EDUCATION AS AN ESSENTIAL SERVICE

by

SIMONÉ GEYER

Submitted in partial fulfilment of the

requirements for the degree of

MAGISTER LEGUM
(LABOUR LAW)

in the Faculty of Law

at the

Nelson Mandela Metropolitan University

Supervisor: Prof JA van der Walt
Submitted: January 2014

“Education is the most powerful weapon you can use to change the world.”
-Nelson Mandela

This treatise is dedicated to realizing the above words of a great leader who sacrificed his life, serving a prison term of 27 years to achieve democracy and freedom for the people of South Africa. May the ideas contained in this treatise continue to inspire all to continue the path of a transformative agenda in South Africa which will enhance education and stabilize it to improve the quality of teaching and learning and develop learners to become worthy citizens with the necessary skills and knowledge to compete in a global society.

DECLARATION

I, SIMONÉ GEYER, declare that the work presented in this dissertation has not been submitted before for any degree or examination and that all the sources I have used or quoted have been indicated and acknowledged as complete references. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the Magister Legum Degree in Labour Law.

……

Simoné Geyer

TABLE OF CONTENTS

SUMMARY

This treatise investigates the extent to which education could be declared an essential service. This is informed by an ongoing public perception that education is in a crisis as a result of the ease within which teachers embark on wildcat strikes, the level of absenteeism in schools, the manner in which communities prevent learners from attending school to place pressure on the state to meet service delivery demands, the lack of professionalism among teachers and the performance of our learners in achieving international benchmarks of results.

The treatise critically explores the debate, in the South African context, on the need to declare education as an essential service in South Africa. This is done by examining the international benchmarks set by the International Labour Organization (ILO) in relation to essential services and what motivating reasons exist, if any, to proceed with declaring education as an essential service. There is a dire need to find a balance between the teachers' right to strike and the learners' right to basic education. At the moment there is a threat to this balance with the rights of teachers appearing to override those of learners and this has a negative impact on the learning outcomes and stability in education.

The question that arises is what measures must the South African government put in place to ensure that the fundamental rights to education are not compromised. If the current situation continues to prevail it has the danger of retarding the development of a society in transition. There is a need for urgent intervention that takes on a consensus-based approach of identifying education as an essential priority in the interests of all.

Can this be achieved by developing a minimum service level agreement for education that outlines which levels of teachers may go on strike? Can policy be regulated that outlines the duties of principals and deputy principals as those who are in the authority of the state and as such may not go on a strike? Can this be achieved without compromising the rights of any citizen as guaranteed in the Constitution of South Africa?

The solution that this treatise provides to these vexing questions attempts to balance the rights of teachers with those of learners with a view to normalizing and stabilizing education in South Africa. It recommends that policy be set in place for principals and deputy principal that identifies them as part of those public servants who are in the authority of the state and therefore may not embark on a strike. This will enable the state to gain control of striking situations in education to ensure that there is still authority at the schools to maintain some level of minimum service, especially where there are very young learners. At the same time this will not be so severe as to render a strike in education ineffective for the teachers' not to be able to exert force on the state to achieve improved conditions of service for themselves.

CHAPTER 1
INTRODUCTION

The South African ANC-led Government has adopted 12 key priorities in the Cabinet Lekgotla of January 2010 to ensure that government is focused on achieving the expected real improvements in the life of all South Africans. Education has been recognized as number one of these 12 key priorities. The progress of these priorities are measured at every Cabinet Lekgotla and Conference of the ANC as a means of measuring the extent to which the policy decisions of the ANC have been met and to identify which areas require tighter policy measures in order to ensure a "better life for all".[1]

At the beginning of 2013, the ANC gave an indication of the ruling party's views on education as an essential service, following the 53rd National Conference of the ANC held in Mangaung in December 2012. The Conference Resolutions on Basic Education reflect the following:

> "*Stability in schools and protecting education from disruptions:*
> There is general agreement that education has to be protected from disruptions. Disruption of schooling through industrial action and service delivery protests impact negatively on the stability of schools and the quality of education."[2]

This resolution was informed largely by what was witnessed in education during 2012, as explained below:

In the Eastern Cape, SADTU embarked on wild-cat strike action in a fight to rid the Eastern Cape Department of Education of the Superintendent General whom they believed was not serving the interests of education. SADTU's grievances related to post provisioning of education that reduced the number of teacher posts due to budget constraints and required teachers to be moved from areas of excess to areas of need.

---

1 Guidelines to the Outcomes Approach of Government http://www.thepresidency.gov.za/dpme/docs/guideline.pdf (accessed on 2013/09/30).

2 ANC Resolutions from the 53rd National Conference in Mangaung http://www.anc.org.za/docs/res/2013/resolutions53r.pdf (accessed on 2013/08/26).

In Northern Cape, the community decided to close down 41 schools in the John Taolo

Gaetsewe district as a result of service delivery protests, preventing learners from going to school until the government built a new road for the community.[3]

In Tafelkop, Limpopo schools were disrupted for about 3 weeks when the community rioted over the lack of water supply. Similarly, in Delareyville in North West 300 primary school pupils were affected when their parents refused to have them moved to a new school.[4]

Furthermore, the pains of the past felt by society during the 2007 and 2010 strikes in the public sector, are not easily forgotten. These strikes were prolonged in their nature with the majority of teachers participating and witnessed high levels of violence and intimidation against learners and teachers who chose to work.

The effect of these strikes result therein that there were periods during the academic year, during which no effective teaching occurred. It was of concern to parents and education stakeholders that the educational interests of learners were not put first in order to cover the curriculum to render acceptable learner achievement results. It also left parents and learners with feelings of anger towards teachers for continuously embarking on strike action.

The concern about sufficient curriculum coverage and learner performance has also led many education stakeholders to critically examine how well the education sector is doing compared to international levels of performance. In this respect the concern increases when the stakeholders evaluate the Department of Basic Education's Annual National Assessment (ANA) results. This shows that learners in grades 3 and 6 have serious difficulties in the scores they attain for numeracy and literacy.[5] This is compounded by the country's performance in international assessments like Trends

---

3 Sowetan LIVE http://www.sowetanlive.co.za/news/2012/10/01/pupils-become-victims-of-protest (accessed on 2013/09/3).

4 Sowetan LIVE http://www.sowetanlive.co.za/news/2012/10/01/pupils-become-victims-of-protests (accessed on 2013/09/3).

5 DBE Source ANA Results 2012.

in International Mathematics and Science Studies (TIMSS) and Progress In Reading and Literacy Studies (PIRLS) where we are rated towards the end of the list of participating countries.[6] It has highlighted serious problems in education with a need for urgent intervention to improve learner performance.

The concern about learner performance and ongoing strikes that continue to disrupt education has left many education stakeholders with a view that it was necessary to stabilize and improve education in order to give every child the opportunity to develop into a meaningful citizen that can compete in a global society. This has opened a recurring debate for education to be declared an essential service in an attempt to limit the right of educators to strike. The debate has highlighted the need to protect the interests of the child rather than the right of the educator.

The Constitution of South Africa recognizes the right to education. The importance of this right is further described in the South African Human Rights Commission Report where they state that:

> "Education itself is a component of human dignity. It is an indispensable means of realizing other human rights effectively in a free society, to appreciate and exercise human rights, to develop the ability to make political and civil choices, and to be able to access economic and social rights. In South Africa, the right to basic education is an economic and social right that is not subject to progressive realization. However, it is a right that is interdependent on the progressive realization of other economic and social rights."[7]

The South African government has been influenced by the views stated above as can be seen by the statements made in the first three months in 2013.

In his January 8th Statement, President Zuma indicated the following:

> "Improved teaching and learning environments in schools remain a priority. We reiterate the non-negotiable in education and call on teachers to be in school, in class, on time, teaching for at least seven hours a day. We call on learners to dedicate themselves to their studies so that they become productive members of society. Given

---

6 DBE Source Report on Progress in the Schooling Sector (2011).

7 SA Human Rights Commission Report of the Public Hearing on the Right to Basic Education http://www.sahrc.org.za/home/zi/files/reports/right%20basic%20education%202006.pdf (accessed on 2013/09/2).

> that education is a societal issue, we urge parents and communities to participate in the day-to-day development of children and to ensure the success of their schools."[8]

On CNBCA's *Political Exchange* on 14 January 2013, the President told the host, Karina Brown, that teaching should be declared as an essential service if that is the only way to ensure that wayward teachers do not compromise our children's education.[9]

On 4 February 2013, the ANC press statement on the NEC meeting and NEC Lekgotla stated the following:

> "The Lekgotla also agreed that a mechanism to monitor all round accountability in the education sector should be devised as a matter of urgency. As the number one priority, the ANC and its government will leave no stone unturned in making education an essential service."[10]

On 6 March 2013 the ANC responded to SADTU's call for the Minister of Basic Education to resign with the following statement:

> "It is the ANC's view that SADTU is missing an opportunity to contribute positively to the debate contained in the ANC's 53rd National Conference Resolutions of making education an essential service. Such a resolution is intended to focus on improving the education of the black child. This resolution will ensure that we provide education that will contribute to the socio-economic transformation and emancipation of a black child in the South African economy."[11]

These statements by the ANC opened up another public debate of various responses on whether education could be declared an essential service. Amongst these responses were many labour law specialists, the tri-partite alliance partners and NGO's who tried to make sense of what government's position was in respect of education as an essential service.

---

8 Statement of the National Executive Committee on the occasion of the 101st Anniversary of the ANC http://www.anc.org.za/show.php?id=10013 (accessed on 2013/08/26).

9 Should teaching be declared an essential service? http://www.news24.com/printArticle.aspx?iframe&aid=a72a5589-d9b8-4dcc-8b04-ed (accessed on 2013/02/27).

10 ANC press statement on NEC meeting and NEC Lekgotla http://www.anc.org.za/show.php?id=10056 (accessed on 2013/08/26).

11 Response to SADTU call for Minister of Basic Education to resign http://www.anc.org.za/show.php?id=10109 accessed on 2013/08/26).

COSATU and the ANC Youth League rebuffed the ANC's statement by indicating that education can best be improved by addressing learning conditions in schools as well as teachers' conditions of employment and not taking away the right to strike.[12]

The SACP responded by saying that declaring teaching an essential service by law would not pass the test. They agreed that there was a need to make education a single and foremost important service in society with resources that will support our children to receive the best form of education. They argued that our education system had to produce skilled individuals who are able to interpret their political, ideological and socio-economic conditions to radically alter those conditions.[13]

In response to COSATU and the SACP, the South African government responded through the President and the Minister of Basic Education by clarifying that making education an essential service did not mean that they would be passing legislation to this effect, nor would it mean that they were taking away the right of teachers to strike. Instead they were using the words "essential" to show it is a priority, to show it is critical and must be worked on accordingly.[14]

The ensuing debate focused on the crisis in education and that it should become "an essential priority" in an effort for the entire South African society to recognize that it is a priority that everyone needs to become involved in and own collectively. It would be important to understand what exactly the ANC government intends by its recent policy pronouncements and how it intends to introduce new policy measures to achieve the resolutions that the party has agreed to.

The purpose of this treatise is to look at the intentions of the ANC government in calling for education to be declared an essential service.

---

12 Education is essential-but not an essential service http://www.mg.co.za/article/2013-02-26-education-is-essential-but-not-an-essential-service (accessed on 2013/06/26).

13 Drop the concept "Essential Service" http://www.sacp.org.za/main.php?id=3860 (accessed on 2013/06/26).

14 Education is essential-but not an essential service http://www.mg.co.za/article/2013-02-26-education-is-essential-but-not-an-essential-service (accessed on 2013/06/26).

Chapter 2 deals with a literature study on the International Labour Organization (ILO) as a framework. It looks at the ILO standards in respect of essential services; examines the definition of essential services; what mechanisms are in place to address disputes of those declared essential services and what are international best practices in respect of the essential services as decided by case law of the ILO.

Chapter 3 deals with the legislative framework that governs education in South Africa. It looks at the Constitution and the Labour Relations Act (LRA) in terms of the right to strike and the limitations imposed by the LRA in respect of areas declared an essential service. In addition, other appropriate legislation will also be referenced in relation to essential services and education as a whole. Examples of decided case law will be provided to elaborate on the rulings on essential services.

Chapter 4 deals with education as a human right. This chapter looks at the right to education and the right to strike and how to achieve a balance between these rights. The importance of the Bill of Rights is considered as well as case law that relates to education and rights.

Chapter 5 deals with education as an essential priority. It looks at teaching as a profession; the roles and responsibilities of teachers; the roles and responsibilities of principals; accountability in education; trends in education performance and the need for stability in education.

Chapter 6 deals with a comparison of essential services in two countries namely Canada and Germany. A study visit to the ILO has also been undertaken by the Public Service Coordinating Bargaining Council (PSCBC) to look at international benchmarking that will inform a minimum service level agreement in the public sector in South Africa.

Chapter 7 deals with what consideration can be given to education as an essential service in the context of what the ANC government intends. The treatise will focus on minimum service level agreements and consideration will be given to determine whether a minimum service level agreement can be developed in education. The chapter looks at the bargaining arrangements in the public service and strikes in

education in South Africa. The focus will be on which aspects of education require minimum services in the event of a strike and what form this will take.

Chapter 8 concludes the treatise by giving recommendations on the way forward for South Africa is respect of giving education the necessary prioritization as intended by the ANC government and what stability this can bring into the education sector.

CHAPTER 2
THE ILO AS A FRAMEWORK

2 1 INTRODUCTION

The International Labour Organization (ILO) was established in 1919 at the Peace Conference of the Treaty of Versailles after World War 1.[15] It is an agency of the United Nations (UN) that was required to deal with labour issues[16] that would raise international standards and create decent work for everyone.[17]

The UN has 193 admitted member states, of which 185 of them are members of the ILO. The Constitution of the ILO offers that any nation which has a membership in the UN can become a member of the ILO.[18] A member state of the UN must inform the Director-General that it accepts all the obligations of the ILO Constitution in order to become a member.[19]

The ILO is primarily concerned with improving working conditions and promoting social justice and human rights in the world. Its ongoing efforts have resulted from a long struggle to defend international labour regulation by monitoring member states progress in improving labour standards.[20]

Langille argues that the two major claims in the Preamble to the 1919 Constitution of the ILO that has to be reassessed in the light of recent evidence of the positive relationship between a nations' respect for core labour rights and its ability to attract foreign direct investment are:

---

15 The ILO: An Agency of Globalization http://www.unhistory.rg/pdf/StandigILO.pdf (accessed on 2013/10/14).

16 The ILO http://www..en.wikipedia.org/wiki/International-Labour-Organization (accessed on 2013/10/14).

17 The ILO: An Agency of Globalization http://www.unhistory.rg/pdf/StandigILO.pdf (accessed on 2013/10/14).

18 The ILO http://www..en.wikipedia.org/wiki/International-Labour-Organization (accessed on 2013/10/14).

19 *Ibid.*

20 *Ibid.*

(1) That universal peace can be established only if it is based upon social justice; and

(2) That the failure of any nation to adopt humane labour standards may be an obstacle in the way of social justice improvements of other nations.[21]

He advances two arguments in an attempt to justify international labour law: that humane labour conditions should be guaranteed to all workers regardless of their nationality and that labour regulation should not affect a country's trade competitiveness.[22]

These statements of Langille broadly confirm the commitments of the ILO to establish international labour and social standards by drafting and adopting international labour conventions.

2 2 THE FRAMEWORK THAT THE ILO OPERATES IN

The ILO has an established framework where international labour standards are developed, setting out the basic principles and rights at work. These are supported in conventions, which are legally binding international treaties that may be ratified by member states, or recommendations which are non-binding guidelines.[23] Once a standard is adopted, members' states are required, under the ILO Constitution, to submit them to their competent authority for consideration. If it is ratified, a convention generally comes into force for that country one year after the date of ratification. Ratifying countries commit themselves to applying the convention in national law and practice and reporting on its application at regular intervals.[24]

There are eight conventions that are identified as "fundamental", covering freedom of association and effective recognition of the right to collective bargaining; the

---

21 Langille *Re-reading the Preamble to the 1919 ILO Constitution in the Light of Recent Data on FDI and Worker Rights* (2003) Vol 42 87.

22 Langille *Re-reading the Preamble to the 1919 ILO Constitution in the Light of Recent Data on FDI and Worker Rights* 89.

23 Handbook of procedures relating to International Labour Conventions and Recommendations, International Labour Standards Department, International Labour Office Geneva Rev 2006.

24 *Ibid.*

elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.[25]

The Freedom of Association and Protection of the Right to Organize Convention No 87 of 1948 is considered one of the most important Conventions of the ILO. The principles set out in this Convention have been augmented by two bodies of the ILO: the Committee of Experts on the Application of Conventions and Recommendations (commonly referred to as the Committee of Experts) and the Committee of Freedom of Association. The Committee of Experts provides general supervision of compliance with the ILO principles. The Fact-Finding and Conciliation Commission on Freedom of Association and the Committee on Freedom of Association are tasked with the protection of trade union rights specifically. In assessing the application by member states of the Convention, these bodies have established various principles and guidelines regarding the regulation of essential and minimum services.[26]

During the apartheid regime South Africa was excluded as a member of the Commonwealth because of its racist policies. After becoming a democratic state in 1994, South Africa rejoined the ILO. It adopted and ratified many of the ILO's important conventions and recommendations. This includes the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87).[27]

2 3 THE ILO'S VIEWS ON STRIKING

The Committee on Freedom of Association has recognized the right to strike to be one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests.[28]

The Committee of Freedom of Association clarified the following in relation to the right to strike:

---

25 *Ibid*.

26 *Ibid.*.

27 Roskam *Essential and Minimum Services and the Right to Strike* (2009) 7.

28 Gernigon *ILO Principles Concerning the Right to Strike* (2000) 11.

1. Made it clear that it is a right which workers and their organizations (trade unions, federations and confederations) are entitled to enjoy;

2. Reduced the number of categories of workers who may be derived of this right, as well as the legal restrictions on its exercise, which should not be excessive;

3. Linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers; and

4. Stated that the legitimate exercise of the right to strike should not entail prejudicial penalties of any sort, which would imply acts of anti-union discrimination.[29]

2 4 PROHIBITIONS ON STRIKES

The ILO has found that the right to strike may only be restricted or prohibited in the following cases:

1. In the public service for public servants exercising authority in the name of the state;

2. In areas of work that were declared essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of a population); and

3. In the event of an acute national emergency and for a limited period of time.[30]

Convention No 87 recognizes the right of association of public servants in no way prejudices the right of such officials to strike.[31]

---

29 *Ibid.*

30 Roskam *Essentia*l *and Minimum Services and the Right to Strike* 7.

31 Gernigon *ILO Principles Concerning the Right to Strike* 17.

The Committee on Freedom of Association and the Committee of Experts both agree that when public servants are not granted the right to strike, they should enjoy sufficient guarantees to protect their interests, including appropriate, impartial and prompt conciliation and arbitration procedures to ensure that all parties may participate at all stages and in which arbitration decisions are binding on both parties and are fully and promptly applied.[32]

2 5 DEFINITION OF ESSENTIAL SERVICES

In 1983 the Committee of Experts defined essential services as “those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population”.[33]

The nature of services is categorized as either being essential or non-essential services. The Committee explains what is meant by essential services in the strict sense of the term “depends to a large extent on the particular circumstances prevailing in a country” and that “a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population”.[34]

Examples of essential services where major restrictions or even prohibitions are placed on the right to strike are: the hospital sector; electricity services; water supply services; telephone services and air traffic control.[35] The reason why these services are considered essential is because if workers embark on a strike the effect of the strike action may endanger the lives of citizens or their health and personal safety such as the case may be for patients in hospital or the need of society to have electricity and water.

