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Consulting over retrenchments

The Constitutional Court examines s189(1)(a) and endorses majoritarianism but….

by P A K le Roux

The decision of the Constitutional Court in *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others* (CCT181/18 23 January 2020) is an important decision dealing with the constitutionality of section 189 (1)(a)to(c) of the Labour Relations Act, 66 of 1995, (the 'LRA') as well as the application of section 23(1)(d) of the LRA in the context of retrenchments, and therefore merits attention.

In this matter the employer, Royal Bafokeng Platinum Limited ('Royal Bafokeng'), embarked on a retrenchment exercise. Prior to commencing the process, Royal Bafokeng concluded a collective agreement with the National Union of Mineworkers ('NUM') and another union, UASA, in terms of which it would consult with these unions only during the consultation process envisaged in section 189 of the LRA. The NUM and UASA had as their members over 75 percent of the total Royal Bafokeng workforce.

Such a collective agreement is envisaged in section 189(1), which prescribes the entities or individuals with which or whom consultation must take place. Section 189(1) prescribes a hierarchy in this regard. The apex of the hierarchy is found in section 189(1)(a). It states that an employer must, in the first place, consult with –

> *'any person with whom the employer is required to consult in terms of a collective agreement.'*

If there is a collective agreement prescribing with whom consultation

Managing Editor:
P.A.K. le Roux
Hon. Consulting Editor:
A.A. Landman
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must take place there is no need to consult with the persons or entities lower down in the hierarchy.

Relying on this section and the collective agreement, Royal Bafokeng proceeded to consult with the National Union of Mineworkers and UASA only. One of the unions excluded from the consultation process was the Association of Mineworkers and Construction Union ('AMCU'), the NUM's primary rival for union membership in the Platinum Mining Industry. AMCU was a minority union with some 11 percent membership within the workforce.

The consultations resulted in a second collective agreement being concluded between Royal Bafokeng, the NUM and UASA ('the Retrenchment Agreement'). This agreement reflected which employees would be retrenched.

Because AMCU was not a party to this collective agreement, it and its members were not automatically bound by its provisions. To bind AMCU and its members, Royal Bafokeng, the NUM and UASA had to rely on the provisions of section 23(1)(d) of the LRA which provides that the parties to a collective agreement can agree to 'extend' a collective agreement that they have concluded to employees who are not members of the union that was party to the agreement..

An agreement to extend can be concluded if the union party or parties to the collective agreement have as its/their members the majority of employees employed in the employer's workplace. Royal Bafokeng the NUM and UASA agreed to extend the Retrenchment Agreement. The extended Retrenchment Agreement also contained a 'full and final settlement clause' in terms of which the employees covered by the agreement waived their rights to challenge the lawfulness or fairness of their retrenchment.

AMCU then sought to challenge the process in terms of which its members had been retrenched on the basis that it should have been a party to the consultation process. When it approached the Labour Court in terms of section 189(13) of the LRA to seek a remedy it was confronted with the extended Retrenchment Agreement with its full and final settlement clause. AMCU then abandoned this approach but brought a further application in the Labour Court challenging the constitutionality of section 189 (1)(a)to(c) as well as the constitutionality of section 23(1)(d), when utilised in the context of a retrenchment agreement.

Both the Labour Court and the Labour Appeal Court ('LAC') rejected AMCU's arguments but leave to appeal to the Constitutional Court was granted. AMCU's arguments in the Constitutional Court can be summarised as follows –

- Section 189(1)(a)to(c) is unconstitutional because the exclusion of minority unions from the consultation process infringes their members' rights to fair labour practices. Alternatively, the section should be interpreted in such a way as to permit minority unions to participate in the consultation process.
- Section 23(1)(d) is also unconstitutional because it infringes the right to fair labour practices of members of minority unions to whom the retrenchment agreement had been extended. Alternatively, if it is accepted that section 23(1)(d) is constitutional, the extension of the retrenchment agreement was invalid because it infringed the principle of legality.

