

SHOULD TEACHERS HAVE THE RIGHT TO STRIKE? THE EXPEDIENCE OF DECLARING THE EDUCATION SECTOR AN ESSENTIAL SERVICE

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1 Introduction

In August 2010 South African teachers who participated in a strike by public servants caused schools across South Africa to close a few weeks before year-end exams. Matric pupils were the hardest hit and did not receive tuition for a period of three weeks before the most important examination of their twelve years at school. Unions representing about 1.3 million public workers, including teachers, embarked on a strike that lasted for 20 days. The conduct of some teachers who intimidated and assaulted those who did not strike and who carried on teaching was severely criticised.¹

The 2010 strike, called a tragedy by some,² was by no means an isolated incident. Many school days are lost every year as a result of strikes by teachers. The Tokiso Review found that South African Democratic Teachers Union (“SADTU”), the biggest trade union in the education sector, was responsible for 42% of all working days lost as a result of strikes during the period 1995–2009.³ According to the 2010 Household Survey of Statistics South Africa, strikes by teachers was singled out as the biggest problem that they experience at school by more than a quarter of learners in South Africa.⁴

In the Eastern Cape teachers went on a go-slow on the first school day of 2012, when a number of temporary teachers were not re-appointed by the

* We would like to thank the two anonymous referees for their helpful comments and suggestions

¹ E Ramasehla “Naptosa Rejects the Employer’s Offer and Continues with Strike Action” (19-08-2010) *NAPTOZA* <http://www.naptosa.org.za/users/pageUsers.php?plugin=publication_detail_user&pubID=630> (accessed 10-07-2012); SAPA “Reports of Assault in Teacher Strike” (19-08-2010) *News24* <<http://www.news24.com/SouthAfrica/News/Reports-of-assault-in-teacher-strike-20100819>> (accessed 10-07-2010)

² SAPA “Teachers’ Strike a Tragedy – Parents” (02-09-2010) *News24* <<http://www.news24.com/SouthAfrica/News/Teachers-strike-a-tragedy-parents-20100902>> (accessed 10-07-2010)

³ Equal Education “EE’s Statement on Tokiso Review and SADTU” (23-02-2012) *Equal Education* <<http://www.equaleducation.org.za/ee-tr-sadtu>> (accessed 12-07-2012)

⁴ Department of Basic Education *General Household Survey 2010: Focus on Schooling* (2010) 24 available at <<http://www.info.gov.za/view/DownloadFileAction?id=172752>> (accessed 24-02-2013)

Department of Education.⁵ The strike ended only on 8 February 2012, more than three weeks after the school term had started.

Concerns about the poor standard of education in South Africa are exacerbated by the possible impact of strikes on pupils. The Annual National Assessment of 2011 indicated that the national average performance in literacy among Grade 3 pupils was 35%, while the numeracy performance was 28%. In Grade 6 the national average performance in languages was 28% and in mathematics 30%.⁶ These figures are even more alarming when South Africa is compared to countries in the region with the same or even lower income levels and a smaller education budget.⁷

Even if South African pupils do pass Matric, they often do not have the necessary skills to find employment. They join the growing pool of unemployed people in South Africa, and currently close to 50% of unemployed people are between the ages of fifteen and 24.⁸ Low quality education in South Africa has rightly been identified as a poverty trap.⁹

Although there are many factors contributing to poor performance by South African pupils, the absence of teachers from class during strikes must surely be a contributing factor. Because of concerns about the impact of strikes on the education of children, the Democratic Alliance and the National Association of Parents in School Governance have called on government to declare teaching an essential service.¹⁰ The most recent proposal for such a step was tabled in the National Assembly on 6 June 2012 by a Ministerial Review Committee appointed by the Minister of Science and Technology.¹¹

The designation of teaching as an essential service will have the effect that teachers are prohibited from participating in strikes, that their disputes will be referred to arbitration, and that they could be dismissed on account of misconduct if they do participate in a strike.¹² It should be kept in mind that all proposed legislation and changes to existing labour legislation must first go through a consensus-seeking process at the Labour Market Chamber of the National Economic Development and Labour Council ("NEDLAC") before any piece of draft legislation is brought before Parliament.¹³ One of the social partners, the influential trade union federation, Congress of South African

⁵ SAPA "Eastern Cape Teachers End Go-slow" (08-02-2012) *News24* <<http://www.news24.com/SouthAfrica/News/Eastern-Cape-teachers-end-go-slow-20120208>> (accessed 10-07-2010)

⁶ Department of Basic Education *Report on the Annual National Assessment of 2011* (2011) <<http://www.education.gov.za/LinkClick.aspx?fileticket=1U5igeVjiqg%3d&tstabid=358&mid=1325>> (accessed 10-07-2012)

⁷ N Spaull *Preliminary Analysis of SACMEQ III South Africa* Stellenbosch Economic Working Papers 11/11 (March 2011) 24

⁸ D Worrall "Youth Unemployment: Have You got any Ideas?" (29-05-2012) *Polity* <<http://www.polity.org.za/article/youth-unemployment-have-you-got-any-ideas-2012-05-29>> (accessed 12-07-2012)

⁹ Stellenbosch University Department of Economics Social Policy Research Group *Low Quality Education as a Poverty Trap* (March 2011) <http://us-cdr.creamermedia.co.za/assets/articles/32695_low-quality-educ-as-poverty-trap-report.pdf> (accessed 23-07-2012)

¹⁰ SABC "NAPSG Wants Teaching declared as Essential Service" (21-12-2011) *SABC News* <<http://www.sabc.co.za/news/a/6aeae880498073cbad8adc80a9ef884/NAPSG-wants-teaching-declared-as-essential-service-20111221>> (accessed 10-07-2012)

¹¹ M O'Connor "Nuwe Versoek Teen Stakings in Onderwys" *Die Burger* (07-06-2012) 7

¹² S 65(2)(d)(i), s 74 and item 6 of the Code of Good Practice: Dismissal of the LRA

¹³ S 5(1)(c) of the NEDLAC Act 34 of 1994

Trade Unions (“COSATU”), will not lightly favour legislation to limit the right of teachers to strike.

In the following discussion the interplay between two constitutional rights, namely the right of teachers to strike¹⁴ and the right of children to basic education,¹⁵ are of the utmost importance. One should also not lose sight of the constitutional imperative in section 28(2) of the Constitution which provides that in every matter concerning a child, a child's best interests are of paramount importance. In this paper the possibility and expedience of declaring the education sector an essential service will be investigated against the background discussed above.

