CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 145/24

In the matter between:

SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION	Applicant
and	
MASSMART HOLDINGS LIMITED	First Respondent
MASSDISCOUNTERS (PTY) LIMITED t/a GAME	Second Respondent
MASSBUILD t/a BUILDERS EXPRESS, BUILDERS WAREHOUSE, BUILDERS SUPERSTORE AND BUILDERS TRADE DEPOT	Third Respondent
MASSMART WHOLESALE t/a JUMBO CASH AND CARRY	Fourth Respondent
MASSTORES (PTY) LIMITED t/a MAKRO	Fifth Respondent
MASSCASH (PTY) LIMITED	Sixth Respondent
MASSMART RETAIL (PTY) LIMITED t/a CAMBRIDGE FOOD AND RHINO CASH AND CARRY	Seventh Respondent

Neutral citation:	*South African Commercial Catering and Allied Workers Union v Massmart Holdings Ltd and Others* [2026] ZACC 11
Coram:	Madlanga ADCJ, Dambuza AJ, Goosen AJ, Majiedt J, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J

Judgments: Dambuza AJ (minority): [1] to [40]
Majiedt J (majority): [41] to [84]

Heard on: 06 May 2025

Decided on: 25 March 2026

Summary: Labour Relations Act 66 of 1995 — interpretation of section 68(1)(b) — claim for payment of just and equitable compensation — loss attributable to conduct occurring during picketing — picketing in furtherance of a protected strike

Section 69(12) — interpretation — picketing as conduct in furtherance of a strike under section 68(1)

Labour Court does not have jurisdiction to consider claim for just and equitable compensation in protected strikes — only High Court may consider such claims based on delict

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ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court, Johannesburg):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Labour Appeal Court is set aside and replaced with the following:

"The appeal is upheld, the order of the Labour Court is set aside and replaced as follows:

'(a) The first exception is upheld.

(b) The second to fourth exceptions are dismissed.'"

JUDGMENT

DAMBUZA AJ:

Introduction

[1] The issue in this application for leave to appeal is whether the Labour Court has jurisdiction to determine a claim for just and equitable compensation under section 68(1)(b) of the Labour Relations Act[1] (LRA) for loss attributable to conduct that occurs during a protected strike. In the Labour Court, the respondents, Massmart Holdings Ltd and its six subsidiaries[2] (Massmart), brought a claim against the South African Commercial Catering and Allied Workers Union (SACCAWU) for compensation for loss occasioned as a result of the conduct of members, officials, representatives and supporters of SACCAWU whilst picketing during a protected strike. SACCAWU raised an exception to the claim as pleaded by Massmart, contending that the Labour Court does not have jurisdiction to determine such a claim because the conduct complained of occurred during a protected strike. The exception was dismissed by the Labour Court. So was SACCAWU's appeal to the Labour Appeal Court against the decision of the Labour Court. In this application, SACCAWU seeks leave to appeal against the judgment of the Labour Appeal Court.

Background

[2] The events to which Massmart's claim relates occurred during May 2021. On 23 May 2021, SACCAWU notified Massmart that its representatives, officials, members and supporters intended to conduct a strike and an associated picket from

[1] 66 of 1995.

[2] The following six respondents, cited as second to seventh respondents, are all subsidiaries of Massmart Holdings: Massdiscounters (Pty) Ltd t/a Game; Massbuild (Pty) Ltd t/a Builders Express, Builders Superstore and Builders Trade Depot; Massmart Wholesale t/a Jumbo Cash and Carry; Masstores (Pty) Ltd t/a Makro; Masscash (Pty) Ltd; and Massmart Retail (Pty) Ltd t/a Cambridge Food and Rhino Cash and Carry.

06h00 on 26 May 2021 to 06h00 on 29 May 2021. On 25 May 2021, the day preceding the start of the strike, Massmart's application to the Labour Court for an interdict to stop the strike was dismissed. The strike was scheduled to begin at approximately 13h30 on 26 May 2021. It is not in dispute that the strike was protected under the provisions of Chapter IV of the LRA.

[3] In its statement of claim in the Labour Court, Massmart alleged that those engaged in the strike under the banner of SACCAWU were required to adhere to the provisions of Chapter IV of the LRA, to strike peacefully and not to engage in unlawful conduct, or conduct constituting an offence under the regulations issued in terms of section 27(2) of the Disaster Management Act.[3] The strikers were also expected to comply with a workplace plan and the Covid-19 guidelines which were in place at Massmart's business premises at various locations throughout the country during this period.

[4] According to the statement of claim, because Massmart and SACCAWU did not agree on the rules that would apply to the picket that was to be conducted in furtherance of the strike, the Commissioner for Conciliation, Mediation and Arbitration (Commissioner) determined picketing rules. The rules provided, among other things, that pickets would be held in designated areas near each affected store. Picketers had to conduct themselves in a peaceful, lawful manner and comply with the relevant Covid-19 Regulations. They would not be armed or be in possession of dangerous weapons or objects. Picketers were not allowed to use hate speech, make defamatory statements or incite violence. They would not prevent Massmart's suppliers, clients, customers or members of the public, employees who were not on strike and/or replacement workers from entering or leaving Massmart's premises. They were also not allowed to intimidate, coerce, threaten or assault any person or to threaten to cause damage to Massmart's property.

[3] 57 of 2002.

[5] The statement of claim further stated that, during the strike, the picketing workers breached the picketing rules by committing offences and that they together with SACCAWU "wrongfully and negligently or intentionally" failed to ensure strike compliance. It was alleged that SACCAWU and its members failed to adhere to provisions of the LRA, section 17 of the Constitution, the Covid-19 Regulations and certain provisions of the Occupational Health and Safety Act.[4] The allegation was that SACCAWU failed to manage its members' conduct to ensure adherence to the rules and picketing within the designated areas, and to appoint sufficient marshals. More particularly, the picketers allegedly picketed outside the designated areas, blocked the entrances to the stores, made untrue statements on the radio concerning the disputes underlying the strike, picketed inside the malls, damaged property and threatened and intimidated Massmart's employees and customers, with the result that Massmart was forced to close its stores for hours during the strike period.[5] Further allegations were that the picketers did not wear masks during the strike, in breach of the Covid-19 Regulations, and that they did not maintain the stipulated distance of at least two metres between people. According to Massmart, after the strike was over, SACCAWU brought an application in the Labour Court to review and set aside the picketing rules insofar as they confined the picketers to designated areas and precluded picketing at the premises of Massmart.

[6] Massmart pleaded that despite its notification to SACCAWU that its members and supporters were acting in breach of the picketing rules, SACCAWU failed to ensure that the strikers acted in compliance with the strike framework. Consequently, the conduct deprived the strike and/or the picket of protection under Chapter IV of the LRA. It further pleaded that the conduct of SACCAWU and its members resulted in it suffering loss of profit running into millions of Rands,[6] and that it was entitled to recover

[4] 85 of 1993.

[5] Massmart alleges disruption of business operation at its Game stores, including stores located in Gilwell, Pietermaritzburg, King William's Town, Fleurdal, Richards Bay, Beacon Bay, Bela Bela, Lebowakgomo and Evaton. Business was also disrupted at its Builders stores in Heidelberg and Rivonia, the Browns Cash and Carry in Nongoma and Lusikisiki, the Jumbo stores in Ottery and Phillippi and the Cash and Carry in Manguzi.

