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The rights and obligations of trade unions:

Recent decisions clarify some limits to both

by P.A.K. le Roux

In this contribution we discuss recent Court decisions which have dealt with some of the rights that accrue to unions and the obligations that they can incur, both in terms of common law principles and statutory provisions. This will cover the following issues;

- Holding unions liable for losses incurred by other parties.
- Undermining the status of a union in the workplace and ;
- The recognition of shop stewards

Claims for damages against unions

Sections 67 and 68 of the Labour Relations Act, 66 of 1995 (LRA) envisage that if employees embark on an unprotected strike they or their union can be held liable for losses suffered as a result of the strike. This claim against the union can take the form of a common law delictual claim for damages or a statutory claim for compensation in terms of section 68 of the LRA. These losses can arise from the strike itself or the acts or omissions of members of the unions during the course of the strike. In most cases it would be the employer of the employees concerned who would seek to recover the loss suffered, but the recent decision in **SA Post Office Ltd v TAS Appointment and Management Services CC & others** [2012] 6 BLLR 621 (LC) seems to envisage the possibility that other parties could also recover losses suffered.

However, employers or other parties seeking to invoke such remedies would, in many cases, have to overcome difficult evidential and legal hurdles to institute a successful claim – especially in establishing that the union should be held liable for the acts of its members in situations where union officials did not authorise the strike or these acts or did not otherwise associate the union with the strike or these acts.

The Regulation of Gatherings Act

The difficulties in this regard, albeit in a slightly different context, were addressed in s 11(2) of the Regulation of Gatherings Act, 205 of 1993 (RGA) and were considered in the recent Constitutional Court decision in **South Africa Transport & Allied**

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Workers Union & Another v Garvas & Others (City of Cape Town as Intervening Party and Freedom of Expression Institute as *amicus curiae*) [2012] 10 BLLR 959 (CC).

The RGA regulates the convening and conducting of "gatherings" as defined therein. Of importance here are the provisions of s 11(1) of the RGA which provides that if "riot damage" occurs as a result of a gathering, every organisation on behalf of, or under the auspices of which, the gathering was held will be jointly and severally liable for that riot damage, together with any other person who unlawfully caused or contributed to the riot damage or any other organisation who is held liable in terms of s11(1).

This section creates a specific statutory liability in addition to any other common law liability based on delictual principles that may exist. Unlike liability based on delictual principles, the statutory liability created by s11(1) does not require that the organisation concerned or its office bearers intentionally or negligently caused the riot damage. It was therefore deemed necessary to provide a statutory defence against this statutory liability. This is found in s 11(2) which reads as follows-

> *"(2) It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such a person or organization proves—*
>
> *(a) that he or it did not permit or connive at the act or omission which caused the damage in question; and*
>
> *(b) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and*
>
> *(c) that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question."*

The abovementioned litigation arose out of a march convened by the South African Transport and Allied Workers Union (SATAWU) in support of a protected strike that its members had embarked upon and that took place in the Cape Town city centre. During the course of this march, which constituted a gathering as defined in the RGA, acts of violence and damage to property allegedly occurred which caused loss to various individuals and businesses. Eight of these businesses or individuals sought to hold SATAWU liable in terms of s 11(1) for the losses they had suffered and instituted proceedings against SATAWU in the High Court.

SATAWU opposed the claims on the merits and also raised the legal argument that s11(2)(b) was constitutionally invalid. The High Court rejected this argument, as did the Supreme Court of Appeal. SATAWU then appealed to the Constitutional Court. The Constitutional Court also rejected SATAWU's arguments and the appeal failed. In coming to this conclusion the Constitutional Court considered two main contentions submitted on behalf of SATAWU

The first was based on the wording of s 11(2) and in particular s 11(2) (b) and (c). For the defence provided in terms of s11(2) to succeed ,three requirements must be met, namely –

- the person or organisation against whom the claim is brought must prove that he or it did not permit or connive at the act or omission which caused the damage;
- that the act or omission in question did not fall within the scope of the objectives of the gathering **and was not reasonably foreseeable**; and
- that the person or organisation against whom the claim was brought **took all reasonable steps within his or its power to prevent the act or omission** in question.

