

***AN EVALUATION OF THE REGULATION OF  
INDUSTRIAL CONFLICT WITH SPECIAL REFERENCE TO  
THE MOTOR INDUSTRY***

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## ***Introduction***

It is trite to observe that employers and their organisations are major actors in labour relations. While trade unions have their own strategies and the state may play a facilitating or intervening role, the philosophy, policies and practices of managers and employer organisations powerfully shape and direct the paths that labour relations follow in individual companies and society as a whole. However, employers, like the unions, do not comprise a homogeneous group and a wide diversity of labour relations policies and practices are found.

The range of concerted human activity which can impact adversely and often unproductively in the workplace is limited only by the ingenuity of man.<sup>1</sup> One of the first persons to attempt to define industrial relations was JT Dunlop<sup>2</sup>. Dunlop regarded the full range of rule-making governing the workplace '*as control to an industrial relations system*'. He defined an industrial relations system as follows:

*'Being comprised of certain actors, managers, workers and specialised governmental agencies, certain contexts, technological characteristics, the market and the distribution of power in the society, an ideology which binds the industrial relations system together, and a body of rules created to govern the actors at the workplace and work community'.*

Since time immemorial, the divergent interests of people with capital, on the one hand and workers on the other hand, have led to conflict.<sup>3</sup> In embarking on this study of the regulation of industrial conflict, the writer makes one fundamental assumption: namely, *that there is an inherent nature of conflict in an employment relationship*.

Chapter one of this study assesses the developments in the automotive industry over the past decade. There has been rapid structural change as a result of policies which have liberalised imports and also encouraged exports. The

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<sup>1</sup> AT Trollip & Sc Gon Power Law and Procedure (1992) 59.

<sup>2</sup> JT Dunlop *Industrial relations systems in New York* Holt (1958).

<sup>3</sup> PS Nel *South African Industrial Relations Theory and Practice* 3 ed (1998)1.

challenge of globalisation in the new century is not to stop expansion of global markets. The challenge is to find the rules and institutions for stronger governance; local, national, regional and global, to preserve the advantages of global markets and competition, but also to provide enough space for human, community and environment resources to ensure that globalisation works for *people not just for profits*.<sup>4</sup>

Chapter two seeks to interpret and understand the nature of collective agreements as envisaged by the Labour Relations Act (LRA), and current practice. The LRA allows a representative trade union in a workplace to demand that an employer negotiate a collective agreement. The recognition of trade unions for collective bargaining purposes was frequently a continuous issue during the 1970s and 1980s as there were no stipulated organisational rights for unions at that time. Unions often had to fight a battle for recognition at the workplace and compel employers to enter into recognition agreements.

At the heart of this study is an analysis of mechanisms as well as the considerations of managing conflict effectively. In the labour market the expressions of conflict are frequent and accordingly sophisticated mechanisms have been developed to manage these processes. It is common that people remain in relationships even though their needs or desires are different, or when the values, needs or interests differ or are perceived to differ. This is true to relationships at work.<sup>5</sup>

Chapter three is devoted to the impact of strike management and provides a framework to develop a common undertaking as well as considerations in managing conflict effectively. The writer makes special reference to the motor industry in an attempt to discover why certain episodes of conflict appear to be managed better than others.

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<sup>4</sup> Extract from the United Nations Human Development index reported in the Ecobulletin 14.7.99.

<sup>5</sup> A Ponds & D Patrick *Labour Relations Handbook* (1998) 3-2.

Chapter four explores the purpose and applicability of Toyota South Africa Motors Governance Rules and examines the lessons to be drawn from the experience of conflict. It is alarming to note that company's do not always include a strategy on how to deal with industrial relations which in turn leads to unexpected problems, reduced productivity and increased labour costs. Every enterprise needs, with reference to its objectives, to establish its values in regard to a whole range of policy matters. The advantage of such policy is that it can be communicated clearly to all levels of management to ensure that its actions are congruent with policy and are consistent and enable employees to have a clear understanding of the organisation and what is expected of them. Policy enables to plan ahead from a common point of reference, anticipate events and to secure and retain an initiative in a dynamically changing society.

## **CHAPTER 1**

### ***Economic and Social Review of Business Conditions in the Motor Industry***

#### ***I Industrial Policy context***

Globalisation and the move for international competitiveness have become the defining characteristics of the forces driving change in manufacturing sectors worldwide. Governments appear to be increasingly unable or unwilling to protect national markets from international competition and neo-liberal forces, demanding trade liberalism in the interests of economic freedom, organisational efficiency and competitive rationality. After decades of protectionism and a policy favouring import substitution industrialisation, South Africa's manufacturing industries are progressively being exposed to increasing foreign competition as a result of a major shift in state policy to promote open markets, export orientation and international competitiveness.

The automobile industry is no exception to this general pattern. In accordance with the country's commitments under the General Agreements on Tariffs and Trade (GATT), tariff reductions are being phased in over a number of years. As intended, the South African government's policy is precipitating industrial restructuring and competition between domestic producers is being replaced by 'real' competition as imported products from low-wage Asian economies challenge the long protected and relatively uncompetitive South African manufacturing sectors.

In the absence of an alternative politically acceptable policy paradigm, the state's approach has been framed to facilitate the country's re-integration into the world

economy and to re-establish the attractiveness of South Africa as a destination for foreign investment.<sup>6</sup>

Unlike other late industrializing countries where unions have typically been made ineffective by state repression, the labour movement led by COSATU grew from strength to strength in the late 1980s. During the political transition and social and political upheaval in the early 1990s, an aggressive and ascendant labour movement exploited the inability of a weakened state and an uncertain business community to change policy unilaterally or jointly, and opened up opportunities to assert a role for itself in socio-economic policy making. As a result, for the first time, industrial policy was developed on a consensual basis by government, business and organized labour.<sup>7</sup> The political transition thus created a unique opportunity for the social partners to develop and implement consensus-based industrial policies in order to restructure them to ensure their long-term viability.

The involvement of organized labour in economic and industrial policy-making began in the early 1990s. At the macro-level, organized labour succeeded in its demand for the formulation of the National Economic Forum, a tripartite economic policy-making forum to prevent unilateral economic restructuring during the political transition. The Southern African Clothing Textile Workers Union (SACTWU) and The National Union of Metalworkers of Southern Africa (NUMSA) were the first manufacturing unions to participate in policy-making at industry level. In both industries, the state established comprehensive industry policy/strategy reviews in 1992. As part of these reviews, these two unions and the labour movement as a whole formulated Southern Africa's GATT proposals with business and government, and agreed to the progressive reduction of tariffs in order to reintegrate South African industry into the global economy.<sup>8</sup>

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<sup>6</sup> G Adler *Engaging the State & Business* (2000) 102.

<sup>7</sup> Ibid 103.

<sup>8</sup> Adler (note 6 above) 104.

Approximately 85 000 people are employed in the auto assembly and component sectors which constitute the major sectors of the auto manufacturing industry. Like many other areas of the South African society, the industry is characterized by an 'alphabet soup' of acronyms which can be bewildering to the uninitiated. The firms are organized into two industry associations - NAAMSA (National Association of Automobile Manufacturers of South Africa) and NAACAM (National Association of Automotive Component and Allied Manufacturers), while NUMSA represents over 80% of workers in the industry. Collective bargaining in the auto assembly sector is centralized in the National Bargaining Forum (NBF) where employers are represented BY AMEO (Automobile Manufacturers Employer's Association). NUMSA and AMEO jointly established the AMIETB (Automobile Manufacturing Industry Education and Training Board). In the industrial policy arena, the state established the MITG (Motor Industry Task Group) to develop an industrial policy or strategy for the industry which culminated in the MIDP (Motor Industry Development Programme) and the establishment of the tripartite MIDC (Motor Industry Development Council) to monitor the implementation of the MIDP.

In order to compete internationally and domestically, South African firms recognize that they will have to restructure their production techniques, work organization and human resource policies to compete with 'lean production', the Japanese style production system that emphasizes flexibility in technology and the organization of production. In addition to multiple skills, workers will need a conceptual grasp of the production process, as well as the analytical skills to identify and solve problems on-and-off-line. To face these challenges, the NBF and AMIETB have developed a human resource development strategy to provide operators with the incentives and training required to develop the necessary skills to undertake quality control routine maintenance and problem-solving.

In analyzing the industry's response to the challenges of increasing international competition, the industrial policy-making process takes cognizance of the sectoral

policy-making process leading to tariff reform, the training and human resource development initiatives of NUMSA and employers in the NBF and AMIETB, and the interaction between these domains of policy formulation and implementation.

The central concern is the question of whether a large, dynamic and internationally competitive industry is viable in South Africa and the policy requirements to achieve this. Research undertaken demonstrates that with an appropriate policy framework, the South African industry is potentially well placed to become a significant producer of vehicles and components.

## ***II Development of the Industry***

The South African market and vehicle production grew very rapidly from 1950 to the early 1980s, with sales increasing tenfold over this period. It has since been through a period of 'volatile stagnation' as the economy entered a period of very slow growth. During this latter phase, growth was constrained by political instability and increasing international isolation during the 1980s as well as a decline in revenues from gold, the major export commodity. The potentially positive impact of economic reforms introduced by the new democratic government since 1994 was further delayed by the repercussions of the Asian economic crisis of 1997-99.<sup>9</sup>

Heavy protection has resulted in proliferation to the extent that most manufacturers built a variety of models and in some cases more than one make in a single assembly plant. All assemblers are now wholly or partly owned by the parent company in Japan, the US or Europe. The component industry consists of approximately 350 firms and produces a full range of components for the domestic and export market. Under the pressures of globalisation foreign ownership has also been increasing as locally owned firms producing under

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<sup>9</sup> A Black 'Globalisation and restructuring in the South African Automotive Industry' (2001) 13 *Journal of International Development* 5.



license have been bought out by foreign multinationals or entered into joint ventures.

### ***III Globalisation and Restructuring in the South African Automotive Industry***

Today's globalisation is being driven by market expansion – opening national borders to trade, capital, information - outpacing governance of these markets and their repercussions for people. More progress has been made in norms, standards, policies and institutions for global markets than for people and their rights.

The sector has become much more internationally integrated with a particularly rapid increase in exports. It is argued that the costs of liberalisation have been fairly low particularly because of the strong encouragement given by the programme for major foreign firms to draw South African operations into their international networks. In spite of the successes, structural problems remain and there are also question marks over the nature and sustainability of export expansion.

As was the case in many other developing countries, the South African automotive industry developed under high levels of protection. While considerable diversified development took place under the protective regime, the industry was also afflicted by the common ailments of a high cost reduction structure exacerbated by excessive proliferation apparent in the large number of models and makes of vehicles being assembled in low volume.

### ***IV Impact of Globalisation***

A major impact of technical change is reflected in the term globalisation. This term is used to describe the increase in cross-border economic interdependence and, more profoundly, integration of the economies of nation states. International trade has traditionally been the engine of economic interdependence. The value of exchange between the major trading nations increased from \$1,5 billion in

1800 to \$4 trillion by 1990. Driving forces have been growing international competitiveness and policies such as GATT, which have facilitated transnational trade. The world has been termed the 'global village' as it has become smaller in terms of accessibility to trade. As more of the nations products are traded, the more national labour force is compelled to compete in its home market with products that are the fruits of foreign labour.<sup>10</sup>

Restructuring of uncompetitive industries is now urgent. Heavy competition from South East Asian countries is experienced from labour intensive industries paying far lower wages. The average manufacturing wage in South Africa is R1 500 per month compared to R110 in Vietnam, R470 in Indonesia, and R740 in Malaysia. Manufacturers are also faced with competition from the highly sophisticated organisations found in the developed countries, where wages are higher but efficiencies far superior to South African organisations. Monitor, an international consultancy, completed a study of South African industries and found they were seriously lacking in competitiveness.<sup>11</sup>

Examples relating to the auto and textile industry are illustrative of the challenge facing industry in South Africa. In the auto industry, quality defects per 100 vehicles manufactured in Japan equaled just over 50. In South Africa, the figure is 350. Cars cost considerably more than those manufactured in other countries. A 2,4 litre engine sedan cost on an index value of 100 in the USA would cost 172 in South Africa. The average number of vehicles produced annually per model is 7 500, in contrast to 195 000 in the USA. This results not only in lack of competitiveness in the auto industry but also the component industry, due to tooling costs for different models. The South African offer to GATT aims to reduce protection on autos from a high of 115 per cent in 1993 to 30 percent by the year 2003.<sup>12</sup>

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<sup>10</sup> M Finnemore *Introduction to Labour Relations in South Africa* 7ed(1999) 62.

<sup>11</sup> K Davie *Survey finds SA a poor competitor* Business Times Sunday Times (1995) 19.3.95.

<sup>12</sup> A Desai 'The motor vehicle assembly industry and international competitiveness: what options for labour' (1995) SAIRJ 84-95.

The impact on union and management relations in South Africa has been far reaching. Parties are voluntarily seeking more harmonious relationships, through agreements that establish structures and procedures that will promote organisational competitiveness but at the same time ensure employee job security. An agreement between Volkswagen and NUMSA is prefaced as follows:

*Mindful of the global over-capacity of motor vehicles of ten million units, and the ongoing eight year tariff reduction programme for the South African motor vehicle industry, as well as the increased competition from both domestic and foreign manufacturers that this will endanger, the parties recognise that there needs to be ongoing negotiation and agreement to forge new standards which match those of our world class competitors.<sup>13</sup>*

## **V Strategies of vehicle manufacturers**

The key decisions affecting the global location of production are made by fewer than a dozen automotive companies worldwide. The location decisions of the vehicle manufacturers also effect the locations selected by major component producers. The strategy adopted by individual vehicle manufacturers is determined not only by the policy regime in the host country and its perception of overall business conditions but is perhaps more importantly contingent on the global strategic conditions facing the multinational.

The MIDP has gradually reduced protection on the automotive industry and encouraged firms to specialise by means of exporting. This policy, which could be termed 'guided integration' is aimed at encouraging a phased transition from completely knocked down (CKD) assembly to full manufacturing with the attendant benefits of higher volumes and increasing localisation of components.<sup>14</sup>

The strategies of Japanese based assemblers are determined by the relatively low level of investment in the South African subsidiaries as well as by market

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<sup>13</sup> Finnemore (note 10 above) 64.

<sup>14</sup> Black (Note 9 above) 17.

share considerations. Historically Nissan and Toyota were domestically owned and operated under licence agreements. During the apartheid years, Japan disallowed its firms from undertaking direct investments in South Africa although there was considerable two-way trade.

At a Board meeting in June 2003, Toyota Motor Corporation (TMC Japan) decided to raise its holding in Toyota South Africa (TSA) from 35,7% to 74,9%. This investment increase signified a strengthening of TMC's commitment to South Africa and their intention to further their contribution to this country. By becoming the major shareholder in Toyota South Africa and integrating the company into their global strategy, TMC has contributed to the economic development of South Africa.

It is now more than 40 years since TMC began its relations with Toyota South Africa in 1961. Since then the company has enjoyed consistent growth under the leadership of the company founder, the late Dr. Wessels and the Chairman, the late Mr. Bert Wessels, and led the market for 22 years.

Toyota's worldwide sales of 5,94 million units during the year 2001-02, has put it in third place among the world's automakers, after General Motors and Ford. Also, at present there are 54 manufacturing companies in 27 countries or locations.

Since the mid-1990s, South Africa has been engulfed in rapid globalisation. German manufacturers have made South Africa a global production base and have launched an aggressive offensive, not only in exports, but also in domestic sales. As a result, Toyota South Africa's market share has been on a downward trend over the last few years and, as a result, profit has also gradually been eroded. In order to halt this trend, a review of overall operations, centered on exports, was necessary and Chairman Wessels expressed his wish for increased assistance from TMC.<sup>15</sup>

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<sup>15</sup> Address by Executive President Yoshio Ishizaka, 17 July 2002 media conference.

TMC has always has a good relationship, cultivated over 40 years, with Toyota South Africa and is committed to providing active support, so that Toyota South Africa, which has long protected its top sales position in the South African market, can play an effective role as a global base. Such has been the background of TMC's recent decision to boost the percentage of shares in Toyota South Africa.

Backed by success in initiatives to bring about substantial quality upgrades and cost reductions, Toyota plans to gradually expand exports within and beyond Africa. With the powerful support from TMC, the new Toyota South Africa will meet the challenges ahead and will contribute, not only of South Africa, but the whole African continent.

### ***Everything Keeps Going Right – Toyota***

National Union of Metalworkers of South Africa (NUMSA) currently represents the majority of the hourly paid employees at Toyota. In line with the company's commitment to the Freedom of Association principle, NUMSA also enjoys support from salaried and technical employees at Toyota. Toyota also consults on general matters with the minority trade union United Association of South Africa (UASA), regarding matters pertaining to a number of salaried and technical employees.

The relationship between Toyota and NUMSA goes back almost 20 years. The nature of the relationship until the late 1990s was determined by the crucible of South African politics and industrial relations. As the macro political and labour relations in South Africa stabilised the interaction between NUMSA and Toyota became more focused on issues of joint concern and socio-economic relevance.

Both Toyota and NUMSA understand that the fate of the company and all its employees will to a significant extent be determined by the ability of NUMSA and Toyota leadership to jointly manage the challenges facing Toyota.

The relationship between Toyota and NUMSA has matured into one of mutual respect and dependency. The Masibambane Pact signed on 22 April 2003 is a reflection of the parties intent to govern the future without abrogating the achievements and milestones of the past. The Pact does not attempt to rewrite existing substantive agreements and procedures but rather contextualises and consolidates the relationship.<sup>16</sup>

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<sup>16</sup> Schedule of prevailing Agreements between NUMSA and Toyota: Prevailing NBF Agreement, Recognition & Procedural Agreement, Agreements on Shop Stewards matters (Training, Allowances, Vehicles and Cell phones), Grievance and Disciplinary Procedures, Payment and Unprocedural Stoppage Governance Agreements (Raja Naidoo documents).

### ***The Nature of Collective Agreements***

The important role played by collective agreements in our industrial relations system is self evident. They regulate or affect the terms and conditions of employment of a large portion of the South African labour force. They are also an important source of procedures for the resolution of disputes and often grant valuable organisational and collective bargaining rights to unions.<sup>17</sup> This importance is reflected in the fact that the Labour Relations Act 66 of 1995 (LRA), contains various provisions dealing with their legal status, their effects and the contracts of employments of employees who fall within the ambit, and the enforcement of such agreements in far more detail than its predecessor, the 1956 Labour Relations Act.

#### ***(a) Historical Origins***

The recognition of trade unions for collective bargaining purposes was frequently a contentious issue during the 1970s and 1980s as at that time there were no stipulated organisational rights for unions. Unions often had to fight a battle for recognition at the workplace and compel employers to enter into recognition agreements. Such agreements usually included disciplinary, grievance and retrenchment procedures and hence were also termed procedural agreements.<sup>18</sup>

However, these agreements were generally structured to formalise what was seen as an adversarial relationship between employer and union. The foundations were based on conflict and it is really no surprise that the agreements did little to stem wildcat strikes that beset most companies in the 1980s and procedures were frequently flouted. But the agreements were the first

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<sup>17</sup> Pak Le Roux 'Collective Agreements: their role and status' Contemporary Labor Law (2003) 12 No 11.

