A CRITIQUE OF THE LEGAL TECHNIQUE OF MANAGING ABSCONDING EMPLOYEES IN SOUTH AFRICA

INTRODUCTION

South Africa is a constitutional democracy and its constitution contains the Bill of Rights in Chapter 2. In section 23(1) of the Bill of Rights the right to fair labour practice is constitutionalized. National legislation including the Labour Relations Act 66 of 1995 (LRA) gives more detailed context to the constitutional right to fair labour practices. Included in this set of rights is the right not to be unfairly dismissed provided for in section 185(a) if the LRA. In terms of section 186(1) of the LRA a dismissal means "an employer terminated a contract of employment with or without notice".

Section 187 of the LRA lists a number of dismissals that are automatically unfair. Section 198 provides further that a dismissal that is not automatically unfair a dismissal is unfair if the employer fails to prove that the dismissal is for a fair reason related to the employees conduct or capacity or based on the employer's operational requirements and the dismissal was effected in accordance with a fair procedure. These provisions give effect to Convention 158 of the ILO and the constitutional right to fair labour practices contained in section 23(1) of the Constitution.

In the Public Service Act 103 of 1994 section 17(3)(a)(i) provides that an employee other than an educator who absents himself without permission of his head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his last day of attendance at his place of duty.

In a virtually identically worded provision of section 14 of the Employment of Educators Act provides for the deemed dismissal of an educator who is absent from work for a period exceeding fourteen (14) consecutive days without permission of the employer.

The issue that is addressed in the present paper is whether or not the provisions dealing with unexplained absence in the South African national and provincial public sector does not unreasonably limit the constitutional right to fair labour practices and whether the provisions do not circumvent the essential provisions of Convention 158 of the ILO. And, if so, how can the issues be addressed. In this regard reference will be made to how selected other jurisdictions address the problematic issue of longer – term absence without permission in the public sector. The public service at local level is not affected since the Public Service Act is not applicable to such employees. Such employees enjoy the same legal protection as private – sector employees.

ABSENCE WITHOUT LEAVE AND ABSCONDING EMPLOYEES: THE GENERAL POSITION

Absence without leave constitutes misconduct. The requirement that a dismissal for such absence should be procedurally and substantively fair is emphasized in terms of section 188 of the LRA. Even if lesser sanction than dismissal is imposed, the imposition of such a sanction may be challenged as an unfair labour practice in terms of section 186(2)(b) which provides that disciplinary action short of dismissal in respect of an employee may constitute an unfair labour practice.

In an instance where an employee absconds from the workplace with no intention to return. Such employee repudiates the contract of employment. Repudiation amounts to breach of a material term of the contract which gives the employer the right to resile from the contract by cancelling it.

In *SABC v CCMA* (2001 22 ILJ 487 LC) the Labour Court held that desertion (or absconding) constitutes breach of the employment contract by repudiation of the contract. Repudiation does not bring about the termination of the contract. It simply entitles the innocent party (the employer in this instance) to acknowledge the repudiation and then to accept it. By electing to accept the repudiation, the contract terminates, but this is a juridical act of the employer. When the employer terminates the contract in this way, the terminations is a dismissal, and section 188 applies. The dismissal must therefore comply with the requirements of substantive and procedural fairness. (paras 492 – 493 of the judgment).

In the Labour Appeal Court judgment of *SACWU v Dyasi* (2001 7 BLLR 731 LAC 735) the court held that the dismissal of a deserting employee was procedurally unfair, because the employee was not afforded a disciplinary inquiry prior to the dismissal. In this case the whereabouts of the employee were known to the employer.

Concerning a deserting employee who cannot be traced the court (albeit *obiter)* opined as follows:

> "When the employee deserts and cannot be traced, the employer has no practical choice other than to accept the repudiation. Where there is no real choice, it can probably be argued that the employer did not terminate the contract."

