University of the Western Cape
Faculty of Law
Masters Programme
Research Paper

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Programme: Law of Unfair Dismissal 2001
Masters in Labour Law (LLM)

Title:

The Right to Strike – Is it an effective component in regulating the South African Labour Market?

Presented in (Partial) fulfillment of the requirements for the degree Magister Legum in the Faculty of Law of the University of the Western Cape. May 2003.

Acknowledgements

The journey towards the completion of my Masters studies in the Law Faculty of the University of the Western Cape was made manageable through the assistance and support of others. I am very grateful to all who have encouraged me during this period and I owe special thanks to:

- The Southern African Clothing and Textile Workers Union (SACTWU) for granting me a bursary. This union pioneered a bursary fund, funded through the contributions of their members. This fund has enabled me as well as others within their ranks to further our studies.
- Advocate Tamara Cohen and Professor Evance Kalula for their guidance and assistance
- André Kriel, the Deputy General-Secretary of SACTWU for always granting advice and being helpful
- Blake Williams, my son, for keeping me on my toes.

ABSTRACT

This research paper presents an analysis of the right to strike in South Africa. It starts by providing a historical overview of labour relations in South Africa and the development of the right to strike. The discussion includes a look at the link between collective bargaining and the right to strike as promoted in the Constitution of 1996 and the Labour Relations Act of 1995. The relevance of International Law found in the International Labour Organisation's Recommendations and Conventions and relevant United Nations Conventions is also explored. As part of this analysis, is a critical look into how the courts have adjudicated the dismissals of strikers in granting the necessary relief, in terms of the old Labour Relations Act of 1956 and the new Labour Relations Act of 1995. Commentaries made on the right to strike and statistics of strikes in confirming that the right to strike is indeed a necessary component of labour market regulation are also provided.

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3) The international context with specific reference to the International Labour Organisation (ILO) Recommendations and Conventions as a source of international law, as well as other relevant instruments of law; and
4) The extent to which the judiciary has given effect to South Africa's Constitution in giving expression to the ILO Recommendations and international instruments in adjudicating dismissals of strikers.

In providing a comparative analysis, instruments governing the right to strike and collective bargaining that are given particular attention are,

1) the Labour Relations Act 66 of 1995;
2) the Constitution of 1996;
3) the Code of Good Practice on dismissals based on operational requirements;
4) the Code of Good Practice on picketing in promoting a framework that promotes orderly collective bargaining and labour peace; and
5) The Amendments to the Labour Relations Act 66 of 1995 in section 189A.

In conclusion, this research paper will determine whether the right to strike and to engage in collective bargaining leads to job losses and industrial unrest or whether the adoption of core International Labour standards is conducive to economic growth and efficiency in the labour market.

Through an in-depth literature review, the relevant information for this research paper was gathered. The secondary sources most heavily relied upon in this research, centred on past and recent debates around strikes and collective bargaining, international trends and comparative studies as well as related case law.

CHAPTER TWO
HISTORICAL PERSPECTIVE

It can be argued that the right to strike was never part of the labour relations' agenda of the Apartheid government. The right to strike and the protection afforded to workers came into being through the bitter struggles workers waged against employers and government, which led to various legal interventions by the court resulting in some relief for strikers. The working class ultimately used its power and strength to influence the current government in entrenching the right to strike in the Constitution.

Formalising Labour Relations

Early industrial relations legislation can be traced to the gold mining industry in 1907 when trouble in the mines resulted in the enactment of the Transvaal Disputes Act of 1909. This piece of legislation,

> "...produced the first proto-collective bargaining statute...It was designed to combat strikes in mining industry and it set out to do this by introducing a procedural bar to unilateral action. No changes could be made by employers to terms and conditions of employment, and no changes could be demanded by employees, unless one month's notice had been given to the other party. Moreover, were a party to invoke the newly-created statutory conciliation machinery in response to a proposed change, then the implementation of the change had to be stayed until 30 days after the board of conciliation had delivered its report. In return for protecting parties against precipitate changes to the employment relationship, the legislature demanded (upon pain of criminal sanction) that industrial action be delayed until the exhaustion of the prescribed procedures'"[4].

This piece of legislation served as an introduction to the status quo remedy and ad hoc conciliation boards in dealing with industrial disputes in South Africa.

The Rand Rebellion, as the 1922 strike was referred to, changed the nature of labour relations forever in South Africa. The government realised that it had to formalise labour relations and in

[4] Thompson and Benjamin. 1998. SA Labour Law (at A1-22)

1924 passed the Labour Conciliation Act. This statute provided for the establishment of Labour Councils and a conciliation board system to resolve disputes.

> "These bodies were (and are) designed not merely to play the dispute-settling role which is the hall-mark of the first-generation labour statutes but also to work pre-emptively and indeed constructively at modelling the work milieu. This they could achieve through the license to negotiate comprehensive industrial agreements which enjoyed the status of subordinate legislation and which had industry-wide application"[5].

Black workers were excluded form this industrial framework and had to wait until 1979 to enjoy the statutory protection of the statute.

The exclusion from these rights led to resistance on a number of fronts, particularly the organising of workers into trade unions. The State, in realising the importance of the emerging trade unions, enacted a number of important pieces of legislation in South Africa in the period 1945 to 1981 to curb the power of black workers. The government enacted several pieces of legislation as a response to the new milieu of worker militancy. These are as follows[6]:

- The Industrial Conciliation Act 28 of 1956 prohibited the registration of mixed unions and introduced formal job reservation. This allowed for the establishment of racially exclusive trade unions.
- The Black Labour Relations Act of 1973[7] provided for the establishment of the liaison committees for blacks at plant level. The Act was formulated to curb the rising militancy of black workers in South Africa.
- Industrial Conciliation (Amendment) Act 94 of 1979 redefined the term 'employee' to include Africans and other migrants, giving them access to the Industrial Council system. It provided for the establishment of an Industrial Court. While legal strike action by blacks was facilitated, the dispute had to be referred to the relevant Industrial Council. In the absence of a relevant Industrial Council, the parties could apply to the Minister of Manpower for the establishment of a Conciliation Board. Where the Minister refused to establish a Conciliation

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[5] Ibid. (at A1-23)

[6] Wood, G. Trade Union Recognition: Cornerstone of the New South African Employment Relations. Johannesburg: Thompson Publishing 1998 (at 33-36)

[7] It was an amendment and renaming of the Native Labour Act 43 of 1953

black trade unions grew steadily, and it became clear that the formal system was increasingly bypassed as employers were forced to recognise and bargain with the unions. Furthermore, the government had to respond to various pressures. Among these were the Soweto uprisings of 1976 coupled with calls of disinvestment in South Africa from overseas.

