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EDUCATION LABOUR RELATIONS COUNCIL

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Nelson Mandela Metropolitan University
for tomorrow

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In this Issue:

1. From the General Secretary's Desk

The ELRC is pleased to provide stakeholders with its July 2013 Labour Bulletin. It contains notes on recent case law of relevance to the education sector as well as some critical commentary on decided cases.

We hope to both inform and stimulate readers. Some of the issues covered are contentious. It goes without saying that the views are those of the authors alone. We would encourage an exchange of views on the jurisprudence generated by the courts and by the ELRC because these rulings shape the way the sector operates.

We trust you will find value in these pages.

Ms NO Foca
ELRC, General Secretary

2. The Legality of the Automatic Termination of Contracts of Employment

1 Introduction

The Labour Relations Act (66 of 1995) (LRA) protects employees against unfair dismissal. In terms of section 186(1)(a) dismissal means that "an employer terminated a contract of employment with or without notice". In order to fall within the ambit of this provision and benefit from the protections afforded by the LRA, an employee must prove that an overt act on the part of the employer has resulted in the termination of the employment contract (*Ouwehand v Hout Bay Fishing Industries* 2004 25 *ILJ* 731 (LC)). The *onus* then shifts to the employer to prove that the dismissal is both substantively and procedurally fair, failing which the employee will be entitled to the remedies afforded by section 193 of the LRA.

However, not every termination of an employment contract constitutes a dismissal and a number of scenarios exist where an employment contract terminates lawfully by operation of law. The termination of a fixed-term contract by effluxion of time, termination of the contract due to supervening impossibility of performance and the attainment of a contractually agreed or implied retirement age all give rise to the lawful termination of an employment contract. Similarly the statutory "deemed-dismissal" provisions of application to

employees in the public sector provide for the automatic termination of employment contracts in circumstances that the employee is absent without authorisation for a designated period of time. The effect of such automatic termination is that the employment contract terminates by operation of law and not by means of an act of the employer, resulting in the dismissal provisions of the LRA being legitimately circumvented.

Labour-broking contracts typically include automatic termination clauses that provide for the automatic termination of employment contracts, between labour-brokers and their employees, when the broker's client no longer requires the services of such employees. Similarly employers have sought to rely upon grounds of supervening impossibility of performance in order to argue that an employment contract has automatically terminated in the instance of absconding and imprisoned employees. This article will be examining the legality of the automatic termination of employment contracts in these contexts and the impact on employees' rights to protection against unfair dismissal.

2 The automatic termination of labour-brokers' employees

Section 198 of the LRA defines a temporary employment service (labour-broker) as any person, who, for reward, procures for or provides to a client other persons who render services or perform work for the client and who are remunerated by the temporary employment service. Section 198(2) stipulates that the temporary employment service is the employer of the person whose services have been procured for a client and limits the client's liability to joint and several liability with the employer for a contravention of the terms and conditions of a collective agreement, arbitration award, sectoral determination or provision of the BCEA (this working arrangement is endorsed by International Labour Organisation (ILO) Recommendation 197 of 2006).

While it has been acknowledged that temporary employment services make a worthy contribution to the South African economy (in the "Regulatory Impact Assessment of Selected Provisions of the Labour Relations Amendment Bill, 2010; Basic Conditions of Employment Amendment Bill, 2010; Employment Equity Amendment Bill, 2010; and Employment Services Bill, 2010" conducted by Benjamin and Bhorat for the Department of Labour (September 2010) the authors cautioned that the outright ban of labour-broking arrangements will have dire negative effects on employment and job creation http://www.labour.gov.za/downloads/legislation/bills/proposed-amendment-bills/FINAL_RIA_PAPER_13Sept2010.PDFA), a less commendable motivating factor for the engagement of labour-broking services is to circumvent the gamut of statutory rights and obligations that would typically arise in a standard employment relationship. Instead the contractual obligations of the labour-broker's clients are circumscribed by the commercial contract concluded and generally indemnify the client against any responsibility towards the broker's employees. To avoid allegations of unfair dismissal and unlawful termination labour-brokers typically include carefully constructed contractual provisions in employment contracts that provide for the automatic termination of such contracts in circumstances that the employer's contract with the client expires or the client no longer requires the services of the particular employee (in *NUMSA v SA Five Engineering (Pty) Ltd* 2007 28 ILJ 1290 (LC)).

In a number of recent decisions the Labour Courts have considered the legality of these provisions. In *Sindane v Prestige Cleaning Services* (2009 12 BLLR 1249 (LC) 1250) the court considered whether the applicant, formerly employed as a cleaner by the respondent in terms of a "fixed-term eventuality contract of employment" (*Sindane v Prestige Cleaning Services supra* 1250), had been dismissed within the meaning of the LRA. The employee had been terminated as a result of the client scaling down its contract with the employer brokers, by cancelling a contract in terms of which an extra cleaner had been provided to them. The contract stipulated that, upon termination of the broker's contract with the client to whom the employee rendered services, the employee's employment contract with the employer broker would automatically terminate. The court was satisfied that, in circumstances when an act of the employer is not the proximate cause of the termination of the employment contract, it does not constitute a dismissal.

In reaching its decision the court distinguished the finding of the Labour Court in *SA Post Office Ltd v Mampeule* (2009 8 BLLR 792 (LC)) which considered the impact of a provision in an employment contract that provided for the automatic termination of the contract upon the occurrence of an external event. In this matter

the employee was appointed CEO of the employer in terms of a 5-year fixed-term contract and was also appointed as an executive director on the employer's board of directors. The employer's articles of association stipulated that the employee's appointment as executive director was an "inherent requirement" of the job and that, if the executive director ceased to hold office for any reason whatsoever including removal by the shareholders, his contract terminated automatically and simultaneously with the cessation of office. Following the employee's removal from the board of directors he was advised that his contract of employment had terminated automatically. The Labour Court considered an interlocutory application to determine whether such termination constituted a dismissal regulated by the LRA. The court held that any act by an employer that directly or indirectly results in the termination of a contract of employment constitutes a dismissal. As the employer had "terminated the respondent's contract of employment by severing the umbilical cord that ties the respondent's employment contract to his membership of the applicant's board of trustees" (*SA Post Office Ltd v Mampeule supra* 793) the act of severance constituted a dismissal. In considering the legitimacy of automatic termination clauses, the court held that such clauses are

> "impermissible in their truncation of the provisions of chapter 8 of the LRA and, possibly even, the concomitant constitutional right to fair labour practices ... Provisions of this sort, militating as they do against public policy by which statutory rights conferred on employees are for the benefit of all employees and not just an individual, are incapable of consensual validation between parties to a contract by way of waiver of the rights so conferred" (*SA Post Office Ltd v Mampeule supra* 803).

