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EDITOR'S NOTE

This 3rd volume of Obiter 2020 is dedicated to contributions relating to various aspects of labour law.

The Labour and Social Security Law Unit (LSSLU) at the Faculty of Law of Nelson Mandela University presented in partnership with the Education Labour Relations Council, Open University of Mauritius as well as Civil Service College Mauritius a labour law conference entitled "Labour Dispute Resolution, Substantive Labour Law and Social Justice Developments in South Africa, Mauritius and Beyond" in Mauritius from 19 to 21 June 2019. The LSSLU and Mercantile Law Department of the same faculty also presented a conference on Collective Labour Law to alumni from 19 to 20 July 2019 in Port Elizabeth.

Some contributions in this volume of *Obite*r originate from these conferences. The other contributions were submitted to Obiter for publication in the ordinary course.

All the contributions are peer reviewed in accordance with the *Obiter* policy.

Prof JA van der Walt
Editor
Obiter

THE TENTACLES OF MAJORITARIANISM: HOW FAR CAN THEY REACH INTO RETRENCHMENT?*

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SUMMARY

Majoritarianism enables a trade union with a majority in the workplace to prevail over minority unions and their members as well as non-unionised employees and to limit some of the minority's rights, including the right to strike. This article revisits the basic tenets of majoritarianism and calls for a more nuanced distinction between legislative provisions giving special privileges to majority unions and those provisions that enable majority unions to prevail over minority unions. Ultimately, the focus of the article is on the interface between majoritarianism and retrenchment. While it argues that there is legitimate scope for a collective agreement concluded after retrenchment consultations to be extended to the members of minority unions, the article expresses reservations whether a collective agreement regarding the identity of consulting parties in the case of retrenchment can similarly be extended. Nonetheless, the article concedes that the model of majoritarianism informing the Labour Relations Act (LRA) possibly lacks the subtlety to accommodate this distinction.

1 INTRODUCTION

Majoritarianism is not defined in the Labour Relations Act,[1] but the Constitutional Court has explained that it merely means that the will of the majority will prevail over that of the minority.[2] Nonetheless, majoritarianism is a premise of the LRA, and a number of the LRA's provisions either give effect to the principle or, at least, aid its expression.

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* This is a revised version of a paper presented at the Labour Law Alumni Conference on Collective Bargaining, hosted by the Faculty of Law, Nelson Mandela University from 19–20 July 2019 in Port Elizabeth. The author is grateful to the delegates for their invaluable questions and comments which helped to shape the revision. The author's sincere thanks also goes to Dr Emma Fergus for her very helpful views on minority unions. Any errors are entirely the author's.

[1] 66 of 1995. Henceforth, unless indicated otherwise, all references to legislative provisions are to the LRA.

[2] *Transport & Allied Workers Union of SA v Putco Ltd* 2016 (4) SA 39 (CC) (*Putco*) par 61.

Although majoritarianism is a premise, its full impact was not immediately apparent when the LRA was passed. Nevertheless, as an understanding of the LRA and its jurisprudence is maturing, the long reach of the tentacles of majoritarianism, also in the case of operational requirement dismissals (retrenchment), is beginning to show, raising new questions about its validity.

Ultimately, this article is about the manifestations of majoritarianism in the context of retrenchment. However, in order to do justice to this focus, the general import of majoritarianism in the context of the LRA will first be explored.

This article is structured as follows: Part 2 reviews the general import of majoritarianism under the LRA, and this is followed by an analysis of the two key building blocks of majoritarianism, namely, a "collective agreement" and the "workplace". Part 2 also explores the possibility of challenging the legality of an extension of a collective agreement to non-parties. Part 3 explores the manifestation of majoritarianism in retrenchment situations. This requires an evaluation of the nature of retrenchment consultations and the role of collective agreements in identifying consulting parties and in settling retrenchment consultations. This is followed by concluding remarks in Part 4.

2 THE LRA AND MAJORITARIANISM

2 1 Introduction

Majoritarianism enables a trade union (union)[3] (or, in certain circumstances, a coalition of unions)[4] with a majority in the workplace to prevail over a minority union and non-union employees and to limit some of the minority's rights, including the right to strike. Despite these potentially invasive implications of majoritarianism, the Constitutional Court in *Association of Mineworkers & Construction Union v Chamber of Mines of SA*[5] (*Chamber of Mines*) confirmed that majoritarianism is a founding principle of the LRA and that it is not constitutionally objectionable for the following broad reasons:

- The legislature's main vehicle for expressing majoritarianism, namely, section 23(1)(*d*) (discussed below),[6] which allows for extensions of collective agreements to non-parties, is not an instrument of oppression as minority unions still have scope to organise;[7]
- Majoritarianism is functional to collective bargaining, and the LRA model exceeds the threshold of representativity that is envisaged by some international instruments for this purpose;[8] and

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3 All references to unions and employer organisations assume that they are registered in terms of the LRA.

4 See s 11 read with ss 14 and 16.

5 (2017) 38 ILJ 831 (CC).

6 See 2 3 below.

7 Par 55.

8 Par 56.

- The limitation on the right to strike through extensions of collective agreements is circumscribed in various ways – in particular, the extension can only relate to issues covered by the extended collective agreement.[9]

This reinforces the insights of the Constitutional Court in *Putco*. This matter concerned the ability of an employer to lock out employees with whom it is not in dispute, but, in the course of the judgment, the Constitutional Court also considered the extension to non-parties, in terms of section 32, of collective agreements concluded in a bargaining council. Such extension can be made only by the Minister of Labour after a number of parties have voted for the extension. These parties include, amongst others, one or more unions whose members constitute the majority of the union's party to the bargaining council, and one or more employer organisations whose members employ the majority of the employees.[10] While the Constitutional Court concluded that majoritarianism did not apply to the facts of the matter before it,[11] the court emphasised that majoritarianism can find "*application [only] after a collective agreement has been concluded*" (emphasis added)[12] and that "it finds no application to strikes and lock-outs under ss 213 and 64(1)".[13]

This is key to understanding the LRA's model of majoritarianism: It finds expression only once collective agreements are concluded and the legislative requirements for extension have been met. In other words, while majoritarianism advances orderly collective bargaining, it is not a given; the stars, so to speak, must first align before it applies. Care should therefore be taken to distinguish majoritarianism, as a means by which the majority prevails over a minority, from situations where the LRA confers on some unions certain *a priori* enforceable rights, primarily in the context of union organisation, albeit clearly in support of majoritarianism (and thus also in the interest of orderly collective bargaining).[14] These organisational rights, however, cannot be used as a means of denying minority unions the right to organise, or of denying individuals the freedom of association, as this would impair constitutional rights and be oppressive. This is a condition precedent for a fair and constitutionally acceptable majoritarian system. In *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* (*Bader Bop*),[15] the Constitutional Court, referring to the views of expert committees of the International Labour Organization (ILO), remarked that majoritarianism could be compatible with freedom of association, provided that "*minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time*" (emphasis added).[16] Echoing these sentiments, the Constitutional Court in *Chamber of Mines* concluded that the LRA provides sufficient scope

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[9] Par 58.
[10] S 32(1).
[11] Par 62.
[12] Par 63.
[13] Par 66.
[14] Also see *Kem-Lin Fashions CC v Brunton* (2001) 22 ILJ 109 (LAC) par 19.
[15] (2003) 24 ILJ 305 (CC).
[16] Par 31.

for minority unions to organise "and to canvass support to challenge the hegemony of established unions".[17]

Nonetheless, despite this endorsement by the Constitutional Court, it might be asked whether majoritarianism can dislodge fundamental rights that do not advance collective bargaining. Asked differently: If majoritarianism aims to promote orderly collective bargaining, it is certainly compatible with a limitation of those rights that promote collective bargaining, such as the right to strike, but is it compatible with the limitation of fundamental rights that do not specifically advance collective bargaining? Would this not allow majoritarianism to become the instrument of oppression that the Constitutional Court has cautioned against? These questions will be reverted to in Part 3.

2 2 Majority unions and the LRA

Apart from sections 189 and 189A, which will be the focus of Part 3, the following are the typical provisions of the LRA where the majority status of a union either affords it some special privileges or enables it to prevail over the minority:

(i) Agency shop agreements (section 25) allow for the deduction of majority union fees from all employees, regardless of whether they are members of that union, and closed shop agreements (section 26) oblige all employees to join the majority union. The constitutionality of these provisions remains untested, but they can be regarded as expressions of majoritarianism as defined in *Putco*.

(ii) Section 14, now slightly tempered by section 21(8A)(*a*), allows a majority union to have elected union representatives in the workplace, and section 16, now tempered by section 21(8A)(*b*), entitles a majority union in a workplace to claim the disclosure of information. These provisions give special privileges to majority unions, but are not an expression of majoritarianism as explained in *Putco*.

(iii) Section 18 allows a majority union and an employer, or the parties to a bargaining council, through a collective agreement, to set the threshold of representativeness for other unions to claim the organisational rights referred to in sections 12, 13 and 15. The apparent bluntness and far-reaching implications of this provision have been softened by the insertion of section 21(8C), as well as the interpretation of section 18 by the Constitutional Court majority in *Police & Prisons Civil Rights Union v SA Correctional Services Workers Union* (*POPCRU*),[18] to the extent that some would argue[19] that what is left of majoritarianism in section 18 has bark, but no bite:

> "When properly construed chapter III of the LRA reveals that a minority union may access organisational rights in ss 12, 13 and 15 in a number of ways. First, it may acquire those rights if it meets the threshold set in the collective

[17] Par 52–55.

[18] (2018) 39 ILJ 2646 (CC).

[19] Also see Fergus "The Disorganisation of Organisational Rights – Recent Case Law and Outstanding Questions" 2019 40 *ILJ* 685.

> agreement between the majority union and the employer. In that event, a minority union does not have to bargain before exercising the rights in question. Second, such union may bargain and conclude a collective agreement with an employer, in terms of which it would be permitted to exercise the relevant rights. Third, a minority union may refer the question whether it should exercise those rights to arbitration in terms of s 21(8C) of the LRA. If the union meets the conditions stipulated in that section, the arbitrator may grant it organisational rights in the relevant provisions."[20]

It is suggested that section 18 merely affords special privileges to unions with a certain level of representation[21] and is not majoritarianism, as explained in *Putco*.

(iv) The seldom-used section 78 provides majority trade unions with the power to initiate workplace forums.

(v) Reference has already been made to sections 23 and 32, which provide for the extension of collective of agreements at the instance of a majority. These two provisions, it is suggested, represent the essence of majoritarianism under the LRA. The rest of this article will focus on section 23(1)(*d*).

2 3 Section 23(1)(*d*)

Section 23(1)(*d*) provides as follows:

> "A **collective agreement** binds ... employees who are not members of the registered trade union or trade unions party to the agreement if–
> i. the employees are identified in the agreement;
> ii. the agreement expressly binds the employees; and
> iii. that trade union or those trade unions have as their members **the majority** of employees employed by the employer in the **workplace**."

At first sight, this provision might appear relatively harmless, but read with section 65, which prohibits striking by anyone bound by a collective agreement regulating the issue in dispute, its full might become clear: It limits the right to strike of employees who are not members of the union party to the collective agreement.

Key to the application of this section is (1) the existence of a collective agreement, (2) a transacting union or unions that has or have the majority[22] in (3) the workplace. Furthermore, the collective agreement must (4) identify the non-party employees who would be bound by the agreement, and the collective agreement must (5) expressly bind these employees. Given the far-reaching implications of an extension, the latter requirement is understandable; when the rights of non-party employees are to be limited, there must be no doubt about it. In this regard, it has been held that "[n]on-

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[20] Par 101.

[21] *Bader Bop* par 40.

[22] In *Association of Mineworkers & Construction Union v Sibanye Gold Ltd t/a Sibanye Stillwater (2)* (2019) 40 ILJ 1607 (LC) it was held that a collective agreement can be extended in terms of s 23(1)(*d*) once the union party achieves a majority even if it did not have a majority when the agreement was concluded. The court further held that, provided that the union party had majority status at the time of the extension, the extension can have both prospective and retrospective application.

parties cannot be bound as contemplated in s 23(1)(*d*) by implication, association or subjective interpretation of the agreement".[23]

Assuming that the transacting union or unions have the required majority and that non-parties are appropriately identified and bound by the collective agreement, the rest of this part of the article will explore the meaning of "collective agreement" and "workplace", followed by an illustration of their practical implication.

Workplace

The meaning of the workplace was central in *Chamber of Mines* and the litigation leading up to the Constitutional Court judgment. At issue was whether workers at five gold mines, the majority of them represented by the Association of Mineworkers & Construction Union (AMCU), could exercise the right to strike while an agreement prohibiting strikes, to which their union was not party, was in force with the mining companies who owned the mines. Despite AMCU's majority status at some of the individual mines, it was not the majority union at any of the mining companies. Section 213, unless the context indicates otherwise, defines "workplace" as the place or places where the employees of an employer work. It further provides that "[i]f an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation constitutes the workplace for that operation." Clearly, if AMCU could show that each mine where it had a majority was an "independent operation" by reason of its size, function or organisation, then it could escape the application of the collective agreement and the implication that it was prohibited from striking on the issues covered by the collective agreement.

The courts *a quo*, for reasons that can broadly be described as "the organisational methodology and practicalities of each mining company",[24] all concluded that the five mines were not independent operations and separate workplaces. Hence AMCU and its members were bound by the collective agreement and could not strike on issues covered by it. In endorsing this conclusion, the Constitutional Court observed that "workplace" had been given a special meaning by the legislature, divorced from geography and individuals:[25] The workplace is not the place where an individual employee works; it is where the employees of the employers work as a collective.[26] Further, a workplace can constitute several locations as long it forms a functional unit; similarly, each such location can constitute a separate workplace if it is functionally independent of other places where employees of the same employer work.[27] The Constitutional Court found that neither the

[23] *Sasol Mining (Pty) Ltd v Association of Mineworkers & Construction Union* (2017) 38 ILJ 969 (LC) par 48. Also see *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation & Arbitration* (2014) 35 ILJ 1959 (LAC) par 26–27.

[24] *Chamber of Mines* par 31.

[25] Par 25–27.

[26] Par 25.

[27] Par 27.

context of section 23(1)(*d*), nor constitutional considerations, warranted a deviation from the special meaning assigned to workplace; in fact, both reinforced the application of its special meaning.[28] This means that a single mine, amongst many owned by a mining company, can constitute a separate workplace, but on the facts of this matter, all the courts agreed that each mining house operated as a single integrated workplace. Since its argument based on the meaning of "workplace" was not successful, AMCU raised, also unsuccessfully, the further argument, dealt with above,[29] that section 23(1)(*d*), and more particularly the principle of majoritarianism embedded in it, is unconstitutional.

Collective agreement

In terms of section 213, a collective agreement, unless the context dictates otherwise, means a written agreement concerning the terms and conditions of employment or any other matter of mutual interest concluded by one or more unions, on the one hand, and by one or more employers' organisations, or one or more employers and one or more employers' organisations, on the other hand.

It is useful to reflect on the meaning of the phrase "matter of mutual interest", and more specifically on what it does not mean: The LRA is said to be premised on a division between rights disputes (in respect of which strike action is impermissible and which are to be resolved by way of arbitration or adjudication) and interest disputes (which are to be resolved by way of power-play). In other words, rights disputes are typically resolved by settlement agreements and interest disputes by collective agreements and strikes. However, the term "matter of mutual interest" should not be conflated with these colloquial terms which are used as shorthand explanations for the basic structure of the LRA. The following explanation provided by Van Niekerk J in *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA*[30] clarifies the distinction:

> "[A]ll interest disputes (broadly, disputes about the creation of new rights) and rights disputes (broadly, disputes about the interpretation and application of existing rights) are subsets in the broader category of disputes about matters of mutual interest. In other words, all interest disputes constitute disputes about matters of mutual interest, but not all disputes about matters of mutual interest are interest disputes."

Nonetheless, even if an agreement meets the definition of a collective agreement, it is not open season, and the mere fact that it is the result of negotiations between a union or unions and employer/s does not imply that is it fair or that it will survive constitutional scrutiny.[31] For this reason, discriminatory terms cannot be tolerated simply because they are contained in a collective agreement.[32] Similarly, *POPCRU* held that since a collective

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28 Par 33.

29 Part 2.1.

30 (2014) 35 ILJ 3241 (LC).

31 *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC) par 28.

32 *SA Airways (Pty) Ltd v Jansen van Vuuren* (2014) 35 ILJ 2774 (LAC) par 59.

agreement is not a law of general application, it cannot limit a fundamental right[33] unless the limitation is authorised by legislation.[34] The remarks of the court related specifically to a possible limitation of the right to engage in collective bargaining through section 18, but in the end, the court was able to interpret the section in a manner that avoided such limitation.[35] However, by parity of reason, the same sentiments should be true in respect of any other fundamental right: Collective agreements cannot limit fundamental rights unless there is a legislative provision authorising such limitation. One such provision authorising a limitation of fundamental rights is section 23(1)(*d*); hence the (unsuccessful) attack on it in *Chamber of Mines* as unconstitutional inasmuch as the limitation related to the right to strike.

Illustration

The interface between retrenchment and majoritarianism will be explored more fully in Part 3, but a very useful demonstration of the significance of both a "workplace" and a "collective agreement" as building blocks of majoritarianism is provided by the Labour Court's judgment in *National Union of Mineworkers v Anglo Gold Ashanti Ltd,*[36] handed down in the context of a retrenchment. The National Union of Mineworkers (NUM) and its members sought to interdict their employer, Anglo Gold, from proceeding with the dismissal of the applicant employees who participated in an unprotected strike. The background was as follows.

As a result of a Constitutional Court ruling[37] and an amendment of the LRA[38] there is now no doubt that employees transfer automatically from the old employer to the new employer when the business is transferred as a going concern. However, it is not always remembered that this consequence can be disrupted by an agreed variation in terms of section 197(6). Anglo Gold commenced with consultations facilitated by the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 189A in respect of all its underground and surface units, one of which a hospital. Anglo Gold secured a buyer for the hospital and concluded an agreement that the hospital would be transferred as a going concern. However, the transfer was subject to a section 197(6) agreement as the buyer did not want to take transfer of all the hospital employees. Nevertheless, at least some of the jobs at the hospital would be saved as a result of this arrangement.

The retrenchment consultation was conducted with four unions (NUM, Solidarity, AMCU and the Aviation Union of Southern Africa (AUSA)), but unlike the other unions, NUM (representing the majority of employees only at the hospital) did not sign the section 197(6) agreement. The applicant employees then threatened to boycott the implementation of the

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33 *POPCRU* par 105.

34 Par 76.

35 Par 97–100.

36 (2019) 40 ILJ 407 (LC) (*Anglo Gold Ashanti*).

37 *National Education, Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC).

38 In terms of the Labour Relations Amendment Act 12 of 2002.

section 197(6) agreement and embarked on an unprotected strike, and were therefore dismissed.

Two broad arguments can be distilled from the judgment. The employer regarded the South African region as one workplace with 7,620 employees. Given that NUM is a minority union, representing only 32.5 per cent of the total number of employees in the South African region (i.e. the workplace), the employer argued that, since the section 197(6) agreement was a collective agreement with the majority unions in the workplace, it was capable of extension and thus applied to NUM and its members.[39] Countering this, the applicants first argued that the hospital was a separate workplace, and since NUM was the majority union in that workplace (the hospital), an extension could not apply to the hospital.[40] The judgment is brief and does not provide enough insight into the operations of Anglo Gold, but provides no evidence to contradict the employer's position regarding the confines of its workplace.

The second argument proposed that the section 197(6) agreement was not a collective agreement since it did not deal with a matter of mutual interest. The court held that it clearly did, as it was concluded in the context of a retrenchment process and was informed by the mutual interest of the parties to save jobs at the hospital.[41] The court further indicated that the extension of the section 197(6) agreement "would absolutely minimise retrenchments and contribute to economic sustainability of both the new and old employers".[42] Echoing the sentiments expressed by the Labour Appeal Court (LAC) in *National Union of Metalworkers of SA on behalf of Members v SA Airways SOC Ltd* (*SAA*)[43] and discussed further below, the court held that chaos would ensue if a minority union who participated in the retrenchment consultation was allowed to hijack the outcome of a fair process right at the end, as this would undermine the finalisation of the retrenchment process. In other words, majoritarianism expressed in this way is simply code for orderly collective bargaining. Needless to say, the application to interdict the dismissal of the applicant employees was dismissed.

2 4 The legality of the extension

Even if the stars align and a collective agreement is extended, our constitutional dispensation will not allow the capricious use of section 23(1)(*d*). In *Chamber of Mines*, AMCU also challenged the constitutionality of section 23(1)(*d*) on the basis that it offends the principle of legality as it allows private actors to exercise public power to legislate over private actors. Cameron J agreed that "[t]he conclusion of a collective agreement triggering a statutorily licensed extension under s 23(1)(*d*) is in its effects and substance an exercise of legislatively conferred public power".[44]

[39] *Anglo Gold Ashanti* par 11–14.
[40] Par 14.
[41] Par 15.
[42] Par 19.
[43] (2017) 38 ILJ 1994 (LAC).
[44] *Chamber of Mines* par 80.

This, however, is not inimical to our constitutional model as it allows private actors to exercise public power provided that it is exercised rationally.[45] Section 23(1)(*d*), by itself, is therefore not irrational, as was argued by AMCU, because it serves a legitimate legislative purpose, namely orderly collective bargaining.[46] Nonetheless, while the provision itself is not irrational, the power granted by it may not be exercised irrationally.[47] An extension under section 23(1)(*d*) is therefore reviewable under the principle of legality.[48] *In casu*, AMCU's argument, which was rejected, focused on the irrationality of section 23(1)(*d*) and not on the irrationality of the extension. As for the latter, there was no evidence or argument placed before the court to support such a claim,[49] but the principle stands: Parties extending collective agreements may not do so irrationally. The Constitutional Court offered the following example where an extension might be irrational:

> "A particular agreement may be vulnerable to attack for irrational and undue effects on minority unions and non-members. An instance might be where parties to a s 23(1)(*d*) agreement conclude it in flagrant breach of an express agreement with minority unions protecting them from the exercise of the power."[50]

It also does not appear as if an extension will be irrational merely because the minority union was not consulted before the extension. In this regard it has been held that there is "no general duty on decision-makers exercising public power to consult interested parties in order for a decision to be rational under the rule of law" as the entire scheme of the LRA is served by the extension: "It facilitates orderly collective bargaining; it avoids the multiplicity of consulting parties and it fosters peace and order in the workplace."[51]

At the very least, a successful attack on the legality of an extension will require evidence that the decision to extend the agreement was *mala fide*, capricious or arbitrary.[52]

3 MAJORITARIANISM AND RETRENCHMENT

3 1 Introduction

A "collective agreement" and a "workplace" are two important building blocks of majoritarianism and, as demonstrated by the judgment in *Anglo Gold*

[45] Par 68–69.
[46] Par 67.
[47] Par 73 and 83.
[48] Par 73.
[49] This argument briefly surfaced again in *SAA* but as no acceptable evidence was presented, the LAC, like the court *a quo*, declined to review either the collective agreement or its extension under the principle of legality.
[50] Par 86.
[51] *Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Ltd* (2018) 39 ILJ 2205 (LAC) (*Royal Bafokeng*).
[52] *Association of Mineworkers & Construction Union v Minister of Labour* (2018) 39 ILJ 1549 (LC); *Glencore Operations SA (Pty) Ltd v National Union of Metalworkers of SA* (2018) 39 ILJ 2305 (LC).

Ashanti, are equally relevant in retrenchment situations. Part 3 further explores the manifestation of majoritarianism in retrenchment situations and whether some aspects of retrenchment are immune to the application of majoritarianism.

3 2 General

Initially, all retrenchments were regulated only by section 189, but since August 2002, section 189A also applies to large-scale retrenchments: It provides an opportunity for third-party facilitation, the choice of disputing substantial fairness through either adjudication or strike action, and an expedited process for procedural unfairness. Some of these privileges can be requested only by certain parties: For instance, only the employer or the consulting parties representing the majority of the employees who the employer contemplates dismissing may ask for facilitation.[53] However, section 189(1), which identifies the parties that the employer is obliged to consult when it contemplates any retrenchment (small- or large-scale), offers another opportunity for the expression of majoritarianism. It provides that the employer must consult the following parties:

> "(a) any person whom the employer is required to consult in terms of a collective agreement;
> (b) if there is no collective agreement that requires consultation–
> (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
> (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
> (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or
> (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."

For the purpose of the discussion that follows, it is useful to reflect on the nature of consultations in the case of retrenchment: While the employer is obliged to consult with the consulting parties with an open mind, it has no duty to reach consensus and it may proceed with the retrenchment once it is satisfied that it has consulted in a meaningful way.[54] The strongest statutory indication of this is section 189(7), which provides that, in the absence of agreed criteria, the employer may select employees for retrenchment using fair and objective criteria and, despite being backed up by the right to strike, this remains the position in large-scale retrenchments. Thus, while consultations may often, especially in the case of large-scale retrenchments, morph into collective bargaining and culminate in a collective (retrenchment) agreement, there is no statutory obligation to conclude a retrenchment

53 S 189A(3)(*b*).
54 Le Roux *Retrenchment Law in South Africa* (2016) 92–93.

agreement; it remains the choice of the parties whether to conclude such an agreement.[55]

Nonetheless, where the consulting parties, or some of them, conclude a collective agreement in these circumstances, it has been said that the voluntarist system and policy choices (such as majoritarianism) on which the LRA is premised should take their course.[56] However, over the last few years, as large-scale retrenchments are escalating in South Africa, it has been questioned how far this can go in retrenchment situations.

In the discussion that follows, for ease of reference, a distinction is made between a collective agreement contemplated by section 189(1)(*a*) (consultation agreement), determining who must be consulted about the proposed retrenchment, and a collective agreement (retrenchment agreement) that is concluded after consultation and in which the parties record any agreement on the issues that the parties are required to consult on in terms of section 189(2) and any further issues.

3 3 No consultation agreement, but a retrenchment agreement

If there is no consultation agreement, but a retrenchment agreement is concluded after the consultations required by section 189, it is possible to extend it in terms of section 23(1)(*d*) and thus for majoritarianism to manifest in this manner. Nonetheless, the long-standing precedent[57] in this regard was questioned in the litigation that culminated in the LAC's judgment in *SAA*.[58]

South African Airways (SAA), the national carrier, and a subsidiary commenced with retrenchment consultations and a single facilitation process was agreed upon. The majority of employees at SAA belonged to one of the three unions recognised by SAA: the National Transport Movement (NTM), the SA Cabin Crew Association (SACCA) and the United Association of SA (UASA). Less than 2 per cent of SAA's employees were members of the National Union of Metalworkers of South Africa (NUMSA), which was unrecognised. Nonetheless, all these unions, as well as management representative bodies, participated in the consultation process facilitated by the CCMA. Very belatedly, and after three and a half months' facilitation and 31 consultation meetings, NUMSA brought an application in the CCMA for the disclosure of information relating to the commercial rationale for and alternatives to dismissals. While this application was pending, SAA concluded a retrenchment agreement with NTM, UASA, SACCA and SAA management employees, representing roughly 80 per cent of employees in the SAA workplace. The agreement was extended to non-party employees in terms of section 23(1)(*d*). At this point, NUMSA launched an application in

55 *Aviation Union of Southern Africa v SA Airways SOC Ltd* (2015) 36 ILJ 3030 (LC) *(Aviation)* par 36–38.

56 *Ibid.*

57 *Tsetsana v Blyvooruitzicht Gold Mining Co Ltd* [1999] 4 BLLR 404 (LC); *Sigwali v Libanon (A Division of Kloof Gold Mine Ltd)* (2000) 21 ILJ 641 (LC).

58 The judgment of the court *a quo* is reported as *Aviation*.

terms of section 189A(13) with the aim of interdicting SAA from proceeding with a large-scale retrenchment until it had complied with a fair procedure. The LAC saw the essential question for determination as follows:

> "[W]hether a retrenchment agreement concluded with unions representing the majority of employees in the workplace, and extended in terms of s 23(1)(*d*), in effect settled any dispute that non-union member employees and minority union members [who participated in the consultation] had about the retrenchment process."[59]

Both the LAC and the court *a quo* conceded that it might appear objectionable that section 23(1)(*d*) can effectively deprive individuals who were not party to the retrenchment agreement of the right to challenge the fairness of a dismissal (retrenchment in this case), but regarded it as inevitable that an extension of a collective agreement will have this effect on non-parties, as is often demonstrated by the implied limitation on the right of non-parties to strike on issues covered by the collective agreement once the latter is extended.[60]

A number of interesting arguments were raised by NUMSA, all of which were rejected. To again illustrate the significance of a collective agreement as a building block of majoritarianism, it is illuminating to focus on NUMSA's contention that a retrenchment agreement such as the one concluded between SAA and the majority unions was in effect not a collective agreement and therefore could not be validly extended to non-party employees.[61] Instead, NUMSA argued that it constituted a settlement agreement that was binding on only the parties and their members and was not a collective agreement capable of extension to non-parties.[62] In supporting this proposition, NUMSA argued that the words "(or) any other matter of mutual interest" in the definition of a collective agreement served to qualify and circumscribe the preceding words "terms and conditions of employment" and restricted collective agreements to matters of interest (i.e. the creation of new rights) and not rights issues (existing rights). Since the issue at stake concerned a dismissal dispute (i.e. a rights dispute) the retrenchment agreement, so NUMSA argued, was not a collective agreement.[63]

The LAC, mentioning that interest disputes are frequently incorrectly conflated with matters of mutual interest,[64] concluded that "the issues covered in s 189(2) of the LRA are manifestly mutual interest issues" and that a "retrenchment agreement between an employer and a trade union settling a retrenchment dispute is therefore a collective agreement".[65] As a result, once a retrenchment agreement meets the requirements of the definition of a collective agreement in section 213 it can be extended, as there is nothing in the scheme of sections 189 and 189A that militates against this conclusion:

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59 Par 2.
60 Par 36. Also see *Aviation* par 28–31.
61 Par 25.
62 Par 26–27.
63 Par 31–32.
64 Part 2.3.
65 Par 33.

> "The application of s 23(1)(*d*) of the LRA to the process set out in s 189 of the LRA is necessary and justifiable to ensure an orderly and peaceful consultation process aimed at minimising dismissals and contributing to economic viability. To allow a situation where a minority party would, right at the end of the consultation process, not be bound by a product of a legitimate and fair process, particularly where it was part of that process, would lead to chaotic situations. It would be difficult, if not impossible, for a consultation process under s 189 of the LRA to be concluded.[66]

However, significantly, on the facts of SAA, the employer apparently met its consultation obligations in terms of section 189(1) by consulting with the unions whose members were likely to be affected by the proposed dismissals and the representatives of non-unionised employees. The question of whether the principles of majoritarianism apply in the same way to consultation agreements is discussed below.

3 4 Consultations and consultation agreements

The discussion in the previous paragraph assumed that the employer consulted with all the consulting parties with which it was required to consult. But what is the status of the various consulting parties mentioned in section 189(1) and can majoritarianism be used to deprive them of a seat at the consultation table?

The courts have often held that section 189(1) represents a hierarchy of consulting parties.[67] However, care should be taken with the meaning of this proposition: If it implies that the mere existence of a consulting party mentioned in section 189(1) creates a hierarchy that displaces all the consulting parties lower down in section 189(1), and more particularly that the mere existence of a consultation agreement in terms of section 189(1)(*a*) will have this effect, then it is suggested that it is wrong (scenario 1). If it implies that consulting parties mentioned in section 189(1)(*b*) to (*d*) are displaced once a consultation agreement is extended in terms of section 23(1)(*d*), there might be some merit in the proposition, although some reservations are expressed below (scenario 2).

It is not easy to distil the jurisprudence on this issue because it often mentions consultation with a "recognised" union as if that is the same as consultation in terms of an extended consultation agreement.[68] The mere fact that a union is recognised for collective bargaining purposes, however, cannot be taken to imply that it is the consultation representative for all employees affected by the retrenchment. Unless the collective agreement clearly envisages consultation for retrenchment purposes and both identifies and expressly binds the non-party employees, an extension cannot be

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[66] Par 39.

[67] *Sikhosana v Sasol Synthetic Fuels (Sikhosana)* (2000) 21 ILJ 649 (LC) 656D–G; *SA Municipal Workers Union v SA Local Government Association* (2010) 31 ILJ 2189 (LC); *Maluleke v Johnson Tiles (Pty) Ltd* (2008) 29 ILJ 2606 (LC) (*Maluleke*); *Mahlinza v Zulu Nyala Game Ranch (Pty) Ltd* [2004] JOL 12459 (LC); *Ketse v Telkom SA SOC Ltd* (2015) 36 ILJ 1592 (LC) (*Ketse*).

[68] *Sikhosana*; *Aunde SA (Pty) Ltd v National Union of Metalworkers of SA* (2011) 32 ILJ 2617 (LAC) (*Aunde*). Also see *Aviation* and *Ketse*.

implied by the fact that a particular union is a "recognised" union. For instance, in *Aunde* the employer entered into a recognition agreement with UASA in terms of which it was recognised as "the sole bargaining representative of the employees in the bargaining unit for all other work-related plant level issues, including any need to consult as required by the LR".[69] In addition, the parties agreed to negotiate a retrenchment procedure. The LAC held that the duty to consult in terms of the recognition agreement with UASA envisaged consultation in terms of Chapter III of the LRA, otherwise the term providing for the negotiation of the retrenchment procedure would serve no purpose.[70] Consulting only with UASA about the proposed retrenchments therefore did not relieve the employer of its consultation obligations.

The scenarios mentioned above are explored in more detail below.

Scenario 1: There is a consultation agreement, but section 23(1)(d) is not invoked

Where the consultation agreement is not extended,[71] it is suggested that there is no "winner takes it all" consulting party. Inasmuch as a "hierarchy" can be said to exist, it should rather be understood as a means of avoiding dual or parallel consultation.[72] To suggest otherwise would not only make a mockery of the model of majoritarianism envisaged by the LRA, but would also give unprecedented power to a minority union in the case of retrenchment.

For the mere existence of a consultation agreement (i.e. a collective agreement not extended in terms of section 23(1)(*d*)) to remove the need to consult with the consulting parties mentioned lower down in section 189(1), two extraordinary hurdles must be negotiated: First, such a collective agreement must have a special meaning in the context of sections 189 and 189A and second, section 23, in particular section 23(1)(*d*), which determines who is bound by a collective agreement, must somehow not apply in the case of a retrenchment agreement.

Section 23 determines who is bound by a collective agreement: Usually a collective agreement will bind only the unions, employers and employer organisations party to the collective agreement as well as their members.[73] It is only in exceptional cases, i.e. when the requirements of section 23(1)(*d*) are met, that non-parties are bound. A claim that any consultation agreement, even one not extended in terms of section 23(1)(*d*), will dislodge the right to be consulted of those consulting parties mentioned lower down in section 189(1) will thus be a peculiar disregard of section 23(1)(*d*) and the safeguards offered by it. Not only is there no suggestion in sections 189 or 189A that *this particular* extraordinary meaning can be assigned to a

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[69] *Aunde* par 16.
[70] *Aunde* par 38.
[71] This might be because it is not with a majority union or the other "soft" requirements of s 23(1)(*d*) are not met.
[72] *Baloyi v M & P Manufacturing* (2001) 22 ILJ 391 (LAC) (*Baloyi*) par 23.
[73] S 23(1)(*a*)–(*c*).

collective (consultation) agreement mentioned in section 189(1)(*a*),[74] but as will be demonstrated below, section 189(1) is reasonably capable of another interpretation that does not violate the rights of employees if it is viewed through another prism, namely, avoidance of dual consultation.

If an employee is covered by a consultation agreement, consultation regarding that employee takes place in terms of the consultation agreement and the options lower down section 189(1) fall away and no individual consultation with *that* employee is required.[75] This means that an employer may fairly discharge its consultation duties without consulting individually with an affected employee.[76] However, where the employee is not covered by the consultation agreement, but is a member of a union not party to the consultation agreement, the "hierarchy" requires that that union be consulted and not the employee.[77] It is only when the employee is not a member of a union that direct consultation with the employee is required.[78]

Put differently, section 189(1) does not imply that the employer will discharge its consultation obligations if it consults with the union party to the consultation agreement if it also contemplates the retrenchment of members of a non-party union.[79] It simply means that in respect of employees covered by the consultation agreement, the employer is obliged to consult in terms of the consultation agreement. In the absence of a consultation agreement and for other affected employees not covered by the consultation agreement, the employer must look for appropriate consulting parties lower down section 189(1). If these employees happen to belong to a union, that union will be the appropriate consulting party. The employer is required to consult directly with the employees only if they do not belong to a union at all (although section 189(1)(*d*) allows these employees to nominate a representative). This appears to have been the scenario in *SAA*: There was no consultation agreement, but the employer consulted with all the unions to which the employees belonged, as well as the representatives of those employees who did not belong to a union.

Furthermore, a suggestion that any consultation agreement invokes a "hierarchy" that displaces the consultation parties lower down section 189(1) would run foul of *POPCRU*: Such an interpretation will result in a limitation of the right to procedural fairness embedded in the constitutional right to fair labour practices of employees belonging to non-party unions and would be of no force and effect unless such a limitation was authorised by legislation. The only legislative mechanism by which such a limitation can possibly be invoked is section 23(1)(*d*), but where its requirements are not met, the consultation agreement can apply only *inter partes*. There is simply no indication in sections 189, 189A and 23 that a consultation agreement as referred to in section 189(1)(*a*) by itself is capable of a special meaning that

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[74] *Aviation* par 31.

[75] *Baloyi* par 23.

[76] *SA Commercial Catering & Allied Workers Union v Amalgamated Retailers (Pty) Ltd* (2002) 23 ILJ 165 (LC) (*Amalgamated*) par 27.

[77] Also see *Royal Bafokeng* par 42.

[78] *Amalgamated* par 26. Also see *Moyo v Knight Watch Security* [2009] JOL 23721 (LC) and *Mahlinza v Zulu Nyala Game Ranch (Pty) Ltd* [2004] JOL 12459 (LC).

[79] *United National Breweries (SA) Ltd v Khanyeza* (2006) 27 ILJ 150 (LAC).

in effect negates the legislative authority (section 23(1)(*d*)) for the limitation of fundamental rights.[80]

It is suggested that by adopting the scheme in section 189(1), which removes the need for dual consultation, the legislature was not only alive to the difficulties of consulting with multiple parties and in this way attempted to lessen the burden on the employer, but it was also alive to the ILO's position that procedural fairness in the case of retrenchment can also be met by consulting with the workers' representative instead of consulting directly with individual employees.[81] Herein, it is suggested, perhaps lie the seeds for assigning special meaning to a consultation agreement, but different from what has been proposed thus far. This will be reverted to below.

Scenario 2: There is a consultation agreement and section 23(1)(d) is invoked

In respect of this scenario, the jurisprudence is established that once the consultation agreement is extended, a hierarchy is invoked and the employer "has no obligation in law to consult with any other union or any individual employee over the retrenchment".[82] And if this leads to the conclusion of a retrenchment agreement, "all employees including those who are not members of the representative trade union that consulted with the employer are bound by the terms of such collective agreement irrespective of whether they were party to the consultation process or not".[83] In other words, if non-party employees are retrenched in accordance with the retrenchment agreement, they are effectively deprived of the right to dispute the procedural fairness of their retrenchment.[84]

This wisdom was challenged in *Royal Bafokeng*.[85] The appellant employees received notices that they would be retrenched. AMCU, their union, was not consulted on their retrenchment and neither AMCU nor the employees were issued with section 189(3) notices. The employer and NUM (the majority union) and UASA, another union at the mine, signed a consultation agreement in terms of which the employer was required to consult exclusively with NUM and UASA in the case of retrenchment. NUM and UASA were duly consulted, and the parties then concluded a retrenchment agreement that was extended to bind employees who were not members of NUM or UASA. These included the members of AMCU. By the time the matter reached the LAC, the Constitutional Court had already spoken in *Chamber of Mines,* and no issue was taken with majoritarianism and its constitutionality in general. Instead, the gripe was limited to the

[80] There is one exception to the claim that s 189(1) aims to avoid dual consultation, but it ought only to arise in the circumstances of scenario 2: Where an employer initiates consultation with non-union members with whom it is not required to consult (because they are covered by an extended consultation agreement), it is obliged to carry that election through and must attempt to reach consensus with those employees in the same manner as with the statutory consulting party. *Amalgamated* par 26.

[81] Article 13 of the ILO Convention on Termination of Employment 158 of 1982.

[82] *Aunde* par 32.

[83] *Ibid.* Also see *Maluleke*.

[84] *Aunde* par 32.

[85] (2018) 39 ILJ 2205 (LAC).

application of majoritarianism in respect of the right to procedural fairness in the case of retrenchment, and more particularly the implication of section 189(1)(*a*) combined with section 23(1)(*d*) that once an employer and a majority union concluded a consultation agreement, constituencies not party to the collective agreement were excluded from retrenchment consultations and hence denied a fair process. In short, the judgment concluded that this expression of majoritarianism too is not unconstitutional. Three aspects of the judgment merit mention.

First, the court observed that collective bargaining and the conclusion of collective agreements are fundamental aspects of the voluntarist structure of the LRA. Collective agreements are therefore deliberately powerful instruments and, once validly concluded, can disrupt the provisions of the LRA.[86]

Second, the court drew a distinction between misconduct and incapacity dismissals and retrenchment. The court alluded to the ILO's guidance that procedural fairness in the case of dismissals is met by giving the employee an opportunity to defend herself, and in the case of retrenchments, by the employer consulting with workers' representatives. Allowing the most representative union to have an exclusive seat at the consultation table in the case of retrenchment serves the interest of the employees optimally,[87] avoids the impracticability of the employer having to consult with numerous constituencies, and avoids the risk of a minority union being able "to frustrate mass retrenchment … [which] would cause bedlam and chaos at the workplace".[88] All of this, so the court concluded, serves orderly collective bargaining.[89]

Finally, this arrangement does not imply that those constituencies not consulted are not represented. The majority union, having won the right to be the representative union, has a duty to represent fairly and without discrimination both its members and non-members. The employer has a similar duty to act fairly towards minority unions and non-unionised employees. If these duties are not observed, a retrenched employee has the right to challenge the fairness of the individual dismissal.[90]

Royal Bafokeng thus confirms that once a consultation agreement is extended, the employer need not consult with a union that is not party to the consultation agreement, even if its members are likely to be affected by the proposed retrenchment, nor with non-unionised employees who are likely to be affected by the proposed retrenchment.[91]

Nonetheless, the outcome does leave one with a sense of unease, because an employee facing an existential crisis is left without representation of his or her choice at the consultation table. It is therefore no surprise that this decision was appealed against in the Constitutional Court. The unease is best expressed by listing a few questions and observations.

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86 Par 24–25.
87 Par 39.
88 Par 42.
89 Par 39.
90 Par 50–52.
91 Le Roux *Retrenchment Law* 88.

Questions and observations

Can it really be said that a union that has won the right to represent all the employees through statistical dominance will be able to fairly represent a niche group of employees (or employees belonging to a rival union) with interests different to, or even in conflict with, the interest of employees belonging to the majority union? In terms of the Constitution,[92] everyone has the right to fair labour practices, which implies a right to a procedurally fair dismissal regardless of the form the dismissal takes. Procedural fairness arguably includes the right to representation, although it is widely accepted that in workplace disputes, this does not imply a right to legal representation, but only representation by a fellow employee or union representative. *Royal Bafokeng* suggests that in the case of retrenchment this entitlement is met even when an affected employee is represented, not by a union the employee has chosen to join, but by a union the employee has chosen not to join.[93] Even if it could be argued that this is sufficient to meet the right to procedural fairness, it still comes worryingly close to what both *Bader Bop* and *Chamber of Mines* cautioned majoritarianism should not do, namely to undermine, amongst others, the freedom of association of individual employees.

Clearly having collective representation in the case of retrenchment as opposed to allowing each employee to be heard as in the case of misconduct and incapacity dismissals is rational,[94] but while majoritarianism might be justified in the circumstances of *Royal Bafokeng* for other reasons, the claim that a multiplicity of consulting parties will be unworkable or cause bedlam is not valid. In *SAA*, the employer consulted with multiple parties and while the process was cumbersome, it was not insurmountable. More particularly, involving the minority unions during consultation did not allow them to keep the majority hostage. Not only does section 189 not require the employer to reach consensus with consulting parties, but it allows the employer to proceed with the retrenchment using fair and objective criteria once the employer has consulted in a meaningful way. In any event, as was illustrated in *SAA* (and also in *Anglo Gold Ashanti*), through the extension of a retrenchment agreement, recalcitrant minority unions were prevented from derailing the finalisation of retrenchment, but, unlike the situation in *Royal Bafokeng*, they at least had a seat at the consultation table. Furthermore, there are other legislative examples where an employer is required to consult across various interest groups without any reports of bedlam.[95] Also, the legislature recognised the difficulty of consulting with individual employees in the case of retrenchments and for that reason provided the regime in section 189(1) which, as proposed above, avoids dual consultation and minimises the need to consult with each employee.

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92 S 23(1) of the Constitution.

93 Although in the context of misconduct, *Independent Municipal and Allied Trade Union (IMATU) v South African Local Government Bargaining Council* (JR2462/18) [2019] ZALCJHB 240 (12 September 2019).

94 *Royal Bafokeng* par 54.

95 See s 16 of the Employment Equity Act 55 of 1998.

Earlier it was argued that there is no indication that a consultation agreement in section 189(1)(*a*) has a special meaning to the effect that it removes the employer's obligation to consult the parties mentioned lower down in section 189(1) without it being extended in terms of section 23(1)(*d*). However, would representation by a disconnected union by means of an extension of the consultation agreement not militate against the special regime established by the legislature in section 189(1)? In other words, does the context of section 189(1) not suggest that a consultation agreement in terms of section 189(1)(*a*) in fact has a special meaning but of a different nature to what has thus far been proposed, namely that section 23(1)(*d*) cannot apply to it?

In *Royal Bafokeng,* the applicants' arguments[96] based on unfair union discrimination were rejected, correctly, it is suggested. It probably is inevitable that majoritarianism will cause some deprivation to members of minority unions or non-unionised employees. Deprivation is therefore not the issue; rather, the concern should be with what they can be deprived of. If one fundamental right, i.e. the right to strike, can be limited through an extension, on what basis can it be said that another fundamental right cannot be limited in a similar way? *Chamber of Mines* confirmed that the right to strike of the members of minority unions can be limited through an extension of a collective agreement because majoritarianism, thus expressed, serves orderly collective bargaining, but does the same hold true for a fundamental right that is not essential to collective bargaining? While the right to strike belongs to an individual employee, it can only be exercised collectively and is necessary for an effective exercise of the right to collective bargaining. If majoritarianism is a means of ensuring orderly collective bargaining, does it not follow axiomatically that it can limit only fundamental rights promoting collective bargaining, but not individual rights (such as the right to procedural fairness) that serve no particular purpose in promoting collective bargaining, as this would allow majoritarianism to become an instrument of oppression?

4 CONCLUSION

This article has demonstrated that, first, while majoritarianism might be a premise of the LRA, it is not a foregone conclusion: It requires a collective agreement in a workplace concluded with a majority union extended in the manner provided for in section 23(1)(*d*). Second, majoritarianism has tentacles that can reach deep into, and then twist, some of the fundamentals of the LRA. The question is whether there are aspects of the LRA, such as retrenchment, that are or ought to be, immune from its reach.

In *Chamber of Mines* the Constitutional Court endorsed majoritarianism as a constitutionally valid instrument of orderly collective bargaining that can validly limit the right to strike. Whether it can also limit fundamental rights not promoting collective bargaining is awaiting pronouncement by the Constitutional Court in *Royal Bafokeng*, after the LAC ruled that the right of employees to be represented by their own union during retrenchment

[96] Par 32 and 35.

consultations can be limited by an extension of a consultation agreement. Therefore, as the jurisprudence currently stands, retrenchment is not exempted from majoritarianism.

This article advanced a number of reasons why this ruling might be overturned, but the reality is that majoritarianism is a blunt instrument in service of broad workplace order and is perhaps not capable of accommodating the nuances advanced in this article. The Constitutional Court, one suspects, will therefore take great care, like the court *a quo*, not to interfere with the thread of majoritarianism in regard to consulting partners in the case of retrenchment, because this "might unravel the entire sweater woven by the legislator".[97] It is therefore perhaps better, as hinted by the court *a quo*,[98] for the legislator to provide the finesse that is currently missing.

[97] *Royal Bafokeng* par 55.

[98] *Ibid*.

THE CLASH BETWEEN THE EMPLOYEE'S RIGHT TO PRIVACY AND FREEDOM OF EXPRESSION AND SOCIAL MEDIA MISCONDUCT: WHAT JUSTIFIES EMPLOYEE'S DISMISSAL TO BE A FAIR DISMISSAL?*

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SUMMARY

The 21st century has an increase in the use of the internet as a means of trading. The use of the internet has also influenced the use of social media as a means of communication. This communication extends to the employer–employee relationship in the workplace. However – in South Africa – due to the rapid use of social media both in and out of the workplace, it has become blurry of what constitutes social media misconduct for which an employee may be disciplined. This is exacerbated by the lack of specific legislation dealing with employees and social media misconduct in South Africa. This article deals with the blessings and the curse of using social media as a means of communication in the workplace. It reveals the difficulties faced by both employers and employees when determining to what extent the behaviour of an employee can constitute adequate grounds for dismissal in relation to that employee's social media misconduct. Recommendations are made on the way forward.

1 INTRODUCTION

For the past few years, South Africa has seen rapid growth in the use of social media as a means of communication. However, the use of social media by employees still needs to be developed. The lack of specific legislation regulating the conduct of employees on social media is an issue

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affecting the relationship between employer and employee. Although social media can be recognised as an under-developed area of law in South Africa, its impact on labour law calls for critical consideration. It appears that the use of the internet and social media has brought both a blessing and a curse to the working place. On the one hand the internet and social media are a blessing for the employer's business in terms of advertising. Other than being a social platform, social media is, in fact, an important tool for business trade.[1] On the other hand, the internet and social media are a curse on both the employer and the employee – particularly where an employer must decide whether or not the comments made by the employee on social media are a dismissible offence. This blessing and curse are inevitable in the modern world, and, as it stands, it is going to continue to be like this until there are specific social media guidelines put in place to govern the conduct of all employees on social media.

What has become a topical debate is the use of social media by an employee – particularly if an employee has posted comments on social media after working hours. Many cases that have been before the courts, the CCMA, and bargaining council, prove that the use of social media after working hours may have a negative impact on employees. The question is to what extent the behaviour of an employee can constitute adequate grounds for dismissal in relation to that of employee's social media misconduct. Without clear legislation or guidelines, the courts have – although not specifically[2] – provided some guidelines on what may be deemed to be an employee's unacceptable behaviour on social media. Since there is no specific legislation dealing with social media misconduct, it remains unclear which conduct may amount to dismissible misconduct, and which may not. Each case is decided depending on the facts put before the court. The dilemma lies in the fact that what can be viewed as social media misconduct by an employer may not necessarily be considered to be such by an employee at the time of posting a comment. The risk comes in when an employee makes comments in a personal capacity, and those comments are deemed to be damaging for the reputation of the employer – and the employee is then dismissed for social media misconduct. This is a complex issue, as it impacts on both the employee's right to freedom of expression and privacy, and also the employer's need to protect its reputation.

The purpose of this article is to critically examine what has been considered by the employers, the courts, the CCMA, and the bargaining council as dismissible social media misconduct. It is a critical analysis of what is currently considered to be social misconduct in the workplace. This will be done by comparing a dismissal and the constitutional rights such as the right to privacy and freedom of expression as having been raised by the employees during the hearing on a social misconduct charge. After such examination, the article examines what impact this has on employees and

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[1] For e.g., the employer may use social media to strategise the business – which may include the facilitation of the employer's recruitment; development and management skills; and publicising its market.

[2] These guidelines are given on a case-by-case basis, which makes it difficult to conclude that they govern the employee's social behaviour in its entirety.

also their participation in social media. This is particularly important where an employee has posted comments which have nothing to do with the employer – but yet they are dismissed. Recommendations will then be made on what can be done to restrict these dismissals, especially when the employee argues that he/she was not aware that the comments made could amount to dismissible misconduct.

2 BACKGROUND: THE LAW AND THE USE OF SOCIAL MEDIA

2 1 Right to freedom of expression and right to privacy

The right to freedom of expression and the right to privacy are often raised as a defence for those facing social media misconduct charges. The employees tend to argue that when they were making comments on social media, they were exercising their right to freedom of expression. On the face of it, this may well be true, because s 16(1) of the Constitution[3] provides that "everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research". The term "and other media" may well be said to include social media. Therefore, this means that the employees do have a right to make commentary on social media. However, most employees fail to read further to s 16(2), which continues to state that "the right in subsection (1) does not extend to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm". Section 16 is a general law that applies to everyone who lives in South Africa. The question is – what does this mean to both the employer and the employee? Does it mean that the employer can simply apply this general law to the workplace for the purposes of social media misconduct by an employee or must the employer still comply with labour law legislation which may have its own guidelines regulating the procedure for fair dismissal?

Other than the right to freedom of expression, s 14 of the Constitution provides that "everyone has the right to privacy, which includes the right not to have their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed". In the context of social media, s 14(*d*) is the most relevant, as it provides that everyone has a right not to have their communication infringed. In other words, it may be said that employees enjoy the right not to have their social media communication infringed.

Although there are these rights, several employees have been dismissed either by limiting the right to privacy or limiting the right to freedom of expression. It is clear that social media and the misconduct following from the use of social media, affect human rights. Without the specific legislation

[3] The Constitution of the Republic of South Africa, 1996.

that regulates the use of social media by employees, however, there is possible harm to both the employer and employee. On the one hand, it becomes difficult for the employer to impose sanctions on the employee for misconduct, while on the other hand applying the law broadly may have a negative impact on the employee's rights.

