Enforcement difficulties in the public and private sectors

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SUMMARY

This article examines sections 142(A), 143, 146 and 51 of the Labour Relations Act 66 of 1995, which deal with the enforcement of CCMA arbitration awards, and section 33 of the Arbitration Act 42 of 1965 which deals with the enforcement of non-CCMA arbitration awards.

It analyses the relevant case law and highlight the real practical difficulties facing worker litigants in enforcing arbitration awards in their favour. Sections 143 and 158 (1) (g) of the LRA and the relevant case law are also examined.

The final section of the article deals with the enforcement of collective and settlement agreements and analyses sections 23, 24, 31,32, 33A, 51A and 158 (i) (c) of the LRA and relevant case law. The essential role of bargaining councils in monitoring and enforcing collective agreements is also highlighted.

The article concludes that '[t]he challenge facing the labour movement is to equip its organisers with the legal knowledge and drafting skills to negotiate and draft agreements which best promote the interests of workers and avoid legal pitfalls when trying to enforce agreements which are challenged by an employer'.

1 INTRODUCTION

The enforcement of individual and collective worker rights are critical in giving effect to hard-won labour movement struggles which culminated in the enactment of our current Labour Relations Act.[1] This article will briefly address the basic legal issues concerning the enforcement of arbitration awards, collective agreements and settlement agreements in both the private and public sector and in doing so will cite relevant provisions of the LRA and the Arbitration Act.[2] Hopefully it will assist in highlighting some of the problematic issues which need to be critically addressed and debated.

1 66 of 1995 (the LRA)
2 42 of 1965.

2 ENFORCEMENT OF ARBITRATION AWARDS

Importantly, the amended section 143(1) of the LRA now specifically provides that an award issued by a CCMA commissioner is final and binding and may be enforced as if it were an order of the Labour Court, unless it was an advisory award.

For this to happen, section 143(3) of LRA provides that the CCMA director must certify that the arbitration award is a binding one. CCMA Rule 40 prescribes the procedure necessary to obtain certification of an arbitration award by the CCMA director. Certain formalities must be observed in bringing an application for certification of an award. First, a form 7.18 must be completed if it is a CCMA award that requires certification and form 7.18A if it is a bargaining council award. Both are in the form of an affidavit deposed to by the applicant or his or her representative, attesting to the fact that an arbitration award was made and proof that a copy of the award has been served on the respondent.

The respondent is then invited to make written representations within fourteen (14) days to the CCMA director as to why the award should not be certified as a binding award in terms of section143 (3).

Once the applicant has successfully obtained the certification of the award, the next step is to obtain a warrant of execution (herein after referred to as a writ) issued by the Registrar of the Labour Court for the payment of an amount of money. The writ must then be handed to the Sheriff of the Court who is directed to attach and take into execution the moveable goods of the respondent and cause to be realised by public auction, the sum of money awarded to the applicant, plus interest (currently at a rate of 15.5%) from the date of the award and the taxed costs of the applicant.[3]

If the other party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, the applicant may initiate contempt proceedings in the Labour Court in order to obtain the desired relief.[4] A classic example would be that of an award that retrospectively reinstates a worker where the employer fails to pay the arrear remuneration or to reinstate the worker. In such a case, the worker could obtain a writ to recover the sum of money awarded and initiate contempt proceedings in the Labour Court to compel the employer to reinstate him or her. [5]

The challenge facing a worker who is not a trade union member in successfully enforcing an award for financial compensation and reinstatement are indeed formidable, especially if he or she cannot afford the services of an attorney. I am reliably informed that, before attempting to execute a writ of execution, Sheriffs of the Court often insist on upfront payment of their fees by the worker.

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3 Part 3 of Form 7.18, contained in Labour Relations GNR 1442 of 10 October 2003

4 S 143(4), LRA

5 In terms of s 142(9), LRA. For the procedure in bringing a contempt referral before the Labour Court, see Labour Court Rule 7 in Rules for the Conduct of Proceedings in the Labour Court (GNR 1665 of 14 October 1996).

