

Changing the issue in dispute during strike action

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Nelson Mandela once said that education is the most powerful weapon we can use to change the world. Surely, this educational journey has changed my world for the better.

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Abstract

Title: Changing the issue in dispute during strike action

Section 23(2) of the *Constitution* gives every worker the right to strike and the LRA gives effect to that right. Section 64 of the LRA, however, requires that the issue in dispute first be referred to a bargaining council or the CCMA before a strike can be called. A certificate declaring that the issue in dispute was not resolved or 30 days or, alternatively, any extension must lapse and notice must be given to the employer before a strike can commence. Generally, the issue in dispute referred to conciliation must be the same issue in dispute over which that the strike was called.

The question that arises is what will happen to the status of the strike if the issue in dispute or the demand changes during the course of the strike. Reference was made to literature study in which the criteria were set out on how to determine the true issue in dispute. Suggestions were also made on how to declare strike action unprotected should an employer be of the view that its workers are striking over a different issue in dispute or demand than the one that was referred to conciliation.

Key terms: Strikes, issue in dispute, collective bargaining

Opsomming

Titel: Wysiging van die kwessie wat betwis word gedurende stakingsgebeure

Artikel 23(2) van die *Grondwet* verleen aan elke werker die reg om te staak en die WAV gee uitvoering aan daardie reg. Artikel 64 van die WAV vereis nietemin dat die kwessie wat betwis word eers na 'n bedingingsraad of die KBVA verwys moet word voordat 'n staking uitgeroep mag word. 'n Sertifikaat moet uitgereik word wat verklaar dat die kwessie wat betwis word nie besleg is nie, of 30 dae moet verloop, of alternatiewelik moes enige verlenging van so 'n tydperk verstryk het, en kennis moet aan die werkgewer gegee word voordat 'n staking mag begin. Gewoonlik moet die kwessie wat betwis word wat vir bemiddeling verwys is, dieselfde geskilpunt wees as waaroor die staking uitgeroep is.

Die vraag wat na vore kom is wat met die status van die staking sal gebeur as die kwessie wat betwis word of die eis gedurende die loop van die staking verander. Daar is verwys na literatuurstudie waarin die kriteria uiteengesit is oor hoe om die ware kwessie wat betwis word, te bepaal. Voorstelle is ook gemaak oor hoe om die aksie van staking onbeskerm te verklaar sou 'n werkgewer van mening wees dat sy werkers oor 'n ander geskilpunt, of oor 'n ander eis, staak as dié een wat vir bemiddeling verwys is.

Sleutelwoorde: stakings, kwessie wat betwis word (geskilpunt), kollektiewe bemiddeling

Abbreviations

CAWU	Catering and Allied Workers Union
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CEPPWAWU	Chemical Energy Paper Printing Wood and Allied Workers Union
Constitution	Constitution of the Republic of South Africa, 1996
FAGWU	Food and General Workers Union
FAWU	Food and Allied Workers Union
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
MAWU	Metal and Allied Workers Union
MEIBC	Metal and Engineering Industries Bargaining Council
NBCFRI	National Bargaining Council for the Road Freight Industry
NCBAWU	National Construction Building and Allied Workers Union
NUM	National Union of Mine Workers
NUMSA	National Union of Metalworkers of South Africa
PTWU	Professional Transport Workers Union
SACCAWU	South African Commercial Catering and Allied Workers Union
SACTWU	South African Clothing and Textile Workers Union
SACWU	South African Chemical Workers Union
SAMWU	South African Municipal Workers Union
SAPU	South African Police Union
SATAWU	South African Transport and Allied Workers Union
SCA	Supreme Court of Appeal
TGWU	Transport and General Workers Union

INDEX

Acknowledgments.....	i
Abstract.....	ii
Summary.....	Error! Bookmark not defined.
Abbreviations	iv
Chapter 1: Introduction and problem statement	1
Chapter 2: Protected and unprotected strikes	7
2.1 <i>The legal effect of a protected strike</i>	9
2.2 <i>Limitations to the right to strike</i>	10
2.3 <i>Strike action</i>	10
2.4 <i>Purpose of the strike</i>	12
2.5 <i>The no work, no pay rule</i>	12
2.6 <i>Presumption of who is on strike</i>	13
2.7 <i>Consequences of unprotected strikes</i>	14
Chapter 3: The issue in dispute	16
3.1 <i>Issue in dispute regulated in a collective agreement</i>	19
Chapter 4: Critical discussion of relevant case law	23
Chapter 5: Conclusion	37
Bibliography	40
<i>Literature</i>	40
<i>Case law</i>	41
<i>Legislation</i>	43
<i>Internet sources</i>	43

Chapter 1: Introduction and problem statement

One of the purposes of the *Labour Relations Act* 66 of 1995 (hereafter the LRA) is to provide a framework for employers and employer organisations and trade unions and their members to bargain collectively with the aim to resolve wages, terms and conditions of employment and other matters of mutual interest.¹ The LRA also encourages orderly collective bargaining.² However, the LRA does not define the term “collective bargaining”. In terms of the guidelines of contemporary collective labour law, employees and employers represent different and contrasting associations, who strive to advance and safeguard their own interest.³ It is argued that the term “collective” relates to a process that involves parties representing groups of individuals and “bargaining” can be defined as a process during which the parties strive to reach agreement by compromise.⁴ It is further argued that an agreement is usually reached when one party accedes to the dictates of the other party during collective bargaining.⁵ Grogan⁶ is of the opinion that: “the right to strike is the antidote to the employer's power to dictate”.

The *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) grants every worker the right to strike.⁷ The right to strike is an individual right, although it can only be exercised collectively.⁸ In *South African Transport and Allied Workers Union v Moloto*⁹ the Constitutional Court confirmed that the right to strike is enshrined in the Constitution as a fundamental right with no express limitations.

The LRA gives effect to this right as envisaged in the Constitution.¹⁰ The statutory definition of a strike is set out in section 213 of the LRA and reads as follows:

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- 1 S 1(c)(i) of the LRA.
 - 2 S 1(d)(i) of the LRA.
 - 3 Grogan *Workplace Law* 307.
 - 4 Grogan *Collective Labour Law* 8.
 - 5 Grogan *Collective Labour Law* 9.
 - 6 Grogan *Collective Labour Law* 9.
 - 7 S 23(2)(C) of the Constitution.
 - 8 Olivier *Impact of the Constitution on Labour Law and Labour Relations* 124.
 - 9 2012 33 ILJ 2549 (CC) par 43.
 - 10 S 23 of the Constitution.

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.

Although the Constitution grants every worker the right to strike, in terms of the LRA a single worker's stoppage of work cannot amount to a strike.¹¹ The right to strike may also be limited in terms of the Constitution.¹² Chapter IV¹³ of the LRA outlines the procedures that must be followed by trade unions and employees to participate in a protected strike. The LRA states with regard to the procedure to be followed, that every employee has the right to strike if the issue in dispute has been referred to a council or commission and a certificate stating that the dispute remains unresolved has been issued or, alternatively, if 30 days have passed since the referral of the dispute.¹⁴

In addition, the LRA expressly places substantive limitations on the right to strike.¹⁵ It has been held by the Constitutional Court that any limitation on the right to strike has to be justified under section 36 of the Constitution.¹⁶ One of the considerations for justification is whether less restrictive means could achieve the same purpose.¹⁷ Although the Constitutional Court acknowledged that one of the purposes of the LRA is to promote orderly collective bargaining, it held that the LRA¹⁸ does not require the elimination of uncertainty, bar certainty when the strike action will commence.¹⁹ At least 48 hours' notice should be given for a proposed strike and where the State is the employer, at least 7 days' notice should be given of the proposed strike.²⁰

11 *South African Transport and Allied Workers Union v Moloto* 2012 33 ILJ 2549 (CC).

12 S 36 of the Constitution.

13 Ss 64-77 of the LRA.

14 S 64(1)(a) of the LRA.

15 S 65 of the LRA.

16 *South African Transport and Allied Workers Union v Moloto* 2012 33 ILJ 2549 (CC) par 70.

17 *South African Transport and Allied Workers Union v Moloto* 2012 33 ILJ 2549 (CC) par 70.

18 S 1(d)(i) of the LRA.

19 *South African Transport and Allied Workers Union v Moloto* 2012 33 ILJ 2549 (CC) par 85-86.

20 S 65 of the LRA.

In *NUMSA v Bader Bop*²¹ the right to strike was described as a "component of a successful collective bargaining system". The court held that strikes are important to the dignity of employees who may not be treated as forced workers and it is only through strikes that employees can exercise bargaining power in industrial relations.²² The Constitutional Court held in *South African Transport and Allied Workers Union v Moloto*²³ that the right to strike should be viewed as a tool to redress inequality in social and economic power in industrial relations. It can also be utilised to highlight and to strengthen other social and political rights in the Constitution, more specifically freedom of association. Strikes are at the core of collective bargaining.