---

32 Gernigon *ILO Principles Concerning the Right to Strike* 18.

33 ILO, 1983 b: par 214.

34 ILO, 1996 d: par 582.

35 ILO, 1996 d: par 585.

Some examples of services that are non-essential and are allowed to strike are: the mining sector; radio and television; transport; the petroleum sector; ports; computer services for the collection of excise duties and taxes; automobile manufacturing; postal services and the education sector.[36] The reason why these services are considered to be non-essential is because if workers embark on a strike then the impact of the strike will not endanger any lives or create a crisis of personal safety and need to society. The effect of a strike in the non-essential services may only serve to inconvenience society or place economic pressure and loss of profits on the employer.

In ratifying the decisions of the ILO in respect of essential services, the ILO gives member states the option to define the essential service in the form of a list that is legislated while others use a definition to determine who part of the essential services is.[37]

2 6 MINIMUM SERVICES

Gernigon explains that the term minimum services are used by the ILO to consider services that are of "fundamental importance" and falls between essential services and non-essential services. In these instances a strike is not banned, but rather a system of minimum operational services may be imposed in a specific institution. Examples of this may be put in place in banking, rail transport or postal service.[38]

The idea of minimum services are usually used together with essential services as a way of reducing the ambit of essential services and has the effect of reducing the restriction on the right to strike.

The Committee of Experts argued that a minimum service:

> "would be appropriate in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question

36 ILO, 1996 d: par 587.

37 ILO, 1994 a: par159.

38 Gernigon *ILO Principles Concerning the Right to Strike* 30.

the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met and that facilities operate safely or without interruption."[39]

2 7 DETERMINATION OF MINIMUM SERVICES

There are certain requirements in how a minimum service is determined. A minimum service must be limited to the operations that are strictly necessary to meet the basic needs of the population.[40]

The process of determining the service and the number of workers who will provide the service should be carefully considered. This should be done by consulting all stakeholders and considering all the facts objectively before concluding an agreement.[41]

It is advisable that a minimum service agreement is concluded when the trade unions and employer are not in dispute. This would allow the parties to maintain objectivity in arriving at their decisions.[42]

2 8 DISPUTE MECHANISMS FOR WORKERS WHO MAY NOT STRIKE

The Committee of Freedom of Association holds that workers who are denied the right to strike should be provided with adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned participate at every stage and the awards are fully and promptly implemented.[43]

The Committee of Experts has adopted a similar approach, advising that the procedure should provide sufficient guarantees of impartiality and rapidity and that the arbitration should be final and binding on both parties.[44]

---

39 ILO, 1994 a: par 162.
40 ILO, 1994 a: par 161.
41 ILO, 1994 a: par 161.
42 *Ibid*.
43 ILO 1996 d: par 547.
44 ILO, 1994 a: par 164.

2 9 WHAT IS THE ILO'S POSITION ON THE EDUCATION SECTOR AS AN ESSENTIAL SERVICE

The Committee of Freedom of Association has identified that the education sector is not an essential service; hence strikes by teachers may not be outlawed because the ILO does not consider this to be reasonable or justifiable according to the criteria to determine essential services.

The ILO has repeatedly indicated that the education sector cannot be declared an essential service because the nature of the service does not endanger life, personal safety or health of a population. They also clarify that teachers are not categorized as those who exercise authority in the name of the state.[45] From the ILO perspective it is understood that the possible long-term consequences of strikes in the education sector does not justify their prohibition.[46]

The Special Intergovernmental Conference on the Status of Teachers in 1966, where the ILO played a pivotal role in the decisions on the status of teachers gives guidance to how to achieve a balance of the right to education as a fundamental human right and the rights of teachers when they adopted the following resolution:

> "Appropriate joint machinery should be set up to deal with the settlement of disputes between teachers and their employers arising out of terms and conditions of employment. If the means and procedures established for these purposes should be exhausted or if there should be a breakdown in negotiations between the parties, teachers 'organizations should have the right to take such other steps as are normally open to other organizations in the defense of their legitimate interests."[47]

2 10 CASES ON EDUCATION AS AN ESSENTIAL SERVICE

The ILO has also dealt with many disputes declared by member states in relation to whether education can be declared an essential service. The following cases are examples of how the ILO ruled in relation to education as an essential service:

---

45 ILO Digest (2006) 583.

46 ILO Digest 590.

47 Recommendation concerning the Status of Teachers http://www.unesco.org/education/pdf/TEACHE-E (accessed on 2013/09/2).

DEFINITIVE REPORT - REPORT NO 355, NOVEMBER 2009; CASE NO 2657 (COLOMBIA)

In this case the Colombian Teachers' Federation (FECODE) called on teachers employed by the State to embark on a strike that lasted from 15 May to 21 June 2001. The purpose of the strike was to express the organization's rejection of the Government's neoliberal policies and measures such as labour flexibility and labour reform, increased economic openness, privatization of public education and the reduction in transfers of resources to local authorities (departments, districts and municipalities) among other issues.[48] They also felt that the Government did not consult them on amendments of articles 356 and 357 of the Political Constitution through Legislative Act No.1 of 2001.[49]

The work stoppage was not declared illegal by the State. However, the Ministry of Education ordered the authorities responsible for education not to pay the teachers who had participated in the strike and to institute disciplinary proceedings against them. The complainant argued that the order by the State left teachers with no other option but to abandon the protest action that was in defense of their rights as workers. If they did not do this they would have faced penal and disciplinary consequences for dereliction of duty, leading to removal from their posts and dismissal from service.[50] FECODE further argued that once the work stoppage was over, the school calendar year was extended in order to complete their curricular and extra-curricular activities that had been planned at the beginning of the year, as this flexibility of the academic year was allowed for by their General Education Act. The teachers therefore made up the time suffered during the work stoppage.[51]

---

48 Definitive Report- Report No 355, November 2009; Case No 2657 (Colombia)- Complaint date: 22-May 2008- Closed Para: 556 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLAINT... (accessed on 2013/09/2).

49 *Ibid.*

50 *Ibid.*

51 *Ibid.*

The teachers requested the State to pay for the days that were worked in order to make up the unworked time, but the State refused to pay any of the salaries and social benefits requested by the teachers.[52]

The Government submitted that the social and legal implications of the strike should be taken into account, since it was deemed a violation of children's fundamental right to education.[53] Their domestic legislation expressly prohibits promoting any work stoppage or protests, except for strikes that are declared in accordance with the law.[54] The Government argued that the stoppage was in violation of article 44 of the Political Constitution which states that education is a fundamental right of children and that the rights of children take precedence over the rights of others. This basic principle is in accordance with the various international treatises aimed at protecting the rights of children.[55]

The Government further argued that the exercise of trade union activity and the right to freedom of association entails a strong social responsibility[56]. Any protest must be undertaken with a sense of responsibility, taking into account the highest interests of community.[57] The Government believed that the right to strike is not absolute and its exercise is subject to certain minimum requirements, which are stated in the country's domestic legislation and recognized by the ILO.[58]

The Government believed that the trade union violated the Constitution and domestic legislation by calling a work stoppage for political reasons, and in doing this infringed the fundamental rights of the Colombian children and then adjusted the academic calendar. Determining the academic calendar is the duty of the Education Ministry

52 *Ibid*.
53 *Ibid.*
54 *Ibid.*
55 *Ibid.*
56 *Ibid*
57 *Ibid.*
58 *Ibid.*

and not the union's. It is illegal for the trade union to determine policies for public education.[59]

The Committee noted the positions of both the trade union and the Government of Colombia. It stated that education is not an essential service in the strict sense of the term (those whose interruption could endanger the lives, safety or health of all or part of the population) in which the right to strike may be prohibited.[60] The Committee further noted that generally salary deductions occur for strikes, but in this instance when the trade union requested adjustments to the academic calendar, the governing bodies of schools agreed to the proposal, without the Ministry objecting or stating that the governing bodies did not have the authority to do this.[61] The Committee believes this lack of response convinced teachers of the validity of what they had agreed to. The Committee considered the Ministry's non-payment of salaries for the days of the strike to be excessive sanction that would not be conducive to the development of harmonious labour relations.[62] The Committee therefore requested the government to take the necessary measures to promote consultations with the trade unions in order to reach a solution on payment for the days worked in place of the work stoppage and to the disciplinary proceedings instituted against the teachers.[63]

DEFINITIVE REPORT – REPORT NO 360, JUNE 2011; CASE NO 2803 (CANADA)

In this case, the Canadian Union of Public Employees (CUPE) complained that the Ontario Federal Government had passed legislation ordering the termination of a legal strike initiated by CUPE.[64] The union wanted to increase the graduate funding and job security for contract facility workers. The University had relied upon contract

---

59 Definitive Report- Report No 355, November 2009; Case No 2657 (Colombia)- Complaint date: 22-May 2008- Closed Para:569-570 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLAINT (accessed on 2013/09/2).

60 *Ibid.*

61 *Ibid.*

62 *Ibid.*

63 Definitive Report- Report No 355, November 2009; Case No 2657 (Colombia)- Complaint date: 22-May 2008- Closed Para:573-574 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLAINT... (accessed on 2013/09/2).

64 Definitive Report- Report No 360, June 2011; Case No 2830 (Canada)- Complaint date: 16 June2010- Closed 1 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLAINT... (accessed on 2013/09/2).

faculty members for multiple decades and it was becoming increasingly difficult for the employer to label them as contingent workers.[65] The union also demanded improvements to health benefits and child care, as well as an increase in the duration of contracts so as to align this with the rest of the sector.[66] After months of unsuccessful negotiation, the union held a strike ballot in line with relevant legislation, and the large majority of workers voted to strike. The strike lasted for 85 days and resulted in the University having to cancel classes. The strike ended when the government passed legislation to end the strike.[67] CUPE accused the Ontario Government of violating the union's members' right to freedom of association and collective bargaining as enshrined in Conventions 87 and 98 of the ILO.[68]

In January 2009 the Premier of Ontario announced that legislation would be passed to end the strike and this brought about the end to the 85 day strike.[69]

In the complaint to the ILO, CUPE argued that although their members were essential to the operation of the university, they were not an essential service.[70] The Government argued that a loss of an academic year has significant personal, educational, social and financial implications for students and their families, as well as serious economic impact on the University and the broader public.[71]

The Committee noted this case concerned back-to-work legislation to end an 85 day strike and that the legality of the strike was not disputed. The Committee further deplored the fact this was the fourth time in ten years that the government adopted ad hoc legislation to end a strike.[72]

---

65 *Ibid.*

66 Definitive Report- Report No 360, June 2011; Case No 2830 (Canada)- Complaint date: 16 June2010- Closed Para:327 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLAINT... (accessed on 2013/09/2).

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 Equal Education Position Paper on *Teaching as an Essential Service* –February 2013 http://www.equaleducation.org.za/article/2013-03-27-equal-education-published-new-... (accessed on 2013/06/24).

72 Definitive Report- Report No 360, June 2011; Case No 2830 (Canada)- Complaint date: 16 June2010- Closed Para:340-341 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLAINT... (accessed on 2013/09/2).

The Committee further stated that the right to strike was one of the legitimate and essential means through which workers and their organizations may defend their economic and social interests. Whilst the right to strike can be subject to certain limited exceptions, the education sector did not fall within these exceptions.[73]

The Committee therefore ruled that the Ontario Government should promote free collective bargaining which would be more conducive to a harmonious industrious climate and resolve labour disputes to the satisfaction of the parties, rather than perpetuating back-to-work legislation.[74]

DEFINITIVE REPORT – REPORT NO 360, JUNE 2011; CASE NO 2784 (ARGENTINA) – COMPLAINT DATE: 18-MAY-2010 CLOSED

This case is about a complaint by the Confederation of Education Workers of Argentina (CTERA) and Education Workers' Association of Neuquén (ATEN) against the Argentina Government who declared education as an essential service and established a system of minimum services.[75]

CTERA and ATEN complained that the province of Neuquén in Argentina has disregarded internationally accepted principles that guarantee freedom of association and the right to strike even though this is part of their legislation[76] and has declared education an essential service, with minimum staffing levels being introduced in educational establishments and directors being obliged to report attendance, thereby preventing teachers from exercising the right to strike by applying punitive sanctions[77].

---

73 *Ibid.*

74 Definitive Report- Report No 360, June 2011; Case No 2830 (Canada)- Complaint date: 16 June2010- Closed Para:343 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLAINT... (accessed on 2013/09/2).

75 Definitive Report – Report No 360, June 2011; Case No 2784 (Argentina) – Complaint date: 18-May-2010 Closed http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLAINT... (accessed on 2013/09/2).

76 *Ibid.*

77 *Ibid.*

The complainants state that there is no ILO Conventions or Recommendations that specifically govern the right to strike, but that this right is seen as implicit in the right to freedom of association enshrined in Conventions No 87 and 98.[78]

They also state that a new interaction appears in section 24 of Act No 25877 in relation to disputes concerning essential services: "Essential services are defined as being health and hospital services, the production and distribution of drinking water, electricity and gas and air traffic control. An activity that is not included in this may, on an exceptional basis, be designated as an essential service by an independent commission established in accordance with the regulations".[79] The complainant believes this supports the case that education cannot be declared an essential service, but rather that it is a social right that should be guaranteed by the State.[80]

The Committee noted that Act No 2587 provided that an independent commission could rule that an activity was essential if the duration and geographical extent of the strike endangered life or safety, or when the strike affected a public service of vital importance.[81] The information provided by the provincial authority did not prove that these conditions were met.

The Committee also noted that this was not the first time that it had to consider a case relating to allegations that government was restricting the right to strike of education workers in Neuquén province.[82] The Committee previously recommended that minimum services be established in the education sector, in full consultation with the social partners, where a strike was prolonged.[83] However, the government had not acceded to this request. The Committee therefore insisted that where future prolonged strikes occurred in education, the worker organizations should participate

---

78 Definitive Report – Report No 360, June 2011; Case No 2784 (Argentina) – Complaint date: 18-May-2010 Closed Para: 233 http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLAINT... (accessed on 2013/09/2).

79 *Ibid.*

80 *Ibid.*

81 Equal Education Position Paper on *Teaching as an Essential Service* – February 2013 http://www.equaleducation.org.za/article/2013-03-27-equal-education-published-new-... (accessed on 2013/06/24).

82 *Ibid.*

83 *Ibid.*

in defining the minimum service.[84] It also asked the government to confirm that the offending decree was no longer in force.[85]

2 11 CONCLUSION

From this chapter it can be concluded that the ILO has set in place a clear framework that benchmarks international labour standards to ensure basic principles and rights at work. With regards to essential services, it has defined essential services in the strict sense of the term as well as where strikes are prohibited because workers exercise authority in the name of the state.[86]

Furthermore, it has given guidance to the essential services on what measures should be put in place in terms of minimum service level agreements. It has also pronounced on the compensatory dispute resolution mechanisms that should be available to workers who may not strike in the form of compulsory arbitrations that are binding.

From the case studies in various countries, it can be concluded that education is not an essential service and that ordinary public sector teachers do not "exercise authority in the name of the state".[87] However, should a strike be prolonged then a minimum service should be ensured, in consultation with worker organizations that have agreed to what constitutes a minimum service. This minimum service should not be defined in a way that renders the impact of the strike ineffective.[88]

---

84 *Ibid.*
85 *Ibid.*
86 *Ibid.*
87 *Ibid.*
88 *Ibid.*

CHAPTER 3
THE SOUTH AFRICAN LEGISLATIVE FRAMEWORK

3 1 INTRODUCTION

South Africa has one of the most progressive Constitutions in the world that has incorporated values of human rights, dignity, equality and freedom into this piece of legislation. It intends to ensure that the prejudices and injustice experienced during the apartheid period will never resurface again. This is established by making the Constitution of the Republic of South Africa to be the most supreme law of the country and no other law may conflict with the values enshrined in the Constitution. Van der Walt *et al* agrees with these sentiments when he explains that South Africa is a democratic state founded on values such as human dignity, equality, the advancement of human rights and freedoms, non-racialism and non-sexism.[89]

Section 23(1) of the Constitution deals with the right to fair labour practices in the workplace.[90] The Constitution indicates that enabling national legislation may be enacted to give further effect to the rights contained in the Constitution. Legislation such as the Basic Conditions of Employment Act (BCEA) [91] and the Labour Relations Act (LRA)[92] gives further expression to the constitutional rights guaranteed in section 23 of the Constitution.[93]

Van der Walt *et al* goes further to explain that the South African labour legislation also gives effect to the obligations incurred by South Africa as a member state of the ILO because we have ratified a number of conventions adopted by the ILO.[94] He says that "international law and standards are, as such, a direct source of law and are relevant when labour rights contained in the Constitution are interpreted or considered".[95]

---

89 Van der Walt, Le Roux and Govindjee *Labour Law in Context* (2012) 3.

90 Constitution of the Republic of South Africa (hereinafter the Constitution).

91 75 of 1997.

92 66 of 1995.

93 Van der Walt *et a*l *Labour Law in Context* 4.

94 *Ibid.*

95 *Ibid.*

Grogan explains that when interpreting the LRA, the interpreter must therefore read the Act to arrive at a result which expands, rather than limits, the rights of the Act.'[96] This means that an interpretation which limits rights should be avoided unless the contrary appears expressly or by necessary implication from the words of the Act, read in their context.[97] The relevance of this was endorsed in the Constitutional Court in *NUMSA v Bader Bop*[98] where it was decided that the Labour Appeal Court (LAC) paid insufficient regard to the ILO Conventions on Freedom of Association and the Protection of the Right to Organize[99] and the Right to Organize and Collective Bargaining.[100] The court held that two fundamental rights could be extracted from these conventions which were the right to associate for purposes of collective bargaining and the right to strike.[101]

3 2 THE CONSTITUTIONAL RIGHT TO STRIKE

Section 23 (2)[102] deals with the right to strike. Every worker has the right to withhold his/her labour, however this is not an absolute right, but a limited right that is introduced through the LRA.[103] Section 36 also places a limitation to this right[104] by indicating that the right may only be limited by a law of general application that meets the criteria set out in that section.[105]

Van der Walt *et al* explains that the LRA limits the right to strike in two ways.[106] It requires a specific procedure to be followed before the right to strike may be exercised, which includes the referral of a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or a bargaining council for conciliation, as well as

96 Grogan *Collective Labour Law* (2010) 15.
97 *Ibid.*
98 (2003) 24 *ILJ* 305 (CC).
99 Convention 87 of 1948.
100 Convention 98 of 1949.
101 (2003) 24 *ILJ* 305 (CC).
102 The Constitution.
103 Roskam *Essential and Minimum Services and the Right to Strike* 17.
104 S 36 states 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.
105 Roskam *Essential and Minimum Services and the Right to Strike* 17.
106 Van der Walt *et al Labour Law in Context* 8.

to issue a strike notice.[107] There are also substantive limitations on the right to strike in as far as workers may not strike about certain disputes that must be referred to arbitration in the CCMA or Labour Court or those who work in designated essential services.[108]

3 3 THE CONSTITUTIONAL RIGHT TO COLLECTIVE BARGAINING

Section 23 (5) gives every trade union, employers' organization and employer the right to engage in collective bargaining.[109] Van der Walt *et al* explains that the Constitution appears to provide a legally enforceable right to collective bargaining, but the LRA does not recognize a legal duty on employers or employers' organizations to engage with trade unions in collective bargaining.[110] He says that the constitutional right to engage in collective bargaining as contained in section 23(5) of the Constitution and the collective bargaining system established by the LRA are at odds with each other. Alternatively, it may be argued that the LRA limits the constitutional right by not acknowledging a legal duty to bargain.[111]

Van der Walt *et al* says that the conflict between the constitutional right and the provisions to bargain was settled by the Supreme Court of Appeal (SCA) in the judgment about the battle for collective bargaining rights in the case of the *South African National Defense Union v Minister of Defense.*[112] Although this judgment was appealed in the Constitutional Court, it failed to deal with the question of whether section 23(5) imposes a legally enforceable duty to bargain. Instead the court held that there was no authority that required the SANDF to engage in collective bargaining with trade unions on the content of regulations. This meant that the SCA's judgment on the duty to bargain stands and that section 23(5) does not establish a legally enforceable right to engage in collective bargaining.[113]

---

107 *Ibid.*
108 *Ibid.*
109 S 23(5).
110 Van der Walt *et al Labour Law in Context* 9.
111 *Ibid*.
112 *Ibid*.
113 *Ibid*.