I am sure many readers, will have personal experience of the many practical difficulties confronting trade unions when seeking enforcement of their members' awards. The amended section 51(8) of the LRA now significantly facilitates the enforcement of bargaining councils' awards by means of the provisions of section 143 of the LRA, provided that a collective agreement does not provide otherwise. The effect of section 51(8) is that the procedure in section 143 is available to enforce the award of a bargaining council without the need to make it an order of the Labour Court.

In *MIBCO v Osborne & Others*[6] Landman J found that the terms of the collective agreement of the bargaining council excluded the operation of the LRA, as permitted in terms of section 51(9), but that the council was entitled to approach it in terms of section 31 of the Arbitration Act instead of section 158(1)(c) of the LRA to have its award made an order of court. The enforcement of arbitration awards by means of the amended section 143 was intended to avoid the expensive, cumbersome and time-consuming direct enforcement of awards of the Labour Court prior to 2002. As Landman J states

> 'upon certification by the director of the CCMA, the award is deemed to be an order of the Labour Court for the purposes of enforcing it. This is intended to be a more expeditious and less expensive means for a successful party to enforce an award'.

The original section 143 of the LRA provided that an arbitration award issued by a commissioner is final and binding and may be made an order of the Labour Court in terms of section 158 1(c), unless it is an advisory award. It is important to note that the certification of an arbitration award does not change the status of the award, as it still remains an award. This was confirmed in *Tony Gois t/a Shakespear's Pub v Van Zyl & Others*[7] where Wagley J held that the CCMA had jurisdiction in terms of section 144 of the LRA to rescind an arbitration award that has been certified by the director. The reasoning of the court was as follows:

> 'the new section 143 did not alter the nature or composition of the award. The award still remains a CCMA award and is not transformed into a Labour Court order as a result of the certification process and as such there is no need to involve this court in the process of rescinding CCMA awards'.

It was held that the aim of the amended section 143 was to simplify the procedure of enforcing CCMA awards. Requiring the Labour Court to first set aside the certification and the writ of execution before an award can be rescinded, therefore, was not intended by the LRA.

The effect of an application for rescission in terms of section 144 of the LRA on the enforcement of arbitration awards in terms of section 143 will now be briefly considered.

The impact of section 144 on the enforcement of an arbitration award can best be illustrated by way of an example. A worker has successfully obtained an arbitration award in his favour at an arbitration hearing at which the employer was absent. The employer immediately brings an application for rescission of the award in terms of section 144 (a) of the LRA on the grounds

6 [2003] 6 BLLR 573 (LC)
7 [2003] 11 BLLR 1176 (LC)

that it was unaware of the arbitration hearing as it had not received notice.

The worker may now oppose the employer's application for rescission by filing his own affidavit(s) and at the same time awaiting the arbitration rescission ruling. If successful, the worker can now enforce the award. The employer may, however, decide to review the rescission ruling in terms of section 158(1) (g) of the LRA in the Labour Court. The aggrieved worker may still pursue the enforcement of the arbitration award in terms of section 143 of the LRA unless the employer successfully applies for the stay of the enforcement of the award pending a review of the award by the Labour Court.

Only if the by now frustrated worker survives the ordeal of the Labour Court review proceedings will he finally be in a position to invoke the provisions of section 143 to enforce his award, provided of course that the employer does not successfully obtain the Labour Court's leave to appeal to the Labour Appeal Court.

To sum up: even if our worker has already obtained certification of his arbitration award in terms of section 143, the persistent employer has the right in terms of section 144(a) to bring a rescission application.[8] In *Siyaka Cleaning Services CC v Nohlanga*[9] it was held that a section 144 application to rescind an award does not constitute *lis pendens*,[10] so that a party seeking rescission is obliged to apply to the Labour Court for a stay of the execution of the award.