This period can best be described as a time when black people had greater awareness of their social rights and were willing to give expression to these rights. A strong black trade union movement emerged, confident and eager to test their strength, resulting in industrial action. The government responded to the crises with the Wiehahn reforms in 1979 by the deracialisation of key Labour Laws. Key features of the Wiehahn Reform are:

- The Unfair Labour Practice Remedy (juridifying labour relations)
- Legal rights supervised by a specialised labour tribunal (Industrial Court)
- Protection against unfair dismissal
- Emergence of a duty to bargain
- Beginning of a protected right to strike

One of the major recommendations contained in the report of the Wiehahn Commission was that there should be a basic right to strike and it was further suggested that there should be a duty on the part of employers to refrain from conduct which infringes such a right[11].

> "The Wiehahn Commission regarded the right to withhold labour as a fundamental component of any labour dispensation...Its tentative suggestions on broadening or investigating further strike rights were tersely rejected by Government"[12].

The Wiehahn report and recommendations gave rise to many key amendments to the statute in 1997. These included the de-racialisation of the Labour Relations Act (LRA), the establishment of an Industrial Court and the introduction of the concept of the unfair labour practice to regulate both individual employment and collective labour relations. The amendments to the LRA, which was recommended in the Wiehahn report, can best be described as a revolution in industrial relations in South Africa. In an attempt to align our statute with international labour standards, it undoubtedly changed the labour market forever.

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[11] Wiehahn Report. para 4.127.20 (at 567). Report of the Commission of Inquiry into Labour Legislation (RP 47/1979)

[12] Thompson C. Development of South Africa's Unfair Labour Jurisprudence in The International Journal of Comparative Labour Law and Industrial Relations 1993.

The ethos of modern labour law is best described by Kahn-Freud,

> "The purpose of labour law is the regulation of conflict between capital, which is always attempting to increase the rate of investment, and labour, which is always intent on increasing the rate of consumption and improving the workings of its members"[13].

Various commentaries and arguments follow a similar line that modern labour should endeavour to institutionalise the conflict. This has been the aim of the LRA 1995, a central tenant of which is to foster the spirit of collective bargaining as a mechanism of resolving industrial disputes. Collective bargaining is a system that regulates conflict between capital and labour and ensures that such conflict remains within an acceptable framework. Collective bargaining is thought to fulfil three functions when it is successful:

> "First, it provides a partial means for resolving the conflicting economic interests of management and labour; second it greatly enhances the rights, dignity and worth of workers as industrial citizens; and third as a consequence of the first two functions, it provides one of the most important bulwarks for the preservation of the private enterprise system"[14].

The Development of Strike Law in South Africa: It's Formative Years

The development of strike law in South Africa was influenced by common law in the dismissal of striking workers. In terms of common law, an employer may regard a strike as a breach of the employment contract, which declares the employment contract null and void. This in turn justifies the dismissal of employees.

> "The Common Law sees all strikes (...) as misconduct. For it, the strike is just a deliberate refusal to work, at best deliberate absenteeism, at worst a dereliction of duty. Individualistic to the core, it can find no justification for the strike in the function it serves; on the contrary, it regards the intent to damage the employer as aggravating the offence and certainly sees dismissal as the proper response"[15].

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[13] Kahn Freud. Labour and the Law: 2nd Edition 1977 (at 15)

[14] Cheadle in Brassey et al. The New Labour Law. Cape Town: Juta 1987 (at 243)

This was found in the case of *R v Smith* 1955 (1) SA 239 (C),

> "At Common Law the employer clearly has the right to dismiss a servant who refuses to work…If in the limited sense the strike is 'legal'…[I]t does not follow that an employer is deprived of his Common Law right to dismiss and employee who refuses to work"[16].

The court in giving effect to the unfair labour practice definition in the LRA 1956 set a precedent whereby it offered protection to strikers in Marievale Consolidated Mines where several hundred workers were dismissed for participating in an illegal strike. Here the court overruled the common law right to dismiss striking workers[17]. This Industrial Court decision was further upheld on review in the Supreme Court[18]. This decision changed the common law 'dismissal at will' landscape forever and enforced a new set of principles, which the court will examine in order to grant the necessary relief when dismissals of strikers take place.

In *SACWU v Sasol Industries (PTY) Ltd and Other*[19], the preponderate view of industrial relations' experts is that the employer's common law right to dismiss when the employment contract is breached ought to subordinate to industrial relations principles of collective bargaining[20]. In giving credence to the LRA over the common law, Brassey argues as follows,

> '[the Act] gives the collective precedent over the individual, and it acknowledges that the broader community also has an interest in industrial peace and stability. Where the common law sees only a bi-polar relationship between individuals, the statute sees a triangle of interests – capital, labour and society at large…Industrial peace, rather than adjustment of individual rights, is the legislature's goal.'[21]

It was held that the right to strike was permissible only after the issue in dispute was referred to a conciliation board or an Industrial Council for conciliation. No explicit guarantee on the right to strike in South African legislation prior to 1995 implicitly recognised the right to strike subject to

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[15] Brassey M. 1990. The Dismissal of Strikers. 2 ILJ 213

[16] R v Smith 1955(1) SA 239 (C) (at 241H – 242B)

[17] National Union of Mine workers v Marievale Consolidated Mines (1986) 7 ILJ 123 (IC)

[18] Marievale Consolidated Mines v. The President of the Industrial Court and others (1986) 7 ILJ 152

[19] SACWU v Sasol Industries (PTY) Ltd and other (1989) 10 ILJ 1031

[20] Ibid. at 1048

[21] supra note 13 at 235

those limitations imposed by section 65 of the Act. In the case of *SACWU v Sasol Industries*[22] the court emphasised the fact that it regarded the right of workers to withdraw their labour as the most fundamental right of unionists[23]. This was a clear declaration of the right to strike to emanate from the Industrial Court.

Dismissal of Strikers

It was argued that the purpose of collective bargaining and the right to strike was not to repudiate or cancel the contract but to put pressure on the employer to vary one or more of its terms.

> 'It ought to be accepted...that it is unfair peremptorily to dismiss on the shortest of ultimatums, strikers who 1) strike for higher wages or better working conditions; 2) have observed the conciliatory procedures of the LRA; 3) have conducted themselves peacefully during a strike'[24].

It was generally accepted that to prohibit dismissal of strikers, altogether, would disturb the balance of power that underpins the collective bargaining process. A dismissal is only "considered as a solution to the problem until the level of tolerance is reached after efforts for a negotiated settlement have been exhausted"[25]. The court in a number of cases upheld this position, for example:

- In *NUM v Marievale Consolidated Mines*[26], the court held that it could not be expected that an employer endured a strike forever. It was found where a strike situation has reached a point of no return an employer may be entitled to dismiss employees.
- In *SACWU v Pharma Nature (Pty) Ltd*[27], the court expressed the following:

  "This court has held on more than one occasion that applicants who take the law into their own hands have a slim chance of obtaining the relief sought"[28].
- In *NUM v Marievale Consolidated Mines*[29] legality was described as essential for protection against dismissals.

