COLLECTIVE ACTION IN INDUSTRIAL RELATIONS UNDER THREAT:

THE CASE OF ESWATINI (TRACK 1)

Introduction

Disputes at the workplace are inevitable. By its nature, the employer-employee relationship is one that is fraught with conflict, as the basic or fundamental interests of each of the parties to the relationship are polarized. Generally, the employers are mainly interested in high quality performance to enhance profits for the owners or shareholders of the enterprise, and the employees are primarily interested in earning the highest wage possible for performing the job while having a say in the decisions that affect them. Higher salaries and wages naturally cut into the company's profits.

The primary purposes and objects of the Industrial Relations Act of Eswatini (IRA) are, *inter alia*, the promotion of harmonious industrial relations and to provide mechanisms and procedures for speedy resolution of conflicts, or disputes, in labour relations.[1] It is my view that similar to the situation in neighbouring South Africa, our IRA seeks to promote this through the creation of an orderly collective bargaining between employers and employees with a view to reaching collective agreements.[2] Unfortunately, no collective bargaining system can be so perfect as to avoid all disputes.

The manner in which disputes may be resolved is ultimately dependant on whether such disputes involve rights or interest. Disputes of rights will naturally be resolved, once they have passed through conciliation, through arbitration of litigation. Those of interests however will be resolved

[1] Act No. 1 of 2000 (as amended), section 4.
[2] J Grogan *Workplace Law,* 10th ed., 2009

by either arbitration or collective industrial action by way of either pickets or strikes. Where the aggrieved party is the employer, then they may be resolved through lockout actions. The focus of this paper is primarily disputes of employees' interests sought to be resolved through strike action.

The advent of the Coronavirus (COVID-19) pandemic towards the end of 2019 brought with it a new normal which has necessarily altered social interaction due to the manner of its transmission. Some of the ways to stop the spread of the pandemic is through social distancing and limiting the number of people who can be allowed to gather for any reason, including meetings of union members, balloting and demonstrating as part of strike actions. The declaration of the pandemic as a national emergency empowered the authorities to not only impose the rules for curbing the spread of the disease as mentioned above, but also to enforce them.

This research seeks to determine whether workers can still be said to have the right to strike in terms of the Constitution of Eswatini, the Industrial Relations Act, as well as international labour standards guaranteeing this right. In short, can employees engage in a strike or even a picket action during this COVID-19 pandemic, and in the event that they can not, is there another way in which they can act in an attempt to achieve the resolution of a dispute of interest with their employer or employers, or even in pursuance of a socio-economic interest as permitted under the Industrial Relations Act.

Conflict

Disputes arise from conflicts. The sources of conflict in industrial relations may come from, *inter alia*, the relationship itself, wage disputes, a scarcity of resources, goal incongruence and

diversity.[3] The employment relationship is characterised by an inherent divergence of roles.[4] The employer is a decision maker who directs the employees in the performance of their duties. The employer also plans and controls the operation of the organisation. This position of the employer is termed managerial prerogative.[5] The employee on the other hand is supposed to be subservient to the employer in carrying out his/her duties.[6] His duty to be respectful and obedient to the employer in carrying out his/her duties is considered the hallmark of the employment relationship.[7] The employer's managerial prerogative has met some resistance from the employees, who feel that they should have more of a say in the decision-making processes that affect them.[8]

Secondly, disputes may and do arise from the fact that employees might feel that their services are undervalued and that they deserve to be remunerated better for their efforts.[9] The primary objective of managers is the maximisations of profits and shareholder value and therefore will be more inclined to paying less to their employees so as to realise higher profits. This results in conflict as employees feel exploited by their employers, while employers feel that the employees are being unreasonable in their demands for a better salary or wage.

Thirdly, conflict may arise from a scarcity of resources.[10] Organisations generally have a finite resource base, whether human, physical or organisational. This makes in necessary for

[3] Venter and Levy (Eds) *Labour Relations in South Africa,* 5th ed., 2014
[4] Note 3 above.
[5] Note 3 above.
[6] Note 3 above.
[7] Note 2 above.
[8] Note 3 above. This has for the most part been achieved over the years through the process of collective bargaining. Employees have managed to increase their say in decision-making within the workplace.
[9] Note 3 above.
[10] Note 3 above.

employees to have to compete for a share of these resources, often having to make do with less than what would be their ideal resources.

