Impact of South African Constitution & Role of Courts on Development of Collective Labor Law

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Apartheid labor legislation denied Black workers not only basic employee rights on an individual level but the collective labor rights also. The Constitution adopted in 1994 included a universal Bill of Rights and section 23 provides for specific labor rights that include collective labor rights. The 1995 Labor Relations Act provides for specific collective labor rights. This new era of collective labor law could be given effect to in practice only by the juris prudence developed by our labor courts by their application and interpretation of the Bill of Rights and the labor rights. This article examines the impact of the Constitution and the role of the courts in the development of collective labor law in South Africa.

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Background

The formal South African labor relations system and first sets of labor laws had their origins in the discovery of gold and diamonds around 1886 and the subsequent development of the mining industry. The workforce of the mines consisted of two types or forms of labor; unskilled Black African mine workers who were also inexpensive, and skilled mine workers who mostly consisted of white men from abroad (Venter & Levy, 2015: 77). Skilled labor was very scarce and the provision of unskilled labor was also problematic as few blacks wanted to go and work in the mines. Black workers were seen as cheap labor and were viewed as threat to poor-white workers who were forced to move to the towns and found work on the mines after the Anglo-Boer War. This perceived threat led to strikes by white mine workers in 1907, 1908 and in 1911, and government was called on to actively protect white miners' interest (Williams,1989: 51). Government introduced the Industrial Disputes Prevention Act in 1909 and the Mines and Works Act in 1911.These two acts excluded black workers from the definition of an employee and as such

they were also excluded from collective bargaining.

The Rand Rebellion of 1922 led to the introduction of the Industrial Conciliation Act of 1924.This Act only recognized white trade unions and again Black workers were excluded for practical purposes from any form of collective bargaining (Venter & Levy, 2015:79). During the apartheid years in the period 1948 -1979 the major piece of labor legislation was the Labor Relations Act which was adopted in 1956,[1] many black trade union leaders were imprisoned in terms of the Suppression of Communism Act of 1957 as it would seem that the apartheid government viewed collective labor action as an insurrection.

After the Soweto uprising of 1976 the government appointed the Wiehahn Commission in 1977 to evaluate the labor dispensation in South Africa. The Wiehahn report of 1979 made far reaching proposals in terms of freedom of association; the government did not adopt all the proposals of the Wiehahn report but amendments were made to the 1956 Labor Relations Act (Labour Relations in South Africa, 2015: 82-89), *Law @ Work* (2015) 13. These amendments included labor and trade union rights for all workers and the establishment of the Industrial Court and the enactment of the definition of an unfair labor practice. Between 1980 and 1994 the jurisprudence that emerged from the Industrial Court created and defined both individual employment and collective bargaining rights (Van Niekerk, 2015: 12).[2] At this point in time there was neither the constitutional court nor a constitution in the Republic of South Africa, which made provision for constitutional collective labor rights.

A New Political Dispensation &New Constitution 1990 – 1994

Mr. Nelson Mandela was released from prison in 1990 and negotiations, CODESA,[3] took place between 1991 and 1993 at the World Trade Centre in Johannesburg. A declaration of intent was issued on 21 December 1991and agreed to by all parties, the most important sections of the declaration in terms of this paper were:

- To bring about an undivided South Africa with one nation sharing a common citizenship, patriotism and loyalty, pursuing amidst our diversity, freedom, equality and security for all irrespective of race, color, sex or creed; a country free from apartheid or any other form of discrimination or domination.
- To strive to improve the quality of life of our people through policies that will promote economic growth and human development and ensure equal opportunities and social justice for all South Africans.

[1] Act 28 of 1956.

[2] See also SA Diamond Workers Union v Master Diamond Cutters Association of SA (1982) 3 ILJ 87 (IC).

[3] Convention for a Democratic South Africa.

