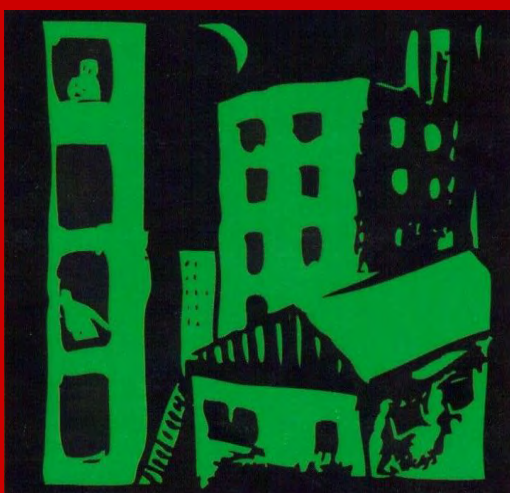
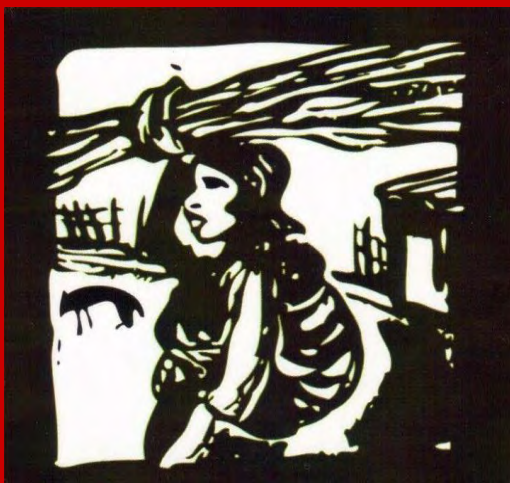


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**A critical analysis of  
*Massmart Holdings  
and Others v South  
African Commercial  
Catering and Allied  
Workers Union*  
[2022] ZALCJHB 119**

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**ABSTRACT**

*South African law under the Labour Relations Act 66 of 1995 (LRA), as amended, confers on the Labour Court the power to adjudicate on issues relating to strikes and to grant an interdict and/or order the payment of just and equitable compensation for any loss attributable to the strike or lockout. At least 48 hours before the strike, workers or their trade unions must give written notice of their intention to strike to the employer, the applicable negotiating council, and the Commission for Conciliation, Mediation, and Arbitration. If a strike follows the law, workers who take part in it are shielded from being fired for no other reason than that they are striking. Employees on strike and their trade unions are shielded from lawsuits for any losses or harm sustained while on the protected strike. During an*

*unprotected strike, workers lose the legal protections afforded by labour laws, leaving them open to legal action and possible termination. In the case under review – Massmart Holdings and Others v South African Commercial Catering and Allied Workers Union [2022] ZALCJHB 119 – the trade union, from whom the employer sought compensation for damages caused during a protected strike, objected to the Labour Court’s jurisdiction as derived from the LRA. This article provides a critical review of the Labour Court’s jurisdiction, particularly in the light of section 68 of the LRA, to order compensation. The analysis revisits previous judgments to test the correctness of the judgment given in the Massmart case.*

**Keywords:** designated picketing areas, employee, employer, Labour Act 66 of 1995, Labour Court jurisdiction, lockout, rights, strike, section 68(1)(b).

## 1 INTRODUCTION

Strikes are a common occurrence in South Africa.<sup>1</sup> While some are protected by law, others may be unprotected and violent.<sup>2</sup> As such, this article seeks to analyse the judgment of *Massmart Holdings Ltd and Others v South African Commercial Catering and Allied Workers Union*.<sup>3</sup> By extension, the analysis of the case aims to find a balance between the right to strike, on the one hand, and, on the other, the consequences that strikes may have for the employer as well as the economy of South Africa at large. The case in question involves a claim brought by the applicants (collectively referred to as “Massmart”), who sued the respondent, the South African Commercial Catering and Allied Workers Union (hereinafter, “the union”) for payment to the amount of R9,383,454.57 for compensation in terms of section 68(1)(b) of the Labour Relations Act, 1995 (“LRA”) for the losses that Massmart allegedly suffered as a result of a strike called by the union in 2021.

The case in essence deals with the application and the exception raised to the application for compensation. Although this article outlines the grounds of exception, its focus is on the ground that relates to the jurisdiction of the Labour Court. Furthermore, it examines the principles relating to the meaning of the terms “strike” and “protected strike”, as well as the impact of section 68(1)(b) of the LRA on both the employees and employer. The article first discusses the exceptions raised in the case. Secondly, it considers international instruments and domestic law instruments which are applicable to the principles discussed in the case. Thirdly, it examines the Labour Court’s jurisdiction over strikes, be they protected or unprotected. Thereafter, the article engages with employer rights and, finally, draws conclusions from the analysis.

<sup>1</sup> Tenza M “The effects of violent strikes on the economy of a developing country: A case of South Africa” (2020) 41(3) *Obiter* at 519.

<sup>2</sup> Odeku K “An overview of the right to strike phenomenon in South Africa” (2014) 5(3) *Mediterranean Journal of Social Sciences* at 695.

<sup>3</sup> *Massmart Holdings Ltd & Others v South African Commercial Catering & Allied Workers Union* [2022] ZALCJHB 119.