It is interesting to note the Labour Court judgment in *Cross Border Road Transport Agency v Mpato & Others*,[11] where the CCMA had notified an employer of an application to convert an award which was not in his favour into an order of court in terms of section 143. Although duly invited to make written representations opposing the application within fourteen days, the employer's opposing papers were filed one day late with the CCMA. It was held that the CCMA director was entitled to proceed with the certification of the award.

The major obstacle facing a worker in enforcing an award is, of course, the possible review of the arbitration award in terms of section 145 or section 158(1)(g) of the LRA (or section 33 of the Arbitration Act, if it is a private arbitration award).

It is not my intention to explore the complex jurisprudence of the review of arbitration awards but merely to make certain observations and comments of immediate relevance to the enforcement of awards. It should be noted that in the matter of *Oliver v University of Venda*[12] it was held that a review application to the Labour Court does not automatically stay the enforcement of an

8 *Ibid.*
9 [2002] 5 BLLR 482 LC.
10 *Lis pendens* is a legal defence, meaning that a legal action involving the same claim between the same parties is already pending before another court. An application for rescission, in other words, is treated as a separate action from that which led to the award which the employer is trying to rescind. This means that an employer who has applied for rescission cannot raise a claim of *lis pendens* in the original proceedings.
11 [2003] 10 BLLR 992.
12 [2005] 5 BLLR 47 (LC).

award. The applicant has to apply to the Labour Court for a stay of the award pending review thereof.

I understand that it is now general practice to launch both an application for review and for the stay of execution of the award. It is well known that unscrupulous employers often adopt dilatory tactics by making an application for review of the arbitration award and successfully staying the execution of the award as an order of court but then not expediting their application. This has the effect of postponing the finalisation of the review proceedings indefinitely.

Unfortunately, unlike the High Court Uniform Rules, the current Labour Court rules do not specifically deter or prevent applicants from failing to expedite their review applications. As a result, an aggrieved worker may be forced to engage the services of an attorney to bring an urgent application to the Labour Court for an order compelling the employer to expedite the review application within a specified period, failing which it will be barred from proceeding with the review.

An amendment to the current Labour Court rules might well address the issue and assist workers in tackling the problem of spurious review applications which have the effect of frustrating the enforcement of arbitration awards. It is important to note that no appeal lies to the Labour Court to overturn arbitration awards. The distinction between review and appeal is well established in South African law. For example, in *Lekota v FNB of SA Ltd*[13] it was pointed out the Labour Court's review function is not to decide whether the commissioner acted correctly but whether he or she was guilty of misconduct or of a gross irregularity or had exceeded his or her powers.

Section 51(8) of the LRA provides that, unless otherwise agreed in a collective agreement, section 142 A and sections 143 to 146 of the LRA apply to any arbitration conducted under the auspices of a bargaining council. In other words, bargaining council arbitration awards are reviewable in terms of section 145 of the LRA and not section 33 of the Arbitration Act.[14] In *Dortprops (Pty) Ltd v CCMA & Others*[15] it was held that the Labour Court can only review an order that has been made an order of court in terms of section 158 (1)(c) of the LRA if an application to rescind the order has been made.

In *PSA obo Haschke v MEC for Agriculture & Others*[16] it was held that awards and rulings are not considered 'administrative actions' and as such are not reviewable in terms of Promotion of Administrative Justice Act.[17] However, the Supreme Court of Appeal has now ruled that CCMA awards constitute administrative acts and are therefore subject to review not only in terms of section 145 of the LRA but also under the far more extensive grounds for review laid down in PAJA.[18] However, the time limits laid down in section 145 are not affected.

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13 [1998] 40 BLLR 1021 (LC). See also *Carephone (Pty) Ltd v Marcus NO & others* [1998] 11 BLLR
14 42 of 1965.
15 [1998] BLLR
16 [2004] 8 BLLR 822 (LC). [2004] 25 ILJ 1750 (LC)
17 Act 3 of 2000 ('PAJA')
18 *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & Others* [2006] 11 BLLR 1021 (SCA)

Interestingly, in *Venture Otto SA (Pty) Ltd v MIBC & Others*[19] it was held that an employer who undertook to abide by an award was barred from taking the matter on review because he had acquiesced to the award.