2 2 Fair or unfair dismissal

The Labour Relations Act[4] (LRA) is one of the statutes that governs the relationship between the employer and employee. As a statute that governs this relationship, it also gives guidelines on what constitutes a fair dismissal. Section 188(1) provides that a dismissal "is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity; or is based on the employer's operational requirements; and that the dismissal was effected in accordance with a fair procedure". Within the LRA there is also Schedule 8 of the Code of Good Practice, which gives further guidelines on what amounts to a fair dismissal. Schedule 8 item 7 provides that "any person who is determining whether a dismissal for misconduct is unfair should consider whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and if a rule or standard was contravened, whether or not the rule was a valid or reasonable rule or standard; the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; the rule or standard has been consistently applied by the employer; and dismissal was an appropriate sanction for the contravention of the rule or standard".

The use of social media has created challenges for the courts, CCMA, and bargaining council, when interpreting Schedule 8 item 7 provisions and the social media misconduct by an employee. This has been even more difficult where the employer does not have any rules and guidelines regulating the employee's conduct on social media. It is therefore imperative to deal with these cases and examine how the courts have interpreted a fair dismissal, even if Schedule 8 item 7 is not met by the employer.

3 SOCIAL MEDIA MISCONDUCT AND DISMISSAL

3 1 Dismissal for misconduct and the right to privacy

In the context of social media and workplace, s 14(*d*) of the Constitution protects the employee from having their social media account hacked. However, one may ask the questions – does an employee have a right to privacy if such employee has made derogatory comments on social media that the employer has access to? What if the employer is not aware of those comments, but is informed by the public and then later opens the employee's social media account to confirm if there are indeed derogatory

[4] 66 of 1995.

comments? Does it mean that the right of the employee's privacy is affected? South African case law has engaged with these issues, and an illustration is given below on how this has been dealt with by the courts.

3 1 1 *Sedick v Krisray (Pty) Ltd*[5]

The employer dismissed the applicants (De Reuck and Sedick) on the grounds of bringing the employer's name into disrepute on the public domain. The applicants challenged the decision of the employer as being both procedurally and substantively unfair dismissal.[6] The dismissal was as a result of derogatory messages posted by the applicants about the respondent's owner and his family members. The comments include, but are not limited to:

- "But one cannot be happy in a family business, especially when the kids join the company after you have been there for six years and they try everything in their power to make you look stupid.
- Trust me no-one can put up with so much shit when the [f…ing] kids join the company! Now we have the son working there as well who has no idea but is pretending he has a clue!
- Office drama! Family business! Kids join the company with no experience! Need I say more …"[7]

The respondent argued that the dismissal was fair as the comments made by the applicants caused disrepute within the employer's business and had the potential to ruin the good name of the business. Represented by Ms Coetzee, the respondent argued that the seriousness of the comments made by the applicants had to be considered in the context of their position in the company[8] and the comments being made in a forum which was fully accessible to anyone – including former and current employees, customers and suppliers.[9] On the other hand, the applicants argued that they had not brought the name of the employer into disrepute as they had not made any direct references to the employer or the people.[10] De Reuck further argued that her right to privacy had been infringed.[11]

The Commissioner rejected both of the applicants' arguments. Dealing with the issue of privacy, the court held that the internet and Facebook is a public domain unless access to such Facebook is restricted by its members.[12] It appeared the applicants had failed to restrict access to their Facebook pages and the commentary was wholly in the public domain. Consequently, the court found that the respondent, through Ms Coetzee,

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5 [2011] 8 BALR 879 (CCMA).

6 Par 8.

7 Par 31.

8 De Reuck was a representative of the company on a day-to-day basis to both customers and suppliers, while Sedick was the bookkeeper and dealt with the private investments of the respondent's owner.

9 Par 34 and 37.

10 Par 39.

11 Par 42.

12 Par 50.

was entitled to intercept the comments that had been made by the applicants.[13] The Commissioner held that by failing to restrict access to their Facebook accounts, the applicants abandoned their right. On the issue of bringing the name of the employer into disrepute, the Commissioner found that indeed the applicants had brought the name of the employer into disrepute in the public domain.[14] In reaching the decision, the Commissioner took into account "what was written; where the comments were posted; to whom they were directed, to whom they were available and last but by no means least, by whom they were said".[15] Consequently, it was found that the comments had the potential to damage the reputation of the employer among its customers, suppliers, and competitors.[16]

3 1 2 Fredericks v Jo Barkett Fashions[17]

The applicant was dismissed on the grounds of destroying the name of the employer in public. The facts were, briefly, that the applicant had used her Facebook account to publish derogatory remarks about the employer's General Manager. The remarks had the potential to affect 90 employees and key customers which generated revenue for the employer.[18] The applicant was therefore charged and dismissed. She challenged the dismissal as being unfair as it affected her right to privacy, as this was infringed.[19]

The Commissioner found that the dismissal was fair.[20] In reaching the decision, the court determined the fairness of the dismissal by interpreting Schedule 8 Item 7 of the Code of Good Practice.[21] Although it was clear from the facts that the employer had no policy concerning Facebook usage, the Commissioner found that the applicant's actions were not justifiable, and therefore the dismissal was fair.[22] Comparing the facts before it with *Sedick v Krisray (Pty) Ltd*, the Commissioner took the view that the applicant had also failed to restrict access to her Facebook profile, as it was open to public and anybody could access it.[23]

In both of these cases, the employees were dismissed for posting derogatory remarks on their social media. The basis of their arguments was that their right to privacy was infringed. In both cases the Commissioner found their arguments to be unfounded. Their failure to restrict access to their social media waived their right to privacy – as the posts were visible to everyone. From the cases above, it is clear that if the employee makes derogatory comments on social media, such comments do affect and in fact,

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13 Par 52.
14 Par 53.
15 Par 57.
16 *Ibid*.
17 [2011] JOL 27923 (CCMA).
18 Par 4.
19 Par 5.
20 Par 6.3.
21 Par 6.2.
22 Par 6.3.
23 *Ibid*.

limit the employee's right to privacy. As long as the remarks can be accessed by the public, then the employer's conduct in terms of accessing those comments without the employee's consent is justified. From the cases above, it is clear that what needs to be proved is that there were derogatory comments made in public – without any restriction in terms of accessing those comments.

What is not clear, however, is what the situation would be if there were restricted access to the employee's social media account. Can the employee successfully raise the defence of the right to privacy under such circumstances? In *Smith v Partners in Sexual Health (Non-Profit),*[24] the employee successfully raised her right to privacy, after the employer accessed her private email account. The facts were, briefly, that while on leave, the applicant had her private Gmail account accessed by the employer's CEO. The emails made reference to internal matters, and were given to former employees and persons outside the organisation. Based on these emails, the applicant was charged and dismissed. The applicant then made an application to the Commissioner arguing that her dismissal was procedurally and substantively unfair.[25] The Commissioner concluded that the applicant's dismissal was indeed procedurally and substantively unfair.[26] The Commissioner found that the employer's conduct had breached the provisions of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002.[27] It was concluded by the Commissioner the comments made on social networks should be distinguished from the private emails intended for the recipient's eyes only.[28]

Although this case made a distinction between private email and social media comments, it did not give clarity on the issue where the social media account is restricted from the general public. Strictly applying the principle of this case, one may conclude that posting on a restricted social media page is similar to sending an email to the recipient. If the employee's social media is restricted, this means that what the employee posts are for the eyes of his/her specific "friends" only. What becomes the problem though, is what if the employer becomes aware of the comments made on a restricted social media page – does it mean that the employee's right to privacy is affected? In the above two cases,[29] the Commissioner found the dismissal to be fair because the employees had failed to restrict access to their Facebook accounts. Both cases did not however touch on the issue of the restricted access on the employee's Facebook account. It is therefore not clear whether the employee's right to privacy is affected if access to the social media account is restricted to specific people. As it stands, the employer's access to the employee's social media accounts will be justified if the employee did not restrict access to the comments made on their social

[24] (2011) 32 ILJ 1470 (CCMA).

[25] Par 3.

[26] Par 68.

[27] Par 46, 47, 48, 49, and 50.

[28] Par 51.

[29] *Sedick v Krisray (Pty) Ltd supra* and *Fredericks v Jo Barkett Fashions supra*.

media. This would be the case, even if the employer had accessed the employee's social media – only to confirm what had been said by the public.[30]

3 2 Dismissal for misconduct and the right to freedom of expression

The right to freedom of expression and the issue of bringing the name of the employer into disrepute is a serious legal issue that has an impact on the relationship between the employer and employee. What has become clear is that employees do make comments about their employers on social media. This may be a case where the employee makes comments in general for internet users to see, or it may be a conversation between the employees. However, some of those comments – when viewed by the employer – have the potential to damage the reputation of the employer. Cases have created what can be viewed as guidance if there is a clash between the employee's right to privacy and the social media comments that may damage the reputation of the employer or bring the name of the employer into disrepute.

3 2 1 Media Workers Association of SA obo Mvemve v Kathorus Community Radio[31]

The applicant was dismissed for failure to post an apology on social media after he had posted malicious remarks on Facebook criticising the employer's board for protecting its station manager and for claiming that the manager was a criminal. These remarks were brought to the attention of the employer, and the applicant was charged and later dismissed. The applicant made an application to the CCMA, alleging that the dismissal was substantively unfair.[32] However, the Commissioner dismissed the applicant's allegations and held that the applicant "tarnished the image of the respondent by posting unfounded allegations on Facebook without first addressing them internally".[33] Accordingly, the dismissal of the applicant was held to be substantively fair.[34]

3 2 2 Chemical Energy Paper Printing Wood & Allied Union obo Dietlof v Frans Loots Building Material Trust t/a Penny Pinchers[35]

This case dealt with the issue of racism between the employer and employee. The applicant who was an employee of the respondent had posted comments on his Facebook page alleging racism by his employer.

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[30] See *Fredericks v Jo Barkett Fashions supra*.
[31] (2010) 31 ILJ 2217 (CCMA).
[32] Par 2.
[33] Par 5.7.
[34] Par 6.1.
[35] (2017) 38 ILJ 1922 (CCMA).

The applicant posted remarks on Facebook alleging that the owner, the respondent, had acted in a racist manner toward two long-service employees when he (the owner) deliberately kissed the white female employee on the cheek and hugged the black female employee.[36] When giving evidence, the applicant argued that the post did not mention or have any relevance to the employer.[37] However, on the evidence given by the respondent – through its owner – the remarks referred to the respondent. According to the respondent, although there was no reference to its name, the wording and construction of the comments indicated an incident could be directly linked to the respondent.[38] The pictures posted on Facebook appeared to have been taken at the respondent's premises, and events mentioned in that post were the same set of events that had occurred at the respondent's event.[39]

Although the respondent did not have rules or policies on social media, the Commissioner found that the applicant's dismissal was procedurally and substantively fair.[40] The Commissioner – citing J Grogan[41] – held:

> "to falsely accuse a superior or colleague of being a racist is as deplorable as racism itself. The dismissal of an employee who had done so was ruled to be fair."[42]

In both of the above cases, it is clear that the employee's right to freedom of expression can be limited, if it has the potential to defame or damage the reputation of the employer. If the employee makes remarks on social media, and they are later proved to have the potential of damaging the reputation of the employer, dismissal by the employer may be said to be justified. Whether or not the name of the employer is referenced, as long as the employer can prove that the comments made on social media have a direct link to its name – the employer may dismiss the employee.[43] As long as the comments can bring the name of the employer into disrepute, it appears that the employer may fairly dismiss the employee for those comments.[44]

However, there is a further issue on the employee's freedom of expression and the comments made on social media. In the all of the above cases[45] either the reference was made directly to the name of the employer,

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[36] Par 5.

[37] Par 14.

[38] Par 11.

[39] Par 11 and 14.

[40] Par 28.

[41] Grogan *Workplace Law* 11ed (2014) 259.

[42] Par 22.

[43] See *Chemical Energy Paper Printing Wood & Allied Union obo Dietlof v Frans Loots Building Material Trust t/a Penny Pinchers supra* and *Sedick v Krisray (Pty) Ltd supra*.

[44] See, also, *Dewoonarain v Prestige Car Sales Pty Ltd t/a Hyundai Ladysmith* 2013 7 BALR (MIBC) 12. In this case, the employee had posted remarks on Facebook stating that "working for and with Indians is [the] pits; they treat their own like dirt". The Commissioner found the dismissal to be fair.

[45] *Sedick v Krisray (Pty) Ltd supra*; *Fredericks v Jo Barkett Fashions supra*; *Smith v Partners in Sexual Health (Non-Profit) supra*; *Media Workers Association of SA obo Mvemve v Kathorus Community Radio supra*; *Chemical Energy Paper Printing Wood & Allied Union obo Dietlof v Frans Loots Building Material Trust t/a Penny Pinchers supra*.

or, if not, the employer could prove that there was a link between its name and the derogatory comments made on social media by an employee. These cases did not touch on whether an employee can be dismissed for the derogatory comments made on social media – even if those comments are made in a personal capacity, and they are not related to the employer.

Dismissal of employees in such circumstances is increasing in South Africa. It appears that even if the employee does not name the employer or if there is a link to the name of the employer, the employee may still be dismissed for posting controversial remarks on social media. The media coverage and court cases have shown that posting controversial remarks on social media can lead to the employee being dismissed. In most cases, these controversial statements are based on race and gender differences. This is a problem, because many of these remarks are being made in personal capacities. Below are some examples of dismissible derogatory comments made by employees on social:

Penny Sparrow is a white woman who made derogatory comments about black people – by calling them monkeys. On her Twitter account she posted:

> "These monkeys that are allowed to be released on New Year's eve and New Year's day onto public beaches, towns etc obviously have no education what so ever so to allow them loose is inviting huge dirt and troubles and discomfort to others."[46]

These remarks led to a national outcry calling for Ms Sparrow to be charged for racism. After the incident, Ms Sparrow's employer distanced itself from her views by stating:

> "Comments made by an ex-employee is threatening a company that is built on integrity, morals and values. We are consulting an attorney to deal with this matter and the damage this woman has done to our company … Penny Sparrow's comments are appalling and degrading and this is not someone we align ourselves with."[47]

Justine Sacco was also dismissed after tweeting racist comments. Justine tweeted:

> "Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!"[48]

The employer distanced itself from her and her comments. In its statement, the employer said:

> "The offensive comment does not reflect the views and values of IAC. We take this issue very seriously, and we have parted ways with the employee in question."[49]

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[46] Wick "Twitter Erupts after KZN Estate Agent Calls Black People 'Monkeys'" (04 January 2016) *Mail & Guardian* https://mg.co.za/article/2016-01-04-twitter-erupts-after-kzn-estate-agent-calls-black-people-monkeys (accessed 2019-05-28).

[47] Omar "PennySparrowMustFall: Estate Agent Feels Twitter Wrath after Racist Post" (04 January 2016) *eNCA* https://www.enca.com/south-africa/penny-sparrow-feels-twitter-wrath (accessed 2019-05-28).

[48] Ronson "How One Stupid Tweet Blew Up Justine Sacco's Life" (12 February 2015) *The New York Times Magazine* https://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html (accessed 2019-05-28).

Furthermore, the Hot 91.9 FM Radio station also dismissed its own DJ, after he called Mr Julius Malema “a monkey” live on air. It did not matter that the DJ had apologised; he was still dismissed. In its statement, the employer said:

> “As such, notwithstanding the presenter’s immediate and unreserved apology, the station has forthwith elected to remove him from all involvement with the radio station with immediate effect.”[50]

Jessica Leandra – although not dismissed – lost her sponsors after tweeting derogatory comments about black people. In her response, she retweeted:

> “I tweeted rather irresponsibly about an incident I encountered last night, using a harsh and unkind word about the gentleman who had confronted me with sexual remarks and sounds,” she wrote in her apology … “While most of you would enjoy the opportunity to throw a few vicious words at me, please do understand that I was acting in pure anger and frustration at the time and although we know this is no excuse, it is a lesson learnt and again, I am sincerely apologetic.”[51]

In all these examples, the employees posted comments in their personal capacities. However, because they were viewed as controversial and derogatory comments, these employees were dismissed. The employers only had to concern themselves with their reputation, and they then dismissed the employees concerned.

Not only did the employers dismiss employees for controversial comments, the courts have confirmed that controversial remarks on social media can amount to a dismissible offence. The recent judgments have shown that the courts tend to agree with dismissal if the employee has made controversial comments on social media.

3 2 3 Gordon v National Oilwell Varco[52]

The applicant was charged and dismissed for making racist remarks on social media. After his mother was injured after an ambulance hijacking, the applicant posted Facebook remarks and said:

> “my mom [is] back in hospital again since last night after her ambulance got hijacked by pieces of sh*t k*****s wanting a ride with the ambulance for their f*****g knife stabbing. I am getting fed up with his country. Will it ever come right again, I doubt it maybe just move out of the country.”[53]

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[49] Broderick “Internet Erupts after PR Woman for Media Firm Tweets a ‘Joke’ About Getting AIDS in Africa” (20 December 2013) *BuzzFeedNews* https://www.buzzfeednews.com/article/ryanhatesthis/internet-uproar-erupts-after-pr-woman-for-media-firm-tweets (accessed 2019-05-28).

[50] Sun Reporter “DJ Fired For Calling Juju a ‘Monkey’!” (02 October 2018) *Daily Sun* https://www.dailysun.co.za/News/National/dj-fired-for-calling-juju-a-monkey-20181002 (accessed 2019-05-28).

[51] Marshall “Controversial SA tweets of 2012” (12 December 2012) *Mail & Guardian* https://mg.co.za/article/2012-12-12-controversial-tweets-of-2012 (accessed 2019-05-28).

[52] [2017] 9 BALR 935 (MEIBC).

[53] Par 9.

The evidence given by the employer was that the applicant knew about social media guidelines as he had signed them when started as an employee.[54] In his defence, he argued that the remarks were posted out of despair.[55] However, the Commissioner held that racial slurs are not acceptable in the workplace, and therefore the dismissal of the applicant was fair.[56]

3 2 4 Dyonashe v Siyaya Skills Institute (Pty) Ltd[57]

The Commissioner had to assess whether the applicant's dismissal was fair. The applicant had been dismissed for posting racist comments on Facebook and for bringing the name of the employer into disrepute.[58] The applicant had posted remarks "Kill the Boer, we need to kill these".[59] The respondent – represented by Laura Mace – argued that "kill the boer" was a racist remark that was disturbing, and the applicant had posted this on his Facebook page, which was a public domain.[60] The applicant, on the other hand, argued that "kill the boer" in his understanding did not mean kill the whites – but rather the system that is there to oppress one side.[61] He argued that he did not think that white people would take this as an offence as he had white friends, and people who were close to him did not have a problem.[62]

The Commissioner found that although the applicant neither mentioned the employer's name nor was at work when he posted these comments, there was a nexus between the applicant's conduct and his employment relationship with the respondent, which affected his suitability for employment.[63] The Commissioner held that even if there was no policy, the CCMA Guidelines were sufficient to render the dismissal as being fair.[64] According to the Commissioner the test to be used in the CCMA Guidelines was "whether the employer could fairly have imposed the sanction of dismissal in the circumstances, either because the misconduct on its own rendered the continued employment relationship intolerable, or because of the cumulative effect of the misconduct when taken together with other instances of misconduct".[65]

The dismissal of employees for social media misconduct and controversial remarks is not limited to the above case, as the employee in *Ward v South African Revenue Services*[66] was also dismissed for calling a co-employee a

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54 Par 14.
55 Par13.
56 Par 55 and 61.
57 [2018] BALR 280 (CCMA).
58 Par 7.
59 *Ibid*.
60 Par 16.
61 Par 24.
62 Par 28.
63 Par 46
64 Par 53–56.
65 Par 59.
66 (2018) 27 CCMA 8.37.14.

monkey. The labour court has also confirmed that posting controversial and racist comments on social media is a dismissible offence, as Facebook can be taken to be a quasi-public forum accessible to potentially thousands of Facebook users.[67]

4 ANALYSIS OF THE CURRENT SITUATION

Without a doubt, the employer is always very particular about their reputation. The employer's reputation is and has always been an asset that needs protection, and, if such is negatively impacted – this can cause harm to the employer's business.[68] The question that remains is whether the employers, courts, and commissioners have broadened the scope of dismissing employees for social media misconduct. Although some employers have social media guidelines in their workplace, even in the absence of such guidelines, employees have found themselves dismissed for social media misconduct. Several cases that come before the courts, the CCMA, or bargaining council have taken an approach that it is a dismissible offence for the employee to knowingly post comments on social media – if such remarks negatively affect the employer.

It is clear from the above discussion that despite the employee's subjective belief that the remarks are made in their personal capacity, the objective approach is used to test those remarks. The employee cannot merely escape dismissal on the grounds that the remarks were subjectively seen by that employee as a joke. It also does not matter that the employee had left the workplace and/or was acting in his/her private capacity outside working hours when making the remarks. The employer is entitled to terminate an employee's employment, even if the employee's conduct was outside the workplace – as long as the employer can show the employee's conduct has affected its interests. Even if the employer is without the policies or rules regulating the use of social media by employees, the employee may be dismissed for what may be viewed by the employer as derogatory remarks. It appears that there are certain standards of ethics that are expected of employees, without a need to have such being encompassed in the employer's employment policies. The unavailability of such standards

Furthermore, both the right to freedom of expression and the right to privacy are limited by the employer's reputation. If the comments made on social media have the potential to bring the name of the employer into disrepute, the employee may be dismissed for social media misconduct. Because of this, two arguments are advanced. From a business perspective, protecting the employer's name and business is more important than the comments made by the employee – if such comments can harm the employer's business. Without a doubt, the employees play an important role in the success of the employer's business. Therefore, if they make negative remarks on social media, their remarks may seriously damage the employer's business.

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[67] *Dagane v South African Police* (2219/14) [2018] ZALCJHB (16 March 2018).

[68] Mushwana and Bezuidenhout "Social Media Policy in South Africa" 2014 16 *Southern African Journal of Accountability and Auditing Research* 64.

However, from a human rights perspective, protecting the employer's name even if the employer has no social media rules and guidelines in its workplace – seem to broaden the scope of dismissing employees, especially if the comments are not directed at the employer. Even more, the LRA and Schedule 8 of the Code of Good Practice have provided guidelines on how the employee may be dismissed. In the above examples and cases where the employees were dismissed, it is not apparent how the employer and Commissioner have applied the LRA and Schedule 8 in deciding that the dismissal is fair. What is said by the employer and Commissioner is that the remarks made by the employee have the potential to damage the employer's good name. Therefore, one may conclude that the employer and the Commissioner have indeed broadened the scope of protecting employers. From a human rights perspective, this appears to mean that the good name of the employer is more important than the employee's rights. Surely this has a bearing in a democratic society such as South Africa. If challenged, this could lead to a floodgate of cases which may have a negative effect on South African labour law.

5 RECOMMENDATIONS

This article has shown that social media misconduct and the right to freedom of expression and privacy are clashing in South Africa. Without the proper legislation regulating the use of social media by employees, there will still be problems in South African labour law. It is therefore recommended that legislation regulating social media in South Africa should be implemented. Reddy argues that with legislation regulating social media in South Africa, social media conduct may be improved.[69] In the meantime – while no legislation is in place – employers must have their own in-house guidelines on the use of social media by employees. Once this has been done, the employee should be made aware of such guidelines. Adopting these guidelines may render the dismissal to be unquestionably substantively and procedurally fair. This may be advantageous to both the employer and the employee – because costly litigations can then be avoided.

Similarly, it is recommended that employees should also exercise caution when expressing their views on social media. Without the legislation in place, they are likely to find themselves dismissed, simply for putting the name of the employer into disrepute. Even more so, without the definition and meaning of "putting the name of the employer into disrepute" employees may be dismissed under the circumstances viewed by the employer as putting its name into disrepute. Employees should be aware that with or without the social media policy in place, it is a dismissible offence to post remarks that may be viewed as bringing the name of the employer into disrepute. It does not matter whether those remarks were made in a personal capacity – they are still considered as social media misconduct. If there is a social media policy put in place by the employer, the employees should become well acquainted with that policy, bearing in mind that failure

[69] Reddy "Establishing a Test for Social Media Misconduct in the Workplace" 2018 4 *TSAR* 817.

to comply with the policy may result in a dismissal. Their remarks on social media must be kept to a minimum, bearing in mind the ethics and code of conduct of the employer. It is true that social media is a platform where some people share their opinions. However, an employee must limit what they say on social media – as such thoughts may result in charges of social media misconduct.

6 CONCLUSION

Social media has created a blurred line in terms of what constitutes the "work" and "private life" of an employee when the employee makes remarks on social media. This will likely cause employees to be very sceptical of what to post and what not to post on social media. The question that remains then is whether this makes life difficult for employees. As it stands, every employee who has access to social media runs the potential risk of being dismissed for comments made on social media. The courts, the CCMA, and bargaining councils have found dismissals to be fair where it is proved that the social media misconduct affects the employer. It appears, although it is not explicitly stated, that the courts consider the common law contract of employment duties when dealing with the issue of social media misconduct. These duties include that the employee has a duty to act honestly, in the best interests of the employer, and should not bring the employer's name into disrepute. These duties are wide enough to include any conduct that may be viewed by the employer as social media misconduct. Without the specific required legislation, it appears that if the employee *breaches*[70] these duties, such an employee may be dismissed for social media misconduct. Therefore, it may be said that without the specific legislation, employees should refrain from posting comments that are likely to be viewed as being misconduct. This is irrespective of whether their privacy settings on social media are activated.

[70] An employer may view social media remarks as misconduct, while an employee does not see such remarks as a breach of duties – which then results in a difficult position for both the employer and employee.

THE EFFECTS OF VIOLENT STRIKES ON THE ECONOMY OF A DEVELOPING COUNTRY: A CASE OF SOUTH AFRICA*

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SUMMARY

The issue of violent and lengthy strikes has been a feature of South Africa's industrial relations for a while now. There are no mechanisms in place to curb violent strikes even though their effects are visible in all corners of the Republic. Violent and lengthy strikes have devastating effects on the economy, cause injury to members of the community and non-striking workers, and more particularly poverty as employers would retrench workers if their businesses do not make profit as a result of prolonged non-production. In the mining sector where strikes are a common feature, it has been reported that employers have lost billions of rands through lengthy and violent strikes. The article acknowledges the developments brought about by amendments in the Labour Relations Act, which appears to be short of addressing the situation. The article proposes that if interest arbitration can be introduced into the Labour Relations Act, the situation may change for the better as employers and unions will be compelled to resolve their dispute(s) within a short space of time. It further submits that a strike should be allowed to proceed only if it is lawful and does not involve violence. In addition, the Labour Court should be empowered to intervene in instances where violence has developed and force the parties to arbitration.

1 INTRODUCTION

Economic growth is one of the most important pillars of a state. Most developing states put in place measures that enhance or speed-up the economic growth of their countries. It is believed that if the economy of a country is stable, the lives of the people improve with available resources being shared among the country's inhabitants or citizens. However, it becomes difficult when the growth of the economy is hampered by the exercise of one or more of the constitutionally entrenched rights such as the right to strike.[1] Strikes in South Africa are becoming more common, and this affects businesses, employees and their families, and eventually, the economy. It becomes more dangerous for the economy and society at large

* Based on a paper presented at the Nelson Mandela University Labour Law Conference on "Labour Dispute Resolution, Substantive Labour Law and Social Justice Developments in South Africa, Mauritius and Beyond" from 19–21 July 2019 in Mauritius.

[1] S 23(2) of the Constitution of the Republic of South Africa, 1996.

if strikes are accompanied by violence causing damage to property and injury to people. The duration of strikes poses a problem for the economy of a developing country like South Africa. South Africa is rich in mineral resources, the world's largest producer of platinum and chrome, the second-largest producer of zirconium and the third-largest exporter of coal. It also has the largest economy in Africa, both in terms of industrial capacity and gross domestic product (GDP).[2] However, these economic advantages have been affected by protracted and violent strikes.[3] For example, in the platinum industries, labour stoppages since 2012 have cost the sector approximately R18 billion lost in revenue and 900 000 oz in lost output. The five-month-long strike in early 2014 at Impala Platinum Mine amounted to a loss of about R400 million a day in revenue.[4] The question that this article attempts to address is how violent strikes and their duration affect the growth of the economy in a developing country like South Africa. It also addresses the question of whether there is a need to change the policies regulating industrial action in South Africa to make them more favourable to economic growth.

2 BACKGROUND

When South Africa obtained democracy in 1994, there was a dream of a better country with a new vision for industrial relations.[5] However, the number of violent strikes that have bedevilled this country in recent years seems to have shattered-down the aspirations of a better South Africa. South Africa recorded 114 strikes in 2013 and 88 strikes in 2014, which cost the country about R6.1 billion according to the Department of Labour.[6] The impact of these strikes has been hugely felt by the mining sector, particularly the platinum industry. The biggest strike took place in the platinum sector where about 70 000 mineworkers' downed tools for better wages. Three major platinum producers (Impala, Anglo American and Lonmin Platinum Mines) were affected. The strike started on 23 January 2014 and ended on

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2 In 2014 Nigeria briefly emerged as the continent's largest economy after rebating its GDP calculation, but by the end of 2015 South Africa's GDP had grown to $301 billion at current exchange rates while Nigeria's had declined to $296 billion; Doya "South Africa's Economy Regains Rand as Africa's Biggest on Rand" *Bloomberg* (10 August 2016) https://www.bloomberg.com/news/articles/2016-08-10/south-africa-s-economy-regains-rank-as-africa-s-biggest-on-rand (accessed 2019-01-01). However, the latest figures of the first quarter of 2019 shows that South Africa's GDP has gone down to 3.2% growth, https://www.dailymaverick.co.za/article/2019-06-04-shock-as-sas-first-quarter-economic-growth-shrinks-by-3-2/ (accessed 2019-06-08).

3 As Van Niekerk put it in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers* 2016 (37) ILJ 476 (LC) (UPN) par 37 "[I]t is regrettable that acts of wanton and gratuitous violence appear inevitably to accompany strike action, whether protected or unprotected … A week in the urgent court where employers seek interdicts against strike related misconduct on a daily basis bears testimony to this."

4 Burkahrd "Platinum Pay Strike Costs South Africa R400-millions a Day" https://mg.co.za/article/2014-02-04-platinum-pay-strike-costs-south-africa-36-million-a-day (accessed 2019-02-01).

5 See Preamble to the Constitution.

6 Https://businesstech.co.za/news/business/98727/strikes-cost-south-africa-r6-1-billion/ (accessed 2019-02-02).

25 June 2014. Business Day reported that "the five-month-long strike in the platinum sector pushed the economy to the brink of recession".[7] This strike was closely followed by a four-week strike in the metal and engineering sector. All these strikes (and those not mentioned here) were characterised with violence accompanied by damage to property, intimidation, assault and sometimes the killing of people. Statistics from the metal and engineering sector showed that about 246 cases of intimidation were reported, 50 violent incidents occurred, and 85 cases of vandalism were recorded.[8] Large-scale unemployment, soaring poverty levels and the dramatic income inequality that characterise the South African labour market provide a broad explanation for strike violence.[9] While participating in a strike, workers' stress levels leave them feeling frustrated at their seeming powerlessness, which in turn provokes further violent behaviour.[10]

These strikes are not only violent but take long to resolve. Generally, a lengthy strike has a negative effect on employment, reduces business confidence and increases the risk of economic stagflation. In addition, such strikes have a major setback on the growth of the economy and investment opportunities. It is common knowledge that consumer spending is directly linked to economic growth. At the same time, if the economy is not showing signs of growth, employment opportunities are shed, and poverty becomes the end result. The economy of South Africa is in need of rapid growth to enable it to deal with the high levels of unemployment and resultant poverty.

One of the measures that may boost the country's economic growth is by attracting potential investors to invest in the country. However, this might be difficult as investors would want to invest in a country where there is a likelihood of getting returns for their investments. The wish of getting returns for investment may not materialise if the labour environment is not fertile for such investments as a result of, for example, unstable labour relations. Therefore, investors may be reluctant to invest where there is an unstable or fragile labour relations environment.

3 THE COMMISSION OF VIOLENCE DURING A STRIKE AND CONSEQUENCES

The Constitution guarantees every worker the right to join a trade union, participate in the activities and programmes of a trade union, and to strike.[11] The Constitution grants these rights to a "worker" as an individual.[12] However, the right to strike and any other conduct in contemplation or

[7] Marriam "State Mulls New Strike Laws, Ban on Scab Labour" (2014-08-07) *Business Day.*

[8] "Labour Laws Need Overhaul to Stop Runaway Strike Train" (2014-11) *Business Times* 2.

[9] Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" (2013) 34 ILJ 836 846.

[10] Webster and Simpson "Crossing the Picket Line: Violence in Industrial Conflict" 1990 11(4) *Industrial Relations Journal of SA* 15–32 http://www.csvr.org.za/wits/papers/paperswgs.htm. (accessed 2019-03-18).

[11] S 23(2)(*b*) and (*c*) of the Constitution.

[12] S 23(2)(*c*).

furtherance of a strike such as a picket[13] can only be exercised by workers acting collectively.[14]

The right to strike and participation in the activities of a trade union were given more effect through the enactment of the Labour Relations Act 66 of 1995[15] (LRA). The main purpose of the LRA is to "advance economic development, social justice, labour peace and the democratisation of the workplace".[16] The advancement of social justice means that the exercise of the right to strike must advance the interests of workers and at the same time workers must refrain from any conduct that can affect those who are not on strike as well members of society.

Even though the right to strike and the right to participate in the activities of a trade union that often flow from a strike[17] are guaranteed in the Constitution and specifically regulated by the LRA, it sometimes happens that the right to strike is exercised for purposes not intended by the Constitution and the LRA, generally.[18] For example, it was not the intention of the Constitutional Assembly and the legislature that violence should be used during strikes or pickets. As the Constitution provides, pickets are meant to be peaceful.[19] Contrary to section 17 of the Constitution, the conduct of workers participating in a strike or picket has changed in recent years with workers trying to emphasise their grievances by causing disharmony and chaos in public. A media report by the South African Institute of Race Relations pointed out that between the years 1999 and 2012 there were 181 strike-related deaths, 313 injuries and 3,058 people were arrested for public violence associated with strikes.[20] The question is whether employers succumb easily to workers' demands if a strike is accompanied by violence? In response to this question, one worker remarked as follows:

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13 There is no definition of picketing in the definitions' section of the Labour Relations Act 66 of 1995. The Constitution, however, makes provision for the right to "picket". S 17 of the Constitution provides that "everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petition". Some academics and courts have relied on s 23(2)(*b*) of the Constitution to confer the right to picket on workers. See in this regard, Woolman "Freedom of Assembly" in Woolman, Roux, Klaaren, Stein, Chaskalson, Bishop (eds) *Constitutional Law of South Africa* (2005) 2. See also *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 where the High Court relied on s 23(2)(*b*) of the Constitution to confer the right to picket on workers.

14 Basson *Essential Labour Law* 2ed (2002) 37.

15 The LRA replaced the Labour Relations Act 28 of 1956.

16 S 1 of the LRA.

17 S 213 of the LRA defines strike as "the partial or complete concerted refusal to work, or the retardation 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", s 213 of the LRA.

18 The use of the word "strike" in this study should be interpreted broadly to include a strike and other activities associated with a "strike". These include pickets and even pickets that have developed into demonstrations.

19 S 17 of the Constitution.

20 SAIRR (2013) http://irr.org.za/reports-and-publications/media-releases/Strike%20violence.pdf/.

> "[T]here is no sweet strike, there is no Christian strike … A strike is a strike. [Y]ou want to get back what belongs to you ... you won't win a strike with a Bible. You do not wear high heels and carry an umbrella and say '1992 was under apartheid, 2007 is under ANC'. You won't win a strike like that."[21]

The use of violence during industrial action affects not only the strikers or picketers, the employer and his or her business but it also affects innocent members of the public, non-striking employees, the environment and the economy at large. In addition, striking workers visit non-striking workers' homes, often at night, threaten them and in some cases, assault or even murder workers who are acting as replacement labour.[22] This points to the fact that for many workers and their families' living conditions remain unsafe and vulnerable to damage due to violence. In *Security Services Employers Organisation v SA Transport & Allied Workers Union (SATAWU),*[23] it was reported that about 20 people were thrown out of moving trains in the Gauteng province; most of them were security guards who were not on strike and who were believed to be targeted by their striking colleagues. Two of them died, while others were admitted to hospitals with serious injuries.[24] In *SA Chemical Catering & Allied Workers Union v Check One (Pty) Ltd,*[25] striking employees were carrying various weapons ranging from sticks, pipes, planks and bottles. One of the strikers Mr Nqoko was alleged to have threatened to cut the throats of those employees who had been brought from other branches of the employer's business to help in the branch where employees were on strike. Such conduct was held not to be in line with good conduct of striking.[26]

These examples from case law show that South Africa is facing a problem that is affecting not only the industrial relations' sector but also the economy at large. For example, in 2012, during a strike by workers employed by Lonmin in Marikana, the then-new union Association of Mine & Construction Workers Union (AMCU) wanted to exert its presence after it appeared that many workers were not happy with the way the majority union, National Union of Mine Workers (NUM), handled negotiations with the employer (Lonmin Mine). AMCU went on an unprotected strike which was violent and resulted in the loss of lives, damage to property and negative economic consequences including a weakened currency, reduced global investment, declining productivity, and increase unemployment in the affected sectors.[27] Further, the unreasonably long time it takes for strikes to get resolved in the Republic has a negative effect on the business of the employer, the economy and employment.

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[21] Von Holdt "Institutionalisation, Strike, Violence and Local Moral Orders" 2010 72 *Transformation: Critical Perspectives on Southern Africa* 127–141.

[22] *Mahlangu v SATAWU, Passenger Rail Agency of SA, Third Parties* (2014) 35 ILJ 1193 (GSJ).

[23] (2012) 35 ILJ 1693 (CC).

[24] SABC news 25 May 2006 at 16h00.

[25] (2012) 33 ILJ 1922 (LC).

[26] *SA Chemical Catering & Allied Workers Union v Check One (Pty) Ltd supra* 1933A.

[27] In the mining sector, mining dropped by 4.5% (R12 billion) between June 2012 and March 2013. This resulted in a negative impact on South Africa's GDP and currency depreciation. In 2013, the Fraser Institute downgraded South Africa to 64th out of 96 countries in respect of investor friendliness (Leon (2013) http//politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=427549&sn=Detail&pid=71616 (accessed 2019-02-01)).

3 1 Effects of violent and long strikes on the economy

Generally, South Africa's economy is on a downward scale. First, it fails to create employment opportunities for its people. The recent statistics on unemployment levels indicate that unemployment has increased from 26.5% to 27.2%.[28] The most prominent strike which nearly brought the platinum industries to its knees was the strike convened by AMCU in 2014. The strike started on 23 January 2014 and ended on 24 June 2014. It affected the three big platinum producers in the Republic, which are the Anglo American Platinum, Lonmin Plc and Impala Platinum. It was the longest strike since the dawn of democracy in 1994. As a result of this strike, the platinum industries lost billions of rands.[29] According to the report by Economic Research Southern Africa, the platinum group metals industry is South Africa's second-largest export earner behind gold and contributes just over 2% of the country's Gross Domestic Product (GDP).[30] The overall metal ores in the mining industry which include platinum sells about 70% of its output to the export market while sales to local manufacturers of basic metals, fabricated metal products and various other metal equipment and machinery make up to 20%.[31] The research indicates that the overall impact of the strike in 2014 was driven by a reduction in productive capital in the mining sector, accompanied by a decrease in labour available to the economy. This resulted in a sharp increase in the price of the output by 5.8% with a GDP declined by 0.72 and 0.78%.[32]

South Africa's primary source of income is through employment; the state relies heavily on the income taxes it collects from employed people. The implication is that unemployment has a negative effect on the state while if more people are employed, their income tax will add to the government's coffers. Unemployment means that people are unable to support themselves and their families, conversely the state has an obligation of ensuring that such people sustainable means in the form of social assistance.[33] The state, together with the private sector, bears the responsibility of alleviating poverty in society. Unemployment is a real contributor to poverty. Other factors that contribute to poverty include a general lack of education, lack of relevant skills in certain areas such as science, inequality, inherited past practices and structural problems such as low wages supporting big families, low domestic savings, the ongoing electricity shortage from 2013 to 2015 threatening investors, low levels of business confidence, severe drought, reduced fiscal capacity, and the growing risk of stagflation. In addition, a

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28 Trading Economics "Unemployment Rate" https://tradingeconomics.com/south-africa/unemployment-rate (accessed 2018-08-02).

29 Cheadle *Strikes and the Law* (2017) 26.

30 Bohlmann, Dixon, Rimmer and Van Heerden "The Impact of the 2014 Platinum Mining Strike in South Africa: An Economy-Wide Analysis" ERSA Working Paper 478 7 http://www.econrsa.org/system/files/publications/working_papers/working_paper_478.pdf (accessed 2018-05-03).

31 The Standard Industrial Classification Codes http://www.statssa.ov.za/additional-services /sic/sic.html (accessed 2018-05-04).

32 *Ibid*.

33 S 27(1)(*c*) of the Constitution.

lengthy strike comes with a threat of job losses in vulnerable sectors such as mining, metals and agriculture. It is also believed that protracted strikes contribute towards weakening the country's local currency (the South African rand). All these factors put a strain on the already struggling economy of South Africa.

3 2 Effects on employment

An unprotected strike has a negative effect on employment and may result in the dismissal of employees.[34] In South Africa, it seems that everyone agrees that unemployment is the major economic problem and that government policy needs to address this scourge. The high levels of unemployment could pose a danger as stretches the government's ability to provide people with social services. Generally, the LRA prohibits the dismissal of employees if the reason for their dismissal is participation in a protected strike.[35] However, and despite this prohibition, the employer may dismiss employees if they commit misconduct[36] during a strike or on the basis of operational requirements.[37] Since it is expected that the employer will not make production or profit during a strike as a result of work stoppage, he or she may put forward economic conditions that have turned around since the commencement of the strike as a reason to cut down his or her workforce. In this regard, he or she will attempt to justify dismissal based on operational requirements. In *SACCAWU v Pep Stores*[38] the court held that it is permissible for an employer to retrench employees where their misconduct has given rise to a genuine operational requirement. In order for an employer to justify terminating the contracts of employees for operational requirements, the dominant reason for the dismissal must be that operational requirements are impacting on the survival of the business. In other words, the economic viability of the employer must be at stake.[39] In *Tiger Food Brands Ltd t/a Albany Bakeries v Levy NO*[40] violence was ongoing and the employer considered the threats so great that it closed down the business pending section 189 of the LRA procedure. As with the *Pep Store* case, no solution was found to the anarchic situation, and indications were that such would continue as a concerted effort by the employees. Thus, no alternatives could be found, and retrenchments took place.

Other than dismissal, the "no work no pay" principle applies where employees are on strike. A contract of employment is a contract with reciprocal rights and obligations. The employee is under an obligation to

[34] S 67(5) of the LRA.

[35] If there is compliance with ss 64(1) and 65(1) of the LRA, the strike will be protected and the employer will not be permitted to take action against participating employees unless they commit misconduct.

[36] S 188(1) of the LRA.

[37] *FAWU obo Kapesi v Premier Foods Ltd t/a Blue River Salt River* [2010] BLLR 903 (LC).

[38] (1998) 19 ILJ 1226 (LC).

[39] Whitearnel "Can Unidentified Protected Strikers Engaging in Misconduct be Retrenched? *FAWU obo Kapesi v Premier Foods Ltd t/a Blue River Salt River*" 2011 23 *SA Merc LJ* 269 276.

[40] (2007) 28 ILJ 1827 (LC).

make him or herself available for work, and the employer in return has to remunerate the employee for the work he or she has done or services rendered. The employer is entitled to refuse to pay the employee if the latter refuses to do the work he or she was employed to do.[41] The LRA also emphasises this common law rule by providing that "an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or protected lock-out".[42] Section 67(3) of the LRA does make one exception to this rule (no work no pay) that is "if the employee's remuneration includes payment in kind in the form of accommodation, food and other basic amenities of life, at the request of the employee, the employer may not discontinue payment in kind during a strike or lock out". The LRA does provide, however, that the employer may at the end of the strike recover the monetary value of such remuneration by way of civil proceedings in the Labour Court.[43]

On the question of whether the employer has to provide benefits such as medical aid, pension fund, and a housing subsidy to employees on strike, the Labour Court in *SAMWU v City of Cape Town*[44] answered this question in the negative. The court held that it was not an unfair labour practice for an employer to apply a policy of "no work, no pay, no benefits" because there was no difference between withholding a *pro rata* share of contributions in respect of benefits and withholding remuneration during a strike. This decision does not, however, set a clear precedent because section 5(1) of the LRA states that no person may discriminate against an employee for exercising a right under the Act. This would include the right to strike. The withholding of benefits may be challenged on the ground that the conduct of the employer is contrary to section 5(1) of the LRA and amounts to discrimination.

3 3 Effects on the employer

Strike violence has been described by the International Labour Organisation (ILO) as abuse of the right to strike.[45] The Labour Court has labelled strike violence as "collective brutality".[46] The reasons for the use of these terms in relation to strike violence is the consequence that comes with it such as the scaring away of non-striking employees and replacement labour hired to continue with production while the employer's workforce is out on strike. Therefore, in all instances where violence prevents the engagement of replacement labour or scare away non-strikers from work, the employer is made to suffer an illegitimate increase in collective bargaining power from the side of the strikers. This is not only because violence effectively

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[41] *Coin Security (Cape) v Vukani Guards & Allied Workers Union* (1989) 10 ILJ 239 244J–245A.

[42] S 67(3) of the LRA.

[43] S 67(3)(*b*).

[44] (2010) 31 ILJ 724 (LC).

[45] As Gernigon *et al* in *ILO Principles Concerning the Right to Strike* (1998) 42 state "Abuse in the exercise of the right to strike may take different forms [including] damaging or destroying premises or property of the company and physical violence against persons."

[46] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* (2012) 33 ILJ 998 (LC) par 11.

increases participation in the bargaining process, but also because non-strikers must still be paid as they avail themselves for work.[47] In instances where violence gets completely out of control, it scares the employer into a settlement. Myburgh argues that the perpetuation of violent strikes in the context of protected strikes skews collective bargaining power and takes the form of economic duress.[48] As a result of violence, the employer feels obliged to increase its wage offer or accede to union demands, not because of pressure brought to bear by collective bargaining and strike action *per se*. The effect of this is not to advance economic development in line with the purpose of the LRA.[49] In fact, the strike fuels violence, which then becomes the focal point of the strike. The employer is then placed under economic pressure to conclude a wage agreement at a wage level that does not reflect the forces of supply and demand, but rather the force of violence.[50]

3 4 Effects on customers

The relationship between the business of the employer and its customers is based on loyalty and confidence. The employer is expected to keep this relationship going by supplying goods or deliver services to clients when needed. It is expected that this would take place without disturbance. However, during strikes or conduct in furtherance of a strike, this relationship gets affected since the level of production or service delivery is reduced or does not take place.

It is well known that the continued existence of a business relies on customers' satisfaction with services or goods provided. A business that does not have customers can hardly survive as they are the backbone of the business. If a strike is violent and takes long to resolve, this may chase away customers or clients as the possibility of not getting what they want is high if less or no production takes place. The possibility that customers could shift loyalty to other businesses doing the same business as the employer is high. The end result is that a prolonged strike has the potential of chasing away customers or clients as they may not want to associate themselves with a business environment that poses a risk to their lives. In addition, customers may want to share solidarity with employees and refuse to associate with a business whose employees are on strike. To stop this from taking place, the

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47 It is the employer's duty to provide employees with a safe work environment, and where it fails to do so, the employee is entitled to refuse to perform their duties: *National Union of Mine workers v Driefontein Consolidated Ltd* (1984) 5 ILJ 101 (IC) 135. In these circumstances, against a tender of services, the employer is not relieved of its obligation to pay the employee *Solidarity v Public Health & Welfare Sectoral Bargaining Council* 2014 (5) SA 59 (SCA) par 11 (*citing Johannesburg Municipality v O'Sullivan* 1923 AD 201).

48 Myburgh "The Failure to Obey Interdicts Prohibiting Strikes and Violence (The Implications for Labour Law and the Rule of Law)" 2013 23(1) *CLL* 1 4.

49 S 1 of the LRA.

50 Myburgh (2013) *CLL* 1 5. Along similar lines, Snyman AJ held as follows in *KPMG Road and Earthworks (Pty) Ltd v Association of Mineworkers and Construction Union* (2018) 39 ILJ (LC) 609 par 3 "But where employees behave unlawfully, under the guise of exercising these rights and legitimate objectives, then the entire collective bargaining process is undermined. One is left to ponder the question – was the dispute resolved on the basis on the basis of legitimate collective bargaining, or because of unlawful conduct by employees? This question should never need to have to be considered, as the resolution of disputes by unlawful means is simply untenable and flies in the face of our Constitutional dispensation."

employer and the union need to speed up the process of resolving their dispute through a non-violent mechanism such as a collective bargaining process.

4 HOW TO ADDRESS PROTRACTED VIOLENT STRIKES?

As stated above, a strike that takes an unreasonably long period to get resolved has devastating effects on the economy. It also increases the levels of unemployment, thereby perpetuating poverty with serious effects on the lives of people. The question that arises is how to put a stop to a lengthy strike and protect the economy from shrinking with negative effects on existing jobs.

4 1 Strikes should only be allowed to continue if they are lawful

The definition of "strike" lends itself any obstruction of work that is lawful.[51] So, if workers refuse to undertake "work" that is illegal and unlawful, this will not constitute a strike.[52] Where employees refuse to work in support of an unlawful demand (for example the removal of a supervisor without following due process), this will also not constitute a strike.[53] Therefore, where the action involved does not constitute a strike, participants do not enjoy the protection offered by section 67(1) of the LRA.[54] If the means used by strikers to obstruct work constitute unlawful conduct such as violence, then the conduct will not qualify as a strike, and will thus not be protected.[55] If a strike becomes violent and no longer pursues legitimate or lawful demands, the court should intervene as violent and unruly conduct is the antithesis of the aim of a strike, which is to persuade the employer through peaceful withholding of work to agree to the union's demands.[56] For a court to intervene, Rycroft argues that the following question needs to be asked: "has the misconduct taken place to an extent that the strike no longer promotes functional to collective bargaining, and is therefore no longer deserving of its protected status."[57] The Labour Court in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd*[58]

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[51] S 213 of the LRA.

[52] *Simba (Pty) Ltd v Food & Allied Workers Union* (1997) 18 *ILJ* 558 (LC) 568H–I. See also *SA Breweries Ltd v Food & Allied Workers Union* 1990 (1) SA 92 (A), (1989) 10 ILJ 844 (A) 847C–D.

[53] See *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union* (2009) 30 ILJ 2064 (LC). See also *TSI Holdings (Pty) Ltd v National Union of Metalworkers of SA* (2006) 27 ILJ 1483 (LAC) par 48.

[54] This would be protection against dismissal.

[55] Myburgh "Interdicting Protected Strikes on Account of Violence" 2018 38 *ILJ* 703 716.

[56] *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd supra* par 30. See also *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union supra* par 3.

[57] Rycroft "What Can Be Done about Strike Related Violence" https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_Rycroft.pdf/eda46151-176d-4091-a689-f1042e03e338 (accessed 2019-05-15).

[58] (2016) 37 ILJ 476 (LC).

adopted Rycroft's functionality test which entails that the Labour Court could assume the power to alter the protected status of a strike to unprotected action on the basis of violence.[59] This entails the weighing up of the level of violence against the efforts of the trade union to curb it in order for a court to determine whether a strike's protected status is still functional to collective bargaining.[60]

Rycroft further argues that there is an inseparable link between strikes and functional collective bargaining and justifies this on three grounds. First, the Interim Constitution of South Africa 200 of 1993 provided that "workers have the right to strike for the purposes of collective bargaining."[61] Secondly, strikes must be orderly. And lastly, the strike must not involve misconduct. This he infers from the fact that employees engaged in misconduct can be dismissed irrespective of whether the strike is protected or not.[62] Informed by the decision of *Afrox Ltd v SACWU 2,*[63] Rycroft argues that a strike can lose its protection if it is no longer functional to collective bargaining. So if a strike is no longer functional to collective bargaining, it is bound to lose protection, and those who participate in such activities will face dismissal or an action for damages can be instituted against those responsible.

4 2 Introducing interest arbitration

As stated above, a strike that takes an unreasonably long period of time to get resolved has devastating effects on the business, customers, economy and employment thereby perpetuating poverty which has severe effects on the lives of people. The question that arises is how to put a stop to a strike that is taking too long to get resolved. The article argues that the introduction of interest arbitration could be used to stop strikers from continuing with violent industrial action. Interest arbitration gives the court or similar structure the power to intervene and force the parties to find a solution to their problem. Interest arbitration gives the parties an option to agree on mechanisms that will terminate industrial action once it becomes violent or cause damage to property. This is not yet applicable in South Africa and it is submitted that the LRA needs to be amended to include a provision on interest arbitration.

In Canada, if a strike continues longer than expected with no solution forthcoming, Canadian law provides certain mechanisms for ending the dispute.[64] The Canadian Labour Code confers certain powers on elected

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[59] Par 32.

[60] Van Eck and Kujinga "The Role of the Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 *ILJ* 476 (LC)" 2017 20 *PER/PELJ* 17.

[61] S 27 of the Interim Constitution of SA 200 of 1993. This was, however, not retained in the Constitution of 1996.

[62] Rycroft "What Can Be Done About Strike-Related Violence" 2014 *IJCLLIR* 202. See also s 67 of the LRA.

[63] (1997) 18 *ILJ* 406 (LC).