2 Protection of the right to strike in international instruments

The International Labour Organisation (“ILO”) regards strike action as “one of the fundamental means available to workers and their organizations to promote their economic and social interests”.¹⁶ The ILO Freedom of Association and Protection of the Right to Organise Convention 87 (1948) (“ILO Convention 87”) and the ILO Right to Collective Bargaining Convention 98 (1949) (“ILO Convention 98”) do not explicitly mention the right to strike, but the ILO’s supervisory bodies deem the right to strike to be an inherent part of the freedom of association, the right to organise and the right to collective bargaining.¹⁷

Even though the right to strike is regarded as part of freedom of association and collective bargaining, this right can be limited, or even denied in very specific circumstances.¹⁸ The ILO recognises a number of situations in which it would be acceptable to limit the right of a worker to strike, as well as certain procedures that have to be followed before the right to strike can be exercised.¹⁹

The ILO suggests that it should be possible to define a service as an essential service in three different scenarios:

- “(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 a strike might be as to result in *acute national crisis* endangering the normal living conditions of the population.
- (3) in *public services of fundamental importance*.²⁰

The first possibility is the traditional type of essential service, and is the basis for the South African definition of essential services. The second

¹⁴ S 23 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”)

¹⁵ S 29(1)

¹⁶ ILO “Labour Legislation Guidelines: Chapter V: Substantive Provisions of Labour Legislation: The Right to Strike” (10-12-2001) *ILO* Introduction <<http://www.ilo.org/legacy/english/dialogue/ifpdial/lbg/index.htm>> (accessed 18-02-2013)

¹⁷ ATJM Jacobs “The Law of Strikes and Lockouts” in R Blanpain & C Engels (eds) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (2001) 587 para 5

¹⁸ ILO “Labour Legislation Guidelines: Chapter V: Substantive Provisions of Labour Legislation: The Right to Strike” *ILO* Introduction

¹⁹ Introduction

²⁰ N Rubin (ed) *Code of International Labour Law: Law, Practice and Jurisprudence I, Essentials of International Labour Law* (2005) 218 (original emphasis, footnotes omitted)

possibility is limited by a requirement that, in the case of an extended period of striking, the disruption of the service would cause a severe countrywide emergency. This possibility also links closely with the traditional type of essential service, since an extended strike would be to the detriment of the life, health or safety of the population. Even though the use of this possibility is still limited, it does provide some scope for the extension of the traditional definition of an essential service. However, even in the case of a prolonged strike by teachers, this sector cannot, in terms of the jurisprudence of the ILO supervisory bodies, be regarded as an essential service.²¹ The third possibility recognised by the ILO is much wider than the first two possibilities. However, the specific public service to be declared essential must be of critical importance. This possibility provides countries with the most scope to extend their essential services further than what is allowed by the strict 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.²²

The ILO Committee on Freedom of Association has stated that employees in state-owned commercial or industrial enterprises in oil, banking and metropolitan transport undertakings, or those employed in the education sector, do not exercise authority in the name of the state and should not be regarded as rendering essential services.²³ Teachers are thus explicitly excluded by the ILO from categories of public officials who exercise authority on behalf of the state and their right to strike can thus not be limited on this ground. Therefore, the strict interpretation of the ILO also means that definition cannot really be interpreted to include education.

3 The protection of the right to strike in South Africa

South Africa has ratified ILO Conventions 87 and 98, and the Constitution provides that every worker has the right to strike.²⁴ As a member country of the ILO, South Africa is bound to these conventions.²⁵ Moreover, the Constitution provides that a court, in interpreting the Bill of Rights, must consider international law.²⁶ The obligation to take international law into account is strengthened by the Constitution, which provides that, when interpreting

²¹ Case No 2305 (Canada/Ontario), Report No 335 Vol LXXXVII (2004) Series B No 3 §§ 471-512 in JM Servais "ILO Law and the Right to Strike" (2010) 15 *Canadian Lab & Emp LJ* 147 152-153

²² *Digest of Decisions of the Committee on Freedom of Association* para 534 294th Report, Case No 1629 para 262 <<http://learning.ilo.org/ilo/jur/en/bibl/Decisions.pdf>> (accessed 24-02-2013); B Gernigon, A Odero & H Guido (International Labour Office) *ILO Principles concerning the Right to Strike* (2000) 14, 534

²³ Committee of Experts on the Application of Conventions and Recommendations *Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the application of the Conventions on Freedom of Association, the Right to Organise and Collective Bargaining and the Convention and Recommendation Concerning Rural Workers' Organisations* Report of the Committee of Experts on the Application of Conventions and Recommendations: Report III (Part 4B) (1983) International Labour Conference, 69th Session, 1983 discussed in Gernigon et al *ILO Principles concerning the Right to Strike* 18, 21

²⁴ S 23 of the Constitution

²⁵ A van Niekerk, MA Christianson, M McGregor, N Smit & BPS van Eck *Law@work* 2 ed (2011) 21-22

²⁶ S 39 of the Constitution

any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.²⁷

The importance of ILO standards in interpreting the right to strike was emphasised by the Constitutional Court in *NUMSA v Bader Bop*.²⁸ The court had to decide whether minority unions should have the right to strike on certain organisational rights conferred only on majority unions in terms of the Labour Relations Act 66 of 1995 (“LRA”). The court commented as follows:

[T]he Constitution contemplates that collective bargaining between employers and workers is key to a fair industrial relations environment... [T]he right to strike... is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood.”²⁹

The court further referred to section 39 of the Constitution and held that an important source of international law in interpreting section 23 of the Constitution is the Conventions and Recommendations of the ILO, the jurisprudence of the Freedom of Association Committee and the Committee of Experts on the Application of Conventions and Recommendations. Both these supervisory committees endorse the principle that freedom of association and the right to organise include the right to strike.³⁰ The Constitutional Court came to the conclusion that because the LRA does not explicitly preclude minority unions from striking on organisational rights and the importance attached to this right by the ILO, the right to strike should in these particular circumstances not be limited.³¹

4 Essential services in South Africa

Although the right to strike is well protected by legislation and jurisprudence in South Africa, the right may be limited in the case of employees involved in essential services. The LRA defines essential services as follows:

- “(a) A service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
- (b) The Parliamentary service;
- (c) The South African Police Services.”³²

Only two services are thus specifically mentioned as being essential. The Essential Services Commission (“ESC”) may also declare services as essential if they fall within this definition. The South African definition mirrors the narrow ILO definition of essential services. The wider provisions allowing

²⁷ S 233

²⁸ 2003 2 BLLR 103 (CC)

²⁹ Para 13

³⁰ Paras 30-33

³¹ Para 37

³² S 213 of the LRA

for services of fundamental importance performed by public employees and certain services in times of acute national crisis are not included.³³

In terms of the proposed amendments to the March 2012 version of the amendment bill to the LRA “services provided by *public officials exercising authority in the name of the state* will be deemed to be an *essential service* and to have been designated an *essential service*”³⁴ These public officials are narrowly defined as “customs officials, immigration officers, judicial officers and officials working in the administration of justice”³⁵ and there is no possibility of teachers being categorised as public officials.

The judgment of the Constitutional Court in *SAPS v POPCRU*³⁶ (“POPCRU”) emphasised the importance of a strict interpretation of essential services so that the right to strike would not be unnecessarily limited. The court stated:

“In order to ascertain the meaning of essential service, regard must be had to the purpose of the legislation and the context in which the phrase appears. An important purpose of the LRA is to give effect to the right to strike entrenched in s 23(2)(c) of the Constitution. The interpretive process must give effect to this purpose within the other purposes of the LRA as set out in s 1(a). The provisions in question must thus not be construed in isolation... a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike. Were legislation to define essential service too broadly, this would impermissibly limit the right to strike.”³⁷

The Constitutional Court confirmed the judgment in the Labour Appeal Court in the same case and stated that “[i]t is the service that is essential – not... the industry within which such services fall”.³⁸ Only employees who are actually involved in essential services may be prohibited from striking. In the POPCRU case the Constitutional Court held that not all employees of the SAPS are rendering essential services, but only those who are *members* (uniformed workers) of the SAPS and thus only these members’ right to strike could be limited.³⁹ This judgment can be criticised for the artificial distinction between members and other employees who often work side by side and who carry out the same duties.⁴⁰

The above judgment has the implication that designating the whole education sector as an essential service will most likely be regarded as overbroad and as an unjustifiable infringement of the right of teachers to strike. Maintaining minimum services in a sector regarded as an essential service could ensure that the right to strike is not limited unnecessarily.

