SHOULD REFUSAL TO WORK FOLLOWING BREACH OF CONTRACT BY THE EMPLOYER REALLY BE A STRIKE?

National Union of Mineworkers on behalf of Employees v Commission for Conciliation Mediation and Arbitration
(2011) 32 ILJ 2104 (LAC)

1 Introduction: Refusal to work in response to a breach of contract

The employment relationship is by its very nature premised on the foundation of inherent inequality between the employer and the employee. The employer by virtue of the resources at its disposal is in a stronger position than the employee. One of the strong criticisms levelled against the common law has always been its indifference to this unequal division of power. The common law tends to deal with a contract of employment on the basis that it is an agreement entered into voluntarily and on equal footing by the employer and the employee. Unsurprisingly, the common law regards terms that regulate the employment relationship as being freely entered into by the contracting parties. This assumption overlooks the inherent inequality that characterizes the employment relationship.

It is on account of this assumption that the common law can be mostly associated with unfairness when it comes to the employment relationship. Nowhere is this assumption clearer than in cases of dismissal. In relation to dismissal all that the common law demands is that the dismissal must be lawful. This requirement is easily met if the employer merely provides the employee with a notice of the dismissal. Under the common law there is no mention of fairness as a requirement for a dismissal.

In order to address the deficiencies of the common law, the legislature has enacted labour legislation like the Labour Relations Act (66 of 1995, hereinafter "the LRA") which seeks to bring in some equilibrium in the employment relationship. It must also be said that the LRA provides parties involved in the employment relationship with a framework within which employment issues must be addressed. This has resulted in a situation where in some instances there is a collision between the common law and the LRA. The critical question that emerges is whether the rights and remedies of the employees in the event of a breach of contract must be exclusively determined within the framework of the LRA. If the answer is in the affirmative then it means that the common law has lost some of its relevance in employment issues.

This case note seeks to analyse the tension between the common law and the LRA in the context of employees withholding their labour on account of a breach of contract by the employer. It also seeks to analyse the implications of the approach adopted by the Labour Appeal Court in *National Union of Mine Workers on behalf of Employees v Commission for Conciliation Mediation and Arbitration* ((2011) 32 ILJ 2104 (LAC)).

2 The facts

The employees (connected to the above-mentioned case) embarked on a work-stoppage after their employer had wrongfully deducted monies due to them. The employer requested the employees to return to work and also to appoint representatives to engage with the company in order to resolve the dispute. The employees refused to return to work, demanding that the employer should first pay back the wrongfully deducted monies. The employer then dismissed the employees on the ground that their action amounted to an unprotected strike.

The employees, relying on the common law, approached the Commission for Conciliation, Mediation and Arbitration (the CCMA), arguing that their refusal to work was in response to a breach of contract by their employer and did not amount to a strike, let alone an unprotected strike. According to the employees their action was a lawful way of enforcing a contractual right and as such their dismissal was unfair. The CCMA held that the refusal of the employees to work constituted a strike. Since the employees had failed to follow the procedures prescribed by section 64 of the LRA, their action amounted to an unprotected strike. Accordingly, their dismissal was found to be fair.

Having failed to have the CCMA decision set aside by the Labour Court the employees approached the Labour Appeal Court.

The question that the Labour Appeal Court had to address was whether the action of the employees constituted a "strike" and thus fell within the ambit of the definition of the strike as per section 213 of the Labour Relations Act. If that was the case, then it would go without saying that the employees would have been expected to follow the procedures prescribed by the LRA in order for their action to be protected. If the answer was not in the affirmative, then it meant that regard had to be had to the common-law contractual principles in relation to a breach of contract.

3 The common law

The contract of employment, like any other contract, gives rise to rights and obligations. The employee is expected to perform specified work and be paid remuneration by the employer in return. Specified work and remuneration are also regarded as essential elements of the contract of employment.