The court in *Sindane* distinguished the finding of the court in *Mampeule* on a number of grounds. In *Mampeule* the termination was based on the employer's decision to remove him from the board of directors following allegations of misconduct. In such circumstances, the court held, he ought to have been afforded an opportunity to contest the fairness of his termination. On the other hand, in *Sindane,* the court was satisfied that the applicant had not been dismissed as the termination of his employment contract was triggered by a third party and not by the employer. In reaching this decision the court relied upon the wording of section 186 of the LRA which defines dismissal as the termination of the contract of employment "by the employer". In finding that the contract terminated as a result of a specified event as opposed to an overt act on the part of the employer the court was satisfied that the termination did not fall within the ambit of section 186.

The Labour Appeal Court subsequently reconsidered on appeal the finding of the court in *SA Post Office Ltd v Mampeule* (2010 10 BLLR 1052 (LAC)) and upheld the finding of the court *a quo* albeit on a different basis. In reaching its decision the court relied upon section 5(2)(b) and 5(4) of the LRA. Section 5(2) provides that "no person may prevent an employee from exercising any right conferred by this Act." Section 5(4) provides further that "[a] provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by this Act." The court noted that the *onus* rested on the employer in such circumstances to establish that the automatic termination clause prevailed over the relevant provisions in the LRA. The court was satisfied that parties to an employment contract cannot contract out of the protection against unfair dismissal, whether by means of an automatic termination clause or otherwise, as the LRA is promulgated in the public interest and not only to cater for the interests of the individuals concerned (see also *Chillibush v Johnston* 2010 6 BLLR 607 (LC) in which the court held that it is not permissible in the labour-law context to allow an employer to negotiate contractually the terms of a dismissal in advance). The court was satisfied that section 5 trumped the contractual provision, as the employer had failed to offer a clear explanation as to why the automatic termination clause had been independently triggered and the only explicable motive appeared to be to circumvent the unfair dismissal provisions of the LRA.

Echoing this approach the Labour Court in *Mahlamu v CCMA* (2011 4 BLLR 381 (LC)) noted that the statutory protection against unfair dismissal is a fundamental component of the constitutional right to fair labour practices that serves to protect the vulnerable by infusing fairness into the contractual relationship, and that the LRA must be purposively construed to give effect to this. The court noted that, as the automatic termination provisions in the contract clearly falls within the section 5(2)(b) injunction,

the key consideration is whether such provisions are permitted by the LRA and whether it is permissible in the circumstances to contract out of the right not to be unfairly dismissed. (In answering this question the court relied upon the finding of the UK Court of Appeal in *Igbo v Johnson Mathery Chemicals Ltd* 1986 IRLR 215 (CA). In *casu* the employee entered into a holiday agreement with her employer that provided that the contract of employment will automatically terminate if the employee failed to work on a specified date. The court held that the contractual provision had the effect of limiting the statutory protection against unfair dismissal and was void.) The court noted that as "a rule of thumb employers can make an agreement varying or waiving their rights under the Act but employees cannot do so by means of individual consent" (*Mahlamu v CCMA supra* 388 referring to Brassey *Commentary on the Labour Relations Act* RS 2 of 2006 A9-6) as the right serves both the interests of other employees and the public interest. The court concluded that "a contractual device that purports to render the termination of a contract of employment as something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of section 188 of the LRA, is the very mischief that section 5 of the Act prohibits" (*Mahlamu v CCMA supra* 389).

The Labour Court in *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010 8 BLLR 852 (LC) 868), criticized the finding of the court in *Sindane* as placing "far too much emphasis on the rights of parties to contract out of the Act". In this far-reaching decision the court, expressing contempt for labour-broking arrangements and their infringement of fair labour practices, was prepared to extend responsibility for the fair dismissal of the broker's employee to both employer and client. In this matter the employee of a labour-broker, while placed at a client, was found guilty of sending an offensive e-mail to another employee using the client's computer system. Following the client refused to permit the employee to return to its premises, the employee was retrenched by the employer. The Labour Court, assessing whether the employee had been unfairly dismissed, noted that in terms of the contract of employment the broker was entitled to dismiss the employee "on grounds proven by the client to be reasonable and/or substantively and procedurally fair". The contract between the broker and its client permitted the client to request an employee's removal on any ground. The employer argued that the client had acted lawfully because it exercised an option permitted by the contract and that, in the circumstances, it had no alternative other than to retrench the employee.

The court noted that, although the relationship between the broker and its client was lawful, it did not follow that all the terms of the contract which governed that relationship were also lawful. A contractual provision that enables a labour-broker to withdraw an employee placed with a client, the court held, is contrary to public policy and in breach of the employee's constitutional right to fair labour practices. The court noted that, in spite of legislative approval of labour-broking services, labour-brokers and their clients are "not at liberty to structure their contractual relationships in a way that would effectively treat employees as commodities to be passed on and traded at the whim and fancies of the client" (*Nape v INTCS Corporate Solutions (Pty) Ltd supra* 862). The client of a labour-broker has a legal duty to do nothing to undermine an employee's rights to fair labour practices, unless the limitation is justified by national legislation (*Nape v INTCS Corporate Solutions (Pty) Ltd supra* 863). The court added that, in applying the right not to be unfairly dismissed, it is not bound by contractual limitations created by the parties and may not "perpetuate wrongs exercised by private parties who wield great bargaining power" ((*Nape v INTCS Corporate Solutions (Pty) Ltd supra* 864).

The court noted further that there is nothing in the text of section 198 of the Act that indicates that a labour-broker and a client may limit the right of an employee not to be unfairly dismissed, and a court is not bound by contractual limitations created by parties through an agreement that conflicts with the fundamental rights of workers. It concluded that any clause in a contract between a labour-broker and a client which allows a client to undermine the right not to be unfairly dismissed is against public policy and unenforceable. While the court acknowledged that an employee has no right of recourse against a client of a labour-broker for unfair dismissal, it was of the view that brokers are not powerless when forced by their clients to treat their employees unfairly. It suggested that brokers in such situations may approach a competent court to order the client to refrain from such conduct and in appropriate circumstances the court may go so far as to order the client to reinstate an unfairly dismissed employee. The willingness of the court in *Nape* to move beyond its legislative mandate, by implying public-policy considerations into the

contract so as to temper unfair contractual and legislative provisions, is to be applauded.