Fourthly, conflict may be caused by the incongruence of goals. The ideal goal of a business enterprise is that all members thereof should share a common goal, that is, acting for the benefit and in the best interest of the organisation and its shareholders. In reality, however, goals often differ and are based on self interest. Instead of being mainly preoccupied with increasing shareholder benefit, managers may be more concerned with self-advancement.[11] Employees on the other hand might be more concerned with increased compensation or remuneration and more leisure time.[12]

These are but some of the ways in which conflict may arise in the workplace, and where the parties to the conflict are not able to find a way to resolve the conflict amicably, it gives rise to a dispute.

Disputes Defined

A dispute is defined in the IRA to include a grievance, a grievance over a practice, trade dispute and to mean and dispute over the-

(a) entitlement of any person or group of persons to any benefit under an existing collective agreement, Joint Negotiation Council agreements, or Works Council agreements;
(b) existence or non-existence of a collective agreement of Works Council agreement and Joint Negotiation Council agreement;

[11] Note 3 above
[12] Bendix S *Labour Relations: A Southern African Perspective,* 6th ed., 2016.

(c) disciplinary action, dismissal, employment, suspension from employment or re-engagement or reinstatement of any person or group of persons;

(d) recognition or non-recognition of an organization seeking to represent employees in the determination of their terms and conditions of employment;

(e) application of interpretation of any law relating to employment; or

(f) terms and conditions of employment of any employee or the physical conditions under which such employee may be required to work.[13]

It is common cause that a dispute will not arise until the parties have tried and failed to come to agreement over a particular issue that has arisen, and on which they do not see eye to eye. While they are engaged in ways to attempt to align their view on the issue, a dispute can not be said to exist. It only arises once the parties reach an impasse, or agree to disagree.

Disputes are broadly divided into disputes of right and disputes of interest. A dispute of right arises when parties cannot agree whether one of them is entitled to the benefit claimed, and a dispute of interest arises when one party claims a benefit to which it is not entitled in law which the other party is not willing to grant.[14] The courts are generally only concerned with disputes involving legal rights of the parties to the employment relationship, i.e., those found in either legislation, the individual contract of employment or a collective agreement. They will not concern themselves with disputes of interests, or those containing rights aspired to and therefore amounting to claims for new rights not already in existence.[15]

If we agree that there will be disputes of interest as well as those of rights at the work place, then we must also agree that there must be effective dispute resolution procedures to settle disputes

[13] Section 2 of the Industrial Relations Act no.1 of 2000.
[14] Note 2 above.
[15] Note 2 above.

between employers and employees. It is my view that there has been a fair attempt to provide for these in the labour legislation of Eswatini. The main legal instrument regulating dispute resolution labour disputes is the Industrial Relations Act[16] in Part VIII. The procedures included in this part of the Industrial Relations Act include procedure for the resolution of disputes of rights by the courts, as well as for disputes of interest through collective action, for example by way of lock outs by employers, or strike action by employees in an attempt to resolve or settle labour disputes. According to the IRA, industrial action is reserved for disputes of interest.

Resolution of Disputes

Disputes in the workplace are divided into individual labour disputes and collective labour disputes. This paper shall only concern itself with collective labour disputes. Even under the category of collective labour disputes, there are disputes of right and disputes of interest. This study shall further limit itself to disputes of interest, those whose resolution does not generally fall under the ambit of litigation in the courts but to collective industrial action, i.e., strikes.

Procedures for the resolution of disputes of interest

The initial steps required to be followed in the dispute resolution process under the law are the same. The aggrieved party files a dispute with the Conciliation, Mediation and Arbitration Commission (CMAC) for the conciliation of the dispute between the parties[17]. A report of dispute must be filed with the Commission not more than 18 months since the issue giving rise to the dispute arose[18]. All disputes must be conciliated before either adjudication or industrial