[64] The Canadian Labour Code of 1985, and Acts of various provinces and territories require collective agreements to make provision for the settlement of disagreements such as grievances and disputes.

officials to intervene where there is a compelling public interest in doing so.[65] Interest arbitration as a remedy is used in periods of prolonged strikes, particularly where a work stoppage has the potential to interfere with "public safety, public health or the general economic health of the nation."[66] The parties to a dispute have to first agree on an arbitrator and if they fail to do so, the Minister of Labour will appoint an arbitrator in terms of legislation.[67] The Minister has the discretion to refer the matter regarding the maintenance of industrial peace to either the Canadian Industrial Relations Board or direct the Board to do what he or she deems necessary as authorised by the Canadian Labour Code.[68] The Minister is also empowered to do what he or she deems expedient to maintain industrial peace and promote conditions favourable to the settlement of industrial disputes.[69]

Borrowing from Canada the concept of interest arbitration, South Africa will have to amend the Labour Relations Act to include such a provision. Interest arbitration gives the parties an option to agree on mechanisms that will terminate industrial action once it becomes violent or cause damage to property. The article suggests that this will assist in reducing the number of protracted strikes and the negative impact that these strikes have on the economy.

However, the introduction of interest arbitration in our labour law will not be easy and will face some challenges. The first challenge is its compatibility with the Constitution. The fact that the introduction of interest arbitration will have the effect of bringing a strike or industrial action to an end has constitutional implications. The right to strike is entrenched in the Bill of Rights.[70] The Constitutional Court has also ruled that it is not for the courts to restrict the scope of collective bargaining tactics which are legitimately robust.[71] Therefore, in order to address the question of whether the introduction and implementation of interest arbitration would be constitutional, the article submits that the answer to this question will have to be found in section 36(1) of the Constitution.[72] To force the parties to abandon their right to strike for arbitration will require compliance with section 36(1). Section 36(1) provides that "any limitation of the right in the Bill of Rights must be in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

Before a limitation of the right to strike or participate in the activities of a strike can be said to be justifiable the factors listed in section 36(1)(*a*)–(*e*)

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65 S 80 of the Canadian Labour Code.

66 Spano "Collective Bargaining under the Canada Labour Code – Remedies when Parties Fail to Resolve Labour Dispute" (2009) http://www.lop.parl.gc.ca/content/lop/researchpublications/prb0846-e.pdf (accessed 2019-03-12) 9. *Greater Toronto Airports Authority* (2005) http://www.canlii.org/en/ca/cirb/doc/2005/2005canlii63057/2005can;ii63057.html (accessed 2019-02-16) 9.

67 S 107 of the Canadian Labour Code.

68 *Ibid.*

69 Spano http://www.lop.parl.gc.ca/content/lop/ researchpublications/prb0846-e.pdf 9.

70 The Bill of Rights is in Chapter 2 of the Constitution.

71 *National Union of Public Service and Allied Workers obo Mani v National Lotteries Board* 2014 (3) SA 544 (CC) 598G–599B.

72 S 36(1) of the Constitution.

have to be taken into account. These factors allow the person or institution that intends to limit the right to weigh the advantages and disadvantages of limiting the right. In considering the advantages and disadvantages of limiting the right to strike, it can be taken into account that interest arbitration as prescribed by the law of general application could be sufficient to meet the situation and constitute the less restrictive means to achieve the purpose of orderly collective bargaining, generally, and of avoiding adverse effects of protracted industrial action.[73] It is submitted that there will be more advantages to ending violent strikes and limiting the right to strike will save the economy compared to allowing the strike to continue with negative consequences on the economy and employees as their loss of wages are inextricably linked to their employer's loss of profit.

The second challenge to the implementation of interest arbitration is that it might be contrary to the International Labour Organisation (ILO) recommendations which provide that where compulsory arbitration prevents strike action, it is contrary to the right of trade unions to organise their activities freely and could only be justified in the public service or essential services sectors.[74]

The third challenge would be that the parties to the dispute will be reluctant to make reasonable attempts to resolve the dispute and leave it to the third party (arbitrator) to resolve the dispute for them. The parties will take extreme positions without any compromises to meet each other under the hope that the arbitrator will come up with a settlement. The disadvantage of relying on a third party will thus affect the ability of the parties to negotiate productively and improve their negotiating skills. This will also have the possibility of prolonging the strike rather than shortening it as it will take time to obtain an arbitrator with the required skills.

Lastly, the concept "lengthy" strike is problematic as it is not clear what would constitute a "lengthy" strike. There is no prescribed maximum period for a strike.[75] It is hoped that if interest arbitration is made law, this will be clearly stated. In the absence of a clear provision to this effect, employers could therefore, potentially approach the Labour Court prematurely. Therefore it is argued that the introduction of interest arbitration will, in the long run, not only serve the interest of the business or the employer as well as the economy, but it may also save the employees from the negative impact that may result from a protracted strike, like the possibility of retrenchments. During a strike, the employer may consider arranging negotiations for retrenchments in terms of section 67(5) of the LRA. This will be a signal to the employees of the devastating effects of the strike on the business. This will also give the parties a warning call to settle their dispute or find ways of ending the strike.

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73 *Ibid.*

74 *ILO Digest* (1996) par 518–521.

75 Budeli *The Impact of the Amendments on Unions and Collective Bargaining* Paper presented at the 27 Annual Labour Law Conference, Sandton Convention Centre Johannesburg, (5–7 August 2014).

4 3 New development in the LRA

A new development has now been ushered into the arena of labour relations in terms of section 150A of the Labour Relations Amendment Act.[76] Section 150A makes provision for a deadlock breaking mechanism for a protracted and violent strike in the form of compulsory arbitration undertaken by a statutory advisory arbitration panel. In terms of this section, there are thus three grounds in which the action can be triggered: (i) if the strike is no longer functional to collective bargaining because it has continued for a protracted period of time and no resolution appears to be imminent; (ii) there is an imminent threat that constitutional rights that may be or are being violated by strikers or their supporters through the threat of use of violence or the threat of or damage to property;[77] or (iii) if the strike causes or has the imminent potential to cause or exacerbate an acute national or local crisis affecting the conditions for the normal social and economic functioning of the community or society. The above provisions in the amended Act give the Director of the CCMA the power to try to force the parties back to the negotiating table to try and mediate the dispute. This is, however, short of being regarded as interest arbitration since no provision forces the parties to resolve their dispute.

Forcing the parties to go for arbitration will be a justifiable limitation of the right to strike since violent strikes affect the rights of innocent individuals and the economy. The Constitution provides that “everyone has the right to live in an environment that is free from all forms of violence from either public or private sources”.[78] It is therefore clear that a strike which is dominated or accompanied by intimidation, and other unlawful behaviour, limits the rights of others to live in an environment that is free of violence. The right to strike cannot weigh more heavily than other rights in the Bill of Rights. This is clearly stated in the Constitution, which provides that “everyone is equal before the law and has the right to equal protection and benefit of the law”.[79] The right to strike can then be limited by the rights of others and by important social concerns such as public order, their effect on the economy, safety, health, and democratic values.[80] So, it is important that the union or participants in a strike keep it peaceful to avoid the negative consequences that may arise should violence and destruction of property occur.

4 4 Empowering the Labour Court to stop or suspend a violent strike

In *Jumbo Products v NUMSA,* the court held that a strike “is the ultimate good of society and accordingly a court should be slow to interfere with the

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76 Act 8 of 2018.

77 In *Gri Wind Steel South Africa v AMCU* (C561/17) (2017) ZALCCT 60 (23 November 2018) par 18, Steenkamp J commented that this proposed amendment was motivated by the fact that violence and contempt for the rule of law have reached alarming levels.

78 S 12(1)(*c*) of the Constitution.

79 S 9(1).

80 Currie & De Waal *The Bill of Rights Handbook* (2013) 150.

process of industrial action".[81] However, a court should interfere when the union fails to show that it had any legitimate interest of [its members] in mind.[82] In South Africa, the Labour Court has exclusive jurisdiction on all matters affecting labour.[83] Section 69(12) of the Labour Relations Amendment Act[84] (LRAA) gives the Labour Court powers to grant an urgent interim relief if there is a variation on the picketing rule. A variation on the picketing rule may include instances where picketers commit misconduct such as violence. To deal with such acts, the article argues that in addition to the powers given to the Labour Court in terms of the LRAA, it should be given more powers that will allow it to intervene where there is a disregard for the rule of law and where strikes become violent or otherwise dysfunctional to collective bargaining.[85] It seems that the legislature has responded to this call by enacting the LRAA. In terms of the LRAA, the Labour Court can suspend industrial action in certain circumstances. The LRAA is not clear on what would constitute grounds for suspending a picket or industrial action. It is believed that if the strike is accompanied by violence that would constitute a valid ground for suspending a strike or conduct in furtherance of a strike such as a picket. This means that a union will be allowed to remedy a polluted industrial action by suspending a picket and perhaps resume it later. It would be advisable for the union to advise its members about their unlawful behaviour and take action against those responsible for wrongdoing. The union must also put up measures to deal with violence in case it erupts again.

It is clear that one of the grounds for ordering the union to suspend a strike or picket is when it becomes violent or cause injury to people or damage to their property. The new law makes it easy for affected people to approach the Labour Court for an order to suspend a strike or picket. It is assumed that the court will look at the degree of violence when making a determination to suspend or not suspend a strike. In Australia, the Fair Work Commission (FWC) is empowered to stop or terminate a strike that has degenerated into violence or threatens peace and order in society. There is not much evidence that is required for the FWC to act swiftly against violent industrial action as long as proof is offered to the effect that public peace is in danger, it would be sufficient for the FWC to suspend or terminate industrial action. Where an offence is committed, action can be brought against the individual perpetrator(s).[86] In a situation where the act was committed by a group of people, the issue of identification of the actual wrongdoer is a problem. To overcome this problem, the Fair Works Act[87] (FW Act) put in place measures to prevent industrial action by employees from becoming violent or causing damage to property. The Act empowers

81 (1996) 17 ILJ 859 (W) 878.
82 *Ibid*.
83 S 157(1) of the LRA.
84 Act 6 of 2014.
85 Botha and Germishuys "The Promotion of Orderly Collective Bargaining and the Effective Dispute Resolution, the Dynamic Labour Market and the Powers of the Labour Court (2)" 2017 80 *THRHR* 531 551.
86 *Dollar Sweet (Pty) Ltd v Federated Confectioner Association of Australia* (1986) VR 383; *R v Commissioner of Police (Tas), ex-parte North Broken Hill Ltd (Trading as Associated Pulp and Paper Mills)* (1992) 1 Tas R 99.
87 Fair Works Act of 2009.

the FWC, which is tasked with enforcing these measures, to issue an order to suspend or prevent industrial action that is "happening, or is threatening, impending or probable" in the course of an industrial dispute.[88] The FWC is also empowered to terminate a bargaining period involving a protected action on the grounds of significant harm.[89] A bargaining period entails a period during which the application to negotiate terms of employment is lodged with the FWC in terms of the law.[90]

In this regard, a proposal can be made in this article for the Labour Court to intervene and suspend industrial action that is accompanied by violence. When making the order, the Labour Court should take the following factors into account: the extent to which the protected industrial action threatens to damage the ongoing viability of a business carried on by the person; the disruption in the supply of goods or services to an enterprise or business; and the failure of the employees to fulfil their contractual duties in terms of the contract of employment with the employer which result in economic loss.

This is echoed by Cheadle when he states that it would be possible where the action is "accompanied by egregious conduct".[91] On the question of how will this work in practice, the article proposes that the affected party may lodge an urgent application to the Labour Court in terms of section 158(1)(*a*)(iv) to declare a strike or conduct in furtherance or contemplation of a strike not functional to collective bargaining and therefore unprotected as a result of damage and chaos and anarchy it has caused. On the basis of evidence provided before the court, including the degree of violence, the court may exercise its discretion to declare or not declare the strike unprotected. Most importantly, the task of the court will be to determine if the strike is still functional to collective bargaining or not. If the answer is in the negative, chances are that it will grant an order declaring the strike unprotected and the consequences for participating in an unprotected strike will follow.

4 5 Alternatively, hold the convening union liable for violent conduct

It is believed that if a convening union is held liable for the conduct of members, this will serve as a deterrent for future misconduct by members of the union. Taking into account the high levels of violent strikes prevailing in South Africa, the effective application by our courts of such liability is necessary. This necessity is further corroborated by the negative impact that violent strikes have on the international image and economy of South Africa as investors may be hesitant to do business in the country.[92] In several instances where cases have been brought against unions for damage

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[88] S 423 of the FW Act.

[89] S 423(2) of the FW Act.

[90] S 229 of the FW Act.

[91] Cheadle, Thompson and Le Roux "Reform of Labour Legislation Needed Urgently" (2011-11-15) *Business Day*.

[92] See "Warning on the Effect of Violent Strikes to the Economy" http://bit.li/2hi0xxp (accessed 2018-03-15); "Worsen South Africa's Economic Situation – Aveng CEO" http://bit.ly/2hsVo3J (accessed 2019-05-15).

caused by members during a strike, the Labour Court has found them liable. In *SATAWU v Garvas*[93] a gathering (pursuant to a strike) was held in Cape Town in May 2006 and organised by the *South African Trade & Allied Workers Union (SATAWU)* in protest against certain issues affecting the security industry. The gathering complied with the initial procedures prescribed by the Regulation of Gatherings Act[94] (RGA), in that the union was granted permission by the local authority and that it had appointed about 500 marshals to manage the movement of the crowd. It apparently advised its members to refrain from any unlawful and violent conduct and requested the local authority to clear the roads of vehicles and erect barricades along the prescribed route on the day of the gathering. Despite all these attempts by the union, the demonstration got out of hand. In the union's own words it "descended into chaos" with extensive damage to vehicles and shops along the route.[95] Several people were also injured. The total damage caused to property (private and owned by the City of Cape Town) was estimated at R1.5 million. Consequently, claims for damages were instituted against *SATAWU* in terms of section 11(1) of the RGA.

The union denied the claims for damages and relied on the provisions of section 11(2)(*b*) of the RGA which reads that the convenors of a gathering cannot be held responsible if the damages were "not reasonably foreseeable". The union alleged that if it were to be held liable, the defence in section 11(2)(*b*) would be rendered incoherent and irrational. The union argued that this part of the provision should be removed so that the defence becomes "real". The Constitutional Court had to consider whether the defence afforded by section 11(2) was as illusory and unattainable as the union argued. It held that the defence in section 11(2) could be interpreted to:

> "provide for the statutory liability of organisations, so as to avoid the difficulties experienced with the common law remedy, that is, proving the existence of a legal duty on the organisation to avoid harm; afford the organiser a more comprehensive defence, allowing it to rely on the absence of 'reasonably foreseeability' and the taking of reasonable steps as a defence against liability; and place the onus on the defendant to prove this defence, instead of requiring the plaintiff to prove the defendant's wrongdoing and fault."[96]

Regarding the meaning of "reasonable steps to prevent the danger", the court held:

> "[T]here is an interrelationship between the steps that are taken by an organiser on the one hand and what is reasonably foreseeable on the other. The section requires that reasonable steps within the power of the organiser must be taken to prevent an act or omission that is reasonably foreseeable. If the steps taken at the time of planning the gathering are indeed reasonable to prevent what was foreseeable, the taking of these preventive steps would render that act or omission that subsequently caused riot damage reasonably unforeseeable. Both sections 11(2)(*b*) and 11(2)(*c*) would be fulfilled."[97]

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93 (2011) 32 ILJ 2426 (SCA).
94 Act 205 of 1993.
95 *SATAWU v Garvis supra* 2429H.
96 *SATAWU v Garvas* (2012) 33 *ILJ* 1593 (CC) 1605E–F.
97 *SATAWU v Garvas* (2012) 33 *ILJ* 1593 (CC) 1606C–D.

After considering a number of factors, the court confirmed the ruling of the Supreme Court of Appeal which had held the convening union (SATAWU) liable for the damage caused to vendors by demonstrators.[98] The court found that section 11(2) was rational. The limitation of the right to freedom of assembly was found to be reasonable and justifiable in terms of the limitation clause in section 36(1) of the Constitution. The limitation was held to serve a legitimate purpose of protecting members of society, including those who do not have the resources or capacity to identify and pursue the perpetrators of riot damage and get to seek compensation. The union was ordered to pay damages to the victims.

In *Mangaung Local Municipality v SAMWU*[99] the court haled that where a trade union has a collective bargaining relationship with the employer, and its members embark on an unprotected strike – of which the union is aware but in which it has, without just cause, failed to intervene – the union will be held liable in terms of section 68(1)(*b*) to compensate the employer for any loss incurred as a result of the strike.

In *In2Food (Pty) Ltd v Food & Allied Workers Union*,[100] the court argued as follows:

> "The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands off the violent actions of their members … These actions undermine the very essence of disciplined collective bargaining and the very substructure of our labour relations regime."[101]

In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*,[102] the applicant had claimed an amount of R15 million from the union for losses suffered as a result of a strike convened by the union. The amount ended up being reduced by the court to R100 000.[103] During the course of the court proceedings, three things were held to be prerequisites for section 68(1)(*b*) to apply. First, the strike or lock-out, or conduct in support of a strike must be unprotected. Secondly, the applicant seeking to use this section must have suffered loss as a result of the strike or lock-out or conduct in furtherance of a strike. Thirdly, the party against whom the claim is made must have participated in the strike or committed acts while furthering the strike.[104] The union was ordered to pay the said amount in monthly instalments of R5 000.[105]

In *Algoa Bus Company v SATAWU,*[106] the unions went on an unprotected strike which affected the respondent's transport operations on most of its routes. The applicant quantified the loss caused by the strike as R1.4 million. It then claimed compensation from the respondent unions, namely the South

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98 *SATAWU v Garvas* (2012) 33 *ILJ* 1593 (CC) 1633F.

99 [2013] 3 BLLR 268 (LC).

100 (2013) 34 ILJ 2589 (LC).

101 *In2Food (Pty) Ltd v Food & Allied Workers Union supra* 2591H–I. See also *Security Services Employers' Organisation v SATAWU* (2007) 28 ILJ 1134 (LC).

102 *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (2001) 22 ILJ 2035 (LC).

103 *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union supra* 2045I.

104 *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union supra* 2042G–H.

105 *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union supra* 2046A.

106 2015 (36) ILJ 2292 (LC).

African Transport and Allied Workers Union (SATAWU) and the Transport, Action, Retail & General Workers Union (TARGWU). The court found the strike to be unprocedural, premeditated and had caused loss to the applicant.[107] The court considered the provisions of section 68(1)(*b*) of the LRA and ordered that the unions pay "just and equitable" compensation for the loss suffered which means compensation which the court considered to be "fair". An amount of R1.4 million was payable in monthly instalments of R5,280 (payable by the union) and R214.50 (payable by every member by way of a salary deduction).[108]

5 CONCLUSION

The right to strikes is important in a democratic country such as South Africa. However, it becomes difficult if such strikes take place too often, damaging the economy and loss of jobs which are the main sources of income in many families. Various sectors are affected by the effects of violent and lengthy strikes. Most importantly, the economy is affected with the result that poverty becomes the consequence. Therefore, the issue of numerous strikes which are also violent needs to be addressed by including interest arbitration to compel parties to resolve their issues and empower the Labour Court to intervene and suspend the strike or picket. In Australia, the Fair Works Commission is empowered to terminate industrial action where it is seen that the economy may be affected due to prolonged strikes. This article argues that interest arbitration can be added into the LRA to make it easy for the affected parties to approach the Labour Court to suspend violent industrial action. Adopting this route will prevent the loss of many jobs as a result of the business not making profit and effect retrenchments. If interest arbitration is made law in South Africa there will be more advantages to strikes than we currently have.

[107] *Algoa Bus Company v SATAWU supra* 2295C.
[108] *Algoa Bus Company v SATAWU supra* 2296J–2297A.

MENTAL ILLNESS, HARASSMENT AND LABOUR LAWS: SOME THOUGHTS ON HARASSMENT BY EMPLOYEES SUFFERING FROM MENTAL ILLNESS*

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SUMMARY

Section 23 of the Constitution of the Republic of South Africa, 1996 provides that everyone has the right to fair labour practices. Section 9 of the Constitution prohibits unfair discrimination directly or indirectly against anyone on one or more grounds, including among others disability. In terms of section 6(1) of the Employment Equity Act (EEA), no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including among others disability or on any other arbitrary ground. Section 6(1) applies to employees, which includes applicants; but it is only limited to conduct occurring within the scope of an "employment policy or practice". In *Marsland v New Way Motor & Diesel Engineering* (2009) 30 ILJ 169 (LC), the court concluded that discrimination based on the fact that a person suffers from a mental health problem, has the potential to impair the fundamental dignity of that person as a human being, or to affect them in a comparably serious manner. Consequently, discrimination based on mental illness must be treated as a prohibited ground of discrimination. However, as it was pointed out in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), it may in some instances be justified to discriminate on the ground of mental illness, if it is proved that the discrimination is based on an inherent requirement of a job. Section 15 of the EEA requires that, when the employer implements affirmative action measures, he/she must make reasonable accommodation for people from designated groups, in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer. Section 1 defines "reasonable accommodation" as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment". Section 6(3) of the EEA provides that harassment is a form of discrimination and is prohibited among others on the ground of disability or any other arbitrary ground. Harassment is also a form of misconduct. The employer is required to take reasonable steps to prevent harassment and failure to do so, the employer is liable for such harassment. Where an employee who has a mental illness, commits an act of harassment against another employee, the employer should take into account its duty to reasonably accommodate the offending employee, the duty to take steps to prevent harassment

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* Based on a paper presented at the Nelson Mandela University Labour Law Conference on "Labour Dispute Resolution, Substantive Labour Law and Social Justice Developments in South Africa, Mauritius and Beyond" from 19–21 July 2019 in Mauritius.

and the fact that it may be automatically unfair to dismiss an employee for misconduct which was committed because of mental illness.

1 INTRODUCTION

Dismissal of an employee on the grounds of mental illness is automatically unfair in terms of the Labour Relations Act (LRA).[1] In *Jansen v Legal Aid SA*,[2] the Labour Court found that where an employer dismisses an employee, suffering from a mental illness, the dismissal would be automatically unfair; if such misconduct was inextricably linked to the mental illness. The court found that the employer has a duty to accommodate the offending employee.

Harassment is a form of misconduct. Where an employee, who has a mental illness commits acts of harassment, how should the employer handle such misconduct, taking into account that it has a duty to provide a safe working environment and a duty to accommodate employees who have a mental illness? This submission will explore the legal implications in this regard.

In order to comprehensively explore the problem, it will be necessary first to define mental illness. The prohibition on unfair discrimination on the ground of disability and the employer's duty to reasonably accommodate an employee suffering from mental illness will be discussed. The implications of *Jansen v Legal Aid SA*[3] on harassment cases will then be explored. This will be done, taking into account the liability of the employer for harassment in the workplace.

2 DEFINING MENTAL ILLNESS

Swanepoel[4] points out that it is very difficult to define the concept of mental illness. She makes the following observation in making that point:

> "This concept, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations. Mental illnesses have been defined by a variety of terms, such as distress, disadvantage, disability, inflexibility, irrationality, and statistical deviation. Each is a useful indicator for a mental illness, but none is equivalent to the concept, and different situations call for different definitions."[5]

The Mental Health Care Act[6] (MHCA) defines mental illness as a positive diagnosis of a mental health-related illness in terms of accepted diagnostic criteria made by an authorised mental health care practitioner.[7] The MHCA requires that there must be a positive diagnosis, made by a mental health care practitioner, in terms of accepted diagnostic criteria. The Employment

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1 55 of 1996.

2 (2018) 39 ILJ 2024 (LC).

3 *Supra.*

4 Swanepoel "Legal Aspects With Regard to Mentally Ill Offenders in South Africa" 2015 18(1) *PER* 3238.

5 *Ibid.*

6 17 of 2002.

7 See s 1 of the Mental Health Care Act 17 of 2002.

Equity Act[8] defines mental illness as a form of disability.[9] The EEA refers to mental illness as a "mental impairment".[10] Mental impairment is defined as "a clinically recognised condition or illness that affects a person's thought processes, judgment or emotions".[11]

It is submitted that the MHCA and the EEA do not provide a definitive answer as to what constitutes mental illness. Further, they do not prescribe which diagnostic criteria are accepted to determine what mental illness is.[12] However, in practice, the World Health Organisation's (WHO) ICD-10 *Classification of Mental and Behavioral Disorders – Clinical Descriptions and Diagnostic Guidelines* and the DSM-5 are routinely relied upon as diagnostic tools.[13] The DSM-5 defines mental disorder as "a clinically significant behavioural or psychological syndrome or pattern that occurs in an individual and that is associated with present distress or disability or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom".

The phrase "mental defect" is also used instead of mental disorder or mental illness and it refers to a condition where the person has significantly below average intellectual functioning, which is accompanied by significant limitations in several areas of adaptive functioning such as communication, social/interpersonal skills and self-direction.[14] In *S v Stellmacher*,[15] the court defined "mental illness" or "mental defect" as a pathological disturbance of a person's mental capacity. Swanepoel[16] defines mental illness as a disorder (or disease) of the mind that is judged by experts to interfere substantially with a person's ability to cope with the demands of life on a daily basis. Generally, mental illness will include but is not limited to, anxiety and depression, agoraphobia and panic disorder, mood affective disorders, and schizophrenia.[17]

The diagnosis of mental illness must be made by a mental health care practitioner.[18] The MHCA defines a mental health care practitioner as a psychiatrist, medical practitioner or nurse, occupational therapist, psychologist or social worker trained to provide mental health care services.[19]

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8 55 of 1998.

9 See s 1 of the Employment Equity Act 28 of 1998. See also Code of Good Practice on Employment of Persons with Disabilities.

10 *Ibid*.

11 Clause 5 of the Code of Good Practice on Employment of Persons with Disabilities.

12 Landman and Landman *A Practitioner's Guide to the Mental Health Care Act* (2014) 12.

13 *Ibid*.

14 See Tredoux, Foster, Allan, Cohen and Wassenaar *Psychology and Law* (2005).

15 1983 (2) SA 181 (SWA) 187.

16 Swanepoel 2015 *PER* 3239.

17 WHO's ICD-10 Classification of Mental and Behavioral Disorders – Clinical Descriptions and Diagnostic Guidelines.

18 S 1 of the MHCA.

19 *Ibid*.

3 EMPLOYMENT OF A MENTALLY ILL EMPLOYEE

3 1 Prohibition of discrimination

Section 23 of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that everyone has the right to fair labour practices. Section 9 of the Constitution prohibits unfair discrimination directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

In terms of section 6(1) of the EEA, no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including, *inter alia*, disability,[20] or on any other arbitrary ground. Section 6(1) applies to employees, which includes applicants; but it is limited to conduct occurring within the scope of an "employment policy or practice".[21] In *Hoffmann v South African Airways*,[22] the court found that the prohibition of unfair discrimination is necessitated by the recognition that under the Constitution, all human beings must be accorded equal dignity. Human dignity is impaired when a person is unfairly discriminated against.[23] When determining the unfairness of the discrimination, it is important to look at various factors including the position of the victim of discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.[24] The determining factor regarding unfair discrimination is its impact on the person discriminated against.[25]

In *Marsland v New Way Motor & Diesel Engineering,*[26] the court considering whether discrimination on the basis of mental illness was fair, found that discrimination based on the fact that a person suffers from a mental health problem, has the potential to impair the fundamental dignity of that person as a human being, or to affect them in a comparably serious manner.[27] Therefore, discrimination based on mental illness must be treated

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[20] This includes persons suffering from a mental illness. See Ngwena "Deconstructing the Definition of 'Disability' Under the Employment Equity Act: Social Deconstruction" 2006 *SAJHR* 613 on a comprehensive discussion of the definition of disability in terms of the EEA.

[21] Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw *Labour Relations Law: A Comprehensive Guide* (2011) 575. The EEA defines "employment policy or practice" to include, advertising and selection criteria; appointment and the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; job assignments; the working environment and facilities; training and development; performance evaluation systems; promotion; transfer; demotion; disciplinary measures other than dismissal; and dismissal.

[22] *Supra* par 27.

[23] *Hoffmann v South African Airways supra* par 27.

[24] *Ibid.*

[25] *Ibid.*

[26] *Supra.* See also *Harksen v Lane* NO 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) on the test for discrimination.

[27] *Marsland v New Way Motor & Diesel Engineering supra* 193D–F.

as a prohibited ground.[28] In *EWN v Pharmaco Distribution (Pty) Ltd*,[29] the court frowned upon the dismissal of an employee who has a mental illness, for refusing to submit to medical testing. The court found that the dismissal based on refusal of an employee, as a person with a bipolar condition, to undergo a medical examination, which she would not have been required to undergo, but for her condition was an act of unfair discrimination in terms of section 6 of the EEA.[30]

However, as it was pointed out in *Hoffmann v South African Airways*,[31] it may, in some instances be justified to discriminate on the grounds of disability (including mental illness), if it is proved that the discrimination is based on an inherent requirement of the job.[32] Grogan[33] points out that the purpose of section 6(2)*(b)* of the EEA is to recognise that, notwithstanding the need to eradicate discrimination from the workplace, there may be situations in which possession or lack thereof of one or more of the listed grounds may be relevant to certain work. He goes further to state that the ground must be linked to the inherent requirement of the job.[34]

Du toit *et al*[35] point out that the EEA does not indicate what test should be used to determine whether an inherent requirement exists. The authors suggest that the notion of the inherent requirement of a job should be tested against the following criteria:[36]

(a) It must be a permanent feature of the job;

(b) It must be integral to the job; that it cannot be changed without materially altering the job itself; and

(c) It must be essential to the performance of the work in question.

In *Whitehead v Woolworths (Pty) Ltd*[37] the court found that the concept of inherent requirement of a job implies that the indispensable attribute must be job-related. The court rejected the suggestion that the requirement of uninterrupted job continuity was an inherent job requirement.[38] The court observed that this was a distortion of the concept of inherent requirement of

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28 *Ibid.*

29 (2016) 37 *ILJ* 449 (LC) par 49.

30 *EWN v Pharmaco Distribution (Pty) Ltd supra* par 49. The court also observed that “The stigmatising effect of being singled out on the basis of an illness that she was managing, notwithstanding the absence of any objective basis for doubting her ability to perform, is obvious. The act of requiring her to submit to the examination in the circumstances was also an act of unfair discrimination in terms of s 6 of the Employment Equity Act.”

31 Supra.

32 See s 6(2)(*b*) of the EEA, which provides that “it is not unfair discrimination to– distinguish, exclude or prefer any person on the basis of an inherent requirement of a job”. See Also ILO Convention 111, which provides that “[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination”.

33 Grogan *Dismissal, Discrimination & Unfair Labour Practices* (2007) 107.

34 See article 1 of the ILO Convention 111.

35 Du Toit *et al Labour Relations Law* 604.

36 Du Toit *et al Labour Relations Law* 608.

37 (1999) 20 ILJ 2133 (LC) par 37. The *Woolworths* judgment was reversed on appeal, but the majority held for the company for different reasons.

38 *Whitehead v Woolworths (Pty) Ltd supra* par 37.

a job.[39] If the job can be performed without the particular requirement, such requirement cannot be regarded as inherent to the job, and therefore it is not protected.[40]

The Labour Court has taken the approach of interpreting the phrase "inherent requirement of the job", in a manner which militates against an expansive reading of the phrase, because "any legislatively formulated justification of discrimination constitutes, in effect, a limitation on the constitutionally entrenched right to equality".[41]

It is accepted that the following would not amount to an inherent requirement of the job:[42]

(a) Evaluation of the person's competency based on the stereotypes of the group that the person belongs to.
(b) Requirements based on preferences of the employer and clients.
(c) The requirement that the job be performed in a particular way, when it may be performed in different ways.
(d) Requirements based on the ability to perform light or heavy work.

In the context of dismissal for misconduct, section 187(1)(*f*) of the LRA,[43] provides that dismissal is automatically unfair if the reason for the dismissal is that the employer directly or indirectly, unfairly discriminated against the employee on the ground of disability. The court in *Jansen v Legal Aid SA*,[44] deciding whether the dismissal of an employee who has a mental illness (depression), for misconduct, amounted to an automatically unfair dismissal in terms of section 187(1)(*f*), found that where the dismissal is based on conduct which is inextricably linked to mental illness, the dismissal will be automatically unfair.[45]

3 2 Reasonable accommodation

Section 15 of the EEA requires that, when the employer implements affirmative action measures, he/she must make reasonable accommodation for people from designated groups[46] in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer. Section 1 of the EEA defines "reasonable accommodation" as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment". Section 15 of the EEA recognises

[39] *Ibid*.
[40] *Ibid*.
[41] See *Independent Municipal & Allied Workers Union v City of Cape Town* (2005) 26 ILJ 1404 (LC) par 101.
[42] See Grogan *Employment Rights* (2014) 243. See also *IMATU v City of Cape Town* 1141A.
[43] 66 of 1995.
[44] *Supra*.
[45] *Jansen v Legal Aid SA supra* par 50–53.
[46] "*Designated groups*" means black people, women and people with disabilities who (*a*) are citizens of the Republic of South Africa by birth or descent; or (*b*) became citizens of the Republic of South Africa by naturalisation (i) before 27 April 1994; or (ii) after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.

that when law is applied in a neutral manner, it may have discriminatory consequences on persons with disabilities.[47]

The definition of reasonable accommodation above is in line with the International standard. The United Nations Convention on the Rights of Persons with Disabilities, 2007 (UNCRPD) defines reasonable accommodation as a "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".[48] Article 5(3) of the UNCRPD provides that in order to promote equality and eliminate discrimination, states parties must take all appropriate steps to ensure that reasonable accommodation is provided to persons with disability. The UNCRPD further provides that state parties must ensure that reasonable accommodation is provided to persons with disabilities in the workplace.[49]

Further giving effect to the provisions of the UNCRPD above, item 6 of the Code of Good Practice on Employment of Persons with Disabilities (the Disability Code) in terms of the EEA provides that employers must reasonably accommodate the needs of persons with disabilities.[50] The purpose of reasonable accommodation is to "reduce the impact of the impairment on the person's capacity to fulfil the essential functions of a job".[51]

The Disability Code makes it clear that the requirement of reasonable accommodation applies to applicants and employees with disabilities who are suitably qualified for the job.[52] The obligation to make reasonable accommodation may arise when an applicant or employee voluntarily discloses a disability or when it is reasonably self-evident to the employer.[53] The nature of the accommodation will depend on the individual, the degree and nature of impairment and its effect on the person, as well as on the job and the working environment and includes:[54]

(*a*) Adapting existing facilities to make them accessible to persons with disabilities;

(*b*) Adapting existing equipment or acquiring new equipment including computer hardware and software to make it accessible to persons with disabilities;

(*c*) Reorganising workstations;

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[47] *HM v Sweden* Communication 3/2011 (committee on the rights of persons with disabilities). See also Grobbelaar-du Plessis and Nienaber "Disability and Reasonable Accommodation: *HM v Sweden* Communication 3/2011 (committee on the rights of persons with disabilities)" 2014 30 *SAJHR* 366 and *MEC for Education Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC).

[48] Art 2 of the UNCRPD.

[49] Art 27(1)(*i*) of the UNCRPD.

[50] Item 6.1 of the Code of Good Practice on Employment of Persons with Disabilities 2015. In terms of Item 6.2 the aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job.

[51] Item 6.1 of the Code of Good Practice on Employment of Persons with Disabilities 2015.

[52] Item 6.3 of the Code of Good Practice on Employment of Persons with Disabilities 2015.

[53] Item 6.4 of the Code of Good Practice on Employment of Persons with Disabilities 2015.

[54] Item 6.9 of the Code of Good Practice on Employment of Persons with Disabilities 2015.

(*d*) Changing training and assessment materials and systems;
(*e*) Restructuring jobs so that non-essential functions are reassigned;
(*f*) Adjusting working conditions, including working time and leave; and
(*g*) Providing specialised supervision, training and support for persons with disabilities in the workplace.

Where the employee's action amounts to a misconduct and such misconduct is linked to the mental illness, which the employer is aware of, the employer has a duty to reasonably accommodate the employee and failure to do so will amount to unfair discrimination and/or unfair dismissal.[55]

The employer is not obliged to accommodate a qualified applicant or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer.[56] There is no hard and fast rule as to what constitutes undue hardship, and each case has to be determined on its own facts.[57] If the employer cannot reasonably accommodate the disabled employee without unjustifiable hardship, the employer may dismiss the employee.[58] The Disability Code defines "unjustifiable hardship" as an action that requires significant or considerable difficulty or expense from the employer.[59] The factors that may be considered in deciding whether the reasonable accommodation would cause unjustifiable hardship include, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.[60]

The Labour Court in *Standard Bank of SA v Commission for Conciliation, Mediation & Arbitration*[61] recognised that unjustifiable hardship means "[m]ore than mere negligible effort".[62] Similar to the notion of reasonable accommodation, the concept of unjustified hardship also imports a proportionality test.[63] Some hardship is envisaged, and a minor interference or inconvenience does not come close to meeting the threshold, but a substantial interference with the rights of others does.[64] To succeed with the claim for unjustified hardship, the employee has to prove special circumstances.[65] Considering the limits of reasonable accommodation, the arbitrator, in *National Education Health & Allied Workers Union on behalf of Lucas and Department of Health (Western Cape)*,[66] made the following observation:

55 *Jansen v Legal Aid SA supra*.
56 Item 6.11 of the Code of Good Practice on Employment of Persons with Disabilities 2015. Item 6 (12) defines unjustified hardship as "action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business."
57 *Standard Bank of SA v Commission for Conciliation, Mediation & Arbitration* (2008) 29 *ILJ* 1239 (LC).
58 *Ibid*.
59 Item 6 of the Code of Good Practice on Employment of Persons with Disabilities 2015.
60 *Ibid*.
61 *Supra*.
62 *Standard Bank of SA v Commission for Conciliation, Mediation & Arbitration supra* par 98.
63 *Ibid*.
64 *Ibid*.
65 *Ibid*.
66 (2004) 25 *ILJ* 2091 (BCA) par 33.

> "It would seem that in deciding what is reasonable depends on the circumstances of the workplace and the employee. The employer and the employee should adopt a collaborative problem-solving approach to modify employment practices to give the employee with the disability opportunities for job performance that would be similar, if not equal to a similarly situated employee who does not have any disabilities. How much and what kind of adjustments are 'reasonable' is difficult to determine and I do not consider I need to determine that now. The goal is ultimately to facilitate greater retention and employment for people with disabilities. Of course one would have to consider the extent, the purpose, arrangements of the accommodation and the employer's resources."

The employer is only obliged to accommodate an employee with a disability if the employee is a "suitably qualified person".[67] Section 20(3) of the EEA provides that a person may be suitably qualified for a job as a result of any one of, or any combination of that person's formal qualifications, prior learning, relevant experience, or capacity to acquire, within a reasonable time, the ability to do the job. The employer is obliged when determining whether the person is suitably qualified, to consider the factors listed in section 20(3) and make a determination based on one or a combination of those factors.[68]

4 HARASSMENT IN THE WORKPLACE

Section 6(3) of the EEA provides that harassment is a form of discrimination and is prohibited on the listed grounds or any other arbitrary ground. Pretorius *et al*[69] argue that this requires implementing harassment policies with sufficient preventative measures and instituting effective procedures and mechanisms for dealing with harassment in the workplace.

The EEA[70] and the LRA[71] do not provide a definition of harassment. However, the direction as to what harassment is may be found in the definitions provided in The Protection from Harassment Act (the Harassment Act)[72] and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).[73] PEPUDA defines harassment as:[74]

67 Pretorius, Klinck and Ngwena *Employment Equity Law* (2018) 6–4. See also Item 7.2.1 of the Code of Good Practice on Employment of Persons with Disabilities 2015.

68 S 20(4) of the EEA.

69 Pretorius *et al Employment Equity Law* 6–4.

70 In the context of sexual harassment, item 4 of the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (Sexual Harassment Code) defines sexual harassment as an unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace. Item 4 further requires that such unwelcome conduct of a sexual nature, must be viewed in light of– whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation; whether the sexual conduct was unwelcome; the nature and extent of the sexual conduct; and the impact of the sexual conduct on the employee. Where an employee has an affair or sexual relationship with a manager or a co-worker it will not amount to sexual harassment because it embarrasses the employer. See *G v K* 1988) 9 ILJ 314 (IC) and *Steynberg v Coin Security Group (Pty) Ltd* (1998) 19 ILJ 304 (LC).

71 66 of 1995.

72 17 of 2011.

73 4 of 2000.

74 See s 11 of PEPUDA.

> "unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to
>
> (a) sex, gender or sexual orientation; or
>
> (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group."

This definition does not apply to the workplace. The provisions of PEPUDA do not apply to persons covered by the provisions of the EEA.[75]

The Harassment Act provides a comprehensive definition of harassment. The Harassment Act is not specifically directed towards the workplace, but its ambit is wide enough to include them. Landman and Ndou argue that the Harassment Act adds to the remedies available to an employee for non-sexual and sexual harassment in terms of the EEA and the LRA.[76] In *Mnyandu v Padayachi*[77] the court agreed with Landman and Ndou's observation. The court found that the Harassment Act has application and may prove useful in the workplace environment as it enhances the remedies for harassment in the workplace available under other legislation.[78]

The definition of harassment in terms of the Harassment Act is broad enough to include stalking and bullying; this can be done verbally or through electronic devices.[79] Landman and Ndou argue that section 9(5) of the Harassment Act provides four defences, namely whether the conduct constituting harassment was engaged–[80]

> "(a) for the purpose of detecting or preventing an offence;
>
> (b) to reveal a threat to public safety or the environment;
>
> (c) to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or
>
> (d) to comply with a legal duty."

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75 See s 5(3) of PEPUDA.

76 Landman and Ndou "The Protection from Harassment Act and its Implications for the Workplace" 2013 22(9) *CLL* 81 87.

77 [2016] 4 All SA 110 (KZP).

78 *Mnyandu v Padayachi supra* par 42.

79 See s 1 of the Harassment Act. Harassment is defined as–

"directly or indirectly engaging in conduct that the respondent knows or ought to know–

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably–

(i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or

(b) amounts to sexual harassment of the complainant or a related person.' 'harm' means any mental, psychological, physical or economic harm.

80 Landman and Ndou 2013 *CLL* 85.

However, the authors acknowledge that these defences are not true defences in the sense that if the party proves them or one of them it will defeat the application.[81] These defences are factors that must be taken into account in addition to any other factors for the purpose of deciding whether the conduct of a respondent is unreasonable as referred to in paragraph (a) of the definition of harassment.[82] However, these factors may be weighty factors as compared to the other factors.[83]

The High Court of South Africa has had the opportunity to consider the definition of "harassment" in terms of the Harassment Act. In *Mnyandu v Padayachi*,[84] the respondent had been granted a protection order in terms of section 2(1) of the Harassment Act against the appellant. The respondent had alleged that the appellant had harassed and subjected him to slander, false allegations and defamation in an email she had sent to their colleagues, where they were both employed. The respondent sought a protection order because the adverse impact of the false allegations reached beyond the workplace into his personal life and was detrimental to his reputation in the community in which he lived. He persisted that the appellant had unreasonably, and in bad faith, sent the email containing false and malicious allegations against him.

The court had to decide whether the appellant's conduct in sending the email in which the appellant made false allegations against the respondent constituted harassment in terms of the Harassment Act. The court noted that given the comprehensive nature of the Harassment Act, it was necessary for the court to define "harassment".[85] The court warned that if the term "harassment" was given a broad definition, the consequences were a plethora of applications premised on conduct not contemplated by the Harassment Act.[86] However, a restrictive or narrow interpretation may unduly compromise the purpose of the Harassment Act and the constitutional protection it offers.[87] After adopting a purposive approach and conducting a comparative analysis, the court concluded that although the definition does not refer to "a course of conduct" the conduct engaged in must necessarily either have a repetitive element which makes it oppressive and unreasonable, thereby tormenting or instilling serious fear or distress in the victim; alternatively the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences, as in the case of a single protracted incident when the victim is physically stalked.[88] It is submitted that the interpretation provided in *Mnyandu v Padayachi*[89] is a correct interpretation of the term harassment.

81 *Ibid*.
82 *Ibid*. See also s 9(5) of the Harassment Act.
83 Landman and Ndou 2013 *CLL* 85.
84 *Supra*.
85 *Mnyandu v Padayachi supra* par 44.
86 *Ibid*.
87 *Ibid*.
88 *Mnyandu v Padayachi supra* par 68.
89 *Supra*.

5 DUTY OF THE EMPLOYER TO PROVIDE A SAFE WORKING ENVIROMENT AND LIABILITY OF THE EMPLOYER FOR HARASSMENT

The employer owes a common law duty to its employees to take reasonable care for their safety.[90] The failure to comply with the duty may result in liability in terms of delict or in terms of the Compensation for Occupational Diseases and Injuries Act, 1993 (COIDA).[91]

Section 60 of the EEA provides that after harassment is reported against an employee, the employer must consult all the relevant parties and take steps to eliminate the harassment. If the employer fails to take reasonably practicable steps, and it is proved that an employee has contravened the provisions of the EEA, the employer will also be deemed to have contravened the provisions of the EEA.[92]

Section 60 has created confusion with respect to what needs to be proved in order to place liability on the employer for failure to take reasonable steps to prevent harassment.[93] Much of the confusion is whether in terms of section 60(4), the phrase "to ensure that the employee would not act in contravention of [the EEA]" means that the employer take steps in advance to eliminate future conduct or refers to steps the employer must take immediately following a report of harassment.[94] In *Mokoena v Garden Art (Pty) Ltd*,[95] the Labour Appeal Court took the approach that the employer will only be liable if the employer knew about the harassment and failed to take proper steps to prevent or eliminate or prohibit such harassment. This suggests that the employer would only be liable if it failed to eliminate future conduct of harassment.

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90 *Van Deventer v Workmen's Compensation Commissioner* 1962 (4) All SA 64 (T); 1962 4 SA 28 (T).

91 See Landman and Ndou "Some Thoughts on Developments Regarding the Recovery of Damages for Pure Psychiatric or Psychological Injury Sustained in the Workplace" 2015 36 *ILJ* 2460; *Hirsch Appliance Specialists v Shield Security Natal* (*Pty*) *Ltd* 1992 (1) All SA 84 (D); and *Media 24 Ltd v Grobler* 2005 (3) All SA 297 (SCA). See also Whitcher "Two Roads to an Employers Vicarious Liability for Sexual Harassment: *Grobler v Naspers BPK en 'n Ander* and *Ntsabo v Real Security CC*" 2004 25 *ILJ* 1907.

92 S 60(2)–(4) of the EEA. See also *Piliso v Old Mutual Life Assurance Co (SA)* (2007) 28 ILJ 897 (LC).

93 *Liberty Group Ltd v MM* [2017] 10 BLLR 991 (LAC) par 35. In this case the employee resigned because she had been sexually harassed by her manager. After incidents of sexual harassment, the employee reported the sexual harassment during a discussion for her salary. The employee was informed to consult the harassment policy and determine whether the conduct amounted to sexual harassment and if so to determine the procedure for lodging a complaint. The employee obtained the forms to lodge the complaint but did not submit such forms after he received a call from her manager informing her that he was aware that she had been in contact with human resources. The employee attempted to resigned, but withdrew the resignation letter after she was convinced by her team leader. After two weeks no steps had been taken to investigate the matter. The employee decided to resign and referred the matter to the CCMA.

94 *Liberty Group Ltd v MM supra* par 36.

95 [2008] 5 BLLR 428 (LC) par 42–43.

The Labour Appeal Court, in *Liberty Group Ltd v MM*[96] found that the employer will be liable if the employer failed to take reasonable steps to prevent the harassment and have also failed to do everything reasonably practicable to prevent continued harassment.[97] The court accepted the requirement for liability of the employer, as stated in *Potgieter v National Commissioner of the SA Police Service*.[98] The court recognised the following requirements:[99]

a) The harassment complained of must have been committed by another employee.
b) The harassment constitutes unfair discrimination.
c) The harassment took place in the workplace.
d) The harassment was immediately brought to the attention of the employer.
e) The employer was aware of the incident of harassment.
f) The employer failed to consult all relevant parties, or take the necessary steps to eliminate the conduct.
g) The employer failed to take all reasonable and practical measures to ensure that employees did not act in contravention of the EEA.

The court in *Liberty Group Ltd v MM*,[100] concluded that the fact that the court in *Potgieter v National Commissioner of the SA Police Service*[101] used the phrase "did not act in contravention of the EEA", instead of "would not act in contravention of the EEA" as provided in section 60(4) of the EEA indicates that the employer would be liable if it failed to take reasonable steps to prevent harassment, after the harassment was brought to its attention, even if no further act of harassment occurs. This is a different approach to that taken in *Mokoena v Garden Art (Pty) Ltd*.[102] The Labour Appeal Court found that this is the interpretation which is in harmony with the purpose of the EEA.

6 MENTALLY ILL EMPLOYEE AS A PERPETRATOR OF HARASSMENT

In addition to being a form of discrimination in terms of the EEA, harassment is also a well-established form of misconduct justifying dismissal.[103] Serious incidents of harassment or continued harassment after warnings are dismissible offences and the employer must follow the procedure set out by

96 *Supra*.
97 Par 37.
98 (2009) 30 *ILJ* 1322 (LC) par 46.
99 *Liberty Group Ltd v MM supra* par 38. See also *Potgieter v National Commissioner of the SA Police Service supra*.
100 *Supra*.
101 *Supra*.
102 *Supra*.
103 Botes "Sexual Harassment as a Ground for Dismissal: A Critical Evaluation of the Labour and Labour Appeal Courts' Decisions in *Simmers v Campbell Scientific Africa*" 2017 *TSAR* 761.

the Code of Good Practice Regulating Dismissal (the Dismissal Code).[104] In the context of sexual harassment, unwanted sexual attention becomes sexual harassment and misconduct if:[105]

> "(a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
> (b) The recipient has made it clear that the behaviour is considered offensive; and/or
> (c) The perpetrator should have known that the behaviour is regarded as unacceptable."[106]

It is submitted that the same approach would be taken in respect of any other form of harassment. It is not required that the harassment amounts to a criminal offence in order to qualify as a dismissible offence.[107] What is important is that the requirements stated above are proved. However, in some instances, dismissal may not be an appropriate sanction. In those instances principles of corrective or progressive discipline must be followed.[108]

In instances where an employee who has a mental illness is a harasser in the workplace, how should the employer handle such a misconduct?[109] The

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[104] Item 7(5) of the Harassment Code. See also *Campbell Scientific Africa (Pty) Ltd v Simmers* [2016] 1 BLLR 1 (LAC).

[105] Item 3 of the Harassment Code. See also *National Union of Metalworkers of South Africa obo Botha / Welfit Oddy (Pty) Ltd* [2016] 2 BALR 109 (MEIBC).

[106] See *UASA obo Zulu / Transnet Pipelines* [2008] 5 BALR 415 (Tokiso), where the arbitrator found that employees of any status should be aware that serious misconduct is not tolerated, even if they are unable to read their employer's disciplinary rules and sexual harassment can never be justified on the basis that it is part of a "culture".

[107] See *Media 24 Ltd v Grobler* [2005] 7 BLLR 649 (SCA); *Reddy v University of Natal* [1998] 1 BLLR 29 (LAC); *Pretorius v Britz* [1997] 5 BLLR 649 (CCMA); *UASA obo Zulu / Transnet Pipelines supra* and *Campbell Scientific Africa (Pty) Ltd v Simmers supra*.

[108] *Maepe and Commission for Conciliation, Mediation & Arbitration* (2002) 23 *ILJ* 568 (CCMA). See also item 3(2)–(3) of the Code of Good Practice: Dismissal which provides "(2) the courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings. (3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction are the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offenses".

[109] This submission does not in any way suggest that the fact that a person suffers from a mental illness means that the persons will commit an act of harassment or violence. Mental illness on its own may not lead to violence or harassment. Hiday, in analysing the connection between mental illness and violence, concludes that mental illness on its own does not lead to violence. However, certain factors together with mental illness may lead to some form of violence. These factors include: mentally ill persons being victims of violence from members of their close network and the larger social environment with both major mental illness and violence through the structured types of strains, events, situations, and individual experiences. For severe mental illness or even active psychosis to lead to violence, social factors must intervene. Hiday clearly explains the link between mental illness and violence in the following manner: "[S]uggesting that severe mental illness is coincidental to or indirectly associated with violence rather than being a direct cause. Violence by severely mentally ill persons is often produced by the co-morbidity of substance

recent judgment in *Jansen v Legal Aid SA*,[110] the Labour Court may give direction on how the employer should respond to misconduct by an employee who has a mental illness. In *Jansen v Legal Aid SA*,[111] the employee was employed as a paralegal. Until 2010, when he was diagnosed with depression, he was an excellent employee and received performance awards. The employee continued to receive treatment and the employer was, at all times, aware of the employee's mental health. However, the employer did not do anything other than placing the employee on its wellness programme. His divorce, disputes with the employer on overtime payments and deductions for maintenance made his mental health condition worse. As his condition worsen, the employee was charged with, *inter alia*, gross insolence in that he turned his back in a disrespectful manner and walked away while his managers, were engaging with him about his absence; and refusal to obey a lawful and reasonable instruction in that he refused to conduct a prison visit after being specifically instructed to do so by his manager. At his disciplinary hearing, the employee argued that he committed the misconduct while suffering from a mental illness. The chairperson rejected the defence. The employee was found guilty and was dismissed.

