## Saslaw conference and AGM: Is the LRA to blame for Marikana?

The South African Society for Labour Law (Saslaw) held its 15th annual general meeting and conference in Johannesburg in October. The main topic of discussion was proposed amendments to the Labour Relations Act 66 of 1995 (LRA).
Other topics discussed included case flow management, amendments aimed at enhancing the efficiency of the Labour Court, the expanded jurisdiction and powers of the Commission for Conciliation, Mediation and Arbitration (CCMA), minority unions and retrenchments.

The conference also reflected on the state of South African labour law in view of current turbulence in the mining field and other industries. On this topic, a roundtable debate on the labour law implications of the Marikana tragedy was held, at which Congress of South African Trade Unions general secretary Zwelinzima Vavi and Johannesburg advocate Martin Brassey presented discussion points.

### The Labour Court, the LRA and Marikana

Labour Court Judge Andre van Niekerk gave the keynote address at the conference, in which he provided a Labour Court perspective on the Marikana debacle, which resulted in the death of 34 striking miners at the Lonmin mine in the North West province. Judge van Niekerk said that the first observation to be drawn from the recent events was to acknowledge the limits of the law. He added that it had often been said that law has a limited role to play in labour relations, which was a ‘good thing’. However, he said that this instance seemed to be a ‘different phenomenon – one that displays contempt for the law and its institutions’.

‘The value and effectiveness of legal institutions is dependent entirely on an acknowledgment and commitment to the rule of law. When citizens or a group of citizens decide that their interests are better advanced by flouting the law, then there is very little to say about the role and perspectives of courts,’ he said.

Judge van Niekerk said that the basic foundation of law is present when citizens are concerned about maintaining the integrity of the legal system, while recognising the inevitability of conflict. ‘When this is not present, and when citizens reject the law as a means of settling normative conflict, then the social good of the law, which includes its capacity to provide a framework of cooperation despite disagreement, disintegrates,’ he said.

Judge van Niekerk said that he preferred to assume that there are those who regard the rule of law as a central component of the country’s democracy and who believe that the greater good is best served by respect for the law and its institutions. He added that if a sufficient number of ‘good citizens’ exist, it is possible to debate the role of the courts and the perspectives they might bring to bear on current events. In a world of good citizens, he said, courts are participants in the democratic process since they consist of institutions that rest on acceptance.

On the Labour Court, Judge van Niekerk said it was a ‘key labour market institution’ and the LRA, which established the Labour Court as a court of law and equity, is a product of social dialogue between industrial citizens. He added that the Act recognises and underscores a commitment to freedom of association and the right to bargain collectively as key tenets of democracy, adding that the court is an ‘integral component of the statutory dispute resolution system’ and is the primary guardian of labour rights.
Judge van Niekerk said that legislation recognises that commissioners and judges are not the best qualified to make decisions about bargaining arrangements, which are best made by the parties.

He added that he had seen arguments in support of the proposition that the LRA is to blame for what happened at Marikana and that the way to avoid similar events in future was to rewrite the Act ‘from a different conceptual perspective’.
‘The argument is that the current legislative framework is no longer suited to existing dynamics and, in particular, its ability to service the needs of the lowest paid, and that a “more radical version” of the call for a legislative overhaul is one that views the true *locus* of competition for resources as one between the employed and the unemployed,’ he said.

Judge van Niekerk said that while the failure of collective bargaining and its structures was no doubt a contributing factor to what happened at Marikana and what continues to happen at a number of mining operations, this should not be blamed on the LRA or on the approach that the Act adopts to the rights of freedom of association and to engage in collective bargaining.

He added that while the LRA is broadly supportive of a majoritarian system of bargaining, it does not compel this. ‘The LRA does not prescribe that employers and unions should enter into agency shop agreements, nor does it compel parties to conclude agreements that impose thresholds of representivity that have the effect of closing the market to outsiders by denying organisational and other rights to minority unions. While the LRA encourages parties to agree to the terms of which union organisational and representation rights should be afforded, it does not prescribe what those terms should be,’ he said.

Judge van Niekerk said that if specific workplace labour relations frameworks are found to have contributed to events at and subsequent to Marikana, then the nature of the collective agreements concerned, and not the statute, should be questioned. If the agreements are found to have contributed to a sense of ‘alienation and powerlessness’ on the part of some workers, then it is the collective agreements that should be revisited, not the legislation, he added.