The argument was that the second and third elements of the defence, when read together, infringed the constitutional principle of legality in that they were irrational. How was it possible for a person or an organisation to take all reasonable steps to prevent the act or omission which led to the riot damage if the act or omission was not reasonably foreseeable? To put it another way, if an organiser of a gathering takes reasonable steps to guard against the act or omission occurring he would never be able to prove that these acts were not reasonably foreseeable. The Court rejected this view in the following terms –

"[43] There is an inter-relationship between the steps that are taken by an organiser on the one hand and what is reasonably foreseeable on the other. The section requires that reasonable steps within the power of the organiser must be taken to prevent the act or omission that is reasonably foreseeable. The real link between the foreseeability and the steps taken is that the steps must prove to have been reasonable to prevent what was foreseeable. If the steps taken at the time of planning the gathering are indeed reasonable to prevent what was foreseeable, the taking of these preventive steps would render that act or omission that subsequently caused riot damage reasonably unforeseeable. Both section 11(2)(b) and section 11(2)(c) would then have been fulfilled.

[44] It must be emphasised that organisations are required to be alive to the possibility of damage and to cater for it from the beginning of the planning of the protest action until the end of the protest action. At every stage in the process of planning, and during the gathering, organisers must always be satisfied of two things: that an act or omission causing damage is not reasonably foreseeable and that reasonable steps are continuously taken to ensure that the act or omission that becomes reasonably foreseeable is prevented. This is the only way in which organisers can create a situation where acts or omissions causing damage remain unforeseeable. In such a case, the requirement of taking reasonable steps is not met simply by guarding against the occurrence of the damage-causing act or omission. The inquiry whether the steps taken were sufficient to render the act or omission in question no longer reasonably foreseeable might be very exacting."

The second argument was that s 11(2) infringed the Constitutional guarantee of freedom of assembly found in s 17 of the Constitution. This provides that -

" Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

The majority of the Constitutional Court judges came to the conclusion that the section did indeed limit the rights granted in s 17. However, they went on to consider whether the limitation of this right could be justified by virtue of the requirements set out in s 36 of the Constitution. This section envisages that a right may be limited if this is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and after taking into account a range of factors set out therein. It came to the conclusion that the limitation could be justified.

Whilst it is evident that this decision does make it more difficult for a union to defend itself against claims arising from gatherings, it should be remembered that s 11 does not apply to actions committed during the course of a picket that complies with the provisions of the LRA. Here ordinary common law principles will apply, at least insofar as the damage or loss is caused by acts or omissions that constitute a criminal offence. It is also important to emphasise that, despite the statements to the contrary in the media, the decision does not deal with the merits of the claims brought against SATAWU. These are still to be decided.

Members' claims against their union

Also of interest is the recently reported decision in **Ngcobo v Food & Allied Workers Union** [2012] 10 BLLR 1035 (KZN) in which two members of the Food and Allied Workers Union (FAWU) sought to claim damages from FAWU on the grounds that FAWU had not pursued a claim for unfair dismissal against their employer. Interestingly, the claim was not one based on delictual principles but rather that FAWU had breached an agreement with the two applicants in terms of which it had undertaken to challenge the fairness of their retrenchments. After dealing with various disputes of fact, and after considering various legal issues, the High Court in KwaZulu-Natal came to the conclusion that FAWU had indeed breached an agreement between FAWU and the two plaintiffs by not referring the dispute to the Labour Court after a certificate of non-resolution of the dispute had been issued.

During the course of the decision the Court dealt with two issues of particular importance. The first was an argument raised by FAWU's legal representative to the effect that the two plaintiffs, as members of FAWU, had an identity of interest with FAWU and that they could therefore not sue FAWU unless FAWU's constitution provided for this. FAWU's

constitution did not grant members this right and the two plaintiffs could therefore not sue FAWU. This identity of interest was described by the Court as follows -

> *"18.2.2 Although on registration in terms of section 97(1) of the LRA, a trade union acquires legal personality and becomes a body corporate, it is also an association of employees who make up the membership of the association and therefore vis-à-vis the membership, it has to be treated as their association. As members of the same association, all the members have an identity of interest with their trade union, their association, and since nobody can sue himself, none of the members may sue their union.*
>
> *18.2.3 As a consequence of such "identity of interest", the plaintiffs cannot sue the defendant, unless this is provided for in the constitution governing their relationship. The constitution would have to embody the agreement of all the other members, to be liable in certain circumstances to compensate the wronged member, by rendering their association liable to such wronged member. Without their agreement it is not legally possible to achieve this result.*
>
> *18.2.4 The constitution of the defendant (as set out above) provides that one of the aims and objectives of the defendant is:*
>
> *'To provide legal assistance to members and/or officials where it deems it in the interest of the union to do so'.*
>
> *The constitution of the defendant makes no provision for a member to sue the defendant in the circumstances giving rise to the plaintiffs' claims."*

