THE LAW RELATING TO
LOCK-OUTS

by

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SUMMARY

The lock-out is accepted as a necessary element of collective bargaining.

The law relating to lock-out is considered as a legitimate instrument of industrial action. There are a number of procedural requirements for a legal lock-out. The dispute should be referred to a bargaining council (or where there is no bargaining council with jurisdiction, to a statutory council) or, failing which, the Commission for Conciliation, Mediation and Arbitration. If the bargaining/statutory council or the commission fails to resolve the dispute, it is no longer required that a ballet should be brought out in favour of the contemplated lock-out before the lock-out could be legal: all that is required is that the period of notice of the intended lock-out is given.

The lock-out may either be protected or unprotected. It is protected if it is not prohibited absolutely and the various procedural requirements have been complied with. The protected lock-out is immuned from civil liability. On the other hand a lock-out will be unprotected if it does not comply with sections 64 and 65 of the Labour Relations Act, 1995. In the circumstances the Labour Court has exclusive jurisdiction to grant an interdict or order to restrain any person from participating in unprotected industrial action and to order the payment of just and equitable compensation for any loss attributable to the lock-out.

Lock-outs are prohibited in specific instances and allowed with some qualifications in others. For example, employers engaged in the provision of essential or maintenance services are prohibited from locking their employees out in order compel them to comply with their demand. Such essential services are Parliamentary services, the South African Police Service and a service the interruption of which endangers the life, personal safety or health of the whole.

A distinction is also drawn between offensive and defensive lock-outs. Defensive lock-outs involve the closure of an employer’s premises or the shutting down of its operations during industrial action initiated by workers. The offensive lock-outs, also known as “pre-emptive lock-outs”, amount to an employer initiated form of industrial
action where the premises are locked and workers are excluded and prevented from working.

The law relating to lock-out in South Africa is clearly put in its proper perspective by the interim Constitution of the Republic of South Africa 200 of 1993, final Constitution of the Republic of South Africa 108 of 1996, Labour Relations Act 66 of 1995 and in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*.\(^1\) However the situation is unsatisfactory to employers. The interim Constitution guaranteed the "right to strike" and "recourse to the lock-out". Under the final Constitution lock-outs enjoy no direct protection. The Constitutional Court's certification judgement rejects the view that it is necessary in order to maintain equality to entrench the right to lock-out once the right to strike has been included. The Constitutional Court concluded that the right to strike and the right to lock-out are not always and necessarily equivalent. However the purpose of the lock-out is to settle collective dispute of the ways permitted by the Labour Relations Act, 1995. The purpose is not to terminate the relationship between the employer and the employee. The employer may not, for example, dismiss employees finally at the end of an unsuccessful lock-out in order to avoid the consequences of impending strike action by the employees.

\(^1\) *(1996) 17 ILJ 821 (CC).*
CHAPTER 1
INTRODUCTION

During 1993 the World Trade Centre near Johannesburg was the venue for the multi-party political negotiations, which drafted South Africa's new interim Constitution. Thousands of singing workers came to demonstrate their opposition to certain clauses in the Constitution. They objected also to the constitutional entrenchment of the possibility that the facility of lock-outs used by employers was being elevated to a fundamental right which requiring protection under the Constitution.

When one discusses the issue of a lock-out, the consideration of strike concept is unavoidable. That is why the various authors visualise a lock-out as the counterpart of a strike. Grogan, opines that "(t)he lock-out is the employer's counterpart of the strike". Brassey is of a different opinion and indicates clearly that lock-out action are not the equivalent of strikes. He concretizes this view as follows:

“That the two [the lock-out and the strike] should be treated differently is not purely a matter of historical accident or political expediency. Formally they may seem symmetrical, but in practice they play very different roles. When employers want to change terms of employment, they do not reach for the lock-out; provided they negotiate to impasse first, they can implement the changes unilaterally. Then, if the workers refuse to accept the change, the law gives their employer the right to retrench or dismiss them. If they refuse to leave the premises, the law provides a range of sanctions that range from judicial interdicts to the police baton. The strike in contrast, is the only means, short of resignation, by which workers can change their lot. It is the way they fend off exploitation and give teeth to the demands that they make at the bargaining table. For them it is a vital necessity, for the employers just an optional extra. By giving collective rights only to workers the law seems to favour them at the expense of their employers. Those who believe in the free interplay of market forces would be quick to condemn this as wrong. What they forget, however, is how much employers are favoured by the legal and social institutions of our society.”

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2 Act No 200 of 1993.
According to Creamer the true counterpart of the strike is not the lock-out, but the management’s prerogative to maintain or to change the terms and conditions in which employees work in the enterprise.  

I support the argument that the lock-out should not be seen as the counterpart of the strike, but as a mechanism which creates an imbalance in the collective labour relationship. Be that as it may, both the issue of strikes and lock-outs had, until the adoption of the interim Constitution, been regulated at statutory level only. The union movement did not immediately seek a change in the status quo regarding lock-outs. Its primary concern was to avoid the lock-out being elevated to the level of a constitutionally entrenched right. It sought to have lock-outs regulated at statutory level only, but to have the right to strike included in the Bill of Rights as a fundamental, constitutionally recognised right.

The Congress of South African Trade Unions (COSATU)’s argument was simply that collective rights of labour are based on the relations of inequality in the labour market between an individual worker and an individual employer, and are a measure to introduce some parity in the relationship. COSATU further argued that it is misguided to consider the right to strike by workers as similar to the use of lock-outs by employers. It is also dangerous, because the parity of power between an individual worker and employer is then assumed.

A compromise was eventually agreed upon which did not substantially resolve the concerns of COSATU, and the matter was expected to be finally resolved in the wording of the final Constitution to be adopted at a Constituent Assembly, after the non-racial elections in 1994. Following an intense debate, the interim Constitution, 1993 provided for a right to strike as well as the recourse of employers to lock employees out. As a part of the negotiated settlement and as a sop to labour which objected to the inclusion of the lock-out as a right, the word “recourse” was used in place of the word “right”. It should be noted that recourse to lock-out action means

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6 S27(5).
something less than a right to strike. What exactly the difference is, is not altogether clear.

During the negotiations of the Constitutional Assembly in 1996, COSATU objected more vehemently to the inclusion of the lock-out in the final Constitution, while employers insisted that as the right was included in the interim Constitution it should be included again in the final Constitution. COSATU exerted considerable pressure on the Constitutional Assembly by holding mass demonstrations and protest action.

The debate was revived when the proposed text of the final Constitution was drafted. The outcome of the debate was that the recourse to a lock-out was not included in the proposed text of the final Constitution.

Under the previous definition of old Labour Relations Act, a lock-out was defined as follows:

“Any one or more of the following acts or omissions by a person who is or has been an employer –

(a) the exclusion by him of any body or number of persons who are or have been in his employ from any premises on or in which work provided by him is or has been performed; or

(b) the total or partial discontinuance by him of his business or of the provision of work; or

(c) the breach or termination by him of the contracts of employment of any body or number of persons in his employ; or

(d) the refusal or failure by him to re-employ any body or number of persons who have been in his employ. If the purpose of that exclusion, discontinuance, breach, termination, refusal or failure is to induce or compel any persons, who are or have been in his employ or in the employ of other persons

(i) to agree to or comply with any demands or proposals concerning terms or conditions of employment or other matters made by him or on his behalf or by or on behalf of any other person who is or has been an employer; or

(ii) to accept any change in the terms or conditions of employment; or

(iii) to agree to the employment or the suspension or termination of the employment of any person.”

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7 Act 28 of 1956.
8 S1(i) of Act 28 of 1956.
Two separate elements can be discerned in this definition. Firstly, for a lock-out to take place, at least an act as described in paragraphs (a) to (d) must occur.

Secondly, the actions (which had to be committed by an employer or ex-employer) had to be committed for a certain purpose.

This definition is very wide and is not, for example, limited to an employer simply dismissing workers. It could, for instance, include such actions as an employer refusing to re-employ workers he has dismissed, or an employer refusing access to his factory.

According to this previous definition of a lock-out certain procedures must be followed before the institution of the lock-out will be regarded as lawful. This implies that the matter in respect of which the lock-out is to be instituted must have been referred to the industrial council with jurisdiction or application must have been made for the establishment of a conciliation board to consider the dispute.

