THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

SECOND EDITION

Editor
Nicholas Robertson

THE LAWREVIEWS

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PREFACE

I qualified as an employment lawyer more than 30 years ago and have practised as an employment lawyer since that day. One of the benefits of passing such milestones is being able to look back and see how trends have appeared over time and have shaped the advice needed by employers, and consequently the expectations of employment and human resources (HR) advisers and lawyers.

When I started, employment law was almost entirely a national subject. This was the case, even though, within the European Union, there was an employment framework derived from the European Union with some common obligations and rights throughout the Member States. During the past 15 years or so, that position has changed as business has become increasingly international, with operations spanning many countries, and often with supply chains spanning yet more countries. As this process developed, employers structured themselves internationally, so that legal and HR teams, among others, are able to deal with a globally mobile workforce. Similarly, employers and their in-house teams are expected to be able to deal with disputes and potential disputes across many countries, and come up with an overall approach that delivers the right results across the board and not in one country at the expense of another. The most obvious example of this may be an attempt by an employer to enforce a post-termination restriction written under the laws of one country against an employee who is based in a second country, but who may want to compete with the employer in a third country. Employment lawyers need to be able to provide this advice, and HR professionals are increasingly expected to have an appreciation of employment law and practice in other countries.

This is why, when I was approached to be the editor of this book, I thought it was very timely and important. Employers and their advisers need to be able to keep up to speed with the significant employer-related developments occurring throughout the world. Added to this is the fact that employment law is a fast-moving area with significant developments occurring every year in all the jurisdictions covered by this book – employment law does not stand still.

I am very grateful to the contributors for their time and effort in putting this book together. Like all the best products, it has been a real team effort. I am sure this book will prove very useful both this year and in subsequent years as we continue to cover the developments in this area.

Nicholas Robertson
Mayer Brown International LLP
London
February 2019

Chapter 15

SOUTH AFRICA

Ross Alcock and Peter le Roux[1]

I INTRODUCTION

During the period of transition to democracy between 1990 and 1998, a series of statutes regulating labour relations and employment were enacted. The most important of these were the Labour Relations Act 66 of 1995 (LRA) the Basic Conditions of Employment Act 75 of 1997 (BCEA) and the Employment Equity Act 55 of 1998 (EEA). Taken together, these statutes formed a detailed legal framework for the regulation of labour relations and employment law.

The LRA regulates aspects of both collective labour law and individual labour law. At the level of collective labour law, it makes provision for the establishment of collective bargaining institutions at sectoral level, called bargaining councils. These bodies also provide dispute resolution mechanisms in the sectors over which they have jurisdiction. The LRA also regulates recourse to strikes and lockouts by employees and employers, respectively. At the level of individual labour law, the LRA provides protection for employees against unfair dismissal, and against a range of defined unfair labour practices committed by employers.

The BCEA provides a floor of minimum terms and conditions of employment, including the regulation of working time and various forms of leave. It does not provide for a minimum wage. This is dealt with in the National Minimum Wage Act, which came into force on 1 January 2019.

The EEA prohibits discrimination by employers against employees on a wide range of grounds, the most important being race, sex, gender, sexual orientation, age, pregnancy and marital status. It also requires employers to implement affirmative action measures.

II PROCEDURE

One of the objectives of the LRA is to attempt to ensure that all types of labour disputes will be addressed and, if possible, resolved expeditiously. It prescribes that by far the majority of disputes that fall within its ambit must first be referred to conciliation. The idea is that the conciliator will seek to assist the parties to resolve the dispute. If there is a bargaining council with jurisdiction over the dispute, the conciliation will usually be undertaken by an official of that council. If there is no bargaining council, the conciliation will usually be undertaken by an official of the Commission for Conciliation, Mediation and Arbitration (CCMA).

