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*The Basic Conditions of Employment Act Amendments: Enabling Redistribution?**

Shane Godfrey**

1 Introduction

Labour legislation is one among a number of mechanisms used by governments for the purposes of redistribution. The art is to balance possible constraints on economic growth and employment creation with the benefits of stable labour relations, decent working conditions, greater consumer demand due to higher incomes, and shared risks. The objective of development policy with a strong redistributive element is job-rich growth that will lower poverty and inequality. It is a goal that the South African government has failed to achieve.

The Basic Conditions of Employment Act 75 of 1997 (BCEA) is probably the most important of the labour statutes when it comes to adding a redistributive element to development policy, especially for the most vulnerable in the labour force. It is also the statute, along with aspects of the Labour Relations Act 66 of 1995 (LRA), such as the extension of bargaining council agreements and unfair dismissal protection, that is seen by organised business as most to blame for restricting job creation. The extremely adversarial negotiations in 1996

* My thanks to Darcy du Toit and Graham Giles for sharing their analyses of the BCEA amendments with me. Of course, the usual disclaimer applies. This article on the amendments to the Basic Conditions of Employment Act flows from a chapter on the Act which will appear in the forthcoming 6 ed of Du Toit et al *Labour Relations Law* (LexisNexis) in January 2015.

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over the original Act bear testimony to the weight placed on it by organised labour and business.

The current amendments to the BCEA have not proved to be particularly contentious.[1] Instead, much of the attention in negotiations seems to have been focused on the amendments to the LRA dealing with non-standard employment. However, the coupling of the BCEA and LRA amendments was unfortunate in two ways. First, it meant that the amendments to the BCEA were caught up in an extremely protracted negotiation process that was due mainly to the amendments to the LRA dealing with non-standard employment. Second, the focus on how best to regulate non-standard employment seemed to have distracted many from other areas of the labour relations system that possibly needed attention. The largely spontaneous strike by farm workers in the Western Cape, the massacre of striking workers at Marikana, and the subsequent five-month strike in the platinum sector occurred during the amendment process, highlighting the fact that while the major stakeholders were haggling over the details, events on the ground appeared to be calling into question some of the fundamentals of the labour relations system, in particular its perceived failure to ensure greater redistribution.

This article reflects on the introduction of the BCEA and subsequent amendments alongside the changes made to development policy, critically examining whether labour market policy, as represented by the BCEA and sectoral determinations, is coordinated with the objectives of economic and social development. Ultimately, the concern is to determine whether the revised Act will contribute to job-rich growth with redistribution. In the section that follows, the history of the BCEA will be briefly surveyed alongside the major development policies introduced by government over the same period. The subsequent section focuses on the rationale for the major changes in the Act as well as discussing the amendments themselves. The fourth and concluding section discusses the amendments in the light of development policy objectives and the challenges being posed to the system of labour market regulation.

2 The BCEA, Subsequent Amendments, and Development Policy: Looking Back

The BCEA had an auspicious beginning. It was introduced at the National Economic Development and Labour Council (NEDLAC) by the Department of Labour in early 1996 as the Green Paper: Policy Proposals for a New Employment Standards Statute,[2] which would

[1] Basic Conditions of Employment Amendment Act 20 of 2013 *GG* 37139 of 9 December 2013.

[2] GN 156 *GG* 17002 of 23 February 1996.

*The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships**

Tamara Cohen**

1 Introduction

The purpose of the Labour Relations Act 66 of 1995 (LRA) is to 'advance economic development, social justice, labour peace and democratisation of the workplace by fulfilling the primary purposes of the Act', which are to give effect to the fundamental rights enshrined in the Constitution and international obligations; and to promote collective bargaining, employee participation in decision-making and the effective resolution of labour disputes.[1] In elucidation of this, the Constitutional Court (CC) in *National Education Health & Allied Workers Union v University of Cape Town & others* noted that 'one of the core purposes of the LRA and s 23 of the Constitution is to safeguard workers' employment security, especially the right not to be unfairly dismissed'.[2] The Decent Work Agenda[3] of the International Labour Organisation (ILO) encourages member countries to adopt 'social and economic systems which ensure basic security and employment while remaining capable of adaptation to rapidly changing circumstances in a highly competitive market'.[4] In support of this, the South African government has pledged its commitment to the attainment of decent work and sustainable livelihoods for all workers and has undertaken to mainstream decent work imperatives into national development strategies.[5]

Notwithstanding these lofty aspirations, large tracts of the working population of South Africa (SA), and especially employees of

* This article on the amendments to non-standard employment relationships flows from a chapter on 'Interpretation and Application of the Labour Statutes' which will appear in the forthcoming 6 ed of Du Toit et al *Labour Relations Law* (LexisNexis) in January 2015.