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[22] supra note 17
[23] supra note 17 at 1032
[24] supra note 17
[25] supra note 21
[26] NUM v Marievale Consolidated Mines (1986) 7 ILJ 123 (IC)
[27] SACWU v Pharma Nature (Pty) Ltd (1985) 6 ILJ 520
[28] Ibid. at 528 E
[29] supra note 24

Protection for Striking Workers

It is argued that striking is a temporary suspension of the employment relationship, whereas dismissals is a permanent termination. Immediate dismissals are thus a disproportionate response to striking and should, therefore, be checked[30]. It was generally found that an employer may only dismiss workers on the following grounds: for misconduct, operational requirements and whether the strike was conducive to collective bargaining. Dismissals could only be effected where it was found that the proper procedures had been followed prior to the dismissals.

In commenting on the case of *SACWU v Sentrachem*[31], Dennis Davis emphasised that employers will have to follow the prerequisite procedures relating to the following: hearings, treating employees alike in the same situation and complying with a disciplinary code before dismissing workers[32].

The development of this unfair labour practice jurisdiction by the court in adjudicating strike disputes was a gradual and cautious process, but it eventually culminated in a qualified right of workers to strike lawfully without having to fear dismissal. In adhering to the framework developed by the court, it served as a precondition for the granting of protection for striking workers.

The court realised that in certain circumstances it would have to protect illegal strikers. In *Themba v Nico van Rooyen Tuksiedermie*[33], the court reinstated dismissed workers that had been provoked into illegal strike by the employer. The court found,

> "[I]n several decisions the industrial court has held that it was unfair for an employer to dismiss strikers when his own wrongful act provoked the strike; and even illegal strikers have been held to deserve protection if immediate industrial action was the only reasonable way to resist the harm caused by the employer's wrong"[34].

In *SACWU v Cape Lime Ltd*[35], the court developed an argument, which served as a protection for illegal strikers,

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[30] supra note 13 at 237

[31] SACWU v Sentrachem (1988) 9 ILJ 410

[32] Davis D. 'Right Track' in Finance Week March 10 – 16 1988, 43

[33] Themba v Nico van Rooyen Tuksiedermie (1984) 5 ILJ 245

[34] supra note 13at 224

[35] SACWU v Cape Lime Ltd (1989) 9 ILJ 441 (IC)

"...that illegal strike action may be justified when it can be shown that the employer acted unfairly"[36].

It is clear from the above that the court, in developing a set of jurisprudence in coming to the assistance of strikers, examined the following criteria in granting relief:

a) were circumstances giving rise to the strike legitimate and conducive to collective bargaining;
b) were other avenues available to the strikers;
c) were conditions such that striking was the only option open to them; and
d) were there compelling reasons in granting relief to dismissed strikers.

The industrial court has also made use of administrative principles, such as *audi alterem partem*, to protect striking workers. In giving expression to the *audi alterem partem* principle in the case of *Langeni and Others v Minister of Health and Welfare*[37], the dismissal of striking workers was upheld where the *audi alterem partem* principle was explored. It was found that since the employees were only temporary workers and could be dismissed on 24 hours notice, they were not entitled to a hearing or reasons for their dismissal.

In giving effect to the *audi alterem partem* in *Pact v Paper Printing Wood and Allied Workers Union*[38], the court lists the following requirements which would comprise a fair ultimatum when an employer contemplates dismissal:

- The ultimatum must be communicated to the employees in a medium, which they understand, and further in a clear, unambiguous language.
- The terms of the ultimatum must state what is demanded of the strikers, when and where they are required to comply and the sanction to be imposed if the terms of the ultimatum are not met.
- Sufficient time must lapse after the issuing of the ultimatum, so as to allow employees an opportunity to make an informed decision on whether to adhere to or reject the ultimatum.

Strikers also enjoyed the protection against selective dismissals where the selection 'was premised on trade union affiliation of workers concerned, constituted victimisation'[39].

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[36] Ibid. at 1051
[37] Langeni and others v Minister of Health and Welfare (1988) 9 ILJ 389 (W)
[38] 13 ILJ 1439 (LAC) 1992

The role of the Industrial Court in adjudicating dismissal during strike action is one where the court will attempt to remedy a situation that has already occurred. 'Protection' by the Industrial Court should therefore always be seen in this context.

In *SACWU v Sasol*[40], it was further argued that the ability to go on a protected strike could not counterbalance the employer's ability to dismiss. Classen argues that when consensus cannot be reached, there comes a stage when a temporary impossibility becomes a permanent one. The point at which this stage occurs will depend on the facts of each case[41].

A common factor that will come into play in these dismissals is whether a reasonable amount of time has passed during a dispute and whether the strike was conducive in achieving its collective bargaining objectives.

The Influence of Foreign Instruments on the South African Judiciary before the Enactment of the new LRA 1995

The judiciary serves as a major source in developing law when adjudicating disputes relating to labour and industrial relations. It is argued that the judiciary – judge-made law – draws its legal sources from international law, constitutional law, statutes and collective agreements[42].

The development of labour law in South Africa, it is argued, has involved a process of drawing from foreign legal models. By South Africa being a member of the British Empire in 1909, it turned to the Canadian model of compulsory negotiations and its settlement of disputes through conciliation via the Industrial Dispute Regulation Act in Transvaal of 1909[43].

The Bargaining Councils, formerly known as Industrial Councils, use a system of self-regulation in a particular industry/trade that was based on the British Whitely Councils' model. In dealing with disputes in this industry, it uses a compulsory conciliation mechanism and a 30-day statutory

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[39] Cameron et al. The New Labour Relations Act: The Law after the 1988 amendments. Juta: Cape Town. 1989 (at 93)

[40] supra note 17

[41] Claasen J.Y. Stakingsreg: 'n Nuwe Teorie. 1978. (3-4) TRW1

[42] Blanpain R et al. Comparative Labour Law and Industrial Relations: Kluver Law Publications 1982 (at 303)

[43] supra note 4

cooling-off period before any party/parties to a dispute can institute industrial action[44]. The Wiehahn Commission strongly advocated that South African labour law and industrial relations laws align itself in harmony with international conventions, recommendations and other instruments[45].

The labour court armed with the concept of the unfair labour practice was established to regulate both individual employment and collective relations. This enabled the labour court to serve as a catalyst in transforming the law relating to labour and industrial relations in South Africa in drafting "foreign" labour authority into our law.