It is important to take note that in terms of section 146 of the LRA, the Arbitration Act does not apply to any arbitration conducted under the auspices of the CCMA. In this regard, section 51 (8) of the LRA extends the same provision to bargaining council arbitrations.

I shall not deal with the relationship between section 145 of the LRA and section 33 (1) of the Arbitration Act. In *NUM v Bern NO & Another*,[20] however, it was held that when reviewing a private arbitration in terms of section 33(1) of the Arbitration Act, the Labour Court, must apply the same standards as those applicable to the review of CCMA awards.

It is settled law that rulings concerning condonation and the refusal to rescind an award are not reviewable by the Labour Court in terms of section 145 but rather in terms of section 158(g) of the LRA. Interestingly, in *Topics (Pty) Ltd v CCMA & Others*[21] the court held that the Labour Court may even review proceedings by a commissioner while the arbitration proceedings are in progress 'where justice may not by any other means be obtained or where a gross irregularity has occurred or where grave injustice may result.'

A successful review of an arbitration award usually results in the award being set aside and the dispute being referred to the CCMA or bargaining council to be arbitrated before another commissioner or arbitrator, as the case may be. However, a worker who successfully opposes an employer's application to review an arbitration award in his or her favour may still be unable to enforce the award, should the employer successfully apply to the Labour Court[22] for leave to appeal to the Labour Appeal Court.

Even an application for leave to appeal, like the noting of an appeal, has the effect of suspending the Labour Court's review judgment. Should the employer succeed in obtaining the Labour Court's leave to appeal to the LAC, but be unsuccessful in the appeal itself, the employer may still appeal to the Supreme Court of Appeal (SCA).[23]

The incidence of employers failing to comply with arbitration awards in both the private and public sectors is borne out by the following national CCMA statistics for the month of December 2006 alone.

Eastern Cape (East London)	7
Eastern Cape (Port Elizabeth)	11
Free State	51
Gauteng (Johannesburg)	149
Gauteng (Pretoria)	85

19 [2005] 3 BLLR 300 (LC)
20 [1998] 8 BLLR 49 (LC)
21 [1998] 10 BLLR 1071 (LC)
22 In terms of s 166(1) of the LRA
23 In *NUMSA and Others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) it was held that section 183 of the LRA, which confers final appellate authority on the LAC in respect of Labour Court judgments, must be read subject to section 167 of the Constitution, which has the effect of vesting the SCA with the power to hear appeals from the LAC in both constitutional and non-constitutional matters.

KwaZulu-Natal (PMB)	9
KwaZulu-Natal (Richards Bay)	7
Limpopo	82
Mpumalanga	36
Northern Cape	18
North West	56
Western Cape	24
Total	535

The numbers of bargaining council arbitration awards which employers failed to honour in December 2006 are as follows:

Eastern Cape (Port Elizabeth)	10
Head Office	140
KwaZulu-Natal	36
Western Cape	8

How many of these workers successfully pursued the enforcement of arbitration awards made in their favour is a moot point. Recalcitrant employers in both the public and private sector could face the wrath of the trade union, which could conduct a 'name and shame' exercise, besides which adverse publicity could also exert added moral pressure to deter future defaulters.

3 ENFORCEMENT OF COLLECTIVE AND SETTLEMENT AGREEMENTS

Section 213 of the LRA defines a collective agreement as a 'written agreement concerning terms and conditions of employment or any other 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'.

More importantly, section 23 of LRA spells out in detail the extent to which a collective agreement is legally binding. Section 24(1) provides that every collective agreement (excluding an agency shop or closed shop agreement or a settlement agreement contemplated in terms of section 142A or section 158(1)(c)) must provide for a procedure to resolve any dispute about the interpretation and application of the collective agreement.

This article will not survey all the case law regarding the enforceability of collective agreements but merely highlight some of the more interesting decisions by courts and arbitrators.