- To set in motion the process of drawing up and establishing a constitution that will ensure, inter alia:

a) that the Constitution will be the supreme law and that it will be guarded over by an independent, non-racial and impartial judiciary;

b) that all shall enjoy universally accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly protected by an entrenched and justiciable Bill of Rights and a legal system that guarantees equality of all before the law.[4]

This declaration of intent of 1991 already contained important key words like *equality, equal opportunities, social justice, supreme law, human rights, civil liberties, freedom of speech and assembly and Bill of Rights* that found fertile ground in the Interim Constitution of 1993, [5] final Constitution of 1996, [6] and the Labor Relations Act of 1995.[7]

The first democratic elections in South Africa took place in April 1994. The enactment of the interim Constitution, which incorporated labor rights in a Bill of Rights, made it essential that the labor market had to be regulated and for new labor legislation to be adopted.[8] South Africa rejoined the International Labor Organization (ILO) in 1994 and ratified the core ILO Conventions. This in itself created international law obligations for South Africa, which demanded a review and adjustment of national legislation to give effect to these international obligations (Van Niekerk et al, 2015:13).[9] The historical background provides us with a taste of what was to come in the Constitution and also a better understanding of why things are the way they are.

Constitutional Provisions on Labor Law &Labor Relations

Bill of Rights: Section 2 of the Constitution makes it clear that the Constitution is the supreme law of the country. The Bill of Rights in chapter 2 applies to all law and it binds the executive, judiciary and all organs of State.[10] The Bill of Rights in chapter 2 guarantees, amongst others, equality, dignity, freedom of expression, freedom of religion, right to privacy, freedom to assembly and picket, freedom of association to all citizens.[11] In terms of section 39(1)(a) of the Constitution all courts, tribunals and forums are compelled, when interpreting the Bill of Rights, to promote the values that are central to an open and democratic society that is based on human dignity, equality and freedom (Olivier, 2019:3).

[4] https://www.sahistory.org.za/article/convention-democratic-south-africa-codesa, downloaded on 6 March 2019.

[5] Act 200 of 1993.

[6] Act 108 of 1996.

[7] Act 66 of 1995.

[8] The Constitutional labor rights and the Bill of Rights are discussed in the next section of the paper.

[9] The impact of some of these core ILO Conventions are analysed later on in this paper.

[10] S 8(1) of Act 108 of 1996.

[11] See sections 9 – 22 of Chapter 2 of Act 108 of 1996.

The Constitutional Court stated clearly that the Constitution seeks to redress the power imbalance between employers and employees.

The Constitutional Court has confirmed that the rights contained in the Bill of Rights must be determined and understood against the background of past human rights abuses. In the light of this the Constitution aims to bring about reconstruction and reconciliation.[12] In *Sidumo v Rustenburg Platinum Mines Ltd (Rustenburg Section)*[13] the Constitutional Court stated clearly that the Constitution seeks to redress the power imbalance between employers and employees. This approach has also been confirmed by the Constitutional Court in the earlier judgment of *Government of RSA v Grootboom*[14] where the Court stated that the fundamental rights in Chapter 2 must be considered as a whole. The Labor Court has also confirmed that labor rights have been elevated to a constitutional right, and that the constitutionalization of labor rights strengthens public policy and the protective components of labor law.[15] In the *National Union of Metal Workers Union of South Africa v Bader Bop (Pty) Ltd*[16] the Constitutional Court confirmed that the recourse to constitutional principles ensured the freedom of trade unions. The Bill of Rights also contains rights that are viewed as basic labor rights and these are; equality, freedom of association, freedom to assembly and picket and it is clear that the Constitutional Court has enforced these basic labor rights through various judgments.