3 4 THE LRA AND STRIKES

A strike is the most powerful way in which workers place economic pressure on employers to give in to their demands.

Section 213 of the LRA[114] defines a strike as:

> "the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect any matter of mutual interest between the employer and employee, and every reference to 'work' in this definition includes overtime work whether it is voluntary or compulsory".[115]

Grogan explains that "to constitute a strike, the refusal to work must be for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between the employer and employee".[116] Therefore a grievance or a dispute must exist before workers can be deemed on strike.[117] Furthermore there has to be a demand that the workers made to management. Where there is no demand then it cannot be considered as a strike within the statutory definition.[118]

An example of the above point is seen in *Simba (Pty) Ltd v FAWU.*[119] The workers refused to comply with the employer's instruction to work a new shift. The court held that this merely amounted to a "concerted refusal to work" - the workers were not making a demand, and had raised no complaint; they were simply refusing to comply with the employer's demand.[120]

---

114 66 of 1995.
115 S 213.
116 Grogan *Workplace Law* 8ed (2005) 284.
117 *Ibid.*
118 Grogan *Workplace Law* 285.
119 (1998) 19 *ILJ* 1593 (LC).
120 Grogan *Workplace Law* 285.

3 5 LIMITATIONS ON THE RIGHT TO STRIKE

Section 64(1) of the LRA states that "every employee has the right to strike".[121] However, section 65(1)(d)(i)[122] also place limitations on the right to strike.[123] Van der Walt *et al* draws from the LRA to explain that no person may partake in a strike if:[124]

- That person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;

- That person is bound by any agreement that requires the issue in dispute to be referred to arbitration (compulsory arbitration);

- The issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of the LRA;

- That person is engaged in an essential service or a maintenance service; or

- That person is bound by any arbitration award, collective agreement or ministerial determination that regulates the issue in dispute[125]

There is a similar limitation in section 77(1) on the right of workers to engage in protest action to promote or defend the socio-economic interests of workers.[126]

Roskam explains that these limitations, when read with the other provisions set out in the LRA relating to essential service, are widely considered to be justifiable in terms of the criteria contained in section 36 of the Constitution.[127] He goes further to explain that the LRA is not the only legislation that limits the right to strike. He says that workers could also be precluded from exercising their right to strike in a state of

121 S 64(1).
122 S 65.
123 Van der Walt *et al Labour Law in Context* 208.
124 *Ibid*.
125 *Ibid*.
126 S 77(1).
127 Roskam *Essential and Minimum Services and the Right to Strike* 17.

emergency, declared in terms of the State of Emergency Act[128] and section 37 of the Constitution, if a state of emergency was declared.[129] Furthermore, members of the armed forces are prohibited from striking in terms of section 104 of the Defense Act[130] and members of the National Intelligence Agency, the South African Secret Service and the South African National Academy of Intelligence are precluded from striking in terms of section 21 of the Intelligence Service Act.[131]

3 6 ESSENTIAL SERVICES

The LRA defines the essential services as:

> "(a) a service, the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
> (b) The Parliamentary service; and
> (c) The South African Police Service."[132]

The definition of the LRA adopts the ILO definition of essential services in the strict sense of the term as well as goes on to list certain public services.

This definition in the LRA is not without problems since there are many employees who work in the Parliamentary Services and the South African Police Service whose work does not fit in with the definition of "endangering the life, personal safety or health" of the nation.

This matter was laid to rest in the Constitutional Court hearing in *SA Police Service v Police and Prisons Civil Rights Union*[133] when the court considered an application for leave to appeal against a decision of the Labour Appeal Court (LAC) which interpreted the meaning of an "essential service" as defined in the LRA. The LAC held that only members of the South African Police Service (SAPS) employed under the South African Police Service Act (SAPS Act)[134] are engaged in essential services

128 64 of 1997.
129 Roskam *Essential and Minimum Services* 17.
130 42 of 2002.
131 65 of 2002.
132 S 213.
133 (2011) ZACC 21.
134 68 of 1995.

as contemplated in sections 65(1) and 71(10) of the LRA. Section 41(1) of the South African Police Service Act prohibits members of SAPS from striking, but does not refer to employees of SAPS.[135] There is also a distinction drawn in this Act between members and employees of SAPS. The LAC held that the SAPS employees employed under the Public Service Act[136] constituted non-member employees and rendered non-essential services. Graham Giles indicates that the importance of this determination was that public sector employees not engaged in an essential service were permitted to strike.[137]

On appeal to the Constitutional Court, the applicant contended that the SAPS as a whole was defined as an essential service in the LRA, and therefore all services- those carried out by members as well as those carried out by non-member employees - are essential to the effective functioning of the SAPS.[138]

The court interpreted the phrase "essential service" restrictively, so as to avoid impermissibly limiting the fundamental right to strike as entrenched in section 23(2)(c) of the Constitution. The court held that the phrase cannot be interpreted in isolation, but that regard must be had to the purpose of the provisions of the LRA and the SAPS Act, and the context in which the phrase appears, so as to give effect to the right to strike.[139] The court therefore upheld the decision of the LAC and held that not all SAPS employees carry out an essential service.[140]

3 7 ESSENTIAL SERVICES COMMITTEE

The LRA provides for the establishment of an Essential Services Committee (ESC) which must determine which services fall within the definition.[141] The LRA provides

---

135 *Ibid.*

136 103 of 1994.

137 Graham Essential services-crime prevention-public sector employees-right to strike? http://www.gilesfiles.co.za/collective-bargaining-2/cc-essential-services-%E2%80%9 (accessed on 2013/9/19).

138 *Ibid.*

139 (2011) ZACC 21.

140 Graham Essential services-crime prevention-public sector employees-right to strike? http://www.gilesfiles.co.za/collective-bargaining-2/cc-essential-services-%E2%80%9 (accessed on 2013/9/19).

141 Brand *Strikes in Essential Services* (2010) 6.

that “the Minister, after consulting National Economic Development and Labour Council (NEDLAC), and in consultation with the Minister of the Public Service and Administration, must establish an Essential Services Committee under the auspices of the Commission”.[142] Members of the Committee are required to have[143] “knowledge and experience of labour law and labour relations”.[144]

The functions of the ESC are to conduct investigations as to whether or not the whole or a part of any service is an essential service and then to decide whether or not to designate the whole or part of that service as an essential service.[145] The ESC is also required to determine disputes as to whether or not the whole or a part of any service is an essential service;[146] and to determine whether or not the whole or part of any service is a maintenance service.[147] Furthermore, at the request of a bargaining council, the ESC must conduct an investigation as to whether or not the whole or a part of any service is an essential service.[148]

Brand explains that the LRA also prescribes the process which the ESC must follow in designating a service as an essential service. In essence the ESC must give notice of an investigation and invite interested parties to submit written representations and to indicate whether they require an opportunity to make oral representations.[149] It is only after following this process that the ESC may “decide whether or not to designate the whole or a part of the service that was subject to an investigation, as an essential service”.[150]

Brand explains further that because the Parliamentary Service and the South African Police Service are already deemed as essential services, there is no need for the ESC to investigate or make a determination in this respect.[151]

---

142 S 70(1).
143 Brand *Strikes in Essential Services* 6.
144 S 70(1)(a).
145 S 70(2)(a).
146 S 70(2)(b).
147 S 70(2)(c).
148 S 70(3).
149 Brand *Strikes in Essential Services* 7.
150 S 71(7).
151 Brand *Strikes in Essential Services* 7.

3 8 MINIMUM SERVICES

The LRA provides for the ESC to ratify a collective agreement that provides for the maintenance of minimum services in a service that is designated as an essential service.[152]

Roskam explains that the LRA does not define minimum services. However, it is evident that what section 72 has in mind is a minimum service of a designated essential service; in other words, the ambit of the designated essential service is shrunk to the minimum service and those employees who were denied the right to strike while the broader essential service designation was in place, but who fall outside the defined minimum service, now regain the right to strike.[153]

In terms of Roskam's explanation, it means that once the ESC ratifies the minimum service agreement for a designated essential service, the essential service shrinks to the minimum service. This minimum service can only be defined in a collective agreement which only takes effect when the ESC has ratified it. A workable collective agreement is required that ensures that the basic needs of the public are met so that the interruption of work as a result of a strike does not endanger the life, personal safety or health of the whole or part of any population.[154]

A minimum services agreement is not confined only to those who fall within an essential service. The provision of minimum services during a strike can be decided in any sector and will simply be regulated through a collective agreement between the employer and employees in a bargaining council. Roskam explains that if an agreement of this nature were concluded, those employees that fell within the minimum service would be precluded from striking in terms of section 65(1)(a) of the LRA, which prohibits a strike or lock-out in respect of the issue in dispute.[155]

---

152 S 72.

153 Roskam *Essential and Minimum Services and the Right to Strike* (2009) 21.

154 Roskam *Essential and Minimum Services and the Right to Strike* 22.

155 Roskam *Essential and Minimum Services and the Right to Strike* 23.

It stands to reason that once a sector has been declared an essential service, the employer's interest is best served by having its employees right to strike prohibited. This may be the reason why there is no minimum service level agreement signed to date in South African labour law. Roskam raises the question about how does the union process a dispute about the conclusion of a minimum service level agreement, bearing in mind that it cannot use strike action to induce an agreement?[156]

3 9 DISPUTES IN ESSENTIAL SERVICES

Section 74 deals with disputes within essential services and provides for a process of conciliation and arbitration for employees in essential services as an alternative to or compensation for the loss of the right to strike.[157]

The conundrum in relation to disputes in essential services arises when there are minimum services identified within a sector that has been declared an essential service. The question that needs to be decided is who has the right to go on strike and who may refer disputes for compulsory arbitration that is binding on the parties. There have been differing views on this matter.

Du Toit *et al* explain that:

> "Although the Act omits to say what they do not apply, section 74 deals with the referral of disputes in essential services to conciliation and compulsory arbitration….; presumably, therefore, it means that disputes outside minimum services are not subject to section 74. The effect is that 'essential services' may be divided into 'minimum services' and non-minimum services and those parties in the latter services, being excluded from the scope of section 74, may resort to industrial action."[158]

Brassey advocates a different view. He says that "section 72 is most confusing, but suggests it means that the minimum service employees cannot use their status as deemed essential service workers to invoke arbitration, but that it could be invoked by the essential services workers as a whole".[159] In response to Brassey's view,

---

156 Roskam *Essential and Minimum Services and the Right to Strike* 24.

157 S 74.

158 Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw *Labour Relations Law: A Comprehensive Guide* 5ed (2006) 330.

159 Brassey *Commentary on the Labour Relations Act* (2006) 76.

Roskam has argued that it is difficult to see how this interpretation arises from the wording of section 72.[160] He asks the question on the purpose of this section and was it included to cure the problem of having the same dispute being resolved in two ways, one by strike action and another by interest arbitration? He concludes that it would throw up very difficult issues if workers were represented by different unions and the one called on its members to strike and the other referred the dispute to interest arbitration.[161]

In the debate on this conundrum, a third view has emerged among labour law practitioners in South Africa which is not recorded in any academic article or book. Roskam explains that this view is that the LRA contains a bargain, which is to the effect that if more employees obtain the right to strike, then those who do not have the right to strike must throw their lot in with those who have the right to strike.[162] However, he says that there are questions as to whether or not this view can be legally correct since it denies the minimum service employees appropriate guarantees or compensation for their restriction of the right to strike, which the ILO's supervisory bodies have stated should include arbitration of their disputes.[163] Roskam believes that this may well be an unjustifiable limitation of their right to strike.[164]

Eskom Holdings (Pty) Ltd v NUM[165] addresses the matter when the Labour Court considered a review application in which the employer argued that the CCMA did not have jurisdiction to conciliate and arbitrate a dispute about the conclusion of a minimum service agreement in terms of section 74 of the LRA. The judge set aside the decision of the CCMA commissioner, holding that the CCMA did not have jurisdiction to deal with the matter. The judge argued that in terms of section 72, the ESC has the power to ratify a collective agreement about a minimum service level

160 Roskam *Essential and Minimum Services and the Right to Strike* 24.
161 *Ibid.*
162 *Ibid.*
163 *Ibid*.
164 *Ibid.*
165 (2009) 1 BLLR 5 (LC).

agreement only, and not an arbitration award that imposes an agreement upon the parties.[166]

This judgment was overturned in the Labour Appeal Court (LAC) in *NUM v Eskom Holdings* when the court ruled that the judge relied exclusively on section 72 and "elided past the express wording of section 74" in order to come to the conclusion that the CCMA does not have the necessary jurisdiction.[167] The LAC took the view that the failure of the parties to agree to a minimum service level agreement has given rise to a dispute, the consequences of which are to preclude a category of workers from participating in a strike. Section 74 provides for a clearly defined mechanism to deal with such an impasse.[168] The judge indicated that in seeking to reconcile sections 65, 70 and 74, no additional limitations are placed on the right to strike, save where these are expressly provided by the LRA. The interpretation that was adopted in the LAC was to give effect to the wording of the various sections rather than, in effect, eliding over the implications of section 74 to resolve the problem exclusively in terms of section 72.[169] The LAC therefore ruled that the CCMA does have jurisdiction to deal with a dispute arising from a failure to agree on the terms of a minimum service agreement.

3 10 LABOUR RELATIONS AMENDMENTS BILL 2012

From the discussion above it is obvious that there is a need to tighten the legislation dealing with strikes, essential services and minimum service agreements. The Minister of Labour submitted amendments to the LRA in March 2012 some of which aimed to address the gaps relating to essential services and strikes. Since then considerable discussion has taken place by all stakeholders in order to influence the final bill that is submitted to the National Assembly and the National Council of Provinces for adoption.

166 (2009) 1 BLLR 5 (LC).
167 (2010) 31 *ILJ* 2570 (LAC).
168 *Ibid.*
169 *Ibid.*

In respect of the essential services in sections 70-74, significant amendments have been introduced in order to eliminate some of the problems experienced in this area.[170] These problems relate to the system for regulating dispute resolution in essential service. These include the scope of essential service determinations made to date, the small number of minimum service agreements ratified by the ESC and the high level of strike action within the essential services.[171] Many stakeholders had negative perceptions about the operation and administration of the ESC.[172] Extensive amendments have been proposed to address these problems. Furthermore, a new provision has been added that deals with public officials exercising authority in the name of the state, defined as customs' officials, immigration offices, judicial officers and officials working in the administration of justice.[173]

In terms of section 72, the minimum services have been amended to allow a panel of the ESC to issue an order directing the parties to negotiate a minimum service agreement within a certain timeframe and if this does not occur, permit either party to refer the matter for mediation before the CCMA or bargaining council.[174] Should there be failure to do this then the panel of the ESC may determine minimum services to be maintained. Once the minimum service agreement has been ratified then the determined minimum service is regarded as an essential service.[175]

In terms of section 73 on disputes about whether a service is essential now also applies to minimum services. Any party may refer a dispute in writing to the ESC to determine whether a service is essential; whether an employee or employer is engaged in a service designated as essential; whether an employer and trade unions should conclude a minimum service agreement and the terms of that agreement.[176]

---

170 Memorandum of Objects http://www.labour.gov.za/DOL/.../amendment.../memoofobjectslra.pdf accessed on29/09/2013.

171 *Ibid.*

172 *Ibid.*

173 *Ibid.*

174 Memorandum of Objects http://www.labour.gov.za/DOL/.../amendment.../memoofobjectslra.pdf accessed on29/09/2013.

175 *Ibid.*

176 *Ibid.*

3 11 CONCLUSION

This chapter has established that the Constitution and the LRA are at odds with each other on the right to collective bargaining. The LRA does not enforce the duty to bargain on the parties. Instead it allows employees to exercise their right to strike by forcing the employer to accede to their demands. Should any employer wish to avoid a strike, the effect of this provision forces the employer to continue to bargain in order to reach an agreement with its employees. Certain conditions must be fulfilled in terms of the LRA before workers can embark on a strike. Certain designated sectors have been declared essential services in terms of the LRA and may not strike; this is considered justifiable in terms of the Constitution.

This chapter has further established that it is the functions that an organization or sector performs that constitutes the essential service and it is the persons engaged in the performance of these functions who are not permitted to embark on a strike. The Constitutional Court case on *SAPS v POPCRU*[177] clarified the apparent tension of the proper meaning of essential service as defined in section 213, read with sections 65(1)(d)(i) and 71(10) of the LRA, within the context of the right to strike in section 23(2)(c) of the Constitution.

The proposed amendments to the LRA seem to have addressed the earlier problems experienced in sections 72 and 74, especially with regards to minimum services and how to proceed with disputes.

What is left to be seen once these amendments are passed in Parliament is whether this will provide a basis for a minimum service agreement to be developed in the essential services.

177 (2011) ZACC 21.

CHAPTER 4
EDUCATION AS A HUMAN RIGHT

4 1 INTRODUCTION

Education in South Africa was the worst affected by apartheid through its discriminatory policies because it destroyed the basis of developing a society. It was therefore not surprising that it became the most contested terrain in our fight for liberation. Throughout society in the world, education is the means for the individual and society to grow. As part of the fight for freedom in South Africa, education was recognized as a means to democratic liberation, hence slogans like “Education for Liberation” and “the doors of education shall be opened to all”[178] was seen during the 1980’s.

With the realization of a new democracy in South Africa in 1994, we faced the mammoth task of leveling the playing fields from the apartheid period. However, South Africa lagged behind many other countries in the improvement of the quality of life for its citizens and the quality of teaching and learning for learners to enable them to emerge as meaningful citizens that could compete equally in an every changing technologically advanced global society.

The Constitution of South Africa was therefore the single most important legislation passed because it “sought to change the country into a constitutional democracy”[179] It aspires to build one nation by upholding values such as dignity, equality, non-racialism and non-sexisms and the granting of one citizenship to all South Africans. Yet it also attempts to accommodate the diversity of interests in South African society and to ensure justice for all.[180]

Bray explains that “the aim of education is to strengthen and develop the inherent dignity and freedom of every human being and promote self-esteem and respect for other human beings. The need for the creation of a human rights culture in education

178 The Freedom Charter 196 ILO, 1994 a: par 161.

179 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 2ed (2008) 14.