<sup>18</sup> Finnemore (note 10 above) 194.

steps towards developing relationships between management shop stewards and employees in the workplace.<sup>19</sup>

During the 1990s, however, in response to increasing global competition and in the light of political transition to democracy, employers and unions began to look more seriously at developing more co-operative relationships. Consequently, many workplace agreements went further to establish a core understanding between all the parties about the future survival of the organisation based on commitment to productivity, job security and labour peace.

The strikes in Durban during 1973 compelled employers to negotiate directly with their workers in the absence of any structures, as the workers involved were for the most part not even organised into unions. As leadership and organisations emerged among the workers, employers were faced with bargaining demands at shop floor level as it was at this level grievances of black workers arose.<sup>20</sup>

The years after 1973 were difficult for unions in that they consistently encountered employer resistance to their organising efforts, but their efforts were not wasted. Although the unions soon won recognition at few factories and minimal improvements for their members during the 1970s, they did gain two weapons which were to prove more valuable in the long term.<sup>21</sup> In July 1974, the first recognition agreement was signed by the National Union of Textile Workers and the British-owned textile company, Smith and Nephew, at its Pinetown plant. This agreement was based on an American agreement which was adapted to local circumstances.<sup>22</sup>

As trade union power increased towards the end of the decade, the strategy of pressing employers to sign recognition agreements developed further. Thus often

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> S Friedman *Building tomorrow today – African workers & Trade unions 1970-84*.

<sup>22</sup> Finnemore (note 10 above) 195.



as a result of protracted strike action, employers came to accept the necessity of recognising trade unions in the workplace.

Piron<sup>23</sup>, in an extensive treatment of recognition agreements in the South African context, pointed out that the main aim of such agreements was the promotion of a harmonious relationship between the parties rather than the drawing up of a legal document. The primary reasons that many employers entered into formal relationships with unions in the 1980s was to institutionalise potential conflict. They feared that the growing power of their employees would be used disruptively in the absence of rules and procedures.

Management therefore extended recognition to unions and agreed to forego or to share certain powers which it was previously able to exercise unilaterally. Under the pluralist system, supported by the old LRA, management entered into recognition agreements in anticipation of greater predictability and order.

But unions often perceived the negotiation of such agreements as a deceptive strategy of control of management. While prepared to allow union representatives certain rights and involvement in agreed procedures, employers in fact attempted to maintain and even gain power by using the agreed procedures to tame the union and bureaucratised disputes. On the other hand, unions also sought to use agreements to maximise their own positions and simply used the basic rights as an opportunity to encroach on and challenge management prerogatives even further. Employers feared that giving further rights to workers at the workplace would open the door to provide the opportunity to assert worker control over the entire production process, an espoused aim of the socialist-supporting unions at the time.<sup>24</sup>

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<sup>23</sup> J Piron *Recognition or rejection* (1984) 2ed.

<sup>24</sup> Finnemore (note 10 above) 195.

Thus agreements drawn up to maintain order often produced further conflict. Dispute arose about their interpretation and parties frequently became the building blocks which established the base of relationships in many companies in South Africa.

The LRA extends organisational rights to unions and their representatives as well as giving greater status to collective agreements. Thus many of the issues that led to disputes in the negotiation of recognition and procedural agreements in the past are now regulated by the Act. However, such agreements still have a role to play to translate these rights into practical agreements that are tailor-made for each workplace. Further, new global challenges to employers have introduced new needs at the workplace such as the introduction of new technology, structures and procedures to deal with change at the workplace are now critical to successful negotiations.<sup>25</sup>

It is submitted that an overview view of the law relating to collective agreements illustrate the perhaps somewhat surprising fact that, despite the importance of collective agreements in South African industrial relations, there are important areas of uncertainty in the law relating to their status, enforcement and effect.<sup>26</sup>

### **(b) The Parties**

Section 213 of the LRA defines a collective agreement as –

*‘a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand:*

- i) one or more employers;*
- ii) one or more registered employers organisations; or*
- iii) one or more employers and one or more employers’ organisations.’*

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<sup>25</sup> Ibid.

<sup>26</sup> Le Roux (note 17 above) 91.

As far as the parties to a collective agreement are concerned, it is important to note that, on the 'employee side' only registered unions can be party to a collective agreement. Also in terms of the previous Act, certain collective agreements entered into by unregistered trade unions were declared to be unenforceable.<sup>27</sup>

An agreement with an unregistered trade union, a group of employees or a workplace forum, therefore, cannot be a collective agreement in terms of the LRA. Such agreements may bind the parties contractually. The difficulty of binding non-members or dissident minorities will, however, continue to exist.<sup>28</sup> If they have legal personality, it is possible that such unregistered bodies may be able to enter into agreements that bind the parties in terms of ordinary contract principles. But these will be 'contracts' rather than collective agreements.<sup>29</sup>

This distinction is of importance for various reasons, not the least being that the provisions of s65 of the LRA, in terms of which a collective agreement can limit the right to strike, will not be applicable to such contracts. In addition, the problems associated with employees deriving rights from these agreements comes to the fore.

It is not unusual for trade union constitutions to prescribe which workers may become members of their union. A union may, for example, limit its membership to employees employed in a specific sector or sectors of the economy. The question arises is the position if a union recruits members that cannot be members in terms of its constitution? The answer appears to be that the union is simply not entitled to recruit such members and their membership will be invalid. The union can therefore not enter into a collective agreement in terms of which

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<sup>27</sup> D Du Toit *Labour Relations Law A Comprehensive Guide* 4 ed (2003) 257.

<sup>28</sup> Rycroft & Jordaan *A Guide to South African Law* 2 ed 1992. Cf Wallis *Labour and Employment Law* par 43 7-8.

<sup>29</sup> Le Roux (note 17 above) 92

rights are granted or obligations are imposed on such employees, although such rights and obligations may arise by other means.

**(c) Formal Requirements**

Section 213 of the LRA stipulates that the collective agreement must be in writing. The agreement need not be signed by the parties. Furthermore, the agreement need not be contained in one document. It is entirely possible that the agreement can be contained in more than one document.

For example, after a series of meetings between an employer and a union during which annual wage negotiations have been conducted, an employer could address a letter to the union informing the union that, in a final attempt to settle the issue, it is making a final offer as set out in an annexure attached to the letter. The union could then respond in writing, accepting this offer. The three documents together could constitute a collective agreement.

The above notwithstanding, the fact that collective agreements fulfill an important function in our industrial relations system, and the fact that important consequences can flow from them, seems to have persuaded at least some arbitrators who are called upon to interpret and apply them, to take a fairly strict approach to what constitutes a collective agreement. The strictest approach is that found in the award in *Communications Workers Union v Telkom SA Ltd*<sup>30</sup> in which it was held that a collective agreement must be incorporated in a *single, formal, written and signed document*. This decision is, it is submitted, wrong.<sup>31</sup> There is nothing in the LRA to suggest that an agreement must be signed in order to qualify as a collective agreement, nor does the law of contract require an agreement to be signed. It is however open to the parties to stipulate that a collective agreement must be signed.<sup>32</sup>

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<sup>30</sup> (1998) 19 ILJ 389 (CCMA).

<sup>31</sup> Le Roux (note 17 above) 91.

<sup>32</sup> *Samanco Limited v MWU Solidarity, NETU, NUM, NUMSA & UASA* (2001) 10 BALR 1060 (AMSSA).

It is, of course, necessary that the document or documents containing the agreement establish that there is, in fact, *agreement* between the parties on the issues set out therein. If this is not the case there can be no collective agreement. Where a formal agreement has been drafted and signed by the parties, the existence of such an agreement is easy to infer. In less formally drafted documents, or sets of documents, this may not be as easy. In this regard arbitrators may be correct in first establishing whether there was in fact an agreement between the parties.

In *SAMWU v Western Cape Local Government Organisation*<sup>33</sup> the arbitrator held that a resolution of a bargaining council did not constitute a collective agreement, even though the resolution was in writing and even though it may have evidenced consensus between the parties. This decision, it is submitted, is probably correct within the context of bargaining councils where the bargaining process is relatively formal and where formal agreements are usually entered into. In many cases resolutions will not be intended by the parties to be collective agreements even though a formal collective agreement may flow from this resolution at a later stage.

**(d) Authority to enter into agreements**

The constitution of at least some unions state that collective agreements may only be entered into with the specific authorization of a specified official or some internal structure. However, in many workplaces, collective agreements are negotiated on behalf of the employees and their union by the shop stewards elected by the employees. Policy varies from union to union but it is not uncommon for a collective agreement to be signed by shop stewards only, without reference to any officials or union structures. It also occurs that shop stewards sign the collective agreement subject to the later confirmation by the union officials or structures and that this never takes place.

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<sup>33</sup> (2000) 10 BLLR 1160 (CCMA).

It seems that, in most cases, no problems arise from this practice and that both parties simply abide by the agreement. In some cases, however, disputes may arise in this regard. For example, an employer could approach the labour court for an interdict to prevent a strike from taking place on the basis that the issue giving rise to the strike is regulated in a collective agreement and that the strike would therefore be unprotected.

The union may raise the argument that the collective agreement alleged to exist by the employer is in fact not binding because it was entered into without the 'official' consent of the union. The LRA does not directly address this issue. The LRA does not state that a collective agreement must be authorised by a unions internal structures, or that there must be compliance with the union's constitution, before a collective agreement becomes binding.

An argument could also be made that, given the practice in many workplaces and given the fact that unions themselves often do not comply with these procedures, that it would be impracticable to set the requirement of compliance with the union's constitution as a pre-requisite for the legal validity of a collective agreement. On the other hand, can it be said that there can be an 'agreement' and therefore a collective agreement, if the internal structures tasked with this responsibility has not dealt with the issue?

The courts have yet to give an answer to this question and it is an issue that employers should be aware of and where necessary take steps to ensure that the required internal union requirements have been complied with.

The difficult position that employers may face in this regard is to some extent at least, ameliorated by the acceptance by the labour court of the principle that in certain circumstances a union may be prevented from denying the existence of a valid agreement. On the basis of estoppel or ostensible authority this could, for example, be the case where the union's officials, office bearers and/or members

have conducted themselves in such a way as to create the impression that they are bound by the agreement.<sup>34</sup>

**(e) The Content of Collective Agreements**

The agreement must concern terms and conditions of employment or “any other matter of mutual interest”. Whilst it may be relatively easy to determine what constitutes terms and conditions of employment, the content of the concept of “matter of mutual interest” is more difficult to determine. The 1956 Labour Relations Act stated that bargaining council agreements could regulate, amongst others, matters of mutual interest to employers and employees. This term was widely interpreted to mean:

*‘whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned’.*<sup>35</sup>

Against this background the inclusion of the same formulation in the LRA, together with the omission of the words “to employers and employees” is, it seems, a clear indication that the scope of collective bargaining and the matters that can be dealt with in a collective agreement is intended to be wide. The LRA makes it clear that it gives wider than simply matters of direct relevance to the employment relationship.

However, there are limitations to what can be contained in a collective agreement. Collective agreements that unfairly discriminate on a prohibited ground will clearly not be enforceable. Collective agreements that provide for terms and conditions of employment that are less favourable than those prescribed in the Basic Conditions Of Employment Act, 75 of 1997 (unless this Act specifically authorizes the parties to a collective agreement to enter into an agreement containing such less favourable terms) will also not be enforceable.

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<sup>34</sup> Le Roux (note 17 above) 92.

<sup>35</sup> *Rand Tyres & Accessories (Pty) Ltd & Appel v Industrial Council for the Motor Industry (Transvaal), Minister of Labour & Minister of Justice* 1941 TPD 118; *R v Woliak* 1939 TPD 428.

**(f) Who is bound by a collective agreement?**

The 1956 Labour Relations Act determined in some detail who would be bound by collective agreements entered into by 'industrial councils' (now called bargaining councils) and when this would be the case. However, its focus was on industry level bargaining and it did not attempt to regulate collective agreements entered into outside industrial councils. This was only a minor consequence in a system where collective bargaining primarily took place within industrial councils. However, during the late 1970s and 1980s there was a tremendous growth in collective bargaining outside these forums at the level of the individual factory or workplace, and later at enterprise level. This development was, of course, tied to the growth of unions catering primarily for black employees, many of which were the predecessors of the unions currently affiliated to COSATU.<sup>36</sup>

**(g) Collective Agreements – Evergreen or terminable?**

Collective agreements are centered in recognition agreements and substantive agreements made in terms thereof. The creation and maintenance of recognition agreements are subject to representivity and due adherence to agreements i.e. no material breach. Changed circumstances such as organisational structure or economic competitiveness may invite one or more of the parties to revisit the very existence of the agreements and to consider ways in which to cancel them.

The LRA provides that collective agreements concluded for an indefinite period may be cancelled by giving reasonable notice unless *otherwise agreed between the parties* (s23). The words emphasised are not as simple in their application as might appear at first glance. Collective agreements are enforceable where their scope and form complies with s213 of the LRA. S23(4) of the LRA reads:-

'Unless the collective provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice to the other parties.'

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<sup>36</sup> Basson et al *Essential Labour Law* 3 ed 16.



Reliance on s23(4) requires that the collective agreement be for an indefinite period. For example a fixed-term agreement cannot be brought to an end using s23(4). What constitutes reasonable notice will depend on the circumstances but is likely to range from 3-6 months.

Disputes around the termination of collective agreements are likely to raise two questions. Firstly, whether the initiating party has the right unilaterally to terminate a particular agreement and secondly, whether the particular notice is, in the circumstances, valid and effective. The proviso to s23(4) – *unless otherwise agreed* – excludes the application of this sub-section. The exclusion will apply where the parties have made other arrangements e.g. that the agreement may not be terminated in this manner or by laying out requirements for a valid termination. These are qualifications which render the section inapplicable.

Evergreen agreements may introduce rigidity to relationships which may in turn threaten sustainability and trust and confidence. These arrangements despite their inherent stability are to be approached cautiously. An alternative form is a fixed-term agreement with perhaps an escape clause in the event of major restructuring or reorganisation including changes in ownership.<sup>37</sup>

The design of collective agreements should distinguish between duration and termination. They cover different notions and should be dealt with separately. Further, one must consider the two features of negotiation to impasse followed by unilateral implementation and unilateral cancellation on its own. It is submitted that good labour practice will encourage the former as the preferred route for the passaging of change.

In conclusion, workplace agreements are the fundamental building blocks of employer and union/employee relations. While the LRA, Basic Conditions of

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<sup>37</sup> Beaumonts Express(2002) Vol 5 No 11 174-80.

Employment Act and Employment Equity Act now provide clear rights and duties as well as procedures for dispute resolution, every workplace is unique.

The legal framework cannot on its own provide for all the challenges and potential disputes in a dynamic working environment. The process of negotiating collective agreements to deal with workplace matters may be time consuming but is likely to build better understanding and legitimacy for management and union behaviour. It must be acknowledged also that the interpretation and implementation of agreements and procedures are enduring elements of labour relations in South Africa and have the potential to contribute to more harmonious relationships in the workplace.

## CHAPTER 3

### ***The Impact of Management of Strike Action in the Motor Industry***

Chapter IV of the Labour Relations Act, which comprehensively regulates industrial action, built on the pre-1995 law but transformed it in certain fundamental respects in order to bring it into line with the Constitution<sup>38</sup> and the relevant standards of the International Labour Organisation.<sup>39</sup>

The Act places heavy emphasis on consensus-seeking and conciliation as the preferred means of resolving disputes but also recognises the legitimacy of industrial action. By granting a regulated right to strike and more limited 'recourse' to lock-out, the Act attempts to bring a shift in the power balance between employers and employees.<sup>40</sup>

The power of the individual employee matched against that of the employer is manifestly disproportionate and it is for this reason that employees organise themselves collectively and use concerted action to balance and regulate this power relationship. While collective bargaining remains the bastion of the conciliatory spirit fostered by the 1995 Labour Relations Act, it is inevitable that the bargaining process and indeed the labour relationship will at times irretrievably break down. While the Act introduces significant new changes to the law on strikes and lock-outs, the basic approach remains the same: *industrial action has a legitimate place in the collective bargaining system, but only when avenues of negotiation and conciliation have been exhausted.*<sup>41</sup>

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<sup>38</sup> S 23(2) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>39</sup> Conventions 87 and 98 of the ILO.

<sup>40</sup> Du Toit (note 27 above) 273.

<sup>41</sup> C Thompson & P Benjamin *South African Labour Law* 2ed (2003) AA - 13.

It has been submitted that the right to strike or recourse to lock-out forms a necessary and integral part of collective bargaining, by providing a real threat to either party in the employment relationship. Indeed, the potential to engage in either form of industrial action provides that necessary incentive for engaging in collective bargaining as well as balancing the unilateral power of the employer or employee to shut down the business or withhold work.

Brassy accordingly describes the role of collective action as follows:

*'Collective bargaining, the means by which the legislature sees industrial peace being achieved is not possible without collective action, it is the threat of collective action that makes the bargaining real, the fact that it makes the threat real.'*

In *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel*<sup>42</sup> the court enforce the belief that:

*'collective bargaining is necessarily a sham and chimera if it is not bolstered by the ultimate threat of the exercise of economic force by one or other of the parties, or indeed both.'*

Trade unions are widely credited with achieving a major improvement in the situation of the wage-earner since the 'bad old days' of the nineteenth century or even the 1930s and this improvement is at times cited as evidence that society itself has been transformed.<sup>43</sup> It is hardly surprising that many writers have interpreted the gains which unions have achieved as at least 'blunting' the edge of workers' discontents and thus contributing towards social stability. Many writers on industrial relations would insist that, whether or not trade unions should be credited with raising wages, this whole controversy diverts attention from an even more significant achievement:

'the protection and advancement of workers' rights and freedoms on the job'.<sup>44</sup>

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<sup>42</sup> (1993) 14 ILJ 963 (LAC) 927D.

<sup>43</sup> R Hyman *Strikes* 3ed (1984) 76.

<sup>44</sup> *Ibid* 77.

The relatively pacific role of modern unions is often attributed to the legitimacy which they have achieved within contemporary society. In their formative years, unions were viewed by employers (and also governments) as dangerous and subversive organisations. The brutal resistance encountered by even the most modest union activities was the main cause of most of the spectacular conflicts of the period. Nineteenth century British employers made frequent use of the 'document', a declaration by each employee that he was not a union member; this was the cause of major disputes in building, engineering and several other industries. In America during the 1930s leading companies spent thousands of dollars on espionage, acquired private arsenals of guns and tear gas and hired thugs and assassins as part of the war against union organisation. In both countries, local and national government at times aided employers in such resistance. But now that managements and the state have for the most part come to terms with unionism, the argument runs, harmonious industrial relations have become possible.<sup>45</sup>

Ralf Dahrendorf<sup>46</sup> concludes his classic study on industrial conflict by arguing that :

*'industrial conflict has become less violent because its existence has been accepted and its manifestations have been socially regulated'.*

It is held that as unions gain acceptance, so industrial conflict is rendered increasingly institutionalised, professionalised, and antiseptic. Situations rarely impel union leaders to wield the strike weapon and when such situations do arise, the conflict itself takes a notably peaceful form. In America, where large-scale stoppages often do accompany the negotiation, every few years, of company-wide agreements, these have become ritualistic engagements with unions co-operating in an orderly shutdown of production, and companies often providing shelter and refreshments for pickets. Even in the British General Strike of 1926, symbolically the apogee of union militancy, is today at times somewhat

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<sup>45</sup> Ibid 78.

erroneously remembered primarily as the occasion for football matches between police and strikers.<sup>47</sup>

While the use of coercive action has remained acceptable practice for some time in drawing attention to real needs or forcing a hand in negotiations, there has been some reluctance in describing it as a human right. This has been largely due to the coercive and destructive nature of industrial action, and hence promoting the very thing that human rights are endowed with protecting. Conceptually however, this becomes acceptable when considering whether the right to strike or lockout is fundamental to collective bargaining.

