

PROCEDURAL FAIRNESS IN UNPROTECTED STRIKE DISMISSALS

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**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
MAGISTER LEGUM
IN THE FACULTY OF LAW
AT THE
UNIVERSITY OF PORT ELIZABETH**

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JANUARY 2003

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SUMMARY

The Labour Relations Act contains a definition of a strike which reads as follows:

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

The Labour Relations Act offers strikers special protection against dismissal if they conform with the Act and its provisions. Hence the distinction between those strikes and protest action in compliance with the Act, namely ‘protected’ strikes and protest action, and those strikes and protest action in violation of the Act, namely, ‘unprotected’ strikes and protest action.

Participation in an unprotected strike is one form of misbehaviour. The Labour Relations Act expressly prohibits the dismissal of employees engaged in a lawful strike. Employees engaged in strike action contrary to the provisions of the Labour Relations Act may be dismissed since their strike action is deemed to be a form of misconduct. The dismissal of striking employees must be both substantially and procedurally fair.

INTRODUCTION

If the requirements contained in the Labour Relations Act have been complied with, a strike is *protected* and the employees involved in the strike is protected from certain legal consequences flowing from such action in that the employer cannot claim damages from the striking employees or their trade unions for losses it suffered as a result of the strike, nor can the employer dismiss employees for breach of contract or based on the employees misconduct for participating in the strike.

In Chapter 1 strike action is defined in the Constitutional context as well as in the context of the Labour Relations Act of 1995.

In Chapter 2 the very important distinction is drawn between protected and unprotected strikes and the meaning and consequences of each is discussed.

In Chapter 3 reference is made to the substantive fairness for dismissing employees participating in an unprotected strike based on misconduct.

Finally, in Chapter 4, the procedural fairness relating to unprotected strike dismissals is discussed with specific reference being made to the common law rule of *audi alteram partem*.

Flippo¹ states:

“A strike is a concerted and temporary withholding of employee services from the employer for the purpose of extracting greater concessions in the employment relationship than the employer is willing to grant at the bargaining table. The strike, or the potential strike, is a basic part of the bargaining process. The possibility of a strike is the ultimate economic force that the union can bring to bear upon the employer. It is the power that offsets the employer's right to manage the firm and lock-out employees. Without the possibility of a strike in the background, there can be no true collective bargaining.”

¹ <http://www.irnet.co.za/COMMENT/Index.htm>

CHAPTER 1

DEFINING STRIKE ACTION

1. STRIKES: THE CONSTITUTIONAL CONTEXT

Strike action, in terms of our common law, constitutes a breach of contract because the employees are failing to tender their services in terms of their contracts of employment.² This entitles the employer to dismiss those employees.³ The employer may also be able to recover damages against responsible parties in terms of the law of delict.⁴ This past situation implied that employees who embarked on a strike, even if it was a legal strike were not protected from dismissal. The legislature appreciated the fact that industrial action and more specifically collective bargaining would be undermined by the common law. The previous Labour Relations Act⁵ moved the right to dismiss employees on strike away from the contractual origins of the common law to a dispensation of collective bargaining falling under unfair labour practice jurisdiction.⁶

² Grogan *Workplace Law* (2001) 6th edition p323.

³ R v Smith 1955 (1) SA 239 (C).

⁴ Grogan 323.

⁵ Act 28 of 1956.

⁶ SACWU v Afrox 1999 20 *ILJ* (LAC) 1724.

The right to strike is well recognised in international instruments.⁷ The International Covenant on Economic, Social and Cultural Rights, which was ratified by South Africa, obliges parties to guarantee the right to strike in conformity with the laws of the particular country.⁸ The right to strike is not dealt with explicitly by the International Labour Organisation Conventions, numbers 87 and 98.⁹ These Conventions promote the right to freedom of association, and the right to organise and bargain collectively. But Convention 87 provides for the right of workers' organisations "to organise their administration and activities and to formulate their programmes".¹⁰

The right of employees to strike is now entrenched in the Constitution¹¹ in section 23(2) of the Bill of Rights which states:

“Every worker has the right –

- (a) to form and to join a trade union;
- (b) to participate in the activities and programmes of a trade union; and
- (c) *to strike* (own emphasis).”

Froneman DJP (as he was then) stated the following:¹²

“The difference between the old and the new, and the evolution of our law even under the old order, serve to illustrate a number of important truths. Amongst these is that the changing content of the law relating

⁷ De Waal *et al* *The Bill of Rights Handbook* (2001) 4th edition p398.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ De Waal 398.

¹¹ Act 118 of 1996.

¹² SACWU v Afrox *supra* 5.

to, specifically, the dismissal of striking employees, was very often influenced by the prevailing views of not only the social, economic and political realities of the day, but also of the nature of the law itself. But the new constitutional dispensation changes much of that. Social, economic and political relations in a democratic state founded on the values set out in s 1 of the Constitution cannot be the same as under an undemocratic and racially exclusive order, as the old order was. Fairness has become the hallmark, or essence, of labour law and practice, not only a moral adjunct thereto. So-called ‘moral’ values have become constitutionalized rights.”

The Constitution¹³ contains a general limitation clause in section 36 which permits the limitation of rights under certain circumstances. The right to strike is a fundamental right protected by the Constitution and as such may only be limited in terms of a law of general application, and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The following factors must be taken into account in determining whether a limitation of a fundamental right is permissible, namely:

- the nature of the right;
- the importance of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose.

¹³ Act 118 of 1996.

2. THE LABOUR RELATIONS ACT OF 1995 AND STRIKES

The Labour Relations Act¹⁴ is a law of general application within the meaning of section 36 of the Constitution and builds on the foundations of the Constitution by providing that:

“Every employee has the right to strike and every employer has the right to lock-out ...”¹⁵

The Labour Relations Act¹⁶ contains a definition of a strike which reads as follows:¹⁷

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

The definition of a strike can therefore be divided into the following separate elements:

an action or omission of a prescribed nature;

the action or omission must be concerted and collective;

the action or omission must have a prescribed purpose, i.e. to resolve a dispute of mutual interest.¹⁸

In order to constitute a strike, the refusal to work must be for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and

¹⁴ Act 66 of 1995.

¹⁵ Section 64(1) of Act 66 of 1995.

¹⁶ Ibid.

¹⁷ Section 213 of Act 66 of 1995.

¹⁸ Basson p100.

employee. In *Simba (Pty) Ltd v FAWU & others*¹⁹ workers refused to comply with the employer's instruction to work a new shift system. The court held that this merely amounted to a 'concerted refusal to work'. The court found that the workers were not making a demand, and had raised no complaint; they were simply refusing to comply with the employer's demand.

The question as to whether a grievance constitutes a dispute regarding a matter of mutual interest was considered in *FAWU v Rainbow Chickens*²⁰. In the *Rainbow Chickens* case²¹ Muslim workers refused to work on Eid ul Fitr, a Muslim religious holiday. These workers were dismissed on the basis of their participation in an unprotected strike. The Labour Court held the following view:

"I am of the view that even though their actions were collective, the individual applicants did not conduct themselves as they did to remedy a grievance or to resolve a dispute. They made no demand. The respondent was also not placed under the type of pressure which, for instance, would accompany a wage demand prior to a strike. The respondent was also not placed in a position where, if it acceded to a demand of the individual applicants, that they would resume work. That would be the case in a strike. A strike would then be called off if the demand was met or the grievance was remedied or the dispute was resolved. This was not the case in this matter. The individual applicants simply refused to work on Eid because of their religious beliefs. Their conduct was similar to the conduct of any employee who decided to be absent from work for whatever reason. The fact that the individual applicants gave prior notice of their absenteeism makes no difference."

¹⁹ 1998) 9 BLLR 1 (LC).

²⁰ *FAWU v Rainbow Chickens (Pty) Ltd* (2000) 21 ILJ 615 (LC).

Employers and registered trade unions are free to bind themselves by a collective agreement that prohibits employees from striking in respect of the certain issue in dispute, or which requires that such disputes be submitted to arbitration. However, employees are not precluded from striking over an issue covered by a current agreement in support of demands relating to a future agreement. In *South African National Security Employers' Association v TGWU & others*²² the applicant sought unsuccessfully to obtain an interdict against a strike in support of wage demands to be implemented after the expiry of a current agreement. The court held that section 65(3)(b)(i) provides that parties are bound by the terms of a collective agreement for the period that it was operative. The respondents were accordingly free to strike over the terms of the current agreement.

The rationale behind strike action was considered by the Labour Appeal Court in the *Stuttafords*-case²³ where the court found that the reason employees resort to strikes is to inflict economic harm on their employer so that the employer can accede to their demands. The court stated further that “[a] strike is meant to subject an employer to such economic harm that he would consider that he would rather agree to workers’ demands than have his business harmed further by the strike”²⁴.