According to this definition a lock-out did not only cover the physical prevention by an employer of employees from entering the work premises, but also the total or partial discontinuation of any part of his normal production. Under this definition it was possible that employer could dismiss employees as part of the lock-out.9

The previous Labour Relations Act and other statutes made it a criminal offence to take part, to instigate or to mate a lock-out in certain circumstances.10

Any employer’s organisation, trade union or federation which grants financial assistance to any person with the object of inducing or enabling such person to commit an offence or with the object of assisting such a person in the commission of such an offence is itself guilty of a criminal offence.11

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9 According to the new Labour Relations Act, such dismissal amounts to an automatically unfair dismissal and is therefore not allowed.
11 S65(3A) of Act 200 of 1993.
Whenever as a result of a dispute concerning the terms and conditions of employment of an employee or employees, there is a discontinuance of work, the employer had forthwith notify the Department of Manpower thereof.\textsuperscript{12}

Other activities which were closely related to lock-outs could constitute criminal offences in terms of various statutes, for example:

- Picketing could constitute a contravention of the Intimidation Act\textsuperscript{13} as well as the Internal Security Act.\textsuperscript{14}

- Employees who refuse to leave their employers’ premises could be guilty of a contravention of the Trespass Act.\textsuperscript{15}

According to the new Labour Relations Act,\textsuperscript{16} there is change in the definition in that the definition is narrower since the purpose of lock-out is limited to enforce acceptance of a demand. The definition of a lock-out in terms of the new Labour Relations Act 1995 is dealt with in the next chapter.

\textsuperscript{12} S65A of Act 200 of 1993.
\textsuperscript{13} Act 72 of 1982.
\textsuperscript{14} Act 74 of 1982.
\textsuperscript{15} Act 6 of 1959.
\textsuperscript{16} Act 66 of 1995.
CHAPTER 2
DEFINITION OF A LOCK-OUT

Presently, the South African legal system accepts that strikes and lock-outs have a valid role to play in South African labour relations and that the parity principle exists. This is in common with the most western industrialized countries.

The Labour Relations Act,\(^\text{17}\) defines a lock-out as follows:

“The exclusion by an employer of employees from the employer’s workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees’ contracts of employment in the course of or for the purpose of that exclusion.”\(^\text{18}\)

This definition retains the requirement that, in order to qualify as a lock-out, an exclusion must be accompanied by a demand related to matters of mutual interest between employer and employee. In Vanadium Technology (Pty) Ltd v National Union of Mine Workers\(^\text{19}\) the court implicitly affirmed the well-established principle that a demand that employees do no more than comply with their existing contractual provisions does not constitute a demand as contemplated in the definition of a lock-out. This definition implies that a certain action is linked to a particular aim or purpose as defined. The element of collusion of collective conduct is however not required for a lock-out. Since a single employer can institute a lock-out, the element of concerted activity need not be present for a lock-out to conform with the definition. The definition of a lock-out refers to “employees” in the plural. The definition makes it clear, therefore, that a single employee cannot be locked out.

In Schoeman and Another v Samsung Electronics (Pty) Ltd\(^\text{20}\) a sales executive was prohibited from returning to work because of that person’s refusal to accept a reduction in commission. The Court held that an individual employee cannot strike and a lock-out can also not be effected against a single employee. Therefore the

\(^{17}\) Act 66 of 1995.

\(^{18}\) S213.

\(^{19}\) (1996) 7 (4) SALLR 33 (LC).

\(^{20}\) (1999) 20 ILJ 200 (LAC) at 1367 I-1368A.
action taken by the respondent was not a lock-out as envisaged by the Act. The
conduct of the respondent in this regard, was a breach of the employment contract
between the parties, a contravention of the Basic Conditions of Employment Act.\textsuperscript{21}

According to Basson et al\textsuperscript{22} the definition consists of two elements, both of which
must be present simultaneously in order to constitute a lock-out, namely:

- the action taken by the employer must fall within the definition of a lock-out;
- the employer must embark on this action for a specific purpose as mentioned in
  the definition.

It is submitted that since a single employer can institute a lock-out, the element of
concerted activity need not be present for a lock-out to conform to a definition.

If one considers the definition carefully, it is clear that it refers to only one form of
action that can constitute a lock-out: the exclusion of employees from the employer’s
workplace. This will usually take the form of employer simply closing the workplace
and not permitting its employees access to the premises. It is also clear from the
definition that the lock-out could involve breaching the contracts of employment in
the course of or for the purpose of that exclusion. The mere exclusion by an
employer of employees from its premises will often have very little effect on its
employees, because the employees still receive their remuneration. In practice, the
exclusion in the form of a lock-out is normally accompanied by the employer’s
refusing to pay the employees. This would amount to a breach of contract on the part
of the employer. The Labour Relations Act\textsuperscript{23} provides that an employer is not
obliged to remunerate an employee for services that the employee did not render
during a protected lock-out.

The purpose for which the exclusion must take place is to compel employees to
accept a demand in respect of any matter of mutual interest between employer and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{21} At 1367 I-1368A.
\item \textsuperscript{22} \textit{Essential Labour Law} Vol 2 (2000) 2\textsuperscript{nd} ed 110.
\item \textsuperscript{23} S67(3) Act 66 of 1995.
\end{itemize}
\end{footnotesize}
employee.

This second element invites the consideration whether a secondary lock-out is possible in our law in the same way as a secondary strike. Du Toit et al\textsuperscript{24} argues that the use of the definite article “the” for employees indicates, quite equivocally, that it is the excluded (that is the locked out) employees whose compliance is sought. This seems to rule out any possibility of a secondary lock-out. Thus, an employer who locks-out non-strikers may well find itself sued for breach of contract for failing to pay wages on proper tender of services.

The lock-out can be used for a variety of reasons. It is necessary to draw a distinction between what is termed an offensive lock-out and a defensive lock-out. The distinction between offensive and defensive lock-outs becomes important in determining whether a particular lock-out is protected and, consequently, in establishing the rights and duties of the parties to a dispute.

An offensive lock-out is also known as pre-emptive lock-out. It occurs where the employer, during the collective bargaining process, seizes the initiative and excludes the employees from the workplace in order to compel them to accept a demand. This amounts to an attempt to compel workers to accept certain new terms or to agree to the variation of the existing terms. The offensive lock-out also influences the timing of industrial conflict, which can prove strategic in increasing the cost to workers of disagreements in the bargaining process. It may also be used to force agreement which would otherwise be difficult to obtain. The Labour Relations Act prohibits employers from hiring replacement labour to do the work of employees who have been excluded from workplace during an offensive lock-out.

In the case of Walker v De Beer\textsuperscript{25} the then Appellate Division of the Supreme Court held that a strike and a lock-out could not take place simultaneously in respect of the same labour dispute.\textsuperscript{26}

\textsuperscript{25} 1948 (4) SA 708 (A).
\textsuperscript{26} See Creamer supra.
In terms of the Labour Relations Act\textsuperscript{27} an employer may embark on a lock-out if an issue in dispute remains unresolved after it has been referred for dispute resolution or if 30 days have elapsed since the referral.

In the \textit{Technikon SA v National Union of Technikon Employees of SA}\textsuperscript{28} case the appellant and respondent reached a deadlock in annual wage negotiations. Conciliation failed. Respondent gave notice of an intended strike and the appellant gave notice of an intended defensive lock-out until such time as the union accepted its last wage offer. The union argued that as the strike was protected the appellant could not institute a lock-out in terms of section 64(3)(d)\textsuperscript{29} nor employ temporary labour in terms of section 76(1)(b).\textsuperscript{30} It launched an urgent application to the Labour Court to interdict the lock-out and the employment of temporary labour. The court granted the application and the appellant appealed to the Labour Appeal Court.

On appeal the court had reference to the three essential elements of a lock-out, namely that there must be an exclusion of employees by the employer from the workplace; that the purpose of the exclusion must be to compel the employees to accept the employer’s demand and that the demand must be in respect of any matter of mutual interest between employer and employee. In allowing the appeal the court found that the lock-out was in response to a strike as contemplated in section 76(1)(b).\textsuperscript{31}

Defensive lock-outs involve the closure of an employer’s premises or the shutting down of its operations during industrial action initiated by workers. Such action strengthens the employer’s bargaining position as it has the effect of increasing economic costs of industrial action for workers who had engaged in a go-slow or work-to-rule action rather than on a full-blown strike action. Furthermore, where employees included in the lock-out were not party to the original industrial action this

\textsuperscript{27} S64(i).
\textsuperscript{28} (2001) 22 ILJ 427 (LAC).
\textsuperscript{29} Labour Relations Act 66 of 1995.
\textsuperscript{30} \textit{Ibid}.
\textsuperscript{31} \textit{Ibid}.
places increased pressure on the representatives of the striking workers to reach agreement with the employer.\textsuperscript{32}

It is noteworthy that while the Labour Relations Act confers on workers the right to strike it merely states that “every employer has recourse to a lock-out”\textsuperscript{33} if it complies with the statutory requirements. According to Grogan\textsuperscript{34} had employers been given a right to lock-out, they could have raised section 7(2)(b) of the Labour Relations Act\textsuperscript{35} against any union seeking to pressurise them to refrain from engaging in such action by boycotts and other forms of pressure. This section prohibits any person from preventing another from exercising any right under the Act. Furthermore, recognition of the lock-out as a right might have rendered unconstitutional the prohibition on employment of replacement labour during “offensive” lock-outs.