The decision of the Constitutional Court consisted of four judgments: the majority judgment, written by Froneman J with which four other judges concurred (referred to as the 'second judgment'); a minority judgment, written by Ledwaba AJ, with which three other judges concurred (referred to as the 'first judgment'); the third judgment, written by Jafta J, in which he gave reasons why he concurred with first judgment; and, the fourth judgment, written by Theron J, in which she gave reasons why she concurred with the second judgment.

The first judgment

The first judgment found that section 189(1) to(c) was unconstitutional. It motivated this finding in a lengthy and detailed judgment. It accepted that the question was whether section 189(1)(a)to(c) infringed the right to fair labour practices enshrined in section 23 of the Constitution. It found that it did. In doing so, it considered the question whether the consultation process envisaged in section 189 should be exercised collectively or individually. It came to the conclusion that it could be exercised individually. It did so in the following terms –

> *'[56] It is apparent from section 189 (2) that the consulting process is intended to protect the individual interests of employees in the retrenchment context. This brings to the fore an issue that lies at the heart of this matter: whether section 189 is concerned with rights that are individually or collectively held. There is good reason for why the bulk of the argument placed before this Court sought to address this issue. What is fair will be determined largely by whether retrenchment dismissals are a collective or individual labour practice.*
>
> *[57] The respondents made much of the fact that retrenchment dismissals are "no-fault dismissals" and so should be measured not against an individual fairness standard but rather a collective one. On their submission, the retrenchment process is a wholly collective endeavour and so should be resolved by collective means. The fairness, or otherwise, is to be gauged by whether there was a meaningful joint consensus-seeking process at a collective level. ... I think this overstates the collective nature of retrenchments. In fact, the individual / collective distinction is a red herring.*
>
> *[58] It is true, retrenchments do occur on a "collective" scale, in that every employee is potentially effected, but this in no way makes the process singularly a collective one. It makes little sense to tag the right as either "individual" or "collective", and so suggest that a group of individuals could come together and, by virtue of that process, have a right conferred upon them de novo (anew). Instead, section 23 vests in each individual employee the right to fair labour practices. So while the right might be expressed individually or collectively, this does not detract from the fact that individuals are themselves right-bearers. And that leads us to the question at the heart of this matter: whether the legislative choice to regulate the right to fair labour practices through the hierarchy in section 189 is reasonable.' (Footnotes omitted.)*

The first judgment then turned to the question whether this infringement of the right to fair labour practices could be justified in terms of section 36 of the Constitution. The section provides that the Bill of Rights may be limited only in terms of a 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, taking into account all relevant factors. It then lists a number of factors that should be taken into account.

It found that the limitation was not justifiable. Three arguments considered in the judgment are of interest. The first was the argument that the limitation on who must be consulted with was necessary in order to achieve the objects of the LRA, which include labour peace and the democratisation of the workplace. The first judgment rejected this argument in the following terms-

> *'[80] I disagree that labour peace is promoted by the exclusion of minority unions and non-unionised employees from the consulting process. Recent instances of industrial strike action signal the potential dangers of excluding minority voices in the labour context, which cannot, and must not, be ignored. It is also difficult to see how exclusion chimes with labour peace given the facts of this very matter. Here we have unionised employees who are aggrieved for the very fact that they were excluded from the process that would determine their fate. This runs counter to the reasons, both pragmatic and principled, for requiring consultation before a final decision on retrenchment is made.'(Footnotes omitted.)*

The second was that the first judgment accepted that section 189(1)to(c) also infringes the right to freedom of association. This is because it leaves a minority union powerless when it comes to protecting a fundamental interest of an employee, i.e. not to be retrenched. The section forces employees to join the majority union, as minority unions will very rarely be granted consulting rights. This can be contrasted with the extension of collective agreements regulating terms and conditions of employment. In this case there is a benefit to the non-unionised employees or members of a minority union.