If conciliation fails to resolve the dispute, three possibilities arise. The first is that, for certain types of disputes, employees may acquire the right to strike and employers may

1 Ross Alcock is a director and Peter le Roux is an executive consultant at ENSafrica.

acquire the right to lock out employees, provided that certain further requirements are met. If employees comply with these requirements, the strike will be regarded as a protected strike. The result will be that employees may not be dismissed for participation in the strike and that trade unions and their members cannot be held civilly liable for any losses suffered by employers arising from the protected strike. The second is that employees may acquire the right to refer certain types of disputes to arbitration to be conducted by an official of a bargaining council or the CCMA. The third is that employees may acquire the right to refer certain types of disputes to the Labour Court. In some cases, employees may have a choice of routes to follow.

The Labour Court has an original jurisdiction to consider certain types of disputes; for example, those concerning the dismissal of strikers, as well as contractual disputes. It also exercises a supervisory jurisdiction in the sense that it can review and set aside arbitration awards issued by the CCMA or a bargaining council. It can also hear appeals against CCMA awards dealing with discrimination claims.

The ordinary civil courts retain their right to consider contractual disputes between employer and employee.

III TYPES OF EMPLOYMENT DISPUTES

The LRA draws a distinction between disputes that can be the subject of a strike or a lockout and those that may be resolved through arbitration by officials appointed by a bargaining council or the CCMA, or may adjudicated by the Labour Court.

For the purposes of this chapter, disputes that can be arbitrated or adjudicated are the most important. By far the majority of disputes considered by dispute resolution bodies concern an allegation that an employee has been unfairly dismissed or that an employee has been the subject of an unfair labour practice. The grounds on which an employer can justify the fairness of a dismissal are the misconduct of an employee, poor work performance on the part of an employee, an employee's incapacity or the employer's operational requirements. A fair procedure must also be followed prior to the dismissal. In certain cases, dismissals are regarded as being automatically unfair (e.g., if the reason for the dismissal is membership of, or participation in, the affairs of a trade union, or participation in a protected strike). Unfair labour practice disputes can involve a range of alleged employer actions, including unfair suspensions, the unfair failure to promote an employee and unfair employer conduct relating to training or the provision of benefits.

The jurisdiction to consider disputes relating to benefits is a particularly important one because of the wide interpretation given to the term 'benefit'. In *Apollo Tyres South Africa (Pty) Ltd v. CCMA & Others*,[2] the Labour Appeal Court held that the definition of a benefit, as contemplated in Section 186(2)(a) of the LRA, was not confined to rights arising from the contract of employment but included rights judicially created, and advantages or privileges employees have been offered or granted in terms of a policy or practice, subject to the employer's discretion.

The LRA grants valuable rights to employees of temporary employment services, part-time employees and people employed in terms of fixed-term contracts. A significant number of disputes involving the enforcement of these rights are being referred to the CCMA. Other types of disputes that may be the subject of arbitration or adjudication are those

2 [2013] 34 ILJ 1120 (LAC).

that deal with the interpretation of collective agreements, those that concern the granting of organisational rights and those that relate to whether or not a strike is protected. The latter type of dispute usually occurs when an employer approaches the Labour Court as a matter of urgency to interdict a strike from taking place.

The above-mentioned disputes are regulated in terms of the LRA. In addition, arbitrators and the Labour Court are being called upon to deal with an increasing number of disputes dealing with allegations that an employer has unfairly discriminated against an employee or a group of employees. These are dealt with in terms of the provisions of the EEA. Finally, a steady stream of disputes are referred to the Labour Court or the ordinary civil courts in which an employee or an employer seeks to enforce contractual rights.

IV YEAR IN REVIEW

i Temporary employment services

The Constitutional Court recently decided in *Assign Services (Pty) Ltd v. National Union of Metalworkers of South Africa and others*[3] on the controversial status of temporary employment services in South Africa. A temporary employment service, also known as a labour broker, procures for, or provides to, a client, for reward, workers who perform work for that client. Even though the worker works for the client, the labour broker is the employer and will remunerate the worker.

However, a worker who is placed with a client by a labour broker and earns below the South African statutory earnings threshold (currently 205,433.30 rand per annum) will be deemed to be employed by the client and the client will be deemed to be the employer if that worker is not performing a genuine temporary service. In this regard, a temporary service means working for a client for a period not exceeding three months or as a substitute for an employee of the client who is temporarily absent.