What is apparent from these judicial decisions is that labour-brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. A contractual provision that provides for the automatic termination of the employment contract under-mines an employee's rights to fair labour practices, is contrary to public policy, unconstitutional and unenforceable (Grogan "The Brokers Dilemma" 2010 *Employment Law* 6). As noted by the Namibian Supreme Court in *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011 1 BLLR 15 (NmS)) agency workers are not commodities and such employees are to be afforded equivalent respect and protection of their human and social rights as employees in standard employment relationships (*supra* 74). While it still remains to be seen (pending further deliberations by labour, government and business) whether labour-broking arrangements will be regulated or prohibited it is apparent that the con-tractually and statutorily sanctioned commoditisation and exploitation of labour-broking employees will no longer be immune from judicial intervention.

3 Automatic termination due to impossibility of performance

In terms of common-law principles of contract, a contract terminates automatically when it becomes permanently impossible to perform the terms of the contract due to no fault on the part of either party. In the context of an employment contract impossibility of performance will result in the automatic termination of such contract and will not constitute a dismissal. Supervening impossibility of performance occurs when "performance of the obligation is prevented by superior force that could not reasonably have been guarded against" (Brassey "The Effect of Supervening Impossibility of Performance on Contract of Employment" 1990 *Acta Juridica* 22 23). This may include physical impossibility such as acts of nature, the death of an employee, acts of state (such as imprisonment or conscription of an employee), or acts of third parties (such as strikes) that prevent an employee from working or an employer from providing employment. Impossibility must be absolute and must not be attributable to the fault of either party. The defence of impossibility of performance has been raised in a number of scenarios, with limited success.

3 1 Termination at the instance of shareholders

The defence of impossibility of performance was rejected by the Labour Court in *PG Group (Pty) Ltd v Mbambo NO* (2005 1 BLLR 71 (LC)). In this matter the court considered whether a resolution by members of a company, removing the employee from office, constituted a dismissal (in terms of section 220 of the Companies Act 61 of 1973 the members of a company in a general meeting may by extraordinary resolution remove directors before the expiration of their terms of office). The employer argued that, as the actions of the shareholders were imposed on it by virtue of the articles of association and it had neither alternative nor discretion but to treat the appointment of the employee as terminated, the employee's contract of employment terminated due to supervening impossibility of performance (*PG Group (Pty) Ltd v Mbambo* 2005 1 BLLR 71 (LC) 73). The court found that one of a company's primary rules of attribution is that the decision of members in a general meeting constitutes a decision of the company itself (*supra* 74). It concluded that it was the employer, not its shareholders, who took the decision to dismiss the employee (*supra* 74).

A similar approach was adopted by the court in *Chillibush v Johnston* (*supra* 607) which considered whether the employee's removal from the board of directors led to the automatic termination of his employment contract. (In *casu* the employee had been appointed as both a creative director as well as a shareholder of the company. The shareholders' agreement provided that, should any shareholder cease to be a director or have his employment terminated by the other shareholders, he would be obliged to resign as director and to offer his shares for sale to the other shareholders. Upon the employee's resignation as a director and cancellation of the shareholders' agreement the employer argued that the employee's contract of employment had been automatically terminated on that basis.) The court held that it was not permissible to allow an employer to contractually negotiate the terms of a dismissal in a contract of employment (or as in the present case the articles of association) and will be in contravention of the provisions of section 5(2)(b) and 5(4) of the LRA. The court concluded that the board's resolution of removing the employee from his post constituted a dismissal (see also *SA Post Office Ltd v Mampeule supra* 1052). The mere fact, the court noted, that the employee was lawfully removed as director in

terms of the Companies Act did not mean that he was deprived of the right to protection against unfair dismissal as "labour law and company law essentially operate in their own spheres" (*Chillibush v Johnston supra* 622).

While shareholders have an unfettered discretion to terminate the directorship of any of its directors, different rules and procedures apply when dismissing an employee in terms of the LRA. Fairness and not lawfulness is the overriding principle in labour law. As a consequence employers relying upon impossibility of performance to justify the automatic termination of the employment contract in such circumstances will most certainly fail.

3 2 Incarcerated employees

The Labour Court has considered whether the inability of an employee to render services to the employer, as a result of the employee's incarceration, gives rise to the lawful termination of an employment contract on the basis of impossibility of performance. In *NUM v CCMA* (2009 8 BLLR 777 (LC)) the employer argued that the employee's imprisonment prevented the performance of his contractual obligations and constituted a repudiation of his employment contract. The acceptance of this repudiation, the employer argued, resulted in the termination of the contract by operation of law. The Labour Court noted, in an *obiter dictum,* that when impossibility of performance of the contract is temporary the employment contract is suspended for the period of incapacity but if permanent or for a lengthy period of time the contract terminates automatically by operation of law. (The Labour Court, in overturning the award on review, was satisfied that on the facts the commissioner had made no attempt to establish whether the employee's incapacity was permanent or temporary in nature.) However, in the absence of clear guidelines delineating temporary from permanent impossibility this approach is likely to be fraught with uncertainty.

An approach more compatible with the provisions of the LRA was advocated by the Labour Appeal Court in *Samancor Tubatse Ferrochrome v MEIBC* (2010 8 BLLR 824 (LAC)). In this matter the employee, after having been incarcerated for 150 days, was advised (by means of a letter addressed to the police station at which he was held) of his dismissal for "operational incapacity" due to his inability to tender his services. The Labour Appeal Court noted that dismissal for incapacity should not be confined to incapacity arising from ill-health, injury or poor performance and that the determination of the fairness of a dismissal for incapacity depends upon the facts of the matter. The court was satisfied that, in light of the commercial need to fill the employee's position, which was critical to the workplace, and due to the uncertain period of incarceration, dismissal for "operational incapacity" was appropriate in the circumstances. (Nonetheless the court held that the dismissal was procedurally unfair as the employee had been deprived of the right to a hearing and compensation was awarded in this regard.)

The approach of the Labour Appeal Court in *Samancor* serves to reconcile common law and statute, by accommodating common-law principles of impossibility within the regulatory framework of the LRA. In this way the employer's common-law rights to the employee's uninterrupted services can be fairly balanced against the employee's entitlement to a procedurally and substantively fair dismissal.