While the right to strike is a class right of workers in their struggles against employers, its collective character often requires, or involves, the use of varying degrees of coercion against individual workers. The right to strike is seen by trade unionists, though not by law, as the right to *require* fellow workers to comply with a strike decision, as well as a right to prevent other workers taking over their jobs.<sup>48</sup>

The justification for the existence of a right of workers to take coercive action against their employers is to be found in the unequal and authoritarian nature of the employment relationship. Workers must be free to organise if they are to have a chance of bargaining on anything like equal terms with their employer and to bargain effectively they need sanctions.<sup>49</sup> As Kahn-Freund and Bob Hepple have written:

*'If the workers are not free by concerted action to withdraw their labour, their organisations do not wield a credible social force. The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places'.<sup>50</sup>*

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<sup>46</sup> R Dahrendorf *Class and Conflict in Industrial Society* (1959) London: Routledge & Kegan Paul.

<sup>47</sup> Hyman (note 43 above) 80.

<sup>48</sup> LJ Macfarlane *The Right to strike* (1981) 184.

<sup>49</sup> Ibid.

<sup>50</sup> Kahn-Freund & Bob Heppel *Laws Against Strikes* (1972) 8.

It might appear, however, that with the extension of collective bargaining to cover virtually the whole industrial field and with the great increase in Government control of industry, exclusive managerial prerogatives have already been considerably eroded, and with this erosion part of the case for the pre-eminent position of the right to strike. Moreover in recent years employers have virtually ceased to proclaim or to use their legal rights of lock-out and replacement labour. They do not take the initiative in labour conflict or seek to wage industrial war. While these developments in no way imply that workers no longer have any need for a legal right to strike, it does suggest that the moral case for taking strike action will in most cases be weaker than it was forty years ago. But if the right to strike has in large part ceased to be what it was in the nineteenth century, the only effective means available for workers to use against the countervailing power of a hostile employing class to secure a measure of economic justice, then it would seem to lack the distinctive qualities which would entitle it to be designated as a basic human right.<sup>51</sup>

The fundamental difficulty, it is submitted is that, especially in bitterly contested disputes, strikers are very liable to seek to extend the area of their claimed authority to exert coercive as distinct from persuasive pressure to include workers to secure their forced adherence to the strike. In consequence, workers who might legitimately claim a moral right to exercise their legal right not to strike are prevented from doing so. This clearly has serious consequences for the moral standing of the right to strike as a human right.<sup>52</sup>

Internationally, the norm has been to accept strikes as a human right (with certain limitations). One need only look to legal institutions such as the International Covenant to Economic, Social and Cultural Rights, Article 8 (1)(d), which provides that the state's party to the covenant undertake to ensure 'the right to

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<sup>51</sup> Macfarlane (note 48 above) 185.

<sup>52</sup> Macfarlane (note 48 above) 191.

strike, provided that it is exercised in conformity with the laws of a particular country’.

At a regional level, article 6(4) of the European Social Charter of 1961 expressly recognizes the right to strike with regard to matters of interest, while article 27 of the Inter-American Charter of Social Guarantees of 1948 stipulates that:

*‘Workers have a right to strike. The law shall regulate the conditions and exercise of that right’.*

Although the International Labour Organisation does not explicitly recognize the right to strike, it recognizes it as an intrinsic corollary to Article 3(1) of Convention No 87, which accepts trade unions and employer organization’s right to organise activities and to formulate programmes. The right to strike is recognised as an organized activity within the meaning of Article 3. This has been confirmed by the Committee of Experts and the Committee on Freedom of Association, both ILO supervisory bodies.

## **II 1996 Constitution**

Section 23(2)(c) of the Constitution of the Republic of South Africa Act 108 of 1996 extends the right to strike to every worker. While the Interim Constitution Act 200 of 1993 granted the employer the recourse to lockout, this has been excluded from the final Constitution. However, section 64 of the Labour Relations Act 66 of 1995 grants every employee the right to strike and every employer recourse to lockout (subject to limitations). This is an important milestone in South African labour legislation, since recognition is now given to the fact that industrial action forms an essential part of the process of reconciliation, rather than being contrary to it.<sup>53</sup>

The major changes are to be found in the new formulation on the right to bargain collectively and the right to strike, the exclusion of the right or recourse to lock-out and the recognition of union security arrangements.<sup>54</sup> The right to strike in the

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<sup>53</sup> M Grossett & R Venter *Labour Relations in South Africa* 492.

<sup>54</sup> Davis Cheadle & Haysom ‘Fundamental Rights in the Constitution’ (1997) 232.



interim constitution is entrenched only in so far as the strike is used for the purpose of collective bargaining. In the new constitution there is no express limit as to purpose. The difference in constitution terms amounts to whether the right to strike is more extensive than its traditional collective bargaining justification. There are two purposes for strikes that go beyond the purpose of concluding collective agreements; strikes to promote or defend the social and economic interests of workers and political strikes.

The effort of the change of the wording in the two constitutions is that the 1996 formulation follows the approach adopted by the two ILO committees that the right to strike in section 23(2)(c) is not limited to a collective bargaining context and extends to strikes that promote or defend the social and economic interests of workers. This means that section 77 of the new LRA may constitute a limitation on the right to withhold labour in support of these objectives.<sup>55</sup>

The provisions limit the right by requiring a procedure to be followed and giving the labour court the power to decide the form and the duration of the protest action. The potential harm that can be caused by such protest action, the fact that employers and customers cannot directly resolve the dispute and the fact that workers have the right to vote and trade unions the right and the capacity to influence the political process, justify the limitations in terms of the text contained in section 36.

In interpreting the right, it is important to note that the right is associated with other labour relations rights. Section 39 of the new Constitution enjoins courts to consider international law in interpreting the provisions of the Bill of Rights. The promotion of the freedom of association of employees has been one of the ILO's major concerns since its inception. The preamble of the Treaty of Versailles of 1919, the ILO's founding document, affirms 'trade union freedom' as one of its objectives. The organisation's founding principles confirm 'the right of association

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<sup>55</sup> Ibid 233.

for all lawful purposes by the employed as well as by the employers' and the 1944 Declaration of Philadelphia which reaffirms the fundamental principles on which the ILO is based stresses that 'freedom of association and expression are essential to sustained progress'.<sup>56</sup>

The ILO Committee of Experts and the ILO Committee on Freedom of Association have consistently interpreted Conventions 87 and 98<sup>57</sup>, both of which South Africa has ratified, to include the right to strike. The former establishes the right of workers and employers to establish organisations for occupational purposes and guarantees their free functioning. The latter protects workers against anti-union discrimination in respect of their work and provides that worker organisations shall enjoy adequate protection against interference by employers. The Committees have recognised that a social and economic purpose can sometimes take a political form and that in those instances the strike may yet constitute a legitimate exercise of the right to strike protected by the conventions.

On 11 May 1988 the Congress of South African Trade Unions(COSATU), on behalf of its affiliates, referred a complaint to the ILO on the grounds that certain provisions of the Labour Relations Amendment Bill<sup>58</sup> infringed the freedom of association. They singled out for consideration those provisions allowing for the racial registration of trade unions<sup>59</sup> and those regulating strikes.<sup>60</sup> The ILO accepted the complaint and in terms of the procedure for investigations of complaints against non-member countries, referred the complaint to the Economic and Social Council of the United Nations to obtain the consent of the South African Government. The Secretary-General of the United Nations formally requested that the complaint be referred to the ILO's Fact Finding and

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<sup>56</sup> HM Seady & PS Benjamin 'The Right to Strike and Freedom of Association: An International perspective' (1990) 11 ILJ 439.

<sup>57</sup> Freedom of Association and Protection of the Right to Organise (87 of 1948); Right to Organise and Collective Bargaining (98 of 1949).

<sup>58</sup> Published in 1987 and which subsequently took effect, subject to certain alterations, as the Labour Relations Amendment Act 83 of 1988 on 1 September 1988.

<sup>59</sup> Clause 4 of the Labour Relations Amendment Bill amending s4(4)(c) of the Act.

<sup>60</sup> In particular the proposed amendments to s65 and s79.

Conciliation Commission. In February 1989 the South African Government declined to accept the ILO's jurisdiction to investigate and hear the complaint on the grounds it was premature as discussions on the LRA were continuing between COSATU and employers and COSATU had not taken advantage of an offer to discuss the bill with the government. COSATU, in the government's view, had not exhausted the internal remedies available to it. It remains open for COSATU, or any other sufficiently interested party to complain to the ILO that South Africa's labour law, in its form, effect and practice, infringes the freedom of association.<sup>61</sup>

### ***III Progress in the law on strikes***

It is possible to divide the history of black South African trade unionism into three broad periods. From 1973 to 1979, these unions were involved in a struggle for recognition. Although a number of strikes took place, these were of short duration as the unions were small and weak. In 1979, the emerging unions won statutory recognition with the amendment to the Labour Relations Act. These amendments started a different phase in the development of these unions as they began to consolidate their organisational presence in South African workplaces. In retrospect, this period was something of a 'honeymoon' period for the South African industrial relations system as the workplace remained relatively isolated from the wider societal tensions building up during the early 1980s. A third period began in 1984 when the trade union movement was drawn into the wider political struggles that were to engulf black society.<sup>62</sup>

Struggles in three separate spheres; in the townships over the Community Councils, in the schools over Bantu Education, and the workplaces over wages and working conditions, culminated in a large scale stay-away in the Transvaal in

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<sup>61</sup> Seady & Benjamin (note 56 above) 449.

<sup>62</sup> Centre for the Study of Violence and Reconciliation Homepage:  
<http://www.csvr.org.za/papers/papew&gs.htm>.

November 1984.<sup>63</sup> The politicisation of the factory floor and of South African trade unionism since 1984 has brought into the industrial relations environment the frustration, aggression and violence of the wider society.<sup>64</sup> So, too, does it witness the permeation and influence from the wider society of the idea that social problems can be solved by resorting to violence.<sup>65</sup>

Close parallels can be drawn between the developments in the law on strikes in European countries and in South Africa. It is suggested that there are three stages of development in European Countries that are paralleled by developments in South African legislation.<sup>66</sup> These are *repression of industrial action*, *tolerance of industrial action* and finally the *extension of the right to strike*.

The first stage of development is that of *repression of industrial action*, in which strike action is completely disallowed. The 1922 Rand Rebellion provides an illustration of this within the South African context. In 1920, according to Hancock, 21,455 whites employed on the mines earned a total of £10.64 million, whereas 179,000 blacks earned £5.96 million. The wage bill was the one area in which costs could be cut to meet the rising expenditure, and this made the 'grey area' of semi-skilled employment, that is jobs related to 'drill-sharpening, waste packing, pipe and tract laying, rough timbering, whitewashing' and similar types of work, the most sensitive area, for blacks and whites were commonly employed in these tasks. To maintain the equilibrium and keep the peace among both blacks and white miners, the Chamber has persuaded them to accept a *status quo* agreement in September 1918, under which the existing allocation of work to the different race groups had been frozen.<sup>67</sup>

This was, in Johnstone's words:

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<sup>63</sup> Labour Monitoring Group (1985) The November stay-away *South African Labour Bulletin* 10(6) 74-100.

<sup>64</sup> cf R Lambert & E Webster 'The re-emergence of political unionism in contemporary South Africa' in W Cobbert & R Cohen (eds) *Popular Struggles in South Africa* (1988) 20-41.

<sup>65</sup> cf J Cock & L Nathan *War and Society: The Militarisation of South Africa* (1989).

<sup>66</sup> T True 'The technology debate' (1984) *Labour and Society* 9 (no2) 109-35.

<sup>67</sup> TRH Davernport *South Africa: A Modern History* 3ed (1987) 280.

*'a strategy of extreme accommodation, designed to minimise class conflict and to stem a rising tide of workers' militancy. It was accompanied, writes Davies, by 'the greatest proliferation of negotiating machinery in the industry's history, before and since'.*

However in November 1921, in face of the growing economic crisis, the Chamber gave notice of its intention to abandon the *status quo* agreement by eliminating a colour bar in any semi-skilled work. Though over 15,000 white workers might ultimately lose their jobs, the Chamber intimated that it did not expect more than 2000 to be retrenched and replaced immediately on the implementation of its policy.<sup>68</sup> During the rebellion, white labour rose up against the mining houses which sought to reduce wages and reintroduce black labour in response to high unemployment in the post war years. African mineworkers had to more to gain from supporting the mine owners in 1922 than from supporting the white mineworkers, for abandonment of the 1918 *status quo* agreement which the owners desired would have made twenty-five extra categories of semi-skilled work available for black and coloured workers. African coalminers in fact continued to work and with the help of a few officials brought up the coal while the white miners were on strike.<sup>69</sup> There was a good deal of violence between white strikers and Africans and perhaps thirty Africans lost their lives from the actions of white strikers' commandos. Even so, one should note the argument fully elaborated by Johnstone that much of the opposition of black miners in the years down and including 1922 was directed against low wages and economic exploitation of blacks under the system, rather than against job colour bar as such.<sup>70</sup>

The consequent passing of the 1924 Industrial Conciliation Act legalised strike action provided that the statutory requirements of attempting settle the dispute in either the industrial council or conciliation board were adhered to. Nonetheless, the ability to strike was only extended to white workers. Since blacks were

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<sup>68</sup> Ibid 280.

<sup>69</sup> Davernport (note 57 above) 283.

<sup>70</sup> Ibid.

excluded from the formal definition of what constituted an employee, they were unable to form and join unions and hence unable to register under the Industrial Conciliation Act. For this reason, even though there were never prohibited statutorily from striking, they were not granted the right legally and hence had to operate outside the conciliation mechanisms provided, and rely on the protection of the common law.

Then, beginning in 1979, there came what has been called the new labour dispensation which transformed labour relations in South Africa. In the field of statutory regulation, differentiation and discrimination on the basis of race largely disappeared. Job reservation was abolished. Black trade unions acquired teeth and muscle which, under the guidance of labour lawyers, they were not slow to apply. In the decade that followed there has been a surge of trade union activity. There has arisen new problems to be solved, new techniques to be developed and new insights to be gained. No doubt there have been tensions and stresses and strains and disruption, but these are the stuff of which change and progress are made.<sup>71</sup>

The second stage of development is that of *tolerance of industrial action*.

Earlier, strikes were not legally prohibited, since the freedom of strike is recognised, but they nonetheless fell under the common law principles of contract, under which strike would constitute a breach of the employment contract.

In 1981, following the recommendations of the Wiehahn Commission, the government amended the Industrial Conciliation Act of 1979 to create the Labour Relations Act which was still dated 1956. This Act extended equal employment rights to all employees regardless of race. Central to this enactment was the fact that mixed unions were now allocated, as were formally registered black unions.

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<sup>71</sup> Hon Mr Justice HC Nicholas 'Introduction' in Benjamin Jacobs & Albertyn (eds) *Strikes Lock-outs & Arbitration in South African Labour Law Proceedings of the Labour Law Conference 1988* (1989) xxi.

Strike action was recognised as a formal means of protest for all employees, provided the formalities of the Act were adhered to. The resultant anomalous position was that while workers received protection from criminal and delictual liability, no protection was offered from dismissal for participating in a strike. Accordingly, since the legislature had not provided otherwise, striking constituted a fundamental breach of the employment contract. As such, nothing prevented the employer from exercising the common law rights of termination of the contract.

The Supreme Court in *Marievale Consolidated Mines v NUM and others*<sup>72</sup> held that:

*'employees are not granted the right to strike with impunity nor are employer's common law rights curtailed'.*

The court held that had the legislature intended to protect employees participating in organized strikes, it would have explicitly expressed this. This view subsequently came under severe criticism in several successive cases dealing with mass dismissals of strikers. In *SACWU & Others v Sentrachem*<sup>73</sup> it was held that it was anomalous to dismiss workers who received protection from delictual and civil liability. It was subsequently held that the dismissal of the workers was unfair.

In *Black Allied Worker's Union & Others v Prestige Hotels CC t/a Blue Waters Hotel*<sup>74</sup> support was given to the fact that dismissal of striking workers amounted to an unfair labour practice. Judge Nugent in *Cobra Watertech v NUMSA*<sup>75</sup> acknowledged this by finding that the dismissal of striking workers was unfair, since they were dismissed for no other reason than to avoid a bargaining relationship.

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<sup>72</sup> (1986) 7 ILJ 108 (W) 115H.

<sup>73</sup> (1988) 9 ILJ 210 (IC).

<sup>74</sup> (1993) 14 ILJ 963 (LAC).

<sup>75</sup> (1995) 16 ILJ 697 (LAC).

It is submitted that perhaps a clearer exposition of the inadequacy of the common law position on strike action came in an earlier case when the court in *Sentrachem*<sup>76</sup> expressed his discontent at dismissal being meted out as punishment for striking workers. He saw it as an inequitable sanction, since the aim of striking workers was not to terminate the contract of employment but to promote collective bargaining, while the employer, in dismissing workers, was the one who in reality repudiated the contract. Indeed, by dismissing striking workers, only effectively ends the negotiating process, and based on the assumption that the freedom to strike forms an intrinsic corollary to the negotiating process, the dismissal of strikers can be seen as a self-defeating exercise.<sup>77</sup>

This is not to say, however, that striking workers will at all times have absolute protection against dismissal. In the *Blue Waters* case, the court noted that workers on a legal strike do not commit an act of misconduct and therefore cannot be dismissed on this ground, their dismissal can be justified in terms of the operational requirements of the organisation i.e. where there is a threat to the continued existence of the organisation or of irreparable economic hardship.

In *NUM v Black Mountain Mineral Development Co (Pty) Ltd*<sup>78</sup> this approach was rejected as being too restrictive, in the sense that the employer had to wait until irreparable harm was about to occur or had occurred before acting in its best interests. Here the court preferred to allow the employer to exercise the right to dismiss once there was a likelihood of substantial economic loss.

This approach was favoured in *NUMSA v Rand Bright Steel*<sup>79</sup> in which it was stated that it was necessary for the employer to show immediately prior to the dismissal that it was on the brink of financial ruin. Nevertheless, the dissenting assessor in the *Black Mountain* case posed the problem slightly differently. The

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<sup>76</sup> (1989) 10 ILJ 249 (W).

<sup>77</sup> Grossett & Venter (note 53 above) 493.

<sup>78</sup> (1994) 15 ILJ 1005 (LAC).

<sup>79</sup> (1995) 16 ILJ 668 (IC).



test to be applied was whether the operational requirements of the employer justified the termination of the employment, weighed in the light of compelling policy arguments favouring the protection of strikers against dismissal.

Judge Nugent in *Cobra Watertech* (supra) favoured this approach and rejected the test laid down in the *Black Mountain* case as being implicitly ludicrous on the basis of it requiring the court:

*'to enter the arena after the event, to decide whether and to what extent each party acted rationally in the process of bargaining, having regard to the employer's financial circumstances'.*

The court in *NUMSA v Vincent Metal Sections (Pty) Ltd*<sup>80</sup> referred to both the *Blue Waters* and *Black Mountain* cases and took the company's 'parlous financial state' into account.