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[1] s 1 of the LRA.

[2] 2003 (3) SA 1 (CC); (2003) 24 *ILJ* 95 (CC) para 42.

[3] http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm.

[4] P Benjamin 'Labour Law Beyond Employment' 2012 *Acta Juridica* 21 at 28 referring to J Somavia 'Report of the Director-General: Decent Work' available at http://ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm.

[5] President Zuma in an opening address to the 12th African Regional Meeting of the ILO in October 2011 entitled Empowering Africa's People with Decent Work http://www.ilo.org/global/meetings-and-events/regional-meetings/africa/arm-12/WCMS_165077/lang--it/index.htm. As early as 2007 the ANC committed in the Polokwane Declaration to 'making the creation of decent work opportunities the primary focus of economic policies'.

temporary employment services (TESs), and part-time and fixed-term employees, are subjected to inferior and unequal terms and conditions of employment and grossly inadequate income and benefits. By virtue of these non-standard working arrangements, these employees are rendered vulnerable and insecure in a labour market challenged by escalating unemployment and dire poverty. The Adcorp Employment Index (May 2014)[6] estimates that there are 8 640 329 permanent full-time workers in SA[7] and 3 901 254 temporary/part-time workers[8] (of whom approximately one million employees are employed by TESs), with the number of non-permanent employees increasing when compared to permanent employees.[9]

In keeping with its commitment to decent work, the 2009 election manifesto of the African National Congress (ANC) called for laws to regulate contract work, subcontracting and outsourcing and to address the problem of labour broking and abusive employment practices.[10] In response to this the Labour Relations Amendment Bill 2012 (LRAB)[11] was introduced with the express intent of ensuring that 'vulnerable categories of workers receive adequate protection and are employed in conditions of decent work'.[12] This article seeks to analyse the proposed amendments insofar as they regulate non-standard employment relationships, in order to determine whether this legislative ambition is likely to be fulfilled.

2 Fixed-term Employees

Section 186(1)*(a)* of the LRA stipulates that the termination of employment, with or without notice, constitutes dismissal. Such dismissal is regarded as unfair unless the employer can prove that the termination was for a substantively fair reason and in accordance with a fair procedure. By contrast a fixed-term contract is a contract of limited duration that terminates upon the occurrence of a specified date or event. As the contract terminates automatically by effluxion of time and not at the instance of the contracting parties, the termination does

[6] http://www.adcorp.co.za/News/Documents/Adcorp%20Employment%20Index%20-%20201406.pdf.

[7] This figure is down 7.48% from April 2014.

[8] This figure is up 8.44% from April 2014.

[9] In the Quarterly Labour Force Survey (QLFS) Quarter 4 2013, 14% of employees were reported to have limited duration contracts, 64% permanent contracts, and 23% contracts with unspecified duration, translating into 1.6 million, 7.4 million and 2.6 million workers respectively — cited in D Budlender 'Private Employment Agencies in South Africa' Sectoral Activities Working Paper 291 (ILO 2013) http://ilo.org/wcmsp5/groups/public/---d_dialogue/---sector/documents/publication/wcms_231438.pdf. The QLFS no longer provides separate statistics for employees engaged in non-standard work within the formal sector.

[10] http://www.anc.org.za/elections/2009/manifesto/manifesto.html.

[11] B 16D-2012. The Bill was adopted by the House of Assembly on 25 February 2014 as the 'LRA Bill 16 of 2012' and was assented to in *GG* 37921 of 18 August 2014.

[12] Memorandum of Objects on Labour Relations Amendment Bill, 2012.