The employee approached the Labour Court arguing that his dismissal was automatically unfair because it was based on the ground of disability, and it also amounted to unfair discrimination in terms of the EEA. The court noted that the employer was aware that the employee was suffering from a disability and that placed a duty on the employer to reasonably accommodate the employee and instead of dismissal, the employer should have instituted an incapacity enquiry.[112] The employer should have, in deciding to dismiss, considered the circumstances under which the misconduct occurred and the effect of the employee's mental illness on his conduct.[113] The court found that the conduct of the employer in ignoring the employee's mental health had potential to impair the employee's fundamental human dignity and, accordingly, falls within the grounds prohibited by section 187(1)(*f*) of the LRA.[114] The court concluded that the employee's misconduct was inextricably linked to his mental condition and therefore, was dismissed because of his mental illness.[115]

The court reached this decision taking into account the evidentiary burden placed on the employer and the employee. The employee led adequate evidence to indicate that he had suffered from depression and the respondent was, throughout, aware of his mental illness.[116] Therefore, the employee made out a prima facie case and, thus, discharged the evidential

abuse/dependence and/or ASP/psychopathy, which are themselves caused by social factors. In other cases, violence arises out of tense social situations." See Hiday "Understanding the Connection Between Mental Illness and Violence" 1997 20(4) *International Journal of Law and Psychiatry* 399 412.

[110] *Supra*.

[111] *Supra*.

[112] *Jansen v Legal Aid SA supra* par 43.

[113] *Ibid*.

[114] *Jansen v Legal Aid SA supra* par 44.

[115] *Jansen v Legal Aid SA supra* par 50.

[116] *Jansen v Legal Aid SA supra* par 51.

burden to show that the reason for his dismissal was on account of his mental illness.[117] It is submitted that the case in *Jansen v Legal Aid SA*,[118] clearly indicates that where the employee commits an act of harassment, dismissal will be automatically unfair if the conduct was because of the mental illness. The employer will have the duty to accommodate the employee. It is recognised that, in *Jansen v Legal Aid SA*,[119] the employee was not charged with harassment. However, the same principle would be applicable because in this case the employee was charged with a misconduct.

7 CONCLUSION

Where an employee has a mental illness, the employer is required to reasonably accommodate the employee. Failure to accommodate amounts to unfair discrimination. The duty to accommodate arises if the employer is

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117 *Ibid*. See also *SACWU v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) par 32 where the court found that: "The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will be merely one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not be utilised here (compare *S v Mokgethi* 1990 (1) SA 32 (A) at 39D–41A; *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34). The first step is to determine *factual* causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not render the dismissal automatically unfair; the next issue is one of *legal* causation, namely whether such participation or conduct was the "main" or "dominant", or "proximate" or "most likely" cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 40). I would specifically venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue … Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)*(a)*. If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further." In *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) par 24–25 the court explaining the test observed that: "In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal". Further in *State Information Technology Agency Ltd v Sekgobela* (2012) 33 ILJ 2374 (LAC) par 15, the court reiterated the test and stated that: "In cases where it is alleged that the dismissal is automatically unfair, the situation is not much different save that the evidentiary burden to produce evidence that is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place rests on the applicant (employee). If the applicant succeeds in discharging his evidentiary burden then the burden to show that the reason for the dismissal did not fall within the circumstances envisaged by s 187(1) of the LRA rests with (employer). It is evident therefore that a mere allegation that there is a dismissal is not sufficient but the employee must produce evidence that is sufficient to raise a credible possibility that there was an automatically unfair dismissal."

118 *Supra*.

119 *Supra*.

aware of the disability. This may be because the employee has disclosed the disability or the disability was reasonably self-evident to the employer. The nature of the accommodation will depend on the circumstances of the particular case. Where the accommodation requires significant or considerable difficulty, the employer will be excused from reasonably accommodating the employee.

When faced with harassment perpetrated by an employee who has a mental illness, the EEA and the LRA provides various provisions that the employer must take into account to escape liability for harassment and to avoid a claim for automatically unfair dismissal. The EEA prohibits unfair discrimination on the grounds of disability, which includes mental illness. Harassment is a form of discrimination against a victim, and it is prohibited in terms of the EEA. The employer may be liable for the harassment, where it fails to take reasonable steps to prevent such harassment. The employer will be liable if the harassment was brought to its attention and it failed to take reasonable steps to prevent it, even if no further act of harassment occurs.

Harassment is also a form of misconduct. Under certain circumstances, harassment may be a dismissible offence and the reasonable step that the employer is required to take, to prevent harassment, may be to institute disciplinary proceedings against the offending employee. Where the offending employee has a mental illness, dismissal of such an employee would amount to an automatically unfair dismissal if he/she committed the misconduct because of the mental illness. In terms of *Jansen v Legal Aid SA*,[120] the employee is required to reasonably accommodate such an employee. However, when the reasonable accommodation requires significant or considerable difficulty, the employer has no duty to accommodate the offending employee and such dismissal may be fair. Repeated incidents of harassment by an employee who has a mental illness may be an indication that it would be unjustifiably hard for the employer to reasonably accommodate the employee. A serious act of harassment together with the requirement to provide a safe working environment, and the possible liability of the employer may also be an indication that reasonable accommodation would be unjustifiably hard for the employer. However, this will depend on the circumstances of the case. The court, *Jansen v Legal Aid SA*,[121] also suggested that, in such cases the employer may also institute an enquiry for incapacity.

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[120] *Supra.*
[121] *Supra.*

TOWARDS A FAIR HEARING FOR ALL EMPLOYEES: A CASE OF PROBATIONARY EMPLOYEE'S IN KENYA AND THE RIGHT TO BE HEARD PRIOR TO DISMISSAL

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SUMMARY

An employer may require a newly hired employee to serve a reasonable period of probation to establish whether or not his or her performance is of an acceptable standard before permanently engaging the employee. Even so, the current provisions relating to termination of probationary employees under the Employment Act, 2007 (EA) remains a source of concern. Currently, an employer may terminate the employment of a probationary employee at will and without affording such employee an opportunity to be heard. The *status quo* has received firm approval by the Employment and Labour Relations Court accentuating that employers are immune from claims of unfair termination of a probationary employee. This article argues that for termination to be considered procedurally fair whether during a probation period or not, it should be preceded by an opportunity for an employee to state a case in response to the charges levelled against him or her. This article highlights that all laws in Kenya, including the EA are subject to the Constitution, particularly article 41(1) of the Constitution which guarantees "every person" the right to fair labour practice. Equally, article 27 of the Constitution states that everyone is equal before the law and has a right to equal protection and benefit of the law. Allowing employers' the freedom to terminate employment without following due process certainly open up the floodgates for abuse of the primary purpose of probation. The mere fact that a contract of employment is labelled as "probationary contract" should not be used as a licence by employers to erode the constitutionally entrenched labour rights. The primary purpose of any good law is to advance the achievement of equity and fairness at the workplace. This can only be achieved by protecting vulnerable and marginalised employees such as probationary employees who participate in unpredictable forms of employment. This article maintains that prominence should be on the existence of an employment relationship and fair labour practice as opposed to the existence of a conditional contract of employment. The existence of an employment relationship should serve as the main "port of entry" through which all employees access the rights and protection guaranteed by labour legislation.

1 INTRODUCTION

There is an increasing trend for employers in Kenya to employ new employees on the basis of a probationary period. Unfortunately, in some instances, these employers have little understanding of the meaning of probation. It is common amongst Kenyan employers that because of the conditional nature of the probationary employment, they are at liberty to terminate the employment without having to comply with the rules of natural justice. In the same way, employers frequently believe, wrongly, that some of the labour law rights do not have to be complied with. In terms of labour law, a probationary employee is one who has a contract of employment; the continuation of which is conditional on whether the employee demonstrated satisfactory ability to carry out the responsibilities stipulated under the job description.[1] The essence of a probationary appointment is to test the employee's suitability for a particular job over a reasonable, mutually agreed period of time.[2] That is the only legitimate purpose of a probationary period.[3] The period is not to be used by an employer for any other improper motive such as to deprive employees' permanent employment[4] or deny a probationary employee of his or her fundamental rights and basic conditions and terms of employment provided for under the EA.[5] But while this describes the purpose of a probationary period, this article seeks to critically discuss the impact of the provisions of the EA dealing with the circumstances where an employer seeks to terminate an employee's appointment during probation.[6]

One particular right usually not complied with is the right to be heard before termination. As will be seen below, this derives from the provisions of the EA as well as decisions made by the Employment and Labour Relations Court which provide employers with immunity against any unfair termination claims made by probationary employees.

[1] Grogan *Workplace Law* 11ed (2014) 301.

[2] Abrahams, Govindjee, Van der Walt, Calitz and Chicktay *Labour Law in Context* 2ed (2017) 154. See also *Mercy Njoki Karingithi v Emrald Hotels Resorts & Lodges Ltd* 2014 28 eKLR (E&LRC), *Abraham Gumba v Kenya Medical Supplies Authority* 2014 46 eKLR (E&LRC), *Carole Nyambura Thiga v Oxfam* 2013 42 e-KLR (E&LRC) and *Kenya Union of Journalists v the Standard Group Limited* 2009 43 eKLR (E&LRC). It is important to note that suitability may not necessarily relate only to the employee's ability to do the job, but may also include other aspects such as the employee's character, his general attitude towards the job, as well as his ability to get along with other employees, Van Niekerk, Christianson, McGregor, Smith and Van Eck *Law@work* 3ed (2015) 194 and Grogan *Workplace Law* 301.

[3] Israelstam "Probation is Not the Easy Way Out For Employers" (2016) 1 https://www.labourguide.co.za/most-recent/872-probation-is-not-the-easy (accessed 2019-09-23). See also *George Kabue v Nokia Siemens Networks* 2014 eKLR (E&LRC).

[4] Schedule 8 Item 8 of the Labour Relations Act 66 of 1995 of South Africa (as amended); Abrahams *et al Labour Law in Context* 154 and Van Niekerk *et al Law@work* 194.

[5] The Employment Act, 2007 (EA). See also *Mercy Njoki Karingithi v Emrald Hotels Resorts & Lodges Ltd* 2014 9 eKLR (E&LRC). The abuse of probation is strictly prohibited. Abuse occurs for instance where an employer engages successive employees on probation (the probationer is dismissed prior to engaging another probationer and so forth) or putting employees on successive fixed term contracts under the guise of probation.

[6] S 41, s 42 and s 47 of the EA.

2 APPLICATION OF INTERNATIONAL LAW IN KENYA

International law forms an important benchmark for evaluating domestic legislation.[7] Kenya has been a member of the ILO since 13 January 1964 and continues to perform its obligation as a member state.[8] To this end, the country has ratified a total of 50 ILO Conventions which include 7 out of 8 fundamental Conventions, 3 out of 4 Governance Conventions (Priority) and 40 out of 177 Technical Conventions.[9] The Kenyan Constitution[10] declares in peremptory terms that the general rules of international law shall form part of the law of Kenya and that any treaty or Convention ratified by Kenya shall form part of the Law of Kenya.[11] The rules set out in international labour standards give content to the constitutional principles.[12] In *Veronica Muthio Kioka v Catholic University of Eastern Africa*, the court emphasised the importance of transforming Kenya from a dualistic[13] state where national law prevailed over international law to a monistic state where national laws are on an equal footing with international law.[14] This is a contrast from the previous dualist approach under the repealed Constitution.[15] What is noteworthy is that when interpreting and applying the EA, the court, is duty-bound to consider international law not only for the reason that the Constitution requires it, but also because of the obligation flowing from the ILO Constitution as a member state.[16]

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7 ILO 2011 International Trading Centre, Use of International Law by Domestic Courts, Compendium of Court Decisions 3.

8 ILO "Country Profile" https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11003:0::NO:3 (accessed 2019-05-12).

9 ILO "Ratifications for Kenya" https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103315 3 (accessed 2019-05-12).

10 The Constitution of the Republic of Kenya, 2010 (the Constitution).

11 Art 2(5) of the Constitution. See also art 2(6) of the Constitution, *Mitu-Bell Welfare Society v Attorney General* 2011 eKLR 15 (HC), *John Kabui Mwai v Kenya National Examination Council* 2011 6 eKLR (HC) and *Okwanda v The Minister of Health and Medical Services* 2012 5 eKLR (HC).

12 *Re the Matter of Zipporah Wambui Mathara* 2010 eKLR (E&LRC) 3–4. See also Oduor "The Status of International Law in Kenya" 2014 2 *Africa Nazarene University Law Journal* 98.

13 Marian "The Dualist and Monist Theories: International Law's" 2007 *The Juridical Current* 24. Dualism is generally dualism refers to a system in which international law is treated and separately observed from the domestic laws of a State. Monism, can be described as the assumption that domestic laws and international laws are one and the same, and indeed, that they carry the same gravity in the local jurisdiction that applies this system. Following the promulgation of the Constitution, Kenya became a monist state, meaning, in essence, that all other international treaties that Kenya has ratified would now become domestic laws and would carry the same force as the Constitution.

14 *David Njoroge Macharia v Republic* 2011 eKLR (E&LRC) 15. See also *Veronica Muthio Kioka v Catholic University of Eastern Africa* 2010 eKLR (IC) 17–18 and Kabau and Njoroge "The Application of International Law in Kenya Under the 2010 Constitution: Critical Issues in the Harmonisation of the Legal System" 2011 44 *Comparative and International Law Journal of Southern Africa* 293–294.

15 The Constitution of the Republic of Kenya, 1963.

16 Art 21(4) of the Constitution stipulates that "the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms".

2 1 Convention No. 158 and Recommendation No. 166 concerning termination of employment

Generally, this Convention was adopted by the governing body of the ILO to address developments in the field of labour relation that had occurred in many countries particularly relating to the termination of employment at the will of the employer for untested reasons.[17] The essence of the Convention is to codify the elementary principles of equity and law at the international level. The Convention articulates in compulsory terms that

> "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."[18]

Besides, the foregoing Convention provides that:

> "the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."[19]

The spirit of article 7 is to rectify the common law position which disregarded the rules of natural justice, discussed below, in terminating an employee's contract of employment. In other words, article 7 seeks to ensure that an employer provides an employee with an opportunity to exonerate himself regarding the allegations levelled against him.

2 2 ILO Employment Relations Recommendation 198 of 2006

In terms of this Recommendation, member states are duty-bound to adopt in their domestic law the scope of relevant laws and regulations, in order to guarantee effective protection for employees who perform work in the context of an employment relationship.[20] The Recommendation aims to eradicate disguised employment. It emphasises that in determining the existence of an employment relationship, prominence should be on the facts relating to performance of work and remuneration of the workers irrespective of how the relationship is characterised or any contrary arrangement that may have been agreed between the parties.[21]

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[17] Committee of Experts on the Application of Conventions and Recommendations, *General Survey – Protection Against Unjustified Dismissal* (1995) par 76. See also ILO "Note on Convention No. 158 and Recommendation No. 166 Concerning Termination of Employment" https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/meetingdocument/wcms_100768.pdf (accessed 2018-05-12).

[18] Art 4 of the Convention No. 158 and Recommendation No. 166 concerning termination of employment.

[19] Art 7 of the Convention No. 158 and Recommendation No. 166 concerning termination of employment (1982).

[20] Art 2 of the ILO Employment Relations Recommendation 198 of 2006.

[21] Art 9 of the ILO Employment Relations Recommendation 198 of 2006.

3 PROBATIONARY EMPLOYEES' LEGAL POSITION UNDER THE EA

Under the EA a "probationary contract" is defined to mean a written contract of employment, which is of not more than twelve months duration or part thereof and expressly states that it is for a probationary period.[22] Sections 41, 42 and 47 are of particular importance when an employer considers terminating a probationary employee's contract of employment.

3 1 Section 42: Termination of probationary contracts

This provision states:

> "The provisions of section 41 [*Notification and hearing before termination on grounds of misconduct*] shall not apply where a termination of employment terminates a probationary contract."[23] A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice."[24]

3 2 Section 41: Notification and hearing before termination on grounds of misconduct

This provision reads as follows:

> "Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.[25] Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."[26]

3 3 Section 47: Complaint of summary dismissal and unfair termination

This provision states:

> "No employee whose services have been terminated or who has been summarily dismissed during a probationary contract shall make a complaint under this section."[27]

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22 S 2 of the EA.
23 S 42(1) of the EA.
24 S 42(4) of the EA.
25 S 41(1) of the EA.
26 S 41(2) of the EA.
27 S 47(6) of the EA.

The above sections, read in the proper context, mean that employees on probation do not have the right to be heard prior to termination like other "employees". Section 42(2) specifies in peremptory terms that a probationary period shall not be more than six months, but with the agreement of the employee, it may be extended for a further period of not more than six months. This means that the maximum statutory probationary period shall not exceed twelve months. For that reason, probationary employees are automatically excluded from protection against unfair termination[28] because section 45(3) provides:

> "an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated".

A cursory analysis of the Employment and Labour Relations Court decisions reveals that the court is disposed to lean in favour of employers in assessing the grounds for dismissing a probationary employee. Some of the most frequently relied upon judgments in which the scope and application of the above provisions were given effect are considered.

3 3 1 Abraham Gumba v Kenya Medical Supplies Authority[29]

In this case, the applicant was employed on a fixed-term contract as an Information Technology Officer. The employer wrote to the applicant terminating his contract of employment with immediate effect. The reasons advanced for termination included poor work performance, insubordination and interference with the employer's ICT system. There was no notice or warning given prior to the termination. In fact, it was revealed in evidence that no offences had been brought to the attention of the applicant by the employer before termination. Amongst others, he sought an order declaring the termination of employment unlawful.

Several questions were raised but one particular question was whether the applicant was at the time of termination employed on probation. Although after critical analysis of the facts, the court found that he was not a probationary employee, it highlighted that if he was, then there would be no need to go into further inquiry because section 42(1) of the EA does not place any obligation on the employer to give an employee on probation, any formal charges or hear the employee in his defence before termination. But in the event that he was found not on probation, then the court would be compelled to determine whether termination was procedurally and substantively fair and whether the applicant was entitled to the remedies sought in the claim.

[28] S 45(1) of the EA.

[29] *Abraham Gumba v Kenya Medical Supplies Authority* 2014 5 eKLR (E&LRC) 36.

3 3 2 *Mercy Njoki Karingithi v Emrald Hotels Resorts & Lodges Ltd*[30]

In casu, the applicant was employed by the Emerald Hotels as an Executive Assistant by a letter dated 24 July 2012. The letter stated that she was to report for duty on 20 August 2012. One of the terms of the employment was that the applicant was on probation for a period of two months and during the probation period the contract would be terminable by either party giving seven days' written notice or salary in lieu of notice. On 22 August 2012, the employer served the applicant with a letter informing her that her appointment was being revoked with immediate effect. The revocation letter further informed her that she was to be paid for the two days she had worked and seven days' salary in lieu of notice.

The key questions before the court were whether an employee under probation is entitled to a hearing before termination and whether provisions of section 45 of the EA are applicable.[31]

In arriving at its judgment, the court held that section 42 of the EA ousts the application of the procedural fairness requirements of section 41 of the EA in termination during a probationary period. The court accentuated that the consequence of section 42 of the EA is that an employee who is still serving under probation is not entitled to a hearing before a decision to terminate is taken. The court affirmed that the rules of natural justice do not apply in such situations. On that basis, the court found that the employer did not breach the statutory protection of following fair procedure before terminating an employee. However, the court conceded that the challenge and the impact in application of the foregoing provision might need to await a decision from a higher court.

3 3 3 *Danish Jalang'o v Amicabre Travel Services Limited*[32]

The question was whether the termination during probation is subject to a procedural and substantive fairness test. Briefly, the applicants were employed as drivers by the employer, a transport company, both on one-year contracts. The second applicant Mr Christopher Kisia Kivango required to work under probation for the first six months. The terms of the contract of employment allowed either party to terminate the contract during probation, by giving at least a seven days' notice of termination, or by payment *in lieu* of notice. His termination happened on 23 March 2012, well within the probation period.

30 *Mercy Njoki Karingithi v Emrald Hotels Resorts & Lodges Ltd* 2014 16 eKLR (E&LRC) 23.

31 In terms of s 45 an employer shall terminate the employment of an employee unfairly. In other words, termination must both be procedurally and substantively fair.

32 *Danish Jalang'o & Another v Amicabre Travel Services Limited* 2014 6 eKLR (E&LRC). See also Industrial Court of Kenya Case between *Carole Nyambura Thiga v Oxfam* [2013] e-KLR (IC) and *Abraham Gumba v Kenya Medical Supplies Authority* 2014 36 eKLR (E&LRC) where the court reached a similar conclusion. See also *Linus Barasa Odhiambo v Wells Fargo Limited* 2012 eKLR (E&LRC).

In its judgment, the court reiterated that section 42(1) of the EA 2007 is unambiguous on the fact that the provisions of section 41 of the EA, which regulates the law of fair termination procedure, shall not apply with regard to probationary contracts.[33] The court repeated that section 42(4) of the EA only provides for termination through a seven-day notice or payment of seven days' wages by the employer to the employee. The court highlighted further that section 42 of the EA is a *sui generis* or standalone law, regulating a special, formative, employer-employee relationship.[34] The court summarised the legal position as follows:

> "There is no obligation under section 43[35] and 45[36] for employers to give valid and fair reasons for termination of probationary contracts, or to hear such employees at all, little less in accordance with the rules of fairness, natural justice or equity. The only question the Court should ask, is whether the appropriate notice was given, or if not given, whether the employee received pay in lieu of notice; and, whether the employee was, during the probation period, treated in accordance with the terms and conditions of the probationary contract. The employee has no expectation of substantive justification, or fairness of procedure, outside what the probation clause and section 42 of the 2007 EA grants. If the employee has received notice of seven days before termination, or is paid seven days' wages before termination, there can be no further demands made on the employer. The employer retains the discretion whether to confirm, or not confirm an employee serving under probation. The law relating to unfair termination does not apply in probationary contracts."

It is evident from the above court judgements that an employee's appointment who is on probation can be terminated at any time during the period and without an employer holding a hearing. This can only implicate that the Employment and Labour Relations Court is not amenable to recourse to the use of constitutionally entrenched human rights provisions to protect probationary employees against unfair termination. The above legal position is also open to abuse of the primary purpose of probation. For instance, it may be subject to abuse where employers repeatedly dismiss probationary employees at the end of their probation periods and replacing them with newly-hired probationary employees. In the long run, this leaves probationary employees vulnerable to employer exploitation.

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[33] See also the Industrial Court of Kenya decision in *Carole Nyambura Thiga v Oxfam* [2013] e-KLR (IC) where the Court affirmed that the protection afforded regular Employees under the unfair termination provisions, are not available to Employees whose contracts are terminated while on probation.

[34] *Danish Jalang'o & Another v Amicabre Travel Services Limited supra* 21.

[35] S 43 of the EA deals with proof of reason for termination and states that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of s 45. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

[36] S 45 of the EA deals generally with substantive and procedural fairness in dismissal or termination on employment. On the one hand, substantive fairness deals with the reasons for the dismissal. In order for a dismissal to be fair, there must be valid reasons for such conduct by an employer (see examples of fair reasons listed in s 45(2) of the EA). Procedural fairness, on the other hand, deals with the formal procedures prescribed by the law which are to be followed by an employer before dismissing an employee (see s 45(2) of the EA).

3 4 Analysis of the above legal position on termination of probationary employees'

At the outset, it is important to consider a few questions: who do the provisions of the EA apply to? Is the definition of "employee" in the EA inclusive of probationary employees? The answers to these questions are integral in finding out whether the EA unduly limits probationary employees' right to be heard prior to termination of employment. Although regrettable, the entitlement for protection against unfair termination under the EA and according to courts hinges on whether one is an "employee" or "probationary employee".

Worth mentioning is that, subject to section 3(2)[37], the EA applies to all employees employed by any employer under a contract of service.[38] A contract of service, as per the definition in the EA, captures the employer-employee relationship, where the person employed agrees to serve the other for a period of time in return for a wage or salary. Probationary employees are employed under a fixed-term contract of service. Accordingly, the protection against unfair termination should extend to them like any other employee.

The EA defines an employee to mean a person employed for wages or a salary and includes an "apprentice" and "indentured learner."[39] It is clear that the definition is circumscribed by the "remuneration" requirement. At the core of the definition lies an employment relationship where one person (without any distinction of employee status) works or renders services for another (employer) in exchange for wages or salary. Nowhere does the definition explicitly exclude probationary employees.

Besides, the EA defines an employee to include an apprentice and indentured learner. Although the EA does not define "an apprentice" and "indentured learner", the Industrial Training Act[40] sheds some light as to the meaning of the terms. The Industrial Training Act defines an "apprentice" to mean

> "a person who is bound by a written contract to serve an employer for such period as the Board shall determine with a view to acquiring knowledge, including theory and practice, of a trade in which the employer is reciprocally bound to instruct that person".[41]

This relationship is established by reference to criteria such as the employer's right to supervision and control. For that reason, the nature of the probationer's employment contract and the primary purpose of a probation period alluded earlier aligns itself with this definition. In fact, the Cambridge

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[37] In terms of s 3(2) of the EA, the only category of employee excluded from its application include: the armed forces or the reserve as respectively defined in the Armed Forces Act; the Kenya Police; the Kenya Prisons Service or the Administration Police Force; the National Youth Service and an employer and the employer's dependants where the dependants are the only employees in a family undertaking.

[38] S 3(1) of the EA.

[39] S 2 of the EA.

[40] The Industrial Training Act 237 of 1960 (as amended) (the Industrial Training Act).

[41] S 2 of the Industrial Training Act.

dictionary meaning of "an apprentice" includes probationers as one of the synonyms for an apprentice.[42]

Also, the Industrial Training Act defines an "indentured learner" to mean

> "a person, other than an apprentice, who is bound by a written contract to serve an employer for a determined period of less than four years with a view to acquiring knowledge of a trade in which the employer is reciprocally bound to instruct that person."[43]

Thus, given the wide scope of the definition of an "employee" in the EA, it is clear as analysed that probationer also falls well within the ambit of the definition. In view of that, probationary employees should be accorded full rights and protection, including the right to be heard prior to termination like permanent employees. The EA lists category of persons who are excluded from its application and probationary employee is not one of them.[44]

4 THE RIGHT TO FAIR LABOUR PRACTICE UNDER ARTICLE 41(1) OF THE CONSTITUTION

Worth noting is that the underpinning principle of a sound employment relationship is that it should be fair, equitable and beneficial to both the employer and the employee in the workplace. Article 41 of the Constitution entrenches various labour rights, key amongst them the right to fair labour practices guaranteed to "every person".[45] This right remains probably the most significant labour right under the Constitution because of its all-encompassing nature. Although the Constitution does not contain a precise definition of the concept "fair labour practice", the converse of a fair labour practice is an unfair labour practice and this is what is prohibited.[46]

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[42] Cambridge Dictionary http://dictionary.cambridge.org/dictionary/english/apprentice (accessed 2019-06-11).

[43] S 2 of the Industrial Training Act.

[44] The EA states clearly that it shall not apply to: (a) the armed forces or the reserve as respectively defined in the Armed Forces Act (Cap. 199), (b) the Kenya Police, the Kenya Prisons Service or the Administration Police Force, (c) the National Youth Service and (d) an employer and the employer's dependants where the dependants are the only employees in a family undertaking.

[45] Art 41(1) of the Constitution.

[46] Art legal analogy could be drawn the decision of the Constitutional Court of South Africa in *NEHAWU v University of Cape Town* 2003 (2) BCLR 154 (CC) par 33–34 where the court held that "Our Constitution is unique in Constitution aliasing the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept. "[T]he concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to s 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations

Therefore, an insightful understanding of this right is imperative because the subject of the sentence, namely "every person" must be interpreted with reference to the object of the sentence, namely "labour practices."[47]

Generally, any interpretation of article 41(1) must be conducted, bearing in mind the importance of ensuring fairness in the working environment is recognised and upheld. In the process, courts must recognise that all laws and regulations, including labour legislation, are always subject to constitutional scrutiny. If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee should have a right to seek a remedy under the EA. If he or she finds no remedy under that Act, the EA must come under constitutional scrutiny for not providing adequate protection to a constitutional right. Similarly, if a labour practice permitted by the EA is not fair, a court might be persuaded to strike down the questioned provision. In *Peter Wambugu Kariuki v Kenya Agricultural Research Institute*[48] the court held that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established workplace policies or practices that give effect to the elaborations set out in article 41 to promote and protect fairness at work. While in *Aviation and Allied Workers Union v Kenya Airways Ltd*,[49] the Industrial Court held that even where there were good reasons for an employer to terminate an employee, the employer had to demonstrate that it followed fair procedure. The court held further that where an employee was not fairly treated and an employer undertook processes to defeat the ends of justice it amounted to a labour practice that was fundamentally an unfair labour practice in the meaning of article 41 of the Constitution and therefore unfair termination. It may be argued that the absolute exclusion of the right to be heard before termination of probationary employees fundamentally defeats the ends of justice.

4 1 Who can rely on article 41(1) of the Constitution for protection?

A cursory look at the broad terms of article 41(1) reveals not only a description of the right accorded but also the beneficiaries of the right to fair labour practices; namely "every person," who then include all types of employees.[50] In fact, it does not end there; the broad interpretation of the word "every person" means that the scope of protection covers relationships other than the traditional employer-employee relationship. In other words,

of the International Labour Organisation. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance."

[47] Van Niekerk *et al Law@work* 186 states that since there is no definition of "labour practice", it is necessary that the practice must arise within the employment relationship.

[48] 2013 13 eKLR (E&LRC) 21.

[49] 2012 eKLR (IC) par 21.

[50] Even the categories of employees excluded from the application of the Employment Act such as: the armed forces or the reserve, the Kenya Police, the Kenya Prisons Service or the Administration Police Force, the National Youth Service and an employer and the employer's dependants where the dependants are the only employees in a family undertaking are protected by art 41(1) of the Constitution because their employment is akin to an employment relationship.

"every person" includes natural and juristic persons.[51] On this basis, therefore, "every person" who is a victim of an unfair labour practice would be entitled to relief in terms of the Constitution. Probationary employees fall within the scope of "every person" and can conceivably turn to article 41(1) of the Constitution for protection against alleged unfair termination without being afforded an opportunity to be heard. In fact, read in its proper context, even those who are expressly excluded[52] from the application of the EA may also conceivably rely on article 41(1) of the Constitution for relief.

Equally, the Constitution guarantees that every person is equal before the law.[53] It also extends the right to equal protection and equal benefit of the law as well as the full and equal enjoyment of all rights and fundamental freedoms to every person.[54] Effectively it is within the spirit of aArticle 27 that the protection would include employees on probation.

5 PRINCIPLES OF NATURAL JUSTICE

The principles of natural justice as it is understood in its broader sense, refer to procedural fairness. The principles intend to ensure that a fair outcome is reached by an impartial decision-maker. These principles are invariably common to all known legal jurisprudence and are rooted in the minds of all fair-minded persons.

One of the two cardinal principles of natural justice is *audi alteram partem* which literally translates to mean "hear the other party" or the rule that no one should be condemned unheard and without having the opportunity of making his defence.[55] This means according to the fundamentals of fair play, any person who decides any matter without hearing both sides, though that person may have rightly decided, has not done justice. Hearing would enable a probationary employee to disprove the charge levelled against him or her, or at least to plead something in mitigation. It also affords them the opportunity to urge the employer to consider alternatives to dismissal or sometimes all they ask of the courts is to assuage their sense of injustice at not having been given a fair opportunity to defend themselves against allegations which gravely impeach their future prospects. The *audi alteram partem* principle noted above imposes a duty upon an employer to act fairly by giving the employee an opportunity to explain him or herself before taking any decision which may extremely affect an employees' career.

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[51] In *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others (*CCT2/02) [2002] ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC) (6 December 2002) 37, the Constitutional Court of South Africa found that there is nothing in the nature of the right to fair labour practices to suggest that employers, employees and juristic persons, are not entitled to the right.

[52] See par 36 above.

[53] Art 27 of the Constitution.

[54] Art 27(1) and (2) of the Constitution.

[55] The other one is *Nemo judex in causa sua* which means no one should be made a judge in his own cause or the rule against bias. The rule of natural justice provides an opportunity for persons whose rights or interests may be affected by decisions to deny the allegations put forward and provide arguments in their favour, to demonstrate and give reasons why proposed d should not be taken, to call evidence to rebut allegations or claims, to explain allegations or present an innocent explanation, and/ or to provide mitigating circumstances.

So why then did the legislature choose to enact section 42 in disregard of the law of natural justice and fair labour practice in depriving employees on probation unduly of rights they might otherwise have flowing from an employment relationship? A duty to act fairly is implied in employment relationships, and the duty connotes that the employer must give an accused probationary employee a right to be heard. Therefore, it is imperious for employers to respect the fundamental principles of procedural fairness for all employees in the workplace. And when the employer unreasonably fails to observe those principles, then the Employment and Labour Relations Court, if approached, should bravely apply the aforesaid principles in order to defeat the imbalance in the exercise of power. As one professor of comparative law says:

> "The quality of the law can be determined by ... the qualities of the judge ... [A] bad statute with a clever judge is a hundred times better that a good statute with a bad judge ... Let us pray for well-drawn statutes but ... let us pray also for judges [who are] clever man with an independent spirit and can stand the weight of honours."[56]

With this in mind, this article encourages the Employment and Labour Relations Court judges to shun away from its own unfortunate practice and that of the EA of categorisation of employees and different rights ascribed to each category. Surely, this does not only infringe the Constitution, it is also a practice passed by time and should not be used in the workplace as a shield against compliance with procedural fairness before termination. Equally, the mere fact that a contract of employment is phrased as "probationary contract" or expressly states that the contract is for a probationary period should not be used as an easy getaway to erode the entrenched constitutional right to fair labour practice guaranteed to every person, which include probationary employees.[57] This article emphasises that the relationship between a probationary employee and his or her employer is akin to an employment relationship and not on the mere existence of a conditional contract of employment. In fact, this article submits that reliance on this traditional contract of employment will render labour law less relevant.

All laws in Kenya, including the EA, are subject to the Constitution. As such, they must give effect to the Constitution. Notably the spirit of the preamble of the Constitution, the right to dignity and fair hearing, revolt at the very idea that a person should not lose his or her employment, no matter how small, without following due process. With this in mind, the fundamental rights entrenched in the Constitution should be the first point of reference for all in authority.

If one is to redirect focus on the mandatory provisions of sections 41, 42 and 47 of the EA, weighed up in light of the constitutional principles, they are clearly not justiciable. Yet, these provisions were enacted by the legislature in the enabling Act to unconditionally deny probationary employees' a right to be heard prior to termination. This article stresses that a visionary court

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56 Meijers "Case Law and Codified Systems of Private Law" 1950 33 *Journal of Comparative Legislation and International Law* 8.

57 Art 41(1) of the Constitution.

inclined to the principles of natural justice in particular *audi alteram partem*, must promote the spirit of articles 41 of the Constitution which provides for commitment to nurture and protect the well-being of all employees in an employment relationship. Further, the article argues that courts that have moulded the law over the ages are those with a deep passion for fairness, equity and social justice that frequently require a departure from stringent inflexible common law rules. The provisions of the EA in question are a point in reference.

Failure by the EA to protect or provide probationary employees with a right to be heard is arbitrary. Equally, it is unjust, unfair and unreasonably infringes and destroys the spirit of the Constitution. In fact, this article observes that like in all disputes there are always two sides to the story and one cannot get to the truth of the matter without hearing both sides. So not only is it a legal requirement but also as a matter of logic and for the feasibility of the end result of a disciplinary hearing, the accused's version must be known to the person deciding his fate. As noted earlier, this requirement is derived from the *audi alterem partem*. It should also be noted that even biblically, procedural fairness and in particular the right to be heard is acclaimed as a principle of divine justice with its roots in the Garden of Eden.[58] To point out, God gave Adam and Eve an opportunity to make their defence before they were condemned. Indeed the principle is so catholic that no one has questioned its pedigree.

Also, employers must always act in good faith in the assessment of the probationary employee's suitability for a permanent position. But in the current law regulating probationary employees, this may be defeated. At the same time, it may lead to abuse of the primary purpose of probation as alluded earlier. For instance, a common abuse is when employers dismiss an employee who completes their probationary period and replaces them with newly-hired probationary employees. Under such circumstances, it means not only a loss of a particular position or post by the probationary employee, but also loss or denial of the opportunity to pursue his or her profession or career. Such practice unduly deprives a probationary employee permanent employment. The court has stressed that the right to security of employment is a core value of the EA.[59]

In terms of the Constitution, every person is guaranteed an inherent right to dignity and the right to have that dignity respected and protected.[60] Phillips, a great European author, expresses most forcibly what reputation means if not backed up by the solid foundation of character built on right thinking and right living. He asked:

> "Who shall estimate the cost of priceless reputation – that impress which gives his human dross its currency, without which we stand despised, debased, depreciated? Who shall repair it injured? Who can redeem it lost?" Why should this verity be limited to employment with statutory flavour and not to all

58 Genesis Chapter 3 in the Holy Bible.

59 *Aviation and Allied Workers Union v Kenya Airways Limited* (2012) eKLR (ELRC). Therefore, where an employer seeks to terminate a probationary employee as unsuitable, the employer must demonstrate that it gave the employee a fair or a reasonable opportunity to demonstrate his ability to do the job.

60 Art 28 of the Constitution.

> employees? Who says that only public employees have reputation that may forever be tarnished? What is the rationale for excluding private employees?[61]

In light of this, where a probationary employee is stigmatised at the workplace as a thief for example, and he or she seeks to do nothing else other than having his or her name vindicated of that stigmatisation, there is everything wrong with the judicial system when the court and the legislation tell him or her that the employer can dismiss him or her and all he or she is entitled to is a seven days' notice alternatively pay in lieu of notice before termination of his or her employment. This article submits that the EA should not be applied in piecemeal fashion to grant probationary employees only the right to receive seven days' notice but not to be heard. Employers should be driven away from the judgment seat, and courts should assume this seat, especially where the employer attempts to deprive his probationary employee the right to be heard before termination.

6 CONCLUSION AND RECOMMENDATIONS

It is apparent from the foregoing analysis that Kenyan employment law is still developing but perhaps in reverse. From sections 41, 42 and 47 of the EA, it is clear that probationary employees have fewer rights and protection when compared to permanent employees in relations to the right to be heard prior to termination of employment. The said provisions not only remain harsh in their imposition by employers exercising their superior economic strength to dismiss but even harsher in their application by the Employment and Labour Relations Court acquiescing to the same. This is evident from court judgments discussed above where probationary employees seeking relief from the court for unfair termination have been turned away. The court remains resolute that in the event that the employer is not satisfied with the performance of an employee on probation, the employer retains a free hand to terminate his or her services without due process. Even worse is that the *status quo* still continues, with little or no hope for radical improvements, so necessary for a changing society and a developing economy. In fact, the absence of an employers' willingness to adopt well-known rules of natural justice along with the norm of fairness co-exists with the lack of Employment and Labour Relations Court's will to enforce the same. This acute unfairness against probationary employees is a practice that the law should not tolerate.

Also, from the analysis of article 41(1) of the Constitution it seems safe to conclude that "every person" is determined with reference to being involved in an employment relationship. As a result, "every person" participating in an employment relationship is entitled to fair labour practices irrespective of the contractual condition or the nature of the contract. For this reason, employment contracts (conditional or unconditional) or terms of an employment contract that are contrary to the spirit of the Constitution or limit unreasonably fundamental rights guaranteed in the Constitution should be set aside by the courts. Henceforth, this article recommends that the Kenyan legislature should seriously consider amending the condemned provisions of sections 41, 42 and 47 of the EA in order to reflect and protect a

[61] Smith "Reputation" 1913 13 *The American Journal of Nursing* 593–595.

probationary employee's right to fair labour practices guaranteed by the Constitution, in particular and the right to be heard prior to termination of probationary employees. In the same way, this article accentuates that the Employment and Labour Relations Act should use article 41(1) of the Constitution as a starting point of reference in interpreting the condemned provisions of the EA, ie sections 41, 42 and 47.

As shown above, article 2(5) of the Constitution of Kenya recognises international law as one of the sources of law in Kenya. For that reason, Convention No 158 forms an important and influential point of reference in the interpretation and application of the provisions of EA in question. The Convention envisages that an employee can only be fairly dismissed if the employer follows a fair procedure in doing so. This article emphasises strongly that although an employee may be employed on probation, and that it is within the right and prerogative of an employer to hire employees, it does not mean that employers can simply terminate employment without following due process. Therefore, the amendment will certainly bring the provisions of the EA in line with the international law discussed above.

Perhaps as a supplement, yet important is the need to consider developing a comprehensive Code of Good Practice: Dismissal similar to the one under Schedule 8 of the South African Labour Relations Act.[62] In South Africa, courts are of the view that probationary employees are entitled to the same protection as any other employee.[63] Negotiated by tripartite stakeholder, the Code of Good Practice will seek to regulate the procedures, both substantive and procedural that must be followed when disputes relating to termination of employment for all employees arise. Importantly, it will allow for a more functional approach to labour disputes.

Another disquieting aspect of the EA is that it does not define nor regulate unfair labour practice. This *lacuna* in law is regrettable and does perhaps also contribute to the current piecemeal protection against unfair termination of probationary employees. For this reason, there is an urgent need for the legislature to seriously consider incorporating provisions regulating unfair labour practice in the EA. This will give effect to article 41(1) of the Constitution. It must be remembered that the primary purpose of any good law is to advance the achievement of equity and fairness at the workplace. Yet this is the one element that is singularly lacking in the EA as regards probationary employees right to be heard. In view of that, it remains a key challenge for the court in Kenya to ensure that all employees in the country regardless of their employment conditions are protected against unfair termination.

The decisions arrived at by courts in analysing and interpreting the provisions of EA in question must be sound and guided by the principles of fairness and the Constitution.

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[62] Schedule 8 item 8 of the Labour Relations Act 66 of 1995.

[63] *Carlton-Shields v James North* (1990) 11 ILJ 82 (IC), *NUMSA v Tek Corporation Ltd* (1991) 12 ILJ 577 (LAC) par 581H–I, *Schuster v CAPAB Orchestra* (1994) 15 ILJ 109 (LAC), *Camhee v Parkmore Travel* [1997] 2 BLLR (CCMA) par 180 and Grogan *Workplace Law* 302.

Quoting from the case of *Re Spectrum Plus Ltd*,[64] Lord Nicholls stated:

> "Judges have a legitimate law-making function. It is a function they have long exercised. In common law countries much of the basic law is still the common law. The common law is judge-made law. For centuries, judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations".[65]

It remains to be seen how the issue is resolved if and when the courts considers it explicitly and in all its ramifications. Should this happen, this article emphasis that judges should be guided by the principles alluded by Lord Nicholls. In their role of interpreting sections 41, 42 and 47 of the EA, courts are duty-bound to bring these provisions in line with article 41(1) of the Constitution to protect probationary employees' right to fair labour practice and unfair termination. In fact, within the terms of article 20(3) of the Constitution, courts are duty-bound to develop the law. Should any law or act be inconsistent with the Constitution, then the court must pronounce a declaration of incompatibility.[66] Given the broad view of article 41(1) of the Constitution, the Employment and Labour Relations Court reserves the right to strike down labour practices found to be unfair. Accordingly, once the court makes such a declaration, it is presumed that Parliament will amend or repeal the law to bring it in line with the court's pronunciation. Parliament has a constitutional mandate of formulating legislation which is intended for implementing several provisions of the Constitution for the realisation of the rights guaranteed.[67] But Parliament, as a law-making body, must strive to promulgate legislation that does not arbitrary and unduly limit right guaranteed to everyone in terms of the Constitution.[68] Nonetheless, whenever that happens, courts are obliged to exercise their interpretive power to quash such laws.[69] A typical example was when the High Court in *Samuel Momanyi v The Hon. Attorney General and SDV Transami Kenya Ltd*[70] declared the provisions of section 45(3) of the EA 2007 unconstitutional in that it was inconsistent with the provisions of articles 28, 41(1), 47, 48 and 50(1) of the Constitution.

On the whole, this article emphasises that sections 41, 42 and 47 of the EA are in direct violation of article 41(1) of the Constitution. They also violate article 27 of the Constitution, which makes it clear that everyone is equal before the law and has a right to equal protection and benefit of the law. Likewise, the condemned provisions infringe the principles of international

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[64] 2005 2 (AC) 680.

[65] *Re Spectrum Plus Ltd supra* par 32.

[66] Art 2(4) of the Constitution.

[67] Art 261(1) of the Constitution. See also Schedule five of the Constitution.

[68] Art 94(5) reserves the power of making law to Parliament. This article provides that no person or body, other than parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

[69] Roschmann, Wendoh and Ogolla "Human Rights, Separation of Powers and Devolution in the Constitution, 2010: A Comparison and Lessons for EAC Member States" https://www.kas.de/c/document_library/get_file?uuid=1864d0c5-21b0-0920-3696-bf118f4d5b26&groupId=252038 (accessed 2019-07-15).

[70] *Samuel Momanyi v The Hon. Attorney General and SDV Transami Kenya Ltd* 2012 eKLR (E&LRC).

law concerning termination of employment as well as the rules of natural justice.

It is hoped that the recommendations and suggestions made herein will provide insight that will lead to the eradication of the unfairness within of sections 41, 42 and 47 of the EA. At the same time, it will shape a way forward and further strengthen labour relationships between employers and the rights of probationary employees. Employers are duty-bound to act in good faith and follow due process in the manner in which they terminate employees. The exclusion of probationary employees from the scope of application of the EA's right to be heard prior to termination is inconsistent with the values of a democratic society and should therefore be amended accordingly.

Noteworthy, the Constitution is the supreme law in Kenya. Any other law inconsistent with it is invalid and cannot survive. Accordingly, such law must be amended or repealed. If this is so, then the first in line must be the provisions of the EA in question. A legal analogy can be drawn from the following *dictum* of Budd, an Irish judge in a case where the application of the constitutional right to an employment contract was in issue:

> "If an established right in law exists a citizen has the right to assert it and it is the duty of the courts to aid and assist him in the assertion of his right. The Courts will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it. To say otherwise would be tantamount to saying that a citizen can set the Constitution at naught and that a right solemnly given by our fundamental law is valueless... The courts will not so act as to permit anybody of citizens to deprive another of his constitutional rights and will ... see that these rights are protected, whether they are assailed under the guise of a statutory right or otherwise."[71]

The Employment and Labour Relations Courts should emulate the foregoing.

[71] *Educational Co v Fitzpatrick* (1961) 2 (IR) par 345–365.

THE INTERNATIONAL LABOUR ORGANISATION IN PURSUIT OF DECENT WORK IN SOUTHERN AFRICA: AN APPRAISAL

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SUMMARY

This article examines the role of the International Labour Organisation (ILO), regional standards, and the "decent work agenda" in addressing challenges facing non-standard workers in southern Africa. Employees in traditional full-time employment are well protected in some southern African states, but the regulation currently available is largely unable to protect non-standard workers, and in numerous instances workers are regarded as "non-standard", on the basis of a narrow interpretation of the term "employee". Casualisation and externalisation have resulted in the exclusion of numerous workers from the protection provided by labour legislation, and union cover for non-standard workers is very low. The article further discusses the relationship between non-standard employment and labour migration in southern Africa. Light is also shed on regional standards, the challenges of unemployment, poverty, and income inequality, and labour-market transitions in southern Africa.

1 ILO INFLUENCE ON THE LABOUR LAW SYSTEMS OF SOUTHERN AFRICA AND OTHER FACTORS AFFECTING NON-STANDARD WORK

The ILO has played a major role in influencing the labour-law systems of southern Africa. Fenwick and Kalula[1] suggest that there are two ways in which the ILO has principally influenced labour law in the region. First, by ratifying ILO Conventions, nations fall under the influence of the ILO's standard supervision system.[2] Since its establishment in 1992, the Southern

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[1] Fenwick, Kalula and Landau "Labour Law: A Southern African Perspective" in Tekle (ed) *Labour Law and Worker Protection in Developing Countries* (2007) 7.

[2] Kalula and Fenwick note that even "before a country ratifies the ILO standard, it is likely to be subject to a range of regulatory activities by the ILO. These include negotiation and discussion between the ILO officials and representatives of countries, including ministers, responsible for labour matters, and senior officials of relevant government departments." Kalula and Fenwick *Law and Labour Market in East and Southern Africa: Comparative Perspectives* (2004) 193–226. This might occur, eg, within the framework of campaigns to promote the ratification of the ILO's core labour standards. This "informal" aspect of ILO

African Development Community (SADC) has encouraged member states to ratify and implement the core ILO standards. All SADC member states, save for Madagascar and Namibia, have ratified all of the core ILO Conventions.[3]

The second way in which the ILO has influenced labour law in the region is by offering technical assistance. The ILO offers countries technical assistance to re-orientate their labour law and labour relations systems. Currently, for example, through its "In Focus Programme on Social Dialogue, Labour Law and Labour Administration", the ILO is running at least two key projects tasked with the legal regulation of labour markets in the SADC region.[4] In general terms, these projects help countries to develop their labour legislation in line with international standards and to advance their capacity in key areas such as dispute resolution. In particular, the ILO has assisted most countries in southern Africa – for example, Botswana, Lesotho, Malawi, Namibia, South Africa, and Swaziland – to develop labour legislation that conforms to international standards.[5] In addition, it has assisted in improving the capacity of key institutions and actors in the region through technical collaboration, for example, in the ILO/Swiss projects entitled "Regional Conflict Management and Enterprise-based Development and Strengthening Labour Administration in Southern Africa" (SLASA).[6]

In 1999, a SADC labour conference was arranged with the support of its Employment and Labour Sector (ELS) in collaboration with the ILO/Swiss Project for the "Prevention and Resolution of Conflicts and the Promotion of Workplace Democracy". The conference presented wide-ranging debate on three themes: minimum standards; collective bargaining; and dispute prevention and resolution.[7]

For instance, the ILO/Swiss Project for "Regional Conflict Management and Enterprise Development in Southern Africa" educated some 180 people on mediation and arbitration by offering a postgraduate diploma programme

regulatory activity, while well-known within certain circles, has not, as far as we know, been the subject of major academic study. For a brief consideration, see Panford *African Labour Relations and Workers' Rights* (1994) 130–141.

3 These are the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948; the Right to Organise and Collective Bargaining Convention 98 of 1949; the Forced Labour Convention 29 of 1930; the Abolition of Forced Labour Convention 105 of 1957; the Minimum Age Convention 138 of 1951; the Worst Forms of Child Labour Convention 182 of 1999; the Equal Remuneration Convention 100 of 1951; and the Discrimination (Employment and Occupation) Convention 111 of 1958. Madagascar has not ratified the Abolition of Forced Labour Convention 105 of 1957 and Namibia has not ratified the Equal Remuneration Convention 100 of 1951. See http//www.ilo.org (accessed 2019-11–30).

4 These are the ILO/Swiss "Project to Advance Social Partnership in Promoting Labour Peace in Southern Africa", and the ILO/USDOL Project 011 "Strengthening Labour Administration in Southern Africa". See ILO "Technical Co-Operation Projects: In Focus Programme on Social Dialogue, Labour Law and Labour Administration" http://www.ilo.org/public/english/dialogue/ifpdial/publ/index.htm (accessed 2019-09-20).

5 For further detail see http://www.ilo.org/public/english/region/afpro/mdtharare/about/index.htm (accessed 2019-10-04).

6 Fenwick, Kalula and Landau in Tekle *Labour Law and Worker Protection in Developing Countries* 7.

7 Communiqué of the Southern African Development Community (SADC) Labour Relations Conference Johannesburg (13–15 October 1999) 1.

in dispute resolution.[8] Botswana, Lesotho, Mozambique, Namibia, Swaziland and Zimbabwe were included in the project. Each country delegation included its Ministry of Labour, national union federations, national employers' organisations, and nominated universities. The project formed part of a broader vision of the ILO/Swiss Project to transform labour law and present modern and effective dispute resolution measures.[9] The outcome of this project was a noteworthy improvement in dispute resolution capacity in the participating countries and a greater understanding of dispute resolution challenges in SADC countries:

> "All participating countries experienced relatively volatile labour markets and poor dispute resolution capacity. All desired greater labour market stability, to attract investment and stimulate growth and create jobs. All recognised the importance of extending access to industrial justice through effective dispute resolution machinery. The creation of a skilled cadre of suitably qualified dispute resolution practitioners would make a material contribution to these objectives."[10]

An additional intervention under the ILO/Swiss "Project for Regional Conflict Management and Enterprise Development in Southern Africa" was the "Dialogue-Driven Performance Improvement in the Clothing and Textile Sector in South Africa".[11] This project aimed to enhance the performance of mediators and arbitrators and to promote growth within the participating firms. In the main, the project offered employment to the rural female labour force and so increase access to health care in an area with a widespread incidence of HIV and AIDS. The project revealed that performance improvement can be achieved through a mix of good practice and skills development, buttressed by vigorous labour-management negotiation at industry level. This, in turn, assists in creating industrial policy regarding performance enhancement.[12] The report on the "Project to Advance Social Partnership and Promote Labour Peace in South Africa" (another ILO/Swiss Project) notes that:

> "[R]espect for procedure has increased dramatically and procedural industrial action has virtually been eliminated from the South African industrial relations landscape. Settlement of disputes by conciliation is in excess of 70% and arbitrations are completed on average within 120 days from date of referral to date of award".[13]

Interventions such as these by ILO/Swiss Project improve the ability of employment establishments to comply with the law. They also nurture cooperation between commercial enterprises and employees so as to

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8 ILO *Educating for Effective Dispute Resolution in Southern Africa* ILO/Swiss "Project for Regional Conflict Management and Enterprise Development in Southern Africa" RAF/03/04/SWI Pretoria (2006) 2.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 ILO *Dialogue Driven Performance Improvement in the Clothing and Textile Sector in South Africa* ILO/Swiss "Project for Regional Conflict Management and Enterprise Development in Southern Africa" 3.

13 ILO *The ILO Promoting Labour, Peace and Democracy in Southern Africa* ILO/Swiss "Project to Advance Social Partnership and Promote Labour Peace in Southern Africa" RAF/99/M10/SW1 Pretoria (2006) 1.

achieve the protective and developmental objectives of the law. The dispute resolution mechanisms established in various southern African countries, such as the Commission for Conciliation, Mediation and Arbitration (CCMA) in South Africa are now working together at the local level to launch the Southern African Dispute Resolution Forum.