Finally, it should be noted that while section 67(4) of the 1995 LRA explicitly lays out protection against dismissal for workers participating in a protected strike, section 189 lends credence to the above decisions by allowing for dismissals based on the operational requirements of the organisation.

The third and final stage of progressive development is an explicit *recognition of the right to strike and recourse to lockout*. This implies that neither a concerted absence of workers from the workplace nor the prevention by the employer of workers entering the workplace to carry out their work constitutes a breach of the employment contract. Instead it leads rather to the legitimate suspension of the individual employment relationship.

Some countries, such as Italy, France and Spain, only recognise the right to strike and not the right to lockout, since it is argued that it is only the employees who deserve the right to collective action in order to redress the imbalances of power.

As stated above, the 1995 LRA repeals much of the previous labour legislation surrounding the rights of workers during strikes. The old LRA, The Public Service Labour Relations Act and The Education Labour Relations Act all proved to be seriously deficient with regard to protecting workers during strike action.<sup>81</sup> Indeed the 'old' law was in conflict with many of the findings of the ILO's Fact Finding Conciliation Commission and was largely contrary to the ILO's Constitution and Conventions as interpreted by the Committees of Experts.

Discrepancies were found in:-

- (a) Complicated pre-strike procedures
- (b) Onerous ballot requirements
- (b) The criminalisation of strikes and lock-outs
- (c) The prohibition of socio-economic strikes
- (d) The ready availability of interdicts and claims for damages
- (e) The absence of statutory protection from dismissal for striking workers.

While these measures provided very little protection to the worker, they did little to stem the plethora of strikes that took place in the 1980s and 1990s, Department of Manpower statistics reveal that 833 strikes took place in 1992 compared with 71 in 1972. A peak was reached in 1987 with 1 148 strikes taking place and 5 825 000 work-days lost. While these figures have decreased in accordance with socio-political improvements in the country (in 1991, dubbed the year of expectations only 613 strikes took place with a total of 1 236 387 labour hours lost), there has not been a complete abating of strike action, and figures reveal an increase in strike activity from 613 strikes in 1991 to 833 strikes in 1992, with only slight drops to 790 and 804 in 1993 and 1994 respectively. Labour hours lost showed significant increases from 1 887 028 in 1992 to 2 232 073 in 1994. This can largely be attributed to unions attempting shows of strength, with little perceived socio-political benefit at grass-roots level.<sup>82</sup>

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<sup>80</sup> NH 11/2/12776.

<sup>81</sup> Grossett & Venter (note 53 above) 494.

<sup>82</sup> Ibid 495

Whether the advent of the right to strike and the 1995 LRA will slow this rapid escalation in the number of strikes is yet to be seen. The Act has, however, provided three important advances to this end. These are:-

- (a) A more comprehensive approach to dispute resolution
- (b) More legitimate measures aimed at facilitating and protecting strike action
- (c) Special measures designed to incorporate socio-economic protest action.

It is envisaged that these measures will provide the necessary guidance and checks and balances to strikers and employers alike, setting specific boundaries and lending clear purpose to all forms of protest action.

The year 1998 represented an extremely difficult period for the broader South African motor industry. The year began with expectations of modest growth of around 2,5%, however following the mid-1998 emerging market crisis, coupled with international financial market instability, severe pressure of the Rand and unprecedented increases in domestic interest rates, the South African economy moved into recession during the third and fourth quarters of 1998. Against this background of a deteriorating economy, new vehicle sales came under severe pressure from the first quarter of 1998 onwards with all sectors in the automotive industry, component manufacturing, vehicle assembly and vehicle retailing, distribution and servicing, experiencing difficult and depressed business conditions. Unprocedural industrial action and sympathy strike action by the industry's major union, during the third quarter of 1998, aggravated the already precarious position of the industry as a whole during the second half of 1998.<sup>83</sup>

The fact that 1998 witnessed an upsurge in industrial action is well known. Various independent studies arrived at different estimates of workdays lost for

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<sup>83</sup> National Association of Automobile Manufacturers of South Africa Homepage: <http://www.naamsa.co.za>.

1998. With a view to improve the quality of statistics of industrial action, the Department of Labour has established a new system for collecting and recording data. This system relies both on reporting by employers and monitoring of the media.<sup>84</sup> While the media plays a crucial role in reporting on labour disputes, it is not always comprehensive in its coverage of disputes. Despite these problems, statistics of industrial action remain important for ongoing assessment of the state of labour relations and for monitoring the economic and social impact of labour disputes. The Department's system for collecting and recording data attempts to follow the guidelines provided by the ILO's.<sup>85</sup> These guidelines cannot be followed in every respect at present. They will, however, ensure that the Department's data is more comparable internationally and that they provide pointers as to what changes may be appropriate in the future.<sup>86</sup>

It is submitted that the full extent of industrial action for 1998 is not clear. To date, two estimates have been made public. Andrew Levy & Associates, a private sector labour consultancy which has been reporting on strike action on a regular basis for the past decade, estimated that 2.3 million workdays were lost due to strikes during 1998.<sup>87</sup> An ILO/Swiss Project report commissioned by the Department of Labour, estimate is that 3 million workdays would be lost due by the end of 1998.<sup>88</sup> The Department of Labour's estimate is that 3.8 million workdays were lost due to industrial action in the year under review. It must be noted that these are all estimates and it is also likely that the full scale of the motor strike during September and October 1998, as well as the secondary action in vehicle manufacturing and other sectors covered by NUMSA, are not

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<sup>84</sup> Department of Labour, Industrial Action in 1998 Annual Report:  
<http://www.labour.gov.za/docs/reports/iaexecsumm.html>.

<sup>85</sup> *Resolution concerning statistics of strikes, lockouts and other action due to labour disputes* (adopted by the Fifteenth International Conference of Labour Statisticians 1993).

<sup>86</sup> Department of Labour, Industrial Action in 1998 Annual Report:  
<http://www.labour.gov.za/docs/reports/iareport.html>.

<sup>87</sup> Andrew Levy & Associates Annual Report (1999) 23-26.

<sup>88</sup> J Baskin 'The 1998 bargaining round in South Africa – an analysis of the strike wave and bargaining settlements' Report commissioned by the ILO/Swiss Project for the Department of Labour (1998) 12.

fully reflected in the above estimates.<sup>89</sup> The overwhelming majority of Labour disputes during 1998 arose from collective bargaining and most of these centered on wages (71%). This figure is lower than that indicated by other commentators, who found that wages accounted for over 90% of all disputes.<sup>90</sup> It should be borne in mind that the national industry strikes, which essentially concerned wage bargaining were unreported.

Judging by available information, strike action has displayed a cyclical trend over the years, which makes it difficult to predict future patterns with any certainty. The accuracy of strike statistics is quite correctly challenged by many analysts. There will, however, be a need for improved reporting and monitoring of industrial action by all concerned with these statistics. It is hoped that future reports by the Department will make a contribution to improved analysis and understanding of industrial action in South Africa.<sup>91</sup>

The above illustrates that the right to strike is firmly entrenched in South Africa. It is clear that both private and public sector employees will exercise these rights when they are aggrieved. In South Africa, 235 workdays per 1 000 employees were lost between 1990 and 1998. The high strike rates over the last ten years are in sharp contrast to the decline of strike activity in developed countries. Comparative figures of workdays lost per 1 000 employees for the United Kingdom were 49, Sweden 86, Germany 9 and Italy 211.<sup>92</sup> This it is submitted, illustrates that South Africa has a long way to go in terms of providing a more stable working environment which is conducive to productivity and investment.

#### ***IV Nature of Strikes and lock-outs***

The LRA defines a strike as follows:

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<sup>89</sup> Department of Labour, Industrial Action in 1998 Annual Report (note 86 above).

<sup>90</sup> Andrew Levy & Associates Annual Report (1998) 24.

<sup>91</sup> Department of Labour, Industrial Action in 1998 Annual Report (note 86 above).

<sup>92</sup> M Anstey 'Are South Africans World Class Strikers?' in SALJ 1999.

*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 [s213]*

In South Africa, traditional strikes remain the most visible aspect of collective action, but other forms of action are commonplace. Withdrawal of co-operation, work to rule, go-slows and overtime bans may be implemented as a means of pressurising an employer, without the employees having to suffer full loss of earnings associated with a full blown strike. The choice of action by employees is usually dependent on the perceived effectiveness of such action.<sup>93</sup>

The primary focus is on whether the strikes and lock-outs undertaken can be termed protected or unprotected. Protected strikes and lock-outs are strikes and lock-outs that comply with the provisions of Chapter IV (s67 (1)). Chapter IV imposes procedural requirements as well as substantive limitations. The procedural requirements specify the procedures that must be followed as a prelude to a protected strike or lock-out, while the substantive limitations prescribe the use of strikes and lock-outs in certain defined circumstances.<sup>94</sup>

Further, a distinction can be made between authorised strikes and wildcat strikes. Authorised strikes refer to strikes that have the union's blessing and for which the correct procedures have been followed, while wildcat strikes are usually strikes that are undertaken by workers without consent and prior knowledge of their union. Generally speaking, strikes that do not follow correct procedures may be termed wildcat. In a study undertaken in 1988 by NUMSA, it was found that only

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<sup>93</sup> Finnemore (note 10 above) 266

<sup>94</sup> Du Toit (note 27 above) 282.

2% of strikes were legal. Much of this can be attributed to the inadequacies of the relevant labour legislation (the 1956 Act) as discussed above.

## **V      *The Right to Strike***

It is generally accepted that the purpose of modern labour law is to regulate industrial conflict by setting up institutions and means through which employers and employees, in the words of Richard Hyman:

*'through engaging in a struggle in which neither side obtains final victory over the other, eventually elaborate rules of the game which both sides become anxious to protect'.<sup>95</sup>*

The 'game' referred to by Hyman is the process of collective bargaining and, according to Harbison, where it operates with reasonable success collective bargaining fulfils three major functions. First, it provides a partial means for resolving the conflicting economic interests of management and labour; secondly, it greatly enhances the right, dignity and worth of workers as industrial citizens; and thirdly, as a consequence of the first two functions, collective bargaining provides one of the most important bulwarks for the preservation of the private enterprise system.<sup>96</sup> Lord Wright in *Crofter Harris Tweed v Veitch*<sup>97</sup> states that:

*'where the rights of labour are concerned, the rights of the employer are conditioned by the rights of men to give or withhold their services. The rights of workmen to strike is an essential element in the principle of collective bargaining'.*

It is therefore essential for the preservation of collective bargaining that the strike weapon and its use are properly understood by both sides. The strike must be seen not as an anti-employer weapon in the sense that the lock-out can, and has, been used as an anti-union weapon.<sup>98</sup> It is submitted that the right to strike is based on the following philosophical argument. Without the power to affect the course of events, a person or a group lacks the ability to reach decisions. Power is the

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<sup>95</sup> Hyman (note 43 above) 75.

<sup>96</sup> Harbison 'Collective Bargaining and American Capitalism' in Kornhanger, Dubin & Ross *Industrial Conflict* (1954) 274.

<sup>97</sup> (1942) AC 435-462.

<sup>98</sup> R Jacobus 'The ancillaries to the Right to Strike' in Benjamin Jacobus & Albertyn (note 71 above) 53.

source of responsibility. Without the right to strike, unions lack the foundation for voluntary negotiation and agreement. If collective bargaining, as a means of resolving conflict is in the public interest then so is the right to strike which is a fundamental underpinning of the power base of most unions involved in negotiations. However, the right to strike is never absolute or unconditional since the exercise of the right can conflict with the interests of the larger society, especially where essential services are affected. Under certain circumstances strikes could lead to the collapse and bankruptcy of the employer with a resultant loss of job opportunities and devastating consequences on the local community.<sup>99</sup>

The right has been won in political terms- The Constitution, the LRA and the courts all affirm that dismissal for striking is now utterly taboo, except where the statutory councils are flouted or where the dispute resolution system forbids a resort to power.<sup>100</sup>

Davis and Freedman in *KahnFreund's Labour and the Law* sum up the position:

*'No country suppresses the freedom to strike in peace-time except dictatorships, and countries practicing active racial discrimination'.<sup>101</sup>*

Economically, the sanctity of the right is a lot more tenuous. In the face of international and domestic pressures, employers are now engaged more or less continuously in workplace restructuring, a process which also regularly entails job losses. Restructuring sometimes provokes strikes; strikes sometimes elicit downsizing. But more often still, organizational change and the associated downsizing programmes are driven by factors outside the collective bargaining forum. Whether the drive to renumber the workplace stems from labour battles or non-labour dynamics, this feature of the times is testing the boundaries of the unfair dismissal laws, reaching into not only the collective bargaining process but also the inner sanctum of the right to strike.

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<sup>99</sup> Finnemore (note 10 above) 270.

<sup>100</sup> Thompson & Benjamin (note 41 above) AA1- 333.

<sup>101</sup> Davis & Cheadle *Kahn-Freund's Labour and the Law* 3ed (1983) 302.



It is important to note that an employer may not dismiss employees to compel them to accept a demand relating to a matter of mutual interest [s187(1)(c)].<sup>102</sup> It is also important to distinguish a dismissal based on operational changes from a s187(1)(c) dismissal. While an employer may fairly dismiss employees because of operational requirements, s187(1)(c) prohibits the dismissal of employees merely for refusing to accept demands related to such requirements.

The employer may dismiss employees only if their refusal creates operational difficulties necessitating their dismissal. With effect from 1 August 2002 the new s189A has allowed trade unions in certain circumstances to strike against dismissals based on the employer's operational requirements. In these circumstances the issue of the fairness of the dismissal may not arise as, ultimately, the dispute will be resolved by the exercise of 'might' rather than 'right'.<sup>103</sup>

The new section 189A was introduced in respect of employers with more than 50 employees which is activated if the number of employees to be retrenched is above a certain threshold.<sup>104</sup> In that event either of the parties may request the appointment of a facilitator. The union or employees must thereupon give notice of a strike or refer the dispute to the Labour Court.<sup>105</sup>

Section 189A also attempts to give more clarity as to what constitutes a fair reason for dismissal. It obliges the court to find an operational requirements dismissal to be substantively fair if it gives 'effect to a requirement based on the employer's economic, technological, structural or similar needs', and was 'operationally justified on rational grounds'. In addition there must be proper consideration of alternatives to retrenchment and the selection criteria must be

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<sup>102</sup> *NUMSA v Zeuna-Starker Bop (Pty) Ltd* (2003) 1 BLLR 72 (LC).

<sup>103</sup> Du Toit (note 27 above) 375.

<sup>104</sup> Ibid 50

<sup>105</sup> Van Niekerk & Le Roux 2001 'A Comment on the Labour Relations Amendment Bill 2001 and the Basic Conditions of Employment Bill' (2001) 22 ILJ 2168.

fair and objective. It remains to be seen how the Labour Court interprets this amendment.<sup>106</sup>

## **VI      *Legal consequences of protected industrial action***

Section 67(2) makes it clear that a person commits no delict or breach of contract by organising, supporting or taking part in a protected strike (or lock-out).

Section 67(6) reinforces this provision by prohibiting the institution of civil legal proceedings against any person for participating in a protected strike or conduct in contemplation or furtherance of a protected strike. Neither of these protections extends to criminal offences associated with the strike action. Accordingly, conduct such as assault, intimidation and damage to property falls outside of the legislative immunity.<sup>107</sup> There is an exception, now largely redundant. Contraventions of the Basic Conditions of Employment Act 3 of 1983 and the Wage Act 5 of 1957 that occurred in the course of a protected strike or lock-out were deemed not to be offences. Both of those Acts have now been repealed by the 1997 Basic Conditions of Employment Act, and the latter with the contraventions principally through a system of administrative remedies rather than criminal penalties.<sup>108</sup>

It is submitted that a breach of a collective agreement will not be covered by immunity.<sup>109</sup> Disputes arising out of non-compliance with collective agreements are disposed of by private or CCMA conciliation-arbitration, and these proceedings do not constitute civil legal proceedings. But in any event, s65(1)(c) prohibits strike action over arbitrable issues. It would be extraordinary subversive of a major aim of the Act – orderly collective bargaining – to allow the obligations negotiated in a collective agreement to be gainsaid by power.<sup>110</sup> In *Lomati Mill*

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<sup>106</sup> Ibid 2170.

<sup>107</sup> Section 67(8).

<sup>108</sup> Thompson & Benjamin (note 41 above) AA1-331.

<sup>109</sup> Ibid AA1-331.

<sup>110</sup> Ibid.

*Barberton v Paper Printing Wood & Allied Workers Union* <sup>111</sup>Judge Landman stated:

*'It is in the nature of good labour relations that the agreements between parties be upheld and enforced'.*

The ambit of the immunity provision and the meaning of the term 'offence' in s67(8) has begun to receive attention in case law. In *Lombati Mill Barberton*<sup>112</sup> the court interdicted a breach of a code on picketing in terms of explicit powers granted to it under s69(11) of the Act. It declined, however, to interdict a breach of a set of strike rules because the conduct in question was in furtherance of a protected strike and therefore apparently covered by the statutory immunity against civil legal proceedings.<sup>113</sup>

It is submitted that immunity from civil liability is not restricted to participation in a protected strike. It extends to all conduct 'in contemplation or furtherance' of a protected strike. The interpretation given to this phrase will determine the span of the Act's protection.<sup>114</sup>

Since participation in a strike is deemed not to constitute breach of contract [s67(2)], the employer's obligation under the employment contract continue to subsist. In the absence of any further qualification, an employer would therefore be obliged to remunerate its employees during a strike. To avoid this anomaly the Act provides that an employer is not obliged to remunerate an employee for the services that the employee does not render during a protected strike [s67(3)].<sup>115</sup>

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<sup>111</sup> (1997) 18 ILJ 178 (LC) 182.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid 183.

<sup>114</sup> Thompson & Benjamin (note 41 above) AA1-332.

<sup>115</sup> Du Toit (note 27 above) 295.

An employer is entitled to employ replacement labour during the course of the strike, unless the whole or part of the employer's service has been designated as a maintenance service. Unions usually refer to replacement labour as "scab" labour. The right of employers to use replacement labour was one of the hotly debated issues at NEDLAC.<sup>116</sup>

## **VII      *Protection against dismissal: The core right to strike***

Protection against dismissal is the most significant legislative protection offered to strikers. Without it, the Act would not pass constitutional muster and the State would be in breach of its public international law obligations. The ILO's Committee of Experts have repeatedly stated that the Conventions protect strikers from dismissal. The dismissal of union members for exercising their right to strike is regarded as discrimination on the basis of trade union membership.<sup>117</sup> But the question that arises is how far does this protection extend?

The starting point must be an examination of s67(4): always bearing in mind that the LRA may regulate but not derogate from the right enshrined in the Constitution:<sup>118</sup>

*'An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike'.*

That proposition is a significant advance on the defenceless pre-Marievale years<sup>119</sup> and the unfair labour practice of the 1956 Act, but none the less is not without limits. Under the common law strike action constituted a fundamental breach of contract, entitling the employer to dismiss employees who went on strike.<sup>120</sup> Although the Industrial Court extended significant protection to

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<sup>116</sup> Finnemore (note 10 above) 274.

<sup>117</sup> Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee 3ed (Geneva 1985) paras 443-44.

<sup>118</sup> Thompson & Benjamin (note 41 above) AA1-335.

<sup>119</sup> *NUM v Marievale Consolidated Mines* (1986) 7 ILJ 123 (IC).