*Protection against Unfair Discrimination: Cleaning up the Act?**

Darcy du Toit**

1 Introduction

The Employment Equity Act[1] (EEA) is potentially one of the most critical pieces of labour legislation in South Africa (SA), if not the most critical. Countless disputes down the years — most recently the Marikana massacre and the bitter platinum strike of 2014 — have driven home one lesson above all: the toxic combination of racial and class divisions nurtured under apartheid and manifested in extreme social inequality[2] remains a fundamental source of conflict, striking at the roots of a 'society based on democratic values, social justice and fundamental human rights' foreshadowed in the preamble to the Constitution.[3] There can be little doubt that the radical transformation envisaged by the EEA[4] would address the causes of this conflict more profoundly than any of the regulatory or dispute resolution processes created by other statutes.

But all this is qualified by the word 'potentially'. Progress (or lack of it)[5] towards equitable representation of black people, women and people with disabilities at higher occupational levels remains extremely limited. This raises the question of the (in)effectiveness of affirmative action policies in the private sector especially, which falls beyond the scope of this article.[6] The present article is concerned with the second fundamental objective of the EEA: the elimination of unfair discrimination, a duty which is incumbent on every employer, designated or otherwise.[7] Here

* This article on the amendments regarding unfair discrimination flows from a chapter on 'Unfair Discrimination' which will appear in the forthcoming 6 ed of Du Toit et al *Labour Relations Law* (LexisNexis) in January 2015.

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[1] Act 55 of 1998.

[2] The gini coefficient for South Africa (SA), reaching 63.1 in 2009, is one of the highest in the world. In Brazil, once on a par with SA, it has dropped to 54.7 — World Bank *Data: Gini Index* http://data.worldbank.org/indicator/SI.POV.GINI?order=wbapi_data_value_2012+wbapi_data_value+wbapi_data_value-last&sort=asc.

[3] The Constitution of the Republic of South Africa Act 108 of 1996.

[4] Section 2 defines the purpose of the Act as the achievement of 'equity in the workplace', involving 'equal opportunity and fair treatment' for all through the elimination of unfair discrimination as well as 'equitable representation' of black workers, women and people with disabilities 'in all occupational levels in the workforce'.

[5] From 2008 to 2010 the percentage of Africans in top management positions actually declined from 13.6% to 12.7%, while the percentage of whites increased from 72.8% to 73.1% — Commission for Employment Equity *Annual Report 2012-2013* (2013) 45.

[6] See, more generally, the article by Shamima Gaibie entitled *Affirmative Action: Concepts and Controversies* elsewhere in this issue.

[7] s 5 of the EEA.

the picture is also unclear. On the one hand, the number of unfair discrimination disputes referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) is negligible.[8] To deduce from this that discriminatory practices and attitudes have been all but eradicated from South African workplaces, however, would hardly be justified. Empirical evidence suggests otherwise.[9] This is also the view taken in this article: it starts from the hypothesis that the problem of discrimination, for the most part in veiled and indirect forms, remains a baleful reality in many workplaces and, indeed, may be seen as part of the reason for the massive under-representation of black people and women at senior occupational levels.

The Department of Labour appears to take a similar view: among the purposes of the Employment Equity Amendment Bill originally introduced in 2010 were those to 'promote the prevention of unfair discrimination in the workplace' and 'ensure that the Act gives effect to fundamental Constitutional rights including . . . protection from unfair discrimination'.[10] The amendments will be addressed from this point of view: to what extent do the amendments help to home in more effectively on the moving target of workplace discrimination and enhance the means of combating it? In conclusion it will be attempted to assess their overall effect.

2 Prohibition of Discrimination on 'Arbitrary' Grounds

Before the enactment of the EEA, Schedule 7 to the Labour Relations Act (LRA)[11] had prohibited 'unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including but not limited to [the various listed grounds]'. The Labour Court (LC) interpreted 'arbitrary ground' as 'the general or primary ground' of discrimination, as distinct from the listed grounds, and understood 'arbitrary' to mean 'capricious or proceeding merely from whim and not based on reason or principle'.[12] Landman J went on to explain:

'In my view, without attempting to be exhaustive, unfair discrimination on an arbitrary ground takes place where the discrimination is for no reason or is

[8] Unfair discrimination is not listed as a separate category in the breakdown of the nature of disputes referred to the CCMA, as reflected in CCMA publications, and is presumably included under 'other'— see *CCMAil* (December-January 2012) 13; CCMA *Annual Report 2010-2011* (2011) 18; P Benjamin *Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)* Working Paper 47 (ILO 2013) 45.