[16] Act no. 1 of 2000
[17] Section 76 (1) of the IRA.
[18] Section 76 (2) of the IRA. See however section 41 of the Employment Act no. 5 of 1980 which entitles employees to file a complaint with the Labour Commissioner for unfair termination of services but does not provide a time

action. In the event the attempt to reconcile the parties through the conciliation process is not successful, the dispute is declared unresolved.[19] It is at this point that the dispute may take a different route depending on whether it is one of interest or one of rights. A dispute of right may be referred by the aggrieved party to the Industrial Court for determination.[20] The parties to a matter involving a dispute of right may also refer the matter to arbitration at CMAC if they agree to do so.[21]

Parties to a dispute of interest may seek resolution of the dispute through arbitration.[22] Where the matter is referred to arbitration, the arbitrator has thirty (30) days from the end of the hearing within which to determine the matter[23], and his/her determination is final[24]. Parties to a dispute of interest on the other hand may, after the dispute has been certified as unresolved, take action by way of a strike where the party is the employee, or a lockout where the party is an employer.[25]

After receiving a certificate of unresolved dispute, employees wishing to proceed by way of strike action is required to give notice, through their trade union or staff association of such intended strike action in writing to the employer or employers' association, to the Commissioner of Labour and to CMAC.[26] On receipt of the strike notice CMAC is expected to arrange and supervise a secret ballot to determine whether the majority of the employees who are members of

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limit for such filing. Clearly this provision of the Employment Act is in contradiction with that dispute reporting provision of the IRA in section 76 (1) under which the time for reporting the dispute is not more than 18 months.

[19] Section 85 (1) of the IRA.

[20] Section 85 (2) of the IRA.

[21] Note 20 above. The IRA goes on to say in section 85 (2)(a) that The President of the Industrial Court has the discretion to refer the matter back to CMAC for arbitration.

[22] Section 85 (3)

[23] Section 86 (4)(a)

[24] Section 85 (4)(b)

[25] Section 86 (1)

[26] Section 86 (1) and (2).

the trade union giving the notice are in favour of the strike.[27] CMAC is then required to notify the parties of the result of the secret ballot within twenty-four (24) hours of the holding of the ballot.[28] Where the result of the ballot is that the majority of the employees are in favour of the strike action, the union is required to issue a new strike notice in writing to the employer, to the Commissioner of Labour and to CMAC at least forty-eight (48) hours before the commencement of the strike.

Definition of a strike

Strikes, by their nature, are intended to cause the employer economic harm by bringing production to a halt and causing him to lose business. The employees do this in the hope that the employer, rather than suffering sustained loss, will be compelled to accede to their demands.[29] When employees jointly down their tools during working hours and refuse to continue work that they are contractually obliged to perform and which is legal to perform, their action normally amounts to a concerted refusal to work.[30] Further, the refusal to work must be aimed at remedying a grievance or at the resolution of a dispute in respect of a matter of mutual interest between an employer and employees.[31] The refusal to work must be in support of a demand. A concerted refusal to work which is not accompanied by a demand does not fall within the definition of a strike or industrial action.[32] Not only must there be a demand[33], the demand itself must be lawful[34].

[27] Section 86 (2). The provision of this section were amended in 2010 to give parties the option of appointing an independent person or institution other than CMAC to arrange and supervise a strike ballot. See the Industrial Relations Amendment Act No. 6 of 2010.
[28] Section 86 (5) (as amended in 2010) .
[29] Van Jaarsveld and Van Eck *Principles of Labour Law.* 3rd ed., 2005
[30] Note 2 above.
[31] Note 2 above.
[32] Note 2 above.

Bendix[35] defines a strike as

> a temporary, collective withholding of labour, its object being to stop or impede the continuation of business and thereby oblige the employer to take notice of the employees' demands.

The Constitution of Eswatini[36], which is the supreme law of the country[37], does not specifically give the citizens the right to strike, and therefore does not define it. It does however guarantee the right to freedom of peaceful assembly and association.[38] According to the Constitution, citizens shall not, except with the free consent of that person be hindered in the enjoyment of the freedom of peaceful assembly and association for the promotion and protection of the interests of that person.[39] As stated hereinbelow, the right to strike is inextricably connected to the right to freedom of association and citizens can not enjoy one without the other. In the premises, although there is no particular mention of the right to strike and it is not in any direct way guaranteed in the Constitution, it is imported as a corollary of the right to freedom of association.