<sup>120</sup> cf Wallis *Labour and Employment Law* (1992) 47.

employees taking part in 'lawful' strikes in terms of the previous Act,<sup>121</sup> the emerging jurisprudence was not entirely consistent.<sup>122</sup> The approach of the industrial court in the *Marievale* case has been criticized, but be that as it may, the impact of the *Marievale* judgment on the industry was dramatic. Employers were thereafter obliged to accept some unpalatable new facts of life. The effect was that employers were obliged to act conservatively. In the past the instinct of many employers was to act precipitatively; to dismiss quickly. A brake had been placed on an employer's ability to dismiss strikers.<sup>123</sup>

The protection of strike action, however, is not absolute. Strikes contrary to collective agreements or the requirements of the Act are not considered functional to collective bargaining and treated as a species of misconduct.<sup>124</sup> In addition, an employer is not precluded from dismissing strikers for reasons related to their misconduct during a strike or based on the employer's operational requirements.<sup>125</sup>

The Act is quite categorical that no dismissals are permitted in the power-play associated with the forging of wage-work deals. Factors independent of the bargaining process must ground an operational requirements dismissal and the test of fairness must also be passed. The point at which the ban on dismissals in the bargaining process yields to an operational requirement justification is difficult to determine.<sup>126</sup>

The Act defines operational requirements as those based on the economic, technological, structural or similar needs of an employer (s213). What falls within the definition is hard to pin down. The Code of Practice on operational

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<sup>121</sup> Section 65 of Act 28 of 1956.

<sup>122</sup> Du Toit (note 27 above) 438.

<sup>123</sup> J Myburgh SC 'The protection of Strikers from Dismissal' in Benjamin Jacobus & Albertyn (note 71 above) 31.

<sup>124</sup> Du Toit (note 27 above) 440.

<sup>125</sup> Section 67(5).

<sup>126</sup> Thompson in Bargaining 'Business Restructuring and Dismissal for Operational Requirements (1999) 20 ILJ 755.

requirements dismissals codifies but adds little to the existing case law. It does not deal directly with strike dismissals for operational requirements in the strike context, and acknowledges the difficulty of defining all the circumstances that might legitimately form the basis of dismissal on this ground.

It states as a general rule that:

*Economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to the restructuring of the employers enterprise.*

*SA Chemical Workers Union v Afrox Limited*<sup>127</sup> brings all the issues surrounding strikes and operational requirements dismissals into sharp relief. In this case employees had been dismissed in the wake of a dispute over the employer's attempt to introduce a new shift system for delivery drivers. The existing system was both illegal under the BCEA and expensive. Neither strike action by employees nor an employer lock-out had been potent enough to break the dead-lock on the issue. The employer as a last resort had decided to outsource the delivery service, and claimed that this business decision validated the retrenchment of its existing drivers. The court found that the employees had not been dismissed in an endeavour to compel compliance with the company's demand that they work a staggered shift, nor to punish the strikers. Either feature would have rendered the dismissals automatically unfair. It was satisfied that the retrenchments were made in good faith and were necessary to place Afrox in a position to service its customers adequately and to stave off a loss of custom to competitors, in other words, they were substantively fair. The court found that the consultative procedures provided for in s189 of the Act had been observed, and

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<sup>127</sup> (1998) 19 ILJ 62 (LC).

that accordingly a case for a fair operational requirements dismissal had been made out.

It might seem irregular to dismiss workers for operational reasons. The whole purpose of conducting strike action is to bring some form of financial loss to the employer to force the compliance with the strikers' demands. It is in the true sense of the term an economic sanction. However, strike action cannot be undertaken to bring the employer to financial ruin. If this were the ultimate objective, it would be self-defeating, since the strikers as well as workers not on strike would lose their jobs if the organisation were to shut down.<sup>128</sup>

### ***VIII Unprotected Strike***

An unprotected strike is one that does not comply with the provisions of Chapter IV. Non-compliance is no longer a criminal offence but participants in and organisers of such strikes do not enjoy statutory protections. The Act provides an employer with four direct remedies to deal with unprotected strike:

- i). An order from the Labour Court to interdict a strike that does not comply with the Act;<sup>129</sup>
- ii). Compensation for losses occasioned by an unprotected strike;<sup>130</sup>
- iii). Self-help through the dismissal of strikers,<sup>131</sup> and
- iv). Self-help in the form of an immediate reactive lock-out.

#### ***(a) Interdicts***

Section 68(1) gives the Labour Court jurisdiction to grant an interdict to restrain any person from participating in a strike or in any conduct in contemplation or furtherance of a strike that does not comply with the provisions of the Act. At least 48 hours notice of the application must be given to the respondent. The applicant must show that there has not been undue delay in bringing the application. In

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<sup>128</sup> Grossett & Venter (note 53 above) 504.

<sup>129</sup> Section 68(1)(a).

<sup>130</sup> Section 68(1)(b).

<sup>131</sup> Section 68(5).

other words the applicant cannot through its own inactivity create urgency. The rationale of the Act's notice provisions is summed up in *National Manufactured Fibres Employers Association v Chemical Workers Industrial Union*.<sup>132</sup> The court may grant an order on a shorter period of notice if it is satisfied that the respondent has been given written notice of the application and reasonable opportunity to be heard.

The applicant must show good cause why a shorter period of notice should be permitted. If the respondent has given the an employer 10 days or more notice of the strike, the employer must give at least 5 days written notice of its application for an interdict. In *Automobile Manufacturers Employers' Organisation v NUMSA*<sup>133</sup> Judge Landman held that notice means that the respondent must receive the applicant's notice of motion and supporting affidavits.

In the case of a strike or a threatened strike in an essential service or a maintenance service, the Act does not prescribe any minimum notice of the application.

In South Africa the use of interdicts to restrain strike action is common, yet little detailed analysis of this practice has been undertaken.<sup>134</sup> Much of the Labour Court's initial work has involved urgent applications to interdict strikes or unlawful conduct during strikes. Judges enjoy a wide discretion when granting interdicts. The discretion extends not only to whether to grant the order sought, but whether to waive the rules of procedure in cases of alleged urgency. Applicants seeking orders restraining strike action have traditionally had little difficulty in satisfying the Court of the urgency requirements. In *North East Cape Forests v SA Agricultural Plantation and Allied Workers Union*<sup>135</sup> the Labour Court refused the application for want of urgency. It found that there had been undue delay in bringing the application and that the employer had failed to quantify the loss it was suffering as a result of the alleged unprotected strike. On appeal the LAC

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<sup>132</sup> (1997) 18 ILJ 1359 (LC) 1371C-D.

<sup>133</sup> (1998) 11 BLLR 1116 (LC).

<sup>134</sup> O'Regan 'Interdicts Restraining Strike Action – Implications of the Labour Relations Amendment Act 83 of 1988 (1988) 9 ILJ 959.



found that there had been no undue delay on the part of the employer in launching the application for urgent relief. It also rejected the Labour Court's finding that the employer should have quantified its loss. It was content to assume that the employer would have suffered loss as a result of the strike because 'it is the object of a strike to inflict harm'. Even if the failure to quantify loss is not relevant considerations of urgency, it is surely indispensable to satisfying the other requirements for an interim interdict, viz irreparable harm (actual or apprehended) and the balance of convenience.

This practice has led to serious criticism of the labour injunction (the equivalent remedy) in foreign jurisdiction:<sup>136</sup>

*'To expect such a mode of hearing to elicit the truth about these ambiguous acts and motives of men is to look for miracles. To ask such a system of procedure to work without serious friction and without arousing wide scepticism regarding law's fair-dealing is to subject the legal order to undue stress and strain.'*

Using urgency as justification, these applications have often been heard on an *ex-parte* basis, that is without notice to the defendant who received short notice of the application.

The ILO's supervisory bodies have concluded that if interdicts in respect of the legitimate exercise of the right to strike are too readily available, workers are deprived of their right to take action to promote and defend their economic and social interests.<sup>137</sup> Although our substantive law cannot be said to infringe the ILO's standards, the basis on which interdicts are heard and granted may raise questions.

### **(b) Compensation**

The right to strike may often exact a high price from employers, the national economy, and the strikers themselves. Legislature has provided that when

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<sup>135</sup> (1997) 18 ILJ 971 (LC).

<sup>136</sup> Frankfurter & Green *The Labour Injunction* 1930 MacMillan New York 52.

<sup>137</sup> Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa, 1992 para 666.

employees or unions strike unlawfully, their employer can sue to recover damages.

The existence and extent of that right is set out in section 68(b) of the LRA.

Section 68(b) confers on the Labour Court the power to order the payment of “just and equitable compensation” for the losses occasioned by a strike or lock-out. When deciding on whether compensation should be ordered and, if so, how much, the court is required to have regard to a number of considerations, including the extent of attempts, if any, by the strikers to comply with the Act, whether the strike was “premeditated”, whether it was in response to “unjustified conduct” by the employer, whether it was in defiance of an interdict, whether it was in the “interests of orderly collective bargaining”, the duration of the strike and the respective financial positions of the employer, on the one hand and the union or employees on the other.

The right of employers to sue for compensation for unlawful strikes may be limited; it is nevertheless enshrined in the LRA. Until now, and perhaps because of these limitations, employers have been slow to resort to such actions. But when members of the quaintly named Mouthpeace Workers Union employed by Rustenburg Platinum Mines Limited engaged in two illegal strikes in as many years, the Company lost patience. Rustenburg Platinum added up the costs of both strikes and sued the union for more than R15 million. In *Rustenburg Platinum Mines Limited v The Mouthpeace Workers Union*<sup>138</sup> the court held that an employer suing for damages must satisfy three requirements. First, it must be proved that the strike was illegal. Second, the employer must prove that it sustained loss as a consequence of the strike. Third, the employer must prove that the party or parties from which it seeks compensation participated in the strike or committed acts in contemplation of or in furtherance of the strike. By the

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<sup>138</sup> (2002) 1 BLLR 84 (LC) 91.

time Rustenburg Platinum and Mouthpeace met in Court, they agreed that the first two requirements had been met. For reasons not apparent in the judgment, Rustenburg Platinum had also drastically reduced its claim from R15 million to R100 000, and sued only for the losses occasioned by the second of the two strikes. Mouthpeace denied that it had anything to do with the second strike. The most direct evidence of Mouthpeace's involvement in the strike that was known to the Company was that the union had held a mass meeting at its offices the day before the strike, and that, after the strike began simultaneously at two mines, union officials had declined to instruct the strikers to return to work until the issue of disciplinary action against the strikers had been resolved. However, the court held that this was enough. The company had twice accused the union of instigating the strike. Union officials had not taken the opportunity during the strike of denying their involvement. This, said the Court, amounted to an admission that the union had instigated the strike, an admission consistent with other snippets of evidence which indicated that the strike could not have been spontaneous and that there was "a larger force at play".<sup>139</sup>

This is the judgment's first general lesson: If a union wants to avoid being sued when its members engage in a wildcat strike action, the union must inform the employer at the earliest possible opportunity that it disapproves of the strike. The explanation offered by Mouthpeace that it did not wish to be seen to be siding with management was inadequate.

In determining whether compensation should be granted and if so, how much, The Court analysed the requirements of section 68(1)(b) and found that the enquiry is subjective in nature, involving an assessment of the gravity (or lack thereof) of the conduct complained of, and the blameworthiness of the person sought to be held accountable therefore. In applying the test to the case before it, the Court did not hesitate to find that the conduct of Mouthpeace had been thoroughly deplorable. The union had carefully planned the strike, and denied the

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<sup>139</sup> Ibid 91.

Company any foreknowledge. The Company was therefore granted what it had sought. The 'upper limit' which the court had in mind is not disclosed in the judgment. The Court would have to name that figure if the Company had persisted with its claim for the full amount of its loss. How the Court would then have reconciled the 'factors' enumerated with the Act with Rustenburg Platinum's right to be fully compensated for its loss will never be known.

*Rustenburg Platinum* should send a sobering message to unions. The Company's action could well spur other employers to follow its example. The judgment shows that the Court will not lightly exercise its considerable discretion in favour of unions that cannot prove that they dissociated themselves from the outset with strikes by their members that do not comply with the requirements of the Act, and that union officials did not make serious attempts to persuade members to return to work.<sup>140</sup>

### **(c) *Dismissal for participation in an unprotected strike***

Even before the adoption of the interim Constitution, the Appellate Division of the Supreme Court indicated in a number of judgments that it was prepared to accept that the dismissal of strikers could constitute an unfair labour practice, albeit in exceptional circumstances. Neither the strict contractual approach nor its residue could survive the constitutional entrenchment of the right to strike and to bargain collectively. However, at the time of the advent of the current LRA, it was impossible to formulate a short and definitive answer to the question as to when 'illegal' strikers could be dismissed. Nevertheless, the drafters of the Code of Good Practice: Dismissal attempted to extract the main principles of earlier jurisprudence.<sup>141</sup>

#### **i) *Substantive fairness***

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<sup>140</sup> J Grogan, "Counting the Costs – compensation for unprotected strikes" (2002) 18(1) Employment Law 18-20.

<sup>141</sup> J Grogan *The South African Law of Unfair Dismissal* (2002)

The Code requires the Labour Court to consider how serious the contravention of the Act is and what attempts were made by the strikers or their union to comply with the Act. This suggests that the court should condone minor technical failures and not assume that more serious infringements automatically justify dismissal. 'Unjustified conduct by the employer' incorporates collective and individual situations: unfair conduct of the employer concerning collective bargaining and unfair conduct of the employer directed at individual employees. Strikes in response to these forms of provocation have received sympathetic treatment from the courts in the past and this jurisprudence will continue to be of relevance under the new Act.<sup>142</sup>

**ii) Procedural fairness**

The Code requires an employer to contact a union official at the earliest opportunity in order to discuss the course of action it intends to adopt. Its purpose is twofold: it allows the union an opportunity to persuade the employer not to dismiss, and it allows the union an opportunity to dissuade the employer from dismissing the strikers and it gives the union an opportunity to persuade its members to return to work to safeguard their jobs. Unnecessary and unreasonable delays on the part of the union official to meet with the employer have not been tolerated in the past.<sup>143</sup>

The employer must give striking employees a fair ultimatum before dismissing them. This procedural rule was developed by the courts under the old LRA, and the exceptions were admitted. There may be instances where it is justifiable not to give an ultimatum. Its purpose is to give striking workers an opportunity to consider continuing with their misconduct in the face of intended discipline by the employer. Furthermore, the labour Appeal Court has held that, as in all forms of dismissal for misconduct, the employer must comply with the *audi alteram partem* principle (the *audi* principle). Bearing in mind that, as in all forms of dismissal,

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<sup>142</sup> Thompson and Benjamin (note 41 above) AA1-348.

<sup>143</sup> Thompson and Benjamin (note 41 above) AA1-348.

failure to comply with a fair procedure may affective the substantive fairness of a dismissal.<sup>144</sup>

### **iii) *Unprotected strikers – cases for assessment***

The decision of the Constitutional Court in *Zinwa & Others v Volkswagen of South Africa (Pty) Ltd*<sup>145</sup> has finally concluded the long-running and often controversial dispute involving the dismissal of the Volkswagen employees who embarked on an unprotected strike during the course of January and February 2003.

The strike had its origins in an internal dispute between factions within the National Union of Metalworkers of South Africa. Volkswagen made strenuous attempts to resolve the issues in dispute and, after its efforts in this regard had failed, dismissed the strikers.

The employees claimed that they had been unfairly dismissed and the issue was referred to arbitration under the auspices of the CCMA. A senior commissioner arbitrated the dispute and found that the dismissal of the applicants had been substantively fair but procedurally unfair. He found that Volkswagen had failed to comply with the *audi* principle in that prior to the decision to dismiss the applicants, there had been no invitation by Volkswagen 'to NUMSA or for that matter, the striking workers or their representatives to explain why their conduct should be tolerated, why an ultimatum should not be issued and why they should not be dismissed'. Somewhat surprisingly the commissioner ordered the reinstatement of the dismissed employees, but declined to do so retrospectively.

Volkswagen then launched urgent review proceedings in the Labour Court and the employees themselves launched a counter-application against the commissioner's finding that the dismissal had been substantively fair. The Labour Court upheld the finding that the dismissal was substantively fair, but procedurally unfair. The court took the view that although it could not find fault with the

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<sup>144</sup> J Grogan (note 141 above) 297.

<sup>145</sup> (2003) 5 BLLR 409 (CC).

procedure followed by Volkswagen in dismissing the employees, it could not hold that the senior commissioner's decision in this respect constituted grounds for review as envisaged in s 145 of the LRA. The court, however, held that the senior commissioner had misdirected himself in ordering the reinstatement of the workers as relief for procedural unfairness. The court found that s193 of the LRA does not permit reinstatement if the workers have only been found to have been procedurally unfairly dismissed.

On appeal, the Labour Appeal Court upheld the finding that the dismissal had been substantively fair but set aside the finding that the dismissal was procedurally unfair and replaced it with a finding that the dismissal had indeed been procedurally fair. It found that both NUMSA and the applicants were given ample opportunity to make representations prior to the decision to dismiss the applicants. It added that because the dismissal had been in accordance with the agreement to end the strike that was the end of the applicants' case. It concluded that the commissioner had misconceived the nature of the enquiry in relation to the *audi* principle. But it went further and considered the question whether reinstatement is a competent remedy for a dismissal which is procedurally unfair. It held that it was not and concluded that in ordering reinstatement, the commissioner had exceeded his powers

The dismissed employees then applied to the Constitutional Court for leave to appeal. Volkswagen intimated that it would oppose the granting of leave to appeal, but the Constitutional Court decided that it would make a decision prior to Volkswagen doing so formally. It did so because the facts were not in dispute and because the court was satisfied that the application was bound to fail, and it was therefore undesirable to require Volkswagen to incur further costs which it would not be able to recover from the indigent employees. The court found as follows:

*[15] The facts show that management held meetings with a delegation of the striking workers and NUMSA, separately, to try to end the strike. At these meetings management warned that the strike was illegal and that those participating in it faced possible*

*dismissal. Management resorted to the closure of its plant in an attempt to get the workers to return to work. It required workers returning to the plant to resume their duties or face dismissal. This too did not work. The agreement between NUMSA and management to end the strike did not succeed in getting the applicants back to work. Nor did the warning that those workers who did not return on 31 January would face disciplinary action, which could include dismissal. An ultimatum calling upon the workers to return to work on 3 February 2000 and a warning that failure to return to work would result in dismissal did not succeed in getting the applicant's to return to work earlier.*

*[16] In light of these facts, the applicant's have no prospect of persuading this court that their dismissal was procedurally unfair.*<sup>146</sup>

The Constitutional Court therefore appears to have upheld the Labour Appeal Court's approach to procedural fairness in a situation where strikers are dismissed. However, it did not find it necessary to decide the issue whether reinstatement is an appropriate remedy in the case of dismissals which are unfair only because of lack of procedure.<sup>147</sup>

#### **(aa) Contact with the strikers' union**

The Code requires the employer to contact a trade union official 'at the earliest possible opportunity' before taking action against strikers.<sup>148</sup> The purpose of this provision is to enable the employer to 'discuss' the course of action the employer intends to adopt. The Code does not indicate what employers must do if all or some of the strikers do not belong to any union. However, the spirit of the provision suggests that in such cases the employer should seek out and communicate with representatives of the strikers.<sup>149</sup>

The requirement that the employer should discuss its proposed course of action with a union official is intended as a safeguard against rash action by the employer. The union is given the opportunity to attempt to persuade the employer

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<sup>146</sup> (2003) 5 BLLR 409 (CC).