## 2 EXCEPTIONS RAISED BY THE UNION

When the application for compensation was brought by Massmart, the union excepted to the statement of claim, raising five grounds of exception. First, the union contends that the Labour Court's exclusive jurisdiction to order the payment of just and equitable compensation for any loss attributable to a strike or lockout, or conduct in contemplation or in furtherance of a strike or lockout, may not be invoked when the strike or lockout (as the case may be) is protected. This contention cannot be entirely correct. In the case of *Rustenburg Platinum Gold Mines Ltd v Mouthpiece Workers Union*, the Court stated that the legislature has conferred a very wide discretion on it.<sup>4</sup> The Labour Court is essentially established to hear and determine disputes emanating from the employment relationship. Under normal circumstances, it has jurisdiction over everyone who lives or is present in its jurisdiction, as well as over all cases that arise and all crimes that can be tried there.<sup>5</sup>

Viewed from a legislative perspective, "jurisdiction" in reference to the courts denotes the right or authority vested in the courts by the state to entertain actions or other legal proceedings.<sup>6</sup> According to common law jurisprudence, the courts exercise jurisdiction under any of the following circumstances: *ratione domicilii*, *ratione rei sitae*, or *ratione contractus*, that is, where the contract has either been entered into or has to be executed within the jurisdiction.<sup>7</sup> Jurisdiction is the competence of the court to hear a dispute and render a decision that is enforcement against any person that such a decision relates to. This is known as the principle of effectiveness.<sup>8</sup> In other words, the term "jurisdiction" refers to the authority the court has to hear a dispute and pronounce itself on the issues raised in terms of the dispute. It is the authority (power and competence) granted to the court to hear and determine an issue between the parties.<sup>9</sup> This authority can be derived from statute or common law. The jurisdiction of the Labour Court, which is the subject of discussion in this article, is provided for under section 65 of the Labour Act and discussed later in detail.

The second exception is to the effect that the court in question has no jurisdiction to determine whether the union's members engaged in conduct that was in breach of the Occupational Health and Safety Act 85 of 1993 ("OHSA") and Covid-related regulatory measures. The OHSA does not does expressly indicate which court shall have jurisdiction to entertain disputes regarding breaches of its provisions. However, it is noteworthy that, under section 35, the Act provides that an appeal against the decision of the labour inspector shall lie against the Labour Court.<sup>10</sup> In other words, any person that is aggrieved by the decision of the labour inspector may appeal to the Labour Court.

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<sup>4</sup> *Rustenburg Platinum Gold Mines Ltd v Mouthpiece Workers Union* [2001] ZALC 126.

<sup>5</sup> *Andile Albert Apleni v African Process Solutions (Pty) Ltd & Zane Salie* Case No. 15211/17. See also section 21(1) of Superior Courts Act 10 of 2013.

<sup>6</sup> *Veneta Mineraria Spa* at 886E.

<sup>7</sup> *Brooks v Maquassi Halls Ltd* [1914] CPD 371.

<sup>8</sup> *Bisonboard Ltd v K Braun Woodworking Machine (Pty) Ltd* 1991 (1) SA 482 (A).

<sup>9</sup> *Gcaba v Minister of Safety and Security & Others* (2009) 30 ILJ 2623 (CC).

<sup>10</sup> Section 35 of the Labour Relations Act 66 of 1995 (LRA).

This could imply that the Labour Court has original jurisdiction to deal with breaches of the OHS Act in the workplace.<sup>11</sup> The line of reasoning is also supported by the idea that workplace issues, regardless of the form of the dispute, should be dealt with through the Labour Court. Furthermore, there are other South African cases in which the Labour Courts have adjudicated on claims brought in respect of section 68(1). Some of these involved protected strikes and others, unprotected strikes.

One such case is *Gri Wind Steel South Africa v Lonon Van Graan*,<sup>12</sup> where the Court had to pronounce on an issue emanating from a protected strike, wherein AMCU called its members at GRI in Atlantis out on a protected strike. The issues in this case emanate from an order granted in the court of first instance, wherein it interdicted and restrained the Association of Mineworkers and Construction Union (AMCU) from the following:

- 3.1 encouraging or instructing its members to perform any acts or omissions, which may directly or indirectly endanger the property of the applicant, its employees or any member of the public;
- 3.2 encouraging or instructing its members to perform any acts of intimidation;
- 3.3. encouraging or instructing its members currently to perform acts or omissions which may, directly or indirectly, endanger the lives or physical safety of any members of the public or any of the applicant's employees; and
- 3.4 encouraging or instructing its members to interfere with, or obstruct, access to and exit from the applicant's premises at 3 John van Niekerk Street, Atlantis, Cape Town.<sup>13</sup>

Furthermore, the court a quo made an order interdicting the striking workers from:

- 4.1 performing any acts, or omissions, that may directly or indirectly endanger the property of the applicant, its employees or members of the public;
- 4.2 performing any acts of intimidation;
- 4.3 performing acts or omissions which may, directly or indirectly, endanger the lives or physical safety of any members of the public or any of the applicant's employees; and
- 4.4 interfering with, or obstructing, access to and exit from the applicant's premises at 3 John van Niekerk Street, Atlantis, Cape Town.<sup>14</sup>

On appeal, the union asked the Court to make a punitive order against the employer, but it refused to do so. The Court explained that it was difficult to see how it could be persuaded to issue such an order in accordance with the law and fairness, given that the employer was forced to seek an interdict in the first place in an effort to stop future unlawful and violent activity and that the union was unable to exert control over its members. The Union, failed to call its members to order not to engage in violent and unlawful activities.

The case of *Algoa Bus v Transport Action Retail and General Workers Union and Others*<sup>15</sup> dealt with similar issues pertaining to claims based on damages resulting from an unprotected strike. In this case, the union and the employees were held jointly and

<sup>11</sup> *PSA obo Members v Minister of Health & Others* (2019) 40 ILJ 193 (LC) (12 October 2018).

<sup>12</sup> *Gri Wind Steel South Africa v Lonon Van Graan* (C561/17) [2017] ZALCCT 60., para 3.

