a facilitator.
\textsuperscript{280}567.
This approach can be contrasted with that used in previous years, when unlawful industrial action was regarded as a form of misconduct. The employer had to meet two requirements before terminating the employment relationship:

“(i) give employees the opportunity to address the employer on the decision to strike;”

“(ii) issue an ultimatum, give the employees sufficient time to consider the matter, and return to work”.

A strike, whether lawful or unlawful, is a collective matter, with norms appropriate to the realm of collective bargaining. Should the employer decide to dismiss, then the established procedures in the event of misconduct would apply. It appears that the court in casu was obliged to consider the requirements of the 1995 Act and the relevant code of good practice. The obligation placed on the employer in Modise v Steve’s Spar is not much different from what a reasonable interpretation of the code of good practice requires in terms of the 1995 Act, and the response thereto was perhaps exaggerated.

In PPAWU v Solid Doors (Pty) Ltd the court determined that the strikers were unfairly dismissed and the dismissals were subject to procedural unfairness in that the audi rule was not observed prior to taking the decision to dismiss. The employer had issued a notice to the strikers and had then issued two written ultimatums. The strikers ignored the ultimatums, that is, if they did receive them. It was established that the employer had not afforded the strikers an opportunity (enough time) to make representations as to whether an ultimatum should have been issued. It is doubtful whether the employer had been aware of such a requirement at the time of the strike, but the Modise v Steve’s Spar judgement was released just before the presiding officer, Thotlhalemajé, had passed judgement in casu, and the Modise approach was supported.

“there are certain factors or instances that need to be taken into account that makes the approach apposite”.

In Karass t/a Floraline v SASTAWU, a matter under the 1956 Act, the majority view of the Labour Appeal Court confirmed that the approach it had adopted in Modise was also

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281 Rycroft and Jordaan (1992) 163.
282 BAWU v Edward Hotel (1989) 10 ILJ 357 (IC) 373 374A.
283 NUMSA v Elm Street Plastics t/a ADV Plastics (1989) 10 ILJ 328 (IC) 337J 338A.
286 Regarding the application of the audi rule in addition to the ultimatum.
applicable under the 1995 Act. This would make sense, since the 1995 Act provisions and code were referred to.

The ultimatum was also considered in *Mzeku v Volkswagen*, another instance of an illegal strike over a demand that was incapable of achievement by the employer. The CCMA commissioner found procedural unfairness in that the employer failed to comply with the *audi* rule. The *Modise* decision it applied to different circumstances but it was also referred to, since it was considered to be applicable to the 1995 Act. In response to the commissioner’s ruling, it was stated that labour relations had come a poor second to legal technicalities, and that investor confidence had been shaken. However, the labour and Labour Appeal Courts rejected the commissioner’s finding in respect of procedural unfairness.

The Labour Appeal Court restored sanity, finding *in casu* that there was procedural and substantive fairness. This did not mean that chapter IV to the 1995 Act, s188 and the terms of the code of good practice should be disregarded by employers.

The strikers, incredibly, applied without success for leave to appeal to the Constitutional Court, arguing that they had simply exercised their unfettered right to strike in terms of section 23(2)(c) of the Constitution Act. The law is, however, peppered with limitations, and the Labour Appeal Court responded that section 64 and other provisions in chapter IV to the 1995 Act proscribe that the right could be exercised, subject to the prescribed conditions being satisfied.

It is evident that a proper reading of the provisions of chapter IV of the 1995 Act and the applicable codes of good practice is imperative, in order to avoid the compounding of uncertainties in respect of strike law.

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288 An internal union dispute over the expulsion of rebel shop stewards.
293 The finding was correct if reference was made to *Modise*, but the order for reinstatement was the incorrect s 193 remedy.
CHAPTER 6
CONCLUSION

This appraisal of South African strike law has attempted to analyse trends and the impact of amendments to labour legislation, in order to address the problem statement and the stated sub-objectives, namely to determine:

(a) whether there is parity between employer and employee remedies,

(b) to what extent the law is satisfying the requirements of collective bargaining,

(c) whether there has been a reduction unprocedural strikes, and

(d) whether there are internal limitations or other impediments to the constitutional and legal remedies available.