In *Stuttafords Department Stores v SA Clothing & Textile Workers Union*,²⁴ the Labour Appeal Court held the following:

The very reason why employees resort to strikes is to inflict economic harm on their employer so that the latter can accede to their demands. A strike is meant to subject an employer to such economic harm that he would consider that he would rather agree to the workers' demands than have his or her business harmed further by the strike. The essence of a lock-out is that the employer denies the locked-out employees the opportunity to earn their wages, thereby causing financial harm to the locked-out employees, in the hope that after a certain point, the financial harm or pain inflicted on the employees would have been so much that they would consider that they would rather agree to the employer's demands than continue to be subjected to the lock-out and to lose more wages.²⁵

What the court described above is what is generally known as the power play between the collective bargaining parties.

Despite the fact that employees have a right to strike, it is important for the employer to know what the issue in dispute is. The LRA states that every employee has the right to strike if the issue in dispute has been referred to a council or commission for conciliation and a certificate stating that the dispute remains unresolved has been

21 2003 2 BCLR 182 (CC).

22 *NUMSA v Bader Bop* 2003 2 BCLR 182 (CC) par 13.

23 2012 33 ILJ 2549 (CC).

24 2001 22 ILJ 414 (LAC).

25 *Stuttafords Department Stores v SA Clothing & Textile Workers Union* 2001 22 ILJ 414 (LAC) 422E-G.

issued.²⁶ According to Grogan the issue in dispute over which the employees finally strike, must be the same issue in dispute that was referred to conciliation.²⁷ For example, if demand A was conciliated and remains unresolved, the employees cannot embark on strike action over the employer's refusal to agree to demand B.²⁸

In *NUMSA obo Mahlangu v Edelweiss Glass & Aluminium*,²⁹ the trade union referred a dispute over organisational rights to conciliation but struck in support of a demand for a 13th cheque. The Commission for Conciliation, Mediation and Arbitration (hereafter the CCMA) held that the demand for a 13th cheque was not an essential part of the dispute that was referred to conciliation and the strike was consequently declared unprotected.³⁰ However, should demand B be fused with or supplementary to demand A, the court may allow a strike over demand B, although demand B had been resolved.³¹ In *SBV Services v Motor Transport Workers Union of SA*³² demand A related to the payment for meal intervals, and demand B related to the tasks to be performed during meal intervals. The Labour Court held that the two demands constituted two different disputes. The court allowed the strike over the second dispute even though the first dispute had been resolved.³³

In *City of Johannesburg Metropolitan Municipality v SAMWU*³⁴ the Labour Court held that the general rule is that the issue in dispute over which a strike may be called, should be the same dispute as the dispute that was referred to conciliation. However, the rule should not be applied literally.³⁵ The court further said that to hold the trade union to the terms of the dispute or the exact wording of the demand as stated in the referral to conciliation, would defeat the purpose of collective

26 S 64(1)(c) of the LRA.
27 Grogan *Collective Labour Law* 162.
28 Grogan *Collective Labour Law* 162.
29 2004 6 BALR 747 (CCMA).
30 Grogan *Collective Labour Law* 164.
31 Grogan *Workplace Law* 308.
32 2008 29 ILJ 3059 (LC).
33 Grogan *Collective Labour Law* 165.
34 (J60/09) [2009] ZALC 15.
35 Grogan *Collective Labour Law* 165.

bargaining. The court stated that collective bargaining is a process which is intended to sway your opponent to adjust its previous position and views previously held.³⁶

In *Platinum Mile Investments t/a Transition Transport v SATAWU*³⁷ the point was raised that if the dispute underlying the strike is different from the dispute which was referred for conciliation, the court will seek to determine the true issue in dispute. The manner in which the employees have characterised the dispute on the referral form is not necessarily decisive.³⁸ The court also held that employees may adapt or develop the issue in dispute that was referred for conciliation. For example, strikers will not be held to the specific demands tabled for conciliation in a wage dispute, and may add further demands.³⁹ The manner in which the dispute is described in the notice must be logical, for example the employer must know what is expected from it to comply with the demand. Where, for example, a union merges a number of past and present disputes referred to the CCMA on different dates, the strike will be ruled unprotected.⁴⁰

If there is a change to a demand, which is not the demand which was conciliated, and this change is raised during the course of a protected strike, how will it impact on the status of the strike? Cases like the ones discussed, and others relating to the identification of the true issue in dispute in other contexts, point out that there is no hard and fast test for determining whether the dispute referred for conciliation is the same as the dispute over which the strike was called.⁴¹ The question that needs to be answered in this dissertation is whether a change to the demand not made during the conciliation process, but indeed during the course of a protected strike, nullifies the strike's status as protected? This research is intended to set out guidelines for employers on how to determine the true issue in dispute and avoid the trap of being

36 *City of Johannesburg Metropolitan Municipality v SAMWU* (J60/09) [2009] ZALC 15 at 8-9 (SAFLLI).

37 2010 31 ILJ 2037 (LAC).

38 *Ceramics Industries t/a Betta Sanitary Ware v NCBWU* 1997 18 ILJ 671 (LAC); *Coin Security Group v Adams* 2000 21 ILJ 924 (LAC); *SA Transport & Allied Workers Union v Coin Reaction* 2005 26 ILJ 1507 (LC).

39 *NUMSA v Edelweiss Glass & Aluminium* 2010 31 ILJ 139 (LC); *Edelweiss Glass & Aluminium v NUMSA* 2012 1 BLLR 10 (LAC).

40 *SA Airways v SATAWU* 2010 31 ILJ 1219 (LC).

41 *Grogan Collective Labour Law* 166.

caught in an automatic unfair dismissal dispute. This research will also deal with the consequences of strikes.

Chapter 2: Protected and unprotected strikes

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.⁴²

The LRA provides protection to striking employees against dismissal if they comply with the requirements set out in the LRA. Strikes which comply with the LRA are protected and those which do not comply are unprotected.⁴³ The following two procedural requirements have to be met before a strike can enjoy its protective status: the dispute must be referred to conciliation and if conciliation fails, notice must be given to the employer.⁴⁴

In order for a strike to be protected the employees or their trade union must comply with the procedural requirements as set out by the LRA.⁴⁵ The LRA⁴⁶ certificate of non-resolution to confirm that the dispute remains unresolved from the CCMA or Bargaining Council or, alternatively, after 30 days or a longer period has lapsed as agreed between the parties, the trade union and its members can give the employer, bargaining council or employer's organisation 48 hours' notice of its intention to embark on a protected strike.⁴⁷

In terms of section 64(3) of the LRA a strike will not be unprotected in the following instances where the requirements of a protected strike were not met: In the event of the parties to the dispute being members of a bargaining council and the dispute has been dealt with in terms of the constitution of the council; if the parties complied with the terms of a collective agreement; if the strike is in response to an unprotected lock-out by the employer; in the event of the employer having introduced unilateral changes to the employees' terms and conditions of employment or if the employer

42 S 213 of the LRA.

43 Grogan *Workplace Law* 373.

44 Basson *et al Essential Labour Law* 119.

45 S 64 of the LRA.

46 S 64 of the LRA.

47 S 64 of the LRA.

threatens to introduce changes and if the employer has failed to comply with a request to either refrain from implementing the change or if he has revoked the change.⁴⁸

In *FAWU v Earlybird Farm*⁴⁹ the court held that:⁵⁰

In my view, therefore, the drivers' strike was unprocedural, by which I mean that it failed to satisfy the conditions upon which the conferment by section 64 of a right to strike is made to depend. It by no means follows, however, that the strike was prohibited and so unlawful. The protection conferred on strikers by the chapter has the effect of placing a ban on the weapon of dismissal to which the employer might otherwise wish to resort. When protected, the strikers are placed in a privileged position and their employment cannot be terminated in consequence of their participation in the collective action. Prohibitions on striking focus on the strike itself and entail state intervention in the freedom to strike itself. Section 64 contains no such prohibitions: it confers rights. Section 65, on the other hand, does create a set of prohibitions and they can be enforced by interdict proceedings and ultimately by state sanctions such as committal for contempt of court. On this reasoning strikes can fall into one of three categories: those that are protected; those that are prohibited; and those that are neither.⁵¹

Grogan⁵² is correct to say that the third category of strikes identified by the court is only relevant when determining the fairness of dismissals relating to strikes. The differences between strikes that are protected, unlawful and unprocedural do not have any bearing on the fairness of dismissal.

The second procedural requirement is that after the lapse of the prescribed period, the soon-to-be strikers or their union must give the employer at least 48 hours' notice of the commencement of the strike.⁵³ At least 7 days' notice must be given in the event that the state is the employer. The state is defined as all organs of the state, which include local authorities. The reason for longer notice to the state is to enable authorities to put measures in place to limit the disruption caused by strikes.⁵⁴ Where the employer is bound to a collective agreement and the issue in dispute relates to a collective agreement to be concluded in the council, it would be sufficient to serve

48 *Grogan Collective Labour Law* 171-173.

