



**Collective bargaining in the education sector in South Africa: Should this sector be classified as an essential service?**

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## **Declaration**

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## **Abstract**

Collective bargaining within public education and limited confidence in the arbitration process has resulted in strike action by educators with adverse consequences on learners. The right to basic education is fundamental and of national importance. Depriving a society the right to basic education is tantamount to depriving them of their human dignity; hence their human right. However, the learner's passive right to basic education is seemingly in conflict with the educator's active right to strike action and freedom to associate. In reconciling these conflicting constitutional rights, this mini-dissertation argues that basic education should be designated as minimum service within essential services.

Relying on international and domestic legal instruments, case law and academic literature, this dissertation justifies the need to persuade the Essential Services Committee (ESC) to recommend designating basic education as essential service to parliament. This should be based on negotiations and recommendations between the government and educator's trade union to recommend designating basic education as essential service. This, however, will be contingent on the imperative to ensure certainty and credibility in the dispute resolution mechanisms where collective bargaining fails.

This dissertation further recommends the need to strengthen the processes of conciliation, mediation and arbitration and also ensure compliance with compulsory arbitration awards, as a formidable measure to balance both the rights of the educator (freedom of association) and the learner to basic education in South Africa.

## **DEDICATION**

This mini dissertation is dedicated to my late friend Ncumisa Mfazo who undertook the degree of Master of Philosophy with me and who was a great source of support and inspiration to me throughout the course work and dissertation until her passing away. Hamba Kakuhle. Lala Ngoxolo.

## **ACKNOWLEDGMENTS**

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Last but not least to my Heavenly Father for sustaining me through it all.

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## LIST OF ACROYNMS

ACRWC	African Charter on the Rights and Welfare of the Child
ANC	African National Congress
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
CFA	Committee of Freedom of Association
COSATU	Congress of Southern African Trade Unions
CTPA	Cape Teachers Professional Association
EEA	Employment of Educators Act
ELRA	Education Labour Relations Act
ELRC	Education Labour Relations Council
ESC	Essential Services Committee
FOSATU	Federation of South African Trade Unions
GPSSBC	General Public Service Sectoral Bargaining Council
HOD	Head of Department
ICA	Industrial Conciliation Act
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
NACTU	National Council of Trade Unions

NAPTOSA	National Professional Teachers' Organisation of South Africa
NATU	National Teachers Union
NEHAWU	National Education Health and Allied Workers Union
NUMSA	National Union of Mine Workers in South Africa
PEU	Professional Teachers Union
PHSDSBC	Public Health and Social Development Sectoral Bargaining Council
PSA	Public Service Act
PSA	Public Servants Association of South Africa
POPCRU	Police and Prisons Civil Rights Union
PSCBC	Public Service Co-coordinating Council
RDP	Reconstruction and Development Programme
SACCOLA	Southern African Employers Consultative Committee on Labour Affairs
SADC	Southern African Development Community
SADTU	South African Democratic Teachers Union
SAMA	South African Medical Association
SAPS	South African Police Services
SANDU	South African National Defence Union
SAOU	Suid-Afrikaanse Onderwyserunie
SCA	Supreme Court of Appeal
SSSBC	Safety and Security Sectoral Bargaining Council
TUCSA	Trade Union Council of South Africa

UDHR	Universal Declarations of Human Rights
UN	United Nations
UNCRL	United Nations Convention on Rights of the Learner
UNESCO	United Nations Educational Scientific and Cultural Organisation

# CHAPTER ONE

## **Collective bargaining in the education sector in South Africa: Should this sector be classified as an essential service?**

“You see, sometimes they’ve got a problem with your conscience. Here is a child I know. They are very poor at home. The child has gone as far as matric. He has become a hope in the family. If he finishes matric, we think our plight may be somewhat alleviated. We have plans and all that. Here are teachers wanting their salary increase or whatever that they want. But the problem is, they are using wrong means to achieve whatever they want. You cannot use kids in order to achieve your salary increase. You are not fighting kids, but who becomes the victim is the child! That is wrong morally wrong! ... I will never accept that.”<sup>1</sup>

### **1.1 Introduction**

The statement above by a principal at a township school in Durban captures the tension of interests between the educator’s right to strike and protecting the learner’s right to basic education in South Africa. This tension manifests as an aftermath of failed negotiations between unions representing educators in public schools (employees) and the state as employer. It is a result of the failure of collective bargaining. This raises the issue of whether and to what extent the education sector ought to be categorised as an essential service in South Africa, and the imperative to enhance the standard and quality of education without necessarily infringing the right of educators to strike under the Labour Relations Act 66 of 1995 (LRA). The mechanism for efficient and effective compulsory arbitration should be strengthened with a view to designate basic education as essential service. Figure 1 below illustrates the South African government’s responsibility to educators and its responsibility to learners.

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<sup>1</sup> Statement of a school principal of Umlazi township in Durban during the 2009 South African Democratic Teachers’ Union (SADTU) strike, extract from a thesis by Kathlyn McClure Pattillo, ‘Quiet corruption: Teachers unions and leadership in South African Township schools’ (2012 Middletown, Connecticut) 13 Wesleyan University. Assessed at <http://www.wescholar.wesleyan.edu/cgi> on 04-04-14

## South African government's responsibility to educators and learners

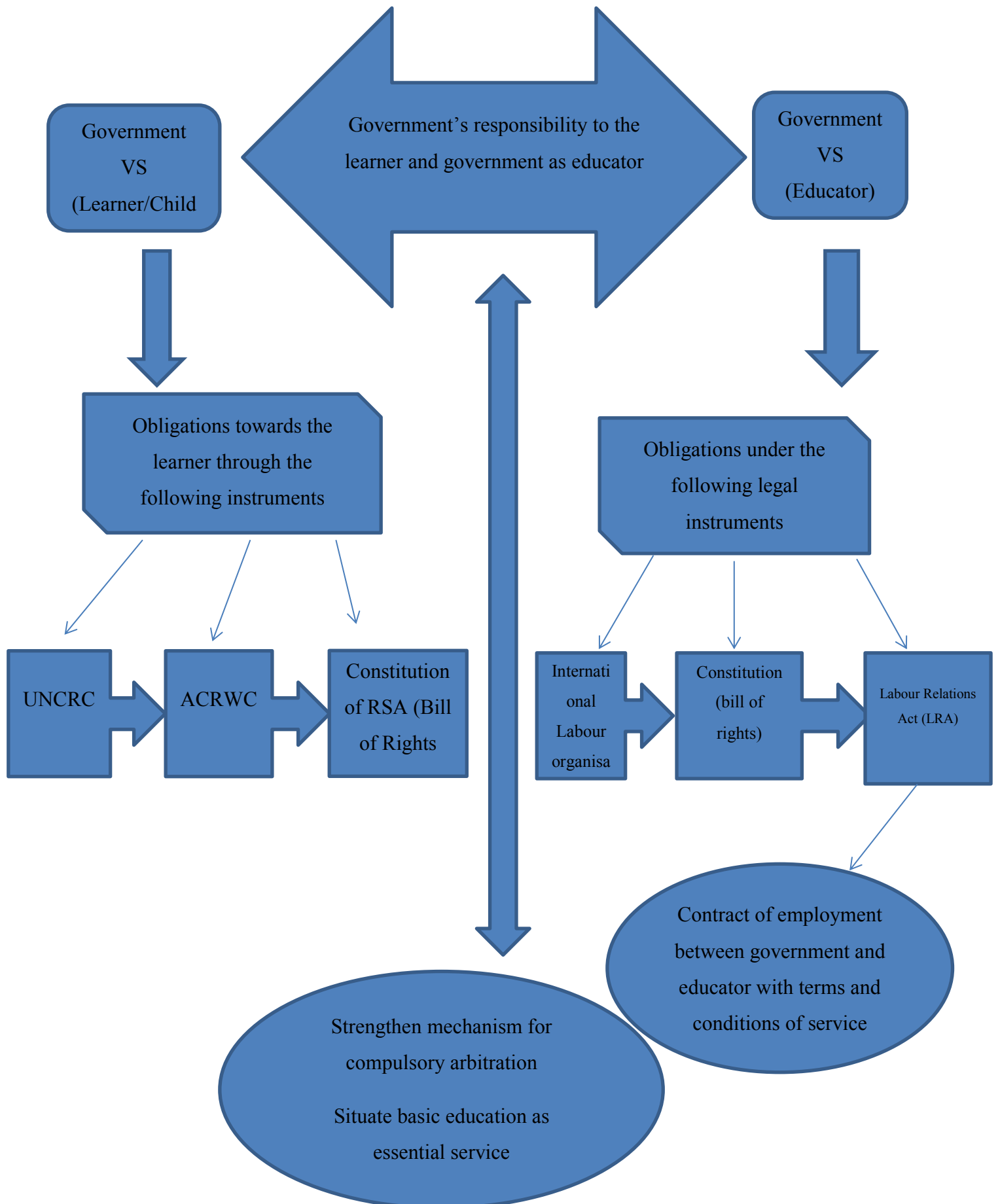


Figure 1

In South Africa, collective bargaining was regulated upon promulgating the 1924 Industrial Conciliation Act 11 of 1924 (ICA). Collective bargaining derives from contractual obligations under contract law in labour relations.<sup>2</sup> Hence collective bargaining agreement is a set of promises, with an implied covenant of good faith and fair dealing, which the law will enforce.<sup>3</sup> The effect of failed collective bargaining in the education sector, particularly basic education, in public schools has engendered learners to suffer and imperil the quality of education in South Africa. This mini-dissertation proposes that basic education should be designated as essential service.<sup>4</sup>

The duty to engage in collective bargaining is central to collective bargaining even though legislation is silent on the duty to bargain. The court in the *South African National Defence Union (SANDU) & Another v Minister of Defence & others*<sup>5</sup> recognises the duty to engage in collective bargaining, or the freedom to bargain collectively, and does not impose the same duty on employers to participate in collective bargaining, hence favouring a ‘voluntaristic approach’.<sup>6</sup> Where the sector is classified Essential Service, the workers have various options to compel employers to bargain. Accordingly certain trade unions are given organisational rights in terms of the LRA in order to bargain effectively. Moreover section 1(c) of the LRA aims to provide a framework whereby employees and their trade unions, employers and employers’ organisations can:

- (a) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interests; and
- (b) formulate industrial policy to balance the interest of both employees and employers.<sup>7</sup>

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<sup>2</sup> Cox A, ‘The legal nature of collective bargaining agreements’ *Michigan law review* 57 1 (1958) 1-37 at 3.

<sup>3</sup> Ibid. Further, collective bargaining aims to balance the unequal interest between the employee and employer. As such, the employer has more economic and therefore an unfair advantage over the employee. The LRA seeks to balance the unevenness of power relations through collective bargaining rather individual bargaining. Individual bargaining has the potential of constraining an employee making the employee powerless and vulnerable to the employer when negotiating for higher wages and better working conditions.

<sup>4</sup> many authors have argued that formative education like others should not be placed under essential service thus upholding the right of workers to strike- see- Du toit & Ronnie, ‘The necessary evolution of strike law’; Horsten & Le Grange, ‘The limitation of the educator’s right to strike by the child’s right to basic education’; Calitz R & Conradie R, ‘Should teachers have the right to strike? The expedience of declaring the education sector an essential service’ *Stellenbosch law review* 1 (2013) 124-145; Prinsloo I, ‘How safe are south African schools’

<sup>5</sup> (2003) 24 *Industrial Labour Journal* 2101 (T)

<sup>6</sup> Grogan J, *Collective labour law* (2010)107; see also: in the *South African National Defence Union (SANDU) v Minister of Defence and Another (1)* 1999 (6) BCLR. 1999 (4) SA 469 & (1999) 20 *ILJ* 2265 (CC) where Section 23 of the Bill of Rights was upheld thus allowing soldiers as workers to embark on strike action – unrestrained by the exceptions in Section 36 of the Constitution.

<sup>7</sup> Section 1 (c) of the Labour Relations Act 66 1995.

Sections 23 (2) (c) of the Constitution and 64 of the LRA further give employees the right to strike for the purpose of collective bargaining. Section 65 of the LRA provides in part: “[n]o person may take part in a strike or lock-out or any conduct in the contemplation or furtherance of a strike or a lock-out if that person is engaged in essential services.”

With regard to basic education, although there is no limitation on the right to strike, the argument for basic education to be designated as essential service will require a mechanism that does not infringe on the right of educators. This mechanism should involve active engagement of both the employees (through their unions) and employer in negotiations but compromise founded on thorough understanding of the importance of uninterrupted education. Interestingly, the right of educators, to strike is not only provided for in International Conventions<sup>8</sup> and the Constitution<sup>9</sup>: it is jealously protected and advanced. Whereas learners’ right to education in a similar breath is provided, it does not enjoy the same protection and advancement.<sup>10</sup> Realising the value and impact of basic education in South Africa will help to protect the right of learners to education and better enforcement of the right.

This research argues that a viable means of achieving this goal is by designating the education sector, or at least part of it, as an essential service; by reinforcing the mechanisms for promoting negotiations; and by professionalising the educators union, rather than the present political posture<sup>11</sup> which is currently reflected. This is in addition to strengthening institutional structures and conditions of service for basic educators in the education sector with a view to address the special and peculiar needs in developing a skilled and literate society.

During the period before democratic rule in South Africa, educators did not have the same labour rights they now have to collectively bargain. Currently the unions that operate in the public education sector thrive to maximise control in work-related areas like remuneration

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<sup>8</sup> The Freedom of Association and the Right to Organise Convention No 87 1948 came into force 04 July 1950 ratified by South Africa 19 February 1996; Collective Bargaining Convention No 98 1949.

<sup>9</sup> Section 29(1) (a) 1996 Constitution of the Republic of South Africa.

<sup>10</sup> Deacon H, ‘The balancing act between the constitutional right to strike and the constitutional right to education’ 34 2 *South African Journal of Education* (2014).

<sup>11</sup> Horsten D and le Grange C, ‘The limitation of the educator’s right to strike by the child’s right to basic education’ 27 *SAPL* (2012) 509-538 at 522 citing Govender L ‘Teacher unions, policy struggles and educational change, 1994 to 2004’ in Chisholm (ed) *Changing class: Education and social change in post-apartheid South Africa* (2004) 286;

Dobbs D ‘Are teachers professionals or public-service workers?’ (2008) available at <http://www.typepad.com>

and service conditions, as well as broader issues of economic and political contestation with the state.<sup>12</sup> The focal point of unions in pre-democratic South Africa was to ensure that educators had ample opportunity for career advancement, while not losing sight of the interest of the learners.<sup>13</sup> This enabled non-involvement in politics by educator's unions across the country. In the period leading up to the establishment of the new democratic South Africa, and with the increase in alliances being formed amongst trade unions in an effort to end apartheid, there was an emergence of a young group of educators who succeeded in re-categorising educators as 'workers' rather than 'professionals,' to link education with politics. They made alliances with the major trade union federation, the Congress of South African Trade Unions (COSATU) thereby subjecting workplace issues to collective bargaining within the education sector.<sup>14</sup>

Educators derive their labour rights under Section 23 of the Constitution and the LRA. The Constitutional basis for limiting the right of employees (educators) to strike takes the following consideration into account: disrupting the public peace, endangering national security and if the strike will be inimical to the interest of the country.<sup>15</sup> Furthermore educators who are not members of a trade union also have their rights protected under the Constitution as well as the LRA. However, not joining a trade union has the potential to limit the effectiveness of the right of an individual worker to collective bargaining. It is in realising the need for strengthening the mechanism of collective bargaining in essential services that the Minister of Labour suggested compulsory or interest arbitration without necessarily foreclosing the rights of workers to strike.<sup>16</sup> This is equally relevant and should be applicable to basic education in South Africa.

A significant percentage of youth in South Africa are in the stages of Grade R to Grade 12.<sup>17</sup> This percentage represents the crucial need for youth to have access to basic education. Education is both a human right in itself and an indispensable means of realising other human

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<sup>12</sup> Ibid.

<sup>13</sup> Chisolm L, 'The democratization of schools and the politics of teachers in South Africa' *Compare* 29 2 (1999)114. (Bendix S, *Industrial relations in South Africa* (2010 Juta Claremont 5<sup>th</sup> Ed.)

<sup>14</sup> Ibid.

<sup>15</sup> *The South African National Defence Union (SANDU) v Minister of Defence and Another* (2003) 24 ILJ 1495 (T) at 1516.

<sup>16</sup> Address by the Hon. Minister of labour: Ms Mildred N Oliphant, MP at the Annual Nedlac organised labour conference, Roodevallei conference and meeting hotel 21 January 2014, assessed <http://www.labour.gov.za/DOL/media-desk/speeches/2014-1> on 08-08-2014.