[6] The amount pleaded was R9 383 454.57.

its losses from SACCAWU as compensation in terms of section 68(1)(b) of the LRA. Finally, Massmart pleaded that it was just and equitable that SACCAWU be ordered to pay compensation in the full amount of its losses.

[7] SACCAWU raised five exceptions to the statement of claim. Only the exception relating to the Labour Court's jurisdiction to determine the claim for compensation is before us. As stated above, in its exception to the statement of claim, SACCAWU contended that the Labour Court's jurisdiction to order just and equitable compensation under section 68(1)(b) of the LRA was limited to loss occasioned during an unprotected strike. The argument was that the conduct in which SACCAWU members were engaged occurred "in furtherance" of a strike that complied with the LRA. Because the strike was protected under section 67 of the LRA, the Labour Court had no jurisdiction to determine the pleaded claim. Instead, Massmart only had a delictual claim, which it could prosecute only in the High Court.

[8] The Labour Court dismissed four of the exceptions, including the one before us. SACCAWU abandoned the fifth. In dismissing the exception on jurisdiction (in reality a special plea of lack of jurisdiction), the Labour Court reasoned that the immunities established under section 67(2) and (6) of the LRA in respect of protected strikes are not absolute because section 67(8) provides that the subsections "do not apply to any act in contemplation or in furtherance of a strike or lock-out, if that act is an offence". The Labour Court adopted the Supreme Court of Appeal's interpretation of section 68(1)(b) in *Dunlop Mixing*,[7] which held that a claim for compensation may be properly brought in relation to conduct undertaken during a protected strike where such conduct constitutes an offence or is in breach of the requirements of Chapter IV of the LRA.

[9] SACCAWU's appeal to the Labour Appeal Court against the judgment of the Labour Court failed. The Labour Appeal Court agreed with the Labour Court. It

[7] *National Union of Metalworkers of SA v Dunlop Mixing & Technical Services (Pty) Ltd* [2020] ZASCA 161; [2021] 3 BLLR 221 (SCA); (2021) 42 ILJ 475 (SCA) at para 18.

rejected SACCAWU's contention that Massmart's claim was founded in common law. It reasoned that although section 68 is headed "[s]trike or lock-out not in compliance with this Act", the provision is also concerned with any conduct in contemplation or furtherance of a strike or lock-out that does not comply with the provisions of Chapter IV.[8] It concluded that the words "any conduct" in section 68(1) include conduct that is unlawful, "even if it arises during the course of a protected strike". The Labour Appeal Court also referred, with approval, to a decision of the Labour Court in *Lomati Mill Barberton*,[9] in which the Court held that unlawful conduct that occurs in contemplation or furtherance of a strike or lock-out, and which constitutes a criminal offence, is unprotected.

[10] In this Court, SACCAWU persists in the arguments that it made in the Labour Court and the Labour Appeal Court. It contends that where criminal conduct occurs during a protected strike, civil liability resulting from that conduct is determinable in the High Court in accordance with delictual and contractual principles. The Labour Court has no jurisdiction to grant compensation under section 68(1)(b) in respect of protected strikes, SACCAWU argues. Further, the Labour Court also does not have concurrent jurisdiction with the High Court as provided in section 157(2) of the LRA. The jurisdictional prerequisite for the application of section 68 is the existence of an unprotected strike or lock-out.

[11] Massmart's argument is essentially that, within the regulatory scheme created in Chapter IV of the LRA, protection is afforded to protected strikes and good faith conduct that is undertaken in furtherance of strikes. However, picketing that breaches the determined rules is not protected.

[8] *SA Commercial Catering and Allied Workers Union v Massmart Holding Ltd* [2024] ZALAC 13; (2024) 45 ILJ 1610 (LAC) (LAC judgment) at para 19.

[9] *Lomati Mill Barberton (A division of Sappi Timber Industries) v Paper Printing Wood and Allied Workers Union* (1997) 4 BCLR 415 (LC); (1997) 18 ILJ 178 (LC).

Jurisdiction

[12] The parties agree that the issue engages the jurisdiction of this Court. Indeed, the interpretation of the provisions of the LRA, in this case sections 67, 68 and 69, all of which fall under Chapter IV of the LRA, is reserved for the Labour Court. Importantly, the LRA was enacted to give effect to sections 17 and 23 of the Constitution, which guarantee the right to peacefully assemble, demonstrate and picket and the right to fair labour practices. The application engages this Court's constitutional jurisdiction.

Leave to appeal

[13] It is in the interests of justice that leave be granted. The issues that arise in this application are important to a significant section of our society, particularly the country's industrial and labour sectors. In addition, conflicting judgments of the Labour Appeal Court and the Supreme Court of Appeal on the issues that arise in this matter require this Court's consideration. Furthermore, this Court has not comprehensively determined the issues arising in this application.

Discussion

The Labour Court's jurisdiction

[14] The objectives of the LRA are to give effect to and regulate the fundamental rights conferred in sections 17 and 23 of the Constitution, together with South Africa's obligations as a member state of the International Labour Organization. The LRA provides a framework within which employees and their trade unions, employers and employers' organisations can collectively bargain for determination of wages, terms and conditions of employment and other matters of mutual interest. The framework is intended to promote orderly bargaining and effective resolution of labour disputes, amongst other things.[10]

[10] Section 1 of the LRA.

[15] Against this background, the Labour Court and Labour Appeal Court were established as specialist superior courts to determine labour disputes arising from the relationship between employees, employers and trade unions. These courts are steeped in workplace issues and specially designed to deal with complaints relating to labour practices and collective bargaining. As this Court held in *Chirwa* in relation to the primary objectives of the LRA—

> "[t]he first is to establish a comprehensive framework of law governing the labour and employment relations between employers and employees in all sectors. The other is the objective to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA."[11]

[16] The purpose is to ensure fair labour practices and labour peace, with the two courts resolving disputes arising from the LRA. The exclusive jurisdiction of the Labour Court is regulated under section 157(1) of the LRA, which provides that "[s]ubject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court".

[17] In terms of section 157(2) of the LRA, the Labour Court has concurrent jurisdiction with the High Court in disputes concerning fundamental human rights violations in the workplace and matters relating to contracts of employment under the Basic Conditions of Employment Act.[12] We are not here concerned with the Labour Court's concurrent jurisdiction.

[18] In *Gcaba*,[13] this Court held that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. In addition, this Court

[11] *Chirwa v Transnet Limited* [2007] ZACC 23; [2008] 2 BLLR 97 (CC); 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC) at para 123.

[12] 75 of 1997. Section 17 of this Act amended section 68 of the LRA.

[13] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) BCLR 35 (CC); 2010 (1) SA 238 (CC).

has held that section 157(1) of the LRA must be interpreted generously to ensure that the Labour Court's jurisdiction is sufficiently broad to enable it to address a wide variety of labour disputes.