In commenting on the development of South Africa's unfair labour practice jurisprudence, it was argued that,

> "Labour law in South Africa today represents a *melange* of foreign and indigenous precepts. The borrowing and grafting process has featured prominently in the legal revolution and, while not unproblematic, has in the circumstances delivered a reasonably coherent jurisprudence. Perhaps almost uniquely, the accelerated reception of foreign notions has proceeded through the judicial process rather than the legislative one, although the latter provided the scope for the former"[46].

In *Bleazard v Argus Printing and Publishing Co.*[47], the court at 77 issued a status quo order, which required the employer parties in the dispute to return to a long established bargaining forum so that negotiations there could be resumed. In embracing foreign precedent in this dispute, the court found,

> "[A]lthough particular statutory provisions specify the detail of the concept in some overseas countries as is the case in the United States, it does not seem inappropriate to take cognisance of what is happening in such countries...It may be important to note that in the United States the court succeeded in enforcing the obligation on the parties to bargain collectively in good faith. It would therefore not seem improbable that n order by this court with similar objective should likewise be enforceable[48].

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[44] supra 5

[45] Wiehahn report part I at 3.13.1

[46] Thompson, C. The Development of South Africa's Unfair Labour Practice Jurisprudence. The International Journal of Comparative Labour Law and Industrial Relations 1993 (at 183)

[47] Bleazard v Argus Printing and Publishing Co. (1983) 4 ILJ 60 (IC)

[48] Ibid. at 71A and 78D

The Labour Court made extensive use of legal transplants in giving legal clarity to a number of precedent cases. In *United African Motors and Allied Workers Union and Others v Fodens (SA) (Pty) Ltd*[49], the court ordered the company to recognise the union and to commence negotiations in good faith with the representative union. The court based its findings in this case by citing a number of ILO Conventions and English industrial tribunal decisions in arriving at this landmark decision[50].

The Labour Court, in its policy formulations,

> "borrowed liberally from other jurisdictions: for instance, its approach to redundancy owes much to the law in Britain; its approach to regulating of collective bargaining drew heavily on the USA"[51].

In regulating strikes, the new LRA of 1995 is an extension of the pre-1995 strike law. Chapter IV of the Act, which regulates and allows for strikes, is complemented by the ILO's Conventions 87 and 98[52]. It is clear from the above that the legislature found it necessary to borrow from other legal sources in developing the laws that govern the South African labour market.

[49] United African Motors and Allied Workers Union and others v Fodens (SA) (Pty) Ltd (1983) 4 ILJ 212 (IC)
[50] supra note 44 at 197
[51] Benjamin, Paul. Union-made law? The regulation of collective bargaining and worker participation in post-apartheid South Africa in Kluver Law International 2000 (at 518)
[52] Du Toit D et al. Labour Relations Law: A Comprehensive Guide. Third Edition. Butterworths 2000 (at 223)

CHAPTER THREE

THE RIGHT TO STRIKE: THE SOUTH AFRICAN LANDSCAPE

This chapter discusses a number of events that had a profound impact on the development of the 'right to strike' within South African labour law.

The Importance of 'Trade Union-Made' Law

It is a well-known fact that unions used their bargaining skills to engage both the business community and the state in negotiations, not only over labour law and industrial relations, but also on the restructuring of the economy as well[53]. The events described below undoubtedly influenced the right to strike as codified in the Act.

The signing of the South African Employers Consultative Committee on Labour Affairs (SACCOLA), COSATU and NACTU accord was where employers and unions agreed to negotiate major changes to the LRA in May 1990. This was followed by the sit-in by COSATU representatives in Pretoria, which culminated in the signing of the Laboria Minute. The Laboria Minute called on the government, business and labour to find ways of implementing the SACCOLA Accord in September 1990. On the 3rd and 4th of August 1992, COSATU and its allies embarked on a general strike demanding a worker friendly LRA and a say in the restructuring of the economic and social order in South Africa. This action resulted in the adoption of the COSATU Platform of Worker Rights held at its Special Congress on 10-12 September 1993, and called for the following organisational rights[54]:

(1) Basic organisational rights, which acknowledges that all workers have the right to join trade unions and organise, bargain collectively and strike and picket on all social and economic matters;

(2) Collective bargaining rights, whereby a new framework should include centralised bargaining through industry forums; and

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[53] Thompson C. Strategy and opportunism: trade unions as agents for change in South Africa. International Industrial Relations Association Ninth World Congress, Sydney 31 August – 4 September 1992.

[54] SACTWU Shop Stewards Bulletin no. 10. April 2001 – May Day Special (at 59-61). Full text of the Resolution.

(3) International Law applicable to the South African labour market calling on the new government to sign International Labour Law Conventions of the ILO concerning Freedom of Association, Collective Bargaining, and any other Conventions dealing with fundamental worker rights.

The COSATU Platform for Workers Rights laid the foundation for the right to strike in South Africa. This platform of workers rights formed part of the policy formation for a new South Africa in the Tripartite Alliance Reconstruction and Development Programme (RDP). When the new government came into power in 1994, the RDP formed the base document for the amendments of the new LRA. The brief given to the Ministerial Legal Task Team[55] "was to draft a Labour Relations Bill, which would –

- give effect to government policy as reflected in the RDP
- give effect to the ILO Conventions 87, 98 and 111 and the findings of the ILO's Fact Finding and Conciliation Commission;
- comply with the Constitution;
- entrench the constitutional right to strike subject to the limitations which are reasonable and justifiable in an open and democratic society based on values of freedom and equality, and regulate lock-outs in a similar manner; and
- provide for the decriminalisation of labour legislation"[56].

The Bill further noted the high level of unprocedural strikes and called for effective mediation to resolve disputes[57].

International Conventions and Recommendations as a source of law in promoting the right to strike in South Africa

The International Covenant on Economic, Social and Cultural Rights (ICESCR) in Article 8(d) explicitly recognises the right to strike. The ICESCR formed part of the Universal Declaration of Human Rights (UDHR) and is elevated to the status of an 'International Bill of Rights'. Human Rights Treaties and Resolutions of the United Nations play an important role in the promotion of

[55] The Ministerial Task Team was lead by Professor H Cheadle and other experts notably the ILO's Professor B Hepple and Professor M Weiss.

[56] Explanatory Memorandum Government Gazette 10 February 1995 (no. 16259)

social, cultural and economic rights internationally. In May 2002, 152 countries ratified this Convention[58].

The right to strike is also found in the European Social Charter (article 6(4)) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (article 8(2)). The right to strike is also entrenched in various present-day constitutions, for example Brazil, Italy, France and Namibia[59].