According to Basson\textsuperscript{36} a lock-out must have a purpose related to collective bargaining, that is, the purpose must be related to a matter of mutual interest between employer and employee. Our courts have interpreted the phrase “matter of mutual interest between employer and employee” in the widest possible sense. In \textit{Rand Tyres and Accessories v Industrial Council for the Motor Industry (Transvaal)}\textsuperscript{37} the court held:

> “Whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned, must be of mutual interest to them; and there can be no justification for restricting in any way powers which the Legislature has been at the greatest pains to frame in the widest sense.”\textsuperscript{38}

The grievance or dispute must relate to a matter of mutual interest between employer and employee. A dispute between two or more trade unions, or between two or more employees, is not a strikable dispute, and employees can accordingly not be locked out during the course of such dispute either.

\textsuperscript{32} S64(1).
\textsuperscript{33} Act 66 of 1995.
\textsuperscript{34} \textit{Workplace Law}\textsuperscript{370}.
\textsuperscript{35} Act 66 of 1995.
\textsuperscript{36} \textit{Essential Labour Law} (2000) 2nd ed 112.
\textsuperscript{37} 1941 TPD 108.
\textsuperscript{38} At 115.
CHAPTER 3
CONSTITUTION OF SOUTH AFRICA

3.1 LOCK-OUT IN THE INTERIM CONSTITUTION

Jordaan\textsuperscript{39} states that “strikes and lock-outs have always been treated as countervailing economic weapons in our law”. Creamer\textsuperscript{40} supports this view and takes the argument further by arguing that “strikes and lock-outs have been widely viewed as countervailing forms of industrial action available to workers and employers for the assertion of their respective interests in the collective bargaining process”. Notwithstanding the severe restrictions which apartheid legislation placed on strike action, particularly for black workers, the Labour Relations Acts, of both 1956\textsuperscript{41} and 1995\textsuperscript{42} protected the resorting to both strikes and lock-outs. While acknowledging the right to strike, the Labour Relations Act, 1995, does not extend the same status to lock-outs.

During the last quarter of 1993, there was a debate in South Africa over the inclusion of the right of employers to lock-out workers, in the Bill of Rights set out in the chapter dealing with fundamental rights in the interim Constitution. The COSATU\textsuperscript{43} Central Executive Committee belatedly became aware that the lock-out was proposed as a constitutionally entrenched right, and that such proposal had emanated from the National Manpower Commission, argued vigorously for its exclusion from the Bill of Rights.

Both the issue of strikes and lock-outs had, until the adoption of interim Constitution, been regulated at statutory level only. The union movement did not seek a change immediately in the status quo regarding lock-outs. Its primary concern was to avoid the lock-out being elevated to the level of a constitutionally entrenched right. It sought to have lock-outs regulated at statutory level only, but to have the right to

\textsuperscript{40} Supra 1.
\textsuperscript{41} Act 28 of 1956.
\textsuperscript{42} Act 66 of 1995.
\textsuperscript{43} Congress of South African Trade Unions.
strike included in the Bill of Rights as a fundamental, constitutionally recognised right.

According to Patel\textsuperscript{44} the Congress of South African Trade Unions (COSATU)’s argument was simply that collective rights of labour are based on the relations of inequality in the labour market between an individual worker and an individual employer, and are a measure to introduce some parity in the relationship. COSATU further argues that it is misguided to consider the right to strike by workers as similar to the use of lock-outs by employers and dangerous too, for any assumption of parity of power between an individual worker and employer.

Finally, international experience was cited in support of the union proposals. Opinions both here and elsewhere are divided over the true place of the lock-out, in particular whether it can properly be said to be the counterpart of the strike. While the lock-out, in one form or another, is permitted in Germany, Sweden and the United States, it is prohibited in France, Italy and Spain. The argument usually advanced in support of prohibition is that strikes and lock-outs are in social reality not on the same plane. The power to withdraw labour is counterbalanced by management’s power to shut down production, to switch it to different places. A second argument against the pairing of strikes with lock-outs is that the employer’s power to unilaterally bring about changes to terms and conditions of service is the true equivalent of the strike.\textsuperscript{45}

A compromise was eventually reached which did not substantially resolve the concerns of COSATU. The compromise was that the matter was expected to be finally resolved in the wording of the final Constitution to be adopted at a Constituent Assembly, after the non-racial elections in 1994. After an intense debate, section 27(5) of the interim Constitution\textsuperscript{46} provided for a right to strike as well as the right of the employers to lock-out employees. So part of the negotiated settlement and as a sop to labour who objected to the inclusion of the lock-out as a right, the word

\textsuperscript{44} Workers Rights: The Role of Organised Labour in a Democratic South Africa (1994) 24.
\textsuperscript{45} Ibid.
\textsuperscript{46} Act 200 of 1993.
“recourse” was used in place of the word “right”. It should be noted that recourse to lock-out action means something less than a right to strike.

3.2 LOCK-OUT IN THE FINAL CONSTITUTION

During the negotiations of the Constitutional Assembly in 1996, the Congress of South African Trade Unions (COSATU) objected more vehemently to the inclusion of the lock-out in the final Constitution, while employers insisted that as the right was included in the interim Constitution it should be included again in the final Constitution.

The Congress of South African Trade Unions (COSATU) placed considerable pressure on the Constitutional Assembly by holding mass demonstrations and protest actions, an organised labour argued that strikes and lock-outs should not be treated equally.

Although a lock-out does not have the legal status of a strike, the Labour Relations Act\(^ {47}\) extends greater protection to the lock-out than many other countries that recognise the right to strike. Most continental countries either prohibit lock-outs absolutely or severely curtail their use. According to Du Toit \textit{et al}\(^ {48}\) in Portugal lock-outs are prohibited altogether. In Spain, they are permitted only in the case of a strike or other irregularity in the performance of work when at least one of the following conditions exists: danger of, or actual violence to persons or damage to property; “sit-down” strikes or occupation of the place of work; or a volume of absenteeism or irregularities in the work which gravely impede the normal work processes. Even then, lock-outs are subject to stringent controls. In France and Italy the lock-out has no statutory recognition. A lock-out is regarded as an illegitimate breach of contract under the civil law and exposes the employer to actions for damages. In all these countries the underlying principle seems to be that because of the asymmetrical power relationship between employers and employees, the lock-out should not be placed on the same legal footing us the strike.

\(^{47}\) Act 66 of 1995.
\(^{48}\) Labour Relations Law. A Comprehensive Guide 3\textsuperscript{rd} ed 255.
The outcome of the debate was that the recourse to a lock-out was not included in the proposed text of the final Constitution. Chapter II of the Bill of Rights, guarantees the right to strike but does not mention lock-outs at all. The repeal of the lock-out provisions in the Labour Relations Act could arguably breach section 9 (the equality provision) and section 23(1) (the right to fair labour practices) of the final Constitution.


The text of the final Constitution was submitted to the Constitutional Court for certification. The Constitutional Court had to decide whether the new text of the final Constitution complied with the constitutional principles agreed to by the different political parties as the framework for the final Constitution. Several objections were raised against the omission of the right to lock-out from the final Constitution.

The first objection raised against the final Constitution was that collective bargaining parties must have the right to exercise economic power against each other. The Constitutional Court held that once a right to bargain collectively is recognised, implicit within it will be the right to exercise some economic power against partners in collective bargaining. The Constitutional Court was therefore of the view that recognition of the right to bargain collectively gave sufficient recognition to the right to exercise economic power against the other party during the collective bargaining process.

The second objection was that the recognition of employees right to strike and omitting the employer's right to lock-out together meant that employers' rights had less status than the rights of employees to engage in collective bargaining. The Constitutional Court disagreed with this argument and re-iterated that the right of employers to bargain collectively was recognised in the Constitution.