Chapter IV of the LRA

[19] Section 68 of the LRA, which is at the centre of the dispute before us, is located within Chapter IV of that Act. The Chapter comprises 14 sections, from 64 to 77. It is a scheme created to regulate the right to strike and the recourse to lock-out.[14] Section 64 prescribes the requirements for exercising the right to strike and the recourse to lock-out. In section 65, the Chapter sets limitations on the right to strike and the related recourse to lock-out. The requirement of compliance with the LRA when exercising the right to strike or recourse to lock-out is a consistent feature in Chapter IV. In *Dunlop Mixing*,[15] the Supreme Court of Appeal described this as the requirement that the rights are exercised in good faith. While the LRA affirms the right of every employee to strike and the recourse of every employer to lock-out, it does so on the condition that the prerequisites for exercising those rights are met. Section 66 regulates secondary strikes. The right regulated in this section is subject to a limitation under section 66(2) to the extent that no person may take part in a secondary strike where the strike does not conform with the provisions of sections 64 and 65.[16]

[20] Section 67(1) defines "protected *strike*" as used in Chapter IV as "a *strike* that complies with the provisions of [Chapter IV]", and "protected *lock-out*" as "a *lock-out* that complies with the provisions of [Chapter IV]".[17] While good faith exercise of the right to strike and the recourse to lock-out is promoted, protected and immunised from liability, conduct in breach of the provisions of Chapter IV triggers the availability of just and equitable remedies under sections 68(1)(b) and 69. A person who participates in a compliant strike or engages in conduct in furtherance of a strike does not commit

[14] Section 64 of the LRA.

[15] *Dunlop Mixing* above n 7 at paras 35 and 37.

[16] Section 66 of the LRA.

[17] Emphasis in original.

any delict and is protected from civil suits. It is useful to set out these sections in full. Section 67, headed "Strike or lock-out in compliance with this Act", provides:

> "(1) In this Chapter, 'protected *strike*' means a *strike* that complies with the provisions of this Chapter and 'protected *lock-out*' means a *lock-out* that complies with the provisions of this Chapter.
>
> (2) A person does not commit a delict or a breach of contract by taking part in—
>
> (a) a protected *strike* or a protected *lock-out*; or
>
> (b) any conduct in contemplation or in furtherance of a protected *strike* or a protected *lock-out*.
>
> (3) Despite subsection (2), an employer is not obliged to remunerate an *employee* for services that the *employee* does not render during a protected *strike* or a protected *lock-out*, however—
>
> (a) if the *employee's remuneration* includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the *employee*, must not discontinue the payment in kind during the *strike* or *lock-out*; and
>
> (b) after the end of the *strike* or *lock-out*, the employer may recover the monetary value of the payment in kind made at the request of the *employee* during the *strike* or *lock-out* from the *employee* by way of civil proceedings instituted in the Labour Court.
>
> (4) An employer may not dismiss an *employee* for participating in a protected *strike* or for any conduct in contemplation or in furtherance of a protected *strike*.
>
> (5) Subsection (4) does not preclude an employer from fairly dismissing an *employee* in accordance with the provisions of Chapter VIII for a reason related to the *employee's* conduct during the strike, or for a reason based on the employer's *operational requirements*.
>
> (6) Civil legal proceedings may not be instituted against any person for—
>
> (a) participating in a protected *strike* or a protected *lock-out*; or
>
> (b) any conduct in contemplation or in furtherance of a protected *strike* or a protected *lock-out*.
>
> (7) The failure by a registered *trade union* or a registered *employers' organisation* to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a *strike* or *lock-out* may not give rise to, or constitute a ground for, any litigation that will affect

the legality of, and the protection conferred by this section on, the *strike* or *lock-out*.

(8) The provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a *strike* or a *lock-out*, if that act is an offence." (Emphasis in original.)

Section 68(1) of the LRA

[21] Section 68, headed "Strike or lock-out not in compliance with this Act", reads:

"(1) In the case of any *strike* or *lock-out*, or any conduct in contemplation or in furtherance of a *strike* or *lock-out*, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction—

(a) to grant an interdict or order to restrain—

(i) any person from participating in a *strike* or any conduct in contemplation or in furtherance of a *strike*; or

(ii) any person from participating in a *lock-out* or any conduct in contemplation or in furtherance of a *lock-out*;

(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* 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 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." (Emphasis in original.)

[22] Significantly, the introductory part to section 68(1) refers to "any strike or lock-out or conduct" that does not comply with the provisions of "this Chapter". Prior

to its amendment in 2002 by the Labour Relations Amendment Act,[18] section 68(1)(b) did not contain the words "or conduct". In *Stuttafords*,[19] the Labour Appeal Court held that the Labour Court has no jurisdiction under the section to award loss attributable to a protected strike or lock-out. It reasoned that the reference to a strike or lock-out under section 68(1)(b) was in relation to an unprotected strike or lock-out because "the use of the article 'the' just before the words 'strike or lock-out' was an indication that the strike or lock-out referred to is the one already referred to . . . at the opening part of subsection (1) of section 68".[20]

[23] SACCAWU contends that the issue in this appeal must be resolved in line with the interpretation adopted by the Labour Appeal Court in *Stuttafords*. It argues that, in *Stuttafords*, the Labour Appeal Court interpreted the provisions of section 68(1) correctly, following the approach set out in *Endumeni*.[21] SACCAWU highlights that that interpretation is consistent with the objectives of the LRA, to provide extensive immunity to employers and employees who resort to lawful lock-outs and strikes. The argument is that the objective of the LRA is to protect, not only a strike or a lock-out, but also conduct undertaken in contemplation or in furtherance of such action. Counsel for SACCAWU submitted, and I agree, that the purpose of section 68 is to discourage strikes and lock-outs that are not in accordance with the LRA. Hence, the lower threshold in respect of liability for compensation in section 68.

[24] One must be mindful, however, that *Stuttafords* was decided prior to the 2002 amendment. The 2002 amendment broadened the scope of industrial action to which the section relates. Prior to the 2002 amendment, section 68 read as follows:

[18] 12 of 2002.

[19] *Stuttafords Department Stores Ltd v SA Clothing and Textiles Workers Union* [2000] ZALAC 22; [2001] 1 BLLR 46 (LAC); (2001) 22 ILJ 414 (LAC).

[20] Id at para 31.

[21] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

> "(1) In the case of any *strike* or *lock-out*, or any conduct in contemplation or in furtherance of a *strike* or *lock-out*, that does not comply with the provisions of this Chapter, the Labour Court has jurisdiction—
>
> (a) to grant an interdict or order to restrain—
>
> (i) any person from participating in a *strike* or any conduct in contemplation or furtherance of a *strike*; or
>
> (ii) any person from participating in a *lock-out* or any conduct in contemplation or in furtherance of a *lock-out*;
>
> (b) to order the payment of just and equitable compensation for any loss attributable to the *strike* or *lock-out*." (Emphasis in original.)

[25] SACCAWU ignores the effect of the 2002 amendment, which introduced the phrase "or conduct" into the introductory part of section 68(1)(b) and related subsections (i)(bb), (i)(cc) and (ii). It ignores the fact that while the objective of section 67(2), (4), (6) and (7) of the LRA is to provide immunity to employees and employers who engage in a protected strike or lock-out, it does not protect non-compliant conduct that occurs in the course of a protected strike. The purpose is to discourage conduct that is inconsistent with the provisions of the LRA.

[26] The language used in the main provision of section 68(1) is not complex. The introductory part of the section, which confers exclusive jurisdiction on the Labour Court, applies to both section 68(1)(a) and (b). On a plain reading, section 68(1)(b) provides that, in the case of any strike or lock-out, or any conduct in contemplation or furtherance of a strike or lock-out, that does not comply with the provisions of Chapter IV, the Labour Court has exclusive jurisdiction to order the payment of just and equitable compensation for any loss attributable to the strike, lock-out or conduct.

[27] This interpretation accords with the fundamental tenet applicable to the interpretation of legal documents, to account for all the words used, in this case, in section 68(1) and in other sections of Chapter IV that are relevant to the particular strike

or lock-out. It also gives effect to the purpose[22] for which the word "conduct" must have been introduced to the subsection, to broaden the scope of conduct in respect of which compensation may be awarded by the Labour Court.