<sup>147</sup> Le Roux 'The Volkswagen strike dismissals: a final footnote', Contemporary Labour Law, vol 12 No 11 June 2003.

<sup>148</sup> Code of Good Practice: Dismissal in Schedule 8 item 6(2).

<sup>149</sup> J Grogan (note 141 above) 297.



to delay the next stage, being the issuing of an ultimatum, while attempts are made to persuade the strikers to resume work.

However, unions cannot abuse their right to be consulted merely to protract the strike. Where it is plain that the union is making no attempt to persuade the strikers to resume work, the employer may issue an ultimatum. Where a union claims that a dismissal was premature because it was still trying to persuade the strikers to resume work the test is whether, on the probabilities, the union could have succeeded in ending the strike in a reasonable time.

Whether consultation with the union as envisaged by the item 6(2) of the Code will constitute sufficient compliance with the *audi* principle depends on the contents of the discussions between the union and the employer, as well as on the unsettled question as to whether strikers must be given a hearing before or after an ultimatum is issued.

The union may take the view that the strike is protected. In such a case the employer must make a reasonable attempt to persuade the union that it is not. In *Modise & others v Steve's Spar Blackheath*<sup>150</sup> the court was of the view that a mere notice to the union that the employer intends issuing an ultimatum is insufficient to meet the *audi* requirement. Acting Judge President Zondo concluded that:

*[99]The respondent was under an obligation to observe the audi rule before it could dismiss the appellants. It did not comply with this obligation. The need for the respondents to hear the appellants was arguably even stronger in this case because this was a case where, to the knowledge of the respondent, certain steps had been taken by the union which were obviously aimed at making the strike a legal strike. The respondent should have realised that, because such attempts has been made, the strikers could well have been under the impression that the strike was legal and, that, for that reason, they might have believed that they were entitled to go on strike and even to ignore any calls by*

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<sup>150</sup> (2000) 21 ILJ 519 (LAC).

*the respondent that they return to work. Although the appellant's strike was illegal, they should not, in my judgment, be treated in the same way as strikers who simply flouted the Act and made no attempts whatsoever to comply with it. They deserve some sympathy. Workers must be encouraged to comply with the law. To treat them as if they fall within the same category as strikers who go on strike without any attempt at all to make their strike legal would not be right. It would not encourage unions and workers to make whatever attempts they can to ensure that their strikes are legal.*<sup>151</sup>

The majority (Zondo AJP and Mogoeng JA) stated that they considered the approach which endorsed the audi principle in the strike context to be preferable to the view adopted by the minority (Conradie J), because the former approach rendered the law in this respect certain, was consistent with the principle that people of equality before the law and acknowledged the principle that people are entitled to be heard before prejudicial action is taken against them.

Judge Conradie (dissenting) was of the view that a 'fair procedure' will almost always involve listening to the employee's side of the argument; but that is not to say that involvement and discussion with the union should, in a continuing strike situation, be supplemented by another and discreet hearing of some kind or other.

### **(bb) Fair Ultimatum**

The second procedural requirement mentioned by the Code is that the employer must give the strikers an ultimatum before dismissing them.<sup>152</sup> An ultimatum is in fact nothing more than a warning that the employer intends to dismiss the strikers if they do not return to work within a specified time. The description of such a warning as an 'ultimatum' tends to suggest incorrectly, that all avenues of negotiation have come to an end, and that the next step is to unleash the

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<sup>151</sup> (2000) 21 ILJ 519 (LAC).

'ultimate weapon' of dismissal if the workers do not comply. Like any ultimatum, a pre-dismissal warning to strikers is intended to give them a last chance to consider whether to comply with the employer's demand that they resume to work. The requirement that an ultimatum be issued before strikers are dismissed is also aimed at ensuring that the employer does not act in anger and haste.

It has been held that the determination of the fairness of a strike dismissal entails two inquiries. The first is aimed at establishing whether the ultimatum was fair; the second at establishing whether the dismissals pursuant to the ultimatum were fair.<sup>153</sup> These, it is submitted are different questions. When assessing the fairness of an ultimatum, factors to be considered are the developments that led to the decision to issue the ultimatum, the terms of the ultimatum and the time allowed for compliance. Factors relevant to the second inquiry include the reaction of the strikers, their reaction to comply with the ultimatum, the reasons for their non-compliance and the developments that may have taken place between the time of the ultimatum was issued and the time of the dismissals.<sup>154</sup>

Once an employer has issued an ultimatum, it is normally assumed to have waived the right to dismiss employees until the ultimatum expires. If an employer waives the right to dismiss on the strength of an ultimatum, it may be required to issue a fresh ultimatum. However the obligation depends on the facts of each case.

In *NUMSA & others v Volkswagen of SA (Pty) Ltd*<sup>155</sup> the Company issued an ultimatum requiring strikers to resume work by a particular time, and to sign an undertaking that they would work according to their contracts of employment after they did so. Of the thousands of workers who responded to this ultimatum, 46 declined to sign the undertaking. They were dismissed that night. However,

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<sup>152</sup> Code of Good Practice: Dismissal in Schedule 8 item 6(2).

<sup>153</sup> *National Union of Metalworkers of SA v GM Vincent Metal Sections (Pty) Ltd* (1999) 20 ILJ 2003 (SCA).

<sup>154</sup> J Grogan (note 141 above) 299.

before the decision to dismiss the 46 was taken, the Company agreed to the union's request to extend the ultimatum. Workers who had not reported for duty at all by the first deadline were allowed back to work. However, the workers who had declined to sign the undertaking were not. The arbitrator was of the view that the effect of an extension of an ultimatum is normally that the employer is precluded from taking disciplinary action against employees who fail to comply with the original deadline. By setting a second deadline, the employer is effectively saying to those who have failed to comply with the first: 'I am giving you one more chance'. Those employees who decide to avail themselves of the second chance are immunised against disciplinary action for failing to have availed themselves of the first chance. This immunity was extended to those workers who failed to report for duty on 31 January but who decided to report on 1, 2 or 3 February. However, 46 employees who were present at the factory on 31 January but who declined to sign the undertaking were deprived of that immunity.<sup>156</sup>

The courts are of the view that the doctrine of estoppel by waiver does not prevent an employer from reserving for itself the right to dismiss workers for misconduct after they have returned to work. However, if the employer does not take action against such workers reasonably promptly, they may be held to have waived their right to do so. In order to ensure that workers guilty of misconduct do not shelter behind their compliance with an ultimatum, employers frequently expressly reserve for themselves the right to take disciplinary action against wrongdoers in the ultimatum itself. When doing so, the employer should avoid the impression that it intends dismissing all or some of the strikers, come what may.<sup>157</sup>

***(cc) Requirements other than those set out in the Code***

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<sup>155</sup> (2002) 23 ILJ 792 (ARB).

<sup>156</sup> Ibid 50

<sup>157</sup> *Doorenfontein Gold Mining Co Ltd v National Union of Mineworkers & others* (1994) 15 ILJ 527 (LAC),

**Pre-dismissal hearings:** The code requires that, as a rule, an employer should grant employees a hearing prior to dismissal for misconduct. It does not specify whether this rule applies to employees facing dismissal for participating in an unprotected strike.<sup>158</sup> Under the previous Act the courts took the view that it did not, provided the employer has issued an ultimatum. The rationale was that a hearing would usually serve no purpose, as participation in the strike was not disputed and the employee's attitude was made clear by their failure to heed the ultimatum.

Initially, the Labour Court followed the approach of the courts under the 1956 LRA. The generally accepted view was adopted by the court in *NUMSA & others v Malcomess Toyota, a division of Malbak Consumer Products (Pty) Ltd*<sup>159</sup> in which the union argued that the company's failure to grant the employees hearings rendered the dismissal procedurally unfair.

The argument was, in essence, that since the LRA expressly states that participation in an unprotected strike constitutes misconduct, unprotected strikers must be treated in accordance with the guidelines relating to discipline for misconduct.<sup>160</sup>

Some exceptions were admitted by courts that followed this approach. It was accepted that fairness might demand an inquiry when some employees pleaded that they did not willingly take part in the strike, or were not in fact striking because they may have been ill or on leave at that time. An enquiry is also necessary if employees are charged with misconduct committed during the strike.<sup>161</sup>

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<sup>158</sup> Du Toit (note 27 above) 446.

<sup>159</sup> (1999) 20 ILJ 1876 (LC) 119-123.

<sup>160</sup> Grogan (Note 141 above) 306.

<sup>161</sup> Ibid 307.

The view generally adopted by the Labour Courts that unprotected strikers were generally not entitled to hearings was at variance with a line of cases decided by the Civil Courts in which it was held that, according to administrative law principles, public sector employees are entitled to make representations before being dismissed for striking.<sup>162</sup>

The Labour Court revisited this issue in *Modise & others v Steve's Spar Blackheath*<sup>163</sup> where the majority noted that the *audi* principle had been imported into labour law from administrative law, and had been generally held to apply in all kinds of dismissals, including those effected for participation in strikes and other forms of mass stay-away. The *audi* rule was based on the principle that people are entitled to hearings before adverse decisions are taken which affect their rights, liberties or legitimate expectations. A decision to dismiss an employee has adverse consequences, whatever the reason for that decision. There was no reason, therefore, why it should not apply in the case of dismissals for participation in strikes, whether legal or illegal, and irrespective of whether the strikers have been given an ultimatum.

According to the majority judgment in *Steve's Spar*, the only basis for excusing an employer's failure to give strikers a hearing before dismissing them is express or implied waiver by the strikers of their right to be heard. However, said the court, waiver cannot be deduced from the mere fact that the workers were on strike and had failed to comply with an ultimatum. The majority also rejected the argument that to give workers a hearing after an ultimatum had been issued would be an exercise in futility. A hearing and an ultimatum served different purposes, and occurred at different times in the dispute. The purpose of an ultimatum is not to elicit information or explanations from the workers to whom it

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<sup>162</sup> Grogan 'Strike Dismissals in the Public Sector' (1991) 12 ILJ 1.

<sup>163</sup> (2000) 21 ILJ 519 (LAC).

is addressed; an ultimatum is intended to give strikers the time to reflect on their actions. A hearing is intended to give workers an opportunity to explain why they did not heed the ultimatum, or why they should not be dismissed. An ultimatum was accordingly not an adequate substitute for a hearing.

The majority did not commit itself to stipulating the form a hearing in the strike context should take place. According to their judgment, this depends on the circumstances of each case.<sup>164</sup> Although the majority in *Steve's Spar* did not express a view on whether a hearing should be accorded to strikers before or after an ultimatum is issued, it preferred the idea that it should be held before, as the employer would at that stage be more amenable to persuasion.<sup>165</sup>

That this is all the Labour Court requires is apparent from the judgment in the *Volkswagen* case where the CCMA commissioner held, following *Steve's Spar*, that the dismissal was unfair because the strikers had not been given a hearing. However, when the case finally arrived before it, the Labour Appeal Court held that, apart from making several attempts to communicate with representatives of the dissident workers, Volkswagen had also complied with the audi rule by reaching agreement with the union that an ultimatum should be issued.

Although the circumstances in the *Volkswagen* case were unusual, the strike was against the employees' union, rather than against their employer, the hypothetical questions posed by the court to illustrate its point tend to support the reservations expressed by Conradie JA in his minority dissenting judgment in *Steve's Spar* concerning the requirement that the employers must hold hearings before dismissing strikers. Conradie JA rejected the idea that a hearing should be granted either before or after an ultimatum. A hearing before the ultimatum would merely enable the determined strikers to argue that they should be able to continue their misconduct. A hearing after the ultimatum would deprive the

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<sup>164</sup> Ibid 551H-552A.

<sup>165</sup> Ibid 544E-G

ultimatum of all force because it would be subject to the resolute condition that 'if you do not comply, and management finds you had good reason for continuing with your misconduct, nothing will happen to you'. According to the minority judgment, a disciplinary inquiry is unnecessary in these circumstances simply because a striker who has not complied with an ultimatum is not entitled to advance individually motivated reasons to escape dismissal. If, said Conradie JA, strikers were permitted to do this, and the employer were required to consider such representations, the door would be opened to selective dismissal. It would also be unfair to the union, because it would be required to argue that certain individuals should be dismissed, and others not. As for those who plead they were unwilling participants in the strike, Conradie JA wrote:<sup>166</sup>

*there would in every strike, legal or illegal, almost certainly be reluctant participants; for example, those who voted against the strike but who participate because they bow to the will of the majority. It would be grossly unfair to require an employer to hold an inquiry into each striker's enthusiasm for the cause before being able to issue an ultimatum against those, and only those, found to be in favour of the strike...The absurd result would be that the "willing" strikers would be dismissed, but those who make allegation of intimidation which the employer is unable to disprove may remain on strike unhindered*

The fact remains however that some employees may well have been so intimidated that they were unable to comply with an ultimatum in spite of their best intention to do so. That situation rose in the aftermath of the *Volkswagen* strike, in which a number of employees raised this defence in private arbitration proceedings held simultaneously with the statutory litigation.<sup>167</sup> The union also claimed on behalf of these individuals that the company had acted unfairly by not granting them hearings before dismissing them for not complying with the ultimatum. The arbitrator dealt with this as follows:

*In the absence of clear authority to the contrary, I am prepared to accept, at most, that an employer which has fairly dismissed a mass of workers for engaging in an illegal strike is required, where fairness so demands, to entertain representations from workers who claim within a reasonable period of their dismissal that they had justifiable reasons for not*

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<sup>166</sup> Ibid 5701I-571A

<sup>167</sup> NUMSA v Volkswagen of SA (Pty) Ltd & Others (2002) 2 BALR 119 (P)



*complying with the ultimatum on the basis that their dismissals will be 'reversed' if the reasons advanced by the employees are accepted.*<sup>168</sup>

The arbitrator also held that a plea of personal reasons for strikers' inability to comply with an ultimatum is akin to a 'special defence', which places the onus on the employees to prove their claim.<sup>169</sup>

Steve's *spar* was decided under the 1956 LRA. In *Karras t/a Floraline v SA Scooter & Transport Allied Workers Union & others*<sup>170</sup> the Labour Appeal Court held in another divided judgment that the requirement of a pre-dismissal hearing for strikers applied with greater force under the current LRA. The majority pointed out, however, that the requirements of item 6(2) of the Code expressed the legislature's view on the form of hearing required.<sup>171</sup> That being so, it must be assumed that the hearing may be conducted on a collective basis.

It is submitted these judgments give little guidance on what they must do to comply with the *audi* rule before dismissing strikers. It would seem, however, that the following steps suffice:<sup>172</sup>

- i) Before issuing the ultimatum, the employer should notify the employees or their union that it intends to do so, and invite representations as to why they should not be done.
- ii) The employer should entertain any representations that are received and, if they are not acceptable, notify the employees of their union that it intends issuing the ultimatum.
- iii) When the ultimatum is issued, the employees should be given a reasonable period to consider their response.

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<sup>168</sup> (2002) 2 BALR 119 (P) para101.

<sup>169</sup> *Ibid* 74.

<sup>170</sup> (2001) 21 ILJ 2612 (LAC).

<sup>171</sup> *Ibid* 26-8.

<sup>172</sup> Grogan (note 141 above) 310

- iv) Any worker who complies with the ultimatum may not be dismissed for participating in the strike.
- v) Those who do not comply with the ultimatum may be dismissed.
- vi) After the dismissal, the employer should consider representations from individuals regarding why the dismissals should be reversed.

**(d) Lock-outs**

Pressure tactics are not only confined to employees and their unions. Employers may also use a variety of tactics in order to compel their employees into meeting their demands or into complying with specific behaviours. Some actions may involve direct coercion such as obtaining of court interdicts against illegal strikes. Plant relocation or closure, technological redundancy or outright dismissal in response to unprocedural stoppages are often threatened in order to obtain compliance from the workforce.

An employer's right to lock-out is not enshrined in the Constitution. The Constitutional Court has ruled that the right of every employer and employers' organisation to engage in collective bargaining includes the employer's right to exercise economic power, which may include a lock-out.<sup>173</sup> Section 64(1) of the Act gives every employer 'recourse' to lock-out if it complies with the statutory requirements of Chapter IV. The court noted that the exclusion of the right to lock-out from the Constitution did not mean that its inclusion in the LRA was unconstitutional. Lock-outs are infrequently resorted to by employers.

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<sup>173</sup> Ex Parte Chairman of the Constitutional Assembly; In re certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) 794-7.

It is submitted that when the LRA was promulgated, strike action had been on the decline since its peak in 1987. It is probable that the Act has contributed to the decline in strike action but difficult to assess what exactly what its impact has been. No area of industrial relations is more influenced by economic and political developments than strike action and much of the reason for the decline in strikes probably lies in the transition to democracy rather than in legislation.<sup>174</sup>

## **CHAPTER 4**

### ***Purpose and applicability of Toyota SA's Governance Rules***

Every workplace is unique and the legal framework cannot on its own provide for all the challenges and potential disputes in a dynamic working environment. Effective written procedures facilitate the management of sound industrial relations and should be established and maintained irrespective of whether or not there is any union presence at the enterprise. Procedures should exist as documents in their own right and should not be dependent upon, or part of, any recognition agreement. Procedures enhance the legitimacy of management's right to manage. Thus decisions which might otherwise be experienced as partial or arbitrary can be tested against existing standards laid down in writing. The nature and severity of work stoppages, and very importantly the residual damage to relationships and productivity can be substantially mitigated by sound managerial pre-planning as to proposed responses to such events carried out well before the heat of the action. Ideally, damage needs to be minimised and a return to normal working conditions achieved with the least possible delay.

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<sup>174</sup> Du Toit (note 27 above) 45.

While discipline, grievance and retrenchment procedures were the staple contents of traditional recognition/procedural agreements, the shift to world-class manufacturing has led to new agreements being forged at workplaces to accommodate the need for flexible manufacturing and work reorganisation.<sup>175</sup>

It is submitted that many employers make the mistake of believing that the appropriate remedy for work stoppage or illegal strike action is always to seek immediate legal relief. Too often, however, that will leave employees with the perception that it is only the law that has saved the day for the employer. The risk or danger is that employees will not develop an adequate, realistic and appropriate sense, or appraisal, of an employer's power in the employment relationship. Each set of facts has to be considered on its own merits having regard to production exigencies and competitive consequences before determining what tactics and course of action offer the most appropriate and effective response in any particular situation.

This chapter explores the history surrounding the signing of the Toyota SA Motors (Pty) Ltd<sup>176</sup> Governance Rules and its commitment to a relationship based on constructive engagement and joint problem solving. No document can cover

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<sup>175</sup>South African Chamber of Business (SACOB): 'Labour Market Flexibility – what does it mean?' - The South African Government has been more inclined to search for a compromise route in which labour market flexibility is tempered with measures to give workers certain guaranteed protections. The approach adopted by Government in its macro-economic policy GEAR is known as "regulated flexibility" and is well reflected, for instance, in the new Basic Conditions of Employment Act. This Act lays down basic conditions of employment but allows variation to take place provided the prescribed pre-conditions are met.