Section 67 of the Labour Relations Act²⁵ indemnifies employees and employers participating in a protected strike or lock-out against any civil liability which may flow from such action.²⁶

²¹ *FAWU v Rainbow Chickens (Pty) Ltd* (2000) 21 ILJ 615 (LC).

²² (1998) 4 BLLR 364 (LAC).

²³ *Stuttafords v SACTWU* (2001) 1 BLLR 47 (LAC).

²⁴ *Stuttafords v SACTWU* supra 53.

²⁵ Act 66 of 1995

²⁶ *Basson et al Essential Labour Law* (1998) Volume 2 p133.

Striking workers not only enjoy protection against participation in an actual strike, but also participation in ‘any conduct in contemplation or in furtherance of a protected strike...’²⁷.

The Labour Relations Act also contains general limitations of the right to strike. Section 65(1)(c) of the Act states that the subject matter of the issue in dispute may impose a limitation on the right to strike in that disputes concerning the application or interpretation of collective agreements must be referred to arbitration and disputes concerning the dismissal of employees must be referred to arbitration or to the Labour Court.²⁸ The Labour Relations Act states further that “[n]o person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if –

- (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute²⁹;
- (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration³⁰; ...
- (c) that person is engaged in-
 - (i) an essential service; or
 - (ii) a maintenance service³¹.”

As Basson *et al*³² states that the approach of the Labour Relations Act of 1995 is based on five basic principles:

- “ a) an acceptance of the right to strike and a recourse to lock-out;

²⁷ Section 67 of Act 66 of 1995.

²⁸ Section 65(1)(c) of Act 66 of 1995.

²⁹ Section 65(1)(a) of Act 66 of 1995.

³⁰ Section 65(1)(b) of Act 66 of 1995.

- b) an acceptance that this right and recourse can nevertheless be limited in the interests of employers and employees and in the public interest;
- c) the adoption of the concept of the *protected* strike or lock-out;
- d) an acceptance of the right of employees to take certain actions in support of strikes;
- e) an acceptance of the right of employees to participate in protest action to defend their socio-economic interests.”

3. SECONDARY STRIKES

Secondary strikes fall within the definition of a strike and is sometimes referred to as a sympathy strike where employees of one employer take concerted action against their own employer in support of other employees who are striking against their own employer.³³

The Labour Relations Act defines a secondary strike as:³⁴

“a strike, or a conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand.”

The court in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd*³⁵ had to consider the definition of a secondary strike, as opposed to a primary strike. The definition of a

³¹ Section 65(1)(d) of Act 66 of 1995.

³² Basson p95.

³³ Basson p107.

³⁴ Section 66(1) of Act 66 of 1995 substituted by section 19 of Act 42 of 1996.

strike was grammatically analysed in terms of the Labour Relations Act and the court reached the conclusion that the definition was broad enough to include a strike that involved employees of the same employer even though they are not directly affected by the issue in dispute.³⁶ The court held³⁷ that the definition of a strike did not identify who the parties to the dispute must be and there was no limitation regarding who such parties may be:

“The absence of any article, definite or indefinite, before either ‘employer’ or ‘employee’ is conspicuous. It has the effect of rendering at its most general and non-specific the employer-employee relationship to which the strike dispute must relate. ... It follows that, while it is clear that the employees not performing work must all share the purpose of remedying a grievance or resolving a dispute, the definition imposes no other requirements of mutuality – whether a shared employment relationship with an employer or a shared interest in the grievance or dispute – upon them.”

The Labour Relations Act contains certain requirements that must be met before a secondary strike will be protected:³⁸

- a) A secondary strike will only be protected if the primary strike is protected;³⁹
- b) The secondary employer must have been given seven days’ prior written notice of the secondary strike;⁴⁰ and
- c) The nature and extent of the secondary strike must be reasonable in relation to the possible direct or indirect effect that it may have on the business of the primary employer.⁴¹

³⁵ (1999) 20 ILJ 321 (LAC).

³⁶ Basson “Some Recent Developments in Strike Law” 2000 *Merc LJ* 119–135 p125.

³⁷ At 327I– 328A.

³⁸ Section 66(2) of Act 66 of 1995.

³⁹ Section 66(2)(a).

⁴⁰ Section 66(2)(b).

Regarding the last requirement Du Toit⁴² had the following to say:

“ This [section 66(2)(c)] introduces a notion of proportionality – the legitimacy of a secondary strike is determined in relation to the impact that it is likely to have on the business of the primary employer. Where the impact is likely to be substantial, for example where the secondary employer is a customer or supplier of the primary employer, a supplier of temporary labour, or is in some other way associated with the primary employer, greater latitude must be permitted when evaluating the reasonableness of the nature and extent of the strike. On the other hand, where the impact on the primary employer is likely to be insignificant, for example where the primary and secondary employers have no business relationship whatsoever, a more restrictive approach must be adopted.”

In *Samancor v NUMSA*⁴³ the Labour Court found that for a secondary strike to be reasonable the court referred to the following:

a) What was the harm done by the strike?

In this regard the court held:

“The respondents intended to inflict harm on the applicants. This, too, is permissible subject to reasonableness and proportionality as explained in section 66(2)(c) of the Act.”

b) Does the strike action have a possible direct or indirect effect on the business of the primary employer?

“But a mere nexus which does not have an effect on the primary employer's business is insufficient to permit a secondary strike.”

⁴¹ Section 66(2)(c).

⁴² Du Toit *et al The Labour Relations Act of 1995* (1996) p202.

⁴³ 1999 (20) ILJ 2941 (LC)

c) The court must consider whether the nature and extent of the secondary strike is reasonable in relation to the effects of the primary strike.

CHAPTER 2

PROTECTED AND UNPROTECTED STRIKES

1. INTRODUCTION

The Labour Relations Act offers strikers special protection against dismissal if they conform with the Act and its provisions.⁴⁴ Hence the distinction between those strikes and protest action in compliance with the Act, namely ‘protected’ strikes and protest action, and those strikes and protest action in violation of the Act, namely, ‘unprotected’ strikes and protest action.⁴⁵

Two procedural requirements must be complied with before a strike or lock-out is protected:

- a) the dispute must be submitted to conciliation, and
- b) if conciliation fails, the required notice of the intended action must be given.⁴⁶

2. SUBMISSION FOR CONCILIATION

First, according to section 64(1)⁴⁷ the issue in dispute must first be referred to a bargaining council having jurisdiction over the dispute, or if there are no such council, to the CCMA. Employees only have the right to strike once the council or a Commissioner of the CCMA have issued a certificate stating that the dispute remains unresolved or once a period of 30 days has

⁴⁴ Grogan *Workplace Law* (2001) 6th edition p327.

⁴⁵ Ibid.

⁴⁶ Basson *et al Essential Labour Law* (1998) Volume 2 p119.

lapsed since the referral was received by the council or the Commissioner. The parties to the dispute may also agree to any extension of the 30 day period.⁴⁸

The Labour Relations Act clearly requires the ‘issue in dispute’ to be referred to bargaining. It is therefore important in every case to determine what this ‘issue in dispute’ is. In section 213 of the Labour Relations Act an ‘issue in dispute’ is defined as “... in relation to a strike or lock-out ... the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out”. The Labour Appeal Court now clearly states that it is necessary to look at the real dispute between the parties and not just simply the parties’ own description of the dispute. In the Ceramic Industries case⁴⁹

the Labour Appeal Court held as follows:⁵⁰

“The Union’s initial complaint was the alleged harassment of the union official and employees ... [T]hat was a justiciable rights dispute with a specific remedy to be pursued in the Labour Court. The union could not convert the nature of that underlying dispute into a non-justiciable one simply by adding a demand for a remedy falling outside those provided for by the Act. The tail cannot wag the dog. If such an approach is allowed, an underlying rights dispute normally justiciable or arbitrable in terms of the Act could be transformed into a strikeable issue simply by adding a demand for a remedy not provided for in the Act. That would be unacceptable. Even if the issue in dispute is not articulated as a substantive complaint coupled with a specific demand, but rather in the form of a complaint about the refusal of the specific demand itself, the position would not change. The refusal of a demand, or the failure to remedy a grievance, always needs to be examined in order to ascertain the real dispute underlying the demand or remedy. The demand or

⁴⁷ Of Act 66 of 1995.

⁴⁸ Section 64(1)(a)(i) and (ii) of Act 66 of 1995.