³³ Rubin *Code of International Labour Law* 218

³⁴ S 71A(3) of the Labour Relations Amendment Bill 2012 (original emphasis)

³⁵ S 71A(1)

³⁶ *South African Police Service v Police and Prisons Civil Rights Union* 2011 6 SA 1 (CC); *SAPS v POPCRU* 2007 10 BLLR 978 (LC); *SAPS v POPCRU* 2010 JOL 26082 (LAC)

³⁷ *SAPS v POPCRU* 2011 6 SA 1 (CC) para 30

³⁸ *SAPS v POPCRU* 2007 10 BLLR 978 (LC) 985 para 26

³⁹ *SAPS v POPCRU* 2011 6 SA 1 (CC) paras 36-39

⁴⁰ J Grogan “Not Necessarily Essential: Developments in Essential Services Law” (2011) 4 *Employment LJ* 45

5 Minimum services

Minimum services are not explicitly defined in the LRA, but section 72 of the LRA provides for the creation of minimum services. By concluding a collective agreement, the employer and employees can agree that only a part of the designated essential service is in fact essential and that only this minimum service should be regarded as the essential service. Any agreement of this kind is subject to ratification and approval by the ESC.⁴¹ This means that instead of all the employees being regarded as providing an essential service, only a specifically identified key group of employees providing the backbone functions will be regarded as providing the essential services that must be sustained during a strike situation. As long as this minimum set of services is provided, the rest of the employees in the broader essential service may participate in strike action. The outcome of a strike by the employees in the essential service working outside the minimum services will also determine the changes, if any, to the working conditions and terms of employment of those employees excluded from participating in the strike.⁴² Normally in an essential service the disputes will be arbitrated and employees do not have the right to strike.⁴³

However, the ESC has lost credibility because very few minimum service agreements have been ratified since its inception in 1995.⁴⁴ Conduct by workers in essential services, such as the participation of nurses in the 2010 public servants' strike, may be ascribed to the fact that no minimum service agreement for the health sector has been ratified.⁴⁵

Furthermore, in the light of the Constitutional Court judgment in *POPCRU* it is inconceivable that the whole education sector could be declared an essential service. Unfortunately the *POPCRU* judgment does not really provide guidelines on how to distinguish between essential and non-essential duties. The same difficulty exists with designating essential services in general. Parties have no guidance on what criteria to follow should parties negotiate about the conclusion of a collective agreement regarding essential services.⁴⁶ In education only teachers and not employees involved in administration or auxiliary services could possibly be regarded as providing essential services. Even declaring that all teachers are providing an essential service can be regarded as being overbroad. The question is which teachers should be regarded as rendering minimum services. Should it be Grade 1 teachers,

⁴¹ S 72(a) of the LRA

⁴² AC Basson, MA Christianson, A Dekker, C Garbers, PAK le Roux, C Mischke & EML Strydom *Essential Labour Law* 5 ed (2009) 315

⁴³ S 65(1)(d) of the LRA

⁴⁴ D Pillay "Essential Services: Developing Tools for Minimum Service Agreements" (2012) 33 *ILJ* 801 801; L Ramutloa "Major Overhaul for Labour Laws" (30-03-2012) *Department of Labour* <<https://www.labour.gov.za/media-desk/media-statements/2012/major-overhaul-for-labour-laws-dol>> (accessed 22-07-2012)

⁴⁵ J Brand "Strikes in Essential Services" (22-09-2010) *The Institute of Accountability in Southern Africa* <http://www.ifaisa.org/Strikes_in_Essential_Services_html> (accessed 18-07-2012)

⁴⁶ Pillay has attempted to provide some guidelines on establishing essential services in Pillay (2012) *ILJ* 814 See also T Harbour "Who are the Essential Service Workers?" *Mail & Guardian* (09-09-2010) <<http://mg.co.za/article/2010-09-09-who-are-essential-service-workers>> (accessed 23-11-2012)

where the foundation is laid for further learning and development, or only Grade 12 teachers, or should the minimum service pertain to periods during which pupils, perhaps even only Matric pupils, write their exams?⁴⁷

6 The right of teachers to strike in other jurisdictions

In a considerable number of jurisdictions as diverse as Denmark,⁴⁸ Germany,⁴⁹ and New South Wales⁵⁰ in Australia, as well as in certain states in the USA,⁵¹ teachers, as part of the wider public services, are prohibited from striking. In jurisdictions such as British Columbia⁵² in Canada and Botswana⁵³ teachers may not strike because the education sector was declared an essential service.

The jurisdictions chosen for legal comparison are Canada, with specific reference to British Columbia, and Germany. In both these jurisdictions the right of teachers to strike and even to bargain collectively (in British Columbia) has been severely limited. Recent judgments of the courts in both jurisdictions have brought about changes to this position, but the right of teachers to strike is nevertheless still controversial in both jurisdictions. The comparison was undertaken to establish whether a prohibition on teachers to strike will indeed have the desired effect to protect the rights of children to basic education.

6.1 Canada

6.1.1 General

In terms of the Canadian Constitution the federal government of Canada may legislate on the collective bargaining rights of federal employees, while the provinces have the jurisdiction to legislate on property and civil rights, which have been interpreted to include labour matters.⁵⁴ Public servants are treated differently from other employees in all the provinces. In some provinces there is a total ban on strikes by public employees and in other provinces only those public employees performing essential services are prohibited from striking.⁵⁵ The *Canada Labour Code*, RSC 1985⁵⁶ requires the parties to a dispute to "continue the supply of services, operation of facilities or production of goods to the extent necessary to prevent an immediate and serious danger to the

⁴⁷ For further discussion see parts 10 and 11 below

⁴⁸ O Hasselbach "Denmark" in R Blanpain (ed) *International Encyclopaedia for Labour law and Industrial Relations* (2009) 1 68

⁴⁹ See discussion in part 6.2

⁵⁰ International Trade Union Confederation 2012 *Annual Survey of Violations of Trade Union Rights – Australia* (06-06-2012) <<http://www.unhcr.org/refworld/docid/4fd8896723.html>> (accessed 24-06-2012)

⁵¹ S Phelps (ed) "Teacher's Unions/Collective Bargaining" (2003) eNotes <<http://www.enotes.com/education-reference/>> (accessed 10-07-2012)

⁵² See discussion in part 6.1

⁵³ Education International "Botswana: Government Takes Away Teachers' Right to Strike" (07-07-2011) *Education International* <http://www.ei-ie.org/en/news/news_details/1870> (accessed 10-07-2012)

⁵⁴ DD Carter, G England, B Etherington & G Trudeau "Canada" in R Blanpain (ed) *International Encyclopaedia for Labour Law and Industrial Relations* 5 (2001) 1 39

⁵⁵ 41

⁵⁶ S 874(1) of the *Canada Labour Code*

safety or health of the public".⁵⁷ *Ad hoc* "back to work" legislation may be introduced to terminate a strike when the economy, or the safety or health of the public is endangered.⁵⁸ Teachers and health workers in most provinces are subject to special provisions regarding their collective bargaining rights.⁵⁹

Canada is a member of the ILO and has ratified Convention 87 on freedom of association and freedom of association is given constitutional protection in the Canadian Constitution Act, 1982 ("Canadian Constitution").⁶⁰ However, the Canadian Supreme Court has ruled in the Labour Trilogy cases⁶¹ that this right is an individual right and that it does not include the right to strike and not even the right to collective bargaining.⁶² The basis for this decision is that Canada is steeped in the Anglo-American tradition which does not view these rights as basic human rights.⁶³ This position was changed by the landmark *Health Services and Support Facilities Subsector Bargaining Association v British Columbia* ("BC Health case")⁶⁴ judgment in which the Supreme Court ruled that freedom of association in the Canadian Constitution does include the right to collective bargaining.