The question that arises is what happens to the relationship between the worker and the labour broker after the worker is deemed to be the employee of the client? The Constitutional Court decided in *Assign Services* that, after the deeming provision takes effect, the client is the only employer, at least for the purposes of enforcing rights granted to employees in terms of the LRA.

The effect of this decision is that the worker automatically becomes the employee of the client for the purposes of the LRA after the deeming provision takes effect. The Constitutional Court noted that the contractual relationship between the client and the placed employee does not come into existence through negotiated agreement or through the normal recruitment processes used by the client. Instead, the employee automatically becomes employed by the client and he or she must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.

ii Extension of collective agreements

In *Association of Mineworkers and Construction Union and Others v. Chamber of Mines of South Africa and Others*,[4] the Constitutional Court considered the controversial

3 [2018] 39 ILJ 1911 (CC).

4 [2017] 38 ILJ 831 (CC).

Section 23(1)(d) of the LRA, which allows the parties to a collective agreement to extend that agreement to employees who are members of other trade unions that are not party to the collective agreement or who are not members of any trade union. This can be done if the trade unions that are party to the collective agreement represent the majority of the employees in the workplace of the employer concerned. This case dealt with a situation in which a collective agreement regulating terms and conditions of employment concluded between an employers' organisation (on behalf of certain of its members) and three trade unions was extended in terms of Section 23(1)(d) of the LRA to bind the Association of Mineworkers and Construction Union (AMCU) and its members. AMCU had refused to sign the collective agreement and gave notice that its members intended to strike in support of its wage demands, which were higher than those contained in the collective agreement. The employers' organisation sought to interdict the strike in the Labour Court on the basis that AMCU and its members were bound by the provisions of the collective agreement, which included a peace clause that prohibited strikes during the period that the agreement was in force. AMCU opposed the granting of the interdict, primarily on three grounds. The first ground concerned the definition of a workplace. The second was that Section 23(1)(d) of the LRA is unconstitutional because it restricts the constitutional right to strike. The third was that such an extension violates the principle of legality and the rule of law because it envisages the unrestricted exercise of a public power by private bodies. The Labour Court rejected AMCU's arguments and granted the interdict. The Labour Appeal Court upheld the decision of the Labour Court. The Constitutional Court granted leave to appeal to it but held that Section 23(1)(d) of the LRA is not unconstitutional. The Court accepted that an extension of a collective agreement in terms of Section 23(1)(d) could restrict the right to strike. However, the Court accepted that the need to maintain the principle of majoritarianism in industrial relations justifies the restriction of the constitutional right to strike. The Court also accepted that the principle of the rule of law was not violated. This was because an agreement to extend a collective agreement could be reviewed and set aside if the extension itself infringed the principle of legality – this despite the fact that the extension met all the requirements set by Section 23(1)(d).

The provisions of Section 23(1)(d) have since been used and upheld in collective agreements to regulate issues other than terms and conditions of employment. For example, in *Association of Mineworkers & Construction Union & others v. Royal Bafokeng Platinum Ltd & Others*,[5] the Labour Appeal Court upheld the validity of an extension to a collective agreement that regulated the terms on which a retrenchment exercise would be undertaken.

The extension of collective agreements entered into by bargaining councils (statutory forums established for the purposes of collective bargaining and dispute resolution at sectoral level) that then bind all employers and employees in the sector, have been the subject of extensive litigation as smaller employers, in particular, seek to challenge these extensions. Recent amendments to the LRA seek to make it easier to make use of such extensions and to limit the ability of employers to challenge them.

iii Violence and intimidation during strikes

In recent years, there has been an increasing incidence of serious violence and damage to property during strikes. This has led to employers approaching the Labour Court for orders

5 [2018] 39 ILJ 2205 (LAC).

interdicting employees from committing these types of actions. If these actions continue, the employer will then seek to have employees guilty of such conduct held in contempt of court. One of the problems faced by employers in this situation is proving that employees are guilty of this type of action. On occasion, employers have resorted to arguing that the doctrine of common purpose should be applied (i.e., that an employee can be held liable even if he or she did not commit an act that constitutes a breach of a court order, provided that the employee, through his or her conduct, associated himself or herself with the action). This doctrine has also been applied if employers seek to dismiss employees for this type of action. In *Association of Mineworkers and Construction and Others v. KPMM Road and Earthworks (Pty) Ltd*[6] the Labour Appeal Court set out the requirements that have to be met by an employer when seeking to invoke this doctrine. It also emphasised that, if an employer seeks to hold a union in contempt of a court order, the court order should specify clearly what actions the union, through its officials, must or may not commit.