[9] See in general D du Toit & M Potgieter *Unfair Discrimination in the Workplace* (Juta 2014).

[10] Explanatory Memorandum on the Employment Equity Amendment Bill 2010 (GN 1112, *GG* 33873 of 17 December 2010) 80 (the 2010 memorandum). In the Explanatory Memorandum to the 2012 Amendment Bill (the 2012 memorandum) these purposes had been narrowed down to '[g]iving effect to and regulating the fundamental rights conferred by section 9 of the Constitution of the Republic of South Africa, 1996'— Employment Equity Amendment Bill [B 31-2012] 12.

[11] Act 66 of 1995.

[12] *Kadiaka v Amalgamated Beverage Industries* (1999) 20 *ILJ* 373 (LC) para 42.

*The Extension of Bargaining Council Agreements: Do the Amendments Address the Constitutional Challenge?**

Darcy Du Toit**

1 Introduction

The Labour Relations Act (LRA)[1] gives great prominence to collective bargaining as a central mechanism of the model of labour market regulation which it envisages and, within this model, to sectoral bargaining based on the principle of majoritarianism in particular. The 'purpose' of the Act, s 1 explains, is 'to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act . . .'. Several of those objects, set out in paragraphs *(c)* and *(d)*, are about the promotion of collective bargaining as a means towards this end:

'*(c)* to provide a framework within which employees and their trade unions, employers and employers' organisations can —
  (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
  (ii) formulate industrial policy; and
(d) to promote —
  (i) orderly collective bargaining;
  (ii) collective bargaining at sectoral level . . . .'

Within the purposive framework of legal interpretation by which our courts are bound, these are not mere words on paper. As the Constitutional Court (CC) explained in *Chirwa v Transnet Ltd & others*:[2]

'The objects of the LRA are not just textual aids to be employed where the language is ambiguous. This is apparent from the interpretive injunction in s 3 of the LRA which requires anyone applying the LRA to give effect to its primary objects and the Constitution. The primary objects of the LRA must inform the interpretive process and the provisions of the LRA must be read in the light of its objects.'

We shall return to this point later. However, it is also important to view the objects of the Act in the context of the far-reaching shifts that have affected the labour relations climate since the current system — itself largely a continuation of the 'Fordist'[3] industrial council

* This article on the amendments flows from a chapter on 'Collective Bargaining' which will appear in the forthcoming 6 ed of Du Toit et al *Labour Relations Law* (LexisNexis) in January 2015.

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[1] Act 66 of 1996.

[2] 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC) para 110.

[3] The term is used here as referring to a labour relations model associated with large-scale production in formal workplaces relying on 'standard' (full-time, indefinite) employment.

system that had been in place since 1924 — was designed. In essence, even while the LRA was setting up a primarily centralised bargaining framework, the processes of economic change generally referred to as 'globalisation' were already far advanced, eroding traditional bargaining models and reinforcing tendencies towards decentralisation and market liberalisation.[4] It is true that, for a time, the number of workers covered by bargaining council agreements rose sharply. But this was due to the establishment of bargaining councils in the public sector after 1995 and, notwithstanding the legal prioritisation of sectoral bargaining, the underlying trend was downward. After reaching 2.36 million in 2004, the number of workers covered by bargaining council agreements declined to 2.22 million in 2010.[5] As a percentage of the employed population this meant a decrease from 20.7% to 16.9%.[6] Even if the focus is narrowed to those categories of workers traditionally subject to collective bargaining, only 32.6% were covered by bargaining council agreements in 2004 at what was, arguably, the zenith of the system.[7]

No less important than the economic climate is the political climate affecting labour relations. Even though bargaining councils play a limited role in the regulation of the labour market, the system has come under sustained attack in recent years from what may be termed a 'free market' perspective:[8] sectoral bargaining, and the extension of agreements in particular, are depicted as a major obstruction to job creation and, hence, a significant contributing factor to mass unemployment. This view is all the more remarkable given that many more workers are covered by sectoral determinations, laying down minimum conditions of employment in relatively unorganised sectors where market forces would otherwise have operated without constraint,[9]

[4] For a more detailed discussion, see S Godfrey et al *Collective Bargaining in South Africa* (Juta 2010) ch 1.