<sup>17</sup> As at 2007 there were 12,401,217 ordinary primary and secondary school learners in South Africa. Although this is an up-to date statistics, it does represent a considerable population of South African youths in a population approximately fifty million people, see assessed at <http://www.southafricaweb.co.za> on 18-08-2014

rights.<sup>18</sup>This right is further reinforced by international convention, the Constitution and legislation.<sup>19</sup> The United Nations Convention on the Rights of the Learner, (UNCRL) 1989 requires signatories to incorporate measures in national legislation which are social, administrative and educational ‘to protect the learner from all forms of physical and mental violence, injury or abuse, negligent treatment or exploitation, including sexual abuse’. Further, Article 3 (1) UN Convention on the Right of the Child states:

“[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.”

Additionally Articles 28 and 29 cover the right to education. Article 28 states:

‘(1) States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- a. make primary education compulsory and available free to all.’

While Article 29 provides that:

‘(1) States Parties agree that the education of the child shall be directed to: the development of the child’s personality, talents and mental and physical abilities to their fullest potential.’

The UNCRL was adopted by the African Union under the Africa Charter on the Rights and Welfare of the Child (ACRWC)<sup>20</sup> by committing member States, who are signatories to this Charter, to take steps to ensure that a learner ‘who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the learner.’ The ACRWC specifically provides for the right of the child to basic education under Article 11 and 3 which respectively states the following:

- 1) Every child shall have the right to education

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<sup>18</sup> Horsten and Le Grange op cit note 11 at1. Such other rights as effective education, equal educational opportunities, human dignity, freedom of security of the person, a safe environment, privacy and just administrative justice to ensure a safe school environment, see Prinsloo I, ‘How safe are South African schools’ *South African journal of education* 25 1 (2005)5-10 at 10.

<sup>19</sup> For example the Employment of Educators Act 76 of 1998, non-legislative body governed by the Constitution of the Educators Labour Relations Council per resolution No. 6 of 2000.

<sup>20</sup> South Africa ratified the UNCRL in 1995 and ACRWC in 2000 – see <http://peopletoparliament.org.za/focusareas/children-rights/resources> Assessed 03-01-2015.

3) States parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:

a) provide free and compulsory basic education

d) take measures to encourage attendance at schools and the reduction of drop-out rates...

By ratifying these instruments, South Africa has undertaken to protect the rights of the learner and this legal protection is reflected in her domestic law.<sup>21</sup> Under the Constitution, the right of the learner to basic education is provided for under the Bill of Rights. Section 29 (1) of the Constitution says: Everyone has the right –

(a) to basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Although basic education is not defined in the Constitution, the World Declaration on Education for All White Paper on Education and Training attempts describe the term as: ‘giving every child, youth, adult the ability to benefit from educational opportunities designed to meet their basic learning needs...’<sup>22</sup>

As stated earlier, the educators’ strike of 2007 and 2010 did not create conducive learning environment for pupils when the strikes took place. It impacted negatively on pupils and some educators alike. For the pupils, their curriculum was disrupted while some were ill prepared for their matric examination. In some cases, educators who refused to comply with the demands of the union were molested, threatened and some assaulted.<sup>23</sup> Underlying the strike were a string of factors, such as political and economic considerations that ultimately resulted in quiet corruption<sup>24</sup> in public schools. Expectedly, the students bore this brunt.

The right to basic education is included under section 29 of the Constitution, which provides as follows:

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<sup>21</sup> See for example the Learner Care Act 74 of 183; The Occupational Health and Safety Act 85 1993.

<sup>22</sup> <http://www.education.gov.za/LinkClick.aspx?fileticket=855fT9w3Awu%3D&tabid=191&mid=484> para 13, see Simbo C, ‘Defining the term basic education in the South African Constitution: An international law approach’ *Law democracy and development* 16 (2012) at164..

<sup>23</sup> Calitz and Conradie, op cit note 4 at 124.

<sup>24</sup> Quiet corruption occurs when issues such as absenteeism, tardiness and overall lack of commitment by both administration and teachers prevent schools from becoming high performing. See The World Bank, ‘Africa Development Indicators 2010 – Silent and lethal: How quiet corruption undermines Africa’s development efforts’ (2010 Washington DC).

‘[e]veryone has the right – (a) to basic education ... (b) ‘to further education, which the state, through reasonable measures, must make progressively available and accessible.’

To the extent that this right is available to everyone, education is beneficial to a learner because it is essential in developing a child’s personality, talents and mental and physical abilities to their fullest potential. The right to basic education, at least in the context of the learner, ranges from Grade R to Grade 12. This right is potentially hindered where a trade union fails to appreciate the consequence of strike action on learners, notwithstanding the union’s legitimate interest in addressing the needs of their members. In this regard, the rights of educators to engage in strike action stems from section 23 of the Constitution. This provision says:

‘[e]veryone has the right to fair labour practices.’<sup>25</sup>

(1) Every worker has the right –

- (a) to form and join a trade union;
- (b) to participate in activities and programmes of a trade union; and
- (c) to strike ...

Furthermore, section 23(5) of the Constitution provides that ‘[e]very trade union, employer’s organisation and employer has the right to engage in collective bargaining....’. This provision also states that any limitation of this right must comply with section 36(1) of the Constitution.

This mini-dissertation is not about spelling out the hierarchy of these seemingly conflicting rights and interests. It sets out to interrogate the right to strike by educators and the right to educate pupils by answering how and to what extent these rights can be reconciled by designating the education sector as an essential service, particularly where the sector provides a service that any interruption may endanger the life, personal safety or health of the entire population or part thereof.<sup>26</sup> In principle, the LRA does not recognise strike action by essential service employees without recourse to arbitration by the bargaining council,<sup>27</sup> if the Commission for Conciliation Mediation and Arbitration (CCMA) has no jurisdiction.<sup>28</sup> Thus employees whose services are categorised as essential services do not engage in strike action

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<sup>25</sup> Section 23(1) Act 108 1996 Constitution of the Republic of South Africa.

<sup>26</sup> Section 77 (4) Labour Relations Act 11 2007; Bendix S, *Industrial relations in South Africa* (2010 5<sup>th</sup> Ed. Juta Claremont) 141.

<sup>27</sup> Section 213 of the LRA states- Bargaining council “means a bargaining council referred to in Section 27 and includes, in relation to the public service, the bargaining councils referred to in section 35.” Section 27 deals with the establishment of bargaining council, and Section 35 deals with bargaining council within the public service.

<sup>28</sup> Section 74 LRA and see further Calitz K and Conradie R op cit note 4 at 128.

once there is a dispute of interest with the government as that can potentially disrupt both social and commercial activities.

Conversely this requirement seems to limit the right of employees to strike by situating the employer at an advantage position because it assumes the employer has economic power over the employee.<sup>29</sup> It is suggested that even in such situations, employees can strike as a last resort.<sup>30</sup> What the LRA primarily does is limit the quick resort to strike it but does not completely foreclose it<sup>31</sup> as strikes are symptoms of labour unrest and do not require a surgeon's quick-fix knife but a physician's skilful approach to be cured.<sup>32</sup> By way of example, in 2003 O'Regan J ruled in favour of the SANDU<sup>33</sup> to have the right to demonstrate, picket and petition with the implication that the union was allowed to negotiate on all matters of mutual interest.<sup>34</sup> Be that as it may, during 2008, members of SANDU threatened to participate in a strike<sup>35</sup> if their demand for salary increase was not taken seriously. This raises some doubt, in practical terms, on essential service worker's right to strike.

Furthermore, the Constitutional Court (CC) in *National union of metal workers of South Africa (NUMSA) and others v Bader Bop (Pty) Ltd and Another* held that the worker's right to strike is necessary to protect the dignity of workers and asserting their bargaining power in industrial relations.<sup>36</sup> Notwithstanding, an exception is provided where a service is categorised as essential. Thus within the army, in *the SANDU* case, there is an exception under Regulation 37,<sup>37</sup> limiting circumstances where the military and a section of the army may be barred from participating in a strike.<sup>38</sup> Given the international protection of worker's right to freedom of association, ominous as it may be with regard to the right of the child to

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<sup>29</sup> Grogan, *Collective labour law* (2010) 10.

<sup>30</sup> Bendix S, 615.

<sup>31</sup> Although it is not often the case that employers lock up to prevent their employees, the Act nevertheless mandates negotiation as a first option. This principle is there meant to be used as a shield and not a sword to limit or stifle the right of essential employees to strike as a last resort.

<sup>32</sup> Kahn E, 'The right to strike in South Africa' *South African Journal of Economics* 11 1 (2007)29.

<sup>33</sup> (2003) 24 *International Labour Journal* 2102 (T).

<sup>34</sup> 'Soldiers score labour-rights victory' the Star 18 July 2003 accessed <http://www.samedia.ouvs.ac.za> on 11-03-2014.

<sup>35</sup> *SA National Defence Union v Minister of Defence & others* (2003) 24 *ILJ* 1516 (T)

<sup>36</sup> (2003) 24 *ILJ* 305 (CC) para 13.

<sup>37</sup> Regulation 37 (1) & (2) states that: "no member may participate in the activities of a military trade union while participating in a military operation" (2) provides that "no union may consult or liaise with members whilst such members participate in military operations, exercises or training."

<sup>38</sup> Trade union activities can be limited during military operations, exercises or training which might threaten the ability of SANDF to carry out its constitutional mandate. See *SA National Defence Union v Minister of Defence & Others* 2007 (8) BCLR 863 (CC) para 98

education, such right can be justifiably limited based on a specific country's needs and interest. Canada, for example, has made education an essential service thus prohibiting educators from strike despite the fact that the International Labour Organisation Convention protects the right to strike by employees by allowing them the freedom to assemble.<sup>39</sup> Hence prescribing legislation to protect the learner's right to basic education by categorising educators as providing essential service can be replicated in other countries alike.

The success of categorising the basic education as an essential service will depend largely on strengthening the mechanism of compulsory arbitration thereby ensuring that both the employee and employer have confidence in the process that will assist in resolving their interest dispute.

In 2007 and 2010 educators embarked on a massive strike action owing to failure in negotiations between the government and the educator's union in public schools. The objective of the strike was to compel the government to increase educator's salary and improve training. The strike was unprecedented. Apart from the violence and intimidation witnessed during the strike, it disrupted academic activities in public schools and the health sector. It was then described as one of the most violent strikes nationwide since the era of democracy.<sup>40</sup> Such description is indicative of both socio-economic imbalances and inadequate or ineffective mechanisms for dispute resolution.

## **1.2 Rationale for the study**

This research argues that the basic education in South Africa should be categorised as an essential service. By doing this, the mechanism for arbitration should be strengthened and made more proactive and credible. In this way, the constitutional right of the learner to a quality education can be guaranteed uninhibited by strike action on the part of educators. A learner's right to education is further given content by legislation as reflected in the preamble to the South African Schools Act,<sup>41</sup> which provides as follows:

“[w]hereas this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a foundation for the development of all our people's talents and capabilities” and further, “uphold the rights of all learners,

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<sup>39</sup> Calitz and Conradie at 133-134.

<sup>40</sup> Calitz and Conradie at 135.

<sup>41</sup> No.84 of 1996.

parents, educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools...”

Assuming educators are to be categorised as an essential service thus limiting their right to strike, an issue that has not been resolved is the criteria for categorising educators’ service as an essential service. In the same way, security, public health and safety considerations are criteria to prohibit strike action by essential service employees. Thus, the development of the child’s personality, talents, mental and physical abilities to their fullest potential; and the effect it will have on the social, economic and political aspect of the child’s development as well as the Country - ultimately should serve as the criteria. It is further suggested that the premium given to the teaching profession to the point of preventing strike action will not be limiting the right to strike, as such, but will designate this right on the same pedestal along with the right of the learner to basic education. In the same vein, the values and principles as entrenched in the Bill of Right are mutually reinforceable.<sup>42</sup>

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<sup>42</sup> This is further reinforced by UNESCO ILO recommendation of 5 October 1966: particularly recommendation’s IV (10) and 84 respectively dealing with educational objectives and policies including the fundamental right of every learner to be provided the fullest possible educational opportunities ... and ‘appropriate joint machinery setup to deal with the settlement of disputes between the teachers and their employers arising out of the terms and conditions of their employment.... If there should be a breakdown in negotiations between the parties, teachers’ organisations should have the right to take such other steps as are normally open to other organisations in the defence of their legitimate interests.’ See - UNESCO/ILO *Recommendation concerning the Status of Teachers* (1960) [http://portal.unesco.org/en/ev.php-URL\\_ID=13084&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13084&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 19-03-2014)

### **1.3 Objective and research question**

This mini-dissertation answers the key research question of whether the basic education ought to be categorised as an essential service. In answering this question, the following questions draw from this main question:

- (a) How has the legal regime on collective bargaining developed in the education sector and in essential services in South Africa?
- (b) What are the international law instruments or mechanisms governing the labour rights of educators and the learner's right to basic education?
- (c) To what extent can South Africa balance the competing rights of the educators as employees and the learner's right to basic education?

### **1.4 Method**

This research is qualitative and desktop based. It relies on primary sources like the Constitution, legislation, statutes, case law and other policy documents to accomplish the objective of this study. An examination of secondary sources will equally seek to achieve this. Secondary sources such as textbooks, journal articles, policy documents, periodicals and research findings from reliable research institutes are relied on to substantiate the arguments made.

### **1.5 Chapter outline**

Chapter one includes the introduction, background to the study, objective, research question and the rationale for the study. It sets out the structure of this mini-dissertation.

Chapter two discusses the historic development of collective bargaining in South Africa.

Chapter three examines collective bargaining in the public education sector in South Africa, international law and the instruments that promote the rights of workers (that is the ILO) and the rights of a learner and it interrogates the extent to which these fundamental rights can be balanced by providing basic education to a learner without unnecessarily infringing the educator's right to strike.

Chapter four examines the right to basic education and considering basic education as an essential service in South Africa.

Chapter five analyses the issues discussed in each chapter, and conclude with certain recommendations.

## CHAPTER TWO

### The state of collective bargaining in South Africa prior to the Labour Relations Act 66 of 1995

#### 2.1 Introduction

History has the ability to shape the attitudes and norms of society.<sup>43</sup> South African labour relations, as with modern industrial society, were characterized by the inherent conflict between employers (especially the government) and employees.<sup>44</sup> Through the collective bargaining process parties pursue their competing goals by means of a process of influence, which in most instances include threats of industrial action.<sup>45</sup> Collective bargaining lies therefore at the heart of any industrial relations system. In South Africa, regulated flexibility is achieved through the collective bargaining process.<sup>46</sup> Regulated flexibility represents a policy framework which provides for the selective application of legislative standards, depending on the remuneration earned by workers and the size of the employers undertakings.<sup>47</sup> Through regulated flexibility, the interests of employers and employees in areas like wages and conditions of service and other matters of mutual interests; as collective bargaining has the potential to balance the imperatives of equity and economic development.

This chapter examines collective bargaining and provides an overview of the state of collective bargaining in South Africa prior to the enactment of the 1995 LRA.

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<sup>43</sup> John Tredoux la Grange *J Labour Relations in South Africa* (2000) 1.

<sup>44</sup> Traditionally, the conflict was between the black majority unregistered unions and the white minority government where the unregistered trade unions were not allowed to bargain with the government. See du Toit D, *Capital and labour in South Africa: Class struggles in the 1970s* (1981 Kegan Pau International London); See also Grogan J, *Workplace Law*. 10<sup>th</sup> ed. (2009) Juta Cape Town 307.

<sup>45</sup> Grogan J, *Collective Labour Law* (2010) 4.

<sup>46</sup> Godfrey S, Theron J and Visser M *The State of collective bargaining in South Africa: An empirical and conceptual study of collective bargaining* (2007) 130.

<sup>47</sup> Two principles guide the application of regulated flexibility: i) it recognizes that lower earning employees are generally in a more precarious position than higher earning employees, who, through education or experience may have earned a level of security in employability; and ii) smaller undertakings should not be burdened with objections that could potentially introduce rigidities and costs which would ultimately inhibit job creation. See Van Eck, 'Regulated flexibility and the Labour Relations Amendment Bill 2012' *De Jure* 45 3 (2013) 601-612 at 604. Regulated flexibility includes both the employers' interest in flexibility and the employees' interest in security. 'It involves three kinds of flexibility: employment flexibility, wage flexibility and functional flexibility.' See Cheadle H, 'Regulated flexibility: revisiting the LRA and the BCEA' 27 *Industrial law journal* (2006) 663-703 p. 668.