<sup>13</sup> *Gri Wind Steel South Africa v Lonon Van Graan* (C561/17) [2017] ZALCCT 60., para 4.

<sup>14</sup> *Gri Wind Steel South Africa v Lonon Van Graan* (C561/17) [2017] ZALCCT 60., para 5.

<sup>15</sup> *Algoa Bus Co (Pty) Ltd v Transport Action Retail and General Workers Union and Others* (2015) 36 ILJ 2292 (LC).

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severally liable to the employer to the amount of R1,406,285.33. In another case, *Numsa obo Aubrey Dhludhlu and Others v Marley Pipe Systems*,<sup>16</sup> the Labour Court, exercising its powers, found that it was just and equitable for the employer to claim compensation to the amount of R829,835 for the loss incurred on the day of the unprotected strike and the days immediately thereafter. This could be taken to imply that the Labour Court has jurisdiction to adjudicate on claims brought in terms of section 68(1) of the Act.<sup>17</sup>

It is evident from this case and the others cited above that the South African courts have adjudicated on cases involving both protected as well as unprotected strikes. The primary role of a court of law is to assist aggrieved parties to protect and enforce rights of theirs that stand to be infringed by others.<sup>18</sup>

According to the third exception raised, the union contends that the statement of claim does not disclose a cause of action in that Massmart relies on certain repealed or otherwise incorrect regulations. This exception was not pursued in the proceedings. Needless to say, any party that intends to bring a lawsuit against another must set out, clearly and unequivocally, all elements of the alleged wrong that was committed so as to disclose a cause of action; failure to aver the correct elements may lead to a result that the claim is expiable.

Fourth, the union contends that Massmart failed to plead or make averments relating to the factors listed in section 68(1)(b)(i)–(iv) of the LRA. Those factors concern matters that the court is required to consider when assessing the quantum of any claim for just and equitable compensation for loss attributable to a strike or lockout or to conduct in contemplation or furtherance of a strike or lockout. Any lawsuit where compensation is sought as a relief cannot succeed if the claimant fails to quantify the losses suffered. Furthermore, apart from quantifying the loss suffered, the claimant must establish that the loss suffered is the result of wrongful conduct by the other party against whom the lawsuit is being brought.

Finally, the union contends that the statement of claim is expiable to the extent that Massmart relies on alleged conduct by union members that occurred outside of designated picketing areas. In other words, it is the union's contention that whatever the striking employees did outside of these areas cannot be taken to be in the scope of employment and hence that no action can be taken against the employees in this regard. Yet although this reasoning is correct, it is a cardinal element of labour relationships that employees must act at all times in the best interests of the employer and not do anything that could bring the employment relationship in disrepute or tarnish the name or reputation of the employer; it is a common law duty of any employee to act in good faith to protect and advance the interests of his or her employer.<sup>19</sup> Consequently, while the conduct of the striking employees outside of the designated picketing areas might not necessarily bring action against the employees, where the employees can be found

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<sup>16</sup> *Numsa obo Aubrey Dhludhlu and Others v Marley Pipe Systems (SA) (Pty) Ltd* Unreported Case. No: JS 878/17.

<sup>17</sup> Labour Relations Act 66 of 1995.

<sup>18</sup> Section 34 of the Constitution of South Africa.

<sup>19</sup> *Autozone v Dispute Resolution Centre of Motor Industry and Others* (2019) 40 ILJ 1501 (LAC).

to have caused damage to the employer's business, reputation or good name, an action may be brought successfully against the striking employees.

### 3 THE COURT'S GENERAL OBSERVATIONS ON THE LAW

The Court noted that the employer had submitted that the employees' conduct did not comply with Chapter VI of the LRA and that employees failed to strike peacefully as well as comply with the OHSA and Covid-related regulations, protocols and directives. Another averment made on behalf of the employer is that the employees and union had failed to comply with picketing rules established by the Commission for Conciliation Mediation and Arbitration (CCMA).<sup>20</sup> The Court stated that the immunities outlined in section 67 must necessarily be taken into consideration when interpreting section 68's requirements.

In terms of section 67(2), engaging in a protected strike or lockout, or engaging in action in anticipation of or in support of one, does not constitute a delict or violation of contract. According to section 67(6), no one may be subjected to civil legal action for taking part in a protected strike or protected lockout, or for acting in anticipation of or in support of one of those actions. The protections provided by sections 67(2)–(6) are not unqualified, however. Section 67(8) states that "any act in contemplation or in furtherance of a strike or lockout, if that act is an offense" is exempt from the provisions of the subsections.<sup>21</sup>

In order to argue that this court lacks jurisdiction under section 68(1)(b) to consider the claim for compensation for loss attributable to a protected strike or any conduct in contemplation of or in furtherance of a protected strike, the union's legal counsel cited the case of *Stuttafords Department Stores Ltd v SACTWU*.<sup>22</sup> In *Stuttafords*, a trade union sought compensation on the grounds that an employer-initiated lockout was not protected and that the employer's use of temporary workers was illegal. Despite concluding that the lockout was protected, the Labour Court had compensated the affected workers for missed earnings. The Court's decision to award compensation was based on its determination that the employer's actions in hiring people to do the locked-out workers' jobs were illegal for having violated section 76(1)(b) of the LRA.

Given that the court in the *Stuttafords* case had determined the lockout to be protected, the Labour Appeal Court asked counsel to address the question of the Labour Court's jurisdiction to consider the claim for compensation.<sup>23</sup> To prove that the provisions of section 68(1) do not preclude a claim for compensation for losses incurred on account of unlawful conduct in support of a protected strike, Massmart's legal counsel cited the ruling in the Supreme Court of Appeal (SCA) case, *National Union of Metalworkers of South Africa and others v Dunlop Mixing & Technical Services and Others*.<sup>24</sup>

<sup>20</sup> *Autozone* (2019) at para 2.