In addition, at the sub-regional level, the adoption of the Charter of Fundamental Social Rights by the SADC at its Dar-es-Salaam meeting on 5 August 2003 was a key development. The Charter is a resolute document that reinforces the need for protection, particularly of workers and vulnerable groups such as non-standard workers, and seeks to establish harmonised programmes of social security within the sub-region.[14] Its provisions aim to extend social protection to both the employed and the unemployed. Article 10 provides that:

> "SADC member states shall create an enabling environment that every worker shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be able to receive sufficient resources and social assistance."

2 ILO INSTRUMENTS PERTINENT TO TACKLING THE ISSUE OF NON-STANDARD WORK IN SADC

Over the past century, the ILO has played a very significant role in developing labour standards and Conventions. Non-standard employment which covers workers outside of the traditional employment relationship has been acknowledged by the ILO. The changes to the traditional perceptions of work have received the attention of the ILO, and since 1990 this subject has been addressed at its annual conferences. The ILO has acknowledged the upsurge in non-standard work and the need to protect non-standard workers by means of the following:

> "(a) Conventions and Recommendations pertaining to particular categories of non-standard workers, such as part-time workers and homeworkers;
> (b) support for micro-enterprises in the informal economy;
> (c) programmes like Strategies and Tools against Social Exclusion and Poverty (STEP) to promote the extension of social protection to informal workers;
> (d) support for mutual health insurance schemes; and
> (e) the continuance of work at its social security department commissioning research and investigating the extension of social- security protection to non-standard workers."[15]

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[14] Art 2 of the Charter of Fundamental Social Rights in SADC (2003).

[15] ILO *Non-standard Forms of Employment* Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment Geneva (16–19 February 2015) 32–36.

2 1 Standards that deal with particular categories of non-standard employment

The ILO Termination of Employment Convention[16] and Recommendation[17] control and offer guidance on the use of fixed-term or temporary employment contracts. The Convention regulates the termination of employment at the discretion of the employer, and allows for certain exclusions from all or some of its provisions which may relate to workers engaged under a contract of employment for a specified period or for a specified task, or to workers engaged on a casual basis for a short period. Furthermore, the Convention specifies that "adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time, the aim of which is to avoid the protection resulting from this Convention".[18]

The Preamble to the Private Employment Agencies Convention 181 of 1997 notes the role that private employment agencies may play in an operational labour market, and also the need to protect these employees. The Convention applies, in principle, to all private employment agencies, all categories of employee (with the exception of seafarers), and all branches of economic activity. Ratifying states are obliged to take measures to guarantee that workers hired by private employment agencies are not deprived of the right to freedom of association and the right to collective bargaining, and that the agencies do not discriminate against workers.

In addition, private employment agencies are not permitted, directly or indirectly, to charge workers any fees or costs – subject to a restricted number of exemptions. Further, ratifying states must guarantee that a system of licensing or certification, or other forms of governance, including national practices, controls the procedures and operations of private employment agencies. Ratifying states are further obliged to guarantee satisfactory protection and, where pertinent, to decide upon and allocate the particular responsibilities of private employment agencies and of user enterprises with regard to: collective bargaining; minimum wages; working hours and other working conditions; statutory social security benefits; access to training; protection in the field of occupational safety and health; compensation for occupational accidents or diseases; compensation in the event of insolvency; the protection of workers' claims; and maternity and parental protection and benefits.

The Private Employment Agencies Recommendation 188 of 1997 acts as an add-on to Convention 181 by providing, among other things, that workers employed by private employment agencies and made available to employer enterprises should, where applicable, have a written contract of employment stipulating their terms and conditions of employment, with information on such terms and conditions provided, at the very least, before the actual commencement of their assignments. Private employment agencies should

[16] Termination of Employment Convention 158 of 1982.
[17] ILO Recommendation 166 of 1982.
[18] Art 4 of the Termination of Employment Convention 158 of 1982.

avoid making employees available to employer enterprises if their placement is to replace workers who are on strike.

The Employment Relationship Recommendation provides that member states should formulate and apply, in consultation with the most representative employers' and workers' organisations, a national policy for revising at suitable periods and, if required, clarifying and adjusting, the scope of relevant laws and regulations in order to ensure active protection for workers in an employment relationship. Such a policy should include procedures: to give direction on establishing the presence of an employment relationship and on the difference between employed and self-employed workers; to contest hidden employment relationships that conceal the true legal standing of workers; to guarantee standards relevant to all forms of contractual arrangements, including those involving various parties, so that employed workers are protected; and to guarantee that such standards state who is accountable for offering such protection. Likewise, national policies should ensure the effective protection of workers, particularly those affected by vagueness regarding the nature of an employment relationship, including women workers and the most vulnerable workers.

The Part-Time Work Convention[19] promotes access to productive, freely chosen part-time employment which honours the needs of both employers and employees, and guarantees protection for part-time employees as regards access to employment, working conditions, and social security. The Convention applies to all part-time workers – defined as employed individuals whose normal hours of work are less than those of equivalent full-time workers.[20] The Convention attempts to ensure the equal treatment of part-time workers and equivalent full-time workers in a number of ways.[21] First, part-time workers are to be accorded the same protection as equivalent full-time employees with regard to: the right to organise; the right to bargain collectively; the right to act as employees' representatives; occupational safety and health; and non-discrimination in employment.

Secondly, procedures must be followed to ensure that part-time workers do not, simply because they work part-time, receive a basic wage[22] which, calculated proportionately, is less than that of equivalent full-time employees. Thirdly, legislative social security schemes based on work-related engagements should be modified so that part-time workers are

[19] The Part-Time Work Convention 175 of 1994 came into force on 28 February 1998 and has 14 ratifications: Albania, Australia, Bosnia and Herzegovina, Cyprus, Finland, Guyana, Hungary, Italy, Luxembourg, Mauritius, Netherlands, Portugal, Slovenia, and Sweden.

[20] However, ratifying states may, after consulting the representative organisations of employers and workers concerned, exclude wholly or in part, particular categories of worker or certain establishments from its scope "when its application to them would raise particular problems of a substantial nature".

[21] The term "comparable full-time worker" refers to a full-time worker who: (i) has the same type of employment relationship; (ii) is engaged in the same or a similar type of work or occupation; and (iii) is employed in the same establishment or, when there is no comparable full-time worker in that establishment, in the same enterprise or, when there is no comparable full-time worker in that enterprise, in the same branch of activity, as the part-time worker concerned.

[22] Pursuant to Recommendation 182 of 1994, part-time workers should benefit on an equitable basis from financial compensation additional to basic wages, which is received by comparable full-time workers.

afforded working conditions equivalent to full-time workers. These working environments may be considered in the light of hours of work, contributions, or earnings. Fourth, part-time workers must also benefit from equivalent conditions with respect to maternity protection, termination of employment, paid annual leave, paid public holidays, and sick leave.[23]

Convention 175 likewise requires the implementation of measures to expedite access to productive and freely-chosen part-time work which meets the requirements of both employers and employees, provided that the essential protection mentioned above is guaranteed. It also requires that, where applicable, procedures must be applied to ensure that a transfer from full-time to part-time work or vice versa is on a voluntary basis in accordance with national law and practice. The Part-Time Work Recommendation 182 of 1994 encourages employers to deliberate with the representatives of the workers concerned on the institution or extension of part-time work on a comprehensive scale and subject to associated rules and procedures, and to offer information to part-time workers on their specific conditions of employment. Furthermore, the Recommendation explains the number and arrangement of hours of work, alterations to the fixed-work schedule, work beyond scheduled hours, and leave, as well as part-time worker training, career prospects, and job-related flexibility.

The ILO has also introduced other standards of specific interest to workers in non-standard forms of employment.[24] Some additional ILO Conventions relevant to non-standard employment are, for example, the Employment Policy Convention[25] which commits states to adopting policies, “to promote full, productive, and freely chosen employment”.[26] In this respect, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) talks of, “measures implemented in

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[23] Exclusions may be introduced for part-time workers whose hours of work or earnings do not meet certain thresholds. However, these thresholds must be sufficiently low in order not to exclude an unduly large percentage of part-time workers, and should be reduced progressively.

[24] With the exception of ILO standards directed at specific occupations or economic sectors, ILO standards apply, in principle, to all workers. In some instances, exceptions may be introduced for certain enterprises, sectors, or occupations, but even then member states are encouraged subsequently to extend protection to excluded groups. Some ILO standards are of particular relevance to workers in non-standard form of employment. The Maternity Protection Convention 183 of 2000 expressly provides for its application to all employed women, “including those in atypical forms of dependent work” in recognition of the significant percentage of women found in non-standard forms of employment. The Workers with Family Responsibilities Convention 156 of 1981 applies to all branches of economic activity and to all categories of worker. It concerns men and women workers whose family responsibilities restrict their opportunities to prepare for, enter, participate in, or advance in economic activity, and is therefore particularly relevant for workers who have entered non-standard employment arrangements in order to combine work and family responsibilities. The Social Protection Floors Recommendation 202 of 2012 can be of benefit to workers in non-standard forms of employment, particularly if they are excluded from social security cover as a result of legal thresholds. Social protection floors are nationally defined sets of basic social security guarantees aimed at preventing or alleviating poverty, vulnerability, and social exclusion.

[25] Employment Policy Convention 122 of 1964.

[26] *Ibid.*

consultation with the social partners to reduce labour market dualism".[27] Moreover, the Labour Administration Convention[28] requests states to broaden the tasks of labour administration to workers not currently considered employed – a concern also recently addressed by the CEACR.[29] Also pertinent is the Labour Inspection Convention[30] on the need to uphold a system of labour inspection for workplaces, and its 1995 Protocol.

ILO standards have affected regional and national protocols on temporary work, temporary agency work, ambiguous and concealed employment relationships, and part-time work. Nonetheless, national regulations differ significantly, reflecting the specificities of the country, including the different legal systems and the different levels of economic development.

2 2 The decent work agenda and non-standard employment

It is difficult to discuss the role and application of ILO standards to non-standard workers in southern Africa without investigating what constitutes decent work.

Decent work has been described as:

> "Jobs of acceptable quality (constructive, profitable, and gainful work) both within the formal and the informal sectors; decent remuneration (to fulfil basic economic and family needs); fair working conditions; fair and equal treatment at work (no discrimination); safe working conditions; protection against unemployment; access to salaried jobs or self-employment promoting entrepreneurship and supporting small business by providing access to credit, premises, management training, business advisory services, and so on; training and development opportunities; and job creation".[31]

The main objective under the decent work agenda is, "not just the creation of jobs, but the creation of jobs of acceptable quality".[32] Numerous aspects need to be addressed if the standard of prevailing employment and current jobs in southern Africa is to become satisfactory.

In February 2015, the ILO held a Tripartite Meeting of Experts on Non-Standard Forms of Employment which hosted experts selected after consultation with governments, the Employers' Group, and the Workers' Group of the Governing Body to debate the obstacles to the decent work

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27 ILO "Direct Request (CEACR) – adopted 2013, published 103rd ILC session (2014) Employment Policy Convention, 1964 (No. 122) – Japan (Ratification: 1986) http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3147206,102729,Japan,2013 (accessed 2020-01-06).

28 Labour Administration Convention 150 of 1978.

29 ILO "Observation (CEACR) – adopted 2011, published 101st ILC session (2012) Labour Administration Convention, 1978 (No. 150) – Republic of Korea (Ratification: 1997)" http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2700228,103123,Korea,%20Republic%20of,2011 (accessed 2020-10-12).

30 Labour Inspection Convention 81 of 1947.

31 McGregor "Globalization and Decent Work (Part 1)" 2006 14(4) *Quarterly Law Review for People in Business* 150–154.

32 ILO *Decent Work: Report of the Director-General* 4.

agenda that non-standard forms of employment may present. The meeting mandated member states, employers' organisations, and workers' organisations to develop policy resolutions to address decent work deficits related to non-standard forms of employment, so that all workers – regardless of their employment arrangement – could profit from decent work. Specifically, governments and the social partners were entreated to collaborate to implement measures to address unsatisfactory working conditions, to support effective labour market changes, to promote equality and non-discrimination, to ensure sufficient social security cover for all, to promote safe and healthy workplaces, to ensure freedom of association and collective bargaining rights, to improve labour review, and to address highly uncertain forms of employment that do not respect essential rights at work.[33]

2 3 Non-standard employment relations and the ramifications for the decent work agenda in Southern African states

Southern African states face numerous common obstacles in their globalised economies. They share similar attributes in their labour markets and encounter numerous problems in their relations with the international trade systems and financial organisations. Unemployment is a common denominator, as are the high rates of poverty. Southern African states have the same challenges of informal versus formal sector development, and share the same concerns and hurdles, including skills development, flexibility, and the restructuring of work.

In developing states such as those in southern Africa, which are afflicted by development hardships with a saturated labour market, the efforts of most employers to reduce labour costs have resulted in the proliferation of non-standard employment relations, such as temporary work, fixed-term work, and part-time work, although workers in these groups have the skills required to be employed on a permanent basis. This phenomenon has varied implications for decent work.[34]

However, to implement the decent work agenda the first goal is the creation of employment opportunities. This goal states that the economy should create opportunities for investment, entrepreneurship, skills advancement, job creation, and sustainable livelihoods. Certain scholars argue that the obstacle to employment opportunities emerges from the variety of employment types created by global production systems.[35] For employment to be decent, it should be indefinite, continuous, and secure so as to guarantee constant earnings for an employee. Furthermore, even within a single enterprise there may be employment that is flexible, insecure, and informal. Within the context of the various SADC states and their

[33] For more detail see ILO "Conclusions of the Meeting of Experts on Non-Standard Forms of Employment" (17 March 2015) http://www.ilo.org/gb/GBSessions/GB323/pol/WCMS_354090/lang-en/index.htm (accessed 2020-12-06).

[34] Individual Observation Concerning Labour Inspection Convention 181 of 1947, Angola.

[35] Barrientos "Modernising Social Assistance" in International Association of African Researchers and Reviewers (IAARR) *Proceedings World Conference on Social Protection and Inclusion: Converging Efforts from a Global Perspective* (2007) 7–24.

economic circumstances, the SADC economies as currently structured and managed, lack the capacity to create employment for their citizens.

The principal result of this is that people desperately seeking a means of survival will accept any form of employment they can find. Against this backdrop, virtually all employers take advantage of these desperate circumstances and exploit people who are in non-standard employment.[36] If SADC governments make little effort to create employment or an enabling environment for people to create their own jobs, non-standard employment relations will continue to proliferate, to the delight of employers who are motivated by profit. As a result, the decent work agenda championed by the ILO will simply remain an illusion in the context of non-standard employment relations in the SADC sub-region.

Today, it is generally acknowledged that the decline in standard employment has gradually eroded labour protection. Non-standard workers become "invisible for recruitment into trade unions or for the protection through law enforcement"[37] – despite certain non-standard employment relationships being perceived as falling within the safety net of labour law:

> "There is a growing body of international evidence that some of the changes, notably the growth of precarious or insecure employment, have profound implications for worker attitudes and commitment as well as minimum labour standards and working conditions, especially the health, safety and well-being of workers. In particular, the growth of elaborate supply chains and flexible arrangements (along with changes to regulatory regimes) has been linked to the emergence or expansion of low-wage sectors/working poor (with substantial hidden costs to the community) and more intensive work regimes."[38]

The second goal of the decent work agenda aims to advance recognition and respect for worker rights in the workplace. All employees, and particularly vulnerable or poor workers, need a voice, representation, participation, and laws that promote their interests and address their concerns. The issue of workplace rights arises from the difficulty of organising and representing these workers. In the absence of collective power to bargain with employers, employees are not able to access or secure other rights. In most SADC member states, non-standard workers are denied several rights. The capacity of labour law organisations in southern Africa to accomplish the tasks consigned to them by the industrial relations system is limited. Despite formal acknowledgement of the right to freedom of association in SADC member states, trade unions in some countries continue to be subjected to substantial government intrusion,[39] either by law or by more informal means. Finally, even where workers are formally covered by labour laws and institutional measures for review and enforcement are in place, a lack of qualified employees, resources, and

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[36] Abideen and Osuji "We are Slaves in our Fatherland – A Factory Worker" 2011 30(9) *The Source* 20–21.

[37] Cheadle, Le Roux, Thompson and Van Niekerk *Current Labour Law* (2004) 698.

[38] Quinlan "We've Been Down This Road Before: Vulnerable Work and Occupational Health in Historical Perspective" in Sargeant and Giovanne (eds) *Vulnerable Workers: Safety, Well-Being and Precarious Work* (2011) 33.

[39] Fenwick *et al* in Tekle *Labour Law and Worker Protection in Developing Countries* 1.

organisational capacity, as well as fraud, limit the degree to which workers are in fact protected.[40]

Some southern African states do not have labour laws which allow non-standard workers to join a trade union, leaving them vulnerable to exploitation.[41] Even when such legislation exists, enforcement remains a problem. When workers are denied the right to join trade unions in their workplace many of their other rights may also be denied. In such circumstances, the employers dictate the terms and conditions of work with little place for resistance from the workers. Further, because non-standard workers cannot unionise, they can also not bargain collectively with their employers, especially concerning remuneration, basic conditions of work, health and safety measures, and other related issues. In short, any employment relationship that does not allow for unionisation and the participation of workers in making choices that affect their work and advance their rights in the workplace, is contrary to the decent work agenda.

The third goal of the decent work agenda focuses on expanding social protection. This goal seeks to stimulate both inclusion and productivity by allowing for a situation where women and men benefit alike from working conditions that are safe, allow sufficient free time and recreation, take family and social values into consideration, afford sufficient reimbursement in case of lost or reduced income, and allow access to suitable healthcare. Barrientos argues that because many flexible and informal workers do not have access to a contract of employment and legal employment benefits, they are often deprived of access to other safeguards and social support from the state.[42] In the South African context, non-standard workers lack basic social protection. For example, they are not included in their employers' pension schemes, nor can they claim unemployment benefits from the state, even though the state can afford to pay these. This leaves numerous workers very vulnerable to economic setbacks, both in their places of work and in society at large. This state of affairs can hardly be seen to advance the decent work agenda.

The fourth goal is advancing social dialogue. This goal is based on the assumption that the participation of strong and independent workers' and employers' organisations is crucial to improving productivity, circumventing disputes at work, and building interconnected societies. According to Barrientos, "the social dialogue challenge arises from the lack of effective voice or independent representation of such workers in a process of dialogue with employers, government or other stakeholders".[43] Given the prevalence of non-standard employment in southern African states, these workers are deprived of a strong voice both within and outside the workplace due largely to their inability to unionise. The chances of their participating in meaningful social discourse with their employers and other participants are therefore slim, at best.

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40 Fenwick *et al* in Tekle *Labour Law and Worker Protection in Developing Countries* 34.

41 Fourie "Non-Standard Workers: The South African Context, International Law and Regulation European Union" 2008 11(4) *PER/PELJ* 1.

42 Barrientos in IAARR *Proceedings World Conference on Social Protection and Inclusion: Converging Efforts from a Global Perspective* 7–24.

43 *Ibid.*

When employers abuse their workers based on the workers' lack of choice, the performance and loyalty of such workers to their work organisation and their work is questionable. This has grave consequences for productivity in both the workplace and in society.

In conclusion, decent work, as espoused by the ILO may be idealistic, but it is also definitely not a reality for most non-standard workers. In a country like South Africa with a saturated labour market and a capitalist social formation driven by the profit motive, employers, both local and foreign, will inevitably take advantage making the ideal of decent work very difficult to realise.

Non-standard employment is a global issue which, in some states, is driven by choice and not by a need to survive. In most southern African states, however, it is a matter of survival not choice. But decent work is arguably a journey rather than a destination; it is a benchmark that each state seeks to achieve. However, if decent work is to become a reality in the SADC states, the labour legislation and the practice of industrial relations must be reviewed to protect non-standard workers from unscrupulous employers who contravene the principles of labour law for personal gain.

Non-standard employment relations have become common in most employment settings in the SADC. Nonetheless, the impact of this form of employment relations on the ILO's decent work agenda has hardly been examined by industrial and social scientists. This article investigates non-standard work within the context of flexibility and the restructuring of work, limited contracts, and outsourced employment. It argues that this type of employment relationship has been exacerbated by the increasing prevalence of unemployment, poverty, and inequality within the region. The article further argues that most employment enterprises in the SADC are using non-standard employment to reduce labour costs and increase profits in accordance with the dictates of the free market economy but to the detriment of temporary workers. The article contends that non-standard work leads to worrying contraventions of the decent work agenda in the SADC region.

2 4 Non-standard employment and labour migration in the SADC

Another aspect that presents a challenge to the capacity of labour law to regulate non-standard employment in southern Africa is extensive labour migration. The late nineteenth century saw a huge number of migrant workers in some economic sectors in South Africa – particularly in the mining and commercial agriculture sectors. Workers came from Botswana, Lesotho, Malawi, Mozambique, Zambia, Zimbabwe, and Swaziland.

To some degree, Namibia, Zambia, Zimbabwe, and Tanzania have also traditionally attracted labour migrants from nearby states. South Africa, however, remains the SADC's most powerful and diverse economy and continues to attract the main volume of both formal and informal migrant labourers.

Since 1990, the number of labour migrants relocating to South Africa from adjacent states has increased dramatically. There are several explanations for this, including growing unemployment in the transfer states and decreasing government contributions to social services.[44] Currently, the main reasons for migration include the huge differences between SADC member states in terms of income, standards of living, levels of unemployment, and political instability.[45] The effects of migration within the SADC are felt in numerous ways. One effect is that many households and communities in the region depend on the earnings of family members who have migrated to find employment;[46] another is that governments have crafted legal and institutional frameworks to ensure that migrants do not settle in the receiving states.[47]

As observed by Mpedi and Smit, migrants may be divided into two main groups: documented migrants (permanent residents, temporary residents, refugees, and asylum-seekers); and undocumented migrants.[48]

Documented migrants are those who enter the state lawfully and have the host state's official authorisation to work within its territory. Consent to work is granted on the basis of an employment proposal from an employer who must justify the need to employ a migrant on the basis of his or her knowledge, abilities, skill, and proficiency in a specific profession. Because host states closely scrutinise applications for permission to allow migrants to work, applications are made only by establishments that are lawfully registered and comply (at least on the face of it) with the legislation regulating employment relations. Therefore, it is likely that most documented migrant workers work under favourable conditions similar to those of their indigenous colleagues. They have greater bargaining power and may rely on the protection afforded by labour legislation. This notwithstanding, apart from workers who have permanent resident status, migrant workers cannot access state social security protection, such as disability and unemployment insurance benefits.[49]

Migration within the region is problematic as it challenges the ability of national labour legislative frameworks to protect undocumented migrant workers who constitute the bulk of the migrant labour force. The latter are workers who enter and work in the state illegally, or who enter legally (on a premise other than work) and remain in the host state and work without permission. They generally lack the education or skills that would justify the issuing of a work permit. They choose to work in jobs where they can escape the attention of the public authorities and, consequently, have fewer

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44 ILO *Labour Migration to South Africa in the 1990s* ILO Southern Africa Multidisciplinary Advisory Team, Policy Paper Series No 4 Harare, Zimbabwe (February 1998).

45 Crush, Peberdy and Williams "Migration in Southern Africa" http://www.sarpn.org/za/documents/d0001680/P2030Migration_September_2005.pdf (accessed 2020-03-18).

46 ILO *Labour Migration to South Africa in the 1990s;* ILO Southern Africa Multidisciplinary Advisory Team, Policy Paper Series No 4 Harare, Zimbabwe (February 1998).

47 *Ibid.*

48 Mpedi and Smit *Access to Social Services for Non-Citizens and the Portability of Social Benefits within the Southern African Development Community* (2011) 3.

49 Olivier and Kalula "Regional Social Security" in Olivier, Smit and Kalula (eds) *Social Security: A Legal Analysis* (2003) 23 15.

choices available to them.[50] They are thus susceptible to exploitation and abuse, and will accept work where the circumstances and conditions are substandard, the wages low, and where there is little or no job security.[51] In addition, undocumented migrants are always vulnerable to substandard living and working conditions, live in fear of being deported, and are generally excluded from the social protection provided by the state.[52]

There is a clear link between non-standard employment and vulnerable workers. The problems facing non-standard work are worsened by the concentration of vulnerable workers in many of these jobs, including migrants, the youth, the elderly, and women. Migrants frequently work in the agricultural harvesting and construction labour forces, and perform undeclared work in many states. The youth and undocumented immigrants are particularly at peril because of their economic dependence, the absence of assistance, and their fear of lodging complaints with the regulatory authorities.[53] Migrants generally engage in work that is not only hazardous, but also in sectors in which non-standard employment arrangements are commonplace.[54] Many studies have failed fully to examine these correlations, a notable exception being the study on hotel housekeepers.[55]

Because of their precarious position, migrants cannot benefit from the protection afforded by labour laws. The SADC has acknowledged the need to work towards enabling the movement of citizens between member states and the steady harmonisation of migration policies.[56] However, there has to date been little progress with regional efforts to regulate labour migration and the SADC region still has no coherent migration policy. Many migrant workers have no form of social protection while working in host states.[57] Migrant workers, particularly those who are undocumented, thus find themselves in conditions akin to non-standard employment. Olivier is of the view that, notwithstanding the existence of AU instruments that regulate and protect migrants in general, "the adoption, implementation and monitoring of international and regional standards … appear to be problematic".[58]

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[50] ILO *Decent Work and the Informal Economy* International Labour Conference, 90th Session, Geneva, 2002.

[51] Fenwick *et al* in Tekle *Labour Law and Worker Protection in Developing Countries* 14.

[52] Dupper "Migrant Workers and the Right to Social Security: An International Perspective" 2007 *Stell LR* 219 223.

[53] McLaurin and Liebman "Unique Agricultural Safety and Health Issues of Migrant and Immigrant Children" 2012 17(2) *Journal of Agromedicine* 186–196.

[54] Rizvi *Safety and Health of Migrant Workers: Understanding Global Issues and Designing a Framework Towards a Solution* (2015) 5.

[55] Seifert and Messing "Cleaning up after Globalisation: An Ergonomic Analysis of the Work Activity of Hotel Cleaners" 2006 38(3) *Antipode* 557–578. See also Sanon "Agency Hired Hotel Housekeepers" 2014 62(2) *Workplace Health & Safety* 86–95.

[56] Draft Protocol on the Facilitation of Movement of Persons in the SADC (1998) www.sadc.int (accessed 2019-11-15).

[57] Olivier and Kalula in Olivier *et al Social Security: A Legal Analysis* 23.

[58] Olivier "Enhancing Access to South African Social Security Benefits by SADC Citizens: The Need to Improve Bilateral Arrangements within a Multilateral Framework (Part I)" 2012 2(2) *SADC Law Journal* 129 138.

2 5 A note on novel categories of employment in southern Africa

Non-standard employment is closely linked to the informal economy, but remains distinct from this category of worker. The term "informal economy" refers to those sectors in the economy where employment is unregulated and can be variously described. In the words of Smit,[59] governments often view informality as an indispensable lifeline for the vulnerable and as a sign of economic vitality. However, informality comes with huge socio-economic costs. The majority of non-standard workers in developing states, and in particular in the SADC states, are not working informally by choice. This type of employment is often associated with uncertain working conditions and increasing employment insecurity.

In addition, the focus of labour law, as it has been advanced in the industrialised world, has been on the formal employment sector, and to a large extent, this is also true of southern African labour laws which have been "borrowed and bent" (Thompson) or "transplanted" (Kahn-Freund) from overseas.[60] Therefore, most of the employed population of southern Africa working in the informal sector and/or in agriculture, do not benefit from labour law as traditionally conceived. A further concern is that the formal sector of the workforce is in a near-constant state of flux, with a significant growth in casual workers, home-workers, and other forms of non-standard employment.[61]

Across the region, between 10 and 20 per cent of the economically active population is engaged in the informal sector of the labour market, and a significant minority work in farming, generally in subsistence agriculture.[62] Consequently, the majority of the economically active population in Southern Africa work in the informal sector of the economy. Unsurprisingly, in many SADC countries, governments vigorously promote the informal sector as a means of economic growth and development because it solves joblessness and offers goods at competitive prices to those on very low wages.[63] According to Benjamin, in September 2005, employment in the South African informal sector represented 22.8 per cent of total employment. This figure increases to 29.8 per cent if domestic workers are included.[64]

Many states are well aware that the informal sector is a growing rather than a passing phenomenon, and that the extension of social protection is of crucial importance. Attempts have therefore been made to extend protection through legislation, for example, the Unorganised Workers Social Security

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59 Smit and Fourie "Perspectives on Extending Protection to Atypical Workers, including Workers in the Informal Economy in Developing Countries" 2009 3 *TSAR* 516–547.

60 Kahn-Freund "On Uses and Misuses of Comparative Law" 1974 37 *Modern Law Review* 1.

61 Kalula "Beyond Borrowing and Bending: Labour Market Regulation and Labour Law in Southern Africa" in Barnard, Deakin and Morris (eds) *The Future of Labour Law: Liber Amicorum Sir Bob Hepple QC* (2004) 275–287.

62 Reports vary as to whether the correct figure is ten per cent (Torres) or twenty per cent. See Harrison and Leamer "Has Globalization Eroded Labor's Share?" 1997 15 *Journal of Labor Economics* 20.

63 Freund *The African Worker* (1998) 133.

64 Benjamin "Informal Work and Labour Rights in South Africa" 2008 29 *ILJ* 1579 1583.

Act 33 of 2008 in India; the Social Security Bill, 2005 in Tanzania; and the Social Security Act 34 of 1994 in Namibia.

2.6 Unemployment, income inequality, and regional labour standards

Table 1: The GDP Per Capita Ranking Over Time by Southern African Countries World Bank, including percentages from 2003–2017

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Angola	-0.6	7.1	10.99	7.64	10.02	7.27	-2.68	1.18	-0.16	4.75	1.31	1.23	-2.46	-5.81	-3.40
Botswana	3.2	1.3	3.06	6.73	6.57	4.50	-9.22	6.68	4.16	2.56	9.29	2.23	-3.51	2.41	0.51
Congo, Dem. Rep.	2.4	3.4	2.81	1.98	2.85	2.78	-0.50	3.60	3.37	3.57	4.93	5.90	3.45	-0.90	0.38
Lesotho	3.7	0.9	2.63	3.38	3.95	5.80	1.18	4.96	5.68	4.69	0.52	1.76	1.40	1.81	-3.58
Madagascar	6.5	2.2	1.56	2.00	3.22	4.11	-6.69	-2.50	-1.31	0.25	-0.48	0.56	0.38	1.42	1.42
Mozambique	3.4	4.6	5.55	6.67	4.32	3.80	3.29	3.62	4.04	4.12	4.07	4.37	3.56	0.82	0.80
Malawi	2.9	2.6	0.39	1.66	6.34	4.39	5.06	3.69	1.76	-1.09	2.15	2.66	-0.15	-0.45	1.04
Namibia	3.0	11.0	1.37	5.85	4.15	1.36	-1.14	4.28	3.08	2.82	3.22	3.91	3.70	-1.56	-3.06
Seychelles	-4.8	-2.5	8.50	7.15	9.86	-4.31	-1.49	3.04	10.76	0.27	4.08	2.89	2.62	3.11	4.00
South Africa	1.6	3.3	4.04	4.44	4.26	2.12	-2.62	1.81	1.94	0.80	1.02	0.41	-0.10	-0.73	0.06
Zambia	4.1	4.2	4.38	5.02	5.44	4.84	6.19	7.16	2.50	4.41	1.92	1.56	-0.15	0.69	0.36
Zimbabwe	-17.9	-6.9	-6.90	-4.82	-5.14	-19.06	9.97	17.33	11.81	14.09	-0.34	0.00	-0.58	-1.57	2.30
Average	**0.63**	**2.60**	**3.20**	**3.98**	**4.65**	**1.47**	**0.11**	**4.57**	**3.97**	**3.44**	**2.64**	**2.29**	**0.68**	**-0.06**	**0.07**

http://api.worldbank.org/v2/en/indicator/NY.GDP.MKTP.CD?downloadformat=csv

The application of ILO standards to non-standard workers and the creation of decent work, are paramount in the southern Africa region. However, unemployment, poverty, and inequality remain serious challenges confronting the region.

Joblessness and disparities in income are prevalent in southern Africa due to the low rate of economic growth in the region, which was reported as averaging 0.07 per cent in 2017. The growth rates in individual states vary. For instance, in 2017, Seychelles and Zimbabwe recorded an average of 4 per cent and 2.30 per cent respectively which was the highest levels of economic progression in the region. This position was formerly occupied by Namibia, Angola, and Mozambique, with growth rates of 11 per cent, 7.1 per cent, and 4.6 per cent respectively in 2004.[65] The region's unemployment rate is estimated at approximately 30–40 per cent. In South Africa, this is due, in part, to the steadily increasing demand for skilled labour. On average, gross domestic product (GDP) per capita has increased by three per cent per year in the SADC over the last decade. The differences in economic growth are considerable. While Angola has experienced a GDP growth per capita of more than seven per cent annually over the last decade, the per capita income of a state such as Zimbabwe has decreased by 2.8 per cent annually over the same period.

2 7 Labour market transitions in the SADC region

A crucial obstacle to the ability of labour law to provide for decent work in southern Africa is the orthodox, but now inadequate, dependence on the

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[65] Fenwick *et al* in Tekle *Labour Law and Worker Protection in Developing Countries* 23–26.

standard employment relationship as the linchpin of protective labour legislation. Casualisation and externalisation have produced different types of triangular employment which present a challenge to workers' protection in southern Africa. As these phenomena change the nature of employment, numerous workers no longer enjoy the protection of labour law.[66]

The ILO has four strategic goals: the promotion of rights at work; employment and income opportunities; social protection and social security; and social dialogue and tripartism.[67] Nevertheless, there are hurdles for non-standard employment relationships associated with these goals that apply to the circumstances in the SADC region.

The principal goal of the ILO today is to advance opportunities for women and men to secure decent and productive employment in circumstances of freedom, equity, security, and human dignity.[68] This goal declares that the economy should generate opportunities for investment, entrepreneurship, skills development, employment, and sustainable decent work. However, globalisation has changed the world of work. For employment to be decent, it should be indefinite, conventional, and secure and ensure an on-going income for an employee.

Within the context of the SADC, where unemployment rates are very high and the region is struggling to create jobs, the result is that people desperately looking for employment may accept whatever comes their way. It is therefore not surprising that unscrupulous employers benefit by exploiting the circumstances of these desperate individuals who are, in the main, non-standard workers.[69] The author argues that if the SADC states do not implement serious measures to create jobs and an enabling environment for entrepreneurship, non-standard employment may become the norm – and only unscrupulous employers will benefit. It is further submitted that if the SADC states fail to act, the ILO's decent work agenda will remain a paper tiger in the context of non-standard employment relationships in the SADC region.

Another crucial ILO goal is to guarantee employment rights in the workplace and promote acknowledgement of and respect for the rights of workers. It is contended that all workers, irrespective of their employment status, but especially those working under unfavourable conditions, need representation, participation, and legislation that will address their concerns. Barrientos is of the view that the obstacles with regard to employment rights are associated with the difficulty of organising and representing workers.[70] In the absence of the collective strength to bargain with employers, workers are not in a position to acquire other rights.

In most SADC states, workers in non-standard employment have few rights. Most labour laws were originally crafted to protect employees in

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66 *Ibid*.

67 See http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-ihtm (accessed 2019-08-15).

68 *Ibid*.

69 Fourie 2008 *PER/PELJ* 1.

70 Barrientos in IAARR *Proceedings World Conference on Social Protection and Inclusion: Converging Efforts from a Global Perspective* 7–24.

standard employment relationships and not those in non-standard work, who usually are unable to join a trade union. When workers find it difficult to join trade unions in their workplace, they fail to enjoy their employment rights. In such circumstances, the employer can stipulate the terms and conditions of employment with little or no opposition from workers. In addition, due to their inability to join trade unions, non-standard workers cannot bargain collectively with their employers, especially in the areas of remuneration, hours of work, health and safety measures, and other basic conditions of employment. In short, any employment relationship that does not afford its workers the right to join a trade union or does not allow the voice of the workers to be heard in decisions that affect their employment and promote their rights in the workplace, cannot advance the ILO decent work agenda.[71]

The extension of social protection is a third goal of the ILO. This goal encourages inclusion and productivity by ensuring that both women and men benefit from working conditions that are safe, permit enough free time and rest, take account of family and social values, provide for sufficient compensation in situations of lost or reduced income, and allow for affordable healthcare. Barrientos[72] further argues that the lack of social protection is a result of the fact that numerous workers in flexible working arrangements and informal workers do not have access to contracts of employment and employment benefits. They are thus often refused access to other types of protection and the social assistance offered by the government. In the southern African context, non-standard workers seldom have any type of social protection, either from their employers, or from the state. For instance, they are excluded from pension schemes by their employers and from unemployment benefits from the state. As far as social security is concerned, this group of workers is excluded, discriminated against, and rejected by the state. This clearly goes against the ILO's decent work agenda to which most southern African states are signatory.

The ILO's goal of promoting social dialogue advocates that the participation of strong and independent employees' and employers' organisations is crucial to increasing productivity, avoiding disputes at work, and building united societies. However, the difficulty with social dialogue is the paucity of powerful voices and the independent representation of employees in a process of dialogue with employers, the state, or other participants. In the context of the dominance of non-standard employment relationships in the southern African region, this goal is very challenging in that these workers do not have a powerful voice either within or outside of their workplaces and are more often than not unable to join trade unions. When workers are exploited by their employers on the basis of their desperation and lack of alternatives, their commitment and loyalty decreases. This has a serious effect on productivity in both the workplace and the SADC region which is currently struggling to deal with poverty, unemployment, and inequality.

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[71] Okafor "Sociological Investigation of the Use of Casual Workers in Selected Asian Firms in Lagos, Nigeria" 2010 8(1) *Ibadan Journal of the Social Sciences* 49–64.

[72] Barrientos in IAARR *Proceedings World Conference on Social Protection and Inclusion: Converging Efforts from a Global Perspective* 7–24.

Olivier summarises some of the dominant characteristics of labour law in SADC countries. First, there is a primary reliance on labour legislation borrowed from other jurisdictions, rather than on developing an autochthonous system of labour law. Second, the underlying bipartite and tripartite corporatist structures have failed to contribute to labour market regulation. Third, there is a narrow focus on labour law in the small (and shrinking) formal sector of the labour market. Fourth, the ILO has had a relatively limited impact: many countries' laws fail to meet minimum standards. Finally, there is a tendency to concentrate on the legislative, judicial, and executive functions within labour departments, particularly in relation to dispute resolution.[73]

3 CONCLUSION

The aim of this article has been to demonstrate policy development at the ILO and to identify the international benchmarks and regional standards relevant to the regulation and protection of non-standard workers.

There can be no social justice and workplace democracy while workers' rights remain unrecognised. The ILO's mandate is organised around four interrelated and mutually reinforcing strategic objectives aimed at realising the decent work agenda: creating jobs; guaranteeing rights at work; extending social protection; and promoting social dialogue. However, like any other organisation, the ILO has its shortcomings, which include the ineffectiveness of the international standards in a changing world of work with a proliferation of non-standard workers.

The ILO has found ways of addressing these shortcomings. With regard to the challenges facing non-standard workers, the organisation has introduced standards that address non-standard forms of employment, standards that address specific categories of non-standard employment, and standards that are of particular concern to non-standard workers.

This article has also analysed the ILO's influence on the labour law systems of southern Africa, as well as unemployment, income inequality, and regional labour standards in the context of non-standard employment and labour market transitions in the southern African region. The ILO offers technical support to more than 100 states in order to achieve these goals with the support of development partners.

Decent work as espoused by the ILO may be the ideal, but is not the reality for most workers in non-standard employment relationships. In southern African states where the labour market is saturated, employers exploit the situation and make the ideal of decent work very difficult to realise. The rise of non-standard work has been aggravated by labour migration in the region, and the article has therefore also considered whether labour law in the region is capable of protecting large numbers of labour migrants.

[73] Olivier "Social Protection in the SADC Region: Opportunities and Challenges" 2002 18(4) *International Journal of Comparative Labour Law and Industrial Relations* 377.

The regulation and protection of the rights of non-standard workers, such as the right to organise and bargain collectively, requires the state, trade unions, and employers to act on the framework provided by the ILO, democratic constitutions, and the labour legislation of the various southern African states, with a view to securing a better southern Africa. Labour law scholars and experts in southern Africa should pay greater attention to international law and jurisprudence and to foreign law, to advance the rights of non-standard workers to organise and to bargain collectively. Both legislation and jurisprudence require updating and development to meet the unique needs of southern Africa.

DISCRIMINATION ON THE GROUNDS OF PREGNANCY, DENIAL OF MATERNITY LEAVE AND LACK OF CONDUCIVE ENVIRONMENT FOR NURSING MOTHER IN THE WORKPLACE IN SOUTH AFRICA

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SUMMARY

In South Africa, women continue to be discriminated against on the grounds of being pregnant in the workplace and sometimes they are denied maternity leave, breastfeeding and childcare facilities. Methodologically, using a descriptive and content analysis research approach, this article examines how the apartheid era restricted the rights of pregnant women in the workplace, particularly black African women. Post-1994 South Africa, the article utilised various protective transformative legal and policy interventions that have been introduced and are being implemented to address the problem of discrimination against women on the grounds of pregnancy in the workplace.

1 INTRODUCTION

Discrimination on the grounds of pregnancy exhibits a coherent social logic.[1] What is worrisome is that women are being excluded from employment on the basis of pregnancy and this perpetuates the sexual division of productive

[1] Gueutal, Luciano and Michaels "Pregnancy in the Workplace: Does Pregnancy Affect Performance Appraisal Ratings?" 1995 *Journal of Business and Psychology* 155–167.

and reproductive labour which confirms women's second-class status in the workplace.[2]

Undoubtedly, in South Africa, patriarchal attributes viewed women as inferior beings to males and consequently not entitled to work.[3] Since the 20th century in South Africa women were subjected to discrimination and black African women in particular were subject to a triple oppression in terms of their race, gender and class. Due to patriarchal attitudes, black African women were largely employed as caregivers and restricted to household activities, procreation roles and maintaining of households.[4] In terms of race, black African women were inferior beings and in terms of class, they were excluded from education and employment opportunities.[5] This resulted in most black African women being confined to inferior job opportunities primarily in the informal sector. Women who were able to access job opportunities in the formal sector, were subjected to various discriminations such as unfavourable working conditions and unfair labour practice when they became pregnant.[6] During apartheid, interruption of service by pregnancy did not guarantee re-employment after birth.[7] Essentially black African female employees who were pregnant were likely not to be re-employed.[8] The apartheid period in South Africa denied black African women of significant employment rights and ultimately active participation in the South African economy.[9]

The discrimination of black African women was exacerbated in the factory jobs during late 1978.[10] The Black Sash, a non-violent liberal white women's resistance organisation in South Africa unearthed that during this period women were paid less in factories, employment was terminated if women became pregnant and no pension or provident funds were provided for women notwithstanding the physical, emotional and time-intensive work allocated to them.[11] The exploitation of women in the workplace was

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2 Siegel "Employment Equality Under the Pregnancy Discrimination Act of 1978" 1985 *Yale Law Journal* 929–930. See also Jones "To Tell or Not to Tell? Examining the Role of Discrimination in the Pregnancy Disclosure Process at Work" 2017 *Journal of Occupational Health Psychology* 239–240.

3 Langa *Becoming a Man: Exploring Multiple Voices of Masculinity Amongst a Group of Young Adolescent Boys in Alexandra Township, South Africa* (report for the Degree of Doctor of Philosophy, Faculty of Humanities, University of Witwatersrand) 2012 2–7.

4 Nolde "South African Women Under Apartheid: Employment Rights, with Particular Focus on Domestic Service and Forms of Resistance to Promote Change" 1991 *Third World Legal Studies* 211–212.

5 Nolde 1991 *Third World Legal Studies* 211.

6 Salane *Is There a Need for Black Feminism in South Africa? An Exploration into Systematic and Intersectional Exclusion* (doctoral/master thesis, University of Johannesburg) 2018 4–17.

7 Black Sash *Survey on Black Women in Employment in a Number of Pinetown Factories* Paper presented at the Black Sash National Conference (14 March 1978) 1–5 www.sahistory.org.za (accessed 2018-03-21).

8 Black Sash paper presented at the Black Sash National Conference.

9 Gaitskell, Kimble and Maconachie "Class, Race and Gender: Domestic Workers in South Africa" 1983 *Journal Review of African Political Economy* 27–28.

10 South African History Online "Women, Employment and Changing Economic Scene, 1920s" www.sahistory.org.za/womens-struggle-1900-1994/women-employment-and-changing-economic-scene-1920s (accessed 2018-09-16) 1–4.

11 Black Sash paper presented at the Black Sash National Conference 1–5.

prevalent particularly because they were targets of even more oppression because of the lack of rights to be employed.[12] Chapman asserts that the lack of rights of women in the workplace resulted in senior male managers abusing female employees by soliciting sexual favours in exchange for women keeping their jobs.[13] This suggests that the employment of women was not dependent on the competency of the female employees but rather on the sexual favours rendered to those in the authority of the company. In order to address gender inequality, the discrimination and exploitation of women in the workplace, trade unions such as Garment Workers Union that resisted gender inequality and social injustice were formed to champion and demand equal treatment for all workers.[14]

Meer points out that the Institute for Black Research unearthed that during the 1980s women were given odd jobs and management refused them time to see doctors when they were sick.[15] Most women did not have medical aid schemes or pension funds. During these periods, women had no job security and were barred from having conversations during working hours and were restricted with time when going to the restrooms. Moreover, maternity and sick leave to pregnant women were not adequate and subject to many formalities that required proof. Promotions for women were few and far between, firing and retrenchment was a cause of constant anxiety.[16] Black women had limited rights and choices both in society and in the workplace and this resulted in African women not only penalised due to race, but discriminatory practices allowed their exploitation in the workplace.

According to Lues, South Africa has an undoubtful history of discrimination in terms of gender and race which was perpetuated in both the public and private sector.[17] However, post 1994, when South Africa became a democratic country, there was commitment to abolish discriminatory laws and commit to the values of equality including *ubuntu*. *Ubuntu* is an emerging value and a valuable transformative tool in the South African law that engenders African values to South Africa's legal culture.[18] According to Himonga[19] *ubuntu* promotes inclusivity and shared values and is key in the development of plural legal culture. It was anticipated that post-1994 South Africa would enact and implement legislation that sought to

[12] Barnett "Invisible Southern Black Women Leaders in the Civil Rights Movement: The Triple Constraints of Gender, Race, and Class" 1993 *Gender & Society* 1–7.

[13] Chapman "Women's Workplace Oppression in 1970s South Africa" *South African History Online* (2015) https://www.sahistory.org.za/article/women%E2%80%99s-workplace-oppression-1970s-south-africa-cait-chapman (accessed 2018-09-16) 1–4.

[14] Chapman https://www.sahistory.org.za/article/women%E2%80%99s-workplace-oppression-1970s-south-africa-cait-chapman 1–4.

[15] Meer "Women in Apartheid Society" (2011) https://www.sahistory.org.za/archive/women-apartheid-society-fatima-meer-0 (accessed 2018-09-16) 1–12.

[16] Meer https://www.sahistory.org.za/archive/women-apartheid-society-fatima-meer-0 1–12.

[17] Lues "The History of Professional African Women: A South African Perspective" 2005 *Interim: Interdisciplinary Journal* 103–104.

[18] Himonga "The Right to Health in an African Cultural Context: The Role of *Ubuntu* in the Realization of the Right to Health with Special Reference to South Africa" 2013 *Journal of African Law* 165–166.

[19] Himonga 2013 *Journal of African Law* 167.

equally protect the rights of black women, particularly in the workplace.[20] It is against this backdrop that the Constitution of South Africa, 1996 (the Constitution) guaranteed the right to dignity, equality, right to fair labour practice to all persons irrespective of their position in life, more particular their gender.[21] In principle, South Africa has significant laws to support the empowerment of women, promote gender equality and bar oppression and all forms of discrimination in the workplace.[22]

South Africa enacted the Employment Equity Act 55 of 1998 (EEA) with the aim to redress the embedded historical differentiation against black African women in the workplace. With the enactment of the EEA in 1998, it was anticipated that workplaces would transform and be inclusive to the extent that women would enjoy equal rights and benefits like their male counterparts in the workplace.[23] The transformation of the workplace is informed by section 15(1) of the EEA that requires designated employers to implement affirmative action measures to ensure that previously disadvantaged groups such as women are equitably represented in all occupational levels in the workforce.[24] Section 15(4) of the EEA bars designated employers to take any decision regarding an employment policy or practice that would establish an absolute barrier to prospective or continued employment or advancement of people not from designated groups.[25]

In view of past discriminatory practices against women in the workplace, South Africa further signed into law the Labour Relations Act 66 of 1995 (LRA) in 1995. The LRA reaffirms women's rights not to be dismissed in the workplace based on pregnancy. Section 187 of the LRA provides that a dismissal is automatically unfair if the employee is dismissed because of her pregnancy, intended pregnancy or a reason related to her pregnancy.[26] As such, an employee who is dismissed on the grounds of pregnancy may invoke section 193(4) of the LRA, which states that a dismissal that is found to be automatically unfair can attract an order of reinstatement, re-employment or compensation. Section 187 of the LRA reaffirms the rights of women to be pregnant in the workplace and retain their jobs notwithstanding pregnancy. Section 187 of the LRA may, therefore, serve as a protective shield against employers who discriminate against pregnant employees in the workplace.

South Africa further signed into law the Basic Conditions of Employment Act 75 of 1997 (BCEA) in 1997 to enforce basic conditions of employment in

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[20] Grosser and Moon "Gender Mainstreaming and Corporate Social Responsibility: Reporting Workplace Issues" 2005 *Journal of Business Ethics* 327–328.

[21] Wing and De Carvalho "Black South African Women: Toward Equal Rights" 1995 *Harvard Human Rights Journal* 57.

[22] Romany "Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender" 1996 *Brook Journal of International Law* 857.

[23] Dupper "In Defence of Affirmative Action in South Africa" 2004 *South African Law Journal* 187.

[24] Dupper "Affirmative Action and Substantive Equality: The South African Experience" 2002 *South African Mercantile Law Journal* 275.

[25] S 15(4) of the EEA.

[26] Whitear-Nel and Grant "Protecting the Unwed Woman against Automatically Unfair Dismissals for Reasons Relating to Pregnancy" 2015 *Industrial Law Journal* 106.

the workplace. Of importance is section 25 of the BCEA which provides for four consecutive month's maternity leave. Section 26 of the BCEA prohibits employers from providing a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or health of her child. Non-compliance with the BCEA could lead to penalties or compensation being awarded.[27] Similar to the LRA, the BCEA reaffirms the protection of pregnant females in the workplace by providing equal rights to men, and further protection in terms of vulnerable female employees who are pregnant.[28]

Maternity leave is mostly unpaid in South Africa and this is because employers including the private sector companies are not obliged to provide paid maternity leave.[29] It is submitted that in the private sector female employees are largely not to enjoy maternity leave benefits if the employer has not registered pregnant employees with the Department of Labour to claim maternity benefits in terms of section 24 of Unemployment Insurance Act 63 of 2001 (UIA).[30] It is submitted that paid maternity leave serves as an attractive benefit for women to be employed and retained in the private sector.[31] It is espoused that the retention of black African women in the workplace creates room for the employers to develop a pool of potential females to be given opportunity and an enabling environment to work in the workplace environments.[32] As such one of the measures to attract and retain black African women in managerial positions in the workplaces is to provide paid maternity leave to female employees.[33] This ideal should be welcomed in a civilised democracy and the court has lent its voice to support this, in the case of *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23 (2 September 2014), the court observed that

> "[o]ur quest to achieve equality must occur within the discipline of our Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive".[34]

More importantly, paid maternity leave is viewed as a progressive step in promoting equality and accords with section 9(3) of the Constitution. Significantly, paid maternity leave is desired in South Africa; it is a

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[27] Schedule Two of the BCEA.

[28] Lues 2005 *Interim: Interdisciplinary Journal* 103–104.

[28] S 2 of the BCEA.

[29] Cabeza and Johnson "Glass Ceiling and Maternity Leave as Important Contributors to the Gender Wage Gap" 2011 *Southern Journal of Business and Ethics* 73–74.

[30] Ss 34 and 37 of the UIA provide for the payment to the employee by the Unemployment Insurance Fund (UIF) of maternity benefits during a period of maternity leave.

[31] Boswell and Boswell "Motherhood Deterred: Access to Maternity Benefits in South Africa" 2009 *Journal Agenda Empowering Women for Gender Equity* 76–78.

[32] Booysen "Barriers to Employment Equity Implementation and Retention of Blacks in Management in South Africa" 2007 *South African Journal of Labour Relations* 47–49.

[33] Booysen 2007 *South African Journal of Labour Relations* 47.

[34] *Barnard v South African Police Services* 2014 (6) SA 123 (CC) par 30.

commendable attribute which all employers should strive for.[35] In view of *ubuntu* there is a need for the balancing of interests of the employer and pregnant women in the workplace within the context of promoting effective business and respect for human rights.[36]

2 THE CONSTITUTION, GENDER, INEQUALITY AND EQUITY

Since the advent of democracy in 1994, South Africa ensured that its legislative framework enacted through drawing its validity from the Constitution encompasses principles of equality, including gender equality and the empowerment of women.[37] The Constitution is regarded as one of the progressive Constitutions globally and a beacon for emerging countries (Stevens and Ntlama, 2016).[38] The South African Constitution provides equal rights and protection to all persons.[39] Moreover, the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including pregnancy and so on.[40] Discrimination on the ground of pregnancy is unfair unless it is established that the discrimination is fair.[41] Essentially this means that the employer must prove that the discrimination has taken place, but such discrimination was fair.[42] This is particularly because the right to equality is subject to the limitation in terms of section 36 of the Constitution.

