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AND DEVELOPMENT IN SOUTHERN AFRICA

Unfair dismissals

by

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INTRODUCTION

"The primary purpose of unfair dismissal law is to provide individual employees with a form of protection against arbitrary termination by employers of their employment relationship - a protection not provided to most employees at common law." (1)

The right to contest the validity of a dismissal on the basis of it being unfair is a recent innovation in South Africa and is closely allied to the introduction into our law in 1979 of the concept of the unfair labour practice.

DISMISSAL AT COMMON LAW

Prior to this an employer's power to dismiss an employee had been determined by the rights accorded him under the common law contract of employment and in the exercise of these rights he had only been fettered to a very limited extent by certain statutory prohibitions, e.g. against victimisation.

The common law does not recognise the inherent inequality in bargaining power that exists between the parties to a contract of employment. It imposes no equitable requirements on the contract and leaves the employer largely free to impose his will in determining its terms and conditions. Whilst this feature may exist in the common law of most western countries, its

significance in South Africa has been greatly magnified by the vast social and political inequality which exists between black employees and their white employers.

An important consequence of this inequality in bargaining power is that an employer is largely free to determine the conditions upon which the contract of employment may be altered or terminated, for example on one day or one week's notice. In the absence of specific agreement on termination, the common law requirement is that reasonable notice must be given.(2)

As long as an employer gives the required notice (either reasonable notice or determined by express agreement) or pays the employee in lieu thereof, he may terminate the contract of employment with no obligations to disclose reasons nor any necessity to justify his decision. Motive on a part of an employer in dismissing an employee is thus irrelevant at common law.(3) The traditional management prerogative to fire at will, no matter how arbitrary or unfair such action might be, is endorsed.

STATUTORY PROTECTION AGAINST DISMISSAL

The State has legislated to limit in certain instances the managerial prerogative to fire at will. Statutes such as the Labour Relations Act 1956(4) and the Wage Act 1925(5) contain provisions prohibiting victimisation in terms of which it is a criminal offence for an employer to dismiss an employee for membership of a trade union or similar organisation or for

participation in its activities or for disclosing information to certain officials. Despite this, there are relatively few recorded prosecutions, due in all probability to the difficulty of imputing a particular motive for dismissal to the perspicacious employer.

REMEDIES FOR WRONGFUL DISMISSALS

A wrongful dismissal would occur in circumstances where an employer dismisses an employee summarily and without good cause without notice or with inadequate notice. A dismissal in these circumstances would constitute a breach of the contract of employment.

It is a well established principle of our law that an innocent victim of a breach or repudiation of a contract may elect to hold the other party to the contract if he tenders to perform his obligations thereunder. He may elect to claim what is termed "specific performance" of the contract. Alternatively the innocent victim may accept the repudiation of the contract and claim what damages he may prove he has suffered as a result of the breach.

For many years our law did not offer this option to the innocent employee who was the victim of a wrongful dismissal. His remedy was limited to a claim for damages.[6] This would be equivalent to the wages which he would have received during the contractual

period of notice less the extent to which he had or could have mitigated his damages through alternative earnings.

The employee could not seek specific performance of the contract against tender of his services, either by claiming wages as and when they fell due or by claiming physical reinstatement in employment.

The rationale for this departure from the general principle was clearly enunciated as being:

> "The inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship; and the absence of mutuality, for no court could by its order compel a servant to perform his work faithfully and diligently." (7)

The law developed along somewhat different lines in regard to the dismissal of an employee in contravention of a particular statutory provision. Here the courts have ruled that an employee would entitled to treat the dismissal as a nullity and of no force and effect. The dismissed employee, in these circumstances, would not be confined to a remedy for damages but could, against tender of his service, claim wages as and when they fell due. (8)

However, where the statute provided a specific statutory remedy for reinstatement it would seem that an employee is limited to that remedy and could not approach court for civil relief. (9)

The approach to remedies available to victims of wrongful dismissals was fundamentally reappraised in the recent judgment of Van Dikjhorst in the Stag Packings case.(10)

In this matter the court noted that as a general rule a party to a contract which had been wrongfully breached by the other party could hold the other party to the contract if he so elected. It held that there was no reason why this general rule should not also be applicable to contracts of employment. The court held, further, that the practice of the law in allowing only the particular remedy of damages to the wrongfully dismissed employee had not been elevated to a rule of law.