180 *Ibid.*

in South Africa is therefore obvious. Education is universally acknowledged as the basis of the cultivation of respect for human rights".[181] She further argues that "the protection of fundamental human rights is equally crucial in striving towards a democratic, open and accountable government, and there is no doubt that education can (and will) provide the key to this"[182].

The Universal Declaration of Human Rights states that "everyone has the right to education and that it will be free, at least at elementary and fundamental stages. Elementary education should be compulsory and education should be directed towards the full development of the human personality and strengthen respect for human rights".[183]

Section 29 of the Constitution,[184] draws from this declaration when it states:

> "Education
> 1. Everyone has the right
> a. To a basic education, including adult basic education…"[185]

The South African Human Rights Commission Report highlights the importance of a thriving education system by stating that the right to basic education is a central facilitative right in our constitutional democracy. It is aimed at providing opportunities and gateways for ensuring the promotion and protection of all other human rights.[186]

From all of the above statements it is clear that the right to education is a paramount right in society and it requires deep commitment by all stakeholders within society to ensure that this is not compromised.

---

181 Bray *Human Rights in Education* (2005) 1.

182 *Ibid.*

183 Universal Declaration of Human Rights 1948.

184 The Constitution of the Republic of South Africa, 1996.

185 S 29(1)(a).

186 SA Human Rights Commission Report of the Public Hearing on the Right to Basic Education 4. http://www.sahrc.org.za/home/zi/files/reports/right%20basic%20education%202006.pdf (accessed on 2013/09/2).

4 2 THE BILL OF RIGHTS

The Bill of Rights is captured in Chapter 2 of the Constitution in which all fundamental rights are protected. It has drawn from other international human rights instruments such as:

- The Universal Declaration of Human Rights,[187]
- The International Covenant on Economic, Social and Cultural Rights, 1960[188]
- The International Covenant on Civil and Political Rights.[189]

Section 7 of the Constitution compels the state to "respect, protect and fulfill the rights in the Bill of Rights".[190] Section 39 requires that when the Bill of Rights is interpreted, the interpretation "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".[191]

Joubert *et al* explains that with respect to the right to education the state has the following obligations and duties:

a) The duty to respect. This duty prohibits the state from acting in ways which will:

   - Arbitrarily deprive people of their right to education;
   - Deny or obstruct the right to education;
   - Unfairly discriminate.[192]

b) The duty to protect. This means that the state must protect individuals from interference by third parties or private companies in the exercise of their right to education.[193]

---

187 Universal Declaration of Human Rights 1948.
188 International Covenant on Economic, Social and Cultural Rights 1960.
189 International Covenant on Civil and Political Rights.
190 S 7(1).
191 S 39(1).
192 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 32.
193 *Ibid*.

c) The duty to promote. This duty requires that the state actively inform people of their right to education and explain how they can gain access to this right.[194]

d) The duty to fulfill. This duty places an obligation on the state to take measures to advance the right to education. The duty imposed on the state in terms of section 34 of the South African Schools' Act is to fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the learners' right to education.[195]

4 3 LIMITATION OF RIGHTS

Rossouw indicates that fundamental rights, as entrenched in the Bill of Rights, are not absolute rights. They are regulated and specified in detail in other statutes, and they can also be limited if so needed according to the limitation clause in section 36 of the Constitution.[196]

In terms of section 36, the general application of the Bill of Rights may be limited to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including:

(a) The nature of the right;
(b) The importance of the purpose of the limitation;
(c) The nature and extent of the limitation;
(d) The relation between the limitation and its purpose; and
(e) Less restrictive means to achieve the purpose.[197]

194 *Ibid.*
195 *Ibid.*
196 Rossouw *Labour Relations in Education: A South African Perspective* 2ed (2010) 25.
197 S 36(1).

4 4 CAN RIGHTS BE COMPROMISED?

The value of the right to life and human dignity was tested in the Constitutional Court case of the *State v T Makwanyane*.[198] Judge Chalskalson said the following concerning these two rights:

> "First, the relationship between rights of life and dignity, and the importance of these rights taken together. Secondly, the absolute nature of these two rights taken together. Together they are the source of all other rights. Other rights may be limited, and may even be withdraw and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity. These twin rights are the essential content of all rights under the Constitution. Take them away and all other rights cease."[199]

This case is an example of how rights can compete with each other. The court held that the death penalty violated three important rights: the right to life, human dignity and freedom from cruel punishment.[200] To justify the infringement of these rights the state had to show that the death penalty served purposes that an open and democratic society based on freedom and equality would consider worthwhile and important. In this instance the state is obliged to take action to protect human life against violation by others.[201]

Section 36 is applied to determine how the right of one party can be limited in a reasonable and justifiable manner.[202] The question of competing rights has been witnessed in education for a long time. The right of an educator to strike and the right of a learner to education are often seen as being in conflict with each other and the question arises as to which right has greater value.

Despite limitation being placed on the right to strike in the LRA where there are certain conditions that have to be met before an educator can embark on a strike, this has recently taken serious debate in South African society because of the ease with which educators embark on a strike, often characterized as wildcat strikes.

---

198 1995 (3) SA 391 (CC)

199 1995 (3) SA 391 (CC)

200 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 20.

201 *Ibid.*

202 S 36(1).

There is a growing view that the right to basic education is being compromised by the right of educators' to strike and this requires urgent intervention by the state. Part of this intervention by the state could be to look at the justifiable limitations in terms of section 36 and see how the right to strike can be balanced with the rights of the child that would include the right to education.

4 5 INTERNATIONAL LAW

Section 39[203] of the Constitution considers the important influence of international law by compelling a court, tribunal or forum to consider international law when interpreting the Bill of Rights.

Joubert *et al* indicates that relevant international public law (in different countries) must be taken into account: the importance of international human rights documents and how states cooperate to promote human rights must be considered. In the cases of the *State v Makwanyane*[204] and the *State v Williams,*[205] the Constitutional Court did extensive research on the universally recognized fundamental right to life and the right to be free from cruel and inhuman punishment, respectively, to shed light on the interpretation in the South African context.[206] In both cases the court established that capital punishment and corporal punishment was inconsistent with the commitment to human rights expressed in the Interim Constitution of South Africa.

4 6 WHAT RIGHTS DO EDUCATORS' HAVE IN EDUCATION?

Section 23 of the Constitution gives workers the right to fair labour practices,[207] to form and join a trade union, to participate in the activities and programmes of the trade union and to strike.[208] In terms of these rights, a principal of a school may therefore not force educators to join a specific trade union, nor may s/he as the first representative of the employer treat any educator unfairly in the workplace.

---

203 S 39(1)(b).

204 1995 (3) SA 391 (CC).

205 *Ibid*.

206 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 36.

207 S 23(1).

208 Ss23(2)(a), (b) and (c).

Joubert *et al* explains that various rights in the Bill of Rights relating to labour issues form the basis for the labour rights of educators and other labour matters as they are applied in education.[209] These rights form the basis of the Employment of Educators' Act (EEA).[210] Issues such as unfair discrimination in the appointment, promotion and dismissal of educators, reasonable conditions of employment, the professional status of educators, grievance procedures, the resolution of labour disputes, disciplinary action against educators (to mention but a few) are therefore dealt with in the EEA.

4 6 1 REGULATION OF THE PROFESSION

Besides the labour rights given to educators in section 23, other sections of the Constitution also have relevance to the rights of educators. These include section 22 which gives a fundamental right to every citizen to choose their trade, occupation or profession freely which may be regulated by law.[211] This means that every educator may practice the teaching profession freely, but the profession is regulated by the South African Council of Educators Act[212] and the Professional Ethics Code of Conduct.[213] In terms of this Act and Code of Conduct, the professional council for educators' ensures and maintains a high level of performance standards for members of the teaching profession. Should any educator violate these standards, they may have their names removed from the register of educators after being found guilty or in breach of the code of professional ethics.[214]

4 6 2 SAFE WORKING ENVIRONMENT

Section 24 states that everyone shall have the right to a healthy environment.[215] In education this means that educators have the right to a safe working environment.

---

209 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 61.
210 76 of 1998.
211 S 22.
212 31 of 2000.
213 South African Council of Educators' Professional Ethics Code (2000).
214 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 61.
215 S 24.

The Occupational Health and Safety Act[216] define the measures that need to be in place at schools to ensure a safe working environment.

4 6 3 ADMINISTRATIVE JUSTICE

Section 33 states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.[217] The Promotion of Administrative Justice Act[218] gives effect to this section of the Constitution and makes provision that any administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.[219]

In *Schoonbee v MEC for Education Mpumalanga*[220] Judge Moseneke found that the dissolution of the governing body by the Head of Department was not procedurally fair in terms of section 3(2)(b) of the Promotion of Administrative Justice Act. He found that "rationality, reasonableness, fairness and openness are very important considerations" and that "the intended administrative action has to be disclosed timeously to the affected party to allow him or her to make such representation as s/he may find appropriate".[221]

Educators therefore need to be informed of what constitutes just administrative actions in order to perform their duties diligently as well as know their rights.

4 7 WHAT RIGHTS DO CHILDREN HAVE IN EDUCATION?

South Africa has committed itself as a country to a number of international declarations and conventions that deal with the rights of children. The significance of signing these international agreements is that the state becomes obliged under international law to implement them. This is particularly true in respect of the right to education and to respect the freedom of education.

---

216 85 of 1993.
217 S 33(1).
218 3 of 2000.
219 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 71.
220 2002 (4) SA 877 (T).
221 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 71.

4 7 1 INTERNATIONAL AGREEMENTS

Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[222] recognizes the right of everyone to a free education; primary education should be compulsory and free; secondary education shall be made available and assessable to all by every appropriate means; higher education shall be made equally assessable by the progressive introduction of free education and the development of a system of schools shall be made possible with the material conditions of teaching staff continuously improved.[223]

The ICESCR also introduces the principle of the four A's, namely availability, accessibility, acceptability and adaptability.[224] Availability entails that schools and programmes are available in sufficient quantity. There should also be an availability of sufficient trained teachers. Accessibility requires that education should be accessible to everyone and has to be in safe physical reach of everyone. Acceptability introduces the idea of set international standards such as water and sanitation whilst adaptability deals with issues that relate to the development of a global society.

The international obligations of a member state in relation to children is contained in the Convention on the Rights of the Child (CRC)[225] that requires the state to take steps to ensure that children's rights are observed. The CRC ensures that the child's right to receive an education shall not be hampered by factors such as parental neglect, abuse or ignorance, cultural resistance or child labour.

Article 3 of the CRC states that in all actions concerning children, the best interests of the child shall be a primary consideration. State parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her legal parents, legal guardians, or other individuals

222 International Covenant on Economics, Social and Cultural Rights (1966).
223 Art 13 2(a) (b) (c) and (e).
224 Art 13(b) and (c).
225 Convention on the Rights of the Child (1989).

legally responsible for him or her and to this end, shall take all appropriate legislative and administrative measures.[226] The implications of this commitment are that the child's best interest must be the first aspect to consider in every situation involving children that occurs in South Africa.

4 7 2 HOW WELL IS SOUTH AFRICA DOING IN RELATION TO INTERNATIONAL LAW?

The South African Constitution complies with international law in many ways that ensure that children are protected. Section 28 mainly deals with the rights of children. Furthermore enabling legislation has been passed in the form of the Child Care Act[227] that makes it an offence to ill-treat a child or allow him or her to be ill-treated, or to abandon that child. Section 50A has also been added to the Child Care Act in the form of an amendment that criminalizes the sexual exploitation of children.

Section 29(1) states that "everyone has the right to a basic education".[228] This right ensures the adequate provision of basic education for all children. In the process of providing education, other human rights are also ensured such as the right to equality,[229] the right to human dignity,[230] the right to freedom and security of the person,[231] and the right to privacy.[232]

Woolman *et al* says that a sound education is supposed to produce citizens who are fundamentally equal and people who actively participate in society. It enables people to enjoy the rights as well as the full obligations that are associated with citizenship.[233] By prioritizing the right to education in Section 29(1), the new democratic South Africa committed itself to ensuring that transformation of society is a goal that will be achieved by exposing its citizens to opportunities of learning.

---

226 Arts 3(1) and (2) of Convention on the Rights of the Child (1989).

227 94 of 1996.

228 S 29(1)(a).

229 S 9.

230 S 10.

231 S 12.

232 S 14.

233 Woolman and Fleisch (eds) *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* 109.

Section 3(1) of the South African Schools' Act[234] gives further content to Section 29 of the Constitution by prescribing that children must complete their schooling from grade R up to grade 9 or up to the age of fifteen years, whichever comes first.

4 7 3 ADDITIONAL PROTECTION FOR CHILDREN

Section 28 of the Constitution sets out the additional forms of protection that applies to children. According to Bray it obliges the school to respect, protect and fulfill these children's rights in the educational context. South African educators have important duties towards learners, not only in terms of the Bill of Rights and other legislation, but also in common-law in terms of their *loco parentis* status.[235]

Joubert *et al* states that educators' duties include responsibilities for the physical and psychological wellbeing of learners. This also includes the right to basic nutrition and basic health-care services which schools are in the best position to fulfill.[236] Furthermore, schools and educators, as representatives of the state as well as the community, have the responsibility to report and even intervene whenever they become aware that a child's rights under section 28 are being violated by someone else.[237] This duty has also been recognized by section 42 (1) of the Children's Act[238] which provides that various professional workers, including medical and social workers, and teachers, have a duty to report cases of child abuse that come to their attention in their official capacity.[239]

4 7 4 IN THE BEST INTERESTS OF THE CHILD

Section 28 (2) of the Constitution provides that a child's best interest is of paramount importance in every matter concerning the child.[240] This principle constitutes a constitutional right extending beyond the other rights in section 28 and that the child's

234 84 of 1996.
235 Bray *Human Rights in Education* 63-64.
236 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 63.
237 *Ibid.*
238 38 of 2005.
239 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 63.
240 S 28(2).

interest will be considered and be given priority in every matter that affects the child.[241]

Malherbe explains that the principle of the "best interest of the child" does not apply absolutely and will every time trump any other competing right or interest.[242] There are limitations to every constitutional right and the weight accorded each principle must be determined in each case, taking into account all the relevant circumstances, but this has to be done in accordance with the requirements of the general limitation clause in section 36 of the Constitution.[243]

The case of the *Government of the Republic of South Africa v Grootboom*[244] reflects the limitations that can be placed on a right.[245] The judgment focused on access to suitable housing as set out in section 26, but part of the case dealt with the child's right to shelter as protected by section 28(1)(c). According to the court's decision, the obligation placed on the state by section 28(1)(c) can only be understood in context of the rights that are created through sections 25(5), 26 and 27 of the Constitution and it should be borne in mind that these rights are subject to the internal limitation clause.[246]

The case of *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*[247] dealt with the question of whether people have the right to demand education in their own home language. The court implied that the interpretation of section 32(c) of the interim Constitution,[248] which states that every person shall have the right to a basic education, places a positive obligation on the state. This is derived from the fact that the grammatical and linguistic structure of section 32 supports its own context. This section creates a positive right.[249]

---

241 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 63.
242 Malherbe *The Constitutional Dimension of the Best Interest of the Child* (2006) 2.
243 Malherbe *The Constitutional Dimension of the Best Interest of the Child* 3.
244 (2001) 1 SA 46 (CC).
245 (2001) 1 SA 46 (CC) 48D.
246 (2001) 1 SA 46 (CC) 81B-D.
247 (1996) 3 SA 165 (CC).
248 Constitution of the Republic of South Africa Act, 200 of 1993.
249 (1996) 3 SA 165 (CC) 9.

4 8 CONCLUSION

This chapter has explored the rights of educators and the rights of children. It looked at whether there can be a balance between the right to strike as opposed to the right to education; or whether the right to education tips the balance in favour of learners.

Learners have the right to education and therefore educators have a duty to protect and promote the right to education, but also to ensure effective teaching and learning occurs. A right is usually balanced by a duty.[250]

The Constitution of South Africa, by including chapter 2 on the Bill of Rights, has gone a long way to ensuring human rights that meet international norms and standards. Through this the state has an obligation to ensure that certain norms and standards are provided in education in relation to infrastructure, availability of teachers, provision of textbooks and access to free education between grades one to nine.

Where any right in the Constitution appears to be competing against another right, the test would be to apply the criteria set out in section 36 that determines the extent to which the limitation may hold.

It does appear that learners have greater priority in their right to education than teachers have in their right to strike. This is because the state has put in place various legislation that regulates the working environment of educators and sets in place mechanisms for collective bargaining and dispute resolution through the established bargaining council in education. On the other hand learners also have supporting legislation to ensure that their best interests are taken care of.

Despite the existence of these measures, it seems that educators still find it very easy to abandon the workplace on strike action, either through protected or unprotected strike action, at the slightest provocation. This becomes an area for the

250 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 71.

state to look at in an attempt to stabilize education and ensure that it meets its obligations in terms of the Constitution.

CHAPTER 5
EDUCATION AS AN ESSENTIAL PRIORITY

5 1 INTRODUCTION

Educators are very special people in whose care children are entrusted for the better part of a day. They have the responsibility to provide morals and values to children in a way that develops trustworthiness and honesty.[251] They have to protect children from abuse; ensure that children learn to respect the rights of others; ensure that every learner is accepted for their contributions; that there is no unfair bias in the class; that all learners participate in the activities of the classroom; that learners perform the tasks that are assigned to them; that they are accountable for their actions; that they show respect and dignity.[252] Educators are therefore role models in society who have the opportunity, through the work they do, to impart knowledge and shape the future generation of society. They are the first citizens who interact and share values of a society and are "role models and promotes a human rights culture"[253] in the classroom.

The National Education Policy Act (NEPA)[254] supports the view of protecting human rights when it states that:

> "the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 2 of the Constitution, and in terms of international conventions ratified by Parliament, and in particular the right… of every person to basic education and equal access to education institutions; of every child in respect of his/her education… enabling the education system to contribute to the full personal development of each student, and to the moral, social, cultural , political and economic development of the nation at large, including the advancement of democracy, human rights and the peaceful resolution of disputes, promoting a culture of respect for teaching and learning in education."[255]

Educators have the responsibility to ensure that the economic development of the country advances by imparting appropriate content knowledge to learners in order to

---

251 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 168.

252 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 170.

253 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 168.

254 27 of 1996.

255 S 4.

assist them to advance and become citizens who can enter the workplace with the necessary skills that would help to transform a developing country further.

5 2 EDUCATORS AS PROFESSIONALS

Educators belong to a profession which is often said to be "a calling".[256] Anyone who is associated with this profession is expected to behave in a particular way that has high regard and standing in society. Educators are therefore expected to be professional because the profession requires that they first have to acquire certain skills and competencies to be able to impart knowledge.[257] After acquiring this knowledge and skills base, educators are required to show professionalism that is associated with the profession of teaching and reflect professional conduct in the manner s/he interacts with learners.[258] This professional conduct is regulated by a Professional Code of Conduct that has been passed by the South African Council for Educators (SACE)[259] and any educators who do not adhere to this code will be de-registered from the profession so that they may no longer be able to practice as an educator.[260]

5 3 DEFINITION OF AN EDUCATOR

The definition of an educator in terms of the Employment of Educators' Act[261] (EEA) means:

> "… any person, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at any public school, departmental office or adult basic education centre and who is appointed in a post on any educator establishment under this Act."[262]

256 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 171.
257 *Ibid.*
258 *Ibid.*
259 SACE is the registered Council of Professional Ethics for Educators.
260 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 179.
261 76 of 1998.
262 S 1.