The Court rejected this argument on the basis that;

- FAWU has legal personality separate from its members and officials.
- Its constitution determines the nature of the relationship between it and its members as well as their rights and obligations *inter se*. FAWU's constitution gives it the power to provide legal assistance to its members when it deems it to be in the interests of the union to do so.
- FAWU therefore had the necessary authority in terms of its constitution to conclude the agreement with the plaintiffs to provide them with legal assistance. The mere fact that FAWU may have been acting in the interests of the plaintiffs as well as its own interests did not prevent the conclusion of an agreement between the plaintiffs and FAWU in terms of which it would institute proceedings on their behalf in the Labour Court.

The second argument was that it would be contrary to public policy to permit a union member to sue his or her union for damages arising from actions taken by a union acting in furtherance of the interests of the union and its members unless this was specifically authorised by the union's constitution.

This is because it would place unions at huge financial risk which would, in turn, require unions to take out expensive professional indemnity insurance to the prejudice of the general body of members. Unions could be destroyed or significantly weakened and their ability to represent their members through collective bargaining would be impaired. This would be against the interests of the "general body of members". The Court rejected this argument. The following excerpt is of interest –

> *"19.6 The defendant was obliged to place before this Court clear evidence that the factual consequences to the defendant of obtaining professional indemnity insurance, would be as described by Landu. Only once such consequences to the defendant were established, would it be possible to determine whether it was against public policy, to hold the defendant liable to compensate the plaintiffs in damages. In any event, I have grave reservations whether public policy would preclude the advancement of the plaintiffs' claim against the defendant, where the omission of the defendant, consists of a gross failure to do that which it had undertaken to do, on behalf of the plaintiffs."*

Defamation Claims

Finally under this heading the decision of the High Court in **SA National Defence Force v Minister of Defence & Others** (2012) 33 ILJ 1337 (KZD) is of interest. In this decision the Court found that a trade union had the *locus standi* to claim damages from a person that has defamed it.

Rights relating to shop stewards.

In **NUMSA obo Sithole v Highveld Steel & Vanadium Corporation Ltd** [2003] 10 BALR 1117 (MEIBC) the employee concerned had been elected as a shop steward. He was then appointed to a supervisory position but was told that, because of this promotion, he could no longer act as a shop steward. He and his union objected to the attitude adopted by the employer and referred a dispute to the Metal and Engineering Industries Bargaining Council. The dispute was then referred to arbitration.

The employer's argument was that, although there was no collective agreement or written employer policy in place dealing with the issue, there had always been a practice in place that if a shop steward was promoted to a supervisory rank he or she would resign the position of shop steward. The arbitrator made a ruling that this practice constituted an infringement of the employee's right to freedom of association and that it should be set aside. This argument was derived from s 4(2) of the LRA which provides that -

> *"(2) **Every member** of a trade union has the right, subject to the constitution of that trade union—*
> *(a) to participate in its lawful activities;*
> *.....*
> ***(b) to stand for election and be eligible for appointment as a trade union representative** and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement." (Emphasis supplied)*

The commissioner also rejected the argument that an employee who is appointed both as a supervisor and a shop steward could experience conflicts between these two roles and that this justified not permitting supervisors from being shop stewards as well.