Chapter 2 provided an insight into the historical development of South African strike law. The 1922 Rebellion led to increased statutory regulation of strike action, based on the recommendations of the Van Reenen Commission. Subsequent to the regulatory segregation of trade unions by the 1948 Botha Commission, the recommendations of the 1976 Wiehahn Commission led to the gradual de-racialisation of labour laws, thereby extending the freedom to strike to a broader spectrum of workers. The Industrial Court contributed to judge-made law in exercising its unfair labour practice jurisdiction, and the higher courts also made a contribution. The 1995 Ministerial Legal Task Team redrafted the Labour Relations Act, ushering in a new era of regulation. Generally, strikes in respect of rights disputes were prohibited, limiting the range of protected and permissible strikes, notwithstanding the conferring of a constitutionally entrenched right to strike.

In Chapter 3 the practical effects of the 1956 Labour Relations Act were examined. The 1956 Act contributed to significant developments in the law on strikes and lock-outs, particularly when these forms of action were incorporated in the unfair labour practice definition in the 1980’s. Fairness and lawfulness became a hallmark of the 1956 Act. Constraints included
lengthy legal procedures, the old collective bargaining system, and the Act’s failure to provide express protection from dismissal for strikers.

In Chapter 4 the Constitution Act of 1986 was considered in regard to the right to strike and recourse to lock-out. Although the 1995 Labour Relations Act should give effect to the relevant rights conferred by the Constitution, but these rights are not unfettered. The right to strike as a necessary adjunct to collective bargaining is recognised, but the right is limited. It is submitted that recourse to lock-out does not significantly tip the scales in favour of strikers, although this was the intention of the legislature.

The relevant provisions of the 1995 Labour Relations Act were discussed in Chapter 5. Relevant innovations included the new forms of statutory CCMA or bargaining council conciliation and arbitration, strong protection against dismissal for striking, the removal of other limitations on strike action, and confirmation of the recognition of private domestic procedures, to the extent that it is not necessary to duplicate domestic and section 64 dispute procedures. However, new limitations on the range of permissible strikes and lock-outs were introduced, and rights disputes are left to arbitration and the Labour Courts to determine, with no right to strike.

In regard to the degree of parity of employer remedies with employee remedies, it was shown that internal limitations on the right to strike exist, but are no different to those encountered in international law. The employer’s recourse to lock-out is also assured, since the removal of the duty to bargain and the fairness requirement from the law appears to place real power back in the employer’s hand in collective bargaining - an area which the courts endeavour to steer clear of.

A criticism of the Labour Court’s jurisprudence under the 1995 Act is that its decisions have limited the right to strike, rather than giving full effect thereto, although such limitations are acknowledged in international labour standards. The 1995 Act has however severely limited the employers’ power to dismiss strikers for participating in a protected strike\textsuperscript{296} and it was assumed that the 1995 Act attempted to shift the balance of power away from the employer and in favour of employees. The consequence is that with the right to strike being limited to

\textsuperscript{296} S 67(5).
the extent described, the employer should have the best bargaining position, in practice. The resort to strike action in the event of a dispute relating to large-scale retrenchments, with the option of a secondary strike, is an exception to the general limitation on strikes over rights disputes. This provision may restore confidence in what employees may perceive to be a limited freedom to strike. It can be concluded that there is reasonable parity in regard to the right to strike and recourse to lock-out, and the consequences thereof.

As regards the extent that the law is satisfying the requirements of collective bargaining, it has been shown that the right to collective bargaining is protected and constitutionally entrenched. It may, however, be necessary for the Constitutional Court to decide whether the interests of orderly collective bargaining justify the limitations on the right to strike described above. An aspect that may justify further research is the consequence of the choice being provided between the use of dispute procedures contained in a collective agreement detailing pre-strike procedures, and section 64 statutory dispute procedures. A confirmed exception exists, in that it is not necessary to duplicate pre-strike procedures in that section 64 procedures can override those contained in a collective agreement.

As to whether there has been a reduction in unprocedural strikes, the limitations on the right to strike as set out above clearly provide a range of limitations not contemplated before in South African labour law. The first few strike related cases considered by the new Labour Court dealt with the interpretation of the provisions of the 1995 Act and the Constitution, and in the process confirmed some of the limitations on strikes. The family of strikeable disputes has been reduced, generally in favour of compulsory statutory arbitration, if not prohibited entirely. It follows that the incidence of strikes has declined proportionately.