[5] D du Toit et al *Labour Relations Law: A Comprehensive Guide* 6 ed (LexisNexis forthcoming) ch 1 table 2.

[6] The employed population grew from 11.39 million in 2004 to 13.13 million in 2010 — *Quarterly Labour Force Survey* (QLFS) Quarter 2 2004 (Statistics South Africa 2011) table I; QLFS Quarter 1 2011 table D.

[7] Godfrey et al n 4 above 115-17. Interestingly in light of the debate outlined below, 'there did not appear to have been any significant remunerative advantage associated with bargaining council membership in either 1995 or 2005' in the private sector, though the picture is different in the public sector — H Bhorat & C van der Westhuizen *A Synthesis of Current Issues in the Labour Regulatory Environment* Development Policy Research Unit, University of Cape Town (2008) 19. See also H Bhorat, C van der Westhuizen & S Goga *Analysing Wage Formation in the South African Labour Market: The Role of Bargaining Councils* Development Policy Research Unit, University of Cape Town (2007).

[8] For an extreme exposition of this viewpoint, see A Kenny '"Wicked" Labour Laws Deny Basic Human Right to Work' *Business Day* 19 April 2011; see also http://www.bdlive.co.za/articles/2011/04/19/andrew-kenny-employment;jsessionid=2624B8DD4C5ABFEEC370D579EBCD44FF.present1.bdfm.

[9] Employees covered by sectoral determinations increased from 3.46 million in 2001 to 4.11 million in 2007 — *Addressing the Plight of Vulnerable Workers: The Role of Sectoral Determinations* Development Policy Research Unit, School of Economics, University of Cape Town (2010) 28 table 3.

than by bargaining council agreements. Logically, this might have been expected to provoke far greater opposition from proponents of market liberalisation, and yet it has attracted little comment. Add to that, the fact that the extension of bargaining council agreements to non-parties affects a negligible 4.6% of 'bargaining unit' workers,[10] and the negative impact on the economy attributed to the extension mechanism becomes even more questionable.

Against this background, two apparently unrelated developments will be looked at: on the one hand, the recent constitutional challenge by the Free Market Foundation (FMF) to the provisions of the LRA regulating the extension of bargaining council agreements[11] and, on the other hand, the amendments to those provisions approved by parliament a year later.

2 The Constitutional Challenge

Until the Marikana tragedy of August 2012, debate about the labour law dispensation in South Africa was relatively muted. The extension of bargaining council agreements had briefly come under the spotlight in two High Court applications in 2004 challenging its constitutionality, but these claims appeared to have been abandoned.[12] Apart from the usual contestation between organised business arguing for greater liberalisation and organised labour demanding stricter regulation, as in many other countries, the statutory system appeared to be working more or less as its architects had intended — or so it seemed.

All that changed in August 2012. The events set in motion by the bloodletting at Marikana, combined with an unprotected strike that bypassed the official majority union but nevertheless resulted in a collective agreement, called into question the functionality of the

[10] Godfrey et al n 4 above 115-17.

[11] *Free Market Foundation v Minister of Labour & others* (case no 13762/2013), hereafter 'FMF application'. The founding documents and supporting material are available at http://www.freemarketfoundation.com/files/files/Labour%20Law%20Challenge%20court%20papers%201. pdf. To the extent that the legal and factual issues are placed in the public domain, they are treated as a subject of comment.

[12] See *Reliff Interior & Joinery CC v Minister of Labour & the Bargaining Council for the Furniture Manufacturing Industry (KZN)* (case no 4158/04); *ITB Manufacturing v Minister of Labour & another* (case no D907/2004).

Affirmative Action — Concepts and Controversies

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1 Introduction

Perhaps the most controversial and emotive issue in anti-discrimination law is whether affirmative action or reverse discrimination is appropriate or legitimate. Affirmative action in essence entails the use of race and gender[1] to benefit an identifiable disadvantaged group. If the use of such characteristics is offensive in determining remuneration and benefits, how can it be legitimate to permit their use in the allocation of jobs or, for that matter, for remedial or restitutive purposes?