⁴⁹ Ceramic Industries Ltd t/a Beta Sanitaryware v National Construction Building and Allied Workers Union & others (1997) 6 BLLR 696 (LAC).

remedy will always be sought to rectify the real, underlying, dispute. It is the nature of that dispute that determines whether a strike in relation to it is permissible or not. If, in the present case, the union formulated the issue in dispute in the referral to the CCMA as, eg ‘the refusal to dismiss Buys, Pieter and Broccard’, it would still be necessary to ask *why* their dismissal was sought. If it was because of the alleged harassment, or victimisation, the issue in dispute would remain justiciable in terms of the Act and therefore not a strikeable issue.”

In *Fidelity Guards Holdings (Pty) Ltd v PTWU & others* (1997) 9 BLLR 1125 (LAC) the Court conducted a “... fundamental enquiry ... to establish what the demand, the grievance or the dispute is that forms the subject matter of the strike”. The court achieved this by looking at the following factors:

- Prior negotiations between the parties;
- The correspondence between the parties immediately prior to the referral to the CCMA;
- The correspondence between the parties and the CCMA after conciliation; and
- The advisory award made in this case by the CCMA.⁵¹

3. NOTICE OF THE INTENDED ACTION

Secondly, the Act states further that after the lapse of the prescribed period, at least 48 hours’ notice of the commencement of the strike has to be given, in writing, to the employer, bargaining council⁵², or employers’ organisation⁵³.

⁵⁰ At 703F-H.

In the Tiger Wheels Babelegi case⁵⁴ the court held that it is sufficient that notice of an intended strike be given only to an employers' bargaining council where the employer is bound by a bargaining council agreement and the issue in dispute relates to a collective agreement to be concluded in the council.

The precise time of the commencement of the intended strike action must be specified in the notice given to the employer.⁵⁵ In the Ceramic Industries case a notice was given to the employer stating that a strike shall start at any time after 48 hours from the date of the notice. In this case the court held⁵⁶ that the "... purpose [of section 64(1)(b)] is to warn the employer of the collective action, in the form of a strike, and *when* it is going to happen, so that the employer may deal with that situation. ... The specific purpose of warning employers of a proposed strike may have at least two consequences for the employer. The employer may either decide to prevent the intended power play by giving in to employee demands, or, may take other steps to protect the business when the strike starts. For the former the notice in the present case might suffice, as a minimum period of 48 hours is given to deliberate on whether to accede to the demands or not. For the latter, however, the notice is deficient, because the employer does not know when, after 48 hours, the proposed strike will commence. The effect is that one of the objects of the section will not be achieved. ... The language and purpose of section 64(1)(b) require that a specific time for the commencement of the proposed strike be set out in the written notice. The legislature was

⁵¹ Basson 121.

⁵² Where the issue in dispute relates to a collective agreement to be concluded by the council.

⁵³ Where the employer is a member of an employers' organisation that is a party to the dispute.

⁵⁴ Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v National Union of Metalworkers of SA & others (1999) 20 ILJ 677 (LAC).

⁵⁵ Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building and Allied Workers Union & others (1997) 6 BLLR 696 (LAC); Fidelity Guards Holdings (Pty) Ltd v PTWU & others (1997) 9 BLLR 1125 (LAC).

⁵⁶ At 701-702.

anxious that attention be paid to the '*commencement*' of the strike. The use of an exact time expressed in hours as a minimum of the notice to be given seems to indicate that the longer period envisaged by the phrase 'at least' should also be expressed in an exact manner. The manner in which the time of the commencement of the strike is expressed may, however, differ depending on the nature of the employer's business. Strikes can occur which involve the whole workforce and others which merely involve one or more shifts. In a shift system notice of the exact time of the proposed strike in respect of particular shifts may be necessary".

In *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v National Union of Metalworkers of SA & others* (1999) 20 ILJ 677 (LAC) the Labour Appeal Court held that there exist no obligation on employees to commence an intended strike at the time stipulated in the notice as long as long as employees commence with the strike within a reasonable period after the stipulated time.

Similarly, in *Transport Motor Spares v National Union of Metalworkers of SA* (1999) 20 ILJ 690 (LC) it was found that it is not necessary for employees who temporarily suspend a strike to issue a fresh notice to the employer.

In *SA Clothing & Textile Workers Union v Stuttafords Department Stores Ltd*⁵⁷ it was held that the time given in two notices, where a second notice was issued due to insufficient time given in the first notice, will be taken cumulatively.

⁵⁷ (1999) 20 ILJ 2692 (LC).

The Labour Appeal Court in *County Fair v FAWU*⁵⁸ found that a party has a choice of either following a pre-strike procedure agreed upon in a collective agreement or following the statutory procedure laid down in section 64(1) of the Labour Relations Act. Compliance with either procedure, it was held, suffices to confer on employees the right to strike and to render such a strike a protected one.

Section 65(1)(d) of the Labour Relations Act prohibit employees who are engaged in the provision of essential or maintenance services from striking. An essential service is defined as:

- “(a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
- (b) the Parliamentary service;
- (c) the South African Police Services.”

The Act provides for the establishment of an essential services committee by the Minister of Labour after consultation with NEDLAC and in consultation with the Minister for the Public Service and Administration.⁵⁹ The Minister must appoint to the committee persons who have knowledge and experience of labour law and labour relations.⁶⁰ The committee’s functions are to designate essential services and to determine disputes as to whether or not the whole or any part of a particular service is an essential service.⁶¹ A further function of the committee is to determine whether or not the whole or any part of a service is a maintenance service.⁶²

⁵⁸ (2001) 21 ILJ 1103 (LAC).

⁵⁹ Section 70(1) of Act 66 of 1995.

⁶⁰ Ibid.

⁶¹ Section 70(2)(a) of Act 66 of 1995.

⁶² Section 70(2)(c) of Act 66 of 1995.

The Essential Services Committee conducts investigations as to whether the whole or any part of any service should be declared essential.⁶³ The definition states that for a service to be designated an essential service there has to be an interruption of a service, whether partial or complete, that can put at risk or imperil or jeopardize the life, personal safety or health of the population.⁶⁴ The probability of economic harm in South Africa, no matter how real, is not an endangerment to the life, safety or health of the population.⁶⁵ It has also been held that plants and animals are not protected by the definition.⁶⁶

The essential services committee may at its own initiative⁶⁷, and must at the request of a bargaining council⁶⁸, conduct an investigation to determine whether or not the whole or any part of a service is an essential service. Where there is a dispute about whether a particular service (not yet designated as essential) is an essential service, any party to the dispute may refer it to the essential services committee for a determination.⁶⁹ The committee must decide the dispute 'as soon as possible'.⁷⁰ Section 72 of the Labour Relations Act provides for a collective agreement that can be concluded between employers and trade unions for the maintenance of certain minimum services in a service designated as an essential service.⁷¹ The employees who provide the minimum services will not be able to strike.⁷²

⁶³ Grogan 336.

⁶⁴ Pillay "Essential Services under the New LRA" 2001 Volume 22*ILJ* 1-36, 11.

⁶⁵ *Ibid.*

⁶⁶ In *Crocodile Valley Citrus Co v SA Agricultural Plantation & Allied Workers* (case no ESC102).

⁶⁷ In terms of section 70(2)(a) of Act 66 of 1995.

⁶⁸ In terms of section 70(3) of Act 66 of 1995.

⁶⁹ Section 73(1)(a) of Act 66 of 1995.

⁷⁰ Section 73(3) of Act 66 of 1995.

⁷¹ Basson 115.

CHAPTER 3

DISMISSAL FOR MISCONDUCT DURING AN UNPROTECTED STRIKE

1. INTRODUCTION

Strikers who comply with the requirements as set out in section 64 of the Labour Relations Act⁷³ are protected from dismissal. But employers still have the right to dismiss employees participating in a strike on grounds of misconduct or the employer's operational requirements.⁷⁴ Dismissals based on misconduct still have to be substantively and procedurally fair and the procedures set out in the Act for dismissals for operational requirements must still be followed.⁷⁵

Participation in an unprotected strike is one form of misbehaviour which receives special treatment in the Code of Code Practice: Dismissal⁷⁶. Item 6 of the Code deals with dismissals in the context of industrial action. Item 6(1) states that “[p]articipation in a strike that does not comply with the provisions of Chapter IV is misconduct”. It then proceeds to state that such conduct may constitute a fair reason for dismissal, in that, like any form of misconduct, it “does not always deserve dismissal”.⁷⁷

⁷² Ibid.

⁷³ Act 66 of 1995

⁷⁴ Section 67(5) of Act 66 of 1995.

⁷⁵ Section 68(5) of Act 66 of 1995.

⁷⁶ Schedule 8 of Act 66 of 1995.