The argument that the limitation was justified by the principle of majoritarianism i.e. that the will of the majority of employees should prevail over the will of the minority of employees, was also rejected. This principle has been accepted in a number of decisions on the basis that it reflects a deliberate policy choice taken by the legislature in order to facilitate orderly collective bargaining, minimise the proliferation of unions and to democratise the workplace. It said the following in this regard –

> *'[83] It cannot be gainsaid that the principle of majoritarianism plays a vital role in ensuring the democratisation of the workplace. The real question is whether the limitation placed on consulting parties supports this role. I think not. If anything, the obligation of an employer to consult inclusively adds legitimacy to the principle of majoritarianism. This is because minority voices will be given an opportunity to raise their concerns to both the employer and the majority union.'(Footnotes omitted.)*

The judgment then dealt with the question of the constitutionality of section 23(1)(d). It pointed out that AMCU did not mount a direct challenge to the constitutionality of section 23(1)(d) *per se*. Rather, it sought a narrow interpretation of section 23(1)(d) which would have the effect of excluding retrenchment agreements from the ambit of 23(1)(d). The view was expressed that such an interpretation was unnecessary. This was for three reasons –

- In so far as the infringement of the right to fair labour practices was concerned, this should be considered in the light of the court's finding that section 189 should be read to envisage an inclusive approach to the consultation process. Once it is understood that consultation is a constitutional obligation that lies antecedent to the conclusion of a retrenchment agreement, the challenge to section 23(1)(d) should fall away.
- The other constitutional rights impacted upon by section 23(1)(d) are the right to strike and the right of access to a court. But in *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* (2017) 38 *ILJ* 831 (CC) The Constitutional Court had already found that, in so far as section 23(1)(d) infringed the right to strike, this is a justifiable infringement. The first judgment also endorsed the approach adopted by the LAC in *National Union of Metalworkers of South Africa (NUMSA) obo Members v South African Airways Soc Limited* & Another (2017) 38 *ILJ* 1994 (LAC) in which the LAC accepted that the right of access to the courts could also be limited.
- The employees and their unions are not without a remedy, notwithstanding that a retrenchment agreement may include a full and final settlement clause. They can request that the Labour Court exercise its 'wide-ranging power' in terms of section 158(1)(a) of the LRA to set the agreement aside. The Labour Court would be competent to do so even in the face of a full and final settlement clause. AMCU could also take the agreement to extend on review on the basis that section 23(1)(d) concerns the exercise of public power. The extension of the agreement could therefore be set aside if it is shown to be irrational.

The third judgment

In the third judgment Jafta J concurred with the first judgment. Two interesting arguments are made in this judgment. The first is the judgment's rejection of the view that section 189(1) reflects the principle of majoritarianism. It argued that the text of the section does not support this view.

> *'[146] ... Notionally the section permits the conclusion of a collective agreement with any union irrespective of its representativeness. Where a collective agreement is between a minority union and the employer and that union is identified as the person with whom the employer must consult, the majority union may not be consulted. This is absurd.*
>
> *[147] Unlike section 18 of the LRA the impugned provision does not require that the conclusion of the relevant collective agreement be between employers and majority unions only. Evidently there is no manifest link between the provision and the principle of majoritarianism. In fact, as illustrated, the section has the potential to undermine majoritarianism by excluding a majority union from consultation where a collective agreement was concluded with a minority union.'(Footnotes omitted.)*

The judgment also went on to find that section 189(1) also infringed the constitutional right to equality and to freedom of association.

The second judgment

The second judgement agreed that the constitutional challenge to section 23(1)(d) should be dismissed. However, it was not prepared to accept that section 189(1)(a)to(c) was unconstitutional. Its arguments can be summa-

rised as follows.

- Section 23 of the Constitution provides that everyone has the right to fair labour practices but this provision does not expressly or impliedly guarantee a right to be individually consulted in the retrenchment process. The Constitution contains neither a right not to be unfairly dismissed, nor a right to the procedural or substantive safeguards that would ensure a fair dismissal.
- These rights are derived from the LRA, and specifically chapter VIII thereof. The procedural requirements for a fair consultative process when retrenchments are being considered are found in section 189 of the LRA. Court decisions have consistently interpreted section 189 to exclude any requirement of individual or parallel consultation in the retrenchment process outside the confines of the hierarchy created in section 189(1).
- This approach is rational. All an individual employee gains is a right to be heard, notwithstanding the fact that retrenchment may be inevitable. In a section 189 consultation process an employer must 'hear and respond' but need not 'accept or comply'.
- It is difficult to imagine that an employee would find 'satisfaction in making representations that can, in effect, be brushed aside.' An individual employee, or even a group of individual employees, has or have scant bargaining clout, particularly where the employer is preoccupied with processing dismissals for operational requirements. In contrast a majority union wields 'coercive power' by the threat of industrial action. It is this power that may sway an employer.
- In its pleadings AMCU also argued that section 189(1) infringed other rights, including the right to freedom of association. But, because only the right to fair labour practices had been canvassed in the written submissions, it was unnecessary to deal with the other alleged infringements. However the judgment briefly considered the question whether the right to freedom of association had been infringed. It rejected this argument in the following terms -