The court decided that the reasons furnished in Schierhout's case limiting the wrongfully dismissed employee's remedy to one of damages were based on practical considerations and not legal principles.

Lest one might be drawn to the conclusion however that the Stag Packings judgment provided a panacea to an employee's vulnerability to arbitrary dismissal, it is as well to bear in mind the following factors:

(a) The court held that the considerations mentioned in Schierhout's case why an order for specific performance should generally speaking not be granted were weighty indeed and in the normal case might well be conclusive.

(b) Civil litigation in the conventional courts is extremely expensive and in most cases beyond the reach on an individual employee and many trade unions. It is also characterised by long delays which render it an inappropriate procedure for enforcing rights under a contract of employment.

(c) Finally and probably decisively it is always open to an employer at common law to pre-empt a claim for specific performance of a contract of employment merely by giving an employee the required notice of termination of his services or payment in lieu thereof.

Given these considerations, the Stag Packings judgment is of limited practical value in furnishing employees with any real protection against arbitrary dismissal.

THE INDUSTRIAL COURT AND THE CONCEPT OF THE UNFAIR LABOUR PRACTICE

This vulnerability to arbitrary dismissal has, however, been significantly reduced by two important developments in our law which have flowed from the recommendations of the Wiehahn Commission.

An Industrial Court has been introduced, to develop a body law which by judicial precedent would contribute to the formulation of fair employment guidelines.(11) The Court was to be an additional component of the dispute resolution machinery of the Labour Relations Act.(12) An important part of the Court's jurisdiction would be to determine disputes concerning alleged unfair labour practices. The concept of the unfair labour practice was simultaneously incorporated within the ambit of the Labour Relations Act with the specific intention of promoting adherence to fair employment practices.

Studies show that dismissals have been one of the major causes of industrial conflict in South Africa. According to one survey 33% of strikes monitored in South Africa during the last quarter of 1982 and the first quarter of 1983 were in response to dismissals or disciplinary action.(13)

What the state intended through the introduction of the Court and the unfair labour practice was to avoid the negative consequences of unregulated industrial conflict by providing incentives to

disputing parties to use the dispute resolution mechanisms of the Labour Relations Act.

The unfair labour practice is defined in the Labour Relations Act as:

(a) Any labour practice or any change in any labour practice, other than a strike or a lockout, which has or may have the effect that -

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic or social welfare is or may be prejudiced or jeopardised thereby;

(ii) the business of any employer or class of employers is or may be unfairly affect or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between employer and employee is or may be detrimentally affected thereby; or

(b) Any other labour practice of any other change in any labour practice which has or may have an effect similar or related to any effect mentioned in paragraph (a).[14]

Immediately apparent from the wide ambit of the definition was that the legislature intended addressing the issue of unfair conduct in the employment relationship without reference to the specific rights and duties of the parties under the common law contract of employment. In other words, certain labour practices entirely consistent with common law principles, for example the right to dismiss on notice for whatever reason, might yet be declared unfair if they had or may have had an effect contemplated in the definition.

This crucial observation was made by the Court in the Diamond Cutters' case,[15] one of its early judgments:

> "It would, however, appear that even acts which may otherwise be quite lawful and permissible, could be said to fall within the ambit of the meaning of the expression as it is defined in the Act."[16]

In a more recent, as yet unpublished judgment, in Zakwe's case, the Court confirmed this view specifically in relation to an allegation of unfair dismissal:

> "Mr Trollip appearing on behalf of the Applicant correctly submitted that in cases of unfair dismissal it is not a question of the legality of the dismissal, but one of fairness. What must therefore be determined is whether the dismissal was fair under the circumstances, despite the fact that the Respondent (the employer) may have acted within its legal rights." (17)

In determining what remedies might be available to the victim of an unfair labour practice, the Court in the Diamond Cutters' case distinguished between terminations of contracts of employment which could be deemed to be unfair labour practices from the common law concept of wrongful dismissals.