In order to understand the concept of affirmative action it is necessary to understand the concept of equality. The supreme importance and centrality of the right to equality in our Constitution is thematic. Section 1 of the Constitution establishes that the 'achievement of equality' is one of its foundational values.[2] Within the Bill of Rights itself, the right to equality is listed as the first substantive right.[3] Section 39(1)*(a)* of the Constitution obliges courts, tribunals or forums 'to promote the values that underlie an open and democratic society based on human dignity, equality and freedom' in its interpretation of the Bill of Rights. The Constitutional Court (CC) has recognised the fundamental and permeating nature of this theme in the following terms:

> 'The South African Constitution is primarily and emphatically an egalitarian constitution … in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred.'[4]

But equality as a principle is extremely complex, and its conversion into a fundamental right is even more so. The right to equality is deeply marked by conflict, controversy and contradiction. On the assumption that equality is the prime value in our society, its status as a fundamental right may, more often than not, conflict with other basic social values or indeed other fundamental rights. For instance, how do we determine whether or when equality takes priority over the right to freedom from state interference or for that matter freedom of speech?

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[1] Or any other protected characteristic.

[2] s 1*(a)* of The Constitution of the Republic of South Africa Act 108 of 1966.

[3] s 27 of the Constitution.

[4] *President of the Republic of SA & another v Hugo* 1997 (4) SA 1 (CC) para 74.

Notes

The Labour Courts in 2014: The Position after the Promulgation of the Superior Courts Act and in Light of the Amendments to Labour Legislation*

1 Introduction

The status and future of the labour courts (ie the Labour Court and the Labour Appeal Court (LAC)) have been the focus of much debate and speculation during the last decade, as various permutations of the Superior Courts Bill were tabled in parliament. Much of the debate was laid to rest with the promulgation of the Superior Courts Act[1] and the Constitution Seventeenth Amendment Act[2] on 23 August 2013. Further changes have been introduced in the amendments to the Labour Relations Act (LRA)[3] and other labour legislation currently before parliament or recently enacted. This article attempts to clarify the current position.

2 The Superior Courts Act 2013

The LRA created the Labour Court and the LAC as specialist courts at the apex of the statutory dispute resolution system. The Explanatory Memorandum to the Labour Relations Bill[4] gave the following rationale for the creation of a specialist court in 1995:

'Consistency in the interpretation and application of the law will be enhanced by the creation of a Labour Court with the same status as a division of the Supreme Court and with national jurisdiction. The Court will have exclusive jurisdiction over labour matters.'

However, after the labour courts had functioned as specialist courts for a decade, the Superior Courts Bill of 2005 (2005 Bill) proposed abolishing both courts in their existing form.[5] But, to misquote Mark

*This note on the amendments affecting the labour courts flows from a chapter on 'Dispute Resolution' which will appear in the forthcoming 6 ed of Du Toit et al *Labour Relations Law* (LexisNexis) in January 2015.

[1] Act 10 of 2013.

[2] Constitution Seventeenth Amendment Act 2012. This Act came into force on 23 August 2013 in terms of Proc R35 *GG* 36774 of 22 August 2013.

[3] Act 66 of 1995.

[4] (1995) 16 *ILJ* 278.

[5] See A Steenkamp 'W[h]ither the Labour Court? The Superior Courts Bill and the Future of the Labour Courts' (2006) 27 *ILJ* 18. For a discussion of an earlier version of the Bill, see B Waglay 'The Proposed Re-organisation of the Labour Court and the Labour Appeal Court' (2003) 24 *ILJ* 1223; P Benjamin 'Termination for Operational Requirements? Some Thoughts on the End of the Labour Court' (2003) 24 *ILJ* 1869.

Insubordination and Legitimate Trade Union Activity

National Union of Public Service & Allied Workers obo Mani & others v National Lotteries Board (2013) 34 *ILJ* 1931 (SCA)

National Union of Public Service & Allied Workers & others v National Lotteries Board 2014 (3) SA 544 (CC); 2014 (6) BCLR 663 (CC)

1 Introduction

When six senior judges hold one view on a case and nine other senior judges hold another, one can be sure of at least one thing: there exist enormous ideological differences on the extent to which the Constitution should protect employees engaged in forms of trade union activities which, traditionally at any rate, were classified as dismissable insubordination. This note seeks to understand the distinctions between the Labour Court (LC) judgment, the unanimous judgment of five judges of the Supreme Court of Appeal (SCA), the minority judgment of three judges of the Constitutional Court (CC), the majority judgment of six judges of the CC, and the judgment which concurs in part with the majority.