## 2.2 ILO conventions and collective bargaining

The International Labour Organisation (ILO) is the body that sets internationally recognized labour standards to protect the right of workers globally. It aims to ensure that it serves the interest of employees by facilitating social dialogue between governments, employers and workers to set labour standards develop policies and devise programmes.<sup>48</sup> South Africa forms part of this community.<sup>49</sup> It is clear that collective bargaining is rooted in international policy structures which will help to set the stage for its activities nationally. The ILO is a special agency of the United Nations (UN) and created by the UN Charter. Through its four strategic goals it aims to:

- Promote and realize standards and fundamental principles and rights at work
- Create greater opportunities for women and men to decent employment income
- Enhance the coverage and effectiveness of social protection for all
- Strengthen tripartism and social dialogue<sup>50</sup>

Considering the above strategic objectives it is clear that the ILO is devoted to promoting social justice and internationally recognized human and labour rights as articulated in its mission. Its primary aim is to promote the rights of employees at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related matters. It is imperative for active engagement between the social partners, such as government, employers and labour in order to set international standards through Conventions. This would ensure that the views of these social partners are reflected in the ILO labour standards, policies and programmes.

Three ILO Conventions focus primarily on collective bargaining. These conventions refer to the Freedom of Association of the Right to Organise Convention,<sup>51</sup> and the Right to Organise and Collective Bargaining Convention<sup>52</sup>. In the ILO's instruments, collective bargaining is seen as the process that would lead up to the conclusion of a collective agreement.

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<sup>48</sup> International Labour Organisation Mission and Objectives Website <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> accessed 27-08-2014.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> No 87 1948 came into force 04 July 1950 ratified by South Africa 19 February 1996.

<sup>52</sup> No. 98 1949.

The ILO's Collective Bargaining Convention of 1981 defines the term collective bargaining widely to include all negotiations which take place between the employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations on the other, for the purposes of:

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers and their organizations and the workers' organizations.<sup>53</sup>

It is worth noting that although Conventions 87 and 98 refer directly to the right to strike, the former Convention does refer to an incidental right which supports the right to strike. Article 11 of the Freedom of Association and Protection of the Right to Organise Convention<sup>54</sup> provides as follows:

“[e]ach member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers may exercise freely the right to organise.”

Article 11 is given a strict interpretation by the Committee on Freedom of Association owing to the fundamental nature of this right. In further ensuring compliance with this provision, the ILO specifically mandated the Committee of Freedom of Association (CFA) to examine complaints on violations of freedom of association<sup>55</sup> whether or not the country concerned had ratified the relevant conventions.<sup>56</sup> The right to associate and to organize thus goes as far as not restricting strike action except in the essential services sector. This underscores the additional requirement that when a state decides to become a member of the ILO, it accepts the fundamental principles embodied in the ILO Constitution and Declaration of

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<sup>53</sup> Gernigon B, Odero A, and Guido H, 'Collective Bargaining: ILO standards and the principles of the supervising bodies. International Labour Office Geneva (2000) 11 Accessed [http://www.ilo.org/wcmsp5/groups/public/...ed\\_norm/...normes/publications/wcms...](http://www.ilo.org/wcmsp5/groups/public/...ed_norm/...normes/publications/wcms...) N 12-07-2014.

<sup>54</sup> Note 4.

<sup>55</sup> An example is the comments from the CFA on the Canadian Labour Code as it committee raised concerns that some provisions limit the rights of worker to strike. The relevant provisions are sections 87 and 7(1) compel striking or lock-out federal enterprise employees to continue to work. Specifically, the section in part states “its employees and their bargaining agent shall continue to provide the services they normally provide...”

<sup>56</sup> ILO Committee on freedom of Association, Assessed at <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang---en/index.htm>

Philadelphia,<sup>57</sup> including the principles of freedom of association. This provision of the ILO Constitution and Declaration of Philadelphia on Freedom of Association includes participating in strike action where negotiation fails. However, there are instances where strike action by a labour union may be limited. Under Article 9 of the ILO Convention,<sup>58</sup> the army and police force may be precluded from engaging in strike action, subject to the domestic laws of a particular state.

In South Africa, the limitations clause under sections 36 (1) of the Constitution of the Republic of South Africa is the provision used when a domestic court has to consider whether to limit constitutional rights, such as the right to strike.

During the apartheid regime, South Africa was criticized by the ILO, taking into account its membership of the Organisation since 1919, for excluding black workers from the 1924 Industrial Conciliation Act (ICA).<sup>59</sup> Given a combination of the fundamental nature of the principles that underlie the ILO (stated above) and the Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively,<sup>60</sup> the 1956 Industrial Conciliation Act (ICA) clearly violated the rights of black workers in South Africa. Convention 89 of 1948 on the Right to Organise and Bargain Collectively seeks to guarantee that:

‘workers enjoy adequate protection against acts of anti-union discrimination in respect of their employment particularly in respect of acts calculated to:

- (a) Make the employment of the worker subject to the condition that he shall not join a union or relinquish trade union membership

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<sup>57</sup> The Declaration of Philadelphia was annexed to the revised ILO Constitution in 1944 to form an integral part of the Constitution. Article I (b) particularly states that freedom of expression and association are essential to sustained progress; while Article III (e) allows the effective recognition of the right of collective bargaining. See Sulkowski J, ‘The Competence of the International Labour Organisation under the United Nations System’ *American journal of international law* 45 2 (1951) 286-313 p.288.

<sup>58</sup> No 87 1948, see also Gernigon B, Odero O and Guildo H, ‘International Labour Organisation principles concerning the right to strike’ *International labour review* 137 4 (2000) also assessed at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_087987.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087987.pdf).

<sup>59</sup> Industrial Conciliation Act 11 of 1924; see Jones R, *Collective bargaining in South Africa* (1982) 26.

<sup>60</sup> Both Conventions were ratified by South Africa on 20 February 1996.

(b) Cause the dismissal of or otherwise prejudice a worker by virtue of union membership...'<sup>61</sup>

South Africa through its membership of the ILO is thus obliged to incorporate the principles underpinning the ILO into its legislation to the extent that the principles are not in breach of the Constitution of the Republic of South Africa.<sup>62</sup> From the backdrop of South Africa's history of apartheid rule, the right of black workers to engage in collective bargaining was grossly denied. The following discussion will provide an overview of significant historical events relating to collective bargaining in South Africa prior to 1995.

### **2.3 Milestones leading up to the 1995 era**

Prior to 1994, collective bargaining in the South African workforce was exclusionary and structured in favour of the minority white group.<sup>63</sup> The majority black working population was excluded from joining registered trade unions through the ICA of 1924 and 1956. Thus black trade unions were not in a position to negotiate on behalf of their members as they were not registered.<sup>64</sup> Legislation was therefore used as the basis to exclude this class of employees from collective bargaining.

### **2.4 Labour period between 1924 and 1995**

In 1924, the Industrial Conciliation Act <sup>65</sup> (1924 ICA) was the first statute to regulate labour in South Africa.<sup>66</sup> This Act primarily covered the relationship between private sector employers and employees,<sup>67</sup> and operated largely on a voluntary collective bargaining system. It was supported by industrial councils that were set up between registered trade unions and employers' organizations.<sup>68</sup> The ICA dealt exclusively with collective labour

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<sup>61</sup> Article 1 (2) C098 - Right to Organise and Collective Bargaining Convention, 1949 (No.98) *Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* (Entered into force: 18 Jul 1951).

<sup>62</sup> Section 39 (1) (b) Constitution.

<sup>63</sup> For example the ICA and the Wages Act set up machinery for the prevention and settlement of disputes but excluded Africans from the definition of employees- meaning that white workers negotiated with employers the conditions of employment for themselves and for the African workers, where the Wages Act, introduce minimum wage standards for whites.

<sup>64</sup> Jones R, *Collective bargaining in South Africa* (1982) 28.

<sup>65</sup> Industrial Conciliation Act 11 of 1924.

<sup>66</sup> Darcy Du Toit David, Woolfrey, et al *Labour Relations Act law: Comprehensive guide* 5ed (2006) 6.

<sup>67</sup> John Grogan, *J Workplace Law* 10<sup>th</sup> ed (2010) 3-4.

<sup>68</sup> Du Toit et al *Labour Relations Act law* cite note 90 at 6.

rights,<sup>69</sup> whereas individual rights were dealt with by the Wage Act No. 27 of 1925. Furthermore, the 1924 ICA did not apply to some industries within the private sector such as domestic servants and agriculture.<sup>70</sup> In spite of the exclusion, black labour did not remain dormant but some trade unions emerged although the growth of these trade unions was unstable.<sup>71</sup> The drawback for these unions was that they were treated with suspicion because they were not duly recognized<sup>72</sup> and the government's legislative response to these groupings remained paternalistic.<sup>73</sup> Many of these trade union officials formed the foundations for the later black political movements that emerged at a later stage.<sup>74</sup> Thus the 1924 ICA fed into a racial divide in the workplace which became the basis for discrimination as it gave white workers the basis to optimally negotiate their conditions of employment; whereas, they negotiated less favourable conditions of employment for the black labour force.<sup>75</sup>

In 1948, the Nationalist government came into power in South Africa.<sup>76</sup> Its aim, amongst others, was to create policies that would protect white workers at the expense of African workers.<sup>77</sup> This was a period of general dissatisfaction amongst all the races due to the scarcity of jobs.<sup>78</sup> Labour legislation was customized in such a way to further strengthen the apartheid structure.<sup>79</sup> It was indeed clear that labour and politics became inseparable. African trade unions faced a huge challenge in the discharge of their duties as they were drawn without hesitation into the political arena.<sup>80</sup> This led to conflict between African trade unions and the state as labour became completely entangled with the politics.<sup>81</sup> This situation resulted in trade unions organizing strike action to advance their objectives, whether it was purely labour related or political issues.

As a result of innovation in the ICA of 1956 is that it prohibited all workers, black and white, from striking in 'essential industries' and more importantly banned unions from political affiliations. Section 77 of the 1956 ICA still maintained the exclusion of the black workforce

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<sup>69</sup> John Grogan, *Workplace Law* 10ed (2010) 4.

<sup>70</sup> Flint S, 'the protection of domestic workers in South Africa: A comparative study (Part 2)' *Industrial law journal* 9 (1988)187-201 p.188.

<sup>71</sup> Godfrey S, Maree J, Du Toit D (et al), *Collective bargaining in South Africa: past, present and future* (2010) 81 and 82.

<sup>72</sup> Jones op cit note 6 at28-9.

<sup>73</sup> Ibid 4.

<sup>74</sup> Ibid 4.

<sup>75</sup> Grogan op cit note 69 at4.

<sup>76</sup> Ibid .

<sup>77</sup> Hofmeyer Julian 'Reform of the labour market in South Africa' (1994) 9 *SA Journal of economic history* 13-4.

<sup>78</sup> John Tredoux la Grange J *Labour Relations in South Africa* (2000) 9.

<sup>79</sup> Ibid Grogan op cit note 69 at4.

<sup>80</sup> Ibid.

<sup>81</sup> Du Toit op cit note 44 at 100.

from collective bargaining while reserving skilled jobs for white workers.<sup>82</sup> An interesting feature was that white workers were protected from other race groups while Coloured and Indian workers were protected from Black workers by restricting the interaction between these race groups.<sup>83</sup> Furthermore, some jobs were reserved for specific race groups. This segregation of workers along race created suspicion among workers which further deepened the racial divide in the workplace and made it difficult for workers to organize, unite and form interracial trade unions to collectively bargain.

During the early 1950's, particularly 1954, the Trade Union Council of South Africa (TUCSA) was established and confined to registered trade unions thus excluding black unions.<sup>84</sup> As from 1962 when it allowed black union membership, TUCSA yielded to pressure by the government in 1967 where the federation was forced to expel black unions that had joined.<sup>85</sup> As a response to the government's exertion of excessive control over the black population, some prominent leaders of the African National Congress (ANC), which at the time was a political movement for the liberation of blacks in South Africa, fled into exile. This ultimately weakened the strength of the black independent workers unions, forcing their existence to cease.<sup>86</sup> The apartheid government's expectation of serene industrial relations without strikes was however brief.

In 1970, owing to lack of formal recognition given to black labour force as a trade union, workers ventilated their grievances through widespread strikes, for example, the 1973 strike which erupted in Durban.<sup>87</sup> The Durban strike heralded the beginning of the end of racially exclusive industrial trade relations, with its effects being felt countrywide.<sup>88</sup> The strikes became a watershed moment as it hastened the rebirth of African unions and jolted employers and the government into changes which would help the new organizations survive and grow.

The Government responded swiftly in its endeavour to discourage the development of black trade unions by amending the Bantu Labour (Settlement of Disputes) Act,<sup>89</sup> which sought to introduce liaison and work committees in an effort to restrict union organization by African

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<sup>82</sup> Du Toit op cit note 44 at 9.

<sup>83</sup> Grogan J op cit note 6 at 4.

<sup>84</sup> Martheanne Finnemore *Introduction to Labour Relations in South Africa* 10 ed (2009)33.

<sup>85</sup> Ibid.

<sup>86</sup> Du Toit et al *Labour Relations Law: A comprehensive Guide* 3<sup>rd</sup> ed.(2000) 10.

<sup>87</sup> Finnemore op cit note 84 at 34.

<sup>88</sup> Du Toit op cit note 44 243

<sup>89</sup> This Act was the new name for the Native Labour (Settlement of Disputes) Act 48 of 1953. It was amended by the Bantu Labour Relations Regulation Amendment Act 70 of 1973.

workers.<sup>90</sup> The majority of workers ignored the committee system and in response to the strike a significant number of black workers started to join new and unregistered unions.<sup>91</sup> These strikes were borne out of support of wage demands and did not materialize out of thin air as prior strikes by black and other workers that took place that proved to be successful.<sup>92</sup> It is important to note that these unions were excluded by statute from bargaining hence they used the workplace as their powerbase.<sup>93</sup> Thus, during the 1973 period, unregistered black trade unions grew gradually and realized that earlier unions had collapsed as they lacked the ability to engage in bargaining.<sup>94</sup>

Furthermore, black workers became more aware of their economic power and therefore rejected their secondary status in industry.<sup>95</sup> In order to make positive strides, they established a shop steward structure and through negotiation managed to exert pressure on employers to engage in bargaining at their respective workplace level.<sup>96</sup> Hence the formal system was being bypassed and employers started to recognize and bargain with these unions.<sup>97</sup> The stark reality was that there was a dire need to update black worker legislation, from which the Black Labour Relations Act<sup>98</sup> of 1977 was passed.<sup>99</sup>

By 1979, the government appointed the Wiehan Commission of Inquiry<sup>100</sup> to investigate a possible overhaul of the existing labour legislation. As a consequence, recommendations were made by the Commission which resulted in the partial liberalization of trade unions and the conferral of bargaining powers on all races, including black workers.<sup>101</sup> The Wiehahn Commission made the following recommendations:

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<sup>90</sup> Du Toit et al *Labour Relations Law A comprehensive guide* 3<sup>rd</sup> ed. 2000.

<sup>91</sup> Du Toit et al. *Labour Relations Law A comprehensive guide* 3<sup>rd</sup> ed. 2000. 9.

<sup>92</sup> Du Toit op cit note 44 at 244.

<sup>93</sup> Ibid.

<sup>94</sup> Finnemore M *Introduction to Labour Relations in South Africa* (2009) 34.

<sup>95</sup> John Tredoux la Grange J *Labour Relations in South Africa* (2009) 10.

<sup>96</sup> Ibid.

<sup>97</sup> Finnemore op cit note 94 at 34.

<sup>98</sup> No 48.

<sup>99</sup> Tredoux la Grange J *Labour Relations in South Africa* (2000) 10.

<sup>100</sup> The Wiehahn commission was set up in response to a number of issues which negatively affected investments into South Africa. These issues were: First the gradual recognition and underhand bargaining by employers of informal unregistered black trade unions and; Secondly the consequences of the Soweto uprising which resulted in the police opening fire on black school children demonstrators- the Soweto uprising In 1977 the government appointed the Wiehan Commission of Inquiry into Labour Legislation, which reported in 1979 and recommended a number of reforms that would fundamentally change the industrial relations system.

<sup>101</sup> Through the Industrial Conciliation Act 1956 changed to the Labour Relations Act 28 of 1956 as Repealed. See further Jones R *Collective Bargaining in South Africa* (1982) 30; Du Toit et al *Labour Relations Law A comprehensive guide* (2000) 12.

- Granting freedom of association to all workers regardless of race and status
- Autonomy of unions in deciding membership criteria
- Apprenticeships to be open to all races
- Appointment of a National Manpower Commission to serve as an ongoing monitor and study group of the changing labour process
- Restructuring of the previous Industrial Tribunal into an Industrial Court to adjudicate on disputes of rights or interests and to create a body of case law.<sup>102</sup>

Additionally, 1979 marked the establishment of the Federation of South African Trade Unions (FOSATU) which was built on the principles of multi-racial and industrial unionism.<sup>103</sup> In 1985, FOSATU changed its name to the Congress of South African Trade Unions (COSATU) consisting of unions with different ideological stance uniting to achieve the common purpose of industrial level bargaining.<sup>104</sup>

## **2.5 Period of transformation within labour movement in South Africa**

Transformation within trade union movements in South Africa assumed a more active role when COSATU came on board. The scope of COSATU activities expanded to include their level of influence (through the tripartite representation of the State, employer and union) in decision making on national socio-economic policy.<sup>105</sup> Thus it pushed for the establishment of one union operating in one industry which would eventually lead to national industry-wide councils in all sectors.<sup>106</sup>

COSATU'S close links with political parties became a huge threat to the existing industrial relations system. Some watershed political events occurred in the country, such as the release of Nelson Mandela and the unbanning of the ANC. These events led to the start of a new socio-political era.<sup>107</sup> It left the National Party government with little option but to recognize the agreement reached between COSATU, National Council of Trade Unions (NACTU) and South African Employers Consultative Committee on Labour Affairs (SACCOLA), which was formalized in the Laboria Minute of 14 September 1990.<sup>108</sup> It stipulated that new labour

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<sup>102</sup> Finnemore op cit note 94 at34-35.