> "Whereas wrongful dismissals require common law remedies, unfair labour practices are to be determined in accordance with the statutory provisions as intended by the legislature." (18)

The Court decided that the concept of reinstatement was not foreign to industrial legislation.(19)

It concluded that in determining an unfair labour practice it was intended that the Court be allowed to give such decision as it deemed fair having regard to the circumstances of each particular case. (20)

It noted that in respect of the common law our Courts would not ordinarily decree specific performance of a contract of employment. (21)

It however presumed that in introducing the new concept of an unfair labour practice into our law the legislature probably intended to change the common law position as it had obtained up to that stage and it suggested that in making a determination in regard to an unfair labour practice the Industrial Court need not necessarily follow the common law. (22)

It accordingly ruled that reinstatement was an appropriate remedy for an employee whose dismissal it determined to be an unfair labour practice.

Particularly significant then is that the Court has taken the view that in determining an unfair labour practice it is neither bound by common law principles nor common law remedies, but rather by what is fair and equitable in the circumstances of each case.

As one commentator has stated:

> "The concept of fairness and social responsibility have replaced the concept of common law rights as the parameters or boundaries of permissible action in respect of the employer/employee relationship. The managerial prerogative

has been limited and those limits are the limits of fairness as defined in the Act." (23)

UNFAIR DISMISSAL AND PROCEEDINGS IN THE INDUSTRIAL COURT

An examination of some decisions of the Industrial Court will indicate in what circumstances it has ruled that dismissals are unfair.

The decisions relating to unfair dismissals which are referred to below were made by the Court both in the exercise of its jurisdiction in considering applications for interim relief under Section 43 of the Labour Relations Act and in making final determinations of unfair labour practices under Section 46(9) of the Act, and a brief explanation of the differing nature of this jurisdiction is perhaps warranted.

The Industrial Court is but one component of a web of interlocking dispute resolution machinery created under the Labour Relations Act.

The Court has held that, as a creature of statute, it has no jurisdiction beyond that granted by the statute creating it. The Act prescribes specific procedures for referring disputes (24) concerning alleged unfair labour practices to the Court which are as follows:

(a) Where a dispute has arisen concerning an alleged unfair

labour practice it must in the first instance be referred to an Industrial Council having jurisdiction. Where no Industrial Council has jurisdiction, application must be made to the Minister of Manpower for the appointment of a Conciliation Board. (25)

(b) Should the Industrial Council or Conciliation Board fail to settle the dispute within 30 days from the date upon which it was referred to the Council, or from the date upon which the Minister approved the establishment of a Conciliation Board, or within such further period or periods as the Minister may determine, then the dispute shall be referred to the Industrial Court for determination. (26)

As this procedure may take several months the Court is empowered to grant interim relief on application in the form of a status quo order under Section 43 of the Act. (27) This interim relief is however limited to particular kinds of disputes concerning:

(a) The suspension or termination of the employment of an employee or employees or the decision or proposal of an employer to suspend or terminate the employment of an employee or employees; or

(b) A change or proposed change in the terms and conditions of employment of an employee or employees, except to give effect to any relevant law or wage regulating measure; or

(c) An alleged unfair labour practice.[28]

The effect of such an order is to preserve or restore the status quo for a limited period pending the settlement of the dispute in terms of the conciliation procedures provided for in the Act, or the determination of the dispute by the Industrial Court.[29]

A period of several weeks can be expected to elapse before a status quo order will be heard by the Industrial Court. Any hardship suffered by an applicant as a result of the delay can be redressed to some extent by the fact that status quo orders may be made retrospective.[30]

Characterisation of the dispute arising from a dismissal is crucially important when seeking interim relief under Section 43 of the Act.