49 *FAWU v Earlybird Farm* 2003 24 ILJ 543 (LC).

50 *FAWU v Earlybird Farm* 2003 24 ILJ 543 (LC) 548.

51 *Grogan Collective Labour Law* 160.

52 *Grogan Collective Labour Law* 160.

53 *Grogan Collective Labour Law* 167.

54 *Grogan Collective Labour Law* 167.

the strike notice on the employers' bargaining council.⁵⁵ The court held further that the employees are not required to embark on strike action on the date that was indicated on the strike notice as long as the strike starts within a reasonable time after the time indicated in the strike notice. In the *Transport Motor Spares v NUMSA*⁵⁶ case it was held that employees are not required to issue a new strike notice after the strike was suspended. In *SACTWU v Stuttafords Department Stores*⁵⁷ the court found that should a second notice be given because short notice was given in the first instance, the time given in the two notices must be calculated together. In *SATAWU v Moloto*⁵⁸ the Constitutional Court held that there is no express requirement in the LRA that every employee who intends to take part in a protected strike has to, individually or through a representative, give notice of the commencement of the strike, nor does the notice have to stipulate who will take part in the strike.

2.1 The legal effect of a protected strike

In terms of section 67 of the LRA, an employee is exempted from civil liability on the grounds of delict or breach of contract for taking part in a protected strike or for any conduct in contemplation or furtherance of a protected strike.⁵⁹ Furthermore, an employee is entitled to payment in kind during a protected strike and cannot be dismissed for participating in a protected strike.

Before 1984 a strike was regarded as a breach of contract and the employer was entitled to cancel the employment contract with the employee. After the introduction of the constitutional right to strike and the LRA, employees are protected from dismissal if they comply with the provisions of section 64 of the LRA. However, the employer retains the right to discipline strikers for misconduct committed during the strike action. This indicates that strikers are still in an ongoing relationship with the employer for the duration of a strike.

55 *Tiger Wheels Babelegi t/a TSW International v NUMSA* 1999 20 ILJ 677 (LAC).

56 1999 20 ILJ 690 (LC).

57 1999 20 ILJ 2692(LC).

58 2012 6 SA 249 (CC) par 43.

59 S 67(2) of the LRA.

Strikers are obliged to adhere to an employer's disciplinary codes and procedures even though they are participating in strike action. Other duties such as the duty not to compete with one's employer are still ongoing. It is submitted that the employment relationship is not suspended by a strike. It is further argued that only the obligation to render services and the reciprocal duty of payment for the employees' labour are suspended.⁶⁰

The employer is not entitled to dismiss employees for taking part in a protected strike on the grounds of breach of contract. Dismissals exclusively based on the participating in or supporting of a protected strike will be regarded as automatically unfair.⁶¹

The labour court confirmed in *FGWU v Minister of Safety and Security*⁶² that the purpose of strike action is to enable employees to pressurise their employers. The LRA has limited the employer's common law right to dismiss employees for withdrawing their service.

2.2 Limitations to the right to strike

The right to participate in a protected strike is not without limitations. Where the pre-strike procedure contravenes section 64 of the LRA the strike will be unprotected. If the strike does not comply with a collective agreement that prohibits a strike on the issue in dispute, the strike will not be protected. Furthermore, if the strike relates to a rights dispute and is subject to arbitration or adjudication such a strike will also be unprotected.

2.3 Strike action

In *SA Breweries v FAWU*⁶³ the union members engaged in an overtime ban. The court held that employees cannot be compelled to perform work which they are not

60 <http://www.worklaw.co.za:80/strikes/strikes-consequences.asp>.

61 S 187(1)(a) of the LRA.

62 1999 4 BLLR 332 (LC).

63 1989 10 ILJ 844 (A).

contractually obliged to do. As a result the overtime ban in these circumstances did not constitute a strike. In terms of the current definition of a strike, a concerted refusal to perform voluntary overtime work, which has the effect of retarding and obstructing work, will constitute strike action. In *Ford Motor Company of SA v NUMSA*⁶⁴ the parties had a collective agreement in place providing that employees would work overtime when operational requirements required them to do so. The court held that this constituted a contractual obligation to work voluntary overtime. The refusal to work overtime without first following the dispute resolution procedures as provided for in the collective agreement constituted an unprotected strike. It is also important to examine whether the employees' conduct falls within the ambit of the definition of a strike.

Retardation or obstruction of work normally occurs when strike action is not that easily noticeable. The employees may be working, but at a slower pace than normal, which results in lower production than in normal circumstances. This kind of action is commonly known as a go-slow but can still qualify as a strike.

In *NUM v Chrober Slate*⁶⁵ employees downed tools and later claimed that they were not on strike but were refusing to work because, as they claimed, were working under unsafe working conditions. The strikers were unable to prove that it was unsafe for them to work. The strike was held to be unprotected and the dismissal of the striking workers was found to be fair.

A normal strike takes place when employees working for the same employer withhold their labour. This is also known as a primary strike. *Picardi Hotels v Food and General Workers Union*⁶⁶ is an example in which the court held that people participating in a strike must prove that their conduct constituted a strike as defined in the LRA. Independent contractors are not employees which means that strikes by independent contractors will fall outside the scope of the definition of a strike.

64 2008 29 ILJ 667 (LC).

65 2008 29 ILJ 388 (LC).

66 1999 20 ILJ 1915 (LC).

2.4 Purpose of the strike

The intention of the strikers must be to remedy a grievance or to resolve a dispute that they have with the employer. In *Simba v FAWU*⁶⁷ it was held that a collective refusal to work constituted a breach of contract and a refusal of the employees to work a staggered break system, but with no demand, grievance or dispute which the employer was required to resolve. The employees raised no complaints and did not articulate any demand. The court accordingly found that the conduct of the employees did not constitute a strike. In *FAWU v Mnandi Meat Products & Wholesalers CC*⁶⁸ the employees abandoned their work stations and left the premises. The court held that the abandonment was not accompanied by a demand and the employees' action could more probably be described as a walk-out rather than a strike.

Also in *NUMSA v CBI Electric African Cables*⁶⁹ the court held that the decision taken by the employees to leave their workplace before the end of their shift constituted misconduct because there was no indication that the abandoning of their workplace was coupled with any grievance or demand. The court held that the dismissals of the employees were substantively fair but procedurally unfair and awarded each employee compensation equivalent to 12 months remuneration.

2.5 The no work, no pay rule

In terms of section 67(3)⁷⁰ of the LRA the employer is not obliged to remunerate an employee during the course of a protected strike. The withholding of remuneration is commonly referred to as the no work, no pay rule. But the employer is not allowed to stop providing for accommodation, food and other basic amenities of life forming part of remuneration, during a protected strike, if so requested by its employees.

67 1998 19 ILJ 1593 (LC).

68 1994 9 BLLR 7 (LC).

69 2014 1 BLLR 31(LAC).

70 S 67(3) of the LRA.

The LRA⁷¹ makes provision for the recovery of the monetary value of the payment in kind made during the strike after the strike, through the labour court. Benefits that do not form part of the employee's remuneration should not be affected by a strike. A benefit is something that is not linked to the rate of pay, like pension, medical, housing and insurance subsidies; they have a monetary value and are a cost to the company. The *SAMWU v City of Cape Town*⁷² judgement stipulates that it is not an unfair labour practice for an employer to apply the no work, no pay, no benefits rule because there is no difference between withholding the pro rata share of contributions in relation to benefits and the withholding of remuneration during strike action.

However, in *South African Municipal Workers Union v Ekurhuleni Metropolitan Municipality*⁷³ it was held that from the date of the election, a full time shop steward no longer works for the employer. A full time shop steward is not obliged to render a service to the employer but only renders services to the union. Consequently a full time shop steward cannot be regarded to be taking part in a strike in the capacity of a full time shop steward. The no work no pay rule will therefore not apply to full-time shop stewards.

Section 20(10) of the BCEA confirms that leave should be taken at an agreed time or at a time determined by the employer. The employer is entitled to reject leave applications made during the strike period. The general principle is that when the strike commences power play takes effect and the employer is entitled to refuse leave for anyone associated with the strike.⁷⁴

2.6 Presumption of who is on strike

Before an employer applies the no work no pay rule, the employer must ensure that the employees affected by the no work no pay rule are actually on strike. In SA

71 S 67(3)(b) of the LRA.

72 2010 31 ILJ 742 (LC).

73 2012 11 BLLR 1174 (LC).

74 <http://www.worklaw.co.za:80/strikes/strikes-consequences.asp>.