[28] Importantly, the factors set out under section 68(1)(b)(i) to (iv) guide the Labour Court in exercising its discretion under section 68(1), in determining whether just and equitable compensation should be awarded and the quantum of such an award. These factors include attempts made to comply with the provisions of the Chapter, whether the strike, lock-out or conduct was premeditated and/or in response to unjustified conduct by another party to the dispute, the interests of collective bargaining and the financial position of the employer, trade union or employees. Proper consideration of these factors lies within the expertise of the Labour Court and enhance the exercise of that Court's discretion in assessing equitable loss awards as opposed to delictual awards, which are determinable in the High Court.

[29] It is true that the heading of section 68 refers only to "strike or lock-out not in compliance with this Act". The accepted approach to the interpretation of legal documents is that the value of headings is limited by the language, the context and purpose of the paragraph, statutory provision or the main document. Where there is no conflict or ambiguity in the main text or content, as in this case, the heading cannot override the language, context and purpose. The main function of headings in legal documents is to give structure to the documents and assist the reader to navigate them. The heading in section 68(1) serves this function. The difference between the heading and the main provision is the absence of the word "conduct" from the heading. Clearly, in this respect, the heading does not accurately reflect the content of the main provision, section 68(1), and ignores the effect of the 2002 amendment. Preference cannot be given to the heading over the substantive text of the provision.

[22] Id at para 18.

[30] The fact that withdrawal of labour is compliant under the provisions of sections 64, 65 and 67 is not the end of the matter. Compliance with other applicable provisions in Chapter IV is required on an ongoing basis. Where conduct in contemplation or furtherance of the strike or lock-out is undertaken, such conduct must also comply with the provisions of the Chapter, hence, the inclusion of non-compliant conduct in the statutory remedies provided for under section 68. The intention to provide a remedy for loss occasioned as a result of a strike, lock-out or conduct that is non-compliant under the Chapter is clear.

[31] In sum, the 2002 amendment broadened the reach of the compensation clause. Whereas prior to the amendment a compensation order was only available in respect of the strikes or lock-outs that were not in compliance with the provisions of Chapter IV, the amendment extended the grant of just and equitable relief to "conduct in contemplation or furtherance of the strike or lock-out" that is not in compliance with the provisions of Chapter IV – in other words, conduct that breaches the provisions of the Chapter – as opposed to all or general negligent breach of legal duty which causes harm.

[32] Consequently, section 68, in its own terms, renders a person who engages in conduct that is not in compliance with the provisions of the Chapter liable to a claim for just and equitable compensation for said conduct. It does so by providing specific statutory remedies, including just and equitable compensation, in respect of breaches of the provisions of Chapter IV, that are distinct from delictual damages. In this regard, Massmart's cause of action is discussed in greater detail in the paragraphs that follow.[23] Similarly, liability for just and equitable relief may be triggered under section 69 as discussed in the paragraphs below.

[23] See [33] to [36].

Section 69 of the LRA

[33] Within Chapter IV, the provisions of section 69 give effect to and entrench the right to strike by regulating picketing, a form of conduct undertaken by striking employees to amplify the impact of their withdrawal of labour. Picketing is conduct that is undertaken in support or furtherance of a protected strike or in opposition to any lock-out.[24] As in the other provisions under Chapter IV that have been discussed, picketing is protected only insofar as it is conducted as a peaceful demonstration and in compliance with the picketing rules. Needless to say, failure to comply with picketing rules constitutes non-compliance with the provisions of Chapter IV. Under section 69(6C), no picket in support of a protected strike or in opposition to a lock-out may occur unless picketing rules are agreed to in a collective agreement binding on a trade union, or in an agreement that has been concluded as provided in subsection (4), or have been determined in terms of subsection (5), as it happened in this case.[25] This is consistent with the purpose expressed in section 1 of the LRA – to promote orderly industrial action.

[34] Pickets are critical to the right to strike and to oppose lock-outs. They enable employees and their trade unions to peacefully persuade non-striking employees and members of the public to support the strikers or oppose lock-outs. Picketing is carefully regulated under the LRA within the context of protected strikes. It is difficult to imagine picketing occurring within or in furtherance of an unprotected strike because, by its nature, it is a regulated form of industrial action. Section 69 sets out a comprehensive regime that regulates picketing. The section provides:

> "(1) A registered *trade union* may authorise a picket by its members and supporters for the purposes of peacefully demonstrating—
>
> (a) in support of any protected *strike*; or
>
> (b) in opposition to any *lock-out*.

[24] Section 69(1) of the LRA.

[25] Section 69(6C) of the LRA.

(2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held—

(a) in any place to which the public has access but outside the premises of an employer; or

(b) with the permission of the employer, inside the employer's premises.

(3) The permission referred to in subsection (2)(b) may not be unreasonably withheld.

(4) Unless there is a *collective agreement* binding on the *trade union* that regulates picketing, the commissioner conciliating the *dispute* must attempt to secure an agreement between the parties to the *dispute* on rules that should apply to any picket in relation to that *strike* or *lock-out* before the expiry of the period contemplated in section 64(1)(a)(ii).

(5) If there is no *collective agreement* or no agreement is reached in terms of subsection (4), the commissioner conciliating the *dispute* must determine picketing rules, in accordance with any default picketing rules *prescribed* by the *Commission* under section 208 or published in any *code of good practice*, and in doing so must take account of—

(a) the particular circumstances of the *workplace* or other premises where it is intended that the right to picket is to be exercised;

(b) any relevant code of good practice; and

(c) any representations made by the parties to the *dispute* attending the conciliation meeting.

(6) The rules determined by the commissioner conciliating the *dispute* may provide for picketing by *employees*—

(a) in a place contemplated in subsection 2(a) which is owned or controlled by a person other than the employer, if that person has had an opportunity to make representations to the commissioner conciliating the *dispute* before the rules are determined; or

(b) on their employer's premises if the commissioner conciliating the *dispute* is satisfied that the employer's permission has been unreasonably withheld.

(6A) The commissioner conciliating the *dispute* must determine the picketing rules contemplated in subsection (5) at the same time as issuing any certificate contemplated in section 64(1)(a).

. . .

(6C) No picket in support of a protected *strike* or in opposition to a *lock-out* may take place unless picketing rules—

(a) are agreed to in—

(i) a collective agreement binding on the trade union;

(ii) an agreement contemplated in subsection (4); or

(b) have been determined in terms of subsection (5).

(7) The provisions of section 67, read with the changes required by the context, apply to the call for, organisation of, or participation in a picket that complies with the provisions of this section.

(8) Any party to a *dispute* about any of the following issues, including a person contemplated in section (6)(a), may refer the *dispute* in writing to the Commission—

(a) an allegation that the effective use of the right to picket is being undermined;

(b) an alleged material contravention of subsection (1) or (2);

(c) an alleged material breach of a *collective agreement* or agreement contemplated in subsection (4); or

(d) an alleged material breach of a picketing rule determined in terms of subsection (5).

(9) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.

(10) The Commission must attempt to resolve the dispute through conciliation.

(11) If the *dispute* remains unresolved, any party to the *dispute* may refer it to the Labour Court for adjudication.