2. SUBSTANTIVE FAIRNESS

Reference must be made to all facts and surrounding circumstances in determining the substantive fairness of the dismissal.⁷⁷ Furthermore, “[t]he substantive fairness of the dismissal in these circumstances must be determined in the light of the facts of the case”⁷⁹, including, but not limited to, the “seriousness of the contravention of the Act”⁸⁰, “attempts made to comply ...”⁸¹ with the Act, and finally, “whether or not the strike was in response to unjustified conduct by the employer”⁸². Each of these factors will now be examined more closely.

2.1 The seriousness of the failure to comply with the provisions of the Labour Relations Act 66 of 1995.

The Labour Relations Act expressly prohibits the dismissal of employees engaged in a lawful strike.⁸³ Employees engaged in strike action contrary to the provisions of the Labour Relations Act may be dismissed since their strike action is deemed to be a form of misconduct.⁸⁴

The extent of non-compliance with the provisions of the Act will depend on the circumstances of each case.⁸⁵ For example, in *Transport & General Workers Union & others v De La Rey’s*

⁷⁷ Item 6(1) of Schedule 8 of Act 66 of 1995.

⁷⁸ Item 6(1) of Schedule 8 of Act 66 of 1995.

⁷⁹ Ibid.

⁸⁰ Item 6(1)(a) of Schedule 8 of Act 66 of 1995.

⁸¹ Item 6(1)(b) of Schedule 8 of Act 66 of 1995.

⁸² Item 6(1)(c) of Schedule 8 of Act 66 of 1995.

⁸³ Section 64 of Act 66 of 1995.

⁸⁴ Section 67(5) of Act 66 of 1995.

⁸⁵ *Transport & General Workers Union & others v De La Rey’s Transport (Pty) Ltd* (1999) 20 ILJ 2731 (LC).

Transport (Pty) Ltd⁸⁶ the Labour Court held that the dismissal of striking workers who contravened a collective agreement and initiated a strike without warning or notice to the employer, was fair.

The Labour Court, in *Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU & Others*⁸⁷, held that the court should not follow a restrictive approach to the provisions of the Labour Relations Act which limit a fundamental right entrenched in the Constitution⁸⁸ such as the right to strike. In this case the court stated that where a strike is unprotected merely because of a technical point, it would be unfair to dismiss those who participated in the unprotected action. Compliance by the strikers with the provisions of the LRA is clearly fundamental. The gravity of non-compliance with the provisions of the Act will, however, depend on the circumstances. In *LAW Wholesale Meat Distributors v FAWU & others*⁸⁹ the court held that minor technical considerations such as non-compliance with time limits or incorrectly completed forms should be condoned.

In *Coin Security Group (Pty) Ltd v Adams & others*⁹⁰ the court held that the union officials were clearly aware that the strike was unprotected and even though the strikers themselves might not have known that the strike was unprotected, they stood to gain collectively from the strike, and could not therefore claim to be absolved because the union's gamble had failed.

⁸⁶ Ibid.

⁸⁷ (1997) 18 ILJ 550 (LC) at 552G-J.

⁸⁸ Act 108 of 1996.

⁸⁹ Supra 1261.

⁹⁰ (2000) 21 ILJ 2731 (LC).

The onus, however, of justifying non-compliance regarding serious contraventions of the provisions of the Labour Relations Act should rest on strikers.⁹¹

2.2 Whether or not the strike was in response to unjustified conduct on the part of the employer

The employer's unjustified conduct justifies strike action by the employees without complying with the statutory requirements as laid down in the Labour Relations Act.⁹² Unjustified conduct in this context includes not only illegal acts of the employer, but goes much wider to include unfair conduct.⁹³

The employer's refusal to bargain with employees⁹⁴ or to bargain in good faith⁹⁵ have granted relief to strikers who have been dismissed.

In general the courts have not been too sympathetic to strikes arising from unfair dismissals, seeing as the individual employees concerned have other judicial remedies to rely on.⁹⁶

Apart from the requirement of substantive fairness, the dismissal of strikers engaged in an unprotected strike will also have to be procedurally fair. The procedural fairness to be followed by employers in dismissing unprotected strikers are discussed in Chapter 4.

⁹¹ See, for example, *National Union of Metalworkers of SA v Tek Corporation Ltd & others* (1991) 12 ILJ 577 (LAC).

⁹² Grogan *Workplace Law* (2001) 6th edition p352.

⁹³ *Ibid.*

⁹⁴ See, for example, *Sentraal-wes (Koöperatief) Bpk v Food & Allied Workers Union & others* (1990) 11 ILJ 977 (LAC) and *Food and Allied Workers Union v Mnandi Meat Products & Wholesalers* (1995) 16 ILJ 151 (IC).

⁹⁵ *Metal & Allied Workers Union & others v Natal Die Casting Co (Pty) Ltd* (1986) 7 ILJ 520 (IC); *Mashifane & others v Clinic Holdings Ltd & another* (1993) 14 ILJ 954 (LAC).

⁹⁶ *National Union of Metalworkers of SA v Three Gees Galvanising* (1993) 14 ILJ 372 (LAC).

CHAPTER 4

PROCEDURAL FAIRNESS IN UNPROTECTED STRIKE DISMISSALS

1. INTRODUCTION

In terms of item 6(2) of Schedule 8 of the Code of Good Practice: Dismissal in the Labour Relations Act the procedural steps to be taken by an employer to dismiss employees engaged in an unprotected strike is as follows:

“Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer dispense with them.”

The above provisions is largely based upon principles formulated by the courts acting in terms of the Labour Relations Act of 1956.⁹⁷ These decisions will therefore most likely remain relevant in the new dispensation.

⁹⁷ Basson *et al Essential Labour Law* (1998) Volume 2 p143.

Procedural fairness in the context of dismissal for participation in an unprotected strike entails the following:

(a) The employer must make contact with the union

Item 6(2) of Schedule 8 of the Code of Good Practice: Dismissal of the Labour Relations Act of 1995 states that employers should contact a trade union official “at the earliest opportunity” before dismissing strikers in order to “discuss the course of action it intends to adopt. Clearly this provision will only apply to strikers who are union members.”⁹⁸ The provision appears to have a two-fold purpose, namely “to give the union an opportunity to dissuade the employer from dismissing the strikers”⁹⁹ and “to give the union an opportunity to persuade the workers to return to work”¹⁰⁰.

This provision does not, however, allow the union to insist on a delay, where the union itself does not have the intention of doing anything constructive to end the strike.¹⁰¹ The test is whether the union could, on the probabilities, have succeeded to, within a reasonable time, bring the strike to an end.¹⁰² In *Performing Arts Council (Transvaal) v Paper Printing Wood & Allied Workers Union & others* the court stated:¹⁰³

“Having regard to the six factors mentioned above, in my opinion there was a distinct probability that had a fair ultimatum been given to the employees the strike would have come to a speedy

⁹⁸ Grogan p352.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ See, for example, *National Union of Metalworkers of SA v Datco Lighting (Pty) Ltd* (1996) 17 ILJ 315 (IC).

¹⁰² *Performing Arts Council (Transvaal) v Paper Printing Wood & Allied Workers Union & others* (1994) 15 ILJ 65 (A).

¹⁰³ At 76D-E.

conclusion. It appears from the evidence that the trade union was certainly opposed to the strike and that attitude would, as a probability, have weighed with the employees, at any rate, after they had cooled down.”

Also, in *Doornfontein Gold Mining Co Ltd v National Union of Mineworkers & others*¹⁰⁴ it was held that an extension of an ultimatum would have enabled the union to help end the strike before dismissals became necessary. In *VRN Steel (Pty) Ltd v National Union of Metalworkers of SA*¹⁰⁵ the court found that had the employer contacted the workers’ union before issuing an ultimatum, it would have learned that the national strike in which the employees participated was about to end.

However, in *National Union of Mineworkers & others v Goldfields Security Ltd*¹⁰⁶, the dismissal of striking employees were ruled to be premature and unfair, while a union official still attempted to intervene.

The legislator has ensured, by placing an obligation to discuss possible courses of action with the trade union, that the communication channels between disputing parties remain open before any final decisions are taken.¹⁰⁷ This provision ensures that decisions are taken rationally.¹⁰⁸

In *CAWU & Others v Klapmuts Concrete (Pty) Ltd*¹⁰⁹ the employer twice faxed its ultimatum to the union office. But the court held that the employer did not comply with the requirement of

¹⁰⁴ (1994) 15 ILJ 527 (LAC).

¹⁰⁵ (1995) 16 ILJ 1483 (LAC).

¹⁰⁶(1999) 20 ILJ 1553 (LC).

¹⁰⁷ Basson p143.

¹⁰⁸ Ibid.

¹⁰⁹ (1996) 17 ILJ 725 (IC).

making contact with the union in that the employer was aware of the fact that there would be nobody at the offices to actually receive the ultimatum.

(b) The employer must issue a fair ultimatum.