In *Early Bird Farm (Pty) Ltd v FAWU & Others*[24] it was held that the employers to whom a collective agreement is extended in terms of section 23 (1)(d) of the LRA must be identified in the collective agreement. In the above matter, because this had not been done, there was held to be no agreement

24 [2004] 7 BLLR 628 (LC)

on a wage increase that was binding on the non-union employees, who thus remained free to strike so as to secure better wages for themselves.

In *SACCAWU v Garden Route Chalets (Pty) Ltd*[25] the arbitrator held that a collective agreement could not override statutory provisions unless the statute expressly provided for it.

In *Majola v MEC Department of Public Works, Northern Province & Others*[26] it was held that despite the provisions of section 24 of the LRA 'an arbitrator is entitled to refuse to apply a collective agreement if just cause exists not to apply it'.

Thus in *MEC, Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumeni*[27] it was held that in any dispute about the interpretation and application of a collective agreement the parties should first attempt to resolve the dispute through conciliation and only resort to arbitration if the dispute remains unresolved.

Section 24(2) of the LRA provides that if there is a dispute about the interpretation or application of a collective agreement, any party to that dispute may refer the dispute in writing to the CCMA if

(a) the collective agreement does not provide for a procedure as required by section 24(1);

(b) the procedure provided for in the collective agreement is not operative; or

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.

Suffice it to say that, in general, our courts have upheld the primacy of collective agreements and their applicability to non-members even where the agreement appears to be detrimental to the latter, provided that the requirements of section 23(1)(d) are complied with[28]. Thus, in *Tsetswana v Blyvoorzicht Gold Mining Co. Ltd*[29] the court found that the applicant's contention that he was not bound by a collective agreement concluded with the trade union of which he was not a member was without substance or foundation.

Section 24 of the LRA in principle confers exclusive jurisdiction on the CCMA or bargaining council arbitrators to determine a dispute about the interpretation and application of a collective agreement. In *SA Motor Industry Employers' Association v NUMSA & Others*[30] the court upheld the principle that every collective agreement must provide for a procedure to resolve disputes as to its interpretation and application. This procedure should entail first conciliation and only then arbitration and only where no such procedure is provided, should resort be had to the CCMA.

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25 [1997] 3 BLLR 325 (CCMA)
26 [2004] 1 BLLR 54 (LC)
27 [2005] 2 BLLR 173 (SCA)
28 See *Mzeku & Others v Volkswagen SA (Pty) Ltd & Others* [2001] 8 BLLR 857 (LAC)
29 [1999] 4 BLLR 404 (LC)
30 [1997] 9 BLLR 1157 (LAC)

In *FAWU v Premier Foods Industries Ltd (Epic Foods Division)*[31] Basson J declined to grant an interdict requiring compliance with a collective agreement on the grounds that the trade unions had an adequate remedy to ensure compliance in terms of section 24 of the LRA. However, in *Fredericks & Others v MEC for Education Training Eastern Cape & Others*[32] the Constitutional Court held that the High Court does have jurisdiction to consider disputes concerning collective agreements if a breach of a constitutional rights has been alleged. Similarly, in *Bester v Sol Plaatje Municipality & Others*[33] the High Court held that section 24 of the LRA does not remove its jurisdiction where the applicant seeks to enforce his or her constitutional right to just administrative action.

Section 24 of the LRA is applicable to bargaining council agreements and bargaining councils should provide for the arbitration of disputes about the interpretation and application of agreements by arbitrators appointed for that purpose. In *NUCW v Oranje Mynbou en Vervoer Maatskappy Bpk*[34] Revelas J held that enforcement of an agreement only becomes an issue when there is some form of non-compliance with that agreement. When a party wishes to enforce the agreement, in other words, it would be because it believes the agreement is applicable to the party who is in breach thereof. Therefore a 'dispute about the application of a collective agreement' applies to the situation where there is non-compliance with a collective agreement and one of the parties wishes to enforce its terms. Consequently, the CCMA, and not the Labour Court, should entertain disputes arising from the non-compliance with collective agreements.