4 Automatic termination of deserting employees

4 1 Desertion in the private sector

Desertion occurs when an employee absconds from the workplace with no intention of returning. Where there is no intention to abscond there is no desertion but instead misconduct in the form of absence without permission. Desertion constitutes a breach of a fundamental term of the employment contract and the employee is regarded as having repudiated the contract. In terms of the common law an employer faced with an employee's act of repudiation has the election of accepting the repudiation or instead holding the employee to the terms of the contract. In the context of desertion, the question has arisen whether the deserting employee terminates the employment relationship and constructively resigns by such conduct or whether the employer terminates the employment relationship by acting upon the desertion. If the termination is as a result of the employer's conduct it will constitute a dismissal in terms of the LRA and necessitate compliance with substantive and procedural fairness. If the act of desertion brings about the termination of the employment contract it will not constitute a dismissal and the provisions of the LRA do not apply.

This issue was addressed in *SABC v CCMA* (2001 22 ILJ 487 (LC)) in which the Labour

Court considered whether the employee's failure to return to work by a specified date gave rise to the termination of the contract of employment. The employer argued that no dismissal had taken place as the employee's desertion, like an act of resignation, constituted the juridical act that terminated the employment contract. The court rejected this argument and found that in accordance with the principles of common law, resignation can be clearly distinguished from repudiation (*supra* 492). It pointed out that

> "Although in some superficial respects, a desertion might be construed as a sort of tacit resignation or constructive resignation, it is not an act which is permitted by the terms of the contract. Because desertion is not permitted by the terms of the contract, it constitutes a breach. It is not part of our law that a breach of a contract however material brings about a termination of the contract. In our law, such an act on the part of a party simply entitles the other party to acknowledge the "repudiation", and then by a juridical act of its own, usually referred to as an "acceptance" of the repudiation, to put an end to the contract by consciously electing to do so. From this perspective, it is not the act of desertion which terminates the contract of employment, but the act of the employer who elects to exercise its right to terminate the contract in the face of that breach" (*supra* 492-493).

The court held, on this basis, that the deserting employee was dismissed by the employer and that such dismissal must comply with the LRA's requirements of substantive and procedural fairness.

While the Labour Court acknowledged that it would be futile to hold a hearing for an employee who has deserted and has indicated an unequivocal intention not to return to work or whose whereabouts are unknown, it noted that the situation is different in the instance of an employee whose absence is unexplained (*SABC v CCMA supra* 492-493). Such absence cannot be regarded as desertion without evidence of this and needs to be treated as misconduct in the form of absence without leave. Whether desertion has taken place, the court held, is a matter of fact and will depend upon the length of absence of the employee in light of the operational requirements of the employer (*SABC v CCMA supra* 492-493). The court noted that, whether or not an employer should convene a disciplinary enquiry before taking the decision to terminate is dependent on the relevant circumstances and the practicality of doing so. Where there is nothing preventing the employer from holding a disciplinary enquiry, for instance if the whereabouts of the employee is known, then this should be done. However, as noted by the Labour Appeal Court in the earlier matter of *SACWU v Dyasi* (2001 7 BLLR 731 (LAC) 735) the "the choice is not always in fact real" (*supra* 735). Where an employee has deserted and cannot be traced the employer often has no choice in such circumstances other than to accept the repudiation. In such circumstances, the court conceded, it may be argued that the contract terminated by operation of law (*supra* 735; and see also *NUMSA obo Magadla and AMT Services* 2003 24 ILJ 1769 (BCA)).

A contrary approach was adopted by the Labour Court in *SA Transport & Allied Workers Union obo Langa v Zebediela Bricks (Pty) Ltd* (2011 32 ILJ 428 (LC)). In this matter the employees were dismissed following an illegal work stoppage and in terms of a subsequent agreement were all unconditionally reinstated, Nevertheless they failed to report for work in spite of a High Court interdict compelling them to so and in defiance of repeated pleas by the employers for them to return to work. On the facts the court was satisfied that the majority of employees had no intention of returning to work and had deserted. This unequivocal act of desertion, the court held, automatically terminated their contracts of employment (*supra* 434). The court concluded that, as a result of this automatic termination, the employees were not dismissed nor were they entitled to a hearing prior to their termination. (However, the evidence revealed that a group of employees claimed to have been intimidated into not reporting for work. Those employees, the court held, should have been disciplined for absence without permission and should have been afforded a fair hearing. The court concluded that the failure to hold a hearing for those workers constituted procedural unfairness.)

The common-law principle of impossibility of performance is intended to provide a contractual remedy to employers and employees that face the absolute or permanent impossibility of performance of the terms of the contract and where no purpose would be served by a hearing. An employer faced with the unenviable situation of a permanently absconded employee whose whereabouts are unknown, may justifiably argue that the contract of employment

has terminated automatically by virtue of such impossibility. In such circumstances an employer cannot be expected to comply with dismissal procedures as the act of termination does not emanate from a decision of the employer. Employees who can, however, be located should be dealt with in terms of the employer's disciplinary codes and procedures. However, the recent approach espoused by the court in *Zebediela Bricks* confirms that this is not a hard and fast rule. Instead what is reasonable and possible depends upon the facts of each case.

4 2 "Deemed dismissals" in the public sector

In the public sector there is statutory provision for the automatic termination of public servants' employment contracts in designated circumstances. Section 17(5)(a) of the Public Service Act (103 of 1994) provides that

> "an officer who absents himself or herself from his or her official duties without the permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct, with effect from the date immediately succeeding his or her last day of attendance at his or her" (s 17(5)(a)(i)).

If an officer who is deemed to have been so discharged, reports for duty any time after the expiry of the specified period, the relevant executing authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee in his or her former position or any other post or position (s 17(5)(a)(ii) and (b)). In a virtually identically worded provision, section 14 of the Employment of Educators Act (76 of 1998) provides for the deemed dismissal of an educator who is absent from work for a period exceeding fourteen consecutive days without the permission of the employer (s 14(2)). The effect of these statutory provisions is that, provided the stipulated requirements are satisfied, the employment contract terminates by operation of law. As this termination is triggered by the occurrence of an event and is not based on an employer's decision, there is no dismissal and the employee is not entitled to a hearing nor is the termination subject to judicial review (*Nkopo v Public Health and Welfare Bargaining Council* 2002 23 ILJ 520 (LC); and *MEC, Public Works, Northern Province v CCMA* 2003 10 BLLR 1027 (LC)). Determining whether the requirements of the statutory provision are satisfied is objectively ascertainable and should a factual dispute arise in this regard, such as the reasons for the employee's absence, such dispute is justiciable by a court (*MEC, Public Works, Northern Province v CCMA supra* 1029).