The final objective is to determine whether there are internal limitations or other impediments to the constitutional and legal remedies available. Some of the impediments have been described above. A matter which requires further research is the need, if any, to provide recognition of unregulated strikes, a third category of strikes which are neither protected or unprotected, but are not unlawful. The court established a precedent under the 1956 Act when it assisted illegal strikers in certain circumstances. The type of dispute envisaged is where the court is unable to decide on the issue in dispute, where, for instance, there is an erroneous belief or action on the part of the strikers, and the court is required to decide on appropriate
relief. The principle has been reaffirmed in *TGWU v Coin Security*[^297] that participation in an unprotected strike is not sufficient to justify the dismissal of the strikers, which does raise the question whether it is at all necessary to make provision for a third category. If the concern is with protection, the provisions[^298] of the 1995 Act do provide sufficient protection to unprotected strikers, as do items 6(1) and (2) to the Code of Good Practice: Dismissal[^299]. The language used in the Code of Good Practice may have to be amended to accommodate these disputes. The problem appears to relate to the jurisdiction of the court. It is submitted that the court could resolve the problem, for instance by remitting the dispute to arbitration. It can be concluded that there are internal limitations to the constitutional and legal remedies available, which may ultimately be resolved by the Constitutional Court.

The approaches of the court were considered in chapter 5, and it is evident that the functional approach to strikes, lock-outs and related dismissals is appropriate, in view of the shift from lawfulness and fairness towards equity considerations under the 1995 Act.

Three issues in case law were discussed, which are or were crucial in determining the court's jurisdiction in respect of disputes relating to strike action. It was shown that the issue in dispute is of critical importance in establishing jurisdiction, and the courts approach was considered in *Adams v Coin Security, Ceramic and Fidelity*.[^300] The conclusion reached is that, in order to identify the underlying issue in dispute, one must ask what the employer would do to bring the strike to an end.

The notice of commencement of strike was considered in regard to *Ceramic, Tiger Wheels*[^301] and *CAWU v Modern Concrete*,[^302] and it can be concluded that there will be more disputes of this nature before the courts, the outcome of which will again depend on the approach adopted by the court.

[^298]: In terms of s 67(4) and (5), s 185, s 67(4) and (5).
[^299]: At schedule 8 to the 1995 Act.
The ultimatum was considered in reference to *Modise, Karras*\(^{303}\) and *Volkswagen*,\(^{304}\) in which the employers were held to have acted procedurally unfairly in failing to adequately apply the *audi* rule. A criticism was that the Code of Good Practice: Dismissal, does not contain an express requirement of a hearing. The Code is referred to in the 1995 Act\(^{305}\) and it describes a procedure requiring contact with the union and the issuing of an ultimatum, often for common sense reasons. However a fair procedure may entail more than the requirements stated in the code.

It is proposed that the following areas could be considered for further research:

- The extent to which changes in public policy have impacted on the law relating to strikes: in respect of lock-outs, secondary strikes, and picketing; the consequence of the choice between the use of collectively agreed dispute procedures detailing pre-strike procedures and section 64 statutory dispute procedures; the need to provide for recognition of a third category of unregulated strikes which are neither protected or unprotected; and the extent to which item 6(1) and (2) of the Code of Good Practice: Dismissal, satisfy the requirements for procedural fairness in respect of dismissals relating to industrial action.

- It is concluded that in regard to the main aim of this study, namely to determine the effect of the 1995 Act and amendments to strike law, a controversial body of case law has developed. This has been derived from decisions made under the former 1956 Act as well as the 1995 Act. It will be necessary, as with the 1956 Act, to continue to look to the Labour Appeal Court for guidance in the development of judicially established strike law.

\(303\) *Modise v Steve’s Spar Blackheath* (2000) 5 BLLR 496 (LAC); 21 ILJ 519 (LAC); *Karras t/a Floraline v SASTAWU* (2001) 1 BLLR 1 (LAC).