(12) If a party has referred a *dispute* in terms of subsection (8) or (11), the Labour Court may, in addition to any relief contemplated in section 68(1), grant relief, including urgent interim relief, which is just and equitable in the circumstances and which may include an order—

(a) directing any party, including any person contemplated in subsection (6)(a), to comply with a picketing agreement or rule;

(b) varying the terms of a picketing agreement or rule; or

(c) suspending a picket at one or more of the locations designated in the *collective agreement*, agreed rules contemplated in subsection (4) or Rules determined by the *Commission*." (Emphasis in original.)

[35] Importantly, and as stated, the purpose of picketing in terms of section 69(1) is peaceful demonstration. Strikers may opt to engage only in a strike, in the sense of withdrawal of labour. Once they choose to picket, they must abide by the rules

determined or agreed upon in relation to the picket. Where picketing rules are breached, the picket ceases to comply with the provisions of Chapter IV and the protected strike loses the statutory immunities provided in the LRA. In such circumstances, section 69(12) empowers the Labour Court to grant relief, including just and equitable urgent interim relief, "in addition to any relief contemplated in section 68(1)". In this case, Massmart pleaded the rules that were set by the Commissioner, details of the breaches and the resultant loss, and sought an order of just and equitable compensation. It pleaded that SACCAWU failed to ensure that the strikers conducted themselves in compliance with the strike framework and that the breaches of the picketing rules deprived the conduct undertaken in furtherance of the strike and/or picket of the protections afforded under Chapter IV of the LRA. Massmart's cause of action is rooted in the provisions of section 69 of the LRA. It did not merely plead negligence or breach of a legal duty and causation in the private law sense.

[36] A litigant who seeks relief for breach of picketing rules, as Massmart does in this case, must prove the breach. The interpretation of the picketing rules and the determination of whether, indeed, there was such a breach, are issues in respect of which the Labour Court has exclusive jurisdiction. The relief sought is consequential upon proof of breach and interpretation of the provisions of the LRA, not the common law. Were Massmart to seek the statutory just and equitable relief for breach of picketing rules in the High Court, a special plea that the determination of such a claim is a matter within the exclusive jurisdiction of the Labour Court would be valid. On the interpretation advanced by SACCAWU, the High Court would have to determine issues in respect of which the Labour Court has exclusive jurisdiction. This is not permissible.

Conclusion

[37] The argument that just and equitable relief is impermissible under section 68(1)(b) in respect of conduct undertaken to further a protected strike takes into account only a portion of Massmart's pleaded cause of action – that the strike was protected. It ignores the essence of the pleaded dispute – the breach of the picket

framework. The argument further disregards the principle that the jurisdiction of the Labour Court must be interpreted sufficiently broadly to ensure that labour relations disputes are adjudicated by that Court. A proper consideration of the language used in section 69 read with section 68(1)(b), the Chapter IV context and the purpose of the relief provided in those sections supports the interpretation that the issues arising from the pleadings in this case fall within the exclusive jurisdiction of the Labour Court. The importation of the relief provided in section 68(1)(b) into section 69 provides an additional basis for granting the section 68(1)(b) relief. This interpretation ensures consistency in the regulation of strikes and confirms the purpose of the section – to provide statutory remedies for conduct that is undertaken in furtherance of protected strikes that is not compliant with the provisions in Chapter IV.

[38] This interpretation of section 68(1)(b) upholds the primary objectives of the LRA: to establish a comprehensive legislative framework regulating orderly labour relations and to establish the Labour Court and the Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA.[26] It does not divest strikers and labour unions engaged in a protected strike, conducted within the prescripts of Chapter IV, of immunities available to them in terms of section 67. Rather, it gives effect to the statutory remedy provided in the LRA, within the jurisdiction of the specialised court (the Labour Court), for loss occasioned as a result of breaches of the provisions of Chapter IV during protected industrial action. It ought not to discourage them from engaging in such a strike within the prescripts of Chapter IV.

[39] Importantly, this interpretation is informed by the pleaded case. The issue in this case is the correct forum for the determination of a claim for breach of picketing rules and the consequential relief of just and equitable compensation. As specialist courts, the Labour Court and Labour Appeal Court are specially designed to deal with complaints relating to labour practices. The breach of picketing rules is a matter within

[26] See *Motor Industry Staff Association v Macun N.O.* [2015] ZASCA 190; [2016] 3 BLLR 284 (SCA); 2016 (5) SA 76 (SCA) at para 18.

the specialist jurisdiction of the Labour Court. Relief consequent to such breach is provided for in the LRA.

[40] I would have thus make an order granting leave to appeal but dismissing the appeal with no order as to costs.

MAJIEDT J (Madlanga ADCJ, Goosen AJ, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J concurring):

[41] I have read the judgment of my Colleague, Dambuza AJ (first judgment). I agree that this case engages this Court's jurisdiction and that leave to appeal ought to be granted, but I part ways with my Colleague regarding the merits. I would uphold the appeal.

[42] The first judgment extensively narrates the background factual matrix and the issues to be determined. I will therefore confine my narration of the facts to those that are important for my line of reasoning. For the reasons that follow, I take the view that the Labour Appeal Court's order and underlying reasoning (and that of the Labour Court) are wrong. I also disagree with the Labour Appeal Court's basis for distinguishing *Stuttafords*[27] from the present case. That Court erred in holding that *Stuttafords* is distinguishable in light of the amendment to section 68(1)(b) of the LRA in 2002.[28] The Labour Appeal Court was also mistaken in its reliance on *Dunlop Mixing*,[29] which has no bearing on the issues in this case.

[43] It bears repetition that this dispute arose in the context of a claim for compensation brought by Massmart against SACCAWU for alleged losses suffered as a result of unlawful conduct committed during a protected strike. In the Labour Court,

[27] *Stuttafords* above n 19.

[28] LAC judgment above n 8 at para 21.

[29] *Dunlop Mixing* above n 7.

the Labour Appeal Court and this Court, the parties adopted contrary positions in relation to the interpretation of section 68(1)(b) of the LRA. In the main, SACCAWU contends that the Labour Court lacks jurisdiction to adjudicate claims like the one brought by Massmart, as section 68 relates exclusively to unprotected strikes, while Massmart argues that the provision encompasses any unlawful conduct during strike action, regardless of whether the strike itself is protected.

[44] It is important to bear in mind that, on the common cause facts, the strike was protected, in that it met the procedural and substantive requirements established by sections 64 and 65 of the LRA, respectively. Massmart sought compensation of over R9 million, claimed in terms of section 68(1)(b) for losses allegedly suffered as a result of the unlawful conduct by the applicant's members, officials, representatives and supporters during the course of the protected strike. Broadly stated, Massmart's statement of claim alleged, amongst others, that the losses suffered were attributable to the breach by the applicant and its members of provisions of the LRA, section 17 of the Constitution, regulations in force under the Disaster Management Act and consolidated directives on occupational health and safety measures. Massmart further claimed that such conduct constituted criminal offences and was unlawful.

[45] Only one of the five exceptions raised by SACCAWU to Massmart's statement of claim is relevant to these proceedings. As the first judgment states, one of the five exceptions was abandoned and the Labour Court dismissed the other four. SACCAWU averred that the Labour Court did not have jurisdiction in terms of section 68 to grant just and equitable compensation for any loss attributable to a protected strike or lock-out, or conduct in contemplation or furtherance of a protected strike or lock-out. It contended further that the Labour Court's jurisdiction in this regard was restricted to unprotected strikes or lock-outs. According to SACCAWU, the statutory exception to delictual liability in section 67(2) and (6) of the LRA did not apply where the strike conduct constituted a criminal offence, as stipulated in section 67(8). In such cases, liability was to be determined in accordance with delictual principles, with the appropriate forum being the High Court.

