

The balancing act between the constitutional right to strike and the constitutional right to education

H J (Jaco) Deacon

Federation of Governing Bodies of South African Schools (FEDSAS) and Department of Mercantile Law, University of the Free State
jaco@fedsas.org.za

While the South African Constitution enshrines both children's right to a basic education and teachers' right to strike, conflict between these two often occurs when the way in which teachers' unions conduct strike actions detracts from learners' education. This article identifies the parties affected by industrial action in the school context, and then proceeds to examine educators' right to strike as defined by the provisions of the Labour Relations Act. The unique implications of picketing in the education environment are then discussed, covering relevant questions such as where pickets may be held, the issue of picketing rules as well as unprotected pickets. Even though we are faced with a qualified right to strike as opposed to an unqualified right to education, the South African reality seems to be that striking teachers are handled with kid gloves. It is therefore concluded that the vast range of existing laws regulating protest action should be applied more effectively. One of the most important aspects should be the picketing rules, which should clearly determine whether picketing in fact contributes to resolution of the dispute, and how learners' interests and rights may best be actualised.

Keywords: educators; Labour Relations Act; learners; misconduct; peaceful demonstration; picket; picketing rules; right to education; right to strike; teachers' unions

Introduction

The education process essentially involves two parties: the learner and the educator. One receives education, and the other provides it. One pays to be provided with education (through parents in the form of school fees or tax), and the other is paid to provide it. One undergoes compulsory education, and the other follows a career choice to educate. One has expectations, the other has responsibilities. One has no collective voice, and the other is organised in a union, or even unions. This is an oversimplified way of stating that we are dealing with two opposites within the education sector (each with its own complex constitutional, educational, labour and political issues).

According to the international McKinsey report on world school systems, the quality of an education system cannot exceed the quality of its teachers. The report clearly shows that if one should remove all equipment (computers, interactive boards, chairs and tables) from a classroom, and be left with nothing but a dedicated educator, education will still take place. Education, therefore, is not possible without the educator (McKinsey & Company, 2007).

Education is one of the non-negotiable aspects of most societies, and, in South Africa this right is enshrined in the Constitution. In terms of section 29, everyone has the right to a basic education (Republic of South Africa, 1996).

On the other hand, educators – being employees (Rossouw, 2012) – enjoy labour rights. Section 23 of the Constitution provides that everyone has the right to fair labour practices, and

every worker has the right to form and join a trade union, to participate in the activities and programmes of a trade union, and to strike (Republic of South Africa, 1996).

While the Constitution protects both teachers' right to strike and our children's right to a basic education, these two are sometimes in conflict, despite the fact that section 28(2) of the Constitution explicitly states: "A child's best interests are of paramount importance in every matter concerning the child" (Republic of South Africa, 1996).

Conflict between learners and educators' rights occurs when teachers' unions conduct strike actions in a way that diminishes the quality and duration of learners' classroom education, or when educators strike just before or during an examination (Horsten & Le Grange, 2012). The two most recent strikes in education were marked by intimidation of non-striking educators, violence and disruption of classes, and even intimidation of learners travelling to school. Educators took part in protest actions at several schools on a single day, and disrupted schooling where non-strikers were employed (Calitz & Conradie, 2013). This gave rise to the question of the right to strike as opposed to the right to education, and quickly became a political 'hot ball'. In 2011, for example, the Democratic Alliance (DA) proposed a Private Members' Bill, through which they sought to limit educators' right to strike (James, 2011). This was immediately rejected by the majority teachers' trade union, the South African Democratic Teachers Union (SADTU), who warned:

Unfortunately, we can't take that lying down. Quality education can only be defined by the investment in the inputs, being teachers, the learners' background and the infrastructure. This investment is aimed at improving the teaching process, which is so complex, with the ultimate aim of improving the expected outcome, which is learner performance (SADTU, 2011).

On 6 June 2012, a ministerial review committee appointed by the Minister of Science and Technology also proposed in vain to Parliament that teaching be declared an essential service (O'Connor, 2012).

On 4 February 2013, the African National Congress (ANC) announced their intention to include educators in the definition of an essential service (Chauke, 2013). The Suid-Afrikaanse Onderwysersunie (SAOU), the National Professional Teachers' Organisation (Naptosa) as well as the student body, the Congress of SA Students, all rejected the proposal, with only the DA welcoming the announcement (Modjadji & Tau, 2013; SAPA, 2013; South African Labour News, 2013).