6.1.2 The right of teachers to strike in British Columbia

The *British Columbia Labour Relations Code*, RSBC 1996, c 244 ("LRC") contains a general definition of essential services which provides that the interruption of services that will pose a threat to the "welfare of residents"⁶⁵ may be designated as an essential service. A myriad of actions may have an impact on the "welfare of citizens" and it will thus be quite easy to limit the right of workers to strike on this ground. Education is the only service singled out, in that it may be designated as an essential service if a dispute poses a threat to the provision of educational programmes. Again this is very wide and practically any action by teachers will have an impact on the provision of educational programmes. If a service in British Columbia is designated as an essential service, a mediator will assist parties to the dispute to agree on

⁵⁷ S Spano "Collective Bargaining under the Canada Labour Code: Remedies when Parties Fail to Resolve Labour Disputes" (26-01-2012) *Parliament of Canada* <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0846-e.htm>> (accessed 10-07-2012)

⁵⁸ Recent examples of these are the *Postal Services Continuation Act* SC 1987, c 40, and the *Maintenance of Railway Operations Act* SC 1995, c 6. Such legislation has been introduced in the past in essential services, or where labour disputes could cause "economic harm disproportionate to the interests of the immediate parties to the dispute" Spano "Collective Bargaining under the Canada Labour Code: Remedies when Parties Fail to Resolve Labour Disputes" *Parliament of Canada*

⁵⁹ DD Carter "Canada" in R Blanpain & R Ben-Israel (eds) *Strikes and Lock-outs in Industrialized Market Economies* (1994) 39 41 In some of the provinces strike action by public employees is not only limited but completely prohibited

⁶⁰ S 2(d) of the Canadian Constitution

⁶¹ *Reference Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313; *PSAC v Canada* [1987] 1 SCR 424; *RWDSU v Saskatchewan* [1987] 1 SCR 460

⁶² Carter "Canada" in *Strikes and Lock-outs in Industrialized Market Economies* 41 It has been said that the basis for the right to strike in Canada finds its application through not being forbidden and therefore it follows that it should be permissible. See also Carter et al "Canada" in *International Encyclopaedia for Labour Law and Industrial Relations* 5 319 para 660

⁶³ BW Burkett, JDR Craig & SJ Gallagher "Canada and the ILO: Freedom of Association since 1982" (2003) 10 *Canadian Lab & Emp LJ* 231 248

⁶⁴ [2007] 2 SCR 391.

⁶⁵ S 72(2) of the LRC

minimum services. If parties cannot come to an agreement, a contract could be enforced on them by back-to-work legislation which will contain the terms and conditions of further employment.⁶⁶

Relying on the *BC Health* case, British Columbia teachers brought a case based on the infringement of their collective bargaining rights in the British Columbia Supreme Court. The teachers' case in *British Columbia Teachers' Federation v British Columbia*⁶⁷ was that the British Columbia government adopted legislation that unilaterally amended collective bargaining agreements which the teachers' trade unions had previously reached with school boards. The court found that this practice of the legislator was indeed an infringement of the teachers' right to collective bargaining.⁶⁸

Although teachers in British Columbia still do not enjoy a right to strike, strikes often still take place. The Labour Relations Board did not regard the strike by teachers on a wage dispute in March 2012 as a threat to educational programmes in terms of the LRC⁶⁹ and teachers were allowed to strike for a few days.⁷⁰ However, despite the ruling in *British Columbia Teachers' Federation v British Columbia*, the legislature passed Bill 22-2012 Education Improvement Act, which contained back-to-work legislation that ended the strike and forced teachers back to work.⁷¹

From the above it is clear that being designated an essential service does not deter British Columbian teachers from striking and that, although there is progress in regard to collective bargaining rights, a right to strike is not yet recognised. However, in the light of the fact that the ILO has frequently noted its concern about the prohibition on teachers' right to strike in British Columbia,⁷² and the decision of the Labour Relations Board to allow teachers to strike for a limited time, it seems to be only a matter of time before teachers in British Columbia will no longer be regarded as an essential service and will be able to exercise the right to strike.

6.2 Germany

The German Constitution (*Grundgesetz* ("GG")) does not explicitly protect the right to strike, but this right is regarded as an implied part of the protection of "collective freedom of association" in article 9 of the *GG*. The right to strike is regarded as an essential part of the right to bargain collectively and is available to employees in the private and public sector as a method of dispute

⁶⁶ S 73(2)

⁶⁷ 2011 BCSC 469

⁶⁸ Para 345

⁶⁹ S 72 of the LRC

⁷⁰ The Canadian Press "B C Passes Back-to-work Legislation for Teachers" *CTV News* (15-03-2012) <<http://www.ctv.ca/CTVNews/Canada/20120315/BC-teachers-strike-union-freeze-20120315/#ixzz1umHQ37Fo>> (accessed 10-07-2012)

⁷¹ The Canadian Press "B C Passes Back-to-work Legislation for Teachers" *CTV News*.

⁷² NUPGE "ILO Cites over 20 Ongoing Labour Rights Violations by Canadian Governments" (08-04-2012) *National Union of Public and General Employees* <<http://nupge.ca/content/4894/ilo-cites-over-20-ongoing-labour-rights-violations-canadian-governments>> (accessed 10-07-2012)

resolution.⁷³ However, tenured or career public servants may not strike, irrespective of the function that they perform.⁷⁴

The German government justifies this prohibition on public servants by emphasising the special position of trust that public servants occupy.⁷⁵ These arguments are put forth despite the fact that Germany has signed and ratified the European Social Charter (1961) ("Euro SC"), which explicitly protects the right to strike, as well as ILO Convention 87 on Freedom of Association, which has been interpreted to include the right to strike as indicated above. Moreover, the European Committee for Social Rights has stated that the Euro SC only allows for a limitation of the right to strike on public servants whose specific function requires such a limitation.⁷⁶ Prohibiting all public officials from exercising the right to strike is, according to the Committee, not in conformity with Article 6(4) of the Euro SC, which provides that state parties recognise "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into".

The right of certain categories of public officials to strike may, according to the Committee, be restricted, but these restrictions should be limited to public officials whose duties and functions, given their nature or level of responsibility, are directly related to national security, public interest and public health. Even in these sectors a total ban on the right to strike would be inappropriate as minimum services could be introduced.⁷⁷ In spite of this view of the Committee, the German government has adhered to its position that all career public servants should be prohibited from striking.⁷⁸

This position of the German government will be difficult to maintain in the light of recent interpretations of section 11 of the European Convention on Human Rights by the European Court of Human Rights. This section provides that everyone has the right to freedom of association and that no restrictions should be placed on the exercise of this right, except those necessary for national security, public safety, the prevention of crime and protection of the health, morals or rights and freedoms of others.⁷⁹

The Grand Chamber (*Grosse Kammer*) of the European Court of Human Rights ("ECtHR") interpreted section 11 in *Demir and Baykara v Turkey*⁸⁰

⁷³ M Weiss & M Schmidt *Labour Law and Industrial Relations in Germany* 4 ed (2008) 182 para 434

⁷⁴ C Schubert "Das Streikverbot für Beamte und das Streikrecht aus Art 11 EMRK im Konflikt" (2012) 137 *Archiv des öffentlichen Rechts* 92 92

⁷⁵ Arts 33(4), 33(5) and 34 of the GG

⁷⁶ Council of Europe *Digest of Case Law of the European Committee of Social Rights* (2008) 57 available at <http://www.coe.int/t/dghl/monitoring/socialcharter/digest/DigestSept2008_en.pdf> (accessed 26-02-2013)

⁷⁷ 56

⁷⁸ *Parallel Report on the Alliance for Economic, Social and Cultural Rights in Germany (WSK-Allianz)* Complementing the 5th report of the Federal Republic of Germany on the International Covenant on Economic, Social and Cultural Rights (2008) 26 available at <http://www2.ohchr.org/english/bodies/cescr/docs/ngos/AESCR_Germany_CESCR46.pdf> (accessed 26-02-2013)

⁷⁹ European Convention on Human Rights 1950 ETS 5; 213 UNTS 221 <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf> (accessed 10-07-2012)

⁸⁰ (2009) 48 EHRR 54 (ECtHR)

to also include the right to collective bargaining.⁸¹ The Third Chamber of the ECtHR went even further in *Enerji Yapi-yol Sen v Turkey*⁸² and interpreted section 11 to include the right to strike, even for public servants.