However, Hodges-Aeberhard et al (1987)[60] argue that there is no guaranteed right to strike outlined in any ILO Conventions or Recommendations. Despite the failure of ILO Conventions and Recommendations to explicitly deal with the right to strike, they argue that:

> (1). Article 3 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87), allows for the general and unrestricted right of workers' organisations "to organise their administration and activities and to formulate their programmes". It is found that strikes are an integral part of the functions of workers' organisations.
>
> (2). The ILO's Committee of Experts, which monitors the Application of Conventions and Recommendations, and the Governing Body Committee on the Freedom of Association, in assessing the application of various countries of Article 3 of Convention No. 87, have supported the principle of the right to strike, subject to any reasonable restrictions imposed by law, and have defined the limits within which the right to strike may be exercised. [61]

From the above, it is apparent that International Conventions recognise the right to strike, whether or not this right is explicitly stated within each of the Conventions

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[57] Ibid. at 115

[58] Association for Women's Rights in Development. Women's Rights and Economic Change. No 3 August 2002 (at 1)

[59] Davis et al. Fundamental rights in the Constitution: Commentary and Cases. Juta. 1997 (at 227)

[60] Hodges-Aeberhard, J and Odero de Dios, A. Principles of the Committee on Freedom of Association concerning strikes. International Labour Review, vol. 126 no. 5. September-October 1987.

[61] Ibid.

Legal Framework

The 1994 elections ushered in a new government, which adopted a new constitution and passed several pieces of legislation. As the Constitution is the supreme law of the land, any interpretation of law is therefore governed by the principles that are enshrined in the Constitution. In giving effect to the Constitution, the Constitutional Court plays an important role in providing clarity when adjudicating these disputes.

The Constitution of South Africa[62] in section 23(2)(c) states that every worker has the right to strike. The LRA of 1995 provides both for the right to strike and for the recourse to lock-out, 'Every employee has the right to strike and every employer has the right to lock-out'[63]. The LRA of 1995 regulates strikes and lock-outs in Chapter IV of the Act. The right to strike and recourse to lock-out is not an unlimited right. The Constitutional Court ruled that the right to strike in the Constitution is not the equivalent of the right to a lock-out in the LRA. In its ruling, the Court found,

> "The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock-out. The argument that it is necessary in order to maintain equality to entrench the right to lock-out once the right to strike has been included, cannot be sustained, because the right to strike and the right to a lock-out are not always and necessarily equivalent" (at 841)[64].

The provisions in section 23 and 36 of the Constitution of 1996 and in sections 64, 189A and schedule 8 of the LRA of 1995 places a limitation on these rights. The LRA further distinguishes between protected strikes and lock-outs and unprotected strikes and lock-outs. A strike or lock-out will usually only be protected if it complies with the procedures in the Act.

Chapter VIII of the Act, in line with the guarantee in the Constitution of the right to fair labour practices[65], proclaims,

> "Every employee has the right not to be unfairly dismissed"[66].

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[62] Act 108 of 1996

[63] LRA s61(1)

[64] Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (1996) 17 ILJ 821 (CC)

[65] Constitution of South Africa 1996, section 23(1)

[66] LRA s185

The new LRA regulates unfair dismissals more precisely than did its predecessor.

> "The Labour Courts are bound by the statute and may no longer develop rules under the umbrella of an amorphous definition of unfair labour practice. The Courts are required to determine the fairness of a dismissal within the boundaries of a more prescriptive statute, and the parameters that interpretation of the statute afford"[67].

In 1994, South Africa rejoined the ILO and adopted its recommendations and conventions. South Africa gives expression to these ILO Recommendations and Conventions in the LRA of 1995. This is evidenced in Chapter 1 of the LRA of 1995 in the following sections:

- section 1(b) 'to give effect to the obligations incurred by the Republic as a member state of the ILO';
- section 3(a) 'to give effect to its (ILO's) primary objectives; and
- section 3(c) 'to comply with the public international law obligations of the Republic'.

Article 214(4) of the 1996 Constitution of the Republic of South Africa further provides,

> "Any international agreement becomes law in the Republic where it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or Act of Parliament. The ILO's Recommendations and Conventions are binding on South Africa as a member state"[68].

[67] van Niekerk A et al. Contemporary Labour Law vol. 6 no 6. January 1997

[68] Rubin N. International Labour Law and the Law of the new South Africa. 25 March 1998. UCT publication (at 2)

CHAPTER FOUR

THE ROLE OF THE JUDICIARY IN GIVING EFFECT TO THE RIGHT TO STRIKE AS PROVIDED IN OUR CONSTITUTION

The judiciary, in an industrialised country, is in the forefront in deciding whether or not it grants the necessary relief when adjudicating strikes. In this chapter, we will analyse the Labour Court's decisions pertaining to the right to strike and the right to fair labour practice as provided for in the Constitution.

The Definition of a Strike

In the LRA of 1995,

> "A strike is defined as...the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same or similar 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"[69].

Basson et al[70] suggest that a strike is defined when it meets the following elements:

- an action or an omission of a prescribed nature
- the action or omission must be concerted
- the action or omission must have a prescribed purpose

In addition, they advocate that these three elements, only when present simultaneously, would constitute a strike as defined in section 213 of the LRA.

In giving effect to the definition of the right to strike, the Labour Court found, in both *Nkutha and Others v Fuel Gas Installations (Pty) Ltd*[71] and *NUM and Others v Via Dora Manufacturing Ltd*[72], that a work stoppage in response to an employer's breach of contract is not a strike as

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[69] LRA 1995 section 213

[70] Basson et al. Essential Labour Law 1998. Vol. 2 (99-100)

[71] Nkutha and Others v Fuel Gas Installations (Pty) Ltd (2000) 2 BLLR 178 (LC)

[72] NUM and Others v Via Dora Manufacturing Ltd (2000) 7 BLLR 827 (LC)

contemplated by the LRA. In *FAWU and Others v Rainbow Chicken Farms*[73], the Labour Court found that where employees make no demand on their employer and simply stay away from work on principle, their collective action does not constitute a strike. It was found that what the employees did in this case was to stay away from work for religious reasons.

The Right to Fair Labour Practice in Collective Bargaining

In *FAWU and Others v Pets Products (Pty) Ltd*[74], the employer gave a R200.00 Pick 'n Pay voucher to those employees who had worked during a protected strike by their colleagues. The court found that the allocation of the vouchers was not for extra work and would affect or influence a union member's decision to strike in future. Such conduct infringed section 5(1) and (3) of the LRA (discrimination for exercising a right/advantage for non-participation) and undermined collective bargaining, and should be strictly prohibited.

In effecting the right to strike, it was found in *CWIU v Plascon Decorative (Inland) (Pty) Ltd*[75], following failed wage negotiations, that the employer sought an interdict preventing union members who were not part of the relevant bargaining unit from participating in a protected strike. The Labour Appeal Court (LAC) found that constitutional rights conferred without expressed limitations cannot be restricted by reading implicit limitations into them. Employees may therefore take part in protected strike action called by their union even if they have no material interest in the outcome, provided it complies with the provisions of the Act[76].