*Onderwysunie v Head of Department, Gauteng Department of Education*⁷⁵ the employer deducted pay from its employees for the strike period. The union felt aggrieved because some of its members only joined the strike for brief periods. The unions filed an urgent application for the refund of their members' monies. The court held that the department had deducted money from employees' salaries without a proper basis. The employer was ordered to repay all the deductions made from its employees' salaries and to stop further deductions until accurate data relating to hours not worked by each worker during the strike period had been collected.⁷⁶

2.7 Consequences of unprotected strikes

Section 68 of the LRA⁷⁷ relates to circumstances in which strikes are not in line with the provisions of the LRA. Section 68 grants the labour court exclusive jurisdiction: to order an interdict to restrain any person from taking part in an unprotected strike, to order payment of just and equitable compensation for any loss attributable to the strike, taking into account attempts made to comply with the LRA, whether the strike conduct was premeditated and whether there was compliance with an order granted by the labour court. The court must also take into account the interest of collective bargaining, the duration of the strike and the financial position of the parties.

Where the employer contemplates to apply for an interdict to restrain any person from taking part in an unprotected strike, it must first give the trade union 48 hours' notice, in writing, of such intention. The court may allow a shorter notice period if: a written notice has been given to the respondent advising of the intention to apply for an order; the respondent has been given a reasonable opportunity to be heard before a decision concerning that application has been taken, and the employer has shown good cause why a shorter period than 48 hours' notice should be allowed.

If the notice to strike was given 10 days before the start of the strike, the employer must give the trade union at least 48 hours' notice of its intention to interdict the

75 Unreported case J2468/10.

76 <http://www.worklaw.co.za:80/strikes/strikes-consequences.asp>.

77 S 68 of the LRA.

strike. Section 68(5)⁷⁸ states that taking part in an unprotected strike may constitute a fair reason for dismissal. Schedule 8 to the LRA must be complied with when an employer contemplates a dismissal of employees who had taken part in an unprotected strike.

78 S 68(5) of the LRA.

Chapter 3: The issue in dispute

The LRA requires the issue in dispute to be referred to conciliation. It is important in every matter to first determine what the issue in dispute is.

In terms of section 213 of the LRA:

... the issue in dispute, in relation to a strike or lock-out, means the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out.

The issue in dispute or the grievance is at the heart of strikes. Courts will almost always first establish what the real issue in dispute was during a strike action.⁷⁹ The issue in dispute that the strike was called over must be the same issue in dispute that was conciliated at the CCMA or Bargaining Council with jurisdiction. The issue in dispute will indicate whether or not a work stoppage can be classified as a protected strike. It is also advisable to first establish whether a demand is a dispute of right or of interest.⁸⁰ Cheadle⁸¹ cautions that section 65 does not prohibit strikes over rights disputes.

In the Labour Court matter *SVR Mill Services v NUMSA*⁸² the trade union declared a strike over the unilateral introduction of a four-shift roster by the employer. The employer conversely argued that the new shift roster was introduced because the trade union demanded it and that it was implemented as per agreement between the parties. The employer alleged that the agreement between the parties created a rights dispute and as a result the trade union could not strike over it. The court held that the LRA did not prohibit a strike over an agreement and the trade union could strike over the issue. If the agreement was in writing and it was a collective agreement the court may have come to a different conclusion.⁸³

79 Cheadle *et al Current Labour Law* (2001) 71.

80 Nengovhela *The Contribution of the Labour Court to the Development of Strike Law* 34-35.

81 Cheadle *et al Current Labour Law* (1998) 23.

82 *SVR Mill Services v NUMSA* 2001 22 ILJ 1408 (LC).

83 Cheadle *et al Current Labour Law* (2001) 71. See also Nengovhela *The Contribution of the Labour Court to the Development of Strike Law* 35.

Du Toit⁸⁴ disagrees with Cheadle and the court's decision in *SVR Mill Services v NUMSA*. He states that rights disputes do not belong to collective bargaining. Rights disputes must be dealt with in the correct forums whereas interest disputes should be dealt with through power play when conciliation has failed to resolve the issue in dispute.⁸⁵

The court held in *Adams v Coin Security Group*⁸⁶ that the above definition is structured in such a way that a strike can be called over a demand, a grievance and an issue in dispute.⁸⁷ In instances where a court has to decide what the issue in dispute is in a particular strike, the basis of that investigation should be the definition of the expression issue in dispute.⁸⁸

In an attempt to define what the issue in dispute was in the matter of *TSI Holdings v NUMSA*⁸⁹ the court held that based on the issue in dispute three types of strikes are established, such as strikes which are coupled with a demand, strikes where there is a grievance but no demand and strikes where there is a dispute. If there is a concerted refusal to work by the employees or a concerted retardation or obstruction of work and it is accompanied by a demand, that demand is the issue in dispute. The court held in the earlier decision of *South African Security Employers Association v TGWU(2)*⁹⁰ that there is no substantial difference between the terms "issue in dispute" and "matter giving occasion for the strike" in section 65 of the previous Labour Relations Act 28 of 1956.⁹¹

In *Dunlop South Africa v Metal and Allied Workers Union*⁹² (hereafter the *Dunlop* matter) the court found that the phrase "matter giving occasion for the strike" means the employer's failure or refusal to come to an agreement or to meet the terms of the demands of the employees or of those who are representing them. The court further

84 Du Toit *et al Labour relations law* 31-32.

85 Nengovhela *The Contribution of the Labour Court to the Development of Strike Law* 35.

86 1998 7 LC 8.29.1.

87 *Adams v Coin Security Group* 1998 7 LC 8.29.1 par 59.

88 *Adams v Coin Security Group* 1998 7 LC 8.29.1 par 60.

89 2006 7 BLLR 631 (LAC) par 27.

90 1998 4 BLLR 436 (LC).

91 Du Toit *et al Labour law through the cases* LRA 9-18(2).

92 1985 1 SA 177 (D).

had to determine what the matter was in regard to an application which was made to establish a conciliation board. The court noted that it must first determine which demands or proposals were refused or not agreed upon, and what demands or proposals formed the basis of the application.⁹³ The court found in *South African Security Employers Association v TGWU (2)*⁹⁴ that:

... the test for determining the issue in dispute as propounded in the Dunlop matter is an appropriate one.⁹⁵

Du Toit *et al*⁹⁶ is of the view that it is essential to first determine what the real nature of the underlying dispute is when establishing if the strike or lock-out is permissible. It was held in *Ceramics Industries t/a Betta Sanitary Ware v NCBWU*⁹⁷ (hereafter the *Ceramics Industries* case) that a dispute of rights cannot be turned into an issue over which a strike can be called by just adding a demand for a remedy which falls outside the scope of the LRA. When determining the dispute underlying the demand, the refusal of the demand or the failure to remedy a grievance needs to be scrutinised first. "The demand or remedy will always be sought to rectify the real underlying dispute".⁹⁸ The court also held in *SAPU v National Commissioner of the South African Police Service*⁹⁹ that only after conditional acceptance or rejection of a demand, a dispute will arise, and that dispute and not the demand, will become the issue in dispute.

The court hinted in the *Adams v Coin Security Group*¹⁰⁰ that there is a difference between demands and complaints. It is argued that the complaint in the *Ceramics Industries* case was the discrimination against union officials and the demand was for the dismissal of certain managers. The court found that the complaint of discrimination was the issue in dispute.¹⁰¹ In the *Fidelity Guard Holdings v PTWU*¹⁰²

93 Du Toit *et al Labour law through the cases* LRA 9-18(2).

94 1998 4 BLLR 436 (LC) par 17.

95 Du Toit *et al Labour law through the cases* LRA 9-18(2).

96 Du Toit *et al Labour law through the cases* LRA 9-18(2).

97 1997 6 BLLR 697 (LAC).

98 *Ceramics Industries t/a Betta Sanitary Ware v NCBWU* 1997 18 ILJ 671 at 703.

99 2006 I BLLR 42 (LC).

100 1998 12 BLLR 1238 (LC).

101 Du Toit *et al Labour law through the cases* LRA 9-18(3).

102 1997 9 BLLR 1125 (LAC).

it was held that the labelling of the dispute in the CCMA referral form does not change the underlying nature of the dispute - a court should examine the substance of the dispute and not only the form of the dispute. The question is "*what is it that the employer was required to do in order for the strike to be called off or ended?*" The court held in *FGWU v The Minister of Safety & Security*¹⁰³ that as soon as the issue has been established and conciliated at the CCMA or Bargaining Council the employees can only strike over that issue. The would-be strikes "cannot change the goal posts when they issue the notice in terms of section 64(1)(b)".¹⁰⁴

The court held in *CAWU v Modern Concrete Works*¹⁰⁵ that the issue should be described with reasonable clarity. The court held that the notice to lock-out did not comply with the provisions of the LRA in that it made reference in general terms to the meeting at the CCMA, which failed to resolve the present dispute without specifying which part of the dispute gave rise to the lock-out. It was held in *Afrox Limited v SACWU*¹⁰⁶ that when the strike or lock-out ends, the issue in dispute will also fall away.