If the dismissal is characterised as a dispute within the meaning of Section 43(1)(a) of the Act, and the Court grants a status quo order, an employer may avoid physical reinstatement of the employee by paying wages.[31]

If on the other hand the dismissal is characterised as a dispute concerning an alleged unfair labour practice, a successful application would necessarily lead to actual physical reinstatement.[32]

Another important consideration is that a dismissal characterised as a dispute only in terms of Section 43(1)(a) of the Act precludes the dismissed employee from ultimately proceeding to the Industrial Court for a final determination, should the dispute not be settled at the level of the Industrial Council or Conciliation Board. This procedure is only available in respect of disputes concerning alleged unfair labour practices. (33) It has thus become practice in seeking interim relief under Section 43 for the dismissed employee to characterise his dispute both in terms of Section 43(1)(c) and alternatively in terms of Section 43(1)(a) of the Act. If the Court at the interim stage regards the dispute as falling appropriately within the ambit of Section 43(1)(a), as it often does, and grants a status quo order on that basis, it is still open to the employee to proceed to the Industrial Court for a final determination of the dispute on the alternative allegation of an unfair labour practice.

It should be borne in mind that the judgments of the Court are not binding on it, and the Court has been careful to emphasise that what may be permissible or fair conduct depends upon the particular facts of each case. Nevertheless it is possible to extract from the judgments some general guidelines on what the Court would regard as permissible or fair in relation to the termination of the employment relationship.

UNFAIR DISMISSAL - SOME EXAMPLES

In Maponya's case[34], the applicant a union activist was employed by a company under a migrant labour contract. In terms of the appropriate regulations this contract could not be for more than one year. Upon the expiry of this period it was administrative practice that employees like Maponya on migrant labour contracts would be required to return to their homelands to attest new one-year contracts as a prerequisite to resuming their employment. The annual renewal of contracts is widely regarded as little more than a formality usually attended to during annual leave periods which does not affect the continuous nature of the employment relationship.

When Maponya's contract expired his employer refused to agree to its renewal, allegedly on the grounds of Maponya's trade union activities.

It was contended before the Industrial Court that it was unfair to rely on the natural termination of a fixed-term contract where there was the expectation of renewal, on the grounds of belonging to a trade union or participating in its activities.

The Court held that the unfair labour practice as alleged could constitute an unfair labour practice, but it declined to decide the issue there and then "without first establishing the true relationship between the parties and the issues in dispute".

In the Diamond Cutters case,[35] the contracts of service of certain skilled employees employed by the different members of the Diamond Cutters' Association of South Africa were terminated on notice. The dismissals took place during a downturn in the industry and amidst allegations that employers continued to employed unskilled workers in jobs traditionally reserved for skilled workers. The South African Diamond Workers Union alleged that these dismissals constituted an unfair labour practice in that they were not effected in compliance with a "termination of employment agreement" applicable to the industry. The Industrial Court upheld this view and reinstated the employees, holding that their employment opportunities, work security or economic welfare might have been jeopardised.

In the Fodens case[36] the question was considered whether the dismissal of two union shop stewards and a migrant worker constituted unfair labour practices.

The Court cited Sigwebela's case[37] as authority for the proposition that where an employer terminates an employee's services the onus rests on the employer to establish that such termination was justified on good grounds. The employer claimed that the two shop stewards had been retrenched and that it was not obliged to give them more than 24 hours notice. It had to concede that overtime was worked at the time and could not offer an explanation as to why it had failed to respond expeditiously to a Union request to discuss the dismissals.

The Court detailed certain general principles regarding retrenchment and held that in circumstances where the employer had displayed a hostile attitude to the union and its own employees, the failure to follow general principles of fair retrenchment constituted an unfair labour practice.

In the case of the migrant worker who had allegedly been dismissed from disobedience the Court found his summary dismissal prior to the expiry of his fixed-term contract of employment to be an unfair labour practice because the employer had failed to prove on the balance of probability that the dismissal was justified.