  [124] But even the freedom of association challenge fails to assist AMCU's case. AMCU can succeed only if we adopt this proposition: that the right to freely associate means that every union must be truly equal, and enjoy each and every statutory entitlement, regardless of size. This cannot be correct. An employee has a right to join a trade union of their preference. That does not entail the right that the preferred union be empowered in every way they desire.'
- The collective consultation process envisaged in section 189 is not unfair or irrational. Dismissals on the grounds of an employer's operational requirements involve complex procedural processes, requiring consultation, objective selection criteria and payment of severance benefits. Because these dismissals are not dependent on individual conduct and require objective selection criteria, the consultation process is pre-eminently the kind of process where union assistance to employee members will be invaluable and the pre-eminence of collective bargaining as required in section 189 is not only rational; it is sound and fair and is based on international practice and standards.

- Even if a consultation process complies with the provisions of section 189 and is fair, an employee is still entitled to argue that the dismissal was substantively unfair.
- Even if section 189(1) does infringe the right to fair labour practices such an infringement is justified in terms of section 36 of the Constitution.

The fourth judgment

In the fourth judgment Theron J accepted that the right to fair labour practices had not been infringed. Section 23(1) of the Constitution, properly interpreted, does not include a right for an employee to be individually consulted in the context of a retrenchment dismissal. The judgment also addressed the question whether the Court should entertain arguments that other constitutional rights, such as the right to equality and the right to freedom of association, had been infringed. This was answered in the negative in that, although these arguments had been pleaded, the applicants did not put up any facts or make any submissions to substantiate the bare allegations in their pleadings that section 189 unjustifiably limited sections 9(1) and 18 of the Constitution.

Comment

Both the second judgment and the third judgment upheld the constitutionality of section 23 (1)(d). But support for the principle of majoritarianism (i.e. the primary reason given for upholding the constitutionality of 23(1)(d) in earlier decisions) was not whole hearted, at least in the case of the first judgment. This is illustrated in an excerpt from the judgment quoted above. It is also illustrated in the following excerpt -

> *'[26] As a principle and practice, collective bargaining has enjoyed primacy in not only our own labour law, but in foreign jurisdictions and international law. However, in recent times the foundation of this norm has begun to crack. Globalisation and the demise of mass, single-skilled assembly line production, has whittled away at centralised collective bargaining's status as best practice for settling labour disputes. Majoritarianism is no longer seen as the panacea it once was. This Court, in AMCU I, remarked on the burden that recent instances of violent industrial strife have placed on the value of majoritarianism.*
>
> *[27] Academics and labour lawyers alike have pointed to these examples of industrial strike action as exposing the deficiencies that stem from a "winner-takes-all" approach to labour relations The rapidly changing labour relations landscape has drawn into focus the concerns of minority voices in the labour context. The present case speaks directly to this. The continued omnipotence of the principle of majoritarianism has been called into question. It is incumbent on this Court to face this question head-on and decide what constraints, if any, should be put on this principle.'(Footnotes omitted.)*

Whilst the first judgment upheld the principle of majoritarianism in the context of the extension of collective agreements in terms of section 23(1)(d) and followed the approach adopted in the Constitutional Court's earlier decision in *Association of Mineworkers & Construction Union & Others v Chamber of Mines of SA & Others* (2017) 38 *ILJ* 831 (CC) ('Chamber of Mines' decision), it was not prepared to uphold the same principle in deciding on the constitutionality of section 189 (1). Given the fact that the Constitutional Court was narrowly split on the issue it is not inconceivable that a differently constituted court may refuse to uphold majoritarianism in other contexts. Some support for this possibil-

ity can be found in *Police & Prisons Civil Rights Union v SA Correctional Services Workers Union & Others* (2018) 39 *ILJ* 2646 (CC) where the Constitutional Court found that a collective agreement concluded by a majority union did not preclude an employer from granting certain organisational rights to a minority union.