These decisions are only binding on the Turkish parties to the case, but should the ECtHR have to decide the question of whether the German prohibition on the right of public officials to strike poses an infringement of section 11 of the European Convention on Human Rights, the principles of these judgments will be applied.

The fact that teachers are public servants and that they are prohibited from striking, has not prevented them from striking. In 2009 a fine was imposed on teachers who went on strike in Nordrhein-Westfalen.⁸³ In June 2010 teachers of the federal state Schleswig-Holstein went on strike in protest against the raising of the number of teaching hours. The Ministry imposed disciplinary steps such as a ban on the promotion of those who participated in the strike. The question in both these cases was whether Germany would be in breach of international instruments to which it is a signatory, if sanctions were to be imposed on the teachers.⁸⁴ Moreover, in 2011 the Düsseldorf Administrative Court set aside the disciplinary punishment imposed on a teacher in late 2010 for participating in a demonstration. The court found that teachers who are public servants may not be punished if they participate in a strike.⁸⁵ The higher courts in Germany will probably overrule the decision, but if a case concerning the right of a German public servant comes before the ECtHR, the court will almost certainly (as in the cases from Turkey) rule that a blanket prohibition on the right of public servants to strike infringes article 11 of the European Convention on Human Rights.

It seems as if it is only a matter of time before the total ban on the right to strike of public servants, who do not exercise authority on behalf of the state or who do not perform essential services, will be lifted. Teachers do not fall into one of these categories and should soon enjoy the right to strike.

As indicated by the above discussion of British Columbia and Germany, the tide is against limiting the right of teachers to strike. A prohibition on participation in a strike also does not prevent teachers from striking. In South Africa such a prohibition will almost certainly not keep teachers from striking as there is a culture in which essential service workers in the public service continue to strike despite the prohibition, as was seen during the public servant strike in 2010.

7 International protection of the right to education

Globally the right to education is regarded as fundamental to the development of a child, as the enjoyment of this right will enable a person to effectively

⁸¹ The “Demir and Baykara case” discussed in Schubert (2012) *Archiv des öffentlichen Rechts* 93-94

⁸² [2009] ECHR 2251 as discussed in Schubert (2012) *Archiv des öffentlichen Rechts* 93-94

⁸³ Schubert (2012) *Archiv des öffentlichen Rechts* 94

⁸⁴ 92-117

⁸⁵ ITUC *Annual Survey of Violations of Trade Union Rights 2011* (2011) 202 <http://survey.ituc-csi.org/IMG/pdf/Survey_ITUC_EN_web.pdf> (accessed 04-10-2011)

exercise her other fundamental rights.⁸⁶ The international community's high regard for this right is evident from the General Comment issued by the United Nations Committee on Economic, Social and Cultural Rights:

"Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised 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."⁸⁷

The Universal Declaration on Human Rights (1948) ("UDHR") was the first international instrument to explicitly provide that everyone has the right to education.⁸⁸ Almost two decades later the International Covenant on Economic, Social and Cultural Rights (1966) ("ICESCR") dealt comprehensively with socio-economic rights, especially the right to education,⁸⁹ and placed an obligation on the member states to provide primary education that is free and compulsory.⁹⁰

Several other international instruments protect the right to education and place duties on states to provide education to children. The Convention on the Rights of the Child (1989) ("CRC") deals extensively with the realisation of a child's right to education.⁹¹ The African Charter on Human and People's Rights (1986) also provides for the right to education for everyone⁹² and the educational goals and duties of states to achieve the realisation of a child's right to education are set out in article 11 of the African Charter on the Rights and Welfare of the Child (1990).⁹³

The UNESCO/ILO Recommendation concerning the Status of Teachers of 1966⁹⁴ emphasises that the right to education is a fundamental human right. Article 84 of the Recommendation provides that:

"Appropriate 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 procedures established for these purposes should be exhausted or if there should be a breakdown in negotiations between the parties, teachers' organizations should have the right to take such other steps as are normally open to other organizations in the defense of their legitimate interests."

⁸⁶ G Bekker "The Right to Education in the South African Constitution: An Introduction" in LV Mashava (ed) *Economic and Social Rights Series 2: A Compilation of Essential Documents on the Right to Education* (2000) 1 The United Nations ("UN") alone has published a number of instruments regarding the right to education, which are adopted either through the UN treaty system, or by the United Nations Educational, Scientific and Cultural Organisation ("UNESCO")

⁸⁷ 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

⁸⁸ Art 26 of the UDHR (1948) UN Doc A/810

⁸⁹ Arts 13 and 14 of the ICESCR (1966) UN Doc A/6316

⁹⁰ Art 13 of the ICESCR; in art 28 of the CRC (1989) UN Doc A/44/49 this right to education is also explicitly recognised

⁹¹ Art 28 and 29 of the CRC South Africa ratified the CRC in 1995

⁹² Art 17 of the African Charter on Human and People's Rights (1986) OAU Doc CAB/LEG/67/3 rev 5 South Africa ratified the Charter in 1996

⁹³ Art 11 of the African Charter on the Rights and Welfare of the Child (1999) OAU Doc CAB/LEG/24 9/49 South Africa ratified the Charter in 2000

⁹⁴ 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> (accessed 18-02-2013)

The last part of the article seems to refer to strike action, as this is normally open to other organisations after dispute resolution machinery has failed. South Africa's dispute resolution machinery for the education sector conforms to this recommendation, as such machinery is available in the Education Labour Relations Council. When there is a breakdown in negotiations in this Council, employees (teachers) may exercise their right to strike.

8 Protection of the right to education in South Africa

The Constitution states that "everyone has the right to a basic education".⁹⁵ As a socio-economic right, section 29(1) is a combination of a number of different rights and serves to empower those entitled to the right.⁹⁶ In contrast to most other socio-economic rights, section 29(1)(a) does not contain any internal limitations,⁹⁷ although the right pertains only to a *basic* education. It may be argued that the right to basic education is regarded as more important than other socio-economic rights, which may be limited.⁹⁸

These provisions place a positive obligation on the state to give effect to the right to basic education.⁹⁹ This means that the state should actively provide sufficient opportunities for everyone to receive a basic education; the provisions are not merely a prohibition against any infringement of the right.¹⁰⁰

The question of what constitutes a *basic* education must be answered, especially if an argument is to be made that a part of the education sector should be designated an essential service. However, the concept of "basic education" is not defined anywhere, neither in the Constitution, nor in the various pieces of legislation giving effect to this constitutional right. One suggestion is that the compulsory years of education, namely up to Grade 9, should be regarded as the scope of a basic education.¹⁰¹ However, this interpretation could disadvantage the right bearer, because it could mean that they would not be

⁹⁵ S 29(1)(a) of the Constitution

⁹⁶ F Verieva "Education" in South African Human Rights Commission *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)* (2006) 101 101