Any educator who is not employed by the state, as well as those individuals working at public schools, but not falling under the definition of an educator, are bound by general laws and not the EEA.[263] Section 20 of the South African Schools Act[264] includes the establishment of posts by the governing bodies of a public school, additional to those established by the Member of the Executive Committee (MEC).[265]Such employees are covered by the definition of an employee in the LRA.[266]

5 4 EMPLOYMENT RELATIONSHIP

According to Bendix, two parties enter into an employment relationship after an employment contract is signed.[267] In education this relationship is solidified when an educator and the State enter into such an employment contract. The educator becomes an official of the employer (the State) and has to perform duties on behalf of the employer.[268]

5 5 DUTIES OF THE EMPLOYER

Grogan stipulates three principle duties of the employer:

- To receive the employee into service;
- To pay the employee's remuneration; and
- To ensure that working conditions are safe and healthy.[269]

Bendix goes further in describing the duties of the employer to include:

- To provide work for the employee;

263 Rossouw *Labour Relations in Education: A South African Perspective* 42.
264 84 of 1996.
265 Rossouw *Labour Relations in Education: A South African Perspective* 75.
266 S 213.
267 Bendix *Industrial Relations in the New South Africa* (1996) 115.
268 Rossouw *Labour Relations in Education: A South African Perspective* 46.
269 Grogan *Workplace Law* 62.

- To provide the necessary facilities;

- To observe statutory duties e.g. to grant reasonable leave and observe working hours.[270]

5 6 DUTIES OF AN EDUCATOR

Educators have detailed contractual obligations defined in the Personnel Administrative Measures (PAM),[271] whilst the Code of Professional Ethics of SACE also gives guidelines on the professional duties of an educator.[272]

The duties of an educator can be summarized as follows:

- To maintain authority and exercise discipline over the learners in a classroom;

- To provide the *in loco parentis* function by caring for the learner during school hours;

- To demonstrate professional conduct in all their actions in and outside the classroom;

- To protect the learners' right to education.[273]

Other duties of educators, as referred to by Joubert, include formulating learning outcomes, planning and preparing lessons properly, continuously assessing learners to ensure proper standards, regularly consulting and involving parents and performing certain administrative duties.[274]

Whereas the Basic Conditions of Employment Act (BCEA)[275] determines the minimum conditions of employment for all other workers in South Africa, the

---

270 Bendix *Industrial Relations in the New South Africa* 116.
271 Personnel Administrative Measure published as regulations in education.
272 Rossouw *Labour Relations in Education: A South African Perspective* 58.
273 Rossouw *Labour Relations in Education: A South African Perspective* 59-63.
274 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 197.
275 75 of 1997.

conditions of service of educators are set out in the PAM. The PAM draws its basic principles from the BCEA and includes:

- Scope of the PAM, workload of school-based educators and their duties and responsibilities;
- Qualifications, appointment, salaries and ranks;
- Development appraisal;
- Allowances;
- Public examinations;
- Service benefit awards;
- Time off and secondment;
- Grievance Procedure;
- Measures not administered by the Minister of Basic Education; and
- Leave Measures.[276]

5 7 DUTIES OF THE PRINCIPAL

The principal is appointed as the manager of the school. S/he serves as the first representative of the employer and is "both the manager and a professional leader of the school".[277] The principal has the responsibility to ensure that the rules and regulations in terms of policy measures of the Department of Basic Education (DBE) are applied at the school, as well as uphold the values of the Constitution. S/he has to "create a climate in which everybody respects the worth and dignity of every other individual, which will contribute to the creation of a climate and culture that

276 Personnel Administrative Measures of 1999.

277 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 181.

accommodates diversity".[278] The principal also has to ensure that effective teaching and learning is taking place at the school and that learner achievement is at acceptable standards as determined by the DBE. The principal is therefore entrusted with authority by the Head of the Provincial Education Department (HoD) to represent the employer at the school and has the responsibility to take independent decisions within the broad guidelines of relevant legislation and departmental policy in order to maintain accountability in education.[279]

Cronje *et al* explains that every manager, regardless of the management level, is on occasion also a leader who ensures that subordinates work together to achieve the school's objectives.[280] The principal therefore has the authority to enforce certain actions within specific policy and to take action against those who do not co-operate to achieve certain goals.[281]

5 8 ENSURING ACCOUNTABILITY IN EDUCATION

Accountability in education is crucial in order to reach the learning outcomes that ensure quality education. The principal is accountable to the HoD for the effective management of the school.[282] The principal therefore has the obligation to ensure that his/her school performs in accordance with the standards set out by the Department of Basic Education as prescribed in the South African Schools Act[283] and provide a turnaround plan for poor performing results.[284]

Accountability in education has become the key driver to measuring improvement and performance. Furthermore, learner performance is the means of measuring progress for academic achievement in our schools. Since these are values that are held in high esteem internationally, it highlights the extent to which the right to education is valued in society. This becomes a conflict in instances where educators

278 *Ibid*.

279 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 230.

280 Cronje, Smith, Brewis and De Klerk *Management Principles: A Contemporary Addition for Africa* (1997) 117.

281 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 230.

282 Joubert and Prinsloo (eds) *The Law of Education in South Africa* 232.

283 84 of 96.

284 S 16A.

utilize their right to strike and the DBE has the continued responsibility to ensure that the learners' right to education is not compromised. For this reason it is important for the employer to clarify the role of principals in ensuring that the education of learners are not compromised in any way.

5 9 PRINCIPALS IN THE AUTHORITY OF THE STATE

The ILO's digest has confirmed that principals and deputy principals are part of those officials who are regarded as being in the authority of the state.[285] This means that the ILO has recognized that they are regarded as being part of the essential service and therefore may not go on a strike. The LRA has not identified principals and deputy principals as being in the authority of the State.

The decision of the ILO to regard principals and deputy principals as part of the essential service may help South Africa to address a recent debate in the country that calls for education to be declared an essential service. The position of the ILO has opened up the possibility for the government, as a member state of the ILO, to consider amending the LRA to incorporate principals and deputy principals as those who are in the authority of the state without going against the agreements of the ILO. Should this occur it will enable the DBE to manage a strike more efficiently in the future and ensure that the best interests of the child are protected.

Currently when teachers go on a strike it is very difficult for the DBE to monitor the extent to which schools in rural areas are affected by a strike. The DBE uses a Strike Management Plan[286] to monitor strikes. Vast distances between schools and district offices in deep rural areas hamper the DBE from monitoring a strike daily. This creates difficulties on the reliability of strike figures on a daily basis. It also results in legal challenges by unions on strike figures and prevents the employer from proceeding with "No work, No pay" deductions because of scant information that was not verified by the principal. This has delayed "No work, No pay" deductions in many provinces, resulting in educators not feeling the pinch of participating in a strike. This

---

285 ILO Digest 588.

286 Source DBE Strike Management Plan (2007) which is used to monitor staff attendance at schools, incidents of violence and intimidation and alternative measures that need to be put in place where it is impossible for the school to function normally.

may be one of the reasons why they so easily heed the unions call to embark on strike action.

The Department of Education attempted to resolve the matter by issuing Government Gazette No 21050 in 2000 that regulated the role of principals prior to strike action. These regulations were laid down by the Minister of Education after consultation with the Council of Education Ministers and trade unions.[287] The matter was heard in the Labour Court in *South African Democratic Teachers' Union (SADTU) v Minister of Education*[288] where SADTU contended that the Minister failed to follow negotiation and dispute resolution procedures in the ELRC. They submitted that the Minister was not empowered to make these regulations as it was inconsistent with the LRA and Constitution. They argued that promulgation of the regulations was invalid and would subvert collective bargaining and the right to strike.[289] They further believed that the regulations, as published, were an attempt to amend the terms and conditions of educators.

The court ruled that the Minister may not promulgate regulations relating to conditions of employment of educators without first following negotiations procedures contained in the Constitution of the ELRC, read together with the LRA. The strike regulations were therefore declared *ultra vires* and invalid and should be set aside.[290]

5 10 WHAT ARE THE IMPLICATIONS FOR SOUTH AFRICA IF PRINCIPALS ARE IN THE AUTHORITY OF THE STATE?

The ILO highlighted three key areas of decisions that should be considered in respect of the education sectors. These relate to the following:

Digest 588:[291] indicates that principals and deputy principals are among those officials who are regarded as being in the authority of the state. This opens the door for serious engagement among all stakeholders in education to consider this as a

287 Rossouw *Labour Relations in Education: A South African Perspective* 117.
288 (2001) ZALC 144.
289 *Ibid.*
290 *Ibid*.
291 ILO Digest 588.

policy measure. The effect of this decision means that the ILO has recognized that there is a part of education that can be declared as an essential service.

By declaring principals and deputy principals as being in the authority of the state, this would address the problem the Minister tried to solve when promulgating *Government Gazette* No 21050 in 2000. There is a need for someone to be present at schools when educators embark on a strike. If principals are part of the essential service, the employer would be guaranteed of having an official at schools to take responsibility for the administrative and education decisions during a strike to ensure the best interests of the child are protected.

Political parties and other significant stakeholders in education have already supported a move to declare education as an essential service in South Africa as is evident from the newspaper debate at the beginning of 2013. The decision of the ILO helps these parties to apply to the ESC to consider including principals and deputy principals as part of the list of essential services.

The ESC has to apply its mind to the procedures set out in section 70 of the LRA in order to ratify that principals and deputy principals may be added as part of the list of those who are regarded as being in the authority of the state.

School nutrition: The ILO has also agreed that it is critical for learners to be fed. In most cases such learners live in areas of extreme poverty and the school nutrition programme is the only nutrition received for the day. In the event of a strike it becomes important to ensure that these learners continue to receive food. Case law of the ILO, as reflected in the Argentina case in Report No 360 of the ILO,[292] therefore indicates that workers who provide this nutrition are considered to be part of the essential service.

In South Africa large numbers of schools are categorized as quintiles 1, 2 and 3. The quintile system is part of the state's policy on norms and standards for school

[292] ILO Case No 2784 NORMLEX: Freedom of Association Cases http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLA... (accessed on 2013/09/02).

funding. Schools categorized as quintiles 1, 2 and 3 are examples of where extreme poverty is experienced and the schools are exempted from charging school fees. These schools provide a nutrition programme, as part of the state's responsibility to ensure that the learners in extremely poor areas are provided with a meal.

In the event of a strike, where the school has to close because no educators are at school, the nutrition programme also becomes compromised. The issue for the South African government to consider is how to continue to provide nutrition in times of a strike so that learners receive food. If principals are always present at schools during a strike it would eliminate the problem of closing schools. This means that the state would be able to act in the best interests of the child by continuing to provide food to learners. This is another area that the ESC would have to apply its mind to in terms of section 70 of the LRA.

Health Service at schools: In many primary schools teachers are used to assist the Health Department in administering medication to young learners. This has resulted from the prevalence of HIV/AIDS in South Africa as well as extreme poverty.

In instances where teachers have undertaken the responsibility to administer medication to learners on a daily basis, this becomes difficult when there is a strike.

Teachers who have undertaken this responsibility can also be seen as part of the section within education that need to continue to work during a strike. This would mean that they can be seen as part of the minimum services that needs to be available to learners in order to protect their best interest. In addition, if the principal is always present at school during a strike because s/he is part of the essential service, it would be easy to ensure that learners who require medication receive it on time because both the principal and teacher who have to administer the medication are available to do so.

5 11 TRENDS IN EDUCATION PERFORMANCE

The education sector is at a critical juncture where there is increasing concern and monitoring of education performance in order to ensure that learners in South Africa

improve their performance to compare better to learners in other parts of Africa and across the world.

A number of initiatives have been introduced in the last three years to address areas of under-performance in schools. Government has already introduced education as the number one priority – “Improved quality of basic education” out of twelve central outcomes declared by President Zuma. This is part of a great effort by government to improve the delivery of government services in the interests of a better life for all.[293]

The trends in education performance is informed by a number of assessments that have been undertaken that raise red flags on how well our learners are doing compare to their international peers. Two international data collections occurred in samples of South African schools during 2011. One was TIMSS and the other was PIRLS. The results of both of these programmes show that South African learners perform dismally against other learners.[294] These studies are important both in terms of the opportunities they offer for understanding the factors contributing towards better learning and because they send out the signal that South Africa is serious about dealing with its human resource development challenges.[295]

Beside of the international tests that were done, the first national Annual National Assessment Report (ANA) was released by DBE.[296] The report indicated that the quality of schooling remained low and that the country continued to face a serious education crisis with large numbers of learner performance not being at acceptable standards in literacy and numeracy. Low levels of learner performance were particularly reflected in poor socio-economic areas. The release of this report has allowed parents to engage more actively with schools with respect to teaching and learning issues. It has assisted school principals in determining which teachers are most in need of support and has also indicated to teachers what acceptable levels of performance are.

---

293 DBE Source *Report on Progress in the Schooling Sector* (2011).

294 *Ibid*.

295 *Ibid*.

296 *Ibid*.

5 12 THE NEED FOR STABILITY IN EDUCATION

The factors explained in the paragraph above give an indication of the need for stability in education. At the same time that the reports of TIMSS, PIRLS and ANA were published, the education sector was still recovering from a public sector strike in 2010 in which the largest percentage of strikers were teachers. The 2010 strike was characterized with high levels of violence and intimidation that set parent and learners apart from their teachers. Furthermore, 2011 and 2012 were characterized by sporadic wild-cat strikes in some provinces and the effect of this drove a wedge in communities against their teachers.

The impact of these strikes, together with a growing concern in the education sector about its performance, has left many people arguing that it was time to look at what was in the best interest of the child and that education needed stability if we wanted to improve learner performance to ensure that our learners reach acceptable levels of performance to hold their own against a global society.

This would require all stakeholders in education to work together to ensure that this stability is achieved. This would require a pact between parents, teachers, departmental officials, government, NGOs and business.

5 13 CONCLUSION

This chapter has looked at the roles and responsibilities of educators, the special nature of the work they do in relation to children and the effect that strike action will have on the learners' education should this take place. Special consideration was given to those educators who assist in school nutrition programmes and administering medication for the health department to learners in poverty stricken areas.

The chapter also focused on the roles and responsibilities of principals and deputy principals and considered the ILO recommendations of the principal and deputy principal being in the authority of the state and should therefore form part of the essential services. The argument raised in the chapter is that as the first

representative of the employer at schools, principals provide a crucial link between the HoD and the school during strike action, to provide information to the employer of the situation prevailing at the school that will inform ensuring that the best interest of learners are considered when teachers withdraw their labour.

Furthermore, accountability in education and the trends in education performance of South African learners were considered. It is clear from the international and national assessments made in respect of numeracy and literacy that South African learners lack critical skills and this needs to be addressed by urgent intervention programmes of government. This requires stability in education with a pact between all stakeholders who agree to recognize education as an essential priority that will ensure continued quality teaching and learning programmes that will not be compromised by any form of interruption.

CHAPTER 6
A COMPARISON OF TWO COUNTRIES ON ESSENTIAL SERVICES

6 1 INTRODUCTION

The similarities in labour rights and processes between Canada, Germany and South Africa have informed the reasons why Canada and Germany have been chosen as two countries that will be compared to South Africa.

All three countries have adopted international law on human and labour rights because they are members of the United Nations and ILO. All three countries have ratified the important Conventions of the ILO, especially Convention 87 and 98 dealing with Freedom of Association and Collective Bargaining. All three countries have historically well-established labour movements that engage the state on issues that affect workers conditions of employment fundamentally and all three countries have a well-established public administration that governs the public service with informed labour laws and democratic principles.

6 2 CANADA

Canada has a rich multicultural and multiracial community, similar to South Africa and also has a history of being previously colonized. When South Africa gained its independence in 1994, new laws had to be passed that liberated the South African society from apartheid by introducing transformative measures of equity, dignity and fairness. South Africa looked towards other established democracies like Canada for examples of good practice that has informed South African law as we currently know it.

The Constitution of Canada is the supreme law of the country and was enacted in 1982. The Canadian Charter of Rights and Freedoms form part of the Constitution of Canada.[297]

---

[297] Constitution of Canada http://en.wikipedia.org/wiki/Constitution-of-Canada (accessed on 2013/10/29).

6 3 HOW DOES LABOUR RELATIONS POLICIES WORK IN CANADA

The Canadian Constitution grants its ten provinces exclusive jurisdiction over labour policies for most industries and about 90% of the workforce. The federal government has authority over labour relations only in specified industries, and in relation to its own employees. They also have jurisdiction over employees in federal Crown corporations.[298]

Canadian jurisdictions have enacted a number of legislative approaches to regulating public sector labour relations. Each province is free to regulate the conduct of public sector industrial relations within its jurisdiction, subject to the overriding provisions of the Charter.[299] Consequently, statutory regulation and organization of public sector labour relations vary considerably across provinces, even in the regulation of the same sector.[300]

Nonetheless, a general model of labour relations legislation has developed:

The basic elements include workers' right to choose to join a union and engage in collective bargaining.[301] Negotiations can encompass a wide variety of subjects (though more limited than private sector bargaining); unions in most bargaining units can strike, and employers can lockout workers.[302]

Collective agreements regulate the workplace in detail. Enforcement of these agreements is through private arbitration.[303] A separate administrative agency (commonly called a “labour relations board”) regulates the system.[304] This is much

---

298 Thompson and Slinn *“*Public sector industrial relations in Canada: Does it threaten or sustain democracy” in *Comparative Labour Law & Policy Journal* (2013) 34 2.

299 *Ibid*.

300 *Ibid.*

301 Vargha ILO Presentation *Comparative Law and Practice* (2013). A presentation made to the PSCBC delegation from South Africa to the ILO.

302 *Ibid.*

303 *Ibid.*

304 *Ibid.*

the same as South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA).

6 4 ESSENTIAL SERVICES IN CANADA

Canada is an interesting country to study because of its stance on legislating the essential services. The Canada Labour Code regulates labour laws in each province. The Canadian Public Service Labour Relations Act, 2003 defines an essential service as "a service facility or activity of the Government of Canada that is, or will be, at any time, necessary for the safety or security of the public or any segment of the public".[305]

Canada has passed an Essential Services Act that regulates labour laws, regulations and collective agreements. This Act is very powerful as it gives the employer the sole right to determine which areas of service should be declared essential; with the only obligation that the employer has is to negotiate the terms of the agreement for essential services.[306]

6 5 DISPUTE RESOLUTION MODELS IN CANADA

Three dispute resolution models exist:

6 5 1 THE UNFETTERED STRIKE MODEL

Under this model, parties can utilize their economic power to resolve outstanding issues within the collective agreement. The parties can strike or lock-out as soon as they are in a legal position to do so. Normally, this is achieved at the expiration of the current collective agreement.[307]

---

305 4(1) http://www.laws-lois.justice.gc.ca/eng/acts/P-33.3/page-1htm1 (accessed on 2013/10/29).

306 Essential Services Act http://www.laws-lois.justice.gc.ca/eng/acts/P-33.3/page-24htm1 (accessed on 2013/10/29).

307 Vargha ILO Presentation *Comparative Law and Practice.* A presentation made to the PSCBC delegation from South Africa to the ILO.

6 5 2 THE NO-STRIKE OR COMPULSORY ARBITRATION MODEL

Under this model, work stoppages are prohibited, and unresolved disputes must go to interest arbitration[308].