Status of Collective Agreements and the Termination of Strikes

With regard to the status of a collective agreement in *Country Fair Foods (Pty) Ltd v FAWU and Others*[77], the LAC confirmed that employers and employees are not required to comply with the pre-strike provisions of a collective agreement if they have complied with provisions of the Act.

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[73] FAWU and Others v Rainbow Chicken Farms (2000) 21 ILJ 615 (LC)
[74] FAWU and Others v Pets Products (Pty) Ltd (2000) 21 ILJ 1100 (LC)
[75] CWIU v Plascon Decorative (Inland) (Pty) Ltd (1998) 12 BLLR 1191 (LAC)
[76] par 29. See also "issue in dispute" s.v. s213
[77] Country Fair Foods (Pty) Ltd v FAWU and Others (2001) 5 BLLR 494 (LAC)

In relation to the termination of a strike, in *Afrox Ltd v SACWU and Others; SACWU and Others v Afrox Ltd*[78], it was found that a strike can terminate in various ways. One possible way is by the disappearance of the reason for the strike. When it is found, for example, that the employer concedes to the demands of the strikers, then the strike has no further purpose and it terminates. When the strike ceases to exist, so does its protection[79]. It was further found where strikers adopted a new demand after the employer had complied with the original demand, then the continued strike was unprotected.

The Effect of 'Current' Collective Agreements

Can a strike take place during the currency of a collective agreement? It was found in *South African National Security Employers Association v TGWU and Others*[80], that a strike is not prohibited during the currency of a collective agreement if the issue in dispute relates to terms and conditions applicable after its expiry. It was further found that where the issue was related to a wage demand in respect of the following year, a collective agreement regulating wages for the current year did not regulate that issue, and employees were not prohibited in terms of section 65(3)(a)(i) of the Act from striking in support of their demands.

Are Employed Workers the only Guarantors of the Right to Strike?

Case law has provided that people who have resigned or have been dismissed from employment are entitled to participate in a strike against their former employer. In the definition of the LRA section 213, 'employee' for the purpose of the Act include 'employed'. This extension to ex-employees takes into account of the concept that the employment relationship extends beyond the termination of the employment contract. This was upheld in the case of *National Automobile and Allied Workers Union v Borg Warner SA (Pty) Ltd*[81].

[78] Afrox Ltd v SACWU and Others; SACWU and Others v Afrox Ltd (1997) 4 BLLR 382 (LC)

[79] at 386

[80] South African National Security Employers Association v TGWU and Others (1998) 4 BLLR 364 (LAC)

[81] National Automobile and Allied Workers Union v Borg Warner SA (Pty) Ltd (1994) 15 ILJ 509 (A)

Secondary Strikes

What is the dominant view of the Labour Court on secondary strikes? In *Samancor Ltd and Another v NUMSA*[82], it was confirmed that the mere existence of a nexus between the business of the primary and secondary employers is not enough to establish the reasonableness of a secondary strike but that, in addition, it is necessary to consider whether the nexus was of such a nature that it could influence the business of the primary employer. In *SACTWU v Free State & Northern Cape Clothing Manufacturers Association*[83], the Labour Court found where the union had served a dispute on the relevant bargaining council, it did not need to re-apply to another bargaining council if its members were covered in another magisterial district. The court clarified that the union only needed to apply the procedures necessary in the union affecting a protected strike. The court based its findings on *Afrox Limited v SACWU and Others*[84] and *Chemical Workers Union v Plascon Decorative Inland (Pty) Ltd*[85].

Benefits of Compliance with the Act

In compliance with section 67 of the Act, the LAC held in *Ceramic Industries Ltd t/a Betta Sanitaryware and Another v NCBAWU and Others*[86],

> "The rewards for compliance with the requirements of a protected strike are found in section 67. ...Non-compliance, however, leads to forfeiture of these benefits....Broadly speaking, therefore, the Act seeks to give effect to the fundamental right to strike by insulating participation in a protected strike from the legal consequences that might otherwise have followed in its wake"

In *Marapula and Others v Consteen (Pty) Ltd*[87], it was held that the dismissal of employees who had embarked on an unprotected strike action was fair when they were advised of the consequences of their action and had been afforded adequate time to reconsider their position.

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[82] Samancor Ltd and Another v NUMSA (1999) 11 BLLR 1202 (LC)
[83] SACTWU v Frees State & Northern Cape Clothing Manufacturers Association (2002) 1 BLLR 27 (LAC)
[84] Afrox Limited v SACWU and Others (1997) 20 ILJ 321 (LAC)
[85] Chemical Workers Union v Plascon Decorative Inland (Pty) Ltd (1999) 20 ILJ 321 (LAC)
[86] Ceramic Industries Ltd t/a Betta Sanitaryward and Another v NCBAWU and Others (1997) 6 BLLR 697 (LAC)
[87] Marapula and Others v Consteen (Pty) Ltd (1999) 8 BLLR 829 (LC)

Can Retrenchments take place during a Lock-Out?

Are employers allowed to dismiss employees during a lock-out? In *NUM and Others v Via Doro Manufacturing Ltd*[88], dismissal for operational requirements during a lock-out is not permissible since any operational requirements leading to the need for dismissal would be of the employer's own making. "If it were the intention of the legislature to give employers the weapon of retrenchment in addition to the lock-out, it would have said so expressly"[89]. An employer may only resort to retrenchment after conclusion of a lock-out.

"A Fair Hearing prior to Dismissal"

Dismissals for participating in an unprotected industrial action are regulated under item 6 of schedule 8 of the LRA. Item 6 confirms that participation in an unprotected strike is misconduct. It goes on to say, however, that participating in an unprotected strike will not always warrant dismissal. Factors that must be taken into account include:

- the seriousness of the contravention of the Act;
- attempts made to comply with the Act; and
- whether or not the strike was in response to unjustified conduct by the employer.

Item 6 also requires an employer to issue an ultimatum and allow the employees sufficient time to reflect on the ultimatum and to respond to it.

The provisions of item 6 are largely a codification of the jurisprudence of the Industrial Court governing dismissal for participating in an unprotected strike. This provision is likely to exert its influence on the Labour Court when it is called upon to adjudicate dismissals for participating in unprotected strikes under the new Act.