While provision is made in the legislation for the subsequent reinstatement of an employee on good cause shown, the courts have confirmed that an employer's decision not to reinstate the employee does not constitute a dismissal as the contract remains terminated by operation of law. In *De Villiers v Head of Department: Education, Western Cape Province* (2009 30 ILJ 1022 (C)) the court was satisfied that, because the employment contract had terminated by operation of law independently of any act or decision on the part of the employer, the employer's decision not to reinstate did not constitute a dismissal. In determining whether the employer's actions constituted administrative action subject to administrative review the court considered the source, nature and subject matter of the power exercised, whether it involves the exercise of public duty, and how closely it related to public policy matters that are not administrative or to the implementation of legislation that is (*De Villiers v Head of Department: Education, Western Cape Province supra* par 10, citing *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA); and see also *President of the Republic of SA v SA Rugby Football Union* 2000 1 SA 1 (CC)). While endorsing the findings of the Constitutional Court in *Chirwa v Transnet Ltd* (2008 29 ILJ 73 (CC) – the court was required to determine whether it had jurisdiction to adjudicate the alleged unfair dismissal of a public-sector employee and whether the jurisdiction of the High Court had been ousted. It held that employment-related disputes involving allegations of unfair conduct by public-sector employees must be resolved through the dispute-resolution framework created by the LRA, instead of in terms of PAJA which was specifically enacted to regulate administrative action and *Gcaba v Minister for Safety and Security* (2009 30 ILJ 2623 (CC)) that employment and labour issues do not generally amount to administrative action it noted that there are exceptions to this rule. It is necessary, the court held, to determine in each case whether the employment-related dispute can be resolved in terms of labour legislation and whether the conduct is sourced in contract or statute. The court was satisfied that the exercise of public power, vested in a public functionary

who is required to exercise it in the public interest, can constitute administrative action regardless of whether it affects the public at large or an individual employee. In considering the facts of the case the court was satisfied that the employer's actions involved a "straight-forward exercise of statutory power" (*De Villiers v Head of Department: Education, Western Cape Province supra* par 20) once the employment contract had been terminated. It concluded that, in light of the inequality of the parties and the lack of alternative recourse for the employee which would leave the respondent's powers unchecked, the employer's conduct in exercising a discretion whether to reinstate constituted reviewable administrative action (*cf PSA obo Van der Walt v Minister of Public Enterprise* 2010 1 BLLR 78 (LC) in which Francis J held that the termination of the employee's employment in terms of the statutory provision constitutes neither administrative action nor a dismissal, because its operation entails no decision on the part of the employer).

The court added that even if it were incorrect on this point the respondent's actions would nonetheless be open to review on the ground of legality in terms of section 158(1)(h) of the LRA, which provides that the Labour Court may review any conduct by the state in its capacity as employer on any grounds permissible in law. In keeping with this provision public officials must be accountable and may not make arbitrary or irrational decisions. Such decisions are reviewable for want of compliance with the Constitution and the rule of law. The court held that an employer determining whether an employee has shown good cause for reinstatement must, in exercising its discretion, bear in mind the principles enunciated in the Good of Good Practice: Dismissal relating to fair dismissal for misconduct. Factors such as whether the misconduct was serious and rendered the continued relationship intolerable ought to influence the employer's determination of "good cause" for reinstatement, as should considerations of progressive and corrective discipline and constructive labour relations (*De Villiers v Head of Department: Education, Western Cape Province supra* par 30). An employer, the court held, should as a general rule approve the reinstatement of an employee unless, having regard to a full conspectus of relevant facts and circumstances, it is satisfied that the employment relationship has been rendered intolerable (*De Villiers v Head of Department: Education, Western Cape Province supra* par 30). Adding to this the Labour Court in *Grootboom v The National Prosecuting Authority* (2010 9 BLLR 949 (LC)) held that in establishing whether there was good cause for reinstatement the employee has to provide a reasonable explanation for the unauthorised absence. The employer, the court held, does not have unfettered discretion in determining whether or not to reinstate the employee and must be influenced by considerations of fairness and justice. Endorsing this approach the Labour Court in *Mahlangu v Minister of Sport and Recreation* (2010 5 BLLR 551 (LC)) noted that one of the key factors to take into account is deciding whether to reinstate is "whether absence without authority on the part of the employee was wilful including objectively considering whether or the employment relationship has broken down due to what section 17(5)(a) has already categorised as misconduct on part of the employee" (*supra* 556).

Concern was expressed by the Labour Court in *HOSPERSA v MEC for Health* (2003 12 BLLR 1242 (LC)) about the draconian nature of such provisions. In an *obiter dictum* the court noted that section 17(5) was a draconian procedure that should be "used sparingly" (*supra* 1249). Reliance on the employer's disciplinary code was held by the court to be a "less restrictive means of achieving the same objective of enquiring into and remedying an employee's absence from work" (*supra* 1249). In spite of these reservations it would appear that these statutorily sanctioned "deemed dismissal" provisions have withstood judicial scrutiny and continue to apply to employees in the public sector.

5 Conclusion

To the extent to which labour legislation fails to regulate the employment relationship comprehensively the common law of contract continues to apply. However, in order to withstand judicial scrutiny the common law must be compatible with constitutional values, as reflected in legislative and public policy. Legislative policy, in keeping with the doctrine of separation of powers, is to be enforced by the courts without unwarranted interference. Thus the statutorily mandated "deemed dismissal" provisions of application to public-sector employees will withstand judicial scrutiny in the absence of legislative amendment. Public policy, on the other hand, requires the courts to balance the interests of the employer in enforcing the agreed terms of the contract against the employee's interests in being treated

fairly. Employers' reliance upon automatic termination clauses in contracts of employment, in order to contract out of legislative protections, has been rejected by the courts as being contrary to both legislative and public-policy considerations. The courts have confirmed that statutory rights are conferred for the benefit of all employees and are incapable of consensual invalidation by the parties. Thus, in keeping with public policy, labour-brokers may no longer hide behind automatic termination provisions, which serve nothing more than to perpetuate the commoditisation and exploitation of vulnerable labour-broking employees. Similarly, in keeping with legislative policy, private-sector employers faced with imprisoned and absconding employees are required to comply with the dismissal provisions of the LRA. It is only in the event of employers facing a situation of absolute or permanent impossibility of performance of the contract that the common law will prevail and the employment contract can be terminated by operation of law.