⁹⁷ In the case of the right to education, the provision thereof is not subject to the available resources of the state, as is the case for other socio-economic rights that do contain internal limitations of this kind

⁹⁸ Verieva "Education" in *Reflections on Democracy and Human Rights: A Decade of the South African Constitution* 102; examples of limitable socio-economic rights include the right to health, housing, food, water and social security, but even the limitations placed on these rights are of a limited nature, since the state is required to provide for these rights through "reasonable legislative and other measures"; see also F Verieva "Education Rights" in S Khoza (ed) *Socio-economic Rights in South Africa* 2 ed (2007) 407 417; *Juma Musjid Primary School v Essay NO* 2011 8 BCLR 761 (CC) para 37

⁹⁹ Bekker "The Right to Education in the South African Constitution" in *A Compilation of Essential Documents on the Right to Education* 7 with reference to *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of the Gauteng School Education Bill of 1995* 1996 4 BCLR 537 (CC) para 9 This case was heard in reference to s 32(a) of the Constitution of the Republic of South Africa Act 200 of 1993 ("the Interim Constitution"), but the wording is similar to that of s 29(1) of the 1996 Constitution, therefore s 29(1) can be interpreted in the same way The positive duty of the state to provide education was recently confirmed again by the Constitutional Court in *Juma Musjid Primary School v Essay NO* 2011 8 BCLR 761 (CC) para 45

¹⁰⁰ *Juma Musjid Primary School v Essay NO* 2011 8 BCLR 761 (CC); Verieva "Education" in *Reflections on Democracy and Human Rights: A Decade of the South African Constitution* 102

¹⁰¹ Verieva "Education Rights" in *Socio-Economic Rights in South Africa* 419; Department of Education *White Paper on Education and Training* Notice 196 of 1995 (1996)

properly skilled and could have difficulty in finding employment if they leave school at the age of fifteen, which is currently the minimum age for leaving school.¹⁰²

Unemployment rates in South Africa are escalating and even qualified people are unable to find work.¹⁰³ Against this background, children who have only completed their compulsory schooling up to Grade 9 will very seldom find work. To solve this dilemma the suggestion was made that education up to Grade 12 should be included in the definition of basic education.¹⁰⁴ A further argument in favour of including twelve years of schooling in the concept of basic education is that the South African Department of Basic Education is responsible for education from Grades 1 to 12.

The importance of the right was recognised in a recent High Court judgment, *Section27 v Minister of Education*.¹⁰⁵ The court found that the Limpopo Department of Education violated the constitutional right of children to basic education by not providing textbooks and ordered the department to deliver textbooks to schools within a given time frame.¹⁰⁶

The court referred to General Comment 13 of the Committee on Economic, Social and Cultural Rights quoted above,¹⁰⁷ and stated:

“[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 transformational imperatives that the Constitution contemplates and ... it is almost a *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 society.”¹⁰⁸

It is significant that the court regards the exercise of this right as a prerequisite to live a life of dignity and equality in the light of historic inequalities in South Africa.

9 The constitutional justifiability of limiting teachers' right to strike

Even though the right to an education and the right to strike are both protected in the Constitution, these rights may be limited in terms of section 36 of the Constitution, which provides as follows:

- “36) The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;

¹⁰² S 3(1) of the Schools Act 84 of 1996

¹⁰³ Statistics South Africa “Labour Force Survey: Historical Revision September Series 2000-2007” (2009) *Statistics South Africa* <<http://www.statssa.gov.za/publications/P0210/P0210September2000,2001,2002,2003,2004,2005,2006,2007.pdf>> (accessed 12-10-2011)

¹⁰⁴ Verieva “Education Rights” in *Socio-Economic Rights in South Africa* 420

¹⁰⁵ 2012 3 All SA 579 (GNP)

¹⁰⁶ Para 33

¹⁰⁷ See discussion in part 7

¹⁰⁸ *Section 27 v Minister of Education* 2012 3 All SA 579 (GNP) paras 4-5

- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.¹⁰⁹

From the above, two broad criteria emerge for a limitation of a constitutional right, namely that the limitation must be in terms of a law of general application, and must be reasonable and justifiable.

If a limitation is not implemented by way of a generally applied law, it would immediately, without any further enquiry, be seen as unjustifiable and unacceptable.¹¹⁰ However, should the right of teachers to strike be limited by way of declaring education an essential service, this could be done in terms of an amendment of the definition of essential services in section 213 of the LRA, or a wider interpretation of the current definition to include the education sector. Such an amendment or interpretation will satisfy the requirement of a law of general application.¹¹¹

The second hurdle could pose a bigger problem. To determine whether a limitation is reasonable and justifiable in an open and democratic society, all relevant circumstances have to be taken into account, including, but not limited to, those mentioned in section 36(1)(a)-(e).¹¹² The process requires the balancing of conflicting values, which involves a flexible assessment within the particular context.¹¹³ Ultimately the question is whether the limitation of a particular right is proportional to the benefit which will accrue to the other right bearer or bearers in whose favour the right has been limited.¹¹⁴

The court making the assessment may take foreign law into consideration and is obliged to take international law into consideration in interpreting the Constitution,¹¹⁵ thus also in interpreting section 36 of the Constitution. The phrase “reasonable and justifiable in an open and democratic country based on human dignity, equality and freedom” invites the court to take the law of foreign countries based on these values into account.¹¹⁶

Key considerations in the court’s consideration of international law in terms of sections 39 and 233 of the Constitution will be the ILO’s stand on the importance of the right to strike, which is acknowledged by South African courts,¹¹⁷ the ILO’s narrow definition of essential services and the explicit exclusion of teachers from essential services by the ILO Committee of Freedom of Association.¹¹⁸ With regard to foreign law, the fact that countries such as Canada, Germany and Denmark, which could be regarded as open and democratic countries based on the values of human dignity, equality and freedom, still deny the right to strike for teachers, in spite of having ratified

¹⁰⁹ S 36 of the Constitution

¹¹⁰ JC Mubangezi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2004) 59

¹¹¹ See in general the discussion of the requirements for a law of general application in S Woolman & H Botha “Limitations” in S Woolman, M Bishop & Brickhill (eds) *Constitutional Law of South Africa* 2 ed (RS 4 2012) 34 7 34 7

¹¹² Woolman & Botha “Limitations” in *CLOSA* (see fn 115) 34-68

¹¹³ *S v Makwanyane* 1995 3 SA 391 (CC)

¹¹⁴ *Moise v Transitional Council of Greater Germiston* 2001 4 SA 491 (CC) para 19

¹¹⁵ S 39(1) of the Constitution

¹¹⁶ Woolman & Botha “Limitations” in *CLOSA* 34-68

¹¹⁷ *NUMSA v Bader Bop* 2003 2 BLLR 103 (CC) para 30

¹¹⁸ Case No 2305 (Canada/Ontario), Report No 335 Vol LXXXVII (2004) Series B No 3 §§ 471-512 in Servais (2010) *Canadian Lab & Emp LJ* 152-153

Convention 87, could also be considered. The court would further have regard to the South African context, which is different to that of some countries which have limited the right to strike, as the South African Constitution explicitly recognises the right to strike.¹¹⁹ Also, because of South Africa's history of suppressing the rights of the majority of workers,¹²⁰ it may be argued that the right to strike will be regarded as more important here than in other open and democratic countries.

Should a court go on to examine the factors in section 36 and the nature of the right to strike, the fact that workers can safeguard core constitutional values such as dignity and equality¹²¹ by exercising the right to strike will be of great importance.