The third argument raised in favour of the inclusion of a right to a lock-out, was probably the most crucial one and was the same argument that had dominated the debate in the run-up to the interim Constitution of 1993. This argument was based on the view that the principle of equality requires that the right to lock-out be treated equally as they are counterveiling forces. The court summarised this argument as follows:

“A related argument was that the principle of equality requires that, if the right to strike is included in the NT [new text - the proposed text of the final Constitution], so should the right to lock out be included. This argument is based on the proposition that the right of employers to lock out is the necessary equivalent of the right of workers to strike and that therefore, in order to treat workers and employers equally, both should be recognised in the NT.”

However, the Constitutional Court also disagreed with this argument and concluded that the right to strike is not the equivalent of the right to lock-out:

“That proposition cannot be accepted. Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lock-out). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock-out. The argument that it is necessary in order to maintain equality to entrench the right to lock-out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock-out are not always and necessarily equivalent.”

The Constitutional Court accordingly concluded that the omission of a right to lock-out from the final Constitution did not conflict with the constitutional principles. Therefore, while employees’ right to strike is expressly protected by section 23 of the Constitution, 1996, the right of employers to lock their employees out is not expressly entrenched. However, this right seems to be protected by implication through the express protection of the right to bargain collectively. The fact that the Labour

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51 At 840-841.
52 At 841.
Relations Act treats strikes and lock-outs as two sides of the same coin supports this view.

In conclusion, strikes and lock-outs should receive the same protection under the law. Where employees take the initiative and resort to industrial action, employers can respond by sitting out the strike and withhold wages and be allowed to use replacement labour. If the strike is unprotected, the employer will be able to invoke disciplinary sanctions. In the case of a protected partial strike, the employer uses a lock-out because participation in a protected strike constitutes neither misconduct nor a breach of contract. The critical test in reality is whether the economic weaponry of employers and workers is reasonably and fairly balanced. It is submitted that Kahn-Freund\textsuperscript{53} was probably correct when he observed that a strike and a lock-out have in common that both actions are a waste of social resources.\textsuperscript{54} However, at times, it remains of utmost importance to utilize these weapons.

In his judgement in the Constitutional Court in Du Plessis and Others v De Klerk and Another,\textsuperscript{55} Sachs J made the point thus:

\begin{quote}
"Much of labour law has a procedural and framework character, leaving it to workers and employers to establish their own agreements in the light of their respective needs and interests. Collective bargaining plays a central role in establishing appropriate balancing of interests. Granting fundamental rights of a constitutional character to individual employees could destroy decades of arrangements, formal and informal, between representatives of employers and employees. Agreements involving closed shop and stop-order facilities for union dues from salary might be regarded by some as controversial and contestable. I do not wish in any way to prejudge the interpretation of constitutional or other provisions relating to labour law. Yet it does seem to me at first sight that the remedy for such persons should be to launch any challenges they may have, either in the Legislature or in the many bodies, statutory and otherwise, concerned with industrial relations, not in the Constitutional Court."
\end{quote}

\textsuperscript{53} Labour and the Law (1983) 3\textsuperscript{rd} ed 291.
\textsuperscript{54} Supra 91.
\textsuperscript{55} 1996 (3) SA 850 (CC).
\textsuperscript{56} At 934 I-935 B.
CHAPTER 4
PROTECTED AND UNPROTECTED LOCK-OUTS

In terms of the Labour Relations Act, 1995, a lock-out will only be regarded as protected if it is not prohibited absolutely and if the various procedural requirements have been complied with. The Labour Relations Act of 1995 only differentiates between protected and unprotected lock-outs. Industrial action has been decriminalised in this Act, and non-compliance with the Act is no longer a criminal offence, as it was envisaged in the old Labour Relations Act of 1956. The new Labour Relations Act 1995, however, does attract certain civil sanctions. The fact of the matter is that the distinction between the protected and unprotected lock-out is that the former refers to compliance with the statutory provision and the latter to non compliance or violation of the statutory provisions of the Labour Relations Act, 1995.

4.1 ABSOLUTE PROHIBITIONS AGAINST LOCK-OUTS

Under certain circumstances a lock-out is prohibited absolutely. These circumstances are regulated in the Labour Relations Act, 1995. According to these provisions a lock-out may not be instituted if:

(a) a collective agreement prohibits a lock-out action;

(b) the matter has been referred to arbitration;

(c) the employer/employees are involved in essential services or in a maintenance service.

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57 S67(1).
58 S67.
59 S65.
60 S67(6).
61 S67(1).
62 S65.
63 S65(1)(a).
64 S65(1)(b).
65 S65(1)(d).
(d) that the matter giving rise to the lock-out is regulated in an arbitration award, a collective agreement or in a wage determination.\textsuperscript{66}

Basson et al\textsuperscript{67} tabulates the absolute prohibition against lock-outs. They categorise the absolute prohibitions into the following six prohibitions:

(1) **Absolute prohibition 1: A collective agreement prohibits a lock-out in respect of the issue in dispute**

Labour Relations Act, 1995 states that no person may take part in a lock-out if that person is bound by a collective agreement that regulates the issue in dispute. A lock-out in contravention of this prohibitions would be unprotected. In *Chemical Energy Paper Printing Wood and Allied Workers Union v National Magazine Printers*\textsuperscript{68} there was a recognition agreement that regulated the collective bargaining relations between the two litigants. That agreement provided for annual negotiations on wages and conditions of employment. The trade union opened the annual round of negotiations with wage demands and a proposal to review the parties’ substantive collective agreement to bring it into line with the new Basic Conditions of Employment Act. The employer responded with its wage proposals together with demands in respect of substantive terms and conditions of service such as the working week, the shift overlap, long service, etc. During the negotiations the union wanted to negotiate the wages separately from the review of the substantive agreement. The employer, however, insisted that all the demands, wage and substantive terms, must be dealt with as a package. Proposals made by the employer in respect of substantive terms and conditions of employment were also discussed. The negotiations ended in deadlock and the dispute procedures provided for in the recognition agreement were exhausted.

On the facts the court concluded that the subject-matter of the dispute processed in terms of that dispute procedure was one that involved both wages and substantive terms and conditions. The trade union referred a dispute about wages’ to the

\textsuperscript{66} S65(1)(e).
\textsuperscript{67} *Essential Labour Law*(2000) 2\textsuperscript{nd} ed 114-121.
\textsuperscript{68} (1999) 20 ILJ 2864 (LC).
CCMA. At the conciliation meeting the dispute in respect of wages occupied most of the time. The employer insisted, however, that an agreement on wages had to be coupled with its demands in respect of substantive terms and conditions. The conciliation did not settle the dispute and the trade union issued a notice stating its intention to embark on industrial action “with regard to the wage dispute” on 22 January 1999. The employer responded by issuing a notice of intention to lock out. In March the trade union accepted the employer’s wage proposals and the employees tendered their services. When the employer continued the lock-out the trade union approached the Labour Court to interdict the lock-out. The union argued that the dispute had been settled and accordingly that the lock-out was unprotected. The court held that the dispute had been settled and that the return to work was not unconditional. It accordingly refused to grant the interdict against the company.

According to Brassey\(^{69}\) collective agreements are normally negotiated either in bargaining councils or at plant level. Prohibitions can be tacit as well as express. Mere conclusion of an agreement imports an undertaking not to seek a variation of its terms by means of individual action thus the employer may not participate in a lock-out or any conduct in contemplation of or furtherance of a lock-out if he is bound by a collective agreement prohibiting lock-out in respect of the issue in dispute. It should be noted that the agreement prohibiting the lock-out must be collective one. A collective agreement may also bind non-union employees. In that event the Constitutional Court is the appropriate body to determine the interests of the non-union employees. The Labour Relations Act, 1995\(^{70}\) has been exhaustively discussed. If a person is bound by collective agreement in terms of this section, such person is prohibited from embarking on a strike if the collective agreement prohibits a strike or a lock-out about the issue in dispute. The purpose of this prohibition is to prevent employees and employers from using strikes or lock-outs where the collective bargaining parties themselves have restricted the right to strike or recouse to lock-out. In other words it prohibits the industrial actions about issues which the collective bargaining parties have agreed will be unfit for such action at a particular time.

\(^{70}\) S65(1)(a).
(2) **Absolute prohibition 2: Where arbitration is prescribed in terms of the agreement**

This discussion refers particularly to the Labour Relations Act, 1995. Here if the parties themselves have agreed on arbitration as a method of dispute resolution they may not take strike action or resort to a lock-out to resolve those disputes.

The reference here is to an agreement and not to collective agreement. It includes both the collective agreements and agreements between individual employers and employees, for example, contract of employment, or an agreement between employer and employee to settle a particular dispute by arbitration. Issues to be resolved for the arbitration in an agreement are unlimited.