<sup>21</sup> *Autozone* (2019) at para 10.

<sup>22</sup> *Stuttafords Department Stores Ltd v SACTWU* (2001) 22 ILJ 414 (LAC).

<sup>23</sup> *Stuttafords* (2001) at para 11.

<sup>24</sup> *National Union of Metalworkers of South Africa and Others v Dunlop Mixing & Technical Services (Pty) Ltd and Others* [2021] 3 BLLR 221 (SCA) (NUMSA).

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In that case, the question for the court was whether a picket organised by a union in support of a protected strike qualified as a "gathering" for the purposes of the Regulation of Gatherings Act of 1993. The High Court ruled that the picket qualified as a gathering for the purposes of the Act and deferred to the trial court's decision on the question of immunity under the LRA. The appellant union claimed before the SCA that claims such as those pursued by the respondents (a claim for property damage during an allegedly violent picket in support of a protected strike) were cognisable in proceedings before the court on the basis of section 68(1)(b), a specialised regime to cater for the exercise of the right to strike and to engage in conduct in furtherance of a strike, as well as for remedies for the unlawful eviction of a person.<sup>25</sup>

The Labour Court concluded that it was persuaded that the interpretation used in *Dunlop* should be used in this situation. In contrast to *Stuttafords*, the SCA's strategy was predicated on how section 68(1)(b) was read after being modified by section 17 of the Labour Relations Amendment Act of 2002. Before the modification, only orders issued by this court for the payment of just and equitable compensation for any loss owing to a strike or lockout were covered by section 68(1)(b). Section 68(1)(b) was expanded by the Amendment Act through the addition of the phrase "or conduct".<sup>26</sup>

#### 4 APPLICABLE INTERNATIONAL INSTRUMENTS AND DOMESTIC LAW

Although the Court did not refer to international covenants in adjudicating on the dispute between the parties, it is essential to briefly examine a few such covenants that make provision for the right to strike. The purpose of this is to explain the operation of the right to strike in the international context before turning to the specific domestic legislation referred to in the judgment.

Article 8 of the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR) places an obligation on state parties to ensure that all of their subjects have a right to form trade unions and participate in such unions' activities.<sup>27</sup> The purpose trade union participation must be geared towards the protection of the social and economic interests of those concerned.<sup>28</sup> Furthermore, no employer may place any restriction on the exercise of the right to strike other than those restrictions that apply by virtue of law and which are required in a democratic society to serve the interests of national security or to protect the rights and freedoms of others.<sup>29</sup>

Hence, the general principles relating to the exercise of one's right must be applied equally to the right to strike. In other words, inasmuch as employees have a right to strike, this right may be limited through restrictions. Apart from international law, South Africa's domestic law makes substantive reference to the right to strike, with legislative limitations placed on the right to strike. The sections below outline the right to strike and the statutory limitations imposed on it.

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<sup>25</sup> NUMSA (2021) at para 14.

<sup>26</sup> NUMSA (2021) at para 18.

<sup>27</sup> Article 8(1)(a) of the ICESCR.

<sup>28</sup> Article 8(1)(a) of the ICESCR.

<sup>29</sup> Article 8(1)(a) of the ICESCR.

#### 4.1 International Labour Organization standards

The International Labour Organization Governing Body initially identified eight "fundamental" conventions that addressed fundamental principles and rights. These includes freedom of association and the recognition of the right to collective bargaining; the abolition of all forms of forced or compulsory labour; the abolition of child labour; and the elimination of discrimination in regard to employment and occupation.<sup>30</sup> These principles are equally recognised by the Declaration on Fundamental Principles and Rights at Work (1998) as amended, which recognises the following principles:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour;
- (d) the elimination of discrimination in respect of employment and occupation;
- and
- (e) a safe and healthy working environment.<sup>31</sup>

Clearly, the right to strike is internationally recognised. It is this intentional recognition that has compelled most democratic states to afford constitutional recognition to the right. Apart from this constitutional recognition, national labour legislation would also provide clearly for the right to strike, as in the case of South Africa. The next section thus deals with the right to strike in the South African labour context.

#### 4.2 The right to strike and recourse to lockout in South Africa

In the case of *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and the Minister of Labour*,<sup>32</sup> the Constitutional Court held that it is important for the dignity of workers that they not be treated as coerced employees. The Court also found that workers may express their bargaining power in labour relations only through collective bargaining; here, it stated in its ruling that a successful collective bargaining system must include the freedom to strike. The *Bop* decision is thus a clear example of the support the Court has granted to the constitutionally recognised right to strike.<sup>33</sup>

Moreover, the South African legislature also provides employees with the right to participate in industrial action. In the first instance, the Constitution recognises employees' right to strike.<sup>34</sup> The constitutional recognition of the right to strike indicates that strikes are afforded the highest protection in South Africa, as such protection is guaranteed by the supreme law of the country.

<sup>30</sup> See Fundamental Principles and Rights at Work available at <https://www.ilo.org/fundamental-principles-and-rights-work> (accessed 11 February 2024).

<sup>31</sup> Fundamental Principles and Rights at Work available at <https://www.ilo.org/fundamental-principles-and-rights-work> (accessed 11 February 2024).

<sup>32</sup> *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and the Minister of Labour* 2003 (2) BCLR 182 (CC) (*Bop*).

<sup>33</sup> *Bop* (2003) at 13.

<sup>34</sup> Section 23 of the Constitution.