Employers faced with employee violence during a strike (and in other contexts) have also resorted to the concept of 'derivative misconduct'. In this type of situation, the employee is not dismissed for a specific act of misconduct, such as violence, but is dismissed for having failed to assist the employer or to cooperate with the employer, in bringing to book the employees guilty of misconduct. The concept of derivative misconduct, which is derived from an employee's common law duty to act in good faith with regard to an employer, has been accepted by South Africa's courts. The most recent decision is that of the Labour Appeal Court in *National Transport Movement (NTM) and another v. Passenger Rail Agency of South Africa Ltd (PRASA)*,[7] which shows that the courts will also apply this concept strictly.

The issue of strike violence has also been addressed in an Accord on Collective Bargaining and Industrial Action (the Accord) entered into between the relevant stakeholders in the South African economy, including trade unions and trade union federations, employers and employers' associations, government and various public and private sector institutions and organisations. One of the provisions of the Accord declares that resorting to violence, intimidation, loss of life or threat of harm to persons and property under all circumstances, and more particularly during strikes, lockouts, pickets and protest action, is intolerable. The parties to the Accord also undertake to take all necessary measures to prevent violence, intimidation and damage to property and, if any such conduct does occur, to take all steps necessary to discourage it and to comply with a court order interdicting the violence, intimidation or damage to property.

Employees wearing T-shirts indicating their support for a specific union is not uncommon in South African workplaces. In *National Union of Metalworkers & others v. Transnet SOC Ltd*,[8] the Labour Court held that a workplace rule imposed by an employer prohibiting the wearing of T-shirts indicating union membership was invalid. This was because the right to freedom of association and the right to organise were infringed. However, the court also recognised that there were circumstances in which such a workplace rule could be enforced; for example, if the employer's operational needs required such a rule or if the wearing of these kinds of T-shirts exacerbated inter-union rivalry.

6 JA 147/2017 [2018] (31 October 2018).

7 [2018] 2 BLLR 141 (LAC).

8 JS 427/15 (31 October 2018).

iv Racism in the workplace

Given South Africa's history, it is not surprising that the courts have had to deal with racist conduct in the workplace, usually in the context of disciplinary action undertaken against employees. This has, in some cases, given rise to the question of what constitutes racist conduct.

In *Rustenburg Platinum Mine v. SAEWA obo Meyer Bester and Others*,[9] the Constitutional Court dealt with the matter of whether an employee referring to a colleague as a 'swart man' (i.e., a black man) constituted misconduct justifying dismissal, particularly in the South African context. The Constitutional Court found that, when interpreting the term 'swart man', the reality of South Africa's past of institutionally entrenched racism could not be ignored. Therefore, the starting point for interpreting the use of those words could not be presumed to be from a neutral context. The term was judicially recognised as being racially loaded and, hence, derogatory. The Constitutional Court found that Mr Bester had shown no remorse. He had steadfastly denied ever saying 'swart man' and in so doing was being dishonest. This dishonesty weighed heavily against him when considering sanction. In finding that dismissal was the appropriate sanction, the Constitutional Court found: 'By his actions he has shown that he has not made a break with the apartheid past and embraced the new democratic order where the principles of equality, justice and non-racialism reign supreme.'