Although the right to strike is not directly guaranteed in the Constitution, the IRS does give workers the right to strike[40]. A strike is defined in the IRA of Eswatini as-

> '… a complete or partial stoppage of work or slow down of work carried out in concert by two or more employees or any other concerted action on their part designed to restrict

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[33] *Simba (Pty) Ltd v FAWU & Others* (1998) 19 *ILJ* 1593 (LC).
[34] *TSI Holdings (Pty) Ltd v NUMSA* (2004) 25 *ILJ* 1080 (LC), *TSI Holdings (Pty) Ltd v NUMSA* (2006) 27 *ILJ* 1483 (LAC)
[35] Bendix S *Labour Relations: A Southern African Perspective,* 6th ed., 2016
[36] Act no. 1 of 2005
[37] Note 36 above, section 2
[38] Note 36 above, section 25(1).
[39] Note 36 above, section 25(2).
[40] Section 86(1) of the Industrial Relations Act no. 1 of 2000 provides that 'Subject to the provisions of this Act, any party to a dispute may take lawful action by way of a lockout or strike if- (a) the dispute has been certified as an unresolved dispute within the meaning of section 85(1).....

their output of work against their employer, if such action is done with a view to inducing compliance with any demand or with a view to inducing the abandonment or modification of any demand concerned with the employer-employee relationship.'[41]

At international law, the right to strike has been recognised as a fundamental human right despite there not being a definition of the right to strike in any of the International Labour Organisation (ILO) binding instruments. There has been wide consensus among member states of the ILO that there is a positive right to strike that is inextricably linked to and is an inevitable corollary of the right to freedom on association.[42] The recognition of the right to strike as a fundamental right in the context of ILO standards has been as a result of the work of two of its supervisory bodies: the Committee of Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations. Both these Committees have consistently indicated that there is a fundamental right to strike for workers that emanates from the content of Convention no. 87 particularly from its article 3 establishing the right of workers' and employers' organizations to "organise their administration and activities and to formulate their programmes" and article 10 establishing the aims of such organisations as "furthering and defending the interests of workers or of employers ".[43] Further, two resolutions of the International Labour Conference which provide guidelines for ILO policy emphasized recognition of the right to strike in member States. These are firstly, the Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation, adopted in 1957, calling for the adoption of laws ensuring the effective and unrestricted exercise of trade

[41] Section 2 of the Industrial Relations Act no. 1 of 2000.
[42] Garcia JAL 'The Right to Strike as a Fundamental Human Right: Recognition and Limitations in International Law' (2017) 44(3) *Revista Chilena de Derecho* 781
[43] ILO Convention on the Right to Freedom of Association and the Right to Organise no. 47 of 1948.

union rights, including the right to strike, by the workers ".[44] Secondly, the Resolution concerning Trade Union Rights and Their Relation to Civil Liberties, adopted in 1970, invited the Governing Body to instruct the Director-General to take action in a number of ways "with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense", with particular attention to be paid, inter alia, to the "right to strike ".

Industrial action, and strikes in particular, are necessary because there can be no meaningful collective bargaining, or any means of balancing the power relationship within the workplace[45], as well as resolving conflict. As stated earlier in this paper, the relationship between the employer and the employee or employees is one that is inherently fraught with conflict. Conflict is said to be a necessary and inherent part of all relationships. However, properly managed, such conflict in the employment relationship can be constructive, in that it constantly highlights areas of improvement in the organisation, while simultaneously eliminating complacency.[46] Where it is allowed to go on unchecked, conflict becomes destructive.[47]

The right to strike during the COVID-19 pandemic

With the advent of the COVID-19 pandemic, the background against which the legislation for collective action was different from that which we now find ourselves in. While there will be no major problems for individual, non-collective action for dispute settlement so long as the proper prescribed protocols of social distancing and frequent hand washing are observed, it is my perception that there might be problems for collective action as in such action involves large

[44] Gernigon et al 'ILO Principles Concerning the Right to Strike' (1998) 137 no. 3 *International Labour Review* 1
[45] Venter and Levy (Eds) *Labour Relations in South Africa,* 5th ed., 2014
[46] Note 3 above.
[47] Bendix S *Labour Relations: A Southern African Perspective,* 6th ed., 2016

crowds not only in meetings, but also in balloting and in the demonstration that normally goes with a strike action by employees.