Also of interest is that reliance on the principle of majoritarianism is not supported by the wording of section 189(1)(a) itself. It does not explicitly state that the collective agreement referred to in this section must be with a majority union. Perhaps this was not addressed because, in this case, the NUM and UASA enjoyed overwhelming majority support in the Royal Bafokeng workplace.

In the Chamber of Mines decision the Constitutional Court accepted that the extension of a collective agreement in terms section 23 (1)(d) constituted an exercise of public power and that the agreement to extend could be reviewed and set aside if the extension breached the principle of legality. This was also accepted in both the first and second judgments. But what is of interest is that the first judgment also accepted that the agreement to extend could also be challenged in terms of section 189A(13) and (14) of the LRA. Section 189(14) read with section 158 of the LRA provides the Labour Court with wide powers in this regard.

There seems little doubt that section 23(1)(d) extensions will be challenged on this basis in the future.

PAK le Roux

SETA Mandatory Grants

Employers battle with Minister of Higher Education & Training

by Dawn Norton

For over seven years the Minister and employers, represented by Business Unity South Africa ('BUSA'), have fought about the size of mandatory grants to be paid to employers.

In terms of the Skills Development Levies Act, 9 of 1999 employers are required to pay a skills development levy calculated at 1 per cent of the total remuneration (as defined in this Act) paid to their employees. As the levy's name indicates, the funds collected through this levy are intended to be utilised for training employees and developing the skills of the South African workforce. These levies are collected by the South African Revenue Service and paid over to the National Revenue Fund. Over 80 percent of the levies received by this Fund are then distributed to the various Sector Education and Training Authorities ('SETAs') who are mandated to utilise these funds to provide training, and to develop the skills of employees in the sectors over which they have authority. The SETAs are then authorised in terms of section 10 of the Skills Development Act, 97 of 1998 ('SDA') to pay grants to employers for the purposes of developing the skills of their employees. The amount of these grants and any requirements set for payment are to be determined by regulations issued by the Minister after consultation with the National Skills Authority

('NSA').

The published regulations provide for the payment of mandatory and discretionary grants to employers.

Mandatory grants are grants paid by SETAs to levy paying employers who can demonstrate their implementation of workplace training for their employees. The grant is called 'mandatory' because SETAs are obliged in law to make payments back to employers provided they meet the necessary requirements (such as registration with SARS, being up to date with their levy payments, etc). The payment of mandatory grants incentivises employers to provide training for their employees. Employers enjoy the benefit of a better trained workforce, and employees enjoy the benefit of new skills and the possibility of upward mobility.

Discretionary grants refer to grants which a SETA makes to training providers, public education institutions, and employers for education and training purposes identified in their sector skills plans and in the National Skills Development Plan.

In short, mandatory grants are paid to individual employers for their own training needs, whilst discretionary grants are paid to a multiple number of entities for education and training purposes identified as national priorities.

The amount of levies collected by SARS is huge. In 2018/2019 employers paid approximately R17.4 billion in skills development levies to SARS. Twenty percent (approximately R3.5 billion) went to the National Skills Fund (the 'NSF') and 80 percent (approximately R13.9 billion) to SETAs. SETAs are entitled to spend up to 10 percent of the funds on their own administration; the balance is spent principally on mandatory and discretionary grants.

Initially, in 2000 the Minister (of Labour, as the SETAs previously fell under that Executive Authority until 2010) prescribed the amount of the grants available to an employer to be 45 percent of the levies paid by that employer. This was increased the next year to an effective 65 percent. In 2005 the prescribed grant payable to employers was set as 50 percent and this applied until 2012.