Judge van Niekerk said that the call for legislative change had also been extended to include the introduction of an enforceable duty to bargain in good faith. In this regard, he said: ‘It is suggested that such a duty may resolve impasses such as those experienced in the mining sector or may have prevented these. I am not persuaded that this is so.

The fundamental challenge more generally, it seems to me, is to restore faith in the institution of collective bargaining. This will not necessarily be achieved by orders issued by commissioners or judges to the effect that parties should bargain in good faith.'

He said the short answer to the question: 'Is there anything fundamentally wrong with the LRA?' is: 'No; it just needs to be implemented,' adding that part of the answer may lie in the transformation of workplace relationships.

Judge van Niekerk also spoke on the role of the court in unprotected strikes and on urgent applications to interdict acts of strike-related violence. In this regard, he said: 'The first and most fundamental concern is one that acknowledges that what may be at issue is a breakdown of the rule of law, especially where orders are issued and then blatantly disregarded. It is not uncommon on return dates to be told that when the order granted by the court was served, the recipients of copies of the order refused to accept them or threw them to the ground and trampled on them. At its most basic level, this is demonstrative of a rejection of the rule of law, and contempt for its institutions. ... Ironically, not infrequently it is the same people who show their contempt for the court in graphic terms who approach the court with claims for reinstatement when the inevitable dismissal for misconduct follows.'

He added that it was inevitable that both sides to a labour dispute will seek to use the law and available legal remedies to gain short-term tactical advantage.

Finally, Judge van Niekerk spoke on applications brought to the court to compel the South African Police Service to do its job. It was of concern, he said, that at times in labour disputes criminal acts were committed in the presence of police officers, who felt the need for the prior authorisation of the Labour Court before upholding the law.

The judge concluded by saying: '[T]here is a great deal of work that needs to be done to change what appears to be the prevailing notion that work-related demands cannot be pursued effectively without violence or the threat of it. ... [T]he court remains a battlefield, often in circumstances where it seems to us, as judges, that the judicial process in these instances is little more than a ritual, wholly unconnected with reality.'

**Constitutional challenges for CCMA amendments?**

Feroze Boda from the Johannesburg Bar spoke on the expanded jurisdiction and powers of the CCMA under the amendments in the LRA Bill, which propose, among others, that the CCMA has the right to certify that a strike ballot has been conducted in compliance with the Act. The Bill also gives the commission power to interfere in contractual relationships and grants it jurisdiction over third parties such as clients of labour brokers and persons who own or control premises where workers are employed. She said that some of the proposed provisions may give rise to constitutional issues and require the balancing of rights.

Ms Boda highlighted four categories of potential constitutional challenges in respect of the amendments. These were:
• The granting of significant powers to the CCMA, which is an administrative body, coupled with the absence of a right to appeal. Ms Boda questioned whether this was constitutional, bearing in mind that the CCMA is not a court.
• The right to make determinations over third parties who are not employers gives rise to potential challenges about available remedies and substantive provisions. She asked whether it was justifiable to restrict remedies and deny an appeal to such persons and further restrict their rights to approach the High Court for competent relief, which right is currently available. She also questioned the impact of the amendments on rights to property.
• The power to override contractual provisions in collective agreements and contracts, such as labour broking contracts, employment contracts (insofar as they contain arbitration clauses or contracts for fixed-term employees) and contracts between owners or those in control of premises and employers.
• The unequal treatment and availability of remedies between employees earning below and above certain thresholds.

**Saslaw fees**

The national membership fees will increase from R 700 to R 750 for advocates, attorneys, arbitrators, mediators, human resources practitioners, industrial relations practitioners, trade union officials, commissioners and candidate attorneys; and from R 500 to R 540 for Labour Court associates, advocates' pupils, full-time students, academics and country members.

The Eastern Cape subscription fees will increase from R 570 to R 620 for advocates, attorneys, arbitrators, mediators, human resources practitioners, industrial relations practitioners, trade union officials, commissioners and candidate attorneys; and from R 440 to R 480 for Labour Court associates, advocates' pupils, full-time students, academics and country members. The reason for lower Eastern Cape fees is to attract members from this region.

**New Saslaw national committee:**
• President – Nick Robb
• Vice-president – Richard Maddern
• Marylyn Christianson
• Shamima Gaibie
• Gillian Lumb
• Michelle Naidoo
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**Nomfundo Manyathi, nomfundo@derebus.org.za**