The definition of an essential service in the Labour Relations Act is 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. (Republic of South Africa, 1995: s 213)

SADTU again immediately responded:

Sadtu general secretary Mugwena Maluleke said the union had requested a meeting with the ANC to discuss the issue, but it was inconceivable that it would enter into any voluntary agreement to limit the right to strike. "The strike is the only weapon that workers have. It would make no sense to agree to limitations on that." The government had recourse in the event of unprotected labour disruptions. It could take disciplinary action against the involved teachers, Mr Maluleke said. "Why do they need another law, when in fact they are not enforcing the one that they have?" (Paton, 2013:3)

South Africa's current labour legislation (especially regarding strike action) is good in theory,

but poorly applied and enforced in the country, despite the provisions contained in the Labour Relations Act. This was evident in the 2007, 2009, and 2010 public workers' strikes.

This article will focus on the loopholes and the possible solutions within our current legal framework in this act of balancing rights.

As most employees in this scenario are appointed by the state, this paper will concentrate on the employment relationship between the Department of Education and those it appoints.¹

The parties involved

In the school context, the institution itself as well as a number of other role players are affected by any strike or protest action. These include educators who want to participate in the strike and withhold teaching; the union who represents the employees; the Department of Education as employer, and the learners of the particular school.

It is important to highlight the fact that some educators work under difficult conditions, as Horsten & Le Grange (2012:519) correctly describe:

Many teachers are expected to work in extremely difficult conditions where they face overcrowded classrooms, unsafe and unsanitary schools, shoddy housing and a shortage of the most basic classroom resources. Teachers are "at the mercy of bureaucracies" which appear to them to be "irrational, unpredictable and unresponsive" and they feel that the system, and even their own principals, are disempowering them.

In terms of the provisions of section 15 of the South African Schools Act (Department of Education, 1996), each public school is a juristic person. This is very important, as it has huge implications where industrial action is concerned. 'Juristic person' is a concept that has developed in law as an entity to afford bodies/societal ties the same or similar legal powers or competencies than those ascribed to natural/adult persons. These legal powers include the power to own assets or incur liabilities, to conclude contracts, and to sue or be sued.

To clarify, one may equate public schools with companies. Similar to companies, public schools do not have organs or body parts like natural persons. This is why companies act through organs such as the board of directors. In the case of public schools, the governing body is the organ acting on behalf of the juristic person. On its own, the governing body is not a juristic person. Indeed, it is simply the organ through which the public school acts as a juristic person. All actions of the governing body may be performed only on behalf or at the expense of the school. In *Governing Body of the Rivonia Primary School v MEC for Education: Gauteng Province*,² the Supreme Court of Appeal stated that the structure of the South African Schools Act and its underlying philosophy placed the governance of the school in the hands of the local community through the governing body. Public schools are juristic persons created by legislation – i.e. they are creatures of statute. This means that their ability to act as juristic persons is limited to the rights, functions and obligations set forth in the statute by which they were created (i.e. the Schools Act). Therefore, sections 15 and 16(1) of the Schools Act limit the powers of schools and their organs (governing bodies) to

those functions authorised by the Act itself (Department of Education, 1996).

The fact that a public school is a juristic person also lends it a particular identity worth protecting. A natural person's own identity and separate personality are characterised by numerous features, such as a personal name, physical characteristics (appearance, height, weight, eye colour, gender, and so forth (etc.)) and a psyche. No-one may violate that without consent. In exactly the same way, a juristic person (public school) has a right to an own identity within its responsibility to be a school. It has the right to have its own name, location, colours, anthem, traditions and customs, composition (e.g. gender-specific schools; single, double or parallel-medium schools; primary, secondary or combined schools) and so forth. In terms of the provisions of section 8(4) of the Constitution, a juristic person is also entitled to the rights entrenched in the Bill of Rights, to the extent required by the nature of the rights and the nature of the juristic person (Colditz, 2003).

The right to take part in industrial action

Even though the right to strike is a constitutional right, it must be exercised in accordance with the provisions of the Labour Relations Act (Republic of South Africa, 1995). This is in line with the International Labour Organisation's (ILO) view that strike action is one of the fundamental means available to workers to promote their interests (ILO, 2001). A strike in terms of the Labour Relations Act means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer, or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in the definition also includes overtime work, whether voluntary or compulsory (Republic of South Africa, 1995: s 213).