6 5 3 THE DESIGNATION OR LIMITED STRIKE MODEL

Under this model, a proportion of workers in the unit are determined to be essential and are required to continue to provide services during any work stoppage. Where strikes are prohibited, compulsory interest arbitration is generally substituted and interest arbitration is commonly available in sectors subject to essential service limits on work stoppages.[309]

6 6 CONDITIONS IN CANADA FOR PUBLIC SERVANTS DURING A STRIKE

Public servants generally fall within the limited strike model, except for the federal public service, where the union has the option of choosing whether to strike or have the dispute resolved by interest arbitration.[310]

Hospital employees are also commonly subject to the limited strike model, although once again the federal unions may opt to strike or go to arbitration. In Ontario hospital workers fall under the no-strike and compulsory conciliation model. Municipal ambulance workers in that province may strike subject to essential service designations.[311] Public school teachers in some jurisdictions have unrestricted access to striking (eg, Federal and Ontario), while those in other provinces are subject to essential service limits on work stoppages (eg, British Columbia and Quebec).[312]

---

308 *Ibid.*

309 *Ibid.*

310 *Ibid.*

311 Vargha ILO Presentation *Comparative Law and Practice.* A presentation made to the PSCBC delegation from South Africa to the ILO.

312 *Ibid.*

6 7 USE OF INTEREST ARBITRATION

Many provinces in Canada have a widespread restriction or ban on work stoppages. In such cases mandatory or voluntary interest arbitration are a common feature of Canadian public sector labour relations. This is generally in the form of conventional arbitration rather than alternatives, such as final offer selection.[313]

Although compulsory arbitration avoids work stoppages, research demonstrates that it also tends to have some negative consequences: settlements are delayed, and, rather than being expressed through strikes, conflict generally reappears in different forms, such as grievances. There is also some evidence that arbitration is associated with a small wage settlement premium.[314]

The use of interest arbitration to resolve impasse in public sector negotiations poses a dilemma for governments, especially at senior levels. While these governments are often reluctant or unwilling to permit work stoppages in sectors such as health or education, they are also distrustful of intervention by an independent third party arbitrator and unwilling to relinquish control over what may be a very costly collective settlement.[315]

Governments' discomfort with strikes has also prompted them to restrict work stoppage activity short of imposing a ban by legislating essential service limits. Essential service designation legislation tends to require parties to reach an agreement, in advance of collective agreement expiry, on the level of service that will continue to be provided in event of a strike or a lockout. Where parties cannot agree, the labour relations board issues an essential services order.[316]

313 *Ibid.*

314 Thompson and Slinn "Public sector industrial relations in Canada: Does it threaten or sustain democracy" in *Comparative Labour Law & Policy Journal*.

315 *Ibid.*

316 *Ibid.*

6 8 HOW HAS THE ILO DEALT WITH COMPLAINTS FROM CANADA

Several complaints have been filed with the ILO in respect of legislation passed in some Canadian federal states to declare education an essential service. This was seen in British Columbia when the government introduced Bills 27 and 28[317] that imposed a wage freeze with no cost-of-living increase, the elimination of all class-size, staffing and workload provisions and the elimination of provisions guaranteeing support for special-needs children in 2001.[318]

The legislated contracts that were imposed by the British Columbian government were found to be in violation of labour rights, both at a Canadian and international level. The Freedom of Association Committee of the ILO ruled that the Canadian government was in breach of international treaties.[319] Even the Supreme Court of British Columbia ruled Bill 27 and 28 unconstitutional and invalid, indicating that the bills impeded the right to free collective bargaining as guaranteed by the Charter of Rights and Freedom of Association.[320] Yet in response to this the British Columbian government chose to defy Canadian and international law by replacing Bills 27 and 28 with Bill 22 called the Education Improvement Act. This bill strips teachers of their right to strike, their right to withdraw any non-contracted services within the workplace and their right to bargain for working conditions and class composition.[321] This has been an ongoing fight between the British Columbian Teachers' Federation and the British Columbian government for the past decade.

In another case in Ontario, the Education International (EI) acting on behalf of the Ontario Teachers Federation (OTF) complained to the ILO that the Government of Ontario had adopted back-to-work legislation in the form of the Education and

---

317 BC Teachers "Federation can't translate court victory into progress at the bargaining table" http://www.straight.com/news/bc-teachers-federation-cant-translate-court-victory-pro... (accessed on 2013/10/30).

318 *Ibid.*

319 Support BC teachers: Bill 22 is a threat to collective bargaining for all unions http://www.marxist.ca/canada/bc/743-support-bc-teachers-bill-22-is-a-threat-to-collc... (accessed on 2013/10/30).

320 *Ibid*.

321 *Ibid.*

Provincial Schools Negotiation Amendment Act of 2003 (Bill 28).[322] This was the fifth time that the government had passed such legislation in a space of five years.

The ILO responded by indicating that the reasons of the Ontario government for restricting the right of teachers to strike was not justified unless there was danger to life, personal safety or health.[323] It also referred to an earlier case in which it has explicitly said that the possible long-term consequences of a teachers' strike did not justify prohibiting such a strike.[324] The Committee strongly requested that the government establish a voluntary and effective dispute prevention and resolution mechanism and asked to be kept informed of what government had done in this respect.[325]

6 9 GERMANY

Germany was chosen as a country for comparative study because it was one of the countries visited by a delegation of South African public servants representing the employer and trade unions in the Public Service Coordinating Bargaining Council (PSCBC) during a recent study visit to establish benchmarked standards for minimum services. The study visit took place during September 2013.

The purpose of the study visit was to engage the ILO at its Headquarters in Geneva on trends in the public sector, looking particularly at determining minimum services in the public sector in South Africa. Examples of various member states of the ILO were examined to have a better understanding of essential services and minimum service level agreements in other countries. The delegation also visited Berlin, Germany to have a closer look at their public service.

322 Definitive Report No 2305 (Canada) November 2004 http://www.ilo.org/dyn/normlex/en/f?p+1000:50002:0::NO:50002:P5002-COMPLA (accessed on 2013/09/02).

323 *Ibid.*

324 *Ibid.*

325 *Ibid*.

6 10 REFORMS IN GERMANY

There are many aspects of the German public administration that has been emulated by South Africa. The principles of encouraging loyalty and rewarding this was taken from the German public service model and established in the South African public service well before 1994.

The German public service has its roots in the 18th century when the servants of the ruler became the servants of the state. The personal attachment to the monarch or ruler was expanded during this time to include the good of the state.[326] The idea of the good of the state contributed to the particular self-image and professional role model of Germany's public service.[327] This laid the basis for the manner in which the public service evolved in Germany and the legislation that was passed to determine labour relations.[328]

During the 1980's numerous reforms became a new trend in the public sector throughout the world. These reforms promoted efficiency in the public service and underpinned structural adjustment programmes that began in the 1980's.[329] Furthermore, with the formation of the European Union in 2000, together with the impact of globalization, the model of labour relations changed across Europe.

Germany is characterized by strong labour market institutions with effective regulatory mechanisms in place that govern collective bargaining.[330] However, the reunification of Germany introduced profound challenges for the country's labour relations system, especially public service labour relations.[331] The reunification coincided with the country's public service reforms, which focused on privatizing certain public enterprises.[332] The public service has been seriously affected by these

---

326 *The Federal Public Service* Published by the Federal Ministry of the Interior, Berlin (2009) 32. http://www.bmi.bund.de.

327 *Ibid*.

328 *Ibid.*

329 Giuseppe and Tenkorang *Public Service Labour Relations: A comparative overview* (2008) Dialogue Paper No 17 ILO Publication.

330 *Ibid.*

331 Giuseppe and Tenkorang *Public Service Labour Relations: A comparative overview* 20.

332 *Ibid.*

changes and was forced to reduce the levels of administration that resulted in the reduction in the number of working posts in the public service.

6 11 HOW DOES LABOUR RELATIONS POLICIES WORK IN GERMANY

The Constitution and the Collective Agreement Act are the most important legislation that governs the system of labour relations in Germany.[333] Workers are guaranteed the right to freedom of association and collective bargaining through the Collective Agreement Act which serves to regulate the labour relations activities of social partners.[334]

Germany is highly unionized with the majority of their employees belonging to unions. At the enterprise level Works Councils are established where collective bargaining takes place. Negotiations are mainly bipartite, between the Works Council or Staff Council and the government representative at the enterprise level.[335]

There are two distinct categories of workers within Germany's public service. The first are the civil servants ("beampte") of the federal Union, who work in all three tiers of government. They are nominated officials and their status is governed by statutes and laws and is not determined by a labour contract.[336] The second category of workers comprises employees of the federal Union, who work in all three tiers of government. Their employment relationship is determined by a labour contract.[337]

6 11 1 CIVIL SERVANTS

Every German employee in the public service aspires to be a civil servant and less than 50% of the public service has this status.[338] Civil servants' conditions of service are determined by the federal Union. The state has the sole legislative power to enact conditions of career, pension schemes and remuneration relating to civil

333 Giuseppe and Tenkorang *Public Service Labour Relations: A comparative overview* 21.
334 *Ibid*.
335 *Ibid.*
336 *Ibid*.
337 Giuseppe and Tenkorang *Public Service Labour Relations: A comparative overview* 22.
338 Giuseppe and Tenkorang *Public Service Labour Relations: A comparative overview* 23.

servants.[339] The reason why most German employees aspire to be civil servants is because they have better benefits and security of tenure because the state rewards loyalty in this way.

6 11 2 OTHER GERMAN PUBLIC SERVANTS

Employees without civil servant status work within the administration in all three tiers of government. They have the right to bargain collectively in terms of the Collective Agreement Act, 1949.[340] The collective agreements are determined for public servants at two levels: for those who work at the communal level ("Tarifvertrag fur den offentlichen Dienst") and those who work for the public service of the states ("Tariefvertrag fur den offentlichen Dienst der Lander").[341] These are major collective agreements that govern the conditions of employment of all public servants without civil status.

6 12 COLLECTIVE BARGAINING IN GERMANY

Collective bargaining in the public service is centralized in Germany. Collective bargaining negotiations are coordinated in order to ensure uniform agreements for employees within a sector.[342] After negotiating a collective agreement at the central level then it is implemented at the enterprise level. The majority of collective agreements are flexible, focusing on finding a balance between job security and productivity, but also cover explicit issues of wages, working hours, hiring and termination of employment and other conditions of service.[343]

6 13 DISPUTE RESOLUTION MECHANISMS IN GERMANY

All public service employees, except civil servants, have the right to strike in order to gain more favourable wage increases and better conditions of service. Strikes are

339 *Ibid.*
340 *Ibid.*
341 *Ibid.*
342 *Ibid*.
343 Giuseppe and Tenkorang *Public Service Labour Relations: A comparative overview* 24.

strictly reserved for achieving one major objective; to have a collective agreement on an issue involving conditions of employment.[344]

German labour law does not impose compulsory arbitration on the parties to settle disputes between social partners. As a result of this, the parties have no obligation to reach an agreement in the course of dispute settlement. Concrete efforts are therefore made by the parties during negotiations to resolve conflict through arbitration to prevent industrial action.[345]

6 14 WHAT DID THE PSCBC STUDY VISIT FIND?

The PSCBC visited the ILO Headquarters in Geneva, as well as Berlin, Germany in September 2013. The discussions during the visit focused on benchmarking labour standards and examining minimum service level agreements in other member states. They also had discussions on approaches to collective bargaining that could be more beneficial to the parties, taking cognizance of emerging trends in Europe that could affect other economies in the world.

They found that member states of the ILO are in agreement that public sector relations are key components of a comprehensive network of social relationships and institutions.[346] Furthermore, there was agreement that the political arena defines the rules and priorities, quality standards and resource distribution, while the administrative arena is responsible for implementing policy objectives.[347]

The delegation also established that there are common areas of elements and sequence that collective bargaining and dispute resolution revolves around.[348] These includes the foundations of social dialogue and stakeholder recognition; dispute prevention that involves joint research and training, productive bargaining, joint problem solving that extends to effective change management, maintenance

344 Giuseppe and Tenkorang *Public Service Labour Relations: A comparative overview* 28.

345 *Ibid.*

346 Carrion-Crespo A presentation to the PSCBC delegation at the ILO Headquarters (2013) Geneva.

347 *Ibid.*

348 *Ibid.*

agreements and peace obligations; dispute resolution that includes dispute resolution agencies, facilitated sessions, conciliation and arbitration and voluntary or compulsory arbitration.[349]

Valuable insight was gained on how to move from positional bargaining to a more mutual gains approach to bargaining. This, however, would require changing mindsets where governments should respect the representative role of trade unions flowing from the principles of freedom of association; whilst trade unions have to move beyond their traditional role of "defender" to incorporate a role of "contributor to the organization" and then be able to manage dualism.[350]

Furthermore, the study visit gave the South African delegation an opportunity to look at the trends in the public service, especially in Europe, and to consider how this influences what is happening to economies in the world. It is clear that the economic environment in Europe has changed drastically and this has affected the employment environment with the following adjustments: employment practices has moved from a practice of non-replacement to cuts in jobs and changed contracts; basic wages have been cut as well as bonuses and benefits; services have been cut with offices closing, reducing automatic stabilizers.[351]

The impact of the situation in Europe has led to widespread protests, workers are feeling wage penalties, there are inequalities and vulnerable groups are emerging, poverty is becoming more widespread and this has reduced social cohesion, these factors has an indirect effect on working conditions, this has led to transformation of the Public Sector image and the overall industrial relations has been affected.[352]

The emerging factors that are important to note from what has been happening in Europe is that social dialogue remains important and that this kind of engagement can lead to better informed decisions that are more likely to be implemented.[353] Decisions to dismiss many workers should rather be discussed with worker

349 *Ibid*.
350 *Ibid.*
351 *Ibid.*
352 *Ibid.*
353 *Ibid.*

organizations in order to plan for the future. It is also useful to strive for economic stabilization strategies that should prioritize collective bargaining to determine the employment conditions of public servants, rather than to pass legislation to that effect.[354]

The important realization was that given the economic circumstances that affects the world, it is important to consider new means of engagement in collective bargaining, since there are new elements in the Public Service labour relations.[355] It is no longer possible to give minimum guarantees in the employment environment. This would imply that new models of collective bargaining have to be considered that takes on a mutual gains approach rather than the normal positional bargaining approach.[356]

6 15 CONCLUSION

This chapter has looked at the public sector in Canada and Germany. In taking a closer look at both of these countries, it has become clear that while strikes continue to form an essential ultimate tool for employees to improve their conditions, greater attention needs to be paid to the rights of ordinary citizens to pursue their daily lives unhindered and to the right of society to protect their well-being and its own essential functioning.[357]

We have also seen that while there is consensus that the right to strike is indispensable for the exercise of workers' economic and social rights, there is an ongoing debate about the need to strike a balance between the protection of these rights and the need to guarantee essential public services in order to safeguard citizens and their well-being.[358]

---

354 *Ibid*.

355 *Ibid.*

356 *Ibid.*

357 The right to strike in essential services: economic implications http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10894&Language=EN 1 (accessed on 2013/08/29).

358 The right to strike in essential services: economic implications http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10894&Language=EN 3-4 (accessed on 2013/08/29).

In the case of Germany, there is a strong culture in social dialogue between the parties in an endeavor to reach a compromise with a real wish not to take recourse to the ultimate weapon of strikes. As a result they have relatively few disputes and unions (which are large) are well integrated into the bargaining process.[359] There is a quest for social harmony and strikes have to be preceded by negotiations, during which only warning stoppages are possible. When negotiations reach a stalemate then an arbitration process has to be followed before a strike can be called. Even then a strike can only take place if three basic principles have been adhered to: social order, proportionality and fairness.[360]

This means that unions must represent at least 75% of employees in order to be able to call a strike and must see to it that it remains proportionate to the objectives.[361] Besides these three principles, only workers who have belonged to a union for at least three months have the right to strike and the unions have to pay strikers at least two-thirds of the amount of their withheld salaries which can be a huge expense for a union.[362]

In the case of Canada, there is an equally strong culture of social dialogue between parties. This is mostly in bipartite discussions between unions and the employers.[363] The trends in Canada on collective bargaining in the public service have completely shifted from decentralization to centralization, whilst the opposite was experienced in the rest of the world in the 1990s.[364] This shift can be attributed to public sector restructuring and reflects governments' decisions to substantially cut down on expenditure in order to ensure fiscal stability.[365]

---

359 *Ibid*.

360 The right to strike in essential services: economic implications http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10894&Language=EN 4 (accessed on 2013/08/29).

361 *Ibid.*

362 The right to strike in essential services: economic implications http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10894&Language=EN 5 (accessed on 2013/08/29).

363 Casale and Tenkorang Public service labour relations: A comparative overview 38.

364 *Ibid.*

365 *Ibid.*

This Canadian model of collective bargaining is similar to the South African model of collective bargaining in the public sector.

What is interesting about the Canadian model of collective bargaining is that whilst public service employees have, in principle, the right to strike; in reality there were many instances where the right to strike was denied and legislation was unilaterally passed by the federal governments of Canada, forcing striking workers to return to work.[366] The effect of these decisions of government continues to narrow the basket of bargaining issues in the public service and legislation has been used by government to determine the contents of collective agreements whilst they threaten reforms such as privatization, contracting-out, and cutbacks of programmes to weaken public sector labour unions.[367]

Canada is an example where education has been declared an essential service when governments have passed legislation forcing teachers back to work. Although the trade unions have complained to the ILO, who in turn have ruled in favour of the trade unions that education does not fall into the category of an essential service; this has not stopped the Canadian government from continuing to pass legislation that denies teachers the right to strike.

The PSCBC study visit was also successful in so far as it established was are current trends in labour standards among the ILO member states, understood what was happening in the public service in the world in respect of common issues and looked at possible models of minimum service level agreements in essential services. Consideration was given to education and the extent to which it was possible to declare education as an essential service. The ILO clarified that education could not be seen as being life threatening and therefore did not meet the definition of essential services, despite there being agreement that the nature of education may be important and any disruption to this may be tampering with the future of learners.

366 Casale and Tenkorang Public service labour relations: A comparative overview 41.

367 *Ibid*.

CHAPTER 7
CONSIDERATIONS FOR EDUCATION AS AN ESSENTIAL SERVICE

7 1 INTRODUCTION

One of the questions that this treatise sets out to answer is what measures the South African government needs to put in place to ensure that the fundamental right to education is not compromised. Consideration of intervention measures have become necessary based on the number of labour disruptions in education since 2007, as well as the declining results on learner achievement that falls below international benchmarks. This has raised concern among all education stakeholders and the community at large that South African learners are not sufficiently prepared in literacy and numeracy to hold their own against learners in other countries. As a result of this our learners will not be able to compete successfully in a global society. The poor performance of South African learners against international standards and the ongoing labour disruptions experienced in education indicates that there is a need to balance the rights of educators with the right to education.

Although the public sector has not experienced many formal protected strikes, two strikes stand out in history to raise the issues that urgently need to be dealt with in relation to the right to strike.