[46] Massmart's opposition to the exception was, in the main, based on its contentions that section 68(1)(b) applies to unlawful conduct undertaken during any strike or lock-out, regardless of whether it is protected or unprotected. It argued that the 2002 amendment to section 68(1)(b), which broadened its scope to include the phrase "or conduct", signalled the Legislature's intention to extend the Labour Court's jurisdiction beyond claims solely related to unprotected strikes.

[47] Section 68(1)(b) in its pre-amended form has been reproduced in full in the first judgment,[30] as has the current iteration, after the 2002 amendment.[31] My Colleague lays much emphasis on the inclusion of the word "conduct" through the 2002 amendment. She opines that it "must have been introduced to the subsection, to broaden the scope of conduct in respect of which compensation may be awarded by the Labour Court".[32]

[48] I disagree with that approach. The first judgment deals somewhat perfunctorily with the headings of sections 67 and 68 of the LRA.[33] But they are important and, in my view, decisive in this case. As both the headings and texts of these sections make clear, section 67 deals with strikes that are compliant with the LRA (protected strikes), while section 68 deals with strikes that are not (unprotected strikes).[34]

[49] Section 67, which only deals with protected strikes, provides that a protected strike, or conduct in support of a protected strike, is not a delict.[35] Section 67(8) qualifies this by stating that section 67(2) does not apply to conduct in support of a protected strike where the conduct is an offence. But section 67 does not confer any

[30] See the first judgment at [24].

[31] Id at [21].

[32] Id at [27].

[33] Id at [20] and [29].

[34] I am cognisant of the fact that the sections also deal with lock-outs, but for purposes of this judgment I refer only to strikes.

[35] See the first judgment at [20].

jurisdiction on the Labour Court to award compensation in respect of criminal conduct (or delictual conduct) in support of a protected strike.

[50] Section 68, on the other hand, deals exclusively with unprotected strikes. On a plain reading of the introductory part of section 68(1) that precedes the powers of the Labour Court (including the power to grant compensation), it is apparent that the phrase "that does not comply with the provisions of this Chapter" refers to the "strike or lock-out" contemplated in each of the preceding two phrases. It mirrors the preceding section 67(2) and (6). An expanded version of section 68(1) would read:

> "In the case of—
>
> (a) any strike or lockout that does not comply with the provisions of this Chapter; or
>
> (b) any conduct in contemplation or in furtherance of a strike or lockout that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction."

[51] Thus understood, section 68(1) only applies to those cases where an employer is seeking relief pursuant to the employees' participation in an unprotected strike or the employees' participation in conduct in support of an unprotected strike. It most certainly does not apply to protected strikes. Section 68(1) does not relate to the question whether conduct in support of the strike is unlawful in itself. On the other hand, if conduct – even if not otherwise delictual – is in support of an unprotected strike, the employer may seek relief from the Labour Court. That Court will then have exclusive jurisdiction in such instances.

[52] This means that an employer's right to relief in terms of section 68 depends on the strike being unprotected. And the Labour Court's exclusive jurisdiction to grant that relief is similarly dependent on the strike being unprotected. Section 68(5) has a similar reading and effect: "[p]articipation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance *of that strike*,

may constitute a fair reason for dismissal".[36] The words "that strike" can, on any sensible reading, only refer to the strike mentioned in the earlier part of the subsection, namely a strike that does not comply with the provisions of the Chapter, in other words, an unprotected strike. The section most certainly does not say that unlawful conduct in contemplation or furtherance of a protected strike may constitute a fair reason for dismissal. Whether unlawful conduct in contemplation or furtherance of a protected strike may constitute a fair reason for dismissal turns on section 67(4) and (5), not on section 68(5).

[53] In summary then, self-evidently, a clear distinction must be drawn between the statutory effects of protected and unprotected strikes. As far as protected strikes are concerned, in terms of section 67 of the LRA—

(a) there is immunity from civil liability, thus participation in a protected strike or related conduct, does not amount to breach of contract or a delict (section 67(2));

(b) there are protections against dismissals – employees cannot be dismissed for striking or related conduct (section 67(4)), unless—

(i) the reason is legitimate misconduct during the strike, or

(ii) it is a dismissal based on operational requirements (section 67(5)); and

(c) there are limits of protection; that is, there is no immunity from civil action for conduct that constitutes a criminal offence (section 67(8)), but section 67 does not confer any jurisdiction in that regard on the Labour Court.

[54] On the other hand, section 68 provides that employees and unions engaging in unprotected strikes, and in conduct in contemplation or furtherance of an unprotected strike, are not shielded from—

(a) dismissal;

[36] Emphasis added.

(b) civil action; and

(c) interdicts and claims for damages.

[55] It is noteworthy that the 1956 iteration of the LRA also recognised immunities for legal strikes, but lacked express reference to conduct "in contemplation" of strikes and clear statutory protection from dismissal for lawful strikers[37] (which evolved through case law, amongst others – *Blue Waters Hotel*[38]). The immunity postulated in the LRA's present relevant provisions applies only to lawful strikes and actions directly related to the strike, but does not cover unlawful strikes or actions that could lead to criminal liability (except for defamation). The consequences of lawful industrial action are: no immunity from criminal liability for participants; no civil liability for actions taken in furtherance of the strike except for criminal conduct; and the legality of the action impacts the unfair labour practice analysis, which can influence whether certain actions are deemed unfair.

[56] I cannot agree with the reasoning of the Labour Court (endorsed by the first judgment) in interpreting the word "conduct" in section 68(1)(b) as not expressly linked to unprotected strikes. That Court's judgment emphasises that the absence of explicit wording is not determinative; rather, necessary implication and contextual reading must be applied. But, as I see it, the phrase "conduct in contemplation or in furtherance of a strike or lock-out that does not comply with the provisions of this Chapter" in the introductory part of section 68(1) necessarily applies to both paragraphs (a) and (b) of the subsection. Section 68(1) sets a condition precedent for the jurisdiction of the Labour Court, inasmuch as the section grants that Court exclusive jurisdiction only in matters involving unprotected strikes, lock-outs or related conduct. It serves as a gatekeeper provision: unless the action is *unprotected*, the Labour Court has no authority to issue interdicts or compensation orders under this section.

[37] Section 17(D) of the Labour Relations Act 28 of 1956.

[38] *BAWU v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC).

[57] The pre-amended section 68(1)(b) did not contain any reference to "conduct" in paragraph (b). The only reference to "conduct" was in section 68(1)(b)(i)(cc), in relation to "unjustified conduct by another party to the dispute" prompting a strike or lockout. This created an inconsistency with paragraph (a), which included both unprotected action *and* conduct in contemplation or furtherance of an unprotected strike. The 2002 amendment subsequently corrected this by inserting "or conduct" into paragraph (b). There is plainly a need to harmonise sections 67 and 68. As stated, the former applies to protected action and grants immunity from dismissal or civil proceedings, while the latter applies to unprotected action, permits interdicts, compensation, and potential fair dismissal under section 68(5). Any interpretation that gives section 68 power over protected action would directly conflict with section 67(6), which prohibits such civil claims. Section 68(5) allows for dismissal for participation in unprotected strikes or related conduct, provided it is fair, by applying the Code of Good Practice: Dismissal (Schedule 8). This codifies a balancing test – striking is a right, but it must be exercised lawfully.