This was developed in *SATAWU obo Langa v Zebedelia Bricks (Pty) Ltd* (2011 32 ILJ 428 LC) the court held that an unequivocal act of absconding automatically terminated the contract of employment and in such a case an employee is not dismissed. The facts of the case were that employee who had participated in an unprotected strike was dismissed. Subsequent to the dismissal the employees were reinstated. Despite the reinstatement the employees did not report for duty, but instead gathered at the entrance of the premises of the employer. They also intimidated the employees and customers and an interdict was obtained against them. They still did not return to work. Subsequently the employees referred a dismissal – dispute to the CCMA. The commissioner held that the CCMA had no jurisdiction to entertain the dismissal dispute since it concerned dismissal for participation in an unprotected strike. The case was thereupon referred to the Labour Court. Certain of the applicants maintained that they had been intimidated, and therefor did not return to work. The court held that these employees were dismissed in a procedurally – unfair manner. The applicants, who had not been intimidated, had deserted and had unilaterally terminated their employment. The court was of the view that "Desertion in its truest sense automatically terminates a contract of employment. It cannot be seen as a form of misconduct.

The court, with respect was incorrect to make a factual finding that the employees had deserted their employer. But even if they did, the construction that the contracts

automatically terminated is not in principle correct. The employees repudiated the contracts and the employer must accept the repudiation. This is a dismissal. If the employer does not cancel the contract the contract has not terminated yet.

THE PUBLIC SECTOR

The cases referred to indicate clearly the difficulties that an employer experiences when faced with a desertion of an employee. In the public sector including public education in South Africa the legislature intervened. As pointed out above desertion in not regulated by legislation in the public sector at local level. The provisions are contained in section 17 of the Public Service Act and section 14 of the Employment for Educations Act.

Section 17(3) of the Public Service Act ("the PSA") provides as follows:

> "(3) (a) (i) An employee, other than a member of the services or an educator or a member of the Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.
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> (ii) If such an employee assumes other employment, he or she shall be deemed to have been dismissed as aforesaid irrespective of whether the said period has expired or not.
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> (b) If an employee who is deemed to have been so dismissed, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine."

Section 14 of the Employment for Educators Act ("the EEA") similarly provides as follows:

> "14 (1) An educator appointed in a permanent capacity who-

(a) is absent from work for a period exceeding 14 consecutive days without permission of the employer;

(b) while the educator is absent from work without permission of the employer, assumes employment in another position;

(c) while suspended from duty, resigns or without permission of the employer assumes employment in another position; or

(d) while disciplinary steps taken against the educator have not yet been disposed of, resigns or without permission of the employer assumes employment in another position, shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where-

(i) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work; or

(ii) paragraph (c) or (d) is applicable, with effect from the day on which the educator resigns or assumes employment in another position, as the case may be.

(2) If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (l) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act. approve the reinstatement of the educator in the educator's former post or in any other post on such conditions. …"

Section 17(3)a

In terms of applicable sections,

If the employee:

- absents him or herself,
- without permission of his or her head of department, office or institution and
- absence exceeds one calendar month

The section applies.

In terms of section 14 of the EEA the period of absence is not a calendar month but only 14 consecutive days.

It is apparent that despite their intention the ambit of the provision is wider than dealing only with absconding employees. They include longer-term absence without leave, as well as temporary impossibility of performance where the permission of the relevant superior has not been obtained.

The effect of the statutory provisions in the public service and public education is that, provided the stipulated requirements are satisfied the employment contract terminated by operation of law. Since the termination of employment is not based on the employer's decision, there is no dismissal and the employee is not entitled to a disciplinary enquiry. The termination of employment is also not subject to judicial review, since no discretion is exercised by a public authority. The termination of employment takes place automatically, by the operation of law. (In this regard see *Mahlangu v Minister of Sport and Recreation* (2010 5 BLLR 551 LC). It is an objective question whether the requirements of the statutory provision are satisfied. If a factual dispute arises such a dispute is justiciable by a court of law.

Both legislative provisions allow for subsequent reinstatement on good cause shown, but the courts confirmed that the decision to reinstate does not constitute a dismissal. It was held that it was a reviewable exercise of statutory power and accordingly reviewable under the promotion of Administrative Justice Act, in *De Villiers v Head of Department: Education, Western Cape Province* (2009 30 ILJ 1022 LC). This view found support in the SCA judgment of *Phenithi v Minister of Education* (11 BCLR 1314).

Already in the case of *Hospersa v MEC for Health* (2003 12 BLLR 1242 LC) the Labour Court expressed concern about these provisions and the court referred to the "draconian procedure" (1249 E).

It was the Court's view that reliance on the applicable disciplinary code was a less restrictive method of achieving the same objective of enquiring into and remedying an employee's absence from work, and that the sections must be invoked sparingly, ad when the employer has no other alternative. For example when the respondent was unaware of the whereabouts of the employee or could not contract her or him (1249 F-G)

These were *obiter* remarks and the South African courts continue to give effect to the provisions.