<http://www.sacob.co.za/Labour/Flexibility.htm>

<sup>176</sup> Toyota South Africa Manufacturing Division (TSM) has been re-organised into the Manufacturing Operations Division and the Commercialised Products Division. The Manufacturing Operations Division comprises the Component Manufacturing, Engine Manufacturing and Assembly Plants as well as the Soft Trim for seats & door panels, the Body Shops, the Paint shops, the Assembly Hall, and the Vehicle Finalising section. The Commercialised Products Division is comprised of the Research and Development Department, the Procurement Department, the Export Department as well as Toyota Die Manufacturing.

every contingency, The Governance Rules is a living document and the purpose is to provide certainty, clarity and to manage future conflict in the Company. However, it is submitted that having governance rules does not guarantee that they are understood by all levels of employees as explored in the Toyota case studies below.

It is therefore incumbent upon those responsible for the conduct of employment relationships to understand and accept that some measure of industrial conflict is unavoidable and perhaps even desirable.

Policies should therefore be devised to anticipate the possibility of such conflict and to avoid it wherever possible – but as a last resort and above all, to manage industrial conflict more successfully than it has been managed in the past.

### ***Assessment of cases***

The work stoppages throughout the past 12 years resulting in man-hours lost reflect a high for the years 1992, 1994, 1996 and 1999. As a result of concerted effort man-hours lost fell from 225 900 man-hours in 2000, to 2337 man-hours in 2002.<sup>177</sup> This improvement runs into thousands and Toyota's target in this regard remains 0%.

This section suggests, by way of case study, the way in which an unprotected strike or work stoppage might be handled by an organisation.

1999 saw the highest man-hours lost due to work stoppages. On 2 March 1999, Toyota obtained a court order in the Labour Court before Judge Landman interdicting the respondents from pursuing any industrial action in support of a demand that a profit-linked incentive be paid to them. The facts are as follows:<sup>178</sup> On or about 16 February 1998, an agreement was entered into between the Toyota and the First Respondents setting out a profit-linked incentive bonus

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<sup>177</sup> Annexure 1: IR Downtime – man-hours lost – TSAM Durban (1991-2003).

<sup>178</sup> Toyota SA & Another v NUMSA & others (LC) D198/99.

scheme. In accordance with this agreement, the Toyota's Board would determine the profit target. In this instance, profit is calculated after interest and tax is paid and final profit is in terms of Toyota's audited and published annual results. It was specifically agreed that the incentives will be paid proportionately in accordance with a sliding scale from 60% of the profit target to 140% of the profit target. Any achievement less than 60% of the profit target would result in no incentive bonus being paid. A maximum incentive bonus is payable of 140% of the profit target irrespective of the target reached and further, any dispute in respect of the interpretation or application of the profit-linked Incentive Bonus Scheme Agreement must be referred to expedited arbitration.

There was an overall deterioration of demand for motor vehicles during 1988 and this negative trend was continued into 1999. Toyota, as a result, was obviously affected by this. This was compounded by the deteriorating exchange rate, high interest rates, the Asian market crises, poor local trading conditions and unprotected industrial action, all had a negative effect on Toyota's profitability. By early 1999, it became increasingly apparent that Toyota was not going to achieve its profit target for the 1998 financial year. This fact was communicated to the shop stewards at the central negotiating committee meeting. It later became apparent that it was unlikely that Toyota would be able to achieve 60% of the profit target. As a result, any payment of a profit share incentive bonus in terms of the agreement, was unlikely. This was further communicated to the shop stewards.

On 23 February 1999, Toyota's executive chairman addressed a memorandum to the respondent's shop stewards confirming that the Toyota's 1998 profit performance were well short of the profit target necessary for an incentive bonus payment and that no payment would be made. On 25 February 1999, The Group HR Director, the Financial Director and the Assistant General Manager HR, met with the respondents shop stewards to confirm that no payment would be made

in terms of the profit-linked incentive bonus. The respondents did not respond to the information given to them.

On 25 February 1999, the shop stewards contacted the Financial Director and requested an urgent meeting to discuss the financial information surrounding Toyota's failure to pay the profit-linked incentive bonus. Prior to the meeting taking place, a mass meeting was convened during the employees lunch break and the employees failed to resume normal work thereafter and embarked upon an unprotected strike.

Thereafter the shop stewards met with Group HR Director and the Financial Director and requested specific financial information regarding Toyota's financial performance during the 1998 financial year. Toyota advised that it was unable to furnish this information at this stage as a Board meeting yet to be convened to ratify and sign the audited accounts. The other reason submitted by Toyota was that as it was listed on the stock exchange it had to submit the audit reports to the JSE *first* and then publish the results. However, the shop stewards were advised that it would, in all probabilities, be able to furnish the information requested by no later than Wednesday 3 March 1999. Notwithstanding this undertaking given by the Toyota, the employees continued with their unprotected strike.

On 26 February 1999, The Group HR Director transmitted a facsimile to NUMSA pointing out that should there be a dispute regarding the profit-linked incentive bonus, the parties were obliged to refer to expedited arbitration as set out in the signed agreement. At a meeting held on Friday 26 February 1999 to address the unprotected strike action, the shop stewards confirmed that the unprotected strike was prompted by the failure to pay the profit-linked incentive. The shop stewards were told that Toyota was not in a position to hand over the financial information requested on that day but that it would make it available after the Board meeting. This did not resolve the matter and Toyota confirmed that it would have no option but to shut its plant.

The Board meeting to ratify and sign the audited accounts was convened for 4 March 1999 and same was communicated to the shop stewards who then advised management that the plant would normalize by Monday 1 March 1999. On Monday 1 March 1999, the plant did not normalize and a further meeting was held with the shop stewards confirming that the financial information requested would be available on 4 March 1999. However, at this point the shop stewards were unable to indicate when their members would return to work.

Toyota then consulted with their attorneys on 1 March 1999 with the intention to approach the Labour Court for urgent relief within the 48 hour period contemplated by section 68(2)(a) of the Act and this was communicated to the shop stewards.

*In granting of the urgent relief sought by Toyota the court took the following factors into account:*

Toyota had a prima facie right to approach the court. It was submitted to the court that the employees had failed to comply with the provisions of the LRA in that they failed to refer the dispute to the Commission in terms of s64(1)(a)(i). Further, no notice of the commencement of the strike was given to Toyota and the employees were also in breach of s65(1)(a) in that they failed to refer the dispute to expedited arbitration required by the profit-linked Incentive Bonus Scheme Agreement signed on 16 February 1998.

Further, that there is irreparable harm or a well grounded apprehension of irreparable harm if the relief is not granted. Toyota's production process had ceased since Thursday 25 February 1999. It was submitted to the court that due to the increasing globalization of the world economy and the removal of import duties, prospective purchasers of Toyota's product have a virtually unlimited access to other vehicles comparable to those manufactured by Toyota. This leads to a far less captive market and accordingly a much more competitive



environment in which trading takes place. If Toyota is unable to supply prospective purchasers in an already competitive market, those purchasers will source products from Toyota's competitors. Every day the unprotected strike was in progress actual damage was caused.

The balance of convenience clearly lies with Toyota as it is entitled to have its business protected and have its employees work normally. The employees on the other hand had no right to act contrary to the provisions of their contracts of employment and s64 of the Act.

The urgency of the application was that Toyota only builds vehicles once it receives orders for vehicles. Accordingly, the order to delivery time is of critical importance and Toyota would not have been in a position to fulfill these orders already obtained by it if the unprotected strike continued. At this stage in the process, the Toyota was already approximately 1 200 units behind in its scheduled build for 1999. This had been caused by a number of unprocedural stoppages on its production line. The Company at that time produced 314 units per day and as the unprotected strike continues, so vehicles are unable to be built and the backlog merely increases. A number of Companies supplying components to Toyota were already contemplating short time for their employees and the impact of this on the greater community was extreme.

Toyota had no adequate or apparent alternative remedies as all efforts in the past to man the lines with contract workers had resulted in intimidation to the extent that contract workers had left their work stations. In any event, it was submitted that contract workers did not possess the required skills and training and it was difficult to procure labour with the required skill and training to supplement the Applicants entire workforce which numbered in the region of 3 000 employees. Finally, that all attempts to persuade the employees to return to work had failed.

The order was obtained in the Labour Court on 2 March 1999 declaring that:

- i) The conduct of the employees by not working normally since 12h30 on Thursday 25 February 1999, constituted an unprotected strike.
- ii) Interdicting and restraining the employees from continuing with and participating in any conduct constituting a strike as defined in s213 of the Act, unless and until the provisions of s64 of the Act have been satisfied.
  - iii) Interdicting and restraining the employees from pursuing any industrial action in support of a demand that a profit –linked incentive be paid to the employees in terms of the agreement signed on 16 February 1998.
- iv) Interdicting and restraining the employees from being upon Toyota's premises save to work normally in compliance with the individual contracts of employment or for any other legitimate reason.

The above order was complied with and the employees returned to work with immediate effect. The granting of the order ensured that the Toyota would no longer be prejudiced.

It is therefore submitted that the Company is entitled to have its business protected and have its employees work normally.

***Settlement Agreement signed between NUMSA and Toyota SA on 7 December 2000***

As a result of unprocedural industrial action Toyota SA Manufacturing Division (TSM) had to be closed on 09-10 November 2000. Toyota SA Automotive components (TAC) employees were only paid for 3½ hours (whilst awaiting the TSM plant closure decision). The employees at TAC demanded to be paid for a further 4½ hours and the parties agreed to refer the matter for arbitration. At the arbitration held on 24 November and 1 December 2000 the parties agreed in a

final settlement of this matter. On 7 December 2000 a Settlement Agreement was signed between Toyota and NUMSA<sup>179</sup> to the effect that:

- i) The Governance Rules in respect of plant closure as a result of an unprocedural work stoppage might not have been fully appreciated.
- ii) In the spirit of compromise the Company shall pay the affected employees at TAC 4½ hours. This is premised on the representation by NUMSA that none of its members at any of the plants similarly affected by the plant closure, would lodge any similar dispute arising from this agreement in respect of past closures. Management also undertakes not to act in a way that will provoke employees regarding issues related to the past plant closures.
- iii) Management and the union acknowledge that unprocedural industrial action is detrimental to the employer/employee relationship and denounce such action in the strongest possible terms.
- iv) In so far as reasonably possible NUMSA pledges not to engage in unprocedural industrial action and to discourage such action taken or to be taken by its members.
- v) Management shall also take precautionary measures to ensure that managers do not indulge in conduct that could provoke conflict. Management also undertakes not to embark on unprovoked unprocedural lock-outs.
- vi) Both parties are committed to a relationship based on constructive engagement and joint problem solving.
- vii) The current Toyota Governance document relating to payment during work stoppages will be jointly signed and approved by NUMSA and management, as part of this agreement.

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<sup>179</sup> Annexure 2 Raja Naidoo 'Governance Rules: Payment during unplanned plant / Division closures due to unprocedural industrial action, short time and excessive absenteeism'.

- viii) The parties endorse the principle of 'no work no pay' and this settlement should not be construed as infringing this principle.

The question that arises is why did Toyota compromise? It is submitted that the settlement agreement reached were the terms agreed for ending the dispute in order to restore the conditions prevailing the pre-dispute and to further amend the pre-existing agreements or understandings on terms acceptable to both Toyota and the employees. Depending on the relative bargaining power of the parties, the settlement may allow one side to insist on some variation, thereby signifying the achievement of its original strategic objectives at the expense of the other side.<sup>180</sup> It is therefore submitted that compromising to pay the affected employees at TAC 4 ½ hours, was Toyota's attempt to get 'buy in' on the Governance document which endorsed the principle of 'no work no pay'. The only other document governing unprocedural industrial action was industry relate (NBF). In order to get an agreement signed that would bind NUMSA and its members, there had to be a trade-off or a compromise.

NUMSA's 'attack' and Toyota's 'counter-attack' culminated in a decisive move for some form of compromise of the dispute. In such a compromise, neither side secures *all* of its objectives but each side achieves *sufficient* gains to permit the final outcome to be seen as 'an honourable peace'. It is submitted that whilst industrial conflict is inevitable it is by no means irreconcilable.

#### ***Settlement Agreement between Toyota and NUMSA signed on 4 May 2001***

As a result of a work stoppage on 18 April 2001 between 07h00 – 08h00 due to the perceived shortage of staff, additional staff were provided and work resumed at 08h00.

At 16h30 management issued counseling letters to the employees involved in the work stoppage. The union disputed the procedure followed in issuing the

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<sup>180</sup>M Sander *Managing Industrial Conflict: 7 Major Disputes* (1988) 17.

counseling letter. To resolve this dispute and clarify the procedure for the future, A Settlement Agreement was signed between Toyota and NUMSA<sup>181</sup> on 7 December 2000 to the effect that:

The counseling letters issued to employees who have participated in the work stoppage of 18 April 2001 shall remain in their files for a period of three months. After three months, the said counseling letters shall be removed and destroyed. That it is the prerogative of management to enforce discipline, including the issuing of counseling letters. All future counseling letters will remain in the employee's file for twelve months as specified in the Company disciplinary procedure.

At the moment of settlement, one side may appear to be the outright winner. However from the standpoint of history and the benefits of hindsight, events may take on an altogether different perspective.<sup>182</sup> It is submitted that the strategic objective of Toyota in reaching this settlement was that it provided an opportunity to assert or to reaffirm the applicable rules or principles governing the relationship between Toyota and NUMSA.<sup>183</sup>

As stated above man-hours fell dramatically from the year 2000 to date. However what remains is for Toyota to improve on this result without compromising any of the hard fought principles put into place.<sup>184</sup> The Toyota strike pattern is typically one of a large number of short disputes in various divisions.

In June 2002 Toyota and NUMSA concluded a procedural agreement governing, among other things, the collective bargaining relationship between the parties. A clause in the procedural agreement (clause 17.2), refers to agreement that neither party may resort to industrial action until the procedures laid down in the procedural agreement have been exhausted and that the parties must follow the

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<sup>181</sup> Annexure 3 *Raja Naidoo Governance Rules: Applicable disciplinary procedure to be followed in dealing with employees involved in an unprocedural work stoppage*

<sup>182</sup> Sander (note 108 above) 21

<sup>183</sup> Annexure 3 (note 181 above)

<sup>184</sup> Governance on unprocedural work stoppages: 'no work no pay' and disciplinary action.

requirements of the Act or the procedural agreement before embarking on industrial action.

On 24 April 2003, Toyota employees at TAC engaged in an unprotected in breach of these provisions. The background to the strike was as follows:

Toyota SA secured significant export orders to supply new motor vehicles to international customers. Participation in this export programme is dependent upon the manufacturer being a stable supplier. Toyota accordingly negotiated and agreed an incentive scheme with NUMSA, in terms of which production uninterrupted by work stoppages would be rewarded. The incentive scheme is part of the “Masibambane Pact” which includes a reward system for stable production, quality and market share.

The terms of the incentive scheme were agreed and signed on 22 April 2003, and therefore, as the documentation reflects, the stable production leg of the bonus would only be eligible for payment at the end of June 2003, should there have been stable production during the calendar quarter April 2003 to June 2003. There is no provision in the signed Pact for bonuses to be paid for the period January to March 2003. The Pact, as signed by Toyota and NUMSA National Office, is very clear on this matter. NUMSA by means of their shop stewards did request Toyota SA’s HR Director to consider paying employees the R1000 for the first quarter although the Pact had not at that point in time been in place. The HR Director during the negotiation meetings frequently advised that no payment would be made for the first quarter.

The unprocedural stoppage at TAC had now effectively also eradicated the payment for the next quarter (April and June).

After finalization and signature of the Pact, details were discussed between management and shop stewards at a Durban MIRC meeting and the shop stewards requested to take the message to the workforce and half an hour should be used before the start of each shift on 24 April 2003. TAC was the only

plant throughout Toyota SA Motors that embarked on an unprocedural work stoppage as a result of the implementation of the Pact. This indicates to management that the communication to the majority of the workforce in Durban and Johannesburg was properly done.

During lunchtime on 24 April 2003, NUMSA held a meeting with its members on Toyota premises. The purpose of this meeting was to advise the employees of the agreed terms of the incentive scheme. None of the employees employed by the Company, returned to work after the lunchtime meeting with NUMSA. Management immediately met with the shop stewards wherein management was advised that the employees would not return to work and would continue withholding their labour until the incentive scheme was backdated to January 2003. The shop stewards were advised that the employees were engaged in an unprocedural strike and the union was requested to facilitate the employee's return to work. The employees continued to withhold their labour on 25 April 2003 and gathered at the premises of the Company's third plant, TAC 3 from 07h00 on 25 April 2003.

A first notice was issued to all employees advising that they were engaged in unprotected strike action and requested that they return to work. The employees continued withholding their labour and a second notice was issued to the employees later on 25 April 2003. At 14h15 on 25 April 2003 management met with NUMSA's regional organizer and the shop stewards and NUMSA did not deny that the employees were engaged in an unprotected strike. Management reiterated that it would not accede to the demand that the incentive scheme be backdated and NUMSA indicated that the employees had agreed to return to work immediately following a feedback meeting to be held with the shop stewards. Management also stressed that there should be no misconception by either the employees, NUMSA officials or shop stewards that management was very serious about normalizing production at TAC in order to safeguard the continued viability of the Company export programme and therefore will consider

issuing an ultimatum to the employees advising them to normalize production by 5 May 2003, failing which their continued employment at Toyota would be in jeopardy.

As there was a shutdown already scheduled for the period from 26 April 2003 up to and including 4 May 2003, it was agreed that the shop stewards would address the employees on 5 May 2003 when production was to resume. The shop stewards met at 08h00 on 5 May 2003 and the employees continued to withhold their labour and refused to tender their services.

A Manufacturing Industrial Relations Committee (MIRC) meeting was convened at approximately 10h00 on 5 May 2003 and the Senior Vice President advised that the main manufacturing plant would not be able to continue with production unless the employees returned to work immediately. The senior shop steward representing the employees indicated that the employees had undertaken to return to work by 11h00 on 5 May 2003. A further notice was issued on 5 May 2003 calling all employees to return to work immediately.

However, just more than half the employees returned to work on 5 May 2003. The Company's production line must be manned by at least 85% of the employees, failing which it cannot operate and in light of the employees unlawful conduct, the applicant was unable to resume production.

The production demands on the company are dictated by the requirements of the main plant, TSM, which operates on the 'Khanban system'. This system requires the input components to be delivered "just in time" to be incorporated in the production line and does not allow for the wasted costs associated with stock piling of input components. As a result of this system, any significant lost production time means that the components required for production at TSM must come to a stop until the components are again produced by the Company.

Toyota had lost crucial production time as a result of such unlawful conduct and the loss in production is irrecoverable as the Company already operates on a two shift system, working both day and night in the normal course of production. No



production had taken place since 12h30 on 24 April 2003 and as a result of the shortage in components, TSM shut down at 12h30 on 5 May 2003. TSM would only be able to resume production when the employees return to work and normal operations are resumed.

Losses to the value of approximately R2,823,224.00 had already been incurred as a result of the unprotected strike. It was further estimated that the losses incurred for each additional day that TSM are unable to operate would be R43,000,000.00 for lost income and R5,603,448.00 for operating costs.

At approximately 14h00 on 5 May 2003, the Company consulted with instructed its attorneys to prepare papers to bring an urgent application to the Labour Court to interdict the unprotected strike. The said application was to be made to the Labour Court on 6 May 2003.

However, the employees finally returned to work the Company was able to resume full production from the night shift on 5 May 2003. The issue of disciplinary action in relation to the participation in the unprotected strike action from 24 April 2003 to 5 May 2003 then followed.