According to Grogan (2007), a strike consists of the withdrawal of labour or a retardation of work. In that sense, a strike should be invisible (Grogan, 2007). Indeed, it is important to note that a strike supposes a peaceful withholding of labour. In the education context, this would simply mean that educators withhold their labour from the Education Department. Such educators would therefore be entitled to stay away from the workplace, or simply be present in the classroom without teaching.

Before educators may participate in a strike, however, their union(s) must first comply with the provisions of section 64 of the Labour Relations Act, which in essence provides that the parties must have reached a deadlock in their negotiations; must have referred the matter to the bargaining council for reconciliation, without success; the council must have issued a certificate, and the union must have given the employer seven days' notice of its members' intention to strike (Republic of South Africa, 1995).

If the union has followed all these steps, the educators would be entitled to participate in a lawful strike. However, at this stage, educators may simply withhold

their labour, but are not permitted to take part in any further protest action.

Once a right to strike is recognised, an application for the right to picket must follow; otherwise, strikers may be arrested in terms of laws that restrict demonstrations and gatherings. While the Constitution does not expressly confer a right to picket, that right is recognised and regulated by the Labour Relations Act (Republic of South Africa, 1995), in particular the provisions of section 69. Should educators want to participate in public protest action in order to pressurise the employer, they must therefore act in terms of the provision of that section.

Picketing is the “visual” part of an industrial action, and is available to a union in addition to a strike in order to exert pressure on the employer, but also to “drum up” public support (Grogan, 2010:389).

According to section 69, only a registered trade union may authorise a picket by its members and supporters, for the purposes of peacefully demonstrating in support of any protected strike. Picketing may be held in any place to which the public has access, but outside the employer’s premises, or inside the employer’s premises with the employer’s permission. This permission may not be unreasonably withheld (Republic of South Africa, 1995).

Picketing may only take place if there is an agreed set of rules. If requested to do so by the trade union or the employer, the council must attempt to secure an agreement between the parties to the dispute on rules that should apply to any picket in relation to that strike or lock-out. If there is no agreement, the council must establish picketing rules and, in doing so, must take account of the particular circumstances of the workplace or other premises where the right to picket is supposed to be exercised, as well as any relevant code of good practice (Republic of South Africa, 1995).

Section 69(1) links the purpose of picketing to the act of demonstrating rather than the purpose of the demonstration itself. However, it seems that the intention is to ensure that the pickets are aimed at supporting the strikers’ objectives or the employees’ opposition to the lock-out. A picket will therefore be protected under the Labour Relations Act only if the strike is protected.

The implications of picketing in the school environment

Peaceful demonstration

Section 69(1) of the Labour Relations Act contains a limitation on picketing in the form of the phrase “peacefully demonstrating” (Republic of South Africa, 1995). These words encapsulate both the nature of the picket and its limits. The aim of picketing is to “demonstrate” support for a strike or opposition to a lock-out (Grogan, 2007:249; 2010:389). Grogan (2007:249; 2010:389) explains this as follows:

Demonstrations may take many forms, including the display of placards, the singing of protest songs and chants, marches, mass gatherings and speeches.

Support for a strike can be demonstrated by actions directed at the employer or at non-striking workers, and even at customers or suppliers of the employer.

The word ‘peacefully’ limits all of these forms of action to those short of violence,

whether actual or threatened. The threshold between peaceful and violent means of demonstration marks the point at which a picket loses protection under the law (Grogan, 2007). The demonstration directed at non-strikers, customers or suppliers should thus also be peaceful and legal, and would exclude actions such as intimidation, damage to property, and assault. Horsten and Le Grange (2012:516) add the following:

...it can be said that to strike is wrong when one's decision to strike causes someone else's vulnerability: when people that cannot solve their own problems and who are not involved in a dispute between an employer and employee or do have any say in the solution become involved therein. Although many people are not content with their salaries, it is important to remember what a salary is: The minimum sum that a person and his/her employer agrees on that is to be paid for services rendered according to our country's labour laws, which makes extreme exploitation very difficult. These circumstances make it clear that a strike shifts the emphasis from the child as first priority with regard to education to the problems of teachers with teaching authorities.

The aim of picketing should thus be persuasion and not threat (Grogan).