Constitutional Labor Rights

Section 23 of the Constitution is headed "Labor Relations" and establishes a set of broadly expressed labor rights that accrue to a variety of parties including but not limited to employers, workers and their respective representative organizations (Van Niekerk et.al,2015: 37). This is the most important section in the South African Constitution relating to work. These fundamental labor rights are:

1. Everyone has the right to fair labor practices
2. Every worker has the right
   a) to form and join a trade union;
   b) to participate in the activities and programs of a trade union; and
   c) to strike.
3. Every employer has the right:
   a) to form and join an employers' organization, and
   b) to participate in the activities and programs of an employers' organization.

[12] See S v Mhlungu 1995 (3) SA 867 (CC)

[13] [2012] BLLR 1097 (CC).

[14] 2000 (11) BCLR 1169 (CC) par 22.

[15] *Parry v Astral Operations Ltd* [2005] 10 BLLR 989 (LC) par 53.

[16] [2003]2 BLLR 103 (CC).

4. Every trade union and every employers' organization have the right

   a) to determine its own administration, programs and activities.

   b) to organize; and

   c) to form and join a federation

5. Every trade union, employers' organization and employer have the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining.

6. National legislation may recognize union security arrangements contained in collective agreements.

These fundamental rights and their interpretation by the courts have resulted in the development of a significant constitutional jurisprudence relevant to workers, employers and their representative bodies.These labor rights in section 23 relate to, amongst others, an individual worker's 'right to join trade unions, participate in the activities of a trade union, the right to strike' and the section also stipulates the rights of trade unions and individual employers as well the rights of employers' organizations. The guaranteed collective labor rights strengthen the right to collective bargaining[17] and the Section states that national legislation may be enacted to regulate collective bargaining.[18]

International Law & International Labor Standards

In sections 231 and 232, the South African Constitution contains provisions that govern the manner in which international law is incorporated or adopted into our domestic law. By ratifying international conventions, South Africa binds itself to their principles (Govender, Olivier & Nyenti, 2013: 218). South Africa has ratified the 8 Core Conventions of the ILO and rejoined the ILO as a member in 1994. The most important Core Conventions, in terms of this paper and collective labor law are:

- Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87).
- Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

In a substantive sense the Constitution accords international law a particular standard and the Constitution also requires the application of international law when interpreting South African legislation.[19] Section 39 of the Constitution also places a premium on the value of international law in relation to the interpretation of the Bill of Rights (Van Niekerk et al,2015:29). In *S v Makwanyane*[20] the Constitutional Court stated:"International agreements and customary international law provide a framework within which … [the Bill of Rights] can be evaluated and understood

[17] S23(5) of Act 108 of 1996.

[18] Collective bargaining is regulated in parts A and B of chapter III of the LAR 66 of 1995.

[19] In this regard see ss 232 and 233 of Act 108 of 1996.

[20] 1995 (3) SA 391 (CC).

… reports of specialized agencies such as the International Labor Organization may provide guidance as to the correct interpretation of particular provisions."

S23 of the Constitution establishes labor rights as fundamental rights.

As stated previously, +S23 of the Constitution establishes labor rights as fundamental rights. In *SA National Defence Union v Minister of Defence & another* [21] section 23 was challenged and the Constitutional Court made reference to ILO standards. SA National Defence Union (SANDU) challenged the constitutionality of a section of the Defence Act[22] prohibiting permanent members of the military force from forming and joining trade unions. The Defence Force argued that members of the military enlist and in the absence of a contract of employment, they were not 'workers' for the purpose of section 23 of the Constitution. In its judgment the court made specific reference to Article 2 of Convention 87, specifically the provision that workers and employers, without distinction, have the right to establish and join organizations of their own choosing. The court went further and referred to Article of 9 of the Convention, which extend these guarantees to the armed forces and the police. The court struck down the provisions of the Defence Act that prohibited union activity and membership of trade unions as unconstitutional (Van Niekerk et al,2015: 30).