In the event, the Court made substantial monetary awards to the two shop stewards (who did not pursue a claim for reinstatement) and required the company to pay the migrant worker his average wages from the date of his dismissal until the date of expiry of his fixed-term contract.

In the matter of Margaret Shezi and Others v Consolidated Frame Cotton Corporation Limited[38], an application for a status quo order, the Applicants contended that they had been retrenched unfairly from Respondent's employ.

The Court detailed certain general principles in regard to retrenchment which could normally be applied:

(i) Finding possible ways to avoid retrenchment such as transfers, eliminating overtime, working short time;

(ii) Consultation with employee representatives as regards the criteria to be applied in selecting the employees to be retrenched.

(iii) The establishment of criteria for selection which so far as possible do not depend solely on the opinion of the person making the selection but can be objectively checked against such things as attendance records, efficiency at the job, experience or length of service;

(iv) Sufficient prior warning to the employee representatives and the employees who may be affected;

(v) Ensurance that the selection is fairly made in accordance with the criteria and consideration of any representations by employee representatives as to such selection;

(vi) Consulting the employees to be retrenched.

The Court found on the facts that the company did cut back on night work, worked a four-day week in one mill which was also shut down for a week, and transferred employees in efforts to avoid retrenchments. It had also determined a criterion for retrenchment, namely efficiency. Nevertheless it was not clear

from the Respondent's sworn written representations whether the selections had been fairly made in accordance with the criterion. It was further not stated that the employee representatives had been informed of the selection or had been given the opportunity to make representations in connection with such selections. It was further not stated that the Applicants selected had been consulted except to be informed of their selection for retrenchment.[39]

Given these circumstances the Court granted the status quo order.

In the matter of Van Zyl v O'Okiep Copper Co Ltd[40], an application for a status quo order in terms of Section 43(4)(b)(i)[41] of the Act, the Court addressed the issue of procedural fairness as a prerequisite for a valid dismissal.

The Applicant in this matter was dismissed for alleged gross negligence. He was not, however, accorded the opportunity to contest the allegations against him and was not present, so it appears, at subsequent enquiries conducted by the Respondent. No reason for denying the Applicant the opportunity to be heard was advanced on the papers.[42]

The Court held, inter alia, that the failure to conduct a proper enquiry gave the Applicant a prima facie right to reinstatement and granted him such interim relief.

In its judgment the Court cited with approval paragraph 11(5) of the I.L.O. "termination of employment recommendation" No 119 of 1963:

> "Before a decision to dismiss a worker for serious misconduct becomes finally effective, the worker should be given the opportunity to state his case promptly, with the assistance where appropriate, of a person representing him." (43)

In the matter of Metal and Allied Workers Union and Others v Barlows Manufacturing Co Ltd (44) the Court took the view that it was empowered to grant a status quo order to a dismissed employee where the dispute had been characterised either in terms of Section 43(1)(a) (suspension or termination of employment) or in terms of Section 43(1)(c) (unfair labour practice) even if the employer had given notice or notice pay in lieu thereof required by the contract of employment.

In its judgment the Court noted:

> "To confine the unfair labour practice jurisdiction of this Court in respect of dismissals to those that were wrongful only would effectively render the legislative intent behind the provision of such jurisdiction nugatory, for the employee would then be given no further rights than those that he has all along enjoyed at common law". (45)

In Matshoba and Others v Frys Metals[46] the Court took the view that the Applicants refusal to work overtime was reasonable given circumstances in which the instruction to work overtime was given on short notice, the urgency and importance of the overtime work appeared not to have been conveyed to the Applicant employees and the Applicant employees had already made other arrangements for the period in question.

Overtime was also at issue in the matter of Alson Dlamini v Cargo Carriers (Natal) (Pty) Ltd[47]

In this matter the Applicant for a status quo order contended that when approached to work overtime at the end of the working day, he refused to do so since he had no transport to get home late at night. He would however have been willing to work if provided transport by the Respondent. He was dismissed as a result of his refusal to work overtime. The Respondent contended, inter alia, that the particular division in which the Applicant was employed was an overtime intensive activity and had apparently explained to the Applicant the serious implications arising from the failure to despatch loaded trucks in accordance with the requirement of the customer.