When this is applied to the most recent strike in education, which was accompanied by various media reports of violence, intimidation and property vandalism, it is clear that that strike was everything but peaceful. By conducting the strike in that way, the strikers lost their protection under the law, and could no longer argue that they were legally exercising their constitutional right, nor could they rely on constitutional protection. Paragraph 3(4) of the Code of Good Practice on Picketing (Republic of South Africa, 1998) also states that if a picket is in support of an unprotected strike, the picket is not protected by section 69 of the Act.

Public protest

The Code of Good Practice on Picketing (Republic of South Africa, 1998) has established procedural guidelines for unions on the practical aspects of picketing. According to the guidelines, the union must appoint a member or official as convenor to oversee the picket. The convenor should carry a copy of section 69 of the Labour Relations Act, a copy of the resolution, and the registered trade union's formal authorisation of the picket. The convenor is required to notify the employer, the responsible person appointed in terms of section 2(4)(a) of the Regulation of Gatherings Act (Republic of South Africa, 1993) as well as the police of the intended picket. The notice should contain a statement confirming that the picket complies with section 69; the name, address and telephone number of the union and the convenor; the details of the employer being picketed; the date of the commencement of the picket, and the place of the picket. Upon receipt of the notice, the employer is required to provide the convenor with the name, address and telephone number of the person appointed by the employer to represent it in any dealings concerning the picket. The union must also appoint picket marshals, who should be supplied with the telephone

numbers of the convenor and the union office. Marshals should wear armbands as identification. The unions should inform the marshals of the law and picketing rules, if any. They should also be reminded that the picket must be peaceful. Unions should further ensure that pickets do not infringe the constitutional rights of other persons, and that picketers do not carry arms. In particular, picketers must not physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employer's premises (Republic of South Africa, 1998).

The Labour Court has exclusive jurisdiction over strike action in terms of section 68(1) and 69(11) of the Labour Relations Act. The court may grant urgent relief in the form of an interdict against breaches of strike rules (Republic of South Africa, 1998). It will however not simply interdict merely because large numbers of strikers are congregating visibly and noisily in the vicinity of the employer's premises (Grogan, 2007). As such congregation is permitted in terms of section 23 of the Constitution (Republic of South Africa, 1996), something more is required.³

In determining whether strikers have exceeded the bounds of their right to picket, the courts will balance that right with the employer's right to conduct its business, the rights of third parties and the general public and, in education specifically, the rights of the school and learners. In *Loursens Division of BTR Ltd v National Union of Metalworkers of SA & others*,⁴ the court remarked as follows:

The applicant is seeking to protect its right to pursue its lawful business interest by employing workers and having them do their work without unlawful interference. It is entirely unnecessary in our law to hold that they have "the right to congregate" or "the right to demonstrate". Each subject has the right to do exactly as he pleases, provided that what he does is lawful.

Picketing is thus well defined and the limitations are clear – it must be lawful.

Where pickets may be held

The question about where pickets may be held is probably one of the most important issues in the education sector.

Section 69(2) of the Labour Relations Act provides as follows:

Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1) may be held –

- (a) In any place to which the public has access but outside the premises of an employer; or
- (b) With the permission of the employer, inside the employer's premises (Republic of South Africa, 1998).

Now, the question arises: What should be considered the premises of the employer? Is it the school where the educator is based; is it the district office of the Department of Education, or is it the office of the Head of the Provincial Department of Education?

As a school is a completely separate legal entity, and is also not the employer of the educators, the school cannot be considered a party to the dispute. The Department

employs the educator to work at a specific school in terms of section 2 of the Employment of Educators Act (Department of Education, 1998). It can be argued that such educator's place of work is a specific school, which would however imply that no educator may take part in any protest action at a school other than his/her own.

The fact that the school is a juristic person, and should and may protect its own interests, also implies that the Department may not, on behalf of the school, grant strikers permission to picket at the school. This permission must come from the governing body of the school. After all, in terms of section 20(1)(g) of the Schools Act (Department of Education, 1996), the governing body is responsible to control the school buildings. This section provides as follows:

- (1) Subject to this Act, the governing body of a public school must
 - (g) administer and control the school's property, and buildings and grounds occupied by the school, including school hostels, but the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of the Executive Council or Head of Department in terms of any law or policy... (Department of Education, 1996).

Even though the section stipulates that the governing body's control over the school's property may not interfere with decisions made by the Member of the Executive Council (MEC) or Head of the Department (HOD) in terms of any law, it remains a moot point whether any legislation in any way authorises the MEC or HOD to permit picketing employees to disrupt learner instruction.