2007 saw the biggest and longest strike in the public sector. This strike was carried by teachers who form the largest group of workers organized in the public sector. This strike lasted for 28 days and left learners seriously compromised in learning opportunities.[368] Not surprisingly, this was reflected in the matric results of 2007 which showed 65% pass rate.[369] This was a 2% drop from the 2006 results.[370]

In 2010 the public sector experienced another strike. This strike lasted for 16 days and witnessed the introduction of large scale participation by essential workers. This strike was the most violent with patients caught between the fracas of nurses and

368 DBE Source Strike Stats for 2007.
369 DBE Source Matric Results 2007.
370 DBE Source Matric Results 2006.

doctors and teachers beating up students and parents alike.[371] These images shocked the State and South African society alike and led to many questioning the rectitude of our laws to merge public and private regulation.[372]

Chapter 3 of this treatise has already indicated that the LRA recognizes that workers have the constitutional right to strike, but it is subject to limitations. Included in these limitations is that persons performing essential services are not allowed to strike. These limitations, as set out in section 36 of the Constitution, were a means of balancing the constitutional rights of public sector workers with the rights of citizens to receive public services.

Chapter 4 has highlighted the rights of children and the fact that the Constitution provides for the best interest of the child to be considered at all times.

Chapter 5 considers how important education is as an essential priority and what needs to happen in certain areas of education so that parts of it could be considered as an essential service. This chapter proposes that principals and deputy principals should be declared "in the authority of the state". Furthermore the chapter identifies that certain categories of teachers, especially those responsible for nutrition programmes and administration of health-care, should also be regarded as being part of the essential services.

This implies that there is a need for the social partners in the public sector to develop a minimum service level agreement for the public service that defines which services will be considered the minimum services that the public can expect to be available when the public sector embarks on a strike. This would include certain categories of workers in education as has already been mentioned.

Since the bargaining on matters that affect the entire public service occurs in the PSCBC, both the employer and the trade unions as parties to the bargaining council,

---

371 DPSA Source *Employer overview of expectations regarding Minimum Service Level discussions with the ILO* (2013) A presentation on the contextual factors for the study visit to the ILO in September 2013.

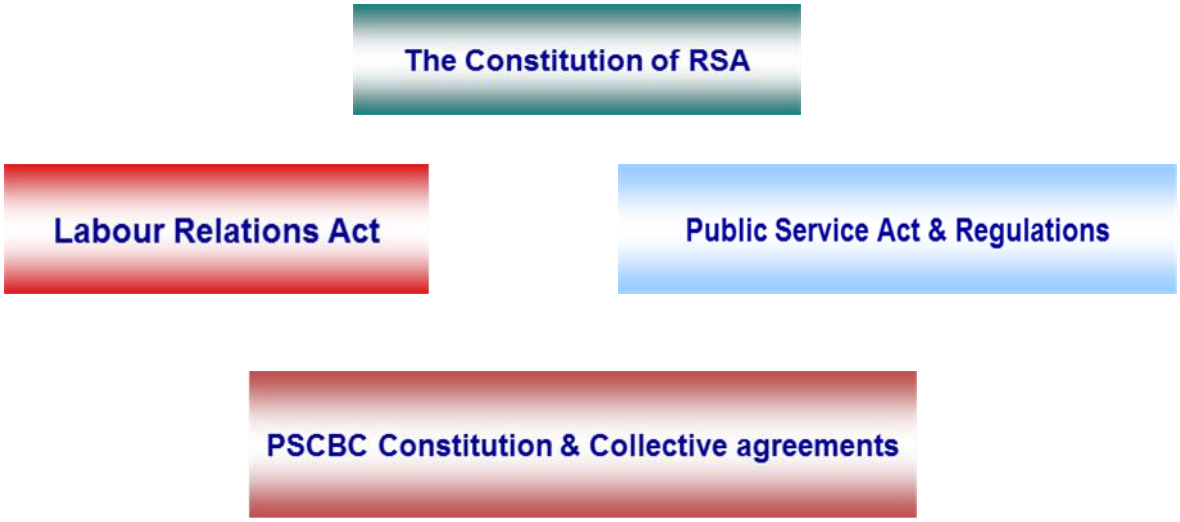
372 *Ibid.*

would have to consider developing a minimum service level agreement that defines what areas of service can be expected in the public service during a period of strike.

7 2 BARGAINING ARRANGEMENTS IN SOUTH AFRICA

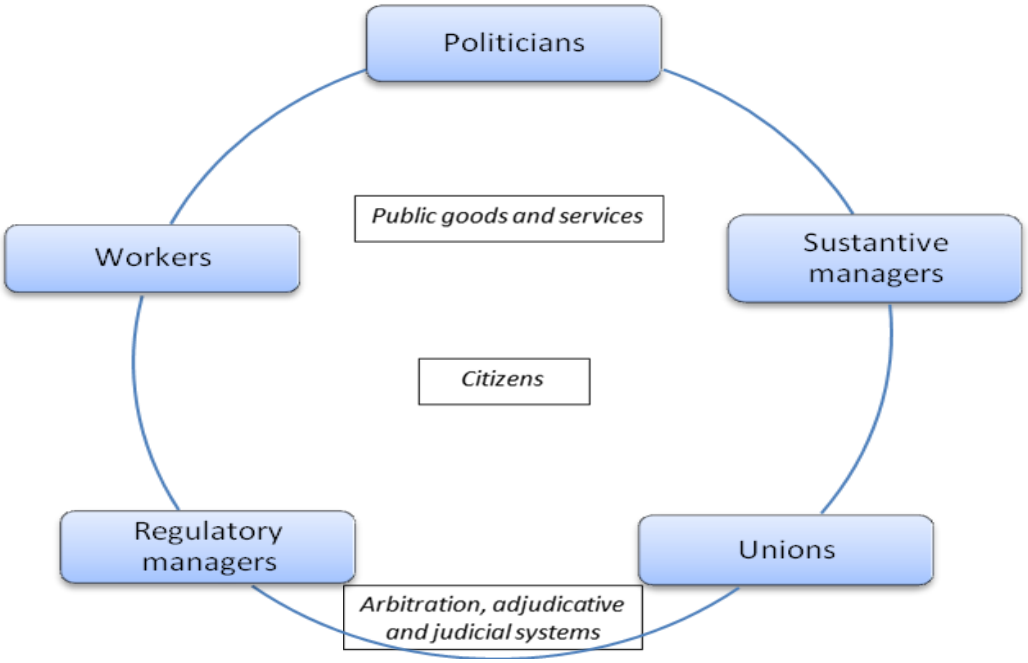
It is important to understand the legislative mandate that relates to the bargaining arrangements in South Africa. The flow chart below unpacks this:[373]

Legislative Mandate



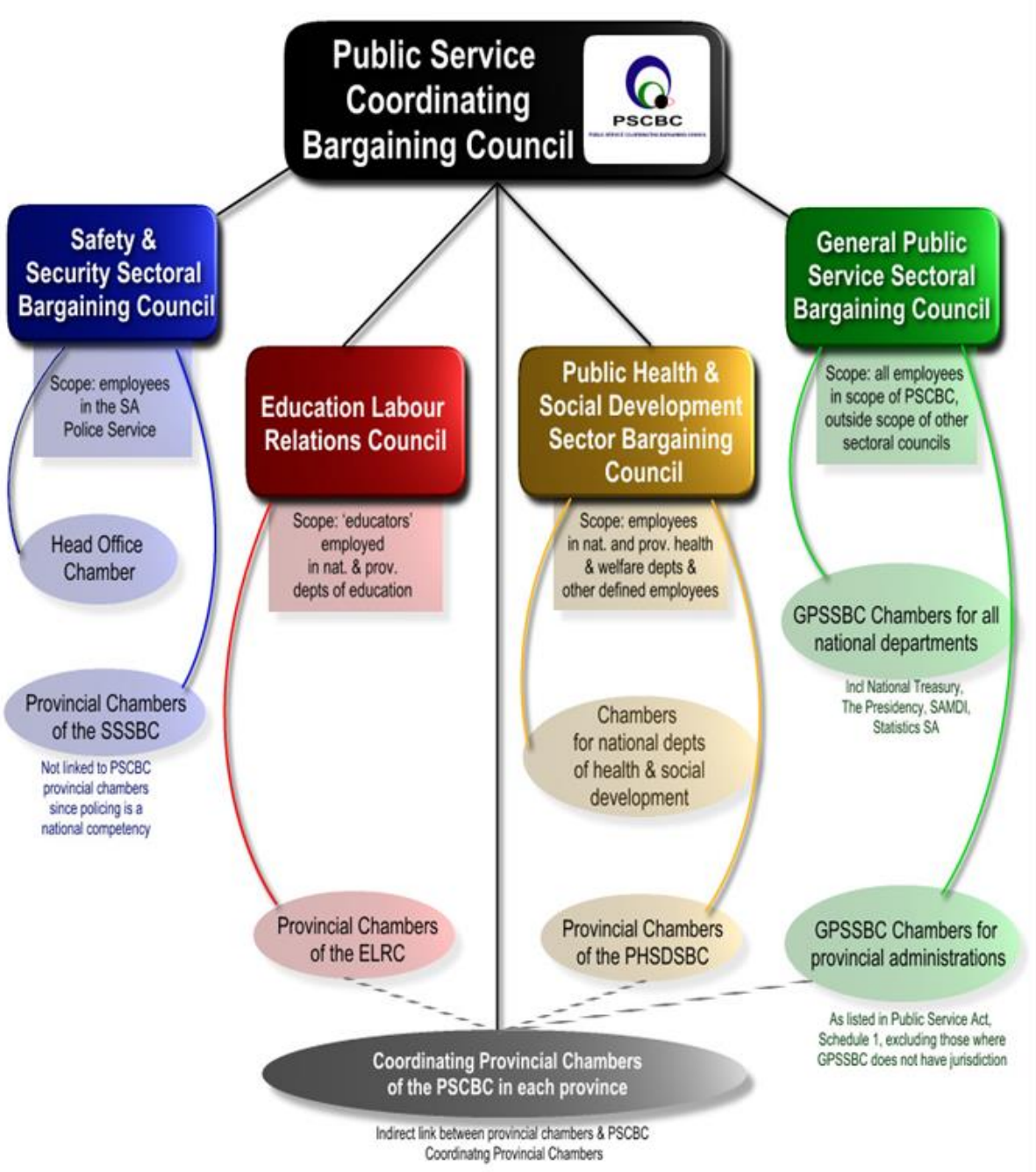
373 De Bruin *The State of Collective Bargaining* (2013). A presentation by the PSCBC to the ILO in September 2013.

Collective bargaining does not occur in isolation, but has a number of actors who participate or are affected by this process. The ILO's flow chart of the actors at play is useful to understand the environment:[374]



374 Carrion-Crespo *Dispute resolution practices in a comparative perspective* (2013) ILO presentation to the South African delegation of the PSCBC in September 2013.

Furthermore, the following flow chart explains the composition of the PSCBC together with the sector councils:[375]



375 De Bruin *The State of Collective Bargaining.*

The model for collective bargaining in the public sector is centralised. The Constitution provides for a single public service. Collective bargaining takes places in the PSCBC where the State as employer is represented by the Department of Public Service and Administration (DPSA) as the lead department, supported by the sector national departments such as education, health, police and the provincial administrations. The employer takes a mandate from the Mandating Committee which is established in terms of the Public Service Act. The Mandating Committee is chaired by the Minister of Public Service and Administration and has Ministers of Finance, Education, Health, Justice, Police, Home Affairs and Correctional Services as its members. The PSCBC is concerned with bargaining on transversal matters that affect all public servants and will bring about the general improvement of conditions of service in the public sector.

Before the State can enter into a collective agreement concurrence must be reached in the Mandating Committee on the affordability of a proposed agreement. Should there not be sufficient funds available for the State to effect the suggested improvements, then the State's negotiators may not reach an agreement in the bargaining council. The issue of funding is an important aspect of the bargaining process in the public service, since the State is dependent on public revenue received through tax collection that will determine the amount of funds that is available to the State.

Unlike in the private sector, where wage increases and other improvement of conditions of service is determined based on company profits, the State determines is budget based on revenue collected. Adair explains that the State, as employer, has distinctive characteristics that are not shared by the private sector.[376] The most obvious distinctions include:

- The rationale for decisions being ideological, political and social, rather than market driven;

---

376 Adair *Collective Bargaining in the South African Public Sector* (2009) 2 http://www.barbara-adair.co.za/2009/07/collective-bargaining/ (accessed on 2013/11/23).

- The fact that the state is a single employer, although it is made up of different departments and components; and

- The necessity for transparency and accountability in decision making.[377]

Adair makes a further interesting point by explaining that in a state controlled bureaucracy the traditional relationship between capital and labour is absent.[378] She explains that managerial power derives, not from ownership of capital, but from a hierarchy of authority that is set out in legislation.[379]

Adair's observations are correct since the employment practices in the public sector are characterised by direct public sector production of services, organizational hierarchies, rule bound or standardised work processes and central determination of terms and conditions of employment by the employer.

7 3 BUDGET IMPLICATIONS TO THE BARGAINING PROCESSES

Since most of the public sector strikes were caused by the trade unions unhappy with wage increments, it would be important to understand the budgetary processes of the state. In terms of the Constitution, all legislation that deals with the budget is passed in the National Assembly and the National Council of Provinces (NCOP) of Parliament. There is little room for legislative interaction in the budget process, since Parliament sees the budget for the first time when the Minister of Finance tables it. Although the Portfolio Committee of Finance and the Portfolio Committees for the national departments have an opportunity to interrogate the allocations after the Minister has tabled the budget, they do not have the power to amend the actual budget.[380]

The difficulty with which the budget vote is tabled and the bargaining processes in the PSCBC of wage increments is that the Minister of Finance makes an

---

377 *Ibid.*

378 Adair *Collective Bargaining in the South African Public Sector* (2009) 2 http://www.barbara-adair.co.za/2009/07/collective-bargaining/ (accessed on 2013/11/23).

379 *Ibid*.

380 Adair *Collective Bargaining in the South African Public Sector* (2009) 10 http://www.barbara-adair.co.za/2009/07/collective-bargaining/ (accessed on 2013/11/23).

announcement on how much is set aside for wage increments before the wage negotiations are concluded. Adair explains that any further increases, other than those already established in the budget must either be appropriated from the departmental and provincial votes of funds or by passing budget adjustments in the form of allocations from the Treasury.[381]

The statements of Adair are astute on the budget process of government and it is this very issue that underpins the wage negotiations in the PSCBC and has led to the strikes in the public sector. The trade unions have raised that the manner in which the budgetary allocations are finalised leaves little for collective bargaining other than to negotiate over the distribution of the funds available and not over the amount of funds available. On the other hand critics of the labour movement have pointed out that they have two bites at the cherry: they are represented in Parliament as South African citizens and are able to influence the budget vote through their elected representatives, while at the same time having collective bargaining rights which influence the parliamentary process.[382]

The manner in which the budgetary processes are set up in South Africa and the recurring strikes about wage increments have led to two critical questions being asked by Adair:

- should the way in which collective bargaining is managed be determined by different laws that establish management authority in the public sector that decentralises collective bargaining to the executing authorities in national and provincial departments; and/or

- should collective bargaining be determined in accordance with those principles set out in the LRA generally, namely the organization of labour relations in accordance with the establishment of sectors which are organised along industrial lines.[383]

---

381 *Ibid.*

382 Adair *Collective Bargaining in the South African Public Sector* (2009) 12 http://www.barbara-adair.co.za/2009/07/collective-bargaining/ (accessed on 2013/11/23).

383 *Ibid.*

The questions Adair raises are valid in rethinking how the public service may be reorganised as a means of avoiding one large strike that involves all public servants with different vested interests. The questions may lead to a more decentralised arrangement that would allow the sector councils to reach agreements that are more specific to the interests of a sector and this may limit the strikes from occurring in such a sporadic way.

7 4 MINIMUM SERVICE LEVEL AGREEMENTS

Chapter 2 and Chapter 3 of this treatise has looked at minimum services both from an international and national perspective to appreciate what are the standards that need to be developed in the identification of minimum services.

It is important to understand that the public service, unlike the private sector, is there to provide services to the general public. This creates an expectation of a certain level of service to be available to the general public at all times. The ILO has set out the situations and conditions in which a minimum-service requirement may be imposed. Chapter 2 has already clarified that services whose suspension might endanger life, safety or health and which are essential in the strict sense of the term may not strike.

The ILO has also clarified that where the scale or duration of a strike may cause a national emergency, threatening normal living conditions or where the services are of prime importance it would be important in such circumstances to identify what the minimum services would be and the number of workers who are needed to provide them.[384]

The idea of minimum services is an important consideration for the public service in South Africa. It is not intended to weaken a strike by neutralising its impact. Unions must therefore not be left with an impression that a strike has failed because the minimum services was too extensive or was set up unilaterally.

---

384 Crema *The right to strike in essential services: economic implications* (2005) 8 http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10894&Language=EN (accessed on 2013/08/29).

Crema makes an interesting point when he says that not all strikes in the public service create the same level of inconvenience or take the place in key sectors. The impact on the community depends on the usefulness of the goods or service provided and whether there are alternatives to the goods and service concerned and at what cost.[385] This is particularly true when examining the South African situation regarding education. As has already been explained in chapter 5, there is wide-scale impression that the rights of learners need to be balanced against the rights of teachers. This is because of the value added to improving learner performance in our education system so that our learners can be developed into meaningful citizens. It is therefore obvious that when teachers go on strike, the inconvenience of what society feels is measured against the value felt at the loss of education. The longer the strike lasts, the more the value of the loss of education is measured. This is a huge price for society to pay because when learning is compromised that leads to a drop in learner performance. The effect of this action can also lead to losing a generation of learners in terms of the competency levels that they leave the schooling system with. It is therefore important to consider what is possible about identifying minimum service level arrangements in education and to identify which staff will be available during a strike.

Brand explains that the LRA makes provision for employers and unions to agree to maintain something less than the whole essential service, or to maintain the whole essential service with a reduced number of staff, but this has to be subject to the overriding supervision of the ESC.[386] This action essentially shrinks the essential service to become a minimum service where only the minimum service workers are not allowed to strike.

Workers who are declared part of a minimum service are entitled to compulsory arbitration and the ruling of such an award is final and binding on the parties. The arbitrator is required to supplement the bargaining process for workers in the minimum service by striking a fair and equitable deal for the parties which they are

385 *Ibid*.

386 Brand *Essential Services and the Implications of Minimum Service Agreements in the Public Service* (2013) 6.

unable to do for themselves.[387] The arbitrator has the serious task of taking into account the arguments that the parties make during the arbitration, consider what is workable, the ability to pay, the prevailing practice in the industry, cost of living indices, previous practice, competition, productivity, public interest, supply and demand and internal and external comparisons and equity.[388]

Brand points out that it is difficult to understand why any union would want to designate a minimum service because it can seldom serve workers interests to have a service designated as a minimum service.[389] By definition the minimum service must be one that enables the delivery of the essential service. Brand explains that the right to strike would then only apply to the workers who are not needed to keep the essential service running effectively, who would strike on behalf of the non-strikers who would keep the service fully operative. Such an arrangement would put very little pressure on the employer to settle and the strike would be likely to fail.[390]

Since the LRA came into effect, no minimum service agreement has been entered into and ratified by the ESC. Brand offers two reasons for this: trade unions are reluctant to endorse strike action that has the effect of dividing the workforce between those who may strike and those who must continue to work. The real effect of such an arrangement would mean that there would be those who continued to earn a salary during a strike and then those who would lose a salary because of the full effect of no work no pay deductions.[391] Employers on the other hand also have not been willing to conclude minimum agreements because in their absence a larger proportion of workers are precluded from striking.