The Labour Appeal Court in *Plaschem (Pty) Ltd v CWIU*¹¹⁰ summarised the desirability of issuing an ultimatum to strikers before resorting to dismissal as follows:

“When considering the question of dismissal it is important that an employer does not act overhastily. He must give fair warning or ultimatum that he intends to dismiss so that the employees involved in the dispute are afforded a proper opportunity of obtaining advice and taking a rational decision as to what course to follow. Both parties must have sufficient time to cool off so that the effect of anger on their decisions is eliminated or limited.”

The requirements for a fair ultimatum are the following:¹¹¹

(i) The ultimatum must be communicated to the strikers in clear, unambiguous terms, in a medium understood by the strikers.

It is important that the ultimatum reach each striker or at least their representatives. In *Coin Security Group (Pty) Ltd v Adams & others*¹¹² an ultimatum was given during the morning to

¹¹⁰ (1993) 14 ILJ 1 000 (LAC).

¹¹¹ Grogan p354.

¹¹² (2000) 21 ILJ 925 (LAC).

employees to return to work by 14:00 the same day. The ultimatum was given to their union. The Court stated in this regard:¹¹³

“Communication of the ultimatum to the chosen collective bargaining representative of strikers during a strike would generally constitute sufficient notice thereof. Employees cannot belong to the collective when it suits them and insist on individual communication when it does not. In any event, having received express verbal notice in the early morning of 16 April that an ultimatum was to be given and that it would expire at 14:00, it was [the union official’s] duty immediately to contact his members to discuss an appropriate response.”

The distribution of the ultimatum or whether it should be in writing is not clearly stipulated in the Code, however, there are certain situations in which written ultimatums may be desirable.¹¹⁴

(ii) 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 do so.

Open-ended threats in an ultimatum by the employer stating that employees would be disciplined after they returned to work rendered the employee’s failure to respond to the ultimatum reasonable and constituted one of the factors relied on by the Court in *NULW & others v Crown Footwear (Pty) Ltd*¹¹⁵ in holding that the dismissals were unfair.¹¹⁶

¹¹³ At para 23.

¹¹⁴ *Performing Arts Council (Transvaal) v Paper Printing Woord & Allied Workers Union & others* (1992) 13 ILJ 1439 (LAC).

¹¹⁵ (2000) 6 BLLR 739 (LC).

¹¹⁶ See, for example, also *WESUSA & others v Jacobz* (2000) 8 BLLR 977 (LC).

Instructions contained in an ultimatum must be clear and reasonable. In *Chemical Workers Union v Plascon Ink & Packaging Coatings (Pty) Ltd*¹¹⁷ the Court stated that where strikers were threatened with summary dismissal if they don't return to work the dismissal of those strikers would be both illegal and unfair in that the dismissal was not based on a ground recognised in law as justifying summary dismissals. So, too, was the dismissal of striking employees found to be unfair in *National Union of Metalworkers of SA v Wubbeling Engineering (Pty) Ltd & another* (1995) 16 ILJ 1489 (LAC) where the employer insisted that the strikers sign an undertaking that they would not continue with their action once they resumed work, and persisted with this condition even though the threat of further strike action had passed.

- (iii) Sufficient time, from the moment of giving the ultimatum, must elapse to allow the workers to receive the ultimatum, reflect upon it, and to respond to it by either compliance or rejection.

The function of an ultimatum was described as follows in *Plaschem (Pty) Ltd v Chemical Workers Industrial Union*¹¹⁸:

“When considering the question of dismissal it is important that an employer does not act over hastily. He must give a fair warning or ultimatum that he intends to dismiss so that the employees involved in the dispute are afforded a proper opportunity of obtaining advice and taking a rational decision as to what course to follow. Both parties must have sufficient time to cool off so that the effect of anger on their decisions is eliminated or limited.”

¹¹⁷ (1991) 12 ILJ 353 (IC).

¹¹⁸ (1993) 14 ILJ 1000 (LAC)

The requirements of a fair ultimatum were set out as follows in *Performing Arts Council (Transvaal) v Paper Printing Woord & Allied Workers Union & others*^{119,120}:

“In my judgment a fair ultimatum in the circumstances of this case should have been of sufficient duration to have enabled:

- (a) PACT to have ascertained what had gone wrong and caused the employees to behave as they did either by direct inquiry from the employees, the shop steward, Motau or some other representative of the trade union;
- (b) The employees time to cool down, reflect and take a rational decision with regard to their continued employment, and for that purpose to seek advice from their trade union.”

The terms and conditions must be accepted by employees completely and unconditionally if the employees wish to be deemed to have complied with an ultimatum.¹²¹ Grogan states that “[o]nce the strikers have complied with the ultimatum, the employer is precluded from taking disciplinary action thereafter *for the act of striking*”¹²².

(iv) The ultimatum must be bona fide.

In *ICS Group v National Union of Food & Beverage Workers & others*¹²³ employees embarked on an illegal strike in protest of possible disciplinary action against some of their colleagues. The employees had, in the meantime, taken the required steps to commence a legal strike. But before these steps had been taken by the employees, the employer had issued an ultimatum and

¹¹⁹ (1994) 15 ILJ 65 (A).

¹²⁰ At 76B-C.

¹²¹ *National Union of Public Service Workers & others v Alberton Old Age Home* (1990) 11 ILJ 495 (LAC); *National Union of Mineworkers v Amcoal Collieries & Industriel Operations Ltd* (1990) 11 ILJ 1295 (IC).

¹²² Grogan 357.

¹²³ (1998) 5 BLLR 452 (LAC).

dismissed the strikers. The Labour Appeal Court held that this was an attempt of the employer to pre-empt a lawful strike, and the Court found the action of the employer as unfair.

(c) The holding of a disciplinary hearing

The audi alteram partem rule is part of the rules of natural justice and is deeply entrenched in our law.¹²⁴ Primarily regulating the relationship between organs of state and individuals the audi rule historically has applied only in the field of administrative law.¹²⁵ However, the sphere of application of the audi rule was extended with the introduction of the unfair labour practice concept into the 1956 Labour Relations Act together with its interpretation and application by the Industrial Court and the old Labour Appeal Court.¹²⁶

In the 1990 case of *National Union of Public Service Workers & others v Alberton Old Age Home*¹²⁷ the court found that when workers go on strike "... they are in fact waiving their right to a pre-dismissal enquiry ...", and that hearings would be necessary only when it was "... uncertain whether employees are indeed taking part in a strike, that is, where the motivation for not working is unclear".¹²⁸

¹²⁴ Le Roux "A hearing required before the dismissal of unlawful strikers?" March 2000 *Contemporary Labour Law* Vol 9 No 8 78.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ (1990) 11 ILJ 494 (LAC).

¹²⁸ At 501A-D.

The Court went further in *Majola & others v D & A Timbers (Pty) Ltd*¹²⁹ and stated that in strike dismissals disciplinary hearings were unnecessary even when employees' contracts of service required the employer to grant hearings to employees before being dismissed.

The Labour Court in *National Union of Metalworkers of SA & others v Malcomess Toyota, a Division of Malbak Consumer Products (Pty) Ltd*¹³⁰ made the follow comment:

“In a strike situation, particularly an unprotected strike, where employees are warned of dismissal in an ultimatum, it would hardly make sense to conduct a hearing just before the dismissal is imposed. Apart from the fact that it promises to be very impractical to have hearings during an unprotected strike about participation in the strike itself, a requirement for disciplinary hearings to be held prior to taking action during an unprotected strike would also mean that the employer's endeavours to bring an end to unprotected action is (sic) seriously hampered. A requirement to have hearings *after* the dismissal had already taken place, would be tantamount to the employer second-guessing its own decision. Such a process would not in any way resolve the issue at hand.”

In *Steel Mining & Commercial Workers Union & others v Brano Industries (Pty) Ltd & others*¹³¹ the court dismissed claims by strikers of procedural unfairness where the employer complied with item 6(2) of the Code. However, in *National Union of Metalworkers of SA & others v Fibre Flair CC t/a Kango Canopies*¹³² the court held that because the employer did not grant unprotected strikers an adequate hearing, their dismissal was procedurally unfair.

¹²⁹ (1997) 18 ILJ 342 (LAC).

¹³⁰ (1999) 20 ILJ 1876 (LC).

¹³¹ (2000) 21 ILJ 666 (LC).

¹³² (1999) 20 ILJ 1859 (LC).

In *Karras t/a Floraline v SASTAWU & others*¹³³ the court held that the need for a hearing must be considered as to determine whether it is a prerequisite for procedural fairness. The court further held that the respondents had not relied on the absence of a hearing in its statement of claim or in the pre-trial minute was irrelevant, as the issue had been canvassed during the trial. Furthermore, the appellant had been aware that the argument based on want of compliance with the audi rule would be raised on appeal. The court held that it was also irrelevant that the respondents had not suggested what purpose would be served by a hearing, as the so-called “no-difference rule” has long been rejected.