<sup>103</sup> Ibid.

<sup>104</sup> Du Toit et al *Labour Relations Law A comprehensive guide* (2000) 12.

<sup>105</sup> Finnemore op cit note 94 at17.

<sup>106</sup> Du Toit et al *Labour Relations Law A comprehensive guide* (2000) 12.

<sup>107</sup> Tredoux la Grange J *Labour Relations in South Africa* (2000) 12.

<sup>108</sup> Dut Toit et al *Labour Relations Law A comprehensive guide* (2000) 15

legislation would be subjected to multi-party consultation and consensus before it was submitted to Parliament.<sup>109</sup> It was in consonance with this that the Constitution and Labour Relations Act of 1995 extensively dealt with past labour imbalances and incorporated international labour standards into the Act.

As mentioned earlier, when political power changed hands in 1994 from apartheid to democracy the transformation of the public service was inevitable following the election of the first democratic government. It was imperative for the newly elected government to fundamentally change existing labour policy and to bring the new labour relations framework in line with the Constitution and objectives of the Reconstruction and Development Programme (RDP).<sup>110</sup> The government faced the huge challenge of delivering services to 40 million people, instead of the 8 million who had been served by the apartheid government.<sup>111</sup>

## **2.6 Conclusion**

Collective bargaining in South Africa has undergone a chequered history. This, as stated, is attributed to the repressive apartheid regime which limited collective bargaining. However, the persistence of labour to socially organize and collectively negotiate on matters of mutual interest between the government as employer and registered trade unions as employees has increased the capability of unions to engage with government on matters of interest. The same vigour could be brought to the collective bargaining process where they are to be categorized as essential services.

The 1924 and 1956 ICA created racial tensions. Black trade unions were deprived of the opportunity to engage in collective bargaining. Collective bargaining in South Africa was limited to a particular group of employees during apartheid. However, since the advent of democracy, labour laws include all categories of workers. Fundamental principles of the ILO partly informed the constitutional provision to protect the right of workers to collective bargaining as elaborated in the LRA. These principles bordered on, although were not limited to, measures of ensuring freedom to associate. In addition to the historic development of

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<sup>109</sup> Ibid 15.

<sup>110</sup> Bendix S, *Industrial relations in South Africa* (2010) 87, The ANC developed the Reconstruction and Development Programme (RDP) before coming into power. It has an integrated, coherent socio-economic policy framework with an inclusive approach that seeks to mobilise everyone and the country's resources toward the eradication of apartheid and the building of a democratic, non-racial and non-sexist society. It also deals with collective bargaining amongst other issues.

<sup>111</sup> Adler, G. *Public Service Labour Relations in a democratic South Africa* (2000) 112.

collective bargaining, it is imperative to examine the legal development of collective bargaining and the right to strike action by educators in South Africa to determine its impact on the right of a learner to education. This will be discussed in the next chapter.

## CHAPTER THREE

### COLLECTIVE BARGAINING IN THE PUBLIC EDUCATION SECTOR IN SOUTH AFRICA

#### 3.1 Introduction

Labour relations in the education sector in South Africa is regulated under the Constitution, LRA and Public Service Act (PSA).<sup>112</sup> Prior to 1994, unions representing educators were fragmented based on race. For years there were different departments for different racial groups with Blacks at the bottom of the ladder in terms of provision of resources<sup>113</sup>- including quality education. The restructuring of the education sector has been one of the critical priorities of the newly elected government in 1994; as the apartheid system left a legacy of inequalities evident in all spheres of society. Hence the focus of the new administration was to improve access to and quality of education especially to previously disadvantaged groups. In recognizing the importance of education, and its impact on the development of the country, the government acknowledged that education and training are essential in growing families and the wealth of the country.<sup>114</sup> To achieve this, both the rights of the educator and the learner need to be upheld. Reconciling the competing rights of educators to strike with the right of learners to uninterrupted education creates a challenge for the government.

Against this backdrop, this chapter examines the legal framework regulating collective bargaining in public education. The constitution guarantees both employees and employers rights along with the right to engage in collective bargaining on the one hand, and also the rights of a child to education on the other hand. Additionally, the LRA spells out measures to consider in implementing these constitutional rights to collective bargaining and strike action by employees. In examining the legal framework, this chapter brings out the approach adopted by the courts in interpreting the Constitution and the LRA on matters concerning collective bargaining in general and within basic education. The interpretation has shaped the relationship between government, educators and learners. This chapter begins by exploring the concept of collective bargaining a central tenet of the Industrial Relations System.

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<sup>112</sup> PSA No.103 Of 1994.

<sup>113</sup> Mda T and Mothata M, *Critical issues in South African Education after 1994* (2000) 2.

<sup>114</sup> Ibid.

### 3.2 Defining the term collective bargaining

Collective bargaining refers to negotiations that take place between employers and employees about terms and conditions of employment.<sup>115</sup> In the education sector, collective bargaining occurs between two main parties, namely trade union representatives for educators and the state as employer. Hence collective bargaining, through trade unions participation and input in the negotiation process, restricts unilateral decision making on the part of employers, particularly those dealing with matters of mutual interest.<sup>116</sup> The result of collective bargaining would be a collective agreement which section 213 of the LRA defines in the following terms:

‘a written agreement concerning terms and conditions of employment or any matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

- (a) one or more employers;
- (b) one or more registered employers’ organisations; or
- (c) one or more employers and one or more registered employers’ organisations’.

Collective bargaining in the education sector is informed by; the Constitution and legislation. By giving content to fair labour practices through balancing the interests of both the employer and employee stipulated in the Constitution, the LRA should be construed in a manner that reconciles this tension. In *NEHAWU v University of Cape Town and Others*<sup>117</sup> Ngcobo J stated that the continuance in the condition of the relationship between an employer and employee should be on terms that are fair to both.<sup>118</sup> The constitutional right to engage in collective bargaining is an issue the court takes seriously. The scope of the constitutional right to engage in collective bargaining extends to essential services.

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<sup>115</sup> Cox A op cit note 2 at 3; Mda T op cit note 112 at 2.

<sup>116</sup> Quick K, ‘A discussion on the meaning of the concept of ‘a matter of mutual interest’ in the context of the right to strike’ 23<sup>rd</sup> Annual Labour Law Conference-Justice on the Job 11-13 August 2010 Sandton Convention Centre Accessed at <http://www.lexisnexis.co.za/our-solutions/private-sector/compliance-and-training/annual-labour-law-conference2010>. Although the LRA deliberately did not define the term matters of mutual interests, it leaves the definition open to judicial interpretation to avoid restricting the meaning of the term. The term matters of interest is described as any matters related to the employment and to the employer and employee relationship, including such matters as terms and conditions of employment, disciplinary procedures, grievance procedures, work rules, recognition, remuneration, service benefits, employee compensation, as well as negotiation structures.

<sup>117</sup> [2002] ZACC 27; 2003 (2) BCLR 154 (CC); 2003 (3) SA 1 (CC). Reference was made in this case to section 27 of the interim Constitution. This section is the equivalent of section 23 of the Constitution.

<sup>118</sup> *NEHAWU v University of Cape Town and Others* at para 40.

For example in *Eskom Holdings Ltd v Union of Mineworkers and others*,<sup>119</sup> a case before the Supreme Court of Appeal (SCA) from the Labour Appeal Court (LAC). The Respondents (Union of mineworkers and 6 others) brought a complaint against the Appellant (Eskom Holdings Ltd) before the Commission for Conciliation, Mediation and Arbitration (CCMA) on whether the CCMA is the appropriate body to determine the issue of failure to agree on the terms of a minimum services agreement between National Union of Mineworkers and Eskom Holdings Limited. The LAC held that the CCMA has the jurisdiction to resolve such dispute under Section 74 of the LRA. Eskom appealed the decision of the LAC to the SCA.

The SCA, per Leach J upheld the constitutional right to collective bargaining. It held that in a dispute to determine the category of employees whose duties are essential services required maintaining acceptable minimum service designated as essential service. Leach J further held that the Essential Services Committee (ESC) designates a service as an essential service under Sections 73 and Section 74 of the LRA.<sup>120</sup> Section 73 requires the dispute to be brought to the ESC at the stage of determining or designating a service as essential service<sup>121</sup> while Section 74 entails referring a dispute that precludes parties from participating in a strike or a lock-out because that party is engaged in an essential service.<sup>122</sup> Pillay notes that a minimum service agreement entered into between the employer and employees of a non-essential service can only be an ordinary collective agreement.<sup>123</sup> Such agreement can be referred to the CCMA under Section 74 of the LRA.

The *Eskom Holdings* case brings out the constitutional importance of collective bargaining and the right of employees to strike by ensuring that even in essential services, only members designated as providing essential services, that is, those engaged in minimum services should be prevented from strike. Thus the remaining workforce within an essential service can partake in strike.<sup>124</sup> In the *Bader Bop* case the CC had to address whether minority trade unions could strike. This case will be discussed later.

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<sup>119</sup> 2012 (2) SA 197 (SCA)

<sup>120</sup> Leach J, paras 30 and 31.

<sup>121</sup> Pillay D, 'Essential services under the new LRA' *Industrial law journal* 22 (2001) 1-37 20.

<sup>122</sup> *Eskom Holdings Ltd v Union of Mineworkers and others* paras 18-19.

<sup>123</sup> Pillay D, 'Essential services under the new LRA' *Industrial law journal* 22 (2001) 1-37 at 27.

<sup>124</sup> *Eskom Holdings Ltd v Union of Mineworkers and others* para 28; see further *South African police Service v police and Prisons Civil Rights Union and Another* [2011] ZACC 21 para 30.

### 3.3 The Constitution

- Chapter two of the Constitution provides a set of fundamental rights for all citizens. In the context of labour relations, section 23<sup>125</sup> of the constitution guarantees both employees' and employers' rights, and confers on both public and private sector educators the right to engage in collective bargaining under section 23 (5).<sup>126</sup> There are other provisions contained in the Bill of Rights that have a direct bearing on collective bargaining.<sup>127</sup>

In this regard everyone including educators has the right to freedom of association. This freedom includes, but is not limited to, the right to form or join a union of their choice, and to participate in activities and programmes of the union, including strike action. Similarly, in terms of the LRA the employer has recourse to lock out. For educators, the freedom to also choose not to be a member of a union is also guaranteed. However, given the fact that these workers might enjoy benefits gained from collective bargaining and associated strike action, these 'free riders' will be required to pay over a fee to the union concerned.<sup>128</sup>

#### 3.3.1 Collective bargaining and the right to strike

The purpose of the LRA is stated in Chapter 1.<sup>129</sup> The LRA seeks to give effect to the obligations of South Africa as a member state to the ILO, and it is the primary legislation

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<sup>125</sup> Section 23 of the Constitution of the Republic of South Africa makes a set of broadly expressed labour rights to certain fundamental rights such as the right to fair labour practices, the right to freedom of association, the right to organize, the right to collective bargaining and the right to strike. These rights have become the basis for labour related matters and are construed as –

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right-

(a) to form and join a trade union;

(b) to participate in the activities and programmes of trade union; and

(c) to strike...

(5) ...to the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

<sup>126</sup> Section 23.

<sup>127</sup> The relevant provisions are respectively sections 17 and 18: the right to assembly, demonstration, picket and petition; the right to freedom of association.

<sup>128</sup> Du Toit et al., *Labour relations law: A comprehensive guide* (2006 LexisNexis Durban) 189.

<sup>129</sup> Section 1 states: "the purpose of the Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –

governing collective bargaining. All employees in South Africa are covered by the LRA.<sup>130</sup> Furthermore, the LRA prohibits those engaged in essential services to resort to strike action where collective bargaining fails.<sup>131</sup> To this end, Sections 70-74 of the LRA mandates the Minister, after consulting with the Minister of the Public Service and Administration to establish an Essential Services Committee. Functions of the Committee are to consider designating whole or part of a service as essential service;<sup>132</sup> and the mechanism and structure (conciliation and arbitration with parliamentary supervision on an arbitral award the ESC considers non-binding) to resolve disputes rather than participating in strike or lock-out under Section 74 of the LRA. Thus the assessment and recommendation of the committee to situate certain category of services as essential is guided by the critical nature of the service to the stability of the country, through security, economic, political and social factors. These considerations could be primary or secondary. Examples of primary considerations are matters under Section 2 (a-e), whereas the consequential effect of neglecting basic education by allowing educators to strike is a secondary or ancillary consideration.

The educator's right to engage in collective bargaining derives from section 23 of the Constitution. More particularly, section 23 (5) of the Constitution provides that national legislation may be enacted to regulate collective bargaining, and that any limitation of this right must comply with section 36(1) of the Constitution. The framework for collective

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- (a) to give effect to and regulate the fundamental rights conferred by section 27 (sic) [rather Section 23] of the Constitution;
  - (b) to give effect to obligations incurred by the Republic as a member of state of the International Labour Organisation;
  - (c) to provide a framework within which employees and their trade unions, employers and employers' Organisations can-
    - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
    - (ii) formulate industrial policy; and
  - (d) to promote-
    - (i) orderly collective bargaining;
    - (ii) collective bargaining at sectoral level;
    - (iii) employee participation in decision-making in the workplace; and
    - (iv) the effective resolution of labour disputes.

<sup>130</sup> However, owing to their significance to national security, the LRA does not apply to the following category of employees as Section 2 (a – e) excludes the National Defence Force; National Intelligence Agency; the South African Secret Service; the South African National Academy of intelligence

<sup>131</sup> Section 65 of the Labour Relations Act 66 of 1995.

<sup>132</sup> Sections 70 and 71 of the LRA. The new amendments to the LRA, particularly the inclusion of sections 70A to 70F, seek to revamp the ESC. Of particular note is the newly introduced section 72 which provides for the negotiation and conciliation of minimum service agreements. This provision will have a tremendous effect on the ability of employees in certain sectors designated as an essential service to embark on a strike. Where employees are prohibited from striking, all unresolved interest disputes will be subject to compulsory arbitration in terms of the LRA.

bargaining under the LRA is contained in Chapter III of the LRA. Organisational rights<sup>133</sup> are referred to under sections 11 to 22 of the LRA, and strikes and lockouts are dealt with under Chapter IV of the LRA. These provisions under the LRA are not narrow but broadly defined to include educators in the public sector as some educators are represented by an umbrella trade union body like SADTU.<sup>134</sup>

To this end, the individual and collective labour rights protected under the constitution also apply to educators. In representing their members through collective bargaining with an employer, such negotiation sometimes reaches a deadlock where, especially, the employer is unwilling to yield to the unions demand on matters of mutual interest. In such situation, the union could resort to strike, as a last measure, to persuade the employer to accede to their demands.

Notably, in giving effect to the public international law obligations of the Republic of South Africa relating to labour relations,<sup>135</sup> the right to strike as enshrined in ILO Convention 87 1949 is given legislative content under the LRA. The Convention provides for Freedom of Association as including the right to strike in the public sector except services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.<sup>136</sup> In South Africa, the right to strike is a constitutional right with certain limitations.<sup>137</sup> It is arguably a weapon of last resort used by employees including educators to advance their demands on mandatory issues and matters of mutual interests. Section 213 of the LRA defines a strike as:

“the partial or complete concerted refusal to work, or obstruction of work, by persons who are 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 of any matter of mutual

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<sup>133</sup> These are rights of employees that are protected by a trade union through the use of collective power. This collective power is used to persuade employers to negotiate. Trade unions represent employees at disciplinary hearings and litigation; engage in collective bargaining on behalf of employees; and represent employees' collective interests at the workplace. See van de Walt A, le Roux R and Govindjee A, *Labour law in context* (2012 Pearson Cape Town)167; see also Du Toit et al., *Labour relations law: A comprehensive guide* (2006 LexisNexis Durban) 2 and 3.

<sup>134</sup> Section 7(1) SADTU Constitution 2010.

<sup>135</sup> The Preamble, Section 3(c) and Section 1(b) – which states the purpose of the LRA.

<sup>136</sup> Digest of Decisions and Principles of the Freedom of Association Committee, 1996, para. 536; also see Beiter K, *The protection of the right to education by international law* (2006)298.