Given the amounts of money involved, it is not surprising that their allocation to employers for the payment of grants, has become a contentious issue. The State wants control over a bigger slice of the skills development levies pie, which conversely means less money available for employers conducting workplace training. This initially came to a head in 2012 when the Minister decreased the grant payable to employers to 20 percent. This led to BUSA challenging this reduction in court. The litigation has continued until late 2019.

Litigation about Mandatory Grants

The 2012 SETA Grant Regulations, which came into effect in April 2013, introduced regulations 4(4) and 3(12) which read as follows:

> *'4(4) - 20% of the total levies paid by the employer in terms of section 3(1) as read with section 6 of the Skills Development Levies Act during each financial year will be paid to the employer who submits a Workplace Skills Plan and Annual Training Report.'*
>
> *'3(12) - the remaining surplus of discretionary funds must be paid by the SETA by 1 October of each year into the National Skills Fund (NSF)'*

BUSA approached the Labour Court to have Regulations 4(4) and 3(12) of the 2012 SE-

TA Grant Regulations set aside. BUSA argued that proper processes had not been followed in bringing the regulations into effect and that the regulations were irrational, unreasonable and *ultra vires* the SDA.

The Labour Court, handing down judgment on 7 August 2015 in *Business Unity SA v Minister of Higher Education & Training & Others* (2015) 36 *ILJ* 3057 (LC), agreed with BUSA and set the regulations aside, declaring them to be invalid. The order of invalidity was suspended until 31 March 2016 in order to afford the Minister the opportunity to correct the regulations

In essence, the Court found that the Minister had not properly consulted with the NSA (having signed the regulations two weeks before consultation with the NSA occurred), and that the reduced grant would frustrate the training purpose of the SDA. AJ Coetzee reasoned,

> *'[113.1] ...regulation 4(4) is not rationally related to the primary objects of the SDA but would in fact serve to frustrate those objects. It is submitted that the reduction will reduce – rather than increase – the funds available to employers to invest in education and training and will discourage rather than encourage employers to pursue the training and education objectives listed in ... the SDA'.*

The Director General in the Department of Higher Education and Training ('DG') then issued a Circular on 2 September 2015 which stated that SETAs must continue with their day to day activities and that mandatory and discretionary grants must be implemented according to the 2012 SETA Grant Regulations. This was, with respect, curious in that the Court had pronounced on their invalidity. This was presumably done on the basis that the court order had been suspended until 31 March 2016, and that the DG was of the view that the 2012 SETA Grant Regulations could be implemented at that time.

Noting the criticism from the Court that the Minister had not properly consulted with the NSA, the Minister then proceeded to do so. The NSA supported the reduction of the mandatory grant from 50 percent to 20 percent. (BUSA did not agree to the reduction, but other stakeholders represented in the NSA did so agree.) On the strength of this, the Minister re-promulgated Regulation 4 (4) in January 2016. The re-promulgated regulation 4(4) provided for mandatory grant payments at 20 percent and the SETA's were advised by the DG in a Circular issued on 5 April 2016 to continue to operate in terms of the 2012 SETA Grant Regulations.

BUSA contested the matter and initially lost in the Labour Court. BUSA took the decision on appeal to the Labour Appeal Court (the 'LAC') and succeeded. In *Business Unity SA v Minister of Higher Education and Training and Others* (2020) 41 *ILJ* 137) the LAC set aside the re-promulgated regulation 4(4) on 16 October 2019. In essence, the LAC found that the Minister had given no justification for the reduction of the mandatory grant and that it was unlawful to do so.

The LAC found that the promulgation of regulations is an exercise of public power which may not be carried out arbitrarily or irrationally. The question before the Court was whether the re-promulgation of regulation 4(4) was done arbitrarily or irrationally, or whether the Minister had in fact provided sufficient evidence to demonstrate that there

were different circumstances that prompted him to re-promulgate the regulations and which would justify his deviating from the Court a quo's order.

The LAC found that the Minister had failed to provide evidence to suggest that there was a clear reason for his decision to re-promulgate the same regulation that had been held to be unlawful, arbitrary and irrational by the Court *a quo*.