The issue of whether the employer is obliged to offer strikers of an illegal strike a hearing before or after issuing an ultimatum again came up in the Industrial Court in *Paper Printing Wood & Allied Workers Union & others v Solid Doors (Pty) Ltd*¹³⁴. In this case the presiding officer held that the requirement that a hearing should precede an ultimatum would be impractical in strike circumstances and interfere with the power play between the parties. It was further held that the preferred order should be the issuing of an ultimatum followed by an invitation to the union to make representations on why an ultimatum should not be carried out.

The important cases of *Modise & others v Steve’s Spar Blackheath*¹³⁵ and *Mzoku & others v VWSA*¹³⁶ regarding the importance of a pre-dismissal hearing for unprotected strikers will be discussed below.

¹³³ (2001) 1 BLLR 1 (LAC).

¹³⁴ (2001) 22 ILJ 292 (IC).

¹³⁵ (2000) 21 ILJ 519 (LAC).

John Grogan writing in *Labour Law Sibergramme* 2 2001 says:

"*Steve's Spar* was the rabbit which the dismissed VW employees pulled out of the hat to persuade the commissioner that they should be re-employed, in spite of his finding that their conduct was thoroughly deplorable, and deserved dismissal. *Steve's Spar*, it will be recalled, laid down the principle that illegal strikers are entitled to a hearing before the employer dismisses them - even if they have already been given an ultimatum warning them that they will be dismissed should they refuse to return to work."

a) Modise & others v Steve's Spar Blackheath ¹³⁷

As a general rule strikers have a right to an ultimatum before they can be dismissed on the basis of an illegal strike and, should they be given a fair and reasonable ultimatum they are not entitled to a hearing.¹³⁸ The aforementioned was issues that was believed to be dealt with already and regarded as the law.¹³⁹ These principles were followed in the *Modise & Others v Steve's Spar Blackheath*.

The facts of the case was that 40 striking workers were dismissed in November 1994.¹⁴⁰

The reason for the strike was the union's demand that all bargaining for the franchise stores must be done centrally.¹⁴¹ According to the 1956 Labour Relations Act the strike was illegal and

¹³⁶ (2001)(LAC).

¹³⁷ 2000 (5) BLLR 496 (LAC)

¹³⁸ Grogan, J "Emasculating the ultimatum – Pre-dismissal Hearings for Strikers" ELJ Vol.16 2000 June

¹³⁹ Ibid.

¹⁴⁰ *supra* 137

¹⁴¹ *supra* 137

therefor Steve's Spar Blackheath warned the striking workers that the strike was illegal.¹⁴² Steve's Spar Blackheath also stated that the demand made by the union is impossible due to the fact that there is no forum that will be able to bargain on behalf of all the franchise stores.¹⁴³ Nine days followed and there was an interdict issued against the strike which was ignored by the striking workers, therefor an ultimatum was given to the striking workers.¹⁴⁴ The striking workers did not comply with the ultimatum whereafter they were dismissed.¹⁴⁵

The Industrial Court held that the dismissal was fair.¹⁴⁶ Then four of the striking workers that were dismissed appealed to the Labour Appeal Court on the grounds that they stopped working out of fear of the workers and they also contended that they did not participate in the strike and as a second ground of appeal should the court find that they were participants in the strike then they appeal that the dismissal was unfair, because the ultimatum was inadequate and also because six striking workers were not dismissed.¹⁴⁷

On Appeal the legal representative for Steve's Spar Blackheath argued that the strike was illegal, because of the impossibility of fulfilling the demand.¹⁴⁸

¹⁴² *supra* 137

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

Furthermore the legal representative argued that the striking workers were dismissed on the basis of non compliance with the ultimatum and not because of the strike in itself.¹⁴⁹ The Labour Appeal Court were divided and what follows is a minority and a majority view.

i) Minority view

The issue on which the court could not reach unanimous consensus was whether a hearing for the strikers falls away once the employer gives the striking workers an ultimatum? ¹⁵⁰ The minority view was that there exists two kinds of strike dismissals the first dismissal taking place during the strike, and the other dismissal taking place after the striking workers return to their work.¹⁵¹ According to the minority view hearings should only be held in the situation where the striking workers return to work.¹⁵² In NUMSA v Vetsak Co-operative Ltd & others¹⁵³ the employer gave the striking workers a fair ultimatum and the workers did not adhere to the ultimatum, therefore they were dismissed.¹⁵⁴ The court dealt with the issue whether or not the workers were entitled to hearings, it seemed as if in certain cases it will be necessary.¹⁵⁵

Furthermore the minority are of the opinion that the audi alteram partem –rule is not applicable to striking workers that are dismissed during the strike and they are also of the opinion that the cases decided under the 1956 Labour Relations Act did not state that the audi alteram partem-rule should be applied.¹⁵⁶ The minority held that the only general rule that exist is that general

¹⁴⁹ Ibid.

¹⁵⁰ Grogan 174

¹⁵¹ *supra* 137

¹⁵² Ibid.

¹⁵³ 1996 (6) BLLR 697 (AD)

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ *supra* 137

fairness in the industrial relations is achieved.¹⁵⁷ Fairness in the dismissal based on a strike will be different in each situation.¹⁵⁸ The minority view is that an ultimatum is a way of getting the employees back to work again, it is not meant to be a sanction, a sanction is the object in a disciplinary inquiry.¹⁵⁹ An ultimatum has a dual function in that it can be used in order to avoid a dismissal or it can be a requirement of a dismissal.¹⁶⁰ The minority is of the opinion that striking workers that complies with the ultimatum of the employer will not be dismissed.¹⁶¹ The effect of the ultimatum will be destroyed if one allows that a striking worker will be excused from his misconduct, because of their personal circumstances.¹⁶² The only goal that disciplinary inquiries will achieve is to allow striking workers to give motivated reasons to rescue them from a dismissal.¹⁶³ The minority held that in all strikes you will have those participants that did not want to have part in the strike., therefor there was six striking workers that were not dismissed, because they went to management and told them that they were intimidated, therefor the appellants could have done the same and told the management of their fear.¹⁶⁴ The minority held that the strike was illegal..¹⁶⁵

ii)Majority view

The majority referred to various judgments for their decision. The majority stated that natural justice is an important part of our law and one of these rules are the audi alteram partem –rule.¹⁶⁶ According to the majority view this rule was integrated in labour law through the unfair labour

¹⁵⁷ *supra* 137

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

practice concept.¹⁶⁷ In *Administrator, Natal & another v Siiya & another*¹⁶⁸ it was held that strikers have a right to a hearing before being dismissed, because this dismissal can influence their right to work and remuneration.¹⁶⁹ The majority referred to those cases that denied strikers the right to a hearing and they held that this right in those cases was not exercised because the strikers did not deserve hearings and therefor the majority held that there can be exceptions to this right of the workers to a hearing before being dismissed.¹⁷⁰

The majority held that courts must be careful in arriving at the decision that it is a situation that qualifies as an exception and therefor depriving strikers from a hearing.¹⁷¹ The majority rejected the ground of the employer that the court must find that the *audi alteram partem* – rule is not applicable here.¹⁷² The majority held that the court must not test the hearing against the requirement of a formal hearing, a mere letter to the unions requesting them to state their side of the matter can be sufficient.¹⁷³ Then the majority looked at the cases where it was held that should the employer issue a fair ultimatum a hearing will not be necessary, to which the majority stated one must not forget that some employees may be able to prove that they were not willing to strike, but they were force to do so.¹⁷⁴ According to the majority the aim of the hearing is to obtain information, whereas the ultimatum give employees advice.¹⁷⁵ An ultimatum cannot replace the *audi alteram partem* – rule.¹⁷⁶ The current Labour Relations Act, that does not apply

¹⁶⁶ *supra* 137

¹⁶⁷ *Ibid.*

¹⁶⁸ 1992 (4) SA 532 (A)

¹⁶⁹ *Ibid.*

¹⁷⁰ 2000 (5) BLLR 496 (LAC)

¹⁷¹ *Ibid.*

¹⁷² *supra* 137

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

to this case, states that there must be a hearing even before the employer gives an ultimatum.¹⁷⁷ The employer must take note of the audi alteram partem – rule, irrespectively of the form in which the rule is observed, a formal or informal hearing or a collective hearing or a mere letter or memorandum.¹⁷⁸ The majority held that dismissal of the striking workers was procedurally unfair, because the employer failed to conduct a hearing.