In *NUMSA v Hendor Mining Supplies*¹⁰⁷ the employees embarked in strike action demanding the dismissal or suspension of a supervisor after they had agreed to report to the supervisor following an earlier dispute over the same issue. The court held that by entering into such an agreement, the workers had by implication abandoned their demand, and therefore the strike was declared unprotected.

3.1 Issue in dispute regulated in a collective agreement

In terms of Section 65 of the LRA:

No person may take part in a strike or in any conduct in contemplation or furtherance of a strike if that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute.

103 1999 4 BLLR 332 (LC).

104 1999 4 BLLR 1020 (LC) par 27.

105 1999 19 BLLR 1020 (LC).

106 1997 5 BLLR 589 (LC).

107 2007 28 ILJ 1278 (LC) par 37.

In *Komatsu Southern Africa v NUMSA*¹⁰⁸ (hereafter the *Komatsu* case) it was held that in terms of clause 37 of the Metal and Engineering Industries Bargaining Council (hereafter the MEIBC) main agreement the MEIBC is the sole forum for negotiating matters contained in the main agreement, and no matter contained therein may be an issue in dispute for the purpose of a strike. The court held that the MEIBC's main agreement prescribes what can generally be termed to be centralised bargaining and that means that all terms and conditions of employment in the industry can only form the subject matter of collective bargaining at central (sectoral) level in the bargaining council itself; and by necessary implication and as a matter of logic, any collective bargaining on conditions of employment at plant level with individual employers would be prohibited.

The court reasoned that: The purpose of centralised bargaining is to ensure uniformity and consistency of conditions of employment in an organised industry. This creates a level playing field in an industry where businesses do not compete with one another on the back of conditions of employment of their employees. Similarly, it prevents individual employers being targeted for further and enhanced conditions of employment just because such employers may be considered to be larger or financially able or susceptible to agree to the same. The strike was on that basis declared to be unprotected.

In *CBI Electric v NUMSA*¹⁰⁹ the employer applied for an urgent interdict to halt a strike initiated by NUMSA. The strike was in support of a demand for a housing allowance to be paid to its employees. CBI Electric, like in the *Komatsu* case, based their arguments on the provisions of section 65 of the LRA. CBI Electric argued that the main agreement of the MEIBC prohibited a strike based on a demand for a housing allowance. Clause 37 of that agreement stipulates at which level collective bargaining may take place in the industry. According to the court, section 65 prohibits the right to strike only where a binding collective agreement pertinently prohibits a right to strike in relation to the issue in dispute. The court held that the

108 2013 ZALCJHB 298.

109 2014 1 BLLR 31 (LAC).

right to strike was not prohibited; only plant level bargaining was prohibited on matters that were agreed upon in the MEIBC main agreement.

The court held further that clause 37 did not bar parallel bargaining on matters that were not contained in the main agreement. The court held that a trade union may call a strike over the demand made at plant level because there was no collective agreement in place that expressly prohibited a strike relating to a demand made at plant level for a housing allowance.

In *TSI Holdings v NUMSA*¹¹⁰ (hereafter the *TSI* case) the court held that a demand which requires the employer to break the law would be unlawful and the strike would not be permissible. The court held in *Modise v Steve's Spar Blackheath*¹¹¹ that strike action in support of an unachievable demand is not one that is useful to collective bargaining. It was held in *Barlows Manufacturing v MAWU*¹¹² that a "demand had to be reasonably achievable".

In *SACCAWU v Transkei Sun International Ltd t/a Wild Coast Sun Hotel, Casino & Country Club*¹¹³ the court was of the view that a "demand for centralised bargaining was unattainable."

In *Pikitup (Soc) v SAMWU (1)*¹¹⁴ the two issues in dispute were that the employer should give an undertaking to the trade union that it would stop the use of a biometric access control system and breathalysing tests on drivers. The court held that the issues in dispute were not unlawful because the employer was not requested to break the law if it had to accede to the trade union's demands. However, the court held that the two issues in dispute were not legitimate topics for collective bargaining because it fell within the management prerogative of the employer. The court further noted that there was no causal link between the demand and the conditions of employment of the employees.

110 2006 7 BLLR 631 (LAC).

111 2000 21 ILJ 519 (LAC).

112 1990 2 SA 315 at 322D-H.

113 1993 14 ILJ 867 (TKA) at 874D-875G.

114 2013 11 BLLR 1094 (LC).

In *Pikitup (Soc) v SAMWU (2)*¹¹⁵ the court noted that the matter must not only be between the parties but must be one of mutual interest to them. "This means that there must be a reciprocal interest in the matter". The court held that the trade union cannot carry on participating in a concerted refusal to work in order to force the employer's hand to adhere to their demand in respect of the biometric time and attendance system. The court stated further that should the dispute pertaining to the breathalyser test be resolved, the strike would be over.

The courts struggled over the years to determine the issue in dispute. In *Coin Security Group v Adams*¹¹⁶ the court asks the following question in an attempt to classify the issue in dispute: *What is it that the employer was required to do in order for the strike to be called off or ended?* If the answer is that the result could be arbitrated or adjudicated in relation to the issue in dispute, then the employees are not allowed to strike over it.¹¹⁷

115 2013 11 BLLR 1118 (LC) par 56-89.

116 2000 21 ILJ 925 (LAC).

117 2000 21 ILJ 925 (LAC) par 1208D.

Chapter 4: Critical discussion of relevant case law

To determine what constitutes the issue in dispute can be problematic. A number of disputes can arise between the parties. One dispute might have several elements. The parties can, through compromise, narrow the scope of the initial disputes, and the parties can be confused on the position taken in each of them. The court must apply a common sense approach when it determines what the dispute entails. The court should be looking at the substance of the issue in dispute and not its form.¹¹⁸

The Labour Court sends out a message that parties must first reach a deadlock before they refer the matter for conciliation. In *City of Johannesburg Metropolitan Municipality v SAMWU*¹¹⁹ the trade union requested the Bargaining Council to conciliate a dispute which consisted of six issues.¹²⁰ The trade union alleged that the parties had reached a stalemate on those issues. The court confirmed that section 64(3) of the LRA requires that the issue in dispute should be referred to the CCMA or a Bargaining Council with jurisdiction. Should the parties fail to conciliate the dispute, a certificate of non-resolution must be issued. The court observed further that parties must always aim to resolve the dispute in line with the objectives of the LRA¹²¹ which objectives are to promote orderly collective bargaining and to improve labour peace.¹²²

It was argued by the employer that the referral of the six disputes was premature and invalid because there was not a dispute at the time of the referral that was capable of being conciliated.¹²³ It was further argued that a stalemate had not yet been reached over the six issues. It was submitted that only three of the six issues had been raised during meetings between the parties.¹²⁴ The remaining three issues were not

118 *Brassey Commentary on the Labour Relations Act* A9-23.

119 J2236/07.

120 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 8.

121 S 1 of the LRA.

122 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 9.

123 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 11.

124 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 12.

capable of being issues in dispute in that the parties had never endeavoured to bargain over it.¹²⁵

The court held that there was no dispute over the three issues in terms of the LRA¹²⁶ because according to the minutes of the meetings between the parties there was no evidence that those issues had been discussed between the parties.¹²⁷ The court stated that those issues could not be conciliated by the bargaining council because they were not issues in dispute.¹²⁸ The court further held that a protected strike can only be embarked upon if it is in support of an issue in dispute.¹²⁹

The court held with reference to *SACCAWU v Edgars Stores*¹³⁰ that for a dispute to exist, it must "postulate the notion of the expression by the parties, opposing each other in controversy, of conflicting views, claims or contentions".¹³¹

The court also referred with approval to *Estate Bodasing v Additional Magistrate, Durban*¹³² in which it was held that a dispute must "*denote at least the positive state of the parties having disagreed*".¹³³

The court also made reference to Brassey in *Commentary on the Labour Relations Act*¹³⁴ who states that:

A dispute can exist only when one person in effect says 'yea' and the other 'nay'; it requires, in other words, a clash in the stances adopted by contending parties. Normally they will communicate their respective standpoints by exchange or words, but a dispute can arise by conduct and will typically do so when one party demands a concession and the other fails to make it by the appointed time.¹³⁵

125 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 12.

126 S 64(1)(a).

127 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 23.

128 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 26.

129 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 15.

130 1997 18 ILJ 1064 LC.

131 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 16.

132 1957 3 SA 176 (D) at 180H.

133 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 16.

134 Brassey *Commentary on the Labour Relations Act* A9-22.

135 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 16.