Clearly, racism in the South African workplace is seen in a very serious light. However, it does not follow that any act of racial differentiation automatically warrants a sanction of dismissal. In *Duncanmec Proprietary Limited v. Gaylard NO & Others*,[10] the Constitutional Court was required to consider whether the singing of struggle songs (i.e., protest songs sung during the apartheid years) during a strike, containing words that could be construed as offensive, warranted dismissal. Specifically, the Court had to consider one song of which the lyrics could be translated as 'climb on top of the roof and tell them that my mother is rejoicing when we hit the boer (farmer)'. The Constitutional Court held that singing this song was inappropriate but distinguished this from crude racism. It did not interfere with the decision of the arbitrator who heard the matter and who found that dismissals for this reason were not fair. In coming to this decision, the arbitrator had taken into account the context in which the misconduct was committed, the fact that the incident took place in a tense atmosphere, that the strike was peaceful and short-lived, and that the employees had clean disciplinary records. The arbitrator had also considered the competing interests of Duncanmec and the employees.

v Automatically unfair dismissals

Section 187(1)(f) of the LRA provides that a dismissal will be automatically unfair if the reason for the dismissal is one of the reasons referred to in that Section, one of which is an employee's religion. The decision of the Labour Appeal Court in *TFD Network Africa (Pty) Ltd v. Faris*[11] deals with an allegation by an employee that she had been automatically unfairly dismissed because of her religion. She was a Seventh Day Adventist and had refused to work on Saturdays because her religious convictions prohibited her from doing so. The Court found that her dismissal had been automatically unfair, primarily because the employer had failed to take sufficient steps to accommodate her religious beliefs.

9 [2018] 39 ILJ 1503 (CC).

10 [2018] 39 ILJ 2633 (CC).

11 (CA 4/17) [2018] ZALAC 30 (5 November 2018).

In *Fry's Metals (Pty) Ltd v. NUMSA & Others*,[12] the Labour Appeal Court was faced with a dispute in which employees argued that their dismissals had been automatically unfair because they had refused to work a new shift system. At that time (in 2003), Section 187(1)(c) of the LRA provided that a dismissal would be automatically unfair if the purpose of the dismissal was to 'compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee'. The employees argued that their dismissals had been automatically unfair because they had been effected to compel them to work the new shift system. The Court rejected their claim and distinguished between two sets of circumstances:

a If an employer dismisses employees in an attempt to compel them to change a shift system, this constitutes an automatically unfair dismissal.

b If an employer dismisses employees after failing to persuade them to accept a change to a shift system and takes the view that it will take on other employees who are prepared to work the new shift system, this will not constitute an automatically unfair dismissal. This is because the employer is evidently not trying to compel the employees to agree to the new shift system.

Section 187(1)(c) was amended in 2015. It now provides that a dismissal will be automatically unfair if the reason for the dismissal is a refusal by an employee to accept a demand in respect of any matter of mutual interest between the employer and employee.

The question then arose as to whether the amendment had the effect of overruling the *Fry's Metals* decision. This question was considered by the Labour Court in its decision in *National Union of Metalworkers of South Africa (NUMSA) obo Members v. Aveng Trident Steel (A division of Aveng Africa (Pty) Ltd) and others*.[13] In this case, the employer had embarked on a retrenchment exercise. During the course of consultation with the recognised unions, the employer proposed that employees' job content be expanded and argued that this would lead to a saving of jobs. Some 733 employees rejected jobs in the new structure and were ultimately dismissed by the employer on the basis of its operational requirements. The employees argued that their dismissals breached the provisions of the new Section 187(1)(c) and were therefore automatically unfair. They argued that the amendment to Section 187(1)(c) rendered the *Fry's Metals* decision irrelevant. The Labour Court rejected their argument and held that the principle in *Fry's Metals* remained good law. In the context of a retrenchment exercise, an employee who refuses to accept a change to terms and conditions of employment may be retrenched without falling foul of Section 187(1)(c), provided that the employer terminates employment with the intention of permanently severing the employment relationship and does not do so with the intention of trying to compel employees to accept the change. Despite the aforesaid, the employer must still be able to show that employees had been fairly dismissed and that it had a genuine operational requirement to change the conditions of employment.

vi Payment of pregnant employees working in a dangerous environment

Section 26 of the BCEA provides that employers may not require or permit a pregnant employee to perform work that is hazardous to her health, or that of her unborn child. Furthermore, if the work poses a danger to her health or safety, or that of her unborn child,

12 [2003] 21 ILJ 133 (LAC).