In *Ceramic Industries Limited t/a Betta Sanitaryware v NCBAWU & Others*[35] it was held that a strike flowing from the interpretation and application of a collective agreement which should have been referred to arbitration is not protected. Section 65 (1)(c) prohibits a strike if 'the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court' in terms of the LRA.

However, the courts have always emphasised that the substance of the dispute must be scrutinised in order to ascertain its true nature. In *Adams & Others v Coin Security Group (Pty) Ltd*[36] Zondo J disagreed with the employer's contention that the workers' strike was unprotected as the issue in dispute was about the interpretation and application of the council's agreement. He found that the issue in dispute in fact concerned a demand for pay equalisation.

In *SACTWU v Best Clothing (Pty) Ltd*[37] the arbitrator held that because the terms and conditions of a collective agreement were clear and unambiguous, additional evidence to alter its meaning was inadmissible. Similarly, in

31 [1997] 6 BLLR 753 (LC)
32 [2002] 2 BLLR 119 (CC)
33 [2004] 9 BLLR 965 (NC)
34 [2000] 2 BLLR 190 (LC)
35 [1997] 5 BLLR 547 (LC)
36 [1998] 12 BLLR 1238 (LC)
37 [1997] 5 BLLR 658(CCMA)

Airport Handling Services (Pty) Ltd v TOWU & Others[38] the judge dismissed the union's argument that, as written collective agreements co-existed with an oral agreement and the written agreements still required ratification, the court should take into account the terms of the written agreements only. The judge applied the parol evidence rule[39] used in the interpretation of contracts to dismiss the union's argument.

In *NE Cape Forests v SAAPAWU & Others*[40] Froneman DJP held that a collective agreement in terms of the LRA is not an ordinary contract and the context within which a collective agreement operates under the Act is vastly different from that of an ordinary commercial contact. The court emphasised that a practical approach to the interpretation and application of the collective agreement was the preferred one to give effect to the primary objects of the LRA, rather than the traditional common law contractual principles. The court also held that the terms of a collective agreement regarding strike action that had been ratified by striking workers was binding on them for the duration of the strike, despite the prior cancellation of the agreement.

Significantly, rights conferred by a collective agreement may also be waived. In this regard the arbitrator in *SAMWU v Mangaung Local Municipality (MLM)*[41] found that although the parties to the collective agreement had intended to make provision for a forum for the purposes of negotiation and consultation on a number of issues including the recruitment and appointment of council officials, such forum had failed to even discuss the appointment of the interviewees concerned. The respondent was thus entitled to advertise the posts and appoint the candidates.

In *NEHAWU obo Senekane & Others v PACOFS*[42] the CCMA commissioner found that a collective agreement providing for the retrenchment of workers expressly stipulated that the employer merely consider the retrenchees for vacancies and thereby did not confer on retrenchees a right to be re-employed.

In *Northern Cape Province Administration v Hambidge NO & Others*[43] Landman J held that the dispute resolution provisions in a collective agreement were inoperative and in terms of section 24 (2) of the LRA, the CCMA had jurisdiction to resolve the dispute.

Section 31 of the LRA deals with the binding nature of collective agreements concluded in a bargaining council. In *Reactor Clothing (Pty) Ltd v Robertson & Others*[44] it was held that a collective agreement concluded in a bargaining council binds the parties and their members as soon as it is concluded, provided it is in accordance with the council's constitution.

Section 32 of the LRA provides for the extension of collective agreements concluded in a bargaining council to non-parties. In *Kim Lin Fashions CC*

38 [2004] 25 ILJ 117 (LC)
39 This rule states that, where an agreement is in writing, the introduction of oral or other evidence that contradicts it is inadmissible.
40 [1997] 6 BLLR 711 (LAC)
41 [2004] 10 BLLR 1270 (CCMA)
42 [2004] 4 BLLR 515 (CCMA)
43 [1999] 8 BLLR 848 (LC)
44 [1998] 3 BLLR 315 (LC)

v Bruntos & Others[45] it was held that as soon as the Minister of Labour has extended a collective agreement to a non-party in terms of section 32 (2) of the LRA, such a party is bound by its terms and can only be released if an exemption is granted or the extension is set aside by an order of court.