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Furthermore, the LRA grants employees the right to participate in protected strikes. Section 64 of the Act provides for the right to strike and lockout. First, all employees in the workforce have a right to participate in industrial action. Secondly, before engagement in an industrial action, a matter must be referred for conciliation and have remained unresolved. The employees' organisation must provide 48-hour notice to the employer before engaging in strike activities. Where the state is an employer, the industrial action notice must be given at least seven days before the industrial action is taken. Arguably, the purpose of the notice is indirectly to convince the employer to yield to employees' demands or, failing that, face industrial action.

Though the issues in the *Massmart* case arose from a protected strike, it is noteworthy that South African courts have shown strong disapproval of unprotected strikes or any similar conduct, as this results in violence, harm to other persons, and the destruction of property.<sup>35</sup> There could be a number of reasons for such disapproval.

First, unprotected strikes may lead to an irretrievable breakdown of the employment relationship between employer and employees. The employment relationship is based on trust, loyalty, honesty, and ethical behaviour between the employer and its employees,<sup>36</sup> whereas behaving in a manner that contravenes the law and workplace policies breaks trust and loyalty. Dishonest behaviour that intentionally and knowingly works against the employer's interests creates problems for operations.<sup>37</sup> Parties to the employment relationship should therefore not act in a manner that would negate the relationship of trust and confidence.<sup>38</sup>

Secondly, the employer may be entitled in the circumstances to dismiss employees participating in unprotected strikes.<sup>39</sup> This may have adverse consequences for the striking, and subsequently dismissed, employees, bearing in mind the effects of unemployment. In addition, unemployment affects not only the dismissed employees but the government of the country. Strikes in general – and unprotected strikes in particular – affect employers in that they lose profits they would have otherwise made had their employees not gone on strike. When business make good profits, they pay higher taxes to the government, increasing the fiscal position. Any adverse effects on the fiscal position of the government makes it difficult for the government to take care of its citizens, for example through the provision of public and social services.

Taking into account in the considerations above, the courts have good reason to disapprove of unprotected strikes and to caution employees to follow the appropriate channels and processes should they wish to participate in strikes.

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<sup>35</sup> *NUMSA obo Aubrey Dhludhlu and Others v Marley Pipe Systems (SA) (Pty) Ltd* (2015) 36 ILJ 2292 (LC) 43 ILJ 2269.

<sup>36</sup> Tshoose CI & Letseku R "The breakdown of the trust relationship between employer and employee as a ground of dismissal: Interpreting the Labour Appeal Court's decision in Autozone" (2020) 32(1) *SA Mercantile Law Journal* 156.

<sup>37</sup> *Autozone v Dispute Resolution Centre of Motor Industry and Others* (2019) 40 ILJ 1501 (LAC) 13.

<sup>38</sup> Bosch C "The implied term of trust and confidence in South African labour law" (2006) 27 *Industrial Law Journal* at 28.

<sup>39</sup> Section 68(5) of the LRA.

Although employees are the ones who exercise their right to strike, striking is beneficial not only to those actually participating in strike: in the event that the demands of the striking employees are met favourably by the employer, non-striking employees also benefit. This may seem unfair from the perspective of those who spent their time participating in a strike; however, were an employer to meet such demands only in respect of striking as opposed to non-striking employees, this would amount to discrimination or unjustifiable differential treatment, which could then invite claims of damages against the employer.

### 4.3 Limitations on the right to strike or recourse to lockout

Under South African labour law, no person is allowed to participate in a strike, a lockout, or any activity related to one if they are (a) bound by a collective agreement that forbids a strike or lockout with regard to the issue at hand; (b) bound by a contract that mandates arbitration of the issue at hand; or (c) the issue is one that a party has the right to refer to arbitration or the Labour Court under the terms of contract.<sup>40</sup> Hence, in terms of the LRA,<sup>41</sup> a party may not participate in strike or lockout if he or she is bound by a collective agreement that expressly prohibits strikes or lockouts in respect of a particular dispute.<sup>42</sup>

Section 65(l)(c) of LRA expressly prohibits a person from participating in a strike or a lockout, or engaging in any conduct in contemplation or furtherance of a strike or a lockout, if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act. Subsection 2 of section 65, however, provides an exception to this general provision. In terms of section 65(2), a person may take part in a strike or lockout or in any conduct in contemplation or in furtherance of a strike or lockout if the issue in dispute is about any matter dealt with in sections 12–15. These provisions refer to existing agreements in terms of which the parties have decided to take the matter on strike in terms of arbitration as required by the law. The registered trade union may not exercise the right to refer the dispute to arbitration in accordance with section 21 for a period of 12 months following the date of the notice if it has given notice of the proposed strike in accordance with section 64(l) with respect to an issue in dispute mentioned in paragraph (a).<sup>43</sup> In other words, workers providing "essential" and "maintenance" services are not permitted to strike and must instead submit their disagreements to binding arbitration.<sup>44</sup>

A person may take part in a strike or lockout, or any conduct in contemplation or in furtherance of a strike or lockout, if the issue in dispute is about any matter dealt with in sections 12–15. If the registered trade union has given notice of the proposed strike in terms of section 64(l) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a

<sup>40</sup> Section 65(1) of the LRA.

<sup>41</sup> Section 65 (1) of the LRA.

<sup>42</sup> Kujinga T & Van Eck S "The right to strike and replacement labour: South African practice viewed from an international law perspective" (2018) 21 *Potchefstroom Electronic Law Journal* 17.

<sup>43</sup> Section 65(2) of the LRA.

<sup>44</sup> Kujinga & Van Eck (2018) at 17.