<sup>137</sup> See Sections 70-74 LRA

interest between employer and employee, and every reference to ‘work’ in this definition includes overtime work, whether it is voluntary or compulsory”.

The interim constitution differs from the 1996 constitution. With the former, the right to strike was limited to a strike for the purpose of collective bargaining whereas the latter provides protection for strikes going beyond collective bargaining such as strikes promoting or defending the socio-economic interests of workers and political strikes<sup>138</sup>. Section 77 of the LRA provides for protest action to promote or defend socio-economic interest of workers. The Act further requires<sup>139</sup> that the purpose and nature of the protest action be considered in determining whether such action will be afforded legislative protection.

Section 64 1 (b) (c) of the LRA essentially outlines the procedure to follow before embarking on a strike action or lockout.

### 3.2.2 Application of the right to strike

The Constitutional Court (CC) referred to the ILO standards in the judgments of *NUMSA vs Bader Bop*<sup>140</sup> (Bader Bop) and *NEHAWU v University of Cape Town and Others*<sup>141</sup> (Nehawu). These standards are hinged on interpreting ‘everyone has the right to fair labour practices’ as defined in Section 23 (1) of the Constitution to include balancing the interests of the employer with the interests of the employee. In balancing these interests especially through collective bargaining, the employee’s right to freedom of association, including the right to strike, must be respected. In the former case, the CC considered the nature and importance of the constitutional right to strike. By the Constitutional court’s interpretation of this right, it made it clear that the right to fair labour practice is guaranteed to everyone, that is, worker or employers or trade unions or employers’ organisations.<sup>142</sup> Thus the fundamental nature of the right to fair labour practice in Section 23 (2) (c) includes the right to strike. The importance of the right to strike<sup>143</sup> was furthermore emphasized by the CC in

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<sup>138</sup> Currie & De Waal *Bill of Rights Handbook* 5<sup>th</sup> ed. (2005) (513).

<sup>139</sup> Section 77 (1) (b) (i and ii) of the Labour Relations Act 66 of 1995.

<sup>140</sup> 2003 2 BLLR 103 (CC)

<sup>141</sup> [2002] ZACC 27; 2003 (2) BCLR 154 (CC); 2003 (3) SA 1 (CC). Reference was made in this case to section 27 of the interim Constitution. This section is the equivalent of section 23 of the Constitution.

<sup>142</sup> NEHAWU case Paras 39-40.

<sup>143</sup> The right to strike is also recognised as a fundamental right in both international and regional instruments. Article 8 (1) (d) of the International Covenant on Economic, Social and Cultural Rights, 6 *ILM* 360 (1967) (the Covenant) states “[t]he State Parties to the present Covenant undertake to ensure .....[t]he right to strike, provided that is exercised in conformity with the laws of the particular country.” The Covenant was adopted on 16 December 1966 and came into force on 3 January 1976. South Africa signed the Covenant on 3 October

*Certification of the Constitution of the Republic of South Africa, 1996*<sup>144</sup> where the following was stated:

“Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanisms of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace. The importance of the right to strike for workers has led to being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out”.<sup>145</sup>

In the *Bader Bop* case, the main consideration before the CC was the right of the National Union of Mine Workers in South Africa, NUMSA, to strike under Section 23 of the constitution. Since NUMSA did not have majority representation (in the workplace), it could not oblige the employer to grant the right to strike in terms of procedure outlined in section 21 of the LRA.<sup>146</sup> NUMSA went ahead and gave notice that it would embark on a strike to acquire the right to be represented by shop stewards and to engage in industrial action. The CC was confronted with the issue whether or not such a strike would be permitted in terms of the LRA. The Court held that the minority trade unions may strike in support of demands for organizational rights to which they are not automatically entitled to under the LRA. In reaching its decision, the Court emphasized two important factors. First, the importance of

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1994 but was not yet ratified. Article 4 (i) of the Southern African Development Community (SADC) Charter of Fundamental Social Rights, adopted on 26 August 2003 and came into force on the same day, <http://www.sadc.int/index/browse/page/171>, accessed 11 April 201, which states:

‘Member States shall create an enabling environment consistent with the ILO Conventions on freedom of Association, the right to organise and collective bargaining so that:

(e) the right to resort to collective action in the event of a dispute remaining unresolved shall:

(i) for workers, include the right to strike and to traditional collective bargaining”.

<sup>144</sup> 1996 (4) SA 774 (CC); 1996 (10) BCLR 1253 (CC).

<sup>145</sup> Para 66.

<sup>146</sup> Section 21 of the LRA states the conditions and procedures to be followed before a registered trade union can embark on a strike. It states the notice in writing to be given Section 21 (1); (2) speaks about the representativeness of the trade union; (3) speaks of the rights and the manner of exercising those rights; while Sections 21 (4), (5 - 6) speak about the measures of appeal where the employer and unions do not reach an agreement; and the appointment of a Commissioner for conciliation respectively. Thus Section 21, broadly speaking, states the mechanism for resolving dispute on matters of mutual interest between the employer and employees.

upholding the dignity of workers who were hitherto treated as coerced employees. Secondly, asserting the bargaining power of workers in industrial relations under the LRA.<sup>147</sup> These issues however are understood within the dynamic nature of the wage-work bargain and the context within which it takes place.<sup>148</sup> However, in practice the recognition of a minority trade union might not have much impact where a O' Reagan J's position was instructive:

“The more members the union has, the more likely the employer will accept that it is sufficiently representative within the meaning of the Act, at least for the purposes of sections 12, 13 and 15. The approach preferred in this judgment will have its greatest effect in relation to the recognition of shop stewards. Unions are entitled to have their shop stewards recognised only when they can establish they are the majority unions.”<sup>149</sup>

From the reasoning of O'Reagan above, although the law recognises minority rights, in practice, their impact is limited in persuading the employer. However this recognition is significant for some educators and the impact it has on the learner. Where a minority trade union does take into account the interests of the learner it can change the nature of the bargaining that occurs between the employer and educators.

For example during the 2009 teacher's strike, in the case of *SAOU and NAPTOSA v Head of Department, Guateng Department of Education and Six Others*, the minority educators union embarked on strike action for five days and resumed teaching and based their decision not to strike longer on considering the interest of the learners. Although the issue for determination in the case was reimbursement for wrongful deduction from their salaries for number of days they did not embark on a strike, two factors were significant: the interest of the learner and the effect of a minority group to mitigate the severity of a strike on the learner.<sup>150</sup>

The constitution acknowledges collective as well as individual rights as basic human rights. Although the Constitution does not explicitly make provision for the employers' recourse to lock out<sup>151</sup> the LRA recognizes this form of industrial action. This ensures that through

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<sup>147</sup> Bader Bop (CC) Case para 43.

<sup>148</sup> *Numsa vs Bader Bop* 2003 2 BLLR 103 (CC) para 13.

<sup>149</sup> Bader Bod case Para 45.

<sup>150</sup> *SAOU and NAPTOSA v Head of Department, Guateng Department of Education and Six Others* Case number J 2468/10.

<sup>151</sup> Section 64, while Section 213 of the of the LRA defines a lock out as the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion.

legislation the power granted to parties in the employment relationship is balanced.<sup>152</sup> This balance is necessary due to the unequal interplay of power between the employer and the employee. The former may abuse the right to recruit and terminate the employment of the worker. Similarly, the employees may abuse the use of their rights. The balance is necessary to protect the employee's economic interest from any form of abuse by the employer. This can promote democracy in the employment relationship.

Section 23 (5) of the Constitution stipulates that there must be national legislation to deal with matters of collective bargaining. In respect to the public service the LRA provides the body for coordinating collective bargaining. Section 35 of the LRA states there will be a bargaining council for the public service as a whole to be known as the Public Service Coordinating Bargaining Council (PSCBC). The PSCBC was established to give effect to sections 35-38 of the LRA which relates to the establishment of a bargaining council for the entire public sector.<sup>153</sup> To ensure a structured and conducive collective bargaining environment, the PSCBC designated four sectors for the establishment of sectorial bargaining councils<sup>154</sup> and these are:

- The Public Health and Social Development Sectorial Bargaining Council (PHSDSBC);
- The Safety and Security, Sectorial Bargaining Council (SSSBC);
- The Education Labour Relations Council (ELRC); and
- The General Public Service Sectorial Bargaining Council (GPSSBC).

The PSCBC plays a co-ordination function between the sectorial bargaining councils in order to ensure that uniformity in systems and practices among the above sectorial bargaining councils.<sup>155</sup> Furthermore, the PSCBC seeks to enhance labour peace in the public sector and to promote a sound relationship between the employer (State) and its employees. It has therefore the mandate to negotiate and bargain collectively by providing a vehicle for the prevention and resolution of disputes and to enforce collective agreements.<sup>156</sup> Any disputes that may arise between bargaining councils in the public sector must be resolved by the

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<sup>152</sup> Venter, R *Labour Relations in South Africa*, 24.

<sup>153</sup> Ferreira, G. *Collective bargaining and the public sector*. 194.

<sup>154</sup> Van der Walt, AJ et al. *Labour law in context*. 270.

<sup>155</sup> Ibid.

<sup>156</sup> Ferreira, G. *Collective bargaining and the public sector*. 195.

CCMA.<sup>157</sup> The practice before this provision was that any disputes used to be referred and dealt by the civil courts as dictated by the principles of the law of contract or administrative law.<sup>158</sup> Through the institution of the CCMA the LRA seeks to promote less confrontational industrial relations practices whilst promoting an orderly and collective joint consensus seeking approach. This indicates a move away from the past where previous legislation represented purely unilateral state action. Collective bargaining in the education sector is thus designated under the Educators Labour Relations Council (ELRC). This will be discussed next.

### 3.4 Education Labour Relations Council (ELRC)

The ELRC is the bargaining council for educators. It has juristic personality and is registered<sup>159</sup> in terms of section 37 of the LRA. This Council is governed by its own Constitution<sup>160</sup> and one of its main functions is to interpret and apply the provisions of the Employment of Educators Act (EEA).<sup>161</sup> It provides for the employment of educators by the State, for the regulation of the conditions of service, discipline, retirement and discharge of educators and for matters connected therewith.<sup>162</sup> The parties to the ELRC are the employer (the state for public institutions) and the educators through their trade union representatives.<sup>163</sup> The ELRC's jurisdiction does not extend to issues bordering on the law arising from employer and educator relationship.<sup>164</sup> Within the objectives of the ELRC, two distinctive issues are the subject of collective bargaining, to wit; mandatory issues and permissive matters of mutual interests.<sup>165</sup>

**Mandatory** issues for collective bargaining in the education sector are issues required by law to be bargained for as they have a direct impact on the daily functioning of an employee.<sup>166</sup> These issues are included under Section 12 of the ELRC's Constitution:

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<sup>157</sup> Labour Relations Act, 2002 (Act 12 of 2002).

<sup>158</sup> Grogan, J. *Workplace Law* (2008) 10.

<sup>159</sup> Section 2 Constitution of the Education Labour Relations Council 6 of 2000.

<sup>160</sup> See Constitution of the Education Labour Relations Council Resolution 6 of 2000.

<sup>161</sup> Employment of Educators Act 76 of 1998.

<sup>162</sup> Preamble to the Employment of Educators Act No. 76 of 1998.

<sup>163</sup> Section 6 of the Constitution of the Education Labour Relations Council

<sup>164</sup> *SAMA v McKenzie* (2010) 5 BLLR 488 SCA.; see also *Saga Moses Mahlangu v Minister of sport and Recreation* Unreported case JR2148/08

<sup>165</sup> Mda T & Mothata S, *Critical issues in South African education - after 1994* (2000) 200-218.

<sup>166</sup> Legotlo M, 'Labour relations in education' in Mda T & Mothata S, *Critical issues in South African education - after 1994* (2000) Juta Kenwyn South Africa 200-218 at 208.

- to maintain and promote labour peace in education;
- to prevent and resolve labour disputes in education;
- to provide and regulate collective bargaining;
- to perform the dispute resolution functions in terms of section 51 of the LRA;
- to negotiate, to bargain collectively, and to consult on matters of mutual interests and issues that affect or may affect the relationship between parties to the Council or the Chamber;
- to conclude collective agreements;
- to enforce collective agreements between the parties and their members;
- to confer in workplace forums additional on additional matters for consultation;
- to determine by collective agreements the matters that may be an issue in a dispute, a strike, or a lock-out at the workplace.

**Permissive** issues or matters of mutual interests are those that may be the subject of bargaining, but are not necessarily required by law to be bargained for. A permissive issue may be discussed if both parties to the negotiation agree to do so. These issues are:<sup>167</sup>

- To establish and administer a fund to be used for resolving disputes;
- To promote and establish and administer pension, provident, medical aid, sick pay holiday, unemployment and training scheme funds.<sup>168</sup>

### **3. 4. 1 The scope of the ELRC**

The ELRC serves the public education service nationally.<sup>169</sup> In setting the objectives of the ELRC, the constitution states that one of its objectives is to promote collective bargaining in relating to all matters of mutual interest between the employer and employees.<sup>170</sup> Similarly, the ELRC Constitution gives it the mandate to conclude and enforce collective agreements.<sup>171</sup> Being the umbrella body for public education service in South Africa, in order for a trade union to gain membership, it must apply to be registered with the Council and this application

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<sup>167</sup> Mda T & Mothata S, *Critical issues in South African education - after 1994* (2000) Juta Kenwyn South Africa 200-218 at

<sup>168</sup> Mda T and Mothata S, *Critical issues in South African education-After 1994* (2000 Juta Kenwyn) 207-8.

<sup>169</sup> Van der Walt A, 'Labour law in the public service at national and provincial level' in Van der Walt, le Roux and Govindjee (ed.), *Labour law in context* (2012 Pearson Pinelands Cape Town) 296-278 at 272.

<sup>170</sup> Article 4 (4) of the Constitution of the Educators Labour Relations Council per resolution No. 6 of 2000.

<sup>171</sup> Article 4 (5) of the Constitution of the Educators Labour Relations Council.

must be accompanied by a certified true copy of its Constitution.<sup>172</sup> The ELRC has in exercising the terms of its mandate with reference to matters of collective bargaining and interpreting the EEA, handled some cases with a modest statics from start to finish.<sup>173</sup> However in some cases disclosed below, the council lacked jurisdiction and had to refer the matter to the Labour Court (LC). Extending the jurisdiction of the ELRC and strengthening the institution for collective bargaining purposes might reduce the incidence of strike action by educators.

### 3.4.2 The Role of the ELRC

Balancing the right of the educator with the right of the learner to attend class creates a dilemma to the government. Yet the government's primary consideration ought to be the attendance of the educator in the class.

In this respect, two issues that arise are: the discharge of the educator by operation of law, and dismissals. The former is by operation of law thus depriving the bargaining council of jurisdiction to entertain the matter; while the latter deals with matters of facts, from the statement of claim,<sup>174</sup> hence bestowing on the bargaining council jurisdiction to arbitrate. Whether dismissal relates to strike action by educators or the absence of an educator from class, the primary consideration is for the learner to have the right to an educator to teach them. In the case of *Phenithi v Minister of Education and 2 others*<sup>175</sup> the (SCA) upheld the dismissal of an educator where this educator was absent from class without permission. The court also used the evidence to point to the intention of the drafters of the EEA on the implication of the educator's absence from the classroom among other factors. Furthermore, notwithstanding the interpretation of deemed dismissal under the EEA, it was held a *bona*

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<sup>172</sup> Article 6(4) *ibid.* the following are the trade union parties under the ELRC: the South African Democratic Teachers Union (SADTU); the Cape Teachers' Professional Association (CTPA); the National Professional Teachers Organisation of South Africa (NAPTOSA); the Suid-Afrikaanse Onderwysersunie (SAOU); the National Teachers Union (NATU); the Professional Educators Union (PEU); and the Public Servants Association (PSA).

<sup>173</sup> The statistics shows the ELRC dealt with Collective bargaining on matters of mutual interests in public education, having 20 percent target but realizing an actual achievement rate of ten percent. ELRC Annual Report 2012/2013 Presentation to parliament 10-10-2013. ELRC Labour Bulletin 2011 Nelson Mandela Metropolitan University.

<sup>174</sup> *SAMA v McKenzie* (2010) 5 BLLR 488 SCA.

<sup>175</sup> Case Number 18/05 Supreme Court of Appeal of South Africa.

*fide* belief by an educator (that s/he had the necessary authorization) to be absent from work, is a sufficient basis to revoke a deemed dismissal.<sup>176</sup>

In *Andre Johann De Villiers v Head of Department: Education Western Cape Province*,<sup>177</sup> the employee, on the advice of his trade union, believed, *bona fide*, that he should not resume work in a different work station. Mr de Villiers (the applicant), an educator was dismissed by the Western Cape education department. The ELRC found his dismissal to be procedurally and substantially unfair and the department was ordered to reinstate him. The department gave a directive that the applicant be redeployed to another school without consultation with the applicant. Consultation was made a pre-requisite for his redeployment in the arbitration award. When he sought the advice of his union, the applicant was advised not to report at the work station he was redeployed to. In bringing an appeal to the labour court against the decision to dismiss the applicant, the court ordered the department to reinstate the applicant and pay cost of the proceedings.<sup>178</sup> This case brings another aspect to the duties of the ELRC in seeking to maintain stability through adjudication of issues dealing with trade unions and their members with the employer.