In trying to establish what triggered the dispute, one is unlikely to receive a simple or straightforward answer and therefore has to look for a range of issues underlying the dispute before the central issues can be identified. Was the 'Masibambane Pact' too sophisticated? or was it perceived as being unfair? The employees demanded that management pay the stable production leg of the Incentive Bonus Scheme for the first quarter of 2003 (January to March 2003). It is submitted that the root cause of the was poor communication of the Pact and Incentive scheme by the TAC shop stewards to the employees. There was no proper communication to the effect the the Pact was signed and agreed on 22 April 2003 and that the stable production leg of the bonus would only be payable at the end of June 2003, provided that there be stable production during the second quarter (April to June 2003). TAC was the only plant throughout Toyota

SA Motors that embarked on a unprocedural work stoppage as a result of the implementation of the Pact. Proper communication to the majority of the workforce was done.<sup>185</sup> Further, the effect of the work stoppage at TAC on 24 April 2003 eradicated the payment for the next quarter (April to June 2003) for the *entire* Toyota workforce.

It is further submitted that managements decision on 5 May 2003 to shut down the main manufacturing plant unless the employees returned to work immediately was a tactic adopted to overcome the resistance of the TAC employees and to influence them to return to work. This strategy was successful in that the employees returned to work from night shift on 5 May 2003.

The estimates released of both the known and projected losses suffered by Toyota as a consequence of this work stoppage should have resulted in an application for compensation from NUMSA.<sup>186</sup> The question arises whether this was a means of bringing direct pressure to bear on the strikers. It is submitted that in view of building or maintaining a sustainable relationship with NUMSA as one of the major stakeholders within Toyota, Toyota would not sue for damages as it could damage the relationship and lead to confrontation and production could easily be recouped with minimal cost to company.<sup>187</sup> It is further submitted that when strikes get to a certain size the value of the money that is lost by employers becomes incalculable. In the main, though, the amounts of money that employers lose through strikes are actually very small. Rarely has an employer gone bankrupt because of a strike. That is testimony to the fact that financial pressures that strikes actually bring about in the workplace are not half as serious as they are cracked up to be.<sup>188</sup>

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<sup>185</sup> Interview with E Killian: Former chairperson of NUMSA.

<sup>186</sup> Section 68(1)(b).

<sup>187</sup> Interview with E Killian: Former chairperson of NUMSA.

<sup>188</sup> cf J Copelyn 'Panel Discussion on Employer Responses to strikes' in Benjamin Jacobus & Albertyn (note 71 above) 107.

The lessons learned is that industrial conflict is inevitable. For however well designed and diligently applied, our policies and procedures can never eliminate such conflict. At best, they contain it within tolerable limits. It is easier to manage a dispute where the central issues are specific and well understood by all sides. Finally the outcomes of strike appear crucially dependent on realistic strategies and tactics by both sides.

As stated above the short duration of strikes is one of the most conspicuous characteristics of Toyota's industrial relations. One hour or two hour strikes are very common and the majority of strikes continue for one or two days at the most, so a strike which lasts for a week will be regarded as a very long strike. The short duration of these strikes is probably best understood if the actual function of the strike is understood and the existence of various other acts of disputes are considered. A strike is not the final weapon in collective bargaining. Often there are strikes before any bargaining even taken place and so quite naturally the unions may stop the strike and the members go back to work without the dispute having actually been settled.

It is submitted that if conflict is inevitable we need to understand more than its immediate underlying causes. We need to understand how employers and employees, management and unions come to define their policy objectives, how they seek to mobilize their resources and increase pressure on their bargaining partners, thereby helping to overcome resistance and so achieve their policy objectives in industrial conflict.

## ***Conclusion***

This study of the regulation of industrial conflict illustrates the challenges facing future labour relations. It is submitted that as long as there are workers and managers, as long as men and women are employed in hierarchically-structured organizations, as long as there are employment relations as we presently understand them, it seems that there will be conflict at work over matters of mutual interest, decision-making, management of the company and over the terms that govern employment relationships.

Given that industrial conflict is inevitable in employment relations, the question arises as to what more should be done, or done better or differently, to keep such conflict within reasonable bounds and to see that in future it is better managed by all concerned.

Industrial conflict comprises two essential demands on the part of the workers. The first being a fair deal at work in the form of a more equitable distribution of material rewards and better conditions of employment for work done or services rendered. Secondly a more genuine voice and one that will be heard in enterprise decision making. The employers demands are no less; requiring a greater commitment by the employees to organisational goals and a more open minded and flexible attitude and co-operative approach towards change in working methods and work organization.

While the late 1900s were characterized by intense conflict within the context of the apartheid state, now there is a new vision of co-operation and consensus based on tripartite labour relations between the state, employers and unions for South Africa. The phenomenon of strike action plays a pivotal role in the distribution of power between capital, labour and the state, and as such the right to strike figures as the acid test for any system of labour relations. Its affirmation lends both efficacy and integrity to the bargaining process, while its denial

amounts to an undercutting of that process.<sup>189</sup> The question raised by employers is that if strikes are regarded as an expression of collective bargaining, why are lock-outs not regarded as the same thing? When one speaks of collective bargaining and the exercise of power, surely that power must be exercised by both parties, and as long as the rules are followed, then it is not intimidation.

In tracing the origins of disputes one needs to understand more than its immediate and underlying causes. It needs to be understood how employers and employees, management and unions come to define their policy objectives and how they seek to mobilize their resources and increase pressure on the bargaining partners, thereby helping to overcome resistance and so achieve their policy objectives in industrial conflict.

This study offers an analysis of the impact of the management of strike action. Special reference was made to the motor industry in an attempt to discover why certain episodes of conflict appear to be managed better than others. These particular episodes of conflict selected for analysis, covered both management and union-initiated disputes and are diverse in their origins. In extracting the lessons of experience from these disputes a wide range of factors are identified which contribute to the successful management of industrial conflict. These are the identification of the more obvious factors such as preparedness and determination to some less-obvious factors such as the combined pursuit of 'deliberate' plus 'emergent' strategies and an ever ready willingness to seek a resolution of the dispute through the process of negotiation and compromise.

It is therefore incumbent upon those responsible for the conduct of employment relationships to understand and accept that some measure of industrial conflict is unavoidable and perhaps even desirable. For that reason policies and strategies must be devised to anticipate the possibility of such conflict and to avoid it

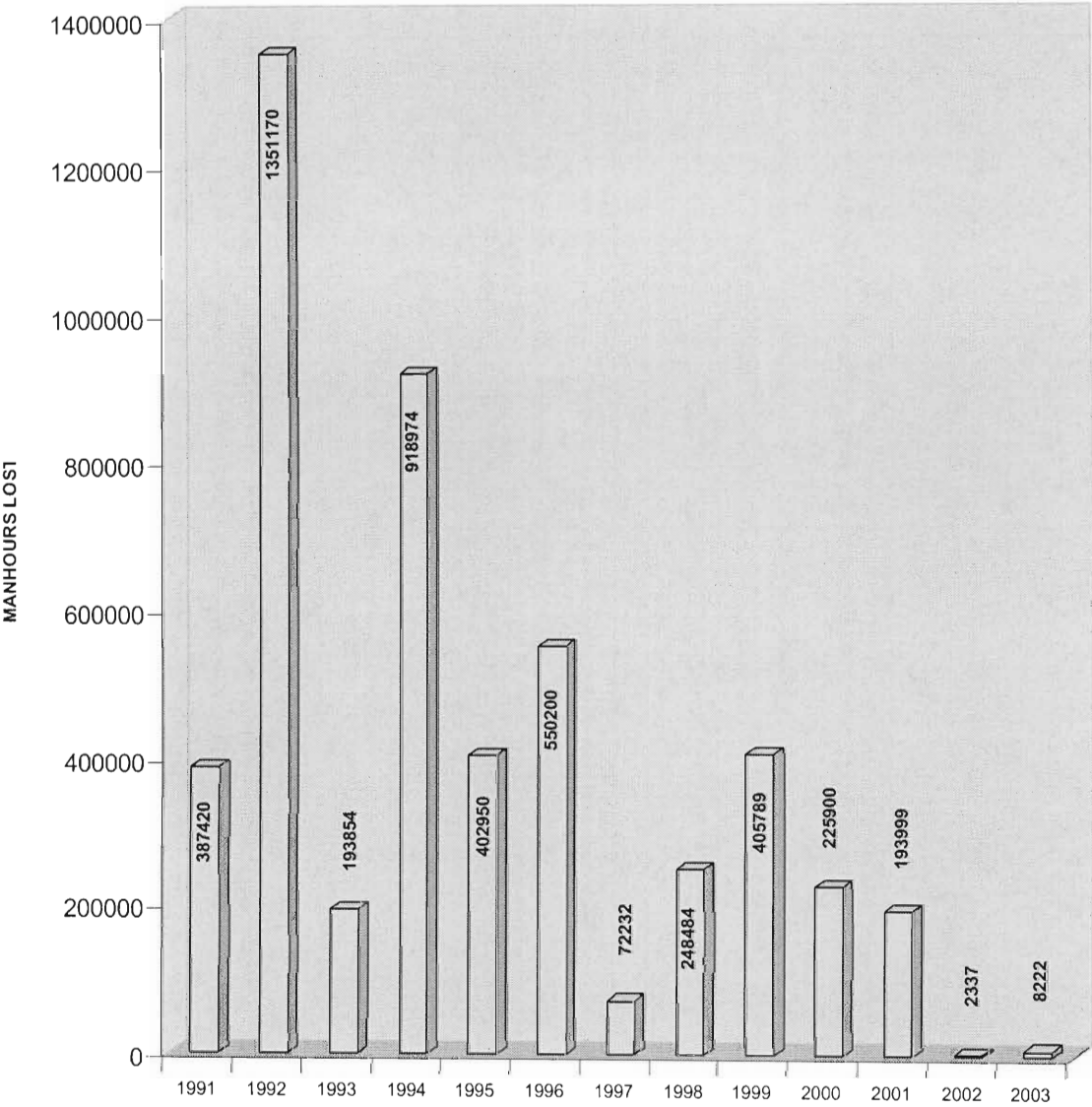
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<sup>189</sup> C Thompson 'The Contractual Regulation of strikes and lock-outs' in Benjamin Jacobs & Albertyn (footnote 71 above) 69.

wherever possible but, as a last resort and above all, to manage industrial conflict more intelligently and successfully than it has been managed in the past.

**IR DOWNTIME - MAN HOURS LOST -  
TSAM DURBAN 12yrs (1991 - 2003)**

**ANNEXURE 1**



### ***GOVERNANCE RULES: Payment during unplanned plant / Division closures due to unprocedural industrial action, short time and excessive absenteeism***

#### ***(a) Governance Rules: Payment and Procedure***

The purpose of this document is to clarify the TSAM Governance Rules to be applied to employees involved and affected by Line/Plant Division closure due to unprocedural action, short time or excessive absenteeism.

#### ***i) Payment Governance***

##### ***(aa) Division closure due to total division stoppage.***

Payment ceases immediately for all employees of the relevant division who are responsible and/or initiated and/or supported the stoppage. This decision will be communicated to the NUMSA Shop Stewards by the divisional management team, who will explain the details of the payment and time of closure(where applicable).

##### ***(bb) Division closure due to a stoppage, which occurs in one area and has an effect on surrounding lines/plants/divisions, up or downstream.***

Payment ceases immediately for those employees directly responsible for the stoppage. Formal discussions will take place between Divisional management and NUMSA Shop Stewards with regard to the effect of the stoppage on up and down stream operations, whereafter a general notice will be issued confirming the details of payment and time of closure (where applicable).

Up and downstream employees not participating in the stoppage will remain on full pay until the time stipulated in the above-mention notice (Figure 2).

##### ***(cc) Excessive Absenteeism***

Where it is impossible to run normal production due to excessive absenteeism, formal discussions will take place between divisional management and NUMSA with regard to the effect of the absenteeism on the operation, whereafter a General Notice will be issued confirming the details of the payment and time of closure (where applicable).

Employees, who clocked in and remained on site, will be paid until the time stipulated in the above-mentioned notice(Figure 3).

##### ***(dd) Short Time***

Short time means a temporary reduction in the number of ordinary hours of working owing to slackness of trade, shortage of raw materials, a breakdown of plant or machinery, or a breakdown or a threatened breakdown of building (Figure 4).

Payment will be made in accordance with the provisions of the NBF agreement, where applicable.

##### ***(ee) Re-Opening of Affected Division/s***

Re-opening of the division is subject to a divisional management decision. The date and time of re-opening will be communicated to the NUMSA Shop Stewards.

Should it be impossible to run normal production after such re-opening, formal discussions will take place between divisional management and NUMSA whereby a General Notice will be issued confirming the details of payment and time of closure. Employees who tendered their services, and had clocked in, will be paid until a decision to close has been confirmed by issuing a General Notice(Figure 5).



**(ff) Night Shift/ Second Shift**

If operationally possible, these employees will continue normal production. Any closure and non-payment, which may affect them due to the stoppage on a previous shift, will be communicated as described above.

If it is operationally impossible to run normal production due to the stoppage on a previous shift, formal discussions will take place between Divisional Management and NUMSA Shop Steward/s with regard to the closure of the plant, whereafter a General Notice will be issued confirming the details of payment and the time of closure. Employees will remain on full pay until the time stipulated in the above-mentioned notice (Figure 6).

**(gg) Applicability of the Governance Rules**

All Durban operations will follow the same rules as set out above in case of stoppages occurring within their specific operations. The Satellite divisions are to make a decision with respect to closing down their operations in case of a stoppage at TSM based on their stock carriers and work loadings at any given time. The same will apply in the event of the satellite divisions, which affect TSM (Figure 7).

*The Plant closure governance described above aims to provide guidelines for payment during ad hoc, short-term plant closures.*

**ii) Procedure to be followed when a stoppage or stoppages occur**

Management's primary objective should be to minimise the disruption caused by industrial action and to get employees back to work as soon as possible.

**(aa) Immediate steps**

- Inform employee representatives and invite them to assist in resolving the dispute.
- Keep an accurate record of events.
- Inform employees not involved of the status and reasons for the industrial action.

**(bb) Gathering information**

Ensure that management and employee representatives are informed on the following issues:

- What exactly happened
- When did it occur
- What appears to be the reason
- What action has been taken by management up to this point

**(cc) Resolving the dispute**

- Advise employees through their representatives to return to their workstations and resume their normal duties
- Advise employees that they must make use of the normal dispute settlement procedures as prescribed by the Labour Relations Act / Company Grievance Procedure
- Assure the employees of management's intention to resolve the grievance which has led to the work stoppage and advise them that management needs to be informed of the groups problems and their proposals and discuss amongst the management team ways of resolving the problems
- Reach agreement with employee representatives on the action to be taken.

**(dd) Communication during work stoppages**

- Communicate as much as practically possible during the stoppage. It is vital to put forward information from management's perspective. Employee representatives may not be in a position to, or may not be inclined to explain

management's position clearly which could lead to misinterpretations and /or misrepresentations and may entrench the view held by employees thereby prolonging the stoppage.

- Management must therefore, whenever there is a change in strategy, communicate orally and in writing by using loud speakers, notice boards etc.
- Communication during a work stoppage must be addressed to both striking and non-striking employees.
- Communication to non-striking employees should give recognition to their efforts and inform them of the progress and steps taken by management to bring an end to the work stoppage.

**(ee)      *Deadlock***

It is imperative not to take up definite positions too early in the dispute. In the case of an unprotected work stoppage, the parties will need to demonstrate that they have negotiated the grievance in dispute with a view to reaching agreement before considering dismissal of strikers.

It is difficult to suggest a time frame for this instance, but the following should be considered:

- Nature of the work stoppage – protected/unprotected
- Economic reality facing the employer
- Reasons for the stoppage.

**(ff)      *The issuing of ultimatums***

For an ultimatum to be fair it must be preceded by serious consideration of the issues in dispute. The following factors should be considered:

- The risk of defiance
- The cost of management carrying out the ultimatum
- The cost of conceding later if the ultimatum is not carried out (i.e. loss of face by management).

Ultimatums must be preceded by a 'first' notification to return to work. The first notification must specify that the employees return to work, that their action are unprocedural and a time must be specified when to return to work. The first notification must also specify further action should they fail to comply with management's request.

Before issuing the second notification a meeting must be held with the employee's representatives.

The second notification must be issued after the deadline for the request to return to work of the first notification has lapsed and a meeting has been held with union representatives.

An ultimatum is the last resort and should only be considered when all other strategies have failed to bring about a return to work. Ultimatums must be clear to employees in as many ways as possible including:

- Through employee representatives
- Informing strikers verbally
- Use of loud hailer
- Written document given to strikers and placed in prominent places.

An ultimatum format should include the following (if appropriate)

- Acknowledgement of demands
- An undertaking to commence investigation or negotiation immediately
- An undertaking that if the employees return within the specified time period, their jobs will be safe.
- Inform strikers that if they are not back by a certain date and time, they will no longer be employed by the Company.

Ultimatums must be widely communicated to all employees (use of notice boards, distribute pamphlets, use of loud hailer, discuss with employee representatives etc). This might often prove difficult to achieve as union representatives

may be reluctant to receive any form of communication from management. It is however an important requirement of fair practice as acknowledged in many Labour Court cases. Although the act suggests that dismissal may be a fair sanction to administer in terms of unprotected strikes, the clear communication of the ultimatum will remain a key issue in assessing the appropriateness of the action.

Employees must also be allowed a reasonable amount of time to consider the ultimatum before it is implemented (at least 12 hours).

Ultimatums should be issued at such times as to allow employees to go home and return the following day in order for them to contemplate their actions and possible consequences, away from the possible influence and pressure from other employees.

- It is also important to bear in mind that formal discipline must not be confused with the procedure to end unprocedural/unprotected industrial action. The procedure is the process used during unprotected industrial action and discipline is the process whereby employees are disciplined after the event.

***GOVERNANCE RULES: Applicable disciplinary procedure to be followed in dealing with employees involved in a unprocedural work stoppage***

***i) Written Counseling***

All future counseling letters will remain in the employee's file for twelve months as specified in the Company disciplinary procedure.

With regard to incidents of misconduct or poor performance involving individual employees management shall:

- give notice of such counseling sessions
- shall permit the employee to be represented by a shop steward and
- shall allow the employee and or the shop-steward to make submissions on the issue of the counseling letter.

With regard to collective incidents involving a large number of workers acting collectively e.g. work stoppages, industrial action etc, management shall:

- investigate the incident
- call a meeting with the union/shopsteward
- inform the union of the action that it proposes to take including the issuing of counseling letters
- give the union a reasonable opportunity to address it on the issue of such proposed action
- consider the union submission and
- then decide on its course of action, including if it deems necessary, the issue of counseling letters or any further disciplinary action.

Where it is impractical to discipline each employee individually, such discipline shall be conducted collectively or on a group basis. Where it is impractical to call each employee individually and hand the counseling letter, a meeting would be called with all the affected employees at the Green Area and the letters will then be issued to them.

Where the employees cease working for any period of time and the shop stewards arrive after cessation of work has been rectified and the employees are already working, the relevant authority will consult with the union and inform the union about the action he/she is proposing to take including the issuing of counseling letters where appropriate.

***ii) Written Warning***

All second instances of unlawful action will attract a written warning. A written warning for all second offences shall be given to each and every employee involved and it stays in the employees file for a period of twelve months.

Management must ensure that the employee understands the nature and implications of the sanctions imposed.

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