Applicant's employment was regulated by a Wage Determination which provided that an employer should not require or permit an employee to work overtime in excess of a prescribed number of hours per day or per week.

The Court took the view that the overtime provision was of a restrictive nature and should not be interpreted as giving the employer the power to compel its employees to work the overtime provided for therein. An employer could be expected to negotiate with an employee to work the overtime allowed.

The Court accordingly held that the employer was not entitled to enforce overtime.

The Court also held as significant that a disciplinary enquiry had not been held at which the Applicant was afforded the assistance of a person representing him. It cited with approval paragraph 11(5) of the I.L.O "termination of employment recommendation" No 119 of 1963[48] and found that no convincing reason had been tendered by the Respondent why the guideline embodied in this recommendation had not been followed.

> "It might therefore be argued that the Respondent did not properly dismiss the Applicant as it purported to have done."

In both the Matshoba and Dlamini matters the Court granted the applications for status quo orders.

CONCLUSION

These examples of the Court's approach to allegations of unfair dismissals indicate a significant improvement in the protection afforded employees against arbitrary dismissal. They would appear to impose requirements that a dismissal be both substantively and procedurally fair for it to be justified.

However it must be recognised that protection afforded in law does not necessarily lead to protection on the shop floor. It will be the task of the unions, through the negotiation of fair disciplinary codes and procedures and through close monitoring, to ensure protection against arbitrary dismissal.

The Court's approach to the exercise of its unfair labour practice jurisdiction is already facing criticism by employers as an unwarranted intervention in the regulation of the employment relationship.

It has been argued that the power of the Court should be curbed and that the unfair labour practice should be restricted or even abolished.

Many cogent reasons could be advanced for not doing this.

One which should make a deep impression on critics from the ranks of employers, is that which examines the issue of job security in the context of state policy on influx control. (49)

As the state moves to denationalise black South Africans, they will in terms of prevailing influx control laws, forfeit the right to permanent urban residence in increasing numbers and will be drafted into the migrant labour system. As a consequence, their presence in the cities will depend upon lawful employment. Loss of such employment will necessarily lead to their removal from the cities and a loss of all the attendant advantages that

urban residence offers.

As such security of employment will increasingly have political implications extending beyond the workplace. Anything less than fair conduct by employers over this issue may well result in unprecedented industrial conflict.

The Industrial Court in the exercise of its unfair labour practice jurisdiction has begun to set a framework for fair conduct in the employment relationship.

While this has necessarily entailed a curbing of the managerial prerogative, employers should take note of the fact that any moves to restrict the Court in the exercise of its unfair labour practice jurisdiction may ultimately prove much more damaging to their interests.

FOOTNOTES

1. Steven D. Anderman: The Law of Unfair Dismissal. pg. 2.

2. For example, when an employee is paid on a weekly or monthly basis reasonable notice would be a week or a month respectively.

3. Kubheka and another vs. Imextra (Pty) Ltd. 1975 - 4 SA at pg. 488.

4. See 66 of the Labour Relations Act 1956.

5. SEc. 25 of the Wage Act 1925.

6. Schierhout vs. Minister of Justice 1926 AD 107. See also Kubheka's case (supra)

7. Schierhout's case (supra) at pg. 107.

8. Schierhout's case (supra) at pg. 110.

9. See Kubheka's case (supra).

10. National Union of Textile Workers and others vs. Stag Packings (Pty) Ltd. 1982 - 4SA pg. 151

11. Paragraphs 4.28.1 and 4.28.6 Part 1 Commission Report.

12. The Act seeks to maintain industrial peace and to regulate industrial conflict by requiring employers and trade unions or employees to resort to conciliation through the collective bargaining machinery of industrial Councils and Conciliation Boards and through specific procedures like mediation or arbitration, before resorting to force. It does this by prohibiting strikes and lock outs unless the appropriate procedures have been exhausted. Severe penalties are attached to transgressions.