Section 69(2) of the Labour Relations Act clearly states that strikers do not have an unqualified right to picket on the employer's premises; permission is required to do so, unless the parties have already established picketing rules by collective agreement. However, section 69(3) of the Act provides that employers may not unreasonably withhold such permission (Republic of South Africa, 1998). There is no reported case that deals with the meaning of the term 'unreasonable' in the context of basic education.

It is however argued that reasonableness would entail weighing up employees and learners' constitutional rights. The fact that section 28 of the Constitution clearly states that the child's best interests are of paramount importance in every matter concerning the child (Republic of South Africa, 1996), should tip the scale in favour of the learners and the school where protest action on the school grounds is concerned. Contributing factors are the disruption of teaching and, perhaps more importantly, learners' safety. The Department of Education's own Regulations for Safety Measures at Public Schools (2001) will have to be seriously considered.

Should the striking employees be disgruntled at a decision not to allow them to picket on the school grounds, they may in terms of section 69(4) of the Labour Relations Act approach the Council for Conciliation, Mediation and Arbitration (CCMA) to help facilitate an agreement on picketing rules, or for the CCMA to establish such rules itself (Republic of South Africa, 1998).

An approach to the CCMA would be unnecessary if picketing rules have already been established by collective agreement. If permission was however refused in spite of an agreement, the union could approach the Labour Court or the CCMA to enforce the agreement, or proceed to picket on the employer's premises and raise the agreement to resist any attempt to remove or interdict them. Another option available to the union is to approach the CCMA under section 69(8)(a) of the Labour Relations Act, with the claim that its "effective use of the right to picket is being undermined". Should the CCMA fail to resolve the dispute, the union may then approach the Labour Court for an appropriate order under section 69(11) of the Act (Republic of South Africa, 1998).

The definition of a school in the Schools Act (Department of Education, 1996:s1) as well as the Employment of Educators Act (Department of Education, 1998: s1) is "a public school or an independent school which enrolls learners in one or more grades from grade R (Reception) to grade twelve". The employer, being the Department of Education, is defined as "the department established by section 7(2) of the Public Service Act, 1994 (Proclamation 103 of 1994), which is responsible for education in a province" (Department of Education, 1996; 1998).

This distinction is of particular importance if the protest action is aimed at the employer. The employer, i.e. the Education Department, is merely represented by the school principal at a particular school. The principal has no discretion in terms of conditions of service, and plays no role whatsoever in salary negotiations. Therefore, it makes little sense to picket at a school if your objective is to put pressure on the employer. The only real goal would be to drum up public support for the protest action. This goal, however, is unlikely to be achieved if learners' right to education is infringed.

Also, the disruption of education by recent protest actions was not limited to schools where union members were personally stationed or involved. Media reports clearly showed that striking employees had intentionally targeted and disrupted other schools as well (Calitz & Conradie, 2013). This action is obviously illegal and not protected under labour legislation, as it occurred at a juristic person other than the employer. Any conduct in this regard constituted an illegal gathering, and the South African Police Service (SAPS) had the right to arrest each and every participant.

Therefore, striking employees would be able to picket only at the schools where they are stationed, and not at any other school. The striking employee's best option, however, is to picket in front of the district or provincial offices of the Department, as that would be the employer's address.

Picketing rules

If parties have not already agreed, or are unable to agree, on access or picketing rules, either the union or the employer may approach the CCMA, who, in terms of section 69(4) of the Labour Relations Act, should attempt to "secure an agreement between the parties to the dispute on rules that should apply to any picket in relation to that

strike or lock-out” (Republic of South Africa, 1998). The process envisaged by this provision is clearly conciliation or mediation (Grogan, 2007). However, this process is one of the problem areas in education, as it appears that the CCMA has insufficient understanding of the education environment and the legal status of the parties involved.

If agreement cannot be reached, the CCMA’s powers are extended even further, as the Labour Relations Act then requires it to establish picketing rules itself. Before doing so, however, the CCMA commissioners are required to apply their minds to “the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised” and “any relevant code of good practice” (Republic of South Africa, 1998). The circumstances of the workplace will obviously include considerations such as the nature of the work performed and the physical nature of the workplace and its surroundings. In addition, these considerations would include for example the location of the workplace; whether the employees are accommodated on the premises; the number of employees who would be involved in the picket, as well as their movements; the areas designated for the picket; its time and duration; past conduct of the picketers, and how the union proposes to control it (Grogan, 2007). The Act also permits commissioners to “provide for picketing by employees on their employer’s premises if the commission is satisfied that the employer’s permission has been unreasonably withheld” (Republic of South Africa, 1998).