In *NUMSA & others v Bader Bop (Pty) Ltd & another*[23] the court ruled that a minority trade union could strike and this decision was largely based on interpretations of Convention 87 and 98, relating to the rights of minority unions and the right to strike. In *Minister of Defence v SA National Defence Force Union & others*[24] the Supreme Court of Appeal considered sections 39 and 223 of the Constitution and the provisions of ILO Conventions 87, 98 and 154 when it ruled that the Labor Relations Act (LRA) did not infringe on the constitutional right to engage in collective bargaining, by failing to incorporate a compulsion to bargain.

It is clear that international law and international labor standards are applicable in South Africa subject to the stipulations of sections 39, 231 and 232 of the Constitution and in addition our courts have referred to these international standards in relation to collective labor law and in that way have impacted on the development of collective labor law in South Africa.

Labor Relations Act 66 of 1995

Section 1(a) to 1(d) of the LRA states that the purpose of the LRA is to advance economic development, social justice, labor peace and the democratization of the workplace by fulfilling

[21] (1999) 20 ILJ 2265 (CC).

[22] Act 44 of 1957.

[23] [2003] 2 BLLR 103 (CC).

[24] (2006) 27 ILJ 2276 (SCA).

the primary objects of this Act, which are:

a. To give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.

b. To give effect to obligations incurred by the Republic as a member state of the International Labor Organization.

c. To provide a framework within which employees and their trade unions, employers and employers' organizations can:

   i. collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

   ii. formulate industrial policy; and

d. To promote:

   i. orderly collective bargaining;

   ii. collective bargaining at sectoral level;

   iii. employee participation in decision-making in the workplace; and

   iv. the effective resolution of labor disputes.

From section 1 of the LRA the following keywords or phrases, in relation to this assignment, stand out namely; fundamental rights, International Labor Organization and collective bargaining. As we have previously seen that the Constitution of the Republic of South Africa guarantees fundamental and labor rights and our courts have enforced these rights in various judgments especially relating to the status of international standards in our law and the right to freedom of association. Presented here is an analysis of how court judgments have impacted on collective labor rights like the right to collective bargaining and the right to strike.

Collective bargaining will be better served by creating mechanisms to encourage collective bargaining.

Against the background of the Bill of Rights and Labor Rights as stipulated in the Constitution the LRA sought to introduce a coherent model of collective bargaining based on voluntarism, it is important to note that there is no general duty to bargain[25] as it is believed that collective bargaining will be better served by creating mechanisms to encourage collective bargaining (Darcy du Toit et al, 2015: 281). In *ECCAWUSA v Southern Hotel Interests (Pty) Ltd*[26] the Labor Court declined to read an implied duty to bargain in good faith into the requirement of annual wage negotiations. Despite statutory rights to collective bargaining, nothing precludes the parties from concluding a collective agreement that regulates organizational rights or for trade unions to engage in industrial action to acquire organizational rights

[25] See in this regard the judgment in [2006] 11 BLLR 1403 (SCA).

[26] [2000] 4 BLLR 404 (LC).

over and above those conferred by the LRA.[27]

The LRA does not use the term 'bargaining unit', a union's right to organizational rights is determined by the level of 'representivity' in the workplace. The level of bargaining is also not determined by the LRA and it is entirely for the parties to determine. These principles were determined in *Rainbow Farms (Pty) Ltd v NUFBWSAW*[28] and also in *SACCAWU v Elite Industrial Cleaning (Pty) Ltd*[29]. The thresholds of 'representivity' in terms of certain organizational rights can also be determined by collective agreement by the parties to a bargaining council.[30] Our courts have also dealt with other aspects of collective bargaining and strikes as a collective action.These included the following:

- Refusal to bargain[31]
- Disclosure of information[32]
- Registration of Bargaining Councils[33]
- Collective bargaining in the public sector[34]
- Collective agreements[35]
- Definition of strike[36]
- Definition of lock-out[37]
- Protected strikes and lock-outs[38]
- Secondary strikes[39]
- Picketing[40]

There is a magnitude of not only LC, LAC also SCA and CC judgments which indicates how the courts in South Africa have interpreted the fundamental rights contained in the Bill of Rights in the Constitution as well as the labor rights. These judgments are also indicative of the impact of our courts on collective labor law as the body of *jurisprudence* in these instances provide guidance for all parties in the employment relationship.