If one of the parties fails to fulfil its obligations then there is a breach of contract. Under the common law one of the remedies available to the aggrieved party in the event of a breach of contract is the *exceptio non adimpleti contractus*. According to the *exceptio non adimpleti contractus*, if a contract creates reciprocal obligations in terms of which performance has to

be rendered by both parties, the party that has not performed its obligations cannot require the other party to render performance. Should the party that has not performed its obligations require performance from the other party, the aggrieved party is entitled to refuse to perform and rely on the *exceptio non adimpleti contractus* defence.

Under the common law, if an employer failed to pay remuneration to its employees it would be in breach of contract. The employees, relying on the *exceptio non adimpleti contractus* remedy, would be entitled to withhold their labour as a way of enforcing their contractual right of remuneration. Their action would be lawful and not constitute a breach of contract.

In the present case it can be said that under the common law the employees would be entitled to withhold their labour as a way of compelling their employer to pay them back the monies that were wrongfully deducted from them. The action of the employees would be lawful as it would constitute a way of enforcing a contractual right.

4 The Labour Relations Act

Under the Labour Relations Act, if employees withhold their labour, their action could fall within the ambit of the definition of strike provided that their action meets the essential elements of a strike.

4 1 The definition of "strike"

According to section 213 of the Labour Relations Act:

> "'strike' means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory;"

According to the definition a strike has three main elements which are:

- A refusal to work,
- collective action,
- purpose.

The refusal to work encompasses partial or complete refusal to work, or retardation or obstruction of work.

The collective action entails a concerted refusal to work.

Lastly, the strike must have a purpose which is to remedy a grievance or resolving a dispute in respect of a matter of mutual interest.

Therefore, on the face of it, by withholding their labour because the employer has not paid them back monies that were wrongfully deducted from them, the employees would be embarking on a strike action. For their action to be protected, the employees would have to follow the procedures prescribed by section 64(1), which are:

- The issue in dispute must be referred to a council or the Commission for Conciliation, Mediation and Arbitration;
- a certificate stating that the dispute remains unresolved must be issued; or
- a period of at least 30 days must have lapsed since the last date of referral;
- a notice of at least 48 hours of the commencement of the strike must be issued to the employer.

Should the employees fail to adhere to these procedures their action would be unprotected, notwithstanding the fact that their action stems from a breach of contract by the employer. It is also worth noting that the definition of a strike in terms of the LRA does not exclude withholding of labour as a result of a breach of contract. The LRA does not draw any distinction between a situation where employees withhold their labour in a context where there is a right dispute and where there is an interest dispute. Some of the potential consequences of their failure to follow the prescribed procedure in the process of asserting their contractual right would be that their action would amount to a breach of contract and the employer would be entitled to be paid just and equitable compensation for damages. The employer would also be entitled in appropriate circumstances to dismiss the employees.

This means that in terms of the Labour Relations Act, employees who rely on the *exceptio non adimpleti contractus* defence as a way of enforcing their contractual rights could be in a worse position if their action complies with the elements of a strike. The LRA prescribes certain procedures that must be followed if employees want to embark on a strike, and if the employees fail to follow those procedures, their action would be unprotected, notwithstanding the fact that they are enforcing a contractual right. This somehow puts the common law and the Labour Relations Act on a collision course.

5 The tension between the common law and the Labour Relations Act

The tension between the common law and the Labour Relations Act was succinctly captured by Hock ("Covenants In Restraint of Trade: Do They Survive the Unlawful and Unfair Termination of Employment by Employer?" (2003) 24 ILJ 1231 1237) this way:

> "The employment relationship brings together the common law and labour law as uneasy bedfellows … The two have, however, remained independent of each other and this has been reinforced in the jurisprudence."

In trying to resolve this tension the court in *Fedlife Assurance Ltd v Wolfaardt* ((2001) 22 ILJ 2407 (SCA)) stated that the clear purpose of the legislature when it enacted the Labour Relations Act was not to do away with the common-law rights of an employee but to supplement them. The court held:

> "The 1995 Act does not expressly abrogate an employee's common-law entitlement to enforce contractual rights and nor do I think it does so by necessary implication."