(3) **Absolute prohibition 3: Disputes that must be referred to arbitration or the Labour Court**

There is a division drawn between disputes which must be arbitrated or adjudicated and those which can be resolved by industrial action. The Labour Relations Act provides that no person may take part in a strike or lock-out, if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court. If a party has a right to refer a dispute to arbitration or to Labour Court in terms of the Labour Relations Act, Act 1995, that party may not resort to a strike or lock-out as a method of having a dispute resolved. In considering whether a prohibition applies, two problems typically arise. The first is a factual one: what is the dispute in issue? The proper approach here is to determine the true issue that is in dispute.

The second, which is quite distinct, is a matter of legal construction and that of law: what kinds of disputes we covered by the prohibition. The answer is simply that those disputes that can be resolved by adjudication or arbitration is covered. The most important types of disputes that were relevant in this regard include:

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71 S65(1)(b) of Labour Relations Act 66 of 1995.
72 S65(1)(c) of the Labour Relations Act 66 of 1995.
Disputes concerning alleged unfair dismissal of employees. The Labour Relations Act 1995\textsuperscript{73} provides that disputes about alleged unfair dismissals for misconduct or incapacity must be referred to arbitration. Dismissals which are automatically unfair are those which are based on the operational requirement of the business must be referred to Labour Court for adjudication.

(a) Disputes about alleged unfair discrimination must be referred to the CCMA for conciliation and then to the Labour Court in terms of section 10 of the Employment Equity Act, 1998.

(b) Disputes regarding unfair conduct relating to training, promotion, benefits, suspension and discipline short dismissal as well as the refusal to relive must be referred to arbitration.

(c) Disputes regarding freedom of association must be referred to the Labour Court in terms of section 9(4) of the Labour Relations Act, 1995.

The case which provides an illustration of the situation is that of \textit{Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building and Allied Workers Union & Others.}\textsuperscript{74} Employees referred two disputes to the CCMA - the first concerned non-payment for certain periods during which they had been on a strike and the second involving a complaint of harassment by certain managers, coupled with a demand for the dismissal of the managers. When the disputes failed to settle, employees went on strike. The employer sought to interdict the strike, claiming that it was unprotected on the grounds, \textit{inter alia}, the issues in dispute were amenable to arbitration or adjudication. Landman J decided that the dispute over non-payment of wages was a dispute that could be adjudicated by the Labour Court\textsuperscript{75} and that it was accordingly not a dispute in respect of which employees could strike. On account of the alleged harassment (a right issue) they could strike in support of their demand for the dismissal of the managers, since the demand was not one that could be determined by a court or arbitrator.

\textsuperscript{73} S191.
\textsuperscript{74} (1997) 18 ILJ 716 (LC).
\textsuperscript{75} S158(1)(a)(iii) of the Act.
In the appeal judgement reported as *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union* the LAC took a different view regarding the second dispute. The court found that the true issue in dispute was the alleged victimisation and not the demand for the dismissal of the managers. In this case the court distinguished between the complaint and the demand. If the complaint concerns a justiciable issue, then it did not matter that the Labour Relations Act did not offer the remedy sought by the demand. In other words, if the complaint is coupled with a demand the court should only look at the complaint and not the demand because a party may seek to characterise the dispute by adding a demand to a justiciable complaint in order to render it non-justiciable.

(4) Absolute prohibition 4: Essential and maintenance services

Employers engaged in the provision of essential or maintenance services are prohibited from locking their employees out in order to compel the employees to comply with their demand. The essential services are the Parliamentary Services, the South African Police Service and “a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population”. The task of determining whether a service falls within this definition lies with the Essential Services Committee established in terms of the Labour Relations Act which is charged with investigating whether a particular party could be declared essential and thereafter with determining whether they remain essential services as proclaimed. The committee may ratify any collective agreement that provides for the maintenance of minimum services in an essential service. A number of services have already been designated as essential services by the Essential Service Committee and they include

- the regulation and control of traffic;
- the Weather Bureau of the Department of Environmental Affairs and Tourism

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78 S70.
because it is a service which supports the regulation and control of air traffic;

- municipal traffic services and policing services;

- municipal health;

- municipal security;

- the supply and distribution of water;

- the generation, transmission and distribution of power;

- fire fighting;

- the services required for the functioning of courts;

- correctional services;

- blood transfusion services provided by the South African blood transfusion services.

The Labour Relations Act, 1995\(^79\) provides that employers and trade unions can conclude a collective agreement which provides for the maintenance of certain minimum services in a service designated as an essential service. If the agreement is approved and ratified by the essential service (who do not provide minimum services) may strike or may be locked out.

A maintenance service is defined as one the interruption of which “has the effect of material physical destruction to any working area, plant or machinery.”\(^80\) The Essential Service Committee must decide whether a service qualifies to as a maintenance service,\(^81\) parties may also conclude collective conclude collective

\(^{79}\) S72 of the Labour Relations Act 1995.

\(^{80}\) S75 of the Labour Relations Act 1995.

\(^{81}\) S70 of the Labour Relations Act 1995.
agreements in this regard.\textsuperscript{82}

Employers and employees engaged in essential services are not entitled to lock-out or to strike about disputes which may arise between them. In the event of that eventually alternative mechanisms have to be devised and provided for the resolution of disputes. The most typical are disputes relating to the terms and conditions of employment. In terms of the Labour Relations Act\textsuperscript{83} the following procedure for the resolution of disputes of interest in essential services is prescribed:

\begin{enumerate}[(a)]
\item If the parties to dispute fall within the jurisdiction of a bargaining or statutory council, the dispute must first be referred to that council for conciliation.
\item If no such Council or the CCMA is successful, any party to the dispute be resolved through arbitration by either the Council or the CCMA. The parties to the dispute will then be bound by the arbitrator’s award.
\end{enumerate}

\textbf{(5) Absolute prohibition 5: An arbitration award or collective agreement regulates the issue in dispute}

A person may not strike or lock-out if he/she is bound by an arbitration award that regulates the issue in dispute.\textsuperscript{84} An arbitration award includes an award by the CCMA, a bargaining council, an accredited agency or a private (non-accredited) arbitration body. This provision gives effect to the principle that parties who have recourse to quasi-judicial remedies should not be entitled to have two bites at the cherry, that is, if the outcome of the arbitration is not their liking, they ought not them to be permitted to resort to power in order to try to obtain a better result.

In \textit{Black Allied Workers Union \& Others v Asoka Hotel}\textsuperscript{85} minimum wages were regulated in terms of a gazetted industrial council agreement (which now would be a bargaining council agreement). The union demanded that the employer negotiate

\begin{footnotesize}
\textsuperscript{82} S75 of the Labour Relations Act of 1995.
\textsuperscript{83} S74 of the Labour Relations Act of 1995.
\textsuperscript{84} S65(3)(a)(i) of Labour Relations Act, 1995.
\textsuperscript{85} (1989) 10 \textit{ILJ} 167 (IC) at 173D-I.
\end{footnotesize}
with it over wage increases. When the employer refused, the union members engaged in a strike to support their demand. The strikers were dismissed. They approached the Industrial Court for an order for re-instatement - the order was granted. On the question whether employees were able to strike over increased wages (wages higher than those prescribed by the agreement) while an industrial council agreement that regulated wages was in force, the court held as follows:

“The strike was occasioned by a demand for an increase in actual wages. ... The industrial council agreement makes provision for minimum wages. It makes no provision for the wages actually paid by any employer to its employees. The industrial council agreement furthermore contains no provision relating to an increase in actual wages which would be binding on the parties during the relevant period. It also contains no prohibition against actual wages being negotiated between an employer and its employees. The object of s 65(1)(a) of the Act (the Labour Relations Act of 1956) is to ensure that agreements which are voluntarily arrived at and valid and binding between the parties are adhered to. The legislature therefore prohibited employers and employees from bringing pressure to bear on each other through the use of the strike or lock-out weapon to agree to amend agreements prior to the time agreed upon for the renegotiation of such agreements. It is for that reason that the Act prohibits a strike or lock-out where there is a provision which deals with the matter giving occasion for the strike or lock-out. The court is aware of the fact that there is a general misconception that strikes and lock-outs are, without qualification, prohibited during the currency of an industrial council agreement. This view of the law is incorrect. In this particular case, there is, as has been pointed out above, no provision in the industrial council agreement which deals with the matter giving occasion for the strike or lock-out.”