iii) Conflicting view

Three months before the *Modise & Other v Steve's Spar Blackheath*- case¹⁷⁹ the *Coin Security Group v Adams & others*¹⁸⁰ was heard and it was the union that told the workers to strike. The strikers were warned that it was an illegal strike.¹⁸¹ The strikers were given an ultimatum whereafter they were dismissed.¹⁸² The dismissal was found to be fair and that the strikers did not follow the correct procedure.¹⁸³ The court held that strikers bear the risk that the strike may be an unprotected strike and therefor meaning that the union was incorrect whilst the employer acted correctly.¹⁸⁴ The requirement that there must be a hearing for the workers was never even mentioned.¹⁸⁵

¹⁷⁷ *supra* 137

¹⁷⁸ *Ibid.*

¹⁷⁹ 2000 (5) BLLR 496 (LAC)

¹⁸⁰ 2000 (4) BLLR 371 (LAC)

¹⁸¹ *Ibid.*

¹⁸² *supra* 137

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

iv) Conclusion

The minority in *Modise & others v Steve's Spar Blackheath* followed the courts' decision in *Coin Security Group v Adams & others*. The *Modise & others v Steve's Spar Blackheath* has laid down the requirement of setting down a hearing to strikers before they can be dismissed, even before the employer hands them an ultimatum.

b) Mzeku & others / Volkswagen SA¹⁸⁶

The facts of this case was that the workers failed to go to work and therefor they committed breach of their employment contract.¹⁸⁷ The reason for the workers' stay away was their request to NUMSA to reinstate 13 suspended shop stewards.¹⁸⁸ The 13 shop stewards were suspended by NUMSA , because they did not agree with the agreement between VWSA and NUMSA regarding special working conditions for the export contract of VWSA.¹⁸⁹ After a week of the stay away VWSA suffered a tremendous financial loss when it had to close down the factory and nearly lost the export contract.¹⁹⁰ In February 2000 Volkswagen South Africa (VWSA) dismissed 1300 workers.¹⁹¹ The reason for the dismissal was that the workers stayed away from work for two weeks and failed to satisfy an ultimatum made by VWSA to return to work.¹⁹² Most of the striking workers did return to work, only the 1300 that did not returned to work

¹⁸⁶ 2001 (3) BALR 256 (CCMA)

¹⁸⁷ *supra* 137

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

were dismissed.¹⁹³ The workers were unable to give a sufficient reason for their breach nor could they prove that they had a right to act the way they did.¹⁹⁴ The workers' defence was their Constitutional right to strike, because if they had a right to strike they will have a reason not to go to work and therefor they will not have committed breach of contract.¹⁹⁵ Furthermore the workers relied on international law that prevents employers to dismiss striking employees including a strike that did not comply with national legislation.¹⁹⁶

This case went to the CCMA the Labour Court and the Labour Appeal Court.

i) CCMA

The CCMA commissioner's award was that VWSA must reinstatement all the dismissed workers.¹⁹⁷ The commissioner found that VWSA did not comply with the audi alteram partem rule.¹⁹⁸ The commissioner took the *Modise & others v Steve's Spar Blackheath*-case¹⁹⁹ into account where it was held that before the employer gives an ultimatum a hearing must be held, before the dismissal can follow.²⁰⁰ The commissioner had to take into account whether VWSA gave the workers an opportunity to explain their side of the story.²⁰¹ Although there were many negotiations, notices, statements etc between the management of VWSA and the workers or their representatives, it was held that this was not suffice in that this was not what the *Modise & other-*

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ 2000 (5) BLLR 496 (LAC)

²⁰⁰ Ibid.

²⁰¹ *supra* 137

case stated. All these negotiations, notices and statements, etc was merely requesting the workers to come back to work.²⁰² On the basis of the aforementioned case the commissioner found that the dismissal of the 1300 workers were procedurally unfair.²⁰³ The commissioner also stated that there is a difference in observing the audi alteram partem- rule and the negotiations for the return of workers back to work.²⁰⁴ Once again it was stressed by the commissioner that an ultimatum is used to ensure the return of workers.²⁰⁵ The case was taken on review to the Labour Court.

ii) Labour Court

The Labour Court differed from the commissioner of the CCMA on two issues namely the judge disagree with the Modise & other v Steve Spar's Blackheath case and secondly the judge of the Labour Court was of the opinion that VWSA did comply with the audi alteram partem rule.²⁰⁶ The Court held that the commissioner was wrong to state that VWSA did not give the workers the opportunity to state their side, through the many meetings VWSA adhered to the audi alteram partem- rule. ²⁰⁷ The judge also acknowledged that the courts are bound by the decision in Modise & other – case.²⁰⁸ The Labour Court reviewed the CCMA award.²⁰⁹ The Labour Court may not interfere with the CCMA decision that the dismissal was procedurally unfair, however the Labour Court found that the commissioner exceeded his authority by ordering VWSA to reinstate the dismissed workers.²¹⁰ The Labour Court held that the only award the commissioner

²⁰² *supra* 137

²⁰³ 2001 (3) BLLR 256 CCMA)

²⁰⁴ *supra* 137

²⁰⁵ *Ibid.*

²⁰⁶ Volkswagen SA (Pty) Ltd v Brand NO & others 2001 (5) BLLR 558 (LC)

²⁰⁷ *supra* 137

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

was entitled to make was compensation to the dismissed workers and not reinstatement.²¹¹ Another issue that the Labour Court had to deal with is whether or not the industrial action taken by the employees was indeed a strike?²¹² The court concluded that it was not a strike.²¹³ The review of the Labour Court was then taken on appeal.

iii) Labour Appeal Court

The Labour Appeal Court upheld the dismissal of the 1300 workers, but the appeal court's grounds differed from the Labour Court's reasons for the dismissal.²¹⁴ The Appeal court emphasised that the Labour Court made two mistakes in arriving at the judgment in that they held that the commissioner's finding that the dismissal of the 1300 workers were substantively fair and the second mistake that the Labour Court made was to state that the workers were not entitled to reinstatement.²¹⁵ VWSA attacked the Labour Appeal Court on the ground that the dismissal of the 1300 workers were not procedurally unfair and that it was not reviewable by the Labour Court.²¹⁶ The issue as to whether the workers' conduct constituted a strike, was affirmed by the Labour Appeal Court.²¹⁷ It is still an open question as to whether employees can strike over demands that the employer are not able to meet.²¹⁸ The Labour Relations Act states that there are demands that employers can satisfy and then there are demands against third parties that employers can not satisfy.²¹⁹ Strikes relates to demands that employers can satisfy, whereas

²¹¹ *supra* 137

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

protest action relates to demands against third parties that cannot be satisfied by the employer.²²⁰ The Appeal Court's reaction to the workers' defence on relying on international law is that before international can be used the relevant state's procedure and law must be applied.²²¹ The Court held that the strike of the workers were illegal and therefor it is substantially fair to dismiss these workers.²²² There was no exceptional circumstances that the illegal strike could be found legitimate in this case.²²³ According to the Code of Good Practice: Dismissal the requirements for substantive fairness of unprotected strikers depends on the seriousness of the contravention of the Labour Relations Act; how far did the unprotected striker comply with the Act and was the strike the result of the conduct of the employer.²²⁴

The Labour Appeal Court held that VWSA gave workers a fair hearing in the various meetings that took place between management and the worker's representatives and therefor VWSA did comply with the audi alteram partem – rule.²²⁵ VWSA warned the workers that the strike was illegal and all the opportunities were there for the representatives to state the workers case.²²⁶ Therefor the silence of the representatives were regarded as if the representatives has nothing further to say.²²⁷ According to the Labour Appeal Court the commissioner of the CCMA was correct on relying on the Modise & other – case .²²⁸

²²⁰ *supra* 137

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *supra* referred to Schedule 8 of Act 66 of 1995

²²⁵ *supra* 137

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

Both NUMSA and VWSA were against the strike and both wanted the workers to return to work.²²⁹ According to the collective agreement between VWSA and NUMSA the workers were by law bound to return to work.²³⁰ The agreement included a phrase stating that should workers continue with the illegal strike, then management will take further steps that may include dismissal.²³¹ The meeting with NUMSA and VWSA constituted the hearing that the *Modise & other* – case required one to do before giving an ultimatum to the workers.²³² There was an agreement between NUMSA and VWSA that workers that did not comply with the ultimatum will not be entitled to a disciplinary hearing, therefor NUMSA waived the requirements laid down by *Modise & other* – case.²³³ Those workers that did not adhere to the ultimatum were dismissed, and the dismissals were regarded as fair in the eyes of the law.²³⁴

The Court looked at those cases where a party did not comply with the *audi alteram partem* – rule and the defence of those parties were that should there have been a hearing the representatives would have nothing to say, however this view has been rejected by various courts.²³⁵