However, past experience of strikes in education has shown no evidence of any picketing rules having been established within the education sector. If such rules have been established, clearly, not all factors within education had been taken into account.

Unprotected pickets

Is there any risk for educators taking part in unprotected pickets? Section 69 of the Labour Relations Act does not directly or expressly deal with the consequences of unprotected pickets. Paragraph 3(4) of the Code of Good Practice on Picketing, which was published in terms of the Act, states that if a picket is in support of an unprotected strike, the picket is not protected by section 69 of the Act. However, the fact that protection is conferred by section 69(7) implies that unprotected picketers are subject to the ordinary law relating to gatherings (Republic of South Africa, 1998). In practice, this would mean that SAPS must take control of the illegal protest and disperse the crowd or arrest the participants. Paragraph 7 of the Code deals specifically with the role of the police. The police should uphold and enforce the law during a strike. They may arrest picketers for participating in violent conduct or attending a picket armed with dangerous weapons, and may take steps to protect the public if they are of the view that the picket is not peaceful and is likely to lead to violence (Republic of South Africa, 1998).

Striking educators retain their constitutional and legal rights during protest action. A picket in the education sector as such is not unlawful. In *Laursons Division of BTR Ltd v National Union of Metalworkers of SA & others*,⁵ the court in fact remarked that

citizens have the right “to do exactly as [they] please, provided that what [they do] is lawful” (Grogan, 2007:254). Section 68(1) of the Labour Relations Act on the other hand enables the court to grant orders restraining “conduct in contemplation or in furtherance of a strike that does not comply with the provisions of [the] Chapter [of the Act]” (Republic of South Africa, 1998). Clearly, picketing constitutes conduct “in contemplation or in furtherance of a strike”.

“The powers provided for in section 68 must therefore apply to picketing that is not in compliance with the Act. Both these provisions also seem to empower the court to grant interdicts against picketers who conduct themselves unlawfully, and to order them to pay damages” (Grogan, 2007:254).

However, it is the duty of the employer – in this instance, the Department of Education – to approach the court for urgent relief.

Realities facing the education sector

Unions’ contribution to the struggle against apartheid and the shaping of political leadership certainly was decisive in having workplace rights directly incorporated into the Bill of Rights, thereby securing the highest form of protection in the Constitution for all workers (Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch & Ros-souw, 2006).

However, within education, we are faced with a qualified right to strike and participate in protest action on the one hand, and an unqualified right to basic education on the other. In addition, section 28(2) of the Constitution states very clearly that the rights of the child should get preference above any other rights (see *Governing Body of Muma Masjid Primary School v Ahmed Asruff Essay*).⁶ Therefore, even mere talk of “weighing up” interests is inconceivable (Horsten & Le Grange, 2012:523). It is entirely outrageous for professional persons to partake in strikes, as disputes with the employer should in actual fact be dealt with at an entirely different level, as ordinary employees. The South African reality, however, is that striking employees are handled with kid gloves.

South Africa has a well-formulated statutory framework governing strikes, but this must be seen against the socio-political background and complex nature of government’s composition (Van Niekerk, Christianson, McGregor, Smit & Van Eck 2008:vi). Within the South African context, the state is governed by a tri-partite alliance consisting of the ANC as majority party, the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU). COSATU consists of 21 unions across a wide range of sectors, including SADTU, the largest union in the public sector and the second largest in South Africa.

The fact that unions, through COSATU via its alliance with the ANC, have a direct say in the government of the country certainly causes a union such as SADTU to negotiate, strike and protest to their heart’s content. Also, for this very reason, it is highly unlikely that educators will ever be classified as essential workers, and the proposals put forward by Horsten and Le Grange (2012:537-538) will therefore remain

a pipe dream. The President already backtracked in his State of the Nation address on the motion of declaring education an essential service: Making education an essential service will not take away teachers' constitutional rights such as the right to strike (News24, 2013).

Employees within education are well organised, and the percentage of union-member educators is extremely high. In a study by the ILO (1997:78), it was found that "the largest single increase in trade union membership came in South Africa, which saw unionization rates leap by 130.8 per cent, with most of the increase coming in the post-apartheid era". The ILO (1997) also found that during 1995, 40.9% of all employees belonged to unions.