It did so in the following terms –

> *"Firstly, there is the argument that a conflict of interest would arise because shop stewards in supervisory positions may have to take disciplinary action against subordinates who are members of the union to which they themselves belong. A supervisor who chooses to stand for election as a shop steward and is elected, should be aware that a conflict may arise between his role as a shop steward and his role as a supervisor. The fact that the Act allows him to carry out the functions of a trade union representative, in no way exempts him from his contract of employment and his duties as a supervisor. He must still do the work for which he is appointed and comply with the duties stipulated in his contract of employment, including duties implied in his appointment. In acting as a shop steward he is obliged to do so in terms of the provisions of the Act, and any failure to do so could lead to disciplinary action against the shop steward for misconduct, or even to his employment being terminated for reasons related to an incapacity on his part to fulfil his contract. Other ways of eliminating the conflict between the role of supervisor and that of shop steward could of course be found. It is also open to the respondent and the applicant to negotiate and agree conditions in regard to the election and role of shop stewards that would lessen or do away with the conflict. In the absence of a collective agreement in this regard, however, it is not permissible for an employer to restrict the right of an employee to act as a shop steward." (At 1120 G – 1121A)*

This decision involved a situation where there was no collective agreement in place regulating the recognition of shop stewards by the employer. But can a collective agreement limit the right of employees to become shop stewards? For example, it is not unknown for a collective agreement to state that shop stewards will be recognised in respect of certain "constituencies" or sections of the workforce and that, for an employee to be recognised as a shop steward in respect of a constituency, that employee must be employed within that constituency. But what if the employee is promoted or transferred out of that constituency? Will the

collective agreement take precedence over the statutory right referred to above? Subsection 2(b) does not appear to cover this situation specifically – the reference to collective agreements seems to refer to the functions of shop stewards rather than their recognition. Nevertheless, the last sentence of the excerpt indicates that the arbitrator accepted that such a limitation can be included in a collective agreement.

The employer in **FAWU & Another v The Cold Chain** [2007] 7 BLLR 638 (LC) had embarked on a retrenchment exercise. As a result a post filled by a recognised shop steward became redundant. As an alternative to retrenchment the shop steward was offered a promotion to a supervisory position. The offer was subject to the condition that the employee would relinquish his position as a shop steward. The employee was prepared to accept the post, but refused to accept that he could no longer be a shop steward. He was then retrenched. He claimed that his dismissal was automatically unfair because the reason for the dismissal was his refusal to relinquish his appointment as a shop steward. The Court accepted that there had been an automatically unfair dismissal. During the course of the judgment the Court considered the argument whether the employee had entered into an agreement in terms of which he relinquished his right to act as a shop steward. The Court found that no such agreement had been entered into but also stated that even if such an agreement had been entered into, it was invalid.

> *"[28] Even if I were to assume that such a "contract" or agreement had been reached, and that Martin, as Mr Wagener contended, acted in breach of his "contractual" terms (by refusing to resign as a shop steward and to relinquish his union office-bearer duties and responsibilities), I believe that Martin was entitled to do so. This would be so, as I believe, in light of my conclusion that the organisational rights afforded to Martin in terms of sections 4 and 5 of the LRA are absolute, that such a contractual term would have been unlawful on the basis of it being contrary to public policy."*

The Court also rejected the argument that the recognition agreement between the union and the employer prevented the employee from being a shop steward if he had accepted the new post - this on the basis that the recognition agreement did not support such an interpretation.

Although this issue was not formally addressed, it appears that the Court accepted that such an agreement could, in principle at least, contain such a limitation.

The above issues were again dealt with in the recent arbitration award in **Independent Municipal & Allied Trade Union & Another v Ekurhuleni Metropolitan Municipality** [2012] 10 BALR 995 (SALGBC) which dealt with the interpretation of clause 2.4 of the Main Collective Agreement of the Local Government Bargaining Council. This clause lists certain employees who cannot be shop stewards. It reads as follows –

> *"2.4.2.Employees not entitled to become shop stewards:*
>
> *2.4.2.1 The Municipal Manager and persons appointed as managers directly accountable to Municipal Managers in terms of section 57 of the Municipal Systems Act, 32 of 2000, Deputy Municipal Manager, Executive Director, Director, Deputy Director, Head of Department, or such post of equivalent management status whatever the title, as it may differ from Municipality to Municipality, as determined by the relevant division of the Council;*
>
> *2.4.2.2 employees appointed to represent the employer in its dealings at the Local Labour Forum;*
>
> *2.4.2.3 Human Resource Managers,*

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Industrial Relations Managers and Industrial Relations Officers;

2.4.2.4 managers above a certain grade, which grade is to be determined by the parties to the relevant division of the Council;
2.4.2.5 those employees who have not completed their probationary periods."