(6) Absolute prohibition 6: If the issue in dispute is regulated by a determination

A person is not entitled to strike or lock-out if he/she is bound by any determination made by the Minister in terms of section 44 that regulates the issue in dispute or any determination made in terms of the Wage Act of 1957. It should be noted that since the Labour Relations Act, 1995 came into operation the Wage Act, 1957 has been repealed by the Basic Conditions of Employment Act, 1997. The fact that the Wage Act, 1957 has been repealed means that the meaning of section 65(3)(b) has to be reconsidered. In this regard two legislative provisions, both to be found in the Basic Conditions of Employment Act, 1997 are important. The first of these is to be

87 Act 5 of 1957.
88 Act 75 of 1997.
found in item 9 of Schedule 3 to the Basic Conditions of Employment Act 1997 which provides that a wage determination made in terms of the Wage Act, 1957 remains in force for its prescribed period and the determination may even be extended (even though the Wage Act has been repealed).

Secondly, the Basic Conditions of Employment Act 1997 provides for a system of sectoral determinations of basic conditions of employment made by the Minister of Labour on the advice of a body called the Employment Conditions Commission. In the final analysis employers and trade unions may not resort to lock-out or strikes if the matter in dispute has been regulated in a sectoral determination by the Minister of Labour.

4.2 PROCEDURAL REQUIREMENTS FOR A PROTECTED LOCK-OUT

If the intended lock-out is not prohibited absolutely, it must comply with certain procedural requirements before the lock-out will be regarded as a protected one. There are two procedural requirements which must be complied with:

- Firstly, the Labour Relations Act, 1995 requires that the dispute must have been referred to either a bargaining council/statutory council or to the Commission for Conciliation, Mediation and Arbitration. It is immaterial which party has referred the dispute.

- Secondly, the Labour Relations Act, 1995 requires, in the case of a lock-out, that the employer gives at least 48 hours written notice of the commencement of the lock-out. Where the state is the employer the required notice period in respect of a lock-out is seven days. This is in terms of the Labour Relations Act, 1995.

Now I turn to discuss the two requirements *in seriatim*:

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89 S64(1)(a).
90 S64(1)(b).
91 S64(1)(d).
(a)  **Procedural requirement 1: Referral of the issue in dispute to conciliation**

The first step in the procedure to obtain protected status for a lock-out is that the issue in dispute must be referred to a bargaining or statutory council with jurisdiction then the matter must be referred to CCMA. The primary purpose of referring a dispute is to promote the effective resolution of labour disputes and to prevent costly lock-out. In terms of the regulations issued under the Labour Relations Act, 1995 referral of a dispute for conciliation to CCMA has to be done on LRA Form 7.11. Once the dispute has been referred to a bargaining council or statutory council or the CCMA, such a body must attempt to resolve the dispute through conciliation. A lock-out will only be protected if conciliation fails. Failure of conciliation means that the issue in dispute has not been settled within a period of 30 days from the date of referral or a certificate has been issued by the CCMA, in the form of FORM RAA 7.12 or the council stating that the dispute has not been settled.

The other important aspect is our to determine the “issue in dispute”. It is important to understand this phrase. The parties may classify the phrase in different ways. In determining the point “in issue” reference is made to the Labour Relations Act, 1995 which defined it as “the demand, grievance or dispute that forms the subject matter of the strike or lock-out”. In determining what the issue in dispute is, the court will look beyond the characterisation of the dispute by the parties in an attempt to identify the real or underlying dispute. In *Adams and Others v Coin Security Group (Pty) Ltd*\(^\text{92}\) the Labour Court held that the issue in dispute can be determined by asking “What is it that the employer was required to do in order for the strike to be called off or ended”. In *Ceramic Industries Ltd t/a Betta Sanitary Ware vs NCBAWU (2)*\(^\text{93}\) Froneman DJP suggested that the underlying complaint determines the nature of the issue in dispute, not the demand that elicited a negative response.

In *NTE v Ngubane and Others*\(^\text{94}\) determining the matter said: “One must have regard to the demands which have been refused and which the strike or lock-out is intended

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\(^{92}\) (1999) 20 *ILJ* 1192 (LC) at 1208.

\(^{93}\) (1997) 18 *ILJ* 671 (LAC).

\(^{94}\) (1992) 13 *ILJ* 910 (LAC) at 919 D-920A.
to enforce”. In short, a dispute can exist only when the one person in effect says “yea” and the other “nay”.\textsuperscript{95} It requires, in other words, a clash in the stances adopted by contending parties. Normally they will communicate their respective standpoints by the exchange of words, but a dispute can arise by conduct and will typically do so when one party demands a concession and the other fails to make it by the appointed time.\textsuperscript{96}

Deciding what constitutes the dispute can be difficult. There might be several disputes between the parties, a single dispute can have a number of elements, the parties might, by compromise, narrow the scope of the original disputes, and there can be confusion between the parties on the stance being adopted by each. A common sense approach must be taken in deciding what the dispute entails and the court should look to substance rather than form. A dispute can exist when one party maintains one point of view and the other the contrary or different one.\textsuperscript{97}

\textbf{(b) Procedural requirement 2: Notice of the lock-out}

After the statutory conciliation process referred to the Labour Relations Act, 1995\textsuperscript{98} has been exhausted without settlement being reached, the Act prescribes for the giving of notice to the other party to the dispute of the intention to embark on an industrial action. At least 48 hours written notice of the commencement of a lock-out must be given to any union that is party to the dispute, or, if there is no union to the employees concerned. Where the state is the employer seven days notice of the lock-out must be given. In addition, in certain circumstances, the notice must be given to a bargaining council or an employer’s organisation. The purpose of the notice is twofold. Firstly, it places the recipient on notice that if it does not come to the table and settle the dispute, it will face industrial action. With this sword of Damocles hanging over its head, the party must then weigh the costs of lock-out against the costs of settling. Secondly, the notice affords the employer who intends withstanding the strike an opportunity to make appropriate arrangements to protect

\textsuperscript{96}Ibid.
\textsuperscript{97}Ibid.
\textsuperscript{98}S64.
its business.

In the case of seven days notice afforded to the state, is based on a view of the state as administrative by less responsive than the private sector. This privilege also carries a corresponding burden. When the state intends to lock-out, it must give the extended period of notice to the employees in question. The question of the notice has been a bone of contention. The courts have been approached in a number of cases to measure the compliance with the notice provision.

In *Ceramic Industries Ltd t/a Betta Sanitary ware v National Construction Building & Allied Workers Union (2)*\(^9^9\) the union served a notice on the employer informing it that “a strike shall start at any time after 48 hours from the date of this notice”. The court held that the primary purpose of the strike notice, namely to give the employer advance warning of the proposed strike so that it might prepare for the ensuing power-play, is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence.

In *CAWU & Others v Modern Concrete Works*\(^1^0^0\) the employer responded to a go-slow by giving notice of its intention to lock out. That notice read: “As a result of our meeting at the CCMA which failed to resolve the current dispute, we hereby give formal notification of our intention to lock-out your members. You are further informed that we will make ourselves available for round table discussions in respect of the current dispute.” In an interdict brought by the union the court held that the notice was defective because it did not indicate when the lock-out would commence.

In *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA*\(^1^0^1\) the Labour Court took somewhat a liberal view on compliance. In this case the employees had failed to commence their strike on the day specified in the notice, and had only done so some three days later. The question was whether the employees had waived their right to strike. The court held that it was not the intention of the legislature to deprive employees of the right to strike for failing to act on the strike notice. The

\(^{99}\) Supra 677A-D.

\(^{100}\) (1999) 10 BLLR 1020 (LC).

\(^{101}\) (1999) 20 ILJ 677 (LC).
Court accepted that one of the purposes of the strike notice was to give the employer an opportunity to prepare for the approaching power-play. However, this did not mean that the non-commencement of the strike on the exact day specified in the notice would defeat the purpose of the notice provision. An employer who had its replacement labour ready on the appointed day could locked-out the would-be strikers and deploy the replacement labour instead. Zondo J suggested that an unreasonable delay may well result in the loss of the right to strike. In this case it might be seen in the light of the relatively short period that elapsed between the date specified in the notice and the day on which the employees commenced the strike.102

Another interesting aspect here is that where an employer embarks on a lock-out that is not protected in terms of the Labour Relations Act, 1995, its employees will be able to strike in response to that unprotected lock-out without complying with the procedures set out in Labour Relations Act, 1995,103 where employees embark on an unprotected strike, an employer will also be able to respond by means of an automatically protected lock-out.