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period of 12 months from the date of the notice. No one is allowed to participate in a strike, a lockout, or any actions taken in anticipation of or in support of a strike or lockout, subject to a collective agreement, if that person is bound by any arbitration award or collective agreement that regulates the issue in dispute; by any determination made in accordance with section 44 of the Act by the Minister; or by any determination made in accordance with the Wage Act and that regulates the issue in dispute.<sup>45</sup> The LRA stipulates that a person may not participate in a strike if "the subject in dispute" may be addressed by arbitration or the Labour Court in accordance with the LRA, this despite the fact that the Act does not clearly distinguish between disputes of right and disputes of interest.<sup>46</sup> In the event that the employees enter into an unprotected strike, the employer may be entitled to take disciplinary action against the striking employees.

One such action that may be taken against striking employees is dismissal. In *Mzeku*, the LAC held as follows:

Once there is no acceptable explanation for the [workers'] conduct, then it has to be accepted that the [workers] were guilty of unacceptable conduct which was a serious breach of their contracts of employment ... The only way in which the [workers'] dismissal can justifiably be said to be substantively unfair is if it can be said that dismissal was not an appropriate sanction.<sup>47</sup>

This means that participating in an unprotected strike does warrant automatic dismissal of the striking employees. The normal test of complying with the principles of fair dismissal still has to be followed. In other words, the employer must prove substantive fairness by indicating that the misconduct complained of warrants dismissal – that is, the seriousness of the offence is proportionate to the sanction of dismissal.

Moreover, the employer whose employees make themselves guilty of participating in an unprotected strike may be entitled to claim compensation against the employees so striking. This position was confirmed in *Numsa obo Aubrey Dhludhlu and Others v Marley Pipe Systems*, where the Court stated that section 68 of the LRA provides the mechanism for relief should the strike fail to comply with the provisions of LRA.<sup>48</sup> The Court went on to cite section 68(1)(b), which refers to the order of payment of just and equitable compensation. Furthermore, in *Mzeku and Others v Volkswagen SA*, the Court set out three requirements that an employer must satisfy before the claim may succeed. First, it must be evident that the strike complained of constitutes an unprotected strike; secondly, the applicant, being the employer, must have suffered some form of pecuniary loss due to the strike; and, lastly, the person(s) against whom the relief is sought must have participated in the furtherance of the act complained of.<sup>49</sup>

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<sup>45</sup> Section 65(3) of the LRA

<sup>46</sup> Kujinga T & Van Eck S (2018) at 17

<sup>47</sup> *Mzeku and Others v Volkswagen SA (Pty) Ltd* [2001] ZALAC 8, para 17

<sup>48</sup> *Numsa obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty) Ltd* [2022] 43 ILJ 2269.

<sup>49</sup> *Rustenburg Platinum Gold Mines Ltd v Mouthpiece Workers Union* [2001] ZALC 126.

Seen from a constitutional point of view, all of the rights in the Bill of Rights, one of which is the right to strike, may be limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>50</sup> The limitations set out above can be said to be reasonable and justifiable, and thus in compliance with the Constitution.

#### 4.4 Protected strikes

In the case of *National Education Health & Allied Workers Union v University of Cape Town*, the Court observed as follows:

[T]he focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices.<sup>51</sup>

Given the potential it holds to rectify the power imbalance which is inherent to the employment relationship, the freedom to strike is viewed as an essential complement to collective bargaining.<sup>52</sup> This right to strike is, as previously noted, guaranteed in terms of the Constitution of South Africa: section 23(2) expressly states that every worker has the right to strike. In addition, the LRA affords statutory protection to the constitutional right to strike and places certain limitations on how it may be exercised.<sup>53</sup> In other words, although every worker has a right to strike, as guaranteed by the Constitution and LRA, workers are required to comply with certain procedural and substantive conditions in order to enjoy the protection that comes with the right to strike. Section 23(5) provides that every trade union, employers' organisation, and employer "has the right to engage in collective bargaining". There are certain acts or omissions that striking employees undertake in their effort to engage in a strike. For a strike to be classified as a "protected strike", it must meet the relevant definitional, procedural, and substantive requirements.<sup>54</sup> The definitional construction of a strike indicates what these acts or omissions relate to. The statutory definition of a strike is contained in the LRA, which defines a "strike" as:

[t]he 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.<sup>55</sup>

<sup>50</sup> Section 36(1) of the Constitution of South Africa.

<sup>51</sup> 2003 24 ILJ 95 (CC), para 40.

<sup>52</sup> Grogan J *Workplace law* 8<sup>th</sup> ed (2005) at 381.

<sup>53</sup> Grogan (2005) at 382.

<sup>54</sup> Collier D & Fergus E (eds) *Labour law in South Africa: Context and principles* 1<sup>st</sup> ed (2018) at 365.

<sup>55</sup> Section 213 of the LRA.

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The elements of a strike are as follows. First, work performance must cease: only the refusal to perform work that employees are contractually obligated to complete and which is permitted by law qualifies as a work stoppage for the purposes of a strike.<sup>56</sup>

Secondly, several employees must stop performing their tasks: one person stopping or refusing to execute duties does not necessarily constitute a strike. Therefore, in accordance with the definition, qualification as a strike requires both a concerted effort and the participation of individuals in the refusal to perform labour. It is crucial that it be a coordinated or joint effort involving more than simply one person.<sup>57</sup> That is to say, there must be a concerted effort by a group of employees calling upon the employer to adhere to the demands of employees.<sup>58</sup>

Thirdly, a strike is undertaken with the intention of settling a dispute or making amends. Hence, parties participating in a strike must intend to achieve a particular objective which is address a particular matter of common concern. Employees ask their employer to comply with their demands, doing so by going on strike in order to apply pressure to it.<sup>59</sup>

Finally, the issue of the conflict must be something in which both the employer and the employee have an interest. In other words, the issue must have an impact on both the employer and employee. As an illustration, consider the situation where employees request higher compensation from their company but it declines to do so. In this scenario, the “increment” sought is a matter of shared interests.<sup>60</sup>

The procedural requirement of a strike is set out in section 64 of the LRA and discussed below. The substantive requirements of a protected strike relate to the substantive limitations in section 65 of the LRA.<sup>61</sup> These limitations were discussed in detail in section 3.2 above.