Once again the Labour Appeal Court referred to the minority judgment of *Modise & other* – case where it was stated that one cannot allow illegal strikers to proceed with the strike without any fear of a possible dismissal.²³⁶

²²⁹ *supra* 137

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

The Labour Appeal Court held that the commissioner was wrong in stating that VWSA did not give the workers a hearing.²³⁷ The main question on appeal was whether the dismissal of the workers were procedurally fair and it was held that it could not be set aside in review.²³⁸ The decision of the commissioner that the dismissal was procedurally unfair will prevail due to the fact that such a judgment can only be repealed if there was gross irregularity, partiality involved, or there was misconduct, where the commissioner were bias or corrupt or if the court did not have jurisdiction, however no one of these grounds could have been used in this case.²³⁹ The Labour Court found that the only reviewable irregularity was that the commissioner made an award of reinstatement of the striking workers, therefor that award was set aside.²⁴⁰ The Labour Appeal Court held that the award of the commissioner of the CCMA was correctly reviewed by the Labour Court.²⁴¹

The commissioner was wrong to award reinstatement of the dismissed workers, in that one can not award reinstatement where the dismissal was only procedurally unfair.²⁴² There are three remedies for unfair dismissals namely reinstatement, re-employment or compensation.²⁴³ The court must order reinstatement or re-employment unless the employee does not want to be reinstated, it would result in an intolerable employment relationship; it is practically impossible for the employer to give the employees job back and if the dismissal was grounded on unfair procedure.²⁴⁴ However employers will still be forced to follow the correct procedures in

²³⁷ *supra* 137

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ *supra* refers to section 193 of the LRA of 1995

²⁴⁴ *supra* 137

dismissing an employee in that unfair procedure could result in the employer paying compensation to the employee.²⁴⁵

The question now was whether or not the 1300 dismissed workers were entitled to compensation?²⁴⁶ Due to the seriousness of the worker's misconduct they were not entitled to compensation.²⁴⁷

²⁴⁵ *Supra* 137

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

CONCLUSION

In terms of section 68(5) of Act 66 of 1995 participation in a strike that does not comply with the provisions of the Act, or conduct in contemplation or furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice in Schedule 8 must be complied with. The Code clearly states that participation in an unprotected strike constitutes misconduct but, like any other act of misconduct, will not automatically allow for summary dismissal. The Code states that the dismissal of striking employees must be both substantially and procedurally fair.

Under the 1956 Labour Relations Act uncertainty existed with regard to the procedure to be followed in the dismissal of illegal strikers. The position in terms of the 1995 Labour Relations Act is clearly set out in item 6(2) in Schedule 8.

BIBLIOGRAPHY

BOOKS

Basson A; Christianson M; Garbers C; Le Roux PAK; Mische C; Strydom EML *Essential Labour Law* Labour Law Publications Groenkloof 1998

De Waal J; Currie I; Erasmus G *The Bill of Rights Handbook* Juta & Co Cape Town 2001

Du Toit P *Labour Relations Law: A Comprehensive Guide* Juta Cape Town 1998

Grogan J *Workplace Law* (sixth edition) Juta Cape Town 2001

ARTICLES

Basson “Some Recent Developments in Strike Law” 2000 *Merc LJ* 119-135

Pillay “Essential Services under the New LRA” 2001 Volume 22 *ILJ* 1-36

Le Roux “A hearing required before the dismissal of unlawful strikers?” March 2000 *Contemporary Labour Law* Vol 9 No 8 78.

TABLE OF CASES

- Administrator, Natal & another v Siiya & another 1992 (4) SA 532 (A)
- CAWU & Others v Klapmuts Concrete (Pty) Ltd (1996) 17 ILJ 725 (IC)
- Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building and Allied Workers Union & others (1997) 6 BLLR 696 (LAC)
- Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU & Others (1997) 18 ILJ 550 (LC)
- Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd (1999) 20 ILJ 321 (LAC)
- Chemical Workers Union v Plascon Ink & Packaging Coatings (Pty) Ltd (1991) 12 ILJ 353 (IC)
- County Fair v FAWU (2001) 21 ILJ 1103 (LAC)
- Coin Security Group (Pty) Ltd v Adams & others (2000) 21 ILJ 2731 (LC)
- Coin Security Group v Adams & others 2000 (4) BLLR 371 (LAC)
- Doornfontein Gold Mining Co Ltd v National Union of Mineworkers & others (1994) 15 ILJ 527 (LAC)
- FAWU v Rainbow Chickens (Pty) Ltd (2000) 21 ILJ 615 (LC)
- Fidelity Guards Holdings (Pty) Ltd v PTWU & others (1997) 9 BLLR 1125 (LAC)
- Food and Allied Workers Union v Mnandi Meat Products & Wholesalers (1995) 16 ILJ 151 (IC)
- ICS Group v National Union of Food & Beverage Workers & others (1998) 5 BLLR 452 (LAC)
- Karras t/a Floraline v SASTAWU & others (2001) 1 BLLR 1 (LAC)
- LAW Wholesale Meat Distributors v FAWU & others
- Mashifane & others v Clinic Holdings Ltd & another (1993) 14 ILJ 954 (LAC)
- Majola & others v D & A Timbers (Pty) Ltd (1997) 18 ILJ 342 (LAC)
- Metal & Allied Workers Union & others v Natal Die Casting Co (Pty) Ltd (1986) 7 ILJ 520 (IC)

Modise & others v Steve's Spar Blackheath (2000) 21 ILJ 519 (LAC)

Mzeku & others v VWSA (2001)(LAC)

National Union of Metalworkers of SA & others v Fibre Flair CC t/a Kango Canopies (1999) 20 ILJ 1859 (LC)

National Union of Metalworkers of SA & others v Malcomess Toyota, a Division of Malbak Consumer Products (Pty) Ltd (1999) 20 ILJ 1876 (LC)

National Union of Public Service Workers & others v Alberton Old Age Home (1990) 11 ILJ 495 (LAC)

National Union of Mineworkers v Amcoal Collieries & Industriel Operations Ltd (1990) 11 ILJ 1295 (IC)

National Union of Metalworkers of SA v Wubbeling Engineering (Pty) Ltd & another (1995) 16 ILJ 1489 (LAC)

National Union of Mineworkers & others v Goldfields Security Ltd (1999) 20 ILJ 1553 (LC)

National Union of Metalworkers of SA v Three Gees Galvanising (1993) 14 ILJ 372 (LAC)

National Union of Metalworkers of SA v Datco Lighting (Pty) Ltd (1996) 17 ILJ 315 (IC)

National Union of Metalworkers of SA v Tek Corporation Ltd & others (1991) 12 ILJ 577 (LAC)

NUMSA v Vetsak Co-operative Ltd & others 1996 (6) BLLR 697 (AD)

NULW & others v Crown Footwear (Pty) Ltd (2000) 6 BLLR 739 (LC)

Paper Printing Wood & Allied Workers Union & others v Solid Doors (Pty) Ltd (2001) 22 ILJ 292 (IC)

Performing Arts Council (Transvaal) v Paper Printing Woord & Allied Workers Union & others (1994) 15 ILJ 65 (A)

Plaschem (Pty) Ltd v Chemical Workers Industrial Union (1993) 14 ILJ 1000 (LAC)

R v Smith 1955 (1) SA 239 (C)

SA Clothing & Textile Workers Union v Stuttafords Department Stores Ltd (1999) 20 ILJ 2692 (LC)

SACWU v Afrox 1999 20 *ILJ* (LAC) 1724

Samancor v NUMSA 1999 (20) ILJ 2941 (LC)

Sentraal-wes (Koöperatief) Bpk v Food & Allied Workers Union & others (1990) 11 ILJ 977 (LAC)

Simba (Pty) Ltd v FAWU & others (1998) 9 BLLR 1 (LC)

South African National Security Employers' Association v TGWU & others (1998) 4 BLLR 364 (LAC)

Stuttafords v SACTWU (2001) 1 BLLR 47 (LAC)

Steel Mining & Commercial Workers Union & others v Brano Industries (Pty) Ltd & others (2000) 21 ILJ 666 (LC)

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

Transport Motor Spares v National Union of Metalworkers of SA (1999) 20 ILJ 690 (LC)

Transport & General Workers Union & others v De La Rey's Transport (Pty) Ltd (1999) 20 ILJ 2731 (LC)

VRN Steel (Pty) Ltd v National Union of Metalworkers of SA (1995) 16 ILJ 1483 (LAC)

WESUSA & others v Jacobz (2000) 8 BLLR 977 (LC)

ACTS

The Constitution, Act 118 of 1996

The Labour Relations Act, Act 28 of 1956

The Labour Relations Act, Act 66 of 1995