Collective bargaining in the education sector creates a dichotomy between the rights of the educator and that of the learner. In this regard, the educator's right to strike is seemingly in conflict with the right of the child to education, the latter right being both internationally recognised<sup>179</sup> and included under the Bill of Rights in terms of sections 29(1)(a) and 28(2) of the Constitution. On the other hand, an important issue is the extent to which the educator's right to strike may trump the learner's right to basic education. Such potential conflict results in enhancing the rights of the educator against the right of the learner, thereby, reposing on the educator an active right against the learner's passive right.<sup>180</sup>

### **3.4.2(a) Active right of the educator**

In dealing with collective bargaining and strike action, the underlying basis for engaging in this action, stems from the need to further the interest of educators by actively engaging the

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<sup>176</sup> *Phenithi v Minister of Education and 2 others* Para 11.

<sup>177</sup> Case number C934/2008.

<sup>178</sup> *De Villiers v Head of department: Education Western Cape Province* Van Niekerk J, Para 31.

<sup>179</sup> Tomasevski K, *Economic, Social and Cultural Rights: The Right to Education*, UN Doc. E/CN.4/1999/49 (Preliminary Report submitted by the special Rapporteur of the Commission on Human Right to Education). (1999)

<sup>180</sup> Beiter KD, op cit note 136 at503-506.

state-as-employer. Such organization and coordination in pursuit of interest rights of teachers through unions have limited consideration for the rights and interest of learners. It is based on this seeming active and real demonstration of the right of the educator which SADTU seeks to avoid, namely, the “commoditization of education” by neglecting their learners and the members of SADTU themselves send their own children to private schools.<sup>181</sup> However, noteworthy is the fact that within this overarching framework of teacher’s trade unions, a different approach can be found within some minority trade unions, namely, Suid-Afrikaanse Onderwyserunie (SAOU), National Professional Teachers’ Organisation of South Africa (NAPTOSA). These groups, it is submitted, attempt to prioritize the interest of the learners alongside the interests of their members.<sup>182</sup> For example in the case of *SAOU and NAPTOSA v Head of Department, Gauteng Department of Education and Six Others*,<sup>183</sup> one significant distinction was apparent. The case involved a claim by the SAOU and NAPTOSA for refund of monies unlawfully deducted by the Head of Department, Guateng Department of Education and Six others<sup>184</sup> during a public sector strike from July 2010. Interestingly, the applicants undertook the strike for 5 (five) days out of 31 (thirty one) days within which the general strike lasted. Yet deductions were made in their salaries even though they did not embark on the strike. The court granted their reliefs especially making an order for “refund of all monies deducted ... pending the compilation of a factually correct database, recording, which members of the applicants in fact participated in the strike and recording the correct number of days they participated in the strike.”<sup>185</sup> The key issue here is the fact that the minority union (SAOU) prioritized the interest of the learner by limiting their strike to five days rather than 31 days, the general strike lasted.

### **3.4.2(b) Passive right of the learner to education**

Enforcing the right of the learner to education is contingent on the effort of individuals and groups that prioritize the interests of the learner. The inability of learners to organize and have a collective voice to pursue and negotiate on issues of interest unlike educators who are

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<sup>181</sup> The South African Democratic Teachers Union’s 2030 Vision Version 4: 20100715 Page 12 Accessed <http://www.sadtu.org.za> 15-07-2014.

<sup>182</sup> Suid-Afrikaanse Onerwyserunie (SAOU) with membership of 8,960 and National Professional Teachers’ Organisation of South Africa (NAPTOSA) membership of 11, 700

<sup>183</sup> Unreported Case number J 2468/10.

<sup>184</sup> The MEC of Education Gauteng, the MEC for Finance Gauteng, the Premiere of Gauteng, the Director-general of Treasury, PERSAL and SITA (Pty Ltd).

<sup>185</sup> *SAOU and NAPTOSA v Head of Department, Gauteng Department of Education and Six Others* Case number C934/2008 Paragraph 53.

organized in a union or unions,<sup>186</sup> makes serving the best interest of the learner less realisable. To this end, and drawing from the fact that learners' right to education is not demonstrably and vigorously pursued along with the right of educators, learner's right to education is rather subtly subsumed through other measures. For example in the 2030 Vision of SADTU, the passiveness of learners rights is accentuated in its statements relating to struggle for transformation as being "... in an environment that is driven by forces within and beyond the control of SADTU as an organized force for change and the teacher as its basic unit." The masking of the learner's right to education as being centred on the educator (teacher) reflects and resonates in the SADTU 2030 Vision. In subsuming further the passive nature of the right of the learner, the aim of the struggle is disguised within the 'foregrounds of the dichotomy of 'teacher rights' vs 'learner rights' to 'uninterrupted' education by SADTU. The question that arises then is the extent to which trade unions balance these rights – of both the learner and educator – to uninterrupted education in a prolonged strike given that they are joint custodians of this right with the State and any other relevant organisation. Furthermore the role of the courts in interpreting and upholding this balance is imperative.

### **3.4.3(c) Balancing these rights by judicial or quasi-judicial bodies**

The best interest of the learner is always paramount whenever issues are referred to the courts for adjudication. For instance the *Settlers High v HOD Education Department* case was decided when the Department of Education appointed an African female instead of a qualified white male. In this regard, the CC overturned the decision of a *court a quo* for not properly considering the interest of the learners under section 28(1) of the Constitution. The court in applying section 28(2) of the Constitution acknowledged the rationale for the preferential selection but affirmed the child's best interest as the principle to inform its decision.

In *Governing Body of the Juma Masjid Primary School and Another v Ahmed Asruff Essay and Nine others*,<sup>187</sup> the CC made a clear distinction between the socio-economic rights and the section 29(1)(a) constitutional right of the child to basic education. The court held that the latter right is 'immediately realisable' and has no internal limitation requiring that the right be progressively realized within available resources subject to reasonable legislative

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<sup>186</sup> Deacon H, op cit note 10.

<sup>187</sup> [2011] ZACC 13.

measures.<sup>188</sup> Thus, ‘immediately realisable’ right in this regard requires the State to take all measures to realize the right to basic education with ‘immediate effect’.

In the case of *Madzodzo and Seven Others v Minister of Education and four others*,<sup>189</sup> the High Court was called to consider an application from parents of learners against the Minister of Education and three schools to enforce the right of the learner to basic education by providing essential school furniture, in the form of desks and chairs, to public schools throughout the Eastern Cape province and impoverished rural areas. Per Goosen J, granted the declaratory relief sought by the applicants. It reiterated the importance of interpreting Section 29 (1) (a) of the constitution as an unqualified right which is immediately realisable and is not subject to the limitation of progressive realisation.<sup>190</sup> In further stating the importance of the rights of a learner in Section 29 the court said the following:

“This has important implications for determining whether the state is in compliance with its constitutional obligations in respect of the right to basic education. In the first instance the nature of the right requires that the state take all reasonable measures to realise the right to basic education with immediate effect. This requires that all necessary conditions for the achievement of the right to education be provided.<sup>191</sup>

Furthermore, the court declared “that the respondents were in breach of the constitutional right of learners in public schools in the Eastern Cape province to basic education as provided by section 29 of the Constitution, by failing to provide adequate, age and grade appropriate furniture which will enable each child to have his or her own reading and writing space.”<sup>192</sup>

In providing these necessary conditions, which include but are not limited to a qualitative learning environment, embarking on strike action can and does impact on the realization of the learners right to basic education. It is against this background that the commodification of basic education through the interest of the educator should not be the compromise. In this regard, Sachs J’s dictum in *Port Elizabeth Municipality v Various Occupiers*<sup>193</sup> regarding the role of courts in balancing constitutional rights is apposite:

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<sup>188</sup> *Governing Body of the Juma Masjid Primary School and Another v Ahmed Asruff Essay and Nine others* [2011] ZACC 13 at para 37.

<sup>189</sup> Unreported Case No 2144/2012 para 17.

<sup>190</sup> *Madzodzo and Seven Others v Minister of Education and four others* Para 17.

<sup>191</sup> *Ibid* para 15.

<sup>192</sup> *Ibid* para 41.

<sup>193</sup> [2004] ZACC &; 2004 (12) 1268 (CC); 2005 (1) SA 217 (CC).

“is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, vice versa... it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.”<sup>194</sup>

The cases discussed above do not refer to balancing the rights of the child to basic education with the rights of the educator to free labour practices and interest based collective bargaining through strike action. Nevertheless, the judiciary’s approach in adopting a gradual and steady recognition to this ‘immediately realisable’<sup>195</sup> right of a learner to basic education is commendable.

### **3.5 Conclusion**

In upholding the right of the educator through collective bargaining and consequence of the failure of collective bargaining through strike, it has impacted on the right of the learner to education in South Africa. Although the education sector was restructured since 1994 to include hitherto excluded race group of South Africans learners to education, it has not effectively addressed the interest of the learner. The courts have made it clear that both rights of the educator and learner are interpreted as non-hierarchical. Upholding equality of the right of the learner and educator can be balanced in designating basic education as essential service and strengthening the mechanism of resolving issues on matters of mutual interest. For example, by exploring the channels of conciliation, mediation, compulsory arbitration and appeal to courts before undertaking a strike, it will create certainty and an uninterrupted academic programme for learners. This procedure will not restrict the right of the educator of freedom of association but rather take into account the right of the learner which is often passive.

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<sup>194</sup> Para 23.

<sup>195</sup> Stride M, ‘Pursuing the right to education’ Cape Times 18-07-2014, page 9.

## CHAPTER 4

### THE PUBLIC EDUCATION SECTOR AS AN ESSENTIAL SERVICE

*“Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that a son of a mineworker can become the head of the mine that a child of farm workers can become the president of a great nation.*

*It is what we make out of what we have, not what we are given, that separates one person from another”.*

*—Nelson Mandela*

#### 4.1 Introduction

The above quotation from Nelson Mandela, father of the South African nation affirms that education has the power to create a conducive environment for infinite possibilities. It undoubtedly suggests that the utility derived from education could bring fundamental changes to the lives of people.

Although the right to strike is acknowledged in the constitution and national legislation<sup>196</sup> this right is severely limited for those engaging in services deemed as essential services. The issue whether in South Africa’s case the public education sector should be declared an essential service has arisen in many countries, such as Denmark, Germany, Australia and in the United States of America<sup>197</sup> and is currently a recurring debate in South Africa.<sup>198</sup>

This chapter will examine the concept of essential services by considering the legal regulation of this service. In doing so it will interrogate the underlying policy considerations as the reasons why the public education sector should be deemed as an essential service in South Africa. The bone of contention would be arguments for and against limiting teachers’ right to strike by deeming it an essential service as well as the child’s right to an education.

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<sup>196</sup> National legislation refers to the Labour Relations Act 66 of 1995.

<sup>197</sup> Calitz K & Conradie R, ‘Should teachers have the right to strike? The expedience of declaring the education sector an essential service’ *Stellenbosch law review* 1 (2013) 124-145 at 131.

<sup>198</sup> Budlender D, ‘Teaching is essential, but it is not an essential service’ Equal Education Position Paper on Teaching as an Essential Service. An analysis of the law relating to education as an essential service Equal Education Position Paper on Teaching as an Essential service February 2013.

By drawing on relevant case law, this chapter will consider whether the education sector ought to be deemed as an essential service.

#### **4.2 Teachers as educators**

Drawing on the *SAPS vs POPCRU* case, the facts of which are as follows: the state and trade unions in the Public Service Co-ordinating Bargaining Council, which POPCRU is affiliated to, had been engaged in negotiations to determine the wage increase for employees in the public service. A national general public service strike involving trade unions ensued after the wage dispute reached a deadlock. When the leadership of POPCRU expressed the intention to call its members to go on strike, the South African Police Service (applicants) sought an order from the court to interdict them from striking. The basis for the application for interdict was to contend that POPCRU was offering essential service. The important decision made by the Constitutional Court in the POPCRU case relates to restricting<sup>199</sup> the broad interpretation of essential services to the principles underlying the Constitution and the LRA- namely the right of freedom of association and fair labour practice.

The Constitutional court made it clear that although members of the South African Police Service (SAPS) are engaged in essential services, not all members are prohibited to engage in strike action. The only members that should not engage in strike action are those performing minimum services. Thus, the Constitutional Court held that only uniformed workers are engaged in essential services and the uniform workers right to strike could be limited.<sup>200</sup>

The relevance of the POPCRU case to designate educators (basic education) as offering essential services has also reigned in the fact that not all educators should be considered as providing essential services but rather those providing minimum services should be precluded from strike. An example of minimum services in education is with matric teachers and grade1 teachers.

For matric teachers, the justification stems from the fact that students write their final examination once in a year and if they miss writing the exam, they risk losing securing admission into university or finding a job. This should be a justification to situate matric teachers under minimum services.<sup>201</sup> Although Calitz and Conradie suggest that teachers should be prohibited from striking during the four weeks before the year ends and during

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<sup>199</sup> *SAPS v POPCRU* 2011 2011 6 SA 1 (CC) para 30.

<sup>200</sup> *Ibid* paras 36-39.

<sup>201</sup> Calitz K & Conradie op cit note 4 at130.

exams, this suggests that for those specified periods, teachers' service should be classified as a minimum service and can be prohibited from embarking on strike. Such a position could potentially affect the entire basic education curriculum if educators are allowed to strike during the term. They should thus be classified as offering an essential service and they ought to be prohibited from striking four weeks prior to students writing exam and during exams.

### 4.3 Minimum services

Although minimum service is not defined within the LRA, Section 72 of the LRA provides for the creation of minimum services.<sup>202</sup> Section 72 of the LRA provides that:

[t]he essential services committee may ratify any collective agreement that provides for the maintenance of minimum services in a service designated as essential service, in which case –

- (a) the agreed minimum services are to be regarded as an essential service in respect of the employer and its employees; and
- (b) the provisions of section 74 do not apply

Section 74 of LRA provides the scope for employers and trade unions to engage in essential services to conclude collective agreements providing that certain minimum services will be maintained during a strike or lockout. The essence of section 72 is to ensure that a critical service sector is not crippled by the whole employees but to limit strike action to employees providing services that constitute the backbone.<sup>203</sup> Thus the outcome of negotiations from a strike by employees offering essential services will also determine the changes to the working conditions of employees participating in the strike. However, the role of the ESC is criticised for lacking credibility because of its inability to ratify the few minimum service agreements since inception of the committee in 1997.<sup>204</sup> It is therefore imperative to note that educators can only be designated by the Essential Services Committee to provide minimum service as essential if an agreement is reached between the employer and the employees. It follows that such an agreement can be reached where both the employer and employees (educators)

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<sup>202</sup> Calitz K & Conradie R op cit note 4 at 130.

<sup>203</sup> Ibid.

<sup>204</sup> Pillay D, 'Essential services: Developing tools for minimum service agreements' *ILJ* 33 (2012) 801; Ibid Calitz K & Conradie R.

realise the importance of basic education and the dangers of breaking the academic calendar of basic education on learners.

#### **4.4 The interplay between the right of the child (learner) and the right of the teacher (educator)**

There are two potentially conflicting constitutional rights at play when educators embark on strike action, namely the right to a basic education<sup>205</sup> and the right to strike<sup>206</sup>. The educator may strike whether there are learners or not – the LRA does not have this as a requirement. Section 28(2) of the Constitution states that in every matter concerning a child, a child’s best interest is of paramount importance. In *Head of Department, Department of Education, Free State Province v Welkom High School and others*,<sup>207</sup> a dispute arose as a result of the decision of the provincial Head of Department (HOD) to exclude a pregnant learner from school. In reversing the decision of the HOD, the CC held the following:

“[t]here is no doubt that the rights of pregnant learners to freedom from unfair discrimination and to receive education had to be protected, promoted and fulfilled, but this had to be done lawfully.”<sup>208</sup>

This decision of the court reinforces the aforementioned constitutional provision and underscores the duty on HOD’s to make decisions within the confines of the law, particularly where these decisions impact on the learner’s right to education.

#### **4.5 International view on the right to education**

In a global context, education is a human right in itself as the enjoyment of this right enables a person to exercise his or her other fundamental rights. The value and importance of education is articulated from the General Comment issued by the United Nations Committee on Economic, Social and Cultural Rights:

“[e]ducation is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by

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<sup>205</sup> Section 29 of the Constitution.

<sup>206</sup> Section 23 of the Constitution

<sup>207</sup> 2014 (2) SA 228 (CC).