### **5 JURISDICTION OVER UNPROTECTED STRIKES OR LOCKOUTS**

In terms of section 65 of the LRA, the Labour Court has exclusive jurisdiction to grant an interdict or order to restrain any person from participating in a strike or any conduct in contemplation or furtherance of a strike. Furthermore, according to section 65 of the LRA the Labour Court has exclusive jurisdiction to interdict any person from participating in a lockout or any conduct in contemplation or furtherance of a lockout if such strike or lockout does not comply with the provisions relating to strike or lockout. Furthermore, the Act grants the Labour Court the authority to order the payment of just and equitable compensation for any loss attributable to the strike, lockout, or conduct, with consideration to be given to the following factors:

- attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

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<sup>56</sup> Section 213 of the LRA.

<sup>57</sup> Section 213 of the LRA.

<sup>58</sup> Collier & Fergus (2018) at 366.

<sup>59</sup> Collier & Fergus (2018) at 366.

<sup>60</sup> Collier & Fergus (2018) at 366.

<sup>61</sup> Collier & Fergus (2018) at 370.

- the strike or lock-out or conduct was premeditated;
- the strike or lock-out, or conduct was in response to unjustified conduct by another party to the dispute; and
- finally, the Labour Court also has the power to grant such relive as provided for in terms of the LRA in the interests of orderly collective bargaining; the duration of the strike or lock-out or conduct; and the financial position of the employer, trade union or employees respectively.<sup>62</sup>

The Labour Relations Act of South Africa has been amended to provide clarity or the amplify certain provisions of the said Act. In particular section 17 of the Amendment Act of 2002 amends section 68 1 (b) of the Labour Relations Act by inserting the following amended section which now replaces section 68 (1) (b) of the Labour Relations Act. Section 17 of the Amendment Act of 2002 thus reads:

- (b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to -
  - (i) whether -
    - (aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;
    - (bb) the strike or lock-out or conduct was premeditated;
    - (cc) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and
    - (dd) there was compliance with an order granted in terms of paragraph(a)
  - (ii) the interests of orderly collective bargaining;
  - (iii) the duration of the strike or lock-out or conduct; and
  - (iv) the financial position of the employer, trade union or employees respectively.<sup>63</sup>

The court in the *Massmart* case correctly pointed out that these provisions, taking into account their purpose and reading them within their correct context, must mean that conduct which is committed during the period of an otherwise lawful industrial action but which constitutes an offence renders the person or persons or organisation responsible for such conduct liable to such orders as may be made pursuant to section 68 of the LRA. The Court's reasoning can be interpreted to mean that, regardless of whether industrial action is lawfully convened or not, should the particular conduct complained of be classified as an offence, the participants of such a strike can be held liable for any damages suffered by the employer.

The Court noted that, congruent with this, the word "conduct" in section 68(1)(b) is not expressly linked to an unprotected strike or lockout, or qualified as being conduct in furtherance of an unprotected strike or lockout. As the counsel for Massmart put it, the mere fact that a strike is protected cannot act as a shield for conduct which is committed during the strike but which is not in furtherance of its peaceful and lawful aims. Section 68(1)(b) thus applies to any conduct that falls outside of the immunity conferred by section 67(6). Hence, the fact that a strike is protected does not give those striking a green light to act in any manner they so wish without considering the rights

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<sup>62</sup> Section 65(b) of the LRA.

<sup>63</sup> Section 17 of the Labour Relations Amendment Act of 2002.

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and interests of the other party. An employer thus has a right under common law to approach any competent court to claim any benefits that it may be entitled to due to the striking parties' conduct. In other words, any claim that involves section 68(1) of the Act is subject to the Labour Court's jurisdiction.

In addition, the aggrieved party – that is, the employer – is entitled to a claim under section 68(1) of the Act regardless of whether or not the strike is protected. This position was equally adopted in the case of *PSA obo v Minister of Health and Others*,<sup>64</sup> where the Court's reasoning in that case was that the Labour Court has exclusive jurisdiction over all matters that occurred anywhere in the Republic in terms of the (Labour Relations Act) or in terms of any other law are to be determined by the Labour Court, subject only to the Constitution and section 173, save where the Act specifies otherwise.

In the judgment in *Motor Industry Staff Association v Macun NO & Others*,<sup>65</sup> the Court clarified the jurisdiction of the Labour Court, stating that section 157(2) of the LRA was enacted with the purpose of extending its jurisdiction to adjudicate over disputes concerning the alleged violation of any right entrenched in the Bill of Rights in respect of labour-related matters. This principle was confirmed by the Constitutional Court in *Gcaba v Minister of Safety and Security and Others*,<sup>66</sup> where it stated that section 157(2) solidifies the fact that the Labour Court has concurrent jurisdiction with the High Court in respect of matters regarding threatened violations of fundamental rights entrenched in Chapter 2 of the Constitution where such matters concern or arise from employment and labour relations. Issues to do with labour relations are clearly protected under the Bill of Rights in terms of section 23 of the Constitution. It is on this basis that the Labour Court can be enjoined to deal with employment-related issues provided for in the Constitution.

In the *Massmart* case, the Court pointed out (rightfully so) that to limit an aggrieved party to the remedy of a common law delictual claim in the civil courts would undermine what the Constitutional Court and the SCA have consistently recognised as the role of this court (the Labour Court) in the determination of labour disputes.