According to the World Health Organisation (WHO), coronavirus (COVID-19) is a highly infectious disease caused by a newly discovered coronavirus.[48] The WHO advises that to prevent and/or slow down the spread of the disease, certain precautions need to be taken including ***physical distancing***, wearing a mask, keeping rooms well ventilated, ***avoiding crowds***, cleaning your hands or using an alcohol based rub frequently, and not touching your face.[49]

The COVID-19 pandemic was confirmed to have reached Eswatini in March, 2020. On the 17th of March, 2020 King Mswati III[50] invoked section 29 of the Disaster Management Act[51] and declared a national emergency in response to the pandemic and closed all schools, colleges and universities. All public and private gatherings including meetings of more than twenty (20) people were suspended. This ban has been in place since then and is still persists save that there was some relaxation of the restrictions at various times in between. It is because of these restrictions that the question of whether workers disputing with their employer on a matter of interest can, under the current conditions, be able to pursue the resolution of that dispute by way of industrial action? It is common cause that in order to obtain the mandate from the membership of a trade union to embark on a strike action, there needs to be a members' meeting. Secondly, in the event that the membership decides to embark on industrial action by way of a strike the

[48] www.who.int (last accessed 30 August 2021).
[49] Note 48 above. (emphasis mine)
[50] The Constitution of the Kingdom of Eswatini, Act No. 1 of 2005, in section 64(4)(e) gives the King the responsibility to declare a state of emergency. Such declaration, in terms of section 36(1)is made by the King on the advice of the Prime Minister.
[51] Act No. 1 of 2006. The then Prime Minister of Eswatini said in his statement that he had been 'commanded by His Majesty' to invoke section 29 of the Disaster Management Act 2006, having assessed the magnitude and severity of the outbreak of the Coronavirus (COVID 19) pandemic confirmed world over, to declare a National Emergency in the Kingdom of Eswatini.

Industrial Relations Act requires that prior to commencing the action, CMAC, or any person or institution appointed by the party intending to embark on industrial action, must have conducted a ballot to determine whether the majority of employees whom it is proposed should take part in the strike action are in favour of taking such action.[52] All these activities require a meeting of the employees, and in many case the number of employees exceed the maximum of 50 set for gathering during the persistence of the COVID-19 pandemic.

While it is possible to have appropriately physically distanced meetings, the strike action itself in another matter. However, even the meeting itself might be in contradiction of the Regulations depending on the number of employees involved. The COVID-19 Regulations prohibit a gathering of more that twenty (20) people.[53] They go on to mandate the Prime Minister from time to time to vary and give direction on the number of people who may be part of a gathering. The highest that the Prime Minister has gone at any time is fifty (50) people. Further, the regulations empower an enforcement officer[54] to order that the persons at a gathering disperse, and on their refusal to do so to take appropriate action including arrest and detention.[55]

Strike actions are normally characterised by toyi-toying. The toyi-toyi itself is a song and dance that started in political protests but has now transcended to protests of all kinds including those by workers. A strike action would generally not be complete without the toyi-toyi. The problem with the toyi-toyi is that it is difficult to maintain physical distance between the marchers in a strike action. This then is where the problem arises. As mentioned above, Coronavirus (COVID-

[52] Section 86(2) if the Industrial Relations Act no.1 of 2000
[53] The Coronavirus (COVID-19) Regulations, 2020 (issued under section 43 of the Disaster Management Act No. 1 of 2006). The interpretation section, section 2, of the Regulations define a gathering as an y assembly, concourse or precession of more than twenty (20) persons, wholly or partially in open air or in a building or premises.
[54] An enforcement officer is defined as to include a public health officer, an immigration officer, members of the police service, defence force and correctional services in section 2 of the Regulations.
[55] Section 25(3) of the Coronavirus (COVID-19) Regulations.

19) regulations advocate restrict crowds and gatherings, especially those not observing social distancing between individuals as a precaution against the spread of the virus. It would follow, therefore, that a toyi-toyi, a necessary and integral part of a strike action, would fall afoul of Coronavirus (COVID-19) Regulations.