\(305\) S 68(5) and s 188.
BIBLIOGRAPHY

LIST OF CASES

A

Afrox Ltd v SACWU (1997) 18 ILJ 399 (LC)

Amalgamated Beverage Industries Ltd v FAWU (1988) 9 ILJ 252 (IC)


B
BAWU v Palm Beach Hotel (1988) 9 ILJ 1016 (IC)

BAWU v Edward Hotel (1989) 10 ILJ 357 (IC)

Billiton Aluminium Ltd v NUMSA (2002) 1 BLLR 38 (IC)

Business South Africa v COSATU (1997) 18 ILJ 474 (LAC)/ (1997) 5 BLLR 511 (LAC)

C
CAWU v Modern Concrete Works (1999) 10 BLLR 1020 (LC)

Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union (1) (1997) 18 ILJ 716 (LC)

Ceramic Industries t/a Beta Sanitaryware v National Construction, Building and Allied Workers Union (2) (1997) 18 ILJ 671 (LAC)

Coin Security Group (Pty) Ltd v Adams (2000) 21 ILJ 925 (LAC)

Columbus Joint Venture t/a Columbus Stainless Steel v National Union of Metalworkers of SA (1998) 19 ILJ 279 (LC)

Council of Mining Unions v Chamber of Mines of SA (1985) 6 ILJ 293 (IC)

County Fair Foods v FAWU (2001) 22 ILJ 1103 (LAC)

E

Edgars Stores Ltd v CCAWU, FCRAWU & NUDAW (1991) 2 (12) SALLR 51 (IC)
F
FAWU v Earlybird Farm (Pty) Ltd (2003) 1 BLLR 20 (LC)

FAWU v Heidelberg Spar (2000) 5 LLD 291 (LC)

FAWU v Rocklands Poultry (Pty) Ltd (1991) 2(5) SALLR 38 (IC)

FBWU v Hercules Cold Storage (Pty) Ltd (1990) 11 ILJ 47 (LAC)

Fidelity Guards Holdings (Pty) Ltd v Professional Transport Union (1) (1998) 19 ILJ 260 (LAC); (1997) 9 BLLR 1125 (LAC)

G
Government of the Western Cape Province v COSATU (1999) 20 ILJ 151 (LC)

H
H van der Berg (Pty) Ltd t/a Mattress Manufacturing v Steel, Engineering and Allied Workers Union of South Africa (1991) 2(11) SALLR 48 (IC)

K
Karras t/a Floraline v SASTAWU (2001) 1 BLLR 1 (LAC)

L
Liberty Box & Bag Manufacturing Co (Pty) Ltd v PPWAWU (1990) 11 ILJ 427 ARB

Lomati Mill Barberton (a division of Sappi Timber Industries) v PPWAWU (1997) 18 ILJ 178 (LC)

M
Majolo v D & A Timbers (Pty) Ltd (1997) 18 ILJ 342 (LAC)

MAWU v Stobar Reinforcing (Pty) Ltd (1983) 4 ILJ 84 (IC)

Midlands Pine Products (Pty) Ltd v CEAPWAWU (2002) 23 ILJ 2276 (LAC)

Modise v Steve’s Spar Blackheath (2000) 5 BLLR 496(LAC)

Monyela v Bruce Jacobs t/a LV Construction (1998) 19 ILJ 75 (LC)

MWASA v Independent Newspapers (Pty) Ltd (1997) 18 ILJ 342 (LAC)

Mzeku v Volkswagen of South Africa (Pty) Ltd (2001) 3 BALR 256 (CCMA)

Mzeku v Volkswagen of South Africa (Pty) Ltd (2001) 21 ILJ 771 (LAC)
Mzeku v Volkswagen of South Africa (Pty) Ltd (2001) 22 ILJ 1575 (LAC)

3M SA (Pty) Ltd v SACCAWU (2001) 5 BLLR 483 (LAC)

N
Natal Die Casting Co (Pty) Ltd v President, Industrial Court (1987) 8 ILJ 245

National Union of Technikon Employees of SA v Technikon SA (2000) 5 LLD 407 (LC)

NUM v Free State Consolidated Gold Mines Operations Ltd - President Steyn Mine, President Brand Mine, Freddies Mine (1993) 14 ILJ 341 (LAC)


NUM v Via Doro Manufacturing Ltd (2000) 5 LLD 306 (LC)

NUMSA v Jumbo Products CC (1991) 12 ILJ 1048 (LC)

NUMSA v Elm Street Plastics t/a ADV Plastics (1989) 10 ILJ 328 (IC)

NUMSA v SA Wire Company (Pty) Ltd (1996) 17 ILJ 660 (LAC)

NUMSA v Vetsak Cooperative Ltd (1996) 6 BLLR 697 (AD)/ (1996) 17 ILJ 455 (A)

NUMSA, Wewe and 36 others v Fry’s Metals (Pty) Ltd (1991) 2(12) SALLR 31 (IC)