However, in the public service in South Africa, this has not stopped the essential service workers from participating in strikes as can be seen from the 2010 strike. This is because unions are aware that strike action by essential workers, even though this

---

387 Brand *Essential Services and the Implications of Minimum Service Agreements in the Public Service* 4.

388 *Ibid*.

389 Brand *Essential Services and the Implications of Minimum Service Agreements in the Public Service* 7.

390 *Ibid.*

391 *Ibid.*

is unprotected, places significant pressure on the employer, especially if they are also part of scarce and critical skills which South Africa really needs.

Furthermore, the ESC must have the agreement of all parties before it may ratify a minimum service agreement. It is by no means easy to identify how many workers are required to maintain a minimum service and that is the main reason why no such agreement could be concluded. Brand therefore offers interest arbitrations as an alternative since he believes that there is more to gain in this approach as the strike option is really an empty and inappropriate one for the public service.[392]

7 5 CONCLUSION

This chapter has reflected on previous chapters to understand what considerations can be made in an essential service. Special consideration was given to education in respect of the specific considerations that has evolved there.

The bargaining arrangements in the PSCBC have been examined as well as understanding the legislative mandate and the stakeholders who are involved in bargaining. Furthermore an explanation was offered on the budgetary processes that affect bargaining and what considerations can be given to alternative arrangements.

Lastly, the chapter has examined the possibility of a minimum service level agreement and the reasons why both the employer and trade unions are reluctant to enter into such an arrangement.

---

[392] Brand *Essential Services and the Implications of Minimum Service Agreements in the Public Service* 9.

CHAPTER 8
CONCLUSION

19 years into a democratic South Africa, the landscape has changed fundamentally since we gained independence in 1994. Much of these changes are accredited to the transformative agenda that the ANC-led government implemented since coming into power. The Constitution of the country has laid a solid basis of human rights for all citizens to give meaning to the ANC's vision of "a better life for all".

The advancement of human rights such as dignity, equality, freedom of association, non-racialism and non-sexism is firmly entrenched in our country's legislation. Furthermore, the Constitution guarantees all citizens rights to fair labour practice, housing, safe environment, education and health.

These are all positive attributes in a broad sense that should set South Africa on a path of success that allows its citizens to finally participate in a global society beyond what was possible during the apartheid period. Yet this is not fully possible when we critically exam how well South Africa is doing against neighbouring countries in Africa and the wider global society. Whilst we are well located economically and have good infrastructure, mineral resources and a good climate for produce to reach the export market, we are lacking in developing a generation of learners with sufficient skills to compete in the open market.

When comparing our learners' performance with poorer countries in Africa, they score far less in international tests than countries like Botswana, Ghana, Kenya and Zimbabwe. This has been one of the main arguments that have been explored in this treatise. Right at the onset this treatise makes the point that there is a strong view in South African society that education is in a crisis and that one of the contributing facts is that the right of teachers to strike has not been balanced with the right that learners have to education. The number of strikes experienced in education, the rate of teacher absenteeism, the lack of professionalism of some teachers, plus the extent to which communities have prevented learners from attending school to make demands on service delivery in local municipalities have led to a call by the ANC

government for all stakeholders in education to come together and ensure that they commit to making it an essential priority that will ensure that our learners get a better chance at improving their performance.

2013 was started with a debate on whether education should or could be declared an essential service. The introduction to this treatise has adequately sketched this background and how the government has clarified its position to indicate that they will not declare education an essential service. This decision has been informed by government's commitment to the ILO as a member state and its intention to honour the conventions and recommendations that it ratified with the ILO.

Despite this clarification by the government, South Africa still faces the problem that there is no balance between the right to strike and the right to education and some urgent intervention needs to rake place to restore the balance and ensure that the best interest of the child are protected. The key question that needs to be answered is what form would that intervention take by the ANC-led government?

This treatise has looked at what the international labour standards provided by the ILO in Chapter 2. It has also taken into account the legislative framework in South Africa and the various laws that have been passed to give effect to our Constitution in Chapter 3. Particular focus has been given to the limitations that can be placed on the right to strike in terms of section 65 (1) of the LRA. Furthermore, the treatise has explored what the essential service and minimum services are and whom they apply to, drawing from international standards of the ILO.

The treatise then focuses on education as a human right and looks at the various role-players that make up a school in terms of learners and teachers in Chapter 4. This chapter explores the extent to which there can be a balance between the rights of children against the rights of teachers by studying relevant case law.

Chapter 5 looks at the duties and responsibilities of teachers and principals. It concludes that principals and deputy principals are entrusted with authority by the Head of the Provincial Department of Education and as such are in the authority of the state. Based on this, the treatise proposes that they be declared as essential

services and be added to the list of those who may not strike in South Africa. This proposal is informed by the findings of the ILO that principals and deputy principals are categorised as being in the authority of the state.

Chapter 6 provides lessons from two countries, namely Canada and Germany who have many similarities with South Africa. These two countries have an advanced public administration and strikes in education are very rare. What is clear from the comparison is that civil servants are highly incentivised and job security is a key incentive that motivates civil servants to perform their duties loyally to the state. In cases where a strike does occur, Canada in particular does not hesitate to use legislation to bring the strike to an end by citing that a prolonged strike will endanger the safety of learners and the school environment. This raises the question of how long should a strike in education last before government intervenes to declare that the situation has reached a point where the safety of society is threatened and as such should be declared an essential service.

Chapter 7 explains what the bargaining process is in the public service. It explores the manner in which the budgetary processes work in the public service and highlights that there is a disjuncture between the budgetary processes and the bargaining process which makes it difficult for workers to get more than what is in the budget. This raises the question of whether public servants should be treated the same as the private sector and whether the same labour laws should apply to both sectors. Finally the chapter looks at the possibility of developing a minimum service level agreement that has the effect of identifying which workers need to provide minimum services, how many workers this will be and has the overall effect of shrinking an essential service.

The question that remains to be answered is what options the ANC government has to put in place measures that will ensure that education is indeed an essential priority in South Africa. The following proposals are submitted for consideration:

- Develop a minimum service level agreement in the PSCBC that outlines all the minimum services that should be in place in each of the sectors in the event of

a strike. This will include the education sector and cover which services should be in place in schools during a strike.

- The minimum service level agreement will indicate that principals and deputy principals are in the authority of the state and would therefore be the minimum service that will be provided in all schools in South Africa. This will be in respect of all 27 000 schools in the country. Their responsibility during a strike would be to ensure that the best interest of the child is protected and that learning is not compromised in any way during a strike. They will also provide reliable information to the employer on who is on strike in order to effect no work no pay deductions and keep the schools open so that departmental officials may visit and check that the information provided is correct. Furthermore, should there be any activity at the school by striking teachers, then the principal and deputy principal has the responsibility to ensure that striking teachers follow the rules of a strike as outlined in the education department's Strike Management Plan. The prime responsibility in this respect will be to ensure that the school environment remains safe for the learners.

- The teachers who are responsible for administering school nutrition programmes and health-care programmes should also be identified in the minimum service level agreement as those who may not participate in a strike in order to ensure that learners receive food and health during a strike.

- The minimum service level agreement should also identify how long a strike should last in education before it is considered to be endangering the safety and well-being of the learners. This will include an analysis of the extent to which learners may be unsupervised during a strike and roam around the streets making them vulnerable to be targeted for criminal activity.

- Should the state not succeed in getting a minimum service level agreement signed off in the PSCBC, then it should take the option of applying to the ESC to have the principals and deputy principals declared in the authority of the state and therefore make them part of the essential services.

- In order to entrench the proposals contained in the minimum service level agreement as policy measures, the list of those who may not strike must be amended. Furthermore, the Minister of Basic Education needs to amend the EEA and PAM to indicate that principals and deputy principals are in the authority of the state and to define the precise duties of these officials during a strike. This amendment will also identify what the teachers who administer the school nutrition and health-care programmes need to do during a strike.

The above measures will go a long way in assisting the education sector during a strike. It will help the employer to be more effective in ensuring that no work, no pay deductions are affected. This may limit the easy way in which teachers currently decide to embark on a strike, since they will have to consider the effect of their decisions on their pocket. It will also limit the number of days that teachers utilize for a strike, since the longer they are out of the classroom the more money they are losing in their pocket. Such measures will change the behaviour of teachers to be more creative in how they engage in bargaining processes and will not leave a strike as the first option of resolving an impasse, but rather the last option that will be explored.

The suggested proposals will hopefully have the effect of highlighting the importance of social dialogue between the parties, especially between the trade unions and the employer. Through regular social dialogue the employer has the opportunity to look at improved benefits that will reward their employees. This can take the form of incentives to reward loyalty and performance that increases learner performance in much the same way in which Germany rewards their “beamptes”. On the part of the trade unions regular social dialogue may encourage them to enter into a pact with the employer that guarantees that teachers will be in class, on time and teaching. This will provide a strike free education environment that will be beneficial to all stakeholders in education. Such a pact may encourage the employer to put in place set conditions that will improve the remuneration and conditions of service of teachers in exchange for no disruptions to education by any trade union in the education sector for a set period. This will go a long way to stabilize education and provide an environment that is conducive to teaching and learning. An opportunity to achieve this does currently exist with the establishment of a Remuneration

Commission by the President of South Africa. The pact between the employer and trade unions can become one of the conditions that the Remuneration Commission proposes to the President in order to stabilize the education environment.

The above-mentioned proposals will also help to ensure that the best interest of the learners of looked after. It will help to ensure that the learners' right to education is not badly compromised during a strike since principals and minimum numbers of teachers are then able to put in place some learning programmes, together with the parent community. Although this will not cover the entire curriculum that learners would have been busy with if there was not a strike, it will be sufficient to ensure that at least limited learning is taking place during a strike.

Finally all the proposals above are not so severe so as to render a strike by teachers ineffective, as there will still be sufficient teachers who will be allowed to strike when such a need arises as a means of using force to the employer to improve their conditions of service. A successful education system requires all teachers to be in class, on time, teaching and to achieve the required learning outcomes that increases learner achievement for the success of education. The proposed measures would serve to ensure that the state's responsibility to find a balance between the right to education and the right to strike is found.

BIBLIOGRAPHY

BOOKS

Bendix, S *Industrial Relations in the New South Africa* (1996) Juta Publishers

Brassey, M *Commentary on the Labour Relations Act* (2006) Juta Publishers

Bray, W *Human Rights in Education* (2005) Centre for Education Law and Policy, Pretoria

Cronje, Smith, Brewis and De Klerk *Management Principles: a Contemporary Addition for Africa* (1997)

Du Toit, D; Bosch, D; Woolfrey, D; Godfrey, S; Cooper, C; Giles, GS; Bosch, C and Rossouw, J *Labour Relations Law: Comprehensive Guide* 5th edition (2006) LexusNexis Publishers

Grogan, J *Collective Labour Law* (2010) Juta Publishers

Grogan, J *Workplace Law* 8th edition (2005) Juta Publishers

Joubert, R and Prinsloo, S *The Law of Education in South Africa* 2nd edition (2008) Van Schaik Publishers

Rossouw, JP *Labour Relations in Education: A South African Perspective* 2nd edition (2010) Van Schaik Publishers

Van der Walt, AJ; Le Roux, R and Govindjee, A *Labour Law in Context* (2012) Pearson Education South Africa (Pty) Ltd

Woolman, S and Fleisch, B (eds) *The Constitution in the Classroom: Law and Education in South Africa, 1994-2008* (Pretoria Law Press Pretoria 2009)

ARTICLES, JOURNALS AND REPORTS

Brand, J *Strikes in Essential Services* (2010)

Casale and Tenkorang *Public service labour relations: A comparative overview* (2008) Paper No 17 ILO Publication Geneva

DBE Source *Report on Progress in the Schooling Sector* (2011)
DBE Source *Report on the Annual National Assessment* (2011)

Gernigon B; Odero A and Guido H (2000) *ILO Principles Concerning the Right to Strike* http://www.ilo.org/wcmso5/groups/public/-ed-norm/- accessed on 24 July 2013 at 11h24

Guiseppe and Tenkorang *Public Service Labour Relations: A comparative overview*. Dialogue Paper No 17 ILO Publication (2008)

Handbook of procedures relating to International Labour Conventions and Recommendations, International Labour Standards Department, International Labour Office Geneva Rev. 2006

ILO, 1994 a. Freedom of Association and Collective Bargaining. General Survey of the reports on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No 98). Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva

ILO, 1996 d. Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Fifth (revised) edition. Geneva http://www.ilo.org/wcmsp5/groups/public/-ed-norm/-normes/documents/publication/wcms-090632.pdf. - accessed on 29/08/2013 at 9h20.

ILO, 1983 b. Freedom of Association and Collective Bargaining: General survey by the Committee of Experts on the Application of Conventions and Recommendations. Report III (Part 4B), International Labour Conference, 69th Session, 1983, Geneva.

Langille, B *Re-reading the Preamble to the 1919 ILO Constitution in the Light of Recent Data on FDI and Worker Rights* (2003) Volume 42

Malherbe, R *The Constitutional Dimension of the Best Interest of the Child* (2006) Paper at SAELA International Conference, 3-5 September 2006, Mpekweni Beach Resort, Eastern Cape.

Roskam, A *Essential and Minimum Services and the Right to Strike* (2009) http://www.ilo.org/public/libdoc/ilo/P/09661(1994-81-4B).pdf accessed on 29/08/2013 at 8h30

Thompson and Slinn (2013) "Public sector industrial relations in Canada: Does it threaten or sustain democracy" in *Comparative Labour Law & Policy Journal* Volume 34, No 2

The Federal Public Service Published by the Federal Ministry of the Interior, Berlin (2009). http://www.bmi.bund.de

The right to strike in essential services: economic implications http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10894&Language=EN (accessed on 2013/08/29)

Recommendation concerning the Status of Teachers http://www.unesco.org/education/pdf/TEACHE-E accessed at 11h28 on 2/09/2013

Vargha, C ILO Presentation *Comparative Law and Practice* (2013) A presentation made to the PSCBC delegation from South Africa to the ILO

TABLE OF STATUTES

Basic Conditions of Employment Act No 75 of 1997

Child Care Act 94 of 1996

Children's Act No 38 of 2005

The Constitution of the Republic of South Africa No 200 of 1993

The Constitution of the Republic of South Africa

Defence Act No.42 of 2002

Employment of Educators' Act No 76 of 1998

Employment Equity Act No 55 of 1998

Intelligence Service Act No. 65 of 2002

Labour Relations Act No 66 of 1995

National Education Policy Act No 27 of 1996

Occupational Health and Safety Act No 85 of 1993

Promotion of Administrative Justice Act No 3 of 2000

Public Service Act No103 of 1994

Skills Development Act No 97 of 1998

South African Council of Educators Act No 31 of 2000

South African Council of Educators' Professional Ethics Code (2000)

South African Schools' Act No 84 of 1996

State of Emergency Act No 64 of 1997

South African Police Service Act No 68 of 1995

TABLE OF CASES

NUMSA & Others v Bader Bop (Pty) Ltd & Another (2003) 24 *ILJ* 305 (CC)

Simba (Pty) Ltd v FAWU & Others (1998) 19 *ILJ* 1593 (LC)

Eskom Holdings (Pty) Ltd v NUM (2009) 1 BLLR 5 (LC)

NUM & Another v Eskom Holdings (2010) 31 *ILJ* 2570 (LAC)

SADTU v Minister of Education (2001) ZALC 144

SA Police Service v Police and Prisons Civil Rights Union & Others (2011) ZACC 21

State v T Makwanyane & M Mchunu (1995) 3 SA 391 (CC)

State v Williams 1995 (3) SA 632 (CC)

Schoonbee v MEC for Education Mpumalanga 2002 (4) SA 877 (T)

Government of the Republic of South Africa v Grootboom (2001) 1 SA 46 (CC)

Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995 (1996) 3 SA 165 (CC)

INTERNATIONAL CONVENTIONS AND TREATIES

Convention on the Rights of the Child 1989
International Covenant on Economics, Social and Cultural Rights (1966)
The International Labour Organizations Convention 87
The International Labour Organizations Convention 98
Universal Declaration of Human Rights 1948

WEB SITES

ANC press statement on NEC meeting and NEC Lekgotla http://www.anc.org.za/show.php?id=10056 accessed on 26/08/2013 at 13h45

ANC Resolutions from the 53rd National Conference in Mangaung http://www.anc.org.za/docs/res/2013/resolutions53r.pdf accessed on 26/08/2013 at 11h59

BC Teachers 'Federation can't translate court victory into progress at the bargaining table http://www.straight.com/news/bc-teachers-federation-cant-translate-court-victory-pro... (accessed on 2013/10/30)

Constitution of Canada http://en.wikipedia.org/wiki/Constitution-of-Canada (accessed on 2013/10/29)

Drop the concept "Essential Service" http://www.sacp.org.za/main.php?id=3860 accessed on 26/06/2013 at 17h00

Education is essential-but not an essential service http://www.mg.co.za/article/2013-02-26-education-is-essential-but-not-an-essential-service accessed on 26/06/2013 at 16h48

Graham, G CC: Essential services-crime prevention-public sector employees-right to strike? http://www.gilesfiles.co.za/collective-bargaining-2/cc-essential-services-%E2%80%9 accessed on 19/9/2013 at 13h05

Essential Services Act http://www.laws-lois.justice.gc.ca/eng/acts/P-33.3/page-24htm1 (accessed on 2013/10/29)

SA Human Rights Commission Report of the Public Hearing on the Right to Basic Education http://www.sahrc.org.za/home/zi/files/reports/right%20basic%20education%202006.pdf accessed on 2/09/2013 at 21h36
Should teaching be declared an essential service? http://www.news24.com/printArticle.aspx?iframe&aid=a72a5589-d9b8-4dcc-8b04-ed accessed on 27/02/2013 at 16h50

Sowetan LIVE http://www.sowetanlive.co.za/news/2012/10/01/pupils-become-victims-of-protests accessed on 3/09/2012 at 9h21

Support BC teachers: Bill 22 is a threat to collective bargaining for all unions http://www.marxist.ca/canada/bc/743-support-bc-teachers-bill-22-is-a-threat-to-collc... (accessed on 2013/10/30)

Statement of the National Executive Committee on the occasion of the 101st Anniversary of the ANC http://www.anc.org.za/show.php?id=10013 accessed on 26/08/2013 at 11h58

Response to SADTU call for Minister of Basic Education to resign http://www.anc.org.za/show.php?id=10109 accessed on 26/08/2013 at 13h59

Definitive Report- Report No 355, November 2009; Case No 2657 (Colombia) - Complaint date: 22-May 2008- Closed http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLAINT... accessed on 2/09/2013 at 16h50

Definitive Report – Report No 360, June 2011; Case No 2803 (Canada) – Complaint date: 16-Jun-2010-Closed http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLAINT... accessed on 2/09/2013 at 16h50

Definitive Report – Report No 360, June 2011; Case No 2784 (Argentina) – Complaint date: 18-May-2010 Closed http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002-COMPLAINT... accessed on 2/09/2013 at 16h50

Definitive Report – Report No 355, November 2004; Case No 2305 (Canada) – Complaint date: 09-October 2003-Closed http://www.ilo.org/dyn/normlex/en/f?p+1000:50002:0::NO:50002:P5002-COMPLA (accessed on 2013/09/02)

Definitive Report No 2305 (Canada) November 2004 http://www.ilo.org/dyn/normlex/en/f?p+1000:50002:0::NO:50002:P5002-COMPLA (accessed on 2013/09/02)