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Striking an 'unequal balance' in the power play

A critical assessment of the Constitutional Court decision in SATAWU & others v Moloto NO & another (2012) 33 ILJ 2549 (CC)

1 Introduction

Section 23 of the Bill of Rights[1] confers a right on all workers to embark on strike action, the parameters and regulation of which are set out in Chapter IV of the Labour Relations Act ('LRA' or 'the Act').[2] In terms of S 64 (i) (b) of the LRA[3] every employee is entitled to strike provided that the employer is notified in writing, 48 hours prior to the commencement of the proposed strike.
The LRA[4] is void of direction on whether or not, non-unionised employees who wish to join a strike initiated by a majority union at the workplace, are compelled to issue a separate strike notice. Nor does the Act[5] provide legal certainty whether it is the responsibility of employees in their own right or their trade union to serve the strike notice contemplated in s 64 (i) (b)[6] on the Employer.

These concerns are dealt with and answered by the Constitutional Court in *SATAWU & others v Moloto NO & Another* ("the Equity case").[7] This commentary critiques the Equity decision and of its implications on the need to promote orderly collective bargaining. For ease of understanding, the facts and the history of the litigation process are presented in some detail.

2 The facts

The applicants are sixty-four employees who were not members of the union ("dismissed strikers") and, the South African Transport and Allied Workers Union ("the union"), which was the majority union at the workplace. The employer is Equity Aviation Services (Pty) Ltd ("the employer"), which at the time of this dispute, provided services at the six major airports the country.

On 13 November 2003, the union referred a wage dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. The dispute remained unresolved after conciliation.

The union then served a strike notice on the employer which merely read, *"We intend to embark on strike action on 18 December 2003 at 08H00. Please confirm that we will meet to discuss a Picketing Agreement on the 17 December 2007".* [8]

The dismissed strikers also joined the strike despite repeated warnings by the employer for them to return to work. The employer contended that the strike notice only protected members of the union. Nor had the dismissed strikers or anyone acting on their behalf issued a separate strike notice. Thus the

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1 1996 Constitution of the Republic of South Africa
2 Act 66 of 1995, as amended
3 Ibid
4 Ibid
5 Act 66 of 1995, as amended
6 Ibid
7 SATAWU & Others v Moloto NO & Another (2012) 33 ILJ 2549 (CC)
8 SATAWU & Others v Moloto NO & Another (2012) 33 ILJ 2549 (CC)

dismissed employees were illegally participating in the strike.

The dismissed strikers refused to return to work and the employer terminated their services on 19 November 2004 by reason of unauthorised absence from work during the strike**.**

3 The litigation history

The dismissed strikers referred an automatically unfair dismissal dispute in terms of section 187(1)(a) of the LRA [9] to the CCMA. Conciliation failed and the dispute was referred to the Labour Court. The Labour Court decided the dispute in favour of the dismissed strikers and ordered their reinstatement. The employer appealed to the Labour Appeal Court.

The LAC dismissed the appeal. The majority held that section 64 of the Act [10] entitles all employees in a bargaining unit, whether belonging to a union or not, to lawfully participate in strike action if the majority union has referred the dispute for conciliation. The majority found that the dismissed strikers' participation in the strike was lawful and that their dismissals were automatically unfair.[11] The employer then approached the Supreme Court of Appeal (SCA).

Interestingly, the SCA agreed with the interpretation and reasoning of the dissenting judgment of the LAC as per Zondo JP. The court unanimously held that the dismissed strikers participation in the strike was not protected in terms of section 64 of the LRA[12] and the appeal was upheld.

4 The Constitutional Court judgment in the Equity case

The union appealed the SCA finding in the Constitutional Court. The Constitutional Court was satisfied that jurisdiction was found on the basis that the issue in dispute was linked to the right to strike which was a fundamental right protected by the Constitution.[13]

4.1 The minority judgment

The minority supported the reasoning of the SCA and the dissenting view of the LAC. The thrust of the reasoning by Maya AJ, in writing for the minority, was that:

" The dismissed strikers were not members of the union which had given the strike notice and therefore had to issue a separate notice to the employer, an employer relies largely on the contents of the strike notice to decide whether to resist or yield to the employees' demands and to make the necessary arrangements to minimise the impact of the strike on its business should the strike go ahead, any interpretation of section 64(1)(b) which made it impossible for an employer to identify the employees who may strike, would run counter to the letter, spirit and purport of chapter 3 of the LRA which was aimed at promoting and regulating orderly collective bargaining. [14]

The minority supported their findings using practical examples of how a business could suffer potential harm if non-union employees were allowed to strike without notifying the employer.

4.2 The majority judgment

The majority disagreed and held that the following weighed against reading implied requirements into section 64 (1) (b)[15]:

4.2.1 The factual context of this case which was not considered by the dissenting judgment was the agency shop agreement and that the union was a recognised bargaining agent for all employees.

4.2.2 The fundamental importance of the right to strike

4.2.3 The general purpose of the Act,[16] was to ensure compliance with the Constitutional mandates especially that which involved the right to strike

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9 Act 66 of 1995 , as amended (Chapter VIII – Unfair Dismissals and Unfair Labour Practice)

10 Act 66 of 1995, as amended

11 *Equity Aviation Services (Pty) Ltd v SATAWU* [2009] 10 BLLR 933 (LAC) (Khampepe ADJP; Davis J concurring separately; and Zondo JP dissenting).

12 Act 66 of 1995

13 1996 Constitution

14 SATAWU & Others v Moloto NO & Another (2012) 33 ILJ 2549 (CC) Minority judgment

15 Act 66 of 1995, as amended

16 The Labour Relations Act, No.66 of 1995,as amended (Chapter iv, s 64 – strikes and lockouts)

and to promote orderly collective bargaining.

4.2.4 A purposive interpretation had to be given to the Act[17] because it embodied a constitutional right which had been "conferred without express limitation and should not be cut down by reading implicit limitations into them" .... and "when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning." [18]

4.2.5 The language and the specific purpose of section 64(1)(b)[19] did not suggest more than a single notice was to inform the employer of the time the strike was to commence. The court went on to add "*to hold otherwise would place a greater restriction on the right to strike of non-unionised employees and minority union employees than It is these employees, who will feel the lash of a more onerous requirement." [20]*

5 Analysis of the Equity judgment

5.1 Interpreting the decision of the majority judgment

The difference between the reasoning of the majority and the minority was that the majority took into consideration the agency shop agreement and that SATAWU was recognized as a bargaining agent. Yakoob ADCJ, writing for the majority held,

"In her judgment Maya AJ has set out the facts that are common cause ..... But there are other facts, also common cause, that have a significant role to play as contextual background for the determination of the matter.(emphasis added)

It is common cause that the union and Equity Aviation Services (Pty) Ltd (Equity Aviation) entered into a recognition agreement in terms of which the union was the recognised bargaining agent of all the workers employed by Equity Aviation..... also entered into an agency shop agreement, the effect…. union.