### 6 EMPLOYEES' RIGHTS

Employers have legislative rights, some of which are set out in Chapter II of the LRA. In terms of section 6, they have a right to form and participate in employers' organisations; employers' rights are also protected under section 7 of the Act, which deals with discrimination against employers for exercising their rights in terms of the law. This is a clear indication that, at the least, employers are not without rights.

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<sup>64</sup> *PSA obo v Minister of Health and Others* [2019] 1 BLLR 71 (LC).

<sup>65</sup> *Motor Industry Staff Association v Macun NO & Others* 2016 37 ILJ 625 (SCA).

<sup>66</sup> *Gcaba v Minister of Safety and Security and Others* (2009) 30 ILJ 2623 (CC).

Moreover, the common law employment relationship includes the obligation of good faith.<sup>67</sup> The fiduciary obligation of good faith necessitates, among other things, that employees always behave in their employers' best interests.<sup>68</sup> This entails that before, during, and after striking, employees should act in a manner that considers the interests of the employer; they should never aim to destroy the employer or its business by means of the strike. Equally, it should not be the aim to punish the employer unnecessarily and unfairly by using strikes as a weapon. A serious breach of the employment relationship occurs when this fiduciary obligation is not upheld, and employees may be held accountable for any harm occasioned by their misconduct.<sup>69</sup>

This means that employers have the right to approach a competent court, as in the *Massmart* case, to institute legal action and claim benefits to which they might be entitled in terms of section 68 of the LRA as well as any other of its relevant provisions. According to employers, employees who participate in dishonest behaviour that costs firms money should face legal action. In some instances, the misconduct may qualify as criminal behaviour, in which case it has to be reported to the appropriate authorities for investigation and prosecution.<sup>70</sup>

## 7 CONCLUSION

Striking is seen as a necessary element of a democracy and a catalyst for social debate about labour relations.<sup>71</sup> As Davidmann observes, "A workforce which cannot withdraw its labour at will is either oppressed or enslaved."<sup>72</sup> Hence, industrial action, and striking in particular, is an important indicator that South Africa has not only achieved political freedom in general, but, since it overcame employer supremacy, accorded employees the right to speak out against any form of injustice in the workplace.

However, the strike must be planned and carried out within the bounds of the law, otherwise it constitutes a breach of the rules of the game and results in penalties.<sup>73</sup> Any form of industrial action has economic and social consequences both for the employer and employee. After a strike has ended, the working relationship between the employer and the employee does not always remain the same. Sometimes trust and loyalty have been broken and the employer does not wish to continue being in an employment relationship with those employees who went on strike; as for economic consequences, the employer loses out on profits due to the strike of the employees.

Thus, if it is proven that the employer is entitled to some form of compensation due to the strike, an employer can successfully claim such compensation. The fact that the strike is protected does not deny the employer the right to claim any quantifiable losses

<sup>67</sup> Coetzer N & Mulligan T "The right to fair labour practices – Employers are not without remedies" (2019) available at <https://www.golegal.co.za/fair-labour-practices-employers/> (accessed 03 March 2024).

<sup>68</sup> See Coetzer & Mulligan (2019).

<sup>69</sup> See Coetzer & Mulligan (2019).

<sup>70</sup> See Coetzer & Mulligan (2019).

<sup>71</sup> See Odeku (2014) at 696.

<sup>72</sup> Davidmann M "Slavery, compulsion and freedom: The right to withdraw one's labour" (1996) available at <http://www.solhaam.org/articles/right.html> (accessed 29 December 2023).

<sup>73</sup> See Davidmann (1996).



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that it suffered as a result of the employees' conduct. The distinction between protected and unprotected strikes is relevant mainly for the purposes of establishing whether the employees have a legal basis for being absent from work, which is indeed the case in protected strikes; in the event of an unprotected strike, however, an employer may, for example, dismiss employees for absenteeism.

An important take-away from the case under review is that it provides authority for employers to bring a claim against employees and unions involved in a strike, even a protected one, in the event that striking employees are violent and cause losses to the employer. The principle is based squarely on section 168(1)(b) of the LRA. If the law does not impose some form of penalty or compensation for losses suffered by the employer, the employees will have not had any regard for their conduct. This is not desirable, as employers could suffer huge losses at the hands of employees. Hence, section 68(1) should be seen as a balancing act, in that although employees are entitled to engage in industrial action, their conduct should not impose severe, uncontrollable losses on the employer.

Reading the provisions of the LRA holistically, in particular sections 157, 158 and 68, it is clear that the Labour Court has jurisdiction to entertain the claims of compensation arising from a strike. The judgments in *Rustenburg*, *PSA*, and *Macun* give clear indication that the Labour Court cannot be denied jurisdiction when an issue arises from an employment relationship, irrespective of whether the issue relates to compensation or to protected or unprotected industrial action.

In view of these judgements and the accuracy with which the presiding officers interpreted and applied the law, one is left puzzled by the exceptions raised in the *Massmart* case. Fundamental human rights that extends to or has an impact on employment relationships can now be enforced or addressed through the Labour Court as per its extended jurisdiction in terms of section 157(2) of the LRA. The Court therefore correctly concluded that all the exceptions that were raised, especially the one with regard to its jurisdiction, must fail and that the respondent (Massmart) must be permitted to proceed with its claims. It is noteworthy that the right to strike is constitutionally guaranteed in terms of section 23 of the Constitution of South, despite the fact that the Court did not make explicit reference to the Constitution. Furthermore, the Labour Court's decision to entertain the claim for compensation in this case was informed by the court objective of comply with the provisions of section 157(2) of the Labour Relations Act of South Africa.

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