13 JS 596/15 (13 December 2017).

she must be provided with suitable alternative work if it is practicable for the employer to do so. This obligation exists during the employee's pregnancy and for six months after the birth of the child.

In the matter of *Manyetsa v. New Kleinfontein Gold Mine (Pty) Ltd*,[14] the Labour Court had to determine whether the employer had unfairly discriminated against a pregnant employee. The employee was an electrician in the employer's metallurgical plant. She became pregnant and could not perform her normal duties as her work constituted hazardous work as contemplated in Section 26(1) of the BCEA. This was because she was exposed to cyanide and radiation and had to climb on certain structures to perform her duties. The employer's pregnancy policy, which is based on Section 26, states that the employer will provide risk-free, alternative suitable work for pregnant employees who perform hazardous work as defined in the policy. If the employer is unable to offer risk-free, alternative, suitable work for the duration of an employee's pregnancy and six months after giving birth, the employee is required to go on extended maternity leave. In accordance with this policy, the employee was not permitted to perform her duties. The employer endeavoured to secure suitable alternative employment for her but could not identify a suitable position. The employee was placed on unpaid leave pending the commencement of her partially paid maternity leave.

The employee claimed that the policy contravened Section 26(2) of the BCEA because that provision guaranteed her alternative employment on no less favourable terms. The employer claimed that it need only provide suitable alternative work if it is practicable to do so and that it had not been practicable in this case.

The Labour Court rejected the employee's argument. It stated the following:

> *It cannot therefore be doubted that the test of 'suitable alternative employment' involves a consideration of whether, upon the employer's assessment, the position is indeed available, whether that position is capable of being a suitable alternative, and whether in fact suitable for that particular employee. The test will further involve an assessment of the job content of the identified alternative position, the appropriate skills and experience of the affected pregnant employee, the terms of the alternative position and its concomitant responsibilities. The employee's specific personal circumstances also need to be considered. In the end, a proper assessment needs to take into account that what may be considered as an alternative may not necessarily be suitable for that employee, and in the same vein, what might appear suitable might not necessarily be an alternative or available for the employee.*

The employee argued that she could have been placed in four alternative positions. However, it was found that she was not qualified for one of those positions, she refused to take part in an interview process for a second position because the remuneration associated with that position was lower than she received as an electrician, and the other two positions did not exist in the employer's labour plan. Ultimately, there was therefore no suitable alternative employment available.

The employee also contended that the policy was in contravention of the EEA as she was being unfairly discriminated against on the grounds of her pregnancy, which is prohibited by Section 6(1). This determination by the Labour Court involved a balancing of pregnant employees' rights not to be unfairly discriminated against and their employers' obligation to ensure a safe and healthy working environment for the employees and their unborn child. The Court found that in light of the fact that the policy did not contravene the BCEA, it

14 [2018] 1 BLLR 52 (LC).

would be unfounded for the policy to contravene the EEA, especially since it was common cause that the policy was modelled on the BCEA. However, the Court specifically mentioned that the constitutionality of the BCEA and the EEA was not placed before it to decide on.

Further, the extended unpaid maternity leave was necessitated by the inherent requirements of the employee's duties; a valid defence in terms of Section 6(2) of the EEA. Thus, because the employee is an electrician who undertakes hazardous work, once she disclosed her pregnancy, the policy, as well as the BCEA, required her to be removed from that work. This is a statutorily sanctioned and reasonable process arising from the fact that the employee did not meet the inherent requirements of her job as an electrician.

Accordingly, maternity leave policies that require a period of unpaid maternity leave when suitable alternative employment cannot be found are in accordance with current legislation. Furthermore, employers do not have to create positions for pregnant employees who have to be removed from high-risk areas.

vii National minimum wage and labour market stability

Wage disparity remains a contentious issue in South Africa. Of equal significance is the violence and other unlawful actions that have accompanied strikes in recent years. This problem has been exacerbated when strikes endure for a lengthy period. These issues were addressed during the course of 2016 and 2017 by representatives of government, business and labour on the National Economic Development and Labour Council.