The Constitution does envisage that there might be limitations on certain rights in the case of an emergency. Section 37 of the Constitution entitled 'Derogations during public emergency' provides as follows;

(1) Without prejudice to the power of Parliament to make provision in any situation or the provisions of section 38, nothing contained in or done under the authority of a law shall be held to be inconsistent with or in contravention of any provision of this Chapter to the extent that the law authorises the taking, during any period of public emergency, of measures that are reasonably justifiable for dealing with the situation that exists during that period.

The Constitution does go on in section 38 to prohibit certain derogations. Section 38 provides that;

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms-

(a) Life, equality before the law and security of person;
(b) The right to a fair hearing;
(c) Freedom from slavery and servitude;

(d) The right to an order in terms of section 35(1)[56]; and

(e) Freedom from torture, cruel, inhumane or degrading treatment or punishment.

The claw-back nature of section 37 of the Constitution limits the enjoyment of rights and protection of civil liberties enshrined in the bill of rights. It is clear that the rights given are subject to limitations. Following from discussions earlier in this paper, the right to strike, while not specifically provided for in the Constitution, is a corollary of the right to freedom of the right to freedom of assembly and association guaranteed under section 25 of the Constitution. It is however unfortunate that the right to the freedom of assembly and association itself is not part of the list of rights from which derogations are not permitted under section 38. Although this right is specifically granted in section 86(1) of the IRA, there can be no basis for assuming that this would go against a constitutional provision, given that the Constitution enjoys supremacy over all other laws in the country, including the IRA.

The rules on public emergency are reminiscent of the provisions of the Public Order Act.[57] This pre-independence legislation was enacted for the stated objective of providing for the maintenance of public order and for connected purposes.[58] Section 3 (3) of this act requires anyone wishing to hold or organise a public meeting or procession to make an application for a license to the police officer in charge of the police, that is, the station commander, in charges of the district in which the meeting or procession may take place. The right to freedom of association, and by extension, the right to strike, goes hand in hand with the right to hold meetings and to demonstrate. The effect of the provisions of the Public order Act is to limit the

[56] Section 35(1) entitles a person who alleges that any of their rights under the Bill of Rights of the Constitution is being, or likely to be contravened, then that person may apply to the High Court for redress.
[57] No. 17 of 1963
[58] Shabangu S *The Legal Development of the Right to Freedom of Association in Eswatini* in Celebrating the ILO 100 Years on Reflections on Labour Law from a Southern African Perspective, (2020) Kalula E (ed)

rights of organisations to hold meetings, or alternatively, to grant the police the discretion to bar meetings from taking place. Section 3(20) of the Act states that:

> "A convenor of a public gathering which is likely to be attended by twenty persons or more and which falls under the definition of public meeting in section 2, shall give details in writing of the gathering, not less than seven days before that date of the gathering, to the police officer in charge of the district in which the gathering is to take place".

A public meeting is defined under s 2 as a public gathering for any purpose in a public place but does not include a gathering or assembly of members of a trade union registered under the law relating to trade unions, convened and held exclusively for a lawful purpose of that trade union. While this definition might initially seem to exclude trade union meetings from the operation of the Act, if read with s 3(20), it would appear that the police have the power to determine from the details given whether the meeting is indeed being held exclusively for a lawful purpose of the trade union.[59] In this way this brings the activities of trade unions squarely within the ambit of the Public Order Act and, in fact, it has been used by the state through the police to control trade union gatherings including strike actions over the years and remains in force to date.[60]

Conclusion

The right to strike is under serious threat. It is apparent to everyone that certain precautions do have to be taken to ensure the spread of the Coronavirus (COVID-19) disease which has cause millions of death worldwide, and thousands in Eswatini, a country with a population of just over one million people. It is even more apparent though that rights are by their nature not absolute and may, under certain stated circumstances be derogated, and a stare of emergency such as the

[59] Note 58 above.
[60] Note 58 above.

one we currently find ourselves in an example of such circumstances. During the persistence of the pandemic, and until the state of emergency is lifted rights including the right to strike have been limited and may not be freely enjoyed by employees in the Kingdom of Eswatini.

In the premises, it would appear that the only avenue available to employees seeking resolution of a dispute of interest is that of following the arbitration route. In any event, this path is already open to employees who are in possession of a certificate of unresolved dispute as an alternative to embarking on a strike action. Employees are left with no choice as the right to strike remains unavailable to them at this time, arbitration is their only option.