THE CONSTITUTIONALITY OF THE PROVISIONS

In *Phenithi v Minister of Education* (2000 11 BLLR 1314 SCA), the SCA held that section 14 of the Employment for Educators Act was not unconstitutional. The court held that "the provision creates an essential and reasonable mechanism for the employer to infer 'desertion' when the statutory prerequisites are fulfilled." Where that is not the case, the statute provides ample means to rectify or reverse the outcome" (para 19).

The Court accepted that education's services under 14(1)(a) of the EEA materially and adversely affects such educators rights. It does not necessarily make section 14(1)a which does not require the right to a hearing unconstitutional. The court referred to the fact that section 14(2) provides the educators with an opportunity to be heard and reinstated, provided he or she is able to show good cause as to why the employer should reinstate.

Referring to evidence that the provisions of section 14(1) a are necessary in the education department, because of the effect of an educator's absence without leave on the rights of children to education the court concluded that the limitation (if there is one) was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom in terms of section 36(1) of constitution.

Concerning these deemed-dismissals provisions only the case of *Grootboom v National Prosecuting Authority* (2014 TLT 121 CC) reached the constitutional court. The constitutionality of section 17(3) and the court accordingly had to interpret section 17(3) in a manner best compatible with the Constitution.

The facts were that the employee had left the country to study abroad while on suspension. He was discharged in terms of section 17(3) of the PSA. The Constitutional Court confirmed that the discharge was not an administrative act

capable of review (par 16). The court held however that the employee did not absent himself from his official duties. He had already been suspended and thereby had been forbidden to perform any official duties. He was also instructed not to come to work. The court concluded that the suspension rendered him absent and section 17(3) was not applicable. The Constitutional Court was not required to pronounce on the Constitutionality of the deemed-dismissal provision. It recognised that in these circumstances a public sector employee's services are terminated without notice or disciplinary hearing. The court accepted that the section has the effect of termination of employment (for misconduct) without a hearing and that it impinges on the section 23 – Constitutional right to fair labour practices. The proper scope of application needs to be determined and, in the case before the CC it does not cover the position when the employer had suspended the employee. It is clear that the CC adapted a narrow approach of interpretation to limit the ambit of the section.

ANALYSIS AND SUGGESTIONS

In *Phenithi* the SCA concluded that section 14 of the EEA was not unconstitutional. One of the reasons advances concerned the balancing of the rights of the child. This reason is not present when the constitutionality of section 17(3) is considered. Other constitutional imperatives may play a role, but it is submitted that "draconian measures " (as per *Horspersa*) of section 17 are not required to limit the public-service employees right to a fair hearing and therefore his or her right to fair labour practices.

Moreover, preferring the child's right to education with the right to fair labour practice of a public educator needs a more fundamental analysis than the consideration given to it in *Phenithi*.

It is not only the right to a hearing *prior* to dismiss that is excluded by section 17 (of the PSA) and section 14 (of the EEA). The sections remove the employee's right of access to conciliation and arbitration, and compel an employee who did not desert to take a decision not to reinstate him or her on administrative review. There is furthermore no requirement that the consideration to determine good cause needs to be done following a hearing where the employee is allowed to be present, or

represented by his or her trade union representative or another fellow employee. This is a further limitation of the constitutional right to fair labour practices.

There are less restrictive means to achieve the same objective. The remarks in *Hospersa* that are instructive in this regard.

A practical alternative option may be to amend the PSA and EEA to the effect that when an employee whose services were terminated returns, a hearing will be held. This hearing need not be conducted by the relevant *executive authority*, but by the authority that would normally exercise discipline or convene incapacity hearings in the department.

A decision not to approve reinstatement should be defined as a dismissal for misconduct or incapacity and the dispute-resolution mechanisms of conciliation and arbitration under the auspices of the relevant bargaining council should apply. The necessity of launching a review application in the Labour Court will accordingly fall away when the refusal to reinstate is challenged. Only an amendment to the PSA and EEA will be required, and not an amendment to the Labour Relations Act. We have no doubt that all the role players will support such a procedure which will not necessarily infringe on the constitutional right to fair labour practices.

NOTE TO REVIEWER

The original abstract includes reference to a comparison of other selected countries. We have not completed this comparison, but will do so before the actual presentation at the conference. The paper will also be improved.