According to the court it would be wrong to argue that the advent of the constitutional dispensation and the enactment of the LRA has deprived the employees of their common-law right to enforce contractual terms. The court emphasized this point this way:

> "In considering whether the 1995 Act should be construed to that effect it must be borne in mind that it is presumed that the legislature did not intend to interfere with existing law and *a fortiori*, *not to deprive parties of existing remedies for wrongs done to them*" (author's own emphasis).

Looking at the decision of the court in *Fedlife* it can be safely assumed that the LRA has not taken away the common-law right of the employees to lawfully withhold their labour in the event of an employer's failure to fulfil its obligations. This also gives the impression that, despite the fact that the action of withholding labour falls within the ambit of the LRA definition of a strike, the fact that the employees would be withholding their labour as a way of enforcing their contractual right does not amount to a strike. Taking the argument to its logical conclusion it would be safe to say that the LRA does not deprive the parties to an employment contract of their common-law right to rely on the *exceptio non adimpleti contractus.*

6 Is there a distinction between a collective refusal to work in response to a breach of contract by an employer and a collective refusal to work to place pressure on an employer to resolve a dispute?

The dichotomy between matters of right and matters of mutual interest has always been used as a starting point when determining the appropriate way of resolving labour disputes. It has always been argued that whilst matters of right may fall within the ambit of matters of mutual interest, matters of right should preferably be dealt with within the domain of contractual principles and not through collective bargaining. Todd (*Collective Bargaining Law* (2004) 82) averred:

> "Where a party already enjoys a (contractual right) to a particular performance by the other, the enforcement of that right is sometimes said not to be a 'matter of mutual interest' and so not to be a matter of collective bargaining. Rather, it is said that the assertion of an existing right should be achieved through the use of the legal remedies that are available to enforce contractual rights."

Therefore, whilst not denying that matters of mutual interest may include matters of right, where a dispute is based on the infringement of an existing right the innocent party can rely on the common-law remedy to enforce a contractual right. According to this approach employees who withhold their labour because of an employer's failure to fulfil its contractual obligations would not be deemed as being on strike since they would be relying on contractual principles as a way of enforcing a contractual right. Du Toit *et al* (*Labour Relations Law. A Comprehensive Guide* 5ed (2006) 295) supporting this view argues:

> "employees who refuse to continue working because their employer has not paid them are not on strike. Refusal to work under such circumstances is not 'for the purpose of remedying a grievance or resolving a dispute' but rather, an exercise by each employee of the common law right to refuse to perform until such time as the employer rectifies its non-performance."

In essence, where there is a collective refusal in response to a breach of contract by an employer, the employees would not be on strike if they withhold their labour since their action would be a response to a breach of contract by the employer. On the other hand, where there is a refusal to work to put pressure on an employer to resolve a dispute, such a refusal to work constitutes a strike.

7 The approach of the courts

A critical analysis of how the courts have answered the question of whether employees who withhold their labour in response to a breach of contract are on strike produces varying answers.

7 1 Coin Security (Cape) (Pty) Ltd v Vukani Guards and Allied Workers' Union (1989 (4) SA 234)

In *Coin Security* the court unequivocally stated that a refusal by employees to work, in response to a failure by an employer to fulfil its contractual obligations does not amount to a strike. Whilst it must be emphasized that this case was decided in terms of the 1956 Labour Relations Act the principles that were distilled are to a certain degree relevant even to the 1995 LRA. The court averred:

> "A refusal by an employee to work in response to a refusal on the part of his employer to perform his, that is the employer's obligations in terms of the contract of employment … does not fall within the ambit of the definition of a 'strike' … Having regard to the reciprocal rights and obligations that flow from a contract … refusal by the employer to perform his part of the contract … entitles the employee to refuse to carry out his side of the bargain as well."

Therefore, if employees withhold their labour because of an employer's failure to fulfil its contractual obligations, then those employees are not on strike but are making use of the exceptio *non adimpleti contractus* remedy.