It is evident that clauses 2.4.2.1 and 2.4.2.4 envisage that the categories of employees who cannot act as shop stewards can be extended by an agreement to this effect entered into by a division of the bargaining council – in this case the Gauteng Division of the Local Government Bargaining Council.

The local authority employer this matter adopted a resolution to the effect that certain managers not specifically mentioned in clause 2.4.2 could not be shop stewards. This was done despite the fact that the Gauteng Division had not made a ruling as envisaged in either clause 2.4.2.1 or 2.4.2.4. The ability or power of the employer to enter into such a resolution was challenged by the applicant union in this matter and was eventually referred to arbitration.

The employer argued that clause2.4.2 did not prevent it from entering into such a resolution. *"Sensibly construed"* this clause meant that an employer was free to decide which categories of employee could not become shop stewards and that this state of affairs would operate until the Gauteng Division determined the matter. If this interpretation was not followed unions could "indefinitely delay the process".

This argument was rejected by the arbitrator. It based its decision on the formulation of the clause itself as well as the view that the employer's argument would limit freedom of association. It went on to state that -

"[18] In my view, the only manner in which 2.4 can be sensibly construed is to assume that it reflects the parties' agreement that certain managers should not be shop stewards, but that situations might arise where, because some municipalities use different job designations and grades, further managers might yet need to be excluded from the general right to act as shop stewards. The drafters envisaged a particular process by which this can be done. This is by referral to the relevant division of the council for further negotiation. That the parties should have wished to have a division of the council determine such issues is understandable. The main agreement is the product of negotiations between the two member unions and the employers' representative, SALGA, at national level. The parties clearly wished to ensure that the addition of further managers, or categories of managers, should also be the product of collective bargaining, rather than be achieved by prescription, unilateral decision-making or some form of third-part intervention.
[19] In its plain meaning, clause 2.4 indicates that managers not expressly excluded by designation or rank cannot and do not fall within the scope of the exclusion contemplated by 2.4.2 until the equivalence of their status, or the minimum grade, has been "determined" by the council. It follows, and I so find, that the "default" position applies until this has been done, and that employers are not entitled to deprive employees of their general right to become shop stewards until consensus has been reached in regard to them at the SALGBC Gauteng division."

Without expressly considering the issue in any detail, all three of the above decisions assume that an employer and a trade union can limit the right of an employee to be recognised as a shop steward. How far this limitation can extent is still a matter for debate.

Full-time shop stewards

Although most shop stewards recognised by employers still perform their normal duties as employees in addition to their duties as a shop stewards, many larger employers have been prepared to recognise full-time shop stewards. Although the precise status, rights and obligations of full-time shop stewards will differ from case to case and will depend primarily on the agreement reached between the employer and the union concerned, it appears that in most cases a full-time shop steward will usually not perform any of the "ordinary" duties of an employee and will solely perform duties associated with being a representative of the union in the workplace.

The status and functions of shop stewards was discussed in the recent decision in **South African**

Municipal Workers Union obo its members in the employ of the respondent v Ekurhuleni Metropolitan Municipality [2012] 11 BLLR 1174 (LC). The dispute in this matter arose from a protected strike called by the applicant union. Because the employees concerned were on strike the principle of "no work-no pay" was applied by the employer. The employer also applied this principle to three full-time shop stewards that it had recognised. The union argued that, because they were performing their duties as full-time shop stewards during the course of the strike, they were entitled to be paid. This dispute was considered by the Labour Court.

The Court referred to the provisions of the collective agreement in terms of which full-time shop stewards could be appointed and in which it was stated that –

- The trade unions that were party to the agreement were entitled to elect shop stewards who would be remunerated by the employer on the basis of the posts that they had held prior to being appointed as shop stewards.
- The shop stewards would report to a designated manager of the employer for administrative purposes but would also report to and be accountable to "the trade union structures or members" in accordance with the provisions of the union's constitution and policies.
- It was the duty of full-time shop stewards to "represent the interests of their trade union and its members".
- The trade union had to ensure that the full-time shop stewards performed their duties efficiently and effectively.