On the other hand, the importance of the purpose of the limitation, namely to protect the constitutionally protected right to basic education, is of immense importance when viewed against the background of the history of unequal levels of education in South Africa.¹²² The court will certainly take into account that this right is explicitly guaranteed in the Constitution,¹²³ as well as in several international instruments.¹²⁴ The state also has a duty to provide education and that in all matters concerning a child the best interests of the child are of paramount importance.¹²⁵ Moreover, the fact that the right to basic education is of importance to all children in South Africa and the right to strike important only to a group within society, will also be highly relevant. Important considerations will be the knock-on effects of schools being closed, such as a possible rise in juvenile crime and children being vulnerable to crime especially in areas with low socio-economic standards.¹²⁶ Finally, the fact that being educated is a prerequisite for exercising the rights to dignity and equality¹²⁷ should be taken into consideration.

Regarding the last three remaining factors of section 36, which deals with the extent of the limitation, a South African court should, in the light of the *POPCRU* decision, find that declaring the whole of the education sector an essential service is overbroad. Even designating all teachers as essential workers could still be regarded as too broad. A minimum service which requires, for instance, that Matric teachers should not strike at all, and that other teachers should not strike for a few weeks directly before and during year-end exams, could be regarded by the court as a reasonable and

¹¹⁹ S 23 of the Constitution

¹²⁰ African workers were excluded from the definition of "employee" in the Industrial Conciliation Act 11 of 1924, Act 36 of 1937 and Act 28 of 1956 and by this device were denied any meaningful participation in collective bargaining structures

¹²¹ *NUMSA v Bader Bop* 2003 2 BLLR 103 (CC) para 13

¹²² *Section 27 v Minister of Education* 2012 3 All SA 579 (GNP); see discussion in part 8 above

¹²³ S 29(1) of the Constitution

¹²⁴ See discussion in part 8 above

¹²⁵ S 28(2) of the Constitution

¹²⁶ See J Luallen "School's Out... Forever: A Study of Juvenile Crime, At-risk Youths and Teacher Strikes" (2006) 59 *Journal of Urban Economics* 75-103 <<http://www.elsevier.com/locate/inca/622905>> (accessed 12-07-2012) for the impact of teachers' strikes on juvenile crime in the USA

¹²⁷ *Section 27 v Minister of Education* 2012 3 All SA 579 (GNP)

justifiable limitation. This could succeed in meeting the requirement that the limitation of a constitutional right should be “narrowly tailored”¹²⁸.

On the basis of the above analysis it is difficult to predict whether a South African court will find that a limitation of teachers’ right to strike by legislation to protect the right of children to basic education is a justifiable limitation of the constitutional right to strike. Both rights have been viewed by our courts as prerequisites for exercising the fundamental rights to equality and dignity. Both rights have been regarded as of particular importance in the South African historical context in that black persons were denied the right to strike¹²⁹ and black children (who will arguably be most affected by teachers’ strikes because of their socio-economic status) received an inferior education under apartheid.¹³⁰

The fact that a court will have to take international law into consideration in terms of sections 39 and 233 of the Constitution means that the ILO’s narrow definition of essential services may be a decisive factor. There are also no equivalent body and supervisory structures with the same prominence acting as champion for the right of children to receive a basic education.

10 Proposals for balancing the right of teachers to strike and the right of children to basic education

The right to strike is undeniably of great importance to any worker, including teachers, when all other methods to resolve a dispute have failed.¹³¹ The ideal would be to balance the right to strike with a right to basic education. If teachers strike responsibly, that is not for prolonged periods or during critical times, there would be some impact, but the damage to education would be limited.

Responsible striking could be brought about by self-regulation in the form of a collective agreement between the Department of Education and trade unions in the Education Labour Relations Council. Essential services, or at least the time of the year in which certain specified services are regarded as essential, could be identified in this agreement. The LRA provides that if a strike is prohibited by a collective agreement, no person bound by that collective agreement may participate in a strike.¹³² But what would persuade an influential trade union such as SADTU – based on the principles of “unionism” with a focus on the worker – to conclude an agreement which limits its powers? There are several possible ways in which this could be done, some of which will be discussed below.

Public hearings on the subject of strikes by teachers scheduled by the National Portfolio Committee on Basic Education as well as the Provincial

¹²⁸ Woolman & Botha “Limitations” in *CLOSA* 34-89

¹²⁹ Le Roux et al “Strikes and Lock-outs” in *Essential Labour Law* 4-5

¹³⁰ Verieva “Education Rights” in *Socio-economic Rights in South Africa* 412-413

¹³¹ JP Rossouw “The Feasibility of Localised Strike Action by Educators in Cases of Learner Misconduct” (2012) 32 *S Afr J Educ* 133-143

¹³² S 65 of the LRA

Portfolio Committees on Education¹³³ could provide an opportunity for stakeholders to systematically and publicly raise their concerns about and spell out the impact of strikes by teachers, prior to any contemplated strike action. The Portfolio Committees could ensure an equal-opportunity platform for interest groups by also calling on bodies such as the South African Council of Educators (“SACE”), trade unions involved in education, other stakeholders such as the civil rights organisation Section27, the Federation of Governing Bodies of South African Schools (“FEDSAS”), and academics in education to testify before the Portfolio Committees.¹³⁴ The extent to which trade unions and teachers would compromise the education of pupils by strikes could be investigated and could by way of media coverage of portfolio committee meetings be brought to the public’s attention. The Portfolio Committee could be requested to release a report on the hearings so as to disclose the views of different interest groups and the way in which they conveyed their understanding of their accountability. A similar process could take place in the Development Chamber of NEDLAC where stakeholders in education could voice their concerns through community representatives.¹³⁵

Research and occasional symposia on the impact of strikes on pupils’ performance in the context of an already weak South African education system and the dissemination of such information in the media will further alert the public to the fact that the community as a whole will suffer if the country’s workforce is poorly educated.

Furthermore, SADTU is not immune to criticism. This was recently indicated when the trade union’s chairperson, Thobile Ntola, appealed to SADTU members to look in the mirror to see whether they are indeed responsible for the poor state of education in South Africa, as alleged by several role players.¹³⁶ This appeal was later repeated by the trade union’s secretary general, Mugwena Maluleke, at SADTU’s national education, gender and labour policy conference in Kempton Park.¹³⁷ Should SADTU be exposed as playing a damaging role, this may result in a loss of public support and may in due course induce SADTU to adhere to a child-centred ethos of professionalism similar to the smaller education trade unions NAPTOSA and SATU.¹³⁸ This may well incentivise them to conclude a collective agreement to limit strikes in the education sector.

What should be regarded as essential services in the education sector? In the light of the distinction drawn in the *POPCRU* decision between members and employees, it has been suggested that the content of an essential service in

¹³³ Ss 59 and 118 of the Constitution provide that the National Assembly and a provincial legislature must facilitate public involvement in the processes of the legislature and its committees

¹³⁴ In terms of ss 56 and 115 of the Constitution a committee of the National Assembly and Provincial Legislature respectively may summon any person to appear before it to give evidence before it or report to it

¹³⁵ S 2 of the NEDLAC Act

¹³⁶ BNkosi “A Watershed Moment for Sadtu” *Mail and Guardian* (30-03-2012) <<http://mg.co.za/article/2012-03-30-a-watershed-moment-for-sadtu/>> (accessed 12-07-2012)

¹³⁷ Nkosi *Mail and Guardian* (30-03-2012)

¹³⁸ SAOU “Waarom die SAOU” (2012) *Suid Afrikaanse Onderwys Unie* <http://www.saou.co.za/index.php?option=com_content&view=article&id=58&Itemid=82> (accessed 10-07-2012)

education should entail that only persons employed in terms of the Employment of Educators Act¹³⁹ and not those employees in the education sector appointed in terms of the Public Service Act 103 of 1994 should be regarded as essential workers.¹⁴⁰ However, even designating only educators (teachers) as essential workers will, as discussed in part 9 above, probably still not be regarded as a reasonable and justifiable limitation of the right to strike.