In the context of this case (emphasis added) this means that the union, which represented the dismissed strikers in the wage negotiations and in the referral for attempted conciliation under section 64(1)(a) before embarking on strike action, was competent also to give the single notice required under section 64(1)(b)."[21]

Apart from the contextual factors there were other important legal principles which the majority had considered as evidenced in paragraph 64, *"The regulatory scheme of the Act and the provisions of section 64 envisage only one strike in respect of one "issue in dispute" or "dispute". The definite article, "the", before the words "issue in dispute" and "dispute" in section 64(1)(a) and before the second use of the word "strike" in section 64(1)(b) makes this clear. "[T]he strike" in section 64(1)(b) can only be in relation to "the [unresolved] dispute" of section 64(1)(a)."[22]*

The court also considered the language used and the need to purposively interpret s 64 (1) (b) [23], as evidenced not only in paragraph 65, *"And if there can only be one strike in relation to one dispute, there seems to be little in language or logic to suggest that more than one notice in relation to the single strike is necessary"* but also in the general purpose of the Act[24] which promotes orderly collective bargaining and the fundamental right to strike as per the judgment in paragraph 66, "*To require more information than the time of its commencement in the strike notice from employees, in order to strengthen the position of the employer, would run counter to the underlying purpose of the right to strike in our Constitution..."* [25]

Evidently, the majority's decision did not turn on the contextual factors alone. However, the extent of influence the contextual factors had and the precedent ultimately set by the majority decision, would need the following questions to be answered:

4.2.6 must the judgment be interpreted to have established legal precedent *only* in cases in which same or similar contextual factors are

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17 Ibid

18 SATAWU & Others V Moloto NO & Another (2012) 33 ILJ 2549 (CC) – Majority Judgment

19 Chapter IV - Labour Relations Act No.66 of 1995

20 SATAWU & Others v Moloto NO & Another (2012) 33 ILJ 2549 (CC) Minority judgment

21 SATAWU & Others v Moloto NO & Another (2012) 33 ILJ 2549 (CC) Majority judgment

22 SATAWU & Others v Moloto NO & Another (2012) 33 ILJ 2549 (CC)

23 Act 66 of 1995

24 Ibid

25 SATAWU & Others v Moloto NO & Another (2012) 33 ILJ 2549 (CC) Majority judgment.

prevalent.(agency shop agreement and/or a union accorded bargaining agent status)?; or

4.2.7 does the judgment establish a broad, in principle precedent to *all* cases in which a strike notice served by the majority union would be deemed to protect *all* employees who participate in that strike, regardless of their union membership?

Assuming that the majority court had intended an interpretation as per the former question above, then the judgment must be commended as well reasoned and having fulfilled its constitutional mandate of promoting orderly collective bargaining and preserving the right to strike all at once, occasioned by the prevalence of an agency shop agreement and the bargaining agent status of the union. These contextual factors certainly served as a rational and legal basis for the union to have acted on behalf of the dismissed strikers at all times (on wage negotiations).

Perusal of commentary on this case supported by the court having regard to other important legal considerations as alluded to above, seem to suggest otherwise. De Vos asserts that "*The binding decision of the Constitutional Court (albeit by the slimmest of majorities) is therefore that one strike notice is good for all employees. Provided a single strike notice is sufficient to enable all employees of the employer to participate in the strike (regardless of whether the employees are all members of the union where it is a union who issues the strike notice).*"[26]

Harison and Maharaj hold the view that "*The binding decision of the Constitutional Court (albeit by the slimmest of majorities) is therefore that one strike notice is good for all employees. Provided that the strike notice……., a single strike notice is sufficient to enable all employees of the employer to participate in the strike (regardless of whether the employees are all members of the union where it is a union who issues the strike notice).*"[27]

In the final tally, it is more than likely that the majority court would have made the same finding even in the absence of the contextual factors were present *in casu*. Thus, this commentary proceeds from here onwards on this assumption.

4.3 Different ideological approaches by the majority and minority judgments

Whilst section 64 (1) (b) of the LRA[28], had been purposively interpreted both, in the minority and majority decisions, their findings were diametrically opposed. This was due to the courts having taken different ideological approaches.

De Vos writes, *"the majority seem to be decidedly more progressive by assuming that the right to strike contained in the Bill of Rights should be limited as little as possible in order to ensure the levelling of the playing field between employers and employees. They would therefore oppose an interpretation of the legislation that would impose limitations on this right unless such limitations are expressly stated in the Labour Relations Act itself."* and; *"The minority seems to be rather more sympathetic to employers and big business and less enthusiastic about protecting the rights of striking workers."* [29]

Even though the minority decision may be exposed to a claim of being conservative in its reasoning, or, even anti-progressive insofar as its understanding, application and development of law regarding strike action, the decision cannot be faulted because of its sound, objective and practical approach, all of which are premised on sound legal reasoning. The court was cogent in its explanation on the erosion of employer rights and of their vulnerability if no obligation were placed on non-union employees to issue a strike notice, a mere procedural requirement.

It would seem that the majority on the other hand, placed greater emphasis on the need to balance the power play between parties by protecting the interest of non-unionised employees at any cost. In doing so, the majority court has obviously interpreted the current legal dispensation as being insufficient in 'leveling the playing field' even though employees already enjoy a constitutionally entrenched right to

[26] Pierre de Vos ; Constitutionally Speaking – Sharp Divisions on the Constitutional Court about the right to strike, 25 September 2012.

[27] Stuart Harison and Pranisha Maharaj - Lexology : *Strike Notice: All for one or one for all - Association for corporate council* http://www.lexology .com

[28] Act No.66 of 1995, as amended

[29] Pierre de Vos ; Constitutionally Speaking – Sharp Divisions on the Constitutional Court about the right to strike, 25 September 2012

strike. In so doing the court has overlooked the primary legal obligation being, the over-arching need to promote orderly collective bargaining. (covered in more detail below)

This dispute relates to the right to strike, which in collective bargaining parlance, is seen as a 'means of last resort'. The purpose of strikes are to threaten and/or cause an employer some form of economic hardship (financial loss), and not designed to serve as a catalyst for some form of lasting damage to the employers business.