P
Paper Printing and Allied Workers Union v Solid Doors (Pty) Ltd (2001) 22 ILJ 292 (IC)

Performing Arts Council (Transvaal) v PPAWU (1994) 15 ILJ 65 (A)

Pick ‘n Pay (Pty) Ltd v SACCAWU (1998) 19 ILJ 1546 (LC)

Picardi Hotels Ltd v Food & General Workers Union (1999) 6 BLLR 601 (LC)

Plascon Evans Paint (Natal) v CWIU (1988) 9 ILJ 231 (D)

R
Raad Van Mynvakbonde v Die Kamer van Mynwese (1994) 5 ILJ 344 (IC)

Rainbow Chicken Farms (Pty) Ltd v FAWU (1997) 8 BLLR 1081 (IC)

Rand Tyres & Accessories v Industrial Council for the Motor Industry (Transvaal) 1941 TPD 108

Rustenburg Platinum Mines v Mouthpiece Workers Union (2002) 1 BLLR 54 (LC)
S
SACCAWU v Rea Sebetsa (2000) 5 LLD 468 (LC)

SACTWU v Stuttafords (1999) 20 ILJ 2692 (LC)

SACWU v Afrox Ltd (1999) 10 BLLR 1005 (LAC)

SA Chemical Workers Union v Sentrachem Ltd (1988) 9 ILJ 410 (IC)

SA Chemical Workers Union v Varcoal Paints (Pty) Ltd (1991) 2(12) SALLR 46 (IC)

SA Chemical Workers Union v Sasol Industries (Pty) Ltd (1989) 10 ILJ 1031 (IC)

Samancor v National Union of Metalworkers of South Africa (1999) 20 ILJ 2941 (LC)

Sasol Industries (Pty) Ltd v SA Chemical Workers Union (1990) 11 ILJ 1011 (LAC)

SA Technical Officials Association v President of the Industrial Court (1986) 6 ILJ 186 (A)

Schoeman v Samsung Electronics SA (Pty) Ltd (1997) 18 ILJ 1058 (LC)

Sealy of South Africa (Pty) Ltd v Paper, Printing, Wood & Allied Workers Union (1997) 18 ILJ 392 (LC)

Seven Abel CC t/a The Crest Hotel v HARWU (1990) 11 ILJ 504 (LAC)

Simba (Pty) Ltd v Food and Allied Workers Union (1997) 18 ILJ 558 (LAC)

Staff Association for the Motor and Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Ltd (1997) 19 ILJ 374 (LC)

T
The SA Breweries Limited v FAWU (1989) 10 ILJ 844 (A)

Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v National Union of Metalworkers of SA (1999) 20 ILJ 677 (LAC)

Transport & General Workers Union v Dolphin’s Cartage (Pty) Ltd (1991) 2(12) SALLR 35 (IC)

Transport & General Workers Union v Coin Security Group (Pty) Ltd (2001) 4 BLLR 458 (LC)

Tshabalala v Minister of Health (1987) (1) SA 513 (W)

X
Xinwa v Volkswagen SA (Pty) Ltd (2003) 8 BLLR 857 (LAC)
LIST OF SOURCES


Bono, LL “The Legal Protection of Socio-Economic Protest Action” (2001) LLM treatise, University of Port Elizabeth

Brassey, MSM; Cameron, E; Cheadle, MH and Olivier, MP The New Labour Law (1987) Juta and Co Ltd, Cape Town


Du Doit, D; Bosch, D; Woolfrey, D; Murphy, J; Godfrey, S and Christie, S Labour Relations Law (2000) 3rd ed Butterworths, Durban


Foster, M “The Proposed Labour Relations Bill” Institute of Personnel Management Member Brief (1995-03-06)


Grogan, J “What was Expected of VW - End of the Line for the ‘Strikers’” (2001) Vol 17 August *Employment Law* Butterworths, Mayville


Maserumule, P “A Perspective on Developments in Strike Law” (2001) 22 *ILJ* 45

Ministerial Legal Task Team *Explanatory Memorandum: Labour Relations Act 1995*


Pillay, D “Essential Services under the New LRA” (2001) 22 *ILJ* 1


Van der Walt, JA and Van der Walt, G *The Labour Relations Amendment Act 9 of 1991* paper University of Port Elizabeth

Wade, RB “*The Legal Protection of Workers on Strike*” (1992-03) LLM Thesis University of Port Elizabeth