The importance of the right to equality was articulated by Mohamed DP when he stated in the case of *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) that "there can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised". According to Mubangi, the right to equality promotes inherently reaffirms that despite the diversity in South Africa, all persons are equal, notwithstanding their status in life. As such, the right to equally aims for a just society.[43] Essentially, the law must treat all persons equally and this is common law known as formal equality in terms of section 9(1) of the Constitution.[44] However, due to past discriminatory practices, women appear to be the victims of inequality and

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35 Ally *From Servants to Workers: South African Domestic Workers and the Democratic State* (2010) 6–8.

36 The EEA defines a designated employer as an employer who employs 50 or more employees, or an employer who employs fewer than 50 employees, but has a total annual turnover as reflected in Schedule 4 of the Act.

37 Waylen "Women's Mobilization and Gender Outcomes in Transitions to Democracy: The Case of South Africa" 2007 *Comparative Political Studies* 521.

38 Stevens and Ntlama "Promoting Women's Right to Development in South Africa Law" 2016 *Law Democracy & Development* 49.

39 S 9 of the Constitution.

40 S 9(2) of the Constitution.

41 Du Toit "Protection Against Unfair Discrimination in the Workplace: Are the Courts Getting it Right?" 2007 *Law, Democracy & Development* 1.

42 Fba "*Discrimination Law*" (2011) 16.

43 Mubangi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2013) 72.

44 De Waal and Currie *The Bill of Rights Handbook* (2013) 213.

as such substantive equality is required for the realisation of their right to equality in South Africa.

Accordingly, the Constitutional Court in the case of *President of the Republic of South Africa v Hugo* (4) SA 1 (CC)" observed that:

> "[w]e need … to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is in one context may not necessarily be unfair in a different context".

Within the workplace the achievement of equity has its genesis to the need for substantive equality in South Africa for women.[45] Braveman and Gruskin define equity to mean social justice or fairness and assert that it is an ethical concept grounded in principles of distributive justice.[46] Oosthuizen *et al*, define employment equity as follows "the employment of individuals in a fair and non-biased manner, thus, to promote equal opportunity by eliminating discrimination in all employment policies and practices".[47] To this end, women who are discriminated against unfairly in the workplace on the grounds of pregnancy may invoke both the Constitution (s 9), the EEA (s 6) which prohibits unfair discrimination) and section 187(*e*) of the LRA. Generally, discrimination based on pregnancy includes termination of employment, refusal to grant an employee time off, demotion, or being compelled to work in a hazardous environment.[48]

In the case of *Wallace v Du Toit* [2006] 8 BLLR 757 (LC), an employee was appointed as an *au pair* to care for her employer's two young children. The woman fell pregnant after a two-year period of her employment and this resulted in the termination of her employment. The employer had not registered the employee to the UIF and as such the woman could not claim any benefits. The employer contends that when the employee was interviewed in late 2001 the question of her starting a family was discussed and he claimed that he made it clear to her that if she had children of her own then he would not regard her as being qualified for the job. The employer expressed that it was a term of the contract, that should the employee fall pregnant, which would inevitably lead to her becoming a mother and having children of her own, then the employment contract would *ipso facto* terminate. This argument was denied by the employee. The court expressed that it was satisfied that a dismissal as defined in section

45 Akala and Divala "Gender Equity Tensions in South Africa's Post-Apartheid Higher Education: In Defence of Differentiation" 2016 *South African Journal of Higher Education* 1–3.

46 Braveman and Gruskin "Defining Equity in Health" 2003 *Journal of Epidemiology and Community Health* 254.

47 Oosthuizen, Tonelli and Mayer "Subjective Experiences of Employment Equity in South African Organisations" 2019 *South African Journal of Human Resource Management/SA* 6–8.

48 McDonald and Dear "Expecting The Worst: Circumstances Surrounding Pregnancy Discrimination At Work And Progress To Formal Redress" 2008 *Industrial Relations Journal* 229–231.

186(1)(*a*) of the LRA had been proven and that the reason for the dismissal related to the employee's pregnancy. The court found that the employer's justification that this was an inherent requirement of the job, and as such cannot in law provide a legal justification. The court emphasised that dismissal where the reason is related to the pregnancy of the employee is automatically unfair and cannot be justified. The employee was awarded damages for the violation of her inherent dignity as a woman and her feelings of hurt she suffered by being dismissed for falling pregnant.

It is observed from this case that the generalisation and stereotyping that fails to consider whether a pregnant employee would be able to continue to fulfil their job function and to simply presume that she could not, when this is not at all self-evident, falls foul of section 6 of the EEA. This form of discrimination further violates the dignity and equality rights in the Constitution. *Ubuntu* in South Africa denotes respect for human dignity of all persons including pregnant women, In the case of *S v Makwanyane* 1995 3 SA 391 (CC) par 225 the court observed that an "outstanding feature" of *ubuntu* is the value it puts on life and human dignity. It is stated that *ubuntu* signifies emphatically that "the life of another person is at least as valuable as one's own" and that "respect for the dignity of every person is integral to this concept".

3 THE LRA AND PROTECTION FROM DISCRIMINATION ON THE GROUNDS OF PREGNANCY

The LRA provides for the rights and duties of both employers and employees. The LRA provides that dismissal of employees must be both substantively and procedurally fair. This means that a dismissal must be based on a reason of law and that the affected employee must be provided with an opportunity to be heard through a disciplinary process before the dismissal is effected. This is significant because during apartheid, it was an acceptable norm for employers to dismiss female employees at work due to pregnancy.[49] This form of discrimination has been in the spotlight and still continues post-apartheid era.[50] It is submitted that termination of a pregnant female is not only automatic dismissal in terms of the LRA but arguably amounts to unfair discrimination in terms of pregnancy, sex and gender espoused in section 9 of the Constitution. In the case of *De Beer v SA Export Connection CC t/a Global Paws* 2008) 29 ILJ 347 (LC) the applicant (employee) was employed as a travel consultant and fell pregnant. An agreement was entered between the employee and the employer to return to work a month after she had given birth. The female employee gave birth to twins who suffered from colic. Against this background, the employee requested two to three days before returning to work and in addition a further month to look after her twins. The employer was amenable to provide the employee with an extra two weeks. The employee declined this, as such, the employer terminated her services. She then referred a dispute to the CCMA

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[49] Naidoo and Kongolo *Has Affirmative Action Reached South African Women* (2018) 177–178.

[50] Black Sash paper presented at the Black Sash National Conference 1–5.

and contended that her dismissal was automatically unfair in terms of section 187(1)(*e*) of the LRA. The court observed that:

> "Section 187(1)(*e*) of the LRA must be seen as part of social legislation passed for the specific protection of women and to put them on an equal footing with men. I have no doubt that it is often a considerable burden to an employer to have to make the necessary arrangements to keep a woman's job open for her while she is absent from work to have a baby, but this is a price that has to be paid as part of the social and legal recognition of the equal status of women in the workplace. If an employer dismisses a woman because she is pregnant and is not prepared to make the arrangements to cover her temporary absence from work the dismissal would be automatically be unfair."

It is clear from the above remarks that to level the playing field for pregnant female employees in the workplace, employers must keep the position of a pregnant employee vacant until the employee returns to work. It is submitted that this is part of social justice and recognition that female employees have additional burdens that affect their full participation as employees in the workplace. As such, it is inconceivable for the private sector to dismiss an employee due to pregnancy by citing economic and extra expenses to be incurred by the employer during the absence of the employee. Such a decision will not escape being automatically unfair.[51] An employee that is dismissed on ground of pregnancy or reasons connected with the exercise of her rights in respect of maternity leave may seek protection in terms of section 187(1)(*e*) of the LRA which grants protection to an employee against dismissal for any reason related to her pregnancy.[52]

Commonly, most of the workplaces, particularly the private sector in South Africa are largely profit-driven and it is submitted that it is conceivable that they deliberately neglect to employ women in general because of the financial implications when they are pregnant. This assertion resonates with the observations of Bosch where it was pointed out that in the workplace most employers encounter challenges once a female employee is pregnant and this includes the relocation of activities that may be harmful to the unborn child, less production and costs for training temporary the replacement.[53] Similarly, Vettori asserts that a workplace environment must be accommodative of pregnant employees even if it has financial implication to the employer-provided that such cost is not disproportional to the reasonable accommodation.[54] These challenges have enormous financial implications for employers. Notwithstanding this, financial implications cannot be a justification for the discrimination of pregnant employees in the

51 Barnard and Rapp "The Impact of the Pregnancy Discrimination Act on the Workplace – From a Legal and Social Perspective" 2005 *University of Memphis Law Review* 93.

52 S 187(1)(*e*) of the LRA provides: "A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy."

53 Bosch "Pregnancy Is Here to Stay – Or Is It?" in Bosch (ed) SABPP Women's Report (2016) 3–6.

54 Vettori "Employer Duties Towards Pregnant and Lactating Employees in the Hospitality Industry In South Africa" 2016 *African Journal of Hospitality, Tourism and Leisure* 12.

workplace.[55] As part of its internal obligations under Convention on the Elimination of All Forms of Discrimination Against Women, human rights treaty adopted by the General Assembly of the United Nations in 1979 (CEDAW) that defines discrimination against women and commits signatory countries to taking steps toward ending it. Article 11 of CEDAW requires South Africa to take steps to eliminate discrimination against women in the workplace to achieve equality between men and females in terms of rights and remuneration. The discrimination of pregnant women is further prohibited in terms of article 11(2)(*a*), instead article 11(2)(*b*) advocates for maternity leave with pay, or with comparable social benefits without loss of former employment, seniority, or social allowances.

The significance of article 11 of CEDAW is that it laments the equality and dignity of women in the workplace. Importantly, article 11 of CEDAW is relevant in addressing the historical; and patriarchal attributes that view women as inferior beings and consequently not entitled to work. Article 11 provides women with the right to work and also provides women with equal opportunities in the workplace and equal remuneration for work of equal value. In other words, women and men who are executing the same duties in the same positions in the workplace must be remunerated equally.

South Africa signed and ratified CEDAW in 1995. This resulted in South Africa being a State Party to CEDAW and therefore voluntarily accepting to a range of legally binding obligations to eliminate discrimination against women in all spheres including, employment. By doing this, South Africa agrees to comply with the norms and standards collectively agreed to by State Parties and further agree to be subjected to scrutiny by the CEDAW committee.[56] The basic State obligations under article 2 of CEDAW include *inter alia* the following:

- To promote equality of men and women in the legal systems by abolishing discriminatory laws against women.
- To put in place public institutions to hold the State and private companies accountable by ensuring the effective protection of women against any act of discrimination.
- To eliminate any act or practice that discriminates against women.

Essentially article 2 charges State Parties to adopt the egalitarianism process that will eliminate direct and indirect discrimination against women. These processes include the adoption of laws that promote non-discrimination of women, the establishment of independent bodies that investigates discriminatory practices of the State and an effective justice system that can be used to compel the State not to discriminate unfairly against women.

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[55] Barnard and Rapp "Pregnant Employees, Working Mothers and the Workplace – Legislation, Social Change and Where We Are Today" 2009 *Journal of Law and Health*. 218–220.

[56] The CEDAW Committee has been established to monitor State Parties compliance of the recommendations issued by CEDAW.

4 THE RIGHT TO MATERNITY LEAVE AND BREASTFEEDING FACILITIES IN THE WORKPLACE

The right to maternal leave is recognised internationally through the Maternity Protection Convention, 2000 (MPC 2000) which was adopted on 15 June 2000. The MPC recognises the importance of promoting equality of all women in the workplace and health and safety of the mother and child. In terms of article 4 of the MPC 2000, women are entitled to a period of maternity leave of not less than 14 weeks. State members are however encouraged to extend maternity leave to at least 18 weeks. Article 6 of MPC 2000 states that cash benefits shall be provided to women who are absent from work due to maternity leave. Article 8 of MPC 2000 bars employers from terminating employment of a pregnant employee during pregnancy or absence of maternity leave or her return to work. Article 8 of MPC 2000 provides that a woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity.

Article 9 of the MPC 2000 states that Member States need to adopt appropriate measures to ensure that maternity does not constitute a source of discrimination in employment, including access to employment. Article 10 of the MPC 2000 provides that a woman shall be provided with the right to one or more daily breaks or a daily reduction of hours of works to breastfeed her child. Article 10 of the MPC 2000 denotes that the nursing or breastfeeding or reduction of daily hours of work shall be counted as working time and remunerated accordingly.

The MPC recognises the importance of giving protection to female employees who are pregnant at work. It is argued that the MPC assists in ensuring that women continue to contribute to a country's economic growth without being marginalised in the labour market due to pregnancy. It is accepted that the marginalisation of pregnant women in the workplace deprives women of choice and opportunities in employment and is essentially contrary to the normative considerations of fairness and justice.[57]

In 2010, the International Labour Organisation (ILO) found that the maternity leaves in South Africa ranked the highest in Africa. In South Africa, pregnant women are provided with four consecutive months' maternity leave. This is in accordance with section 25 of the BCEA. Section 25(4) of the BCEA provides further protection to pregnant employees by barring employees from working for six weeks after the birth of a child unless a medical practitioner or midwife certifies that she is fit to do so. Similarly, an employee who has experienced a miscarriage on their third trimester of pregnancy or bears a stillborn child has a right to maternity leave for a period of six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth.[58]

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57 International Labour Organisation (ILO) *Maternity Protection Resource Package, Maternity Protection at Work: Why is it important?* (2012) 4.

58 S 25(4) of the BCEA.

Through the BCEA employers are challenged to proactively provide an alternative employment to a pregnant employee on the terms and conditions that are no less favourable than her ordinary terms and conditions of employment. The reading of the BCEA informs the view that the intention of the legislature when drafting the BCEA was to cater *inter alia* for the needs of female employees by ensuring that their jobs are safeguarded even during and after pregnancy. According to Klerman and Leibowitz "maternity-leave promise advantages for both infants and their mothers. Infants are expected to benefit from their mother's full-time care during the maternity-leave guarantee period. The mothers benefit not only from increased time to spend with their new-borns but also from the right to return to their jobs without penalty."[59] As such, employers must guard against discriminating against pregnant employees in the quest to achieve profit and efficiency of the business.[60] Employers are bound by the legal prescripts to ensure that human rights, *ubuntu* and non-discrimination of pregnant employees are promoted in the running of the business. For a fair discrimination, the employer must rely on the inherent requirement of a job and such requirement must be so inherent that if not met the employee would not qualify for the position.[61] It was decided in the matter of *Woolworths v Whitehead* (CA06/99) [2000] ZALAC 4 (3 April 2000) that a party who claims discrimination, must show that but for her pregnancy, she would have been appointed. In other words, there must be a causal connection between her not being appointed to a position and her pregnancy.

In the case of *Woolworths v Whitehead*, Ms Whitehead (Respondent) had applied for a senior human resources position at Woolworths (Appellant). The respondent contended that, based on her pregnancy, the appellant withdrew the permanent employment offer and offered temporary employment for five months, which would essentially have endured until she commenced her maternity leave. The appellant concedes the respondent was discriminated however argues that the discrimination related to the requirement of uninterrupted job continuity which requirement applied equally to any applicant for the position advertised; and further the job continuity need not be interrupted for at least twelve months and was rationally and commercially supportable.[62] The court observed that:

> "A careful balancing of interests is required in a case such as this. We live in a country with pervasive poverty, poor social security, high unemployment and a low growth rate. Without a rapidly expanding economy, it will be impossible to deliver to our society so many of the changes and improvements it so desperately needs. At this stage of our history, to hold that an employer cannot take into account a prospective employee's pregnancy would be widely regarded as being so economically irrational as to be fundamentally harmful to our society."[63]

Notwithstanding the progressive legal framework that guarantees basic conditions of employment, the lack of compulsory paid leave arguably adds

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59 Klerman and Leibowitz "Job Continuity Among New Mothers" 1999 *Demography* 145–147.

60 *Whitehead v Woolworths* (C 122/98) [1999] ZALC 82 (28 May 1999) par 32.

61 *Whitehead v Woolworths supra* par 37.

62 *Woolworths (Pty) Ltd v Whitehead* (CA06/99) [2000] ZALAC 4 (3 April 2000) par 46.

63 *Woolworths (Pty) Ltd v Whitehead supra* par 136.

a financial burden to pregnant employees. In the case of *Manetsa v New Kleinfontein Gold Mine* [2018] 1 BLLR 52 (LC) paragraph 4, the court held that "it can further not be doubted that whilst on maternity leave, whether paid or unpaid, pregnant employees by virtue of their absence from the workplace in certain instances invariably lose out on advantages of being at the workplace, such as bonuses, promotions, and career development in the form of training and development offered to other employees".[64] The court correctly further pointed out that:

> "[p]regnant women continue to worry about the prospects of their continued employment once they disclose their pregnancy or even after childbirth … workplaces that provide child care facilities. These problems cut across all industries but are even more prevalent in sectors of our economy that are traditionally male-dominated such as mining … Female employees become unintended casualties of their pregnancies or womanhood".[65]

These remarks inform the view that pregnancy has the effect of denying women of opportunities that can be of assistance in their progression and advancement in the workplace especially in predominately male-dominated sectors. This resonates with the findings of the National Research Council that unearthed that motherhood is a major reason that companies promote fewer women compared to their male counterparts.[66] The National Research Council report of 1994 unearthed further that women with children are often not promoted at companies and this has resulted in other women hiding their pregnancies.[67] Interestingly, the Commission for Gender Equality (CGE) report (2018) has observed that most private sector companies do not have childcare facilities in the workplace, do not offer breastfeeding breaks in the workplace nor offer paid maternity leave.[68] It is submitted that an employer that fails to introduce in a workplace an environment that is sensitive to the needs of women, will unlikely not attract potential female employees and would similarly not retain its female employees. Of course, the employer would not be able to attract and retain skilled women who would add value to the company.

The workplace needs to transform and progressively create an enabling environment that is sensitive and accommodative to the needs of female employees and pregnant employees in general.[69] To achieve this, the BCEA provides guidance through a Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child (the Code of Good practice). The Code of Good Practice protects female employees to return to work while breastfeeding and states that a nursing mother may breastfeed 30 minutes twice a day at the workplace. The Code of Good

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64 *Manetsa v New Kleinfontein Gold Mine* [2018] 1 BLLR 52 (LC).

65 *Manetsa v New Kleinfontein Gold Mine supra* par 4.

66 National Research Council (NRC) *Women Scientists and Engineers Employed In Industry: Why So Few, 1994* (1996) 41.

67 National Research Council *Women Scientists and Engineers Employed In Industry: Why So Few, 1994* 42.

68 Commission for Gender Equality (CGE) *Employment Equity Hearings in the Private Sector* (2018) 52–58.

69 Major *Pregnancy in the Workplace: Stigmatization and Work Identity Management Among Pregnant Employees* (Psychology Theses and Dissertations UMD Theses and Dissertations) 2004 1–6.

Practice further requires the employers to assess and control risks to the health and safety of pregnant and breastfeeding mother in the workplace.

To this effect, the Code of the Good Practice prescribes that "arrangements should be made for pregnant and breastfeeding employees to have breaks of 30 minutes twice a day for breastfeeding or expressing milk each working day for the first six months of the child's life".[70] For the breastfeeding breaks to benefit employees, it is conceivable that employers provide child care facilities in the workplace alternatively provide flexible-working hours to women who are still breastfeeding.

It is submitted that the existence of child care facilities in the workplace will assist women in balancing their work role and family responsibilities. The CGE unearthed that most companies in South Africa do not provide child care facilities in the workplace.[71] Conversely, Doubell and Struwig postulate that child care responsibilities associated with school-going children did not support the narrative that this is a barrier to women's career success.[72] It is submitted that a workplace that provides breastfeeding breaks and facilities would be viewed as an enticement and has the effect of attracting black African women to join the private sector and not leave to other sectors.[73] This is against the backdrop understanding that most employers do not provide opportunities for women to breastfeed at work.[74] Commonly, the job may be demanding in nature and required extra effort, and generally requires more hours at work. To this end, in order to ensure that women are on an equal footing with their male counterparts, breastfeeding facilities are imperative in the workplace.[75] The establishment of breastfeeding facilities would essentially assist women to have a work-life balance.[76]

Remarkably, Bidvest was one of the companies that appeared before the CGE and was found to have had an in-house crèche facility available to its employees which was an attractive measure to entice women to join the company.[77]

According to UN Women, when a company introduces child care facilities in the workplace it has the effect of improving punctuality, reduces absenteeism and further increases productivity and motivation for women.[78]

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[70] Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child, 13 November 1998, s 5.13.

[71] CGE *Employment Equity Hearings in the Private Sector* 39.

[72] Doubell and Struwig "Perceptions Of Factors Influencing The Career Success Of Professional And Business Women In South Africa" 2014 *South African Journal of Economic and Management Sciences* 532.

[73] Groenmeyer *Women And Social Policy–Experiences Of Some Black Working Women In Contemporary Post-Apartheid South Africa* (PhD thesis, Department of Sociology and Political Science, Faculty of Social Sciences and Technology Management, Norwegian University of Science and Technology, NTNU, Trondheim) 2011 1–4.

[74] Netshandama "Breastfeeding Practices Of Working Women" 2002 *Curationis* 21.

[75] Salcedo "Breastfeeding in the Philippine Workplace: What's Wrong with the Right?" 2015 *DLSU Business & Economics Review* 124.

[76] Salcedo 2015 *DLSU Business & Economics Review* 124.

[77] CGE *National Employment Equity Report* (2010–2011) 15.

[78] International Finance Corporation, Tackling Childcare (IFCTC) "The Business Case For Employer-Supported Child Care" (2017) www.ifc.org/wps/wcm/connect/topics_ext_

Lack of child care facilities is recognised as a barrier to female labour force participation. It is from this premise that the CGE recommended that the workplace must have child care facilities to enable females to balance their roles as employees and their roles as mothers and/or primary caregivers.[79] This recommendation is based on soft law and is not legislated but it is desirable.

5 CONCLUSION

What is remarkable from the submissions above is that all the transformative interventions discussed require that pregnant employees be treated comparably with others on the basis of ability or inability to work. Women continue to be discriminated in the workplace on various grounds and on the grounds of pregnancy and breastfeeding. Procreation and bearing a child are parts of an inherent and inalienable endowment for women from the time immemorial, and this shall continue. Women who are pregnant should not be discriminated at all in the workplace rather they should be given all the supports they need. Regrettably, apartheid South Africa denied women, particularly black African women all these rights with impunity. Post-apartheid 1994, women rights have been restored and given to them starting from the Constitution which expressly provides for the respect of human dignity and human rights where all, men and women are considered as equal in all aspects and respects irrespective of their gender. The Constitution promotes and protects equality and frowns against inequality of any types. Therefore, women's rights to work, be pregnant and bear children are duly protected. Similarly, protective transformative pieces of legislation and policy have been introducing and being implemented to guarantee women right generally and in the workplace. The LRA expressly provides for unfair labour practices hence dismissal or discrimination on the ground of pregnancy will be unfair labour practice and the court will not hesitate to reinstate the dismissed employee. Similarly, international instruments particularly CEDAW abhors discrimination against women and promotes the right of women to be pregnant. The private sector employers are notorious from discriminating against pregnant women. The good news is that there are ample transformative interventions like the EEA, BCEA, LRA and the Code that are available to pregnant women to seek redress against erring employers at the appropriate court. As part of protective mechanisms to ensure that the right of pregnant women are guaranteed prior and after pregnancy even at birth in the workplace, maternity leave, breastfeeding and crèche facilities are imperatives for a nursing mother to continue to discharge her responsibility to the employer.

content/ifc_external_corporate_site/gender+at+ifc/priorities/employment/tackling_childcare_the_business_case_for_employer_supported_childcare (accessed 2019-12-12).

79 CGE *Employment Equity Report* (2016) 18.

NOTES / AANTEKENINGE

THE DEVIL IN THE DEEMED: NOVEL TAKES ON SECTIONS 198B AND D[1]

1 Introduction

Section 198 of the Labour Relations Act is designed to protect vulnerable employees of labour brokers and those on fixed-term contracts. Some recent judgments may make obtaining that protection more complicated.

2 *Nama Khoi Local Municipality v SALGBC*

2 1 Background

The dispute in *Nama Khoi Local Municipality v South African Local Government Bargaining Council* [2019] 8 BLLR 830 (LC) arose in the following circumstances. Mr August was employed as a communal officer by the Nama Khoi municipality on two successive fixed-term contracts, the first from 1 October to 31 December 2016, the second from 1 January to 31 March 2017. This made a total of six months; three months longer than employers are now allowed to employ workers earning below R205,433.30 a year unless the nature of the work is "of a limited or definite duration" or the employer can establish some "justifiable reason for fixing the term of the contract" (s 198B(3) of the Labour Relations Act 66 of 1995, as amended on 1 January 2015). If the contract is for longer than three months or is extended beyond that period, without the employer demonstrating a justifiable reason for this, employment is deemed to be of indefinite duration (s 198B(5)).

August was informed on 31 March 2017 (the day his extended contract was set to expire) that it would not be renewed and that his service to the municipality would end. Three days earlier (on 27 March 2017), August's union, IMATU, had referred a dispute to the CCMA in terms of section 198D, seeking the following relief:

> "The employer failed and/or neglected to appoint Mr R August on an indefinite contract although function of the post are of a permanent nature [*sic*], alternatively to confirm that he is appointed on an indefinite contract."

[1] This contribution first appeared in *Employment Law* (2020) vol 36(1).

The conciliating commissioner classified the dispute as one falling under section 198B, and the matter was referred for arbitration in the same terms. After the dispute was arbitrated on 21 June 2017, another commissioner noted that the municipality had not explained why it had chosen to employ August on a second fixed-term contract. The commissioner also noted that neither of the contracts explained why it was necessary to employ August on fixed-term contracts at all, as required by section 198B(6)(*b*). The arbitrator accordingly ruled that August had been deemed employed indefinitely. Importantly, the commissioner took a step further: Having noted that Mr August's second contract had ended on 31 March 2017, he reinstated August retrospectively to that date. This was the aspect of the award that was challenged on review.

Apart from claiming that the commissioner had ignored evidence concerning the justifiable reasons why it claimed to have employed August on fixed-term contracts, the municipality raised a number of innovative points: First, that, since the dispute had been referred under section 198D, the commissioner lacked power to do anything more than interpret and apply that provision; secondly, that section 198D does not confer on arbitrators power to appoint employees; thirdly, that IMATU (the referring party) had not sought reinstatement; finally, that reinstatement would have been impracticable within the meaning of that word in section 193(2)(*c*).

2 2 Judgment

Snyman AJ began by referring to the conventional dispute resolution provisions of the LRA which relate to dismissals. If August was deemed a permanent employee by virtue of section 198B(5), the termination of his contract could be covered by one of two provisions of the definition of "dismissal" in section 186(1)(*a*). If the municipality was wrong in contending that August was employed on a fixed-term contract, he would have been dismissed in the sense contemplated in section 186(1)(*a*) – his employment had been terminated without notice. Or, if August was indeed employed on a fixed-term contract, he might have been dismissed in the sense contemplated by section 186(1)(*b*) – he could claim that he reasonably expected to have been employed on an indefinite basis on the same or similar terms. Either way, August would normally have had to refer a dispute for conciliation under section 191(5)(*a*) of the LRA and, if successful, could claim relief under sections 193 and 194.

Significantly, IMATU had not referred the dispute under section 191(5). It had relied on section 198D, the dispute resolution provision specifically tailored for alleged breaches of sections 198A, B or C, which requires arbitrators to interpret and apply those provisions to resolve the dispute. Save for spelling out its own time limits (six months from the act or omission complained of and 90 days after the dispute has been certified unresolved), the procedural steps prescribed by section 198D are much the same as those set out in section 191(1)(*a*) – first conciliation and then, if unresolved, arbitration.

Unlike section 193, section 198D does not expressly spell out the relief arbitrators may grant after interpreting and applying sections 198A, B or C.

The question before the *Nama Khoi* court was what arbitrators may do if they find that any of the substantive provisions of sections 198A, B or C apply – i.e. if an employee is deemed an employee of a labour broker's client (s 198A(3)(*b*)), if an employee on a fixed-term contract is deemed permanently employed (s 198B(5)) or if a part-time employee is entitled to be treated no less favourably than full-time employees (s 198C(3)(*a*)).

While the employment relationship still exists, the answer seems obvious. All the arbitrator need do is to declare that the employee is "deemed" to be a fulltime employee of the client or permanently employed or entitled to be treated similarly to fulltime employees, and the legal consequences will follow. Any specific order will be unnecessary because the consequences of the deeming provisions are spelt out in the Act itself. The same applies to arbitrators charged with interpreting and applying collective agreements: No power to grant specific remedies is expressly afforded by section 24(5) because the arbitrator need only declare as much and the employer is legally bound to comply with the agreement as interpreted by the arbitrator.

However, after the employment relationship has ended the position appears to be different. Employees can hardly claim to be deemed employees of a labour broker's client or to be permanently employed because they were on fixed-term contracts for longer than three months or to be entitled to be treated the same as permanent employees of an employer once the employment relationship has ended. As far as section 198B is concerned, Snyman J had no doubt. He wrote:

> "In my view, it is clear why sections 198A, 198B and 198C have their own dispute resolution process. The reason for this is that section 198D makes it possible for employees to pursue disputes about whether any of these provisions apply to their employment *whilst the employment relationship is ongoing*, with the view to obtaining declaratory relief, particularly where it comes to section 198B, as to the status of that employment relationship." (Emphasis supplied.)

In other words, if employment was *subsequently* terminated, the employer could not then rely on a claim that the fixed-term contract had expired because the contract will in law *already have become* permanent. The termination would then amount to a dismissal and the employer would then have to find some other reason to justify it.

2 3 *The section 198D procedure*

What, then, is the purpose of the section 198D procedure? Snyman AJ did not doubt that score either. He wrote:

> "I consider section 198D to be a process designed to be proactive. It places an entitlement in the hands of an employee party to remedy a state of affairs as contemplated by sections 198A, 198B and 198C *during the currency of the employment relationship.* Section 198D as a dispute resolution process is not intended to be applied once the employment relationship has terminated. For that, employee parties already have the required protection in the unfair dismissal provisions of the LRA." (Emphasis supplied.)

The judge regarded this view as fortified by the absence from section 198D of the kind of relief expressly provided for unfair dismissals and unfair labour

practices by sections 193 and 194 reinstatement, re-employment, or compensation. In Snyman AJ's view, the only competent relief that may be granted under section 198D is declaratory. But even that would be moot if the employment relationship has ended by the time the referral comes before an arbitrator: An award declaring that the employee had become deemed permanent would serve no purpose.

On this approach, Mr August's case seems to have been hit by mootness, not by the fact that the dispute had been referred after employment had ended. As indicated above, he referred his dispute three days *before* the ending of his second contract, that is, while the employment relationship still subsisted. It may be arguable that he had left his referral too late. But a delay of this nature cannot deprive the CCMA of jurisdiction to entertain the dispute. The facts contained in the judgment do not indicate that August was told any earlier that his employment was to end on 31 March 2017. The timing of the referral would not therefore have precluded the arbitrator from declaring that August had been "deemed" a permanent employee of the municipality from one day after the end of his first three-month contract and that the subsequent termination constituted a dismissal, as opposed to the automatic expiry of a fixed-term contract. But even that would not have helped August given the approach adopted by the court. By the time the matter came before the arbitrator several months had passed since the employment relationship ended. On the court's approach, an order declaring that on 31 March 2017 August had become a deemed employee could not revive the employment relationship.

The court also placed another hurdle before August. This was that he could and should have referred an unfair dismissal dispute to the CCMA under section 191 if he wished to be reinstated. The judge relied on two authorities and an example to justify this proposition. The first authority was *Piet Wes Civils v Association of Mineworkers and Construction Union* [2018] 12 BLLR 1164 (LAC). This matter involved section 198B only obliquely. The workers, in this case, were told that their fixed-term contracts had expired because the employer's service contract with a mine had come to an end. The workers claimed that they had been deemed permanently employed and on that basis approached the Labour Court under section 189A(13) for an order reinstating them until their union had been consulted. They were granted that order by the Labour Court. After finding that the employer had failed to prove that the workers had not become deemed employees because they had not been given written contracts, as required by section 198B(6), the LAC found that the workers were entitled to approach the Labour Court under section 189A(13). They were reinstated so that consultations could commence.

To Snyman AJ, *Piet Wes* was relevant because it showed how section 198B could be applied "as part and parcel of an unfair dismissal dispute"; it becomes "an element of a dismissal dispute, when deciding whether a dismissal exists, or whether a dismissal is fair". This arguably stretches the point. *Piet Wes* did indeed involve an unfair dismissal dispute referred in terms of section 189A(13). The issue was whether the employees had become permanent by virtue of section 198B. The court found that they had and that they had accordingly been dismissed unfairly because the employers had staked their entire case on the claim that the employees'

limited duration contracts had expired. *Piet Wes* did not say that employees wishing to rely on section 198B *must* refer disputes under one of the "standard" dispute resolution procedures if their fixed-term contracts are terminated once they have been deemed permanent because they had.

The second judgment on which Snyman AJ relied was *National Union of Metalworkers of SA obo Members v Transnet SOC Ltd* [2018] 5 BLLR 488 (LAC), which also involved an application under section 189A(13). The Labour Court found that NUMSA had failed to prove that its members were dismissed because they had not satisfied the court that they had either a reasonable expectation that their contracts would be renewed or that they had become deemed permanent employees by operation of section 198B. The LAC agreed, noting that section 189A(13) applies only when dismissals are contemplated or effected. All Transnet had done was to allow permissible fixed-term contracts to expire.

The example provided by Snyman AJ concerned the hypothetical situation of an employee employed on a 12-month fixed-term contract in contravention of section 198B where the employer releases the employee at the end of the contract. In this case,

> "[T]he employee would then be in a position to pursue an unfair dismissal claim to the CCMA as contemplated by section 186(1)(*a*) of the LRA, contending that the employer's reliance on the fixed term was misplaced, because *by way of operation of law* it had become indefinite. In such a case, the employer would be found to have dismissed the employee when seeking to rely on the fixed term, which, if found to be unfair, could carry with it the relief of fully retrospective reinstatement. The point is, however, that an unfair dismissal dispute must be pursued." (Emphasis supplied).

2 4 A proactive section?

If, as this passage suggests, the employee becomes permanently employed by operation of law, what is the point of obtaining a declaratory order to this effect under section 198D before the contract expires? Snyman AJ's answer was that, like section 189A(13), section 198D initiates a process that is meant to be "proactive"– it "places an entitlement in the hands of an employee party to remedy a state of affairs as contemplated by sections 198A, 198B and 198C during the currency of the employment relationship". In the case of section 198B, this can only be to enforce the employer's obligation under subsection (8)(*a*) – to treat the employee no less favourably than permanent employees performing the same or similar work. That relief cannot be granted unless and until the employee is found to have been unfairly dismissed and is reinstated.

In this sense, the purpose of section 198D is similar to that of section 189A(13). That provision is designed to ensure that pre-retrenchment consultations are properly conducted. This does not mean that employees may not invoke section 189A(13) after they have been dismissed. However, the courts accept that that provision may not be invoked long after the retrenchment has been effected, even though the Act provides that employees may be reinstated if the employer has failed to comply with a fair procedure. Late applications under section 189A(13) are usually dealt with on the basis that the delay cannot be condoned (see *Steenkamp v Edcon*

Ltd [2019] 12 BLLR 1189 (CC) and the judgments cited there), which did not seem to affect the approach of the court in *Piet Wes*.

As alluded to above, Snyman AJ saw the bar raised by section 198D as more than a matter for condonation. For him, it was a matter of process. On this approach, while employees could not invoke section 198D after they had been dismissed, they may do so only as "part and parcel" of a dismissal dispute, as was done in *Piet Wes* and *Transnet*. In other words, the employee may still raise section 198B (and presumably s 198A), but only to defeat the employer's claim that a fixed-term contract has expired (or, presumably, that the employee was rendering "temporary service"). After employment has ended, these issues can only be raised in the context of an unfair dismissal claim. If the employer succeeds in proving that the deeming provision in section 198B (and presumably in s 198A(3)) did not apply during the employment relationship, the employee will fail to prove that he or she had been dismissed, and the matter will end there.

The *Nama Khoi* court saw two further reasons why section 198D cannot be invoked after termination of employment. The first was that if an employee claims, as Mr August did, that she wishes to be reinstated, she must prove that she had been dismissed in one of the senses the LRA defines as a dismissal. Employees can be reinstated only if they have been unfairly dismissed. August had not claimed that he had been dismissed. He had merely sought confirmation that he had been appointed on an indefinite contract. Without an averment that the referring employee has been dismissed, the matter can't be treated as such.

The second reason why Snyman AJ regarded section 198D as the incorrect route for August to have followed was that, if indeed he claimed to have been dismissed, the matter had not been referred for conciliation as a dismissal dispute, as all dismissal disputes must be (see *National Union of Metalworkers of SA v Intervalve (Pty) Ltd* [2015] 3 BLLR 305 (CC)). August and his union had in effect used section 198D as means of bypassing the procedural requirements of the LRA. However, as IMATU pointed out, August was still in employment when the dispute was referred, if only for a few days before the contract lapsed. For Snyman AJ, the commissioner could have declared August to be a permanent employee but, by the time such a declaration was made, August's status as an employee was moot.

Snyman AJ found the situation in which the arbitrator found himself akin to that in which an arbitrator would be if asked to decide an unfair labour practice dispute after employment had terminated, as occurred in *Independent Municipal and Allied Trade union obo Joubert v Modimolle Local Municipality* (2017) 38 *ILJ* 1137 (LC). In that case, both the Labour Court and the Labour Appeal Court (see [2018] 11 BLLR 1106 (LAC)) found that an order reinstating Mr Joubert to the disputed post was a complete misdirection because there was no unfair dismissal dispute before the arbitrator. By the same token, this arbitrator lacked power to order reinstatement.

Snyman AJ pointed out that the only remedies statutory arbitrators may grant are set out in section 193 of the LRA. The remedies of reinstatement, re-employment or compensation are limited to unfair dismissals and unfair labour practices. Section 198D provides for no such remedies –

reinstatement, re-employment, or compensation – may be granted, only if the employee has been unfairly dismissed or subjected to an unfair labour practice. The arbitrator, in this case, had made no such finding. The judgment ends with this synopsis:

> "In summary therefore, the [arbitrator] committed a material error of law when he proceeded to determine whether [August] was employed indefinitely by virtue of the application of section 198B(5), when it was patently obvious that the [his] employment … had already been terminated, and there was no unfair dismissal dispute before him [the arbitrator]. Insofar as he may have decided the matter based on the existence of a dismissal, he had no jurisdiction to do so. In addition, and by awarding reinstatement, the [arbitrator] completely exceeded his powers, and gave relief that he was not competent to give, considering the nature of the dispute that was before him. Stripped down to its basics, what the [arbitrator] actually did was to try and decide an unfair dismissal dispute that was never before him."

2 5 Analysis

In the wake of *Nama Khoi*, then, the situation created by referral under section 198D is this: Employees on fixed-term contracts who claim to have become deemed permanently employed may seek an arbitration award confirming this to be the case. Such referrals may be accompanied by a further claim directing the employer to accord them more or less the same terms and conditions of its employees who perform the same work. The arbitrator may then issue a declaratory order and a direction to that effect, but only if at the time the employee is still in the employer's service. If the employment relationship has ended by the time the matter is set down for arbitration, the most the arbitrator can make is an empty declaration that the employee was once a permanent employee. The dispute can be kept alive only if the employee claims an unfair dismissal, and refers a dispute as such (obviously within the time frames set by the LRA for unfair dismissal disputes or condonation must be sought). This was the approach followed by the arbitrator and ultimately the employee in *Mhlanga / King Recruitment Services* [2019] 12 BALR 1273 (MEIBC).

While this remains the law, one can only sympathise with employees, like Mr August (and all classified as "vulnerable"), who find themselves without jobs because they have delayed referring a dismissal dispute until just before their employment formally ends. Only a higher court can overrule *Nama Khoi*, unless another Labour Court judge finds it "plainly wrong".

In the meantime, the judgment evokes some questions. First, why does section 198D(3) give a generous period of six months to refer disputes relating to sections 198A, B or C (as opposed for 30 days for unfair dismissal disputes)? It seems inconceivable that the legislature should grant that period of grace for referring disputes under section 198D if, as in cases like that of August, his period of service was only six months, and in many other cases is perhaps less. The requirement set by *Nama Khoi* effectively reduces the statutory period in which such cases may be referred.

Secondly, it may well be that the court took too technical a stance by drawing an impermeable line between unfair dismissal disputes and referrals under sections 198A and B. The avowed purpose of those provisions is to protect vulnerable employees by converting temporary service of

employment on fixed-term contracts into fulltime employment. Section 198A(4) provides that the termination by a Temporary Employment Services provider of employees' services with a client for the purpose of evading the deeming provision is a dismissal. A challenge to such a dismissal may presumably be launched under section 198D within 30 days because section 198D(3) says that disputes referred under subsection (1) must be referred within six months, *except if the dispute is about a dismissal contemplated in 198A(4).* No such exception is made in section 198B.

Thirdly, if as the court said an employee who meets the statutory criteria becomes a permanent employee by operation of law, why can't an arbitrator's pronouncement on the legal position operate with retrospective effect? If that issue can be dealt with in a dismissal dispute, it seems hard to understand why it should not be dealt with under section 198D. Disputes under that provision must also be referred for conciliation and arbitration. During conciliation employees in the position of Mr August, if confronted with the proposition that they should have referred a dismissal dispute, would presumably say: "But I was dismissed and I want to be reinstated." Having identified the true nature of the dispute, the conciliating commissioner should then, on the strength of *September v CMI Business Enterprise CC* [2018] 5 BLLR 431 (CC), have indicated that the dispute in truth concerned a dismissal and the matter could have been referred for arbitration as such. As the highest court found the LAC had been in *CMI*, *Nama Khoi* could also well be criticised for being too formalistic.

3 *Masoga v Pick 'n Pay*

3 1 Background

Masoga v Pick 'n Pay Retailers (Pty) Ltd [2019] 12 BLLR 1311 (LAC) was another judgment in which a commissioner was held to have misinterpreted section 198B. As part of an empowerment initiative, PnP decided to use several bakeries which supplied products to its stores on an outsourced basis to train previously disadvantaged persons to operate bakeries on their own. The project was intended to be completed in five years. The function of one of the outsourced firms (AB) was to supply mixed ingredients to the other bakeries. AB operated from PnP's premises. AB employed Mr Masoga and his colleagues as bakery assistants on 12-month fixed-term contracts. They claimed that AB was a temporary employment service and that they should be deemed employees of PnP. However, the dispute was set down for arbitration as a dispute concerning "198B – fixed-term contracts with employees earning below threshold". Four days after the dispute was referred, AB informed the employees that their fixed-term contracts were to end and offered them permanent contracts. So, in this case, the workers were still in employment when the matter came before the arbitrator.

PnP simply denied that AB was a TES. The commissioner identified the issue in dispute as "the identity of the true employer, whether PnP was the employer and whether the employees were entitled to parity within the meaning of section 198" (without identifying the section to which he referred). The commissioner found that AB was subservient to PnP and that the employees worked under PnP's supervision and control and that, with

reference to section 200B, PnP was a “co-employer” and was therefore jointly liable to effect parity of treatment between the employees and PnP’s permanent employees. On review, the Labour Court held that the arbitrator should simply have found, with reference to section 198B, that AB was obliged to employ the employees permanently, which it had done, and that any further inquiry into the role of PnP was irrelevant. The award was set aside.

3 2 Judgment of the Labour Appeal Court

The LAC noted that commissioners are required to identify the true nature of disputes before them not only for purposes of determining jurisdiction but also to ensure that the correct inquiry is conducted. Although commissioners are not necessarily bound by the description of the dispute in the referral form, they may not entirely ignore that description because it remains a factor to be considered. Once the nature of the dispute has been identified, an award should not be founded on matters not dealt with by the parties, which the commissioner had done by invoking section 200B (which extends liability for breaches of employment laws to third parties if the purpose of an arrangement between the third party and the employer is aimed at defeating the purpose of the law).

The AB employees had characterised their dispute as one falling under section 198A. However, the certificate of outcome reflected that the dispute concerned section 198B and D. This was repeated in the referral for arbitration and the notice of set down. Neither the employees nor the arbitrator had contested the companies’ opening statement that the employee had to prove that AB was a TES. Prior to the award, there had been no reference to section 200B or any claim that the arrangement between PnP and AB was a sham. Section 200B was raised for the first time in the award, which was founded on it. The companies had never been given an opportunity to address the commissioner on the relevance of section 200B or on the further finding that the relationship between PnP and AB was a sham designed to evade it. This was grossly unfair. Since there was no proof that AB was a sham, it was unsurprising that the employees had jettisoned their reliance on section 198A and re-characterised it as a dispute concerning section 198B.

The court then turned to section 198B. Although AB had not attempted to justify employing the employees on fixed-term contracts for longer than three months, it was common cause that AB had ultimately employed them permanently. This had resolved the dispute between the employees and AB and without proof that AB was a TES, that should have been the end of the matter. Even so, the employees had persisted with the dispute. The employees could not claim to be deemed employees of PnP by virtue of section 198A(3)(*b*) because AB was not a TES. They could not invoke section 198B(5) because they had already made permanent employees of AB. There was accordingly no dispute for the arbitrator to determine. If the employees wished to obtain anything from AB, they would have to refer an unfair labour practice dispute claiming that they are being treated less favourably then AB’s fulltime employees performing the work of bakery assistants, if there are any (see below).

The commissioner had also wrongly invoked section 200B. This provides that "employer" includes one or more persons who carry on related businesses to evade the provisions of any employment law. This provision merely extends liability that would ordinarily be that of the employer to others who carry on a related business through the employer. Section 200B does not identify the employer; it merely extends liability. That section cannot be used to make entities the employers of others; its purpose is to prevent employers using complex arrangements to evade employment laws. There was no evidence to suggest that PnP had devised the empowerment scheme for this purpose. In finding the contrary, the commissioner had focused only on certain clauses in the contracts between PnP and AB, while ignoring the overall purpose of the arrangement. The appeal was dismissed.

4 *PRASA v CCMA*

4 1 Background

Passenger Rail Agency of South Africa v CCMA [2020] 1 BLLR 49 (LC) was another recent case involving section 198B – also referred by employees who were still in service when they claimed to have been deemed permanently employed by virtue of 198B(5). When section 198B came into force, PRASA had many employees on fixed-term contracts. Two unions referred disputes to the CCMA claiming that their members on fixed-term contracts were deemed permanent employees. That referral was settled on the basis that a study would be undertaken within three months to verify the numbers of fixed-term contract workers to be absorbed in terms of criteria to be agreed. The agreement was made an order of the Labour Court, but a subsequent application to declare PRASA in contempt of court was dismissed. The ultimate outcome of the study remains unknown.

While this was going on, 166 PRASA workers lost patience and referred two disputes to the CCMA, which were consolidated, claiming the relief that had been abandoned by the unions. By this time, PRASA had conceded that the employees were permanent. The commissioner not only agreed that these employees had been deemed permanently employed by PRASA, but ordered the company to compensate them for the benefits received by fulltime employees, with retrospective effect – which came to a whopping R35 million. The arbitrator's analysis and conclusion centred on section 198B:

> "Whereas the applicants were integrated into the business, they are not treated equally to their indefinitely employed colleagues and are still referred to as contract workers. Thus, up to these proceedings there had been no acknowledgement by [PRASA] that the applicants had become indefinitely employed. They are still treated differently compared to their colleagues doing the same work, particularly in that they are not members of the provident fund and are never considered to be paid bonuses…Once an employee is deemed to have become indefinitely employed they are from that date onwards entitled to be treated on par with their colleagues. Failure to do this would constitute an unfair labour practice or could even amount to discrimination …"

PRASA took the award on review, raising a number of grounds, including that the dispute had already been settled; that the arbitrator did not have the

jurisdiction to deal with the dispute afresh in circumstances where the settlement agreement had been made an order of the Labour Court (because the appropriate remedy available to these employees would also have been a contempt application to the Labour Court); and that a dispute about the interpretation of section 198B of the LRA should have been referred for conciliation to the CCMA within six months after 1 April 2015 (when PRASA failed to employ the workers permanently), failing which condonation should have been sought.

4 2 Judgment

Conradie AJ disposed of the matter by accepting PRASA's first ground – that the dispute had been settled and that the matter was accordingly *res judicata* and the commissioner accordingly lacked jurisdiction. This was because the parties were bound by the settlement agreement, which was a collective agreement as defined in the LRA and included clauses detailing benefits to which the employees would enjoy after absorption as permanent employees. These employees were not entitled to ignore the agreement struck by their unions and "pursue their own relief outside of the collectively bargained process". The parties were entitled to agree to a gradual or phased implementation of benefits, or even to lesser benefits.

According to the court, the arbitrator lacked jurisdiction to entertain the dispute on this basis as well – the employees had effectively referred a dispute concerning the interpretation and/or application of the settlement agreement, which was precisely what the commissioner had considered. But, according to the court, "[t]he matter was not referred to him as an interpretation and application dispute and he had no jurisdiction to deal with it as such. The parties should have been told to resolve their interpretation and application dispute with reference to the dispute resolution provisions in the settlement agreement".

In respect of section 198B, the judge noted that that provision has no application to employees employed on a permanent basis. It is concerned only with fixed-term contracts of employees earning below the threshold. As such, once PRASA had conceded that the employees were employed on a permanent basis, section 198B could no longer apply. If the employees felt that they were being treated less favourably than other employees, they could simply refer an unfair labour practice dispute. Section 198D, according to the court, would typically apply in disputes relating to whether or not an employee is employed on an indefinite basis, and when fixed-term contract employees rely on section 198B(8) to claim more favourable treatment. According to Conradie AJ, echoing *Nama Khoi* but not referring to it, "[s]ection 198D offers no other relief beyond this, and…is not concerned with the equal treatment or benefits of permanent employees". The arbitrator had thus committed an error of law or exceeded his powers by granting substantive relief to the employees.

What of the argument that the dispute related to an alleged unfair labour practice? Relying on *September v CMI Business Enterprise CC* (*supra*), the court found that the dispute was never dealt with as an unfair labour practice (either at conciliation or at arbitration). The commissioner had therefore

committed a further gross irregularity by treating it as such. In any case, the arbitrator had not considered the kind of issues that arise in disputes related to the exercise of an employer's discretion. As Conradie AJ put it: "The point is that in this matter the arbitrator did not approach the matter as an unfair labour practice and it therefore cannot be correct that the relief which he granted was competent under the unfair labour practice provisions of the LRA."

4 3 Analysis

An aspect of the judgment which is open to debate is this:

> "[O]nce it is conceded by an employer or determined by an arbitrator that employees are employed on a permanent basis, *section 198B has no application to such employees*. If these employees believe that they are being treated less favourably than their counterparts in respect of benefits, for example, they can then simply refer an unfair labour practice dispute. This is the same route which any other permanent employee would have to follow." (Emphasis supplied.)

Although generally true, there may be (limited) cases where this observation requires some qualification. For example, there seems no reason why employees who have obtained orders in terms of section 198D declaring that they are indefinitely employed (as per the approach of the court in *Nama Khoi*), but whose original fixed-term contracts have expired without renewal or permanency being conceded by the employer should not be able to rely on section 198B(7) when launching an unfair dismissal claim. This section provides that "If it is relevant in any proceedings, an employer must prove that there is a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed."

The approach in *PRASA* seems to differ from that in *Nama Khoi* in this regard. For Snyman AJ, referrals in terms of section 198D may be accompanied by a further claim directing the employer to comply with section 198B(8), so that employees alleging deemed permanency are not treated less favourably in the absence of a justifiable reason. For Conradie AJ, section 198B(8) has no application whatsoever once employment has been deemed to be of indefinite duration in terms of section 198B(5). Such employees should utilise the LRA's unfair labour practice provisions, presumably that relating to "unfair conduct in relation to the provision of benefits" (section 186(2)(*a*)). Again, the severing of the "standard" dispute resolution provisions provided by the LRA from those in section 198D seems to go against the purpose of the provisions designed to protect "vulnerable" workers employed by labour brokers and those retained indefinitely on fixed-term contracts without good reason.

5 *CCMA v Commission Staff Association*

5 1 Background

A further reason why the application by the PRASA employees might have failed was fortuitously provided by *Commission for Conciliation, Mediation*

and Arbitration v Commission Staff Association [2020] 1 BLLR 9 (LAC), handed down after the *PRASA* judgment, in which the very body charged with monitoring the application of section 198B ironically found itself in the respondent's box. The questions in the *CCMA* case was whether the amendments to the LRA that came into operation on 1 January 2015 apply retrospectively to fixed-term contracts concluded before that date and whether employers are obliged to amend these "historical contracts" to comply with the amendments and pay affected employees the additional salary and benefits to which they would have been entitled as permanent employees?

CCMA interpreters who had been engaged on a part-time or fixed-term basis for more than three months before the LRA amendments argued that they had become permanent employees and referred that claim for arbitration, claiming "back pay" to the date on which they should have been deemed permanent. The CCMA argued, unsuccessfully, that the interpreters were independent contractors and the matter was referred to arbitration under section 198D. The arbitrator found that sections 198B(3), (4) and (5) did not operate retrospectively and therefore did not apply to contracts concluded before the new amendments came into effect. This meant that employers were not obliged to regularise the contracts concluded before 1 January 2015 and that the interpreters were not entitled to any back pay.

5 2 Judgment and appeal

On review in *CCMA v National Union of Metalworkers of South Africa (NUMSA)* (case number JR1624/16 dated 23 June 2017, as yet unreported), the Labour Court set aside the commissioner's decision on the basis that it constituted a material error of law and was unreasonable, and remitted the matter for determination by a different arbitrator. The court reasoned that to apply section 198B retrospectively would yield "the most equitable results", at least to employers. This was supported by the presumption against retrospectivity and the courts' unwillingness to disrupt vested rights, as well as the wording of section 198B itself. Commission Staff Association's (CSA) argument that these considerations were overridden by fairness to the employees and the ultimate purpose of section 198B – the protection of vulnerable employees employed on fixed-term contracts – was rejected by the court.