102 I.e 3 days.
103 S64.
CHAPTER 5

CONSEQUENCES OF A PROTECTED LOCK-OUT

5.1 IMMUNITY FROM CIVIL LIABILITY

The Labour Relations Act, 1995, extends a strong protection to lock-outs that comply with its provisions. First, it guarantees to protected lock-outs immunity from the reaches of civil liability. The Act provides that participation in a protected strike or lock-out, or any conduct in contemplation or furtherance of a protected strike or lock-out, is not a delict or breach of contract. The protections take two forms: indemnities against criminal and civil liability and protection against extra-curial measures that can otherwise lawfully be employed by way of self-help, most notable the cancellation of the contract.

In terms of common law, the exclusion of employees who are willing to work from the employer’s premises, usually accompanied by a refusal to pay their wages, constitutes a breach of contract by the employer. This means in terms of common law the employees could sue the employer for their losses resulting from the breach of contract and can also apply for an interdict to prevent the employer from instituting or continuing with the lock-out. The legislature appreciated that the common law would undermine the industrial action and its role in collective bargaining. The Labour Relations Act, 1995, a person does not commit a delict or a breach of contract by taking part in a protected lock-out or any conduct in contemplation thereof and no civil proceedings may be instituted against such a person. In the circumstances, therefore, employers are specifically indemnified against any civil liability which may flow from their participation in a protected lock-out and may not be interdicted from instituting such action. Furthermore no claims for damages, whether based on delict or breach of contract may be instituted in respect of protected lock-out.

104 S67(2).
105 S67.
There is one important limitation to the protection of lock-outs. The Labour Relations Act, 1995\(^{106}\) states that the protection granted does not apply to any act in contemplation or in furtherance of a lock-out, if that act is an offence (a common law or criminal offence). Thus, trespass, assault, intimidation, vandalism and the like will attract both civil and criminal liability.

The Act\(^ {107}\) specifically provides that any act in contemplation or in furtherance of a protected strike or lock-out, that contravenes the Basic Conditions of Employment Act or the Wage Act, does not constitute a criminal offence. This provision protects employers from liability for failing to remunerate employees during a strike or lock-out.

### 5.2 PROTECTION AGAINST DISMISSAL

The question arises as to whether or not the employer may fairly dismiss the employees during a protected lock-out. This question was considered in the case of *NUM and Others v Via Doro Manufacturing Ltd.*\(^ {108}\) In this case the employer did not pay its employees at the end of the month, stating that it was unable to do so. The employees responded by refusing to work until they go paid. The employer retaliated by locking them out. During the lock-out the employer gave notice of intention to retrench. The court noted that the Labour Relations Act, 1995,\(^ {109}\) specifically recognised the employer’s right to dismiss strikes for operational reasons, but did not do so in respect of lock-outs. The court stated as follows:

"The subsection is silent about dismissals for operational reasons during a protected lock-out. If it were the intention of the legislature to give employers the weapon of retrenchment additional to lock-out, it would have said so expressly. On a retrenchment during a protected strike the employees maintain a modicum of control in that they can call off the strike. They will be disproportionately disadvantaged if the double-basselled weapon of a lock-out retrenchment were available to the employer."\(^ {110}\)

\(^{106}\) S67(8).
\(^{107}\) S67(9).
\(^{108}\) (2000) 7 BLLR 827 (LC).
\(^{109}\) S67(5).
\(^{110}\) At 10.
This means, therefore, that the employees could not be dismissed during a protected lock-out. The Labour Relations Act, 1995\textsuperscript{111} ends the debate about whether an employer can fairly dismiss employees pursuant to a lock-out, since a dismissal is deemed automatically unfair if the reason for it is “to compel the employee to accept a demand in respect of any matter of mutual interest between employer and employee” the very object of the lock-out itself.

5.3 REMUNERATION OF EMPLOYEES

Section 67(3) makes it clear that no remuneration is payable since no services are rendered in the course of a protected lock-out. This would include ancillary benefits. The common law rule of no work, no pay is confirmed. However, it should be noted that the word “remunerate” is wider than the word wages or salary an employee normally receives. Remuneration includes any payment money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person \textit{eg} housing subsidies, medical aid, provident fund. There is one exception to the no work, no pay rule. If the employee’s remuneration includes payment in kind in the form of accommodation, the provision of food and other basic amenities of life, the employer may not stop this payment in kind during the lock-out. After the lock-out the employer may recover the monetary value of the payment in kind from the employees by way of legal proceedings in the Labour Court. An employer does not merely subtract the monetary value of the payment in kind from the employees’ salaries. In the circumstances the position of the employee is somewhat better.

5.4 RECOUERSE TO LOCK-OUT

The Labour Relations Act, 1995 grants employers recourse to lock-out. The employers were not granted the right to lock-out in the Constitution. The Constitution does not guarantee a right to lock-out as a fundamental right. It should be noted that recourse to lock-out action means something less a right to strike. The underlying argument is that the lock-out should not be seen as a counter part of the strike, but

\textsuperscript{111} S187(1)(c).

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as a mechanism which creates an imbalance in the collective labour relationship. The lock-out does not enjoy the same protection as the strike. For example, unlike secondary strike action no provision is made for secondary lock-out action. Furthermore, replacement labour may only be used in the course of a defensive lock-out, not during an offensive lock-out.
CHAPTER 6

CONSEQUENCES OF AN UNPROTECTED LOCK-OUT

The employees locked-out can approach the Labour Court and seek an order for compelling the employer to desist from the lock-out. The test to determine whether the lock-out is protected or not is whether it complies with the provisions of the Labour Relations Act, 1995. It will be unprotected if it does not comply with the provisions of these sections. In any event non-compliance with the Act is no longer a criminal offence, however, it may attract certain civil sanctions. The Labour Court has an exclusive jurisdiction to grant an interdict or order restraining a lock-out (or any act in contemplation or furthering of lock-out). Also the Labour Court has exclusive jurisdiction to order the payment of “just and equitable” compensation for any loss attributable to such lock-out. The exclusive jurisdiction of the Labour Court is in the Labour Relations Act, 1995.

6.1 INTERDICTS

An interdict is a restraining order. The court is given the general power to grant interdicts by the Labour Relations Act, 1995. It is made clear that an interdict can be given on an urgent, interim basis.

At common law the applicant, in order to obtain a final interdict, must make out a clear right. An interim interdict will be granted if the papers reveal a prima facie right and a balance of convenience is in favour of the applicant. However, the court has a discretion to refuse to grant relief sought if it considers it inappropriate. The Labour Court also applies the same authority.

The Labour Relations Act prescribes 48 hours’ notice to the respondent. In cases

\[112\] Ss 64 and 65.
\[113\] S68.
\[114\] S158(1)(a)(ii).
\[115\] S68(1)(b).
\[116\] S68(2).
of urgency the court may permit shorter notice but it must be satisfied that the
respondent has at least had some notice of the application and that the applicant has
shown a good cause why a shorter notice should be permitted. In *New Tyre Manufactures Employers Association v NUMSA*\(^{117}\) the court struck from the roll an
application to an interdict on the grounds that the applicant had not set out good
cause why less than 48 hour period should be permitted. This time limit can be
dispensed with subject to section 68(3) of the Act. Where an applicant has received
at least ten days’ written notice of a proposed lock-out, it must bring its application
for an interdict on at least five days’ notice. There is no provision for condonation of
short service in respect of five days’ notice even on grounds of urgency.

### 6.2 COMPENSATION

The Labour Relation Act, 1995 grants the Labour Court jurisdiction to order the
payment of just and equitable compensation for any loss caused by the unprotected
lock-out. In deciding whether to award compensation and, if so, how much, the court
must consider whether:

(a) attempts were made to comply with the provisions of sections 64 and 65 and
the extent of those attempts;

(b) the lock-out was premeditated;

(c) the lock-out was in response to unjustified conduct by the other party;

(d) there was compliance with an order or interdict granted in terms of the Labour
Relations Act, 1995.\(^{118}\)

The Court must also take into account:

(a) the interest of orderly collective bargaining;

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\(^{117}\) (1999) 20 *ILJ* 189.

\(^{118}\) S68(1)(a).
(b) the duration of the lock-out;
(c) the financial position of the employer, trade union or employees respectively.

According to Grogan\textsuperscript{119} “[t]hese considerations clearly indicate that a court is permitted to condone minor transgressions of the Act”.

According to Du Toit \textit{et al}\textsuperscript{120} “the Act has created a \textit{sui generis}, statutory cause of action. Unlike the position under common law, plaintiffs will not be entitled automatically to the full measure of their proven damages, subject to mitigation, contingencies, etc. They will only be entitled to such compensation that is ‘just and equitable’. The jurisdiction is therefore an equitable one, and the Labour Court is not bound by the common law rules pertaining to the payment of damages”.