The court also referred to *Leoni Wiring Systems (East London) v NUMSA*¹³⁶ in which it was held that:

If any of the parties is in dispute with the other, such dispute should be stated clearly and not be clothed in such a way, that, objectively viewed, the other side does not know that it is in dispute at all. I am firmly of the view that parties should not conduct themselves in any manner which may lead to a situation where the other side is left in doubt as to whether there is a dispute between them in relation to a particular issue. Likewise I hold the firm view that, if a dispute has arisen between the parties, not only must the dispute be clearly stated and identified but also the outcome, or the solution, which a party requires to resolve the dispute, should be unambiguously stated. The mere fact that one party may be unhappy about a particular state of affairs does not give rise to a dispute.¹³⁷

The court held that as soon as the employer party has refused the demand or has shown through its conduct that it is not prepared to comply with a demand, then the parties can claim that they have reached stalemate to a point that it may be argued that an issue in dispute has arisen that can be conciliated and if not successful, a strike can be called over it.¹³⁸

The court also referred with approval to *Chamber of Mines of SA v NUM*¹³⁹ in which it was held that the strike was not permissible because the trade union was not allowed to refer the matter to conciliation because management had not responded to the demand and the deadline for a reply to the demand had not yet been reached.¹⁴⁰

The court held amongst others that the bargaining council lacked jurisdiction to conciliate the matter because no issue in dispute existed as required by the LRA and interdicted the strike.¹⁴¹

In *City of Johannesburg Metropolitan Municipality v SAMWU*¹⁴² the applicant averred that the bargaining council did not have jurisdiction to conciliate the disputes that

136 2007 28 ILJ 642 (LC).

137 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 17-18.

138 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 18.

139 1987 1 SA 668 (A).

140 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 18.

141 *City of Johannesburg Metropolitan Municipality v SAMWU* J2236/07 par 26.

142 *City of Johannesburg Metropolitan Municipality v SAMWU* J60/09.

were referred to it or to grant a certificate that the disputes were not resolved. The crux of the applicant's preliminary points was that the disputes referred to the bargaining council were not strikeable issues. The strike notice did not mention the exact issues that were before the bargaining council and only mentioned in general terms that the issues referred to the bargaining council remained unresolved. It was evident that the trade union only wanted to call a strike over the issues that the bargaining council regarded as strikeable issues.¹⁴³

The court mentioned that the parties deadlocked on the suspension demand and the employment of pensioners' demands. Those two demands formed the issues in dispute for the proposed strike. The court stated that the demand must be lawful in a strike situation and must pertain to the issue in dispute.¹⁴⁴

The court held that:

The lawfulness of a demand is an issue that is relevant to the definition of a strike, rather than to the question whether the strike is protected. In other words, an unlawful demand directed to an employer does not give rise to a strike.¹⁴⁵

The court further held that the issue in dispute pertaining to a strike has to be determined from the facts which will include the referral form; the correspondence between the parties; the minutes of the negotiation meetings between the parties and the statements filed at court.¹⁴⁶

The court stated that the issue in dispute in relation to the strike must be the same as the one that was referred to conciliation.¹⁴⁷ The court, however, warned that the rule should not be applied literally and that some flexibility should be applied.¹⁴⁸ Because collective bargaining is a system that is in place to convince your opponent to change the stance it previously held and to amend the views it previously

143 *City of Johannesburg Metropolitan Municipality v SAMWU* J60/09 par 3-4.

144 *City of Johannesburg Metropolitan Municipality v SAMWU* J60/09 par 6-7.

145 *City of Johannesburg Metropolitan Municipality v SAMWU* J60/09 par 7.

146 *City of Johannesburg Metropolitan Municipality v SAMWU* J60/09 par 8.

147 *NUMSA obo Mahlangu v Edelweiss Glass & Aluminium* [2004] 6 BALR 747 (CCMA).

148 *City of Johannesburg Metropolitan Municipality v SAMWU* J60/09 par 8.

voiced.¹⁴⁹ The flexibility that should be applied was established in the *TSI* case. The court held in the *TSI* case the following:

One accepts that in a conciliation process a party may make a demand which he is prepared to later moderate and that a party may sometimes put up a demand that it is aware the other party will not agree to.¹⁵⁰

The court was of the view that the suspension demand that was referred to conciliation "i.e. that Mr Nkosi and Mr Essau be suspended, is hardly far removed from a demand, as presently articulated, that they be suspended fairly".¹⁵¹ The court also took into account the wording of the strike notice.¹⁵²

The court stated that it would counteract the spirit of collective bargaining should a court hold a union to the exact wording of the demand that was referred to conciliation because collective bargaining is a process that was intended to convince the other side to change its stance previously taken.¹⁵³ The court held that the demands were lawful¹⁵⁴ and refused the application for final relief.¹⁵⁵

In *Adams v Coin Security Group*¹⁵⁶ the applicants instituted an unfair dismissal dispute against their erstwhile employer.¹⁵⁷ The applicants were dismissed for participating in an unprotected strike.¹⁵⁸ The court was tasked to determine, amongst others, whether the strike was indeed unprotected. The trade union argued that the strike was called over two issues, namely different wages were paid to employees in Cape Town and at Wits. Secondly, the applicant did not pay the union its subscriptions that were deducted from their members' wages.¹⁵⁹ The employer

149 *City of Johannesburg Metropolitan Municipality v SAMWU* J60/09 par 9.

150 *TSI* case par 30.

151 *City of Johannesburg Metropolitan Municipality v SAMWU* J60/09 par 9.

152 *City of Johannesburg Metropolitan Municipality v SAMWU* J60/09 par 9.

153 *City of Johannesburg Metropolitan Municipality v SAMWU* J60/09 par 9.

154 *City of Johannesburg Metropolitan Municipality v SAMWU* J60/09 par 11.

155 *City of Johannesburg Metropolitan Municipality v SAMWU* J60/09 par 13.

156 *Adams v Coin Security Group* 1998 7 LC 8.29.1.

157 *Adams v Coin Security Group* 1998 7 LC 8.29.1. par 1.

158 *Adams v Coin Security Group* 1998 7 LC 8.29.1. par 3.

159 *Adams v Coin Security Group* 1998 7 LC 8.29.1. par 27.

argued that the dispute concerning the application of the council agreement should be resolved through arbitration and not through strike action.¹⁶⁰

The court observed that a strike over a dispute that was settled at conciliation would not be protected.¹⁶¹ The court stated that should the employer fail to comply with the settlement agreement it would amount to a breach of contract which is not a strikeable issue because the issue in dispute was settled between the parties at conciliation.¹⁶² Judge Waglay held in *BMW South Africa v NUMSA*¹⁶³ *obo Members* that a collective agreement is binding between the parties. The judge further held that a collective agreement is a contract and such contract is enforceable as long it is not in conflict with the law or *contra mores*.¹⁶⁴

The court held that the determining of the issue in dispute in a strike matter is of the utmost importance because.¹⁶⁵

In terms of section 64(1) the right to strike is conferred if the issue in dispute has been referred to conciliation;

In terms of section 64 an advisory award is a requirement if the issue in dispute is a refusal to bargain; and

In terms of section 65 the limitations to the right to strike operate with respect to the issue in dispute.

The court held that the limitation to the right to strike in terms of section 65(1)(c) applies when the referring party has the right to refer the matter to arbitration or to the labour court. The court stated that should a trade union refer a matter to conciliation and should it intend to strike and should the strike be called over a dispute other than the issue in dispute, and should that issue in dispute not have been referred to conciliation, or should the issue in dispute be a dispute that could be referred to arbitration or to adjudication, that strike would be unprotected.¹⁶⁶

160 *Adams v Coin Security Group* 1998 7 LC 8.29.1 par 28.

161 *Adams v Coin Security Group* 1998 7 LC 8.29.1 par 27.

162 1998 7 LC 8.29.1 par 27-28.

163 *BMW South Africa v NUMSA* JA 71/2011.

164 *BMW South Africa v NUMSA* JA 71/2011 par 10.

165 1998 7 LC 8.29.1 par 32.

166 1998 7 LC 8.29.1 par 32.

The court referred to the *Ceramic Industries* case as well as to the *Fidelity* case in its attempt to identify the issue in dispute. The court stated that the approach in the *Ceramic* case concentrated on the formulation of the dispute whereas it should have been focused on what the issue in dispute was. The *Ceramic Industries* case, according to the court, intended to circumvent a situation where a party would turn a rights dispute into a mutual interest dispute by linking to a complaint a demand to take the case out of the scope of arbitration or the labour court. The court hinted that the *Ceramic Industries* case approach may be:¹⁶⁷

Unworkable in a situation where a demand is made without any complaint being voiced and that the demand and the employer's refusal to comply with it is referred to the CCMA and thereafter a strike notice is given and the strike commences without the workers or the union giving reasons for such demand - especially now that the employer would not be able to compel them by way of court order to negotiate with him and to do so in good faith, which is a process which might have compelled the disclosure of reasons or the complaint.