13. A. Levy and Associates : IR Data : Special Report on Industrial Action: June 1983.

14. Section 1, Labour Relations Act, 1956.

15. S.A. Diamond Workers Union vs. The Master Diamond Cutters Association of South Africa. Industrial Law Journal (ILJ) Vol. 3 Part 2 1982.

16. ibid. at pg. 120G.

17. Zakwe vs AECI Limited : Industrial Court: unreported judgement 1984.

18. Diamond Cutters case (supra) at pgs. 139H - 140A.

19. ibid at pg. 109H.

20. ibid. at pg. 135C.

21. ibid. at pg. 135C.

22. ibid. at pg. 139C.

23. Paul Pretorius : The Role of the Industrial Court in Establishing Fair Employment Guidelines. - unpublished paper 1984.

24. Moses Nkadimeng vs Raleigh Cycles (Pty) Ltd. ILJ. Vol. 2 Part 1 at pg. 40G.

25. See Sec. 23 and 35 of Labour Relations Act 1956.

26. Sec. 46(9) of the Labour Relations Act 1956.

27. The test which the court has consistently applied in considering whether status quo relief is appropriate is the same test applied for the granting of an interim interdict at common law, namely

a) the prima facie existence of a right

b) a reasonable apprehension that continuance of the alleged wrong will cause harm that cannot be repaired or remedied.

c) The absence of an alternative remedy to obtain relief.

Where the right is prima facie established but open to doubt the "balance of convenience test" is applied viz. the prejudice to the applicant if the relief is withheld is weighed against the prejudice to the respondent if it is granted.

28. Sec. 43(1) of the Labour Relations Act 1956.

29. In terms of Sec. 43(6) a period of 90 days is allowed but this may be extended by the Court of its own motion or on application for periods not exceeding 30 days at a time.

30. Sec. 43(5) of the Labour Relations Act.

31. Sec. 43(4)(b)(i) read with Sec. 43(7) of the Act.

32. This it is submitted is the reasonable interpretation of Sec. 43(4)(b)(iii) of the Act.

33. Sec. 46(9) of the Act.

34. MAWU and another vs. A Mauchle (Pty) Ltd. t/a Precision Tools ILJ 1980 at pg. 227.

35. Diamond Cutters case (supra) ILJ 1982 Vol. 3 Part 2. pg. 115.

36. United African Motor and Allied Workers Union vs. Fodens (Pty) Ltd. ILJ 1983 Vol. 4 Part 3.

37. Sigwebela vs. Huletts Refineries Ltd. ILJ Vol. 1 Part 1. pg. 51.

38. Industrial Court unreported judgement 1984.

39. ibid. at pg. 15 and 16.

40. ILJ 1983 Vol. 4 Part 2. pg. 125.

41. An order may be granted in terms of this section if the dispute is one falling within the meaning of Sec. 43(1)(a). (suspension or termination of employment).

42. Quote from the headnote in Van Zyl vs. O'Okiep Copper Company Limited (supra) at pg. 125.

43. ibid at pg. 135H.

44. ILJ. 1983 Vol. 4 Part @ pg. 283.

45. ibid at pg. 294A

46. ILJ. 1983 Vol. 4 Part 2. pg. 107.

47. Industrial Court : unreported judgement. November 1983.

48. See above

49. Geoff Budlender, in a recent unpublished address, points to the implications of a developing tension between the policies of the Dept. of Manpower and the Dept. of Co.operation and Development. The former has pursued a policy of incorporation, seeking to secure black worker participation in the new labour dispensation, irrespective of nationality or urban status. The latter , through its policy of denationalisation, seeks to exclude rising numbers of blacks from the right to permanent residence in the cities.

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Quoting (in context) from these preliminary papers with due acknowledgement is of course allowed, but for permission to reprint any material, or for further information about the Inquiry, please write to:

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