In *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA & Others*[46] it was held that where a bargaining council agreement has been extended to non-parties and the dispute resolution provisions in the collective agreement are inoperative in terms of section 24(2) of the LRA, the CCMA has jurisdiction to resolve the dispute. In the same case it was held that where a bargaining council agreement has been extended to non-party employers, individual notice of the commencement of a strike need not be given once the bargaining council has been advised.

In *Tua King Metal Industry (Pty) Ltd v Pooe No & Others*[47] it was held that an exemption from a bargaining council agreement expires when the agreement is replaced with another. Accordingly, a party seeking a further exemption has to make a fresh application for exemption.

Section 33A of the LRA provides for the enforcement of collective agreements by bargaining councils. Section 33A(1) clearly empowers bargaining councils to monitor and enforce compliance with their collective agreements in terms of the section itself or a collective agreement concluded by the parties to the council. It is important to note that a collective agreement for the purposes of section 33A of the LRA is defined as including

(a) any basic condition of employment which, in terms of section 49 (1) of the Basic Conditions of Employment Act, constitutes a term of employment of any employee covered by the collective agreement; and

(b) the rules of any fund or scheme established by the bargaining council.

Section 33 A (3) provides that a collective agreement may authorise a bargaining council agent to issue compliance orders requiring any person bound by the collective agreement to comply with the collective agreement within a specified period.

Section 33A(8) of the LRA provides that an arbitrator conducting an arbitration in terms of this section may make an appropriate award which may include

(a) ordering any person to pay an amount owing in terms of a collective agreement;

(b) imposing a fine for a failure to comply with a collective agreement in accordance with subsection (13);

(c) charging a party an arbitration fee;

(d) ordering a party to pay the costs of the arbitration; and

(e) confirming, varying or setting aside a compliance order issued by a designated agent in terms of subsection (4).

45 [1998] 3 BLLR 315 (LC)
46 [1999] 1 BLLR 66 (LC)
47 [2006] 5 BLLR 456 (LAC)

Most importantly, section 33A(10) provides that the award in an arbitration conducted in terms of this section is final and binding and may be enforced in terms of section 143.

Section 142A of the LRA provides that the CCMA 'may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award'. A settlement agreement is defined as a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding an essential services award.

It is clear that only so-called 'rights disputes' are capable of being included in a settlement agreement which may be made an arbitration award. Significantly, section 51 (8) of the LRA provides that unless otherwise agreed to in a collective agreement, section 142 A and sections 143 to 146 apply to any arbitration conducted under the auspices of a bargaining council. In terms of section 158 1(c) of the LRA, the Labour Court may make any arbitration award or any settlement agreement an order of the Court.

The new section 142A defines a settlement agreement, for the purposes of section 158(1)(c), as 'a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court', excluding a dispute arising in an essential or maintenance service that a party is only entitled to refer to arbitration in terms of section 74 (4) or 75 (7) of the LRA.

4 CONCLUSION

A well-resourced and recalcitrant employer presently has the means to frustrate and indeed thwart the enforcement of arbitration awards despite the 2002 amendments to the LRA, thereby undermining the constitutional right of employees to fair labour practices.

The labour movement, especially in unionised industries, has a number of non-legal options at its disposal. These include publicity campaigns and tabling the issue at a bargaining council.

A major challenge facing the labour movement is how to put pressure on an employer in a non-unionised workplace to honour arbitration awards.

Unfortunately, the only way to enforce an arbitration award which orders the re-instatement of a worker is to bring an application for contempt of court in the Labour Court.

That labour relations are becoming increasingly judicialised is well illustrated by the current labour law dealing with the enforcement of collective and settlement agreements. The challenge facing the labour movement is to equip its organisers with the legal knowledge and drafting skills to negotiate and draft agreements which best promote the interests of workers and avoid legal pitfalls when trying to enforce agreements which are challenged by an employer.

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