The Labour Court, in applying the old law, provided useful points as to how the Court is likely to interpret and apply the provisions of item 6 of schedule 8 of the Act. Workers who participate in an unprocedural strike commit an act of misconduct, and the normal disciplinary procedures should be applied, just as in any other case of misconduct[90]. There had been some confusion whether an employer who issued an ultimatum to workers on an unprocedural strike ('that they

[88] see supra note 71

[89] see supra note 71 at par 10

return to work by a certain time or else...') complied with the requirements of fair procedures. This question was clarified in the *Modise and Others v Steve's Spar Blackheath*[91] judgement in which the court held that striking workers (on an unprocedural strike) are entitled to a hearing before being dismissed. The reference to the 'audi alterem partem' rule in the judgement refers to the widely accepted legal principle that fairness requires that the other side be heard.

The Relevance of the ILO Conventions

In *Karras t/a Floraline v SASTAWU and Others*[92], the LAC reaffirmed the correctness of its position regarding the requirement for a hearing prior to the dismissal of striking employees, as stated in *Steve's Spar Blackheath* (supra).

It was argued that the employees had been dismissed because they had repudiated their contracts of employment. The majority of the court (Zondo JP and Nicholson JA) noted that in *Modise and others v Steve's Spar Blackheath*[93] the court had held that when an employer contemplates that an employee's job may be in jeopardy because the employee may have committed misconduct, the employer must observe the 'audi alterem partem' rule. The court opined that s188 (1)(b) of the LRA 1995, which required that the dismissal be in accordance with a fair procedure, supported this view. The section was, in accordance with s3 (2) of the LRA 1995, to be interpreted in compliance with public international obligations of the Republic of South Africa, which in turn brought article 7 of the ILO Convention on Termination of Employment 158 of 1982 into play. The court also relied on item 6(2) of the Code of Good Practice: Regulating Dismissals. The court found that there were no circumstances, which relieved the employer from the obligation to comply with the 'audi' rule.

The court also noted that no ultimatum had been given. An ultimatum is required to give the strikers a sufficient opportunity to consider the matter and the consequences of non-compliance with the ultimatum as well as to seek advice before taking the decision to comply or not to comply with the ultimatum.

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[90] See item 6 of the Code of Good Practice. Labour Relations Act 66 of 1995

[91] Modise and Others v Steve's Spar Blackheath (2000) 21 ILJ 519 (LAC)

[92] Karras t/a Floraline v SASTAWU and Others (2000) 21 ILJ 21612 (LAC)

[93] supra note 67

Uniformity with ILO Conventions

The Labour Court found harmony in interpreting the application on South African Labour Law of Article 7 of the ILO. Article 7 of ILO Convention on Termination of Employment 158 of 1982 provides as follows:

> 'The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity'.

It is clear from the provisions of Article 7 of the ILO, that international standards are such, that the only basis on which an employer can escape the obligation to give a hearing where the reason for dismissal is based on the employee's conduct or performance, is if he cannot reasonably be expected to give such a hearing in a particular case. There is no provision for another exception, in the form of a dismissal, for participating in a strike. It was found binding in both *Steve's Spar Blackheath*[94] and in *Karras t/a Floraline*[95].

In the above cases, the court has signalled its intention of a fairly strict approach to the dismissal of unprotected strikers. There is a clear indication that the courts will, in most instances, require something more than mere want of compliance with the Act where the unprotected strike is of a short duration and the non-compliance of a somewhat technical nature. In order to ensure that dismissal is held to be fair, the employer should attempt to address the grievances of the strikers, and not resort to a knee-jerk dismissal every time there is an unprotected strike.

Unilateral Change in Conditions of Employment: Is Strike Action Permissible?

With regard to unilateral change in conditions of employment, the court held in *SVR Mill Services (Pty) Ltd v NUMSA and Others*[96], that the union had the right to strike in a dispute involving an alleged unilateral change to terms and conditions of employment, and the provisions of s 64 of the Act have been complied with, it is not for the court to determine whether or not there has been

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[94] see supra note 67 par. 30

[95] see supra note 68 par. 26

[96] SVR Mill Services (Pty) Ltd v NUMSA and Others (2001) 22 ILJ 1408 (LC)

a unilateral change to the terms and conditions of employment, as the Act defines as dispute to include an 'alleged dispute'.

Clarity on Essential Service Dispute

The LRA places a limitation on the right to strike on essential service. In *Natal Sharks Board v SACCAWU and Others*[97], the employer sought to interdict a strike on the basis that it was an essential service. The court held that the employer did not qualify as an essential service since it did not fall within the class of employers classified as such under the 1956 Act, which was deemed to be essential services for a period of six months following the promulgation of the 1995 Act. It was found that,

> "The Essential Services Committee must designate a service as an essential service by publishing a notice to that effect in the Government Gazette and only after an investigation has been done. These requirements are found in section 70 and 71 of the Act, and have not been complied with. The applicant has not gone through this process...If the applicant feels that it ought to be an essential service it should go through the procedures laid down in section 70 of the Act".

Liability for an Unprotected Strike

Is an employer entitled to compensation from a trade union/employees for loss suffered as a result of an unprotected strike? Employers may sue for compensation for losses occasioned by an unprotected strike and approach a Labour Court for a 'just and equitable' amount as provided for in section 68 (1)(b) of the Act. In *Rustenburg Platinum Mines Limited v Mouthpeace Workers Union*[98], the court found that the strike was unprotected and it was instigated by the union and no attempts were made by the union to resolve the strike. The court ordered the union to pay compensation to the amount of R100 000.00 in instalments.

In *Manguang Municipality v SAMWU*[99], the merits was similar to the above and compensation to the amount of R25 000.00 was also granted to the employer for the loss suffered as a result of the

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[97] Natal Sharks Board v SACCAWU and Others (1997) 8 BLLR 1032 (LC) at 1039
[98] Rustenburg Platinum Mines Limited v Mouthpeace Workers Union (2001) 22 ILJ 2035 (LC)
[99] Manguang Municipality v SAMWU (2002) J586

strike. Here the court refused to grant the amount of R272 541.84 that was allegedly suffered by the employer.

The new Amendments in the LRA Section 189A: Giving Further Effect to the Right to Strike

This section allows the unions, when faced with the prospect of more than fifty members earmarked for retrenchment, to embark on legal strike action. A limitation will be placed on this action if the union opts to refer the matter to the Labour Court for adjudication. It was decided on the advice of the social partners, government, labour and employers to incorporate this provision into the LRA after it was felt that unions should be granted a right to strike in order to influence the outcome of an operational requirement dispute. This new innovation had its origins in the difficulties that the court found in developing appropriate relief to workers faced with retrenchments. The Labour Court, in *Van Rensburg v Austin Safe Co*[100], found that,

> "an employee is entitled to fair labour procedures. This right is protected by the Constitution as well. Unfortunately, this does not mean that an employee has the right to permanent and indefinite employment with a particular employer or in a particular position. An employer is entitled to look for new areas to better himself...A court should be mindful not to interfere with the legitimate business decisions taken by the employers who are entitled to make profits and even better profits if this can be achieved".