The court held that the weakness of the *Fidelity* case lies in the fact that a party could table or add a demand to escape the limitations contemplated by section 65(1)(C).¹⁶⁸ The employer implemented a new shift roster. This was known as the 5-on-2-off system. This resulted in employees having more time off and earning less money. The trade union demanded that the employer must reintroduce the previous system that was known as the 6-on-1-off system. The employer argued that the dispute that was referred to conciliation was a dispute relating to the unilateral change in the conditions of employment and a refusal to bargain. The court commented that it was refusal by the employer to agree to a demand rather than a refusal to bargain. The court held that the demand to reintroduce the 6-on-1-off system which, was not acceded to by the employer, was the issue in dispute. The court further held that the nature of the true dispute cannot change just because one of the parties put a label on it.

The court was further of the view that:¹⁶⁹

167 1998 7 LC 8.29.1 par 58.

168 1998 7 LC 8.29.1 par 60.

169 1998 7 LC 8.29.1 par 60.

The difficulty that arises is that not all demands are made simply to avoid section 65(1)(1) and those who make a genuine and legitimate demand to their employer because that is what they want, should not be barred from resorting to a protected strike when the definition of the issue in dispute clearly contemplates, amongst others, a demand just because a few people might illegitimately link to their complaints demands so as to avoid section 65(1)(c).

The court held that the issue in dispute in this matter was the demand for equal pay between Cape Town and Wits workers¹⁷⁰ and not the application of the bargaining council agreement. The court took into account the first letter of demand; the referral of the dispute to the CCMA; the statement of claim; the minutes of the meetings between the parties; the strike notice; the ultimatum; the founding affidavit for an urgent application for relief about the dismissal of the applicants.

The court held that everyone knew that it would not matter whether the bargaining council agreement was or was not applicable. As long as there was a disparity in wages there would be a dispute between the parties.¹⁷¹ This decision is open to criticism in that the parties to a collective agreement cannot demand that it should change during its application period.¹⁷² The Labour Appeal Court in the *Komatsu* case¹⁷³ was of the view that the negotiators at sectoral level were fully aware of the needs of workers and what the workers wanted. They were also aware of what the other party could afford and that arrangement should be left undisturbed.¹⁷⁴ It was held that when the subject matter of the issue in dispute is contained in the main agreement then plant level bargaining is not allowed. Those issues can only be negotiated at sectoral level and any strike pertaining to it will not be allowed.¹⁷⁵ The Labour Appeal court held a different view in the *CBI Electric* case¹⁷⁶ it stated that if the main agreement does not explicitly prohibit a strike in relation to a specific demand made at plant level and all procedural limitations are adhered to, employees are allowed to embark on strike action.

170 1998 7 LC 8.29.1 par 61.

171 1998 7 LC 8.29.1 par 70.

172 Grogan *Collective Labour Law* 131.

173 2013 ZALCJHB 298.

174 Par 38.

175 Par 47.

176 2014 1 BLLR 31 (LAC).

In *Platinum Mile Investments t/a Transition Transport v SATAWU*,¹⁷⁷ the court held that the central issue it had to decide upon was whether the strike was protected or not.¹⁷⁸

The trade union approached the CCMA with a refusal to bargain/organisational rights dispute conciliation. The CCMA subsequently set the matter down for the conciliation of the recognition dispute. The trade union also referred another dispute to the National Bargaining Council for the Road Freight Industry (hereafter the NBCFRI) for conciliation regarding the use of labour brokers. The CCMA commissioner informed the parties that he would make an advisory award in the matter. Before the issuing of the advisory award the trade union gave the employer a notice to strike regarding the recognition dispute. In response, the employer informed the trade union that the strike would be unprotected and the strikers may be dismissed.¹⁷⁹

The employer called the strikers to a disciplinary hearing but none of the strikers attended the hearing. The striking employees were consequently dismissed for participating in an unprotected strike.¹⁸⁰ The labour court held that the strike was protected and that the dismissals were automatically unfair because the issue in dispute was a matter of mutual interest.¹⁸¹ The question before the Labour Appeal Court was what the nature of the dispute was that led to the strike, and whether the dismissal of the employees was automatically unfair.¹⁸²

The Labour Appeal Court held that taking into account the evidence presented at the Labour court and the video footage it was clear that the strike was over the signing of the recognition agreement. The court stated that the trade union did not withdraw the first strike notice relating to the signing of the recognition agreement. The trade union also did not give the company a new notice that they would embark on strike action in relation to the non-signing of the recognition agreement.¹⁸³ The court further held

177 2010 31 ILJ 2037 (LAC).

178 2010 31 ILJ 2037 (LAC) par 2.

179 2010 31 ILJ 2037 (LAC) par 4-6.

180 2010 31 ILJ 2037 LAC par 13.

181 2010 31 ILJ 2037 LAC par 16.

182 2010 31 ILJ 2037 LAC par 36.

183 2010 31 ILJ 2037 LAC par 40.

that the trade union used the underlying labour broker dispute as a smoke screen to relate the strike to the recognition agreement.

The Labour Appeal Court stated that the Labour Court should have allowed the employer to hand in the main agreement as evidence and should have allowed cross examination on it. The main agreement allowed the appointment of casual workers. The Labour Appeal Court held that the trade union did not lead any evidence that the employer appointed any casual worker in contravention of the main agreement. Nor was it put to any of the employer's witnesses that a labour broker was being used. The Labour Appeal Court held that it was convinced that the strike was over the recognition agreement and concluded that the strike was unprotected.¹⁸⁴

In *NUMSA v Edelweiss Glass & Aluminium*¹⁸⁵ employees were dismissed because they took part in an alleged unprotected strike. The trade union argued that the strike was protected and therefore the dismissals were automatically unfair. The trade union further argued that if the court found that the strike was unprotected then the court should find that the dismissal was both substantively and procedurally unfair.¹⁸⁶

The trade union declared a dispute by referring the matter to the CCMA for conciliation. The trade union raised the employer's failure to agree to its demand for organisational rights as the issue in dispute. The trade union also listed a number of other demands as matters of mutual interest. The other demands included a demand for a 13th cheque.¹⁸⁷

Prior to the conciliation at the CCMA the company prepared a document that laid the foundation for a collective agreement. The document included a number of matters that were discussed during the negotiations between the parties. The document also referred to the 13th cheque. The document stated that the employer granted its employees leave pay and a leave bonus instead of a 13th cheque. The document stipulated further that the union demanded leave pay; leave bonus and a 13th cheque

184 2010 31 ILJ 2037 LAC par 39-41.

185 2010 31 ILJ 139 LC.

186 2010 31 ILJ 139 LC par 3.

187 2010 31 ILJ 139 LC par 9-10.

but had not received a final mandate on the matter.¹⁸⁸ The CCMA eventually issued a certificate stating that the matter had not been resolved. The commissioner indicated that the dispute was about organisational rights.¹⁸⁹

The trade union subsequently served the employer with a strike notice.¹⁹⁰ Subsequent to the strike notice, the employer convened a meeting with the employees informing them that the strike would only be protected in relation to organisational rights.¹⁹¹ A strike in relation to the other matters would be unprotected and the employees would not be allowed to strike over it.¹⁹² The employer was clearly wrong in its approach because the strike was called over the organisational rights dispute and all employees were entitled to strike. It would be impossible for the employer to point out which employees were striking over organisational rights and which employees were striking over the other matters. Further evidence was lead that one of the shop stewards allegedly approached the employer and advised them that the employees only wanted a 13th cheque. The shop steward also said that the strike would be abandoned once the employer acceded to the demand for a 13th cheque.¹⁹³

The employer further informed the trade union that the strike would be unprotected if it continued.¹⁹⁴ Subsequently, the employer issued an ultimatum to the strikers warning them that if they persisted with the strike in terms of substantive issues, disciplinary action would be taken against them and they may be dismissed.¹⁹⁵ Nevertheless, the workers continued with the strike.¹⁹⁶ The court held that substance must prevail over form. It held further that the court was not bound by the description given by the parties to the dispute. The crux of the dispute would ultimately be

188 2010 31 ILJ 139 LC par 18-20.

189 2010 31 ILJ 139 LC par 27.

190 2010 31 ILJ 139 LC par 28.

191 2010 31 ILJ 139 LC par 29.

192 2010 31 ILJ 139 LC par 29.

193 2010 31 ILJ 139 LC par 36.

194 2010 31 ILJ 139 LC par 41.

195 2010 31 ILJ 139 LC par 48.

196 2010 31 ILJ 139 LC par 49.

determined by the court.¹⁹⁷ The court is duty bound to take the following factors into account:¹⁹⁸

The history of the dispute, as reflected in the communications between the parties themselves and between the parties and the CCMA, before and after the referral of the dispute. Relevant documents for this purpose may include the referral form, the certificate of outcome, any relevant correspondence, negotiations between the parties, and affidavits filed in court proceedings in which the issue must be determined.