7 2 Nkutha v Fuel Gas Installations (Pty) Ltd ([2000] 2 BLLR 178 (LC))

Aligning itself with *Coin Security*, the court held that a refusal to work in response to an employer's failure to fulfil its contractual obligations does not amount to a strike. Emphasizing the fact that under the common law the employees can rely on the *exceptio non adimpleti contractus* remedy the court emphasized that a distinction should be drawn between a collective refusal to work in a situation where there is a breach of contract by an employer and that where there is no breach of contract. The court stated:

> "In the event, the refusal of employees to work in response to a failure on the part of the employer to perform its obligations, such as paying the employees

> for services rendered, is a lawful reason in that it does not amount to a breach of contract under common law. In other words, the employees are legally entitled to refuse to carry out their side of the employment contract. It is the employer who is breaching the employment contract by unlawfully failing to fulfil its reciprocal obligation(s)."

According to the court where an employer fails to fulfil its contractual obligations then the employees are in terms of the common law entitled to withhold their labour to enforce their contractual right. Their action is lawful and does not constitute a strike. The court went out of its way to stress that the employees' refusal to work as a way of enforcing a contractual right under the common law must be distinguished from refusal to work for the purpose of remedying a grievance or resolving a dispute. Employees who refuse to work in response to a breach of contract are not on strike. On the other hand, employees who withhold their labour to resolve a dispute are on strike.

7 3 National Union of Mineworkers on behalf of Employees v Commission for Conciliation, Mediation & Arbitration ((2011) 32 ILJ 2104 (LAC))

Adopting a completely different stance the court argued that employees who withhold their labour in response to an employer's breach of contract are on strike. The court further argued that as long as the action of the employees complies with the elements of a strike which are:

- Refusal to work,
- collective action,
- for the purpose of resolving a dispute,

then their action constitutes a strike action. In rejecting the position adopted by the court in *Nkutha* that there is a distinction between refusal to work in response to a breach of contract, and a refusal to work in order to resolve a dispute the court stated:

> "I find it difficult to accept the justification for this distinction between a collective refusal to work in response to a contractual breach by an employer and a collective refusal to work to place pressure to resolve a dispute. That is not in accordance with the section. Section 213 provides that '[t]he partial or complete concerted refusal to work or the retardation or obstruction of work by persons who are or have been employed by the same employer … for the purpose of remedying a grievance' constitutes a strike. Whether affected employees can decide to cancel the contract pursuant to a breach by the employer or sue for damages is beside the point. The key issue is to classify whether, on its own, the refusal to work for whatever reason in order to remedy a grievance falls within the scope of the Act's regulation of a strike. In my view, it manifestly does so and accordingly the dictum in *Nkutha* does not adequately reflect the position encompassed in s 213."

Therefore, if employees refuse to work what is crucial is whether their action complies with the elements of a strike. If it does then it constitutes a strike. That their action is in response to a breach of contract is completely irrelevant. According to the court the common-law remedy of *exceptio non adimpleti contractus* is no longer available as a defence. If the employees want to address their issue they have to follow the procedures prescribed by

the LRA in relation to a strike. Otherwise their action will be unprotected in terms of the LRA and they risk, amongst other things, dismissal, for failing to follow the prescribed procedures.

8 Analysing the issues

The employment relationship is based on inherent inequality between the employer and the employee. It is also a fact that the common law fails at times to appreciate this inequality. However, it can be argued that where the common law provides a remedy which would address this inequality the courts should be slow in abrogating such a remedy.

If employees refuse to work in response to a breach of contract by the employer, the *exceptio non adimpleti contractus* provides them with an immediate remedy that they can make use of in order to enforce their contractual right.