The LAC found that, in the absence of any new context being provided by the Minister as a justification for the re-promulgation, regulation 4(4) was irrational and lacked any legal justification.

The LAC held that - ,

> *'[24] ...no clear justification was offered for the decision by the minister which flew in the face of a court order. For this reason the only conclusion that the court could reach was that the decision to re-promulgate regulation 4(4) was irrational and lacking in any legal justification.'*

The LAC reviewed and set aside regulation 4(4).

Discussion and analysis

The Courts have pointed to the dearth of justification from the Minister for decreasing the percentage of the mandatory grant available to employers, and conversely making more funds available for discretionary grants. A motivation may be gleaned from budget speeches of the Minister which draw attention to the need to: upgrade the facilities at TVET colleges; increase bursaries for university students from poor families (following the fees must fall protests in 2015); and, expand the number of artisans in training.

Some three months after the LAC judgment, the DG issued a Circular on 17 January 2020 informing the SETAs that '*it would be within the power of a SETA to decide what percentage of the levies would be paid back to the employer as a Mandatory Grant'*.

Clearly the Circular was at odds with the LAC decision. On a plain reading of the circular the SETA was given the power to decide on the quantum of the mandatory grant, which could notionally include a percentage from 1 percent to 20 percent, and that this would obviously contravene the court order. Furthermore, the SETAs would be exercising a power which only the Minister has to set the quantum of the grants. This was patently unlawful. Some two weeks later the DG repealed the Circular.

Employers and SETAs are now asking the obvious question – what is the size of the mandatory grant which should be paid out? Quite simply there is no clear answer because there is no regulation in force which stipulates the amount. There is a lacuna in the regulations. Because of the Court decisions, the 2012 SETA Grant Regulations (the last valid regulations dealing with grants) no longer stipulate a quantum to be paid. Only the Minister (after consultation with the NSA) has the power to decide on that quantum and he hasn't done so. This is an unsatisfactory situation for SETAs who have grants to pay, and education and training programmes to support. SETAs have been left in a regulatory quagmire. Employers in turn are dissatisfied with repeated attempts by the Minister to reduce the grant, and by the uncertainty that currently prevails with respect to the funding of workplace training.

Dawn Norton

Picketing with 'dangerous weapons'

The LAC rejects 'technical' approach

by PAK le Roux

The decision of the Labour Appeal Court ('LAC') in *Pailprint (Pty) Ltd v Lyster N.O & Others* (2019) 40 *ILJ* 2047 (LAC) makes some interesting points about disciplinary steps taken against employees for acts of misconduct committed during the course of a picket. It also comments on the formulation of disciplinary charges.

The five employees in this matter were charged with, and dismissed for, the disciplinary offence of the 'brandishing or wielding of dangerous weapons'. This had occurred whilst the employees were picketing in support of a protected strike. It was common cause that four of the employees had carried sticks. One of them had also carried a sjambok. Another employee carried a length of PVC pipe. In the crowd with the five employees was one person who carried a golf club and another who carried an axe.

These charges were based on the provisions of the employer's disciplinary code, as well as a picketing policy that had been issued by the employer. The disciplinary code specifically provided that the brandishing or wielding of dangerous weapons constituted a dismissible offence.

The picketing policy stated that picketers may not 'engage in unlawful or violent actions' and that no 'weapons of any kind are to be carried or wielded by the picketers'. It also stated that the employer may take disciplinary action if an employee's actions during a picket were in breach of its disciplinary code.