<sup>208</sup> *Head of Department, Department of Education, Free State Province v Welkom High School and others*, paragraphs 70, 72, and 105 at 250D.

which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.....the importance of education is not just practical....[a] well stocked, enlightened and active mind, able to range freely and widely, is one of the joys and rewards of human existence.”<sup>209</sup>

Internationally, the Universal Declaration on Human Rights 1948 (UDHR) was the first international legal instrument that explicitly emphasized that everyone has the right to education.<sup>210</sup> This was followed by the International Covenant on Economic Social and Cultural Rights of 1966 (ICESCR) which dealt comprehensively with socio-economic rights, in particular the right to education.<sup>211</sup> Articles 13 and 14 of the ICESCR<sup>212</sup> give expression to Article 26 of the UDHR. In fact the detailed provision of the rights to education in Articles 13 and 14 is described as the bulwark of the right of a child to education thus constituting a codification of the right to education under international law.<sup>213</sup> Although the Declaration of the Rights of the Child of 1959 and the Convention on the Rights of the Child of 1989 are soft law, the former, under Principle 7 and the latter, in terms of Articles 28 and 29 of the Convention, protects the right to education. Other international instruments protect the right to education and place duties on states to provide education to children,<sup>214</sup> such as, the Convention of the Rights of the Child as well as the African Charter on Human and People’s Rights. The ILO, in Article 84 of the Recommendation in terms of the Status of Teachers, views education as a fundamental human right:

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<sup>209</sup> Committee on Economic, Social and Cultural Rights *General Comment No 13: The Right to Education (Art 13)* (1999) UN Doc E/C 12/1999/10.

<sup>210</sup> Art 26 of the UDHR (1948) UN Doc A/810 According to Article 26 (1) “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”

<sup>211</sup> Calitz K & Conradie R, 136.

<sup>212</sup> Articles 13 (2) (a) and 14 respectively provides:

‘[s]tates parties to the present Covenant recognize that, with a view to achieving the full realization of this right;

(a) [p]rimary education shall be compulsory and available free to all; ...’

Article 14 states:

‘each party to the present Covenant, which at the time of becoming a party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.’

<sup>213</sup> Beiter K, op cit note 136 at 86.

<sup>214</sup> See Calitz K & Conradie B, 136; ibid Beiter K 86.

“[a]ppropriate joint machinery should be set up to deal with the settlement of disputes between the teachers and their employers arising out of terms and conditions of employment. If the means and procedure 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 defence of their legitimate interests.”<sup>215</sup>

In analysing this extract, it becomes evident that the global norm is that strike action is the last resort after dispute resolution has failed. Opinion is still varied over whether the right of a learner (child) to education is inhibited if educators embark on strike. In other words educators should not embark on strike.

South Africa is not immune from this norm. This recommendation is in line with South Africa’s approach to dispute resolution in terms of the education sector. In a South African context, the institution to which the dispute has to be referred to is the Education Labour Relations Council (ELRC) which seeks to maintain labour peace within public education through the processes of dispute prevention and dispute resolution.<sup>216</sup>

#### **4.6 Protection of the right to education in South Africa**

Section 29(1) of the Constitution<sup>217</sup> states everyone has a right to a basic education. This implies that the state must ensure that everyone has equal access to a basic education. Some authors have described the right to education as being an empowerment right.<sup>218</sup> An empowerment right could best be understood as a right that enables a person to exercise control over their own lives as well as the role and functioning of the state. In addition this empowerment right could provide liberation to the recipient of such a right as it allows individuals to combine education and life experiences acquired to become the authors of their own preferred futures. This right to basic education could further be seen as a facilitative right as education facilitates the intellectual capacity needed to understand and exercise other rights as enshrined in the Constitution.<sup>219</sup> Neither the Constitution<sup>220</sup> nor any relevant

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<sup>215</sup> ILO *Recommendations concerning the Status of the Teacher* (1960) [http://portal.unesco.org/en/ev.php-URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 1 April 2014).

<sup>216</sup> Van der Walt, AJ et al. *Labour Law in Context* (2012 ) 272.

<sup>217</sup> Constitution of the Republic of South Africa.

<sup>218</sup> Horstein, D & Le Grange C *The limitation of the educator’s right to strike by the child’s right to basic education* (2012).

<sup>219</sup> Beiter K D op cit note 136 at 17.

legislation pertaining to education defines the term ‘basic education.’ It might be advisable to take international law into account as suggested by section 39 of the Constitution by considering international law. The World Declaration on Education for All<sup>221</sup> definition was suggested in the White Paper on Education and Training<sup>222</sup> as follows:

“[e]very person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy and problem solving) and the basic learning content (such as knowledge, skills, values and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should continue to be met varies with individual countries and cultures, and inevitably, changes with the passage of time.”<sup>223</sup>

Furthermore, in the light of what has been said thus far the question that arises is whether the right to education forms part of customary international law. Beiter answers affirmatively based on the fact that whether or not a State ratifies the International Covenant on Economic, Social and Cultural Rights, it is under a duty to realise these obligations.<sup>224</sup> Although the obligation goes as far as making the right to education compulsory, correspondingly, it requires educators to make the realisation of the right to basic education practicable. Beiter argues that making basic education customary international law should, in addition to being free and compulsory, further provide that learners are not to be discriminated against in the enjoyment of educational rights.<sup>225</sup> But the learner’s right to education could be limited as a result of the absence of an educator from class owing to strike action.

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<sup>220</sup> Constitution of the Republic of South Africa.

<sup>221</sup> World Declaration on Education for All adopted by the World Conference on Education for All 1990 -03-5/9 (hereafter World Declaration on Education for All).

<sup>222</sup> White Paper on Education and Training 1995.

<sup>223</sup> <http://www.education.gov.za/LinkClick.aspx?fileticket=855fT9w3Awu%3D&tabid=191&mid=484> para 13.

<sup>224</sup> Beiter K D op cit note 136 at 45.

<sup>225</sup> Ibid at 17.

#### 4.7 The idea of Compulsory Education

Compulsory education on its face seems to be contrary to the traditional concept of human rights; that is the freedom to refuse the exercise of a right is maintained at all times.<sup>226</sup> Unlike human rights which deal with enforcing a right protected in law, Kühnhurdt argues that making basic education compulsory is a violation of the classical concept of the freedom to withhold the exercise of a right at all times. Kühnhurdt thus states that “compulsory education must either be seen as a violation of the human right to education, as it makes education an instrument of coercion, or it must be freed of its particular moral significance, by no longer having recourse to it for human rights ideals and by no longer postulating the need for education as a human right.”<sup>227</sup> However, it is argued that compulsory education can be reconciled with education as a human right because it guarantees that nobody can withhold a child from going to school,<sup>228</sup> and getting a good education through the attendance of educators in class. Furthermore, mandatory school attendance advances an essential principle of human rights law, the principle of equal opportunity.<sup>229</sup> In the sense that all children should be given an equal playing field to learn and develop their potential regardless of social standing by having the access to basic education. This means compulsory education ensures that every learner will have the same chance and equal opportunity in society.

Compulsory education in South Africa constitutes a fundamental tenet of international human rights. South Africa is a signatory to the Dakar Framework for Action of 2000<sup>230</sup> whereby the state commits itself to fight poverty and uplifting the nation by providing basic education that is compulsory to all its children. Furthermore, education should be of good quality and must ensure excellence. The financial position of the child should not be an impediment for the child to gain access. Compulsory education could be seen as the cornerstone of a nation, which should aim to give all citizens a fair start in life. Hence through compulsory schooling, education can therefore be seen as the vehicle to provide opportunities for citizens to become productive members of society who can participate fully in the economy and society at large.

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<sup>226</sup> Ibid at 31.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

<sup>230</sup> The Dakar Framework for Action

#### 4.8 The meaning of Basic Education

Section 3(1) of the South African Schools Act,<sup>231</sup> which forms the legal foundation for schools in the country, suggests compulsory attendance for every learner to attend a school from the first day of the year in which such a learner reaches the age of seven years until the last school day of the year in which such a learner reaches the age of fifteen year or grade nine, whichever occurs first. This prescription could be construed as the meaning of basic education as it gives content to the right to basic education as articulated in section 29(1)(a) of the constitution. Thus in South Africa the scope of compulsory education spans from grade nine or when the learner reaches the age of fifteen.

#### 4.9 Education as Essential Service

Having examined international law, the constitution, the legislative framework<sup>232</sup> and decided cases<sup>233</sup> on the right to freedom of association by educators (teachers) and the right of the child to education, it is imperative to open up the argument to justify situating the education sector in the category of an essential service.

##### 4.9.1 The International perspective on essential service

The ILO suggests possible ways to define a service as an essential service in the following three ways:

“(1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (*essential services in the strict sense of the term*).

(2) services which are not essential in the strict sense of the term but where the extent and duration of the strike might result in *acute national crisis* endangering the normal living conditions of the population.

(3) *in public services of fundamental importance.*”<sup>234</sup>

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<sup>231</sup> South African Schools Act, 84 of 1996.

<sup>232</sup> Discussed in Chapter 2

<sup>233</sup> Discussed in Chapter 3.

<sup>234</sup> Rubin N (ed) *Code of International Labour Law: Law, Practice and Jurisprudence I Essentials of International Labour Law* (2005) 218.

The first possibility is similar to the South African definition of essential service. Section 213<sup>235</sup> of the LRA defines an essential service as:

- “(a) a service the interpretation 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.”<sup>236</sup>

The second prospect poses a limitation by a requirement that should a strike persists for a long period the disruption of the service could cause a serious countrywide crisis. This further implies that an extended strike would be detrimental to the society considering health or safety of the population. It therefore reinforces the traditional definition of essential services.

The third option clearly states that to be deemed an essential service, it must be of critical and absolute importance. It is far wider than the first two options and more specific. This provides countries with some latitude to extend their essential service beyond the narrow and limited definition of essential services. “A limitation on the right of public servants to strike is, moreover, only justified in the case of public servants exercising authority in the name of the State”.<sup>237</sup>

The ILO Committee on Freedom of Association has stated that the education sector does not exercise authority in the name of the state hence it cannot be regarded as rendering an essential service.<sup>238</sup> Furthermore, the Committee’s decisions make it clear that simply declaring education as an essential service and thus outlawing strikes by teachers could not be “reasonable” nor “justifiable” criteria which must be met to limit any right in the South African Constitution, of which the right to strike is one.<sup>239</sup> The argument against classifying the basic education as an essential service is further bolstered by the fact that South Africa has ratified both the Convention on the Right to Organise and Collective Bargaining and the

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<sup>235</sup> Labour Relations Act 66 of 1995.

<sup>236</sup> Section 213 of the Labour Relations Act 66 of 1995.

<sup>237</sup> Calitz & Conradie op cit note 4 at 127.

<sup>238</sup> Budlender D op cit note 197.

<sup>239</sup> Position Paper.

Convention<sup>240</sup> on Freedom of Association and Protection of the Rights to Organise, which are Conventions under the ILO charter dealing with labour rights of employees.<sup>241</sup>

#### **4.9.2 The South African Constitution on Essential Service**

Section 18 of the Constitution<sup>242</sup> states that everyone has the right to freedom of association and section 23(2)(c) of the Constitution states that every worker has the right to strike. Although these constitutional rights are fully protected by legislation and jurisprudence they may however be limited when it comes to employees engaging in an essential service. It is important to note that section 36(a) of the Constitution states that any of the rights in the Bill of Rights which includes the rights provided for in section 18 and section 23 of the Constitution can only be limited in a way that is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Before such limitation can take place, the following factors must be considered:

- “(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.”<sup>243</sup>

It is important to understand these limitations by considering each individually and to apply them in the context of education as an essential service.

- (a) The nature of the right. The right to strike cannot be casually limited as strike action is a fundamental means used by workers, including educators, as a last resort to promote their economic and social interest.; from the background of the right of an educator to strike, the next pressing issue is the instance where there can be an exception to the right of an educator to strike, on the one hand and

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<sup>240</sup> 1949 (No 98).

<sup>241</sup> 1948 (87).

<sup>242</sup> Constitution of the Republic of South Africa.

<sup>243</sup> Section 36 (1) (a) Constitution of the Republic of South Africa.

whether the right of the child to basic education is a justifiable exception to the right of an educator to strike on the other hand.

- (b) The importance of the purpose of the limitation: A key consideration here is whether limiting the right of a teacher enhances the right of the learner-child to education. The objective of the limitation is to enhance the right of a child to education. The question arises how important is the right of a child to serve as a basis to limit the teacher to strike action.
- (c) The nature and extent of the limitation. This refers to the form that the limitation will take, whether absolute or relative prohibition. In this instance, the limitation is not absolute but rather relative as it will relate to prohibiting educators who perform minimum service. In doing such an analysis, some sociological factors could be considered such as national stability, economic stability, and the extent to which such sociological factors will serve as the appropriate basis. It is imperative to consider the effect and impact of strike action as the child's right to education is prominent.
- (d) The relation between the limitation and its purpose. The purpose of the limitation is to advance the right of the child to education and to limit the right of the educator to strike. By the existing position, teachers are not prohibited from embarking on a protected strike. The question that arises is what the outcome would be on the child's right to education. The 2007 and 2010 public sector strike caused havoc and breakdowns at schools across South Africa and affect schools' governance and performance.
- (e) Less restrictive means to achieve the purpose. This limitation suggests the exploration of other measures for the improvement of terms and conditions of educators as well as alternative ways for dispute resolution mechanism for educators. For instance the ELRC can be used as a less restrictive means to achieve the purpose of strike. By creating another sub-structure for basic education under the ELRC will enable strategic and focused process of collective bargaining between educators and the government on matters of mutual interest. This can further restrictive strike where conciliation and arbitration is necessarily required in the event that collective bargaining fails.

The right to strike, which is not absolute in South Africa, is similarly limited by the provision of the constitution<sup>244</sup> and the LRA.<sup>245</sup> Thus the right to strike is limited where the sector is classified as an essential service; an example is the health service sector, the police force and the South African National Defence Force.

#### **4.9.3 The LRA and Public Education as Essential Service**

Calitz and Conradie argued that the definition of essential service in Section 213 of the LRA mirrors the narrow international definition of essential services as suggested by the ILO.<sup>246</sup> Calitz and Conradie further argue that the wider provision should include services of fundamental importance performed by public employees and certain services in times of acute national crisis. This is because limiting essential service to services that endanger life, personal safety or health of the population only would conversely neglect other services which if a strike action is allowed to prolong could also endanger life and safety of the population.

Basic education, for example, fits the category of services provided by educators that the effects and consequences of a national strike action by educators could potentially lead to an increase in juvenile crime rates<sup>247</sup> and ultimately jeopardising the future of the country. In examining the legislative definition of essential services it is clear that only two services are specifically mentioned as essential services, namely: Parliamentary services and the South African Police Service. In South Africa, judicial interpretation of essential services is limited to prohibiting strike by employees performing minimum services that are essential services. Some selected cases below buttress this position.

#### **4.10 Limiting the right to strike of essential service workers in South Africa**

As stated earlier the right to strike is limited when it comes to workers who provide minimum services which are essential services. The scope of what constitutes an essential service became an issue in the case of *South African Police Service v Police and Prisons Civil Rights*

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<sup>244</sup> Section 36 of the Constitution of South Africa.

<sup>245</sup> Section 65 of the Labour Relations Act.

<sup>246</sup> Ibid fn 4; see also Budlender D op cit note 197 at3.

<sup>247</sup> Horstein D and le Grange op cit note 11 at521.

*Union and Another*<sup>248</sup> (the *POPCRU* case). A case which issue for determination is whether all staff engaged in the South Africa Police Service performs the minimum function of essential service to wit: safety and security within the meaning of the Ministerial Decree 29 and Section 13 of the SAPS Act.<sup>249</sup> Nkabinde J concluded that only the *members* of the police force who offer essential services are to be prohibited from undertaking strike action and not the police force in general.<sup>250</sup> Nkabinde J's decision thus designates members of the police force as providing the minimum core services within the organisation. The *POPCRU* case clearly draws a distinction between operational cum support and essential services (minimum core services) envisaged to be limited under section 23(2)(c) of the Constitution.

Furthermore, the Constitutional limitation in section 23(5) and International Labour Convention, which the LRA replicates, does not make a distinction between essential and non-essential services. However, an inference of this distinction is drawn from Section 65 (1) (d) (i) LRA read in conjunction with 71 (10) which specifies the category of employees precluded from striking as providing essential services. The ESC under section 72 of the LRA has the mandate to ratify any collective agreement that provides for the maintenance of minimum services in a service designated as essential service...<sup>251</sup> To further prevent essential workers from strike, Section 74 of the LRA lays out a dispute resolution procedure between members of this group and the employer to ensure their services are not disrupted.