The LAC agreed that some subsections of section 198B apply retrospectively to fixed-term contracts concluded by employees earning under the threshold prior to 1 January 2015, but did not say which. What mattered was that the language of subsections (3) and (4) (which set the circumstances in which employee may be employed on fixed-term contracts for longer than three months) as well as subsection (5) (the deeming provision). Linguistic indications which pointed to non-retrospectivity included the use of the present tense, the word "employ", the phrases "conclusion of a fixed-term contract" and "a fixed-term contract concluded or renewed". The court could also not see how section 198B(6), which requires that a fixed-term contract must be in writing, could be applied retrospectively. The express statements in subsections (8)(*b*) and (10)(*b*) that subsections 8(*a*) (the equal treatment provision) and (10)(*a*) (the severance pay

provision) do not apply retrospectively also indicated that subsections (3), (4) and (5) don't apply to contracts concluded after 1 January 2015. So, too, does the wording of subsection (9) (the equal access to opportunities provision). While in the face of these indications in the Act itself it was unnecessary to apply the presumption against retrospectivity, it would have led the court to the same conclusion.

CSA's reliance on *Enforce Security Group v Fikile* (2017) 38 *ILJ* 1041 (LAC) (a case that did not relate to an application of section 198B), and its suggestion that the LAC had determined the issue in *Piet Wes*, was misplaced (even though the contracts in that case had been concluded before 1 January 2015, which the *Piet Wes* court had ignored). In this case, the court held that if the *Piet Wes* court had indeed found that the subsections in question applied to "historical" contracts, the judgment would have been "plainly wrong". Section 198B does not outlaw fixed-term contracts, or seek to replace them entirely with contracts of indefinite duration: "Instead it acknowledges the need for such contracts and seeks to regulate them and to protect vulnerable employees that are often exploited through the means of such contracts, in a manner that is fair." The commissioner's finding that subsections (3), (4) and (5) do not apply to historical contracts was therefore correct and the appeal succeeded. The LAC wrote in conclusion:

> "A construction that subsections (3), (4) and (5) do not apply to historical contracts, ie retrospectively, does not offend the intention behind section 198B or any provision of the Constitution. Considered in the context the construction is reasonable and fair. This section appropriately addresses the abuses (or 'mischiefs') that were wrought through fixed-term contracts. Employees would effectively be denied permanent full-time employment unjustifiably through the successive renewal, or extension, of such contracts; and not be treated the same as permanent employees of the employer; they would also not be given the same access, as those employees, to opportunities to apply for vacancies; and there was no obligation to pay such employees any amount similar to a severance at the end of the contract's term. Each of those aspects is now addressed by section 198B in specific subsections, in a manner that is fair."

5 3 Analysis and conclusion

The practical impact of this judgment will probably be limited. It is concerned with contracts concluded before section 198B became effective. As five years have passed since then, few if any such contracts (especially those with workers earning below the threshold) can still be in existence. However, *Nama Khoi*, *Pick 'n Pay*, *PRASA* and *CCMA* suggest that vulnerable workers who wish to claim the benefits afforded by section 198A, B and C may not always have an easy ride.

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ARBITRATION OF LABOUR DISPUTES IN MAURITIUS*

1 Part I: Historical background

A remote island in the Indian Ocean surrounded by a blue lagoon was first discovered by the Arabs followed by the Europeans; the Dutch, the French and the British. It was the Dutch that gave the island the name "Mauritius" during the 16th century. The 17th century was marked by the introduction of French labour law under the Napoleon era.

The evolution of labour law on the island started with the repeal of the "code noir" (literally the black code) which was introduced in France in 1685 and extended to the island in 1723. It contained inhumane provisions that treated a slave as merchandise, as the property of his master which was subject to a list of punishments for not obeying the orders of the latter. Freedom of movement was then a crime.

The British took over the island from the French in 1810. Article 8 of the *Traité de Capitulation* (Act of Capitulation), signed in 1820, provided that the British undertake to preserve the French laws, customs and traditions. With economic development, industrial relations law from Britain found its way to Mauritius.

Slavery was finally abolished in 1833. Mauritius introduced a series of legislations, regulations and executive policies that granted greater freedom to the Indian immigrant workers who were brought to the island as cheap labour, with the exception of Indian traders coming from Gujarat.

According to Fok Kan, a Mauritian author on labour law, the main objective of labour law and hence arbitration is "*la protection des faibles contre les forts*" (the protection of the weak as against the mighty strong; Fok Kan *Introduction as Droit du Travail Mauricien, Les Relations Individuelles de Travail* (2009) 2).

In the wake of the industrial unrests of 1937, the British colonial government set up the Labour Department and the Labour Administration Service following the recommendations of the Hooper Commission of Enquiry in 1938. In that year the Industrial Associations Ordinance was introduced which allowed workers to form associations for the first time; unionism was previously an offence.

In 1968, Mauritius became independent. It inherited a bilingual legal source – French and English. Consequently, Mauritius became a mixed legal system where French and English laws work as a marriage, sometimes

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harmoniously together, at other times falling apart. The area of labour law is no exception.

Unfortunately, Mauritius, a newly born independent nation, was crippled by a series of strikes in almost all sectors of the economy in the early 70's. In his book *Political History of Mauritius, Recollections and Reflections*, Moonindra Nath Varma, a political historian, writes–

> "[s]ome 716 buses were off the road and around 75,000 people deprived of transport … Economic and social activities were reduced. Mauritius stood almost at a standstill."

> "[C]onciliatory meetings had ended in deadlock due to obstinacy, arrogance and the idea of confrontation. The Government now applied the Public Order Act. Anyone inciting workers for an illegal strike was to be detained …" (Varma *Political History of Mauritius, Recollections and Reflections* (2011) 205)

The strike in the transport sector started spreading like cancer to other sectors, reaching the Central Electricity Department, the ports authority and the sugar industry – the economic pillar of the country. The strikes continued with disastrous consequences with ships and unloaded goods remaining immobilised in the harbour and having to be rerouted to the neighbouring island, Reunion Island.

Meanwhile, in Britain, strikes known as the British disease led to the introduction of the Industrial Relations Act of 1971 by the Conservative government. The Secretary of State stated that the objective of the Act was–

> "[e]ssentially about regulating the eternal tension between on the one hand of the individual person and group for complete freedom of action, and on the other hand the need of the community for a proper degree of order and discipline".

He added that the law was a vital element in the longer-term strategy for dealing with the underlying problem of achieving steady and sustainable growth.

In Mauritius, the then Minister of Labour and Social Security presented the Industrial Relations Act 1973 as the response–

> "[t]o the consistent demand for more effective communication and more industrial democracy, and to the concepts and the legitimate aspiration of a modern society".

The events of the early 1970s demonstrate that the objectives of the Mauritian government were similar to those of the British government.

2 Part II: The law

Mauritian labour law is enriched by 300 years of case law while there is, unfortunately, little case law relating to industrial relations. In the absence of local case law, the tradition is to seek guidance from appropriate English or French law. Whenever a piece of legislation is borrowed from French or English law, it ceases to be French or English and becomes Mauritian law (*R v Shummoogum* 1977 MR 1).

Whether it is for French or English cases, it must be stressed that these are not strictly speaking precedents, though admittedly they are very often of persuasive authority. They are only to be referred to for guidance. This point is of special importance in the context of industrial law where the influence of various factors in modelling the system of collective bargaining and the mechanism for the resolution of industrial disputes cannot be overstated. Mauritius has had an economic and social history different from that of England and France; solutions appropriate there may very often not be applicable in Mauritius. Guidance is, therefore, to be sought from other sources as well. One such source is the laws of the United States, the relevance of which is to be explained by the fact that the English Industrial Relations Act of 1971, which inspired the Mauritian Industrial Relations Act of 1973, aimed at introducing American style industrial relations in Britain.

Another possible source is South African law. The first legislation in the labour field, namely the Industrial Associations Ordinance 1938, was of South African origin. It is believed that this South African origin cannot be ignored in an attempt to determine what the Mauritian law is, since in the context of the regulation of industrial disputes, the Industrial Relations Act of 1973 contains many of the features of the Industrial Association Ordinance of 1938.

The Industrial Relations Act 1973 established an independent body called the Permanent Arbitration Tribunal with the main function of settling industrial disputes through the process of arbitration. From 1938 to 1954, the Arbitrator had been appointed on an *ad hoc* basis. An Arbitration Tribunal was first set up under the Trade Disputes Ordinance of 1954 and carried on its function under the Industrial Relations Act 1973. While the British Industrial Relations Act of 1971 provided for the setting up of a National Industrial Relations Court to be presided over by a High Court Judge, the Mauritian Industrial Relations Act of 1973 stipulated that no one is to be appointed president or vice-president of the Tribunal unless he is qualified for appointment as a judge of the Supreme Court.

For the setting up of that Tribunal, a judge resigned from the Supreme Court to take office as the first president. Alongside the Tribunal, the Act also established a Civil Service Arbitration Tribunal for the public service and civil service unions. The Permanent Arbitration Tribunal and the Civil Service Arbitration Tribunal were later merged as one with the setting up of the Employment Relations Tribunal in 2009 under the Employment Relations Act of 2008. Consequently, there was no longer a distinction between public and private sector labour disputes.

Sir Henry Garrioch, a Chief Justice in Mauritius foresaw as far back as 1976 in the case of *Union of Labourers of the Sugar and Tea Industries v Permanent Arbitration Tribunal*–

> "[t]he Tribunal is by its Constitution the main arbiter in the sphere of industrial relations. It is or is expected to become with time and experience, an expert body in that sphere …"

Time has witnessed the virtuous words of the then Chief Justice to have become a reality.

With recent developments in the field of industrial relations and information communication technology and as the government embarks further in modernising and amending employment laws, the role of the Tribunal will increase in the future. Indeed, with globalisation and the unprecedented financial crisis of 2007 and the yet persisting insecure state of the economy in the Eurozone, in relation to Brexit, the Mauritian economy is not immune from a downturn. In any crisis, those at the lower levels of the economy are the ones to suffer the most and workers are particularly at risk. Good employment laws and relations are more than ever crucial in this era of uncertainty, and the role and responsibility of the Tribunal through the arbitration that it performs are *sine qua non* to ensure peace, social stability and economic development.

3 Part III: Arbitration

Arbitration is a form of alternate dispute resolution. It resolves disputes through the issuing of an award that becomes binding on the parties and enforceable in the courts. The Tribunal deals with both voluntary and statutory arbitration. In the latter case, the Commission for Conciliation and Mediation has the power to refer an unresolved labour dispute of an individual for arbitration before the Tribunal if the latter consents to it. Although some common principles of arbitration may hail from international arbitration principles and the Code de Procédure Civile, the arbitration before the Tribunal emanates from the statutory provision of the Employment Relations Act of 2008 where further considerations may be taken into account in deciding over any dispute as per section 97 of the Act. These considerations include the need to promote decent work and decent living, the need to ensure the continued ability of the government to finance development programmes and recurrent expenditure in the public sector, the capacity to pay of enterprises and the principles of natural justice and best practices of good employment relations, amongst others.

Labour disputes are classified as disputes of rights (i.e. as to legal rights), which relate to the application of existing collective agreements or contracts of employment and disputes of interests (i.e. economic disputes) which relate to claims by workers or proposals by management about terms and conditions of employment. A labour dispute is defined in the Act as "a dispute between a worker, or a recognised trade union of workers, or a joint negotiating panel, and an employer which relates wholly or mainly to wages, terms and conditions of employment, promotion, allocation of work between workers and groups of workers, reinstatement or suspension of employment of a worker". It does not include a dispute where a worker has opted for a salary review report and also where a dispute is reported more than three years after the act or omission that gave rise to it.

Earlier this year the Tribunal had to hear a dispute in which an employee who had been working as a sales assistant in a five-star hotel, was prevented from wearing a tikka on the work premises (see *S. Dalwhoor and The Residence Hotel* (ERT/RN 77/18)). A tikka is a red paper sticker which is applied to the middle of a lady's forehead to symbolise her sacred marital status. Initially, the contract of employment of the employee did not contain any such prohibition. The Tribunal noted that the wearing of the tikka by the

employee in no way affects the operations of the hotel as the employee does not deal with food in the course of her duties but only sells beachwear in a separate department. The Tribunal condemned the manner in which the employer imposed such prohibition the wearing of the tikka, on its employees and remarked–

> "On the whole the Tribunal cannot but adopt the view that the communication of such an 'important and sensitive' issue should not have been via a mere display on notice boards at the entrance of the canteen of the Hotel ... At the training sessions, management could have assured itself that every employee is apprised of such policy change by requiring them to sign a circular if it considered its decision to be an important one".

The Tribunal decided in favour of the employee based on a provision of the Code of Practice included in the second schedule of the Employment Relations Act. This provision prevents employers from making impersonal forms of communication when dealing with important and sensitive issues. The Tribunal and the Commission for Conciliation and Mediation have the discretion to consider provisions of the Code of Practice when relevant to an issue at hand. This Code, in a nutshell, provides practical guidance for the promotion of good employment relations.

In the above-mentioned case, the Tribunal based itself on principles of fairness to limit the employer's power to regulate if it is disproportionately abusive. In the spirit of compassion and understanding, the Tribunal made a humble appeal to the Respondent.

> "We believe Management will go out of their way to provide the best working environment. However, in striving obsessively to maintain a five star hotel standard, it should not turn the resort into a military zone. Rally the people around and get their consensus when it comes to sensitive issues".

The Tribunal also referred to a finding by Professor G. Dumbara of the University of Petrosani, Romania, in his research on *Workplace Relations and Emotional Intelligence*:

> "We cannot leave our emotions at home because they are part of our unique status as human beings and, therefore, situations in which we cannot express our feelings are stressful." (Dumbara *Workplace Relations and Emotional Intelligence* (2012))

The flexibility associated with arbitration, whether procedural or substantive, is what makes it the ideal mechanism to redress such grievances; grievances which a court of law is not suited to look at. Arbitration is what keeps the thread of employment relations going, however thin it may at times get. The writer referred to marriage earlier.

With these words, the writer hopes to have imparted the importance of arbitration when it comes to labour disputes as well as what considerations an effective arbitration needs to take – those found in section 97 of the Employment Relations Act of 2008 and the Code of Practice as explained previously.

The application of these considerations can be demonstrated in another case delivered by the Tribunal in 2017– *Subratty v Financial Services*

Commission (ERT/RN 14/17) in which the balancing exercise characteristic of an effective arbitration can be gleaned from this passage of the Award–

> "The Respondent decided on two actions simultaneously: the demotion and the suspension ... the suspension came after the disciplinary hearing … and it therefore amounts to a sanction. This is against the principle of double sanctions for a wrong doing (*Non bis in idem*) …
>
> …Granted that the Disputant may not have been a star employee, but such abuse of power on the part of Respondent offends the fundamental principles of fair employment".

A case where the Tribunal had to consider purely economic and financial factors is *High Security Guards and Mauritius Private Security Guard Employees Union* (RN 692) where the then Permanent Arbitration Tribunal delivered an award that cut down the increase in wages of 36% recommended by the National Remuneration Board to 15% on the grounds that the disputant companies would face an imminent closure of business due to their inability to pay – a purely financial consideration.

The Tribunal held:

> "The principle that the ultimate aim should be, and this, while preserving employment, that a worker is entitled to a fair day's pay for a fair day's work. It is obvious that the salary increase … cannot be granted without signing effectively the death warrant of security guards companies in this country ..."

The Employment Relations Act, which is the main legislation providing for arbitration of labour disputes, provides for specific conditions to be met before an arbitration reaches the Tribunal: the case must first be referred for conciliation and mediation. Before a dispute is reported to the Commission for Conciliation and Mediation, the president of the Commission shall ensure that the parties have reached a stage of deadlock after meaningful negotiations lasting 90 days or less. Conciliation may be performed at this stage by the supervising officer at the Ministry of Labour well before the matter reaches the Commission for Conciliation and Mediation (the CCM). On the whole, the Act ensures that only genuine disputes reach the Tribunal for the arbitration process.

The conditions for arbitration are well-defined, and the spirit of the law is to streamline the arbitration process and not to overwhelm the business of the Tribunal. The Tribunal makes time limits a priority so that the arbitration of a labour dispute does not bring to a standstill the business of the employer i.e. the specific statutory delay of 90 days for the resolution of "labour disputes", 30 days for determining a contention on recognition of a trade union, amongst other statutory time limits.

Another point worth noting is that any arbitration conducted by the Tribunal is in the presence of a representative of workers, a representative of employers and an independent member. They ensure that diverse perspectives are considered when making a decision. After all, their mere presence creates a perception of fairness and impartiality in the minds of the parties before the Tribunal.

4 Part IV: Procedure and evidence

The Employment Relations Act gives discretion to the Tribunal to "conduct its proceedings in a manner it deems appropriate in order to determine any matter before it fairly and promptly and may deal with the substantial merits of such matter with a minimum of legal formalities". This provision mirrors that of section 138(1) of the Labour Relations Act of South Africa.

However, that does not mean that a quasi-judicial body does not adhere to the prescribed norms that guarantee a proceeding that is both fair and perceived as fair. The law provides for any member of the Employment Relations Tribunal who has an interest in a matter before the Tribunal to refrain from taking part in the proceedings. In addition, another constitutional principle that is guaranteed to any person whose right may be affected in a proceeding is the right to be assisted by counsel. In fact, the provision goes further by enabling a party to be assisted by a representative of a trade union and "such other persons at the discretion of the Tribunal". This provision ensures that the arbitration process does not become too legalistic.

It is often that the case before the Tribunal is at a pro forma stage or "mention" stage, and counsel for the respondent will raise a plea *in limine.* The Tribunal will then ask the disputant, who would have conducted the case himself, if he wished to be assisted by counsel to argue on the preliminary point. In the absence of any argument in law during the proceedings, parties are allowed to be represented by a union negotiator who would be allowed to examine the disputant, cross-examine the representative of the employer and re-examine if need be, with a proviso that the negotiator will not be able to make any submission in law. In short, flexibility is allowed provided that it does not impinge on the basic tenets of an impartial and fair hearing.

The need to respect time limits (as previously mentioned) does not mean that proceedings are conducted in a disorderly, or at most, an informal manner. Preliminary meetings are not held for parties to be allowed the opportunity to exchange pleadings. In addition, for the issues in dispute to be narrowed down in order to expedite matters, the preliminary meetings allow arbitrators the opportunity to settle matters between parties by inviting them to a conciliation or mediation process while respecting their rights of being afforded a hearing. A distinct provision of the Employment Relations Act 2008, as amended, allows the Tribunal to exercise its jurisdiction to explore "other possibilities for conciliation and mediation"– that is other than referring the dispute back to the Commission for Conciliation and Mediation.

Similarly, when it is said that the Tribunal "conduct(s) its proceedings in a manner it deems appropriate" that does not mean that the arbitrators actively intervene in the proceedings just for the sake of expeditiousness. Parties do retain the sole discretion to conduct their cases provided that the fairness of trial is maintained. The procedure is to a large extent adversarial, and the role of the judge remains passive though he/she will intervene in the interests of parties when their rights are being infringed.

Arbitration represents the top end of the Alternate Dispute Resolution scale. As we travel along with that scale, passing by conciliation and

mediation, flexibility decreases and formalism increases. In other words, things get more serious if not more contentious. The more so as arbitration performed by the Tribunal is statutorily provided for and the outcome is a binding award; it closes the doors to any other forum of adjudication. The writer's point here is that arbitration conducted by the Tribunal cannot be effective if it is not empowered to enforce its orders and undertake its proceedings in the way it considers necessary to ensure a fair hearing. This view is aptly set out in the words of Mr Casper Lötter, attorney at law (*Labour Dispute Resolution*) in his analysis on the powers of the Commission for Conciliation, Mediation and Arbitration of South Africa as it provides a starting point for comparison with the powers of the Employment Relations Tribunal–

> "When an institution is tasked with an adjudicatory function, its authority and dignity must be protected to enable it to perform them. The legislator (of the Labour Relations Act of South Africa) clearly wished to protect the dignity and repute of the Commission in the interests of an effective dispute resolution. To that end it has decreed that the same rules which apply in courts of law apply to the CCMA". (Brand, Lötter, Steadman and Ngcukaitobi *Labour Dispute Resolution* (1997) 126)

The author in the same line enumerates the various powers (Brand *et al Labour Dispute Resolution* 126) entrusted to the CCMA. It is submitted that the Employment Relations Act also provide *inter alia* for the power of the Tribunal to obtain the attendance of a person before it, whether to depone and to produce documents before it. The Tribunal also administers an oath before witnesses give evidence and the Act makes perjury an offence. It is similarly an offence if one fails to obey any order given by the Tribunal. Failure to appear provides the Tribunal with the right to proceed with the matter in his absence, adjourn the proceedings or even dismiss the matter. Wilful interruption of the proceedings constitutes an offence, and the Act goes as far as coining the concept of "contempt of the Tribunal".

With regard to evidence, paragraph 20(1) of the second schedule to the Employment Relations Act stipulates that the Tribunal should not be bound by the law of evidence in force in Mauritius. However, minimum evidential rules are observed to allow the Tribunal to rely on credible proof. For example, the rule against self-incrimination where a party refuses to answer incriminating questions is preserved.

All relevant facts must be proved. If evidence thereof is admissible, it will be taken into consideration in the proceedings. All possible irrelevant matters are discussed and weighed accordingly. This occurs mostly at the pro forma stage, where its importance from an evidential point of view is determined.

It is tried as far as possible to supplement items of real evidence by the deposition of witnesses. At any rate, the Tribunal will not interrupt proceedings unnecessarily by getting into complex arguments on hearsay and admissibility because in the end, what matters is the weight attached to the evidence.

All that can be inferred from the way the Tribunal has come to tackle the rules concerning admissibility of evidence is that it reconciles the flexibility desired of an arbitration proceeding and the need to protect the rights of

parties from having their cases damaged by manufactured and questionable evidence.

5 Conclusion

To conclude, Mauritian labour legislation and consequently, the arbitration of labour disputes did not merely appear but are the product of fruitful considerations. It emerged as carefully devised responses to address the prevailing tensions that unfolded in the years leading to independence and following it. They were forged out of legislation that stood the test of time in other countries and with experience have come to counter and redress the fallouts of industrialisation that leads to industrial disputes in those advanced economies.

Arbitration has come to establish itself as the most appropriate dispute settlement procedure to further the aims of such labour legislation. Key considerations are to provide redress to the aggrieved expeditiously, with a minimum of formalism while keeping the thread of employment relations intact and with a distinguished focus on principles and considerations of good employment relations.

The Tribunal, being statutorily the primary arbiter of industrial disputes in Mauritius, has wide powers provided under the Employment Relations Act. And yet it does not see itself as a sanctioning body, but rather the bridge that supports and improves harmonious industrial relations between management and employees.

Rashid Hossen
Employment Relations Tribunal, Mauritius

CASES / VONNISSE

DOES THE INCORRECT CLASSIFICATION OF MISCONDUCT CHARGES CONSTITUTE SUBSTANTIVE UNFAIRNESS?

EOH Abantu v CCMA (2019) 40 ILJ 2477 (LAC)

1 Introduction

Dismissals are commonplace in employment and arise for various reasons. One such reason is the unacceptable or undesirable conduct of an employee, which is recognised as a dismissal for misconduct. Notwithstanding the employers' right to effect dismissals, employees are considerably protected by the law (s 185 of the Labour Relations Act (LRA)). An employee has the right to challenge his/her dismissal by referring an unfair dismissal dispute to the CCMA (s 191 of the LRA). This is not surprising considering the fact that fairness is the cornerstone of the employment relationship (as evident from s 23(1) of the Constitution, which states that "everyone has the right to fair labour practices"; see also Blanpain and Weiss *Changing Industrial Relations and Modernisation of Labour Law* (2003) 182). While it is indisputable that employers should act fairly towards its employees, a significant principle that has been highlighted in the determination of fairness is that it must accommodate and balance the conflicting interests and rights of both employers and employees (*National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC) par 38 and 40).

In determining unfair dismissal disputes, adjudicators have the task of striking this balance (*Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) par 171–172). However, the determination of fairness is not always a simple task. This is the challenge that presented itself in *EOH Abantu v CCMA* ((2019) 40 ILJ 2477 (LAC)). Here, an employee had been charged with misconduct, and it was unquestionable that he had committed an act of misconduct. However, the employer classified the misconduct as one involving dishonesty, whereas he committed and was found guilty of gross negligence. The substantive fairness of the dismissal was challenged on this basis.

The case essentially came down to whether the incorrect framing of the allegations was unduly prejudicial towards the employee, such that the only fair decision was to exonerate him, despite his commission of misconduct.

However, the LAC did not absolve him. Instead, it found that the dismissal was substantively fair. This case note seeks to evaluate whether the LAC adequately balanced the interests of both parties and reached a conclusion that still protects the fundamental right against unfair dismissal.

2 Legislative setting

Section 188 of the LRA gives substance to the right against unfair dismissal. It prescribes that a dismissal is unfair if the employer cannot prove that the dismissal was effected for a fair reason and in accordance with a fair procedure (s 188(1)(*a*)–(*b*) of the LRA). Section 188 recognises only three reasons for a fair dismissal. One such reason is misconduct committed by an employee (Grogan *Dismissal* (2017) 212).

An employer who wants to dismiss an employee for misconduct must observe the requirements of both substantive and procedural fairness. These requirements are set out in Schedule 8: Code of Good Practice Dismissal. In terms of substantive fairness, there must be a contravention of an established workplace rule or standard. Furthermore, the gravity of the offence must justify the sanction of dismissal (item 3 of the Code of Good Practice). The requirements for procedural fairness are set out in item 4 of the Code of Good Practice. Of relevance, the employee must be notified of the allegations using a form and language that can be reasonably understood. He/she must be allowed an opportunity to state a case in response to the allegations. In this regard, the employee must be given a reasonable time to prepare a response and has the right to be assisted by a trade union representative or fellow employee.

Apart from the requirements that must be followed by an employer, the Code of Good Practice also provides guidance to commissioners and other decision-makers whose task it is to determine whether an employee has been unfairly dismissed. These guidelines must be observed, as the LRA requires that any person assessing the fairness of a dismissal must consider the Code of Good Practice (s 188(2) of the LRA).

There are a number of factors that must be considered in determining substantive fairness (item 7 of the Code of Good Practice). Firstly, it must be considered whether the employee contravened a rule or standard regulating conduct in the workplace. Secondly, where a rule or standard was contravened, the commissioner has to consider whether the rule or standard was valid or reasonable; whether the employee was aware of the rule or standard; whether the rule or standard was consistently applied; and whether the dismissal of the employee for contravening the rule or standard was an appropriate sanction.

The test for substantive fairness can be broken down into two clearly identifiable stages. The first, relates to the determination of whether the employee is guilty of unacceptable conduct (misconduct). Where he/she is guilty, the second leg of the enquiry is establishing whether dismissal is a fair sanction for the commission of the misconduct (Myburgh and Bosch *Review in the Labour Courts* (2016) 271).

3 Facts of case

At the time of dismissal, the employee (Danny), was employed through a labour broker (EOH Abantu) to render services as a Microsoft server team leader at Wesbank, a client of the employer (*EOH Abantu v CCMA supra* par 2). Wesbank purchased "multiple activation keys" from Microsoft for Windows Office 2010. These keys could only be used by employees for official purposes. The use of these keys by third parties was strictly prohibited (par 4). In order to install Microsoft Office software on his girlfriend's mother's computer, Danny sent her via email a volume licence key that he downloaded from the server (par 5). This email was picked up by the internal forensic investigators (par 7). When questioned about whether he had sent the key, he initially denied it, but later confirmed that he had sent it (par 7).

He was charged with misconduct and called to a disciplinary hearing (par 8). The specific charges levelled against him were:

Charge 1 – contravention of the disciplinary code, namely theft, fraud, dishonesty or the unauthorised removal of any material from the Bank, or from any person or premises where such material is kept in that he dishonestly distributed the Wesbank Microsoft office licence keys.

Charge 2 – contravention of the disciplinary code, namely being in breach of the Bank's confidentiality agreements and/or by divulging such confidential information, in that he divulged information he obtained through his position as team leader, to unauthorised external personnel.

Charge 3 – contravention of the disciplinary code, namely disregarding or breaching the bank's code of ethics, in that he dishonestly distributed the Wesbank Microsoft licence keys to external parties.

Following a disciplinary hearing, he was dismissed for gross negligence. Although he was found to have committed the offences with which he was charged, he was found not to have acted intentionally (par 9).

The CCMA found his dismissal to be substantively unfair as he was found guilty and dismissed for gross negligence, yet this is not the offence with which he was charged (par 9). The argument advanced by the CCMA was that the employer was bound by its charges (par 9).

4 Judgment of the Labour Court

The Labour Court (LC) dismissed the review application. It reasoned that as the employee was charged with dishonesty, that is the case that the employer had to prove. As the employer failed to show that there was any intent on the part of the employee, it failed to prove the misconduct. Therefore, it was unfair to dismiss him (*EOH Abantu v CCMA supra* par 11).

5 Arguments advanced before the Labour Appeal Court

The employee's argument was essentially that it was unfair of the employer to dismiss him, as they failed to prove the charges against him, which required proof of intent. In terms of the law a chairperson cannot find an employee to be negligent when the charge against the employee is not one of negligence (*EOH Abantu v CCMA supra* par 9).

The employer argued that the CCMA's decision was unreasonable as the employee was well aware of the incident for which he was charged. It further argued that dishonesty was only one element of the charge. The charge was essentially about the unauthorised appropriation of the licence keys which was the property of the bank (*EOH Abantu v CCMA supra* par 13).

6 Judgment of the Labour Appeal Court

The LAC concluded that the CCMA in finding that the dismissal was substantively unfair committed a material error of law and that its decision was unreasonable (par 18). The court surmised as follows:

First, a key element of fairness is that an employee must be made aware of the charges against him/her. Therefore, the charges must be specific enough in order for the employee to respond to them. However, this does not mean that courts and arbitrators must adopt an approach that is too formalistic or technical (par 15). What is key is that the information given to the employee must enable him/her to ascertain the misconduct that he/she is alleged to have committed.

Secondly, "the categorisation of the alleged misconduct is of less importance" (par 15). The LAC gave the all familiar example of employees who are charged with theft, yet it is the offence of unauthorised possession that is proven at the disciplinary hearing or arbitration. What is of key importance said the court is that the employer must be able to show that a workplace standard was contravened, that the employee knew about the standard and that the employee suffered no significant prejudice due to the incorrect categorisation of the misconduct. If these elements are present, a competent verdict and sanction can be imposed even if the charge is not properly classified (par 16). This is premised on the fact that employers are not skilled legal practitioners and it can be commonly expected of them to incorrectly define the misconduct.

Thirdly, in considering whether an employee has been prejudiced, one of the questions to be asked is whether the employee has been denied knowledge of the charge which he is required to respond to (par 17). Another question is whether the employee would have conducted his defence differently had he known that he could have been found guilty of an offence other than that documented in the charge sheet.

Considering the evidence, the LAC found that Danny was fully aware of the incident that gave rise to the charges against him. It was trite that Danny acted negligently. He was the team leader and was required to observe a

high standard of care in protecting the intellectual property under his control, but he failed to do this (par 20). His actions had the potential of causing reputational harm to the employer (par 20). Although Danny contended that his defence on a charge of negligence would have been different, including different submissions in mitigation of sanction, the LAC found that he was unable to identify what that different evidence would have been (par 21).

Considering the nature of the offence; the fact that he held a senior position of team leader; as well as his short service with the employer, the LAC found it justifiable for the employer to have lost trust in him and to have sanctioned him with dismissal (par 23).

7 Consideration of established legal principles

Two pertinent issues arise from the decision of the LAC. The first is the requirements of a charge sheet, which is key to understanding the relationship between the misconduct detailed in the charge sheet and the misconduct for which an employee is found guilty. The second is the role of arbitration in determining the fairness of a dismissal for misconduct.
In order to evaluate the decision of the LAC, which is done later, an assessment of the established judicial principles in relation to the above-mentioned issues is first required.

7 1 Requirements of a charge sheet

It is trite that in order to prepare a response or answer to allegations of misconduct, the employee must have reasonable certainty about what the charge is (*POPCRU v Minister of Correctional Services* 1999 20 ILJ 2416 (LC) par 33). In this regard, it was stated that "the information on the charge-sheet must be sufficient to make the accused's right to prepare a real and not an illusory right" (par 37).

However, decision-makers must appreciate that the procedural fairness requirements set out in the Code of Good Practice signifies a shift away from the "criminal justice" model that was applied by the Industrial Court (*Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 27 ILJ 1644 (LC) 1651; see also *Woolworths v CCMA* 2011 10 BLLR 963 (LAC) par 32). The previous model "likened a workplace disciplinary enquiry to a criminal trial" (*Avril Elizabeth Home for the Mentally Handicapped v CCMA supra* 1651). Under the new model, the LRA recognises that managers are not experienced legal officers (1652). As correctly confirmed, a disciplinary enquiry no longer envisages procedures associated with a criminal trial, such as technical and complex "charge-sheets" (1652). An important aspect that arises from *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (*supra*) is that commissioners should not assess disciplinary hearings as if they are criminal trials (Grogan *Dismissal* 321).

Applying the above-mentioned principles to the disciplinary charge or allegation, the following has been affirmed. Charges do not have to be drafted with the precision of an arraignment in a criminal trial. It is sufficient if the charge is worded in a manner that provides adequate information to the

employee to enable him/her to identify the incident for which charges of misconduct are instituted, so that the employee can prepare a defence. The incorrect categorisation of the misconduct by the employer does not automatically result in a fatal irregularity. However, there must be a relationship between the charges levelled against the employee and the misconduct for which the employee is found guilty. (*National Commissioner of SAPS v Myers* 2012 JOL 28980 (LAC) par 97–98; see also Grogan *Dismissal* 336; see also *Zeelie v Price Forbes (Northern Province)* (1) 2001 22 ILJ 2053 (LC) par 37; see also Coetzer "Substance Over Form – The Importance of Disciplinary Charges in Determining the Fairness of a Dismissal for Misconduct" 2013 24 *Industrial Law Journal* 57 72).

A charge sheet usually consists of two components. The one is a description of the incident that is considered to constitute misconduct. The other, is the categorisation of that incident as a specific act of misconduct. In *EOH Abantu v CCMA* (*supra*) the incident that gave rise to the charges was the employee's distribution of the bank's office licence keys to an external party, which was prohibited. The employer categorised the misconduct that arose from that incident as dishonesty (in two of the three charges), but the employee was found guilty and dismissed for being grossly negligent.

In terms of the requirements of a charge sheet, there must be some flexibility. Although the misconduct for which an employee is charged and for which he/she is dismissed should ideally be the same, there must be room for variation. The dismissal of an employee for misconduct that differs from that specified in the charge sheet should not automatically render the dismissal unfair. Of key importance, the employee must have done what the charge/s depicts he/she has done. The chairperson of the disciplinary hearing must be satisfied that the actions of the employee constitute misconduct, even if it is misconduct other than the misconduct for which it was categorised in the charge sheet.

One cannot overlook the fact that not all employers are skilled in the field of labour law. As such, employers will not always know how a specific incident of misconduct should be categorised. However, one cannot lose sight of the purpose of instituting disciplinary proceedings. Employees who conduct themselves in an unacceptable manner must be held accountable. It is commonplace that an employer cannot be expected to put up with an employee who has no regard for its rules and regulations. Unfortunately, employers may falter in reducing the employee's unacceptable conduct to writing, especially with regard to the legal correctness of the categorisation of the charge. As disciplinary hearings are not court proceedings, decision-makers need to grant some leeway to employers, especially if employees are not unduly prejudiced as a result of the employers confounds.

7 2 Role of arbitration in determining fairness of dismissal

An employee dissatisfied with his/her dismissal following the internal disciplinary process has the right to refer an unfair dismissal dispute to the CCMA (s 191 of the LRA). The fairness of such a dismissal is determined

during arbitration, at which the appointed commissioner must conduct the proceedings in a manner that he/she considers appropriate. Of key importance, the dispute must be determined fairly and quickly, and the substantial merits of the dispute must be dealt with, with the minimum of legal formalities (s 138(1) of the LRA). Fundamentally, an arbitration constitutes a new hearing (CCMA: Guidelines on Misconduct Arbitration as published in *GG* 38573 under GNR 224 of 2015-03-17). It is the commissioner's duty to determine whether the dismissal is fair based on the evidence admitted at the arbitration. Significantly, the commissioner must not merely review the evidence that was considered by the employer when it decided to dismiss the employee (CCMA: Guidelines on Misconduct Arbitration par 17; see also *National Commissioner of SAPS v Myers supra* par 42 and 69).

In *Toyota SA Motors v CCMA* (2016 37 ILJ 313 (CC)) Zondo J emphasised two important points about the role of the commissioner. The one is that the Code of Good Practice requires a commissioner in determining whether a dismissal for misconduct is fair to consider whether or not a rule or standard had been contravened (par 120). The other is that the commissioner must decide whether the employee was guilty of the misconduct for which he/she was dismissed (par 124). This is essentially the misconduct with which an employee was charged (cases such as *Toyota SA Motors v CCMA supra* par 5 and 57; *SAMWU v Ngaka Modiri Molema District Municipality* 2016 37 ILJ 2430 (LC) par 13 makes it clear that courts equate the misconduct with which an employee is charged with the misconduct for which an employee is dismissed).

Flowing from the above, the question to be answered is whether a commissioner is restricted to finding that a rule or standard was contravened only if the specific allegations of misconduct for which the employee was charged and dismissed at the disciplinary hearing is found to have been committed? It is interesting to note that the Code of Good Practice does not require a commissioner in assessing whether a dismissal is fair, to determine whether the employee contravened the rule or standard for which he/she was charged and/or found guilty at the disciplinary hearing. The provision is worded in broader terms.

However, in *Phuthi v CCMA* (2016 37 ILJ 2417 (LC)) the LC found that the commissioner was confined to determining whether the misconduct specified in the charge sheet had been committed. The misconduct was stated as "clocking in and out in that on 22 July 2014 you allegedly clocked for work but did not proceed to your workplace" (par 6). The arbitrator found the dismissal to be fair but referred to the employee's misconduct as fraud. This was because the employee clocked in, failed to carry out his duties and was subsequently paid even though he did not perform his duties (par 25). The arbitrator went on to find that dismissal was a fair sanction (par 25). While the LC found that on the employee's own admission he was guilty of the misconduct for which he was charged, it held that the commissioner misdirected himself by implying misconduct as serious as fraud in a charge of a less serious nature, effectively meaning that "the charge is quite different from what meets the eye" (par 37). The court stated that once an

employee is charged with misconduct, the employee should be able to look at the charges and to understand what the case that he or she is facing is in order to prepare a defence (par 37). Accordingly, the court explained that the fairness of an employee's dismissal must be determined on the basis of the reasons given by the employer at the time of dismissal (par 34).

The LC adopted a similar approach in *SAMWU v Ngaka Modiri Molema District Municipality* (*supra*). Here, the employee was charged with "unacceptable behaviour" in that she conducted an unauthorised search for documents in the finance registry office and entered the office under false pretences. The arbitrator found her guilty of the incident but categorised her misconduct as insolence (par 5). While the LC accepted that an arbitration is a hearing *de novo*, it stated that it does not alter the fact that a dismissal happened because an employer believes that an employee committed a particular act of misconduct. For that reason, a commissioner must determine whether the misconduct for which the employee was dismissed warrants the sanction of dismissal (par 13).

However, in *National Commissioner of SAPS v Myers* (*supra*) a different stance was followed. Here, the LAC dismissed the argument that the commissioner by entertaining the alternative charge of which the employee was acquitted at the disciplinary hearing was formulating his own charge sheet and acting beyond his powers (par 67–68). The LAC held that there was nothing irregular about the commissioner having regard to the alternative charge, as a commissioner is enjoined to conduct an arbitration in a manner that he/she deems appropriate (par 68). Furthermore, arbitration takes the form of a hearing *de novo*, which means that the findings of the disciplinary hearing are irrelevant and not binding on the commissioner (par 69). This implies that the commissioner's powers go further than merely assessing whether the misconduct for which the employee was charged and dismissed at the disciplinary hearing was committed or not.

It is trite that there is a close relationship between the misconduct charges levelled against the employee at the disciplinary hearing and the acts of misconduct that the employer must prove at the arbitration hearing. This is because the employee lodges the unfair dismissal dispute based on what transpired at the disciplinary hearing. In other words, the employee is alleging that the decision to dismiss him/her for specific allegations of misconduct, or the procedure followed, or both, was unfair. The basis or foundation upon which the disciplinary hearing was premised has an important role to play. However, this does not mean that the arbitration is limited to an assessment of whether the employee committed the misconduct as categorised in the charge sheet.

What is of greater importance is the incident that gave rise to the charge of misconduct and not the categorisation of that misconduct. For example, if the transgression is the employee's removal of a computer from the employer's premises on 10 December 2019 without permission, it is of less importance whether the transgression is categorised as dishonest conduct or theft or unauthorised removal of property. The emphasis should be on whether the employee committed the transgression. Did he remove the computer without permission? If the employee did, it follows that he/she is

guilty of misconduct, as it amounts to a contravention of a rule or standard. The next question will be whether the respective contravention warrants dismissal. Here, the impact and gravity of the contravention will come into question. Whether the contravention involved acts of dishonesty are factors that will be taken into account in determining the seriousness thereof. Even though an employer may not have categorised the charge as dishonest conduct, the arbitrator is competent to find that dishonesty was present.

The decisions of the LC in *Phuthi v CCMA* (*supra*) and *SAMWU v Ngaka Modiri Molema District Municipality* (*supra*) incorrectly placed substantial emphasis on the characterisation of the transgression. It was of less importance whether the commissioner categorised the misconduct as fraud and insolence, respectively. What was key, was whether the employees' committed the acts of misconduct detailed in the charge sheet. It is indisputable that both charge sheets clearly set out the transgression for which the employees were charged, so there was no uncertainty about the incident that gave rise to the charges. The fact that an employer may not have classified an act of misconduct as fraud or may have incorrectly classified an act of misconduct as fraud should not detract from the actual transgression.

In *Phuthi v CCMA* (*supra*) it was irrefutable that the employee clocked in but did not perform any work for the day. There was also testimony led at the arbitration to explain that this transgression constituted fraud clocking as the employee got paid for the shift without rendering any service to the company. The witness also testified about the further negative implications of this transgression (par 21).

At arbitration the onus lies on the employer to prove that misconduct was committed. The employee is privy to all of the evidence led during the arbitration process and has the right to question all witnesses brought by the employer. Employees also have the right to call their own witnesses to disprove elements of the employer's case. The fact that the employee may not have been charged with fraud at the disciplinary hearing, does not diminish the fact that the employee was well aware of the transgression that led to his dismissal. That transgression did not change during arbitration. Furthermore, the employee was aware of the fact that the employer regarded this transgression to constitute fraud, as this evidence was led at the arbitration where the employee was present. The employee had the opportunity to counter the employer's linkage of this incident to fraud.

One cannot lose sight of the fact that arbitrations are hearings *de novo*. Importantly, the commissioner's role is not to review whether what transpired at the disciplinary hearing was reasonable or not. Although the arbitration stems from the outcome of the disciplinary hearing, it is a new process during which the employer must prove that the dismissal of the employee was fair. This must be done by firstly proving that the employee committed an act of misconduct. The misconduct to be proven by the employer must relate to the transgression for which the employee was charged at the disciplinary enquiry. However, if there were defects in the employer's charge sheet, this should not automatically lead to a conclusion that the dismissal was substantively unfair. The commissioner has a duty to hear the evidence

that is led by the employer during arbitration and to assess that evidence to establish whether the employer has on a balance of probabilities established that the transgression took place. If the evidence heard by the commissioner leads to him or her categorising the transgression as a specific disciplinary offence, such as fraud, theft or insubordination, why is this unreasonable. After all, the commissioner is tasked with making a finding on whether or not a rule or standard was contravened.

8 Evaluation of Labour Appeal Court judgment

The LAC endorsed the key principles that exist regarding the requirements of a charge sheet. It correctly emphasised that the categorisation of the misconduct should not overshadow the fundamental elements of the charge. A key element is that the information given to the employee must detail the transgression so that the employee understands the incident that led to him/her being charged with misconduct. Here, it was undeniable that notwithstanding the references to dishonesty in the charge sheet, it clearly detailed the incident that led to the charges of misconduct. The charge sheet complied with the requirements of providing sufficient information to the employee to enable him to identify the incident and to be able to prepare a proper defence. Although the employee was dismissed for gross negligence, this was founded on the incident described in the charge sheet. There was therefore an explicit relationship between the allegation with which the employee was charged and the misconduct for which the employee was found guilty. The charge documented in the charge sheet was not characteristically different from the charge for which he was found guilty and dismissed.

The LAC correctly concluded that the decision of the commissioner was unreasonable. It was the duty of the commissioner to listen to the evidence presented at arbitration and to decide whether the employee committed the transgression that he was accused of. If the commissioner found the employee guilty on the evidence presented, he/she should then have decided whether dismissal was appropriate for the contravention committed. To have automatically concluded substantive unfairness by virtue of the fact that the employee was dismissed for negligence, yet the charge sheet made reference to dishonesty, was prejudicial to the employer.

As rightfully explained by the LAC, an important fact to be established when dealing with the incorrect classification of misconduct is whether the employee has been unduly disadvantaged. No such enquiry was conducted by the commissioner. It was further trite that the employee committed the misconduct for which he was charged. Therefore, the commissioner’s decision gives employees an unfair advantage by allowing them to escape the consequences of misconduct based on technicalities. This does not align with the objectives of labour law, which is fairness towards both parties.

Although the law protects employees against unfair dismissal, there was in this instance, no unfairness perpetrated by the employer against the employee. The LAC adequately balanced the interests of both parties and reached a fair conclusion.

9 Conclusion

The LAC judgment clarifies that disciplinary hearings must not be held to the same legal and technical standards as court proceedings. It is trite that disciplinary hearings are not bound by the same strict rules as criminal and civil cases. The adjudication of such cases must be premised on the principle of fairness. The automatic declaration of a dismissal as substantively unfair based on the incorrect classification of the misconduct in the charge sheet is unreasonable towards the employer. Commissioners have a duty to ascertain whether the employee has been prejudiced and to what extent. They also have a duty to hear the evidence presented by the employer to prove the commission of misconduct and based on that evidence to determine whether a contravention of a rule or standard took place. While commissioners and judges are instrumental in protecting an employee's right not be unfairly dismissed, this important task must be executed in a balanced manner.

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THE EVASION OF SECTION 187(1)(*c*) OF THE LABOUR RELATIONS ACT[*]

***National Union of Metalworkers of South Africa v Aveng Trident Steel (a division of Aveng Africa Proprietary Ltd)* (JA25/18) [2019] ZALAC 36; (2019) 40 ILJ 2024 (LAC); [2019] 9 BLLR 899 (LAC)**

1 Introduction

Section 187(1)(*c*) of the Labour Relations Act 66 of 1995 (LRA), has over the years proven to be a controversial section. At the heart of the controversy is the question as to whether an employer may terminate employees' contracts of employment based on operational requirements in circumstances where they refuse to accept changes to terms and conditions of employment. This question came before the courts on a number of occasions and answered in the affirmative by the Labour Appeal Court in *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* ((2003) 21 ILJ 133 (LAC)), and confirmed on appeal by the Supreme Court of Appeal in *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* (2005 (5) SA 433 (SCA)). However, the LRA has since been amended with the Labour Relations Amendment Act 6 of 2014 (LRAA). Whether an employer may, in light of the amendments, adopt this approach, was recently considered by the Labour Appeal Court in *National Union of Metalworkers of South Africa v Aveng Trident Steel (a division of Aveng Africa Proprietary Ltd)* ((JA25/18) [2019] ZALAC 36; (2019) 40 ILJ 2024 (LAC); [2019] 9 BLLR 899 (LAC) (13 June 2019) (*Aveng* case (LAC)). The judgment is noteworthy as it is the first time that the Labour Appeal Court (LAC) delivered judgment relating to section 187(1)(*c*) of the LRA post-amendment, thus providing a degree of judicial certainty on the interpretation to be accorded to the amended section.

2 The law prior to *Aveng*

Prior to the enactment of the LRA, lock-outs were regulated under the Labour Relations Act 28 of 1956. The 1956 Act recognised both termination and exclusion lock-outs. The definition of an unfair labour practice under the

[*] Based on a paper presented at the Labour Law Alumni Conference on Collective Bargaining, hosted by the Faculty of Law, Nelson Mandela University from 19–20 July 2019 in Port Elizabeth.

1956 Act, expressly excluded lock-outs, thus depriving the Industrial Court (IC) of jurisdiction to determine the fairness thereof. However, if the lock-out were not to compel acceptance of a demand or based on operational requirements pursuant to the lock-out, the IC would retain jurisdiction. Under the LRA, a lock-out does not include a termination lock-out. Section 187(1)(*c*) was introduced with the promulgation of the LRA and provided that it is an automatically unfair dismissal "to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee" (s 187(1)(*c*) of the LRA). The LRA does not provide clarity on when a dismissal for operational requirements may ensue where employees reject their employer's demands.

The extent of the prohibition contained in section 187(1)(*c*) came before the Labour Court (LC) on a number of occasions. Once a dismissal has been established in a section 187(1)(*c*) context, the critical question that must be determined is whether the dismissal was justified based on the employers' operational requirements or for purposes of compulsion. This subtle distinction emerged in several judgments. Early in the development, the LC accepted that, where an employer in a retrenchment context proposes amendments to terms and conditions of employment as an alternative to dismissals, and this is met with rejection by its employees, such an employer may dismiss employees based on operational requirements (see *ECCAWUSA v Shoprite Checkers t/a OK Bazaars Krugersdorp* (2000) 21 ILJ 1347 (LC); see also *MWASA v Independent Newspapers (Pty) Ltd* (2002) 23 ILJ 918 (LC); see also *Mazista Tiles (Pty) Ltd v NUM* (2004) 25 ILJ 2156 (LAC)). However, the LC adopted a different approach in a collective bargaining context. In *Fry's Metals* (LC), the employer sought to alter a shift system and intended dismissing employees who did not accede to the changes. The LC held that this approach was not permissible given the definition of a lock-out under the LRA. If the issue concerned a matter of mutual interest, the employer would offend section 187(1)(*c*) if employees were dismissed for refusing its demand. In this context, the employer would have to rely on collective bargaining and potentially a lock-out to secure agreement and not change tact midstream. On appeal in *Fry's Metals* (LAC), the LAC disagreed with this approach and found that the dismissals were final and irrevocable. The final nature of the dismissals could not be said to induce compliance with a demand, thus evading section 187(1)(*c*). In *Chemical Workers Industrial Union v Algorax* (Memorandum of Objects: Labour Relations Amendment Bill, 2012), the facts were similar to those in *Fry's Metals*. In this case the employer sought to change a shift system. The employees refused and were subsequently dismissed. The difference in *Algorax* was that the employer repeatedly offered to reinstate the dismissed employees on the proposed changes, an offer that remained open until the date of the trial. This matter was therefore distinguishable in that the dismissals were not final, thus triggering section 187(1)(*c*). Subsequent to the judgment in *Algorax*, the LAC's judgment in *Fry's Metals* was confirmed on appeal by the Supreme Court of Appeal (*supra*). The net effect of the judgments implies that section 187(1)(*c*) was avoided if dismissal was final and irrevocable, but triggered when the dismissals were temporary.

3 The amendments to section 187(1)(*c*) of the LRA

The interpretation accorded to the section prior to the amendments was not without criticism. Academic authors and commentators found it peculiar that a temporary dismissal triggered the section and questioned the interpretation given to the section (Thompson "Bargaining Over Business Imperatives: The Music of the Spheres After *Fry's Metals*" 2006 *ILJ* 704; Grogan "Chicken or Egg: Dismissals to Enforce Demands" 2003 19(2) *Employment Law* 11; see also Grogan *Workplace Law* 11ed (2014) 216; see also Newaj and Van Eck "Automatically Unfair and Operational Requirement Dismissals: Making Sense of the 2014 Amendments" 2016(19) *PER/PELJ* 14). The interpretation afforded to the section in *Fry's Metals* when read with *Algorax* had the effect of discouraging employers from engaging meaningfully in consultation processes and proposing alternatives to dismissal on pains that such proposals may offend against section 187(1)(*c*). This in turn prompted an amendment to the LRA with the LRAA, which came into operation on 1 January 2015. Far-reaching changes to the LRA were introduced with amendments. For present purposes, the amendments sought to amend section 187(1)(*c*) of the LRA. The section now provides as follows:

> "A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is–
> (a) …
> (b) …
> (c) a refusal by employees to accept a demand in respect of a matter of mutual interest between them and their employer;"

The fundamental difference between section 187(1)(*c*) post-amendment lies in the wording of the section. In its pre-amended form, it was an automatically unfair dismissal "to compel the employee" to accept a demand in respect of a matter of mutual interest. This has been substituted with the wording "a refusal by employees" to accept a demand in respect of a matter of mutual interest (Newaj and Van Eck 2016 *PER/PELJ* 17). The amended section also uses the plural "employees" as opposed to the singular term "employee" in the pre-amendment.