The five employees challenged the fairness of their dismissals. A CCMA commissioner accepted that the sticks that the employees were carrying were weapons, but also found that the employer had not proved that the employees had 'brandished' or 'wielded' weapons – they had merely carried sticks in their hands. These employees were therefore only in partial breach of a reasonable disciplinary rule imposed by the employer. The commissioner then proceeded to consider whether dismissal was an appropriate sanction to have imposed. He found that this was not the case. His reasoning appears to have been the following -

- The employees were not brandishing or wielding weapons, only carrying them.
- The picketing policy did not state what the consequences of a breach of the picketing policy would be; nor did it indicate a link to the employer's disciplinary code.
- The disciplinary code was intended to regulate the conduct of on-duty employees and not when they were on strike or off-duty.
- There was an 'inconsistent disjuncture' in the disciplinary code in that it provided for the sanction of a final written warning for an assault, yet provided for the sanction of dismissal for brandishing or wielding a weapon.
- The commissioner reinstated the employees from the date of the arbitration award, subject to a final written warning valid for 12 months. However, the commissioner did sound a warning note. He stated that the award should not be interpreted to validate

the carrying of weapons during a strike and - *'that the less we see in South Africa of groups of men armed with sticks, the better'.*

- If an employer wishes to outlaw this practice its disciplinary code should be amended to make employees aware that the mere holding of any form of object that could intimidate others, or inflict harm on others, would be visited with dismissal.

The employer sought to review this award but was unsuccessful in the Labour Court. On appeal the LAC took a different approach, set aside the award, and ruled that the employees' dismissals had been fair.

It found that the employees' conduct had been in breach of the picketing rules and that the rules against the carrying and wielding of weapons was a reasonable and valid rule. It expressed the view that it was difficult to understand how the commissioner was able to conclude that the rule had only been partially breached when the picketing policy clearly prohibited this conduct.

It also rejected the argument that the employer had not warned employees of the consequences of them breaching the picketing rules. This was clear from the formulation of the picketing policy and the disciplinary code. The commissioner's finding that there was an 'inconsistent disjuncture' in the disciplinary code was also criticised. This was because the disciplinary code explicitly stated that it constituted a guideline and that the imposition of a sanction contained in the code was not mandatory. Any disjuncture which may have been reflected in the code remained to be determined having regard to the misconduct committed.

Perhaps of more importance was the LAC's rejection of the argument that the disciplinary code only regulated the on-duty conduct of employees and its comments concerning the formulation of disciplinary charges. As far as the first argument was concerned, the LAC had the following to say -

> *'[15] … This is patently not so. A disciplinary code remains applicable to striking workers who exercise their constitutional right to strike within the context of the employment relationship. For this reason, the appellant is entitled to take disciplinary action against employees arising from strike misconduct and to take such action in accordance with the terms of its disciplinary code. The picketing rules, which expressly referred to the disciplinary code, could, therefore, be similarly enforced by the appellant.'*

As far as the formulation of disciplinary charges is concerned, the LAC commented that –

> *'[18] It has repeatedly been stated by this Court that an unduly technical approach to the framing and consideration of allegations of employee misconduct should be avoided. In finding that the employees were not "brandishing or wielding … dangerous weapons" as they had been charged but "were clearly just carrying sticks in their hands", the arbitrator adopted precisely such an approach. Appropriate regard was not had to the purpose of the rule and the harm it sought to avoid. As much was evident from the reliance placed by the arbitrator in the determination of the matter on the definition of the word "wield". The decision to have a sjambok, PVC pipe and sticks at a protest, at which others were in possession of a golf club and axe, was not only a clear breach but, viewed objectively, was aimed at sending a message which, at the very*

least, was threatening to others. Within the context of the nature of the strike violence committed, the seriousness of this breach was overlooked by the arbitrator.'

Finally, the LAC stated that the commissioner had approached the matter in a unduly narrow manner. The employer had been entitled to prohibit weapons from the picket line in order to avoid strike violence.

'[19] The constitutionally protected right to strike does not encompass a right to carry dangerous weapons on a picket line which, by their nature, not only expose others to the very real risk of injury, but also serve to threaten and intimidate. It is noteworthy that the arbitrator recorded his discomfort with the outcome of the arbitration award when he described the employees as "extremely fortunate" and recognised the unacceptable dangers posed by armed crowds in this country. It follows for all of these reasons that in arriving at the decision that he did on the material before him, the arbitrator committed a reviewable irregularity and arrived at a decision which a decision-maker acting reasonably could not have reached on the material before him. The Labour Court erred in finding that the decision of the arbitrator fell within the bounds of reasonableness required and the appeal must therefore succeed.'

PAK le Roux