The Act does not expressly remove the right to claim damages in the ordinary court in terms of the common law principles. The plaintiff has an election to claim compensation under the Labour Relations Act or to claim damages in terms of the common law.\textsuperscript{121}

Another aspect pertaining to lock-outs, which also needs to be considered is picketing. Picketing also touches on the fibres of the lock-out. The Labour Relations Act\textsuperscript{122} regulates picketing. The Act gives registered unions the right to authorise a picket in support of a protected strike or in opposition to a lock-out. The Act also establishes picketing rules by agreement between the parties or failing that, by the CCMA. “Picketing takes place where striking employees (and/or their supporters) station themselves at or near their place of work and attempt to persuade other parties such as non-strikers, customers, and supplies of the employer, not to enter the premises, not to work there and not to do business with their employer.”\textsuperscript{123} A picket is a demonstration designed to convey on the general public the reason for the strike, and to mobilize support for the strikers’ cause. It takes in the form of verbal, written or symbolic messages (speeches, songs, posters dancing) to express

\textsuperscript{119} Workplace Law (2001) 6\textsuperscript{th} ed 347.
\textsuperscript{120} Labour Relations Law (2000) 3\textsuperscript{rd} ed 257.
\textsuperscript{121} Ibid.
\textsuperscript{122} S69.
\textsuperscript{123} Basson \textit{et al} Essential Labour Law 2\textsuperscript{nd} ed.
the strikers’ message. Despite the fact that it should be peaceful and controlled it was held that chanting, dancing and waving placards are all permissible, *Picardi Hotels Ltd v Food and General Workers Union and Others*. In this case the Labour Court itemised a number of acts which legitimately form part of a protected picket.

According to Du Toit “picketing may be either primary or secondary. Primary picketing occurs when employees picket at the premises of their own employer. Secondary picketing occurs when employees picket at premises of another employer, for example, an associate, a supplier or customer”.

In any event the purpose of picket is found in the Code of Good Practice on Picketing:

> “The purpose of the picket is to peacefully encourage non-striking employees and members of the public to oppose a lock-out or to support strikers involved in a protected strike. The nature of that support can vary. It may be to encourage employees not to work during the strike or lock-out. It may be to dissuade replacement labour from working. It may also be to persuade members of the public or other employers and their employees not to do business with the employer.”

At common law there is a problem about picket - because it provides the employer with civil remedies or an interdict against the picketing employees.

Picketing employees could incur criminal liability if their actions contravene traffic laws and municipal by-laws. However, recognition of the right to picket reflects society’s commitment to the fundamental human rights of freedom of expression and freedom of assembly. The Constitution of the Republic of South Africa provides that everyone has the right “peacefully and unarmed” to assemble, to demonstrate, to picket and to present petitions. The Constitution protects freedom of expression and that everyone has the right to freedom of association. The Labour Relations Act, 1995 therefore accepts that picketing is an accepted action in support of a
strike. The Act, therefore, recognises the legitimacy of picketing and regulates it by providing picketing rules.

Although the picket may take place in any place to which the public has access, it may not interfere with the constitutional rights of the other people.\textsuperscript{130} It is also provided that picketers may not physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employer’s premises and the picketers may not commit any action which may be unlawful. In actual fact the Code provides practical guidance on picketing.

Picket will enjoy protection if it complies with the requirements of the Labour Relations Act, 1995.\textsuperscript{131} Therefore, an employer may not obtain interdict to prohibit it and may not institute an action for damages against picketers and the union that authorised picket.

If the picket does not comply with the Act\textsuperscript{132} or any rules agreed to the parties or set by the CCMA, the picket will not enjoy protection of the Act and it could be prohibited by a court order (interdict). Participation in an unprotected picket could also form the basis of a dismissal for misconduct.

\textsuperscript{130} Item 6(5) of the Code of Good Practice of Picketing.
\textsuperscript{131} S69(1) and (2).
\textsuperscript{132} \textit{Supra.}
CHAPTER 7

CONCLUSION

The South African law accepts that lock-outs have a valid role to play in South African labour relations.

It must always borne in mind that the purpose of a lock-out is to settle a collective dispute in any of the ways permitted by the Labour Relations Act, 1995. The purpose is not to terminate the relationship between employer and employee. However, this does not mean that the extent and duration of a lock-out may not be such as to allow employer to dismiss on other grounds. It may well be that the employers operational requirements may necessitate the dismissal of the employees.

Creamer\textsuperscript{133} correctly puts it that the attention granted to the development of a jurisprudence of industrial action rights is recognition of the fundamental nature of the decisive shift - from a symmetrical to an asymmetrical regulation of industrial action. Employers also have their own tactics in order to compel their employees to accept a demand. In some countries a lock-out is seen as a counterpart of a strike weapon that can be applied once deadlock has been reached in the bargaining process. In other countries such as France, Italy and Portugal the lock-out is perceived as a disturbance of the balance of power and as a breach of contract. In fact the international standards are there for the people at national level to look outside of the country to see what has been done elsewhere to solve problems which they themselves are currently facing.

Lock-outs were made the subject of protection under the interim Constitution but that failed. Whereas workers were given a full right to strike, employers had to be content with the “recourse to the lock-out”. Lock-outs enjoy no express protection under the final constitution. Even in the \textit{Certification}\textsuperscript{134} case the employers lost the

\textsuperscript{133} Supra.
\textsuperscript{134} Supra.
battle. The Constitutional Court held that the employer’s right to lock-out was implicit in their right to bargain collectively. However, under the Labour Relations Act, 1995 lock-outs must, to be permissible, conform with the same requirements as strikers. But there are two extra requirements that govern lock-outs. First, an employer cannot dismiss a worker in furtherance of a lock-out since a dismissal is automatically unfair if the object is “to compel the employee to accept a demand in respect of any matter of mutual interest between employer and employee.”

Secondly, an employer may not hire replacement labour in order to maintain production during a lock-out, unless it is a defensive one. These requirements may be a hurdle to the employer, but do not hamstring it completely.

A lock-out can be terminated in a number of ways. The one way would be for the employer to abandon the lock-out. The other way is that through ongoing contact and negotiations during the lock-out, the parties reach agreement and settle the dispute. The option of a dismissal lock-out is not available in South African law any longer. What remains is therefore, a limited right to lock employees out. It remains to be seen whether union pressure will remove the lock-out option altogether in future.

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Strikes and Lock-outs. What is a strike? To strike is the refusal to work, the slowing down of work or the obstruction of work by employees (â€œstrikersâ€). A strike takes place to resolve a dispute between the employees and their employer. The demand must relate to disputes of mutual interest. The demand of the employer can be, for example, to force the employees to accept changes to their terms and conditions of employment. The information contained on this website is aimed at providing members of the public with guidance on the law in South Africa. This information has not been provided to meet the individual requirements of a specific person and LegalWise insists that legal advice be obtained to address a personâ€™s unique circumstances. Lock out agreements are agreements between a property seller and buyer granting the buyer exclusive rights to the sale of the property for a certain period of time. Essentially, a lock out agreement is a contract stating. What is a Lock Out Agreements? A lock out agreement is an agreement between a property seller and a buyer giving the buyer exclusive rights to proceed with the purchase for a certain period of time. It stops the seller from negotiating with any other potential buyer during a lock out period. However, it does not guarantee an eventual sale to the buyer. Labour Law. Strikes and lock-outs. Under the Guidance of: Mrs. N.P. Khan, By- Name: Sarah Rehman. B.a.llb.(h). 3rd year 5th semester. Acknowledgment I would like to express my gratitude to my Labour Law teacher, Mrs. N.P.Khan, for making the subject so easy and understandable to us that has helped me to put my best efforts to the assignment. I also thank my friends who supported me and assisted me. Of any number of persons who are or have been so employed to continue to work or to accept employment; (7) They must stop work for some demands relating to employment, non-employment or the terms of employment or the conditions of labour of the workmen. 9 Ingredients of Strike Cessation of Work: This is most significant characteristic of the concept of strike. Lock-Out is the keeping of labour away from works by an employer with a view to resist their claim. There are four ingredients of Lock-Out: 1. (i) temporary closing of a place of employment by the employer, or (ii) suspension of work by the employer, or (iii) refusal by an employer to continue to employ any number of persons employed by him. Causes: A lockout is generally used to enforce terms of employment upon a group of employees during a dispute.