The court held further that the rule which determine that the *issue in dispute over which a strike may be called must be the issue in dispute that was referred to conciliation* should not be literally interpreted.¹⁹⁹ A literal application of the rule will curtail the collective bargaining process.²⁰⁰ Parties should still be in a position to amend and improve on their demands during the bargaining process.²⁰¹ However, a trade union is not entitled to embark on strike action over a specific demand whereas the real demand is not a demand over which it is entitled to strike.²⁰² The decision is in line with the *Catering & Allied Workers Union v Speciality Stores*²⁰³ because courts have the jurisdiction to investigate if the prerequisites for the exercise of a statutory power to act have been met.²⁰⁴

The court held that there was not sufficient evidence that the employees had relinquished their demands for organisational rights. The employer failed to inform the trade union that according to them the workers had given up their demands for organisational rights. The employer had also failed to give reasons in the ultimatum why they were of the view that the workers relinquished their demands for organisational rights. The letters from the trade union did not contain anything regarding the relinquishing of the workers' demands for organisational rights. The

197 2010 31 ILJ 139 LC par 59.

198 2010 31 ILJ 139 LC par 60.

199 2010 31 ILJ 139 LC par 61.

200 2010 31 ILJ 139 LC par 61.

201 2010 31 ILJ 139 LC par 64.

202 2010 31 ILJ 139 LC par 61.

203 1998 19 ILJ 557 (LAC).

204 1998 19 ILJ 557 (LAC) par 24.

court further held that, given the circumstances, the employees were within their rights to demand a 13th cheque while the strike was in progress.²⁰⁵

The court held that the parties are at liberty to adopt a holistic approach to solve collective bargaining disputes. Parties may make new proposals to break a deadlock.²⁰⁶ The employer erred by labelling the new demand during the progression of a strike as not permissible and therefore changing the status of the strike from protected to unprotected.²⁰⁷ The court further held that dismissing employees under these circumstances was automatically unfair, more so without consulting the trade union first and without applying to the labour court to establish whether the strike was protected or not.²⁰⁸ The employer appealed the above ruling to the Labour Appeal Court but the decision of the labour court was upheld.²⁰⁹

It appears from the reasoning of the court that the court is open to being convinced. It seems that should the employer have produced more compelling evidence that the employees had abandoned their claim for organisational rights and had introduced a new demand and should the employer have communicated that clearly to the trade union and the employees, the court may have found in favour of the employer and interdicted the strike. The court held correctly that the demand for a 13th was merely raised to break the strike and it was not intended to change the issue in dispute. If a new demand is made during the course of a protected strike and is made to break the strike, the status of the strike cannot change from a protected strike to an unprotected strike.

From the discussion of the above-mentioned cases it is evident that all issues should have been raised during the negotiations or meetings between the parties. A stalemate or a deadlock should have been reached. In other words the parties should have disagreed. One party should have demanded a concession and the other party should have failed to make it at the appointed time. To put it differently,

205 2010 31 ILJ 139 LC par 62-70.

206 2010 31 ILJ 139 LC par 71.

207 2010 31 ILJ 139 LC par 72.

208 2010 31 ILJ 139 LC par 76.

209 *Edelweiss Glass & Aluminium v NUMSA* 2011 32 ILJ 2939 LAC.

the deadline to comply with the demand should be reached before a referral to conciliation. The dispute must be clearly stated, the other party must know what the dispute is all about. The dispute must be clearly identified. Mere unhappiness does not give rise to a dispute. The outcome or the solution that the other party requires must be clearly stated. The issue must be a strikeable issue. Rights disputes are not strikeable issues; it must be referred to arbitration or adjudication. If the strike is over a dispute other than the issue in dispute not referred to conciliation, then the strike is not a protected strike. The demand must be lawful and demand should not have been settled previously. When the dispute that caused the strike is settled, the strike should end and the right to strike will fall away.²¹⁰

210 *Afrox Ltd v SA Chemical Workers Union (2)* 1997 18 ILJ 406 (LC) par 411A.

Chapter 5: Conclusion

The dismissal of an employee for taking part in a protected strike or engaging in any strike related conduct is regarded as an automatically unfair dismissal. In determining whether a dismissal is fair or not, a court will investigate whether or not the strike was in line with the requirements set out in the LRA. Conversely, an employee who takes part in an unprotected strike commits misconduct and such an employee may be dismissed.

The South African labour law has progressed from the complete banning of strikes, to allowing strikes, to the protection of strikes and finally to the pre-empting of strikes. According to Rycroft²¹¹ strikes are pre-empted by calling for conciliation and by placing limitations on the constitutional right to strike. The limitations on the constitutional right to strike are brought about by prescribing to the employees over which issues they are allowed strike; it further prescribes which categories of employees may take part in a strike and that employees are also not allowed to embark on strike action without first complying with the provisions of section 64 of the LRA.

Strikes are entrenched in collective bargaining; it is based essentially on the need to bring about a balance in the relationship between employees and their employers. The reason for that is that employers have much more social and economic power than their employees. The LRA confirms this fact by setting out minimal procedural pre-conditions for employees to engage in a protected strike. Strikes:

... enhance human dignity, liberty and autonomy of workers by giving them an opportunity to influence the establishment of workplace rules, thereby gaining some control over a major aspect of their lives, namely their work.

The Labour Appeal Court defined the true nature of a strike as follows:

The very reason why employees resort to strikes is to inflict economic harm on their employer so that the latter can accede to their demands. A strike is meant to

211 Rycroft 2014 *IJ Comp LL & Indus R* 199-216.

subject an employer to such economic harm that he would consider to rather agree to the worker's demands than have his/her business harmed further by the strike.

Strikes play a very crucial role in collective bargaining and courts should not easily interfere with the right to strike. Can a new demand made during the course of a protected strike nullify the status of the strike? In *Digistics v SA Transport & Allied Workers Union* the Labour Court draws a distinction between permissible and impermissible demands. A court can differentiate between demands that are permissible and those who are not permissible. The court held that the moment the impermissible demands are abandoned by the strikers, the strike becomes protected.

Rycroft²¹² correctly puts it that the reasoning of the court suggests that the status of a strike can change from unprotected to protected and *vice versa*. The writer agrees with Rycroft that the Labour Court should, under certain conditions, be in a position to declare a protected strike unprotected. Rycroft,²¹³ in confirming the *obiter dictum* in *Tsogo Sun Casinos t/a Montecasino v Future of SA Workers Union*,²¹⁴ commented that the Labour Court can be convinced to declare a protected strike unprotected.

The LRA does not provide for a strike to forfeit its protective status. Such may be inherent in the jurisdiction of the Labour Court. Although there is not much authority, the question that needs to be answered is whether a change to the demand which is not made during the conciliation process, but during the course of a protected strike, nullifies the strike's status as protected. If the demand changes during the course of the strike, the strike will lose its status and become unprotected. It was decided in *NUMSA obo Mahlangu v Edelweiss Glass & Aluminium* that the demand was not an essential part of the dispute referred to conciliation and the strike was declared unprotected. It is suggested that an employer may approach the Labour Court by way of an urgent application to obtain a declaratory order in terms of the LRA to declare the strike unprotected, based on the abandoning or change in the demand.

212 Rycroft 2014 *IJ Comp LL & Indus R* 199-216.

213 Rycroft 2014 *IJ Comp LL & Indus R* 199-216.

214 2012 33 ILJ 998 (LC).

The employer must provide *prima facie* evidence in support of its argument and the employees must be given an opportunity to respond to the employer's case.

The LRA does not provide for a strike to forfeit its protective status. Such may be inherent in the jurisdiction of the Labour Court. Although there is not much authority in this regard, the question that needs to be answered is whether a change to the demand which is not made during the conciliation process but during the course of a protected strike, nullifies the strike's status as protected. This study showed that the courts differed in its approach in different cases. The issue in dispute over which the employees finally strike, must be the same issue in dispute that was referred to conciliation. If the demand changes during the course of the strike, the strike will lose its status and become unprotected as decided in *NUMSA obo Mahlangu v Edelweiss Glass & Aluminium*. It clearly demonstrated that if the employees go out on a strike not based on an issue in dispute that was conciliated, it goes to the root of the issue in dispute that was the subject matter of the strike. In this award the issue in dispute in relation to the strike, as envisaged in section 65(1)(c) and 65(2) of the LRA and as demonstrated in evidence and by the certificated of outcome, was organisational rights. I agree with the award that if a strike is called over an issue that was not in dispute, employees who participate in the furtherance of such a strike would be transgressing section 65 of the LRA. It is suggested that an employer may approach the Labour Court by way of an urgent application to obtain a declaratory order in terms of the LRA to declare the strike unprotected, based on the abandoning of or change in the demand. The employer must provide *prima facie* evidence in support of its argument and the employees must be given an opportunity to respond to the employer's case.

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