2 Insubordination: Preliminary Considerations

The contract of employment is, by definition, a contract of subordination, in terms of which the employee submits herself or himself to the will of the employer. As Kahn-Freund put it: 'There can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the "contract of employment"' (*Labour and the Law* (1972) 9). There are, of course, limitations to the power to command: an employer's instructions must be legal and reasonable.

When an employee is unwilling to be subordinate to the employer, this is typically called insubordination, a concept which has undergone a shift from the master and servant era. Scoble wrote, 'Disrespect or insubordination on the part of the servant may make the intimate relationship of master and servant untenable if such disrespect is of a serious character' (*Law of Master and Servant in South Africa* (1956) 148). This justification assumes an 'intimate relationship' between employer and employee which is not a usual feature in large enterprises with many employees. However, even in the supervisor-employee context there has to be subordination for an enterprise to function.

As far back as the pre-1995 era the Industrial Court recognised that an employee in her or his capacity as shop steward, when approaching or negotiating with a senior official or management, does so on virtually an equal level with such senior official or management and the ordinary rules applicable to the normal employer and employee relationship

Are Magistrates Without Remedy in terms of Labour Law?

President of SA & others v Reinecke 2014 (3) SA 205 (SCA); (2014) 35 *ILJ* 1585 (SCA)

1 Introduction

Compared to the situation that prevailed under the former Labour Relations Act[1] (LRA), the current LRA 66 of 1995 has an extensive scope of application. Members of the South African Police Service, public servants, school teachers and university lecturers have all been brought under the protective reaches of South Africa's primary labour statute. The only categories of workers that are expressly excluded are members of the South African National Defence Force and members of the State Security Agency.[2]

Despite their exclusion, these categories of workers are nonetheless not entirely without protection. In *Murray v Minister of Defence*[3] the Supreme Court of Appeal (SCA) confirmed that soldiers can rely on their fundamental right to fair labour practices and, for example, may not be constructively dismissed. Also with the backing of the Constitution Act 108 of 1996, the reach of labour legislation has been stretched beyond the existence of an enforceable common law contract of employment. In *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*[4] the Labour Appeal Court (LAC) concluded that the existence of an employment relationship (rather than a contract of employment) should be the determinative factor regarding the protection afforded by labour law.[5]

The trend to bring workers within the fold of labour protection has also been evident in the sphere where administrative and labour law principles overlap. In *Gcaba v Minister for Safety & Security & others*[6]

[1] Act 28 of 1956.

[2] s 2 of the LRA 66 of 1995, as substituted by s 53 of the General Intelligence Laws Amendment Act 11 of 2013.

[3] 2009 (3) SA 130 (SCA); (2008) 29 *ILJ* 1369 (SCA). In *SA National Defence Union v Minister of Defence & another* 1999 (4) SA 469 (CC); (1999) 20 *ILJ* 2265 (CC) the Constitutional Court also held that members of the Defence Force are 'akin' to workers when they fought to have their constitutional right to establish trade unions recognised. See A van Niekerk, M A Christianson, M McGregor, N Smit and B P S van Eck *Law@work* (2012) 38.

[4] (2008) 29 *ILJ* 2234 (LAC). See also P A K le Roux 'The Meaning of "Worker" and the Road Towards Diversification: Reflecting on *Discovery*, *SITA* and "*Kylie*"' (2009) 30 *ILJ* 49.

[5] The courts have confirmed that labour legislation also applies to prostitutes and illegal immigrants. See *'Kylie' v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 *ILJ* 1600 (LAC) and *Discovery Health v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 *ILJ* 1480 (LC). See also C Bosch 'Can Unauthorised Workers be regarded as Employees for Purposes of the Labour Relations Act?' (2006) 27 *ILJ* 1342 and D Norton 'Workers in the Shadows: An International Comparison on the Law of Dismissal of Illegal Migrant Workers' (2010) 31 *ILJ* 1521.

[6] 2010 (1) SA 238 (CC); (2009) 30 *ILJ* 2623 (CC). See also *Chirwa v Transnet* 2008 (4) SA 367 (CC); (2008) 29 *ILJ* 73 (CC).