It then analysed the unchallenged evidence presented on behalf of the full-time shop stewards dealing with their activities during the course of the strike and came to the conclusion that they were entitled to be paid. It did so in the following terms -

> *"[20] In the present case, I am of the view that the employees did not participate in the strike and therefore they are entitled to their remuneration for the months in question. In arriving at this decision, I have taken note of the following: Firstly, on the facts, the employees did not withhold or withdraw their labour from the employer: They signed in every day and reported for work (as full-time shop stewards). Secondly, during the course of the strike they attended to their duties as full-time shop stewards: They monitored the strike and attended disciplinary hearings and meetings. Thirdly, although I do take the point that a full-time shop steward never loses his/her status of being an employee; the three employees participated in the strike in the capacity of serving the interests of the union and its members. Fourthly, the employer's obligation to remunerate an employee is suspended in terms of section 67(3) of the LRA which states that an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike. There is no evidence before this Court that the individual employees did not render their services. They continued as normal and their involvement in the strike was in their capacity as full-time shop stewards who had to manage the strike on behalf of the union. They did not refuse to render services to the employer as this obligation was suspended by virtue of their appointment as full-time shop stewards."*

Collective bargaining

Because there no longer exists a legal duty to bargain collectively, decisions dealing with bargaining conduct are hard to find. However there are two reported decisions, the one interesting and the other inexplicable, that can be mentioned.

The employer in **Safcor Freight (Pty) Ltd t/a Safcor Panalpina v South African Freight Dock Workers Union** [2012] JOL 29551 (LAC) conducted a freight forwarding business throughout South Africa at all the large South African ports as well as in Johannesburg. In terms of a "relationship agreement" entered into between the employer and the South African Freight and Dock Workers Union (SAFDWU) SAFDWU had been recognised as the representative of its members within a bargaining unit as defined, provided that SAFDWU maintained a membership level of at least 50 per cent of the employees within the workplace. The bargaining unit was defined as permanent employees who were members of the union, excluding managerial

employees, financial accountants and payroll and human resources administrators.

SAFDWU met these criteria at the employer's Durban and Johannesburg operations and had been recognised for the purposes of collective bargaining on behalf of its members at these operations.

Prior to the events described below, wage adjustments were effected at the employer's Durban operations with effect from 1 January of each year. In accordance with this pattern the employer and SAFDWU entered into a collective agreement in terms of which wage increases were given to SAFDWU members as from 1 January 2007. Wage increases were also given to non-union members but the extent of these increases is unclear.

In August 2007 the employer decided to change the wage cycle for non-union members – wage adjustments would be effected from 1 July of each year. This was communicated to non-union members in a letter and, as an incentive to agree to this change and to forgo an increase in January 2008, non-union members were offered a further wage increase of 4.5 per cent backdated to 1 July 2007.

The letter also contained an important proviso – the offer was made subject to the condition that a non-union member did not become a member of SAFDWU at any time during the period 1 July 2007 to 30 June 2008. If an employee nevertheless became a union member during this period the 4.5 per cent increase granted would cease to apply as from the end of the calendar month that the employee joined SAFDWU and the employee would then be paid the wage he or she received prior to 1 July 2007. The employee would next receive a wage increase as from 1 January 2008 when the next wage increase negotiated with SAFDWU came into force.

Whilst this was not explicitly stated to be the case it seems that the purpose of the proviso was to prevent employees from accepting the backdated increase of 4.5 per cent and then joining the SAFDWU in order to receive the benefit of a further increase in January 2008.

In principle at least there does not appear to be anything objectionable in such an arrangement. Of course the same result could have been achieved by catering for this eventuality in any agreement entered into with SAFDWU regulating the January 2008 increases for union members. But the likelihood that SAFDWU would be prepared to agree to any such arrangement was probably slim. Unfortunately this was not the end of the matter for the employer. During November 2007 the attorney for SAFDWU addressed a letter to the employer in which it accused the employer of discriminating against union members and confirmed that SAFDWU was also prepared to agree to the wage adjustment date for its members being changed to July of each year.

The employer responded in writing and indicated that it was under no obligation to negotiate or consult with SAFDWU in respect of non-bargaining unit employees and that, subject to not acting in a discriminatory manner in respect of SAFDWU, it could "arrange its affairs in keeping with its own best interests". It pointed out that there was a binding collective agreement in existence between the parties which was valid until 31 December 2007 and that, when negotiations for the new wage cycle commenced, SAFDWU could make proposals regarding possible changes to the wage cycle. It refused, however, to agree to a proposal to change the 2007 wage agreement.