[58] The correct interpretation of section 68(1)(b) is the one advanced by SACCAWU. This conclusion is inescapable for the reasons set out above. In short, that interpretation accords with the plain words of the section, read in context with the rest of that Chapter of the LRA and the statute as a whole. It also attains the purpose of the provision. Moreover, if the phrase "does not comply with the provisions of this Chapter" in section 68(1) is interpreted as referring to conduct (even where the strike is protected), it would not be possible for compensation to be claimed in respect of lawful conduct in support of an unprotected strike, since lawful conduct would not be in contravention of the Chapter. This would considerably narrow the intended scope of section 68(1)(b).

[59] Regarding conduct in contemplation or furtherance of a strike, section 68 is concerned with such conduct – whether lawful or unlawful in itself – where it is in contemplation or furtherance of an unprotected strike. If conduct is in furtherance of an unprotected strike, for example, an interdict can be granted in terms of

section 68(1)(a) even though the conduct – viewed in isolation – is not unlawful. The critical feature that gives rise to jurisdiction under section 68(1) is the unprotected nature of the strike. Section 68 discourages unprotected strikes by providing that conduct in support of such strikes will not benefit from the protections contained in section 67. The conduct contemplated in section 68 is "tainted" because it is undertaken in contemplation or furtherance of an unprotected strike, and not because the conduct – viewed apart from the strike – is contrary to Chapter IV or otherwise unlawful.

[60] On the first judgment's interpretation of section 68(1), the words "that does not comply with the provisions of this Chapter" (i.e. Chapter IV) may apply to conduct in contemplation or furtherance of a strike, even though the strike itself is protected. On that interpretation, one needs to search Chapter IV to determine whether the impugned conduct is regulated by and is in violation of a provision in the Chapter. In the case of employees, only picketing is regulated by Chapter IV (aside from strikes). I shall deal shortly with the first judgment's analysis of the interrelationship between section 68 and the picketing provisions in section 69.

[61] For the moment, however, the point I highlight is that section 68(1) applies to conduct, not only by employees, but also by employers, that is, lock-outs and conduct in contemplation or furtherance of lock-outs. There is no conduct by an employer, other than a lock-out, that is regulated by the Chapter, so the reference in section 68(1) to "conduct" would, on the first judgment's interpretation, be rendered nugatory in the case of employers.

[62] Even in relation to employees, the only conduct (aside from strikes) regulated by Chapter IV is picketing, an aspect which will be considered later. The consequence is that, on the first judgment's interpretation, delictual or even criminal conduct in support of an unprotected strike does not fall within the scope of section 68(1), unless the conduct in question can be regarded as a form of unlawful picketing. This consequence would follow from the fact that such other delictual or even criminal conduct would be unlawful, not because of non-compliance with the provisions of Chapter IV, but because

of the violation of other delictual or criminal norms. This attenuates even further the proper scope of section 68(1), because on the first judgment's interpretation it excludes from its net not only otherwise lawful conduct in support of an unprotected strike, but even unlawful conduct unless the unlawfulness flows specifically from non-compliance with a regulation contained in Chapter IV. This could never, in my view, have been the lawmaker's intent.

[63] If the Legislature had intended to grant jurisdiction to the Labour Court in respect of delictual conduct in support of a protected strike, section 67 would have been the place to do it, yet it is not there. Of course, this does not take away the employer's right to claim damages in delict for such conduct if it is criminal (section 67(8)), but the employer needs to claim such damages in the ordinary courts and not in the Labour Court.

[64] The next aspect for consideration is the divergent approaches and outcomes in *Stuttafords* and *Dunlop Mixing*. These two cases adopted contrary approaches to the interpretation of section 68(1)(b) of the LRA and its implications for compensation claims during protected strikes and lock-outs. *Stuttafords* came before the Labour Appeal Court at a time when section 68(1)(b) had not been amended to include the words "or conduct".

[65] In *Stuttafords*, the key issue was whether the Labour Court has jurisdiction to award compensation for losses resulting from a protected lock-out. The Labour Appeal Court firmly answered that question in the negative, holding that only unprotected industrial action falls within the scope of section 68(1)(b). The Court emphasised the significance of the definite article "the" in the statute, which limits its application to action "that does not comply" with Chapter IV, that is, unprotected action. This interpretation aligns with section 67 of the LRA, which provides legal immunity and protections for parties involved in protected industrial action, thereby reinforcing the sanctity of lawful collective bargaining. The Labour Appeal Court further noted that economic harm is an intended feature of protected strikes and lock-outs, serving as

legitimate tools in labour negotiations. As such, courts should not interfere in these situations by awarding compensation unless the strike action is unprotected.

[66] The fact that *Stuttafords* was decided prior to the 2002 amendment of section 68(1)(b) does not in any way detract from the force of the reasoning in that case. Its more expansive approach rightly recognises that conduct, when connected to the strike's aims, may still fall within the protective scope of the LRA, affirming the principle that not every act of unlawfulness should automatically strip workers of their statutory protection. That approach aligns more closely with the purpose and structure of the LRA, which seeks to balance the rights of workers to engage in collective action with the need for lawful conduct. Both the Labour Appeal Court and the first judgment are wrong when they seek to distinguish *Stuttafords* on this narrow basis.

[67] On the other hand, as I see it, *Dunlop Mixing*, relied upon by the Labour Appeal Court (and by the first judgment), cannot be applied here. It appears to me to be distinguishable on both the facts and the law. In *Dunlop Mixing*, the Supreme Court of Appeal considered whether a picket in support of a protected strike qualifies as a "gathering" under the Regulation of Gatherings Act[39] (Gatherings Act). It held that while picketing may fit the general definition of a gathering, it is a specific form of expression governed by section 69 of the LRA, which takes precedence as the more specialised law. The Supreme Court of Appeal held that peaceful, lawful pickets fall under the LRA's protections, but if any criminal acts occur during such pickets, the responsible parties may be liable under section 68(1). Ultimately, that Court ruled that the Gatherings Act does not apply to conduct during authorised pickets regulated by the LRA.

[68] Both the Labour Court and Labour Appeal Court opted to adopt the approach in *Dunlop Mixing* and declined to follow *Stuttafords*. My Colleague does so too. The Labour Court rejected SACCAWU's argument that the Supreme Court of Appeal's

[39] 205 of 1993.

remarks in *Dunlop Mixing* regarding section 68(1) of the LRA were merely *obiter dicta* (incidental remarks, not essential to decide the case). It held that the core issue before the Court was whether, given the LRA's detailed provisions on picketing and remedies for strike-related loss, an aggrieved party could instead claim "riot damage" under section 11 of the Gatherings Act. The Labour Court in the present instance held that in *Dunlop Mixing*, the Supreme Court of Appeal's interpretation of sections 67, 68 and 69, and specifically, that section 68(1) applies to unlawful conduct linked to a protected strike, was integral to the conclusion that the Gatherings Act does not apply to losses arising from authorised pickets under the LRA. Regarding the perceived inconsistency between *Stuttafords* and *Dunlop Mixing*, the Labour Court noted that *Stuttafords* was decided under an earlier legislative framework, prior to amendments to section 68(1)(b).

[69] I agree with SACCAWU's contention that the Supreme Court of Appeal's remarks in *Dunlop Mixing* regarding sections 67, 68 and 69 of the LRA were *obiter dicta*. That much is clear from the discussion in paragraph 31 of that judgment, and the paragraphs which follow it. The Labour Appeal Court rejected SACCAWU's argument that section 68(1)(b) of the LRA applies only to unprotected strikes and lock-outs, not to conduct during protected strikes. That Court upheld the Labour Court's decision, and held that a plain reading of section 68(1)(b), especially after its 2002 amendment to include "or any conduct", indicated a legislative intent to extend the Labour Court's jurisdiction to include unlawful conduct occurring during protected strikes.