4 Facts of the case

The steel industry has experienced a sharp decline since 2010. Aveng's (the company) sales volume fell by 20%, and its operations could not be sustained by its income (*Aveng* case (LAC) par 4). With the decline in sales and profits, the company desperately needed to reduce costs to maintain profit margins. It decided to restructure and contemplated the possibility of retrenchments. In 2014, it initiated a consultation process in terms of section 189A of the LRA with NUMSA (*Aveng* case (LAC) par 5). Faced with dire operational constraints, the company realised that a reduction in its workforce would not be sufficient. The situation it found itself in also demanded a significant increase in productivity in order to secure the company's survival (*Aveng* case (LAC) par 6). It proposed to do this by

restructuring through reviewing job descriptions to combine certain functions. NUMSA refused to agree to this proposal. After several consultations, the company gave notice to NUMSA advising it that the process has been exhausted (*Aveng* case (LAC) par 23). After reaching an impasse on this issue, the company informed NUMSA that it would implement the proposed changes and presented all the affected employees with new contracts of permanent employment together with redesigned job descriptions, without altering their rate of pay (*Aveng* case (LAC) par 27). The company further informed the employees that if the contracts of employment were rejected, they would be dismissed. The employees refused to accept the new terms and conditions of employment and were subsequently dismissed (*Aveng* case (LAC) par 28).

5 The Labour Court

The legal question for determination before the court was when do operational requirements justify the dismissal of employees who reject an employer's demands to amend terms and conditions of employment (*National Union of Metalworkers of South Africa v Aveng Trident Steel (a division of Aveng Africa Proprietary Ltd)* (JS596/15) [2017] ZALCJHB 513; [2018] 5 BLLR 500 (LC); (2018) 39 ILJ 1625 (LC) (13 December 2017) (*Aveng* case (LC)). The union (NUMSA) contended that the reason for the dismissal was the refusal by employees to accept the employers' demand in respect of a matter of mutual interest (altered job descriptions and grade structure), thus rendering the subsequent dismissals automatically unfair in terms of section 187(1)(*c*). Aveng asserted that the dismissals were not automatically unfair, but based on its operational requirements. In considering these submissions, the LC found that the employees were not dismissed for refusing to accept a demand in respect of a matter of mutual interest, but for operational requirements after rejecting alternatives to dismissal proposed by the employer. According to the court, the proposal to alter job descriptions was an appropriate measure to avoid or minimise the number of dismissals (*Aveng* case (LC) par 50).

6 The Labour Appeal Court

On appeal before the Labour Appeal Court (LAC), NUMSA argued that the LC erred in its interpretation of section 187(1)(*c*) and that the dismissals were automatically unfair as the wording of the section makes it plain that the section intends to render any dismissal automatically unfair where the reason is based on the employees' refusal to accept a demand in respect of a matter of mutual interest. It was submitted that the section envisages three elements being; a demand, a refusal and a dismissal. Aveng submitted that the wording of section 187(1)(*c*) of the LRA does not imply that, since a proposed change to terms and conditions is refused and a dismissal thereafter ensues, the reason for the dismissal is owing to the refusal to accept the proposed change. Aveng also asserted that no demand was made and instead, an alternative to retrenchment was offered to employees, which they had a choice to accept or decline.

The LAC considered the explanatory memorandum accompanying the Labour Relations Amendment Bill, which provided the reasons for amending section 187(1)(*c*) (*Aveng* case (LAC) par 59). According to the Bill, the reasons were to remove the anomaly arising from the interpretation of section 187(1)(*c*) by the SCA in *Fry's Metals* when read with judgments such as *Algorax*. After the decision in *Fry's Metals*, employers were wary of offering re-employment to retrenched employees in the context of restructuring, even if there was a valid operational requirement for the retrenchment (*Aveng* case (LAC) par 60). This was due to the fact that such an offer might be construed as falling within the ambit of section 187(1)(*c*) of the LRA, thus rendering the dismissal automatically unfair. This consequently had the effect of depriving employees of offers of re-employment (*Aveng* case (LAC) par 60).

The LAC held that the amendment of section 187(1)(*c*) has a specific purpose (*Aveng* case (LAC) par 61). It shifts the focus from the employer's intention in effecting the dismissal to the employee's refusal to accept proposed changes (*Aveng* case (LAC) par 61). Thus the distinction between final and conditional dismissal as a basis for the application of section 187(1)(*c*) is no longer applicable (*Aveng* case (LAC) par 61). According to the court, if employers were not permitted to dismiss employees who refuse to accept changes to terms and conditions of employment and to employ others in their place who are willing to accept the altered terms and conditions of employment that are operationally required, the only way to satisfy an employer's operational requirements would be through collective bargaining and ultimately power play. If no agreement could be reached, the only means available to an employer would be through an offensive lock-out (in which case it would not be permitted to use replacement labour) or unilateral implementation in breach of contract (potentially resulting in litigation) (*Aveng* case (LAC) par 63). The LAC found these options to be self-defeating and only add to the economic pressure placed on an employer that was already trying to remain afloat.

According to the court, NUMSA's approach would result in employers being wary of proposing any changes to terms and conditions of employment during the course of a section 189 consultation process (*Aveng* case (LAC) par 64). That in turn would undermine the purpose of a consultation process which is to encourage engagements on alternatives to retrenchment. While employees cannot be dismissed for refusing to accept a demand, they may be dismissed if such a refusal results in the more dominant or proximate operational imperative. The court held that the question whether section 187(1)(*c*) of the LRA is contravened does not depend on whether the dismissal is conditional or final, but rather on what the true reason for the dismissal is. The existence of a refusal on the part of employees merely prompts a causation enquiry (*Aveng* case (LAC) par 67). The proximate reason for the dismissal then needs to be determined. In doing so, there is no basis for excluding an employer's operational requirements from consideration as a possible reason for dismissal. In finding that the true question that must be determined is one of factual and legal causation, the court held as follows:

> "Hence, the essential inquiry under section 187(1)(*c*) of the LRA is whether the reason for the dismissal is the refusal to accept the proposed changes to employment. The test for determining the true reason is that laid down in *SA Chemical Workers Union v Afrox Ltd*. The court must determine factual causation by asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no, as in this case, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such refusal was the main, dominant, proximate or most likely cause of the dismissal." (*Aveng* case (LAC) par 68)

The court found that the contention that the dismissal was effected based on the employees' refusal was not sustainable on the facts. According to the court, there was no employer demand (*Aveng* case (LAC) par 72). The proposals were made not only to change terms and conditions of employment, but as an alternative to dismissal in the context of retrenchment consultations. The purpose of Aveng's proposal was not to gain an advantage in collective bargaining, but to restructure for operational reasons in order to ensure its survival (*Aveng* case (LAC) par 72). The proximate cause for the dismissals was therefore based on the employer's operational requirements. Notably, the LAC acknowledged that the distinction between a demand and a proposal is a fine one, but held that demands are often made in the context of collective bargaining (*Aveng* case (LAC) par 72). While both wage negotiations and restructuring impacts on the business and restructuring proposals may feature in wage negotiations, the risk of retrenchments arise when the viability of the enterprise is at stake and constitute the dominant objective for the proposal (*Aveng* case (LAC) par 72).

7 Analysis

The Memorandum of Objects: Labour Relations Bill of 2012 makes it plain that the amendment to section 187(1)(*c*) has a limited reach in that it was intended at resolving the anomaly arising from *Fry's Metals* read with *Algorax.* The amendment was not aimed at altering the law by outlawing the type of dismissals that came before the court in *Fry's Metals*. The LAC's interpretation afforded to the section in *Aveng* accords with the intention of the legislature by removing the anomaly complained of. According to the LAC, the inquiry is whether the reason for the dismissal is the refusal to accept changes to terms and conditions of employment in terms of the *Afrox* test for factual and legal causation. If the purpose of the amendments were to dissolve the kind of dismissals discussed in *Fry's Metals*, it would require section 189 subject to section 187(1)(*c*). There is no indication in the statute that such an interpretation is called for. Established law as outlined herein recognises that an employer's operational requirements may be adduced as a reason for dismissal when confronted with a section 187(1)(*c*) claim. If this were prohibited, it would bring about the exact anomaly that the amendments intended to resolve, which in turn impacts negatively on a section 189 process relating to engagements concerning an alternative to dismissals. The effect of *Aveng* is therefore clear in a section 189 context. The effect of the judgment is rather obscure in the collective bargaining

context. As far as dismissal as a consequence is concerned, the court drew an analogy between the right to strike and collective bargaining and reasoned that:

> "[I]f it is permissible in terms of section 67(5) of the LRA to dismiss protected strikers where the employer is able to demonstrate (on all the facts and circumstances of a particular case) a legitimate and substantial business necessity, the underlying policy rationale applies equally to the dismissal of employees resisting employer demands or proposals. Striking workers may not be dismissed for striking but can be retrenched where a genuine substantial operational necessity arises. By the same token, while employees cannot be dismissed for refusing to accept a demand, they can be dismissed if that refusal results in a more dominant or proximate operational necessity. This legislative scheme of collective bargaining is in line with the constitutional right of trade unions and employers to engage in collective bargaining in that any limitation of the power play is reasonable and justifiable in the balance struck between the strike weapon and the employer's power of implementation at impasse." (*Aveng* case (LAC) par 67)

A degree of scepticism is required when interpreting this part of the judgment. The above paragraph appears to suggest that dismissal for operational requirements may follow the rejection of both a demand and a proposal as would potentially be the case in a strike context where this is motivated by operational requirements. The effect is then to conflate the application of section 187(1)(*c*) in a section 189 process and a collective bargaining context without drawing any meaningful distinction between the two processes. In the absence of a clear distinction, the judgment proceeds to apply the *Afrox* test. In attempting to distinguish a demand from a proposal, the LAC held that:

> "The distinction between a demand and a proposal is admittedly a fine one, but nonetheless goes beyond semantics. Collective bargaining demands are made ordinarily in negotiations over wages. Although both wage negotiations and restructuring proposals may impact similarly on the bottom line, and restructuring proposals can feature regularly in wage negotiations, the retrenchment risk arises when the operational requirements for the viability of the employer are compelling, overriding and the dominant objective of the proposal." (*Aveng* case (LAC) par 72).

It is submitted that the question of whether the matter concerned the rejection of a demand or proposal was incidental to determining the matter before the court. In rejecting the contention that the dismissal was effected based on the employees' refusal, the court found that there was no employer demand. Importantly, the LAC acknowledged that the distinction between a demand and a proposal is a fine one. However, the distinction drawn by the court is rather superficial and fails to take into account that there are instances where the two processes overlap (Cohen "Dismissals to Enforce Changes to Terms and Conditions of Employment – Automatically Unfair or Operationally Justifiable?" 2004 *ILJ* 1883–1896; Cohen opines that "the wide scope of mutual interest‖ disputes encompasses proposed changes to terms and conditions of employment as part of a business restructuring exercise. Notwithstanding the clear demarcation of interest and rights disputes and their respective dispute-resolution-forums, such disputes by their very nature also fall within the ambit of s 189"). In *Fry's Metals* (LAC), the court per Zondo JP as he then was, held as follows:

> "[A]ll that the Act refers to, and, recognises, in this regard is an employer's right to dismiss for a reason based on its operational requirements without making any distinction between operational requirements in the context of a business the survival of which is under threat and a business which is making profit and wants to make more profit." (par 33)

Given Zondo's *dictum*, the "risk of retrenchment" does not only arise when the viability of the business is at stake given that the LRA does not distinguish between retrenchment to ensure survival and retrenchment to increase profit. The categorisation of the concepts "demand" and "proposal" is particularly helpful in matters of this nature as a distinction must be drawn between section 187(1)(*c*) of the LRA in a collective bargaining context and in a retrenchment context. Regrettably, the LRA makes no such distinction with the result that the debate rages on. In the absence of such a clear distinction, there is practically no difference between the two concepts with a demand being capable of being disguised as a proposal with the ultimate result that dismissal for operational requirements may follow the rejection of a demand disguised as a proposal. The use of the *Afrox* test is apposite where a demand or proposal determination has been made. The suggested approach may also be reconciled with the wording of section 187(1)(*c*) in that it is only concerned with a dismissal pursuant to the rejection of a demand and not the rejection of a proposal. Thus, if on the factual matrix, it is found that there was no employer demand, but a proposal in a section 189 process, it would be superfluous to employ the *Afrox* test. In the absence of a clear demarcation, the effect of the judgment potentially covers both areas (collective bargaining and retrenchment). The LC judgment was clear that "a consultation in terms of section 189 is not a collective bargaining process" (*Aveng* case (LC) par 50). It is a statutory process wherein parties must attempt to reach agreement on amongst others, measures to avoid dismissal (*Aveng* case (LC) par 50). This reasoning makes it plain that the section is confined to a demand in a collective bargaining process.

8 Conclusion

Prior to the amendments to section 187(1)(*c*) of the LRA, an employer who sought to implement changes to terms and conditions of employment could, if its proposed changes were rejected by employees, justify dismissing its employees based on operational requirements, provided the retrenchment was final and irrevocable, and the requirements of the LRA were met (*Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA supra,* and confirmed on appeal by the Supreme Court of Appeal Court in *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd supra*). With the amendments to the LRA, there has been much anticipation as to how the amended section would be interpreted and applied. In *Aveng,* the Labour Appeal Court in interpreting section 187(1)(*c*) determined that a change to organisational structure culminating into changes to terms and conditions of employment would not invariably render dismissals that follow automatically unfair. An employer may therefore terminate employees' contracts of employment based on operational requirements in circumstances where they refuse to accept changes to terms and conditions of employment.

Aveng did not alter the law in that respect. However, the LAC transcended *Fry's Metals* and *Algorax* in that the question whether section 187(1)(*c*) of the LRA is contravened no longer depends on whether the dismissal is conditional or final, but a consideration of the true reason for the dismissal. The question is whether the reason for the dismissal was for a refusal by employees to accept a demand in respects of any matter of mutual interest between them and their employer. In answering this question, the court must employ the test in *Afrox* as outlined above. The approach adopted by the LAC is in line with the Memorandum of Objects accompanying the Labour Relations Amendment Bill (Memorandum of Objects: Labour Relations Amendment Bill, 2012). Despite what has been decided, in *Aveng* and previous Labour and Labour Appeal Court authorities, this is unlikely to be the end of disputes relating to the interpretation of the elusive section 187(1)(*c*).

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PROCEDURAL UNFAIRNESS OCCASIONED BY UNREASONABLE DELAY IN FINALISING A DISCIPLINARY INQUIRY

Stokwe v Member of the Executive Council: Department of Education, Eastern Cape [2018] ZACC 3

1 Introduction

"Justice delayed is justice denied" is a legal maxim which denotes that if legal redress is available to a party that has suffered, or is suffering an injustice but is not dispensed timeously, it has the same effect as having no redress at all (see Steenkamp J sentiments in *Road Accident Fund v Commission for Conciliation, Mediation and Arbitration* [2016] ZALCJHB 139 par 5; see also the definition at Definitions and Translations https://www.definitions.net/definition/justice+delayed+is+justice+denied (accessed 2019-09-12)). In this context, the maxim is used to emphasise that delays in finalising employment disciplinary processes may amount to a denial of justice. Research shows that unreasonable delays in finalising disciplinary cases affect the health and can even cause excruciating distress on the employees concerned (Van der Bank, Engelbrecht and Strumpher "Perceived Fairness of Disciplinary Procedures in the Public Service Sector: An Exploratory Study: Empirical Research" 2008 6(2) *SA Journal of Human Resource Management* 8).

The purpose of the Labour Relations Act 66 of 1995 (LRA) as outlined in s 1(*d*)(v) is to promote an effective resolution of labour disputes. Disputes relating to unfair dismissal should as a matter of principle be resolved expeditiously and cheaply (*Road Accident Fund* par 5). This injunction does not, in any way, vitiate the employers' prerogative to discipline his or her employees where there's alleged misconduct provided that this power is exercised within the purview of the law (*SAPU v Minister of Safety and Security* [2005] 5 BLLR 490 (LC) 513; Manamela "Dismissal Based on an Unfounded Allegation of Racism Against a Colleague: *SACWU v NCP Chlorche*" 2008 20(2) *SA Merc LJ* 298 298). The Constitutional Court's judgment in *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape* ([2018] ZACC 3, *Stokwe*) is concerned with a disciplinary proceeding which took almost four years to reach conclusion as a result of delays by the employer. The case is an important reminder to employers and all role players in the labour dispute resolution system that the spirit and purport of the LRA – to resolve labour disputes effectively –

should underlie all disciplinary processes. Failure to heed this principle compromises procedural fairness and inexorably, the consequent outcome.

This case note discusses the impact of unreasonably lengthy delays in finalising disciplinary proceedings on procedural fairness in the context of a dismissal. It aims to underscore the importance of effectiveness in labour dispute resolution and procedural fairness (as one of two legs of the fairness enquiry) as an indispensable test and not just a superfluous or a by-the-way criterion (see *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration* [2006] 9 BLLR 833 841). The case note concerns itself with delays in finalising the internal disciplinary process by the employer and not delays in the labour dispute resolution system (delays at the CCMA and the labour courts) as shown by cases such as *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus* ([2016] ZACC 49) and *Mogaila v Coca Cola Fortune (Pty) Limited* ((CCT76/16) [2017] ZACC 6) which took almost a decade to reach finality. A summary of the facts of the case is provided below. This is followed by the decision and rationale of the court; an analysis and a conclusion.

2 Facts of the case

Mrs Thandiwe Stokwe (the applicant) was employed by the Eastern Cape Department of Education (the Department) as a Deputy Chief Education Specialist stationed in the Uitenhage District Office. In January 2008 she was seconded as a Chief Education Specialist when the incumbent in that post was placed on sick leave. In August 2009, one of the transport service providers contracted to the Department to transport learners to school terminated their services with immediate effect. This service had to be replaced urgently, failing which learners who relied on the transport provided by the Department would be left stranded the following school day and that would remain the case until a replacement was appointed. The applicant decided to award a temporary service contract to a company owned by her spouse, who happened to be in the transport business. This company provided these services for four months and then a new service provider was appointed through a tender process.

On his return to work, the Chief Education Specialist received a request to approve the payment to the applicant spouse's company. The Chief Education Specialist noted that the applicant had contravened the National Treasury Practice (Note Number 7 of 2009/2010 clause 2.2) which required the applicant to disclose her interest and to withdraw from participating in the process of awarding the contract. The applicant submitted a report in September 2009 explaining the emergency and context within which she awarded the contract to her spouse and further indicated that she did this as a gesture of support to her husband who felt sick because of his unemployment.

In July 2010 (10 months later) the Department charged the applicant with four counts of misconduct in terms of s 18(1)(*a*)–(*b*) and (*f*)–(*g*) of the Employment of Educators Act 76 of 1998 (EEA) respectively. A disciplinary

hearing was convened in March 2011, and the applicant was advised between June and August of the same year that she was found guilty of charges 2 and 4 and was dismissed. The applicant requested reasons for the finding and also noted an internal appeal against the sanction. The applicant remained in the employ of the Department as per Item 8(4) of Schedule 2 of the EEA which stipulates that a sanction may not be effected pending an appeal. The applicant sent written requests for the reasons for dismissal on 17 October 2011; on 6 March 2013 and again on 3 May 2013. On the two latter occasions, the applicant informed the Department that she viewed the delay and silence as an abandonment of the disciplinary process. This was almost two years since the Department last communicated with her in this regard.

On 5 December 2013, the Department finally responded and furnished the applicant with reasons for the sanction of dismissal. Even in this attempt, the response merely supplied an excerpt written by the chairperson of the disciplinary hearing stating that the applicant's dismissal was based on her bad faith and overstepping of boundaries in terms of the code of conduct. The dismissal was effected in February 2014. The applicant turned to the Education Labour Relations Council (ELRC) seeking to challenge both the substantive and procedural fairness of her dismissal. She raised the delay in finalising the disciplinary process after she noted an appeal and argued that it indicated an abandonment of the disciplinary process by the Department. Arbitration under the auspices of the ELRC was held in August 2014. The arbitrator accepted the Department's response that it had not abandoned the process, that the applicant's continued employment with the Department was based on Item 8(4) Schedule 2 of the EEA and that it removed the applicant from the scholar transport section to a different section.

The arbitrator conceded that the delay was unreasonably long but found that any prejudice suffered by the applicant was ameliorated by the fact that she remained gainfully employed throughout the protracted process. With regards to the substantive aspect of the inquiry, the arbitrator found *inter alia* that the applicant was not guilty of breaching policy because she had no knowledge of it, but that she was guilty of breaching the Revised Policy Guidelines for Scholar Transport (Revised Guidelines). This is because she was the custodian of the Revised Guidelines and had intimate knowledge of them. For current purposes, it suffices to say that the arbitrator found the dismissal substantively fair but was silent on procedural fairness despite having considered this aspect and making a finding on it.

The applicant approached the Labour Court to have the award reviewed and set aside. She contended that the arbitrator based his finding on an incorrect understanding of the Revised Guidelines; that the arbitrator overlooked the unreasonably long delay and challenged the appropriateness of dismissal as a sanction for her offence. The Department explained that there were prescribed time limits within which to finalise disciplinary proceedings but that the Department was placed under administration by National Government in terms of s 100 of the Constitution (the "section 100 defence").

The court found that the arbitrator's understanding of the Revised Guidelines was correct, and that the dismissal was therefore reasonable and fair in substance. The court also accepted the explanation for the delay justifying procedural fairness of the dismissal. The review application was then dismissed. Both the Labour Court and the Labour Appeal Court refused the applicant leave to appeal. The applicant then turned to the Constitutional Court on the same ground that the award was unreasonable and should be set aside. Regarding substance, the applicant argued that the finding was based on an incorrect understanding of the Revised Guidelines by the arbitrator. With regards to procedure, she argued that the process was tainted by the undue delay and that the Department had abandoned the disciplinary process (waiver of right to discipline). The Court was called upon to apply the *Bato Star Fishing* test to determine if the decision reached by the arbitrator was one that as reasonable decision-maker could not reach (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; *Stokwe* par 56).

3 Proceedings at the Constitutional Court

At the Constitutional Court, the Department conceded that their understanding of the clause in the revised guidelines was incorrect and sought to base the charges on a different clause. The court noted that the arbitrator's reasoning was not beyond criticism but that the award was substantially fair because the applicant had conceded that she knew that her conduct contravened the employer's policy. With regards to procedural fairness, the court considered two factors regarding the delay in finalising the disciplinary process. Firstly, the argument that the delay was unexplained and an unjustified departure from the employer's own disciplinary procedure and therefore unlawful. Secondly, it considered that argument that the delay went against the spirit of the LRA to resolve labour disputes with effectiveness (par 34). The court further considered Schedule 2 of the EEA and noted conspicuous features regarding dispute resolution. It noted that the Schedule provides that discipline must be prompt and should be concluded in the shortest possible time frame; that a disciplinary hearing must be held within 10 working days after the service of charges and that a decision of an appeal should be made and communicated within 45 days by the ELRC. The applicant raised a principle from the Labour Court in *Riekert v Commission for Conciliation, Mediation and Arbitration* ([2005] ZALC 90 par 22) that where an employer subverts or flouts his own disciplinary procedure, it has a duty to justify non-compliance and to establish that the procedure was still substantially fair, reasonable and equitable (par 37). The applicant also argued that the delay subverted the LRA's objective to promote effective dispute resolution.

The applicant relied on *Moroenyane v Station Commander of the South African Police Services – Vanderbijlpark* ((J1672/2016) [2016] ZALCJHB 330) for the claim that undue delay in finalising disciplinary process can manifest a waiver of the right to discipline an employee. Further reliance was placed on *Department of Public Works, Roads and Transport v Motshoso* ([2005) 10 BLLR 957 (LC)) where the court held that a delay of almost three

years in finalising a disciplinary process rendered the proceedings procedurally unfair. In response to these contentions, the Department argued that the disciplinary code was merely a guide and not rigid rules that had to be followed blindly. It was argued on behalf of the Department that there were no time frames in the EEA within which to conclude disciplinary proceedings although conceding that ordinarily they should be concluded within the shortest time possible. It was explained that the cause for the delay was that the Department was placed under administration. The applicant argued that a "section 100 administration" applies only to executive functions of a province and that administrative functions such as disciplinary processes remain vested with provincial authorities and that this argument was raised for the first time at the Labour Court.

The court considered s 23(1) of the Constitution (the right to fair labour practices) and s 1(*d*)(iv) of the LRA which highlight the purpose of the LRA to promote effective labour dispute resolution system and held that its jurisdiction was engaged and granted leave and condonation. The court considered that there was a space of over four and a half years between the commission of the misconduct and the final determination of her internal appeal and subsequent dismissal. The Department took nine months before a disciplinary hearing was held despite policy requiring that it be convened within 10 working days. In *Toyota SA Motors v CCMA* ((CCT228/14) [2015] ZACC 40), the court held that any delay in the resolution of labour disputes undermined the primary object of the LRA (par 69). The court noted that the applicant relied on the delay to finalise the disciplinary process rather than to initiate/ institute it. However, the requirement for promptness extended to both the institution and completion of the disciplinary process. The court said that, the fact that the employer retained the employee in its employment after the guilty finding and dismissal for an extended period may indicate that the employment relationship had not broken down irretrievably.

A delay on its own is not inherently unfair. Therefore, unfairness must still be determined separately and on a case by cases basis (*Bothma v Els* [2009] ZACC 27 par 35). To do this, the court employed six factors propounded in *Sanderson v Attorney-General, Eastern Cape* ([1997] ZACC 18 par 25) and reiterated in *Moroenyane v Station Commander of the South African Police Services – Vanderbijlpark* (*supra* par 42) as follows:

a) The delay has to be unreasonable. In this context, first, the length of the delay is important. The longer the delay, the more likely it is that it would be unreasonable.
b) The explanation for the delay must be considered. In this respect, the employer must provide an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness.
c) It must also be considered whether the employee has taken steps in the course of the process to assert his or her right to a speedy process. In other words, it would be a factor for consideration if the employee himself or herself stood by and did nothing.
d) Did the delay cause material prejudice to the employee? Establishing the materiality of the prejudice includes an assessment as to what

impact the delay has on the ability of the employee to conduct a proper case.

e) The nature of the alleged offence must be taken into account. The offence may be such that there is a particular imperative to have it decided on the merits. This requirement however does not mean that a very serious offence (such as a dishonesty offence) must be dealt with, no matter what, just because it is so serious. What it means is that the nature of the offence could in itself justify a longer period of further investigation, or a longer period in collating and preparing proper evidence, thus causing a delay that is understandable.

f) All the above considerations must be applied, not individually, but holistically.

The court dismissed the "section 100 defence" and found the delay to be unfair and that it rendered the process procedurally unfair. The court also found that the applicant's claim of a waiver by the employer could not succeed because there was not enough supporting evidence. The matter was remitted back to the Labour Court for an appropriate remedy.

4 Comments

4 1 Effective labour dispute resolution

The EEA regulates the terms and conditions of employment of educators. The LRA aims *inter alia* to promote the effective resolution of labour disputes (s 1(*d*)(v)). In line with this, the guidelines in Item 2(g) of Schedule 2 of the EEA provides that disciplinary proceedings must be concluded in the shortest possible time frame. This means that an employer must initiate and conclude disciplinary proceedings within a reasonable period. Jafta J notes that employment disputes are urgent matters that require speedy resolution as undue delays in finalising them, even for a period of three years may have catastrophic ramifications to both the employer and the employee (*Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus supra* par 33). In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* ([2008] ZACC 16) Nkabinde J expressed the court's disapproval of the delays in finalising unfair dismissal disputes and noted the adverse impact this had on those involved (par 52). This sentiment is further echoed by Judges Navsa and Ponnan in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* ([2009] ZASCA 24 par 34) wherein it was stated that, the philosophical underpinning of the entire scheme of the LRA is easy access to dispute resolution and one of its clear intentions is the speedy outcome of disciplinary processes (par 34).

Section 188 of the LRA requires the employer to prove that a dismissal satisfies both the substantive (fair reason) and procedural fairness tests. The Code of Good Practice provides that failure to do this on the part of the employer may render the dismissal unfair (Code of Good Practice: Dismissal Schedule 8: Item 2). Although an employer is not bound to follow the code inflexibly, he may not depart from it arbitrarily (Du Toit, Godfrey, Cooper,

Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* 6ed (2015) 443). The Code of Good Practice provides that after a disciplinary enquiry, the employer should communicate its decision preferably accompanied by written reasons. The use of the "after", indicates a period within which the decision should be reached and made known to the employee. An unreasonable delay in either instituting or finalising disciplinary proceedings may render the procedure and a dismissal unfair. It is submitted that therefore that unreasonable delays are a stark contrast of an effective dispute resolution. The court in *Stokwe* was correct to hold that it was unreasonable for the employee to wait for over four years for the outcome of her disciplinary enquiry.

4 2 *The effect of delay on fairness*

An unreasonable delay in prosecuting or finalising a case vitiates the credibility of the resultant outcome and could even border to abuse of process (*Cassimjee v Minister of Finance* (455/11) [2012] ZASCA 101 par 10). In some instances, the effect of a delay may be the inability to recall material facts surrounding the alleged misconduct. Potential witnesses could also be lost as a result of circumstances outside the control of the employee (Cameron "Right to a Hearing Before Dismissal" – Part 1 1986 7 *ILJ* 183). An employee awaiting a disciplinary outcome for a lengthy period may suffer from anxiety and this could create a hostile working environment and affect the business of the employer (*Mohlala v South African Post Office* (JR 737/10) [2013] ZALCJHB 244 par 47, see also Van der Bank, Engelbrecht and Strumpher 2008 *SA Journal of Human Resource Management* 6 where it is stated that employees in the security sector suffer depression and even experience suicidal thoughts during protracted disciplinary processes). Depending on the circumstances of each case, lengthy delays in finalising disciplinary proceedings render the whole process unfair, even if substantially, the employer had a solid case (*Mohlala v South African Post Office supra* par 47).

4 3 *Waiver of the right to discipline an employee*

An employer should be able to discipline their employees where there's alleged misconduct (*Poya v Railway Safety Regulator* [2018] ZALCJHB 354 (6 November 2018) par 37; Basson, Christianson, Garbers, Le Roux and Strydom *The New Essential Labour Law Handbook* 6ed (2017) 127; see also Manamela 2008 *SA Merc LJ* 298). However, there are circumstances where delay in institution or finalisation of the disciplinary process may indicate a waiver of the employer's right to discipline or where it even thwarts the institution or continuation of disciplinary proceedings. A waiver is defined as the legal act of abandoning a right to which one is otherwise entitled (expounded by Cameron J in *National Union of Metalworkers of SA v Intervalve (Pty) Ltd* (2015) 36 ILJ 363 (CC) par 60).

An employee pleading a waiver on the part of the employer bears the burden to prove that the employer knew that it had waived its rights (*Moroenyane v Station Commander of the South African Police Services –*

Vanderbijlpark supra par 44). In *Van Eyk v the Minister of Correctional Services* (2005, 6 BLLR 639), an employee was charged with misconduct almost two years after the alleged offence. The employer's disciplinary code prescribed three-and-a-half months within which an employee could be charged after discovery of the offence by the employer. The court found that the employer had waived his right and that the charges had fallen away.

In *Jonker v Okhahlamba Municipality* ([2005] 6 BLLR 564 (LC)), the court held that the time limits and procedure set out in the employee's employment contract were a mere commitment to deal with disciplinary matter expeditiously and but were not cast in stone (par 20). Failure to adhere to these by the employer did not necessarily amount to a waiver of the right to discipline the employee. The court found that neither the contract nor the conduct of the employer amounted to a waiver in the circumstances (par 20). In *Department of Public Works, Roads and Transport v Motshoso* ((JR795/03) [2005] ZALC 62), the court agreed that a waiver of the right to discipline may, in certain circumstance, be inferred from an unexplained and unreasonable delay on the part of the employer.

The applicant's submission was that there was an unexplained delay (over four years) in the period between her dismissal and the decision on her internal appeal from which a waiver could reasonably be drawn. Both the initial disciplinary hearing leading to the dismissal and the appeal were dealt with and fell to be decided by the same employer. Moreover, the fact that the employer was prohibited from effecting the dismissal pending the appeal does not in itself explain or justify the delay between the two events. The court itself, found the delay inexcusable (par 91). Therefore, the employer's reliance on Item 8(4) of Schedule 2 was excluded by the unreasonableness. Even if it was not excluded, still it did not remedy the situation and should have been rejected. It is submitted that should the court have enquired in-depth into the waiver, it would have possibly upheld the inference. This would have certainly bolstered the precedential value of its judgment.

4 4 International and foreign comparators

Although not considered in *Stokwe*, it is prudent to draw comparisons from other jurisdictions and gauge South African legislation against international standards to glean lessons. Section 233 of the Constitution of South Africa, 1996 encourages courts to prefer an interpretation of law that is more consistent with international law than other inconsistent alternatives. This part draws comparators from the foreign jurisdictions and the International Labour Organisation.

4 4 1 United Kingdom

The Advisory, Conciliation and Arbitration Service (ACAS) Code of Practice on Disciplinary and Grievance Procedures (ACAS code) issued in terms of s 199 of the Trade Union and Labour relations (Consolidation) Act 1992, provides disciplinary process guidelines in the United Kingdom (ACAS Code https://www.acas.org.uk/media/1047/Acas-Code-of-Practice-on-Discipline-

andGrievance/pdf/Acas_Code_of_Practice_on_Discipline_and_
Grievance.PDF (accessed 2019-11-09)). The ACAS code is not legally binding on employers, however, the Employment Tribunal considers its guidelines when dealing with cases and are predisposed to award up to 25 per cent more compensation to employees where employers failed to adhere to the code. The ACAS code may be said to be the United Kingdom's equivalent of the LRA Code of Good Practice. It encourages employers and employees to raise and deal with issues promptly and to not unreasonably delay meetings and decisions or confirmation of those decisions. Employers must carry out necessary investigations of potential disciplinary matters without unreasonable delay. The ACAS code lays down steps which must be followed before and during a disciplinary hearing. The employer must first start by conducting its own investigation into the alleged misconduct and then send a letter to the employee to inform him/her about the allegation and to invite the employee to a hearing. A meeting must be convened to discuss the allegation and to provide the employee with an opportunity to state their side of the case. The employer must then decide on the outcome of the enquiry and lastly, the employee must be advised about his/her right to appeal the decision. A recurrent factor in all these steps is that they must all be carried out without unreasonable delay (see ACAS https://beta.acas.org.uk/code-of-practice-on-disciplinary-and-grievance-procedures (accessed 2019-11-09)). These guidelines are akin to the guidelines contained in Item 4 of the LRA's Schedule 8 Code of Good Practice: Dismissal.

In *Yorkshire Housing Ltd v. Swanson* ([2008] UKEAT 0057_07_1206 (12 June 2008)) an employee was dismissed for misconduct following a disciplinary hearing. However, there was a delay of about five months between the disciplinary hearing and the dismissal of the employee (par 19). The Employment Appeal Tribunal considered *inter alia* the provisions of Part 3(12) of Schedule 2, Employment Act of 2002 which required that every step of a disciplinary action be taken without unreasonable delay read with s 98A of the Employment Rights Act of 1996 which provided that a dismissal is regarded unfair if the procedures set out in Schedule 2 of the Employment Act 2002 are not fully observed (par 56–58 and 60). The dismissal was found to be unfair (par 70). Honourable Mrs Justice Cox DBE observed that "[…] delay is always the enemy of fair dispute resolution in the workplace, leading as it does to fading memories, prolonged anxiety, the entrenchment of parties' positions, prejudice to a fair hearing of the issues, and thereby to injustice" (par 69).

4 4 2 Malaysia

In Malaysia, there is a doctrine called the "doctrine of condonation" which operates as an equivalent of a waiver in South African law. In terms of this doctrine, an employer who has full knowledge of an employee's misconduct elects not to punish the employee (Dahlan, Romli and Ahmadat "Doctrine of Condonation: Challenges in the Management of Disciplinary Cases in Public University" 2016 7 *UUM Journal of Legal Studies* 139 142). An employer who delays inordinately to make the election whether to discipline the

employee or to overlook the misconduct is deemed to have waived his right by forgiving the employee (Dahlan *et al* 2016 *UUM Journal of Legal Studies* 144). In the case of *M Sentivelu R Marimuthu v Public Service Commission Malaysia* ([2005] 3 CLJ 778) where there was a delay of seven years in prosecuting misconduct charges, Gopal Sri Ram JCA (the Judge in the case) observed that the fact that the law is silent on time limits does not mean that the employer is free to act slowly or to delay proceedings as this was procedurally unfair and could cause an injustice (*M Sentivelu R Marimuthu v Public Service Commission Malaysia supra* 783). In *Telekom Malaysia Bhd. v Subramaniam Ahyahio* ([1998]1ILR 476) the court upheld a condonation where the employee was asked to report for duty whilst waiting for the disciplinary outcome (*Telekom Malaysia Bhd. v Subramaniam Ahyahio supra* 479).

4 4 3 The ILO

Section 1(*b*) of the LRA states that one of its purposes is "to give effect to obligations incurred" by South Africa as a member state of the ILO (see Smit and Van Eck "International Perspectives on South Africa's Unfair Dismissal Law" 2010 43(1) *CILSA* 46 48). Chapter VIII of the LRA entitled "Unfair Dismissal and Unfair Labour Practice" is inspired by the Termination of Employment Convention No 158 of 1982 (Convention 158) (See *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration supra* 839–840). Article 7 of Convention 158 provides that a dismissal related to an employee's conduct may not be effected until procedural fairness has been observed in line with the *audi alteram partem* principle (*Old Mutual v Gumbi* [2007] SCA 52 (RSA) par 5, 7; see also *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration supra* 839–840). The *audi alteram partem* principle forms part of the guidelines under the Code of Good Practice (Basson *et al The New Essential Labour Law Handbook* 143; see also Du Toit *et al Labour Relations Law: A Comprehensive Guide* 457). Article 10 of Recommendation 166 provides that an employer should be deemed to have waived his right to dismiss an employee for misconduct if he has failed to do so within a reasonable period of time after he has learnt of the misconduct.

5 Conclusion

Stokwe has highlighted the importance of procedural fairness in disciplinary enquiries and serves as a deterrence to unreasonable delays in finalising proceedings. This note has shown the effects of these delays on procedural fairness. Furthermore, it has highlighted the importance of effectiveness in labour dispute resolution. The employer's failure to act promptly may in certain circumstance amount to a waiver of the right to discipline his employees and this proscribes him from instituting disciplinary proceedings against them in this regard. The ILO Recommendation 166 demonstrates that this principle is internationally recognised. Furthermore, the foreign jurisprudence regarding procedural delays and "waiver" attests to the

undesirable effects of delays in labour dispute resolution and that the principle of waiver is not peculiar to South Africa. Apart from Petse AJ's abstinence from dealing with the waiver in detail, *Stokwe* is a commendable and judicious judgment and therefore welcome.

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A LEGAL ANALYSIS OF LABOUR DISPUTE PREVENTION AND RESOLUTION UNDER INDIVIDUAL EMPLOYMENT LAW IN ZAMBIA*

Willard Mutoka v Chambeshi Water and Sewerage Company Limited (Comp. IRCLK/382/2018)

1 Introduction

This case note is a legal review and analysis of *Willard Mutoka v Chambeshi Water and Sewerage Company Limited*, a Zambian case relating to a labour dispute under the individual employment law sphere. The authors/reviewers herein were retained as counsel for the respondent company in the matter *in casu*. Appreciating that Zambia has both individual and collective labour dispute prevention and resolution mechanisms, the authors/reviewers in consultation with all parties involved opted to pursue the alternative dispute resolution approach under the High Court for Zambia (Amendment) Rules, 1997 (Court-Annexed Mediation Order XXXI Rule 4), instead of litigation, resulting in the faster, cheaper and final settlement of the case in full satisfaction and accord of both parties as discussed hereinafter. Unlike arbitration awards which are conclusive and final, mediation agreements or settlements need to be registered in the courts for them to be recognised as binding.

2 Background information

2 1 Synopsis of the case

The complainant entered into a contract of employment with a respondent company on a three-year contract renewable based on performance from 2015 to 2018. Upon expiry of the said contract, the complainant applied for the renewal of the contract through the Permanent Secretary (PS) of the Portfolio Ministry as there was no board of directors in place then; which application was denied by the PS. The complainant then approached the Parliamentary Select Committee to complain that the non-renewal his of contract was based on political discrimination.

The Parliamentary Select Committee ordered the PS to renew the complainant's contract of employment and acting on that purported instruction, the PS renewed the complainant's contract for a further three

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years. The complainant took office and three weeks thereafter the PS received legal opinion from the Attorney General of the Republic of Zambia that the Parliamentary Select Committee had no power to order the PS to renew the contract of employment for the complainant. The PS wrote to withdraw the complainant's renewed contract. Being aggrieved by the said withdrawal, the complainant commenced an action against the respondent company alleging unfair and wrongful dismissal. The matter was referred for mediation by the High Court Judge with the authors herein being retained counsel for the respondent.

2 2 Possible dispute prevention/resolution avenues

Labour dispute resolution is regulated by statute as well as through court-annexed mediation and conciliation. Arbitration is also provided for under the Arbitration Act No 19 of 2000 of the Laws of Zambia. The effect of social justice and access to justice in labour disputes have been made possible through a fast track process under the Small Claims Court which is a creature of Small Claims Court Act, Cap 47 and Industrial Relations Division of the High Court created by the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia.

2 3 Identified legal issues

The following were the pertinent legal issues identified as to beg for resolve by the honourable mediator:

1 Whether or not the PS was a competent authority with the legal mandate and backing to take charge of overall supervision of the respondent company in the absence of the board of directors;

2 Whether or not the PS was under a legal obligation to obey a directive from the Parliamentary Select Committee compelling him to renew the contract of employment for an employee whose contract had expired;

3 Whether or not the correct procedure was followed by the respondent company in offering and subsequent withdraw of the "renewal" of contract of employment;

4 Whether or not there was both unfair and wrongful dismissal in the manner the complainant was separated from the respondent employer; and

5 Whether or not the complainant was entitled to the relief that he was seeking including payment of all allowances, salaries and increments for a period of three years amounting to more than two and a half million Zambia Kwacha (ZMW2.5 million) which was equivalent to US$ 200,000.

2 4 Discussion of the applicable law

The following legal discourse was presented before mediation:

1 With respect to the first legal issue of whether or not the PS was a competent authority to take charge of a government institution in the absence of the board of directors:

- First, it is a matter of common practice for purposes of giving efficacy to the continuation of company operations and existence. It is trite law that a company operating without a board of directors for a period of more than 90 days, must be wound up (closed) otherwise its subsequent "decisions" would be illegal.
- Secondly, this legal issue falls under the scope and ambit of equitable estoppel. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption (Brooke "An Estoppel Case Review" https://www.newlawjournal.co.uk/content/estoppel-case-review (accessed 2019-01-19)). The case of *Africast (Pty) Ltd v Pangbourne Properties Ltd* ((2010/2117) [2013] ZAGPJHC 39) is authoritative hereon.

2 Turning to the issue of the Parliamentary Select Committee's directive to the PS to renew the complainant's contract of employment, it was opined that the Parliamentary Select Committee acted *ultra vires* its powers. The National Assembly Powers and Privileges Act (Cap 12 of the Laws of Zambia) is very clear on what immunities and protections parliament can confer on persons that appear before it. The powers and privileges do not include the powers to have parliament or any of its Committees directing or ordering a limited company to renew any employee's contract.

3 Regarding the third legal issue herein:

The general considered view was that the respondent breached the law on legitimate expectation by withdrawing the purported renewal of the "subsequent" contract. However, considering the timeframe in which the events occurred, a legitimate expectation may be circumvented and/or atoned for by paying a salary prorated for the number of days worked under the mistaken renewal prior to the learned Attorney General's advice.

4 Pertaining to unfair dismissal and/or wrongful dismissal:

It was contended that there was a slight chance for the courts to find in favour of the complainant on matters of wrongful dismissal for the reason that there was error on procedural matters of communicating to the complainant about the erroneous "renewal" and its subsequent withdrawal. The Industrial and Labour Relations Act (Cap 269 of the laws of Zambia) may be authoritative hereon. Wrongful dismissal has been held to be illegal dismissal for want of following due/correct procedure (*Phiri v Bank of Zambia* (198/2005) [2007] ZMSC 21 (20 August 2007)). It was further held that for cases of wrongful dismissal the only remedy available is the award of compensation if the form of damages to which both parties agreed to.

In terms of unfair dismissal, it was heard that any termination which falls under Section 108 of the Industrial and Labour Relations Act (Cap 269 of the Laws of Zambia), would be deemed to be unfair dismissal whose automatic remedy is reinstatement, re-employment and compensation for loss of employment. However, in mediation the parties agreed that ordering reinstatement or re-employment would undermine the freedom

of employment contract which espouses for the view that parties should not be forced to continue working together if they do not wish to as doing otherwise would entail converting a contract of employment into a contract of slavery.

5 Concerning entitlements:
Based on the philosophy of labour income as buttressed by law, it is clear and settled legal principle that paying a former employee for services not worked for is deemed not only speculative but also unjust enrichment. The mediator's attention was drawn to a plethora of cases wherein the above position has been repeatedly held by the courts of law; with the latest decision being that of the Supreme Court of Zambia in the case of *ZCCM Investments Holdings v Sichimwi* ((Appeal No. 172/2014) [2017] ZMSC 51 (12 June 2017)).

2 5 Application of the law to the facts

Applying the law relating to dispute prevention and resolution, through mediation, the parties resolved the dispute by consent agreement within two weeks thereof premised on the following:

1 Taking into consideration the law pertaining to the first legal issue herein identified, it is clear that the PS in charge of a particular portfolio where a government institution falls must take charge of such a company for purposes of efficacy in the continued operations of the institution in the absence of a Board so as to avoid the negative effect as espoused in the *Emirates case.*

In any case, it was the complainant who initiated the process of placing the PS in the place of authority by writing to the PS requesting for renewal of his complainant's contract of employment on his own assumption that the PS was a competent authority to renew or not to renew the contract.

It was thus espoused that the complainant was, therefore, equitably estopped by law from denying his own assumption following his argument that the PS did not have the power to terminate the contract of employment when in the same breath the said complainant asked the same portfolio PS to renew his contract.

2 Applying the law to the second legal issue herein it is trite and clear that not only did the Parliamentary Select Committee exceed its legal powers but also breached the Constitutional separation of powers and seriously violated the fundamental tenets of company law by interfering in the internal operations of a limited company by ordering the company to renew an expired contract of employment for a former employee. This can also be said to be a clear case of breach of freedom of contract which is premised on the principle of mutual consent (as espoused in the case of *The Council of the Copperbelt University v Akombelwa* 2009/HK/609) whereby each contracting party has a right to exercise the freedom to continue or terminate the contract of employment if either or both parties desire to do so. It is also a settled legal principle within the employment and labour law sphere forcing an employer to continue employing an employee when one party to that contract does not desire

to continue to be bound by that contract is like converting a contract of employment into a contract of slavery. This could be seen to be contrary to spirit, purport and object of article 14 of the Zambian Constitution, Cap 1 of the Laws of Zambia and international labour standards.

Although the PS ought not to have complied with an "illegal" instruction from parliament, it seems to us that he might have operated under the basic requirement to obey seemingly lawful instructions to avoid being cited for contempt of parliament contrary to the provisions of the said National Assembly Powers and Privileges Act (Cap 12 of the Laws of Zambia).

3 With respect to the 4th legal issue, the complainant averred that the decision by the PS not to renew the complainant's contract had three conflicting dates namely: the date on the letter itself, the date on the envelope and the date of service/delivery to the complainant. He contended that the decision not to renew was an afterthought by the PS, he the complainant sounded the weaknesses obtaining in the company including the delayed appointment of the Board of Directors.
The complainant's contention was going to be that the conflicting dates were not accidental but evidence of ill-intent on the part of the respondent hence, "backdating the response not to renew his contract." Such an act if proven in court would be tantamount to unlawful dismissal.

In the premises and for that fact that the complainant was erroneously communicated to about the purported renewal, of course at the coercion and duress of parliament, it is regrettable that the respondent did flout any procedure(s). The ideal position should have been to first consult the Attorney General about the directive from parliament before communicating to the complainant.

4 Applying the law to the facts it is likely that the court would find in favour of the complainant and possibly hold unfair dismissal, from the perspective of dismissing an employee by taking into account irrelevant factors, his reporting the company's shortcomings to parliament without approval of the PS.

There is also a slight chance that the court might find for the complainant on wrongful dismissal on procedural errors on the part of the respondent.

5 From a legal point of view, as enunciated in point 4 above, the defence team for the respondent held a legal opinion that even if the complainant succeeded in proving his case at trial, the court would not award complainant the speculative and unjust enrichment of the claim of more than ZMW2.5 million(US$190,000.00). The defence team contended that the complainant might be compensated damages for either unfair dismissal and/or wrongful dismissal, as elucidated above, which quantum legally could not reach the claimed ZMW 2.5 million (US$190,000.00) or anything close to that spectrum. In the case of *ARB Electrical Wholesalers (Pty) Ltd v Hibbert N.D* (Case No. DA3/13 (Judgment delivered on 21 August 2015)), the court distinguished compensation from damages and stated that where an employee has suffered embarrassment (such as reporting to the office only to be removed thereafter), equitable and just compensation may be given on reasonable

scales. The respondent averred that reasonable scales are not equal to payment equivalent to the end of the contract as herein claimed.

It is, therefore, at the discretion of the court to decide what scales may apply on a case-by-case basis.

In the case *SBV Services (Pty) Ltd v CCMA* (2013 34 ILJ 996 (LC)) it was stated that only in matters of proved unfair dismissal that reinstatement of an employee may be ordered but considering soured relations, the employee may be awarded damages that are equivalent to what they could have earned as a total sum at the end of their terminated/dismissed contract.

Our view was that it would be an uphill battle for the complainant to prove unfair dismissal, except for the alleged backdating of the non-renewal letter as allegedly contradicted by the date on the envelope. If they proved their case, then the complainant would be entitled to 36 months' payment without consideration of the unjust enrichment doctrine as espoused in the case of *ARB Electrical Wholesalers (Pty) Ltd v Hibbert N.D* ((DA3/13)[2015] ZALAC 34) where the court stated that compensation in labour suits ought to be just and equitable- payable for the period served.

Ordinarily, if the employee had a validly renewed contract, which he didn't have herein, and it was to be withdrawn immediately without notice, he would have been entitled to 3 months' salary compensation in lieu of notice to terminate as per section 20 of the Employment Act provided (Cap 268 of the laws of Zambia (now amended and replaced by *"The Employment Code Act, No 3 of 2019 of the Laws of Zambia"*)).

In instances where a former employee has been paid his dues such as gratuities, the court may only award very nominal damages – usually four months equivalent of salaries as held in the cases of *Jonathan Musialela Ng'uleka v Furniture Holding Limited* ((2008) Z.R. 19), and *Chintomfwa v Ndola Lime Company Limited* ((1999) Z.R. 172).

Therefore, considering that the former employee herein has been retained on the payroll and duly receiving his monthly salary pursuant to the *2016 Amended Constitution*, he is only entitled to nominal damages of about 4 months. The case of *Banda v Medical Council of Zambia* (Appeal No 116/2012) together with the above-discussed cases applies by implication and analogy herein *mutatis mutandis.*

2 6 *Final submissions*

The gist and thrust of submissions by the defence team for the respondent were that case bordered on procedural or mutual mistake. As such, it was deemed to be a proper case for alternative dispute resolution, through the mediation as opposed to the costly litigation.

From the foregoing and indeed on a *plethora* of authorities, it is clear that the respondent was on firm ground in the manner it acted and the Parliamentary directive to have the complainant's contract renewed was an illegality on the part of parliament as it has no legal backing to do so.

However, it is clear that the respondent had also made a procedural mistake in offering a renewal of contract to the complainant before seeking legal opinion from the Attorney General. This procedural error could be atoned for in law by the award of damages as opposed to reinstatement as pleaded by the complainant herein.

The main thrust of our averments was that the complainant's contract of employment had expired by effluxion of time and the purported subsequent renewal was an illegality prompted by parliament thus constituting mutual mistake at law.

For the above reasoning, we advised our client to consider an amicable settlement to be negotiated and pegged at a just and reasonable sum of six months' salary equivalent in the spirit of cost-benefit settlement based on the principle of a win-win situation. We further advised our client to offer the claimant an additional payment of a pro-rated monthly earning for the period that he worked before the withdrawal of the purported "renewed" contract.

3 Case outcome

A consent agreement was reached in less than two weeks where the claim of ZMW 2.5 million (US$ 190,000.00) was reduced to ZMW 180, 000.00 (US$ 14,000.00) all inclusive (including lawyers' fees).

4 Legal analysis of key findings

The postulation and promotion of labour dispute resolution through court-annexed mediation led to speedy and expeditious conclusion of the matter leading to the progressive realisation of social justice and access to justice through a fast track court system, the Labour Court Division, being a court of substantial justice in Zambia.

5 Conclusion

It is clear from the foregoing and on a *plethora* of authorities that Zambia is making commendable strides in the prevention and resolution of labour disputes under individual employment law sphere. The *Mutoka* case *in casu* is demonstrative of such strides just like the recent case of *Professional Teachers Union of Zambia v Labour Commissioner & Attorney General* (Comp/IRC/LK/AP/2/2018) in which the courts allowed a labour dispute under individual employment law to be commenced under judicial review and not by traditionally filing a complaint. This is widening the scope of judicial review intervention encompassing the settlement of labour disputes in the individual employment law sphere. Similarly, in *Konkola Copper Mines Plc v Martin Nyambe* (Appeal No 12 of 2018), the court espoused, *inter alia*, that wages when due and payable can be promoted and guaranteed even under alternative dispute resolution and not only through litigation.

The afore-stated legal principles applicable to dispute prevention and resolution mechanism, as demonstrated herein, can be effective and function as cost-saving mechanisms in resolving court disputes if well applied, resulting in a mutually agreed win-win situation.

It must be noted that *Rule 21(1) of the Industrial Relations Court* (*Arbitration and Mediation Procedure*) (*Amendment*) *Rules 2007* states that where mediation fails, the record of proceedings must be returned to court. Therefore, refusing to reach an agreement through mediation attracts sanctions in Zambia.

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