When the parties failed to resolve their differences SAFDWU approached the Labour Court for a declaratory order to the effect that the employer's conduct was in breach of s 5 of the LRA as well as in consistent with s 9 and s 23 of the Constitution. The Labour Court found for SAFDWU on this issue and the employer lodged an appeal with the Labour Appeal Court (LAC). The LAC refused to deal with the matter on the basis that SAFDWU and its members' Constitutional rights had been infringed. It based its decision on section 5 of the LRA.

Section 5(1) provides that no person may discriminate against an employee because that employee exercised a right conferred by the LRA. In addition to this general prohibition s 5(2) and s 5(3) contain more specific prohibitions. Of particular relevance here are s 5(2)(c), which provides that no person may prejudice an employee because of that employees' membership of a trade union and s 5(3) , which states that no person may "advantage" an employee in exchange for that

employee not exercising any right conferred by the LRA.

The LAC came to the conclusion that it was probable that the wage increases granted for the period 1 January 2007 to 30 June 2008 resulted in a discernible advantage to non-union members. This meant that members of SAFDWU were "prima facie prejudiced or discriminate against" because of their membership of the union and that non-union employees had been advantaged and in exchange for not exercising their right to be a member of the union. The LAC further found that the employer had not been able to justify its conduct and that s 5 had therefore been contravened.

> "[30] *The appellant's conduct was therefore a form of anti-union discrimination as proscribed by section 5(2)(c) and s*ection *5(3) of the LRA. I agree thus with the submission of counsel for the respondent that whatever gloss the appellant may wish to place on what it chose to do and its reasons for doing so, and for why it was not willing to accommodate the respondent to adjust the annual wage cycle for union members, there is no getting away from the impact of its actions, which would have been self-evident, and that was to provide a strong inducement to non-union members not to exercise their right to join the union for the relevant six-month period, or for union members to resign. The fact that the disadvantage or prejudice was ameliorated later does not detract from the harmful effects. The measurement of the impact of the discrimination must be made when the prejudicial or disadvantageous behaviour takes place. On 1 July 2007 and until 31 December 2007, the appellant differentiated prejudicially between its employees on the basis of the rights they respectively chose to exercise in terms of the LRA to join or not join a trade union. It is no defence to argue, as the appellant has sought to do, that the differentiation is based on bargaining unit membership, not union membership, when the applicable agreement defines the bargaining unit as synonymous with union membership. All the more the case, when the introduced differentiation was subject to the condition precedent that the non-union members were paid more on the express understanding that their monthly remuneration would revert to what it was before the increase if they chose to exercise their fundamental right to join the union during the six-month period."*

The second decision of interest under this heading is the award in **Chemical Energy Paper Printing Wood & Allied Workers Union obo members & Others v Team Plating Supplies** [2012] 9 BALR 926 (CCMA). The union in this matter sought to be recognised by the employer as the sole collective bargaining agent within the workplace. This was on the basis that it represented the majority of the employees employed by the employer. The employer refused to recognise the union and the union then referred a dispute to the CCMA in terms of s 21 of the LRA - i.e on the basis that the employer was refusing to grant the union an organisational right. After conciliation failed to settle the the dispute it was referred to arbitration. Because there appears to have been a dispute as to the representivity of the union the commissioner ordered that a ballot of employees be conducted in terms of section 21(9) of the LRA. The commissioner analysed the result of the ballot and came to the conclusion that the union did not enjoy majority support in the workplace and therefore refused to find in favour of the union.

This decision is mystifying. The first point to be made is that the LRA does not confer the organisational right of recognition for the purposes of collective bargaining. Section 21 simply does not cater for this possibility. The second is that neither the CCMA nor the Labour Court has the power to force an employer (assuming that the union had shown majority support) to bargain collectively with a union. It is, of course, possible that the employer and the union knew what the correct legal position was but decided that this was an issue that could appropriately be dealt with through an arbitration process that both parties agreed to. However, there is no indication that this was the case and the commissioner specifically refers to s 21 and the acquisition of an organisational right. In addition, if this was indeed the case, no explanation was given as to how the parties could agree to confer jurisdiction on the CCMA to deal with a dispute that it does not have the statutory power to deal with. ■

P.A.K. le Roux