[70] The Labour Appeal Court referenced *Dunlop Mixing*, which, as stated, held that protection under section 67(2) and (6) of the LRA is lost if criminal acts occur during a strike, thereby permitting remedies under section 68(1). The Labour Appeal Court also distinguished *Stuttafords*, noting it was decided before these key amendments. It concluded that allowing compensation claims only for unprotected strikes, but not for unlawful conduct during protected ones, would be inconsistent and would weaken the role of the Labour Court in adjudicating labour disputes.

[71] In *Stuttafords*, the Labour Appeal Court adopted an expansive view and one that can be described as worker-centred. As the Supreme Court of Appeal's remarks in *Dunlop Mixing* regarding this aspect were *obiter dicta*, I need say no more about them. What bears repetition, though, is that they have no direct bearing on the central issue now under discussion. The key question is whether conduct that is technically unlawful, such as breaches of Chapter IV, can nonetheless be seen as part of the contemplation or furtherance of a protected strike.

[72] The Labour Court and the Labour Appeal Court wrongly rejected the broad, worker-centred reasoning advanced in *Stuttafords*. And the first judgment wrongly does so too. Although the Labour Appeal Court stopped short of explicitly equating all unlawful conduct with unprotected action, its deference to *Dunlop Mixing* still signalled a preference for a narrower application of the LRA.

[73] There is one last consideration which fortifies my view on *Stuttafords* and *Dunlop Mixing*. This Court held, in *Thistle Trust*,[40] that a court can have limited regard to an explanatory memorandum for a Bill in the interpretive exercise, as long as it clearly articulates the underlying rationale for the legislative provision. SACCAWU can thus legitimately rely on the explanatory memorandum to the 2002 amendment, albeit to the limited extent enunciated in *Thistle Trust*. In order to determine whether *Stuttafords* is distinguishable from the current case and *Dunlop Mixing*, the materiality of the 2002 amendment to section 68(1)(b) of the LRA must be assessed.

[74] Although the amendment added the words "or conduct", the overall wording of section 68(1)(b) remains unchanged from when *Stuttafords* and *Dunlop Mixing* were decided. SACCAWU argued that this amendment simply clarified that compensation could be sought for conduct in contemplation or furtherance of an unprotected strike, aligning with *Stuttafords*. But, in *Stuttafords*, the Court already interpreted section 68(1)(b) to include such conduct even before the amendment. Therefore, unless

[40] *Thistle Trust v Commissioner, for the South African Revenue Service* [2024] ZACC 19; 2024 (12) BCLR 1563 (CC); 2025 (1) SA 70 (CC) at paras 65-7.

the amendment was intended to codify that interpretation, *Stuttafords* does not fully support SACCAWU's argument.

[75] However, more recently, in *Blinkwater Mills*,[41] which was decided after the 2002 amendment, the High Court reached the same conclusion as *Stuttafords*, finding that section 68(1)(b) does not grant the Labour Court jurisdiction to award compensation for losses arising from protected strikes.[42] The Court emphasised that the status of a strike, being protected or unprotected, is not altered by whether unlawful conduct occurs during it and, thus, delictual claims arising from protected strikes fall outside the Labour Court's jurisdiction. Given the consistent reasoning in both *Stuttafords* and *Blinkwater Mills*, the Labour Court and the Labour Appeal Court's attempts to distinguish *Stuttafords* from *Dunlop Mixing*, and the current case, do not bear scrutiny.

[76] In reaching its conclusion, the first judgment places significant reliance on section 69(12) of the LRA, which empowers the Labour Court, in certain circumstances, to grant additional just and equitable relief over and above that contemplated in section 68(1). The subsection falls under the picketing provisions in section 69 of the LRA. That approach is misconceived. Self-evidently, in seeking to apply section 69(12), one must first engage with the provisions of section 68 and determine its scope and ambit. To my mind, an unlawful picket in support of a protected strike does not fall within the scope of section 68.

[77] It is necessary to provide a brief overview of section 69. Only registered trade unions can arrange pickets. Picketing must be in support of a protected strike or in opposition to any lock-out (protected or not). Unprotected strikes cannot be supported by lawful picketing. Various picketing rules are set out in the section. The picketing rules must be in place before the commencement of a protected strike or picket.[43] These

[41] *Blinkwater Mills (Pty) Ltd v Food & Allied Workers Union* (2020) 41 ILJ 873 (ML).

[42] Id at para 13.

[43] Section 69(6C).

rules can be agreed upon in a collective agreement or between the parties during conciliation, or can be determined by a commissioner if no agreement is reached.[44]

[78] Picketing may occur in publicly accessible areas outside the employer's premises, or inside the premises with the employer's permission.[45] Extensive provision is made for the resolution of disputes in relation to picketing.[46] If disputes arise, for example, disputes about alleged breaches of picketing rules, they are referred to conciliation, and if unresolved, to the Labour Court. That Court can then enforce or vary the picketing rules, suspend pickets at certain locations, or grant urgent interim relief.

[79] In summary, picketing is not an unregulated right; its exercise is premised on compliance with procedures and rules established under the LRA. The law aims to balance the rights of workers to demonstrate with the rights of employers and the orderly resolution of industrial disputes. A failure to comply with picketing rules can render the conduct unlawful and subject to Labour Court intervention.

[80] It is possible for section 69(12) to apply to a picket in support of an unprotected strike. Section 69(1)(a) states that a union may authorise a picket, amongst others, "in support of any protected strike". In terms of section 69(8)(b), a picketing dispute may arise where the employer contends that the picket is in material contravention of section 69(1). If the picket has been organised in support of an unprotected strike, such a picket is a material contravention of section 69(1)(a). Therefore, in such a case the employer could seek relief in terms of section 69(12), even though the strike is unprotected. And, because the strike is unprotected, such an employer could also seek relief in terms of section 68(1).

[44] Section 69(4) to (5).

[45] Section 69(2).

[46] Section 69(8) to (12).

[81] The first judgment's reasoning in effect holds that section 69(12) empowers a party to claim compensation as it would under section 68(1)(b). But that is not what the section provides. It merely stipulates that "in addition to any relief contemplated in section 68(1)", the court may grant the relief set out in section 69(12). This simply means that relief which a party may be entitled to claim in the Labour Court in terms of section 68(1) is not excluded. Thus, section 69(12) simply preserves the Labour Court's right to grant any relief that section 68(1) may itself authorise. The only further relief that section 69(12) itself authorises is relief relating to picketing (which section 68(2) does not deal with at all), and that further relief may be granted on an urgent interim basis, provided it is just and equitable in the circumstances.

[82] It is therefore wrong to invoke section 69(12) as an aid to interpreting section 68(2). It bears repetition that an unlawful picket conducted in support of a protected strike does not fall within the scope of section 68, but it may give rise to relief under section 69(12). In these circumstances, section 69(12) provides no answer to the central issue in this case.

[83] For these reasons, the appeal must be upheld. In accordance with the usual approach in labour matters, there will be no order as to costs.

[84] To conclude, for the reasons advanced, I make the following order:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Labour Appeal Court is set aside and replaced with the following:

   "The appeal is upheld; the order of the Labour Court is set aside and replaced as follows:

   '(a) The first exception is upheld.

   (b) The second to fourth exceptions are dismissed.'"

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