[27] See in this regard NUMSA v Bader Bop (Pty) Ltd [2003] 2 BLLR 103 (CC); Transnet Soc Ltd v National Transport Movement [2014] 1 BLLR 98 (LC).

[28] [2008] JOL 21761 (LC).

[29] (1997) CCMA GA 7877, 29 July 1997.

[30] *POPCRU v Ledwaba NO* [2013] 11 BLLR 1173 (LC).

[31] *Greater Johannesburg Transitional Metro Council v IMATU* [2001] 9 BLLR 1063 (LC).

[32] *UPUSA v GrinakerDuraset* [1998] 2 BLLR 190 (LC); Atlantis Diesel Engines (Pty) Ltd v NUMSA [1995] 1 BLLR 1; NUMSA v Comark Holdings (Pty) Ltd [1997] 5 BLLR 589 (LC); CF Langa v Active Packaging (Pty) Ltd [2001] 1 BLLR 37 (LAC)

[33] *WUSA v Crouse NO* [2005] 11 BLLR 1156 (LC).

[34] *Maas v CCMA* [1999] 5 BLLR 491 (LC).

[35] *SA Post Office Ltd v CWU* [2010] 1 BLLR 84 (LC); Minister of Safety and Security v SSBC [210] 6 BLLR 594 (LAC).

[36] *Kgasago v Meat* 'n More Spaza [1998] 1 BLLR 69 (LC); NUM v CCMA [201] 1 BLLR 22 (LAC).

[37] *Vanadium Technology (Pty) Ltd v NUMSA* [1997] 7 BLLR 912 (LC).

[38] *Vodacom (Pty) Ltd v CWU* [2010] 8 BLLR 836 (LAC).

[39] *CWIU v Plascon Decorative (Inland) (Pty) Ltd* [1998] 12 BLLR 1191 (LAC).

[40] *SANDU v Minister of Defence* [2007] 9 BLLR 785 (CC) para 82.

Conclusion

Olivier (2019 :3) eloquently sates that "The Constitution therefore has as its aim a decisive break with the past of human rights abuses, discrimination and suffering, often sanctioned by legislative enactments in the area of labor law and labor relations".The Constitution has introduced constitutionalism, it created a Bill of Rights and imposed a duty on courts when interpreting labor relations legislation an obligation to promote the spirit and objectives of the Bill of Rights. Section 23 of the Constitution also provides for specific constitutional labor rights.

Amongst these constitutional labor rights are the right to belong to a trade union in section 23(3) and the right to engage in collective bargaining in section 23(5). These rights in section 23(3) and 23(5) of the Constitution has had a profound impact on collective labor law in South Africa, these rights were challenged in the *SANDU v Minister of Defence* matters.[41] In the *Parry v Astral Operations Ltd*[42] judgment the Labor Court provides an indication of the impact of the Constitution on collective labor law when it states: "In South Africa, an added consideration is the elevation of labor rights to a constitutional right……the constitutionalization of labor rights strengthens public policy and protective components of labor law…as that is what the Constitution and the LRA encourage, through collective bargaining, but within the limits allowed by the Constitution and the legislation."

The courts in South Africa applied the duties imposed on them in terms of the Constitution and interpreted the Bill of Rights, international law, international standards and the labor rights and through their judgments impacted on collective labor law. These judgments, as was pointed out in section 3 of this paper, provided all parties in the collective labor relationship with a road map on how to go about building a collective relationship that is in line with the principles of the Constitution. Every single aspect of a collective labor relationship as stated in the LRA has been addressed by our courts.

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[41] These two cases were discussed earlier on in the paper.

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