Whilst it is true that their action complies with the elements of a strike as defined in section 213 of the LRA, sight should not be lost of the fact that such an interpretation further strengthens the inequality in the employment relationship. If the *NUM v CCMA* decision is followed it means that employees would have to follow the procedures laid out in the LRA whilst still rendering services for which they may not have been paid to start with. The employees would have to refer the issue to either the bargaining council or the CCMA, wait for a certificate indicating that the dispute is unresolved or a period of 30 days to lapse since the referral of the dispute for conciliation, and then issue a written notice of at least 48 hours of the commencement of the strike to the employer. All this time they would be expected to still render services, notwithstanding that the employer would be in breach of contract and therefore not entitled to such performance. Until all the processes as prescribed by the LRA are duly followed the employer would unjustifiably be receiving performance which, under the common law, it is not entitled to since it is in breach of the contract. Failure by the employees to follow the procedures would amongst other things put them at the risk of being dismissed for embarking on an unprotected strike.

It is submitted that when enacting the LRA it may not have been the intention of the legislator to deprive employees of their common-law contractual rights. The intention of the legislator might have been to supplement and not to take away the common-law rights and remedies of employees. This was succinctly captured by the court in *Fedlife Assurance* when it emphasized that the LRA did not abrogate the common-law rights of employees. It is against this background that it is argued that by rejecting the approach adopted in *Nkutha* the Labour Appeal Court in *NUM v CCMA* adopted an approach that failed to appreciate the fact that common-law remedy of *exceptio non adimpleti contractus* provided innocent party that was a victim of a breach of contract with an immediate weapon of enforcing its contractual right. It also prevented the innocent party from being compelled unjustifiably to render performance to the party which it in the first place failed to perform its contractual obligations. It must also be emphasized that the common law offers a remedy which is fairer to the innocent party.

9 Conclusion

The approach adopted by the Court in *NUM v CCMA* effectively deprives employees who withhold their labour in response to a breach of contract by the employer of the *exceptio non adimpleti contractus* common-law remedy. This approach flatly rejects the distinction between a refusal to work in response to a breach of contract by the employer and a refusal to work in order to resolve a dispute. Whilst it can be argued that the definition of a strike in section 213 also draws no such a distinction, courts should be slow in adopting an approach that argues that employment-related matters should be exclusively dealt with within the ambit of labour legislation. Where the common law provides a remedy that is fair to the parties to the contract then the courts should be slow in getting rid of such a remedy. The main purpose behind enacting labour legislation is to address the failure by the common law to take into account the inherent inequality of the employment relationship. The Labour Relations Act should not be interpreted in a way that results in employees being put in a position that is far worse than they were at common law. It is against this background that the Labour Appeal Court decision in *NUM v CCMA* failed to appreciate the background from which the court in *Nkutha* reasoned when it came to the conclusion that a refusal to work in response to a breach of contract by the employer had not to be regarded as a strike despite the fact that it might fall within the ambit of the definition of a strike as per section 213. It is this failure that inadvertently puts an employer who is in breach of contract in a much stronger position than under the common law. It can be argued that this could hardly have been the purpose of the legislator.

It has to be emphasized that acknowledgement of the relevance of the common-law principle, the *exception non adimpleti contractus* defence, to be specific, does not in any way undermine the status of the Labour Relations Act. Wallis ("The LRA and the Common Law" 2005 9(2) *Law, Democracy and Development* 181 188) argued:

> "The acceptance of the common law and its rules … does not mean that it reigns supreme over our labour law or that the LRA is subordinate to its dictates."

It is submitted that parties to an employment contract should not be deprived of the common-law contractual remedies where such an option does not produce unfairness. The *exceptio non adimpleti contractus* remedy provides innocent parties with a powerful weapon in the event of a breach of contract. No unfairness is visited upon the party responsible for the breach because it has not performed its obligations in the first place. Doing away with the *exceptio non adimpleti contractus* tilts the scale in favour of the party responsible for the breach of the contract. Certainly this is not what the LRA envisages. The common-law principles can co-exist with the LRA in the labour-law arena.

Thanduxolo Qotoyi
Nelson Mandela Metropolitan University, Port Elizabeth