Agreement was reached on the introduction of a national minimum wage. This has now been implemented though the enactment in January 2019 of the National Minimum Wage Act. It is envisaged that the national minimum wage will be reassessed annually by the National Minimum Wage Commission, which will make recommendations to the Minister of Labour in this regard.

As far as strike violence is concerned, amendments to the LRA, as from January 2018, have been enacted to address this issue. These amendments envisage that, in certain circumstances, an advisory arbitration process can be invoked in an attempt to resolve the underlying dispute that led to a strike (or a lockout). If an advisory award is issued, the parties to the dispute will have seven days to indicate whether they accept or reject the award. If they reject the award, the refusal must be motivated. A failure to accept or reject the award within seven days has the result that the party is bound by the award.

The amendments also envisage changes to the law relating to picketing.

The problem of strike violence has also been addressed by a proposal to introduce a code of good practice dealing with collective bargaining, industrial action and picketing. The underlying idea is that it is important to improve the effectiveness of collective bargaining as a mechanism for resolving disputes and thus to avoid strikes and lockouts.

V OUTLOOK AND CONCLUSIONS

It is expected that the Labour Laws Amendment Act will come into force in 2019, under which new forms of leave will be introduced. These include the granting of leave to adoptive parents and to surrogate parents.

Decisions regarding interpretation of the National Minimum Wage Act and the recent amendments to the LRA can also be expected. The issue of violence during strikes will also probably continue to receive the attention of the courts.

In *Minister of Justice and Constitutional Development and Others v. Prince*, *National Director of Public Prosecutions and Others v. Rubin* and *National Director of Public Prosecutions and Others v. Acton and Others*,[15] the Constitutional Court struck down various statutory provisions that had the effect of criminalising the private use and cultivation of cannabis in a private place. While this decision will probably not affect the ability of employers to prohibit the use or possession of cannabis in the workplace, it is likely to give rise to some uncertainty as to when the private use of cannabis outside working hours could be seen to affect the workplace and what tests will be appropriate for testing employees in this regard.

15 [2018] ZACC 30.

Appendix 1

ABOUT THE AUTHORS

ROSS ALCOCK

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Ross Alcock is a director at ENSafrica in the employment law department, where he specialises in integrated employment solutions and global mobility.

He has acted for private and public sector clients with regard to executive issues in the workplace, including drafting executive agreements (with a focus on, *inter alia*, restraints of trade (restrictive covenants), share incentives, performance bonus structures, protection of personal information, and intellectual property and copyright protections). He has also handled senior executive exits by way of negotiation or formal disciplinary or performance enquiries.

Ross' experience includes drafting, enforcing and defending restraint of trade agreements in the High Court and Labour Court, providing advice with regard to the employment aspects of mergers and acquisitions, insolvency, and outsourcing and secondary outsourcing. He has extensive experience providing advice in respect of large-scale and small-scale restructuring exercises (retrenchments) and drafting opinions on all facets of employment law, as well as all employment-related litigation and due diligence and employment law compliance audits.

Ross is recognised as a leading or a recommended lawyer by *Chambers Global Guide: Employment (South Africa)* 2015–2018, *The Legal 500 EMEA: Labour and Employment (South Africa)* 2016–2018, *Who's Who Legal: Labour and Employment (South Africa)* 2016, *Best Lawyers: Employee Benefits (South Africa)* 2017–2019 and *Best Lawyers: Labour and Employment (South Africa)* 2011–2019.

Ross has also sat as an Acting Judge of the Labour Court of South Africa.

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Peter le Roux is an executive consultant at ENSafrica in the employment department.

Peter has expertise in administrative law and labour law. He has represented and advised prominent mining houses, and local and international corporate clients, in matters pertaining to employment, pension funds, medical aid schemes and health and safety.

He is the co-author of *Essential Labour Law* and *The Law of Unfair Dismissal* and co-edits *Contemporary Labour Law*.

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