A number of countries have declared education an essential service. Calitz and Conradie (2013) explored this option, and came to the following conclusion:

...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...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...Our view is that it is not feasible to designate the education sector as an essential service (Calitz & Conradie, 2013: 141, 144).

Conclusion

The unique relationship between COSATU and the ANC within government, along with the power this affords unions in the workplace, render any proposed amendments outside of the ordinary, cumbersome process of consultation subject to socio-political agendas. For precisely this reason, this article puts forward recommendations on the application of the prevailing legal position.

The problem is not so much the legislation or the lack thereof, but rather its application. There are sufficient existing laws regulating strikes, and particularly protest action or picketing. One of the most important aspects within education should be the picketing rules. The question that needs to be asked is whether picketing will in fact contribute to the resolution of the dispute, and how learners' interests may be best served under the circumstances.

No educator should be allowed to participate in picketing during school hours. Picketing should be limited to action away from the school grounds where the educator is stationed, and only if the principal, as representative of the employer, is present at the school. Preferably, such action should occur outside the employer's office, and therefore, picketing should ideally take place in front of the district or provincial offices of the Education Department.

A provincial department of education, as the employer, has the right of recourse to lock out striking educators in terms of section 67 of the Labour Relations Act (Republic of South Africa, 1995). This means that the employer excludes the em-

ployees from the employer's workplace.

A provincial department may also approach the Labour Court in terms of section 158(1)(i) and (ii) to ask for urgent interim relief or an interdict to prevent strikers from disrupting school activities. For example, the Gauteng Department of Education was granted an urgent interdict on 14 August 2012 by the Johannesburg Labour Court, preventing the East Rand Region of the teachers' union SADTU from disrupting schooling the following day in Ekurhuleni (Phalane, 2012).

SAPS will have to play a much more active role in maintaining law and order, and protecting learners' constitutional interests. The fact is that striking educators who commit misconduct or participate in any unlawful protest action effectively part with constitutional protection.

In May 2006, striking security guards participated in a protest in the Cape Town city centre. The protest turned violent, and businesses, informal traders and transport owners suffered damages to the tune of thousands of rands. The Western Cape High Court found that the South African Transport and Allied Workers Union (SATAWU) should be held liable for damages. This was reiterated by the Supreme Court of Appeal in September 2011.⁷ SATAWU then appealed to the Constitutional Court, which again confirmed the decision in the High Court and Supreme Court of Appeal.⁸

During protest action in education, the damage is done when learners are deprived of their right to education. Sadly, as this cannot be calculated in rands and cents, it seems to be treated as less serious, but holds grave consequences for the youth of our country as well as our nation as a whole. It remains to be seen, however, whether this would keep educators from striking, or whether parents and learners would utilise this ruling in the future. The burden of proof, causal connection and the calculation of damages might remain a challenge within the basic education sector for some time to come.

Section 28(2) of the Constitution states very clearly that the rights of the child should get preference above any other rights and the mere talk of "weighing up" interests is inconceivable.

Notes

- 1 Employment of Educators Act 76 of 1998 in respect of educators; Public Service Act 103 of 1994 in respect of non-educators.
- 2 2013 1 SA 632 (SCA).
- 3 Also see section 17 of the Constitution.
- 4 (1992) 13 ILJ 1405 (T) at 1408A-B.
- 5 (1992) 13 ILJ 1405 (T) at 1408A-B.
- 6 2011 8 BCLR 761 (CC). The Constitutional Court found that the right to basic education is subject to no internal limitations, and is thus immediately realisable.
- 7 *South African Transport & Allied Workers Union v Garvis & others* (007/11) [2011] ZASCA 152 (27 September 2011). Available at http://www.justice.gov.za/sca/judgments/sca_2011/sca2011-152.pdf.
- 8 *South African Transport and Allied Workers Union and Another v Garvas and Others* (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ

1593 (CC) (13 June 2012). Available at <http://www.saflii.org/za/cases/ZACC/2012/13.html>. The court emphasised that the reasonable steps taken on the one hand and the reasonable foreseeability of destructive conduct on the other were interrelated. Organisers are obliged at all times to take reasonable steps to prevent all reasonably foreseeable conduct that can cause damage, which steps must be such that they render the eventual damage-causing conduct unforeseeable.

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