It is proposed that in line with the discussion in part 8, the right to basic education should be interpreted to include all pupils from grade one to twelve, and a collective agreement on essential services should entail that all teachers should be prohibited from striking during the four weeks before year-end exams, as well as during the time when pupils write their exams. If exams are not written at the end of each year, pupils will not be able to move on to the next grade in the year following the strike. This is especially so in the case of pupils writing their Matric exams as even a postponement of exams to early in the following year will have an immense impact on their ability to find employment or to proceed with higher education. It is therefore also proposed that teachers of Matric pupils should not strike at all.

At a local level parents could be encouraged to campaign for representatives on school governing bodies who would influence the incidence of strikes. Section 20(1)(a) of the South African Schools Act provides that such a body must promote the best interests of the school and strive to ensure its development through the provision of quality learning for all learners at school. The section further confers certain powers on the governing body to ensure that the school is able to perform its functions. An amendment to this section in terms of which the governing body is given the explicit authority to consult with teachers' trade unions before a strike in order to negotiate measures to minimise the impact on pupils could have a positive effect. In *The Governing Body of the Rivonia Primary School v MEC for Education: Gauteng Province*¹⁴¹ the Supreme Court of Appeal in referring to the important role conferred on governing bodies by the Schools Act stated that "the structure of the Act and its underlying philosophy places the governance of the school in the hands of the local community through the governing body".¹⁴²

School governing bodies could endeavour to reach an agreement with teachers at a particular school to limit the period of the strike, or could request teachers to rather not strike on consecutive days but intermittently – a so-called grasshopper strike. Negotiation about these aspects could prove to be futile if a strike is organised on a national scale, but locally a system could still be worked out in terms of which teachers could give pupils extra work to

¹³⁹ Employment of Educators Act 76 of 1998; definition of "educator" being "any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at any public school, further education and training institution, departmental office or adult basic education centre and who is appointed in a post on any educator establishment under this Act"

¹⁴⁰ AJ Adams *The Education Sector as an Essential Service* LLM thesis NMMU (2011) 62 <<http://dspace.nmmu.ac.za:8080/jspui/bitstream/10948/1573/1/ANTON%20%20JOHN%20%20ADAMS.pdf>> (accessed 25-11-2012)

¹⁴¹ 2013 1 SA 632 (SCA)

¹⁴² Para 34

do during the strike. During this time parents could take turns to supervise classes to ensure that pupils are not on the street and are busy with self-study until teachers return so that as little teaching time as possible is lost.

Within FEDSAS the particulars of a strategy of consulting with trade unions to minimise strikes and their damaging influence on children can be concretised.

One of the proposals in the 2012 amendments of the LRA which could furthermore prove valuable in curbing strikes in the education sector, provides that if conciliation has failed during a process of collective bargaining (and a strike is imminent), the Director of the CCMA may, if she believes that it is in the public interest that the dispute be conciliated, appoint a Commissioner to again attempt to conciliate the dispute.¹⁴³ Currently the Director may only offer to appoint a commissioner to assist parties to resolve a dispute. If this measure is implemented, strikes by teachers (the prevention of which would certainly be in the public interest) could be limited.

11 Conclusion

Our view is that it is not feasible to designate the education sector as an essential service. The first hurdle is that the definition of an essential service will have to be amended to include the education sector, or the current definition will have to be interpreted by the Essential Service Committee to include teaching. Because of the influential position of COSATU, it is unlikely that the social partners at NEDLAC will reach consensus on legislation that prohibits teachers from striking. A wider interpretation of essential services by the Essential Service Committee does not have to follow the NEDLAC route, but such an interpretation will be open to constitutional challenge. The fact that the ILO supports a narrow definition of essential services and that the ILO supervisory bodies do not regard teaching as an essential service, even in the case of prolonged strikes, has the implication that such a limitation of the right to strike, even to protect the important right of children to basic education, could be regarded as unconstitutional.

If essential services legislation is adopted, this will almost certainly not stop dissatisfied teachers from striking. This was evident during the public sector strike in 2010, when nurses in the health service, an essential service, participated in strikes. Likewise, in the case of Germany and British Columbia, legislation prohibiting teachers to strike does not keep teachers from striking. In these two jurisdictions the courts are increasingly coming to the aid of teachers whose rights to collective bargaining and the right to strike are being denied.

Proposals for protecting the right of children to basic education without declaring education an essential service include public pressure on SADTU to embrace an ethos of professionalism and to conclude a collective agreement to limit strikes in the education sector. This pressure could be brought about in various ways. Public hearings by the Portfolio Committees on Education

¹⁴³ Labour Relations Amendment Bill B16-2012 Proposed amendment to s 150 of the LRA

could provide a platform for many more stakeholders to voice their concern in an open and systematic manner. The Portfolio Committees could also summon certain bodies and persons to testify at their meetings and research and symposia on the impact of strikes on pupils' performance could be disseminated in the media. If these hearings, symposia and reports are conducted responsibly it would become clear that there are occasions where sectional interest should yield to national interest. A climate could be forged in which self-regulation by trade unions in the education sector is regarded as indispensable to quality education. In such an atmosphere the conclusion of a collective agreement with the Department of Education to identify essential services within the education sector becomes a win-win matter of balancing the right to education with the right to strike.

It is proposed that this agreement on essential services should entail that teachers should not strike while pupils write their year-end exams and also not during the four weeks prior to the exams and that teachers of Matric pupils should not strike at all.

It is further proposed that the Schools Act should be amended to grant governing bodies of schools the authority to consult with teachers' trade unions before a strike in order to negotiate on measures to minimise the impact on pupils.

Strikes by teachers could also be prevented in terms of a proposed amendment to the LRA authorising the Director of the CCMA to appoint a commissioner to attempt for a second time to conciliate a dispute after the first conciliation has failed, should the Director deem this to be in the public interest.

SUMMARY

Concern about the impact of teachers' strikes on the right of children to basic education has led to calls that education should be designated an essential service. The authors argue that this is not feasible as it is not likely that consensus will be reached by the social partners at the National Economic Development and Labour Council ("NEDLAC"). In the event that legislation to this effect is adopted, the limitation on teachers' right to strike will be open to constitutional challenge. In the light of the International Labour Organisation ("ILO")'s narrow definition of essential service and the explicit exclusion of teaching from essential services, such a limitation will in all probability be found to be unconstitutional. Prohibitions on teachers to strike in British Columbia and Germany indicate that teachers do not desist from striking and that the courts are increasingly coming to the aid of teachers who are prohibited from striking. Proposals to minimise the impact of strikes on pupils include public pressure (*inter alia* by way of public hearings scheduled by the Portfolio Committees on Education) to persuade SADTU to conclude a collective bargaining agreement to limit strikes by teachers. It is proposed that this collective agreement should be to the effect that teachers should neither strike during the four weeks leading up to the exams nor during the period while pupils are writing their exams. It is proposed that Matric teachers should not strike at all. An amendment to section 20(1)(a) of the South African Schools Act 84 of 1996 would give governing bodies of schools the power to negotiate with teachers at a particular school on measures to limit the impact of an impending strike on pupils. Proposed amendments to the LRA include a second round of conciliation by the Director of the CCMA, should it be in a public interest to prevent a strike. This measure could be instrumental in limiting strikes in the education sector.