The majority court seemingly, has promoted the idea of a 'guessing game' between employer and non-unionised employees during strikes. That the court has found this to be an acceptable, 'tactical strategy' at the disposal of employees is, to say the least, unfortunate, much less seen to promote orderly collective bargaining. It is thought provoking whether or not by implication, employers are now to benefit likewise when contemplating a lock-out. Would it be acceptable if the Employer, when enforcing a lock-out, serve notice only to the union (if one present) but effects the lock-out of non-union employees at the same time?

The findings of the majority court in the Equity case has undoubtedly given rise to unintended consequences, all of which had been elaborately expressed by Zondo JP in his dissenting judgment in the LAC[30] and in the unanimous decision of the SCA.[31] In summary, they are:

4.3.1 It disturbs the power balance between parties by creating uncertainty for employers to make a conscious decision when notified about an impending strike.

4.3.2 An 'ambush' approach to industrial action runs the risk of damaging the employment relationship.

4.3.3 It could adversely affect innocent 3rd parties who are reliant on the employers' services thereby also damaging the reputation of the employer. Eg in the Health sector.

4.3.4 It affects the employers ability to prepare to absorb the effects of strike should the employer opt to do so thereby nullifying the legislative requirement to inform the employer 48 hours before commencement of strike.

To the above consequences, the following may be added:

4.3.5 It poses a potential risk to trade unions now having to brace itself for a significant increase in the strike force, many of whom they have no control over. This increases liability risk in cases of damages caused through union initiated strikes.

4.3.6 It questions the legal mandate of unions to provide representation to non-union members, by issuing a strike notice that would cover non-union members to go on strike. Unions generally comply with their constitutions and operate on the basis of an express mandate from members.

4.3.7 There is a question mark that hangs over the peremptory provision in section 64 (1) (a)[32] which compel employees to lodge a dispute at the CCMA/Bargaining Council and attempt conciliation before embarking on strike. Must the majority judgment be construed to mean that the trade union which calls for the strike to be acting on behalf of non-union members when complying with this provision?

5.3 Placing the notion of orderly collective bargaining and strike action in perspective

Much has been bandied about the need to promote orderly collective bargaining, a concept seemingly susceptible to subjective interpretation and reasoning. After all, the majority and minority courts had expressly promoted the notion of orderly collective bargaining but arrived at diametrically opposed findings. What precisely then, is orderly collective bargaining?

Collective bargaining is premised on the belief that conflict is an endemic part of the employment relationship. As such, conflict must

[30] *Equity Aviation Services (Pty) Ltd v SATAWU* [2009] 10 BLLR 933 (LAC) (Khampepe ADJP; Davis J concurring separately; and Zondo JP dissenting).

[31] *Equity Aviation Services (Pty) Ltd v SATAWU* [2009] 10 BLLR 933 (LAC)

[32] Act 66 of 1995, as amended

be managed in a way that promotes labour peace for mutual gain and benefit. In seeking to reduce or eliminate conflict, Parties do place premium on effective 'round-table dialogue' / negotiation (collective bargaining). If dialogue fails, then Parties acquire the right to utilize power play (strikes/lock-outs) but only to the extent that it is necessary. All of this takes place under the guise or notion of orderly collective bargaining.

The legal framework advocates collective bargaining taking place at a macro level " to advance economic development, social justice, labour peace and democratization of the workplace"[33] and at a micro level, " to provide a framework within which, employees and their trade unions,…can collective bargain to determine wages and conditions of service….[34] The interdependence between macro and micro level bargaining is obvious, the one cannot be achieved without the fulfillment of the other. But their interdependence in turn is informed by the legal mandate to promote orderly collective bargaining, which permeates section 23 of the Constitution[35] in its entirety. This is evidenced in language used in this section: that all employees are afforded the right to fair labour practice, the right of employees to resort to strike action, the promotion of collective bargaining through organized employer/employee labour forums, and lastly, express mention of the right of employer and employees to collectively bargain.

Interpreted from this perspective, the right to strike, it seems, was intended seems to provide employees with just a "tool" or a mean (albeit an important one) to counter-balance the employer's economic advantage during discourse over interest disputes. Thus, the right to strike cannot be equated to as having the same status as the need to promote orderly collective bargaining. It this was the case, then such would run counter to the spirit, purport, and objects of Constitution.[36] Industrial action *pe se* must remain located *within* the broader framework of promoting orderly collective bargaining.

6 CONCLUSION

Nine years on, it took a divided Constitutional Court to decide the Equity case. Even then, the majority decision has left itself susceptible to criticism, particularly of its impact on orderly collective bargaining. The judgment is, nonetheless, supreme authority on the matter and ushers in a new era for strike action, one, which presents employees/trade unions with added tactical opportunities when deciding to strike at the expense of a vulnerable employer.

Mr Dolin Singh
ELRC Provincial Manager: KwaZulu-Natal

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3. Questions & Answers

Dear General Secretary

Question:

Kindly inform whether employees appointed under the Employment of Educators Act are also covered by the leave provisions contained in the Determination and Directive On Leave Of Absence In The Public Service that was issued by the Department of Public Service and Administration (DPSA) in August 2012.

Dear Anonymous

In terms of the Employment of Educators Act of 1998, Section 2.1, an institution-based educator will be regarded as being on annual leave during institution closure periods, which are outside scheduled working time.

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[33] Act 66 of 1995, as amended – Chapter 1, Purpose, Application and Interpretation
[34] Ibid
[35] 1996 Constitution, Chapter 2, Bill of Rights, section 23 – Labour Relations.
[36] 1996 Constitution, Chapter 2, Bill of Rights

Dear General Secretary

Question:

When are arbitrators supposed to submit arbitration awards?

Dear Anonymous

The Panellist(s) must issue a signed arbitration award within 14 days of the conclusion of the arbitration proceedings, taking into account the Council's policy on arbitrations.

The General Secretary serves a copy of the award on each party to the dispute or the person representing a party in the arbitration proceedings, within four days after receiving the award from the Panellist.

Ms NO Foca, ELRC General Secretary

Dear Readers

Please note that the *Questions and Answers* section is a new column that we would like to develop. We would like to hear your views and will respond to questions in the next issue of the Labour Bulletin. Please send any questions relating to labour law to the ELRC Media Officer, Ms Bernice Loxton.

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