The judgements that followed the Labour Court decisions were as such that the Labour Court was not prepared to second-guess the management's reasons for operational dismissals.

In *South African Mutual Life Assurance Society v Insurance Banking Staff and Association and Others*[101], the court held that the alleged restructuring/reorganisation by the employer of a particular department was really nothing more than 'a means of dismissal of the individual respondents based upon their incapacity and work performance'. The decision to dismiss thus did not pass muster, but was found to be 'neither commercially, nor operationally justifiable on rational grounds based on fairness'. In this decision, it became clear that the courts were prepared to analyse the substantive nature of dismissals based on operational requirements. This

[100] Van Rensburg v Austin Safe Co (1998) 1 BLLR 86 (IC)
[101] South African Mutual Life Assurance Society v Insurance Banking Staff and Association and Others, case number CA 10/00, dated 29 June 2001

signalled a major shift from previous case law where the court moved from caution to a more interventionist approach.

This new procedure, section 189A allows for a facilitator to be appointed by the CCMA in assisting the parties in arriving at an agreement as to avert possible strikes or litigation in the Labour Court. Employees affected by a proposed retrenchment will have a 60-day period in order to try to resolve any possible disputes. The labour court will no longer rely on the precedent set in *SACWU v Affrox*[102] instead it will have a more proactive approach in determining relief sought by these dismissals. It is clear that the labour court armed with the new amendments would conduct a more interventionist approach in determining operations requirements disputes in the Labour Court when called upon to adjudicate these disputes.

Can Minority Unions Strike?

The Constitutional Court in a landmark decision in *National Union of Metalworkers and Others v Bader Bop (Pty) Ltd*[103], was called upon to determine whether a minority union is afforded the right to strike as provided for in the Constitution. In a previous judgement, it was ruled in the LAC in three separate but concurring judgements, with judge Davis writing a separate dissenting judgement. The court found that the strike by a minority union would be unprotected based on the following:

- that the Act only confers organisational rights on majority unions and where the issue is in dispute, it should be referred to arbitration;
- the Act further promotes collective bargaining through 'majoritarianism' and that only majority unions have the right afforded in section 65 of the Act;
- that strike action by an unrepresentative trade union demanding organisational rights conferred by part A of Chapter III of the LRA is not a strike as defined in section 213 of the LRA and is therefore prohibited.

Judge Davis, in dissenting judgement held that a strike was protected for the following reasons:

- there is no express prohibition in the LRA against the right to strike in support of a demand for organisational rights included in section 14 of the Act;

[102] SACWU v Affrox (1999) 20 ILJ 1718 (LAC)
[103] National Union of Metalworkers and Others v Bader Bop (Pty) Ltd (2003) 24 ILJ 305 (CC)

- an unrepresentative trade union can strike in support of a demand to be allowed to exercise rights that is provided for in Chapter III of the LRA, including those in section 14 of the Act.

The Constitutional Court, in its judgement, was unanimous that minority unions have the right to strike, in giving effect to the Constitution and the ILO's Recommendations and Conventions applicable.

> "This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it s through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in s 23 [of the Constitution], therefore, the importance of those rights in promoting a fair working environment must be understood. It is also important to comprehend the dynamic nature of the wage-work bargain and the context within which it takes place. Care must be taken to avoid setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change."[104]

This is a clear signal from the Constitutional Court that workers have the right to strike.

[104] Ibid.

CHAPTER FIVE

CONCLUDING COMMENTS

The right to strike as entrenched in the Constitution stimulated a number of debates in whether this right will lead to labour unrest or chaos in the field of labour relations. Various quarters in our society advocated that the right to strike is not conducive to growth and job creation. This debate is far from over as the recent constitutional judgement of the *National Union of Metalworkers and Others v Bader Bop (Pty) Ltd*[105]. Questions will be asked whether this decision will hold on challenge in a Constitutional Court appeal and, if successful, if we can afford a new wave of strikes by minority unions.

It is clear that the South African government's commitment in transforming the South African labour market has fully embraced the international arena in giving effect to the right to strike as found in a significant number of countries in the world. Empirical research has shown that the right to strike is a basic right in the regulation of power between employers and employees and that strike action does not necessarily lead to job losses and chaos in the economy. The strategy that the government has adopted in the Department of Labour's 15-point programme is one that addresses the whole labour market, not only in providing for the right to strike but also it is backed up by providing an infrastructure for growth and job creation. It is shown that in the 1980s, during the days of the apartheid government when there was no right to strike, the number of work days lost to strike action amounted to six million and that there was a gradual decline in strikes during the 1995 and 1996 period[106]. The South African Reserve Bank Survey further found that there was a decline in strike action. In 1999, 3.1 million man-days were lost to strike action and in 2000, the number fell to 0.5 million (almost 84%). This indicates the lowest level of strike action in almost two decades[107]. The statistics revealed that labour relations in South Africa have shifted from an adversarial approach to a more harmonious interaction between labour and business. The CCMA has undoubtedly played an important role in providing support and expertise in the settling of disputes.

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[105] see supra note 100

[106] Finnemore M. Introduction to Labour Relations in South Africa. Sixth Edition. Durban: Butterworths November 1998 (at 257)

[107] South African Reserve Bank. Labour Markets and South Frontiers: Reflections on current issues no 1, March 2002.

The South African government's commitment to construct a legislative framework, which not only, promotes collective bargaining and the right to strike, but also, provides support in the development of skills and the restructuring of industry, is an important component in positioning itself in dealing with the ever-changing demands brought about by globalisation in the world of work. In embracing the framework provided by the ILO Recommendations and Conventions in promoting collective bargaining, it can be argued that the minimum standards provided by the ILO is a realistic benchmark in determining South Africa's own labour standards to the rest of the world. The survival of the labour market will, however, depend on the compromises and sacrifices the parties are prepared to make in terms of developing a realistic framework which will be flexible enough to accommodate the concerns of both organised labour and industry, coupled with the strong legislative and supportive framework provided by the government and in such forums such as the National Economic Development and Labour Council (NEDLAC)[108], and the Millennium Labour Council.

The South African experiment in promoting the right to strike will undoubtedly be challenged on all fronts in the labour market. But, the current set of strike law can serve as a model for other countries, which are interested implementing the South African experience into their strike law.

[108] NEDLAC is a statutory council governed by Act 35 of 1994. It consists of organised labour, organised business and government where all legislation relating to labour, economic and development policy is considered in order to reach consensus before it is sent to Parliament in order for it to be written into statute. See duToit et al Labour Relations Law: A comprehensive guide. 3rd edition. Butterworths 2000 (18-19)

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