Although the *Bader Bop* case mentioned limiting the right to strike, the court firmly alluded to the fact that both ILO Conventions and the Constitution will sanction limiting this right where it can be justified by the party seeking to limit. Thus O'Regan J said:

“[a]lthough the ILO Conventions specifically referred to mentions the right to strike, both committees with their supervision have asserted that the right to strike is essential to collective bargaining. The Committees accept that limitations on the right to strike for certain categories of workers such as essential services, and limitations on procedures to be followed do not constitute an infringement of the freedom of association.”<sup>252</sup>

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<sup>248</sup> 2011 (6) SA 1 (CC)

<sup>249</sup> 68 of 1995. Section 205 (3) of the Constitution states the objects of the Police Service as: ‘to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.’

<sup>250</sup> *POPCRU* case Nkabinde J para 39.

<sup>251</sup> Section 72 LRA.

<sup>252</sup> *Bader Bop* case op cit note 36, para 32.

Thus by justifying limiting the right to strike, O'Regan J said the court will apply its mind in such circumstance with circumspection. Furthermore, O'Regan J alluded to the fact that prohibiting the fundamental right to strike which is protected in legislation will amount to limiting the right to strike provided and protected under section 23 of the Constitution of the Republic of South Africa.<sup>253</sup>

The court can be persuaded if the ground to justify limiting the right to strike is the intention of the legislature. But even in relying on the intent of the legislature to limit the right to strike, the court per O'Regan J, will require “careful and thorough argument that such interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by section 36 of the Constitution.”<sup>254</sup>

“[t]his is not to say that where the legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, such an interpretation may not be preferred in order to give effect to the clear intention of the democratic will of parliament.

Clearly O'Regan J states the reluctance of the court to limit the right to strike without justifiable arguments for such limitation in addition to interpreting the intention of legislature. It however, does not foreclose limiting the right to strike where there are valid grounds to justify. Thus the limitation with regard to essential services applies to minimum services. Though the *Bader Bop* case did not make a distinction between essential services and core minimum services, as it was not an issue in dispute, nevertheless, the distinction made above is necessary.

Considering the importance of basic education to the learner and the imperative to have an uninterrupted academic year, the teaching services offered by such educators to learners should be categorised as minimum service. This assumption provides the guide to justify the argument that educators should not strike in order to protect the interest of the learner.

Significantly, the argument to situate basic education and the service of educators as minimum service within essential service raises the issue of an effective mechanism for

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<sup>253</sup> Ibid para 35, see further para 36, the position of that: “limiting the right to strike may only be accepted by the court where an interpretation of the statute that would have the effect of limiting the constitutional rights in issue would be justifiable.”

<sup>254</sup> *Bader Bop* op cit note 36, para 37.

conciliation and arbitration for educators union. In O'Regan J's position, the mechanism for conciliation followed by arbitration is an interpretation of the LRA which does avoid limiting constitutional rights.<sup>255</sup> Sections 71 (10), 72 and 74 of the LRA provides the basis to both the employer (government) and the educators not to resort to strike action but rather explore the avenue(s) of conciliation and arbitration. This mechanism should be strengthened to optimise its effectiveness in order to avoid strike action by educators.

#### **4.11 Justification to situate basic education as essential service**

Political will is an essential if not paramount ingredient in advocating to designate basic education as essential service in South Africa. Indicators of using this often rare yet important tool was demonstrated when President Jacob Zuma delivered the State of the Nation address on 15 February 2013:

“[b]y saying education is an essential service we are not taking away the Constitutional rights of teachers as workers such as the right to strike.”<sup>256</sup>

Following the president's expression, the General Secretary of the ANC ruling party- Gwede Mantashe declared that education would be an “essential service” and the minister of education - Angie Motshekga – reinforced the sentiment of the President saying:

“[w]e may need to look at making education an essential service [in future]. For now we must cease hostilities and make it a priority.

So I don't know what will happen in the future, for now we are using the word 'essential' to show it is critical and must be worked on accordingly”<sup>257</sup>

The President's statement broadly acknowledges that situating education as an essential service may, if not legally justified through legislation, result in dispute with teachers challenging the constitutionality of such action. This stems from the Constitutional Court's strict interpretation to limit workers right to freedom of association - strike. Thus prioritising basic education through minimum services offered by educators will form the basis to provide a valid and justifiable argument to situate basic education as essential service.

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<sup>255</sup> Ibid, paras 39 and 40.

<sup>256</sup> Budlender D op cit note 198.

<sup>257</sup> Ibid.

The majority of academic opinions argue that the International Labour convention, constitution of the Republic of South Africa and the LRA interpretation of freedom to associate, does not support limiting the right to strike for basic education as essential service. For example Budlender does propose a more refined definition of freedom of association by including what constitutes minimum services for educators. She, nevertheless, recognises the strategic use of strike in negotiation process by saying minimum service should not render ineffective strike action but should be performed while other educators continue with negotiation to resolve a dispute. With the persuasive argument for the importance of education, she admits that the law does not recognise education as essential service.<sup>258</sup>

Calitz and Conradie, also share Budlender's position for minimum core service.<sup>259</sup> However, they propose narrowing a minimum core to a certain time period within the academic year. The four weeks leading to exam, and the period within which learners are writing their matric exams. It is within this period they propose limiting educator's right to strike thus making their recommendation contingent on exam period. While it is true that the period prior to, and during exam, is critical to learners, focusing minimum core services on that period alone will not yield as much result- if other periods of the academic year is neglected as acceptable period for educators to strike.

Horsten and le Grange do not distinguish between essential services and the core minimum service.<sup>260</sup> However, they agree that basic education should be made an essential service by eliminating the educator's right to strike. They suggest compensatory guarantees in the form of conciliation and mediation process and a strengthened system that is independent and impartial.

Deacon, on the other hand, focuses on the interest of the learner and the right of the learner to basic education under section 28 (2) of the Constitution. His position is that education should be categorised as essential service and educators should be prevented from striking. This is because of the importance of basic education to the Country and the society. He, however, does not consider balancing the right of the educator the learner's right to education.<sup>261</sup>

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<sup>258</sup> Ibid at 17-18.

<sup>259</sup> Calitz K & Conradie R op cit note 4 at 141 & 145.

<sup>260</sup> Budlender D op cit note 198; Calitz K & Conradie op cit note 4; Horsten D and le Grange C op cit note 11.

<sup>261</sup> Deacon H, op cit note 10 at 12.

Brahm Fleisch<sup>262</sup> has a political approach to whether or not educators should be categorised as giving essential service. His view proposes that educators should be categorised as professionals and thus should not embark on strike.

It is instructive to consider South Africa's historical antecedent as an apartheid country and the impact it still has on education particularly basic education as stated in the case of *Section 27 v Minister of Education*<sup>263</sup> where the court referred to General Comment 13 of the Committee and Economic, Social and Cultural Rights, stating that-

“[i]f regard be had to the history of an unequal and inappropriate educational system, foisted on millions of South Africans for so long, and the stark disparities that existed and continue to exist in so many areas and sectors of our society, education ... becomes ... an indispensable tool in the transformation imperatives that the Constitution contemplates and ... it is almost *sine qua non* to the self-determination of each person and his or her ability to live a life of dignity and participate fully in the affairs of the country.”<sup>264</sup>

Although the law under section 36 of the constitution does not designate basic education as essential service, the importance of basic education is vital to the peace, stability and growth of South Africa. Both the courts and academics alike agree that basic education is important and should be given utmost priority as essential service. Academic and judicial opinions are justifiable grounds to consider by the Essential Services Committee to decide on designating basic education as essential service within the broader education sector.

#### **4.12 Conclusion**

Both the right of the educator to strike and the right of the learner to a basic education are given due recognition in the constitution. The stark reality is that both rights are confronted with challenges. On the one hand the education system in South Africa, due to past racial and social inequalities, is still in shambles hence it requires transformation as we compete with a fast improving socio-economic, technological world. Equally important on the other hand educators as workers experienced enormous injustices due to the brutality of apartheid hence transformation is needed by virtue of rights to become accessible to workers. This

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<sup>262</sup> Fleisch B, ‘Politics of the governed: South African democratic teachers’ union Soweto strike, June 2009’

<sup>263</sup> 2012 3 All SA 579 (GNP).

<sup>264</sup> *Section 27 v Minister of Education* 2012 3 All SA 579 (GNP) para 4-5.

phenomenon for workers to have rights is compliant with international standards and conventions. It raises the question whether education should be declared an essential service considering the constitutional rights of both educator and child and whether basic education should be extended beyond the status quo, which is not essential service.<sup>265</sup> The implication is to elevate basic education as essential service and including the services of educators for learners within ages 7 (seven) and 15 (fifteen) or up to Grade 9 (nine)<sup>266</sup> as providing minimum services. In doing so, the existing statutory framework under the ELRC for collective bargaining between public educators and government should be re-categorised to specifically enhance collective bargaining between educators providing basic education and the government.

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<sup>265</sup> The existing status quo does not consider basic education as essential service neither does it categorise basic education as the minimum service which prohibits educators to participate in any strike action.

<sup>266</sup> Seleane M, 'The right to education: lessons from Grootboom' Law, Democracy and Development (2009).

## CHAPTER FIVE

### 5.1 Conclusion & Recommendations

Collective bargaining within public education and limited confidence in arbitration process have resulted in strike action by educators with adverse consequences on learners. Collective bargaining in South Africa evolved through a chequered history. Hitherto, legislative provisions sanctioned the discrimination of workers based on racial stratification. However with the advent of democracy, trade unions were also liberalised taking into account South Africa's obligations as a member of the International Labour Organisation. The process of liberalising trade unions during the democratic period began with the recommendation of the Wiehan Commission of Inquiry.<sup>267</sup> A salient feature with the history of labour relations is the right to collective bargaining and the freedom of workers to associate and embark on a strike. Although the right to strike is respected both under international conventions, the South African Constitution and the LRA, the right is not sacrosanct but subject to certain limitations such as for workers engaged in essential services.

The learner also has the right to education as guaranteed by the constitution and provided under international legal instruments. Unlike the educator's right to collective bargaining and strike which the educator actively pursues, the learner does not have the privilege of pursuing their rights. Learner's right to education is passive and should be protected for the interest of the learner. Protecting the learners' right raises the question of whether it does not infringe on the educator's right to strike. Kühnhardt argues that it does, stating that:

[c]ompulsory education must either be seen as a violation of human right to education, as it makes education an instrument of coercion, or it must be freed of its particular moral significance, by no longer having recourse to it for human rights ideals and by no longer postulating the need for education as a human right.<sup>268</sup>

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<sup>267</sup> See pages 21 -22.

<sup>268</sup> Kühnhardt, L., *Die Universalität der Menschenrechte: Studie zur ideengeschichtlichen Bestimmung eines politischen Schlüsselbegriffs*, Munich, 1987, p. 340. Own translation from original German text, "Entweder muss, . . . , die Schulpflicht als eine Verletzung des Menschenrechts auf Bildung angesehen werden, da sie Bildung zu einem Zwangsinstrument erklärt, oder aber die Schulpflicht wird von ihrer besonderen moralischen Bedeutung befreit, indem sie nicht länger für Menschenrechtsideale in Anspruch genommen und das Bildungsbedürfnis nicht länger als Menschenrecht postuliert wird." Cited in Beiter K op cit note 136 at31.

Budlender<sup>269</sup> also shares the view that education in general should not be considered an essential service as suggested by President Jacob Zuma but acknowledges that only what constitutes minimum service. And since educators are not acting on behalf of the state like the police force and judiciary whose services can endanger life and public safety if withheld, education should not be considered as essential services. The same view is shared by Calitz and Conradie<sup>270</sup> that it is not feasible to designate education sector as essential service. They however argue that even if there is legislation to designate education as essential service, educators will still strike because of the foreseeable challenges involved in negotiation with trade unions like COSATU. Their proposal for public pressure to persuade SADTU to agree to negotiate with the Essential Services Committee to designate education as essential service and amendment of the Schools Act to prohibit Matric teachers from strike is plausible. However the dilemma will be the uphill task of convincing the trade unions that some of their members should be excluded from exercising their right to strike.

It is this researcher's considered submission that the focus should be on basic education under Section 29 of the Constitution which guarantees the right to basic education and section 28 which states 'A child's best interest is of paramount importance in every matter concerning the child' and not education broadly. Hence situating basic education as minimum service within essential service should not constitute infringement of educator's right to strike as Kühnhardt argues.

This opinion that learner's right to education does not infringe on the educator's right to strike is shared by some authors. Beiter argues that learners should not be discriminated against in the enjoyment of their basic right to education. It is argued that the underlying principle for discrimination is making a prejudicial distinction which includes age especially upon a group which has limited or no ability to speak for or represent themselves. Horsten and le Grange<sup>271</sup> argue that education as a whole should be considered as essential service, while Deacon's opinion is that educator's should be prohibited from strike action in the best interest of the learners.<sup>272</sup>

It is suggested that educators within the basic education system should be categorised as providing minimum core services and should have their right to strike limited to keep learners

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<sup>269</sup> Budlender D op cit note 198 at 17-18.

<sup>270</sup> Calitz and Conradie op cit note 4 at 144-145.

<sup>271</sup> Horsten and le Grange op cit note 11 at 537-538.

<sup>272</sup> Deacon H, op cit note 10 at 12-13.

in class. This consistency reinforces the right of the learner to a basic and quality education especially where this right is passive (since the learners is unable to actively pursue their rights) compared to the active right of educators. Thus the active right of educators should be limited while an effective alternative framework is provided to supplant recourse to strike as a last resort in the process of collective bargaining.

Consequently, limiting the right of educators providing basic education should be done within an effective, reliable and enforceable mechanism for conciliation and arbitration that is fair, just and equitable.

Should South Africa adopt the position to situate minimum core service of teaching by educators as an essential service thereby limit the right to strike, it will not be alone. Other countries like Canada, Germany and Denmark, regarded as open democratic countries, based on the values of human dignity, equality and freedom, educators are denied the right to strike in spite of ratifying Convention 87 of the International Labour Organisation.<sup>273</sup>

## **5.2 Recommendations**

It is this researcher's considered opinion that the passive right of the learner should be advanced by limiting the educator's right to strike. Such limitation, however, should be done by situating basic educators under workers providing minimum service within essential service. As such only teachers and not other members of the teaching profession should be precluded from striking. However this is justified by advancing the argument for the importance of basic education, not as a device to neglect other levels of education, by the Essential Services Committee.

Furthermore, both educators and the government can agree to compulsory arbitration where collective bargaining fails. This can be achieved for instance through compulsory arbitration, conciliation, mediation and competent enforcement body. Achieving this objective will keep both the educator and learner in class with a view to ultimately secure the foundation of South Africa's education system and future.

It is further suggested that basic education should be considered an essential service in South Africa by the Minister of Education upon justifiable recommendation of the Committee on

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<sup>273</sup> See CalitzK, Conradie R op cit note 4 at 145.

Essential Services. The Committee's recommendation should further give content to the requirement by the Constitutional Court by O'Reagan J that the right of workers to strike may be limited where the legislature clearly justifies such limitation.<sup>274</sup> Additionally, the limitation should be followed with a credible mechanism for resolving and enforcing conciliation and arbitration disputes where collective bargaining within basic education fails. The proactive nature of such mechanisms should give more confidence and credibility to both the government and educators to resolve their disputes expeditiously.

The position of the ILO Committee on the Freedom of Association's regarding compulsory arbitration for essential service further substantiates the need for expeditious resolution of failed negotiation between the government and educators to prevent possible strike. This informs the committee's position that:

“[c]ompulsory arbitration to end a collective labour dispute and a strike is acceptable if it is at the request of both parties involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the public sector service involving public servants, exercising authority in the name of the State or in essential services in the personal safety or health of the whole or part of the population.”<sup>275</sup>

It is concluded that aforementioned international conventions of the ILO, the Constitution and the LRA prescribe circumstances to limit the right of the educator without corresponding limitation on the right of the learner to a basic education. It is submitted that realising the right to basic education should not be contingent on the right being progressively realisable but immediately realisable as the court held in *Governing Body of Juma Masjid Primary School v Ahmed Asruff Essay N.O.* that-

“[u]nlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures.” The right to a basic education in section 29 (1) (a)<sup>276</sup> may be limited only in terms of a law of

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<sup>274</sup> *Bader Bop* case op cit note 36 para 37.

<sup>275</sup> ILO, 1996d, para 515.

<sup>276</sup> Section 29 (1) (a) of the Constitution.

general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”<sup>277</sup>

The furtherance of the right to basic education and the need for the educator to be in the classroom to ensure consistency of the learning process of the learner in school is given judicial content in *Phenithi v Minister of Education*. The chain of consistency is applied through ensuring that the educator is not, except on reasonable grounds,<sup>278</sup> absent from the classroom.

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<sup>277</sup> [2011] ZACC 13 para 37.

<sup>278</sup> Section 14 (1) (a) of the Employment of Educators Act 76 of 1998.

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